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, *Plaintiffs*, vs. **IDAHO DEPARTMENT OF FISH AND GAME, an agency of the STATE OF IDAHO, and VIRGIL MOORE, Director of the IDAHO DEPARTMENT OF FISH AND GAME,** *Defendants*.	Case No. **CV 2005 6253** **MEMORANDUM DECISION AND ORDER GRANTING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION FOR SUMMARY DISPOSITION OF DEFENDANTS' MOTION TO PARTIALLY LIFT INJUNCTION**

I. PROCEDURAL HISTORY AND FACTUAL BACKGROUND.

This case is before the Court on two motions: plaintiff Citizens Against Range Expansion (CARE's) Motion for Summary Judgment and defendant Idaho Department of Fish and Game (IDFG)'s Motion for Summary Disposition of Defendants' Motion to Partially Lift Injunction.

A. History of This Case.

This lawsuit was filed in 2005 by CARE, who are landowners living adjacent to the Farragut Shooting Range, after the IDFG proposed making $3.6 million in improvements to the range, which would increase the number of shooters who used the range from less than 500 per year to more than a half-million per year. On February 23, 2007, this Court granted CARE's request for an injunction. In the decision granting that injunction, this Court previously found as an established matter of fact:

> 19. Idaho Department of Fish and Game made a grant application to the National Rifle Association (NRA). The IDF&G told the NRA that based on the area population, IDF&G expected up to 46,426 people per month (or 557,112 shooters per year) to use the facility. Plaintiffs' Exhibit 22, Table 2. This is broken down to 25,063 handgun participants per month and 21,363 rifle participants per month. Further, IDF&G told the NRA "For purposes of this range, we need to assume this facility will capture 100% of the market share because there is so much open land around that whatever is built will compel shooters to come and shot [sic] in an organized fashion." *Id.* There are 450 parking spaces in the paved parking lot in the Vargas Master Plan. David Leptich is the Regional Habitat Biologist and manager of the IDF&G property at Farragut State Park. Leptich testified that IDF&G has approved its goal of $3.6 million being invested in the implementation of the Vargas Master Plan.
>
> 20. IDF&G's estimate of 557,112 shooters per year is **471 times** the 1,181 shooters in the year 2005, and more than **three thousand times** the 182 shooters in 2002. What is being proposed by the IDF&G greatly exceeds a "significant increase" in the 2005 use of the range, let alone the use of the range back in 2002.

February 23, 2007, Memorandum Decision, Findings of Fact, Conclusions of Law and Order, p. 19. (emphasis in original). No appeal was taken from that order; thus, no appeal has ever been taken regarding the findings of fact made in that decision. The above passage from this Court's February 23, 2007, decision was included in this Court's March 11, 2011, Memorandum Decision and Order on Motions to Strike, Motion for View, Motion for Partial Lifting of Injunction and Motion for Summary Judgment at page 50-51. [In *Citizens Against Range Expansion v. IDFG,* 153 Idaho 630, 289 P.3d. 32 (2012), there is no mention by the Idaho Supreme Court of the uncontradicted and un-appealed-from fact finding made by this Court that IDFG was seeking not simply to exceed 500 shooters per year, but rather to expand the range use to 557,112 shooters per year.] This Court's February 23, 2007, sixty-page Memorandum Decision, Findings of Fact, Conclusions of Law and Order, ended as follows:

CONCLUSION AND ORDER

*** * ***

> **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 an 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 on its property. However, use levels will remain capped at 500 shooters per year unless the following two concerns have been addressed: 1) **Safety:** include safety measures adequate to **prevent** bullet escapement beyond the boundaries owned and controlled by IDF&G, * * * 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. Once bullet containment is achieved, it matters not for the purposes of this litigation if the range is supervised (with bullet containment, supervision would inure to the benefit only of the participants, an important consideration, but not the subject of this lawsuit). * * *

February 23, 2007, Memorandum Decision, Findings of Fact, Conclusions of Law, and Order, p. 60. (emphasis in original). A Judgment which contained substantially all of the above language was prepared by counsel for CARE, and entered by this Court on March 2, 2007. No appeal was taken from that Judgment.

To explain other factual details of this case, the following excerpt is from this Court's March 11, 2011, Memorandum Decision and Order on Motions to Strike, Motion for View, Motion for Partial Lifting of Injunction and Motion for Summary Judgment:

> The Farragut Wildlife Management Area was formerly the site of the Farragut Naval Training Center established by the United States Navy in 1942. Land began being acquisitioned by the IDFG in 1949, when four separate parcels bordering Lake Pend Oreille were purchased. IDFG's ownership at Farragut Park presently consists of approximately 1,413 acres. This is made up of four parcels totaling 157 acres on the shore of Lake Pend Oreille and one 1,256-acre parcel located west of Bayview,

> Idaho. The Farragut Shooting Range occupies a site of approximately 160 acres and has been used as a shooting range since the land was owned by the United Sates Navy. The surrounding neighborhood consists of private residential houses, a public road (Perimeter Drive), school bus stops and hiking trails.
>
> The use of the Farragut Shooting Range has expanded a great deal since 2002. Use went from 176 shooters in 2002, to 370 shooters in 2004, to 509 in 2005 only through August of that year. Plaintiffs' Brief in Support of Motion for Summary Judgment, p. 25, n. 2.
>
> A public proposal for the improvement of the Farragut Shooting Range made by the IDFG seems to be what precipitated this lawsuit. In 2004, the IDFG published a proposal to improve the Farragut Shooting Range with the investment of $3,600,000. That proposal was based on the Vargas Master Plan. The Vargas Master Plan proposed making improvements to the Farragut Shooting Range in the areas of public safety, public access, noise mitigation, facility quality and management.
>
> Plaintiff CARE is an unincorporated non-profit association formed for the purpose of stemming unwarranted expansion of the Farragut Shooting Range (Complaint, p. 2, ¶ 1), and the individual plaintiffs who live near the Farragut Shooting Range. CARE claims these expansions cannot be done safely because the IDFG does not own enough property nor have enough money to make these improvements safe. CARE seeks to enjoin IDFG from carrying out the Vargas Master Plan. CARE claims that although the plan purports to make improvements to the shooting range, the plan will also expand the shooting range by lengthening the range from 500 to 600 yards, adding berms, parking and intermediate firing positions, and including trap and skeet fields, mounted cowboy action areas, and 130 shooting stations.
>
> IDFG claims there is no plan to *expand* the Farragut Shooting Range, either in geographic size, shooter capacity, or types of shooting activity, but only to *improve* it.
>
> In 1996, Clark Vargas, a professional engineer, published a paper for the 1996 Third National Shooting Range Symposium, which was intended to provide a general review of range design criteria when selecting a shooting range site. This paper set forth nationally-recognized safety standards for construction and operation of shooting ranges. The Vargas Master Plan is inconsistent with the range design criteria Vargas discussed in his 1996 Third Shooting Range Symposium.

March 11, 2011, Memorandum Decision and Order on Motions to Strike, Motion for View, Motion for Partial Lifting of Injunction and Motion for Summary Judgment, pp. 1-3.

After 2007, IDFG made changes to the Farragut Shooting Range. After making those changes, IDFG requested this 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." March 11, 2011, Memorandum Decision and Order on Motions to Strike, Motion for View, Motion for Partial Lifting of Injunction and Motion for Summary Judgment, p. 6, citing Defendants' Brief in Support of Motion for Partial Lifting of Injunction, p. 12. This led to "IDFG's Brief in Support of Summary Disposition of Defendants' Motion for Partial Lifting of Injunction", filed December 12, 2010. Extensive evidence and briefing was submitted by both parties. Oral argument was held on February 14, 2011, and on March 11, 2011, this Court issued its **"**Memorandum Decision and Order on Motions to Strike, Motion for View, Motion for Partial Lifting of Injunction and Motion for Summary Judgment." There were two issues at that time, noise and safety, and how those two issues pertained to range operation "up to 500 shooters per year" and "more than 500 shooters per year."

Regarding the "noise" issue, in that March 11, 2011, decision, this Court found the Idaho Outdoor Sport Shooting Range Act, I.C. § 67-9101, et seq., violated the "special law" prohibition of Article III, § 19 of the Idaho Constitution and is, thus, unconstitutional, and the Court also found Act was an unconstitutional deprivation of judicial power, violating Article V, Section 13, of the Idaho Constitution. March 11, 2011, Memorandum Decision and Order on Motions to Strike, Motion for View, Motion for Partial Lifting of Injunction and Motion for Summary Judgment, pp. 76-77. This Court granted CARE's motion for summary judgment as to the unconstitutional nature of the Act, and due solely to the finding that the Idaho Outdoor Sport Shooting Range Act is unconstitutional, the Court denied IDFG's motion to partially lift the injunction, and denied IDFG's motion for summary disposition of its motion to partially lift the injunction at that time. *Id.* The Idaho Supreme Court reversed "…the district court's order holding

the Act to be unconstitutional.' 153 Idaho 630, 640, 289 P.2d, 32, 42.

Regarding the "safety" issues for less than 500 shooters per year, this Court held:

> 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.

