STATE OF IDAHO)
County of KOOTENAI)ss

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CLERK OF DISTRICT COURT

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Deputy

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI

LAWRENCE ("BUD") MOON, JR., et al,,

Plaintiffs,

vs.

NORTH IDAHO FARMERS ASSOCIATION, et al,.

Defendants.

Case No. **CV 2002 3890**

MEMORANDUM OPINION AND ORDER DENYING DEFENDANTS' MOTIONS TO DISMISS

I. FACTUAL BACKGROUND.

Plaintiffs are eight individuals who either themselves have, or who represent minor children who have, chronic pulmonary disorders such as asthma, bronchitis, cystic fibrosis and/or cardiac conditions. Class Action Complaint, ¶ 1. They allege they are at great risk for serious health problems due to smoke from the burning of grass seed stubble and straw, and are thus differentiated from the rest of the population that are exposed to such smoke. *Id.*¶ 5. Accordingly, plaintiffs shall be referred to as "at risk citizens", or "citizens." The defendants consist of about 78 farmers who farm on the Couer d'Alene Indian Reservation and the Rathdrum prairie (located in Kootenai and Benewah counties), who grow grass seed and who have burned grass residue. *Id.* pp. 10-26, ¶ 23-101. They are referred to as "farmers". Defendant North Idaho Farmers Association (NIFA) is a non-profit organization whose voluntary members are Idaho farmers and corporations,

including those who grow turf grasses. *Id.* p. 10, ¶ 22. Finally, the State of Idaho is a defendant. *Id.* p. 26, ¶ 102. On June 10, 2002, plaintiffs filed their "Class Action Complaint" against defendants, seeking: 1) class certification (however, certification has not been brought before the Court at this time); 2) an order from the Court creating an independently supervised medical monitoring program; 3) a preliminary and permanent injunction ordering farmers to immediately stop any agricultural burning in the State of Idaho even if such burning is in compliance with any applicable provision of the Idaho "Smoke Management Plan"; 4) a declaration that citizens' property was taken by the State of Idaho without just compensation and that Idaho Code § 52-108 and the immunity provisions of the Right to Farm Act (I.C. § 24-4503) are unconstitutional; 5) damages for just compensation for any taking and for future costs incurred as a result of exposure to smoke; 6) costs, attorney fees and the payment of the expenses of the medical monitoring program; and 7) "any other relief the Court deems just and equitable." *Id.* p. 55-56. As of the date of this opinion, none of the farmers have filed an answer to the Class Action Complaint.

Citizens' attorneys scheduled a two day hearing for a temporary restraining order, to be held on July 18-19, 2002. The week before that hearing was scheduled, citizens' attorneys cancelled such hearing, as one of them was traveling to England. Citizens' Motion for Temporary Restraining Order and Order to Show Cause for Issuance of Preliminary Injunction was filed on July 31, 2002.[1] Citizens' attorneys made no request to reschedule the hearing until August 1, 2002, at which time citizens' attorneys called the Court to schedule the hearing on their motion for TRO and preliminary injunction, and they were given a one day hearing on August 9, 2002.

[1] Injunctive relief is not sought against defendant NIFA, and thus, the attorney for NIFA did not appear at the August 9 and 15, 2002 hearings. Affidavit of Donald J. Farley,

The State of Idaho and some of the farmers[2] filed motions to dismiss on August 7, 2002. Other farmers filed their motions to dismiss on August 8, 2002. All motions to dismiss were pursuant to I.R.C.P. 12(b)(6), failure to state a claim upon which relief could be granted. None of the motions to dismiss were timely filed relative to the hearing date the farmers noticed up (I.R.C.P. 6(d)), but in Plaintiffs' Partial Objection to Defendants' Motion to Shorten Time filed August 8, 2002, and again at hearing on August 9, 2002, Steve Berman, attorney for citizens, did not object to the Court's hearing the farmers' motions to dismiss on the issues of preemption, nuisance and trespass. The farmers motions to dismiss on the theories of strict liability, conspiracy, medical monitoring and the State of Idaho's motion to dismiss on the issues of constitutionality of the statutes and taking without just compensation, were agreed by all counsel at hearing on August 9, 2002, to be deferred to a later date. Hearing on the citizens' motion for a temporary restraining order, and motion for preliminary hearing, and the farmers' motions to dismiss as to the issues of 1) pre-emption, 2) nuisance and 3) trespass, were held August 9, 2002. Evidence and argument by counsel were presented. The matter was continued to another hearing held August 15, 2002, to give all parties the opportunity to submit additional briefing to the Court on the issues of trespass and nuisance. Additional evidence and argument were presented at the August 15, 2002 hearing. The Court has carefully considered the extensive briefing submitted, the case law provided, the testimony, affidavits and exhibits offered, and arguments of counsel in support of and in

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filed August 5, 2002.

[2] Various farmers are represented by various attorneys, and all have submitted pleadings. So as to avoid confusion in referencing those pleadings in this and future decisions, the groups of farmers as represented by their attorneys will be referred to as follows: McLean, Asher and Place represented by Michael E. McNichols are referred to as **McLean et al**.; Lampert Farm, Clausen, M. LaShaw, Morris, Nichols, Towne, Bloomsburg, B. LaShaw, Heaton and Sievers represented by Michael E. Ramsden are referred to as **Lampert et al**.; Meyer, Deshiell and others are represented by Peter

opposition to these motions.

At the first hearing, Trina Heisell testified that her child was kept in the hospital for 17 days until they were done burning, and now they leave the area until the second week of September when hopefully, burning is completed. She testified her child's symptoms continue for about four months after the burning stops. Laura Fowler testified her child has asthma, and that field burning causes her medications to increase, use of steroids increase, she fights for her breath, gets shaky and that these symptoms hang on for a while even after the burning has stopped. Bud Moon testified about the respiratory problems he has had due to the smoke from grass fields as the smoke hits the Sandpoint/Hope Idaho area where he has resided for 77 years Dr. Covelli (pulmonary critical care) and Dr. Strimas (allergist and immunologist) testified about the relationship they have seen between increased respiratory symptoms and grass field burning. Dr. Tarnasky testified on behalf of the farmers. He is a gynecologist (lack of foundation for any pulmonary opinion), and he owns 220 acres which he leases to grass seed farmers who burn (possible bias), so the opinions Dr. Tarnasky gave regarding the relationship between grass field burning and pulmonary problems are accorded little if any weight.

The Court will first explain why a hearing on the temporary restraining order was held. A motion for a temporary restraining order may be granted *ex parte*, without a hearing. I.R.C.P. 65(b). However, because many of the defendants had appeared in this case and were represented by counsel by the time the temporary restraining order was requested, and because the injunction sought encompassed so much of the controversy between the parties, an exercise of caution indicated this Court should use its discretion and conduct a hearing so the parties could present evidence and argument in addition to what had been presented by briefing. The Idaho Supreme Court in *Lawrence*

Erbland, Gary H. Baise and Stewart D. Fried are referred to as **Meyer et al**.

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. Cited in *Lawrence Warehouse Co. v. Rudio Lumber Co.,* 89 Idaho at 395, 405 P.2d at 640.

