STATE OF IDAHO)
County of KOOTENAI)ss

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Deputy

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

LAWRENCE ("BUD") MOON, JR., et al., *Plaintiffs*, vs. **NORTH IDAHO FARMERS ASSOCIATION, et al.,** *Defendants*.	Case No. **CV 2002 3890** **MEMORANDUM DECISION AND ORDER GRANTING PLAINTIFFS' MOTION TO DECLARE HB 391 UNCONSTITUTIONAL**

I. BACKGROUND.

Plaintiffs filed their "Motion to Declare HB 391 Unconstitutional to the Extent it Purports to Extinguish any of the Rights of Plaintiffs and Members of the Class" on April 30, 2003. The stated purpose of plaintiffs' motion is "to move for an order declaring HB 391 unconstitutional on the following grounds: (1) HB 391 takes plaintiffs and class members' property without prior compensation in violation of the state and federal constitution; (2) HB 391 is unconstitutional because the state cannot authorize the right to injure plaintiffs and the class in their own homes; (3) HB 391 violates due process because it fails to provide procedures for compensation; (4) HB 391 constitutes illegal special legislation in violation of Article III, Section 19 of the Idaho

Constitution; and (5) HB 391 violates plaintiffs' and class members' fundamental rights." Motion to Declare HB 391 Unconstitutional, p. 2. The motion was supported by "Plaintiffs' Memorandum in Support of Motion Regarding the Constitutionality of HB 391" and the "Affidavit of R. Brent Walton Regarding the Constitutionality of HB 391," all filed on the same date. On May 7, 2003 the State of Idaho Attorney General, as the State's chief legal officer filed its "Brief *Amicus Curiae* of Idaho Attorney General In Support of House Bill 391's Constitutionality" along with a Motion to Appear as *Amicus Curiae* by Idaho Attorney General in Support of House Bill 391's Constitutionality. The Motion to Appear as *Amicus Curiae* was granted by the Court in its May 19, 2003 Order Granting Leave to Appear as *Amicus Curiae*. Also filed on May 7, 2003 were Defendants Lampert Farm & Ranch et al.'s "Memorandum in Opposition to Plaintiffs' Motion to Declare HB 391 Unconstitutional"; defendants Meyer et al. filed a "Memorandum in Opposition to Plaintiffs' Motion to Declare HB 391 Unconstitutional Submitted by Defendants Wayne Meyer et al."; defendants McLean et al. filed: "McLean, et al.'s Memorandum in Opposition to Motion to Declare HB 391 Unconstitutional"; and defendants North Idaho Farmers Association filed "Defendant North Idaho Farmers Association's Memorandum in Opposition to Plaintiffs' Motion to Declare HB 391 Unconstitutional." On May 14, 2003, plaintiffs filed "Plaintiffs' Combined Reply Re: Constitutionality of HB 391" and "Affidavit of R. Brent Walton in Support of Plaintiffs' Combined Reply Re: Constitutionality of HB 391." Oral argument on the motion was held May 22, 2003. The Court has read each of these briefs on more than one occasion, has reviewed the text of the decisions cited in those briefs, and has reviewed a transcript of the May 22, 2003 hearing in reaching its decision.

II. THE STATUTE AT ISSUE AND CONSTITUTIONAL ANALYSIS OF STATUTES.

A. HOUSE BILL 391 AND IDAHO CODE § 28-4803A(6).

Idaho Code §§ 22-4801 through 4804 allow agricultural field burning when farmers comply with those statutes and any rules promulgated under those statues. Those statutes have been in effect since 1999.

On April 23, 2003, HB 391 was signed into law by Idaho's Governor. Section 5 of that bill contains an emergency clause, causing the statute to take effect on its passage and approval, rather than on the ordinary effective date of July 1 following the legislative session. House Bill 391 amended portions of Idaho Code § 22-4803, and added a new statute, Idaho Code § 22-4803A. While not specifically stated in plaintiff's "Motion to Declare HB 391 Unconstitutional to the Extent it Purports to Extinguish any of the Rights of Plaintiffs and Members of the Class," the Court understands that the pertinent portion of HB 391 which plaintiffs argue is unconstitutional, is that portion which created Idaho Code § 22-4803A(6). This is because plaintiffs argue: "HB 391 purports to give this small group of farmers the right to do what no others in our society can—irreparably injure others with absolute immunity." Motion to Declare HB 391 Unconstitutional to the Extent it Purports to Extinguish any of the Rights of Plaintiffs and Members of the Class, p. 1.

Idaho Code § 22-4803A(6) reads as follows"

> (6) Crop residue burning conducted in accordance with section 22-4803 Idaho Code, shall not constitute a private or public nuisance or constitute trespass. Nothing in this chapter shall be construed to create a private cause of action against any person who engages in or allows crop residue burning of a field or fields required to be registered pursuant to section 22-4803(3) Idaho Code, provided such activities are conducted in accordance with chapter 49, title 22, Idaho Code, and rules promulgated thereunder.

B. CONSTITUTIONAL INTERPRETATION.

The constitutionality of a statute is a question of law. *State v. Cobb,* 132 Idaho 195, 197, 969 P.2d 244, 246 (1998). The party challenging a statute's constitutionality bears the burden of establishing that the statute is unconstitutional and "must overcome a strong presumption of validity." *Olsen v. J.A. Freeman Co.,* 117 Idaho 706, 709, 791 P.2d 1285, 1288 (1990). Courts are obligated to seek an interpretation that will save the statute from constitutional infirmity. *State v. Richards,* 127 Idaho 31, 34, 896 P.2d 357, 360 (Ct.App. 1995). These cases were noted by defendants Lampert Farm & Ranch et al., Memorandum in Opposition to Plaintiffs' Motion to Declare HB 391 Unconstitutional, p. 4. As noted by this Court in its Memorandum Opinion and Order Denying Defendants' Motions to Dismiss, p. 11: "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)." "An act of the legislature is presumed to be constitutional, but whether the act is reasonable or arbitrary or discriminatory is a question of law for determination by this Court." *Coghlan v. Beta Theta Pi Fraternity,* 133 Idaho 388, 395, 987 P.2d 300, 307 (1999).

III. CONSTITUTIONAL ANALYSIS OF IDAHO CODE § 22-4803A(6).

Plaintiffs assert that Idaho Code § 22-4803A(6) is unconstitutional as it: (a) takes plaintiffs and class members' property without prior compensation in violation of the state of Idaho and federal constitutions; (b) violates due process because it fails to provide procedures for compensation; (c) constitutes illegal special legislation in violation of Article III, Section 19 of the Idaho Constitution; (d) HB 391 violates plaintiffs' and class members' fundamental rights

and (e) HB 391 cannot apply retroactively. Plaintiffs' Memorandum in Support of Motion Re: Constitutionality of HB 391, pp. 4-5, 11-27.

This Court finds Idaho Code § 22-4802A(6) to be unconstitutional for the following reasons: (1) it takes property without prior compensation or due process in violation of the Fifth and Fourteenth Amendment to the United States Constitution and Article 1, Section 13 and Section 14 of the Idaho Constitution; (2) it violates Article 1, Section 1 of the Idaho Constitution because the "limitation" imposed by the statute is not in the "interests of the common welfare" and (3) because it is a "local or special law" in violation of Article III, section 19 of the Idaho Constitution.

A. TAKING WITHOUT PRIOR COMPENSATION OR DUE PROCESS.

The Fifth Amendment to the Federal Constitution provides that "no person shall be . . . deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation." The Fourteenth Amendment to the Federal Constitution prohibits a state from "depriving any person of life, liberty, or property without due process of law." The Fourteenth Amendment makes the Fifth Amendment applicable to the states and their political subdivisions. *Chicago B. & Q. R. Co. v. City of Chicago*, 166 U.S. 226, 234-35 (1897).

Article I, section 13 of the Idaho Constitution also proclaims that no person shall "be deprived of life, liberty or property without due process of law." The very next section of Idaho's Constitution provides:

> SECTION 14. RIGHT OF EMINENT DOMAIN. The necessary use of lands for the construction of reservoirs or storage basins, for the purpose of irrigation, or for rights of way for the construction of canals, ditches, flumes or pipes, to convey water to the place of

> use for any useful, beneficial or necessary purpose, or for drainage; or for the drainage of mines, or the working thereof, by means of roads, railroads, tramways, cuts, tunnels, shafts, hoisting works, dumps, or other necessary means to their complete development, or any other use necessary to the complete development of the material resources of the state, or the preservation of the health of its inhabitants, is hereby declared to be a public use, and subject to the regulation and control of the state.
>
> Private property may be taken for public use, ***but not until a just compensation***, to be ascertained in the manner prescribed by law, ***shall be paid therefor***.

