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County of KOOTENAI)ss

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Deputy

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE

STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI

CITIZENS AGAINST RANGE EXPANSION, et al, *Plaintiffs*, vs. **IDAHO FISH AND GAME DEPARTMENT, an agency of the STATE OF IDAHO, et al.** *Defendants*.	Case No. **CV 2005 6253** **MEMORANDUM DECISION, FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER**

MEMORANDUM DECISION

This Memorandum Decision provides procedural and factual background, and discusses jurisdiction and nuisance law in depth. The Court's Findings of Fact and Conclusions of Law and Order follow the Memorandum Decision.

I. PROCEDURAL BACKGROUND.

On August 22, 2005, plaintiffs Citizens Against Range Expansion (CARE) filed their Complaint in this matter. Defendants Idaho Department of Fish and Game (IDF&G)[1] filed

[1] The caption of the case reads Idaho Fish and Game Department, but all exhibits indicate "Idaho

an Answer on September 16, 2005. On November 9, 2005, this Court set the matter for a five-day jury trial scheduled to begin on July 17, 2006. On February 9, 2006, plaintiffs filed an Amended Complaint. On March 13, 2006, pursuant to the parties' stipulation this Court vacated the July 17, 2006, trial and scheduled this for a jury trial beginning September 18, 2006. Following a hearing on June 2, 2006, this Court granted plaintiffs' motion to vacate the trial date of September 18, 2006, and scheduled this matter for jury trial beginning December 11, 2006.

On July 26, 2006, plaintiffs filed a Motion for Summary Judgment upon their first and second causes of action in the Amended Complaint as follows:

> 1. For a permanent injunction prohibiting defendant Idaho Fish and Game Department, its agents and employees from operating or allowing anyone to use the existing Farragut Shooting Range as a shooting range in its present condition.
> 2. For a permanent injunction prohibiting defendant Idaho Fish and Game Department, its agents and employees from any further action to implement or carry out the Vargas Master Plan and Definitive Drawings, Farragut Shooting Range, July 2004.

Motion for Summary Judgment, p. 2. The Motion for Summary Judgment was supported by "Brief of Plaintiffs in Support of Plaintiffs' Motion for Summary Judgment", "Plaintiffs' Statement of Material Facts Not in Dispute", "Plaintiffs' Appendix of Relevant Publications in Support of Motion for Summary Judgment", and the Affidavits of Marcelle Richman, Duane Nightingale and Roy H. Ruel. On August 30, 2006, defendants filed "Defendants' Memorandum in Opposition to Plaintiffs' Motion for Summary Judgment", "Defendants' Statement of Material Facts in Dispute", "Defendants' Appendix of Relevant Documents" and affidavits of Clark Vargas, P.E., Randall Butt and David Leptich. On September 5,

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Department of Fish and Game" is more accurate.

2006, plaintiffs filed "Plaintiffs' Reply Brief in Support of Motion for Summary Judgment" and various certifications of documents. On September 7, 2006, plaintiffs re-filed "Plaintiffs' Reply Brief in Support of Motion for Summary Judgment", this time attaching a "Comparison Vargas Affidavit With Vargas Design Criteria".

Oral argument was held on September 13, 2006, on the Plaintiffs' Motion for Summary Judgment. That motion was taken under advisement. On September 19, 2006, this Court entered its Memorandum Decision and Order Denying Plaintiffs' Motion for Summary Judgment. In that order, the Court ordered the parties to submit simultaneous briefing on the applicable standards the parties urged this case be decided upon, briefing on what issues were appropriate for the jury to decide, and what issues were left for the Court to decide. In Plaintiffs' Initial Reasponse to Memorandum Decision and Order filed October 2, 2006, plaintiffs noted they had waived their claim for damages and stated a jury was not needed. Initial Response to Memorandum Decision and Order, p. 15. Defendants agreed in Defendants' Brief on Applicable Standards filed October 2, 2006, p. 6. This matter was tried before this Court on December 11, 12, 13 and 14, 2006. Pursuant to Court order, proposed revised findings of facts and conclusions of law were filed by the parties on December 21, 2006. The matter is now at issue. With the permission of the parties, on February 18, 2007, the Court took a view of the range and area surrounding perimeter road.

II. FACTUAL BACKGROUND.

The Farragut Wildlife Management Area was formerly the site of the Farragut

Naval Training Center established by the United States Navy in 1942. Defendant Idaho Department of Fish and Game (IDF&G) began land acquisition in 1949 when four separate parcels were purchased that bordered Lake Pend Oreille. Idaho Fish and Game'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 significantly 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. Plaintiffs' Exhibit 26. Testimony of Jeanne Hom.

A public proposal by IDF&G for the improvement of the Farragut Shooting Range seems to be what precipitated this lawsuit. In 2004, the IDF&G 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. Plaintiffs claim 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.

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. The Vargas Master Plan is inconsistent with the range design criteria Vargas discussed in his 1996 Third Shooting Range Symposium.

Plaintiff CARE is an unincorporated non-profit association formed for the purpose of unwarranted expansion of the Farragut Shooting Range. Complaint, p. 2, ¶ 1. The individual plaintiffs are people who live near the Farragut Shooting Range. Plaintiffs claim the expansions set forth in the Vargas Master Plan cannot be done safely because the IDF&G does not own enough property nor have enough money to make the improvements safe. Plaintiffs seek to enjoin IDF&G from carrying out the Vargas Master Plan. Idaho Fish and Game 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. Defendants' Memorandum in Opposition to Summary Judgment, p. 3. Defendant's Answers to Plaintiffs' Interrogatory No. 8.

Plaintiffs seek to permanently enjoin the IDF&G from continued operation of the range and future implementation of the Vargas Master Plan. Plaintiffs' Post Trial Proposed Findings of Fact and Conclusions of Law, p. 17, ¶¶ 7, 9. Specifically, plaintiffs ask this Court in their first cause of action for a permanent injunction that requires IDF&G to restore and close the outer access gate, prohibit any other or different access road to the range and restore the operational policy that existed in July 2003. Amended

Complaint, p. 16, ¶ 54. Plaintiffs' second cause of action asks the Court for a permanent injunction against any expansion to the shooting range and to restore it to its July 2003 level of operation. Amended Complaint, p. 17, ¶ 58. Plaintiffs assert that bullet escapement (Plaintiffs' Post Trial Proposed Findings of Fact and Conclusions of Law, p. 17, ¶ 6) and noise (*Id.* p. 16, ¶ 5) constitute a nuisance. Idaho Department of Fish and Game claims the shooting range as currently constructed and operated has not undergone a substantial change in use within the meaning of Idaho Code § 55-2602. Defendants' Revised Findings of Fact and Conclusions of Law, p. 8, Conclusions of Law ¶ 2.

III. JURISDICTION AND NUISANCE LAW.

The Idaho Appellate Courts have yet to directly address the issue of whether a court has jurisiction to fashion a remedy (something other than simply granting or refusing all injunctive relief sought) in a suit brought for injunctive relief on the theory of nuisance. The Idaho Supreme Court has held that the granting or refusing of injunctive relief rests in the sound discretion of the court and the exercise of such discretion will not be reversed on appeal absent a clear abuse of discretion. *Unity Light & Power Co., v. City of Burley*, 83 Idaho 285, 290, 361 P.2d 788, 793 (1961). This discretionary power should be excercised with great caution upon a full hearing. *Lawrence Warehouse Co., v. Rudio Lumber Co.,* 89 Idaho 389, 395, 405 P.2d 634, 640 (1965).

Courts outside Idaho have further elaborated, holding that the granting of an injunction is within the sound discretion of the trial court to be exercised according to the

circumstances of each case. *Alderwood Assocs., v. Washington Envtl. Councli*, 96 Wn.2d 230, 233, 635 P.2d 108, 111 (Wash. 1981); see also *Five Oaks Corp. v. Gathmann*, 190 Md. 348, 58 A.2d 656 (Md. Ct.App. 1948) (holding that actions in which the abatement of a nuisance is sought, the relief to be awarded rests, as in other cases involving injunctive relief, largely in the discretion of the court). While the court in the exercise of its discretion with respect to the grant or denial of injunctive relief is not controlled by technical legal rules, the power is not an arbitrary and unlimited one, nor does it constitute the mere whimisical will of the court, but rather it is the exercise of a sound judicial discretion. 42 Am.Jur.2d Injunctions § 25, 26.

For purposes of granting or denying injunctive relief, the standard for evaluating the exercise of judicial discretion is whether it is based on untenable grounds, or is manifestly unreasonable, or is arbitrary. *Washington Federation of State Employees, Council 28, AFI-CIO v. State*, 99 Wn. 2d 878, 887, 665 P.2d 1337, 1343 (Wash. 1983). The court may not interfere with a defendant's use and enjoyment of his property any further than is necessary to give the plaintiff the protection from which he is entitled. CJS Nuisances §119; *Seabaord Rendering Co., v. Conlon*, 152 Fla. 723, 724, 12 So. 2d 882, 883 (Fla. 1943). Idaho Rule of Civil Procedure 65(d) sets forth the scope of the injunction, stating in part "every order granting an injunction …shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained."

The Idaho Supreme Court in *Lawrence Warehouse Co. v. Rudio Lumber Co.,* 89 Idaho 389, 395, 405 P.2d 634 (1965) indicated there should be a hearing where the

injunction “encompasses the entire controversy between the parties.” Any injunction in this case could encompass the “entire” controversy, or nearly the entire controversy. Justice Thomas in *Mountain States Tel. & Tel Co. v. Jones,* 75 Idaho 78, 267 P.2d 634 (1954), wrote:

> The discretionary power vested in the court to grant injunctive relief in such cases is not an arbitrary one; it is a sound and legal discretion which should be exercised with great caution; the requirements of caution and sound legal discretion can only be had upon a full hearing; it is indeed a delicate power which requires an abundance of caution, deliberation and sound discretion based upon a full disclosure of the facts which demonstrate with reasonable certainty and persuasiveness the probability of confiscation; it cannot be exercised soundly or with caution without hearing all the relevant facts on the issues joined with reference to the probability of confiscation.

75 Idaho at 86, 267 P.2d at 638. Also cited in *Lawrence Warehouse Co. v. Rudio Lumber Co.,* 89 Idaho at 395, 405 P.2d at 640. In the present case there has been an evidentiary hearing.

In *Jones v. Kelley Trust Co*., 179 Ark. 857, 18 S.W.2d 356 (Ark. 1929) appellants sought a permanent injunction against the operation of a quarry and rock crusher, arguing noise and the throwing of stone constituted a nuisance against the quiet enjoyment of their homes. Although the appellants sought a permanent injunction preventing the operation of the quarry and rock crusher entirely, the Arkansas Supreme Court upheld the decision of the chancery court to allow operation of the quarry and rock crusher under certain conditions and limited hours. 18 S.W.2d at 359. The Court held the chancellor had the authority to fashion a remedy that would allow the appellee reasonable use of his quarry and rock crusher while protecting the appellants and their families from falling stone and noise pollution. The Court reasoned the chancellor’s

decision left the appellees with the option to comply with the terms of the decree or be permanently enjoined from operating.

Language found in cases from Idaho and several other jurisdictions allow the court, in its discretion, to grant injunctive relief that would give the defendant the most reasonable use of his property while still affording plaintiffs a remedy against nuisance. The court therefore has the authority to “fashion a remedy” based upon the circumstances of each individual case. So long as the court does not abuse its discretion or fashion a remedy outside the scope necessary to secure the relief sought, the court has judicial discretion to grant or deny injunctive relief that is not manifestly unreasonable.