March 11, 2011, Memorandum Decision and Order on Motions to Strike, Motion for View, Motion for Partial Lifting of Injunction and Motion for Summary Judgment, pp. 76-77. IDFG appealed that decision, and as to the less than 500 shooters per year issue, the Idaho Supreme Court reversed this Court and found the injunction for up to 500 shooters per year must be lifted. 153 Idaho 630, 640, 289 P.2d, 32, 42.

Regarding the "safety" issue, in that March 11, 2011, decision, this Court denied cross motions for summary judgment on the issue of range safety as material issues of fact remain. "Issues of material fact remain in dispute as to range safety issues…to allow IDFG to expand beyond 500 users per year." March 11, 2011, Memorandum Decision and Order on Motions to Strike, Motion for View, Motion for Partial Lifting of Injunction and Motion for Summary Judgment, pp. 76-77. The Idaho Supreme Court remanded this issue "…to the district court to determine whether IDFG has complied with the 501-shooter component of the injunction. 153 Idaho 630, 640, 289 P.2d, 32, 42.

B. History Regarding Present Motions.

This matter is before the Court on two motions. The first motion filed was a Motion for Summary Judgment filed on May 30, 2013, by plaintiff CARE. The second motion filed was a Motion for Summary Disposition of Defendants' Motion to Partially Lift Injunction filed on June 25, 2013, by defendants IDFG. IDFG's Motion for Summary Disposition requests "summary disposition" of IDFG's Motion to Partially Lift Injunction, which was filed over three years ago, on June 9, 2010. On March 11, 2011, also following summary proceedings, this Court denied IDFG's motion as it pertained to opening the Farragut Range to more than 500 shooters per year. IDFG appealed, and on November 15, 2012, the Idaho Supreme Court remanded the case to this Court to consider IDFG's motion as it related to compliance with safety and noise aspects of the 2007 injunction for opening the range to more than 500 shooters per year. *CARE v. IDFG,* 153 Idaho 630, 640-41, 289 P.3d 32, 42-43. In the past, the Court and the parties have treated motions for "summary disposition" as a motion for summary judgment. March 11, 2011, Memorandum Decision and Order on Motions to Strike, Motion for View, Motion for Partial Lifting of Injunction and Motion for Summary Judgment, p. 26. IDFG has not set forth any different position on its present motion.

C. Evidence and Argument Considered Regarding Present Motions.

On June 25, 2012, IDFG filed its "Brief in Support of Summary Disposition of Defendants' Motion to Partially Lift Injunction" (Memo in Support of Summary Disposition), "Statement of Undisputed Facts" (IDFG Statement of Facts), "Affidavit of Kathleen Trever in Support of Summary Disposition of Defendants' Motion to Partially Lift Injunction" (Trever Affidavit), and "Affidavit of Colin Meehan, P.E." (Meehan Affidavit). On July 8, 2013, CARE filed its "Plaintiffs' Reply Brief" (CARE Reply) and "Affidavit of James A. Caulder, Jr. in Support of Motion for Summary Judgment of

Plaintiffs" (Caulder Affidavit). While it would appear from the caption of the Caulder Affidavit that these filings are connected to CARE's motion for summary judgment, rather than IDFG's motion to partially lift injunction, the timing of the filing of the motions would suggest the opposite, as CARE's "reply" was filed one day **before** IDFG's response to CARE's motion for summary judgment. As CARE did not file a brief specifically referencing the motion to partially lift the injunction, it is reasonable to assume CARE's "reply", though labeled incorrectly, was actually a response to IDFG's motion to partially lift the injunction. On July 17, 2013, IDFG filed its "Defendants Reply Brief in Support of Summary Disposition of Defendants' June 9, 2010 Motion" (IDFG Reply) and "Second Affidavit of Jon Whipple, P.E." (Whipple Second Affidavit).

CARE filed its motion for summary judgment on May 30, 2013, and in support, also filed its "Brief of Plaintiffs in Support of Motion for Summary Judgment", "Plaintiffs' Statement of Material Facts Not in Dispute", "Plaintiffs' Certification Upon the Affidavit of James A Caulder, Jr., P.E.", and "Affadavit [sic] of Harvey Richman". On June 25, 2012, CARE filed its "Supplemental Brief in Support of Motion for Summary Judgment of Plaintiffs". On July 9, 2013, IDFG filed its "Defendants' Brief in Opposition to Plaintiffs' Motion for Summary Judgment", "Defendants' Statement of Dispute with Plaintiffs' Statement of Facts" and "Affidavit of Lucien Haag". On July 16, 2013, CARE filed its "Plaintiffs' Rebuttal Brief in Summary Judgment". Oral argument on the motions was held on July 23, 2013.

II. ANALYSIS OF THE IDAHO SUPREME COURT'S DECISION.

At the outset, it is helpful to understand that this Court's February 23, 2007, injunction concerned two aspects: noise and safety. The injunction also had two thresholds: the "up to 500-shooter [per year] component" (the term used by the Idaho Supreme Court), and the more than 500-shooter per year component, or "501-shooter

component" as denoted by the Idaho Supreme Court. Because up to 500 shooters per year was an increase from historical use, but not a significant increase, there were no noise requirements that had to be satisfied to lift the injunction for up to 500 shooters per year, only safety requirements. To go beyond the 500 shooter per year limit (and keep in mind it was IDFG's stated intention to not simply go beyond 500 shooters per year, but increase to 557,112 shooters per year, which would be 471 times greater than the 1,181 shooters in 2005, the year before this lawsuit commenced), this Court imposed noise requirements and additional safety requirements.

It is also helpful to understand that it was not the February 23, 2007, injunction that was appealed from; IDFG appealed from this Court's March 11, 2011, seventy-seven page decision which denied IDFG's motion to partially lift the injunction, and this Court's August 25, 2011, Memorandum Decision, Findings of Fact, Conclusions of Law and Order Following Court Trial on Defendant's Motion Partial Lifting of Injunction (Safety Issues).

In its November 15, 2012, decision in *Citizens Against Range Expansion v. Idaho Fish and Game Dept.*, the Idaho Supreme Court made express note of this Court's un-appealed-from February 23, 2007, Memorandum Decision; specifically, that in that injunction there are two separate components for lifting the injunction: 1) the up to 500-shooter per year component and 2) the over 500 shooters per year component (which the Idaho Supreme Court called the "501-shooter component". *CARE v. IDFG*, 153 Idaho 630, 632, 289 P.3d 32, 34 (2012).

With regard to the "up to 500-shooter component", the Idaho Supreme Court specifically noted that this Court had found in its 2007 decision "the Farragut Range would remain closed 'to all persons with pistols, rifles and firearms using or intending to use live ammunition until a baffle is installed over every firing position.'" *Id*. The Idaho

Supreme Court held that this Court abused its discretion when it found in 2011 that IDFG had not taken into account ricochets, because this Court's 2007 decision did not mention the word "ricochets" as to the up to 500-shooter component. 153 Idaho 630, 634, 289 P.3d 32, 36. The Idaho Supreme Court held:

> Here, the district court's interpretation of the 500-shooter component of its injunction was an abuse of discretion because it took its original, and unambiguous, 500-shooter requirement—installing "a baffle…over every firing position"—and expanded it into a requirement for "ground baffles in conjunction with overhead baffles…and an eyebrow berm or bullet catcher near the top of the back of the berm." This interpretation does not follow from the plain language of the injunction because the judgment never referred to these other devices. Moreover, preventing bullet escapement via ricochet—the stated rationale for requiring these additional improvements—was similarly absent from the judgment.

Id. The Idaho Supreme Court is correct that in the Conclusion and Order portion of this Court's February 23, 2007, decision and in the Judgment this Court entered on March 2, 2007, these other devices (ground baffles, eyebrow berm or bullet catcher, any of which would prevent ricochets and none of which are expensive to install) were not expressly included, nor was preventing bullet escapement via ricochets. In giving this narrow interpretation of this Court's February 23, 2007, decision, the Idaho Supreme Court failed to mention in its decision that this Court specifically made the following conclusion of law:

> 6. The present operation of the Farragut Shooting Range, which allows escapement of bullets beyond Farragut State Part/IDF&G boundaries into the Surface Danger Zone encompassing plaintiff's private property and Farragut State Property open to members of the public, constitute a clear and present danger to the safety and health of plaintiffs and other persons in the area.

February 23, 2007, Memorandum Decision, Findings of Fact, Conclusions of Law, and Order, p. 48. Nowhere in the Idaho Supreme Court's decision is this conclusion of law mentioned. So, while this Court discussed the problem (bullet escapement) as a

matter of law, the Idaho Supreme Court, apparently because this Court did not reiterate that problem (bullet escapement) in the "Order" section of this Court's decision, and again in the Judgment, concluded this Court abused its discretion four years later when it included ricochets in discussing the problem (bullet escapement). While stating it will review a district court's interpretation of its prior injunction orders under an abuse of discretion standard, under "deference" will be given, apparently that deference now accorded by the Idaho Supreme Court is quite limited. It is now clear the Idaho Supreme Court will review a district court's interpretation that district court's prior injunction extremely narrowly, and if an issue such as "ricochets" or "bullet escapement" is not specifically mentioned in the Order portion of the earlier injunction (even though it was mentioned as a conclusion of law), then requirements such as "ground baffles" and "eyebrow berms or bullet catchers" to address ricochets or bullet escapement cannot at a later time be considered when lifting the injunction. Anything else will be interpreted by the Idaho Supreme Court as "revision" rather than "interpretation." The Idaho Supreme Court stated "[a]lthough a district court is given deference in its interpretation of its own order, that deference cannot extend so far as to allow interpretation to become revision." *CARE*, 153 Idaho 630, 635, 289 P.3d 32, 37.

