STATE OF IDAHO)
County of KOOTENAI)ss

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CLERK OF DISTRICT COURT

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Deputy

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE

STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI

CITIZENS AGAINST RANGE EXPANSION, et al, *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 IN PART AND DENYING IN PART DEFENDANT IDFG'S MOTION FOR RECONSIDERATION**

I. PROCEDURAL HISTORY AND FACTUAL BACKGROUND.

A. Most Recent Procedural History.

This case is before the Court on the Motion for Reconsideration filed on September 4, 2013, by defendants Idaho Department of Fish and Game (IDFG) and its director. In that Motion for Reconsideration, IDFG, pursuant to I.R.C.P. 11(a)(2)(B), "…move this Court to reconsider its August 21, 2013 Memorandum Decision and Order granting Plaintiff's Motion for Summary Judgment as to IDFG's compliance with safety requirements to open the 100-yard shooting area at the Farragut Shooting Range to more than 500 shooters per year." Motion for Reconsideration, p. 2. The basis of this motion is new evidence, specifically, the deposition testimony of IDFG's ballistics expert, Lucien Haag, whose deposition was taken August 22, 2013, the day after this Court's decision which is now sought by IDFG to be reconsidered. Brief in Support of

Motion for Reconsideration, pp. 3-8. IDFG also requests this Court reconsider its interpretation of Surface Danger Zone (SDZ). *Id.,* pp. 8-12.

For obvious reasons, IDFG does not request this Court to reconsider its granting IDFG's Motion for Summary Disposition of Defendants' Motion to Partially Lift Injunction (as to noise issues), and plaintiffs Citizens Against Range Expansion (CARE) has not requested reconsideration of that issue.

Also filed on September 4, 2013, were defendants' "Brief in Support of Defendants' Motion for Reconsideration" and the "Affidavit of Kathleen Trever in Support of Motion for Reconsideration." Unfortunately, Trever's affidavit did not have attached to it the certified transcript of the August 22, 2013, deposition of Lucien Haag, and exhibits from that deposition. That document was later lodged with the Court.

On September 10, 2013, this Court filed its "Order Granting Plaintiffs' Motion for Summary Judgment", which was consistent with this Court's August 21, 2013, Memorandum Decision and Order granting Plaintiff's Motion for Summary Judgment.

On September 18, 2013, defendants IDFG filed an "Amended Motion for Reconsideration." The purpose of that pleading was to make it clear that IDFG was seeking reconsideration not only of this Court's August 21, 2013, Memorandum Decision and Order granting Plaintiff's Motion for Summary Judgment, but also of this Court's September 10, 2013, *Order* Granting Plaintiffs' Motion for Summary Judgment.

On September 30, 2013, CARE filed its "Reply Brief of Plaintiffs on Motion for Reconsideration."

On October 4, 2013, IDFG filed its "Reply Memorandum in Support of Defendants' Motion for Reconsideration."

On October 8, 2013, this Court heard oral argument on IDFG's Motion for Reconsideration. The matter is now at issue.

B. History of This Case.

This section is taken predominantly from this Court's August 21, 2013, "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", pages 1-6. That is the decision IDFG now moves this Court to reconsider. This section of that decision is reiterated only to give the reader context.

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. (italics in original).

After 2007, IDFG made changes to the Farragut Shooting Range. The problem was in how IDFG made those changes. While the Vargas Master Plan was inconsistent with the range design criteria which Vargas had previously discussed in his 1996 Third Shooting Range Symposium, that inconsistency turned out to be only part of the problem for IDFG. IDFG had previously told the granting agency, the NRA, and the local citizens, that this range "improvement" (IDFG has adamantly called it an *improvement* not an *expansion* even though it predicted a thousand fold increase in use) would follow the Vargas Master Plan, but when IDFG actually built the improvements, it failed in many aspects to follow the Vargas Master Plan. Thus, because IDFG had told the NRA and the local citizens it would follow the Vargas Master Plan and then did not follow the Vargas Master Plan, IDFG was not honest with either the granting agency, the NRA or the local citizens.

After making those changes which deviated from the Vargas Master Plan, 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 the 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.

C. History Regarding the Motion Sought to be Reconsidered.

This section is also taken entirely from this Court's August 21, 2013, "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", page 7, again, to give the reader context.

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.