II. MOTIONS TO DISMISS.

As stated above, the motions to dismiss that are before the Court at the present time, are the farmers' motions to dismiss citizens causes of action based on 1) federal pre-emption, 2) nuisance claims and 3) trespass claims. Farmers claim federal law (the Clean Air Act, 42 U.S.C. § 7401, as implemented through the State Implementation Plan (SIP), Idaho Code § 39-105 – 39-107 and IDAPA 58.01.01), preempts common law nuisance and trespass claims. Meyer et al.'s Memorandum in Support of Defendants' Motion to Dismiss, pp. 4-17. Farmers argue citizens' claims under the common law torts of private and public nuisance are barred by Idaho Code § 52-108 and Idaho Code § 22-4503. *Id.* pp. 17-19. Farmers argue citizens' claims under the common law tort of trespass is not a proper cause of action as smoke and soot give

rise only to a nuisance claim, not a trespass claim, as with trespass there has to be an invasion which interferes with the right of exclusive possession of the land which is a direct result of some act committed by the defendant, and that if there is a trespass, farmers have a prescriptive easement over the land since they have been burning for "many, many years." *Id.* pp. 19-24.

A. FEDERAL PRE-EMPTION.

Farmers claim federal law (the Clean Air Act, 42 U.S.C. § 7401, as implemented through the State Implementation Plan (SIP), Idaho Code § 39-105 – 39-107 and IDAPA 58.01.01), preempts common law nuisance and trespass claims. Meyer et al.'s Memorandum in Support of Defendants' Motion to Dismiss, pp. 4-17. Specifically, farmers claim the federal Clean Air Act, 42 U.S.C. §§ 7401 to 7671q, preempt citizens' common law claims. *Id.* p. 8.

The United States Congress enacted the federal Clean Air Act (CAA) to address the failure of the various states to cooperate with the federal government in its efforts to protect America's air resources. 42 U.S.C.l § 7401, *ASARCO Inc. v. EPA,* 578 F.2d 319 (D.C. Cir. 1978). The CAA has National Ambient Air Quality Standards (NAAQS), which cover "particulate matter" ("PM") and other pollutants. 36 Fed.Reg. 8186. Congress directed the states to develop, adopt after notice and public hearing, and enforce state plans (State Implementation Plans, or "SIP") to implement the CAA. A state must submit its SIP to the federal EPA for approval. Idaho has a SIP approved by the EPA. 40 CFR § 52.6. Idaho Code § 39-105 and 39-107 authorize the State of Idaho Department of Environmental Quality (DEQ) to promulgate air pollution rules. The DEQ has promulgated the Idaho Rules for the Control of Air Pollution in Idaho ("IDAIR"). IDAPA 58.01.01. The Idaho SIP regulates open burning, such as the

burning of agricultural fields by the farmers, through IDAIR. IDAPA 58.01.01 – 600 through 616. Agricultural field burning needs a permit (IDAPA 58.01.01.614.01(a)) or, if no permit is required, any person who burns must "meet all conditions set forth in a Smoke Management Plan for Prescribed Burning." IDAPA 58.02.02.614.02(a). Idaho Code § § 22-4801 – 4804 set forth the Smoke Management and Crop Residue Disposal Act (SMCRDA). Pursuant to SMCRDA the Idaho Department of Agriculture adopted Crop Residue Disposal Rules and implemented a statewide crop residue disposal and smoke management plan. IDAPA 02.06.16. The Crop Residue Rules and the Smoke Management Plan set forth the program for permitting the burning of agricultural fields in the State of Idaho. Each field to be burned in Kootenai and Benewah counties must be registered with the DEQ before burning. Idaho Code §22-4803(3); IDAPA 02.06.16.100. After registering the field, a person may burn that field only on the dates and times set forth by the Idaho Department of Agriculture. ADAPA 20.06.16.200. However, burning shall not begin if the PM (particulate matter) level for an area has been reached or is predicted to be reached. If the $PM^{2.5}$ one hour levels have reached 80% of the standard, or an air stagnation is declared by DEQ, no new burning can be initiated. IDAPA 58.01.01.550; IDAPA 2.06.16.500.02. Smoke particles are measured at $PM^{2.5}$ (small particles less than 2.5 microns, or less than 1/25th the diameter of a human hair) and at PM^{10} (less than 10 microns).

Farmers argue these federal regulations, as implemented through state statutes and rules, preempt the common law torts of nuisance and trespass. Farmers cite a plethora of cases which they claim support their argument. Meyer et al.'s Memorandum in Support of Defendants' Motion to Dismiss, pp. 8-17. The problem with farmers' argument is that none of those cases applied any state's common law torts of nuisance or trespass to the Clean Air Act (CAA). Each of those cases dealt with the CAA

preempting other federal statutes, such as the Americans with Disabilities Act and the Rehabilitation Act in *Save Our Summers v. Washington Dept. of Ecology,* 132 F.Supp.2d 896 (E.D. Wash. 2000) and the federal Resource Conservation and Recovery Act in *Safe Air For Everyone v. Meyer et. al.,* ___ F.Supp.2d ___, (D.Idaho 2002). *International Paper Co. v. Ouellete,* 479 U.S. 481 (1987) specifically held that the Clean Water Act **did not** preempt claims of nuisance asserted by land owners in the state of Vermont. *Middlesex County Sewerage Auth. V. National Sea Clammers Association,* 453 U.S. 1, 101 S.Ct. 2615, 69 L.Ed.2d 435 (1981) held that **federal** common law claims of nuisance, which are unavailable to private parties such as the farmers in the present case, are preempted by the Federal Water Pollution Control Act (FWPCA). 453 U.S. at 21, 101 S.Ct at 2627, 69 L.Ed.2d at 451-52. It is clear that the United States Supreme Court did not address any state tort claims. 453 U.S. at 5, n. 6 and n. 8, 101 S.C.t at 2619, n.6 and n. 8, 69 L.Ed.2d at 441-42, n. 6 and n. 8. Two federal district of Idaho judges (Callister and Ryan respectively) in *State of Idaho v. Hanna Mining Co.,* 882 F.2d 392 (1989) and *State of Idaho v. Bunker Hill,* 635 F.Supp. 665 (1986), both clearly stated there is no preemption of a state common law nuisance claim, though these two cases specifically dealt with state law (Idaho Environmental Protection and Health Act of 1972, I.C. §39-101 – 114). As noted by Judge Callister in *Hanna*, "Statutory changes abolishing the common law are not presumed." 882 F.2d at 834, citing *Williams v. Blakely,* 114 Idaho 323, 757 P.2d 186 (1987). The Idaho Legislature has spoken as to the State's strong policy protecting the environment of the State of Idaho and the health of its citizens:

> It is hereby recognized by the legislature that the protection of the environment and the promotion of personal health are vital concerns and are therefore of great importance to the future welfare of this state. It is therefore declared to be the policy of the state to provide for the protection of the environment and the

> promotion of personal health and to thereby protect and promote the health, safety and general welfare of the people of this state.

I.C. § 39-102(1). The Idaho Environmental and Protection and Health Act specifically contemplates civil actions in addition to governmental enforcement actions, as the Act states:

> No action taken pursuant to the provisions of this act or of any other environmental protection law shall relieve any person from any civil action and damages that may exist for injury or damage resulting from any violation of this act or of the rules, permits and orders promulgated thereunder.

