

12-22-2011

Citizens Against Range Expansion v. Idaho Fish and Game Dept Clerk's Record Dckt. 39297

Follow this and additional works at: https://digitalcommons.law.uidaho.edu/idaho_supreme_court_record_briefs

Recommended Citation

"Citizens Against Range Expansion v. Idaho Fish and Game Dept Clerk's Record Dckt. 39297" (2011). *Idaho Supreme Court Records & Briefs*. 3412.

https://digitalcommons.law.uidaho.edu/idaho_supreme_court_record_briefs/3412

This Court Document is brought to you for free and open access by Digital Commons @ UIIdaho Law. It has been accepted for inclusion in Idaho Supreme Court Records & Briefs by an authorized administrator of Digital Commons @ UIIdaho Law. For more information, please contact annablaine@uidaho.edu.

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

CITIZENS AGAINST RANGE)
EXPANSION, an Unincorporated non-profit)
Association; JEANNE J. HOM, a single woman;)
EUGENE and KATHLEEN RILEY, husband)
and wife; LAMBERT and DENISE RILEY,)
husband and wife; GABRIELLE)
GROTH-MARNAT, a single woman, GERALD)
PRICE, a single man; RONALD and DOROTHY)
ELDRIDGE, husband and wife; and GLENN)
and LUCY CHAPIN, husband and wife, SHERYL)
PUCKETT, a single woman; CHARLES MURRAY)
and CYNTHIA MURRAY, husband and wife;)
and DAVIE VIG, a single man,)

DOCKET NO. 39297-2011

CIVIL CASE NO. 2005-6253

Plaintiffs (Respondents),)
)

IDAHO FISH AND GAME DEPARTMENT)
an agency of the STATE OF IDAHO, and)
VIRGIL MOORE, Director of the IDAHO)
FISH AND GAME DEPARTMENT,)

Defendants (Appellants).)
)

CLERK'S RECORD ON APPEAL

SCOTT W. REED
PO Box A
Coeur D'Alene, ID 83816

KATHLEEN TREVER
Deputy Attorney General
PO Box 25
Boise, ID 83707

ATTORNEY FOR RESPONDENTS

ATTORNEY FOR APPELLANTS

Date	Code	User		Judge
8/22/2005	NCOC	VICTORIN	New Case Filed - Other Claims	John T. Mitchell
		VICTORIN	Filing: A1 - Civil Complaint, More Than \$1000 No Prior Appearance Paid by: Scott Reed Receipt number: 0664109 Dated: 08/22/2005 Amount: \$82.00 (Check)	John T. Mitchell
	SUMI	BARKER	Summons Issued	John T. Mitchell
9/12/2005	AFSV	OLSON	Affidavit Of Service-August 29, 2005-Idaho Fish and Game Department	John T. Mitchell
	AFSV	OLSON	Affidavit Of Service-August 29, 2005-Steven M. Huffaker	John T. Mitchell
9/16/2005	ANSW	BARKER	Answer	John T. Mitchell
9/27/2005	HRSC	THORNE	Hearing Scheduled (Status Conference 11/17/2005 04:00 PM)	John T. Mitchell
9/28/2005	NOTC	THORNE	Notice of Status Conference	John T. Mitchell
10/24/2005	NTSV	OLSON	Notice Of Service of Interrogatories and Requests for Production from Plaintiffs to Defendants	John T. Mitchell
11/9/2005	HRVC	THORNE	Hearing result for Status Conference held on 11/17/2005 04:00 PM: Hearing Vacated	John T. Mitchell
	HRSC	THORNE	Hearing Scheduled (Jury Trial Scheduled 07/17/2006 09:00 AM) 5 DAYS	John T. Mitchell
	NOTC	THORNE	Notice of Trial Setting	John T. Mitchell
	STIP	JREYNOLDS	Stipulation for Scheduling	John T. Mitchell
12/30/2005	HRSC	THORNE	Hearing Scheduled (Motion 02/08/2006 03:30 PM) Reed	John T. Mitchell
1/3/2006	MISC	OLSON	Disclosure of Expert Witnesses by Plaintiffs	John T. Mitchell
1/5/2006	MOTN	MCCOY	Plaintiff's Motion to Amend Complaint	John T. Mitchell
	NTSV	MCCOY	Notice Of Service of Interrogatories, Request for Production and Request for Admissions from Plaintiffs to Defendants	John T. Mitchell
	NOHG	MCCOY	Notice Of Hearing Plaintiff's Motion to Amend Complaint	John T. Mitchell
1/9/2006	MOTN	OLSON	Plaintiffs' Motion for Court Inspection of Property	John T. Mitchell
1/23/2006	NOTC	ROBINSON	Notice of service of defendants responses to Plaintiffs requests for admissions	John T. Mitchell
			Document sealed	
2/1/2006	MISC	ROBINSON	Defendants' Disclosure of expert witnesses	John T. Mitchell
2/8/2006	GRNT	TAYLOR	Hearing result for Motion held on 02/08/2006 03:30 PM: Motion Granted Reed	John T. Mitchell
2/9/2006	AMCO	PARKER	Amended Complaint Filed	John T. Mitchell
	MISC	PARKER	Second Interrogatories and Requests for Production and Requests for Admissions from Plaintiffs	John T. Mitchell

Date	Code	User		Judge
2/9/2006	NOTD	PARKER	Notice Of Deposition of David J Leptich and Charles (Chip) Corsi	John T. Mitchell
2/10/2006	ORDR	THORNE	Order Granting Plaintiffs' Motion To Amend Complaint	John T. Mitchell
2/15/2006	NOTC	LEITZKE	Notice of Association of Counsel (Harvey Richman w/ Scott Reed obo Plaintiffs)	John T. Mitchell
	NOTC	LEITZKE	Amended Notice of Depositions Duces Tecum of David J. Leptich and Charles (Chip) Corsi	John T. Mitchell
3/13/2006	STIP	THORNE	Stipulation To Vacate Trial	John T. Mitchell
	ORDR	THORNE	Order Vacating Trial & Resetting Trial	John T. Mitchell
4/6/2006	HRSC	THORNE	Hearing Scheduled (Motion to Compel 04/24/2006 04:00 PM) Reed	John T. Mitchell
4/10/2006	MOTN	ROBINSON	Plaintiffs Motion to compel	John T. Mitchell
	NOTC	ROBINSON	Notice of hearing on motion to compel	John T. Mitchell
4/24/2006	HRVC	THORNE	Hearing result for Motion to Compel held on 04/24/2006 04:00 PM: Hearing Vacated Reed	John T. Mitchell
5/16/2006	MISC	HUTCHINSON	Plaintiff's Disclosure of Expert Witnesses	John T. Mitchell
	MOTN	HUTCHINSON	Plaintiff's Motion to Vacate Trial	John T. Mitchell
5/22/2006	HRSC	THORNE	Hearing Scheduled (Motion to Vacate 05/30/2006 04:00 PM) Scott Reed	John T. Mitchell
	NOHG	HAMILTON	Notice Of Hearing of Plaintiffs Motion to Vacate Trial	John T. Mitchell
5/30/2006	HRHD	THORNE	Hearing result for Motion to Vacate held on 05/30/2006 04:00 PM: Hearing Held Scott Reed	John T. Mitchell
6/2/2006	FILE	MCCOY	New File Created - FILE #2	John T. Mitchell
	ORDR	THORNE	Order Granting Plaintiff's Motion To Vacate Trial and Resetting Trial To 12-11-06	John T. Mitchell
6/7/2006	HRSC	THORNE	Hearing Scheduled (Motion for Summary Judgment 08/08/2006 04:00 PM) Scott Reed	John T. Mitchell
7/26/2006	AFFD	MCCOY	Affidavit of Roy H Ruel in Support of Plaintiff's Motion for Summary Judgment	John T. Mitchell
	AFFD	MCCOY	Affidavit of Duane Nightingale in Support of Plaintiff's Motion for Summary Judgment	John T. Mitchell
	AFFD	MCCOY	Affidavit of Marcelle Richman in Support of Plaintiffs Motion for Summary Judgment	John T. Mitchell
	MISC	MCCOY	Certification Upon Defendants' Answers to Plaintiffs' Interrogatories and Responses to Requests for Production	John T. Mitchell
	MISC	MCCOY	Plaintiffs Statement of Material Facts Not In Dispute	John T. Mitchell
	BRIE	MCCOY	Brief of Plaintiffs in Support of Plaintiffs Motion for Summary Judgment	John T. Mitchell
	MNSJ	MCCOY	Plaintiffs Motion For Summary Judgment	John T. Mitchell

Date	Code	User		Judge
7/26/2006	MISC	MCCOY	Plaintiffs Appendix of Relevant Publications in Support of Motion for Summary Judgment	John T. Mitchell
	NOHG	MCCOY	Notice Of Hearing on Plaintiffs Motion for Summary Judgment	John T. Mitchell
8/10/2006	NOHG	MCCOY	AMENDED Notice Of Hearing on Plaintiffs' Motion for Summary Judgment	John T. Mitchell
8/30/2006	AFFD	BROOK	Affidavit of David Leptich	John T. Mitchell
	AFFD	BROOK	Affidavit of Randall Butt	John T. Mitchell
	AFFD	BROOK	Affidavit of Clark Vargas	John T. Mitchell
	AFFD	BROOK	Affidavit Defendants statement of material facts in dispute	John T. Mitchell
	MISC	BROOK	Defendants appendix of relevant documents	John T. Mitchell
	MISC	BROOK	Defendants memorandum in opposition to plaintiffs motion for summary judgment	John T. Mitchell
9/5/2006	AFFD	MCCOY	Affidavit of Certification on Documents Prepared by Kootenai County Assessor	John T. Mitchell
	AFFD	MCCOY	Affidavit of Certificate on Farragut State Park Trail Guide	John T. Mitchell
	MISC	MCCOY	Certification on Introductory Pages to NRA Range Source Book	John T. Mitchell
	MISC	MCCOY	Certification on Big Sun Shooting Complex Marion County, Florida	John T. Mitchell
	BRIE	MCCOY	Plaintiff's Reply Brief in Support of Motion for Summary Judgment	John T. Mitchell
	MOTN	MCCOY	Plaintiff's Motion to Strike	John T. Mitchell
	NOHG	MCCOY	Second AMENDED Notice Of Hearing Upon Plaintiffs' Motion to Vacate Trial	John T. Mitchell
9/7/2006	FILE	VICTORIN	*****File #3 Created*****	John T. Mitchell
	BRIE	MCCOY	Plaintiffs' Reply Brief in Support of Motion for Summary Judgment	John T. Mitchell
9/13/2006	HRHD	THORNE	Hearing result for Motion for Summary Judgment held on 09/13/2006 03:00 PM: Hearing Held Scott Reed	John T. Mitchell
	AFFD	SRIGGS	Affidavit of Edward M Santos	John T. Mitchell
9/19/2006	MEMO	THORNE	Memorandum Decision And Order Denying Plaintiffs Motion For Summary Judgment, And Order Setting Briefing Schedule	John T. Mitchell
9/29/2006	NOTC	SRIGGS	Notice of Deposition Duces Tecum of David White	John T. Mitchell
	MISC	SRIGGS	Plaintiff's Waiver of All Claims for Damages	John T. Mitchell
	NOTC	SRIGGS	Notice of Continued Depositions Duces Tecum of David J Leptich and Charles (Chip) Corsi	John T. Mitchell
10/2/2006	DBRF	REMPFER	Defendant's Brief on Applicable Standards	John T. Mitchell