II. STANDARD OF REVIEW.

A trial court's decision to grant or deny a motion for reconsideration is reviewed for an abuse of discretion. *Jordan v. Beeks,* 135 Idaho 586, 592, 21 P.3d 908, 914 (2001). A party making a motion for reconsideration is permitted to present new

evidence, but is not required to do so. *Johnson v. Lambros,* 143 Idaho 468, 147 P.3d 100 (Ct.App. 2006). A district court must consider new evidence or authority bearing on the correctness of a summary judgment order if the motion to reconsider is timely filed under I.R.C.P. 11(a)(2)(B). *Kepler-Fleenor v. Fremont County,* 152 Idaho 207, 210-11, 268 P.3d 1159, 1162-63 (2012). When deciding a motion for reconsideration, the district court must apply the same standard of review that it applied when deciding the orginal order being reconsidered. *Fragnella v. Petrovich,* 153 Idaho 266, 276, 281 P. 3d 103, 113 (2012). Since the motion sought to be reconsidered in the present case is plaintiffs' motion for summary judgment, the standard of review under I.R.C.P. 56(c) applies, that summary judgment is appropriate if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.

III. ANAYLYSIS OF THIS COURT'S AUGUST 21, 2013, MEMORANDUM DECISION AND ORDER GRANTING PLAITNIFFS' MOTION FOR SUMMARY JUDGMENT AND GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION FOR SUMMARY DISPOSITION OF DEFENDANTS' MOTION TO PARTIALLY LIFT INJUNCTION.

A. Introduction.

At the time this Court issued its August 21, 2013, 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, it had before it the Affidavit of Lucien Haag, filed by IDFG on July 9, 2013. 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, p. 8. In its Motion for Reconsideration, IDFG claims it has new evidence in the form of Lucien Haag's

deposition. Because IDFG's Motion for Reconsideration is based on this new evidence by IDFG via Haag's deposition, and because IDFG asks this Court to reconsider the definition of Surface Danger Zone (SDZ), it is important the reader must know those pertinent portions of this Court's August 21, 2013, decision.

B. Review of the Motion Sought to be Reconsidered.

The following is this Court's analysis of the pertinent Idaho Supreme Court decision as set forth in the 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:

> **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.

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, pp. 8-13.

The following are the arguments that were made to this Court on CARE's summary judgment motion, as set forth in this Court's decision regarding that motion.

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.

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.

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, pp. 13- 22.

Finally, the following is this Court's analysis based on the above arguments on CARE's summary judgment motion, as set forth in this Court's decision.

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**
>
> *** * ***
>
> 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.

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, pp. 28-38.

C. Analysis of IDFG's Motion to Reconsider.

1. New Evidence Via Haag's Deposition Testimony.

IDFG claims Haag's deposition testimony warrants denial of CARE's motion for summary judgment. Brief in Support of Motion for Reconsideration, pp. 3-8. It needs to be kept in mind that this Court's August 21, 2013, 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 simply granted CARE's motion for summary judgment *at that time* as to whether IDFG had satisfied the safety requirements of the 2007 injunction. This does not

mean CARE has prevailed on the safety issue for all time into the future. Because in opposing CARE's motion for summary judgment on the safety issues, IDFG was attempting to convince the Court that it had complied with the 500 or more shooters per year requirement in this Court's 2007 decision, and because CARE moved for summary judgment claiming IDFG hadn't met the requirements, to which this Court agreed, the net effect of that decision is that *as of this time* IDFG cannot open the range to more than 500 shooters per year. Such ruling did not preclude the possibility of the safety issue at some point in time being addressed in later motions or proceeding to trial. As of August 21, 2013, however, the Court determined that IDFG did not have the evidence to avoid summary judgment that IDFG had not met the safety requirements. That was because at that time, even IDFG's expert, Haag, admitted there was a possibility of bullet escapement. 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, p. 34; citing, Statement of Dispute with Plaintiffs' Statement of Facts, p. 4, ¶¶ 10-11, which in turn, cited the Affidavit of Lucien Haag, pp. 2-3, ¶¶ 8-10. The problem with Haag's affidavit was he did not opine that a bullet could not escape, and complete containment was what was required in this Court's 2007 injunction decision.

Now, IDFG claims: "…Mr. Haag's August 22, 2013 deposition testimony provides new evidence that IDFG's range improvements do in fact result in 'no bullet escapement' from IDFG property." Brief in Support of Motion for Reconsideration, p. 4. IDFG writes: "Mr. Haag testified that it is 'a practical impossibility' from a mathematical and bullet performance standpoint for a ricochet to travel to a distance of three quarters of a mile from the 100-yard shooting area firing line." *Id.,* citing August 22, 2013, deposition of Lucien Haag at p. 41.