Regarding the more than 500-shooter per year component, that deficiency in the 2007 decision and judgment (not including the word bullet escapement in the Order) inadvertently created by this Court in its March 11, 2011, decision regarding the less than 500-shooter component, is not present. As to the more than 500-shooter per year component, on February 23, 2007, this Court clearly stated:

> **CONCLUSION AND ORDER**
>
> *** * ***
>
> IT IS FURTHER ORDERED the Idaho Department of Fish and Game is free to seek any funding it wishes. The Idaho Department of Fish and Game is free to build any improvements on its property.

> However, use levels will remain capped at 500 shooters per year unless the following two concerns have been addressed: 1) **Safety:** include safety measures adequate to **prevent** bullet escapement beyond the boundaries owned and controlled by IDF&G, * * * 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. Once bullet containment is achieved, it matters not for the purposes of this litigation if the range is supervised (with bullet containment, supervision would inure to the benefit only of the participants, an important consideration, but not the subject of this lawsuit.

February 23, 2007, Memorandum Decision, Findings of Fact, Conclusions of Law, and Order, pp. 61-62. (emphasis in original). This Court's Judgment, entered March 2, 2007, reads: "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 Fish and Game…" Judgment, p. 3.

With regard to the 501-shooter component, the Idaho Supreme Court quoted this Court's judgment, stating the injunction would not be lifted "until and unless [IDFG] has constructed and installed safety measures adequate to prevent bullet escapement beyond the boundaries owned and controlled by [IDFG]…" 153 Idaho 630, 632, 289 P.3d 32, 34. The Idaho Supreme Court then specifically noted neither party appealed this Court's 2007 Judgment. *Id*.

The Idaho Supreme Court then went on to hold the Idaho Outdoor Sport Shooting Range Act (Act) is a constitutional general law and not a special law, as held by this Court, stating the "Act is a general law because it applies to all shooting ranges in like situations." 153 Idaho 630, 635-39, 289 P.3d 32, 37-41. The Idaho Supreme Court held the Act is not an unconstitutional deprivation of judicial power, but instead

was a valid use of the Legislature's police power. 153 Idaho 630, 639-40, 289 P.3d 32, 41-42. The Act addresses the noise issue. The Idaho Supreme Court held "In considering the noise aspect, the district court must apply the noise standards established in the Act." 153 Idaho 630, 640, 289 P.3d 32, 42. Thus, the only determination for this Court to make regarding the noise issue is whether the Farragut Range complies with the noise requirements of the Act.

Finally, the Idaho Supreme Court remanded to this Court to determine IDFG's compliance with both safety and noise requirements of the 501-shooter standard. *Id*. The Idaho Supreme Court did not go into detail on this holding, except to state this Court denied the lifting of the 501-shooter component solely on the unconstitutionality of the Act, so this issue needs to be remanded to this Court.

In summary, the Idaho Supreme Court: 1) reversed this Court's finding that IDFG has not complied with the 500-shooter component of the injunction; 2) concluded as a matter of law that IDFG has complied with the 500-shooter component, and lifted that component of the injunction; 3) reversed this Court's order finding the Act to be unconstitutional; and 4) remanded this case to the district court to determine if IDFG complied with the 501-shooter component of the injunction. 153 Idaho 630, 640-41, 289 P.3d 32, 42-43.

The Idaho Supreme Court never addressed the factual findings made by this Court, only certain conclusions of law made by this Court in its March 11, 2011, decision and its August 29, 2011, decision. Because this Court's previous Orders and Judgments were not appealed, conclusions of law and factual findings made in those Orders and Judgments are still binding and are the law of the case.

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III. CURRENT ARGUMENTS BY THE PARTIES RE: CARE'S MOTION FOR SUMMARY JUDGMENT.

A. CARE's Arguments Regarding its Motion for Summary Judgment.

CARE begins it Memorandum in Support of Motion for Summary Judgment with a quote from this Court's July 23, 2008 [actually February 23, 2007] Order regarding safety and emphasizes the portion addressing prevention of "bullet escapement beyond the boundaries owned and controlled by IDFG". Brief in Support of Motion for Summary Judgment, p. 2. CARE then sets forth some of this Court's Findings of Fact from this Court's August 25, 2011, Memorandum Decision, Findings of Fact, Conclusions of Law and Order Following Court Trial on Defendant's Motion for Partial Lifting of Injunction (Safety Issues), including:

> 4) In 2007 IDFG commenced construction of a PARTIALLY CONTAINED range which was completed in 2010. (Emphasis supplied.)
> 5) The decision and order apply to the entire range without consideration that a portion of the range might remain closed.
> 23) The baffles at the hundred yard shooting area are sufficient to prevent shooters from "directly" firing above the berm behind the target at any of the 12 shooting positions…However, the baffles do nothing to contain ricochets that hit the floor of the range FROM ESCAPING THE FLOOR OF THE RANGE (Emphasis supplied)…
> 29) The design criteria for shooting ranges 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 degree arc away from the firing line.
> 31) Evidence submitted on behalf of CARE, confirmed on cross examination of IDF&F's [sic] witnesses, establishing that a PARTIALLY CONTAINED range as constructed by IDF G would not provide complete protection AGAINST ESCAPEMENT OF BULLETS THAT RICOCHET…" (Emphasis supplied).
> * * *
> 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 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 escaping over the back berm.

39) Evidence presented by IDF and G 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 footplate stanchions and 6 x 6' 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 Calder's [sic] opinion, provide any significant deterrent to ricochets.
* * *
43) …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. (Emphasis supplied).

Brief in Support of Motion for Summary Judgment, pp. 2-3. The above-quoted portion differs, but not significantly, from this Court's August 25, 2011, Memorandum Decision, Findings of Fact, Conclusions of Law and Order Following Court Trial on Defendant's Motion for Partial Lifting of Injunction (Safety Issues), pp. 29-33.

CARE also points out particular portions of the Conclusions of Law from that decision:

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 1 1/2 miles down range and OFF THE PROPERTY OWNED by the Idaho Fish and Game Department in the surface danger zone." (Emphasis supplied).
5) [6] . . . 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"; . . . to encompass shooters firing at, below, or in directions to the side of or away from the berm behind the target . . .
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) …A ricochet bullet violates the restrictions on public safety in the Memorandum of Decision.
9) IDFG has not addressed the problem of ricochets in its constructed improvements . . .
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 sourcebook (1999 version) and the ETL.
11) danger remains that a smaller but unknown number of rounds will ricochet off the rock filled range floor with steel and

> stanchion footings and go over the side berm, back berm, and 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 THE SAFETY CONSIDERATIONS SET FORTH IN 2007.

Brief in Support of Motion for Summary Judgment, pp. 4-5. Again, the above-quoted portion differs, but not significantly, from this Court's August 25, 2011, Memorandum Decision, Findings of Fact, Conclusions of Law and Order Following Court Trial on Defendant's Motion for Partial Lifting of Injunction (Safety Issues), pp. 34-38.

CARE contends that Blue Sky is still visible on the range, relying on the Caulder Affidavit and Defendants' Answer to Request for Admission No. 3. Brief in Support of Motion for Summary Judgment, p. 5. CARE states the findings of fact in this Court's August 25, 2011, Order are binding on the parties and as such, the "partially-contained" range as it exists now is not enough, that a fully-contained range is necessary. *Id*. at 6.

CARE then jumps back to the July 23, 2008 [February 27, 2007] Order and quotes a number of findings of fact, including:

> 35) . . . a range needs to be built so no bullet escapes…If you build in a populated area your range *must be totally baffled* so that the range owner can demonstrate to a judge that *a round cannot escape*.
> * * * [underlining in original]
> 49) . . . (Quoting Vargas) If you build in a populated area the range *must be totally* baffled so that the range owner can demonstrate to a judge that a ROUND CANNOT ESCAPE. [italics in original, bold was italics in original]
> 59) …Because property owners are located within the Surface Danger Zone and individual members of the public can ride within the area where bullets from the firing lines could land with lethal force, the applicable safety standards require THAT THE RANGE BE COMPLETELY BAFFLED FROM THE FIRING LINE TO THE TARGET LINE. (Emphasis supplied.)
> 61) The Farragut Range… Must, for the safety of all persons within the Surface Danger Zone, be subject to the "No Blue Sky" rule."
> 62) The "No Blue Sky" rule is that all pistol and rifle routers [ranges] be designed to include containment to eliminate the "Blue Sky" view from all potential shooting positions. Containment must not only be from all firing positions shown on the plans but also from the impromptu

> locations that can be anticipated and available to be established by shooters.