(emphasis added). Due process under the Idaho Constitution requires compensation **first, before** private property may be taken. The Idaho Supreme Court held:

> It being thus firmly established and announced by the Constitution that the owner of property is entitled to compensation before it can be taken, to force him for relief to file a suit for recommendatory judgment, Art. 5, Sec. 10, before the Supreme Court, almost denies relief because such procedure is uncertain, problematical, dilatory, and based purely on sufferance and not on right.

Renninger v. State, 70 Idaho 170, 177, 213 P.2d 911 (1950). Idaho Code §§ 7-706 to 7-710 establishes the procedure that the Constitution and law requires.

> It will thus be seen that under the provisions of the constitution private property may be taken for public use, ***but not until just compensation, ascertained in a manner prescribed by law***, shall be paid therefor. This provision of the constitution limits the power of the legislature in providing the proceedings for the taking of private property for public use, in that before such property can be so taken a just compensation must be first ascertained and the payment therefor made.

Big Lost River Irrigation Co. v. Davidson, 21 Idaho 160, 168, 121 P. 88 (1912) (emphasis added).

Plaintiffs claim HB 391 fails to include any procedure for providing compensation, and thus is a taking which violates due process in contravention of the United States and Idaho Constitutions. The remedy claimed by plaintiffs is that HB 391 be declared void.

One argument of defendants is that the legislature may authorize public nuisances. While the legislature may authorize **public** nuisances, it lacks the authority to immunize people and corporations from **private** nuisance or trespass claims where the conduct allegedly authorized is so unreasonable and causes such serious harm as to destroy fundamental property rights to occupy, use and enjoy one's home in security and comfort, because to do so violates the Federal and State Constitutions.

Another argument of defendants is that the legislature may take away causes of action. Clearly the legislature can do this, but it cannot violate the Federal and State Consitutions in doing so.

This Court is being asked to determine if the immunity provision in Idaho Code § 22-4803A(6) results in a taking without prior compensation. Again, that statute reads:

> (6) Crop residue burning conducted in accordance with section 22-4803 Idaho Code, shall not constitute a private or public nuisance or constitute trespass. Nothing in this chapter shall be construed to create a private cause of action against any person who engages in or allows crop residue burning of a field or fields required to be registered pursuant to section 22-4803(3) Idaho Code, provided such activities are conducted in accordance with chapter 49, title 22, Idaho Code, and rules promulgated thereunder.

This Court finds such statute results in a taking without prior compensation. Accordingly, the statute cannot survive a constitutional analysis, and therefore, it is unconstitutional.

The reason this amounts to a taking is as follows. By abolishing nuisance and trespass claims, the Idaho legislature placed these plaintiffs and class members in a situation where they are now powerless to enjoin the injury and damage suffered by grass field burning[1]. By doing so, the Idaho legislature imposed a servitude on plaintiffs' property. "Property is taken in the constitutional sense when inroads are made upon an owner's use of it to an extent that, as

[1] Idaho Code § 22-4308A(6) only immunizes defendants for burning when done in compliance with the regulations, however, plaintiffs have put on proof that even when fields are burned in compliance with the regulations, injury occurs.

between private parties, a servitude has been acquired." *United States v. Dickinson,* 331 U.S. 745, 748 (1947).

Simply stated, defendants' field burning impacts plaintiffs' right to exclusive possession of their property, and the immunity provision in Idaho Code § 22-4308A(6) causes plaintiffs to lose their remedies of either injunctive relief or damages under trespass or nuisance. That result is a taking of their property without compensation. The smoke is still present, the effects on their health are still present, the nuisance and trespass are still present, but as of April 23, 2003, plaintiffs lost their remedy due to Idaho Code § 22-4308A(6). That is a taking without compensation.

Stated another way, the right to maintain a nuisance is an easement. RESTATEMENT (THIRD) PROPERTY § 1.2(1) (2000); RESTATEMENT OF PROPERTY § 451, at 2912 (1944). Defendants right to burn and create smoke which goes upon plaintiffs' land is a nuisance, and a right to maintain a nuisance is an easement[2], and defendants cannot have that easement without paying for it. The immunity provision of Idaho Code § 22-4308A(6) precludes defendants from ever paying for that easement, thus, defendants have taken plaintiffs' property without just compensation.

In Idaho, "[t]he home is a favorite of the law. It is there that the citizen can claim the right of privacy, the right to be let alone, on clear grounds." *Rowe v. Pocatello*, 70 Idaho 343, 352, 218 P.2d 695, 701 (1950). "[T]he very constitutional guarantees of life, liberty, property and equal protection . . . are the same provisions which guarantee the right of the householder to the quiet, peaceful, and undisturbed enjoyment of the privacy of his home." *Id.* And, when a

[2] As plaintiffs noted in the present case, smoke traversing over and into plaintiffs' homes, or otherwise forcing them to abandon their homes, is an easement because it privileges the owner of one tenement with a right to use the tenement of plaintiffs; it is "a right which one person has to use the land of another for a specific purpose, or a servitude imposed as a burden upon land." *Sinnett v. Werelus,* 83 Idaho 514, 520, 365 P.2d 952, 955 (1961). Plaintiffs' Combined Reply Re: Constitutionality, p. 11, n. 8.

citizen seeks to protect his or her rights of safety, privacy, and security in the home, "the ordinary remedies by civil suit are available." *Id.* Thus, any law that deprives people of their ability to protect these rights through the courts or remedy the invasion of these rights is unconstitutional. As the Idaho Supreme Court has stated:

> Under the provisions of the constitution, private property cannot be taken for public use or for corporations without just compensation being first made to the owner, except by consent. The courts--and it was never intended to be otherwise understood--are not "masons" to "chisel" away vested rights of property or private individuals, however humble or obscure the owner, for the benefit of the public or great corporations. It is the pride of this republic that no man can be deprived of his property without due process of law, and the poorest citizen can find redress for an unlawful injury caused by his wealthy neighbor by appealing to the courts of his county.

Hill v. Standard Mining Co., 12 Idaho 223, 239, 85 P. 907, 911-12 (1906).

The right to exclusive use of one's land (the right to exclude others from that land), is a fundamental element attributable to ownership of property, and the Government cannot take such without compensation. *Kaiser Aetna Et al. v. United States,* 444 U.S. 164, 179-80, 100 S.Ct. 383, 62 L.Ed.2d 332 (1979). Idaho recognizes that easements are property rights, as is every legal interest in the estates and rights of land. *Hughes v. State*, 80 Idaho 286, 293, 328 P.2d 397 (1958). Fundamental to any concept of property are mainly three powers: possession, use, and disposition. *United States v. General Motors Corp.*, 323 U.S. 373, 377-78 (1945). In Idaho, "**Any** destruction, **interruption**, or deprivation **by the common, usual, and ordinary use of property is** by the weight of authority **a 'taking'** of one's property in violation of the constitutional guaranty." *Hughes v. State,* 80 Idaho 286, 294, 328 P.2d 397 (1958); *citing Knowles v. New Sweden Irr. Dist.,* 16 Idaho 217, 231, 101 P. 81, 86 (1908). (emphasis added). Plaintiffs have proven through their medical evidence, that they cannot reside in their land during field burning without suffering injury. The emphasized words of *Hughes* show that even though

field burning takes place in two months of the year, August and September, the burning invades and destroys two of the three fundamental aspects of their property rights…possession and use.

Renninger v. State, 70 Idaho 170, 213 P.2d 911 (1950), is an Idaho Supreme Court decision which holds that just compensation is warranted even when the taking is *intermittent*. 70 Idaho at 176, 213 P.2d at 915, citing *United States v. Lynah,* 188 U.S. 445, 23 S.Ct. 349, 47 L.Ed. 539 (1903). In *Renninger* the taking was intermittent because of the seasonal overflow of a river. In the present case it is intermittent because burning only occurs two months out of the year. The Idaho Supreme Court in *Renninger* held: "…where real estate is actually invaded by superinduced additions of water, earth, sand **or other material**…so as to effectually destroy **or impair** its usefulness, it is a taking, within the meaning of the Constitution, and that this proposition is not in conflict with the weight of judicial authority in this country, and certainly no with sound principle." 70 Idaho at 174, 213 P.2d at 913. (emphasis added). The Idaho Supreme Court held that under Article 1, Section 14 of the Idaho Constitution it "…is mandatory that private property may not be taken until a just compensation, to be ascertained in the manner prescribed by law, is paid." 70 Idaho at 177, 213 P.2d at 915. The Idaho Supreme Court in *Renninger* (70 Idaho at 174) cited *Eaton v. B.C. & M. R. R*, 51 N.H. 504 (N.H. 1872) with approval. The Supreme Court of New Hampshire in *Eaton* held that the railroad was liable because "it was beyond the power of the legislature to authorize the infliction of this injury on the plaintiff, without making provision for his compensation." 51 N.H. at 515. As in this present case, the defendants in *Eaton* were causing injury to the plaintiff by performing some act on their land which "restrict[ed] or burden[ed] the plaintiff's ownership of his land." *Id.* Thus, according to the *Eaton* court, if the defendants' claim that they were not liable because of a legislative

authorization was "well founded," then "an easement is already vested in them." *Id.* Then, the New Hampshire Supreme Court stated:

> An easement is property, and is within the protection of the constitutional prohibition now under consideration. If the defendants have acquired this easement, it cannot be taken from them, even for the public use, without compensation. But the right acquired by the defendants is subtracted from the plaintiff's ownership of the land. Whatever interest the defendants have acquired in this respect the plaintiff has lost. If what they have gained is property, then what he has lost is property. If the easement, when once acquired, cannot be taken from the defendants without compensation, can the defendants take it from the plaintiff in the first instance without compensation?

