STATE OF IDAHO )
County of KOOTENAI )ss

FILED_____

AT_____ O'Clock _____M
CLERK OF DISTRICT COURT

_____
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 DENYING PLAINTIFF'S APPLICATION FOR ATTORNEY FEES AND GRANTING DEFENDANT'S MOTION TO DISALLOW ATTORNEY FEES AND COSTS**

## I. FACTUAL BACKGROUND.

At issue is Citizens Against Range Expansion's (CARE) Application for Attorney's Fees Against the defendant Idaho Fish and Game Department (IDFG), and IDFG's Notice of Objection and Motion to Disallow Attorney Fees and Costs.

On September 9, 2011, CARE filed its "Application of the Plaintiff for Attorneys Fees Against the Defendant Idaho Department of Fish and Game", "Plaintiffs' Memorandum of Costs Against the Defendant Idaho Department of Fish and Game", and "Plaintiffs' Brief in Support of Award of Costs and Attorneys' Fees". On September 12, 2011, CARE filed its "Application of the Plaintiff for Attorneys Fees Against the Defendant Idaho Department of Fish and Game as Related to Attorney Scott W. Reed". On September 23, 2011, IDFG filed "Defendants' Notice of Objection and Motion to Disallow Attorney Fees and Costs", and on October 3, 2011, IDFG filed an "Affidavit of Charles 'Chip' Corsi", "Affidavit of David Leptich", "Affidavit of Mary Boyer", and "Brief in

Support of Defendants' Notice of Objection and Motion to Disallow Attorney Fees and Costs." On November 2, 2011, CARE filed its "Corrected Application of the Plaintiff for Attorneys Fees Against the Defendant Idaho Department Fish and Game" (which simply added a page seven that was inadvertently omitted in the initial filing).

On February 23, 2007, this Court entered its 63-page Memorandum Decision, Findings of Fact, Conclusions of Law and Order. The 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). Beginning in June, 2010 IDFG sought an Order of this Court lifting portions of the February 23, 2007, Injunction. IDFG sought a partial lifting of the Court's injunction because of its own efforts in modifying the Farragut range to address the Court's concerns and in light of the Idaho legislature's enactment of the Idaho Sport Shooting Range Act, which went into effect on July 1, 2008, and established noise standards for state outdoor shooting ranges.

On February 14, 2011, the Court heard IDFG's Motion to Strike the Affidavit of James Caulder, IDFG's Motion for Summary Disposition of Motion for Partial Lifting of Injunction, and IDFG's Motion for View. On March 11, 2011, the Court issued its seventy-seven page Memorandum Decision and Order on Motions to Strike, Defendant's Motion for View, Defendant's Motion for Partial Lifting of Injunction and Plaintiff's Motion for Summary Judgment, and Order Scheduling Court Trial. This Court denied IDFG's motion to strike, denied CARE's motion to strike the Affidavit of O'Neal (except for ¶ 26 and the attendant Exhibits 4 and 5), denied IDFG's motion for view, granted CARE's motion for summary judgment as to the Idaho Outdoor Sport Shooting Range Act being unconstitutional (specifically finding the Idaho Outdoor Sport Shooting Range Act to be an unconstitutional "special law"), and denied IDFG's motion to

partially lift the injunction and IDFG's motion for summary disposition of the motion to partially lift the injunction. The Court denied cross motions for summary judgment on safety issues as material questions of fact remained and set a Court trial for June 13, 2011, to address those questions.

IDFG filed a motion for permission to appeal on March 25, 2011. That motion was heard on April 20, 2011, following which this Court filed its Memorandum Decision and Order Denying Defendants' Motion for Permission to Appeal Under I.A.R. 12.

Court trial was held for two days on June 13 and 14, 2011, following which the parties submitted post-trial briefing and proposed findings of fact and conclusions of law. On August 25, 2011, this Court entered its 39-page Memorandum Decision, Findings of Fact, Conclusions of Law and Order Following Court Trial on Defendant's Motion for Partial Lifting of Injunction (Safety Issues). An "Order Denying Motion for Partial Lifting of Injunction" was submitted by CARE, signed by the Court on August 29, 2011, and filed on that date. That Order denied IDFG's motion for partial lifting of injunction, and awarded CARE its costs against IDFG pursuant to I.R.C.P. 54(d)(1). The filing of that Order prompted the above described application for fees and costs by CARE and IDFG's objection to those fees and costs.