Date	Code	User		Judge
10/2/2006	MISC	REMPFER	Plaintiff's Initial Response to Memorandum Decision and Order, Page 15	John T. Mitchell
10/10/2006	BRIE	SRIGGS	Defendants' Reply Brief on applicable Standards	John T. Mitchell
	MISC	SRIGGS	Plaintiffs' Closing Response to Memorandum Decision and Order Page 15	John T. Mitchell
10/18/2006	MISC	REMPFER	Addendum on number of shooters at farragut shooting range	John T. Mitchell
	NTSV	REMPFER	Notice Of Service	John T. Mitchell
	MOTN	REMPFER	Motion to compel	John T. Mitchell
11/14/2006	WITP	RICKARD	Witness List - Plaintiff's	John T. Mitchell
	STIP	RICKARD	Stipulation For Settlement	John T. Mitchell
11/16/2006	MNCL	ZLATICH	Motion To Compel	John T. Mitchell
11/17/2006	HRSC	CLAUSEN	Hearing Scheduled (Motion to Compel 12/07/2006 03:30 PM)	John T. Mitchell
	MISC	SRIGGS	Corrected Witness List	John T. Mitchell
11/20/2006	AFFD	PARKER	Affidavit in Support of Motion to Compel	John T. Mitchell
	NOTH	PARKER	Notice Of Hearing Upon Plaintiffs' Motion to Compel	John T. Mitchell
	MISC	PARKER	Corrected and Amended Witness List	John T. Mitchell
	DFWL	SRIGGS	Defendant's Witness List	John T. Mitchell
	DFWL	SRIGGS	Defendant's Witness List	John T. Mitchell
11/22/2006	LETR	ZLATICH	Letter to Judge Mitchell	John T. Mitchell
			Document sealed	
11/27/2006	NOTD	CROUCH	Notice Of Deposition Deponet: David White	John T. Mitchell
11/29/2006	MOTN	CROUCH	Motion To Amend Amended Complaint To Conform With Evidence	John T. Mitchell
11/30/2006	NOTR	SRIGGS	Notice Of Transcript Delivery/David J Leptich	John T. Mitchell
12/1/2006	BRIE	MCCOY	Plaintiffs' Brief in Support of Motion in Limine to Exclude Testimony of Defendants' Expert Witnesses	John T. Mitchell
	MISC	MCCOY	Certification Upon Defendants' Responses to Plaintiffs' Second Interrogatories and Request for Production	John T. Mitchell
	MNDS	MCCOY	Motion To Dismiss Third and Fifth Causes of Action	John T. Mitchell
	MNLI	MCCOY	Plaintiff's Motion In Limine to Exclude Testimony of Claude Vargas, Scott D. Hansen and Edward M. Santos	John T. Mitchell
	MISC	MCCOY	Plaintiffs' Proposed Findings of Fact and Conclusions of Law	John T. Mitchell

Date	Code	User		Judge
12/1/2006	NOHG	MCCOY	AMENDED Notice Of Hearing Upon Plaintiffs' Motion to Compel, Motion in Limine and Motion to Amend to Delte Causes of Action and Motion to Amend to Conform With Evidence	John T. Mitchell
12/4/2006	MISC	REMPFER	Defendant's trial brief	John T. Mitchell
	MISC	REMPFER	Defendants' proposed findings of fact and conclusions of law	John T. Mitchell
	MISC	REMPFER	Defendant's trial brief	John T. Mitchell
	MISC	REMPFER	Defendants' proposed findings of fact and conclusions of law	John T. Mitchell
	MISC	REMPFER	Plaintiffs' pretrial brief	John T. Mitchell
	MISC	REMPFER	Corrected certification upon defendants' responses to plaintiffs' second interrogatories and requests for production	John T. Mitchell
	NOTC	REMPFER	Notice to produce at trial	John T. Mitchell
12/5/2006	AFFD	REMPFER	Affidavit of W. Dallas Burkhalter	John T. Mitchell
	MISC	REMPFER	Defendants' brief opposing motion in Limine and motion to compel	John T. Mitchell
	MISC	REMPFER	Defendants' brief opposing motion in limine and motion to compel	John T. Mitchell
	AFFD	REMPFER	Affidavit of W. Dallas Burkhalter	John T. Mitchell
12/6/2006	FILE	JANUSCH	New File Created****4****	John T. Mitchell
12/7/2006	GRNT	CLAUSEN	Hearing result for Motion to Compel held on 12/07/2006 03:30 PM: Motion Granted plnf - 10 min	John T. Mitchell
12/8/2006	MISC	OLSON	Amendment to Amended Complaint Made by Interlineation	John T. Mitchell
	ORDR	CLAUSEN	Order On Plaintiffs' Motion to Compel	John T. Mitchell
	ORDR	CLAUSEN	Order on Plaintiffs' Motion in Limine	John T. Mitchell
	ORDR	CLAUSEN	Order on Plaintiffs' Motion to Amend to Delete Causes of Action and Motion to Amend to Conform with Evidence	John T. Mitchell
	AFFD	ZLATICH	Affidavit of Edward M Santos	John T. Mitchell
12/11/2006	CTST	CLAUSEN	Hearing result for Court Trial Scheduled held on 12/11/2006 09:00 AM: Court Trial Started 5 DAYS	John T. Mitchell
	MISC	CLAUSEN	Under Advisement	John T. Mitchell
12/21/2006	MISC	SRIGGS	Defendants' Revised Proposed Findings of Fact and Conclusions of Law	John T. Mitchell
	MISC	CLAUSEN	Plaintiff's Post Trial Proposed Findings of Fact and Conclusions of Law	John T. Mitchell
2/23/2007	MEMO	CLAUSEN	Memorandum Decision, Findings of Fact, Conclusions of Law and Order	John T. Mitchell
3/2/2007	IDMT	CLAUSEN	Judgment	John T. Mitchell

Date	Code	User		Judge
3/2/2007	STAT	CLAUSEN	Case status changed: Closed pending clerk action	John T. Mitchell
3/16/2007	MISC	REMPFER	Application of plaintiffs for attorney's fees against defendant Idaho Fish and Game Department	John T. Mitchell
	MEMO	REMPFER	Memorandum of costs of plaintiffs against defendant Idaho Fish and Game Department	John T. Mitchell
3/30/2007	MOTN	SRIGGS	Motion to Disallow Costs and Attorney Fees	John T. Mitchell
	BRIE	SRIGGS	Brief in Opposition to an Award of Costs and Attorney Fees	John T. Mitchell
4/3/2007	HRSC	CLAUSEN	Hearing Scheduled (Motion 04/30/2007 03:00 PM) Attorney's Fees - Reed - 1 hr	John T. Mitchell
4/9/2007	NOHG	JANUSCH	Notice Of Hearing Upon Defendants' Motion to Dismiss costs & attorneys' fees	John T. Mitchell
	MISC	JANUSCH	Plaintiffs' Brief in Support of Award of Costs & Attorneys' Fees	John T. Mitchell
4/30/2007	HELD	CLAUSEN	Hearing result for Motion held on 04/30/2007 03:00 PM: Motion Held Attorney's Fees - Reed - 1 hr	John T. Mitchell
5/4/2007	ORDR	CLAUSEN	Order on Costs	John T. Mitchell
5/7/2007	NOTC	CLAUSEN	Notice of Delivery of Original Transcript	John T. Mitchell
6/25/2007	ORDR	CLAUSEN	Memorandum Decision and Order Regarding Attorney Fees	John T. Mitchell
6/26/2007	FILE	JANUSCH	New File Created****5*****	John T. Mitchell
1/11/2008	NIDE	RICKARD	Notice Of Intent To Destroy Exhibits	John T. Mitchell
10/8/2008	NOAP	CLAUSEN	Notice Of Appearance - Kathleen Trever	John T. Mitchell
	MISC	CLAUSEN	Status Report	John T. Mitchell
6/9/2010	AFFD	CRUMPACKER	Affidavit of Kerry O'Neal	John T. Mitchell
	MOTN	CRUMPACKER	Motion for Partial Lifting of Injunction	John T. Mitchell
	DBRF	CRUMPACKER	Brief in support of Defendants Motion for Partial Lifting of Injunction	John T. Mitchell
6/21/2010	HRSC	CLAUSEN	Hearing Scheduled (Status Conference 08/03/2010 02:30 PM)	John T. Mitchell
7/2/2010	CONT	CLAUSEN	Hearing result for Status Conference held on 08/03/2010 02:30 PM: Continued	John T. Mitchell
	HRSC	CLAUSEN	Hearing Scheduled (Status Conference 08/30/2010 04:00 PM) Trevor	John T. Mitchell
	STAT	CLAUSEN	Case status changed: Reopened	John T. Mitchell
	HRSC	CLAUSEN	Hearing Scheduled (Motion 09/29/2010 04:00 PM) Partical Lift Injunction - Trevor	John T. Mitchell
7/6/2010	PRSB	LISONBEE	Plaintiff's Response To Motion For Partial Lifting Of Injunction	John T. Mitchell
	MISC	CRUMPACKER	Amended Plaintiffs Response to Motion for Partial Lifting of Injunction	John T. Mitchell