The Court has read the entire deposition of Lucien Haag. That reading of Haag's testimony does not change this Court's ruling that IDFG has not presently met the safety requirements. However, with this new testimony of Haag, IDFG has presented a dispute of material fact as to whether a bullet cannot escape the range in the direction that IDFG would like to characterize as "down range". Previously, IDFG had no evidence that a bullet would not escape in the direction it characterizes as "down range", and now it does via Haag's deposition testimony. However, as to the sides of the range, even Haag admits bullets and ricochets can escape out the side of the range as presently constructed, as the range is not fully contained. Lucien Haag, deposition, Tr. p. 118, L. 15 – p. 119, L. 24. Unless IDFG cures that problem, IDFG has not met the safety requirements as it has not built a fully-contained range.

Haag testified in his deposition that a partially contained range has some areas of blue sky. *Id.,* p. 104, L. 19 – p. 105, l. 22. Haag testified that as the range presently exists, you can see blue sky (*Id.,* p. 118, L. 15 – p. 119, L. 24); thus, this range is not fully contained. Haag testified that Clark Vargas' original design for the NRA Range Manual constitutes a fully-contained range. *Id.,* p. 68, L. 11 – p. 69, L. 9; p. 105, Ll. 6-9; Exhibit A13.

It is only in this "down range" direction that Haag expresses the opinion that it is a "practical impossibility" for a ricochet to escape beyond land controlled by IDFG. Haag's testimony presents issues in that he has never visited the site (*Id.,* p. 29, Ll. 6-8), and doesn't feel he needs to (*Id.,* Ll. 9-11), Haag has never heard of Clark Vargas (*Id.,* p. 67, L. 19 – p. 68, L. 6), IDFG's first range designer and preeminent expert in the field, and Haag is not an engineer, has never designed a range for anyone other than himself and does not hold himself out as a range design expert. *Id.,* p. 70, Ll. 5-22. Nonetheless,

since IDFG now has Haag's new opinions, and CARE has testimony that a ricochet can escape that direction and travel beyond land controlled by IDFG, there is now a dispute of fact.

2. IDFG has Confused an Evidentiary Standard with This Court's 2007 Decision.

Next, IDFG argues:

> The August 21, 2013 Order also indicated that Mr. O'Neal's testimony that escapement was 'highly improbable' was insufficient to demonstrate compliance with the requirement for the prevention of bullet escapement. August 21, 2013 Order at 31-32. This determination would hold IDFG to a standard of certainty in proving the prevention of bullet escapement that is inconsistent with the applicable burdens of proof and requirements for sustaining injunctive relief. Absent statutory or other special considerations, issues of fact, in civil cases, 'are to be decided in accordance with the preponderance of evidence and reasonable probability of the truth.' *Boise Street Car Co. v. Van Avery,* 61 Idaho 502, 103 P.2d 1107 (1940). IDFG is not aware of any heightened standard applicable under Idaho law to its burden for demonstrating compliance with the conditions for lifting the injunction. Even if the heightened civil standard of 'clear and convincing' were found to apply, the certainty indicated by the August 31, 2013 Order would be inconsistent with that standard as well.

Brief in Support of Motion for Reconsideration, p. 7. This argument by IDFG is completely without merit. This argument of IDFG intentionally confuses the evidentiary *burden of proof* of any proposition in any civil case, with the very proposition which must be proven in this case with the *standard* set in this case back in 2007 of <u>no bullet escapement</u>. This Court stated in 2007 there could be no bullet escapement for IDFG to exceed 500 shooters per 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). The party with the burden of proof on a proposition must prove to the trier of fact that the proposition is more probably true than not true. IDJI 1.20.1. In this case, the *proposition* that must be proven, based on the standard articulated in 2007 (from which no appeal was taken), is *no bullet escapement*. At trial, IDFG would have the burden of proving the proposition that IDFG has met the *standard* of no bullet escapement, and that burden of proof of that proposition of no bullet escapement would be by a preponderance of the evidence. Thus, if IDFG's expert were to testify that on a more likely than not basis that a bullet cannot escape IDFG's land, then IDFG has evidence that it has met the standard imposed in 2007. However, all Haag has done at this point is testify (presumably more probable than not basis, although that was never gone into in his deposition) that the likelihood of a bullet escaping IDFG-controlled land is "a practical impossibility", without defining that term. Haag has not testified as to no bullet escapement.

