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 GRANTING PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION**

I. FACTUAL BACKGROUND.

To place matters in context, the "Factual Background" set forth in the Court's "Memorandum Opinion and Order Denying Defendants' Motions to Dismiss" filed August 19, 2002, is reiterated in part in this Memorandum Opinion and Order Granting Plaintiffs' Motion for Preliminary Injunction as follows:

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 are referred to as "at risk citizens", or "citizens." The defendants consist of about 78 farmers who farm on the Coeur 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 August 30, 2002, 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.

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

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[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, 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 Erbland, Gary H. Baise and Stewart D. Fried are referred to as **Meyer et al**. The plaintiff citizens are represented by Steve W. Berman, R Brent Walton, Philip H. Gordon and Karen Lindhodlt are referred to as **citizens.**

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.

The Court will again 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 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. LEGAL ANALYIS OF MOTION FOR PRELIMINARY INJUNCTION.

A Temporary Restraining Order pursuant to Idaho Rule of Civil Procedure 65(b) was sought by citizens. Above, the Court explained why it was unwilling to grant such an order *ex parte*, without giving all parties an opportunity to be heard on the matter. Since a hearing has been had, there essentially can be no "Temporary Restraining Order". *See Rowland v. Kellogg Power & Water Co.,* 40 Idaho 216, 233 P. 869 (1925). Accordingly, this will be analyzed as a motion for a preliminary injunction under Idaho Rule of Civil Procedure 65(e), and not a motion for temporary restraining order under Idaho Rule of Civil Procedure 65(b).

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 prelimnary injunction may be granted. Those grounds are set forth in Idaho Rule of Civil Procedure 65(e):

> **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.
> (4) When it appears, by affidavit, that the defendant during the pendency of the action, threatens, or is about to remove, or to dispose of the defendant's property with intent to defraud the plaintiff, an injunction order may be granted to restrain the removal or disposition.
> (5) A preliminary injunction may also be granted on the motion of the defendant upon filing a counterclaim, praying for affirmative relief upon any of the grounds mentioned above in this section, subject to the same rules and provisions provided for the issuance of injunctions on behalf of the plaintiff.
> (6) The district courts, in addition to the powers already possessed, shall have power to issue writs of injunction for affirmative relief having the force and effect of a writ of restitution, restoring any person or persons to the possession of any real property from the actual possession of which the person or persons may be ousted by force, or violence, or fraud, or stealth, or any combination thereof, or from which the person or persons are kept out of possession by threats whenever such possession was taken from them by entry of the adverse party on Sunday or a legal holiday, or in the nighttime, or while the party in possession was temporarily absent therefrom. The granting of such writ shall extend only to the right of possession under the facts of the case, in respect to the manner in which the possession was obtained, leaving the parties to their legal rights on all other questions the same as though no such writ had issued: provided, that no such writ shall issue except upon notice in writing to the adverse party of at least five (5) days of the time and place of making application therefor.

Obviously not all grounds enumerated in Idaho Rule of Civil Procedure 65(e) apply to the facts of the present case ((4), (5) and (6)), but the first three grounds do apply. *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.

A. IDAHO RULE OF CIVIL PROCEDURE 65(e)(1).

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.

It is the "entitled to the relief demanded" feature of Idaho Rule of Civil Procedure 65(e)(1) that caused this Court to feel that the farmers' motions to dismiss needed to be decided first, before the preliminary injunction was ruled upon. In other words, it would be impossible to gauge citizens' likelihood of success without subjecting the legal basis to scrutiny through the motions to dismiss.

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 *First National Bank & Trust Co. v. Federal Reserve Bank,* 495 F.Supp. 154 (W.D.Mich. 1980), the federal district judge wrote:

> Although it appears to the Court that Plaintiff has a likelihood of success, whether it has a "substantial likelihood" as required by Mason, supra, is, at this juncture, unclear.
>
> It is the Court's opinion that there can be no substantial likelihood of success where there exist complex issues of law, the resolution of which are not free from doubt. This is especially true when the record before the Court is incomplete.