I.C. § 39-102(7).

Farmers must be claiming state common law is preempted as there is no general federal common law. "Federal courts, unlike state courts, are not general common law courts and do not possess a general power to develop and apply their own rules of decision." *Safe Air For Everyone v. Meyer et. al.,* ___ F.Supp.2d ___, (D.Idaho 2002), citing *National Audobon Society, et al. v. Department of Water, et al.,* 869 F.2d 1196, 1200 (9th Cir. 1988), in turn quoting *Milwaukee v. Illinois,* 451 U.S. 304, 312 (1981).

Finally, there is a general savings clause within the citizen suit provisions of the Clean Air Act which states:

> Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any emission standard or limitation or to seek any other relief.

42 U.S. C. § 7604(e).

The farmers' claims that the citizens' lawsuit is barred by the doctrine of preemption, is misplaced. There is no preemption. Farmers' motions to dismiss on the grounds of preemption are DENIED.

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B. STATE COMMON LAW CLAIMS OF NUISANCE.

1. IDAHO CODE § 52-108.

Citizens allege nuisance as their first cause of action. Complaint, pp. 47-49, ¶ 179-192. Citizens allege both public and private nuisance. Complaint, p. 47, ¶ 185. 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.

Discussed below under the trespass section (section C), is the confusing interplay between trespass and nuisance. Under the more modern definitions of nuisance which require a "substantial interference with the use and enjoyment of his land" (*Bradley v. American Smelting & Refining Co.,* 635 F.Supp. 1154, 1157 (W.D.Wash. 1986), citizens have alleged sufficient facts to show a "substantial interference with the use and enjoyment of their land." They have alleged and testified about the health problems caused, the need to lock themselves in their homes during times of grass field burning, and the need to leave the area until burning is complete.

Farmers argue that Idaho Code § 52-108 bars the citizens' nuisance claims. Meyer et al.'s Memorandum in Support of Defendants' Motion to Dismiss, pp. 17. Idaho Code § 52-108 reads:

> When not a nuisance. – Nothing which is done or maintained under the express authority of a statute can be deemed a nuisance.

Citizens claim that Idaho Code § 52-108 is unconstitutional. Complaint, p. 53, ¶ 223. After reviewing the many cases cited by both sides, and upon its own research, this Court is convinced that Idaho Code § 52-108 is constitutional, but only if it applies to public nuisances. This Court is convinced for at least seven reasons, discussed below, that the proper reading of Idaho Code § 52-108, is that it applies only to public nuisances. Thus, citizens' claims, to the extent they arise under a theory of public nuisance **may** be barred by Idaho Code § 52-108 (this is actually a burden shifting statue as addressed in part 7 below). Farmers' Motions to Dismiss are DENIED upon the public nuisance theory, but the Court notes the burden shifting required under Idaho Code § 52-108 for public nuisance claims. Farmers' Motions to Dismiss under theories of private nuisance are DENIED in all aspects.

The following are the reasons why Idaho Code § 52-108 applies only to public nuisances, and thus, why citizens' private nuisance claims are not barred.

1. Constitutional Interpretation. This Court is mindful that statutes should be interpreted when possible, to avoid raising constitutional questions. *United States v. Grace,* 461 U.S. 171, 175-76 (1983); *Crowell v. Benson,* 285 U.S. 22, 62 (1932). The Idaho Supreme Court has held: "The cardinal principle of statutory construction is to save and not destroy. *Keenan v. Price,* 68 Idaho 423, 195 P.2d 662 (1948). The Iowa Supreme Court held Iowa's Right to Farm act was unconstitutional in granting immunity for private nuisance, and that:

> This immunity [from nuisance suits] resulted in the Board's taking of easements in the neighbors' properties for the benefit of the applicants. The easements entitle the applicants to do acts on their property, which, were it not for the easement, would constitute a nuisance. This amounts to a taking of a private property for public use without the payment of just compensation in violation of the Fifth Amendment to the Federal Constitution. This also amounts to a taking

> of private property for public use in violation of article I, section 18 of the Iowa Constitution.

Borman v. Board of Supervisors, 584 N.W.2d 309, 321 (Iowa 1998). The choice here is 1) Idaho Code § 52-108 applies only to public nuisances and is constitutional, or, 2) if Idaho Code § 52-108 applies to private nuisances (as well as public nuisances), there is a taking (*see Baltimore & Potomac R.R. Co. v. Fifth Baptist Church,* 108 U.S. 317, 331 (1883) and *Richards v. Washington Terminal Co.,* 233 U.S. 546, 553 (1914)), and if there is no remedy available to citizens for that taking, then Idaho Code §52-108 is unconstitutional. The power of the legislature to control and regulate nuisances is not without restriction, and it must be exercised within constitutional limitations. 66 C.J.S. *Nuisances* § 7, at 738 (1950). That quote also illustrates the choice this Court must make between the two alternatives. The Court chooses the constitutional interpretation, that Idaho Code § 52-108 only applies to shift the burden in public nuisance cases.

Furthermore, "The compiled laws establish the law of this state respecting the subjects to which they relate, and their provisions and all proceedings under them are to be liberally construed, with a view to effect their objects and to promote justice." Idaho Code § 73-102. All statutes must be liberally construed with a view to accomplishing their aims and purposes, attaining substantial justice, and the courts are not limited to the mere letter of the law, but may look behind the letter to determine its purpose and effect, the object being to determine what the legislature intended, and to give effect to that intent. *Keenan v. Price,* 68 Idaho 423, 195 P.2d 662 (1948).

2. All Idaho Supreme Court cases interpreting Idaho Code § 52-108, deal with public nuisances. *Twin Falls v. Harlan,* 27 Idaho 769, 151 P. 1191 (1915); *Village of American Falls v. West,* 26 Idaho 301, 142 P. 42 (1914); *Boise City v. Boise*

City Canal Co., 19 Idaho 717, 115 P. 505 (1911); *Lewiston v. Isaman,* 19 Idaho 653, 115 P. 494 (1911); *MacCammelly v. Pioneer Irrigation Dist.,* 17 Idaho 415, 105 P. 1076 (1909). This interpretation that Idaho Code § 52-108 only applies to public nuisances is bolstered by United States Supreme Court interpretation that legislative authorization only exempts liability from State actions, "it does not affect any claim of a private citizen for damages for any special inconvenience and discomfort not experienced by the public at large." *Baltimore & Potomac R.R. Co. v. Fifth Baptist Church,* 108 U.S. 317, 332 (1883). This interpretation makes sense as the state cannot legislate away the private property rights of the citizens without paying just compensation. *Brown v. County Commissioners of Scioto County,* 87 OhioApp.3d 704, 713, 622 N.E.2d 1153, 1159 (Ct.App.4th Dist. 1993) indicates this interpretation of a similar statute: "Since a pollution control facility operates under sanction of law, it cannot be a common-law public nuisance." "This is another way of saying that although it would be a nuisance at common law, conduct which is fully authorized by statute or administrative regulation is not actionable in tort." *Id.* In *Scioto*, public nuisance is analyzed under a negligence *per se* and burden shifting analysis. 87 OhioApp.3d at 714-15, 622 N.E.2d at 1160-61. Private nuisance was analyzed separately and differently. 87 OhioApp.3d at 715-16, 622 N.E.2d at 1161.