Brief in Support of Motion for Summary Judgment, pp. 6-7. Again, the above-quoted portion differs, but not significantly, from this Court's February 23, 2007, Memorandum Decision, Findings of Fact, Conclusions of Law, and Order, pp. 27-37. CARE next cites to Conclusions of Law and the Conclusions and Order of the July 23, 2008 [February 27, 2007] Order:

> **CONCLUSIONS OF LAW**
>
> 6) The present operation of the Farragut Shooting Range, WHICH ALLOWS ESCAPEMENT OF BULLETS BEYOND FARRAGUT STATE PARK/IDF&G BOUNDARIES INTO THE SURFACE DANGER ZONE ENCOMPASSING PLAINTIFF'S PRIVATE PROPERTY AND FARRAGUT STATE PARTK PROPERTY OPENED MEMBERS OF THE PUBLIC, CONSTITUTES A CLEAR AND PRESENT DANGER to the safety and health of plaintiffs and other persons in the area.
> * * * [emphasis added]
> 9) . . . However, use levels will remain capped at 500 shooters per year unless these two concerns have been addressed: 1) include safety measures adequate to **prevent** bullet escapement beyond the boundaries owned and controlled by IDF and G . . . The first concern (safety) is 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 . . . (Emphasis supplied). [bold in original, capitalization and underlining supplied]
>
> **CONCLUSIONS AND ORDER**
>
> . . . However, use levels will remain capped at 500 shooters per year unless the following two concerns have been addressed: 1) **Safety:** include safety measures adequate to **prevent** bullet escapement beyond the boundaries owned and controlled by IDF&G . . . The first concern (safety) can be satisfied only by the "NO BLUE SKY RULE OR TOTALLY BAFFLED…SO THAT A ROUND CANNOT ESCAPE…(Emphasis supplied). [bold in original, capitalization and underlining supplied]

Brief in Support of Motion for Summary Judgment, pp. 7-8. Again, the above-quoted portion differs, but not significantly, from this Court's February 23, 2007, Memorandum Decision, Findings of Fact, Conclusions of Law, and Order, pp. 37-39.

Throughout its briefing, CARE relies heavily on Caulder to argue the No Blue Sky rule has not been met, that ricochets will leave IDFG's property, that the rocky soil and baffle footings provide a ricochet surface, and that the log waste does nothing to eliminate ricochet. Brief in Support of Motion for Summary Judgment, p. 8. CARE points out IDFG could have originally complied with the Vargas standards, but chose not to. *Id.,* pp. 8-9. CARE points to a Memorandum dated October 29, 2007, from Clark Vargas to IDFG's David Leptich, in which Vargas stated, "Legally it is required that all the projectiles fired on this site stay within the Park's ownership boundaries." *Id*. p. 9; Affidavit of Harvey Richman, filed May 30, 2013, Exhibit 3, p. 1. In this same Memorandum, CARE points out Vargas discussed ricochets as well. Brief in Support of Motion for Summary Judgment, p.10; Affidavit of Harvey Richman, filed May 30, 2013, Exhibit 3, p. 2. Indeed, Vargas told IDFG's David Leptich:

> As requested we have shown ground baffles on Dwg C2 and alternate on dwg C-10 to demonstrate that potential ricochets can be intercepted. The IDFG fears that the plaintiffs attorney, will object to no ground baffles and IDFG wants to demonstrate to the Court that active means of precluding ricochets is also available so this ricochet problem does not get to be argumentative we shown that ricochets can also be actively contained the wood or earth ground baffle. It is CVA's [Vargas' company] position, however that ground baffles for the calibers that will be allowed to be fired are not needed and we [Vargas' company] are the recognized experts in this field regardless of the plaintiff's position.

Affidavit of Harvey Richman, filed May 30, 2013, Exhibit 3, p. 2. This Court agrees with CARE's argument that "Nothwithstanding the urging of their engineer [Vargas], IDFG chose to ignore this advice in all regards." Brief in Support of Motion for Summary Judgment, p.10. This Court disagrees with CARE's claim that this October 29, 2007, Vargas Memorandum "…pre-dates the Court Order of July 23, 2008" (*Id.*, p. 9), for the simple reason that CARE misstates the date of the Order. The correct date of the pertinent order was February 27, 2007. For that same reason, the Court disagrees with

CARE's claim that IDFG is "disingenuous" in IDFG's argument that ricochets were not considered by the Court in its February 29, 2007, decision and order (*Id.*), due to the Vargas Memorandum, but only for the simple fact that the October 27, 2007, Vargas Memorandum did not exist at the time the Court wrote that decision. However, that mistake by counsel for CARE does not mean, as discussed below, that this Court did not consider the issue of ricochets when it issued its February 27, 2007, decision.

CARE is concerned that "[IDFG's] counsel argues that when the Court in its Order spoke to '"No Blue Sky', ***or*** 'Totally Baffled', that it [IDFG] was given a choice if either one or the other." *Id.,* p. 10. Specifically, CARE takes issue with IDFG's interpretation of the word "or". *Id*. CARE argues "or" is a rephrasing word, not a choice word and so is essentially given the same meaning as "and". *Id*. CARE states the intent of this Court's Order was safety, which can only be achieved by "preventing bullet escapement from the property owned and controlled by IDFG". *Id*. Under CARE's interpretation, the No Blue Sky rule means a bullet cannot get out at all. *Id*. p. 11. As bullets can currently escape the range, CARE argues the requirements for this Court to lift the 501-and-above-shooters injunction have not been met; thus, the range must remain closed for 501 and above shooters. *Id*., pp. 12-13.

In its Supplemental Brief in Support of Motion for Summary Judgment of Plaintiffs, CARE also states the March 2, 2007, Judgment is binding on the parties, and is the operative judgment stating the conditions IDFG must meet should they wish to open the range for 501 shooters and above. Supplemental Brief in Support of Motion for Summary Judgment of Plaintiffs, p. 2. This Court agrees.

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B. IDFG's Arguments Against CARE's Motion for Summary Judgment.

IDFG claims the facts set forth in this Court's August 25, 2011, Order are not binding on the parties as the Idaho Supreme Court's November 15, 2012, decision "specifically rejected certain of the Court's August 25, 2011 conclusions." Statement of Dispute with Plaintiffs' Statement of Facts, p. 2. Specifically, IDFG admits that in its August 25, 2011, decision, this Court made a finding that down range includes a 180-degree arc away from the firing line. *Id.,* p. 3. IDFG "disputes this finding", arguing it would result in a significant expansion of the requirements for the 501-shooter component based on this Court's February 23, 2007, findings. *Id.,* Brief in Opposition to Plaintiffs' Motion for Summary Judgment, pp. 11-12. Similarly, IDFG states while log waste may not provide any significant change to the native soil from a ricochet standpoint, it is not material as soil conditions were not discussed in 2007. Statement of Dispute with Plaintiffs' Statement of Facts, p. 4. On the issue of ricochets, IDFG disputes there is a reasonable degree of probability that such create a safety hazard and a clear and present danger outside the property owned and controlled by IDFG. Statement of Dispute with Plaintiffs' Statement of Facts, p. 4, citing the Affidavit of Lucien Haag, pp. 2-3, ¶¶ 8-10, Exhibit B; This new evidence and IDFG's argument will be discussed below. Also, IDFG states ricochets off concrete and metal is not material as there is no evidence a ricochet could travel outside property owned by IDFG. Statement of Dispute with Plaintiffs' Statement of Facts, p. 5, citing Affidavit of Lucien Haag, pp. 2-3, ¶¶ 8-10, Exhibit B at 3. IDFG disputes ricochets could travel as far as one and a half times downrange and beyond the control of IDFG. *Id*. IDFG argues this Court's February 23, 2007, Order does not contain the word "ricochets" in the "Order" portion of that document. *Id.* While ricochets were not discussed in that 2007 decision,

bullet escapement was discussed as it pertains to the more than 500 shooters per year component. This is discussed in more detail below.

IDFG argues this Court's March 11, 2011, and August 25, 2011, Orders have been reversed by the Idaho Supreme Court's November 15, 2010 [2012] Opinion. Brief in Opposition to Plaintiffs' Motion for Summary Judgment, p. 2. IDFG claims CARE "…urge the Court to interpret the safety criteria of the 501-shooter component in an expansive manner parallel to the interpretation of the 500-shooter component that was previously rejected by the Idaho Supreme Court in these proceedings." *Id.* In this argument, IDFG notes the Idaho Supreme Court stated "[a]lthough a district court is given deference in its interpretation of its own order, that deference cannot extend so far as to allow interpretation to become revision." *Id*., pp. 2-3, citing 153 Idaho 630, 635, 289 P.3d 32, 37.

IDFG then analyzes this Court's February 23, 2007, Order and argues: 1) "downrange" means ± 10 degrees of the Surface Danger Zone (SDZ) and 2) the Order did not address ricochets. *Id*. at 3. IDFG states the February 23, 2007, and March 2, 2007, Orders are binding on the parties, while the March 11, 2011, and August 25, 2011, Orders were reversed by the Idaho Supreme Court. *Id*. p. 6. Under that premise, IDFG claims the "No Blue Sky" rule or Vargas "totally baffled…so that a round cannot escape" set forth in February 23, 2007, Order and March 2, 2007, Judgment, cannot be extended. *Id*. pp. 7-8. IDFG argues the Blue Sky rule (and its definition) have been established by the 2007 record and argues the 2007 orders do not require the range to be "fully-contained", and IDFG argues those orders only address direct shots at the target. *Id*., pp, 8-9. IDFG argues this Court cannot extend direct fire to include ricochets. *Id*., p. 11.

