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, FINDINGS OF FACT,CONCLUSIONS OF LAW AND ORDER FOLLOWING COURT TRIAL ON DEFENDANT'S MOTION PARTIAL LIFTING OF INJUNCTION (SAFETY ISSUES)

I. FACTUAL BACKGROUND.

The following is taken from this Court's 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:

> 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 defendant, Idaho Department of Fish and Game (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 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.

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, pp. 1-3.

II. PROCEDURAL BACKGROUND.

On August 22, 2005, CARE filed its Complaint in this matter. 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 June 9, 2010, IDFG filed its Motion for Partial Lifting of Injunction, along with an Affidavit of Kerry O'Neal, and a Brief in Support of Defendants' Motion for Partial Lifting of Injunction. On July 6, 2010, CARE filed Plaintiffs' Response to Motion for Partial Lifting of Injunction and an Amended Response to Motion for Partial Lifting of Injunction. On August 4, 2010, IDFG filed its Reply Brief in Support of Motion for Partial Lifting of Injunction. On August 16, 2010, CARE filed the Affidavit of James A. Caulder and Affidavit of Jeanne Hom. 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. In its seventy-seven page 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, the Court held:

> **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.

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, pp. 75-77.

On March 25, 2011, IDFG filed Defendants' Motion for Permission to Appeal Under I.A.R. 12 this Court's decision finding the Idaho Sport Shooting Range Act unconstitutional, and a memorandum in support thereof. On April 4, 2011, CARE filed Plaintiffs' Response to Defendants' Motion for Permission to Appeal Under I.A.R. 12. Oral argument was held on April 20, 2011, and later that day this Court entered its Memorandum Decision and Order Denying Defendants' Motion for Permission to Appeal Under I.A.R. 12. IDFG also filed a similar motion with the Idaho Supreme

Court, which was denied on May 26, 2011.

On June 6, 2011, CARE filed Plaintiffs' Pretrial Memorandum, and on June 8, 2011, IDFG filed Defendants' Pre-Trial Brief. On June 10, 2011, the parties submitted a Joint Stipulation on Evidence and Facts. The Court trial was held June 13-14, 2011. On June 28, 2011, CARE filed Plaintiffs' Proposed Findings of Fact and Conclusions of Law, and IDFG filed Defendants' Post-Trial Brief and Defendants' Proposed Findings of Fact, Conclusions of Law and Draft Order. On June 29, 2011, CARE filed its Plaintiffs' Closing Brief.

III. ANALYSIS.

A. AGREEMENT REMAINS THE SUPERIOR RESOLUTION.

Four and one-half years ago this Court implored the parties to this lawsuit to agree as to noise and safety issues going forward. February 23, 2007, Memorandum Decision, Findings of Fact, Conclusions of Law and Order, pp. 50-51, 59-60.

Resort to the courts for resolution is *a* method of working through this problem between the IDFG, which wants to increase the number of people using this range, and CARE, representing those citizens down range who would be impacted by that increased use. However, in the long term, given the fact the parties will have to co-exist regardless of the outcome, litigation is unlikely the *superior* method of resolving these issues. This is obviously, and understandably, an emotionally charged issue for both sides. It is unknown what, if anything, CARE has tried as far as working with IDFG. In the record, up to this point in time, IDFG has done little to work toward agreement or to lessen the emotions involved. To begin with, IDFG told the granting agency, the National Rifle Association (NRA) that it expected 46,426 people per month or 557,112 people per year would visit the range once it was modified (February 23, 2007,

Memorandum Decision, Findings of Fact, Conclusions of Law and Order, p. 19, ¶ 19; Plaintiffs' Exhibit 22, Table 2), yet did not tell area residents about those projected numbers in public meetings. Even after litigation commenced, IDFG claimed the $3.6 million investment in the range was not any sort of *expansion* to the range but was simply an *improvement* of the range (*Id.,* pp. 4-5; Defendant's Memorandum in Opposition to Summary Judgment, p. 3; Defendant's Answers to Plaintiffs' Interrogatory No. 8), even though IDFG was in fact planning to increase usage from less than 500 people per year to more than one half million per year. IDFG made its grant application based upon the Vargas Plan, yet that Vargas Plan is at odds with what Clark Vargas himself considers to be safe as set forth in his Design Criteria, which he authored ten years before he created the Vargas Plan for this range. *Id.,* pp. 13-14; pp. 32-24, ¶ 49. Next, rather than establish noise standards by agreement as encouraged by this Court, IDFG chose the legislative path, which IDFG is allowed to do. IDFG was successful in its legislative effort. However, in the evidence that came before this Court regarding what IDFG was telling Idaho's legislators, IDFG was caught making several false claims in its effort to get its legislation passed. This Court found such legislation to be "special legislation", and thus, unconstitutional. All of this was discussed in detail in a previous decision. March 11, 2011, Memorandum Decision and Order on Motions to Strike, Motion for View, Motion for Partial Lifting of Injunction and Plaintiff's Motion for Summary Judgment and Order Scheduling Court Trial, pp. 48-54. More recently, IDFG has shown its reluctance to follow advice it has been given by its own retained experts. IDFG did not build the existing improvements to the plans and specifications established by IDFG's new expert Kerry Lynn O'Neal. IDFG filed a construction plan with Kootenai County in 2007 to obtain a building permit, but did not provide a copy to

CARE. Plaintiff's Proposed Findings of Fact and Conclusions of Law, p. 4. While IDFG was not required to notify CARE of its request for a building permit, either by Idaho law or by prior Court orders, not keeping CARE informed certainly does nothing to engender trust. IDFG then commenced and completed building its improvements to the range without running those improvements by CARE or by the Court. Again, IDFG was not required to provide prior notice. However, failing to keep CARE informed of what IDFG was building until after those improvements were completed when IDFG filed its Motion for Partial Lifting of Injunction certainly creates tension in the community and does nothing to build trust, let alone a collaborative solution. Further, its lack of communication puts IDFG and its expenditures at risk by building improvements that might later be determined to be unacceptable.