495 F.Supp. at 157. This Court has analyzed the facts and law of the present case, and, similar to the federal district judge in Michigan, it appears to this Court that the citizens have a "likelihood of success", maybe a "good" likelihood of success, but it is not clear at this juncture that the citizens have a "substantial likelihood" of success as required by Idaho Rule of Civil Procedure 65(e)(1) and *Harris.*

Even though this Court has denied farmers' motions to dismiss[3], the issues of law remain somewhat complex. At the time of the hearings, the Court had concerns over the applicability of the legal theories advanced by plaintiffs, specifically, nuisance and trespass. The Court is convinced that the law as set forth in this Court's "Memorandum

[3] Meyer, et al. on August 23, 2002 filed an "Augmentation of Authority in Opposition to Motion for Preliminary Injunction", citing *Covington v. Jefferson County (Planning and Zoning Commission),* 2002 Opinion No. 111 (Idaho Supreme Court filed August 16, 2002). This Court has reviewed that case, and finds it not controlling as this Court did not reach the issue as to whether there was a "taking" of citizens' property.

Opinion and Order Denying Defendants' Motions to Dismiss" filed August 19, 2002, is the appropriate current state of the law to be applied to nuisance and trespass. Yet there are other issues of law not thoroughly explored at this juncture which will need to be addressed in the future. Those issues of law are somewhat complex as well. For example, causation and apportionment will need to be addressed. Farmers argue that each citizen plaintiff will need to prove from which particular farmer's field the particular smoke particles came from. Citizens' counsel mentioned in argument that the citizens do not need to show which farmer's ash went in which plaintiff's lungs or over which plaintiff's land due to joint and several liability. Idaho Code § 6-803(3) limits joint and several liability, to three situations, found in Idaho Code § 6-803 (5), (6) and (7). It would seem Idaho Code § 6-803 (5) and (6) may well apply to the smoke from field burning. Idaho Code § 6-803 (5) reads:

> A party shall be jointly and severally liable for the fault of another person or entity or for payment of the proportionate share of another party where they were acting in concert or when a person was acting as an agent or servant of another party. As used in this section, "acting in concert" means pursuing a common plan or design which results in the commission of an intentional or reckless tortious act.

It could be that the farmers are acting in concert. Clearly field burning is an intentional act, and since nuisance and trespass have been alleged, it is a tortuous act. Idaho Code § 6-803 (6) reads:

> Any cause of action arising out of a violation of any state or federal law or regulation relating to hazardous or toxic waste or substances or solid waste disposal sites.

It would seem that field burning produces a hazardous substance, and it certainly is regulated. If any burn has violated those state or federal regulations, joint and several liability could attach under this section of the statute. Additionally, even if liability may

be several, the burden of proof may still fall upon the farmers. *City of Benton City v. Adrian,* 50 Wash.App. 330, 339, 748 P.2d 679, 685 (Ct.App.Wash. 1988); liability may be several, but if apportionment is difficult or impossible, defendants have the burden of proving their individual contribution, not the plaintiffs.

Causation and apportionment do not need to be decided at this time. They have been briefly discussed only to illustrate the fairly complex issues of law in this case.

The issues of fact, at least at the present time, are not really in dispute. Clearly the farmers' burning of grass seed residue causes smoke. That smoke, causes these citizen plaintiffs to have increased medical problems, some very serious, which in turn causes some of them to hole up in their homes or to leave the area completely during the period of burning. The medical testimony by Dr. Strimas and Dr. Covelli is corroborated by the affidavits (in federal district court case number 02-0241N-EJL, admitted as evidence in the present case) of Dr. David P. York and Dr. Timothy E. Bruya (both board certified pulmonologists in the immediate area). Also, the opinion that particulate matter from agricultural field burning increases the incidence of respiratory disease and cardiac disease, has been expressed by 87 Kootenai County physicians of various specialties (Declaration of David P. York, M.D., Exhibit B), and by 28 Bonner County physicians (Declaration of Scott Burgstahler, M.D., Exhibit A). Their opinions are contradicted only by Dr. Moogavkar, a professor of epidemiology at the University of Washington, who testified there is no epidemiological or statistical evidence, based on a large population, as to the effects of field burning and health problems. But even Dr. Moogavkar admitted that "there is no doubt there are some individuals who are legitimately distressed" due to the smoke from grass field burning. That epidemiological evidence is given little weight

by this Court compared to the testimony and affidavits of the physicians who actually **treat** people having respiratory problems during the field burning season. That "clinical evidence" (as opposed to epidemiological evidence) is overwhelming, and uncontradicted. However, at the present time, this Court cannot say that the citizens' case is based on "the clearest evidence", because it is still somewhat incomplete. Again, this can be traced to the fact that the Complaint in this case was not filed until June 10, 2002. As in *First National Bank & Trust Co.,* "the record before the Court is incomplete" because citizens' medical records have only recently been disclosed to counsel for farmers at the time of the August 15, 2002 hearing. As stated above, the issues of law are somewhat complex. The matter is not "free from doubt".