None of the plaintiffs who have residences down range from the rifle range resided there before the range was created in 1950. Thus, in that sense, each of the plaintiffs have “come to the nuisance”. "Coming to the nuisance" is the notion that if you move to the nuisance after the nuisance already exists, you cannot be heard to complain of the nuisance since you knew what you were getting into. “Coming to the nuisance does not apply unless plaintiffs had actual or constructive knowledge of the objectionable activity before they acquired their property.” *Marks v. State ex rel Department of Fish and Wildlife,* 191 Or.App. 563, 575, 84 P.3d 155, 163 (Or.App. 2004); *citing St. Johns Shingle Co. et al. v. Portland,* 195 Or. 505, 527, 246 P.2d 554 (1952). In this case, each of the plaintiffs who testified stated they did not know that there was a gun range nearby *before* they purchased. While that testimony at first glance may seem incredible, it is consistent given the limited use of the range at the

times when the various plaintiffs purchased their property. Whether the buyer visited the property one time or ten times before purchasing, it is quite likely they heard no shooting, given the fact that in 2002 and before the range was used by an average of less than one shooter per day. Further, a view by the Court of the range and the surrounding area shows the range itself is not visible from Perimeter Road. Dorothy Eldridge began living near the range in 1994. She testified she found out about the range about a year after she purchased when someone told her about the range. Jeanne Hom moved near the range in 1997. She testified she heard occasional gunfire after she moved in but assumed it was from a neighbor. She discovered the range when riding a bike in the area, and she testified that when she rode near the range it was never in use. Marcelle Richman testified she moved near the range in the early 1980's and found out about the range about a year later while riding her horse. She testified only occasionally would she hear rifle shots in the 1980's and 1990's. Each witness became aware of the gun range after they had lived there a while. "'Coming to the nuisance' is not an absolute and preclusive doctrine; rather, it is simply one of a variety of material considerations in determining the existence of a nuisance and the proper remedy, if any." *Marks v. State ex rel Department of Fish and Wildlife,* 191 Or.App. 563, 575, 84 P.3d 155, 163 (Or.App. 2004).

In 1996, the Idaho Legislature added a provision that codifies the doctrine of "coming to the nuisance" for "sport shooting ranges." Idaho Code § 55-2601 *et. seq.* Specifically, Idaho Code § 55-2602(1) reads: "Except as provided in this section, a person may not maintain a nuisance action for noise against a shooting range located in

the vicinity of that person's property if the shooting range was established as of the date the person acquired the property." There is no dispute that all individual plaintiffs fall under that category. That section continues: "If there is a substantial change in use of the range after the person acquires the property, the person may maintain a nuisance action if the action is brought within three (3) years from the beginning of the substantial change."

The corollary to "coming to the nuisance" is when an existing activity significantly increases in size, and in so doing, becomes a nuisance. By all appearances, the rifle range was not bothersome to area residents from 1950 to 2002, and only became bothersome when use of the range increased significantly in 2002. From 1950 to 2002, various people built homes down range from the rifle range. While they might not have known there was a range, it really did not matter because there in fact was a range, and they lived with that range. It was only when the use of that range significantly expanded in 2002, with easier access and published plans to increase the usage of the range manifold, that the range became bothersome to area residents.

Five Oaks Corp. v. Gathmann, 190 Md. 348, 58 A.2d 656 (Md. Ct.App. 1948) illustrates such a progression may become a nuisance which may be subject to an injunction. Although *Five Oaks* was decided sixty years ago, it has consistently been cited with approval. "The power of a court to enjoin a party from using his own property to interfere with the rights of others 'is not only a well established jurisdiction of the Court of Chancery, but is one of great utility, and one which is constantly exercised.'" *Becker v. State,* 363 Md. 77, 87, 767 A.2d 816, 821 (Md. 2001), *citing Five Oaks.* In

Five Oaks, a corporation bought what had been a public swimming pool and a restaurant. The corporation added lights which shone into neighboring residences and kept the restaurant open 24 hours a day, with concomitant traffic, horns blaring, music and loud conversation. After eight days of testimony the trial court noted "…its present operation is a great change from the manner in which it was previously conducted". 190 Md. at 356, 58 A.2d at 660. The trial court prohibited defendant from causing or permitting noises and sounds to be transmitted to plaintiffs' property to the extent such noises and sounds interfered with the reasonable and comfortable enjoyment of their properties, and set out four specific methods by which this was to be done. 190 Md. at 357-58, 58 A.2d at 661. The Maryland Court of Appeals upheld two of those methods, one prohibiting curbside or car-side service after midnight (requiring customers be served inside after midnight), and one changing the aim and brightness of lights. The Court of Appeals found unreasonable the requirement that after midnight no music be played on the premises (because it could be played inside without disturbance) and the requirement that the restaurant be closed from 2 a.m. to 7 a.m. (because the business owner should be able to figure out a way to keep it open all night without disturbing the landowners). The Maryland Court of Appeals then went on to discuss two issues that pertain to the case before this Court: *specificity* in what is being prohibited, and *continuing jurisdiction*:

> The Supreme Court of the United States, in a lengthy and important case, concerning the operation of a copper smelting plant, determined that escaping sulphur produced the harmful results, and passed a decree which provided for the keeping of records and for inspection of the plant, so as to determine just how far the final prohibition should go. *State of Georgia v. Tennessee Copper Co.,* 237 U.S. 474, 35 S.Ct. 631, 59 L.Ed.

> 1054. That case was retained for further action with a right to either party to apply later for appropriate relief. It was in the nature of an experimental decree, justifiable on the assumption that on the one hand specific relief might be burdensome and unnecessary and on the other hand that any specific prohibition laid down by the Court might not produce the result desired. That case was of such magnitude, involving such an extensive operation, that the facts are in no sense comparable to the facts in the case before us. Nevertheless, it is applicable in this respect, that it shows the advisability of not being too explicit in the prohibition first decreed. In harmony with this point of view, we think that in a nuisance case such as the one before us general decrees should be passed with only such specific prohibitions as appear to provide the only remedies. In other respects, the offending party should be allowed to take such measures as in its opinion will reach the desired result. If these measures are not adequate or sufficient, further application can be made to the court, as in the Washington Cleaners case, supra, appropriate action can be taken, and the decree made more specific where it appears to be necessary. And while we do not assume that the decree will not be obeyed, and that the appellant will not do all in its power to abate the nuisance caused by the noisy operation of its business inside the restaurant after midnight, it is not, we think, out of place to remind it that courts have wide powers in dealing with those who do not obey their decrees. We note this because in modifying the decree we do not wish to be understood as justifying any of the conditions or of placing the appellees in a position where they will have to try this case over again, in case appellant does not remedy the conditions complained of and found to exist.

190 Md. at 361, 58 A.2d at 662.

This Court also finds this case is "ripe" for adjudication. While neither side has discussed this issue, the fact that IDF&G's Vargas Plan has yet to be implemented raises the issue. Ripeness concerns the timing of a suit and asks whether a case is brought too early. *United Investors Life Insurance Co. v. Larry Severson and Carolyn L. Diaz,* 2007 Opinion No. 2, 07.2 ISCR 15, 16 (January 16, 2007), *citing State v. Manley,* 142 Idaho 338, 342, 127 P.3d 954, 958 (2005). "The purpose of the ripeness requirement is to prevent courts from entangling themselves in purely abstract disagreements. Under the ripeness test in Idaho, a party must show (1) the case

presents definite and concrete issues; (2) a real and substantial controversy exists (as opposed to hypothetical facts); and (3) there is a present need for adjudication." *Id.* This case presents definite concrete issues as to whether a nuisance has been proven, and if so, at what level is it a nuisance and what standards should be used to abate that nuisance. While this case concerns a "Vargas Plan" that has yet to be implemented, that Vargas Plan was used to obtain funds which will be used by IDF&G to implement that Vargas Plan. As a result of improvements made possible by the expenditure of those funds, IDF&G has told the source of those funds that the IDF&G expects an incredibly large increase in the use of this range. Due to recent minor improvements in access to the range, there has been a substantial increase in use between 2002 and the filing of this lawsuit on August 22, 2005. Because of the present substantial change in use and proposed future substantial changes in use, the case is ripe for adjudication.

FINDINGS OF FACT

1. Plaintiff Citizens Against Range Expansion (CARE) is an unincorporated non-profit association formed under Idaho Code §§ 53-5701 et. seq. representing persons who reside upon private property and members of the public who use and recreate on the Farragut State Park in close proximity to the Farragut Shooting Range.

2. Plaintiffs Jeanne J. Hom, Eugene and Kathleen Riley, Lambert and Denise Riley, Gabrielle Groth-Marnat, Gerald Price, Ronald and Dorothy Eldridge, Glenn and Lucy Chapin, Sheryl Puckett, Charles Murray and Cynthia Murray and Dave Vig all reside upon and own real property in close proximity to the Farragut Shooting Range.

Clark Vargas, the engineer who developed the Vargas Master Plan, testified there are between eighteen and twenty residences within 1000 feet of the range and a road (Perimeter Road) within 600 feet of the range.

3. Defendant Idaho Department of Fish and Game (IDF&G) is a governmental subdivision and agency of the State of Idaho which owns and operates the Farragut Shooting Range located on the Farragut Wildlife Management Area (GSA No. 10-N-ID-005) adjacent to Farragut State Park.

4. Defendant Steven M. Huffaker is the Director of IDF&G.

5. The Farragut Shooting Range was established by the United States Naval Training and Distribution Center and was used by the United States Navy from 1942 until 1946 when the Naval Training Center was closed. The Farragut Shooting Range occupies a site of approximately 160 acres.

6. On June 8, 1950, the United States, through the General Services Administration, executed a deed of all of the property of the Naval Training and Distribution Center to defendant IDF&G for the express and restricted purpose to manage the property for ". . . the management for the conservation of wildlife, other than migratory birds. . ."

7. On July 28, 1964, IDF&G deeded the larger portion of said land back to the United States which in turn on December 30, 1965, deeded the same property to the State of Idaho for ". . .the continuous use and maintenance of the hereafter described premises as and for public park and public recreational area purposes." Said

described property was thereafter placed by the State of Idaho into the jurisdiction and control of the Idaho Department of Parks and Recreation as Farragut State Park.

8. IDF&G retained certain of the lands originally granted including the shooting range and surrounding contiguous area.

9. The property owned and controlled by IDF&G extends approximately three quarters of a mile from the shooting lines. Exhibit 16, p. 10. The property beyond that owned and controlled by IDF&G is owned by either private individuals or the Idaho Department of Parks and Recreation and is not available for the IDF&G to acquire.

10. From 1950 through the year 2002, there is no evidence that the use of the range was anything other than occasional and sporadic. The resident to testify with the most years of residence was Marcelle Richman. Marcelle Richman testified she moved near the range in the early 1980's and found out about the range about a year later while riding her horse. She testified only occasionally would she hear rifle shots in the 1980's and 1990's. Farragut Park Manager Randall Butt testified there are no records of the number of shooters before 2002. Plaintiffs presented uncontradicted evidence that prior to 2002, the use of the range was at best occasional and sporadic, with less than two to three hundred shooters a year. Prior to 2002 the number of shooters were small and not of concern to the neighbors. The Court specifically finds IDF&G's claim that "Since 1950, there has been regular and substantial use of the range by both individuals and organized groups" (Defendants' Revised Findings of Fact and Conclusions of Law, p. 2, ¶ 2), to be completely unsupported by the record. IDF&G put on no evidence to support that claim.