3. IDFG's Argument as to Injunctive Relief Standard is Unavailing.

Similar to the above argument where IDFG intentionally confuses burden of proof with this Court's 2007 standard of no bullet escapement, but with a slightly different approach, IDFG makes the following argument:

> The standard for demonstrating compliance indicated in the August 21, 2013 Order is also inconsistent with the standards related to injunctive relief. The Idaho Supreme Court has held that "[i]n order to obtain an injunction against, or the abatement of, an alleged nuisance, the complaining party must show a clear case supporting his right to relief" and "[a] showing that there is a possibility of injury will not sustain the injunctive relief sought." *Larsen v. Village of Lava Hot Springs,* 88 Idaho 64, 73, 396

> P. 2d 471 (1964) (citations omitted); *see also Boise Development Co. v. Idaho Trust & Savings Bank,* 24 Idaho 36, 133 P. 916 (1913) ("[a]n injunction cannot be granted to allay the fears and apprehensions the respondents have as to what may occur in the future….The injury must be material and actual and not fanciful, theoretical, or merely possible"). If there mere possibility of injury cannot sustain the granting of an injunction, the mere possibility of an event, particularly where it is not linked to injury, cannot be sufficient to prevent the lifting of an injunction.

Brief in Support of Motion for Reconsideration, pp. 7-8. This Court is not persuaded by this argument. This Court is persuaded by CARE's response:

> The cases upon which the defendants rely in addressing the burdens of proof relates to injunctions, Boise Street Car Co. v. Van Avery, 61 Idaho 502, 103 P.2d 1107 (1940); *Larsen v. Village of Lava Hot Springs,* 88 Idaho 64, 396 P. 2d 471 (1964) and *Boise Development Co. v. Idaho Trust & Savings Bank,* 24 Idaho 36, 133 P. 916 (1913), all relate to the issuance of an injunction, not the enforcement of an injunction firmly in place. These cases are simply inapposite.

Reply Brief on Motion for Reconsideration, p. 2. The Court agrees, those cases are inapposite. This is especially true when one considers the fact that IDFG now seeks relief from an injunction which has been in place for six years, regarding a proposal to increase shooters from 500 over the course of a year to over a half million shooters a year, when IDFG has repeatedly chosen to disregard its own experts in the construction of the improvements on that range.

4. Technical Compliance With I.R.C.P. 11(a)(2)(B).

Idaho Rule of Civil Procedure11(a)(2)(B) allows for reconsideration on the presentation of new "facts." IDFG claims it has presented "new evidence" via the Haag deposition. Reply Memorandum in Support of Motion for Reconsideration, p. 3, n. 2. CARE argues Haag does not present any "new facts", but only "new opinions." To support this argument, CARE cites *Coeur d'Alene Mining Co. v. First National Bank of Idaho,* 118 Idaho 812, 800 P.2d 1026 (1990). Reply Brief on Motion for Reconsideration, p. 7.

> On a motion for reconsideration of the specification of facts deemed established pursuant to I.R.C.P. 56(d), the trial court should reconsider those facts in light of any new or additional facts that are submitted in support of the motion. This view of the effect of I.R.C.P. 11(a)(2)(B) is consistent with the discussion of reconsideration in *J.I. Case Company v. McDonald,* 76 Idaho 223, 280 P.2d 1070 (1955). There, this Court said:
>
> > A rehearing or reconsideration in the trial court usually involves new or additional facts, and a more comprehensive presentation of both law and fact. Indeed, the chief virtue of a reconsideration is to obtain a full and complete presentation of all available facts, so that the truth may be ascertained, and justice done, as nearly as may be.
>
> *Id.* at 229, 280 P.2d at 1073.

118 Idaho 812, 823, 800 P.2d 1026, 1037. Thus, CARE is correct the Idaho Supreme Court wants new or additional facts to support a motion for reconsideration. This Court agrees with CARE that Haag does not present new facts, but only new opinions. However, if the trier of fact were to believe Haag's opinion, that would be evidence to support the "fact" that a bullet cannot escape the IDFG property. Prior to this new evidence, IDFG did not have that evidence. While CARE's argument is a correct reading of *Coeur d'Alene Mining Co.,* the argument that because Haag provides no new fact is a reason this Court should not exercise its discretion to hear IDFG's motion to reconsider is not persuasive.