Hearing was held November 9, 2011, on CARE's motion for fees and costs, and the attendant objection and motion to disallow fees and costs by IDFG, and those matters are now at issue.

**II. STANDARD OF REVIEW.**

The district court's decision to award attorney fees is a discretionary decision, subject to the abuse of discretion standard of review. *Bailey v. Sanford,* 139 Idaho 744, 753, 86 P.3d 458, 467 (2004).

## III. ANALYSIS.

CARE moves the Court to award attorney's fees and costs pursuant to I.R.C.P. 54 and I.C. § 12-117. Plaintiff's Brief in Support of Award of Costs and Attorneys' Fees, p. 2. It is CARE's contention that IDFG has acted without a reasonable basis in fact or law. Specifically, CARE argues IDFG failed to present any credible evidence at trial demonstrating that a round would not be able to travel over the back berm behind the target. *Id.,* pp. 2-3. CARE continues that IDFG acted unreasonably in positing it had complied with the Court's requirements for lifting the February 23, 2007, injunction through the building of a single baffle. *Id.*, p. 3. Further, CARE writes this Court has detailed the "failures of Mr. O'Neal's [range] design. The members of the [Idaho Fish and Game] Commission [who is not a party to this case] ignored that deficient design for it built less baffles than O'Neal suggested." *Id.,* p. 5. CARE argues that while it attempted to meet and review the issues with IDFG, this Court has noted the Idaho Fish and Game Commission's failure to attempt to resolve issues by conferring with CARE. *Id.* CARE urges the Court to overlook the unconstitutionality of the Idaho Sport Shooting Range Act issue for purposes of the instant motion for attorney's fees, because noise would only have become an issue had IDFG prevailed on its safety claims. *Id.*, p. 6. "The fact that the statute's viability was potentially arguable mattered not one wit, as the precursor was rounds over the backberm. Until that barrier has been breached, noise was not an issue." *Id.* Finally, CARE states the "alleged" expert testimony provided by IDFG was "met with little credulity by this Court", and the "deficiencies" of IDFG's expert witness' status were long known to IDFG. *Id.,* p. 7.

In response, IDFG makes several arguments. First, IDFG states it made reasonable efforts to meet and confer with CARE and list "[s]everal conversations

illustrat[ing] Plaintiffs' unwillingness to discuss mutually agreeable solutions." Brief in Support of Notice of Objection and Motion to Disallow Attorney Fees and Costs, pp. 4-5. Related to this claim, IDFG urges the Court not to consider failed settlement negotiations in determining the propriety of an award of fees and costs. *Id.,* pp. 5-6. IDFG argues it acted with a reasonable basis in fact and law regarding the unconstitutionality of the Idaho Outdoor Sport Shooting Range Act in light of the issue being one of first impression and this Court's own questions regarding the "special law" vs. "local law" analysis previously utilized by Idaho Appellate Courts. *Id.,* p. 8. IDFG argues at length that it acted with reasonable basis in fact and law in moving for partial lifting of the injunction, conceding that its interpretation of the February 23, 2007, Memorandum Decision and Order may have been an erroneous interpretation, but arguing it was nonetheless reasonable. *Id.,* p. 10. IDFG states it met the plain language of the 2007 Order, despite this Court's later conclusion that the injunction would not be lifted without ground baffles and an eyebrow berm or bullet catcher. *Id.* IDFG also notes its erroneous belief that ricochets would not be considered in relation to the requirements for lifting the injunction for up to 500 shooters, but argues it acted in conformance with the plans by the range designer, which were approved by a professional engineer. *Id.,* pp. 11-12. Finally, IDFG argues the amount of fees sought by counsel for CARE are not reasonable because: (1) fees of $325 per hour are above the prevailing rate and above the $200-$250 per hour rate previously listed by CARE's counsel in an application for fees; (2) the hours billed exceed the hours listed in timekeeping references by almost 41 hours; (3) the hours billed for research, drafting, and review of materials by Mr. Richman relating to the unconstitutionality issue resulted in only a one-page response "with bare assertions of constitutional arguments

unsupported by any reference to case law" and overlap with Mr. Reed's hours separately billed; and (4) there is billing overlap with regard to the attorney's fees issue now before the Court, and Mr. Richman's billing for drafting and briefing was related to issues which predated the Court's August 25, 2011, Order. *Id.,* pp. 14-15.