11. Other than the 600-yard portion of the range being established in 1957 (Defendants' Exhibit RR), in the time period since acquisition in 1950 until 2003 the Farragut Shooting Range was relatively unchanged and lacked power, water, fencing, road access and parking.

12. Roads internal to the park provide access to the shooting range. Prior to 2003 individual users were required to park at an outer gate and walk approximately one-half mile to the range area. Apparently, the long walk had the effect of discouraging many potential users.

13. The IDF&G has a Memorandum of Understanding (MOU) with the Idaho Department of Parks and Recreation (IDPR). This MOU provides that IDPR provides daily management oversight of the Farragut Shooting Range. This includes controlling public access, communication of range user expectations and range rules, and enforcement of the rules. Defendants' Exhibit W. Randall Butt testified that they open the range every morning and close the range every night, but anyone can go through the gate and shoot at the range by walking in. Randall Butt testified they use "unscheduled visits" to monitor the range because "we can't be at all places at all times." According to David Leptich, IDF&G manager for IDF&G property inside Farragut State Park, the park comprises some 4,000 acres. Randall Butt testified no records are kept as to how often park rangers visit the range. He testified there are days where there are no visits by park rangers. Randall Butt testified that up to 2006 the primary reason for any park ranger to visit the range was for parking fee compliance, not to

monitor activity at the range. David Leptich testified that when he is present at the range, very little time is spent monitoring the firing line.

14. In 2003, IDF&G used federal money and grants and funds from logging for the development of the Vargas Master Plan, safety fence construction, bringing power to the new building site, redeveloping the access road off of Perimeter Road, bringing water and power to the site, putting in entrance lighting and a sign at Perimeter Road. The development of the access road allowed opening the gate one-half mile from Perimeter Road and allowed parking at the range constituting, in effect, a new access road. Plaintiffs' Exhibit 29. Users may now drive this distance to the range during normal hours of operation. The shooting range hours of operation are from 8:00 a.m. to 6:30 p.m. or one-half hour before sunset. Plaintiffs' Exhibit 27.

15. The improved access allowing driving to the site and the attendant promotional publicity by IDF&G has resulted in a substantial change in the use of the Farragut Shooting Range. On March 7, 2005, Chip Corsi, IDF&G Regional Supervisor for the Panhandle Region, stated in a guest column to a local paper: "Over the past three years, use of the range has increased 160 percent." Exhibit 37. Randall Butt, Park Manager for Idaho Department of Parks and Recreation, testified at trial that the use of the range has increased "significantly" for individual users.

16. The Farragut State Park shooter sign-up sheets produced by IDF&G for the years 2002 through September 30, 2006, show the following totals which include counting numbers within groups: 182 shooters for 2002, 427 shooters for 2004, 1,181 shooters for 2005 and 1,413 shooters to September 30, 2006. Plaintiffs' Exhibit 26.

Testimony of Jeanne Hom.

17. The concomitant percentage increase from 2002 to 2004 was 234% and from 2002 through 2004, 649%. The IDPR sign-in and group registration records are incomplete, and range use in 2002, 2003 and 2004 cannot be reconstructed with certainty. However, the incomplete records give a close indication of usage, and the increase shown in the records is consistent with the testimony of residents in the area regarding increased usage. Sign-in protocol was changed between 2005 and 2006, but comparison between those years is still appropriate. While the range was closed on an intermittent basis at times to accommodate logging, road reconstruction, and fence building, making the range not fully available to the public in 2005, IDF&G did not prove what dates the range was not available to public use.

18. All of these figures and estimates constitute a "substantial change" in use between 2002 and the filing of this lawsuit on August 22, 2005.

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.

21. Each of plaintiffs named in the complaint and identified as property owners were owners of record prior to 2002.

22. The Farragut Shooting Range is located in an area zoned "rural" by Kootenai County. The Kootenai County regulatory safety standard applicable to the Farragut Shooting Range is Kootenai County Zoning Ordinance No. 375, Article 33, Section 33.02, entitled: "Gun Clubs, Rifle Ranges, Archery Ranges." Defendants' Exhibit R, p. 110. That ordinance states in part that such activities may be located in "rural" areas, must be located on a minimum of ten acres, and that the target areas shall be six hundred feet from any existing dwelling and three hundred feet from any property. The existing range meets those requirements. The ordinance continues: "All facilities shall be designed and located with full consideration to the safety factors involved in such a use." The Court finds the range as it presently exists, and as planned in the Vargas Master Plan, fails this requirement. There is not a single overhead baffle at present, and none upon the Court's review of the Vargas Master

Plan. Even a solitary overhead baffle located just in front and above all firing stations will drastically lower the chance of a bullet escaping the range.

23. Individual plaintiffs testified that the increased use of the Farragut Shooting Range that began in 2002 (three years prior to the filing of this lawsuit), has created on a regular and continuing basis, gunfire noise that is intrusive, highly annoying, and disturbing.

24. Tests relating to noise from gunfire at the Farragut Shooting Range were conducted and expert witnesses testified as to noise measurements.

25. For the plaintiffs, expert witness Duane Nightingale made his measurements of gunfire noise on private properties which fell within the range of 80.7 to 50.2 dBA. Plaintiffs' Exhibit 16, Table 3 &4, pp. 13-16. Scientific studies of gunfire show that at a level of 80 dBA, 40% of human beings are highly annoyed by the noise (Sorensen and Magnusson, 1979). Plaintiffs' Exhibit 16, Table 7, pp. 16-17. Nightingale is an acoustical engineer with expertise and experience in hydro acoustics. While Nightingale's Farragut Shooting Range Noise Study was the first shooting range noise evaluation and first outdoor environmental noise study he had conducted (Plaintiffs' Exhibit 16, 25), his credentials are more than sufficient for the Court to recognize him as an expert.

26. Defendants' expert is Scott Hansen. Hansen is an acoustical engineer who specializes in shooting range evaluation. Defendants' Exhibit CCC. Hansen testified as to the various "modes" equipment can be adjusted to measure sound pressure. Hansen testified PEAK mode measures the absolute peak sound pressure,

with no averaging. Hansen testified FAST mode measures peak sound pressure but averaged over 1/8 of one second. Hansen testified IMPULSE is yet another mode which catches the fast rise of sound, with a .35 second rise and a one second decay. Hansen testified he used the FAST setting. Nightingale testified he used the IMPULSE setting. The Nightingale Study uses a Leq or IMPULSE method of noise measurement as does the Kootenai County Industrial Noise Ordinance. Plaintiffs' Exhibit 16, p. 9.

Hansen admitted IMPULSE is maybe a more true measure of the impulsive nature of sounds, but noted most standards use the FAST setting. There is up to a 4 dB difference between measurements taken between FAST and IMPULSE mode. This is consistent with the differences Nightingale testified Nightingale observed on Hansen's equipment when Hansen performed his testing. Plaintiffs' Exhibit 16, Part 2, p. 4. Nightingale testified his measurements on IMPULSE setting taken at the same time as Hansens' measurements at FAST setting were about 4 dB higher. It is for the trial court as the trier of fact to determine which method best measures a level of given noise. *Davis v. Izaak Walton League of America,* 717 P.2d 984, 987 (Colo.Ct.App. 1986). The trial court in that case used IMPULSE mode to determine the maximum permissible noise levels emitted by defendant's shooting range. *Id.*

27. The noise levels measured by Hansen had a highest measured peak noise level at 103.2 dB (Table 2A). This is 20 dB over the Kootenai County Industrial limit. These high noise levels were observed at several properties (5 of 7) and from all range firing positions (600, 500, 300 and 200 yard). Defendants' Exhibit K; Plaintiffs' Exhibit 16.

28. As measured by Nightingale, the measured peak unweighted noise levels of gunfire fell within the range of 102.7 to 72.1 dB. The Kootenai County Industrial Noise Ordinance specifies a peak, unweighted impulsive threshold of 83 dB. This noise limit was exceeded by as much as 19 dB at seven of nine private properties. Exhibit 16, p. 15, ¶ 2. Congruent with this, the Kootenai County Special Use Ordinance limit of 75 dBA was violated at four of seven private properties. Plaintiffs' Exhibit 16.

29. The Hansen study also uses a day-night level (DNL) which measure over a 24-hour period. DNL is the standard applied to transportation noise in high-density metropolitan areas. Plaintiffs' Exhibit 16, Part 2, p. 8. Nightingale testified that DNL measurements will result in lower levels because no shooting, no sound is measured in the nine or more hours of night. Nightingale stated DNL as a standard for a shooting range is inappropriate and Hansen's measurements should be rejected because DNL does not apply to impulsive noise or to rural areas. *Id.* p. 9. Hansen admitted in his trial testimony that DNL would dilute or lower the results on a shooting range if the area is fairly quiet at night.

30. The Court viewed the area. It is rural. During the day it was completely quiet. There is no reason to believe nighttime would be otherwise. The Court finds Nightingale credible that DNL should not be used in measuring noise levels at a gun range. In the rural community of Bayview, which has background ambient sound levels in the range of 25 dBA to 35 dBA, the acceptable sound pressure level at the private property line should not exceed 55 dBA, as measured with a certified sound measuring device with an IMPULSE filter. This finding is in accordance with the Shomer studies

relied upon by Nightingale and the guidelines of the World Health Organization (WHO). Plaintiffs' Exhibit 16.

31. The Court's review of the Vargas Master Plan reveals it does not appear to include any noise mitigation. Exhibit C. Clark Vargas, creator of the Vargas Master Plan, testified at the trial. Vargas did not give any testimony as to how he factored in noise attenuation as part of his Vargas Master Plan or whether he even considered noise issues. The IDF&G anticipates an incredible expansion and increase of use with the Vargas Master Plan. Plaintiffs' expert on sound, Nightingale, testified that when IDF&G first advertised the Vargas Master Plan, they claimed it would be less noisy. Nightingale testified that he did not see any features in the Vargas Master Plan used to mitigate or attenuate sound. He testified the proposed shooting sheds were not designed for sound attenuation and the berms between shooting positions were concrete, which reflects and does not absorb sound. Nightingale testified that the berms and sheds in the Vargas Master Plan would not reduce noise to acceptable levels where people would not be highly annoyed by the sound. IDF&G argues their expert Hansen found the Farragut Shooting Range currently meets the federal sound standards recommended by the Environmental Protection Agency (EPA), Housing and Urban Development (HUD) and Department of Defense-Army Regulation AR 200-1. Defendants' Revised Findings of Fact and Conclusions of Law, p. 7, ¶ 28, *citing* Defendant's Exhibit K, pp. 2-3, 8-9, 57-58, 64. Hansen testified that in his modeling the Vargas Master Plan generally reduced the sound levels that would leave the range and only one measurement resulted in a slight increase in sound. Exhibit K, p. 48. But

Hansen admitted that the Vargas Master Plan still modeled sound measurements that exceeded some state laws and some federal laws. Hansen also testified that only by using DNL can the rifle range satisfy Department of Defense, HUD and EPA standards. Due to the number of increased shooters, and due to little if any sound attenuation in the Vargas Master Plan, development of the Vargas Master Plan would greatly increase the unacceptable noise level surrounding private property owners. Plaintiffs' Exhibits 16 and 20. The only Kootenai County Ordinances regarding noise are the ordinances for "Industrial Zone", which is a "land use classification for a district suitable for manufacturing and processing of all types." Exhibit 31. Article 11, Section 11.10 deals with noise. Nightingale testified that at the 200-yard firing line, two of the five sites he tested exceed the Kootenai County standards, and at the 500-yard firing line, three of the five sites tested exceed those standards. Nightingale pointed out that this is an **industrial** ordinance which would set sound levels higher than would be acceptable in a residential area. The State of Illinois has statewide noise standards. Exhibit 16, p. 18, Table 8. Idaho does not have such standards. The Illinois standards set maximum noise level at 50 dB, and all sites distant from the Farragut Range measured by Nightingale exceed that standard.