5. Reconsideration of the Definition of Surface Danger Zone (SDZ).

IDFG argues at length (Brief in Support of Motion for Reconsideration, pp. 8-12) that "A review of the record evidence supports IDFG's contention that the appropriate parameter for evaluating the prevention of bullet escapement, and thus application of the 'No Blue Sky rule,' is the Surface Danger Zone are of 10 degrees to the right and left of the perpendiculars between the firing line and the target line." *Id.,* p. 12. This argument is entirely without merit. As set forth above, and has been set forth time and time again in this litigation, this Court stated in 2007 there could be no bullet escapement for IDFG to

exceed 500 shooters per year. It is that simple. "No bullet escapement" means what it says, "no bullet escapement." When the Court wrote those words in the Court's decision, "no bullet escapement" had nothing to do with whether the SDZ is 10 degrees each side of a centerline or 40 degrees each side of a centerline, as this Court held:

> **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). IDFG's own experts were not discussing the SDZ with IDFG when discussing the issue of bullet containment with IDFG. As this Court wrote in its August 31, 2013, decision:

> 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.

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, p. 18.

D. Conclusion.

At the end of its February 23, 2007, Memorandum Decision, Findings of Fact, Conclusions of Law, and Order, this Court encouraged the parties to get together and agree as to noise levels and shooter numbers in advance of any construction by IDFG. February 23, 2007, Memorandum Decision, Findings of Fact, Conclusions of Law, and Order, p. 68. Near the end of this Court's March 10, 2011, decision, this Court again implored the parties to get together to agree as to how to proceed with more than 500 shooters per year. March 10, 2011, Memorandum Decision and Order on Motions to Strike, Defendant's Motion for View, Defendant's Motion for Partial Lifting of Injunction and Plaintiff's Motion for Summary Judgment, p. 75. After the Court trial, this court wrote:

> 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.

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), p. 38. The Court has at all times encouraged a mediated agreement. On October 8, 2013, CARE moved for an order of mediation pursuant to I.R.C.P. 16(k)(4)(A). On October 25, 2013, IDFG responded that they did not oppose the motion for mediation, and on November 4, 2013, this Court entered an Order for Mediation. The parties have since informed the Court that mediation will occur December 5, 2013. This case cries out for a mediated resolution.

IDFG has at all times had at its disposal plans to build a fully baffled, fully contained open air range. IDFG, for whatever reason, chose not to follow the plans

drafted by its own expert Clark Vargas, which would have resulted in the construction of a fully-contained range. IDFG's current expert, Lucien Haag testified that Clark Vargas' original design for the NRA Range Manual constitutes a fully-contained range. Lucien Haag Deposition, Tr., p. 68, L. 11 – p. 69, L. 9; p. 105, Ll. 6-9; Exhibit A13. A review of that exhibit to which Haag was referring, A13, is Vargas' design. It shows "venetian baffles" being used. Instead of installing venetian baffles (overhead baffles that are installed at an angle with the top of the overhead baffle slightly closer to the shooter than the bottom of the baffle), IDFG chose to install flat baffles perpendicular to the shooter. Even Haag, IDFG's current expert, testified venetian baffles would absorb ricochets. *Id.,* p. 70, Ll. 1-4. This Court can conceive of no additional cost that could be incurred in mounting the baffles at an angle (as designed by Vargas), versus perpendicular which is what IDFG built. This Court is simply unable to understand why IDFG has disregarded its own experts' advice, and has done so on multiple occasions, and instead has chosen to rely on protracted legal arguments over the meaning of specific words such as "or", specific phrases such as "downrange" and SDZ, all to try to dance around the established criteria set six years ago by this Court of "no bullet escapement." Had IDFG followed the advice of its own expert Clark Vargas, this range would have opened years ago with no need to resort to this protracted litigation. Should mediation not be successful, this matter will be scheduled for a court trial on the remaining safety issues.

IV. CONCLUSION AND ORDER.

For the reasons stated above, because IDFG has now placed some evidence that a bullet might not escape land it owns or controls, plaintiff CARE's Motion for Summary Judgment as to IDFG's non-compliance with safety issues must be denied as there is now an issue of material fact.

IT IS HEREBY ORDERED as a result of defendant IDFG's Motion to Reconsider, plaintiff CARE's Motion for Summary Judgment as to IDFG's non-compliance with safety issues is DENIED. To this extent only, defendant IDFG's Motion to Reconsider is GRANTED. As a result, a trial will be held on the safety issues. All other aspects of defendant IDFG's Motion to Reconsider are DENIED.

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

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

IT IS FURTHER ORDERED a Court trial on the safety issues of the range is scheduled to begin March 17, 2014, at 9:00 a.m.

Entered this 2nd day of December, 2013.

_____
John T. Mitchell, District Judge

Certificate of Service

I certify that on the _____ day of December, 2013, 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 #**
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_____
Jeanne Clausen, Deputy Clerk