Given the history, it is understandable why CARE does not trust IDFG's future promise to have a supervisor on the premises at all times it is open for operation, or IDFG's promise to create detailed rules and post those rules throughout the facility. This is why future dialogue between the parties is truly superior compared to resorting to litigation. Litigation will produce an answer, but litigation will probably not produce the superior answer and litigation will never restore trust between these parties. It is inescapable that these parties will be required to continue to co-exist into the future. That co-existence can be by court directive, or could be by a collaborative agreement reached by thoughtful discussion between the parties. This Court simply encourages the parties to at least try to communicate and attempt to collaborate.

B. O'NEAL'S QUALIFICAITON AS AN EXPERT WITNESS.

IDFG hired Kerry Lynn O'Neal to make recommendations for safety of IDFG's range through his business, TRS Range Services. O'Neal testified at length on June

13, 2011. O'Neal testified he is the president and CEO of TRS Range Services Corporation. O'Neal's credentials are listed in Exhibit III. O'Neal has experience in firearm design, shooting firearms, testing firearms, testing baffles and looking at bullet penetration and fragmentation. O'Neil admitted his experience comes from on-the-job training. He has taken no tests, and relies on books for authority. O'Neal is not an engineer. At trial on June 13, 2011, the Court conditionally ruled O'Neal's testimony admissible. O'Neal was asked whether a whole bullet could go through the side openings on the IDFG range with the modifications that had been made, and O'Neal testified that was possible. O'Neal was asked whether a whole bullet could go over the backstop of the range, and he did not think that was possible. When asked for the basis of those opinions, O'Neal, refreshingly honestly, but starkly deficient, said "Based on my expert witness ability."

In spite of that deficient basis, O'Neal has experience and is minimally qualified as an expert. Because little has changed in the Court's analysis, the following is taken from this Court's March 11, 2011, Memorandum Decision and Order on Motions to Strike, Defendant's Motion for View, Defendant's Motion for Partial Lifting of Injuction and Plaintiff's Motion for Summary Judgment; and Order Scheduling Court Trial:

> 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.

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, pp. 10-13. After hearing O'Neal's testimony at trial, CARE's Motion to Strike is denied. O'Neal is minimally qualified, only through experience, as an expert on ranges and weapons.

Just because O'Neal has been found minimally qualified as an expert does not mean the Court finds all of O'Neal's testimony is credible. CARE points out O'Neal's financial bias, being the President and CEO of TRS Range Services. Plaintiff's Closing Brief, pp. 14-15. O'Neal was hired by IDFG and as CARE points out, could be held liable if his design fails. *Id.* This Court agrees. O'Neal is financially biased, and accordingly, that is one of the reasons his opinions are given little weight.

Some of O'Neal's testimony is simply incredible. For example, O'Neal's opinion that ground baffles are used primarily to protect the target, and not to retain or reduce ricochets, is simply untenable. This opinion of O'Neal's is contrary to: 1) the NRA (CARE's Trial Exhibit 3, p. I-6, I-8, I-1-8, I-1-16, I-1-17); 2) David Luke (NRA Technical Team Advisory authored by David Luke: "Therefore, the primary purpose for the construction of backstops, berms and baffles is to protect against the injury of people, the damage of property or both. A secondary benefit is to permit the systemic recovery of fired lead projectiles…" There was no tertiary benefit listed by Luke. CARE's Trial Exhibit 6, p. 1.); 3) the testimony of James A. Caulder, Jr., (Caulder deposition, November 18, 2010, p. 26, L. 18 – p. 27, L. 4); and 4) Clark Vargas (CARE's Trial Exhibit 2, p. 5, Figure 12; Figure 22). O'Neal's testimony doesn't even begin to make

sense. The shooter is shooting at the target, and the shooter hopes to hit the target. Once the target is hit often enough, the target is destroyed. O'Neal's opinion that ground baffles protect the target is simply unsupportable. At the June 13, 2011, hearing, O'Neal testified he "Doesn't support ground baffles", and when asked why he testified "They are earthen berms, and they become impacted with bullets which create other ricochet hazards." Aside from being absurd, this statement is directly contradicted by O'Neal's other testimony. First of all, O'Neal testified he would remove all rocks six inches deep in the earth. A spent lead bullet is smaller than a rock, and softer than a rock, thus, why would a spent bullet not be an acceptable material on the floor of the range? Second, O'Neal testified he did not know if there would be accidental discharges at the range; yet, the ground baffle earthen berm that would become so impacted with lead bullets that the berm itself becomes a ricochet hazard, *would only happen with misfires…people aiming too low*.

The Court finds believable O'Neal's testimony that the supports for the baffles, the rocks in the ground, are all ricochet hazards. But such opinion is only common sense, hardly expert testimony. O'Neal's testimony on that issue is at least consistent with the obvious and with laws of physics. At the June 13, 2011, hearing, O'Neal testified that there is "No telling where it [a ricochet] is going to go", and that a ricochet can be a fragment or a whole bullet. However, the fact that there is no telling where a ricochet is going to go is directly at odds with O'Neal's testimony at that hearing that he has personally observed ricochets tumbling over the end berm at some other unspecified high use law enforcement range, and "most tumble less than fifty yards."

O'Neal was asked whether a whole bullet could go through the side openings on the IDFG range with the modifications that had been made, and O'Neal testified that

was possible. The Court finds such to be credible, as it is corroborated by the evidence…many openings are visible from the photographs taken. CARE's Trial Exhibit 47, 48.