32. The Court finds there is a difference between FAST and IMPULSE settings, but even in the IMPULSE setting advocated by IDF&G's expert Hansen, the noise from the existing range exceeds most standards by agencies and jurisdictions which have thought to consider and establish such standards. Thus, the distinction between FAST and IMPULSE is without much significance. The Court finds that the

DNL averaging used by IDF&G creates a significant difference in sound measurement, and that DNL averaging is not appropriate for a gun range used during the day because at night this area is quiet. The Court notes that regardless of the mode or the analogous standards, the Farragut Range fails from a noise standpoint. The most significant factor for the Court as far as noise and nuisance law is concerned is not the mode in which one measures maximum sound pressure *level* (whether measured by PEAK, FAST or IMPULSE), and it is not which noise standards should apply (EPA, HUD, DoD, Kootenai County Industrial, Illinois or Hawaii). The most significant factor for the Court is the increase since 2002 in the ***amount*** of gunfire, the *number of times* such gunfire occurs during the day and the *number of rounds* shot during the day…all results of increased *use* of the range. Even more dramatic is the increase in *projected use* of the range by IDF&G.

33. On behalf of plaintiffs, expert witness Roy Ruel testified as to the likelihood of bullet escapement from the real property owned and controlled by defendant IDF&G. Ruel's testimony regarding the likelihood of bullet escapement was not contradicted in any way by defendant's experts Clark Vargas or Edward Santos.

34. The distances from the firing line at the Farragut Shooting Range to private property owned by plaintiffs and others and to unrestricted public areas within Farragut State Park are less than three-quarters of a mile. Plaintiffs' Exhibits 16 and 20.

35. Small arms ammunition has a maximum range of just under a mile for .22 caliber pistols and rifles to over three miles for .30 caliber rifles. Plaintiffs' Exhibits 2, 32, 33 and 34. Roy Ruel, a professional mechanical engineer, gave expert opinion

testimony on behalf of plaintiffs. Ruel has reviewed about 200 other rifle ranges and performed a Hazard Assessment study on this range. Ruel has performed Hazard Assessments on other things, but this is his first hazard assessment on a rifle range. Ruel gave uncontradicted testimony that a 30-0-6 caliber bullet will travel 4,000-5,000 yards, which could hit anyone traveling on Perimeter Road and could hit houses owned by plaintiffs beyond Perimeter Road. A .50-caliber rifle goes even further than 4,000-5,000 yards. There is uninhabited land which is part of Farragut State Park between the back or target end of the range and Perimeter Road. Plaintiffs' Exhibit 16. While this strip of land has no dwellings, there are trails on this strip of land that are part of Farragut State Park. Plaintiffs' Exhibit 13. Thus, it cannot be said that IDF&G "controls" this strip of land between the target end of the range and Perimeter Road. There are dwellings located on the other side of Perimeter Road. At its closest point to the range, Perimeter Road is much less than 1,000 feet from the target end of the rifle range. Clark Vargas testified that there are eighteen to twenty residences within 1,000 feet of the range. Plaintiffs' Exhibit 13 bears this out as well. The residences are just beyond Perimeter Road. Will Collins, who lives at 1801 E. Perimeter Road, testified he has heard the "crack" of a bullet overhead while standing on his property. Collins next- door neighbor Dorothy Eldridge testified about two occasions, one in 2000 where she heard a bullet hit a tree above where she was standing on her deck, and another in 2001 where she heard a bullet hit a rock and ricochet. The Court finds these witnesses credible. Ruel testified that with a shooter in standing position at the 500-yard range, raising a rifle barrel one inch compared to the target aim would cause a bullet to go over

the existing berm. Ruel testified that in the prone position at the 500-yard range, raising the barrel just ¼ of an inch compared to the target aim would cause a bullet to go over the existing berm, and raising the barrel one inch would cause a bullet to go over the trees that are well behind the berm. Ruel testified that on the 200-yard range raising the barrel one inch compared to target aim would cause a bullet to go over the existing berm. Ruel testified that unless the range owner controls all land down range, a range needs to be built so no bullet escapes. Ruel testified that as this range is situated adjacent to residences and the Perimeter Road, 100% bullet containment is required. Ruel testified that baffling can reduce bullet escapement. Ruel testified no baffling exists at the range today, and no baffling is called for in the Vargas Master Plan. This is true even though Clark Vargas stated at a national symposium in 1999: "**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.**" Clark Vargas testified that his Vargas Master Plan has side walls in place to contain cross fire and trellis baffles to reduce the angle of escape, but Vargas did not testify about any overhead baffles to prevent or even reduce a bullet escaping from his proposed improved range. Ruel testified that a "Hazard Assessment" is appropriate whenever there is a pubic safety concern, and that Vargas had performed no hazard assessment. Ruel testified that as planned under the Vargas Master Plan, the safety factor is reduced as compared to the existing range due to the vast increase in the number of people expected to use this range after the Vargas Master Plan is implemented. Ruel testified that at present the families down range are at risk of bullet escapement from the range onto their property,

and under the Vargas Master Plan they are at an increased risk of bullet escapement onto their property.

36. The Surface Danger Zone from the Farragut Shooting Range firing line encompasses a large area of private and public property and extends beyond and down range from the real property owned and controlled by IDF&G anywhere from one to two miles. Plaintiffs' Exhibit 1, G-5 and Exhibit 2, figure 2; Exhibit 13, 14, 15; Exhibit 16, figure 10; Exhibit 20. The Farragut Shooting Range is not large enough to contain bullets fired from guns at the firing line within the fenced boundaries of the range.

37. Approximately three-quarters of a mile down range are private property homes along Perimeter Road which parallels the IDF&G fence. There are at least 18 occupied residences, including homes of some of the plaintiffs, located within the Surface Danger Zone. Exhibit 17, 20. Testimony of Clark Vargas.

38. Park property beyond ownership of the IDF&G commences one-half (1/2) mile from the shooting range. Park visitors may and do come close to the interior fence from time to time and are thus exposed to bullets within the one-half mile. Plaintiffs' Exhibits 13, 14, 15, 16, 17 and 20. Hikers, bikers, and riders on trails and motor vehicles, including school buses picking up and letting off school children on Perimeter Road, are within the Surface Danger Zone. *Id.*

39. School buses make regular stops to pick up or drop off school children at several points along Perimeter Road which is in a direct line of fire and well within the Surface Danger Zone. Plaintiffs' Exhibits 1; G-5, 14, 15 and 20.

40. The evidence at trial from the testimony of plaintiffs' expert Roy Ruel, as well as the Range Design Criteria prepared by Clark Vargas and the NRA Range Source Manual establishes the probability that bullets from the firing line at the Farragut Shooting Range have in the past, may now and will in the future travel beyond the boundaries of the IDF&G property into the private property of plaintiffs and others and into the Farragut State Park property used by members of the public. Plaintiffs' Exhibits 2, 3, 4, 6, 16, 32, 33 and 34. None of this was contradicted by the testimony of IDF&G's experts Clark Vargas or Edward Santos. Most notably, as mentioned above, Clark Vargas stated in his "Design Criteria for Shooting Ranges" given at the Third National Shooting Range Symposium in 1996: "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. Ranges are very expensive to construct.**"** Exhibit 2, p. 5 under "Site Selection".

41. The present operation of the Farragut Shooting Range does not provide overhead and ground baffling, berms and barriers that will fully prevent rounds fired from rifles or pistols from escaping from the range boundaries to impact on private and Farragut State Park property and people thereon. Plaintiffs' Exhibits 32, 33, 34, 38, 39 and 42. Testimony of Clark Vargas. Testimony of Roy Ruel.

42. The IDF&G is not able to acquire more adjoining property down range. Plaintiffs' Exhibit B.

43. The IDF&G has created and provided to all persons applying to shoot upon the range written safety instructions. Defendants' Exhibit PP. Plaintiffs' Exhibit 26.

44. The IDF&G has safety warning signs posted at various prominent locations on its shooting range. Plaintiffs' Exhibit 27.

45. Idaho Parks and Recreation Department and the IDF&G entered into a Memorandum of Understanding in 1982. Defendants' witnesses David Leptich and Randall Butt testified that the Memorandum of Understanding gave range supervision to the Idaho Department of Parks and Recreation. Defendants' Exhibit W.

46. Plaintiffs' expert witness Roy Ruel testified that two range managers were needed on site whenever shooters were using the range. The Design Criteria of Clark Vargas and the National Shooting Sport Association video support this opinion. As Clark Vargas stated in his 1999 national symposium: "A completely safe range cannot be designed. A safe range results if, and only if it is safely operated and if the participating shooters are controlled by the rules and safety policies." Plaintiffs' Exhibit 2, p. 1. "Cost effective range design results only if the designer assumes that the shooter is going to be controlled." *Id.* p. 2. "If the designer knows that the shooter is not going to be controlled, the only thing that can be designed would be a box with 16-inch thick walls for the shooter to enter." *Id.* "Remember that a safe range results from controlling your shooters." *Id.* p. 8.

47. The testimony of David Leptich and Randall Butt that adequate range supervision had been regularly provided was not supported by their admission that

personnel from both departments were on the shooting range for only one hour per week. The testimony of defendants' witnesses that there has been adequate supervision is not credible nor is it supported by the record. The IDF&G does not employ or otherwise provide range managers to supervise, enforce or control shooters on the firing line nor does it offer training to potential range managers or range users. No evidence was presented indicating that anyone from the IDF&G or from the Farragut State Park has ever enforced any of the posted or circulated printed safety rules or cited any shooter for any violation of those rules.

48. Defendants' “expert” witness Edward M. Santos testified at the trial, but gave no opinions at the trial. Santos’ testimony consisted of him merely explaining his training and identifying his report, Exhibit G. On the subject of “range safety”, Santos’ training is minimal, consisting only of a 4-5 day NRA training seminar, and most of that training consisted of a review of the NRA Range Resource Book. Santos testified that in his examination of the Farragut Shooting Range he used the NRA standard for "non-attended range." The Court has read every word of Exhibit G, Santos’ evaluation. The Court has also reviewed Exhibit 3, the NRA Range Source Book, and can find no separate standards for “non-attended ranges.” Upon cross examination, Santos could not testify as to what criteria he used from the Range Source Book to render any of his opinions. Accordingly, his opinions in Exhibit G are accorded little weight. The trier of fact must be made aware upon what an opinion is based. Santos did not provide that. Santos’ opinions lack the factual foundation required by Idaho Rule of Evidence 703, and *State v. Enyeart,* 123 Idaho 452, 849 P.2d 1255 (Ct.App. 1993). Santos’ opinions

regarding unattended ranges are not corroborated by the NRA Range Source Book which states: "Rules and Regulations must be established for each specific range" and "If you do promulgate rules and regulations, be sure to enforce them." Exhibit 3, p. I-1-19, § 3.05.2.1; p. I-1-24, § 4.04.1. "Control of a facility implies that appropriate authority is bestowed upon range officers appointed to enforce the rules and regulations." Exhibit 3, p. I-2-3, § 1.03. "All commands are given by a designated range or safety official, except for cease-fire or misfire." Exhibit 3, p. I-2-8, § 4.03.2.