Date	Code	User		Judge
7/20/2010	NOTD	CRUMPACKER	Notice Of Deposition Duces Tecum of Kerry O'Neal	John T. Mitchell
8/4/2010	BRIE	SREED	Reply Brief in Support of Defendants' Motion for Partial Lifting of Injunction	John T. Mitchell
	NOTC	SREED	Notice of Status Conference	John T. Mitchell
8/13/2010	MISC	LISONBEE	Plaintiff's Filing Re: Status Confrence Hearing	John T. Mitchell
8/16/2010	AFFD	CRUMPACKER	Affidavit of James A Caulder, Jr., P.E. with C.V. and ETL 02-11 attached	John T. Mitchell
8/18/2010	MISC	BAXLEY	Shortened and Highlighted ETL Without Editorial Comment	John T. Mitchell
	AFFD	BAXLEY	Affidavit Of Jeanne Hom	John T. Mitchell
8/26/2010	MISC	BAXLEY	Defendants' Filing Before August 30, 2010 Status Conference	John T. Mitchell
8/30/2010	DCHH	CLAUSEN	Hearing result for Status Conference held on 08/30/2010 04:00 PM: District Court Hearing Hel Court Reporter: JULIE FOLAND	John T. Mitchell
9/10/2010	HRVC	CLAUSEN	Hearing result for Motion held on 09/29/2010 04:00 PM: Hearing Vacated Partial Lift Injunction - Trevor	John T. Mitchell
9/13/2010	NOTD	CRUMPACKER	Notice Of Deposition Duces Tecum of Kerry O'Neal	John T. Mitchell
9/16/2010	MISC	CLEVELAND	Joint Case Management Plan	John T. Mitchell
9/17/2010	ORDR	CLAUSEN	Order RE: Joint Case Management Plan	John T. Mitchell
9/22/2010	NOTD	ROENBUSCH	Amended Notice Of Deposition Duces Tecum of Kerry O'Neal	John T. Mitchell
9/24/2010	PRQD	BAXLEY	Plaintiff's Requests For Admission And Interrogatory To Defendants	John T. Mitchell
10/5/2010	MISC	ROENBUSCH	Plaintiffs' Response to Expert Witness Disclosure	John T. Mitchell
10/7/2010	ANSW	LEU	Plaintiff's Response to Request For Production	John T. Mitchell
10/29/2010	NOTD	BAXLEY	Plaintiffs' Notice Of Intention To Take The Preservation Deposition For The Perpetuation of Testimony Of James A Caulder PE on 11/18/10 at 1:00 pm	John T. Mitchell
11/9/2010	HRSC	CLAUSEN	Hearing Scheduled (Motion 02/14/2011 02:00 PM) Partial Lift Injunction;2 to 3 hrs; Trever	John T. Mitchell
	FILE	SREED	New File Created *****FILE 6*****	John T. Mitchell
11/16/2010	MISC	LEU	Plaintiffs' Interrogatories To Defendants	John T. Mitchell
	ANSW	LEU	Plaintiffs' Answers to Requeset For Admissions	John T. Mitchell
12/10/2010	DBRF	CRUMPACKER	Brief in Support of Summary Disposition of Defendants Motion for Partial Lifting of Injunction	John T. Mitchell
	MISC	CRUMPACKER	Statement of Undisputed Facts	John T. Mitchell
	AFFD	CRUMPACKER	Affidavit of David Leptich	John T. Mitchell
	AFFD	CRUMPACKER	Affidavit of Kerry O'Neal	John T. Mitchell

Date	Code	User		Judge
12/10/2010	AFFD	CRUMPACKER	Affidavit of Jon Whipple	John T. Mitchell
12/14/2010	HRSC	CLAUSEN	Hearing Scheduled (Motion 01/11/2011 11:00 AM) Strike Affd's and Testimony - Richmon	John T. Mitchell
12/20/2010	MOTN	CRUMPACKER	Motion to Strike the December 9, 2010 Affidavits of Jon Whipple & Kerry O'Neal	John T. Mitchell
	MOTN	CRUMPACKER	Motion to Strike Testimony of Kerry O'Neal Based on Lack of Expertise & Lack of Foundation	John T. Mitchell
	NOHG	CRUMPACKER	Notice Of Hearing	John T. Mitchell
	AFFD	CRUMPACKER	Affidavit of Harvey Richman	John T. Mitchell
12/27/2010	NOHG	CRUMPACKER	Notice Of Hearing	John T. Mitchell
	MNSJ	CRUMPACKER	Motion For Summary Judgment	John T. Mitchell
	DBRF	CRUMPACKER	Brief in Response Defendants Summary Disosition of the Cause & Brief in Support of Plaintiffs Motion for Summary Judgment	John T. Mitchell
	AFFD	CRUMPACKER	Affidavit of Jeanne Marie Holder Nee HOM	John T. Mitchell
	AFFD	CRUMPACKER	Affidavit of Harvey Richman	John T. Mitchell
	MISC	CLAUSEN	****NEW FILE CREATED #7 ****	John T. Mitchell
12/28/2010	MISC	CRUMPACKER	Certification on Idaho State Legislative History Records: House Bill 515	John T. Mitchell
1/3/2011	MEMO	ROSENBUSCH	Defendants' Memorandum in Opposition to Plaintiffs' Motion to Strike Affidavits of Jon Whipple and Kerry O'Neal	John T. Mitchell
	AFFD	ROSENBUSCH	Affidavit of Kathleen Trever in Opposition to Motion to Strike Affidavits of Jon Whipple and Kerry O'Neal and Motion to Strike Affidavit of Kerry O'Neal	John T. Mitchell
	MEMO	CRUMPACKER	Defendants Memorandum in Opposition to Plaintiffs Motion to Strike Affidavit of Kerry O'Neal Based on Lack of Expertise & Lack of Foundation	John T. Mitchell
1/4/2011	NOHG	CRUMPACKER	Corrected Notice Of Hearing	John T. Mitchell
	MOTN	CRUMPACKER	Amended Motion to Strike the December 9, 2010 Affidavits of Jon Whipple & Kerry O'Neal	John T. Mitchell
1/7/2011	PRSB	BAXLEY	Consolidated Reply Brief Of Plaintiffs' To Motions To Strike	John T. Mitchell
1/10/2011	MOTN	BAXLEY	Motion To Strike And/Or Exclude Testimony Of James Caulder	John T. Mitchell
	DRSB	BAXLEY	Defendant's Reply Brief In Support Of Summary Disposition of Motion For Partial Lifting Of Injunction	John T. Mitchell
	AFIS	BAXLEY	Affidavit Of Kathleen Trever In Support of Motion For Partial Lifting Of Injunction	John T. Mitchell
	AFFD	BAXLEY	Second Affidavit Of David Leptich	John T. Mitchell
	AFFD	BAXLEY	Affidavit Of Randall Butt	John T. Mitchell
1/11/2011	FILE	CLAUSEN	*****NEW FILE CREATED #8*****	John T. Mitchell

Date	Code	User		Judge
1/11/2011	DCHH	CLAUSEN	Hearing result for Motion held on 01/11/2011 11:00 AM: District Court Hearing Held Court Reporter: JULIE FOLAND	John T. Mitchell
1/19/2011	BRIE	ROSENBUSCH	Consolidated Reply Brief in Support of Plaintiff's Motion for Summary Judgment and Motion to Strike and/or Exclude Testimony of James Caulder	John T. Mitchell
1/24/2011	MOTN	ROSENBUSCH	Motion for Court View	John T. Mitchell
	BRIE	ROSENBUSCH	Defendants' Brief in Support of Motion to Strike	John T. Mitchell
	AFFD	VIGIL	Second Affidavit of Kathleen Trever, in Support of Motion to Strike	John T. Mitchell
1/25/2011	HRSC	CLAUSEN	Hearing Scheduled (Motion 02/14/2011 02:00 PM) Trever	John T. Mitchell
	HRSC	CLAUSEN	Hearing Scheduled (Motion 02/14/2011 02:00 PM) Court View - Trever	John T. Mitchell
1/28/2011	MISC	CRUMPACKER	Plaintiffs reply to the Defendants 24 January 2011 Brief in Support of Motion to Strike Ttestimony of James Caulder	John T. Mitchell
2/4/2011	AFFD	ROSENBUSCH	Amended Affidavit of Kerry O'Neal	John T. Mitchell
2/10/2011	MOTN	BAXLEY	Motion To Strike & Objection To The Amended Affidavit Of Kerry O'Neal Dated February 3, 2011	John T. Mitchell
	AFFD	BAXLEY	Affidavit Upon Legislative Records 2008 Legislature	John T. Mitchell
	MOTN	VIGIL	Motion to File Additional Legislative Record	John T. Mitchell
2/11/2011	AFFD	BAXLEY	Supplemental And Amended Affidavit Upon Legislative Records 2008 Legislature	John T. Mitchell
2/14/2011	DCHH	CLAUSEN	Hearing result for Motion held on 02/14/2011 02:00 PM: District Court Hearing Held Court Reporter: JULIE FOLAND	John T. Mitchell
	DCHH	CLAUSEN	Hearing result for Motion held on 02/14/2011 02:00 PM: District Court Hearing Held Court Reporter: JULIE FOLAND	John T. Mitchell
	DCHH	CLAUSEN	Hearing result for Motion held on 02/14/2011 02:00 PM: District Court Hearing Held Court Reporter: JULIE FOLAND	John T. Mitchell
3/10/2011	NOTE	CLAUSEN	****NEW FILE CREATED #9*****	John T. Mitchell
3/11/2011	ORDR	CLAUSEN	Memorandum Decision and Order on Motions to Strike, Defendant's Motion for View, Defendant's Motion for Partial Lifting of Injunction and Plaintiff's Motion for Summary Judgment; and Order Scheduling Court Trial	John T. Mitchell
	HRSC	CLAUSEN	Hearing Scheduled (Court Trial Scheduled 06/13/2011 09:00 AM) 5 DAY	John T. Mitchell
3/25/2011	MOTN	BAXLEY	Defendants' Motion For Permission To Appeal Under IAR 12	John T. Mitchell