Here, CARE filed its application for fees and supporting affidavit and brief on September 9, 2011, within fourteen days of entry of this Court's Order Denying Motion for Partial Lifting of Injunction which was filed on August 29, 2011, as contemplated by I.R.C.P. 54(d)(5). An additional Application of the Plaintiff for Attorney's Fees Against the Department of Fish and Game as Related to Attorney Scott Reed was filed on September 13, 2011, beyond the 14-day deadline, but this merely added a page that was earlier omitted. IDFG filed its objection on September 23, 2011, which was timely filed within fourteen days of their receipt of the memorandum of costs. I.R.C.P. 54(d)(6).

In determining the prevailing party entitled to costs, the Court is to "consider the final judgment or result of the action in relation to the relief sought by the respective parties." I.R.C.P. 54(d)(1)(B). In their objection, IDFG does not dispute CARE's being the prevailing party. Indeed, it would be impossible for the Court to not find CARE the prevailing party in light of the August 25, 2011, Memorandum Decision, Findings of Fact and Conclusions of Law and Order Following Court Trial on Defendants' Motion for Partial Lifting of Stay (Safety Issues), which denied IDFG's motion for partial lifting of the injunction. The Court specifically finds CARE to be the prevailing party on the Motion for Partial Lifting of Stay.

An "Order Denying Motion for Partial Lifting of Injunction" was signed by the Court on August 29, 2011, and filed on that date. That Order denied IDFG's motion for

partial lifting of injunction, and awarded CARE its costs against IDFG pursuant to I.R.C.P. 54(d)(1). The Court signed that Order as presented by CARE's counsel because the Court had just denied IDFG's motion to partially lift the injunction, and it was patently obvious CARE was the prevailing party as far as costs (exclusive of attorney fees) were concerned. To the extent that the Court already ordered costs (not including attorney fees) against IDFG, in favor of CARE, IDFG essentially requests this Court to reconsider that August 29, 2011, Order.

IDFG argues that an award of fees (not costs) is inappropriate because IDFG did not act without a reasonable basis in fact or law pursuant to I.C. § 12-117.

Attorney fees under I.C. § 12-117 are awarded where it is shown that the non-prevailing party acted without a reasonable basis in fact or law. *Stacey v. Idaho Dep't of Labor,* 134 Idaho 727, 9 P.3d 530 (2000). In 2010, I.C. § 12-117 was amended so as to do away with the practice of Courts being permitted to award fees on petitions for judicial review; an award of fees under I.C. § 12-117 is limited to civil judicial proceedings and administrative proceedings. *Smith v. Washington County,* 150 Idaho 388, ___, 247 P.3d 615, 618 (2010). Idaho Code § 12-117 also applies to witness fees and other reasonable expenses and, therefore, "provide[s] the exclusive basis for awarding court costs." *Lake CDA Investments, LLC v. Idaho Dept. of Lands,* 149 Idaho 274, 285, 233 P.3d 721, 732 (2010). Thus, for an award of costs and fees in the instant matter, CARE would have to demonstrate it was the prevailing party, and that IDFG acted without a reasonable basis in fact or law.

In *Allied Bail Bonds v. County of Kootenai,* the Idaho Supreme Court awarded Kootenai County fees pursuant to I.C. § 12-117 because the nonprevailing party, Allied, acted without a reasonable basis in fact or law by misrepresenting controlling

precedent, abandoning several arguments made in briefing at oral argument, and unreasonably pursuing the appeal without compliance with the Idaho Tort Claims Act or bond requirements. 151 Idaho 405, ___, 258 P.3d 340, ___ (2011). As discussed by IDFG, the Idaho Supreme Court has stated, "when dealing with an issue of first impression, this Court is generally reluctant to find an action unreasonable." *Ciszek v. Kootenai County Board of Commissioners,* 151 Idaho 123, ___, 254 P.3d 24, 36 (2011) (citing *Kootenai Med. Ctr. Ex rel. Teresa K. v. Idaho Department of Health and Welfare,* 147 Idaho 872, 886, 216 P.3d 630, 644 (2009)).