O'Neal was asked whether a whole bullet could go over the backstop of the range, and he did not think that was possible. When asked at the June 13, 2011, hearing for the basis of those opinions, O'Neal, refreshingly honestly, but starkly deficient, said "Based on my expert witness ability." Because O'Neal provided no legitimate basis for that opinion, it is accorded no weight. Later on, O'Neal conceded a ricochet could go over the backstop. Still later, O'Neal changed his testimony again. When asked "But some will ricochet over the back berm?", O'Neal answered: "I don't know that." Then, O'Neal changed again and testified that he didn't know the percentages of bullets that would ricochet over the back berm.

O'Neal testified that "IDFG changed my plan—they didn't build what I designed." The Court finds such to be credible. O'Neal designed seven baffles, IDFG built its improvements with six baffles. Exhibit 56.

O'Neal testified that he "didn't know" if ground baffles would help reduce or prevent ricochet, an answer the Court finds not credible. Such an answer overlooks the obvious. O'Neal was asked whether he agreed or disagreed with the NRA Technical Team Advisory authored by David Luke that "Ground baffles should always be used with overhead baffles". CARE's Trial Exhibit 6, p. 5. O'Neal stated he disagreed, but did not state why he disagreed, only to argue that he did not know where the NRA's Luke got his information from. The very beginning of Luke's article shows it was "reprinted from the Third National Shooting Range Symposium, 1996 with permission from International Association of Fish and Wildlife Agencies, Wildlife Management

Institute and U.S. Fish and Wildlife Service", and makes it clear everything discussed is found in the "NRA Range Manual", but that he would be going into more depth based on "lessons learned" in shooting range design. *Id.,* p. 1.

At the June 13, 2011, hearing, O'Neal testified that "We do not design for accidental discharge", O'Neal admitted a mistake in shooting was an "accidental discharge", and O'Neal would not answer the question as to whether they design for deliberate misuse (eg., firing into the floor of the range causing a ricochet). If such is true, O'Neal's firm's work is of little value since misfires, accidental discharges and deliberate misuse, in fact, occur. O'Neal himself testified that at a high use *law enforcement* range, he observed ricochets tumbling over the back berm. If law enforcement has misfires, misuse, accidental discharge, and aiming too low, it would seem a *civilian* range would have an even greater percentage of such.

Speaking of misfires, O'Neal was asked at trial whether there will be accidental discharges that occur at the Farragut Range, O'Neal testified: "I couldn't tell you that". Such answer by O'Neal strains credulity. Such answer is also inconsistent with O'Neal's testimony under oath on other occasions. O'Neal was a little more forthright in his deposition when he responded as to accidental discharges: "It could happen anywhere, as you know." O'Neal deposition, October 8, 2010, p. 59, Ll. 20-22.

O'Neal did not know that the ETL (Engineering Technical Letter) recommends removing rocks from the soil one meter deep. O'Neal didn't think he had ever read Vargas' Design criteria for shooting ranges. At the June 13, 2011, heaing, O'Neal testified he does not agree with the NRA manual.

C. THE STANDARD FOR LESS THAN 500 SHOOTERS PER YEAR.

As set forth above, in its February 23, 2007, Memorandum Decision, Findings of

Fact, Conclusions of Law and Order, this Court held that for the range to be re-opened, for less than 500 shooters per year, IDFG must do the following:

> 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.

Memorandum Decision, Findings of Fact, Conclusions of Law and Order, p. 61.

For a variety of reasons, IDFG now claims all it had to do was install a baffle, and IDFG could open the range up to 500 people, and that since IDFG has installed a baffle, IDFG is entitled to a partial lifting of the injunction. CARE takes a different position.

IDFG made this present claim known at the outset of the June 13, 2011, court trial when counsel for IDFG made a motion *in limine* asking for a ruling that IDFG had met this Court's safety requirement by installing the baffle. Counsel for IDFG argued that by installing the baffle, the "no blue sky" rule was satisfied. "No blue sky" means from any shooter's position, no open area is visible at the end of the range, all that is visible is the ground (floor) of the range, the target and the berm behind the target, and the overhead baffle. Counsel for IDFG argued that by "direct fire" (meaning the bullet hitting nothing from the instant it left the barrel until the bullet contacted the target), a bullet would have to be contained within the range, and that the issue of ricochets were not before the Court back in 2007. The Court, on the record, immediately after hearing argument from both sides on IDFG's motion *in limine*, denied the motion *in limine*. The Court held that while its 2007 decision did not mention "ricochets", neither did it mention

"direct fire". The Court went on to state that the Court's 2007 decision did state that a round can't be fired above the berm, and that whether that round gets there by direct fire or by ricochet is of little consequence when the only reason this topic is being discussed in the first place is *public safety*.

Although the Court denied IDFG's motion in limine, IDFG's claim (that all it needed to do to open the range for up to 500 shooters per year was install an overhead baffle) is still at issue following the presentation of evidence at the court trial.

IDFG now argues there is significance in this Court's choice of the word "baffle" (singular) and not "baffles" (plural) in its 2007 opinion. IDFG argues such word choice means this Court did not intend to include ricochet rounds escaping the range. IDFG writes: "Notably, the Court consistently refers to 'baffle' in the singular and not the plural in its findings and conclusions related to up to 500 shooters." Defendants' Post-Trial Brief, p. 6. IDFG then argues in its post-trial brief:

> IDFG made motions *in limine* at the commencement of trial in response to Plaintiffs' description of their offered evidence and their late-breaking concession that baffles at the 100-yard shooting area were sufficient to prevent shooters from firing high. IDFG asked the Court to exclude evidence related to ricochets and the other issues described in Plaintiffs' pre-trial memo unrelated to the plain-language and contextual reading of the Court's 2007 Order. In ruling on these motions, the Court acknowledged that its 2007 Order lends itself to IDFG's interpretation that as long as direct fire has been addressed the injunction should be relieved as to particular shooting positions.