Also, as stated above, IDFG argues the definition of "downrange", according to the 2007 Orders is the SDZ which is ± 10 degrees rather than 180 degrees. *Id*. IDFG states there is no blue sky in this defined SDZ. *Id*., p. 12.

In response to CARE's definition of "or" used by this Court in its February 23, 2007, decision, IDFG states that "or" is disjunctive, implying a choice, rather than defining, implying an additional condition that must be met. *Id*., p. 13. As evidence, IDFG points to *Market Intern. Ins. Co., Ltd. v. Erekson*, 153 Idaho 107, 110, 279 P.3d 93, 96 92012) stating "or" is a disjunctive word used to express alternatives. *Id*.

IDFG then goes on to state the doctrines of law of the case and *res judicata* prevent CARE from relitigating matters regarding the requirements of the Court's 2007 Orders and go on to discuss Caulder's testimony at length. As rebuttal, IDFG introduces the affidavit of Lucien Haag. *Id*. at 18-19.

C. CARE's Rebuttal Arguments.

In its rebuttal brief, CARE references this Court's April 26, 2013, Order Re: Supreme Court Remand, in which this Court held:

> All the findings of fact and conclusions of law not specifically overruled by the Supreme Court, are in full force and effect and binding on the parties, in that they constitute the broad-spectrum of legal principles of estoppel by prior litigation which include res judicata, claim preclusion, issue preclusion, collateral estoppel and judicial estoppel.

Plaintiffs' Rebuttal Brief in Summary Judgment, p. 2; Order Re: Supreme Court Remand, p. 3, ¶ 7. In so referencing, CARE states this Court's Order states the issues cannot be relitigated; thus, IDFG cannot introduce Haag's affidavit to dispute Caulder's testimony referenced in the 2007 Order. However, CARE's argument seems to ignore the fact that CARE is also attempting to relitigate these issues with an updated affidavit from Caulder.

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IV. STANDARD OF REVIEW.

In considering a motion for summary judgment, the Court may properly grant a motion summary judgment only where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. I.R.C.P. 56(c). In determining whether any issue of material fact exists, this court construes all facts and inferences contained in the pleadings, depositions, and admissions, together with the affidavits, if any, in a light most favorable to the non-moving party. *Partout v. Harper*, 145 Idaho 683, 685, 183 P.3d 771, 773 (2008). The Court draws all inferences and conclusions in the non-moving party's favor and if reasonable people could reach different conclusions or draw conflicting inferences, then the motion for summary judgment must be denied. *Zimmerman v. Volkswagen of America, Inc.*, 128 Idaho 851, 854, 920 P.2d 67, 70 (1996).

However, if the evidence shows no disputed issues of material fact, then summary judgment should be granted. *Smith v. Meridian Joint School District No. 2*, 128 Idaho 714, 718, 918 P.2d 583, 587 (1996); *Loomis v. City of Hailey*, 119 Idaho 434, 437, 807 P.2d 1272, 1275 (1991). A mere scintilla of evidence or only slight doubt as to the facts is not sufficient to create a genuine issue for purposes of summary judgment. *Samuel v. Hepworth, Nungester & Lezamiz, Inc.*, 134 Idaho 84, 87, 996 P.2d 303, 306 (2002). The non-moving party "must respond to the summary judgment motion with specific facts showing there is a genuine issue for trial." *Id*.

In ruling on the motion, the Court considers only material contained in the affidavits and depositions which are based on personal knowledge and which would be admissible at trial. *Samuel*, 134 Idaho 84, 88, 996 P.2d 303, 307. Summary judgment

is appropriate where a non-moving party fails to make a sufficient showing to establish the existence of an element essential to its case when it bears the burden of proof. *Id.*

Neither party to this matter has requested a jury trial. In cases set for a court trial, the Court is entitled to arrive at the most probable inference to be drawn from the undisputed evidence presented to it. *J.R. Simplot v. Bosen,* 144 Idaho 611, 618, 167 P.3d 748, 755 (2006). "The test for reviewing the inferences drawn by the trial court is whether the record reasonably supports the inferences." *Id.,* citing *Shawver v. Huckleberry Estates, LLC,* 140 Idaho 354, 360-61, 93 P.3d 685, 691-92 (2004). However, the Court is not to make credibility determinations of the affiant. *Sohn v. Foley,* 125 Idaho 168, 171, 868 P.2d 496, 499 (Ct.App. 1994). Credibility should be tested in court before the trier of fact. *Id., Argyle v. Slemaker,* 107 Idaho 668, 670, 691 P.2d 1283, 1285 (Ct.App. 1984).

Cross-motions for summary judgment do not change the applicable standard of review. *McFadden v. Sein*, 139 Idaho 921, 923, 88 P.3d 740, 742 (2004); *Miller v. Idaho State Patrol*, 150 Idaho 856, 863, 252 P.3d 1274, 1281 (2011). The fact that both parties move for summary judgment does not in and of itself establish a lack of a genuine issue of material fact. *Shawver v. Huckleberry Estates, L.L.C.*, 140 Idaho 354, 360, 93 P.3d 685, 691 (2004). However, where the parties have filed cross-motions for summary judgment relying on the same facts, issues and theories, the parties effectively stipulate that there is no genuine issue of material fact precluding the district court from entering summary judgment. *Intermountain Forest Management, Inc. v. Louisiana Pacific Corp.*, 136 Idaho 233, 235, 31 P.3d 921, 923 (2001).

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V. OBJECTIONS BY IDFG TO CAULDER'S TESTIMONY.

At oral argument on July 23, 2013, counsel for IDFG made extensive objection to the admissibility of the affidavits of James A. Caulder, Jr., P.E. Specifically, counsel for IDFG objected to Calder's opinions regarding "the travel distance of ricochets, the lethality of ricochets that have travelled certain distances", "the legitimacy and fear of a person traversing the public road and private property downrange" and his opinions regarding a 40 degree Surface Danger Zone.

While it is permissible for counsel to object at oral argument, the better practice is to make objections in advance to avoid surprise to the opposing party. Three years ago, IDFG did just that; IDFG filed its Motion to Strike and/or Exclude Testimony of James Caulder" almost three months before oral argument. Why IDFG chose to wait and object at oral argument on the present occasion is puzzling. In any event, the Court must make its determination on the admissibility of all evidence presented at summary judgment, and must rule on any objections. *Gem State Ins. Co. v. Hutchison,* 145 Idaho 10, 14, 175 P.3d 172, 176 (2007). The admissibility of expert testimony is a matter committed to the discretion of the trial court. 145 Idaho 10, 15, 175 P.3d 172, 177.

As just mentioned, this Court has been down this road before. In this Court's March 10, 2011, Memorandum Decision and Order on Motions to Strike, Defendants' Motion for View, Defendants' Motion Partial Lifting of Injunction and Plaintiffs' Motion for Summary Judgment; and Order Scheduling Court Trial, this Court wrote:

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

2011, IDFG filed "Defendant's Brief in Support of Motion to Strike." On January 28, 2011, CARE filed "Plaintiff's Reply to the Defendant's 24 January 2011 Brief in Support of Motion to Strike Testimony of James Caulder."

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

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

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

In its reply, CARE asserts that no expert for either party has suggested a difference exists between civilian and military ranges with regard to safety issues or the behavior of bullets fired. Plaintiff's Reply to the Defendant's 24 Jan. 2011, Brief in Support of Motion to Strike Testimony of James Caulder, p. 2. CARE argues Caulder's opinions are based upon his review of documentation provided by IDFG, pictures and video taken by the parties, his own engineering experience, and review of current literature *inter alia. Id.,* pp. 3-4. CARE argues reference to Air Force standards was "not intended to be incorporated as the law applicable to Farragut, it is rather a standard to look to, to aid and assist in describing when bullets will escape the range and under what circumstances." *Id.,* p. 4. CARE asserts Caulder's opinion on the issue of ricochet bullets goes to the heart of the Court's Order where such ricocheting bullets travel over the back berm and/or leave the property owned and controlled by IDFG. *Id.* CARE urges the Court to admit the testimony of Caulder as his methodology and resulting conclusions are helpful to the Court. *Id.,* p. 7

Again, the language of Idaho Rule of Evidence 702 is disjunctive; therefore, an expert may be qualified by virtue of his knowledge, skill,

> experience, training, *or* education; the ultimate question is whether the expert's knowledge will assist the trier of fact. Rule 702 reads:
>
> > If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.
>
> I.R.E. 702. The decision to permit or deny expert witness testimony is one left to the discretion of the Court. *J-U-B Engineers,* 146 Idaho 311, 314-15, 193 P.3d 858, 861-62. And, again, upon making that decision, the Court (as trier of fact at the summary judgment stage of proceedings) is also entitled to give such testimony the weight to which it deems such testimony is entitled. *Christensen,* 125 Idaho 663, 666, 873 P.2d 917, 920; *Simpson,* 100 Idaho 357, 362, 597 P.2d 600, 605.
>
> A proper foundation for Caulder's opinions has been laid here. Idaho Rule of Evidence 703 permits the facts or data upon which an expert's opinions are based to be "those perceived by or made known to the expert at or before the hearing." I.R.E. 703. There is no dispute here that Caulder perceived certain facts and data regarding the Farragut Shooting Range and formed his opinion from the facts and data he observed. Given that this matter is left to the discretion of the Court, both as to admissibility of and weight to be given to Caulder's testimony, IDFG's motion to strike Caulder's affidavit must be denied.