It cannot be said that any action of IDFG in the instant matter was as egregious as the non-prevailing party's action in *Allied.* Preliminarily, as to the issue of the unconstitutionality of the Idaho Outdoor Sport Shooting Range Act, CARE's contention that the issue not be found relevant to addressing attorney fees is correct. This Court specifically concluded:

> In its Order of March 11, 2011, this Court limited the scope of the evidentiary hearing held on June 13, and 14, 2011, to the issue of safety considerations at Farragut Range for up to 500 shooters.

Memorandum Decision, Findings of Fact, Conclusions of Law and Order Following Court Trial on Defendant's Motion for Partial Lifting of Injunction (Safety Issues), p. 34. The court trial was thus limited to safety considerations, and the question of whether IDFG acted without a reasonable basis in fact or law in arguing for the constitutionality of the Idaho Outdoor Sport Shooting Range Act as related to the noise issue is not before the Court. However, CARE is seeking attorney's fees specific to work done regarding the issue of the Act's constitutionality. CARE also contends IDFG acted unreasonably in failing to meet its burden of proving that rounds could not go over the berm behind the targets. Plaintiffs' Brief in Support of Award of Costs and Attorneys'

Fees, p. 3. "[IDFG] simply ignored the circumstances surrounding rounds fired low, which would strike a whole series of impermissibly placed ricochet potential sites and, on a more probable than not basis, rounds would go over the back berm behind the target as a direct result of ricochet." *Id.* IDFG argues it reasonably believed it had met and even surpassed the Court's baffle requirements by installing baffles to prevent firing over the back berm and by, additionally, installing side berms to address ricochets. Brief in Support of Notice of Objection and Motion to Disallow Attorney Fees and Costs, pp. 11-12. While the subject of ricochets was not discussed in the 2006 trial, the Court determined the use of the term "round" in the 2007 Order requiring that a "shooter in any position cannot fire a round above the berm behind the target" included "ricochets." Memorandum Decision, Findings of Fact, Conclusions of Law and Order Following Court Trial on Defendant's Motion for Partial Lifting of Injunction (Safety Issues), p. 36. Importantly, the Court concluded:

> …that the partially contained range as presently in place will not contain rounds that ricochet over the back berm and could travel as far as one and one-half miles down range and off the property owned by the Idaho Fish and Game Department in the surface danger zone.

*Id.,* p. 34. This conclusion of law, however, does not go so far as to hold that IDFG acted without a reasonable basis in fact or law, or in bad faith, in bringing its motion for partial lifting of the 2007 injunction. The question of whether the improvements to the range made by IDFG subsequent to 2007 were sufficient such that IDFG could reasonably move the Court for a partial lifting of the injunction is necessarily a question of first impression for the Court; IDFG's motion provided the Court with the first opportunity since 2006 to review range construction. The Court concluded that the failure of IDFG to utilize (1) ground baffles, (2) additional overhead baffles to address ricochets off the floor of the range, (3) an eyebrow device at or near the top of the back

berm to address ricochets resulting from the striking of the floor at a shallow angle just before the toe of the back berm, and (4) measures to address the gaps in the baffles which could result in ricochets off to the side, resulted in "….violation of safety considerations set forth in 2007". Memorandum Decision, Findings of Fact, Conclusions of Law and Order Following Court Trial on Defendant's Motion for Partial Lifting of Injunction (Safety Issues), pp. 37-38. And, as presently constructed, the Court has determined the range currently does not meet professional standards set forth by Clark Vargas in the National Rifle Association Range Source Book or the ETL. *Id.,* p. 38. However, these conclusions by the Court do not necessarily result in a finding that IDFG acted without a reasonable basis in fact or law in bringing its motion for partial lifting of the injunction.

Both parties, perhaps taking heed of this Court's encouragement since 2007 to communicate and attempt to collaborate on a resolution, have argued to the Court that each made attempts to meet and confer on the issues which were ultimately resolved via this Court's August 25, 2011, Order. *See* [Plaintiffs'] Affidavit of Counsel, filed September 9, 2011; Brief in Support of Defendants' Notice of Objection and Motion to Disallow Attorney Fees and Costs, pp. 3-5. At oral argument on November 9, 2011, this Court made it clear that a lack of attempts to resolve this matter by the parties themselves was not a criteria for determining costs and fees. The Court has never *ordered* the parties to attempt resolution of this case or any issue in this case. While the Court has certainly encouraged such negotiated resolution, failure to follow that encouragement is simply not competent evidence that IDFG acted without a reasonable basis in fact or in law.