3. 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). Applying Idaho Code § 52-108 to abolish private nuisance claims would certainly be inconsistent with these cases.

4. The Environmental Protection and Health Act indicates that Idaho Code § 52-108 only applies to public nuisances. Again, the Idaho Legislature has spoken as to the State's strong policy protecting the environment of the State of Idaho and the health of its citizens:

> It is hereby recognized by the legislature that the protection of the environment and the promotion of personal health are vital concerns and are therefore of great importance to the future welfare of this state. It is therefore declared to be the policy of the state to provide for the protection of the environment and the promotion of personal health and to thereby protect and promote the health, safety and general welfare of the people of this state.

I.C. § 39-102(1). If this is the stated policy of the State of Idaho, then what are asthmatics and cystic fibrosis sufferers to do if the Idaho Environmental and Protection and Health Act does not protect them because some other less specific statute (Idaho Code § 52-108) bars a private nuisance claim? In statutory construction, the more specific statute controls over the more general. Idaho Code § 72-102; *People ex rel. Springer v. Lytle,* 1 Idaho 143 (1867); *State v. Jones,* 34 Idaho 83, 199 P. 625 (1921); *Herrick v. Gallet,* 35 Idaho 13, 204 P. 477 (1922); *In re Drainage District No. 3*, 40 Idaho 549, 235 P. 895 (1925). The Idaho Environmental and Protection and Health Act specifically contemplates civil actions in addition to governmental enforcement actions, as the Act states:

> No action taken pursuant to the provisions of this act or of any other environmental protection law shall relieve any person from any civil action and damages that may exist for injury or damage resulting from any violation of this act or of the rules, permits and orders promulgated thereunder.

I.C. § 39-102(7). The fact that Idaho Code § 52-108 does not apply to private nuisance claims is supported by *State of Idaho v. Hanna Mining Co.,* 882 F.2d 392 (1989) and

State of Idaho v. Bunker Hill, 635 F.Supp. 665 (1986), which both upheld the bringing of common law nuisance claims.

5. *Varjabedian v. City of Madera,* 20 Cal.3d 285, 572 P.2d 43 (1977). As noted in citizen's Brief in Support of Nuisance and Trespass Claims, pp. 16-17, *Varjabedian v. City of Madera,* 20 Cal.3d 285, 572 P.2d 43 (1977) is very much on point. The California Supreme Court interpreted a statute very similar to Idaho Code § 52-108 in a manner consistent with the *Baltimore & Potomac R.R. Co. v. Fifth Baptist Church,* 108 U.S. 317, 331 (1883) case. The city claimed the general authorization of municipal construction expressly sanctioned the production of any particular level of odors from a sewage treatment plant. The California Supreme Court rejected that claim, stating:

> None of the Government Code statutes under which the city claims to act mentions the possibility of noxious emanations from such facilities. Nor can we find that such odors were authorized by the "plainest and most necessary implication" from the general powers conferred, or that it can be fairly said that the Legislature contemplated, to any extent, the creation of a malodorous nuisance when it authorized sewage plant construction. Indeed, one object of such plants is to *remove* harmful and obnoxious effluents from the environment.

572 P.2d 43 at 48. (emphasis in original). Just as "none of the the Government Code statutes under which the city claims to act mentions the possibility of noxious emanations from such facilities" in *Varjabedian,* in the present case there is nothing in the SIP regulations that mentions the possibility that particulate matter would get to a level that would harm citizens with breathing problems. This Court finds *Varjabedian* to be very much on point.

6. Opacity Standards. Idaho Code § 52-108 reads:

> When not a nuisance. – Nothing which is done or maintained under the express authority of a statute can be deemed a nuisance.

The Court finds persuasive citizens' argument that because farmers' burning is not

maintained in accordance with authority of a statute (the opacity standards of IDAPA 58.01.01.625), Idaho Code § 52-108 does not operate to ban citizens' negligence actions. The evidence of Aaron Day, an expert certified[3] in testing emissions for compliance with opacity standards was uncontradicted, smoke from grass seed field burning violates the visible emissions standards contained in IDAPA 58.01.01.625, which provides:

> A person shall not discharge any air pollutant into the atmosphere from any point of emission for a period or periods aggregating more than three (3) minutes in any sixty (60) minute period which is greater than twenty percent (20%) opacity as determined by this section.

Farmers countered that a "field" is not defined as a point source of emission or a "stationary source" under 40 CFR part 60, Appendix A, Method 9. Mr. Day's opinion was that while "field" is not listed, "facility" is listed, and would include fields in his opinion. The Idaho rules omit "facilitiy" but do include "emissions unit". IDAPA 58.01.01.006. Mr. Day's interpretation is that "emissions unit" includes agricultural field burning. Mr. Day's opinions on this subject are uncontradicted. Farmers put on no expert or other testimony to counter Mr. Day's expert opinions.

7. Idaho Code § 52-108 creates a rebuttable presumption in public nuisance cases. Citizens argue that even if Idaho Statutes expressly allow the type of irreparable harm alleged, Idaho Code § 52-108 simply establishes a rebuttable presumption that the farmers' actions are not a nuisance. Citizens' Brief in Support of Nuisance and Trespass Claims, pp. 19-20. *Boise City v. Boise City Canal Co.,* 19 Idaho 717, 724, 115 P. 505 (1911) and *MacCammelly v. Pioneer Irrigation District,* 17 Idaho 415, 423, 105 P. 1076 (1909) would certainly lead to that interpretation. In *Boise*

[3] Mr. Day testified he is employed by Trinity Consultants in Des Moines, WA. He has a chemical engineering degree from Massachusetts Institute of Technology, he is a professional engineer in the State of Washington, does air quality consulting and is

City, the Idaho Supreme Court quoted from its decision two years earlier in *MacCammelly* and stated:

> Said canal was constructed and maintained under the express authority of a statute and for that reason it cannot be deemed a nuisance under the express provision of sec. 3659, Rev. Codes [predecessor to I.C. §52-108]. When a thing complained of is lawful, *the burden is upon the plaintiff to show that it has become a nuisance in fact*, which was not done in this case. The canal had an actual and lawful existence at the time the road was located and unless it is shown that it has become a nuisance, it will not be *presumed* that it has become such.

19 Idaho 717, 724, 115 P. 505, 512; 17 Idaho 415, 423, 105 P. 1076, 1084. (italics added). The italicized portion indicates the past interpretation of the Idaho Supreme Court is that Idaho Code § 52-108 is a burden shifting statute, not an outright abolition of nuisance causes of action. It is this Court's interpretation in the present case, that Idaho Code § 52-108 only applies to public nuisances (and not private nuisances), and that as to public nuisances, it is not a statute that abolishes public nuisances, but that creates burden shifting presumptions in public nuisance cases.