Id., p. 7. While this is accurate, it is also incomplete. Reviewing the notes taken by this Court's Court Reporter, what was said by this Court on June 13, 2011, was:

> The opinion does lend itself to an interpretation that as long as direct fire has been addressed, then the injunction should be relieved…at least as to this shooting position. But it also clearly says that it's in effect until it is shown either by agreement or to the court's satisfaction that a round can't be fired above the berm behind the target, and when we're considering issues of public safety, I think it would be naïve to limit the language of the decision to only direct fire. * * * It's clear from the decision that something

less than zero bullet escapement is contemplated, but it is clear that something more than just direct fire was contemplated back in 2007.

Without citation to any authority, evidence or prior opinion, IDFG then makes the claim: "As a fundamental matter, the mere identification of ricochet 'hazards' on the Range does not demonstrate harm to the Plaintiffs." Defendants' Post-Trial Brief, p. 13. This claim is incredible.

As written by this Court in 2007: "There can be no more 'irreparable' injury than death or injury from a bullet." Memorandum Decision, Findings of Fact, Conclusions of Law and Order, p. 57. Whether the bullet that penetrates the skull of the innocent citizen tending his or her downrange garden arrived there by direct fire or by ricochet is of little consequence to that now deceased gardener. Ricochets were not discussed much during the 2006 court trial. The fact that ricochets *were* discussed in the June 2011 court trial (and much of that discussion was by IDFG witnesses) does not provide any logic to IDFG's claim that "As a fundamental matter, the mere identification of ricochet 'hazards' on the Range does not demonstrate harm to the Plaintiffs."

IDFG supports its claim that "As a fundamental matter, the mere identification of ricochet 'hazards' on the Range does not demonstrate harm to the Plaintiffs", with the following convoluted reasoning:

> In 2006, the Plaintiffs had the burden of showing clear endangerment to those outside the area owned and controlled by IDFG. However, the Court found the Range relatively safe for use up to 500 shooters "[e]xcept for the fact that the existing range contains no baffle. 2007 Order at 46.

Id., p. 13. Because of the words IDFG omitted from this portion of this Court's prior decision, IDFG's claim is completely false and intentionally misleading. Here is what the Court wrote, in context and in its entirety:

> The Court finds this remedy [closing Farragut range to everyone] is not warranted. Except for the fact that the existing range contains no baffle,

the range is relatively safe as to its level of use up to and including 2002.

February 23, 2007, Findings of Fact, Conclusions of Law and Order, p. 46. AS found by this Court the level of use in 2002 was 176 shooters for that entire year. *Id.*, p. 4. This Court found that as of the 2006 trial, the level of use "has expanded significantly since 2002." *Id.* Thus, for IDFG to make the claim "However, the Court found the Range relatively safe for use up to 500 shooters "[e]xcept for the fact that the existing range contains no baffle", and cite this Court's February 23, 2007, opinion as authority is simply disingenuous. IDFG's making that false claim by using an incomplete quote of the Court, can only be construed by this Court as an intentional act by counsel, an act that may warrant a sanction. The issue of a sanction will be left for another day, and counsel's misconduct will not be held against IDFG. What is pertinent today is that this Court has *never* held *all* that was needed to make the range safe for up to 500 shooters was the installation of *a* baffle.

What the Court did hold was: "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." While the Court did not mention "ricochets" in so holding, neither did the Court mention "direct fire". A review of this Court's notes from the December 11, 12, 14, 14, 2006, trial shows "ricochet" was only mentioned once, in passing, by IDFG's expert Roy Ruel, when he mentioned a ricochet can occur off the ground or floor of the range. If a shooter, intentionally or accidentally, shoots into the floor, and doing so causes a good likelihood of that bullet travelling over the berm behind the target, then the requirement that the shooter "cannot fire his or her weapon above the berm behind the target", has not been met.

While ricochets were not discussed in 2006, IDFG has not made any cogent

argument as to why the problem of ricochets should *not* be considered by this Court relative to IDFG's motion to partially lift the injunction. In 2007, this Court was concerned with bullets that went over the back berm. Whether by ricochet or direct fire, the problem is still bullets going over the back berm.

D. THE PROBLEM OF RICOCHETS.

The problem of ricochets must be addressed and cannot be ignored. The problem of ricochets was not obviated by this Court's prior order. The problem of ricochets cannot be fully solved simply by supervision at the range and by trusting that no shooter will ever intentionally or accidentally misfire his weapon such that a bullet hits the floor of the range at a slightly acute angle, ricocheting over the back berm.

Caulder explained how ricochets *will* occur at the range. Shooting at the target but shooting low (only about one degree off the target) causes the round to strike the floor of the range about 150 feet down range, which then ricochets up about ten degrees, which in turn results in some ricochet bullets going over the back berm.

Ricochets can be addressed by either containing them within the range, or by having enough land surrounding the range that any ricochet will land in property closed off to the public. IDFG does not have sufficient land it can close off to the public, within which to contain ricochets. Caulder Deposition, November 18, 2010, Court's Exhibit 3, p. 63, Ll. 5-21; p. 69, L. 6 – p. 75, L. 16. The land IDFG does control is not closed off to the public. Jeanne Hom testified at trial that she could easily roam the entire property entering through the half-gates in the fence (used for game migration).