Memorandum Decision and Order on Motions to Strike, Defendants' Motion for View, Defendants' Motion Partial Lifting of Injunction and Plaintiffs' Motion for Summary Judgment; and Order Scheduling Court Trial, pp. 16-19.

Since that time, there is even more information provided to the Court about the foundation of Caulder's opinions. In "Plaintiffs' Certification Upon the Affidavit of James A. Culder, Jr., P.E.", filed May 30, 2013, Caulder set forth in detail the basis of his opinions. At page three of that report, Caulder writes:

> It is likewise consequential for me to unequivocally state, *predicated upon industry accepted standards regarding ricochet fire,* that high-power ricochet rounds will remain lethal, more often than not, for a distance that is approximately 50% of their maximum range. It is my professional opinion that a ricochet round striking someone on the Perimeter Road or on down range private property would likely be lethal.

(italics added). This Court has gone back and reviewed the Affidavit of Harvey Richman, filed on December 27, 2010, which contains the preservation deposition of Jim Caulder taken on November 18, 2010, and the exhibits referenced in that deposition. Calder described his extensive experience with shooting ranges. Calder deposition, p. 8, L. 15 – p. 10, L. 24. While most of his experience is with military ranges, Calder explained that mattered little because his testimony is based on geometry and physics. *Id.,* p. 52, Ll. 8-18. Calder worked on the second through sixth revisions of the Air Force's ETL (Engineering Technical Letter) for shooting ranges, and described in detail all that this involved. *Id.,* p. 8, L. 15 – p. 16, L. 18. Calder's opinion that a ricochet can travel about half the distance compared to the maximum direct fire distance of a given caliber. *Id.,* p. 37, Ll. 2-19; p. 38, Ll. 12-24. In response to counsel for IDFG's question, Calder testified about the Picatinny probabilistic surface dange zone models, and ricochets (*Id.,* p. 81, L. 6 – p. 82, L. 12), and then testified:

> Q. [by Ms. Trever] And the Air force new guideline of 50 percent is not a firm guideline. Is that correct?
> A. [by James Calder, Jr.] It is the – it is a firm guideline, but it's not an absolute. I mean, it's – there's provisions in there that if you don't meet the 50 percent, that you can do other things to keep the range operational.

Id., p. 82, Ll. 13-20. Perhaps IDFG's counsel has forgotten this deposition. It did occur almost three years ago. In any event, IDFG's objections voiced at the hearing on July 23, 2013, are overruled.

VI. THIS COURT'S ANALYSIS OF CARE'S MOTION FOR SUMMARY JUDGMENT.

A. The 501 Shooter Component Requires No Bullet Escapement.

In an attempt to persuade this Court of their positions, both sides dredge up factual issues, many of which have been previously litigated. All that has accomplished is confusion of a relatively simple fact: this Court's February 23, 2007, Memorandum

Decision, Findings of Fact, Conclusions of Law and Order, and this Court's March 2, 2007, Judgment, discussed "bullet escapement." No other conclusion may be reached other than "bullet escapement" includes direct fire and ricochets. A bullet is a bullet, and a bullet that leaves the range by ricochet is still "bullet escapement."

The Idaho Supreme Court made it clear that because this Court in 2007 did not discuss ricochets in its *less than* 500 shooters per year analysis, the discussion of ricochets in this Court's 2011 decision was impermissible. In analyzing the less than 500 shooters per year in 2007, this Court did not discuss "bullet escapement", but instead discussed "direct fire" ("…cannot fire his or her weapon above the berm behind the target", February 23, 2007, Memorandum Decision, Findings of Fact, Conclusions of Law and Order, p. 59; March 2, 2007, Judgment, p. 2). Thus, the Idaho Supreme Court held this Court's inclusion of ricochets four years later was error. However, in 2007, when this Court discussed the *more than* 500 shooter per year component, this Court specifically discussed "bullet escapement", and held IDFG had to "…include safety measures adequate to **prevent** bullet escapement." *Id.* (emphasis in original). Under the reasoning of the Idaho Supreme Court, it would at present be an abuse of this Court's discretion for it to now hold that "measures adequate to **prevent** bullet escapement" did not then include ricochets and does not now include ricochets. With regard to the 501-shooter component, the Idaho Supreme Court quoted this Court's judgment, stating the injunction would not be lifted "until and unless [IDFG] has constructed and installed safety measures adequate to prevent bullet escapement beyond the boundaries owned and controlled by [IDFG]…" 153 Idaho 630, 632, 289 P.3d 32, 34. The Idaho Supreme Court then specifically noted neither party appealed this Court's 2007 Judgment. *Id*.

An issue before the Court is which of its prior Orders are still in effect and what portions of its prior Orders have been reversed by the Idaho Supreme Court. This Court's opinion on that issue has already been made clear in its April 26, 2013, Order Re: Supreme Court Remand, discussed immediately above. What is beyond dispute is this Court's February 23, 2007, Memorandum Decision, Findings of Fact, Conclusions of Law and Order, and this Court's March 2, 2007, Judgment, have never been appealed. This Court finds: IDFG has failed to meet the requirements of the this Court's February 23, 2007, Memorandum Decision, Findings of Fact, Conclusions of Law and Order, and this Court's March 2, 2007, Judgment; and CARE has proven at the present time, IDFG has failed to comply with the 501 shooters and above component set forth in this Court's February 23, 2007, Memorandum Decision, Findings of Fact, Conclusions of Law and Order, and this Court's March 2, 2007, Judgment. Accordingly, CARE's Motion for Summary Judgment must be granted. This is so without resort to a review of this Court's 2011 decisions.

As mentioned above, with regard to the 501-shooter component, the Idaho Supreme Court quoted this Court's judgment, stating the injunction would not be lifted "until and unless [IDFG] has constructed and installed safety measures adequate to prevent bullet escapement beyond the boundaries owned and controlled by [IDFG]…" 153 Idaho 630, 632, 289 P.3d 32, 34. The Idaho Supreme Court then specifically noted neither party appealed this Court's 2007 Judgment. *Id*.

The Idaho Supreme Court has taken a very literal approach to its decision in that if something is not mentioned in the original injunction, it cannot be added in during a later interpretation of that original injunction. 153 Idaho 630, 635, 289 P.3d 32, 37. The converse is true; if something is mentioned in the original injunction, it cannot be subtracted during a later interpretation of the original injunction. To do so would "allow

interpretation to become revision." *Id.* That being the case, if this Court were to adopt IDFG's argument that "bullet escapement" as used by this Court in 2007 did not include ricochets, this Court would be violating the Idaho Supreme Court's mandate.

This Court has previously found that the range as presently constructed, does not accomplish complete bullet containment. This Court wrote: "CARE goes on to note that while the Court required 100% containment, IDFG's expert, O'Neal, only states it would be 'highly improbable' that rounds from the 100-yard shooting would leave IDFG's property." March 11, 2011, Memorandum Decision and Order on Motions to Strike, Motion for View, Motion for Partial Lifting of Injunction and Motion for Summary Judgment, p. 73. The Idaho Supreme Court's decision in this case did not overturn that factual finding. IDFG apparently decided on a slightly different tack, and repackaged its claims in the Affidavit of Lucien Haag, IDFG's new expert. Haag testified that a ricochet round *would not be lethal*, contrary to CARE's expert Caulder. Affidavit of Lucien Haag, pp. 2-3, ¶¶ 8, 9. Implicit in such statement is that there would be ricochet rounds which would escape, but most importantly, such claim ignores the fact that back in 2007, this Court did not order that for IDFG to exceed 500 shooters per year, IDFG had to contain all *non-lethal ricochets*. Caulder states: "The Farragut range as presently constructed is NOT adequate to prevent bullet escapement beyond the property boundaries owned and controlled by the Idaho Department of Fish and Game." Affidavit of James A. Caulder, Jr. in Support of Motion for Summary Judgment, filed July 8, 2013, p. 2, ¶ 3. (emphasis in original). That alone is sufficient to create an issue of disputed fact, and as such, CARE is entitled to summary judgment on IDFG's request to open the range to more than 500 shooters per year.