2. IDAHO CODE § 22-4503.

Farmers next contend that Idaho Code §22-4503 prohibits a nuisance cause of action. Meyer et al.'s Memorandum in Support of Defendants' Motion to Dismiss, pp. 18-19. Idaho Code § 22-4503, a part of Idaho's "Right to Farm Act", reads:

> Agricultural operation not a nuisance – Exception. – No agricultural operation or an appurtenance to it shall be or become a nuisance, private or public, by any changed conditions in or about the surrounding nonagricultural activities after the same has been in operation for more than one (1) year, when the operation was not a nuisance at the time the operation began…

This statute expressly applies to both public and private nuisances, but a plain reading of the statute makes it clear that it only applies to the situation where the

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certified in plume evaluation or measuring opacity from its source.

"nonagricultural activity" at a point in time after the agricultural activity has already begun, "comes to the nuisance". All the statute does is clarify the existing common law doctrine of "coming to the nuisance", making it clear that an agricultural operation need only be in operation for only one year, before any subsequent nonagricultural activity that moves in or "comes to the nuisance" is barred. That fact situation is not present in the instant case, and thus, Idaho Code § 22-4503 is not applicable as a bar to citizens' nuisance action in this lawsuit.

In the only two Right to Farm Act cases that have come before it, the Idaho Supreme Court has held that the Right to Farm Act applies only to surrounding activities that encroach upon existing agricultural operations. *Crea v. Crea,* 135 Idaho 246, 248-49, 16 P.3d 922, 924-25 (2000) ("the Act's intent [is] to address the encroachment of 'urbanizing areas,' as well as changes in 'surrounding nonagricultural activities,'" and holding the expansion of a hog farm was not protected); *Payne v. Skaar,* 127 Idaho 341, 344, 900 P.2d 1352, 1355 (1995). *See also Carpenter v. Double R Cattle Co.,* 105 Idaho 320, 322, 669 P.2d 643, 655 (Ct.App. 1983). This interpretation is also consistent with *Rancho Viejo, LLC v. Tres Amigos Jiejos, LLC,* 2002 WL 1691450 (Cal.App. 4th Dist., July 25, 2002), furnished by counsel for Meyer et al. That case interpreted California's Right to Farm Act which is similar to Idaho's except that it requires three years existence rather than one year. In reviewing the legislative history of California's Right to Farm Act, the California Court of Appeal made it clear these the California legislature intended the Act be applied only in "coming to the nuisance" cases:

> In that letter, Assemblyman Thurman stated: "AB 585 is an important step in eliminating suits by individuals who have moved to a new housing development 'in the country' and find the long-established farm bordering their back fence offends their senses."

Id., p. 5. The present case is not a "coming to the nuisance" case. Accordingly, Idaho Code § 22-4503 is not applicable as a bar to citizens' nuisance action in this lawsuit.

For the reasons set forth in part B.1 and B.2 above, farmers' motions to dismiss citizens' nuisance causes of action are DENIED in their entirety.

C. STATE COMMON LAW CLAIMS OF TRESSPASS.

Citizens have also sued in trespass. Complaint, pp. 49-50, ¶193-198. As citizens have noted, most nuisance actions also include a trespass allegation. Citizens' Brief in Support of Nuisance and Trespass Claims, p. 24, citing *Sinclair* 30 IDAHO LAW REVIEW 496. "The theories of trespass and nuisance are not inconsistent, and they may apply concurrently, and the injured party may proceed under both theories when elements of both actions are present." *Bradley v. American Smelting and Refining Co.,* 104 Wash.2d 677, 709 P.2d 782 (Wash. 1985).

In Idaho there is both criminal trespass (I.C. § 18-7008) and civil trespass (I.C. § 6-202). Idaho's civil trespass statutes recognize the invasion of land by particulates, ash and pollutants since it uses the word "substances". Idaho Code § 6-202A. The words "enters" and "entry" mean "going upon **or over** real property, either in person or by causing any object, substance or force to go upon or over real property." Idaho Code § 6-202A. (emphasis added).

Farmers argue that trespass requires an "entry onto the land", citing *Mock v. Potlatch*, 796 F.Supp. 1545 (D.Idaho 1992). McLean et. al's Supplemental Memorandum in Opposition to Motion for Preliminary Injunction, p. 10. In *Mock,* Judge Ryan held that noise from Potlatch's Lewiston turbine electrical generators did not constitute a trespass. Judge Ryan noted that as of 1992, "The Idaho Supreme Court

has not addressed the question of whether intangible entries onto another's land in the form of noise, smoke, light or odor can give rise to an action for trespass." 796 F.Supp. at 1548. Since the facts of his case only dealt with "noise", Judge Ryan's mention of "smoke, light or oder" was dicta. Judge Ryan noted the modern trend:

> However, a modern trend has emerged under which airborne pollution may constitute a trespass, where the plaintiff can demonstrate physical damage to his property.... The modern trend departs from the traditional rule by finding that intangible invasions of the plaintiff's property may constitute a trespass. However, the modern trend also departs from traditional trespass rules by refusing to infer damage as a matter of law, thereby eliminating the right to nominal damages. *The plaintiff claiming trespass must prove that the intangible invasion resulted in substantial damages to the plaintiff's land.*
> *Id.* (citations omitted) (emphasis added).

796 F.Supp at 1549. In the present case, citizens are claiming more than "nominal" damage. They have alleged substantial damages (health problems, inability to breathe, needing to move away from their home). The amount of damage awarded remains to be seen, but this case is at the motion to dismiss juncture, and citizens have alleged substantial damage.

As noted by citizens, there is no Idaho appellate decision on point, but the State of Oregon has addressed trespass with respect to field burning and found that such smoke can constitute a trespass. Citizens' Brief in Support of Nuisance and Trespass Claims, p. 25. In *Ream v. Keen,* 314 Or. 370, 838 P.2d 1073 (1992), the Oregon Court of Appeals held that the smoke from field burning trespassed by drifting over plaintiffs' property. 314 Or. at 372-73. In *Koos v. Roth,* 293 Or. 670, 690, 652 P.2d 1255 (1982), the Supreme Court of Oregon found that trespass resulted from the farmer's field burning. The Supreme Court of Oregon in *Davis v. Georgia-Pacific Corp.,* 251 Or. 239, 242-43, 445 P.2d 481 (1968) found airborne particles from a pulp mill constituted trespass even if invisible.

Washington courts have also recognized trespass by microscopic particles. In *Bradley v. American Smelting & Refining Co.,* 104 Wn.2d 677, 709 P.2d 782 (1985) the Supreme Court of Washington held that airborne chemical substances from a smelter was a trespass upon plaintiffs' land. Another case allowing smelter emissions as a trespass is the Supreme Court of Alabama's decision in *Borland v. Sanders Lead Co.,* 369 So.2d 523 (Ala. 1979).

Similar cases from other states (which also illustrate that this is not a particularly "new" development in the law) include: *Roberts v. Kaiser Permanente Corp.,* 188 Cal.App.2d 526, 10 Cal.Rptr. 519 (Cal.Ct.App. 1961) (cement dust as trespass); *Sheppard Envelope Co. v. Arcade Malleable Iron Co.,* 138 N.E.2d 777 (Mass. 1956) (particulate emissions as trespass); *Hall v. De Weld Micca Corp.,* 93 S.E.2d 56 (N.C. 1956)(trespass for minute and invisible particles of silicon dioxide) and *Ingmundson v. Midland C. R.R.,* 173 N.W. 752 (N.D. 1919).