Ricochets over the back berm at other ranges happen apparently quite often. Often enough that O'Neal *watched* rounds go over the back berm, but go no further than fifty yards. O'Neal testified that rounds would go over the back berm of the newly

modified Farragut Range, as a result of a bullet being fired too low. The bullet strikes the earth at a low angle and ricochets forward and up. While this Court finds O'Neal's testimony that he watched rounds go over the back berm at some unidentified range to be credible, the testimony that from his observation *all* of the rounds went no further than fifty yards is not credible. First, while O'Neal did not state where he was located when he made these observations, it is simply impossible for O'Neal to have been in a position to watch and note exactly where every ricochet round landed. Second, to come to that conclusion (that all rounds went no further than fifty yards), O'Neal would have had to have located and measured the exact location of every round that was not contained by the back berm. O'Neal did not testify that he had done so. Third, O'Neal's testimony (that all rounds went no further than fifty yards over the back berm) defies laws of physics. The object any given bullet hits and the angle with which it hits that object on the ground (short of the berm) determines how far over the berm that bullet will travel. Certainly some bullets will travel less than fifty yards over the back berm, but not all bullets which ricochet will fall within that fifty yard boundary to which O'Neal testified. Fourth, O'Neal's testimony that all ricochets land within fifty yards of the back berm flies in the face of the ETL (that ricochets can travel half the distance of a direct fired bullet), and Air Force experience that even 300 yards was insufficient, which led to the development of the ETL in 1999. Caulder deposition, November 18, 2010, p. 70, L. 5 – p. 75, L. 22. The Court finds O'Neal credible to the extent that he watched rounds go over the back berm (which demonstrates the *frequency* of the problem of ricochets occurring), and that he observed *some* ricochet rounds fall within the fifty yard boundary. Again, the Court finds O'Neal's testimony that *all* rounds fell within fifty yards of the back berm is not credible.

This Court's prior decision did not require all parties to ignore the problem of ricochets. For IDFG to claim that for the Court to now address the problem of ricochets violates the Idaho Civil Rules of Procedure regarding injunctive relief, is wholly unpersuasive.

At trial, O'Neal testified that misfires can happen and will occur at the Farragut Range. At trial, O'Neal testified he could not tell us that misfires would happen at the Farragut Range. Again, this was inconsistent with his earlier testimony under oath. O'Neal deposition, October 8, 2010, p. 59, Ll. 20-22. In his earlier deposition, O'Neal places the problem of unintentional discharges all upon the shooter. O'Neal stated that whether accidental discharge was within the realm of possibility "…depends if there's supervision or not and training." *Id.,* p. 57, L. 19 - p. 58, L. 1. While supervision and training may help reduce accidental discharges, there is no evidence that supervision and training will eliminate accidental discharges. O'Neal begrudgingly admitted to such. *Id.,* p. 58, L. 2 – p. 62, L. 1.

At trial, O'Neal agreed the range should be supervised and that supervision would reduce (but not eliminate) accidental discharges. Caulder agrees supervision will improve safety as opposed to an unsupervised range. Caulder deposition, November 18, 2010, p. 78, Ll. 12-18.

IDFG's current design actually *adds* to the ricochet problem, as compared to the range configuration in 2002 and 2006. Section 7.2.5 of the ETL (Engineering Technical Letter, Caulder deposition, November 18, 2010, Exhibit B, p. 21, Section 7.2.5) states that "No protrusions from the floor that can be struck by bullets are permissible." The overhead baffles have created protrusions down range at the Farragut Range. O'Neal deposition, October 8, 2010, Exhibits 2, 6, 7, 11, 13, 15, 16, 17, 18, 19, 20, 21, 22, 27;

CARE's Trial Exhibits 46, 47, 48, 51, 53, 57, 58, 59. 60, 61, 62, 63. The solution would have been to have baffles engineered so there is no bracing in the middle, but certainly, that would have been more expensive to engineer and construct, given the span of the baffle. However, choosing the less expensive alternative has created a ricochet problem for IDFG. Another choice made by IDFG is to have overhead baffles which are vertical, rather than baffles which are tilted such that the top of the baffle is closer to the shooting line and the bottom of the baffle is closer to the target, in contravention of the ETL. Caulder deposition, November 18, 2010, Exhibit B, p. 31, Section 7.5.2. That angle helps contain ricochets off the ground better than a vertical baffle, merely because there is more baffle surface area exposed to the ricochet and the ricochet will hit that angled baffle at a more direct angle than a vertical angle. *Id.*

IDFG's own expert O'Neal has figured out a way to partially deal with the problem of ricochets, but the IDFG has not employed that solution on its remodeled range. O'Neal deposition, October 8, 2010, p. 37, L. 17 – p. 39, L. 1. Part of the problem was in the "Scope of Work" memorandum from IDFG to O'Neal, the IDFG did not ask O'Neal to address the problem of ricochets. *Id.,* p. 154, L. 11 – p. 156, L. 25; Exhibit 28 to that deposition; CARE's Trial Exhibit 20. O'Neal recognized that ricochets are a hazard (*Id.,* p. Ll. 20-22), that ricochets presented a problem in establishing the Surface Danger Zone (*Id.,* p. 154, Ll. 11-25), yet O'Neal was not asked to design for ricochets. *Id.,* CARE's Trial Exhibit 28. ETL Section 7.5.6.3 also talks about the eyebrow. Caulder Deposition, November 18, 2010, Exhibit B, p. 35, Section 7.5.6.3.

NRA Technical Team Advisory authored by David Luke discusses eyebrows. CARE's Trial Exhibit 6, p. 5. Also, that "Ground baffles should always be used with overhead baffles". *Id.* Vargas details the plans for an "Eyebrow Ricochet Catcher".

CARE's Trial Exhibit 2, Figure 16.