According to Santos, because some other ranges exist in the country which have no supervision, the Farragut Range needs no supervision. Exhibit G, pp. 3-4. But Santos fails to explain whether or not those other ranges are in a remote location where it doesn't matter if there is bullet escapement, or whether the geography (eg. firing toward a cliff) or structures (baffles) precludes bullet escapement. In those situations, an unattended range only creates risks for the shooters and not the general public outside the range (because there is no public at risk outside the range). Santos' opinion that the Farragut Range need not be attended is contradictory to the NRA Range Source Book, Exhibit 3. Again, Santos supplied no factual foundation for his opinion.

Finally, Santos lacks credibility. Santos testified that the NRA contacted Edward Santos to review the existing range and review the Vargas Master Plan. However, Santos' report (Exhibit G) states that "This evaluation was conducted at the request of the Idaho Fish and Game Department…" Exhibit G, p. 2.

49. The Vargas Master Plan does not meet and, in numerous instances, is deficient and falls short of the requirements recommended by Clark Vargas in his

"Design Criteria for Shooting Ranges" presented to the Third National Shooting Range Symposium sponsored by the National Rifle Association in 1996 and in the Illinois Department of Natural Resources Shooting Range Safety Plan, rules prepared by Clark Vargas, Plaintiffs' Exhibits 2 and 43. Clark Vargas has been involved in the design of forty-five ranges other than the improvements to the Farragut Range, and those are only his *recent* projects. Affidavit of Clark Vargas dated August 24, 2006, Exhibit 1, pp. 2-13. Given his breadth of experience, if Vargas identified a range similar to Farragut, with a similar number of residences down range which used no baffles, no sound attenuation, and yet was acceptable in its community even after its use doubled in one year and was forecast to increase more than a thousand fold, it would have been very probative. There was no such testimony. The Court can only assume no such similar situation exists in the United States. Vargas was involved in the creation of the National Rifle Association Resource Book (NRARSB). *Id.,* p. 2, ¶3. Vargas states: "The NRARSB is the closest thing to a standard for civilian shooting range design and it is not a standard!" *Id.,* ¶5. Vargas continued: "The NRARSB also states that its guidelines are not a substitute for professional engineering consultation." *Id.* Yet, the preeminent "engineer" of range design refuses to be held to his own "Design Criteria for Shooting Ranges". Vargas states the "Design Criteria for Shooting Ranges" was a symposium "paper which simply lists the myriad of design criteria considerations involved" with "range site selection." *Id.*, p. 3, ¶ 10. A review of Vargas' "Design Criteria for Shooting Ranges" shows that it in no way is limited to "range site selection". Exhibit 2. The title itself, "Design Criteria for Shooting Ranges" tells you it is not limited to

range site selection. Vargas tells us in his symposium paper: "I will be presenting guidelines on how to design ranges, but more importantly the reasons for design considerations." Exhibit 2, p. 1. That is not a limitation as to "range site selection." The Court finds Vargas not credible as to his limitation on his own "Design Criteria for Shooting Ranges." Vargas stated in his affidavit that as to the "no blue-sky concept" or "fully contained range", "most civilian ranges do not warrant or require this degree of more expensive engineering safety design to ensure reasonable expectations of safety to range participants and the public at large." Affidavit of Clark Vargas dated August 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. The Court finds Vargas to be the preeminent expert in his field. However, much of his Vargas Master Plan and many of his opinions expressed for purposes of this litigation conflict with his "Design Criteria for Shooting Ranges", which was not prepared for litigation purposes. To the extent Vargas' opinions and the Vargas Master Plan conflict with his "Design Criteria for Shooting Ranges", the Court finds the opinions expressed in his "Design Criteria for Shooting Ranges" to be more credible and better reasoned.

50. From a shooter safety standpoint, a managed range would be a good idea (Plaintiffs' Exhibits 2 and 3), but is not required. From the plaintiffs' standpoint, if the range improvements produce zero bullet escapement, the range need not be supervised. From the plaintiffs' standpoint, if a baffle is placed above and in front of

each firing position, the chance of bullet escapement from the existing range is significantly reduced. If such a baffle is place above and in front of each firing position, and the range is operated at no more than 500 shooters per year, the range need not be supervised.

51. As presently operated and funded, IDF&G has no plans for nor financial support to employ professional or trained range managers. David Leptich testified IDF&G has had six volunteer “Range Hosts” recently, but they require no firearms familiarity or any requirement that they be able bodied. Clark Vargas testified he could not remember if he looked at the supervision of the range, but expressed the opinion that a full-time supervisor would not be required for civilian ranges. The Court finds that to be inconsistent with his opinions expressed in his "Design Criteria for Shooting Ranges" presented to the Third National Shooting Range Symposium sponsored by the National Rifle Association in 1996. Exhibit 2, p. 1, 2 and 8. Roy Ruel testified that at least two people should be working at the range as supervisors. Otherwise, range rules do not get enforced. The Court finds Ruel’s testimony to be more credible and consistent with Vargas’ opinions in his “Design Criteria for Shooting Ranges.” However, if zero bullet escapement is achieved in the range as constructed, supervision is not required as supervision in that situation only inures to the benefit of the shooters.

52. Operation of a shooting range that lacks any baffles without supervision creates a clear and present danger to all outside the Farragut Shooting Range property lines. NRA Range Source Book, Exhibit 3; Testimony of Roy Ruel; Opinions of Clark Vargas stated in his "Design Criteria for Shooting Ranges" presented to the Third

National Shooting Range Symposium sponsored by the National Rifle Association in 1996 and in the Illinois Department of Natural Resources Shooting Range Safety Plan, Plaintiffs' Exhibits 2, pp. 1, 2 and 8.

53. Idaho Department of Fish and Game has committed to the Master Plan created by C. Vargas & Associates, Inc. estimated to cost Three Million Six Hundred Thousand Dollar ($3,600,000.00) to expand the shooting range. Testimony of David Leptich. The Vargas Master Plan shows the renovation of the existing 200-yard firing line to create lanes for one 200-yard, two 100-yard, and three 50-yard firing lanes. The existing 500-yard range is to be lengthened to 600-yards. The range is planned to include trap and skeet fields, mounted cowboy action areas and a 600-yard range for 50 caliber rifles. Plaintiffs' Exhibits 1 and 29.

54. The Vargas Master Plan provides for simultaneous use of one hundred thirty (130) shooting stations, whereas the historical use has primarily a ten (10) shooter limit. Plaintiffs' Exhibits 1 and 29.

55. The Vargas Master Plan incorporated a Surface Danger Zone based upon the range standards used by the National Rifle Association and by the United States Army and Air Force. Plaintiffs' Exhibits 1, 4 and 6.

56. The Vargas Surface Danger Zone as applied on the ground at the existing Farragut Shooting Range extends more than two miles beyond the perimeter fencing of the IDF&G property. Plaintiffs' Exhibits 1 G-5, Exhibit 2, figure 2 and Exhibit 16, p. 10, figure 3.

57. The Surface Danger Zone on page G-5 of the Vargas Master Plan is labeled as showing that the down range danger zone for high powered rifles extends 5,249 yards or 15,747 feet, i.e., approximately three miles. Rifles and pistols are labeled on page G-5 with a range of 1,530 yards or 4, 590 feet, approximately 7/8th of a mile beyond the range boundary. Plaintiffs' Exhibit 1, figure 2 and Plaintiffs' Exhibit 2.

58. The baffles and berms as designed and illustrated in the Vargas Master Plan will not fully contain all bullets fired from the various identified firing lines. Plaintiffs' Exhibits 1, G-5, Exhibit 2, figure 2, Exhibit 16, p. 10, figure 3 and Exhibit 38.

59. Because property owners are located within the Surface Danger Zone and individual members of the public can walk or ride within the area where bullets from the firing lines could land with lethal force, the applicable safety standards require that the range be baffled completely from the firing line to the target line. Plaintiffs' Exhibits 2, 3, 6 and 38.

60. The Vargas Master Plan does not provide for complete baffling to protect all those within the Surface Danger Zone from bullet escapement. Plaintiffs' Exhibits 6 and 38.

61. The Farragut Shooting Range as presently exists and as proposed for expansion in the Vargas Master Plan must, for the safety of all persons within the Surface Danger Zone, be subject to the "No Blue Sky" rule. Plaintiffs' Exhibits 2, 6, 38 and 43.

62. The "No Blue Sky" rule is that all pistol and rifle 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. Plaintiffs' Exhibit 2, 6, 38 and 43.

63. David Leptich is the Regional Habitat Biologist for IDF&G and is the IDF&G's lead individual regarding the range improvement project. At trial, Leptich testified that in his opinion baffling is not necessary at present and is not included in the Vargas Master Plan. Leptich admitted this is in part due to cost, but added "Economics isn't the only issue." In an earlier deposition, Leptich testified that "economics" is a "secondary consideration" in choosing not to incorporate baffles. Lepteich deposition, p. 146. At trial, Leptich testified IDF&G would consider baffling but it "Depends on if more people move in down range", because then "The risk changes". Leptich acknowledged that the more shooters, the more rounds you will have, and that in turn increases the chances for bullet escapement. Leptich was asked: "If the number of shooters increases but the population down range remains the same, then the cost benefit analysis gravitates toward baffling?" To which Leptich responded "absolutely". Leptich admitted he wants to turn this into a first-class regional shooting range and bring in more shooters. However, Leptich testified: "I definitely don't consider a change in patronage a change in use." The Court finds Leptich's inconsistent testimony not credible. However, Leptich's testimony shows that as IDF&G's representative in charge of the range project, he is wearing blinders as he proceeds forward with this project. Further evidence of such is Leptich's response to Clark Vargas' statement: "If you build in a populated area it must be totally baffled so the range owner can demonstrate to a

judge that a round cannot escape". Exhibit 2, p. 5. Leptich said he interpreted that rather clear language to mean "*highly* populated areas". Further evidence of wearing blinders is the fact that Leptich testified that even though Clark Vargas (designer of the very plan Leptich is following) has the opinion that site selection is **the most important criteria** ("The most important decision in range design is site selection with safety in mind", Exhibit 2, p. 8), IDF&G has never even considered the fact that the site itself may be inappropriate. Leptich was asked: "If the site selection back in 1950 was a mistake, you are not prepared to correct that mistake?", to which Leptich responded: "I would say that's correct, we're not approaching it from that direction." Leptich admitted: "Clark Vargas was not tasked to examine the appropriateness of the site." Toward the end of his testimony Leptich stated: "If this range is improved, the local public benefits because it is a safer, quieter range." Neither the claim of increased safety nor the range being quieter is supported by the evidence.

CONCLUSIONS OF LAW

1. The Farragut Shooting Range is a sport shooting range within the meaning of Idaho Code §§ 55-2601 et. seq.

2. Substantial change in expansion of use of the Farragut Shooting Range has occurred within three years prior to the filing of this lawsuit. Thus, plaintiffs are qualified to bring this lawsuit within the meaning of Idaho Code § 55-2602.

3. Plaintiff Citizens Against Range Expansion, an unincorporated association, has representative standing. The named individual plaintiffs, as residents and property owners, have standing to enforce the claims made in this case.

4. The Court has jurisdiction over the parties. The case is ripe for adjudication. The Court has continuing jurisdiction over the parties and this dispute.

5. Plaintiffs allege nuisance as their first cause of action. Amended Complaint, pp. 16-17, ¶ 55-58. Plaintiffs specifically allege private nuisance. Amended Complaint, p. 16, ¶ 57. The Idaho Code defines "nuisance" as follows:

> Anything which is injurious to health or morals, or is indecent, or offensive to the senses, or an obstruction to the free use of property, so long as to interfere with the comfortable enjoyment of life or property, or unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, or river, stream, canal, or basin, or any public park, square, street, or highway, is a nuisance.