Farmers argue that in *Ream* while the Oregon Supreme Court held the deposit of particulate matter on another's land can constitute trespass, "the Oregon Supreme Court acknowledged that the result might have been different if the deposit of particulates had been less substantial." McLean et. al's Supplemental Memorandum in Opposition to Motion for Preliminary Injunction, p. 12. That isn't really what the Oregon Supreme Court said. What the Oregon Supreme Court actually stated is as follows:

> Defendant argues that, in *Martin et ux v. Reynolds Metals Co.,* 221 Or. 86, 342 P.2d 790 (1959), *cert. den.* 362 U.S. 918, 80 S.Ct. 672, 4 L.Ed.2d 739 (1960), "the court stated that in some cases trespass might not lie because the actionable invasion was so trifling that the law would not consider it," and "[s]ome intrusion may be allowable even though substantial if the court refuses to recognize the plaintiff has a legally protected interest in the particular possessory use as against the particular conduct of the defendant." Although defendant's characterization of those considerations in *Martin* is accurate, he does not show how they might benefit him.
>
> The court said in *Martin:*

> "In every case in which trespass is alleged the court is presented with a problem of deciding whether the defendant's intrusion has violated a legally protected interest of the plaintiff. *In most cases the defendant's conduct so clearly invades the well established possessory interest of the plaintiff that no discussion of the point is called for.*"
>
> 221 Or. at 95, 342 P.2d 790. (Emphasis supplied.)
>
> Defendant advances no reason, and we discern none, why this case is not among the ordinary ones that call for no discussion of the point. Plaintiffs' buildings were affected by the smoke, and there was a heavy pall of smoke over their property for short periods, followed by a residual smoke odor for several days after each of the burning incidents. We conclude that defendant's conduct resulted in an invasion of plaintiffs' legally protected possessory interest, as a matter of law.
>
> We also reject defendant's argument that the intrusion was so "trifling" that it was not cognizable as a trespass. In *Martin,* the court noted that the maxim *de minimis non curat lex* can apply in trespass cases and gave as an example that "the casting of a grain of sand upon another's land would not be a trespass" nor would other intrusions that do "no actual damage or [cause] no interference in any way with a legitimate use of the premises." 221 Or. at 97-98, 342 P.2d 790. This is not such a case. Defendant attempts to avoid that conclusion by using minimalistic descriptions of what occurred, *e.g.,* "the passage of smoke over a portion of plaintiff's land for a brief period of time." Those descriptions might be appropriate in a jury argument regarding the amount of damages. However, as we understand the *Martin* test, there is no connection between the factual question of the amount of damages and the legal "*de minimis* " determination that the court must make in deciding whether the law of trespass applies. Indeed, actual damage is not necessary for a defendant to be liable for intentional trespass. 221 Or. at 97, 342 P.2d 790; *but see* 221 Or. at 98, 342 P.2d 790. The question that the court must consider is whether the intrusion is so minimal that, as a matter of law, no legal consequences *can* attach. We hold that the answer here is no.
>
> Defendant relies on cases from other jurisdictions that do not assist him, *inter alia,* because of differences between the jurisdictions' law and Oregon's. He also relies on *Amphitheaters, Inc. v. Portland Meadows,* 184 Or. 336, 198 P.2d 847 (1948), for the proposition that intrusion by smoke necessarily falls under the law of nuisance rather than trespass. Assuming that that case was ever authority for that proposition, the later decisions in *Davis v. Georgia-Pacific, supra* and *Martin et ux v. Reynolds Metals Co., supra,* say that it can constitute an intentional trespass.

828 P.2d at 1039-1040. In the present case, it cannot be said that the “actionable invasion was so trifling that the law would not consider it”, since the actionable invasion has caused health problems and people to move from there homes for periods of time. The invasion here is not so “trifling” that it is not cognizable as a trespass. Farmers’

attempt to discredit *Ream* is without merit.

Certainly there are cases that support farmers' position that smoke and particulate matter is really a nuisance rather than a trespass. Most of those cases are older cases. *See Thackery v. Union Portland Cement Co.,* 64 Utah 437, 231 P. 813 (Utah 1923). This Court takes notice of two cases from immediately adjacent sister states (Washington and Oregon), where their Supreme Courts, *en banc* in each case, held that airborne particles (and grass field burning in particular in the Oregon case) is a trespass. The fact that every single one of the Washington Supreme Court justices unanimously decided the issue in *Bradley v. American Smelting & Refining Co.,* 104 Wn.2d 677, 709 P.2d 782 (1985), and every single one of the Oregon Supreme Court justices unanimously decided the issue in *Ream v. Keen,* 314 Or. 370, 838 P.2d 1073 (1992), is clear guidance to this Court which lacks on point precedent from Idaho's Supreme Court.

The distinction between trespass and nuisance is difficult to understand. The law of nuisance has been described as the most "impenetrable jungle in the entire law." *Brown v. County Commissioners of Scioto County,* 87 OhioApp.3d 704, 712, 622 N.E.2d 1153 (1993). "The courts have been groping for a reconciliation of the doctrines of trespass and nuisance over a long period of time and, to a great extent, have concluded that little of substance remains to any distinction between the two when air pollution is involved." *Bradley v. American Smelting & Refining Co.,* 104 Wn.2d 677, 684, 709 P.2d 782, 786 (1985). The Washington Supreme Court in *Bradley* clarified the history of this area of the law first, by citing W. Rogers, *Environmental Law*, § 2.13 at 154-57:

> The basic distinction is that trespass can be defined as any intentional invasion of the plaintiff's interest in the exclusive possession of property, whereas a

nuisance requires a substantial and unreasonable interference with his use and enjoyment of it. That is to say, in trespass cases defendant's conduct typically results in an encroachment by "something" upon plaintiff's exclusive rights of possession.

The first and most important proposition about trespass and nuisance principles is that they are largely coextensive. Both concepts are often discussed in the same cases without differentiation between the elements of recovery....

It is also true that in the environmental arena both nuisance and trespass cases typically involve intentional conduct by the defendant who knows that his activities are substantially certain to result in an invasion of plaintiff's interests. The principal difference in theories is that the tort of trespass is complete upon a tangible invasion of plaintiff's property, however slight, whereas a nuisance requires proof that the interference with use and enjoyment is "substantial and unreasonable." This burden of proof advantage in a trespass case is accompanied by a slight remedial advantage as well. Upon proof of a technical trespass plaintiff always is entitled to nominal damages. It is possible also that a plaintiff could get injunctive relief against a technical trespass--for example, the deposit of particles of air pollutant on his property causing no known adverse effects. The protection of the integrity of his possessory interests might justify the injunction even without proof of the substantial injury necessary to establish a nuisance. Of course absent proof of injury, or at least a reasonable suspicion of it, courts are unlikely to invoke their equitable powers to require expensive control efforts.