IV. FINDINGS OF FACT

1. On February 23, 2007, this Court made an Order directing that all shooting ranges shall remain closed until conditions supporting the Order were met regarding the installation of each baffle. The February 23, 2007, Order provided in part as follows:

> IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the annual use level shall not exceed 500 shooters per year until and unless defendant Idaho Department of Fish and Game has constructed and installed safety measures adequate to prevent bullet escapement beyond the boundaries owned and controlled by defendant Idaho Department of Fish and Game and constructed and installed 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. Such further use shall only be commenced upon Order of this court following hearing establishing that the safety and noise concerns have been eliminated in the manner satisfactory to the Court based upon its Findings of Fact, Conclusions of Law and Order.

2. In its Memorandum of Decision, the Court proposed that CARE and IDFG agree to meet the required safety and noise restrictions. IDFG chose not to attempt to reach agreement. In that Memorandum of Decision, the Court did not require that if no agreement was reached, the safety and noise issues would be submitted to the Court for final resolution *prior to* construction. IDFG was free to make improvements prior to any approval by the Court.

3. IDFG filed a construction plan with Kootenai County in 2007 to obtain a building permit but did not provide a copy to CARE.

4. In 2007 IDFG commenced construction of a partially contained range which was completed in 2010.

5. The Memorandum of Decision, Order and Judgment of this Court in 2007 is applicable to the entire shooting range without contemplation that a portion of the range could be opened while the rest of the range remained closed.

6. On June 9, 2010, IDFG filed its Motion for Partial Lifting of Injunction.

7. In the period of time between said motion and commencement of trial on June 13, 2011, the Court made certain decisions which are incorporated by reference.

8. Trial was conducted on June 13 and 14, 2011, with witnesses testifying and depositions and partial transcripts from the first trial being entered as evidence by stipulation.

10. In its June 9, 2010, Motion to Partially Lift Injunction, IDFG asked the Court to allow IDFG to open the 100-yard shooting area at the Farragut Shooting Range to the use of live ammunition. The area IDFG proposes to open to the use of live ammunition consists of 12 shooting positions, each approximately six feet by six feet along an approximately 72-foot designated firing line, whose approximate location is identified in red on Exhibit NNN; target positions at the 100-yard shooting area are parallel to the shooting positions. IDFG's Exhibits MMM, NNN and PPP; testimony of David Leptich.

11. At this time IDFG is not seeking to open areas of the Farragut Shooting Range outside the 12 shooting positions at the 100-yard shooting area to the use of live ammunition. Testimony of Chip Corsi.

12. IDFG is no longer pursuing the Vargas Master Plan for Farragut Range, and has scaled back its plans for use of the Farragut Shooting Range. Testimony of Chip Corsi and David Leptich.

13. IDFG has made improvements to the Farragut Shooting Range since the February 23, 2007, Order of this Court. June 10, 2011 Joint Stipulation on Evidence and Facts.

14. IDFG has constructed earthen side berms and backstops (berms behind target positions) to contain a 50-yard, 100-yard and 200-yard shooting range and depressed

the floor of these areas by four to eight feet at a downslope of approximately one degree. Joint Stipulation.

15. IDFG has installed a three-sided shooting shed on the 100-yard range with an armored canopy to house a static (fixed) shooting line for up to 12 shooters. The degree of vertical elevation from designated shooting positions to the upper edge of the roof armament is approximately 40 degrees. Joint Stipulation.

16. The backstop (berm behind the target) at the 100-yard shooting area is 25 feet tall. Side berms for the 100-yard shooting area are 12 to 18 feet high, as measured from the down-sloped range floor. Joint Stipulation.

17. IDFG has installed a series of six overhead ballistic baffles over the 12 firing positions at the 100-yard shooting area, as well as six additional side baffles along each side of the range. Testimony of Jon Whipple. The baffles extend downrange for approximately 50 yards. Joint Stipulation.

18. The baffles consist of a 5-½" glu-laminated wooden beam, a sheet of 10-gauge steel, 2x4 wooden spacers, a 1-½" tumble gap, and a second sheet of 10-gauge steel. Testimony of Kerry O'Neal, David Leptich, Exhibit HHH.

19. The approximate placement of the overhead and side baffles is documented in Exhibit GGG and visually presented in Exhibit PPP. Testimony of Jon Whipple and David Leptich.

20. Baffle design, placement, and construction are consistent with acceptable engineering and construction practices and standards. Testimony of Jon Whipple; Exhibit HHH. However, that construction itself creates ricochet hazards.

21. Direct fire from rounds fired by shooters from the 100-yard shooting area will strike no closer to the top of the back berm than 8.8 feet. Testimony of Jon Whipple; Exhibit FFF.

22. All direct fire from prone, standing, and kneeling positions from along the designated shooting line at the 100-yard range will strike either a baffle, floor, berm or stanchion if fired within a horizontal arc up to at least 20 degrees to either side of perpendicular from the designated firing line to the target line. Joint Stipulation; Exhibits NNN and PPP, Testimony of David Leptich. However, it is when a bullet strikes the floor or stanchion that a ricochet will occur.

23. The baffles at the 100-yard shooting area are sufficient to prevent shooters from "directly" firing above the berm behind the target from any of the 12 shooting positions (from prone to standing). Testimony of Jon Whipple, Kerry O'Neal, David Leptich, Jon Haus, Michael Loy, and Jeanne Hom Holder; Exhibits FFF and PPP; CARE's Pre-trial Memo., p. 8. However, the baffles do nothing to contain ricochets that hit the floor of the range from escaping the range.

24. IDFG will need to maintain baffles at the 100-yard range because repeated strikes at a single location over time would eventually lead to baffle penetration. Joint Stipulation.

25. IDFG and the Idaho Department of Parks and Recreation (IDPR) have used signs, gates and fences to identify that the Range is closed to shooting under the 2007 Order. Testimony of Randall Butt, David Leptich and Chip Corsi; Exhibit PPP.