The Court determines that a preliminary injunction under Idaho Rule of Civil Procedure 65(e)(1) is not allowed due to the somewhat complex legal issues, the lack of a complete record in some aspects, and because the matter is not free from doubt.

B. IDAHO RULE OF CIVIL PROCEDURE 65(e)(2).

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.

1. A "Very Clear" Right.

This Court determines that 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.* A complete ban on burning as injunctive relief would have the "effect of giving to the party seeking the injunction (citizens) all (or nearly all) the relief sought in the action". 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.

2. Great or Irreparable Injury to Plaintiff.

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 essentially uncontroverted that these citizens have suffered great damage in the past. Not being able to breathe and needing steroidal drugs to breathe, are events of great damage. If these citizens, with their predispositions are exposed again to these levels of smoke, it "will result in great damage" to these citizens. The argument can be made by farmers that the smoke might not blow the direction of these citizens this year. However, if the smoke does blow in their direction, in concentrations experienced in the past, there will be great damage. The wind speed and direction is something no party to this case may control. Thus, while there may be a statistical probability that the smoke this year will not blow in the direction of any one of these citizens, there is also a statistical probability that it will blow in the direction of one of them, and if it does, "great damage" will occur. The testimony was that the damage is irreparable. Dr. Covelli, a pulmonary critical care specialist, testified that his respiratory patients are affected by grass burning, and his opinion to a degree of medical certainty is that field burning is a trigger, even when only exposed for a few minutes. He testified that people are dying in emergency rooms from that

exposure, that one person died from exposure to smoke that was from a field burning across the street. He testified that heart attacks increase with increased exposure to particulate matter. Dr. Covelli testified that steroids are used to treat chronic lung inflammation, and that there are long term consequences with steroid use, especially with children (eye damage, bone damage, skin damage and muscle damage).

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, and even the less severe consequences of steroid treatments are "irreparable". Furthermore, other courts have declared field burning to cause irreparable injury. In *Save Our Summers et al., v. Washington,* 132 F.Supp.2d 896, 905 (E.D. Wash. 1999), Judge Whaley found "The risk of physical injury from continued field burning is sufficient to establish a risk of irreparable harm." That is a case originating 27 miles away. In a case more distant geographically, irreparable injury was found in *Heather K. v. City of Mallard,* 887 F.Supp. 1249, 1260 (N.D. Iowa 1995), when the court stated: "continued open burning poses a very real health threat, possibly even a mortal threat, to Heather K."

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 complaint and affidavits for an injunction against a city alleged a nuisance especially injurious to the plaintiff (a city maintained a dumping ground for all kinds of waste, which emitted offensive odors, endangering the health and comfort of plaintiff and his family, and depreciating 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 intended to prevent any more occurrences, but the proof was that conditions had not materially changed, then it was error for the district court to deny a temporary injunction, and the 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. Citizens have proven the smoke from field burning "endangers the health" of themselves and their family members, and they have proven the smoke "renders their premises unsafe for habitation" during periods when grass field smoke is present. Farmers certainly have not admitted a nuisance, which was admitted in *Schreck.* However, farmers cannot really deny their field burning smoke is a "nuisance" in the common usage of the word. Instead, farmers argued their field burning smoke could not constitute a "nuisance" as that word is legally defined. However, farmers have not prevailed on that legal argument, as set forth in this Court's "Memorandum Opinion and Order Denying Defendants' Motions to Dismiss." Farmers also argue the new regulations this year will in essence "abate" the nuisance. But if even with those new regulations, if the respiratory problems persist, then we are in a fact situation very analogous to *Schreck.* Keep in mind the Idaho Supreme Court stated that in such a situation, it would be error not to grant an injunction.

As grass growing farmer Wayne Meyer testified at the hearing on August 9, 2002: "If my daughter had cystic fibrosis I'd move." If viewed that way, that all of these citizens with respiratory problems could simply move away from here, then their injury is not "irreparable." Even though they would be leaving behind their home, their jobs, their loved ones, they can still move away from the problem, using Wayne Meyer's remedy. But under Idaho law, "irreparable injury" is only half of the question. The other half of

the question is whether such a move would be "great injury". This Court finds as a matter of law, such a move would be "great injury".

The farmers could argue that the citizens could simply move away during the two month burn period. That would still be "great injury", to be forced with the Hobson's choice of staying at your home and risking health problems, or moving away from your family, job, school and home. What if a citizen guessed wrong, and stayed hoping the smoke wouldn't come their direction this year? If they guess wrong, and don't get out in time they could suffer irreparable and great injury, or death, the ultimate irreparable injury.