Date	Code	User		Judge
3/25/2011	BRIE	BAXLEY	Brief In Support Of Defendants' Motion For Permission To Appeal	John T. Mitchell
3/29/2011	HRSC	CLAUSEN	Hearing Scheduled (Motion 04/20/2011 04:00 PM) Rule 12(b) - Turner	John T. Mitchell
3/30/2011	NOHG	BAXLEY	Notice Of Hearing on 04/20/11 at 4:00 pm	John T. Mitchell
4/4/2011	MISC	ROSENBUSCH	Plaintiffs' Response to Defendants' Motion for Permission to Appeal Under I.A.R. 12	John T. Mitchell
4/12/2011	HRVC	CLAUSEN	Hearing result for Motion held on 04/20/2011 04:00 PM: Hearing Vacated Rule 12(b) - Turner	John T. Mitchell
	HRSC	CLAUSEN	Hearing Scheduled (Motion 04/20/2011 01:00 PM) Rule 12(b) - Trever	John T. Mitchell
		CLAUSEN	Amended Notice of Hearing	John T. Mitchell
4/20/2011	DCHH	BUTLER	Hearing result for Motion held on 04/20/2011 01:00 PM: District Court Hearing Held Court Reporter: Julie Foland Number of Transcript Pages for this hearing estimated: Rule 12(b) - Trever - less than 100 pages - motion denied	John T. Mitchell
	MEMO	BUTLER	Memorandum and Decision and Order Denying Defendants' Motion for Permission to Appeal Under I.A.R. 12	John T. Mitchell
5/9/2011	MISC	HUFFMAN	Received - Idaho Court Of Appeals Plaintiffs' Response To Defendants' Motion For Permission To Appeal Under I.A.R. 12.	John T. Mitchell
5/18/2011	BNDC	LEU	Bond Posted - Cash (Receipt 21267 Dated 5/18/2011 for 500.00)	John T. Mitchell
5/26/2011	NOTC	CLAUSEN	Notice of Delivery of Original Transcript	John T. Mitchell
	BNDV	DUBE	Bond Converted (Transaction number 1200 dated 5/26/2011 amount 500.00) to Julie Foland for transcript.	John T. Mitchell
	MISC	BAXLEY	Invoice For Transcripts (6) (Testimonies of Roy Ruel, Will Collins, Dorothy Eldridge, Ron Eldridge, Jeanne Horn and Marcelle Richman)	John T. Mitchell
	FILE	BAXLEY	New File #10 EXPANDO (Created for 6 Transcripts)	John T. Mitchell
	ORDR	VICTORIN	Order Denying Motion for Permission to Appeal	John T. Mitchell
6/6/2011	MEMO	BAXLEY	Plaintiffs Pretrial Memorandum	John T. Mitchell
6/8/2011	BRIE	ROSENBUSCH	Defendants' Pre-Trial Brief	John T. Mitchell
6/10/2011	STIP	CRUMPACKER	Joint Stipulation on Evidence & Facts	John T. Mitchell
6/13/2011	DCHH	CLAUSEN	Hearing result for Court Trial Scheduled held on 06/13/2011 09:00 AM: District Court Hearing Hel Court Reporter: JULIE FOLAND	John T. Mitchell
	CTSC	CLAUSEN	Court Trial Scheduled	John T. Mitchell
6/14/2011	MISC	CLAUSEN	Plaintiff's Original Exhibit List	John T. Mitchell
	MISC	CLAUSEN	Defendant's Original Exhibit List	John T. Mitchell

Date	Code	User	Judge
6/28/2011	MISC	LISONBEE	Plaintiff's Proposed Findings Of Fact And Conclusions Of Law
	BRIE	ROSENBUSCH	Defendants' Post-Trial Brief
	MISC	HUFFMAN	Defendants' Proposed Findings of Fact, Conclusions of Law And Draft Order
6/29/2011	PBRF	BAXLEY	Plaintiffs' Closing Brief
8/25/2011	ORDR	CLAUSEN	Memorandum Decision, Findings of Fact, Conclusions of Law and Order Following Court Trial on Defendant's Motion Partial Lifting of Injunction (Safety Issues)
8/26/2011	STAT	CLAUSEN	Case status changed: closed pending clerk action
8/29/2011	ORDR	CLEVELAND	Order Denying Motion for Partial Lifting of Injunction
9/9/2011	AFFD	CLEVELAND	Affidavit of Counsel
	APPL	CLEVELAND	Application of Plaintiff for Attorneys Fees Against the Defendant Idaho Department Fish and Game
	MEMO	CLEVELAND	Plaintiff's Memorandum of Costs Against the Defendant Idaho Department of Fish and Game
	BRIE	CLEVELAND	Plaintiffs' Brief in Support of Award of Costs and Attorneys' Fees
9/12/2011	FILE	HUFFMAN	New File ***** # 11 *****
9/13/2011	APPL	HUFFMAN	Application of the Plaintiff for Attorney's Fees Against the Defendant Idaho Department of Fish & Game as Related to Attorney Scott W Reed
9/23/2011	NOTC	VIGIL	Defendant's Notice of Objection and Motion to Disallow Attorney Fees and Costs
9/28/2011	HRSC	CLAUSEN	Hearing Scheduled (Motion 11/08/2011 03:00 PM) Disallow Fees and Costs - Trever
	STAT	CLAUSEN	Case status changed: Reopened
10/3/2011	DBRF	CRUMPACKER	Brief in Support of Defendants Notice of Objection & Motion to Disallow Attorney Fees & Costs
	AFFD	CRUMPACKER	Affidavit of Mary Boyer
	AFFD	CRUMPACKER	Affidavit of Charles "Chip" Corsi
	AFFD	CRUMPACKER	Affidavit of David Leptich
10/5/2011	BNDC	LEU	Bond Posted - Cash (Receipt 42018 Dated 10/5/2011 for 1644.50)
		LEU	Filing: L4 - Appeal, Civil appeal or cross-appeal to Supreme Court Paid by: state Receipt number: 0042033 Dated: 10/5/2011 Amount: \$.00 (Cash) For: Idaho Fish & Game Department (defendant)
	APDC	VIGIL	Appeal Filed In District Court

Date	Code	User		Judge
10/5/2011	NOTC	VIGIL	Notice of Appeal	John T. Mitchell
10/17/2011	MISC	VIGIL	Clerk's Certificate of Appeal	John T. Mitchell
10/18/2011	MISC	VIGIL	Plaintiff/Respondents Request for Additional Records	John T. Mitchell
11/7/2011	APPL	LEU	Corrected Application Of The Plaintiff for Attorneys Fees Against The Defendant Idaho Department Of Fish And Game	John T. Mitchell
	APPL	LEU	Corrected Application Of The Plaintiff For Attorneys Fees Against the Defendant Idaho Departme Of Fish and Game	John T. Mitchell
11/8/2011	DCHH	CLAUSEN	Hearing result for Motion scheduled on 11/08/2011 03:00 PM: District Court Hearing Hel Court Reporter: JULIE FOLAND	John T. Mitchell
11/10/2011	NLTR	VIGIL	Notice of Lodging Transcript	John T. Mitchell
11/14/2011	ORDR	CLAUSEN	Memorandum Decision and Order Denying Plaintiff's Application for Attorney Fees and Granting Defendant's Motion to Disallow Attorney Fees and Costs	John T. Mitchell
	STAT	CLAUSEN	Case status changed: closed pending clerk action	John T. Mitchell
11/18/2011	BNDV	VIGIL	Bond Converted (Transaction number 2488 dated 11/18/2011 amount 1,644.50)	John T. Mitchell
11/22/2011	MISC	VIGIL	Amended and Corrected Plaintiff/Respondents Request for Additional Records	John T. Mitchell

STATE OF IDAHO
COUNTY OF KOOTENAI
FILED: 64109
ORIGINAL

2005 AUG 22 PM 12:39

CLERK DISTRICT COURT
Cathy Victoria
DEPUTY *CB*

Scott W. Reed, ISB#818
Attorney at Law
P. O. Box A
Coeur d'Alene, ID 83816
Phone (208) 664-2161
FAX (208) 765-5117
Attorney for Sanders Beach
Preservation Association, Inc.

SUMMONS ISSUED
AUG 22 2005

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

**CITIZENS AGAINST RANGE)
EXPANSION, an Unincorporated non-)
profit Association; JEANNE J. HOM, a)
single woman; EUGENE and)
KATHLEEN RILEY, husband and wife;)
LAMBERT and DENISE RILEY,)
husband and wife; GABRIELLE)
GROTH-MARNAT, a single woman,)
GERALD PRICE, a single man;)
RONALD and DOROTHY)
ELDRIDGE, husband and wife; and,)
GLENN and LUCY CHAPIN, husband)
and wife, SHERYL PUCKETT, a single)
woman; CHARLES MURRAY and)
CYNTHIA MURRAY, husband and)
wife; and DAVE VIG, a single man,)**

Plaintiffs,

v.

**IDAHO FISH AND GAME)
DEPARTMENT, an agency of the)
STATE OF IDAHO, and STEVEN M.)
HUFFAKER, Director of the IDAHO)
FISH AND GAME DEPARTMENT,)**

Defendants.

Case No. CV-05 6253

COMPLAINT

CATEGORY A-1

FEE: \$82.00

**ASSIGNED TO
JUDGE MITCHELL**

Plaintiffs allege as follows:

PARTIES

1. Plaintiff Citizens Against Range Expansion (C.A.R.E.) is an unincorporated non-profit association formed under Idaho Code §§53-5701 et. seq. for the purpose of preventing the unwarranted expansion of the Farragut Shooting Range which would destroy the peaceful quiet environment at Farragut State Park and surrounding private properties in and around Bayview, Idaho.

2. Plaintiff Jeanne M. Hom resides at 18331 East Perimeter Road, Athol, Idaho on real property described as the East Half of the Southwest Quarter of the Southeast Quarter of the Northeast Quarter (E 1/2 SE 1/4 SE 1/4 NE 1/4), Section 32, Township 54 North, Range 2 W.B.M. Kootenai County, Idaho.

3. Plaintiffs Eugene and Kathleen Riley and Lambert and Denise Riley reside at 17537 East Perimeter Road, Athol, Idaho and own real property described as the East half of the East Half of the Northeast Quarter of the Northwest Quarter (E 1/2 E 1/2 NE 1/4 NW 1/4) and East Half of the East Half of the Southeast Quarter of the Northwest Quarter (E 1/2 E 1/2

SE 1/4 W 1/4), Section 32, Township 54 North, Range 2 W.B.M, Kootenai County, Idaho.

4. Plaintiff Gabrielle Groth-Marnat resides at 15501 East Perimeter Road, Athol, Idaho and owns real property described as Tax No. 9415, Kootenai County, Idaho.

5. Plaintiff Gerald Price resides at 15783 East Perimeter Road, Athol, Idaho and owns real property in Section 6, Township 53 N, Range 2 W.B.M., Kootenai County, Idaho described as South 10 rods of South 20 rods of North 50 rods of Government Lots 1 and 2 and North 10 rods of South 20 rods of North 50 rods of Government Lots 1 and 2.

6. Plaintiffs Ronald and Dorothy Eldridge reside at 17845 East Perimeter Road, Athol, Idaho and own real property described as the East half of the Northwest Quarter of the Northeast Quarter and the East half of the Southwest Quarter of the Northeast Quarter (E 1/2 NW 1/4 NE 1/4 and E 1/2 SW 1/4 NE 1/4) in Section 32, Township 54 North, Range 2 W.B.M., Kootenai County, Idaho.

7. Plaintiffs Glenn and Lucy Chapin reside at 35176 Bishop Lane, Athol, Idaho and own real property described on the West half of the East half of the Northeast Quarter of the Northwest Quarter (W 1/2 E 1/2 NE 1/4 NW

1/4) and Tax No. 18648, Section 32, Township 54 North, Range 2 W.B.M. Kootenai County, Idaho.

8. Plaintiff Sheryl Puckett resides at 16023 East Shaeffer Street, Bayview, Idaho and owns real property described as Lot 6, Block 3, Schaffer's First Addition, according to the recorded plat together with two additional lots across from her home.