26. No shooting has occurred at the Farragut Range since its closure by court order in 2007. Testimony of Randall Butt.

27. IDFG and IDPR have drafted standard operating procedures for the Farragut Range in preparation for reopening of the range. The agencies intend to review procedures for compliance with any court order prior to finalizing them. Testimony of Randall Butt, Chip Corsi, and David Leptich; Exhibit EEE. The approved operating procedures will need to be made a requirement in a future court order, and will need to be made part of a judgment, so that IDFG does not unilaterally change these procedures in the future, after this litigation has concluded.

28. IDFG and IDPR have decided to provide a range supervisor any time in the future that the Farragut Shooting Range is open to public shooting. The agencies' draft standard operating procedures for the Farragut Shooting Range reflect this decision. Testimony of Randall Butt, Chip Corsi, and David Leptich; Exhibit EEE. This will need to be made a requirement in a future court order, and will need to be made part of a judgment, so that IDFG does not unilaterally change this decision after this litigation has concluded.

29. The design criteria offered for a shooting range offered by Clark Vargas required safety from bullet escapement down range as being anywhere away from where a missile was fired.

30. Down range would include a 180° arc away from the firing line.

31. Evidence submitted on behalf of CARE, confirmed on cross-examination of IDFG's witnesses, established that a partially contained range as constructed by IDFG would not provide complete protection against escapement of bullets that ricochet. While complete containment is not required at this juncture (500 shooters per year or less), IDFG has not incorporated any of the relatively simple and inexpensive measures to

attempt to contain ricochets. Those methods are: ground baffles in conjunction with overhead baffles, and an eyebrow berm or bullet catcher near the top of the back berm.

32. IDFG's witness Jon Whipple, a licensed engineer with full time employment with IDFG, testified that direct rounds fired from any shooting position would not go over the back berm if fired between 20 degrees of perpendicular, right or left.

33. On cross-examination, Whipple testified that ricochets can and do occur with ricochets defined by him as bullets which strike an object and then go off in a different or unintended direction.

34. IDFG presented a video of Farragut Range which was informative and would serve in lieu of a Court visit to the range allowing the Court to be familiarized with the physical nature of the range as improved.

35. By stipulation, the deposition of James A. Caulder, a career engineer for the Department of Defense and author of the Air Force Engineering Technical Letter 2008 (ETL), was entered. Joint Stipulation on Evidence and Facts, pp. 2-4. None of the objections made in that deposition change any of the above findings, and the objection by IDFG as to the 2008 ETL are overruled. There was no express stipulation by IDFG that Caulder was qualified as an expert witness, but such is inferred. *Id.* In any event, the Court finds Caulder to be qualified as an expert witness.

36. Caulder testified that ricochets would travel 50% of the maximum distance of the ammunition's capability in the surface danger zone.

37. Caulder testified that from his examination of records and photographs it is apparent that IDFG owns less than half the down range surface danger zone.

38. Caulder was aware of the rocky nature of the soil at Farragut and concluded that Farragut range does not include enough down range land behind the back berm to prevent ricochets from escape over the back berm.

39. Evidence presented by IDFG established that log yard waste had been placed over the down range firing area in immediate proximity to the firing line.

40. Down range from the firing line are steel foot plates and stanchions and six-by-six-foot concrete footings, all of which create a ricochet hazard.

41. Log yard waste placed by IDFG has not previously been used in a shooting range and would not, in Caulder's opinion, provide any significant deterrent to ricochets.

42. In addition to relying on the ETL, Caulder also relied upon the National Rifle Association Source Book (1999 version) as suitable planning documents.

43. Making reference to these planning documents, Caulder was of the opinion that the partially contained range as constructed would not, within a reasonable degree of probability, prevent ricochets from going over the berm and creating a safety hazard on and off range property.

44. Jeanne Hom-Holder, one of the individual plaintiffs and member of CARE, testified she could easily roam the entire firing range property going through the half-gates located on the west side of the property and be within the 600-yard line and the old 200-yard line, being vulnerable to exposure from shooting.

45. IDFG called as witnesses: Randall Butt, Park Manager of Farragut Park; and John House and Mike Lowe, volunteers related to supervision of shooting ranges. These witnesses established that if the range were open there would be adequate range supervision by qualified persons.

46. IDFG called as an expert witness Kerry Lynn O'Neal who was accepted as an expert witness with the Court reserving a ruling to determine later if his qualifications complied with Idaho Rules of Evidence 702 and 703. The Court finds O'Neal marginally qualified as an expert.

47. O'Neal testified that he did not consider the National Rifle Association Range Source Book or the Air Force Engineering Technical Letter of 2008 (ETL) to be of any assistance in setting range standards.

48. O'Neal was subject to cross-examination which raised serious questions as to his expertise, bias and soundness of opinions.

V. CONCLUSIONS OF LAW.

1. 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.

2. As a result of his experience, this Court has concluded as a matter of law that Kerry Lynn O'Neal is marginally qualified as an expert witness under the standards set forth in Idaho Rule of Evidence 702 and 703. However, for the reasons set forth above, this Court is not persuaded by most of O'Neal's opinions and conclusions.

3. The Court concludes 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.

4. On February 23, 2007, this Court enjoined IDFG from opening the Farragut Shooting Range to the use or intended use of live ammunition until IDFG met the following condition to open for up to 500 shooters per year:

> [a] baffle is installed over every firing position. The baffle must be placed and of sufficient size that the shooter, in any position (standing, kneeling, prone), cannot fire his or her weapon above the berm behind the target.

2007 Order at 59.

5. "[I]n a case of conflicting rights, where neither party can enjoy his own [property] without in some measure restricting the liberty of the other in the use of property, the law must make the best arrangement it can between the contending parties, with a view to preserving to each one the largest measure of liberty possible under the circumstances." *Payne v. Skaar*, 127 Idaho 341, 348, 900 P.2d 1352, 1359 (1995)(citations omitted). For the purpose of fashioning equitable relief in a nuisance case, "[t]he restraint imposed by an injunction should not be more extensive than is reasonably required to protect the interests of the party in whose favor it is granted, and should not be so broad as to prevent defendant from exercising its rights…." *Kolstad v. Rankin,* 179 Ill. App. 3d 1022, 1034, 534 NE 2d 1373, 1381 (Ill App. 1989).