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. For the reason discussed above, such an injunction cannot "have the effect of giving to the party seeking the injunction all the relief sought in the action". That requirement has been met, as the detailed "Specific Terms of the Preliminary Injunction" are discussed below.

3. Public Interest.

While the "public interest" is not a factor enumerated in Idaho Rule of Civil Procedure 65(e), it is a factor which should be discussed. Since the "public interest" apparently has not been expressly[4] adopted by the Idaho Supreme Court as a factor under Idaho Rule of Civil Procedure 65(e), the "public interest" has not been considered by the

[4] The argument could be made the Idaho Supreme Court has "implicitly" adopted the "public interest" criteria, as the Idaho Supreme Court in *Harris* cited with approval *First National Bank & Trust Co. v. Federal Reserve Bank,* 495 F.Supp. 154 (W.D.Mich. 1980), which did discuss "public interest".

Court in reaching its decision to grant the preliminary injunction. If the "public interest" were a criteria under Idaho Rule of Civil Procedure 65(e), it would be satisfied under the facts of this case.

First National Bank & Trust Co., supra, cited with approval in the Idaho Supreme Court's decision in *Harris, supra,* discussed public interest. 495 F.Supp. 154 at 157-158. 11A Wright, Miller & Kane, Federal Practice and Procedure 2d § 2948.4 (2002) states:

> The final major factor bearing on the court's discretion to issue or deny a preliminary injunction is the public interest. Focussing [sic] on this factor is another way of inquiring whether there are policy considerations that bear on whether the order should issue. It frequently has been emphasized that whether the public interest either might be furthered or might be injured by an injunction should be given considerable weight.

Id. at pp. 200-205. In the present case, this Court can see no injury to any public interest by granting an injunction. If an injunction were to be granted, the injury would be limited to the farmers that are parties to this lawsuit, not the public at large. The Court can see great public interest being furthered by an injunction being granted. Other than the farmers who "want" burning due to their own economic interests, the Court can conceive of no other segment of the public that "want" field burning to occur.

A federal district judge sitting 27 miles away from Coeur d'Alene, has already reviewed extensive evidence as well, and come to the same conclusion regarding the public interest. United States District Judge Robert H. Whaley, sitting in Spokane, Washington (Eastern District) on September 14, 2000, issued his decision in *Save Our Summers et al., v. Washington,* 132 F.Supp.2d 896 (2000). Judge Whaley stated: "Furthermore, the public interest in preserving health and safety favors issuance of a temporary restraining order. There is significant evidence in the record that agricultural burning may pose a significant threat to public health." 132 F.Supp.2d at 909.

Dr. David York, a pulmonologist in Coeur d'Alene stated "It is my opinion, to a reasonable degree of medical certainty, that exposure to fine particulate matter pollution from grass field residue burning is a significant heatlh problem for people in North Idaho." Declaration of Dr. David P. York, p. 2, ¶ 3.

For all the above reasons, if the "public interest" were a criteria under Idaho Rule of Civil Procedure 65(e), it would be satisfied under the facts of this case.

C. IDAHO RULE OF CIVIL PROCEDURE 65(e)(3).

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." Citizens simply argue: "Moreover, the failure to enjoin defendants burning would render ineffectual the potential judgment", without stating why. Plaintiffs' Motion for Temporary Restraining Order, p. 20. Additional argument was made at pages 23-25, but those arguments did not really address the language of Idaho Rule of Civil Procedure 65(e)(3). 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 further damage occurs to these citizens, either through degradation in health, shortening of life, the permanent effect of steroid use, or needing to move away for weeks at a time each year, 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 the 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). A complete injunction banning all burning could, theoretically, issue under this ground. The Court declines to do so for the following reasons. First, the class has not been certified. At the present time we are concerned with eight citizens, and the remedy below addresses their concerns for this burning season. It is not up to the Court to get the class certified, it is up to the plaintiffs, the citizens. Second, this lawsuit is in its infancy as the Complaint was only filed June 10, 2002, and heard by this Court August 9 and 15, 2002. There is an overwhelming amount of material and case law which has been read. It may be that if there were more testimony and exhibits, for example further development of the medical record, a complete injunction may be appropriate. On the other hand, depending on the nature of that evidence, it may be that no injunction is

appropriate. Based on the present state of the evidence (but recognizing there is more evidence to come at trial), the terms of the injunction set forth below are appropriate. A complete injunction, at the present time[5], is not appropriate. Third, the burn season is half over. Again, that is a function of when the citizens filed their Complaint. This Court has done everything in its ability to digest the volume of information presented, and render an informed decision as soon as humanly possible. Fourth, if the practice of baling before burning is as effective as estimated, the injury to these citizens should be lessened as the particulate matter should be greatly reduced. Also, there is an alternative available in the injunctive relief terms should the citizens not want to remain in the area while burning after baling takes place.