While the strict liability origins of trespass encourage courts to eschew a balancing test in name, there is authority for denying injunctive relief if defendant has exhausted his technological opportunities for control. If adopted generally, this principle would result substantially in a coalescence of nuisance and trespass law. Acknowledging technological or economic justifications for trespassory invasions does away with the historically harsh treatment of conduct interfering with another's possessory interests.

Just as there may be proof advantages in a trespass theory, there may be disadvantages also. Potential problems lurk in the ancient requirements that a trespassory invasion be "direct or immediate" and that an "object" or "something tangible" be deposited upon plaintiff's land. Some courts hold that if an intervening force, such as wind or water, carries the pollutants onto the plaintiff's land, then the entry is not "direct." Others define "object" as requiring something larger or more substantial than smoke, dust, gas, or fumes.

Both of these concepts are nonsensical barriers, although the courts are slow to admit it. The requirement that the invasion be "direct" is a holdover from the forms of action, and is repudiated by contemporary science of causation. Atmospheric or hydrologic systems assure that pollutants deposited in one place will end up somewhere else, with no less assurance of causation than the blaster who watches the debris rise from his property and settle on his neighbor's land. Trespassory consequences today may be no less "direct" even if the mechanism of delivery is viewed as more complex.

The insistence that a trespass involve an invasion by a "thing" or "object" was repudiated in the well known (but not particularly influential) case of *Martin v. Reynolds Metals Co.,* [221 Or. 86, 342 P.2d 790 (1959)], which held that gaseous and particulate fluorides from an aluminum smelter constituted a

> trespass for purposes of the statute of limitations:
> [L]iability on the theory of trespass has been recognized where the harm was produced by the vibration of the soil or by the concussion of the air which, of course, is nothing more than the movement of molecules one against the other.

709 P. 2d at 787. Quoting from the Restatement (Second) of Torts § 821D, comment d, at 102 (1979) the Washington Supreme Court went on to state:

> For an intentional trespass, there is liability without harm; for a private nuisance, there is no liability without significant harm. In trespass an intentional invasion of the plaintiff's possession is of itself a tort, and liability follows unless the defendant can show a privilege. In private nuisance an intentional interference with the plaintiff's use or enjoyment is not of itself a tort, and unreasonableness of the interference is necessary for liability.

709 P.2d at 789. But then, the Washington Supreme Court adopted the rationale of *Borland v. Sanders Lead Co.,* 369 So.2d 523, 529 (Ala. 1979):

> Although we view this decision as an application, and not an extension, of our present law of trespass, we feel that a brief restatement and summary of the principles involved in this area would be appropriate. Whether an invasion of a property interest is a trespass or a nuisance does not depend upon whether the intruding agent is "tangible" or "intangible." Instead, an analysis must be made to determine the interest interfered with. If the intrusion interferes with the right to exclusive possession of property, the law of trespass applies. If the intrusion is to the interest in use and enjoyment of property, the law of nuisance applies. As previously observed, however, the remedies of trespass and nuisance are not necessarily mutually exclusive.
>
> * * *
>
> Under the modern theory of trespass, the law presently allows an action to be maintained in trespass for invasions that, at one time, were considered indirect and, hence, only a nuisance. In order to recover in trespass for this type of invasion [i.e., the asphalt piled in such a way as to run onto plaintiff's property, or the pollution emitting from a defendant's smoke stack, such as in the present case], a plaintiff must show 1) an invasion affecting an interest in the exclusive possession of his property; 2) an intentional doing of the act which results in the invasion; 3) reasonable foreseeability that the act done could result in an invasion of plaintiff's possessory interest; and 4) substantial damages to the *res.*

709 P.2d at p. 790. In the present case, this Court finds the first three of these elements have been met. The fourth element, "substantial damage to the *res*" goes beyond the damage to the earth under citizens' land. *Mercer v. Rockwell International Corporation,* 24 F.Supp.2d 735, (W.D.Ky. 1998) is directly on point. *Mercer* discusses

Bradley, Mock and others, and concludes that "had the imperceptible substance posed some sort of health hazard, then there would have been a sufficient injury to support of claim of trespass". The pertinent passage of that case reads:

> One might say that the Court has "labored long and produced a mouse." While that may be true, this lengthy analysis informs the next stage of discussion. The Court must now determine what kind of proof might constitute "actual harm."
>
> C.
>
> In *Bradley v. American Smelting and Refining* upon certification, the Washington Supreme Court announced the new rule that in cases involving an intentional trespass by imperceptible cadmium and arsenic deposits there must be real and substantial harm to the property. The federal district court was left to decide whether the deposits harmed plaintiff's property. *See Bradley v. American Smelting & Refining Co.,* 635 F.Supp. 1154, 1157 (W.D. Wash. 1986). The federal court eliminated the most obvious injuries to the real property: the deposits were imperceptible to human senses and there was no demonstrable effect on plaintiff's property. The court also rejected plaintiff's argument that the diminished fair market value constituted an injury to his property. According to the district court, any evidence of diminished fair market value can only serve to quantify the magnitude of the injury otherwise proven. *See id. See also, Mock v. Potlatch,* 786 F.Supp. 1545, 1551 (D.Idaho 1992). Thus the court concluded that if there was any injury it "must consist of a hidden hazard." *Bradley,* 635 F.Supp. at 1157. The expert testimony revealed that at these low levels cadmium and arsenic are not harmful and therefore do not constitute an injury to plaintiff's property. Had the imperceptible substance posed some sort of health hazard, then there would have been a sufficient injury to support a claim of trespass. *See id.*
>
> The Court agrees with this approach. Although PCB's are invisible and are not detectable by any other human sense, it is still possible to show that they harm the property.

24 F.Supp.2d at 743. "Plaintiffs may recover if they demonstrate that the amount of PCB's on their property now are a health hazard." *Id.* at 745. In *Karpiak v. Russo,* 450 Pa.Super. 471, 676 A.2d 270, 275 (Pa.Super. 1996) the court dismissed a negligent trespass claim because there was no evidence that the plaintiffs "suffered ailments from the dust nor was there evidence that the dust caused any corrosive damage to the property." *Id.* cited with approval in *Mercer,* 24 F.Supp.2d at 743. Aside from the physical injury alleged to the citizens, there certainly is sufficient evidence that the physical effects of the grass field burning cause citizens to not be able to enjoy their

property, to the extent that they lock themselves in or move away during the period of burning. That is a significant interference with the *res.* After the Washington Supreme Court ruled on the certified questions in *Bradley v. American Smelting & Refining Co.,* 104 Wn.2d 677, 684, 709 P.2d 782, 786 (1985), the federal district court for the western district of Washington decided what to do with those certified answers. Federal District Judge Rothstein held: "The requirement of damage to the *res* limits 'trespass by airborne pollutants' to cases in which there has occurred an injury that actually interferes with the **right to possession.**" 635 F.Supp. 1154, 1157 (W.D.Wash. 1986). (bold added). Clearly in the present case, citizens have alleged an interference with their "right to possession". If they have to leave that land due to the pollution, there is a substantial interference with their right to possession.