"Reasonableness" is the watchword in these types of cases. Consistent with these equitable principles, the Court has discretion to partially lift its 2007 injunction to allow opening only part of the range, or to allow opening part of the range up to only 500 shooters per year.

6. Idaho Rule of Civil Procedure 65(d) sets specificity requirements for injunctive relief applicable to the Court's 2007 Order. The rule reads:

> Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained; and is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.

In the absence of Idaho case law on the subject of specificity under Rule 65(d),

case law on the corresponding federal rule is pertinent.

> [Federal] Rule 65 serves to protect those who are enjoined "by informing them of what they are called upon to do or to refrain from doing in order to comply with the injunction or restraining order…. The drafting standard established by Rule 65(d) is that an ordinary person reading the court's order should be able to ascertain from the document itself exactly what conduct is proscribed.

11A Wright, Miller & Kane, Federal Practice and Procedure: Civil 2d § 2955 (1995), quoted in *Hughey v. JMS Development Corp.*, 78 F.3d 1523, 1531, *reh'g denied,*89 F.3d 857 (11th Cir. 1996), c*ert. denied*, 519 U.S. 993 (1996). Rule 65(d) "is satisfied only if the enjoined party can ascertain from the four corners of the order precisely what acts are forbidden or required." *Petrello v. White*, 533 F.3d 110, 114 (2nd Cir. 2008)(citations omitted), *affirmed,* 344 Fed.Appx. 651 (2nd Cir. 2009) (unpublished, No. 09-0343-CV).

Because the subject of ricochets were not discussed at the 2006 trial; because the improvements IDFG has since placed on the range actually increase the frequency of ricochets; because the Court finds the word "round" (in the language of this Court's 2007 Order which required a "…shooter in any position cannot fire a round above the berm behind the target…") also includes "ricochets"; and because the 500 person limit under that Order reflected an allowable *increase* in shooter numbers from 200 per year in 2002 to 500 with minimal improvements; it does not violate I.R.C.P 65(d) to interpret the plain language and context of the Court's 2007 Order condition for up to 500 shooters (the installation of a baffle over every shooting position to prevent a shooter from firing over the berm behind the target), to encompass shooters firing at, below, or in directions to the side of or away from the berm behind the target. Simply because IDFG has installed at least one baffle over all 12 designated shooting positions at the 100-yard shooting area, and such baffles are placed and of sufficient size that a

shooter in any position (standing, kneeling, prone) cannot fire his or her weapon above the berm behind the target at the 100-yard shooting area does not mean IDFG has complied with the Court's 2007 condition to lift its 2007 injunction for these 12 designated shooting positions, for up to 500 shooters per year. While ricochets were not discussed in 2006, IDFG has not made any cogent argument as to why the problem of ricochets should *not* be considered by this Court relative to IDFG's motion to partially lift the injunction. In 2007, this Court was concerned with bullets that went over the back berm. Whether by ricochet or direct fire, the problem is still bullets going over the back berm.

7. Standards set forth in the Memorandum of Decision, Order and Judgment entered in 2007 are for public safety of anyone within the surface danger zone.

8. There was never any intention in the Order entered in 2007 to exempt ricochets from the safety requirement. The subject of ricochets was not discussed at any length. A ricochet bullet violates the restrictions on public safety in the Memorandum of Decision, Order and Judgment entered in 2007 to the same extent as a directly fired bullet.

9. IDFG has not addressed the problem of ricochets in its constructed improvements. The following are solutions to that failure, based upon the evidence from the 2006 trial and the June 2011 trial: The range construction as completed does not include ground baffles and additional overhead baffles that appear to be necessary to be placed on ranges to address ricochets off the floor of the range. The range construction as completed does not include an eyebrow device at or near the top of the back berm to address ricochets that occur as a result of striking the floor at a shallow angle just before the toe of the back berm. The range construction as completed does not

address ricochets off to the side as there are gaps in the baffles shown in the photographs.

10. The partially contained range was not designed and constructed by IDFG to meet the professional standards set forth by Clark Vargas in the National Rifle Association Range Source Book (1999 version) and the ETL.

11. Danger remains that a smaller but unknown number of rounds will ricochet off the rock filled range floor or the steel and stanchion footings and go over the side berm, back berm, and the backstop behind the target and create safety danger down range and off the range in the surface danger zone.

12. The partially contained range as constructed remains in violation of safety considerations set forth in 2007. While complete containment is not required at this juncture (500 shooters per year or less), IDFG has not incorporated any of the simple and relatively inexpensive measures to attempt to contain ricochets. Those methods are: ground baffles in conjunction with overhead baffles (to reduce ground ricochets caused by striking the floor of the range short of the back berm), and an eyebrow berm or bullet catcher near the top of the back berm (to reduce ground ricochets caused by striking the floor of the range near the back berm). Once these measures are implemented, partial lifting should occur. This can be by another hearing after the fact of that construction, before the fact of that construction, or (preferably), by agreement between the parties.

13. The Motion for Partial Lifting of Injunction filed in 2010 by IDFG must be denied.

VI. CONCLUSIONS OF LAW.

IT IS HEREBY ORDERED that IDFG's Motion for Partial Lifting of Injunction filed on June 9, 2010, is DENIED.

ENTERED this 25th day of August, 2011.

____

John T. Mitchell, District Judge

Certificate of Service

I certify that on the _______ day of August, 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		

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Secretary