Idaho Code § 52-101. A "public nuisance" is defined as follows:

> One which affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal.

Idaho Code § 52-102. In Idaho, a "private nuisance" is one that is "not defined by law as a public nuisance or as a moral nuisance." Idaho Code § 52-107. Additionally, the plaintiffs claim "As authorized by Idaho Code § 52-111, the *public* is entitled to a permanent injunction requiring defendants Idaho Fish and Game Department and Director Steven M. Huffaker to take whatever action is necessary to restore the operational policy existing in July of 2003 and before limiting the maximum number of shooters to ten (10) and restricting the times of operation." (emphasis added). Amended Complaint, p. 17, ¶ 58. In that the "public" is defined as a community or a neighborhood, a "public nuisance" has been alleged as well as a private nuisance.

The IDF&G has rights regarding its property and the uses to which it is put. The "great principle of common law" is that one may not use their property to injure others,

even if authorized by statute. *Baltimore & Potomac R.R. Co. v. Fifth Baptist Church,* 108 U.S. 317, 331 (1883). "It should be remembered that this property belongs to appellant, and that it has a right to use it in any lawful manner in which it sees fit to employ its property, so long as it does not damage anyone else." *Lorenzi v. Star Market Co.,* 19 Idaho 674, 684, 115 P. 490 (1911). *Ransom v. Garden City,* 113 Idaho 202, 208, 743 P.2d 70, 76 (1987).

The IDF&G has invoked the protection of Idaho Code § 55-2601, which limits liability for "sport shooting ranges" in certain situations. Idaho Code § 55-2602(1) reads: "Except as provided in this section, a person may not maintain a nuisance action for noise against a shooting range located in the vicinity of that person's property if the shooting range was established as of the date the person acquired the property." All individual plaintiffs fall under that category. That section continues: "If there is a substantial change in use of the range after the person acquires the property, the person may maintain a nuisance action if the action is brought within three (3) years from the beginning of the substantial change." This Court finds there has been a "substantial change" in the use of the range, beginning in 2002. Thus, plaintiffs are not barred from bringing their nuisance action.

The increased noise from the firing of rifles and pistols on the Farragut Shooting Range in the time period of three years prior to the filing of this lawsuit has been stressful to plaintiffs, offensive to their senses and an obstruction of their free use of property so as to interfere with their comfortable enjoyment of their lives and their property, constituting a nuisance as defined in Idaho Code § 52-101. Plaintiffs so

testified and IDF&G put on no evidence to the contrary. No area resident testified that the noise was not a problem. Gabriel Roth-Marnat lives closest to the range. She testified she has been awakened at night due to the shooting, her windows rattle, and twice in 2002 she left her home for a motel due to night shooting. She testified she has a stress-induced illness due to the noise. Chip Corsi, IDF&G Regional Supervisor for the Panhandle Region, testified at trial that he had difficulty hearing shots fired at the range from Bayview, from the park headquarters and from Snowberry Campground. But at Perimeter Road, Corsi testified he could quite clearly hear the shots, that it was noticeably louder. Duane Nightingale is an acoustical engineer for the Department of Defense at the Bayview, Idaho installation. Decibels (dB) measure sound pressure. Nightingale testified that the threshold of human speech is between 0-30 dB, speech is between 40-60 dB, a lawn mower is 80 dB, a jet engine is 140 dB and gunfire is 130-150 dB. Every 10 dB increase is a doubling as humans perceive it (eg. 100 dB is twice as loud as 90 dB). These measurements are near the source. Measured at various distances (various residences along Perimeter Road) from the source (a firing rifle from the various firing points at the range), Nightingale measured from 50 dB 2.17 miles away (in the town of Bayview) from the source, to 76 dB 493 yards from the source to 144 dB 80 yards from the source. Exhibit 16, pp. 13-15. Nightingale testified that impulsive sound is perceived by humans differently than constant noise like being next to a busy highway. Impulsive sound “spikes” and is more annoying to human beings. Nightiengale cited a Swedish study cited by the United States Department of Defense (Sorensen and Magnusson, 1979), which studied 350 people, and found 10% of the

population are highly annoyed by gunfire at 63 dB, and 38% of the population are highly annoyed by gunfire at 80 dB. Exhibit 16, p. 16. "It can scarcely be argued that any habitual noise (whether produced by skilled musicians led by the frank and cultivated leaders who testified as here, or by domestic animals as in *Singer v. James,* 130 Md. 382, 100 A. 642) which is so loud, continuous, insistent, not inherent to the character of the neighborhood, and unusual therein, that normal men, women, and children when occupying their own homes, however distant, are so seriously incommoded that they cannot sleep, study, read, converse, or concentrate until it stops is not an unreasonable, unlawful invasion of their rights." *Five Oaks Corp. v. Gathmann,* 190 Md. 348, 354, 58 A.2d 656, 659 (Ct.App.Md. 1948), *citing Meadowbrook Swimming Club v. Albert,* 173 Md. 641, 197 A. 146, 148 (Ct.App.Md. 1938). "In all such cases, the question is, whether the nuisance complained of, will or does produce such a condition of things as, in the judgment of reasonable men, is naturally productive of actual physical discomfort to persons of ordinary sensibilities, and of ordinary tastes and habits, and as, in view of the circumstances of the case, is unreasonable and in derogation of the rights of the complainant." *Five Oaks,* 190 Md. at 354, 58 A.2d at 659, *citing Dittman v. Repp,* 50 Md. 516, 33 Am.Rep. 325 (Ct.App.Md. 1879).

A shooting range is not a nuisance per se, but errant bullets could support a finding of nuisance:

> Gun clubs generally are not nuisances per se but, depending on the surrounding circumstances, may be found to be nuisances in fact. The conclusion that a shooting range or gun club is a nuisance may be supported, at least in part, by a finding that the shooting conducted in those places caused bullets to fall upon or over adjacent estates or roads, endangering other people and animals. The noise and dust produced by

> the operation of a shooting range are also relevant to determining whether such range constitutes a nuisance.

58 Am Jur. 2d, Nuisance, §211. The locality and surroundings of the challenged operation or thing becomes an important factor in arriving at a judicial decision as to the existence or non-existence of an actionable nuisance. *Oak Haven Trailer Court, Inc. v. Western Wayne County Conservation Association*, 3 Mich.App. 83, 89, 141 N.W. 2d. 645 (Mich.App. 1966). All the surrounding circumstances are of extreme importance in determining whether a gun club and its activities do in fact constitute a nuisance. *Id*. Whether some of the activities of the gun club constitute a nuisance is a question of fact for the court to consider. 3 Mich.App. at 90, 141 N.W.2d at 648. In *Oak Haven,* the Michigan Court of Appeals upheld the trial court's refusal to grant an injunction of a rifle range. From a noise standpoint, the trial court allowed the range to continue only if the noise level did not exceed 88 ¼ dB at a distance of one-quarter mile, and with restricted hours of operation. 3 Mich.App. at 88, 141 N.W.2d at 647. From a safety standpoint, the appellate court noted the gun club was "built with the most stringent safety precautions." 3 Mich.App. at 92, 141 N.W.2d at 649. *Kolstad v. Rankin,* 179 Ill.App.3d 1022, 534 N.E.2d 1373 (Ill.App. 1989) discussed *Oak Haven,* but upheld the trial court that granted an injunction against a rifle range. It was noted "The restraint imposed by an injunction should not be more extensive than is reasonably required to protect the interests of the party in whose favor it is granted, and should not be so broad as to prevent defendant from exercising his rights." 179 Ill.App. at 1034, 534 N.E.2d at 1381.

"Reasonableness" is the watchword in these types of cases. In a case dealing

with noise and soot from a dye manufacturing plant, the Supreme Court of Pennsylvania stated:

> "The courts have found it difficult to lay down any precise and inflexible rule by the application of which it can be determined that a plaintiff in a given case is entitled to relief by injunction against smoke, fumes, and noises emitted in the vicinity of his residence. It has been said that a 'fair test as to whether a business lawful in itself, or a particular use of property, constitutes a nuisance, is the reasonableness or unreasonableness of conducting the business or making the use of the property complained of in the particular locality and in the manner and under the circumstances of the case." 46 C.J. 655. It has also been said: "Whether the use is reasonable generally depends upon many and varied facts. No hard and fast rule controls the subject. A use that would be reasonable under one set of facts might be unreasonable under another. What is reasonable is sometimes a question of law, and at other times, a question of fact." * * * No word is used more frequently in discussing cases of this kind than the word 'reasonable,' and no word is less susceptible of exact definition. What is reasonable under one set of circumstances is unreasonable under another. * * * "The utmost protection the plaintiffs are entitled to from smoke, odors, gases, smudge, and noises from the defendant's plant is from these things in amounts that are unnecessary and unreasonable under the circumstances. If the defendant's plant is emitting more of these annoying things than other plants in the same business and of equal output are emitting, there is something wrong with the equipment and management of the defendant's plant and the smoke, odors, gases, smudge, and noises are unnecessary and unreasonable. If devices or more efficient management which would reduce the smoke, odors, gases, smudge and noises and vibrations issuing from its plant are available to the defendant at a reasonable expense, it is the duty of the defendant to secure such devices or management, and, if it fails to do so, the smoke, noises, etc., emitting from its plant may be regarded as unnecessary and unreasonable.'

Hannum v. Gruber, 346 Pa. 417, 423-24, 31 A.2d 99, 102-03 (Penn. 1946). In the present case, it is the significant increased use of the range resulting from better access and publicity by IDF&G that has caused the use of the range to become unreasonable from a noise standpoint alone. Safety concerns are another issue. Both as to noise and as to safety, there are "devices or more efficient management" outlined by IDF&G's

own designer, Clark Vargas, that if implemented by IDF&G would cause that unreasonableness to become reasonable.

Racine v. Glendale Shooting Club, Inc., 755 S.W.2d 369 (Ct.App. Missouri 1988) is on point. In that case, the gun club began operation in 1976, but beginning in June of 1982 the use of the club increased dramatically. The club started with one firing range and increased to five, from two shooting events a year to fifty. "The number of participants at matches as well as the number of rounds fired at matches and the number of high-power matches had all dramatically increased." 755 S.W.2d at 372. The appellate court upheld the trial court's use of a "limited injunction" after finding the existence of a nuisance. The trial court limited the discharge of high-powered firearms, limited shooting hours, limited the number of matches and limited the numbers of shooters that could shoot at a time. 75 S.W.2d at 371. The appellate court upheld the trial court's attempt to "abate the nuisance…so that there is no permanent damage from that nuisance." 75 S.W.2d at 373. The appellate court noted: "The injunctive relief granted does not clearly allow a use beyond that found to be acceptable by plaintiffs prior to June 1982." *Id.*

Davis v. Izaak Walton League of America, 717 P.2d 984 (Colo.Ct.App. 1986) affirmed the trial court's grant of an injunction based on public nuisance (not on private nuisance) on a shooting range until dust problems were corrected and until the noise from discharging firearms were brought within statutory limits. Safety was not a concern in that case as the range was oriented so all shooting was focused away from plaintiff's property.