Haag also testified that an escaped ricochet cannot reach downrange private property or Perimeter Road. Affidavit of Lucien Haag, p. 3, ¶ 10. First, that statement

misses the point, as this Court's 2007 decision required any bullet, ricochet or direct fire not escape the IDFG's controlled property, and Haag's affidavit does not address that requirement. The Court did not prohibit bullets from reaching Perimeter Road or other people's property; the Court required all bullets stay on IDFG land. Second, as noted above, IDFG's prior expert, O'Neal, gave testimony that was completely at odds with IDFG's new expert Haag, when O'Neal testified that it was "…'highly improbable' that rounds from the 100-yard shooting would leave IDFG's property." March 11, 2011, Memorandum Decision and Order on Motions to Strike, Motion for View, Motion for Partial Lifting of Injunction and Motion for Summary Judgment, p. 73. "Highly improbable" is not "complete containment" on IDFG-owned property.

B. IDFG's "or" Argument Does not Change the Fact That the 501 Shooter Component Requires No Bullet Escapement.

Again, this Court's February 23, 2007, Memorandum Decision, Findings of Fact, Conclusions of Law, and Order reads:

> **CONCLUSION AND ORDER**
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> *** * ***
>
> 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 on its property. However, use levels will remain capped at 500 shooters per year unless the following two concerns have been addressed: 1) **Safety:** include safety measures adequate to **prevent** bullet escapement beyond the boundaries owned and controlled by IDF&G, * * * 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. Once bullet containment is achieved, it matters not for the purposes of this litigation if the range is supervised (with bullet containment, supervision would inure to the benefit only of the participants, an important consideration, but not the subject of this lawsuit.

February 23, 2007, Memorandum Decision, Findings of Fact, Conclusions of Law, and Order, pp. 61-62. (emphasis in original).

As mentioned above, CARE argues "or" is a rephrasing word, not a choice word and so is essentially given the same meaning as "and". Brief in Support of Motion for Summary Judgment, p. 10. CARE states the intent of this Court's Order was safety, which can only be achieved by "preventing bullet escapement from the property owned and controlled by IDFG". *Id*. Under CARE's interpretation, the No Blue Sky rule means a bullet cannot get out at all. *Id*. p. 11. CARE is concerned that "[IDFG's] counsel argues that when the Court in its Order spoke to '"No Blue Sky', ***or*** 'Totally Baffled', that it [IDFG] was given a choice if either one or the other." *Id.,* p. 10. Specifically, CARE takes issue with IDFG's interpretation of the word "or". *Id*.

In response to CARE's definition of "or", used by this Court in its February 23, 2007, decision, IDFG states that "or" is disjunctive, implying a choice, rather than defining, implying an additional condition that must be met. *Id*., p. 13. As evidence, IDFG points to *Market Intern. Ins. Co., Ltd. v. Erekson*, 153 Idaho 107, 110, 279 P.3d 93, 96 92012) stating "or" is a disjunctive word used to express alternatives. *Id*.

Viewed in context, it is obvious this Court in 2007 viewed "No Blue Sky" as synonymous with "totally baffled . . . so that a round cannot escape". This is because with either description, or both ("No Blue Sky" or "totally baffled . . . so that a round cannot escape"), the Court held the only way "**Safety"** could be addressed was with "…measures adequate to **prevent** bullet escapement beyond the boundaries owned and controlled by IDF&G". IDFG argues they have met the "No Blue Sky" requirement in that you can see no blue sky from the shooting position. CARE disputes that claim if "downrange" means everything in front of the shooter. As discussed below, this Court finds there is at least a dispute of fact that IDFG has not complied with the "No Blue Sky" requirement. This Court specifically finds IDFG has not met the requirement that

the range be totally baffled…so that a round cannot escape, the most important deficiency is that IDFG has not implemented "…measures adequate to **prevent** bullet escapement beyond the boundaries owned and controlled by IDF&G."

The following from this Court's 2007 Order shows this Court intended "No Blue Sky" as being synonymous with "totally baffled . . . so that a round cannot escape". This Court found:

> Vargas stated in his affidavit that as to the "no blue sky concept" or "fully contained range", "most civilian ranges to not warrant orrequire this degree of more expensive engineering safety design to ensure reasonable exdpectations of safety to range participants and the public at large." Affidavit of Clark Vargas dated Autgust 24, 2006, p. 4, ¶12. However, Vargas in his "Design Criteria for Shooting Ranges" states in unequivocal and mandatory language: "If you build in a populated area, your range *must be totally* baffled so that the range owner can demonstrate to a judge that *a round cannot escape*." Exhibit 2, p. 5.

February 23, 2007, Memorandum Decision, Findings of Fact, Conclusions of Law, and Order, pp. 33-34, ¶ 49. (italics in original).

C. Bullet Escapement Beyond IDFG's Land.

On the issue of ricochets, IDFG disputes there is a reasonable degree of probability that such create a safety hazard and a clear and present danger outside the property owned and controlled by IDFG. Statement of Dispute with Plaintiffs' Statement of Facts, p. 4, ¶¶ 10-11, citing the Affidavit of Lucien Haag, pp. 2-3, ¶¶ 8-10, Exhibit B. Again, IDFG misses the point. The directive from this Court's 2007 decision was not that any subsequent improvements reduce the probability of a safety hazard on land now owned and controlled by IDFG. The directive was that the only way "**Safety"** could be addressed by IDFG was with "…measures adequate to **prevent** bullet escapement beyond the boundaries owned and controlled by IDF&G". February 23, 2007, Memorandum Decision, Findings of Fact, Conclusion of Law, and Order, p. 60. (emphasis in original).

CARE has produced evidence that even with the modifications to the Range which IDFG has constructed, bullets will escape. James A. Caulder, Jr., P.E. stated in his affidavit: "The Farragut range as presently constructed is NOT adequate to prevent bullet escapement beyond the property boundaries owned and controlled by the Idaho Department of Fish and Game." Affidavit of James A. Caulder, Jr. in Support of Motion for Summary Judgment of Plaintiffs, p. 2, ¶ 3. (emphasis in original). Caulder then provided more detail to that conclusion:

> It is my opinion, as a professional engineer, that rounds fired at the Farragut range **can and will** leave the property owned and controlled by the range through the existing Blue Sky side openings and from ricochet and land on the public road and private property downrange. This is an absolute certainty. The frequency of these events is difficult if not impossible to determine, but is clearly a function of the number of rounds fired. The more rounds fired, the greater the potential for bullet escape.
>
> With the principle underlying the "no blue sky" or Vargas's "totally baffled" criteria being to "…protect people or property adjacent to the range.", the Farragut range, as presently designed and constructed, falls well short of that goal.
>
> As currently constructed, the Farragut range SDZ encumbers public roads and private property downrange. In my professional opinion, persons traversing the public road down range from the firing line and persons on private property downrange from the firing line, live in **real and legitimate** fear that rounds fired at the Farragut 5range will strike them, injuring or killing them as they walk that public and private property.

Id., p. 3, ¶¶ 9, 10, 11. (emphasis in original). Caulder set forth the reasons for his opinion that bullets will escape beyond land owned and controlled by IDFG:

> The court order stated that the Farragut range should be "TOTALLY BAFFLED." The Farragut range as presently constructed is NOT totally baffled; in point of fact there are observable Blue Sky direct fire openings on the right and left extremes of the range within the surface danger zone (SDZ) fan. As currently constructed, the Farragut range has 6 overhead baffles located in the first 148 feet of range floor, which is slightly less than 50% of the total distance from the firing line to the target. The remaining 50% of the range is unbaffled all the way to the earth backstop. This construction allows for the escape of both direct fire and ricochet rounds fired at the range.
>
> At such time, until the existing Blue Sky openings between the baffles and the side berms are properly addressed, the range WILL NOT

qualify even as "partially contained". The Blue Sky openings will permit direct fired rounds to travel up to their maximum range.

In both the NRA range manual and in documentation of Clark Vargas's range criteria, which I have reviewed, as well as other industry standards for small arms range design, the definition of the surface danger zone includes an angle of 40% to the left of perpendicular and 40% to the right of perpendicular from the direction of the fire. This SDZ area addresses the portions of the down range property that is endangered by direct and ricochet fire.

The definition of "no blue sky" rule as operationally employed by professional range designers including Clark Vargas requires that not bullets will leave range property either by direct exit or by ricochet.

A shooting range floor, such as the one which exists at the Farragut range, must not be constructed with ricochet producing hazards. If the range floor contains ricochet hazards, then bullets **can and will** acquire those potential ricochet targets. Unless other measures, such as ground baffles, overhead Venetian blind baffles or a sufficient number of vertical baffles and/or bullet catchers are in place, the ricochets will leave the range proper. For a partially baffled range, such as Farragut range, you must apply the 50% maximum distance SDZ ricochet rule, which is an accepted standard among small arms range engineering professionals. The Farragut range is at best a partially baffled rand and it has numerous ricochet producing components constructed in the range floor. At Farragut, the ricochets will have the real potential to leave Fish and Game Department property owned and controlled by the range management unless sufficient down range property is owned out to the 50% maximum distance. At Farragut, the range does not have enough baffles to control ricochet bullet escape and Idaho Department of Fish and Game simply does not own enough down range property to ensure ricochets will fall on IDFG property.

Id., pp. 2-3, ¶¶ 4-8. (emphasis in original).