D. PRESCRIPTIVE EASEMENT.

Farmers argue that even if citizens have a viable trespass claim, farmers have a prescriptive easement over the citizens' land since they have been burning for "many, many years." Meyer et al.'s Memorandum in Support of Defendants' Motion to Dismiss, pp. 22-24. Farmers invite this Court to take judicial notice of the fact that agricultural burning of bluegrass and other crops have occurred in this region for many, many years. *Id.* p. 22. Certainly this has occurred every year since this judge's birth here in Coeur d'Alene 44 years ago. Farmers also wish this Court to take judicial notice that the trespass of the farmers alleged by the citizens is "open and notorious". *Id.* p. 23. The Court declines to do so. "Open and notorious" are terms with legal significance, and this court cannot take judicial notice of that fact of legal consequence. However, this Court can certainly analyze the issue. Farmers cite *Bradley v. American*

Smelter & Refining Company, 709 P.2d 782, 792 (Wash. 1985), in support of their claim for prescriptive easement. This is the **only** case cited by farmers that deals with air pollution and prescriptive easements. But even a quick look at *Bradley* shows it does not help the farmers claim of prescriptive easement in the present case. In looking at microscopic heavy metals from a smelter in Ruston, Washington, the Washington Supreme Court said:

> There is little likelihood that the doctrine of prescriptive easement will have application to the situation before us. To gain a prescriptive easement, the use must be open, notorious, continuous and uninterrupted for a period of 10 years. ***We have observed that invasion by particulate matter is not open and notorious*** **and therefore it would indeed be difficult to establish on the part of a defendant that the prescriptive easement period had run.** However that may be, there may be instances when a defendant can establish as a defense all of the elements of prescriptive easement, thereby precluding any recovery by a landowner. As a practical matter, this would indeed be a blatant and flagrant pollution of adjoining land to start the running of the prescriptive period and to forever bar the landowner from recovering for the continuing activity of the polluter. We recognize the possibility and recognize also that whether or not the invasion of the plaintiffs' land was open and notorious is a question of fact to be established in a forum other than this court.

709 P.2d at 792. (emphasis added). The emphasized portion at the same time indicates 1) why the doctrine of easement by prescription does not apply in the instant cast, and 2) why the farmers wanted to slip this issue by through judicial notice. *Anderson v. Larsen,* 34 P.2d 1085, 1089 (Idaho 2001) certainly does not deal with a field burning fact situation, and to the extent farmers' argue it applies by analogy, would seem to run counter to their claim as it places a strict construction on the "continuous and uninterrupted" use that is required, rather than the "sporadic, periodic and inconsistent in frequency" found by the Court in *Anderson.* The *Anderson* case also makes it crystal clear that the burden of proof placed on the farmers in the instant case is to a clear and convincing standard. *Id.* Farmers simply have not met that standard. *Baxter v. Craney,* 135 Idaho 166, 16 P.3d 263 (2000), makes it clear that not only must

proof by farmers in this case be by clear and convincing evidence, but also:

> The purpose of the requirement that prescriptive use be open and notorious is to give the owner of the servient tenement knowledge and opportunity to assert his rights. The open and notorious use must rise to the level reasonably expected to provide notice of the adverse use to a servient landowner maintaining a reasonable degree of supervision over his premises.

16 P.2d at 270. Farmers argument is thus: "we have been burning for many, many years, and that burning put these plaintiffs in this case on notice years ago that if they didn't do something about the burning a long time ago, the farmers would have a prescriptive easement over their land." It is no wonder there is no case law on point. Such an argument finds no support in the law.

Leu v. Littell, 513 N.W.2d 24 (Neb.App. 1983) does not involve field burning and does nothing to support farmers' claim of prescriptive easement. *West v. Smith,* 95 Idaho 550, 511 P.2d 1326 (1973) dealt with a houseboat, and is not helpful regarding farmers claims of prescriptive easement.

Although the case addressed "public nuisance" and not trespass, the Washington Court of Appeals specifically held that no prescriptive right may be acquired to a public nuisance. *City of Benton City v. Adrian,* 50 Wash.App. 330, 337, 748 P.2d 679, 683 (Ct.App.Wash. 1988).

Farmers have no prescriptive easement across citizens' land.

For the reasons set forth in parts C and D, farmers motions to dismiss on trespass grounds are DENIED in their entirety.

III. CONCLUSION AND ORDER.

Many of the nuisance and trespass cases cited to the Court and cited in the Court's opinion deal with industries or practices which are public or quasi-public in nature and which involve an activity which if not a necessity, is close to being a necessity

(sewage treatment plants, irrigation canals, railroads, highways, etc.). In the present case, we are dealing with private individuals (farmers) not performing an essential public service (none of us need grass seed to survive), raising a particular cash crop…grass seed. An aspect of that crop (burning) is simply not necessary. Depending on which experts the Court believes, there is an economic benefit to the farmer who doesn't burn, or, there is some economic detriment to the farmer who doesn't burn. There is nothing that says any of these farmers must plant grass seed. It is a choice they make each year. It is obviously an economically lucrative crop to plant, or they wouldn't plant the grass crop in the first place. However, it is the general public (not a party to this case) and especially those with breathing problems (some of whom are parties to this case), who are damaged each year by the grass field burning. Those parties with breathing problems have historically in essence "paid" a price to "subsidize" those farmers' grass seed crops. The production of grass seed has been in effect "subsidized" for many years because the farmers have historically not paid for the damage caused by the nuisance and trespass caused by the burning of grass seed residue. The motions to dismiss, if granted, would allow that status to remain into the future. The law does not permit citizens' damage to be without a remedy.

Citizens cited *Atlas Chemical Indus., Inc. v. Anderson,* 514 S.W.2d 309, 316 (Tex.Ct.App. 1974) for the following:

> No acceptable rule of jurisprudence which permits those engaged in important and desirable enterprises to injure with impunity those who are engaged in enterprises of lesser economic significance. The cost of injuries resulting from pollution must be internalized by industry as a cost of production and borne by consumers and shareholders, or both, and not by the injured individual.

Citizens' Brief in Support of Nuisance and Trespass Claims, pp. 23-24. Using that language of *Atlas* to the facts of the present case, on one side of the scale is placed the farmers, who are engaged in the "important and desirable enterprise" of grass seed

growing. A question can be raised as to how "important and desirable" grass seed is to our way of life…it probably cannot rank as high as sewage treatment, irrigation canals or transportation as a "necessity" to our civilized life. On the other side of the scale found in *Atlas* are persons "engaged in enterprises of lesser economic significance". In the present case, that side of the scale is occupied by persons trying to breathe in the months of August and September each year during grass field burning. This is hardly an "enterprise of lesser economic significance". Instead, it is life itself. As the Court stated at the conclusion of the August 9, 2002 hearing, when you balance simple economics issues on one side of the scale, with health and life issues on the other side of the scale, it is easy to see where the scales of justice will tip.

Citizens causes of action for nuisance and trespass survive the motions to dismiss brought by the farmers. The farmers' motions to dismiss as to citizens' nuisance and trespass causes of action are DENIED in all respects. A decision on injunctive relief will issue as soon as possible.

Entered this _____19th_____ day of November, 2002.

_____
John T. Mitchell, District Judge

Certificate of Service

I certify that on the _____ day of November, 2002, a true copy of the foregoing was mailed postage prepaid or was sent by interoffice mail or facsimile to each of the following:

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_____
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