Other courts have used permanent injunctions when shooting ranges are no longer safe and constitute a nuisance. *Citizens for a Safe Grant v. Lone Oak Sportsmen's Club, Inc.,* 624 n.w.2D 796 (Ct.App. Minn. 2001); *Wolcott v. Doremus,* 11 Del.Ch. 58, 95 A.904 (Ct.Chancery Deleware 1915); *Fraser Twonship v. Linwood-Bay Sportsman's Club,* 270 Mich.App. 289, 715 N.W.2d 89 (Ct.App. Mich. 2006).

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 plaintiffs' private property and Farragut State Park property open to members of the public, constitutes a clear and present danger to the safety and health of plaintiffs and other persons in the area.

7. Plaintiffs request a permanent 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." Plaintiffs' Proposed Findings of Fact and Conclusions of Law, p. 17, ¶ 7. The Court finds this remedy is not warranted. Except for the fact that the existing range contains no baffle, the range is relatively safe as to its level of use up to and including 2002.

Installation of a baffle above and in front of every firing position, to reduce bullet escapement over the berms at the end of the range will result in a significantly safer range at little added expense. There was testimony about various materials used in baffles, that if a bullet strikes a wood baffle it will likely need to be replaced, where baffles made of concrete and other materials are more durable. The IDF&G is free to

construct the baffles from any material it chooses, but it must maintain those baffles. Once the IDF&G installs those baffles at each firing station, it is free to operate the range up to 500 shooters per year. As authorized specifically by Idaho Code §52-111 and, in general, by the duty of the courts to protect members of the public from known and controllable dangers, 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. Once baffles are installed, and the Court has lifted that injunction, IDF&G may operate that range in the same manner in which it historically has (ie., without any on site supervision), up to 500 shooters per year. Once IDF&G has realized that number in a given year, it must close the range for the remainder of that calendar year.

Idaho Department of Fish and Game is limited to 500 shooters per year because the Court finds such number to be a significant change in use compared to 2002. The Farragut State Park shooter sign-up sheets produced by IDF&G show 182 shooters (including counting numbers within groups) for 2002. Given the fact that those records are incomplete, the Court gives IDF&G the benefit of the doubt that perhaps up to 250 shooters actually used the range in 2002. Doubling that amount to 500 shooters per year is a significant increase in the number of shooters per year, but acceptable. The doubling of use compared to 2002 seems to have been the significant increase that area residents found the start of becoming a nuisance, and use continued to increase

even further. The doubling of use compared to 2002 is a significant increase, but the Court finds is not likely to be a nuisance.

If IDF&G wishes to exceed 500 shooters per year, it must make improvements to the range that will address noise and safety considerations.

8. The Vargas Master Plan, as presented and accepted by IDF&G and admitted in evidence in this case, does not provide baffles, berms and safety measures adequate to prevent bullet escapement beyond the boundaries of the property owned and controlled by IDF&G. An issue in this litigation is what standards should apply. There are no federal or state regulations for gun ranges. Kootenai County Building and Planning Department regulation on "Gun clubs, rifle ranges, archery ranges, Section 33.02, is of little help since, other than stating minimum areas and minimum distance between dwelling and target, the regulation defers to other criteria for safety: "All facilities shall be designed and located with full consideration to the safety factors involved in such use." Exhibit R. The NRA Range Source Book (NRARSB) specifically states that its material furnishes design strategies and suggestions and does not furnish necessary design criteria. "For these reasons, this source book may not be utilized to establish design standards or criteria for ranges." Affidavit of Clark Vargas, Exhibit 2, p. I-3. On several occasions the source book states that professional evaluation is necessary. Professional evaluations were performed by Roy Ruel on behalf of the plaintiffs and Edward Santos on behalf of defendants. As mentioned above, Santos provided little substance to his opinions. Roy Ruel's opinions were supported by sound engineering principles, and Ruel's opinions were consistent with Clark Vargas' "Design

Criteria for Shooting Ranges" presented to the Third National Shooting Range Symposium sponsored by the National Rifle Association in 1996 and in the Illinois Department of Natural Resources Shooting Range Safety Plan, rules prepared by Clark Vargas, Plaintiffs' Exhibits 2 and 43. The Court finds Clark Vargas to be preeminent in the field of gun range design. However, the Vargas Master Plan does not meet and, in numerous instances, is deficient and falls short of the requirements recommended by Clark Vargas in his "Design Criteria for Shooting Ranges" presented to the Third National Shooting Range Symposium sponsored by the National Rifle Association in 1996 and in the Illinois Department of Natural Resources Shooting Range Safety Plan, rules prepared by Clark Vargas, Plaintiffs' Exhibits 2 and 43.

IDF&G claims the Vargas "Design Criteria for Shooting Ranges" should not be relied on by the plaintiffs because it was provided as a general review of design criteria to impress the importance of range site selection and was not meant to provide regulatory guidance. That argument is not persuasive. Nothing in Vargas' "Design Criteria for Shooting Ranges" limits that document to site selection. The focus of the entire document is as the title indicates, safe range design. Vargas is the designer of the Vargas Master Plan for the Farragut Range. Idaho Department of Fish and Game cannot be heard to complain if Vargas' Master Plan does not live up to his own criteria that he has espoused at a national symposium. Idaho Department of Fish and Game cannot ignore Vargas' opinions either as to safe range design or as to site selection. While IDF&G has a range, it is a range that has been used by less than one shooter per day. Idaho Department of Fish and Game now desires to expand the use of that range

three thousand times, yet refuses to consider the appropriateness (as defined by their own range designer, Clark Vargas) of such an expanded range in its present community.

9. Plaintiffs claim they "are entitled to judgment of this Court that defendants Idaho Department of Fish and Game and Director Steven M. Huffaker cease all efforts to obtain funds and to carry out the Vargas Master Plan." Plaintiffs' Post Trial Proposed Findings of Fact and Conclusions of Law, p. 17, ¶ 9. The Court finds this remedy is not warranted. For example, if IDF&G were to find sufficient funding and build an enclosed range, plaintiffs could not be heard to complain about safety or noise considerations.

The Idaho Department of Fish and Game is free to seek any funding it wishes. The Idaho Department of Fish and Game is free to build any improvements upon its property. However, use levels will remain capped at 500 shooters per year unless these two concerns have been addressed: 1) include safety measures adequate to **prevent** bullet escapement beyond the boundaries owned and controlled by IDF&G, and 2) include noise abatement measures to reduce noise to a decibel level agreed upon by the parties in the first instance, or, if the parties are unable to agree, to be set by the Court following further evidence. Even if the solution to these two concerns are agreed upon by the parties, in order to close this case IDF&G will need to obtain an order from the Court to exceed 500 shooters per year. The first concern (safety) 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. Exhibit 2, p. 5. Once bullet

containment is achieved, it matters not for purposes of this litigation if the range is supervised (with bullet containment, supervision would only inure to the benefit of the participants, an important consideration, but not the subject of this lawsuit). The second concern (noise) is a function of the number of shooters (per year or per day) and peak decibel level. For example, it may be that 500 shooters per year in an unmitigated range producing 65 dB or more is less desirable than 50,000 shooters per year from a range that only produces 45 dB maximum. It would seem logical for the parties to agree as to noise levels and shooter numbers in advance of any construction, but it is not the Court's place to force such agreement in advance. If the parties in the future cannot agree as to noise levels and maximum shooter numbers, the Court will make that determination after taking additional evidence. If IDF&G makes improvements but does not successfully address safety and noise concerns, IDF&G will not be allowed to exceed 500 shooters per year.

10. Idaho law requires every order granting an injunction shall set forth the reasons for its issuance, it shall be specific in terms, it shall describe in reasonable detail the act sought to be restrained and is binding only upon the parties to the action (their officers, agents, servants, employees and attorneys) who receive actual notice of the order by personal service or otherwise. Idaho Rule of Civil Procedure 65(d). In analyzing "the reasons for its issuance", the Court must look to the "grounds" for which a preliminary injunction may be granted. Those grounds are set forth in Idaho Rule of Civil Procedure 65(e). The grounds applicable to this case are:

> **Rule 65 (e). Grounds for Preliminary Injunction.**
> A preliminary injunction may be granted in the following cases:

> (1) When it appears by the complaint that the plaintiff is entitled to the relief demanded, and such relief, or any part thereof, consists in restraining the commission or continuance of the acts complained of, either for a limited period or perpetually.
> (2) When it appears by the complaint or affidavit that the commission or continuance of some act during the litigation would produce waste, or great or irreparable injury to the plaintiff.
> (3) When it appears during the litigation that the defendant is doing, or threatens, or is about to do, or is procuring or suffering to be done, some act in violation of the plaintiff's rights, respecting the subject of the action, and tending to render the judgment ineffectual.

Harris v. Cassia County, 106 Idaho 513, 681 P.2d 988 (1984), provides a good analytical framework for analyzing the preliminary injunction grounds that apply to the present case.

This Court is cognizant of the fact that granting or denying injunctive relief is a matter of discretion vested in the trial court, and that such discretion is not to be abused. *Harris v. Cassia County,* 106 Idaho at 517, 681 P.2d at 992 (1984). The court which is to exercise the discretion is the trial court and not the appellate court, and an appellate court will not interfere absent a manifest abuse of discretion. *Id., citing Milbert v. Carl Carbon, Inc.,* 89 Idaho 471, 406 P.2d 113 (1965); *Western Gas & Power of Idaho, Inc. v. Nash,* 75 Idaho 327, 272 P.2d 316 (1954).

Each of the applicable grounds under Idaho Rule of Civil Procedure 65(e) are analyzed below.

11. Idaho Rule of Civil Procedure 65(e)(1) reads:

> A preliminary injunction may be granted in the following cases:
> (1) When it appears by the complaint that the plaintiff is entitled to the relief demanded, and such relief, or any part thereof, consists in restraining the commission or continuance of the acts complained of, either for a limited period or perpetually.

The "entitled to the relief demanded" language found in Idaho Rule of Civil Procedure 65(e)(1) is frequently restated as "substantial likelihood of success." The Idaho

Supreme Court in *Harris* interpreted "substantial likelihood of success" as follows:

> The substantial likelihood of success necessary to demonstrate that appellants are entitled to the relief they demanded cannot exist where complex issues of law or fact exist which are not free from doubt. *First National Bank & Trust Co. v. Federal Reserve Bank,* 495 F.Supp. 154 (W.D.Mich. 1980); *Avins v. Widener College, Inc.,* 421 F.Supp. 858 (D.Del. 1976) (not granted where issues of fact and law are seriously disputed); *Wm. Rosen Monuments, Inc. v. Phil Madonick Monuments, Inc.,* 62 A.D.2d 1053, 404 N.Y.S.2d 133 (N.Y.App.Div. 1978) (granted only upon the clearest evidence). Appellants claim of right in this case is not one which is free from doubt and, accordingly, we hold that appellants have not carried their burden of proof under I.R.C.P. 65(e)(1).

106 Idaho at 518, 681 P.2d at 993. In the present case, the issues of fact and law are not complex. While the factual issues are disputed, the evidence is complete. Idaho Department of Fish and Game disputes there has been a "substantial change" in the use of the range from 2002 to the present and disputes that there will be a "substantial change" in the future. The IDF&G's claim of a lack of "substantial change" is not supported by the evidence. The evidence shows a 649% increase in range use from 2002 through 2004 due solely to some simple access improvements by IDF&G. IDF&G's own grant application shows that with the range improvements of the Vargas Master Plan an estimated increase of use **three thousand times** greater than the use in 2002.

The Court determines that a preliminary injunction under Idaho Rule of Civil Procedure 65(e)(1) is allowed. The record is complete. The legal issues are not complex.