Id. (citations omitted). The New Hampshire Supreme Court held defendants could not take an easement without compensation.

One case is very much factually on point. *Bormann et al. v. Board of Supervisors in and for Kossuth County, Iowa, et al., (Bormann),* 584 N.W.2d 309 (Iowa 1998), is a unanimous decision[3] of the Iowa Supreme Court. That opinion has not been overruled or interpreted negatively by any other appellate court since it was written five years ago. The United States Supreme Court denied certiorari in February, 1999. *Girres v. Bormann,* 525 U.S. 1172, 119 S.Ct. 1096, 143 L.Ed.2d 96. In *Bormann,* Gerald and Joan Girres applied to the Kossuth County Board of Supervisors for establishment of an "agricultural area" for their 960 acres. 584 N.W.2d at 312. Under Iowa Code section 352.11(1)(a), approval of an "agricultural area" gave the applicants immunity from nuisance suits. Iowa Code § 352.11(1)(a) read in part: "A farm or farm operation located in an agricultural area shall not be found to be a nuisance regardless of the established date of operation or expansion of the agricultural activities of the farm or farm operation." 584 N.W.2d at 314. The Bormanns and others challenged the County Board of

[3] All Iowa Supreme Court Justices concurred except Justices Larson and Adreasen who did not take part. 584 N.W.2d 309, 322.

Supervisor's decision approving the designation of an agricultural area. 584 N.W.2d at 312-13.

That *Bormann* opinion begins as follows:

> In this appeal we are asked to decide whether a statutory immunity from nuisance suits results in a taking of private property for public use without just compensation in violation of federal and Iowa constitutional provisions. We think it does.

584 N.W.2d at 311. That opinion ends as follows:

> Accordingly, we hold unconstitutional and invalidate that portion of section 352.11(1)(a) that provides for immunity against nuisance suits. We reach this result under the Fifth Amendment to the Federal Constitution and also under article I, section 18 of the Iowa Constitution.
>
> We reverse and remand for an order declaring that portion of Iowa Code section 352.11(1)(a) that provides for immunity against nuisances unconstitutional and without any force or effect.
>
> We reach this holding with a full recognition of the deference we owe to the General Assembly. That branch of government--with some participation by the executive branch--holds the responsibility to sort through the practical realities and, through the political process, reach consensus in highly controversial public decisions. Those decisions demand our sincere respect. The rule is therefore that "[a] challenger must show beyond a reasonable doubt that the statute violates the constitution and must negate every reasonable basis that might support the statute." *Johnston v. Veterans' Plaza Authority,* 535 N.W.2d 131, 132 (Iowa 1995). **The rule finding constitutionality in close cases cannot control the present one, however, because, with all respect, this is not a close case. When all the varnish is removed, the challenged statutory scheme amounts to a commandeering of valuable property rights without compensating the owners, and sacrificing those rights for the economic advantage of a few. In short, it appropriates valuable private property interests and awards them to strangers.** The same public that constituted the other branches of state government to make political decisions with an eye on economic consequences expects the court to resolve constitutional challenges on a purely legal basis. We recognize that political and economic fallout from our holding will be substantial. **But we are convinced our responsibility is clear because the challenged scheme is plainly--we think flagrantly--unconstitutional.**

584 N.W.2d 309, 321-22. (emphasis added).

One hundred and twenty years ago, the United States Supreme Court decided *Baltimore & Potomac Railroad Co. v. Fifth Baptist Church,* 108 U.S. 317; 2 S.Ct. 719; 27 L.Ed. 739 (1883). That case involved a lawsuit to recover damages for discomfort occasioned by

establishment of a building for housing railroad locomotives next to a church. The first words of that decision read:

> If the facts are established which the evidence tended to prove, and from the verdict of the jury we must so infer, **there can be no doubt of the right of the plaintiff to recover.** The engine house and repair shop of the railroad company, as they were used, rendered it impossible for the plaintiff to occupy its building with any comfort as a place of public worship.

108 U.S. at 328-29; 2 S.Ct. at 726. (emphasis added). The emphasized language indicates that it, too, was not a close call. In that case, the immunity provision alleged applicable by the railroad did not even apply to private nuisance claims, but only exempted liability from civil or criminal suits brought by the state. The Supreme Court held:

> Plainly the engine-house and repair-shop, as they were used by the railroad company, were a nuisance in every sense of the term. They interfered with the enjoyment of property which was acquired by the plaintiff long before they were built, and was held as a place for religious exercises, for prayer and worship; and they disturbed and annoyed the congregation and Sunday-school which assembled there on the Sabbath and on different evenings of the week. **That is a nuisance which annoys and disturbs one in the possession of his property, rendering its ordinary use or occupation physically uncomfortable to him. For such annoyance and discomfort the courts of law will afford redress by giving damages against the wrong-doer, and when the cause of the annoyance and discomfort are continuous, courts of equity will interfere and restrain the nuisance.** *Crump* v. *Lambert*, L. R. 3 Eq. 409.

Id. (emphasis added). The Supreme Court continued:

> Whatever the extent of the authority conferred, it was accompanied with this implied qualification that the works should not be so placed as by their use to unreasonably interfere with and disturb the peaceful and comfortable enjoyment of others in their property. **Grants of privileges or powers to corporate bodies, like those in question, confer no license to use them in disregard of the private rights of others, and with immunity for their invasion. The great principle of the common law, which is equally the teaching of Christian morality, so to use one's property as not to injure others, forbids any other application or use of the rights and powers conferred.**

108 U.S. at 331, 2 S.Ct at 728. (emphasis added). In *Fifth Baptist Church,* the railroad **needed** a repair shop, but the Supreme Court said the remedy is to remodel the repair shop to "prevent" the nuisance complained of, and if that was not possible, the repair shop would need to be moved.

108 U.S. at 334, 2 S.Ct. at 730. In the present case, the states of Washington and Oregon have shown that the farmers do not **need** to burn. *See* Memorandum Opinion and Order Denying Defendants' Motion to Dismiss at p. 30; testimony of Grant Pfifer, Washington Department of Ecology that since the state of Washington curtailed burning of grass seed stubble, grass seed production is actually little *higher*. Farmers in those states can competitively grow grass seed without burning. In *Fifth Baptist Church* the Supreme Court said: "Whatever prevents the **comfortable** use of the property for that purpose [a church] by the members of that corporation…is a disturbance and annoyance, as much so as if access by them to the church was impeded and rendered inconvenient and difficult." 108 S.Ct. at 330, 2 S.Ct at 727. (emphasis added). In the present case, much more than the **comfort** of plaintiffs and the class members is at issue. It is their health and safety that are at issue.

It is important to discuss the *Bormann* decision, as both plaintiffs and the various groups of defendants have argued that case at length in their briefs and at oral argument.

Clay R. Smith, deputy attorney general for the State of Idaho, at oral argument claimed the Iowa Supreme Court erred in finding that the easement arose in that case by virtue of the immunity provision that was contained in their "right to farm" statute, because the easement was not authorized by the immunity provision in that statute, but rather by the county's authorization of the agricultural practice that generated the offensive smells.[4] That argument has no logical merit. Essentially, the Attorney General's argument is "The Iowa Supreme Court erred because is was the county's authorization of an agricultural area, not the statutory immunity provision that caused the easement, that caused the taking." The logical flaw is that without the statutory

[4] That argument is also found in Brief *Amicus Curiae* of the Idaho Attorney General in Support of House Bill 391's Constitutionality, pp. 11-12.

immunity, there is no taking! That argument by the Attorney General was also contradicted by the Iowa Supreme Court's own language:

> The Board's approval of the agricultural area here triggered the provisions of Iowa Code section 352.11(1)(a). More specifically, the approval gave the applicants immunity from nuisance suits. The neighbors contend that the approval **with the attendant nuisance immunity results in a taking of private property without the payment of just compensation in violation of federal and state constitutional provisions.**

584 N.W.2d 309 at 313. (emphasis added). The Iowa Supreme Court agreed with the neighbors' argument, and held:

> In enacting section 352.11(1)(a), the legislature has exceeded its authority. It has exceeded its authority by authorizing the use of property in such a way as to infringe on the rights of others by allowing the creation of a nuisance without the payment of just compensation. The authorization is in violation of the Fifth Amendment of the Federal Constitution and article I section 18 of the Iowa Constitution.