Indeed, the parties' inability to reach any sort of agreement on any of the issues necessarily is some evidence that IDFG acted with at least some reasonable basis in fact and law in bringing its motion to partially lift the injunction. In no other way could this case move toward final resolution. In *St. Luke's Magic Valley Regional Medical Ctr. V. Board of County Commissioners of Gooding County,* the hospital sought review of the commissioners' determination that a patient was not medically indigent, meaning that the County would not be liable to the hospital for reimbursement of costs of treatment, the District Court affirmed the commissioners and upon appeal, the Idaho Supreme Court affirmed again. 149 Idaho 584, 591, 237 P.3d 1210, 1217 (2010). In denying an award of fees under I.C. § 12-117, the Supreme Court noted two factors supporting the conclusion that, despite being unsuccessful, St. Luke's did not act without reasonable basis in fact or law: (1) the question of whether "potential income" could be considered a resource was a question of first impression and (2) a pre-litigation screening panel found the patient to be medically indigent, "suggesting that St. Luke's factual assertions may have had merit." *Id.* Here, IDFG sought this Court's opinion of the improvements made to the range following the 2007 injunction issuing. The question before the Court was unique and fact-specific; there was no manner by which the Court could have reviewed the changes to the Farragut Range and analyzed those changes in light of the 2007 injunction but for IDFG's ultimately unsuccessful motion for partial lifting of the injunction and the attendant Court trial. An agency acts without a reasonable basis in fact or law when it does not have the authority to take a particular action. *Fischer v. City of Ketchum,* 141 Idaho 349, 356, 109 P.3d 1091, 1098 (2005); *Reardon v. Magic Valley Sand and Gravel, Inc.,* 140 Idaho 115, 120, 90 P.3d 340, 345 (2004) (citing *Moosman v. Idaho Horse Racing Comm'n,* 117 Idaho 949, 954,

793 P.2d 181, 186 (1990). Although wrong in its interpretation of this Court's 2007 Order, it cannot be said IDFG acted in excess of its authority in bringing the motion. In *Matter of Russet Valley Produce, Inc.,* 127 Idaho 654, 904 P.2d 566 (1995), the Idaho Supreme Court reversed an award of costs and fees to Russet Valley pursuant to I.C. § 12-117 because, although the Idaho Potato Commission was wrong in interpreting the term "continuing violations", the Idaho Supreme Court found the Idaho Potato Commission had not "altogether acted without a reasonable basis in fact or law" as its interpretations were a "reasonable, but erroneous interpretation of an ambiguous statute." 127 Idaho 654, 661, 904 P.2d 566, 573. *See also Payette River Property Owners Ass'n v. Board of Comm'rs of Valley County,* 132 Idaho 551, 558, 976 P.2d 477, 484 (1999) (upholding the District Court's statement that "the County Commission misapplied the law, it acted with a reasonable though erroneous basis in fact and law.")

In the present case, IDFG was later found to be "wrong" or "erroneous" in its interpretation of this Court's 2007 Order, but it cannot be said that IDFG acted without a reasonable basis in fact or law in bringing an arguably legitimate dispute as to how to interpret that 2007 Order.

CARE cites to *Bogner v. State Dept. of Revenue and Tax,* 107 Idaho 854, 859, 693 P.2d 1056, 1061 (1984), for the proposition that the purpose of I.C. § 12-117 is: "(1) to serve as a deterrent to groundless or arbitrary agency action; and (2) to provide a remedy for persons who have borne unfair and unjustified financial burdens defending against groundless charges or attempting to correct mistakes agencies should never had made." Plaintiffs' Brief in Support of Award of Costs and Attorneys' Fees, p. 4.

It is undisputed IDFG made improvements to the range. It is undisputed that the types of improvements (baffles, covering on the ground, etc.), were intended by IDFG to

improve safety. The Court in 2007 did not specify that safety improvements had to include addressing ricochets, but that is because the topic of ricochets was not directly raised in 2007. What was discussed was safety and noise, and safety includes ricochets. While it seems odd for IDFG to ignore the issue of ricochets, it is understandable that IDFG would focus on live rounds escaping the range, given that the focus at the 2006 proceeding on safety concerns was the "no blue sky" concept, which addressed only direct shots at the target. Since that was *the focus by the parties* of the 2006 proceeding, it was the focus of this Court' February 23, 2007, decision.