12. Idaho Rule of Civil Procedure 65(e)(2) reads:

> A preliminary injunction may be granted in the following cases:
> (2) When it appears by the complaint or affidavit that the commission or continuance of some act during the litigation would produce waste, or great or irreparable injury to the plaintiff.

The Idaho Supreme Court in *Harris* interpreted Idaho Rule of Civil Procedure 65(b)(2)

requirement of “irreparable injury” as follows:

> We have previously stated that "a preliminary mandatory injunction is granted only in extreme cases where the right is very clear and it appears that irreparable injury will flow from its refusal." *Evans v. District Court of the Fifth Judicial District,* 47 Idaho 267, 270, 275, P.99, 100 (1929); *quoted in Farm Service, Inc., v. United States Steel Corp.,* 90 Idaho 570, 587, 414 P.2d 898, 907 (1966). The district court's findings state that: "[t]he evidence clearly indicates that neither of the named plaintiffs nor, for that matter, any of the other proposed plaintiffs whose records were presented are in danger of any irreparable damage." We agree.

106 Idaho at 518, 681 P.2d at 988. There are two issues then to be analyzed: 1) a right that is “very clear” and 2) irreparable injury.

First, the Court analyzes whether there is a “very clear” right. The statement in *Harris* that the right must be “very clear” interpreting Idaho Rule of Civil Procedure 65(e)(2) is not applicable in all instances for the following reasons: First, that statement in Harris is based on *Farm Service, Inc., v. United States Steel Corp.,* 90 Idaho 570, 587, 414 P.2d 898, 907 (1966), which interpreted Idaho Code § 8-402(2), the predecessor to Idaho Rule of Civil Procedure 65(e)(2). A reading of *Farm Service Inc.,* shows that it is only when the granting of the preliminary injunction “will have the effect of giving to the party seeking the injunction all the relief sought in the action”, that the moving party must show “a clear right to the relief sought.” *Id.* The relief *requested* by plaintiffs in this matter would have the “effect of giving to the party seeking the injunction all (or nearly all) the relief sought in the action”. However, the Court has not *granted* plaintiffs all or nearly all the relief sought in the action (the Court has not prohibited all existing use, nor has it prohibited future improvements). If injunctive relief short of that is deemed appropriate, then, according to *Farm Service, Inc.,* there need be no showing of “a clear right to the relief sought.” Second, a plain reading of Idaho Rule of Civil Procedure 65(e)(1) and (2) shows that “a clear right to relief” is not contemplated under

Idaho Rule of Civil Procedure 65(e)(2), when it is required under Idaho Rule of Civil Procedure 65(e)(1), through the language "When it appears by the complaint that the plaintiff is entitled to the relief demanded…". Idaho Rule of Civil Procedure 65(e)(2) is completely silent on this aspect, and thus, it is presumed not to be contained as an element under the ground set forth in Rule 65(e)(2). As noted by the Idaho Supreme Court in *Gilpin v. Sierra Nevada Consol. Mining Co.,* 2 Idaho 696, 703, 23 P. 547, 549 (1890), (interpreting Revised Statute of Idaho Section 4288, the statutory predecessor to Idaho Code § 8-402(2), the statutory predecessor to Idaho Rule of Civil Procedure 65(e)(2)), the various grounds for granting an injunction were "disjoined in the statute from the other grounds." In other words, each ground is separate and stands alone.

This Court finds that, under Idaho Rule of Civil Procedure 65(e)(2), if the injunctive relief granted does not "have the effect of giving to the party seeking the injunction all the relief sought in the action", then there is no required showing of a "very clear" right, and injunctive relief may be granted where the injury is great or irreparable.

Second, the Court analyzes whether there is great or irreparable injury to the plaintiffs. At first glance the above quote in *Harris* might indicate that the Idaho Supreme Court felt an injunction could be granted only where the injury is irreparable. 106 Idaho at 518, 681 P.2d at 988. But that interpretation would be out of context with Idaho Rule of Civil Procedure 65(e)(2) which reads: "When it appears by the complaint or affidavit that the commission or continuance of some act during the litigation would produce waste, or great or irreparable injury to the plaintiff." A review of other Idaho Supreme Court cases makes it clear that injunctions can be granted under Idaho Rule of Civil Procedure 65(e)(2), where the injury is "great" **or** "irreparable". As stated in *Meyer v. First Nat'l Bank,* 10 Idaho 175, 181, 77 P. 334, 336 (1904):

> The contention of defendants that plaintiffs have an adequate remedy by an action at law, and cannot, therefore, resort to an equitable remedy, is not well founded. It is true that they have their remedy for damages, but under our statute, section 4288, Revised Statutes, a party is not under the necessity of waiting till his property has been damaged and destroyed, and his business disorganized, and his premises encroached upon to the extent of his own ouster, and then resorting to an action at law for redress. In *Staples v. Rossi,* 7 Idaho, 618, 65 Pac. 67 [1901], this court laid down the rule under our statute as follows: "Injunctions will issue to restrain temporarily an act which will result in great damage to the plaintiff, although the injury is not irreparable, and notwithstanding that other remedies lie in behalf of plaintiff."

The last sentence in the above quote makes it clear that "Injunctions ***will*** issue to restrain temporarily an act which will result in great damage to plaintiff", even though the injury is not irreparable and even though damages may later compensate the injured party for that injury. (emphasis added). The testimony is uncontroverted that due to significant increase in range use since 2002, from a noise standpoint alone, plaintiffs have experienced a degradation in living on their own property. Dorothy Eldridge testified the noise shakes her windows, that they no longer ride horses due to the horses spooking from the noise, that the noise causes her migraines to become symptomatic. She testified there is no way to avoid the noise from the range as it is still annoying inside the house with the windows closed and the television on. Her husband Ron Eldridge testified he is considering selling their property because twelve years ago they bought in that location for the quiet. Jeanne Hom is considering selling her property and taking a loss on the sale because "it is impossible to live there". Marcelle Richman no longer takes 4H children on horse rides in the area due to safety concerns with bullets and the noise spooking horses. These are examples of "great" injury.

In addition to the noise there are personal safety concerns. Granted, no one has been hit by a bullet yet, but Will Collins testified that he has heard the sound of a bullet "crack" as it went over his head while standing on his property. Dorothy Eldridge has

had two experiences of bullets hitting or going over her property. While the mathematical probability of a bullet hitting a person are slight, if that event happens, the harm will be great. In addition to being "great" injury, the injury is also "irreparable" for the same reasons noted above. There can be no more "irreparable" injury than death or injury from a bullet. Using either word from Idaho Rule of Civil Procedure 65(e)(2), the injury proven to these citizens is both "great" and "irreparable". In *Schreck v. Village of Coeur d'Alene,* 12 Idaho 708, 87 P. 1001 (1906), the Idaho Supreme Court held that where the nuisance was especially injurious to the plaintiff (a city maintained a dumping ground for all kinds of waste, which emitted offensive odors, endangered the health and comfort of plaintiff and his family, depreciated the value of his property and rendering his premises unsafe for habitation), and the city did not deny the existence of the nuisance but instead alleged that it has taken steps to abate it, but the proof was that conditions had not materially changed, then it was error for the district court to deny a temporary injunction. The Idaho Supreme Court remanded back to the district court with instructions to grant a temporary injunction. The facts in the present case are different but analogous. Plaintiffs have proven the sound from rifle fire at the range, increased in frequency since 2002, "endangers the health and comfort" of themselves and their family members.

This Court finds as a factual matter and as a matter of law that the requirements of Idaho Rule of Civil Procedure 65(e)(2) have been met and that an injunction should issue.

13. Idaho Rule of Civil Procedure 65(e)(3) allows a preliminary injunction: "When it appears during the litigation that the defendant is doing, or threatens, or is about to do, or is procuring or suffering to be done, some act in violation of the plaintiff's

rights, respecting the subject of the action, and tending to make the judgment ineffectual." Idaho Rule of Civil Procedure 65(e)(3) appears to have been interpreted by the Idaho Supreme Court only once in *Gilpin v. Sierra Nevada Consol. Mining Co.,* 2 Idaho 696, 703, 23 P. 547, 549 (1890). That case dealt with whether an injunction regarding a mine in Shoshone County should have been denied by the district court. The Idaho Supreme Court held: "To remove the ore from the mine, and leave but a worthless shell to be contended for, would certainly have a 'tendency to render ineffectual' any judgment which the plaintiff might recover." *Id.* In the present case, an analogous situation exists. If continued and increased range use causes further and increased damage to these plaintiffs, either through degradation in health, shortening of life, the need to move away, it would have a "tendency to render ineffectual" any judgment they may recover, because a money judgment cannot restore health, cannot restore life expectancy, cannot repair permanent damage to the body and cannot restore time spent away from their home. It should be noted that in *Gilpin* the Idaho Supreme Court reversed the district court's denial of a preliminary injunction, and itself ordered a preliminary injunction, not even remanding the issue back to the trial court. 23 P. at 552.

This Court finds as a factual matter, and as a matter of law, that the requirements of Idaho Rule of Civil Procedure 65(e)(3) have been met, and that an injunction should issue upon that ground as well. The requirement of Idaho Rule of Civil Procedure 65(e)(2) that an injunction cannot "have the effect of giving to the party seeking the injunction all the relief sought in the action" does not apply to Idaho Rule of Civil Procedure 65(e)(3).

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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 any on site supervision), up to 500 shooters per year. Once IDF&G has realized that number in a given year, it must close the range for the remainder of that calendar year.

IT IS FURTHER ORDERED the Idaho Department of Fish and Game is free to seek any funding it wishes. The Idaho Department of Fish and Game is free to build any improvements upon its property. However, use levels will remain capped at 500 shooters per year unless the following two concerns have been adequately addressed: **1) Safety:** include safety measures adequate to **prevent** bullet escapement beyond the boundaries owned and controlled by IDF&G, and **2) Noise:** include noise abatement measures to reduce noise to a decibel level agreed upon by the parties in the first

instance, or, if the parties are unable to agree, to be set by the Court following further evidence. Even if the solution to these two concerns are agreed upon by the parties, in order to close this case IDF&G will need to obtain an order from the Court to exceed 500 shooters per year. The first concern (safety) can be satisfied only by the "No Blue Sky" rule, or "totally baffled…so that a round cannot escape", as espoused by the nation's preeminent authority on range design and designer of the Vargas Master Plan, Clark Vargas. Exhibit 2, p. 5. Once bullet containment is achieved, it matters not for purposes of this litigation if the range is supervised (with bullet containment, supervision would only inure to the benefit of the participants, an important consideration, but not the subject of this lawsuit). The second concern (noise) is a function of the number of shooters (per year or per day) and peak decibel level. For example, it may be that 500 shooters per year in an unmitigated range producing 65 decibels is less desirable than 50,000 shooters per year from a range that only produces 30 decibels. It would seem logical for the parties to agree as to noise levels and shooter numbers in advance of any construction, but it is not the Court's place to force such agreement in advance. If the parties in the future cannot agree as to noise levels and maximum shooter numbers, the Court will make that determination with additional evidence. If IDF&G makes improvements but does not successfully address safety and noise concerns, IDF&G will not be allowed to exceed 500 shooters per year.

ENTERED this 23rd day of February, 2007.

_____
John T. Mitchell, District Judge

Certificate of Service

I certify that on the _____ day of February, 2007, a true copy of the foregoing was mailed postage prepaid or was sent by interoffice mail or facsimile to each of the following:

Lawyer	Fax #	Lawyer	Fax #
Scott W. Reed	208 765-5117	Harvey Richman	Via mail
W. Dallas Burkhalter	208 334-2148		

_____
Secretary