584 N.W.2d 309 at 321. The Iowa Supreme Court found the remedy for that taking without just compensation was as follows: "We reverse and remand for an order declaring that portion of Iowa Code section 352.11(1)(a) that provides for immunity against nuisances unconstitutional and without any force or effect." *Id.* at 321-22. If the Idaho Attorney General's illogical argument were followed to its conclusion, the Iowa Supreme Court should have struck down the county's decision, not the state statute providing immunity. That is not what happened in Iowa, that is not what should result in the present case. Just as in *Bormann,* it is Idaho's immunity statue, Idaho Code § 22-4308A(6), that provides immunity against nuisance and trespass, and it is that provision which is unconstitutional.

The Idaho Attorney General then makes the argument that "Although a nuisance cause of action may have been a method for addressing that impact [in *Bormann*], the court cited no authority, and none exists, for the notion that the simple availability of such a claim against a private party constitutes "just compensation" for *inter alia,* Fifth Amendment purposes." Brief

Amicus Curiae of the Idaho Attorney General in Support of House Bill 391's Constitutionality, p. 13. **First**, the nuisance claim is not "just compensation," as the Idaho Attorney General argues. The Iowa Supreme Court made it clear in *Bormann* that "the legislature has exceeded its authority…by authorizing the use of property in such a way as to infringe on the rights of others by allowing the creation of a nuisance without the payment of just compensation…in violation of the Fifth Amendment of the Federal Constitution and article I section 18 of the Iowa Constitution." 584 N.W.2d 309 at 321. The reason the elimination of the nuisance claim is a taking without just compensation is because elimination of that nuisance claim creates an "easement" in others' property, and if the offending party does not pay for such easement because of statutory immunity, there is a taking without compensation. The Iowa Supreme Court made that clear when it wrote:

> Thus, the nuisance immunity provision in section 352.11(1)(a) creates an easement in the property affected by the nuisance (the servient tenement) in favor of the applicants' land (the dominant tenement). This is because the immunity allows the applicants to do acts on their own land which, were it not for the easement, would constitute a nuisance. For example, in their farming operations the applicants would be allowed to generate "offensive smells" on their property which without the easement would permit affected property owners to sue the applicants for nuisances. *See* Iowa Code § 352.2(6); *see also Buchanan v. Simplot Feeders Ltd. Partnership,* 134 Wash.2d 673, 952 P.2d 610, 615 (1998) (holding that Washington's Right-to-Farm Act gives farm quasi easement, against urban developments that subsequently locate next to farm, to continue nuisance activities) (dictum).

584 N.W. 2d 300 at 316. **Second,** the Idaho Attorney General is mistaken when as quoted above, he argues: "the [*Bormann*] court cited no authority, and none exists, for the notion that the simple availability of such a claim against a private party constitutes 'just compensation' for *inter alia,* Fifth Amendment purposes." The following lengthy quote from *Bormann* shows, the Attorney General's argument is simply wrong, there *is* authority and it *was* cited:

> **(c) Liability of government for a taking by the operation of a nuisance- producing governmental enterprise.** With regard to private nuisances,

> [t]he power of the legislature to control and regulate nuisances is not without restriction, and it must be exercised within constitutional limitations. The power cannot be exercised arbitrarily, or oppressively, or unreasonably.... It has been broadly stated, as an additional limitation to the power of the legislature, that ... the legislature may not authorize the use of property in such a manner as unreasonably and arbitrarily to infringe on the rights of others, as by the creation of a nuisance. So it has been held that the legislature has no power to authorize the maintenance of a nuisance injurious to private property without due compensation.

66 C.J.S. *Nuisances* § 7, at 738 (1950).

Thus, the state cannot regulate property so as to insulate the users from potential private nuisance claims without providing just compensation to persons injured by the nuisance. The Supreme Court firmly established this principle in *Richards,* holding that "while the legislature may legalize what otherwise would be a public nuisance, it may not confer immunity from action for a private nuisance of such a character as to amount in effect to a taking." *Richards,* 233 U.S. at 553, 34 S.Ct. at 657, 58 L.Ed. at 1091; *see also Pennsylvania R.R. v. Angel,* 41 N.J. Eq. 316, 7 A. 432, 433 (1886) ("[A]n act of the legislature cannot confer upon individuals or private corporations, acting primarily for their own profit, although for public benefit as well, any right to deprive persons of the ordinary enjoyment of their property, except upon condition that just compensation be first made to the owners.").

A number of state courts have decided takings cases on the basis that the government entity operated a nuisance-producing enterprise. *See, e.g.,Thornburg v. Port of Portland,* 233 Or. 178, 376 P.2d 100, 106 (1962) ("[A] taking occurs whenever government acts in such a way as substantially to deprive an owner of the useful possession of that which he owns, either by repeated trespasses or by repeated nontrespassory invasions called 'nuisance.' "). Significantly, a large number of these cases deal with smoke and odors from sewage disposal plants and city dumps. One commentator describes the cases this way:

> Typically, a city sewage plant or dump in the vicinity of, but not necessarily directly adjacent to, the plaintiff's land has wafted its noxious smoke, odors, dust, or ashes, usually combinations of these, over the plaintiff's land, with the obvious result of lessening its enjoyment. No physical touching is present, nor do the courts try to equate the municipal acts with touchings. [Several states] have allowed eminent domain compensation in cases of this kind.... More significant than a court's language is the result it announces, and in this respect all the decisions stand for the proposition that nuisance-type activities are a taking....

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The commentator ascribes a name to the theory of these cases: condemnation by nuisance. Stoebuck, at 226. And the commentator has formulated the theory this way: "governmental activity by an entity having the power of eminent domain, which activity constitutes a nuisance according to the law of torts, is a taking of property for public use, even though such activity may be authorized by legislation." *Id.* at 208-09; *see also City of Georgetown v. Ammerman,* 143 Ky. 209, 136 S.W. 202, 202 (1911) (holding that odors from city dump adjacent to plaintiff's property created a nuisance that was a taking

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One court long ago anticipated the so-called condemnation by nuisance theory this way:

> Whether you flood the farmer's fields so that they cannot be cultivated, or pollute the bleacher's stream so that his fabrics are stained, or fill one's dwelling with smells and noise so that it cannot be occupied in comfort, you equally take away the owner's property. In neither instance has the owner any less of material things than he had before, but in each case the utility of his property has been impaired by a direct invasion of the bounds of his private dominion. This is the taking of his property in a constitutional sense.

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The district court erred in concluding otherwise.

584 N.W. 2d 300 at 319-320.

The Idaho Attorney General then claims *Bormann* is not applicable in Idaho due to the Idaho Supreme Court's ruling last year in *Covington v. Jefferson County,* 137 Idaho 777, 53 P.3d 828 (2002). Brief *Amicus Curiae* of the Idaho Attorney General in Support of House Bill 391's Constitutionality, pp. 13-15. The various groups of defendants made similar arguments. Memorandum in Opposition to Plaintiffs' Motion to Declare HB 391 Unconstitutional Submitted by Defendants Wayne Meyer at al., pp. 15-16; Lampert Farm & Ranch et al. Memroandum in Opposition to Plaintiffs' Motion to Decleare HB 391 Unconstitutional, pp. 6-10.