9. Plaintiffs Charles Murray and Cynthia Murray reside at 16990 East Cape Horn Road, Bayview, Idaho and own real property described as Tax No. 13537.

10. Plaintiff Dave Vig resides at 18083 East Perimeter Road, Athol, Idaho and owns real property described as the East Half of the Southwest quarter of the Southeast quarter of the Northeast Quarter (E 1/2 SW 1/4 SE 1/4 NE 1/4) Section 32, Township 54 North, Range 2 W.B.M. Kootenai County, Idaho.

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

12. Defendant Steven M. Huffaker is Director of the Idaho Fish and Game Department.

JURISDICTION AND VENUE

13. All of the plaintiffs reside in Kootenai County. The Farragut Shooting Range subject to challenge in this action is located in Kootenai County. Defendants Idaho Fish and Game Department and Director Huffaker are subject to venue in Kootenai County under Idaho Code §5-402.

14. The values of the properties subject to this action exceed \$10,000 placing this case in District Court.

STATEMENT OF FACTS

15. The Farragut Shooting Range was established by the United States Naval Training and Distribution Center and was used by the United States Navy from 1942 until 1946 when the Naval Training Center was closed.

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

17. On July 28, 1964, defendant Fish and Game Department deeded the larger portion of said land back to the United States which in turn on December 30, 1965 deeded the same property to the State of Idaho for ". . .the continuous use and maintenance of the hereafter described premises as and for public park and public recreational area purposes." Said described property was thereafter placed by the State of Idaho into the jurisdiction and control of the Idaho Department of Parks and Recreation as Farragut State Park.

18. Defendant Fish and Game Department retained certain of the lands originally granted including the shooting range and surrounding contiguous area.

19. The Farragut Shooting Range is not property managed "for the conservation of wildlife". That use is in direct conflict with the stated limitation of purpose in June 8, 1950 grant from the United States.

20. The Farragut Shooting Range as presently operated is noxious and disturbing to and in conflict with the purposes of the Farragut State Park which hosts 150, 000 visitors per year and over 40 different recreational activities.

21. From 1950 when defendant Idaho Fish and Game Department acquired title through the year 2002, the use of the range was occasional and sporadic with relatively few shooters.

22. In the time period since acquisition in 1950, the Farragut Shooting Range had undergone only limited improvement and lacked power, water, fencing, road access and parking.

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

24. In 2003, defendant Idaho Fish and Game Department used federal money and grants totalling \$91,000 for the engineering of a master plan, safety fence construction, bringing power to the new building site, redeveloping the access road off of the perimeter road, bringing water and power to the site, putting in entrance lighting and a sign at perimeter road.

25. In July of 2003, the redevelopment of the access road eliminated the locked gate one-half mile from the perimeter road eliminating the walk and allowed parking at the range constituting, in effect, a new access road.

26. Users may now drive this distance to the range during normal hours of operation (winter 9 AM - 4 PM, summer 9 AM - 8:30 PM). Group reservations are given access to an inner gate that allows participants to drive directly to the firing lines.

27. The shooting range comprises an area approximately 1,000 ft by 600 ft that provides a 200-yard firing line for rifle training. As of May 2005, the 500 yard firing line on the 600 yard range is open with plans to clear small trees to reopen the 600 yard firing line. A small shooting shed and pit toilets have been added.

28. The improved access allowing driving to the site and the attendant promotional publicity by defendant Idaho Fish and Game Department has resulted in a substantial change in the use of the Farragut Shooting Range.

29. Inadequate records as to use have been kept and maintained by the defendant Idaho Fish and Game Department. Group reservations are available only for the year 2004, but not for 2002 and 2003. Individual registrations do not reflect the number of shooters in each party.

30. The individual registrations for shooting kept by the defendant Idaho Fish and Game Department show an increase in usage of 37% from 2002 to 2003 and an increase of 94% from 2002 to 2004 for the full years.

31. The actual increases in use are greater still. Examination of the individual shooter sign in sheets shows 176 shooters in 2002, 225 shooters in 2003 and 370 shooters in 2004.

32. From 2002 to 2003 there is an increase of 27.8%; from 2003 to 2004 there is an increase of 64.4%; from 2002 to 2004 there is an increase of 110.2%.

33. Each of plaintiffs named in the complaint and identified as property owners in Paragraphs 2 through 10 were owners of record prior to 2002.

34. Plaintiff C.A.R.E commissioned Perlworks, LLP, qualified acoustical experts, to conduct environmental noise measurements and computer modeling to assess gun fire noise near the Farragut Shooting Range. Such a study was undertaken with measurements taken at the locations of nine residents which included five of the named individual plaintiffs.

35. The Farragut Shooting Range Noise Study published June 17, 2002 found that measured gunfire levels at seven sites exceeded the Kootenai County Ordinance Noise limits for special events of 75 dBA and also the Kootenai County Industrial Noise limit of 83 dB. The levels exceeded community standards for noise.

36. The present and existing increased use of the Farragut Shooting Range creates on a regular and continuing basis between 9:00 a.m. and 8:30 p.m. gunfire noise that is intrusive and annoying to the residents.

37. The gunfire noise is injurious to the health of the individual plaintiffs and interferes with their comfortable enjoyment of life and property.

38. On occasion, the sudden gunfire from the Farragut Shooting Range has frightened horses being ridden by residents and their guests causing safety hazards to adults and small children.

39. Gunfire from the Farragut Shooting Range has disturbed the peace and tranquility of owners of adjacent and neighboring private recreational, retirement and full-time residences of a total value likely to be in excess of one hundred million dollars (\$100,000,000.00).

40. Defendant Idaho Fish and Game Department has committed to a Three Million Six Hundred Thousand Dollar (\$3,600,000.00) Master Plan to expand the shooting range. The Master Plan created by C. Vargas & Associates, Inc. shows the renovation of the existing 200-yard firing line to create lanes for one 200-yard, two 100-yard, and three 50-yard firing lanes. These lanes are sectioned on each side by berms and include new backstops and shooting shelters. The existing 500-yard range is to be lengthened to 600-yards and improved with the addition of berms, parking, and intermediate firing positions at 500, 400, 300 and 200 yards. The range is planned to include trap and skeet fields, mounted cowboy action areas and with the 600 yard

range for 50 caliber rifles. The Vargas Master Plan provides for simultaneous use of one hundred thirty (130) shooting stations whereas the historical use has a ten (10) shooter limit.

41. Defendant Idaho Fish and Game Department has publicly stated that the range will serve military reservists and national guard units from the states of Montana and Washington as well as all of Idaho. The expanded range is identified by defendants as "a regionally important facility" meaning the present expanded use will be multiplied exponentially.

42. As a consequence of the substantial change in use of the Farragut Shooting Range, the fair market value of the properties and residences owned by the individual named plaintiffs have been adversely impacted.

43. Although the funding for the plan for changes made to date has primarily come from the federal government, defendant Idaho Fish and Game Department has not complied with the National Environmental Policy Act and regulations made thereunder which require the preparation of an Environmental Assessment and then for an Environmental Impact Statement.

44. Defendant Idaho Fish and Game Department in developing expansion plans has cited as a model the workbook for the Development of Arizona Shooting Ranges published by the Arizona Game and Idaho Fish

Department. Under the caption "[I] Location Assessment" said workbook lists the following cautions and liabilities to be part of every assessment:

. . .

b. Down Range Area: Unless a shooting range is completely baffled, an adequate down range safety buffer is necessary as part of the shooting range. The extent of this area is dependent upon the types of firearms that will be used and how they will be used.

c. Buffer Area: Unless a shooting range is completely enclosed, control of noise pollution is a serious issue. Noise effects diminish over distance. Vegetation, terrain, and other environmental factors modify the effects of distance. A sound buffer area is critical to range design. In Arizona, the desert does not provide good sound attenuation. Distance may be your best tool.

. . .

h. Environmental Impact: Development of the site must not create critical conflicts with the natural environment. If the site is on Federal land, there will be many national environmental regulations. Bullet/shot deposit areas should not drain into a watershed.

. . .

k. Local Support: The site must have the support of the local community and government. Local Planning and Zoning Commissions are critical to the selection of a site. A commitment from these organizations is essential.

l. Conflicting Groups: The site must be compatible with the existing community or these conflicts must be capable of being resolved.

m. Conflicting Uses: The site must be compatible with existing and adjacent land uses, or must be capable of being resolved.

. . .

45. The expansion, both as presently completed and as planned for the future, is violative and contradictory to each of the above Arizona model Location Assessment criteria publicly identified or known as follows:

b. Down Range Area: There are presently occupied residences exposed to bullets from firearms within the down range safety buffer.

c. Buffer Area: As set forth above, noise pollution is an existing untreated and untreatable problem. The Arizona recommendation of "distance" is not available. The military recommendation is for a one mile "distance."

h. Environmental Impact: Existing recent expansion and future expansion has and will create critical conflict with the natural habitat of wildlife species and of public uses of Farragut State Park.

k. Local Support: There is almost no local support. The Bayview Chamber of Commerce has opposed expansion. Present zoning and the Kootenai County Comprehensive Plan prevent expansion.

l. Conflict Groups: C.A.R.E. is a conflicting group representing an existing community with which the site is not compatible.

m. Conflicting Uses: Existing uses as a park and as single family residential, recreational and retirement homes are incompatible with a shooting range.

FIRST CAUSE OF ACTION

46. As described above, the expansion of the Farragut Shooting Range by defendant of Idaho Fish and Game Department is injurious to the health of plaintiffs, offensive to their senses, an obstruction of their free use of property so as to interfere with their comfortable enjoyment of their lives and their property constituting a nuisance as defined in Idaho Code §52-101.

47. As described above, the actions of the defendant of Idaho Fish and Game Department have resulted in a substantial change and great expansion of the use of the range since January 1, 2003.

48. The identified plaintiffs each own property, are affected by the substantial change and bring this action within three years after the commencement of the substantial change.

49. Each of the plaintiffs has suffered damage in excess of \$10,000.

50. As authorized by Idaho Code §52-111, plaintiffs are entitled to a permanent injunction that defendants Idaho Fish and Game Department and Director Steven M. Huffaker restore and close the outer access gate at the

previous location one-half mile from the range, prohibit any other or different access road that would go to the range and restore the operational policy existing in July of 2003 and before limiting the maximum number of shooters to ten (10).

SECOND CAUSE OF ACTION

51. Paragraphs 1 through 45 as set forth above are incorporated by reference.

52. Plaintiffs, acting in the capacity of private attorney general or ombudsman, bring this action on behalf of the general public constituting the 150,000 annual users of Farragut State Park.

53. The actions of defendant Idaho Fish and Game Department in making a substantial change and expansion of use have caused interference with the comfortable enjoyment of life and public properties in the customary manner of the public park being Farragut State Park, the present operation being a nuisance as defined in Idaho Code §52-101.

