STATE OF IDAHO)
County of KOOTENAI)ss

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AT_____ O'Clock _____M
CLERK OF DISTRICT COURT

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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 FISH AND GAME DEPARTMENT, an agency of the STATE OF IDAHO, et al,** *Defendant*.	Case No. **CV 2005 6253** **MEMORANDUM DECISION AND ORDER DENYING DEFENDANTS' MOTION FOR PERMISSION TO APPEAL UNDER I.A.R. 12**

I. PROCEDURAL HISTORY AND FACTUAL BACKGROUND.

This matter is before the Court on defendant Idaho Fish and Game Department's (IDFG) motion for permission to appeal this Court's March 10, 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."

On February 23, 2007, this Court entered its 63-page Memorandum stating:

> **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). Since 2007, IDFG has made changes to the Farragut Shooting Range and requested 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 §§ 67-9101-67-9105, as the standard applicable to operation of the Farragut

Shooting Range." Brief in Support of Motion for Partial Lifting of Injunction, p. 12. Hearing on the motion for partial lifting of the injunction was held on February 14, 2011, and this Court issued a 77-page Memorandum Decision and Order on March 10, 2011. In that decision this Court found 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. Memorandum Decision and Order on Motions to Strike, Motion for View, Motion for Partial Lifting of Injunction and Motion for Summary Judgment, p. 78. This Court also found the Act violated Article V, § 13 of the Idaho Constitution.

On March 25, 2011, IDFG filed its Defendants' Motion for Permission to Appeal Under I.A.R. 12, and a Brief in Support of Defendants' Motion for Permission to Appeal. On April 4, 2011, CARE filed Plaintiffs' Response to Defendants' Motion for Permission to Appeal Under I.A.R. 12. Oral argument on the motion was held on April 20, 2011.

II. STANDARD OF REVIEW.

Where an order is not appealable as a matter of right under Idaho Appellate Rule 11, it can in some circumstances be accepted as a permissive appeal of an interlocutory order. I.A.R. 12; *Idaho Dept. of Labor v. Sunset Marts, Inc.,* 140 Idaho 207, 91 P.3d 1111 (2004). I.A.R. 12 states that permission may be granted to appeal an interlocutory order or decree of the district court which "involves a controlling question of law as to which there is substantial grounds for difference of opinion and as to which an immediate appeal from the order or decree may materially advance the orderly resolution of the litigation."

III. ANALYSIS OF MOTION FOR PERMISSIVE APPEAL UNDER I.A.R. 12.

IDFG requests permission of this Court to appeal the Court's March 10, 2011, Memorandum Decision and Order to the Idaho Supreme Court pursuant to Idaho

Appellate Rule 12(b). Defendants' Motion for Permission to Appeal, p. 2. The Rule requires filing of a motion for permission to appeal from an interlocutory order or judgment within fourteen days of date of entry. I.A.R. 12(b). This Court's Memorandum Decision and Order was dated March 10, 2011, but filed March 11, 2011. As such, IDFG's motion was timely filed on March 25, 2011.

IDFG moves the Court to permit an appeal of its interlocutory order on numerous grounds, claiming: the "substantial grounds for difference of opinion" requirement of I.A.R. 12 is met given this Court's holding the Idaho Outdoor Sport Shooting Range Act unconstitutional under this Court's "special law" analysis; the impact of the Court's holding the Idaho Outdoor Sport Shooting Range Act unconstitutional upon Idaho Code § 55-2605 (concerning the preemption of local governmental law and its ability to establish or enforce noise standards for outdoor sport shooting ranges); and, because evidence regarding safety requirements for up to 500 and over 500 shooter overlaps, "consideration of the appeal [by the reviewing court] would allow more efficient conduct of an evidentiary hearing [by this Court at a later date than that currently scheduled] to address factual issues." Brief in Support of Defendants' Motion for Permission to Appeal, pp. 4, *et seq.*

In response, CARE recognizes the difference of opinions held by the parties, but notes any appeal prior to a trial on the underlying safety requirements which must be met before noise standards are addressed, "serves no useful purpose towards the goal of advancing the orderly resolution of the litigation to permit piecemeal appeal." Plaintiffs' Response to Defendants' Motion for Permission to Appeal Under I.A.R 12, p. 4. CARE goes on to argue no pending cases would benefit from any expedited handling of an appeal as to the Court's holding I.C. § 67-9102 unconstitutional. *Id.,* p. 5.