As correctly noted by defendants Meyer et al., in *Covington* the plaintiffs lived near a gravel pit and asphalt plant operation that had received a special use permit for operation from Jefferson County, and the plaintiffs alleged an inverse condemnation taking under both the United States and Idaho Constitutions due to the landfill's causing flies, dust and disturbing odors. Memorandum in Opposition to Plaintiffs' Motion to Declare HB 391 Unconstitutional Submitted by Defendants Wayne Meyer at al., p. 15; 137 Idaho 777, 779, 53 P.3d 828, 830. In rejecting those claims, the Idaho Supreme Court noted that a taking under Idaho's Constitution requires more than a claim that the property be merely "damaged" or that there is a diminution in the value of the property. *Id.* ; 137 Idaho at 780-81, 53 P.3d at 831-32. The Idaho Supreme Court also rejected the Covington's claims under the federal constitution because they had not alleged that they had been permanently deprived of all economic uses of their land. *Id.,* pp. 15-16; 137 Idaho at 781-82, 53 P.3d at 832-33. The problem in arguing that *Covington* overrules *Bormann* is simply *Covington* is not a nuisance case, and *Bormann* is not an inverse condemnation case. In a footnote, the Idaho Supreme Court specifically noted *Covington* is not a nuisance case, when it rejected the Covingtons' federal taking claim, noting:

> The Covingtons argue a physical invasion of their land has taken place due to increased traffic, dust, flies and noise that drift onto their property from across the street. **This activity may constitute a nuisance claim which is not before this court.**

137 Idaho at 781, 53 P.3d at 832, n. 2. The Idaho Supreme Court then made it clear it was rejecting "Covingtons' claim for inverse condemnation." 137 Idaho at 782, 53 P.3d at 833. The Idaho Attorney General argues: "This footnote drew precisely the distinction that the Bormann court did not and properly identified that, while conduct may give rise to a nuisance action, it need not form a predicate for a just compensation claim." Brief *Amicus Curiae* of the Idaho Attorney General in Support of House Bill 391's Constitutionality, p. 14. In that footnote the Idaho Supreme Court clearly drew no such distinction that a nuisance cause of action could not be a predicate for a just compensation claim. The Idaho Supreme Court clearly stated that the facts in *Covington* could certainly amount to a nuisance claim. In no way did the Idaho Supreme Court state that elimination of that nuisance claim would not amount to a taking. That is the specific question which *Bormann* addressed. The Attorney General continues: "Plaintiffs here effectively ask this Court to deem the claims interchangeable by holding that Idaho Code § 22-4803A(6), insofar as it precludes a nuisance or trespass claim, somehow precludes a just compensation claim against the State. It plainly does not foreclose an inverse condemnation claim." *Id.,* pp. 14-15. This is similar to counsel for defendants Wayne Meyer et al.'s statement at oral argument that plaintiffs' constitutional challenge is "in the wrong courtroom," that these arguments should be raised in the lawsuit filed by the same plaintiffs against the State of Idaho claiming a taking by the State of Idaho. Those arguments ignore yet another distinction between *Bormann* and the present case on one hand, and *Covington.* The statute at issue in *Covington* was a zoning ordinance, and while the county designation of an agricultural area in *Bormann* was akin to a zoning ordinance, it was the Iowa statutory immunity from nuisance suits that caused a

taking without compensation and their state immunity statute to be unconstitutional. The Iowa Supreme Court correctly noted:

> Thus, the state cannot regulate property so as to insulate the users from potential private nuisance claims without providing just compensation to persons injured by the nuisance. The [United States] Supreme Court firmly established this principle in *Richards,* holding that "while the legislature may legalize what otherwise would be a public nuisance, it may not confer immunity from action for a private nuisance of such a character as to amount in effect to a taking." *Richards,* 233 U.S. at 553, 34 S.Ct. at 657, 58 L.Ed. at 1091.

584 N.W.2d 309, 319-320. In the present case, the Court is faced with a statute that prohibits the plaintiffs from protecting their homes and property rights. Again, we need to go back to the distinction discussed above, that is, the Idaho Supreme Court specifically noted the plaintiffs in *Covington* still had an avenue available to them to protect their rights…a nuisance claim. 137 Idaho at 781, 53 P.3d at 832, n. 2. In the present case, that is exactly what is being sought to be protected by plaintiffs, and it is exactly what the legislature recently took away through Idaho Code § 22-4802A(6).

The Idaho Attorney General and the various groups of farmer defendants essentially argue, look, plaintiffs, your claim lies in an inverse condemnation proceeding, and you haven't alleged one in this case. The Idaho Supreme Court in *Covington* said an inverse condemnation proceeding is not available for a regulatory taking under the facts in that case. The Idaho Attorney General argues that the facts of this case, in light of the *Covington* factors (no actual physical taking, no permanent taking), show no regulatory taking would be allowed in the present case. Brief *Amicus Curiae* of the Idaho Attorney General in Support of House Bill 391's Constitutionality, pp. 13-14. If this Court were to analyze the field burning smoke itself as a regulatory taking under *Covington,* an important distinction between the present case and *Covington* is that the Idaho Supreme Court specifically noted the Covingtons alleged "…no loss

of access to or denial of any use of the Covingtons' property." *See, e.g. Hughes v. State,* 80 Idaho 286, 295, 328 P.2d 397, 402 (1958) (destroyed right of access constitutes a taking)." 137 Idaho at 781, 53 P.3d at 832. In the present case, plaintiffs allege loss of access to their homes, a denial of use of their homes and interference with their exclusive right of possession. This is a crucial distinction, as the Idaho Supreme Court in *Covington* (citing *Hughes*), held that a loss of access or denial of use of property constitutes a taking. But that is a crucial distinction only in a pure regulatory takings analysis.

What *Covington* **ALSO** says, is, that under the facts of *Covington*, and even more so in the present case, **a nuisance cause of action remains.** 137 Idaho at 781, 53 P.3d at 832, n. 2. Eight months after *Covington* was decided, the Idaho legislature passed HB 391, which **eliminated** the nuisance cause of action. The bottom line is, the plaintiffs in the present case (and the plaintiffs in *Covington*) are now without a remedy, unless that provision in HB 391 granting immunity (Idaho Code §22-4803A(6)) is unconstitutional. *Bormann* tells us it is in fact clearly unconstitutional.

Defendants Lampert Farm & Ranch et al. argue the *Bormann* decision only protected a property right in a cause of action. Lampert Farm & Ranch et al. Memorandum in Opposition to Plaintiffs' Motion to Declare HB 391 Unconstitutional, p. 12, citing 584 N.W.2d at 316. That is incorrect. In Iowa, just as in Idaho, a right to maintain an easement over the land of another is an easement. 584 N.W.2d at 315. *Sinnett v. Werelus,* 83 Idaho 514, 520, 365 P.2d 952, 955 (1961). *Bormann* expressly held that "the nuisance immunity provision is section 352.11(1)(a) creates an easement in the property affected by the nuisance (the servient tenement) in favor of the applicants' land (the dominant tenement). This is because the immunity allows the applicants to

do on their own land which, were it not for the easement, would constitue a nuisance." 584 N.W.2d at 316. Then the *Bormann* Court held:

> In enacting section 352.11(1)(a), the legislature has exceeded its authority. It has exceeded its authority by authorizing the use of property in such a way as to infringe on the rights of others by allowing the creation of a nuisance without the payment of just compensation. The authorization is in violation of the Fifth Amendment to the Federal Constitution and article I, section 18 of the Iowa Constitution.

584 N.W.2d at 321. *Bormann* doesn't protect a property right in a nuisance cause of action. *Bormann* declares that the legislature's immunization of a nuisance creates an easement without the payment of compensation, and that is what was held to be unconstitutional.

Another argument raised by some of the defendants is that in Iowa, the legislature cannot modify the common law, but in Idaho the legislature can. McLean et al.'s Memorandum in Opposition, pp. 10-11. Lampert Farm & Ranch et al.'s Memroandum in Opposition to Plaintiffs Motion to Declare HB 391 Unconstitutional, pp. 6-8. However, in Iowa, the legislature *does* have the ability to modify common law rights. *McKiness Excavating & Grading, Inc. v. Morton Bldgs.,* 507 N.W.2d 405, 410 (Iowa 1993). In Idaho, the legislature has the authority to "…modify the common law with few exceptions." *Jones v. State Board of Medicine,* 97 Idaho 859, 555 P.2d 399 (1976); *citing State v. McCoy,* 94 Idaho 236, 486 P.2d 247 (1971)(dictum). The premise of defendants' argument is wrong. The next question to be asked is what are the "few exceptions" to the Idaho legislature's authority to modify common law? Obviously, constitutionality of legislation is one of those "few exceptions." It is fundamental that the legislature must comply with constitutional constraints, so constitutionality is one of the "few exceptions" referenced in *Jones v. State Board of Medicine.* The legislature cannot modify the common law if doing so results in a constitutional violation. Both briefs also cite *Webb's Fabulous Pharmacies v. Beckwith,* 449 U.S. 155, 161 (1980) for the proposition that state law

determines the existence of a property right. McLean et al.'s Memorandum in Opposition, pp. 10-11. Lampert Farm & Ranch et al.'s Memorandum in Opposition to Plaintiffs Motion to Declare HB 391 Unconstitutional, p. 6.[5] Implicit in that argument is the legislature can choose to abolish plaintiffs' nuisance and trespass causes of action. The Idaho legislature can so choose, and it made that choice in this case. However, nothing in *Webb's Fabulous Pharmacies* allows any state legislature to violate the federal or its own state's constitution in so doing.