Having made its improvements following that 2007 decision, absent agreement from CARE, IDFG *had* to apply to the Court in some fashion in order for the Court to determine the adequacies of IDFG's improvements. The motion for partial relief was certainly a method to bring the issue before the Court. From the safety standpoint, this Court cannot find IDFG's petition to partially lift the injunction was "without a reasonable basis in fact or in law." The Court cannot say IDFG's improvements and subsequent attempt to have the Court approve the adequacy of those improvements was a "groundless or arbitrary agency action." While CARE paying for its attorney's work is certainly from CARE's standpoint, an "unfair" or "unjustified" "financial burden", this Court cannot find it to be an "unfair" or "unjustified" "financial burden", as it was CARE which filed this complaint, CARE has been vigilant in its prosecution, and CARE stands to benefit from its continued prosecution. The range was there before any of the individual plaintiffs (the members of CARE) moved into or built their homes. The dispute arose because IDFG planned and secured funding for a massive expansion of this little used range. This Court cannot say IDFG's improvements and subsequent attempt to have the Court approve the adequacy of those improvements was a

"defense of groundless charges" or "an attempt to correct mistakes the agency should never have made." To hold otherwise would turn the standard in I.C. § 12-117 (agency acting without a reasonable basis in fact or in law) into simply the prevailing party analysis found in certain civil cases (not involving the State) under I.C. § 12-120.

If the issue is one which has not previously been addressed by a court, then attorney fees will not be awarded under I.C. § 12-117. *Henderson v. Eclipse Traffic Control and Flagging, Inc.,* 147 Idaho 628, 213 P.3d 718 (2009); *St. Alphonsus Regional Medical Center, Inc., v. Board of County Commissioners of Ada County,* 146 Idaho 51, 190 P.3d 870 (2008). That is the situation in the present case. The improvements made by IDFG have not "previously been addressed by a court."

For the June 2011, trial, IDFG hired experts Jon Whipple and Kerry O'Neal. The Court found CARE's expert (Jim Caulder) to be more credible and to have more believable opinions as compared to IDFG's experts. However, the only way to test the credibility of any witness is in the crucible of trial, hearing, or deposition, presented before the finder of fact. The Court found CARE's expert more believable, but just because IDFG presented its expert does not mean IDFG acted without a reasonable basis in fact or in law. The safety issues in the present case are somewhat complex, and there is no one agreed upon industry standard. In the past, this Court has looked to a variety of sources, including the NRA Sourcebook Drawings (standards written by the National Rifle Association), and Clark Vargas' 1996 Third National Shooting Range Symposium. Vargas was the expert engineer IDFG hired in 2004 to create the Vargas Master Plan, which detailed the $3.6 million expansion the IDFG was planning to implement. However, one problem with the Vargas Master Plan was it was at times inconsistent with Vargas' 1996 Third National Shooting Range Symposium. This Court

explained this in its March 11, 2011, Memorandum Decision and Order on Motions to Strike, Defendant's Motion for View, Defendant's Motion for Partial Lifting of Injunction and Plaintiff's Motion for Summary Judgment and Order Scheduling Court Trial:

> 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.

Memorandum Decision and Order on Motions to Strike, Defendant's Motion for View, Defendant's Motion for Partial Lifting of Injunction and Plaintiff's Motion for Summary Judgment and Order Scheduling Court Trial, p. 3.

In its motion to partially lift the injunction, IDFG overlooked the issue of ricochets. Ricochets were not *explicitly* discussed in 2007. However, ricochets were certainly *implicitly* discussed in 2007 when the Court mentioned bullet "containment". This Court wrote:

> 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).

February 23, 2007, Memorandum Decision, Findings of Fact, Conclusions of Law and Order, pp. 61-62.