54. As authorized by Idaho Code §52-111, the public is entitled to a permanent injunction requiring defendants Idaho Fish and Game Department and Director Steven M. Huffaker to close the newly opened road to the range

and restore operations of the shooting range to the conditions existing prior to January 1, 2003.

THIRD CAUSE OF ACTION

55. Paragraphs 1 through 45 as set forth above are incorporated by reference.

56. The present use being made by defendant Idaho Fish and Game Department is a violation of the conditions in the grant deed to the Idaho Fish and Game Department made on June 8, 1950 and in violation of the grant deed made to the State of Idaho for park purposes on December 30, 1965.

57. The deed from the United states of America as grantor to the Idaho Fish and Game Department, as grantee, recorded July 10, 1950 was explicitly subject to the following commitment by the grantee:

The said party of the first part, for and in consideration of the use and maintenance by the party of the second part of the property hereinafter described as a reserve for the conservation of wildlife, other than migratory birds, and the benefits which shall accrue to the United States from the continued use of such property for such purpose. . .(grants) for the use and benefit of the Idaho Fish and Game Department of said State of Idaho having the management for the conservation of wildlife, other than migratory birds, the following described property, being portions of the facility formerly known as Farragut Naval Training and Distribution Center, and Naval Spur Railroad - Farragut to Athol, Idaho situate, lying and being in the county of Kootenai, State of Idaho, to-wit:

...

58. At the date of deed and for several prior years since the Farragut Naval Training Center was closed and vacated, the shooting range used by the Navy for training purposes had been closed and was out of use.

59. On July 28, 1964 through agreement made by Idaho Governor Robert E. Smylie, the State of Idaho deeded back to the United States a major portion of the real property received by deed on July 10, 1956 and thereafter on December 30, 1965, the United States deeded the same property to the State of Idaho ". . .in consideration of the continuous use and maintenance of the hereafter described premises as and for public park and public recreational purposes by the State of Idaho."

60. The State of Idaho has faithfully kept and performed the conditions of the grant by creating Farragut State Park and administering the same through the Idaho Parks and Recreation Department.

61. The operation of shooting range is absolutely incompatible with and directly contradictory to management for conservation of wildlife.

62. The June 8, 1950 deed is subject to the following reverter clause:

The premises herein conveyed are to be continuously used only as for the conservation of wildlife, other than migratory birds, and are conveyed upon the conditions that in the event they are no longer used for such purpose, the title thereto shall revert to the United States, and upon which reversion the title of the State of Idaho shall cease and

determine and the United States shall have the immediate right of possession thereof.

Book 145 of Deeds, page 264.

63. The condition is for the benefit of wildlife and for the general public including plaintiffs.

64. Pursuant to Rule 65, I.R.Civ.P., the Court should issue a permanent injunction prohibiting the use of any of the property granted to defendant Idaho Fish and Game Department for a shooting range in order to prevent irreparable harm in the event that the federal government at some future time invokes the reverter clause to take back the property now owned by the State of Idaho.

FOURTH CAUSE OF ACTION

65. Paragraphs 1 through 45 as set forth above are incorporated by reference.

66. The Master Plan for expansion of the Farragut Shooting Range prepared for defendant Idaho Fish and Game Department by C. Vargas & Associates, Inc: dated March 5, 2004 requires an expenditure of several million dollars over the next five to ten years.

67. The expansion according to the Master Plan certainly and inevitably will increase the noise level in the properties of plaintiffs and the

surrounding private recreational, retirement and residential properties and the Farragut State Park.

68. As set forth in the Arizona Game and Fish Workbook, Location Assessment, subparagraph "c" in Paragraphs 44 and 45 above, the only certain method to avoid excessive noise is distance and the shooting range does not have and cannot obtain the necessary distance.

69. Plaintiffs are entitled to judgment of this Court that defendants Idaho Fish and Game Department and Director Steven M. Huffaker cease all efforts to obtain funds and to carry out said Master Plan.

WHEREFORE, plaintiffs pray judgment as follows:

1. Under the First Cause of Action, for judgment awarding plaintiffs damages for injuries and losses incurred personally and to their properties caused by operation of the Farragut Shooting Range since January 1, 2003.

2. Under the First and Second Cause of Actions for a permanent injunction directing the defendants Idaho Fish and Game Department and Director Steven M. Huffaker to close present access road to the range and any other roads directly to the range and to reduce the average daily and monthly operations on the shooting range to the average use existing prior to January 1, 2003.

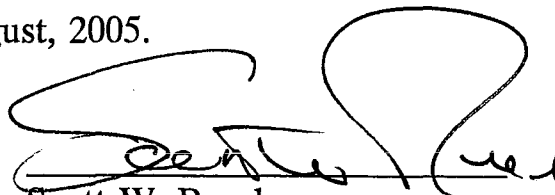
3. Under the Third Cause of Action, for a permanent injunction prohibiting defendants Idaho Fish and Game Department and Director Steven M. Huffaker from allowing any use whatsoever of property owned by the State of Idaho at the former Naval Training Center as a shooting range.

4. Under the Fourth Cause of Action, for judgment that defendants Idaho Fish and Game Department and Director Steven M. Huffaker cease and desist from any further efforts to obtain funds or carry out in any manner the Vargas Master Plan.

5. For an award of costs and attorney's fees.

6. For such other relief as the Court may deem just and proper.

Dated this 22nd day of August, 2005.

A handwritten signature in black ink, appearing to read "Scott W. Reed", written over a horizontal line.

Scott W. Reed
Attorney for Plaintiffs

LAWRENCE WASDEN
ATTORNEY GENERAL

JP

2005 SEP 16 PM 2:03

CLERK DISTRICT COURT

Camden Barker
DEPUTY *CB*

Clive J. Strong
Chief of Natural Resources

W. DALLAS BURKHALTER, ISB# 3286
Deputy Attorneys General
PO Box 25
Boise, ID 83707
Telephone: (208) 334-3715
Attorneys for Defendants
State of Idaho, IDFG and Huffaker

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

CITIZENS AGAINST RANGE)
EXPANSION, an Unincorporated non-profit)
Association; JEANNE J. HOM, a single)
woman; EUGENE and KATHLEEN RILEY,)
husband and wife; LAMBERT and DENISE)
RILEY, husband and wife; GABRIELLE)
GROTH-MARNAT, a single woman,)
GERALD PRICE, a single man; RONALD)
and DOROTHY ELDRIDGE, husband and)
wife; and, GLENN and LUCY CHAPIN,)
husband and wife, SHERYL PUCKETT, a)
single woman; CHARLES MURRAY and)
CYNTHIA MURRAY, husband and wife; and)
DAVE VIG, a single man,)

Case No. CV-05-6253

ANSWER

Plaintiffs,

vs.

IDAHO FISH AND GAME DEPARTMENT,
an agency of the STATE OF IDAHO, and
STEVEN M. HUFFAKER, Director of the
IDAHO FISH AND GAME DEPARTMENT,

Defendants.

COMES NOW Defendants, Idaho Department of Fish and Game (hereinafter "IDFG") and Steven M. Huffaker, Director of the Idaho Department of Fish and Game (hereinafter "Director"), in this action by and through their attorneys of record and in answer to Plaintiffs' Complaint ("Complaint"), admit, deny and allege as follows:

All allegations or averments contained in Plaintiffs' Complaint are generally and specifically denied unless specifically admitted herein.

PARTIES

1. With respect to Paragraph 1 of Plaintiffs' Complaint, these answering Defendants are without knowledge and therefore **deny**.

2. With respect to Paragraph 2 of Plaintiffs' Complaint, Defendants are without knowledge and therefore **deny**.

3. With respect to Paragraph 3 of Plaintiffs' Complaint, Defendants are without knowledge and therefore **deny**.

4. With respect to Paragraph 4 of Plaintiffs' Complaint, Defendants are without knowledge and therefore **deny**.

5. With respect to Paragraph 5 of Plaintiffs' Complaint, Defendants are without knowledge and therefore **deny**.

6. With respect to Paragraph 6 of Plaintiffs' Complaint, Defendants are without knowledge and therefore **deny**.

7. With respect to Paragraph 7 of Plaintiffs' Complaint, Defendants are without knowledge and therefore **deny**.

8. With respect to Paragraph 8 of Plaintiffs' Complaint, Defendants are without knowledge and therefore **deny**.

9. With respect to Paragraph 9 of Plaintiffs' Complaint, Defendants are without knowledge and therefore **deny**.

10. With respect to Paragraph 10 of Plaintiffs' Complaint, Defendants are without knowledge and therefore **deny**.

11. With respect to Paragraph 11 of Plaintiffs' Complaint, Defendants are without knowledge as to the allegation of "(GSA No. 10-N-ID-005)" and therefore **deny** the same. Defendants **admit** the remaining allegations of Paragraph 11.

12. With respect to Paragraph 12 of Plaintiffs' Complaint, Defendants **admit**.

JURISDICTION AND VENUE

13. With respect to Paragraph 13 of Plaintiffs' Complaint, Defendants are without knowledge as to the residency of the plaintiffs and therefore **deny**. Defendants **admit** that the Farragut Shooting Range is located in Kootenai County. Defendants **deny** the remaining allegations of Paragraph 13.

14. With respect to Paragraph 14 of Plaintiffs' Complaint, Defendants **admit**.

STATEMENT OF FACTS

15. With respect to Paragraph 15 of Plaintiffs' Complaint, Defendants **admit**.

16. With respect to Paragraph 16 of Plaintiffs' Complaint, Defendants **admit** that the transfer was recorded on June 8, 1950, and that the deed contained restrictive and reversionary language. The deed was executed on December 19, 1949 and therefore Defendants **deny**.

17. With respect to Paragraph 17 of Plaintiffs' Complaint, Defendants **admit**.

18. With respect to Paragraph 18 of Plaintiffs' Complaint, Defendants **admit**.

19. With respect to Paragraph 19 of Plaintiffs' Complaint, Defendants **deny**.

20. With respect to Paragraph 20 of Plaintiffs' Complaint, Defendants **deny**.

21. With respect to Paragraph 21 of Plaintiffs' Complaint, Defendants **deny**.

22. With respect to Paragraph 22 of Plaintiffs' Complaint, Defendants **admit** the lack of power and **deny** the remaining allegations.

23. With respect to Paragraph 23 of Plaintiffs' Complaint, Defendants **admit** that for an approximately twelve year period a wooden gate blocked some access, that individual shooters had to walk from the gate to the range, and that the walk may have discouraged some individual shooters. Defendants **deny** the remaining allegations of Paragraph 23.