There is one important difference between the present case and *Bormann.* In *Bormann* the Iowa Supreme Court noted: "The neighbors concede, as they must, that their challenge to section 352.11(1)(a) is a facial one because the neighbors have presented neither allegations nor proof of nuisance." 584 N.W.2d 309, 313. The facts in the present case are much stronger in favor of plaintiffs. The plaintiffs in the present case have not only alleged facts which show a nuisance, they have proven facts at one preliminary injunction hearing and proved a nuisance, and they have withstood a summary judgment filed against them on the issue of nuisance. The fact that *Bormann* dealt with a "facial" challenge to the Iowa statute, and the fact that the Iowa Supreme Court held that it was "not a close case" that the statute was "flagrantly—unconstitutional" (*Id.*, at 322), shows that the facts present in the present case, coupled with the law, make an even stronger showing that Idaho Code § 22-4803A(6) is unconstitutional.

Bormann went through a regulatory taking analysis (584 N.W.2d 315-321), because the neighbors claimed the statutory immunity created an easement over their property in that it allowed the applicants to maintain a nuisance on their property. 584 N.W.2d 309, 313. "The

[5] Plaintiffs argue that defendants' claim that *Webb* stands for the proposition that property rights are determined solely by state law is incorrect. Plaintiffs argue that the Supreme Court in *Webb* held that property rights are created and defined by "existing rules or understandings that stem from" a source independent from the Constitution "such as state law." Plaintiffs' Combined Reply Re: Constitutionality of HB 391, p. 2, n. 2 *citing Webb's Fabulous Pharmacies, Inc. v. Beckwith,* 449 U.S. 155, 161 (1980). This Court's reading shows plaintiffs' interpretation is more accurate. In any event, nothing in *Webb's Fabulous Pharmacies* allows any state legislature to violate the federal or its own state's constitution.

creation of the easement, the neighbors conclude, results in an automatic or per se taking under a claim of regulatory taking." *Id.* *Covington* also addressed a regulatory taking, which *Bormann* discussed, and like the Idaho Supreme Court noted in *Covington,* you need to have a permanent physical invasion. The Bormann court discussed cases like *Pumpelly v. Green Bay & Mississippi Canal Co.,* 80 U.S. 166, 181, 20 L.Ed. 557, 561 (1871) which held:

> Where real estate is actually invaded by superinduced additions of water, earth, sand, or other material, or by having any artificial structure placed on it, so as to effectually destroy **or impair its usefulness, it is a taking,** within the meaning of the constitution.

Id. (emphasis added). The *Bormann* court then discussed the taking caused by flight easements near airports (*United States v. Causby,* 328 U.S. 256, 266-67, 66 S.Ct. 1062, 1068, 90 L.Ed. 1206, 1213 (1946); *Griggs v. Allegheny County,* 369 U.S. 84, 89, 82 S.Ct. 531, 533-34, 7 L.Ed.2d 585 (1962); *Dolezal v. City of Cedar Rapids,* 209 N.W.2d 84, 87 (Iowa 1973)) and firing navy coastal guns over property (*Portsmouth Harbor Land & Hotel Co. v. United States,* 260 U.S. 327, 43 S.Ct. 135, 67 L.Ed. 287 (1922). 584 N.W.2d at 317, 318. Certainly the Idaho Supreme Court has embraced these types of takings in *Tibbs v. City of Sandpoint,* 100 Idaho 667, 603 P.2d 1001 (1979), when it directed trial judges in the future to look at the factors in *Causby* and *Jensen v. United States,* 305 F.2d 444, 447, 158 Ct.Cl. 333 (Ct.Cl. 1962), to determine when the interference becomes so serious so as to constitute a taking: the frequency and level of flights, the type of planes, uses of the property, the effect on values, reasonable reactions of humans below, and the impact upon animals and vegetable life. 100 Idaho 667, 671, 603 P.2d 1001, 1005. After all that discussion, the Iowa Supreme Court noted that *Richards v. Washington Terminal Co.,* 233 U.S. 546, 34 S.Ct. 654, 58 L.Ed. 1088 (1914) "presents a factual scenario closer to the facts of this case." 584 N.W.2d at 319. The Iowa Supreme Court held:

> In *Richards,* the plaintiff owned residential property along the tracks of a railroad that had the power of eminent domain. The property lay near the mouth of a tunnel. The Court

> recognized that two kinds of the railroad's activities had partially destroyed the plaintiff's interest in the enjoyment of his property. The first kind involved smoke, dust, cinders, and vibrations invading the plaintiff's property at all points at which the property abutted the tracks. The second kind involved gases and smoke emitted from engines in the tunnel that contaminated the air and invaded the plaintiff's property. A fanning system inside the tunnel forced the emission of the gases and smoke from the tunnel. As to the first activity, the Court denied compensation because it was the kind of harm normally incident to railroading operations. *Id.* at 554-55, 34 S.Ct. at 657-58, 58 L.Ed. at 1091-92. As to the second activity--gases and smoke from the tunnel--the Court concluded the plaintiff was entitled to compensation for the "special and peculiar damage" resulting in diminution of the value of the plaintiff's property. *Id.* at 557, 34 S.Ct. at 658, 58 L.Ed. at 1093.
>
> *Richards* is viewed as recognizing the taking of a property interest or right "to be free from 'special and peculiar' governmental interference with enjoyment." Stoebuck, at 220. **The taking involved "no kind of physical taking or touching--none whatever." *Id.* Viewed in this light, *Richards* "entirely does away with the requirement of a physical taking or touching."** *Id; see* Nichols § 6.01, at 6-9 n. 11 **("It is not necessary, in order to render a statute obnoxious to the restraint of the Constitution, that it must in terms or in effect authorize an actual physical taking of the property or thing itself, so long as it affects its free use and enjoyment....").**

584 N.W.2d at 319. (emphasis added). After this takings and regulatory takings analysis, that the Iowa Supreme Court next analyzed whether immunization of a nuisance and the resulting easement was a taking. This is also where footnote 2 in *Covington* comes into play (137 Idaho at 781, 53 P.3d at 832, n. 2), because that is where the Idaho Supreme Court recognized that the type of activity in *Covington* may well result in a nuisance claim. The following section of *Bormann* (repeated from *infra* a pages 16-18 for the convenience of the reader) shows the analysis of why the taking of that nuisance claim by the legislature, and the resulting easement placed upon one's land, causes an outright taking without compensation, and is an unconstitutional act:

> **(c) Liability of government for a taking by the operation of a nuisance- producing governmental enterprise.**
> With regard to private nuisances,
>
> > [t]he power of the legislature to control and regulate nuisances is not without restriction, and it must be exercised within constitutional limitations. The power cannot be exercised arbitrarily, or oppressively, or unreasonably.... It has been broadly stated, as an additional limitation to the power of the legislature, that ... the legislature may not authorize the use of property in such a manner as

> unreasonably and arbitrarily to infringe on the rights of others, as by the creation of a nuisance. So it has been held that the legislature has no power to authorize the maintenance of a nuisance injurious to private property without due compensation.

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Thus, the state cannot regulate property so as to insulate the users from potential private nuisance claims without providing just compensation to persons injured by the nuisance. The Supreme Court firmly established this principle in *Richards,* holding that "while the legislature may legalize what otherwise would be a public nuisance, it may not confer immunity from action for a private nuisance of such a character as to amount in effect to a taking." *Richards,* 233 U.S. at 553, 34 S.Ct. at 657, 58 L.Ed. at 1091; *see also Pennsylvania R.R. v. Angel,* 41 N.J. Eq. 316, 7 A. 432, 433 (1886). ("[A]n act of the legislature cannot confer upon individuals or private corporations, acting primarily for their own profit, although for public benefit as well, any right to deprive persons of the ordinary enjoyment of their property, except upon condition that just compensation be first made to the owners.").

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sewage disposal plant resulted in a taking of plaintiff's property); Nichols § 6.07, at 6-112 (stating under broad view of property--right to use, exclude, and dispose--there need not be a physical taking of the property or even dispossession; any substantial interference with the elemental rights growing out of property ownership is considered a taking).

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As mentioned, the Board's approval of the applicants' application for an agricultural area triggered the provisions of section 352.1191)(a). The approval gave the applicants immunity from nuisance suits. (Significantly, section 352(6) allows an agricultural area to include activities such as the creation of noise, odor, dust, or fumes.) This immunity 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 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.

In enacting section 352.11(1)(a), the legislature has exceeded its authority. It has exceeded its authority by authorizing the use of property in such a way as to infringe on the rights of others by allowing the creation of a nuisance without the payment of just compensation. The authorization is in violation of the Fifth Amendment to the Federal Constitution and article I, section 18 of the Iowa Constitution.

The district court erred in concluding otherwise.