D. The "Surface Danger Zone", "downrange" and "No Blue Sky."

CARE claims downrange means a 180 degree arc as measured from the firing line (Statement of Material Facts Not in Dispute, p. 2, ¶ 6), IDFG claims downrange only means a 20 degree cone, 10 degrees either side of the line from the shooter to the target. Statement of Dispute with Plaintiffs' Statement of Facts, p. 3, ¶ 7. IDFG writes:

IDFG agrees blue sky is visible within the 180 degree-sector on right and left extremes from certain shooting positions on the 100-yard firing line. IDFG does not agree this fact is material to determining IDFG's compliance with the 501-shooter component. The "No Blue Sky Rule" is based on a shooter's downrange "blue sky" view, and the areas of visibility

> are not downrange. There is no blue sky visible within a shooter's downrange view from any firing position at the 100-yard shooting area.

Statement of Dispute with Plaintiffs' Statement of Facts, pp. 4-5, ¶ 12; Defendants' Brief in Opposition to Plaintiffs' Motion for Summary Judgment, pp. 11-13. IDFG claims: "No evidence was presented to the Court in 2007 of bullets in fact leaving the unbaffled range outside of this ± 10-degree sector." IDFG's argument misses the point. As discussed several times above, in 2007, the Court held the only way "**Safety"** could be addressed was with "…measures adequate to **prevent** bullet escapement beyond the boundaries owned and controlled by IDF&G". February 23, 2007, Memorandum Decision, Findings of Fact, Conclusion of Law, and Order, p. 60. This Court did not hold "…the only way '**Safety'** could be addressed was with measures adequate to **prevent** bullet escapement beyond the boundaries owned and controlled by IDF&G *within a 20 degree cone 10 degrees either side of the line of fire*."

This Court finds "downrange" means what it says. It means *any area in front of the shooter*, necessarily being an arc of 180 degrees looking downrange if measured from the shooter's position. With that definition, IDFG's improvements fail to satisfy a literal interpretation of the No Blue Sky Rule. As mentioned above, IDFG's improvements fail to satisfy the No Blue Sky Rule as construed by engineers. IDFG's Lucien Haag did not place that issue in controversy, as all he did was opine as to the extent of the injury (or lack thereof) that would be caused by a ricochet.

This Court finds no reason to adopt IDFG's counsel's argument that the Surface Danger Zone is ten degrees either side of a line between the shooter and the target. No engineer has testified as to such interpretation advocated by IDFG. IDFG makes its argument for a twenty degree cone by extrapolating that this Court found in 2007 that there was at least 18 occupied residences located within the Surface Danger Zone.

Defendants' Brief in Opposition to Plaintiffs' Motion for Summary Judgment, pp. 11-12, citing February 23, 2007, Memorandum Decision, Findings of Fact, Conclusions of Law, and Order, p. 28, ¶ 37; Plaintiffs' Trial Exhibit 32. Exhibit 32, admitted at the first trial on December 11, 2006, is a drawing from Roy Ruel which depicts a Surface Danger Zone of 10 degrees either side of the line of fire. However, in this Court's 2007 decision, while the Surface Danger Zone was discussed, there was no description or finding by this Court of what its exact parameters were. Even if this Court were to now adopt the 20 degree SDZ advocated by IDFG, such does not change the fact that IDFG has not implemented "…safety measures adequate to prevent bullet escapement beyond the boundaries owned and controlled by IDF&G." February 23, 2007, Memorandum Decision, Findings of Fact, Conclusion of Law, and Order, p. 60. (emphasis in original).

Because of his citation to reliable authority (the NRA Range Manual and Clark Vargas) this Court finds Caulder's description of the Surface Danger Zone persuasive:

> In both the NRA range manual and in documentation of Clark Vargas's range criteria, which I have reviewed, as well as other industry standards for small arms range design, the definition of the surface danger zone includes an angle of 40% to the left of perpendicular and 40% to the right of perpendicular from the direction of the fire. This SDZ area addresses the portions of the down range property that is endangered by direct and ricochet fire.

Affidavit of James A. Caulder, Jr. in Support of Motion for Summary Judgment of Plaintiffs, p. 2, ¶ 6.

VII. THIS COURT'S ANALYSIS OF IDFG's MOTION FOR SUMMARY DISPOSITION OF DEFENDANTS' MOTION TO PARTIALLY LIFT INJUNCTION.

A. Noise Standard.

In its supporting brief, IDFG states the noise standards set by the Idaho Outdoor Sport Shooting Range Act, I.C. § 67-9101 *et seq.,* of less than 64 dBA Leq(h) has been met, as the testing performed on June 1, 2013, by Colin Meehan, P.E., resulted in 39.4.

dBA. Memorandum in Support of Summary Disposition, pp. 3-4; Affidavit of Colin Meehan, P.E., pp. 2-3, ¶¶ 4-12. In response, CARE states the noise standards have not necessarily been met, as the testing took place with only 25 shooters present, rather than a larger number. Plaintiffs' Reply Brief, p. 3. The entirety of CARE's argument is:

> Paragraph A, as raised by the Defendant relative to the Idaho code section 67-901, et.seq. must, at this time, remind the Court that only 25 shooters during the entire shooting day, the scant number of shooters did not breach the statutes standard during the one hour and 3 minutes of the test.
>
> It remains for the Plaintiffs to retest at such time as a greater volume of shooters maybe firing and address the test results at that future date.

Id. CARE is mistaken. The time for deciding the motion for summary judgment is now, not in the future when CARE gets around to developing its evidence. CARE has not made a motion to allow it additional time to develop its own evidence, as provided under I.R.C.P. 56(f). Motions for summary judgment are decided upon facts shown, not upon facts that might have been shown. *Verbillis v. Dependable Appliance Co.,* 107 Idaho 335, 337, 689 P.2d 227, 229 (Ct.App. 1984). Via the affidavit of Colin Meehan, P.E., IDFG has set forth *facts* demonstrating the Range complies with the noise standards in the Act. Meehan's conclusion is: "The measurements I took on June 1, 2013 indicate that noise emissions from the shooting activities at the Farragut range comply with the 64 dBA Leq(h) noise standard specified in Idaho Code Section 67-9102." Affidavit of Colin Meehan, P.E., p. 3, ¶ 13. CARE's argument that there were "…only 25 shooters during the entire shooting day, the scant number of shooters did not breach the statutes standard during the one hour and 3 minutes of the test", falls on deaf ears. This lay opinion by counsel is not sufficient to create a genuine issue of

material fact. *Puckett v. Oakfabco, Inc.,* 132 Idaho 816, 823, 979 P.2d 1174, 1181 (1999).

For these reasons, IDFG's Motion for Summary Disposition of Defendants' Motion to Partially Lift Injunction must be granted as to the noise compliance standards of the Act and the noise aspect of the more than 500 shooter per year component.

B. Safety Issues.

IDFG also claims the safety concerns set forth in this Court's February 23, 2007, Order have been met. *Id*., pp. 4-10. IDFG argues the No Blue Sky rule is met as defined by Plaintiff's Exhibits 2 and 43, as it claims the applicable SDZ is ± 10 degree and no blue sky is visible in this SDZ. *Id*. at 7. IDFG also states the Vargas standard has been met by virtue of the berms installed, also using the stated SDZ. *Id*. This issue is discussed above in the analysis of CARE's motion for summary judgment. IDFG concludes by stating ricochets were not discussed at all in the 2007 Orders; thus, such cannot be discussed now nor can such influence this Court's decision with regard to the injunction. *Id*. at 10. This Court has discussed above how "…measures adequate to **prevent** bullet escapement beyond the boundaries owned and controlled by IDF&G" necessarily includes ricochets. IDFG's strained interpretation is not persuasive, and if followed, would be an abuse of this Court's discretion. For these reasons, IDFG's Motion for Summary Disposition of Defendants' Motion to Partially Lift Injunction must be denied as to the safety aspects of the more than 500 shooter per year component.

IV. CONCLUSION AND ORDER.

For the reasons stated above: plaintiff CARE's Motion for Summary Judgment as to IDFG's non-compliance with safety issues must be granted; defendant IDFG's Motion

for Summary Disposition of Defendants' Motion to Partially Lift Injunction must be denied as to safety issues and granted as to compliance with applicable noise standards. Because IDFG needed to satisfy both noise and safety issues to get the injunction for over 500 shooters per year lifted, the injunction as to over 500 shooters per year remains.

IT IS HEREBY ORDERED plaintiff CARE's Motion for Summary Judgment as to IDFG's non-compliance with safety issues is GRANTED.

IT IS FURTHER ORDERED defendant IDFG's Motion for Summary Disposition of Defendants' Motion to Partially Lift Injunction as to safety issues is DENIED.

IT IS FURTHER ORDERED defendant IDFG's Motion for Summary Disposition of Defendants' Motion to Partially Lift Injunction as to noise issues is GRANTED.

IT IS FURTHER ORDERED the Court trial scheduled to begin September 30, 2013, is VACATED.

Entered this 21st day of August, 2013.

_____
John T. Mitchell, District Judge

Certificate of Service

I certify that on the _____ day of August, 2013, a true copy of the foregoing was mailed postage prepaid or was sent by interoffice mail or facsimile to each of the following:

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_____
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