24. With respect to Paragraph 24 of Plaintiffs' Complaint, Defendants **admit** completing a site topographical survey and developing a Master Plan during 2003-2004, and **deny** the remaining allegations of Paragraph 24.

25. With respect to Paragraph 25 of Plaintiffs' Complaint, Defendants **deny**.

26. With respect to Paragraph 26 of Plaintiffs' Complaint, Defendants **admit**.

27. With respect to Paragraph 27 of Plaintiffs' Complaint, Defendants **deny**.

28. With respect to Paragraph 28 of Plaintiffs' Complaint, Defendants **deny**.

29. With respect to Paragraph 29 of Plaintiffs' Complaint, Defendants **deny**.

30. With respect to Paragraph 30 of Plaintiffs' Complaint, Defendants **deny**.

31. With respect to Paragraph 31 of Plaintiffs' Complaint, Defendants **deny** to the extent that this allegation is based on the allegations of Paragraphs 29 and 30 of Plaintiffs' Complaint.

32. With respect to Paragraph 32 of Plaintiffs' Complaint, Defendants **deny** to the extent that this allegation is based on the allegations of Paragraphs 29 and 30 of Plaintiffs' Complaint.

33. With respect to Paragraph 33 of Plaintiffs' Complaint, Defendants are without knowledge and therefore **deny**.

34. With respect to Paragraph 34 of Plaintiffs' Complaint, Defendants are without knowledge and therefore **deny**.

35. With respect to Paragraph 35 of Plaintiffs' Complaint, Defendants are without knowledge and therefore **deny**.

36. With respect to Paragraph 36 of Plaintiffs' Complaint, Defendants **deny**.

37. With respect to Paragraph 37 of Plaintiffs' Complaint, Defendants **deny**.

38. With respect to Paragraph 38 of Plaintiffs' Complaint, Defendants **deny**.

39. With respect to Paragraph 39 of Plaintiffs' Complaint, Defendants **deny**.

40. With respect to Paragraph 40 of Plaintiffs' Complaint, Defendants **deny**.

41. With respect to Paragraph 41 of Plaintiffs' Complaint, Defendants **deny**.

42. With respect to Paragraph 42 of Plaintiffs' Complaint, Defendants **deny**.

43. With respect to Paragraph 43 of Plaintiffs' Complaint, Defendants **deny**.

44. With respect to Paragraph 44 of Plaintiffs' Complaint, Defendants **deny**.

45. With respect to Paragraph 45 of Plaintiffs' Complaint, Defendants **deny**.

FIRST CAUSE OF ACTION

To the extent that paragraphs 46 – 50 of Plaintiffs' Complaint require a response, Defendants respond as follows:

46. With respect to Paragraph 46 of Plaintiffs' Complaint, Defendants **deny**.

47. With respect to Paragraph 47 of Plaintiffs' Complaint, Defendants **deny**.

48. With respect to Paragraph 48 of Plaintiffs' Complaint, Defendants are without knowledge and therefore **deny**.

49. With respect to Paragraph 49 of Plaintiffs' Complaint, Defendants **deny**.

50. With respect to Paragraph 50 of Plaintiffs' Complaint, Defendants **deny**.

SECOND CAUSE OF ACTION

To the extent that paragraphs 51 – 54 of Plaintiffs' Complaint require a response, Defendants respond as follows:

51. With respect to Paragraph 51 of Plaintiffs' Complaint, Defendants reallege and incorporate by reference their answers to paragraphs 1 through 45 of Plaintiffs' Complaint as though set forth in full herein.

52. With respect to Paragraph 52 of Plaintiffs' Complaint, Defendants **deny**.

53. With respect to Paragraph 53 of Plaintiffs' Complaint, Defendants **deny**.

54. With respect to Paragraph 54 of Plaintiffs' Complaint, Defendants **deny**.

THIRD CAUSE OF ACTION

To the extent that paragraphs 55 – 64 of Plaintiffs' Complaint require a response, Defendants respond as follows:

55. With respect to Paragraph 55 of Plaintiffs' Complaint, Defendants reallege and incorporate by reference their answers to paragraphs 1 through 45 of Plaintiffs' Complaint as though set forth in full herein.

56. With respect to Paragraph 56 of Plaintiffs' Complaint, Defendants **deny**.

57. With respect to Paragraph 57 of Plaintiffs' Complaint, Defendants **admit** that the deed contains the referenced language.

58. With respect to Paragraph 58 of Plaintiffs' Complaint, Defendants are without knowledge and therefore **deny**.

59. With respect to Paragraph 59 of Plaintiffs' Complaint, Defendants allege that several of the conveyance dates are wrong and therefore **deny**.

60. To the extent that Paragraph 60 of Plaintiffs' Complaint requires a response, Defendants **deny**.

61. With respect to Paragraph 61 of Plaintiffs' Complaint, Defendants **deny**.

62. With respect to Paragraph 62 of Plaintiffs' Complaint, Defendants **admit** that the deed contains the referenced reverter language.

63. With respect to Paragraph 63 of Plaintiffs' Complaint, Defendants **deny**.

64. With respect to Paragraph 64 of Plaintiffs' Complaint, Defendants **deny**.

FOURTH CAUSE OF ACTION

To the extent that paragraphs 65 – 69 of Plaintiffs' Complaint require a response, Defendants respond as follows:

65. With respect to Paragraph 65 of Plaintiffs' Complaint, Defendants reallege and incorporate by reference their answers to paragraphs 1 through 45 of Plaintiffs' Complaint as though set forth in full herein.

66. With respect to Paragraph 66 of Plaintiffs' Complaint, Defendants deny.

67. With respect to Paragraph 67 of Plaintiffs' Complaint, Defendants deny.

68. With respect to Paragraph 68 of Plaintiffs' Complaint, Defendants are without knowledge and therefore deny.

69. With respect to Paragraph 69 of Plaintiffs' Complaint, Defendants deny.

AFFIRMATIVE DEFENSES

FIRST AFFIRMATIVE DEFENSE

Plaintiffs' Complaint fails to state a cause of action against Defendants upon which relief can be granted and should therefore be dismissed pursuant to Rule 12 (b)(6), I.R.C.P.

SECOND AFFIRMATIVE DEFENSE

Plaintiffs' claims are barred by Idaho Code Sections 55-2601 through -2604.

THIRD AFFIRMATIVE DEFENSE

Plaintiffs have failed to comply with the requirements of the Idaho Tort Claims Act; particularly Idaho Code Sections 6-905, 6-907, 6-908, 6-911, and therefore the Complaint should be dismissed.

FOURTH AFFIRMATIVE DEFENSE

The acts or omissions of Defendants, if any, were neither the proximate cause nor the cause in fact of the alleged injury or damages claimed by plaintiffs, if any.

FIFTH AFFIRMATIVE DEFENSE

Plaintiffs were guilty of negligent, careless and/or intentional misconduct at the time of and in connection with the matters, events and damages alleged in the Complaint, which negligence and carelessness or intentional misconduct on their part proximately caused and/or contributed to the events and damages alleged by Plaintiffs.

SIXTH AFFIRMATIVE DEFENSE

Plaintiffs have failed to act reasonably and/or otherwise mitigate their damages.

SEVENTH AFFIRMATIVE DEFENSE

The claims and damages set forth in Plaintiffs' Complaint are barred by the doctrines of unclean hands, waiver and/or estoppel.

EIGHTH AFFIRMATIVE DEFENSE

To the extent that Plaintiffs are asserting state law claims, the liability, if any, of Defendants for any state law claims or causes of action is limited pursuant to the provisions of the Idaho Tort Claims Act. In asserting this defense, Defendants are in no way conceding or admitting liability.

NINTH AFFIRMATIVE DEFENSE

Defendants are immune from liability because the acts or omissions complained of, if any, were done by Defendants in good faith, with honest, reasonable belief that such actions were necessary and constitutionally proper.

TENTH AFFIRMATIVE DEFENSE

The acts or omissions, if any, of Defendants were privileged.

ELEVENTH AFFIRMATIVE DEFENSE

Defendants are absolutely immune from suit for their acts or omissions, if any, as they were a discretionary function.

TWELTH AFFIRMATIVE DEFENSE

Defendants' acts or omissions, if any, which are not entitled to absolute immunity, are entitled to qualified good faith immunity from suit.

THIRTEENTH AFFIRMATIVE DEFENSE

Defendants have not been able to engage in sufficient discovery to learn all the facts and circumstances relating to the matters described in Plaintiffs' Complaint and therefore request the Court to permit Defendants to amend their Answer and assert further affirmative defenses once discovery has been completed.

ATTORNEY'S FEES

Defendants have been required to retain attorneys in order to defend this action and are entitled to recover reasonable attorney's fees pursuant to Idaho Code Sections 6-918A, 12-117, and 12-121, and other state law and applicable Rules of Civil Procedure.

PRAYER FOR RELIEF

Wherefore Defendants respectfully request that the Court enter judgment as follows:

1. That Plaintiffs take nothing from their Complaint and that it be dismissed with prejudice with respect to Defendants
2. That Judgment be entered in favor of Defendants on all claims.
3. For Defendants' costs and attorney's fees incurred.
4. For such other relief as the Court deems just and equitable.

DEMAND FOR JURY TRIAL

Defendants respectfully demand a trial by jury on all issues.

DATED this 16th day of September, 2005



W. DALLAS BURKHALTER
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 16th day of September, 2005, I caused to be served a true and correct copy of the foregoing by the following method to:

Scott W. Reed ISB #818
Attorney at Law
P.O. Box A
Coeur d'Alene, ID 83816

- U.S. Mail
- Hand Delivery
- Certified Mail, Return Receipt Requested
- Overnight Mail
- Facsimile: 765-5117
- Statehouse Mail

Honorable Judge Mitchell

- U.S. Mail
- Hand Delivery
- Certified Mail, Return Receipt Requested
- Overnight Mail
- Facsimile: _____
- Statehouse Mail

- U.S. Mail
- Hand Delivery
- Certified Mail, Return Receipt Requested
- Overnight Mail
- Facsimile: _____
- Statehouse Mail



W. DALLAS BURKHALTER
Deputy Attorney General

ORIGINAL

STATE OF IDAHO }
COUNTY OF KOOTENAI } SS
FILED:

Scott W. Reed, ISB#818
Attorney at Law
P. O. Box A
Coeur d'Alene, ID 83816
Phone (208) 664-2161
FAX (208) 765-5117

2006 FEB -9 PM 4:08

CLERK DISTRICT COURT

DEPUTY

Joanna Barber

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

CITIZENS AGAINST RANGE)
EXPANSION, an Unincorporated)
non-profit Association; JEANNE J.)
HOM, a single woman; EUGENE and)
KATHLEEN RILEY, husband and)
wife; LAMBERT and DENISE RILEY,)
husband and wife; GABRIELLE)
GROTH-MARNAT, a single woman,)
GERALD PRICE, a single man;)
RONALD and DOROTHY)
ELDRIDGE, husband and wife; and,)
GLENN and LUCY CHAPIN, husband)
and wife, SHERYL PUCKETT, a)
single woman; CHARLES MURRAY)
and CYNTHIA MURRAY, husband)
and wife; and DAVE VIG, a single)
man,)

Case No. CV-05-6253

AMENDED COMPLAINT

Plaintiffs,

v.