III. SPECIFIC TERMS OF THE PRELIMINARY INJUNCTION.

The act sought to be restrained is preventing particulate matter from grass field burning from these defendant farmers from reaching levels which, while perhaps below regulated levels, are still hazardous to the health of these citizen plaintiffs.

Farmers are enjoined from further field burning for the remainder of year 2002 unless they comply with the following terms and conditions:

1. Before any further burning occurs, every farmer who is a party to this case shall bale all loose straw and other residue from the ground. Prior to any additional field being burned, the Smoke Management Coordinator (for land within Coeur d'Alene Tribal

[5] An injunction is an equitable remedy issued under established principles that guide courts of equity, and the court retains the power to modify the terms of its injunction in the event that changed circumstances require it. *Pacific Rivers Council v. Thomas,* 936 F.Supp. 738 (D.Idaho 1996).

boundaries) or the local smoke coordinator (for Kootenai or Benewah County land outside of Coeur d'Alene Tribal boundaries) must verify in a written document setting forth the date of the burn and describing the location of the field that is to be burned, that such field has been baled and loose straw and residue removed from that field. All such written verification shall be submitted to Dan Redline at DEQ (Department of Environmental Quality) where such written records shall be maintained and made available to the public for viewing, with copies to be sent by DEQ to: one counsel for each of the various groups (set forth in footnote 2 above) of parties to this lawsuit (each group of parties must designate in writing to Mr. Redline which attorney shall receive the copy for that group), and the Court.

2. No defendant farmer shall burn until the defendant farmers collectively have placed One Hundred Thousand Dollars $100,000.00[6] **cash**, with the Clerk of the Court, Kootenai County, in Coeur d'Alene, Idaho. It matters not who pays for such bond, but it is the defendant farmers' responsibility to account among themselves for the amounts contributed, and to distribute any funds remaining among themselves after this Court has determined that any remaining funds may be dispersed back to the defendant farmers. The purpose of this $100,000.00 fund is to make monies available to the plaintiff citizens, should they need funds for: 1) health care expenses actually incurred and related to grass field burning from defendants' fields or 2) actual expenses incurred in relocating during periods of burning.[7] Only the eight plaintiff citizens may apply to the Court for those

[6] Even if all of said fund were used up, that $100,000.00 is 1/60th of what Dr. Van Tassell (the expert called by defendant farmers) testified farmers will loose if they don't burn. That also amounts to $2.70 per acre burned (based on testimony of 37,000 acres).
[7] Only these items of special damage are allowed to be paid out of this fund. General damages are not included, but are an item of damage left to be litigated at trial.

funds. Such application shall be accomplished by submitting a sworn statement as to why the expenses were incurred, along with a physician's written statement that the medical expenses were incurred due to burning from any of the defendant farmers' fields or a physician's written statement that the move was medically necessary due to burning planned from any of the defendants' fields. If those terms are satisfied, the funds requested shall be released ***provided*** plaintiff citizens have posted a **surety** bond (does not need to be a cash bond) with the Clerk of the Court, Kootenai County, in Coeur d'Alene, Idaho, in the amount of One Hundred Thousand Dollars ($100,000.00). The purpose of plaintiff citizens' bond is to provide a fund to repay the defendant farmers' fund, if citizens are found at a later date not to be entitled to these funds from defendant farmers. Neither the fund nor the bond can be used for any other purpose. Neither the fund nor the bond can be used to pay any attorney fees that may later be awarded against a party. Finally, if all parties agree that these funds do not need to be established, burning can continue pursuant to term number one above, upon filing a stipulation with the Court.

The fund created and bond posted give citizens a way to ameliorate the immediate financial hardship that may result, yet protect farmers if at a later time they are found not liable.