This is where *Covington's* footnote 2 is so important. 137 Idaho at 781, 53 P.3d at 832, n. 2. In that footnote, the Idaho supreme Court recognized that the type of activity in *Covington,* while not amounting to a regulatory taking, may well result in a nuisance claim. *Bormann* holds that

the Iowa legislature exceeded its authority by granting immunity for nuisance, because doing so is an outright taking without just compensation.

Many cases have been cited to this Court, and this Court has reviewed the text of those cases furnished by counsel for both sides of this dispute. The Court has observed three distinctions between the facts of the present case and many of the cases cited to this Court. **First,** HB 391 and specifically Idaho Code § 22-22-4803A(6) allows defendant farmers to do an "act" which plaintiffs have proven, up to this point in time, will cause injury to certain individuals. In most of the cases cited, the "act" (smell from a landfill, airplanes overhead, locomotive smoke and noise), causes only an inconvenience, rather than a health hazard or an injury producing event. The present case concerns plaintiffs' and class members' ability to breathe, and their need to leave their property when burning occurs or risk injury. **Second,** most of the cases concern a nuisance or trespass from an adjoining or nearby landowner. In the present case, because of the amount of smoke and the uncontrollability of that smoke, many of those plaintiffs affected by defendants' smoke are somewhat distant, some are adjacent. **Third,** most of the cases cited concerned a defendant who was doing an activity which had a fairly obvious "public benefit" (landfill, public transportation, etc.), and there was a **need** for that public benefit (ie., we **need** to put our garbage somewhere, we **need** to put the railroad tracks and airport runways somewhere). In the present case, the legislature stated the public benefit is that grass seed somehow protects water quality. Idaho Code § 22-4801 as amended. Assuming that is a legitimate public benefit, the stated public benefit is that ***growing*** grass seed protects water quality. There is nothing in the stated public benefit that says ***burning*** grass seed stubble protects water quality. Implicit in the stated public benefit is the argument that if the farmers are not allowed to burn, the crop will not be grown. Washington and Oregon farmers have proven

field burning is not a necessary practice to produce an economically viable grass seed crop. Grant Pfifer, in charge of Air Quality for the Washington Department of Ecology testified at the August 9, 2002 hearing on the temporary restraining order, testified that since the state of Washington curtailed burning of grass stubble, grass seed production is a little *higher* at present as compared to before the ban. This was noted almost ten months ago in this court's Memorandum Opinion and Order Denying Defendants' Motion to Dismiss at p. 30.[6] Thus, giving all reasonable inferences to the public benefit as stated by the legislature in Idaho Code § 22-4801, there simply is **no *need* to burn.**

The stated public benefit is important to an analysis of a statute under a regulatory takings claim, such as where the use of one's property is sought to be restricted. Plaintiffs argue: "thus, the State in this case has granted the defendants a property right and taken it from plaintiffs for a purported public use – to benefit that portion of the agricultural industry that conducts open burning." Plaintiffs' Combined Reply Re: Constitutionality of HB 391, p. 13. What does the statute say about the public benefit? The new Idaho Code § 22-4801, amended by HB 391 has the following new language shown in *italics*:

> It is the intent of the legislature to promote agricultural activities *while at the same time protecting public health. The legislature finds that due to the climate, soils and crop rotations unique to north Idaho counties, crop residue burning is a prevalent agricultural practice and that there is an environmental benefit to protecting water quality from the growing of certain crops in environmental areas. It is the intent of the legislature to*

[6] At page 30 of that August 19, 2002 decision, this Court held:

> 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.

> *reduce the loss to the state of its agricultural resources by providing a safe harbor to farmers when burning crop residue in compliance with this chapter and limiting the circumstances under which agricultural operations may be exposed to claims outside of the lawful framework for crop residue burning.*

Again, the new statutory language does not say "burning protects water quality," the statute says the crop which the legislature is protecting protects water quality. Implicit in that is the thought that if these farmers are not allowed to burn, they won't grow this crop for which there is an environmental benefit. But the fallacy here again is, there is **no need to burn.** The state of Washington and the state of Oregon and free markets have proven that. One other obvious problem is the legislature's logic as to how taking away nuisance and property rights of the citizens of the State of Idaho regarding crop burning is in any way "protecting public health." Under *Penn Central Transp. Co. v. New York City,* 438 U.S. 104 (1978)[7], use restriction legislation requires a balancing approach. A use restriction on property is a taking if the use restriction is not reasonably necessary to a substantial public purpose or "if it has an unduly harsh impact upon the owner's use of the property." 438 U.S. at 127. (underline added). Under this analysis, all that is needed is one of those two conditions in order for the restriction to be unconstitutional. In the present case, both are present. As shown above, the stated public purpose of the statute is a fallacy as there is no need to burn to produce an economically viable crop. If the restriction is not reasonably necessary to a substantial public purpose, there is a taking. Also, if the restriction has an unduly harsh impact on the owner's property, there is a taking. Again, up to the present time, plaintiffs have proved injury and an inability to use ther property, caused by defendants' smoke.

[7] At oral argument, deputy Idaho Attorney General referenced *Brown v. Legal Foundation of Washington, et al.,* 155 L.Ed.2d 376, 123 S.Ct. 1406 (March 26, 2003), which interprets *Penn Central* and many of the other cases previously cited to this Court. This Court has reviewed *Brown,* and it does not change this Court's analysis. Under a physical takings analysis, it matters not if the entire parcel is taken or merely a part thereof, and compensation is mandated even when the use is temporary. 123 S.Ct. at 1418.

Finally, there are two reasons the unconstitutionality of Idaho Code § 22-4803A should come as no surprise. **First,** this Court held almost ten months ago, when it found that Idaho Code § 52-108 (Idaho's Right to Farm Act) was constitutional, the only way that statute could be constitutional was if it applied only to public nuisances, because if it applied to abolish private nuisances as well, there would be a taking without compensation, and thus, it would be unconstitutional. The Court wrote:

> 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.

Memorandum Opinion and Order Denying Defendants' Motions to Dismiss, p. 12. **Second,** the State of Idaho Attorney General, through its deputy attorney Steven W. Strack, told Idaho State Representative Douglas Jones in a March 7, 2003 letter that HB 226 would "unlikely" be viewed by a court as a "taking" of property rights, "especially since HB 226 leaves intact common law actions for trespass as well as nuisance." Steven W. Strack March 7, 2003 letter to Rep. Jones p. 3, Affidavit of R. Brent Walton in Support of Reply to Constitutionality of HB 391, Exhibit 2. The converse obviously applies, if you abolish common law actions for trespass and nuisance, it is likely a taking.

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B. FUNDAMENTAL RIGHTS.

Plaintiffs claim that they and the class members have the inalienable right to enjoy life and the possession of their property. Plaintiffs' Memorandum in Support of Motion re: Constitutionality of HB 391, p. 5, pp. 24-26.

As stated by the Idaho Supreme Court in *Newland v. Child,* 73 Idaho 530, 537, 254 P.2d 1066 (1953): "The right to own and enjoy private property is fundamental. It is one of the natural, inherent and inalienable rights of free men. It is not a gift of our constitutions, because it existed before them. Our constitutions embrace and proclaim it as an essential in our conception of freedom."

Article I, section 1 of the Idaho Constitution states:

> All men are by nature free and equal, and have certain inalienable rights, among which are enjoying . . . life and liberty; . . . possessing and protecting property; pursuing happiness and securing safety.

Article 1, section 1 of the Idaho Constitution guarantees the inalienable right to own and enjoy private property and secure and defend life and liberty. As the Idaho Supreme Court has explained in discussing this constitutional guarantee:

> The right to own and enjoy private property is fundamental. It is one of the natural, inherent and inalienable rights of free men. It is not a gift of our constitutions, because it existed before them. Our constitutions embrace and proclaim it as an essential in our conception of freedom. This right of property, though of such high order, is nevertheless subject to reasonable limitation and regulation by the state in the interests of the common welfare. Indeed, a statute imposing any limitation upon the right must be supported by such purpose.

Newland v. Child, 73 Idaho 530, 537, 254 P.2d 1066, 1069 (1953). *Newland* tells us that any statute which would limit those fundamental rights, must be supported by the purpose supporting the interests of the common welfare. House Bill 391, specifically that portion which creates

Idaho Code § 22-4803A(6), limits plaintiffs' (and all other citizens of Idaho) fundamental rights. Thus, the Court needs to analyze what are the "interests of the common welfare."