An appeal of an interlocutory Order may be accepted as a permissive appeal under Idaho Appellate Rule 12 even where the Order is not appealable as a matter of right. *Taylor v. Maile,* 142 Idaho 253, 257, 127 P.3d 156, 160 (2005). The Supreme Court of Idaho treats appeals as interlocutory appeals under I.A.R. 12 where the parties have briefed and argued issues on appeal, the District Court issues an Order involving a controlling question of law regarding which there are substantial grounds for difference of opinion, and an immediate appeal would materially advance orderly resolution of the litigation. *Id.* In *Budell v. Todd,* 105 Idaho 2, 665 P.2d 701 (1983), the Supreme Court wrote:

> In accepting or rejecting an appeal by certification under I.A.R. 12, this Court considers a number of factors in addition to the threshold questions of whether there is a controlling question of law and whether an immediate appeal would advance the orderly resolution of the litigation. It was the intent of I.A.R. 12 to provide an immediate appeal from an interlocutory order if substantial legal issues of great public interest or legal questions of first impression are involved. The Court also considers such factors as the impact of an immediate appeal upon the parties, the effect of the delay of the proceedings in the district court pending the appeal, the likelihood or possibility of a second appeal after judgment is finally entered by the district court, and the case workload of the appellate courts. No single factor is controlling in the Court's decision of acceptance or rejection of an appeal by certification, but the Court intends Rule 12 to create an appeal in the exceptional case and does not intend by the rule to broaden the appeals which may be taken as a matter of right under I.A.R. 11. For these reasons, the Court has, over the six year experience of the use of Rule 12, accepted only a limited number of the applications for appeal by certification.

105 Idaho 2, 4, 665 P.2d 701, 703. Two things are needed: 1) "substantial issues of great public interest" or "legal questions of first impression" and "an immediate appeal would advance the underlying resolution of the litigation."

Here, while the parties' opinions regarding the Court's March 10, 2011, Memorandum Decision and Order differ, and the question of the constitutionality of the Idaho Sport Shooting Range Act is one of first impression, the Court's very reasoning

sets forth the fact that the instant case only gives rise to legal questions applicable to the parties involved (and thus, is not a "legal issue of great public interest"). The Court specifically stated:

> There is nothing about this litigation that pertains to anything other than the Farragut range. There is nothing about the Court's prior decision that pertains to anything other than the Farragut range.

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. 49. The Court found no other state gun ranges exist near residences, there is no "like basis" upon which to compare Farragut range to others, and one can only conclude that "special litigation" is at issue. *Id.,* p. 56. Further, as argued by CARE, an appeal of the safety requirement issue (at a minimum) would "certainly" take place following trial. *See* Plaintiff's Response to Defendants' Motion for Permission to Appeal Under I.A.R. 12, p. 4. An immediate appeal of the noise standard constitutionality questions would certainly delay the June 13, 2011, trial on the safety issues.

If this Court were to grant IDFG's I.A.R. 12 motion for permissive appeal, it would be about a year for the appellate decision. If this Court's decision on the unconstitutional nature of the statute regarding the noise issue is upheld, then, at the time of the appellate court's decision and subsequent remittitur, this Court would have to schedule and hold a trial on the safety issue and the noise issue. There is no reason why those could not be at the same trial. If this Court's decision on the unconstitutional nature of the statute regarding the noise issue is overturned by the appellate court, then, at the time of the appellate court's decision as subsequent remittitur, this Court would have to schedule and hold a trial on the safety issue. No matter how this Court decides the safety issue, a second appeal is virtually a given.

If this Court denies IDFG's I.A.R. 12 motion for permissive appeal, then, after this Court's decision following the June 13, 2011, trial on the safety issues, IDFG can appeal the unconstitutionality of the act pertaining to the noise issue (and this appeal is a given according to IDFG's attorney at the April 20, 2011, hearing), and, if the safety issue is decided against IDFG, then IDFG can appeal this Court's decision on that issue at the same time. If, following trial, this Court decides the safety issue against CARE, then CARE can cross-appeal that issue. The end result, *there is only one appeal*.

Given the fact that this matter is currently scheduled for a court trial on the safety issues beginning June 13, 2011, and given the certainty of IDFG's appeal on the unconstitutionality of the act pertaining to the noise issue, the I.A.R. 12 motion must be denied.

None of the factors listed in *Budell* weigh in favor of IDFG's instant motion for permission to appeal under I.A.R. 12. An immediate appeal would simply not advance the orderly resolution of this litigation. This case is less than two months away from being resolved, at least at the trial court level. A permissive appeal now would likely protract the resolution of the safety issues more than a year, and could produce two appeals rather than one (an appeal of the constitutionality issues involving the Idaho Outdoor Sport Shooting Range Act, followed by a trial on the safety issues and an appeal on the Court's determination of that issue). Such a scenario is not "orderly resolution". While this litigation is important to the parties, it is only germane to the parties…there is no "substantial legal issues of great public interest." Under I.A.R. 12, one needs both for the District Court to grant a permissive appeal…in this case neither are present. While the constitutionality of the Idaho Outdoor Sport Shooting Range Act is a "legal issue of first impression, it only pertains to the noise issue in this litigation and does not pertain to the safety issue to be tried in June, 2011.

IV. CONCLUSION AND ORDER.

For the reasons stated above, this Court must deny IDFG's motion for permission to appeal under I.A.R 12.

IT IS HEREBY ORDERED IDFG's Motion for Permissive Appeal Under I.A.R. 12 is DENIED.

Entered this 20th day of April, 2011.

_____
John T. Mitchell, District Judge

Certificate of Service

I certify that on the _____ day of April, 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**
Scott W. Reed	208 765-5117	Harvey Richman (via mail)
W. Dallas Burkhalter/Kathleen Trever	208 334-2148	

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Jeanne Clausen, Deputy Clerk