Simply because IDFG ignored the issue of bullet containment and ignored the practical fact that ricochets are bullets too, does not equate to IDFG acting without a reasonable basis in fact or in law. This is a complex case spanning several years. The fact is the parties did not initially (in 2006) directly discuss ricochets, and initially (in

2007), the Court did not discuss ricochets. But the fact that what appears to be an obvious issue (ricochets) was initially overlooked by the attorneys for each side and the one judge who was assigned the task of trying to resolve this complex litigation, underscores the need for a collaborative approach in the future. If all the stakeholders involved in this litigation worked together, the odds of overlooking an important issue are greatly reduced.

CARE also argues that IDFG's defense of the Idaho Sport Shooting Range Act should not be considered by this Court when determining attorney fees under I.C. § 12-117, because the motion to partially lift the injunction only pertained to getting the range to the point where up to 500 shooters per year could use the range, and thus, the noise issue was not at issue. Plaintiffs' Brief in Support of Award of Costs and Attorney Fees, p. 6. CARE then goes on to alternatively discuss why IDFG's defense of that statute warrants attorney fees. *Id.,* pp. 6-8.

The Court finds the Idaho Outdoor Sport Shooting Range Act issue must be discussed regarding attorney fees, but only because I.C. § 12-117 presently reads the Court "…shall award the partially prevailing party reasonable attorney's fees, witness fees and other reasonable expenses with respect to that portion of the case on which it prevailed." CARE is also the prevailing party on the constitutional challenge to the Act. However, the Court agrees with CARE that the defense of the Idaho Outdoor Sport Shooting Range Act is not a factor in this Court's analysis of the attorney fee issue for the simple reason that noise at the under 500 shooters per year level was not a factor, and the under 500 shooters per year was the level to which IDFG's motion to partially lift the injunction was focused. Alternatively, even were the Court to analyze the Idaho Outdoor Sport Shooting Range aspect of this case, I.C. § 12-117 only applies to

litigation, not legislation. This is an unusual case, in which litigation ensued, a decision by this Court was made, IDFG went to the legislature with special legislation to overturn part of this Court's decision, and the legislature enacted the special legislation which was later determined by this Court in that same litigation to be an unconstitutional "special law." While the "special law" legislative effort is bookended by litigation in this case, the "special law" is still legislation, and not litigation as covered under I.C. § 12-117. Title 12 of the Idaho Code governs "Costs and Miscellaneous Matters in Civil Actions"; in other words, litigation, not legislation.

Because IDFG acted erroneously, but not without a reasonable basis in fact or law, this Court need not reach IDFG's contentions that the hourly rate claimed is excessive, or that specific hours claimed are unreasonable.

In the Order Denying Partial Lifting of Injunction, this Court ordered CARE's costs be paid by IDFG "as allowed by Rule 54(d)(1) I.R.Civ.P." Order Denying Partial Lifting of Injunction, p. 2. That portion of the Order Denying Partial Lifting of Injunction is in error. The Idaho Supreme Court in *Lake CDA Investments, LLC, v. Idaho Department of Lands,* 149 Idaho 274, 285, 233 P.3d 721, 732 (2010), held: "Because [I.C. § 12-117] also applies to the award of 'witness fees and reasonable expenses,' it would also provide the exclusive basis for awarding court costs." This Court is more than a little familiar with *Lake CDA Investments*, and should have stricken that portion of the Order Denying Partial Lifting of Injunction. As set forth above, this Court finds attorney fees under I.C. § 12-117 are not justified against IDFG for bringing its motion to partially lift injunction. For the same reason attorney fees are not justified, under *Lake CDA Investments,* neither are costs.

For the reasons set forth above, this court denies CARE's motion for fees and costs.

## IV. CONCLUSION AND ORDER.

IT IS HEREBY ORDERED CARE's "Application of the Plaintiff for Attorneys Fees Against the Defendant Idaho Department of Fish and Game" is DENIED.

IT IS FURTHER ORDERED that IDFG's "Defendants' Notice of Objection and Motion to Disallow Attorney Fees and Costs" is GRANTED.

IT IS FURTHER ORDERED that the portion of the Order Denying Partial Lifting of Injunction, which reads: "IT IS FURTHER ORDERED that plaintiffs Citizens Against Range Expansion, et al, be and they are hereby awarded their costs as against defendant Idaho Fish and Game Department as allowed by Rule 54(d)(1) I.R.Civ.P."; is RESCINDED.

**ENTERED** this 14th day of November, 2011.

_____
John T. Mitchell, District Judge

**Certificate of Service**

I certify that on the _____ day of November, 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