The analysis of the statute's "public benefit" set forth immediately above applies. The intent of the statute is to "…promote agricultural activities while at the same time protecting public health." Idaho Code § 22-4801 as amended. However, the only "public health" reason given in the statute is "…there is an environmental benefit to protecting water quality from the growing of certain crops in environmental areas." Once again, the new statutory language does not say "burning protects water quality", the statute says the crop which the legislature is protecting protects water quality. Implicit in that is the thought that if these farmers are not allowed to burn, they will no longer grow this crop for which there is an environmental benefit. But the fallacy here again is, there is no **need** to burn. The state of Washington and the state of Oregon and free markets have proven that.

Accordingly, the requirement of *Newland* that the "limitation" imposed by the statute (elimination of nuisance and trespass causes of action) must be in the "interests of the common welfare," is not met. Idaho Code § 22-4803A(6) is unconstitutional as violating Idaho Constitution Article 1, Section 1.

The legislature was also forewarned about this problem as well. Deputy Attorney General Steven W. Strack wrote to Idaho State Representative Douglas Jones on March 7, 2003, and told him that "the right to exclude others" and the "owner's right to prevent occupation of the property by other people or objects" "is so fundamental that where governmental action results in '[a] permanent physical occupation' of the property, by the government or others, a taking of the property is found to occur, 'without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner.' *Loretto v.*

Teleprompter Manhattan CATV Corp., 458 U.S. 419, 434-35 (1982)." Steven W. Strack March 7, 2003 letter to Rep. Jones p. 3, Affidavit of R. Brent Walton in Support of Reply to Constitutionality of HB 391, Exhibit 2.

C. IDAHO CONSTITUTION ART. III, § 19, NO LOCAL OR SPECIAL LAWS.

Article III, section 19 of the Idaho Constitution prohibits certain "local" or "special laws." "The legislature shall not pass local or special laws in any of the following enumerated cases, that is to say: . . . Affecting estates of . . . minors, . . . [or] Releasing or extinguishing, in whole or in part, the indebtedness, liability or obligation of any person or corporation in this state, or any municipal corporation therein . . . [or] For limitation of civil or criminal actions." A law is not local "when it applies equally to all areas of the state." *Sun Valley Co. v. City of Sun Valley,* 109 Idaho 424, 429, 708 P.2d 147 (1985). The test for determining whether a law is local or special is basically whether the legislature has singled out "persons or corporations for preferred treatment." *Concerned Taxpayers of Kootenai County v. Kootenai County,*137 Idaho 496, 499, 50 P.3d 991 (2002). Plaintiffs argue Idaho Code § 22-4803A(6) is a 'local or special law." Plaintiffs argue: "This is hardly surprising since defendant Wayne Meyer, a state representative, was one of the moving forces behind the bill and is a farmer who torches his fields in North Idaho." Plaintiffs' Memorandum in Support of Motion Re: Constitutionality of HB 391, p. 23. Wayne Meyer is also a defendant in this lawsuit. While it would be naïve to believe that this legislation was not passed in response to this litigation by these plaintiffs against these defendants, there has been no proof offered by plaintiffs as to the origins of this legislation, its legislative history, or Representative Wayne Meyer's involvement or the involvement of any other party. It would seem that such information was capable of being presented to the Court. At oral argument, counsel for plaintiffs claimed he was not allowed into executive sessions in

Boise at the legislature, but there was no sworn testimony. There is simply no proof that the legislature has singled out "persons or corporations for preferred treatment."

However, the minimal legislative record does not end the inquiry. The Idaho Supreme Court in *Jones v. State Board of Medicine,* 97 Idaho 859, 873-74, 555 P.2d 399 (1976) complained about how the lack of a legislative record hampered its equal protection analysis, yet it went on to draw from other literature "outside the parameters of the record in this case" (979 Idaho at 874). In the present case, the Court need not look outside the record to determine whether the statute has statewide or local impact. This law does limit "civil actions" in the ten northern counties of the State of Idaho. House Bill 391 limits civil actions via the new statutory language found in Idaho Code § 22-4803A(6). Nothing in that statute pertains only to the ten northern counties in the State of Idaho, but Idaho Code § 22-4803A(6) references Idaho Code § 22-4803 and Idaho Code § 22-4803A(3), both of which are limited to the ten northern counties in the State of Idaho. The State of Idaho argues that the law applies to all agricultural burning in the state of Idaho, specifically, that Idaho Code § 22-4801 shows that the "crop residue burn statute is statewide, not local." Brief *Amicus Curiae* of the Idaho Attorney General in Support of House Bill 391's Constitutionality, p. 21-22. Portions of Idaho Code § 22-4801 are statewide in scope, but the italicized portion below of Idaho Code § 22-4801 clearly places the legislation back on northern Idaho counties: "…due to the climate, soils and crop rotations *unique to north Idaho counties*, crop residue burning is a prevalent agricultural practice…". However, Idaho Code § 22-4801 is not the provision to which plaintiffs address their argument. Plaintiffs' argument addresses only Idaho Code § 22-4803A(6), and that statute **is** specific to the ten northern counties, via Idaho Code § 22-4803 and Idaho Code § 22-4803A(3). Accordingly,

Idaho Code § 22-4803A(6) is a special or local law because it does not apply "equally to all areas of the state." *Sun Valley Co. v. City of Sun Valley,* 109 Idaho 424, 429, 708 P.2d 147 (1985).

Even that does not end the inquiry. To be a special or local law, the classification must also be arbitrary, capricious, or unreasonable. *Kirkland v. Blaine County Medical Center,* 134 Idaho 464, 4 P.3d 115 (2000). Again, this is where the origins of this legislation and its legislative history might be very relevant.[8] The Court was not presented that information. What the Court has regarding the intent of the statute is what the legislature has told us:

> It is the intent of the legislature to promote agricultural activities while at the same time protecting public health. The legislature finds that due to the climate, soils and crop rotations unique to north Idaho counties, crop residue burning is a prevalent agricultural practice and that there is an environmental benefit to protecting water quality from the growing of certain crops in environmentally sensitive areas. It is the intent of the legislature to reduce the loss to the state of its agricultural resources by providing a safe harbor to farmers when burning crop residues in compliance with this chapter and limiting the circumstances under which agricultural operations may be exposed to claims outside of the lawful framework for crop residue burning.

HB 391, § 1; Idaho Code § 22-4801. The Court notes the statute does not say "burning protects water quality." Instead, the statute in essence says "the crop which the legislature is protecting, protects water quality." This protection implies that if these farmers are not allowed to burn, they will no longer grow this crop for which there is an environmental benefit. However, the fallacy again is, there is **no need to burn.** Again, Washington, Oregon and free markets have

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[8] Once again, the legislature was warned that the lack of a well prepared record may hurt "the farmers". Deputy Attorney General Steven W. Strack's March 7, 2003 letter to Representative Douglas Jones reads at page 7:

> Absent a well-prepared record showing why farmers deserve to be treated differently than any other persons, House Bills 227 and 226 are likely to be held unconstitutional. The question to be asked may be "why is it that plaintiffs who are allegedly injured by smoke and/or odor from farming are the only citizens restricted in their opportunity to seek damages/injunctive relief?" A reviewing court will wonder how the field burning and/or odors is a "statewide concern" and how immunizing the farmers from personal liability serves "the health and welfare of the people of the state of Idaho." Also, since no factual basis has been presented that assists in answering such questions, the risk of a court finding the two statutes unconstitutional is significantly increased.

Steven W. Strack March 7, 2003 letter to Rep. Jones p. 7, Affidavit of R. Brent Walton in Support of Reply to Constitutionality of HB 391, Exhibit 2.

proven that fact. Accordingly, the stated purpose of the statute as written by the legislature, since it is based on that fallacy, is arbitrary, capricious and unreasonable. As a result, Idaho Code § 22-4803A(6) is a local or special law in violation of Article III, section 19 of the Idaho Constitution.

IV. RETROACTIVITY.

Due to the Court's ruling on the constitutionality of Idaho Code § 22-4803A(6), there is no need to rule on the retroactive or non-retroactive nature of that statute.

V. ORDER.

IT IS HEREBY ORDERED Plaintiffs' "Motion to Declare HB 391 Unconstitutional to the Extent it Purports to Extinguish any of the Rights of Plaintiffs and Members of the Class" is GRANTED as it pertains to Idaho Code § 28-4803A(6). This Court finds Idaho Code § 22-4802A(6) to be unconstitutional as it: (1) takes property without prior compensation or due process in violation of the Fifth and Fourteenth Amendment to the United States Constitution and Article 1, Section 13 and Section 14 of the Idaho Constitution; (2) violates Article 1, Section 1 of the Idaho Constitution because the "limitation" imposed by the statute is not in the "interests of the common welfare"; and (3) because it is a "local or special law" in violation of Article III, section 19 of the Idaho Constitution.

ENTERED this 4th day of June, 2003.

_____
John T. Mitchell, District Judge

Certificate of Service

I certify that on the _____ day of June, 2003, 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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