The reasons for the preliminary injunction under these terms are due to the reasons set forth above, for the reasons set forth in this Court's Memorandum Opinion and Order Denying Defendants' Motions to Dismiss and for the following reasons. This is a dispute over economic issues on one side, and a health issue on the other. As this Court stated at the August 9, 2002 hearing and in its August 19, 2002 "Memorandum Opinion and Order Denying Defendants' Motions to Dismiss" at page 31: "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." The Idaho Supreme Court dealt with an injunction where trespassing was cheaper than other alternatives, in *La Veine v. Stack-Gibbs Lumber Co.,* 17 Idaho 51, 104 P. 666 (1909). That case involved trespass caused by a party who built a dam at the end of Fernan Lake, to allow logs to be transported between Fernan Lake and Coeur d'Alene Lake during low water. The landowners alleged trespass due to the flooding of their land and sought an injunction. It was the dam owner who alleged great injury and damage if unable to float their logs down stream. 104 P. at 667. The district court permitted the trespass and denied the injunction. The Idaho Supreme Court reversed the district court, and held "That an injunction is the proper relief to be granted in a case of this kind is clearly established." *Id.* The Idaho Supreme Court also stated:

> The defense in this case is sham and frivolous, and utterly devoid of any element of merit. **The fact that it would be more convenient and cheaper** for defendants to float their logs down this stream over plaintiff's premises than to remove them in any other way **affords no reason whatever for their trespassing upon plaintiff's premises** and building dams thereon, and maintaining guards to protect the same and flooding his premises.

Id. (bold added).

The Idaho Supreme Court has held: "If the municipality is acting in good faith, as we have no doubt it is, an injunction against the continuation of this nuisance can work no injury upon it." *Schreck v. Village of Coeur d'Alene,* 12 Idaho 708, 87 P. 1001, 1002 (1906). In *Schreck,* the City of Coeur d'Alene was doing everything it could to bury the offensive animal and vegetable garbage "and honestly attempted to prevent the dumping of any more offensive matter thereon". *Id.* The Supreme Court then felt that an injunction certainly wouldn't work a hardship: "If the municipality is acting in good

faith, as we have no doubt it is, an injunction against the continuation of this nuisance can work no injury upon it." *Id.* In the present case, some of the farmers are not acting in "good faith" as they are not doing all they can to reasonably mitigate the damage to citizens. The following proves that fact. **1) The farmers know the smoke from burning their grass fields has a negative health effect on at least certain people.** If the farmers were not aware of it in the past, they were made aware of that through the uncontradicted testimony at the August 9, 2002 hearing…even their own physician Dr. Moogavkar testified there was no doubt some individuals are legitimately distressed due to the smoke. The farmers certainly know smoke burning has a negative effect on at least certain people after this Court's August 19, 2002 "Memorandum Opinion and Order Denying Defendants' Motions to Dismiss". **2) The farmers know there is a need to reduce particulate matter.** This is proved by the changes to the Smoke Management Plan. This is additionally proved by the fact that 30% of the farmers within the Coeur d'Alene Indian Reservation have agreed to bale their straw before they burn. **3) Baling before burning will result in a reduction, perhaps a "significant reduction" in particulate matter emission.** Farmer Paul Stearns testified in the hearing in this case about the fact that 30% of the farmers within the tribal boundaries will bale before burning. In the federal case, Paul Stearns testified that based on tests performed last year on 250 acres that were baled before burning, there was a "very significant decrease in the amount of emissions into the air". Preliminary Injunction Hearing transcript, July 10, 2002, District of Idaho Case Number CV 02-241-N-EJL, p. 516, L. 21 – p. 517, L. 17. It only makes sense that if you significantly reduce the amount of fuel, you significantly reduce the amount of pollution. **4) If baling before burning provides a "very significant decrease" in the**

amount of particulate matter, there is no justifiable reason to limit it to 30% of the farmers within tribal boundaries. If bailing before burning causes a "very significant decrease" in particulate matter, are the remaining farmers who do not bale before burning operating in "good faith"? At the federal hearing Farmer Paul Stearns testified he found a market for his straw last year, (Id. p. 518, Ll. 1-7), but at the hearing before this Court, Paul Stearns testified that straw has no value this year. However, since his testimony on August 9, 2002, a gentleman named Del Loney from Burley, Idaho has purchased the defunct strawboard plant in Plummer, Idaho from seven grass growers and the Coeur d'Alene Tribe, and Mr. Loney plans to open such plant by October 1, 2002. Spokesman-Review, August 22, 2002, p. B1, the Handle (Idaho ed.).

IT IS HEREBY ORDERED plaintiffs' motion for preliminary injunction is GRANTED under the terms set forth in Section III above.

ENTERED this 30th 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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_____
Secretary