IDAHO FISH AND GAME)
DEPARTMENT, an agency of the)
STATE OF IDAHO, and STEVEN M.)
HUFFAKER, Director of the IDAHO)
FISH AND GAME DEPARTMENT,

Defendants.

Plaintiffs allege as follows:

PARTIES

1. Plaintiff Citizens Against Range Expansion (C.A.R.E.) is an unincorporated non-profit association formed under Idaho Code §§53-5701 et. seq. for the purpose of preventing the unwarranted expansion of the Farragut Shooting Range which would destroy the peaceful quiet environment at Farragut State Park and surrounding private properties in and around Bayview, Idaho.

2. Plaintiff Jeanne M. Hom resides at 18331 East Perimeter Road, Athol, Idaho on real property described as the East Half of the Southwest Quarter of the Southeast Quarter of the Northeast Quarter (E 1/2 SE 1/4 SE 1/4 NE 1/4), Section 32, Township 54 North, Range 2 W.B.M. Kootenai County, Idaho.

3. Plaintiffs Eugene and Kathleen Riley and Lambert and Denise Riley reside at 17537 East Perimeter Road, Athol, Idaho and own real property described as the East half of the East Half of the Northeast Quarter of the Northwest Quarter (E 1/2 E 1/2 NE 1/4 NW 1/4) and East Half of the East Half of the Southeast Quarter of the Northwest Quarter (E 1/2 E 1/2 SE 1/4 W 1/4), Section 32, Township 54 North, Range 2 W.B.M, Kootenai County, Idaho.

AMENDED COMPLAINT

2

4. Plaintiff Gabrielle Groth-Marnat resides at 15501 East Perimeter Road, Athol, Idaho and owns real property described as Tax No. 9415, Kootenai County, Idaho.

5. Plaintiff Gerald Price resides at 15783 East Perimeter Road, Athol, Idaho and owns real property in Section 6, Township 53 N, Range 2 W.B.M., Kootenai County, Idaho described as South 10 rods of South 20 rods of North 50 rods of Government Lots 1 and 2 and North 10 rods of South 20 rods of North 50 rods of Government Lots 1 and 2.

6. Plaintiffs Ronald and Dorothy Eldridge reside at 17845 East Perimeter Road, Athol, Idaho and own real property described as the East half of the Northwest Quarter of the Northeast Quarter and the East half of the Southwest Quarter of the Northeast Quarter (E 1/2 NW 1/4 NE 1/4 and E 1/2 SW 1/4 NE 1/4) in Section 32, Township 54 North, Range 2 W.B.M., Kootenai County, Idaho.

7. Plaintiffs Glenn and Lucy Chapin reside at 35176 Bishop Lane, Athol, Idaho and own real property described on the West half of the East half of the Northeast Quarter of the Northwest Quarter (W 1/2 E 1/2 NE 1/4 NW 1/4) and Tax No. 18648, Section 32, Township 54 North, Range 2 W.B.M. Kootenai County, Idaho.

8. Plaintiff Sheryl Puckett resides at 16023 East Shaeffer Street, Bayview, Idaho and owns real property described as Lot 6, Block 3, Schaffer's First Addition, according to the recorded plat together with two additional lots across from her home.

9. Plaintiffs Charles Murray and Cynthia Murray reside at 16990 East Cape Horn Road, Bayview, Idaho and own real property described as Tax No. 13537.

10. Plaintiff Dave Vig resides at 18083 East Perimeter Road, Athol, Idaho and owns real property described as the East Half of the Southwest quarter of the Southeast quarter of the Northeast Quarter (E 1/2 SW 1/4 SE 1/4 NE 1/4) Section 32, Township 54 North, Range 2 W.B.M. Kootenai County, Idaho.

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

12. Defendant Steven M. Huffaker is Director of the Idaho Fish and Game Department.

JURISDICTION AND VENUE

13. All of the plaintiffs reside in Kootenai County. The Farragut Shooting Range subject to challenge in this action is located in Kootenai County. Defendants Idaho Fish and Game Department and Director Huffaker are subject to venue in Kootenai County under Idaho Code §5-402.

14. The values of the properties subject to this action exceed \$10,000 placing this case in District Court.

STATEMENT OF FACTS

15. The Farragut Shooting Range was established by the United States Naval Training and Distribution Center and was used by the United States Navy from 1942 until 1946 when the Naval Training Center was closed.

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

17. On July 28, 1964, defendant Fish and Game Department deeded the larger portion of said land back to the United States which in turn on

December 30, 1965 deeded the same property to the State of Idaho for ". . .the continuous use and maintenance of the hereafter described premises as and for public park and public recreational area purposes." Said described property was thereafter placed by the State of Idaho into the jurisdiction and control of the Idaho Department of Parks and Recreation as Farragut State Park.

18. Defendant Fish and Game Department retained certain of the lands originally granted including the shooting range and surrounding contiguous area.

19. The Farragut Shooting Range is not property managed "for the conservation of wildlife". That use is in direct conflict with the stated limitation of purpose in June 8, 1950 grant from the United States.

20. The Farragut Shooting Range as presently operated is noxious and disturbing to and in conflict with the purposes of the Farragut State Park which hosts 150, 000 visitors per year and over 40 different recreational activities.

21. From 1950 when defendant Idaho Fish and Game Department acquired title through the year 2002, the use of the range was occasional and sporadic with relatively few shooters.

22. In the time period since acquisition in 1950, the Farragut Shooting Range had undergone only limited improvement and lacked power, water, fencing, road access and parking.

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

24. In 2003, defendant Idaho Fish and Game Department used federal money and grants totalling \$91,000 for the engineering of a master plan, safety fence construction, bringing power to the new building site, redeveloping the access road off of the perimeter road, bringing water and power to the site, putting in entrance lighting and a sign at perimeter road.

25. In July of 2003, the redevelopment of the access road eliminated the locked gate one-half mile from the perimeter road eliminating the walk and allowed parking at the range constituting, in effect, a new access road.

26. Users may now drive this distance to the range during normal hours of operation (winter 9 AM - 4 PM, summer 9 AM - 8:30 PM). Group reservations are given access to an inner gate that allows participants to drive directly to the firing lines.

27. The shooting range comprises an area approximately 1,000 ft by 600 ft that provides a 200-yard firing line for rifle training. As of May 2005, the 500 yard firing line on the 600 yard range is open with plans to clear small trees to reopen the 600 yard firing line. A small shooting shed and pit toilets have been added.

28. The improved access allowing driving to the site and the attendant promotional publicity by defendant Idaho Fish and Game Department has resulted in a substantial change in the use of the Farragut Shooting Range.

29. Inadequate records as to use have been kept and maintained by the defendant Idaho Fish and Game Department. Group reservations are available only for the year 2004, but not for 2002 and 2003. Individual registrations do not reflect the number of shooters in each party.

30. The individual registrations for shooting kept by the defendant Idaho Fish and Game Department show an increase in usage of 37% from 2002 to 2003 and an increase of 94% from 2002 to 2004 for the full years.

31. The actual increases in use are greater still. Examination of the individual shooter sign in sheets shows 176 shooters in 2002, 225 shooters in 2003 and 370 shooters in 2004.

32. From 2002 to 2003 there is an increase of 27.8%; from 2003 to 2004 there is an increase of 64.4%; from 2002 to 2004 there is an increase of 110.2%.

33. Each of plaintiffs named in the complaint and identified as property owners in Paragraphs 2 through 10 were owners of record prior to 2002.

34. Plaintiff C.A.R.E commissioned Perlworks, LLP, qualified acoustical experts, to conduct environmental noise measurements and computer modeling to assess gun fire noise near the Farragut Shooting Range. Such a study was undertaken with measurements taken at the locations of nine residents which included five of the named individual plaintiffs.

35. The Farragut Shooting Range Noise Study published June 17, 2005 found that measured gunfire levels at seven sites exceeded the Kootenai County Ordinance Noise limits for special events of 75 dBA and also the Kootenai County Industrial Noise limit of 83 dB. The levels exceeded community standards for noise.

36. The present and existing increased use of the Farragut Shooting Range creates on a regular and continuing basis between 9:00 a.m. and 8:30 p.m. gunfire noise that is intrusive and annoying to the residents.

37. The gunfire noise is injurious to the health of the individual plaintiffs and interferes with their comfortable enjoyment of life and property.

38. On occasion, the sudden gunfire from the Farragut Shooting Range has frightened horses being ridden by residents and their guests causing safety hazards to adults and small children.

39. Gunfire from the Farragut Shooting Range has disturbed the peace and tranquility of owners of adjacent and neighboring private recreational, retirement and full-time residences of a total value likely to be in excess of one hundred million dollars (\$100,000,000.00).

40. Defendant Idaho Fish and Game Department has committed to a Three Million Six Hundred Thousand Dollar (\$3,600,000.00) Master Plan to expand the shooting range. The Master Plan created by C. Vargas & Associates, Inc. shows the renovation of the existing 200-yard firing line to create lanes for one 200-yard, two 100-yard, and three 50-yard firing lanes. These lanes are sectioned on each side by berms and include new backstops and shooting shelters. The existing 500-yard range is to be lengthened to 600-yards and improved with the addition of berms, parking, and intermediate firing positions at 500, 400, 300 and 200 yards. The range is planned to include trap and skeet fields, mounted cowboy action areas and with the 600 yard range

for 50 caliber rifles. The Vargas Master Plan provides for simultaneous use of one hundred thirty (130) shooting stations whereas the historical use has a ten (10) shooter limit.

41. Defendant Idaho Fish and Game Department has publicly stated that the range will serve military reservists and national guard units from the states of Montana and Washington as well as all of Idaho. The expanded range is identified by defendants as "a regionally important facility" meaning the present expanded use will be multiplied exponentially.

42. As a consequence of the substantial change in use of the Farragut Shooting Range, the fair market value of the properties and residences owned by the individual named plaintiffs have been adversely impacted.

43. Although the funding for the plan for changes made to date has primarily come from the federal government, defendant Idaho Fish and Game Department has not complied with the National Environmental Policy Act and regulations made thereunder which require the preparation of an Environmental Assessment and then for an Environmental Impact Statement.

44. Defendant Idaho Fish and Game Department in developing expansion plans has cited as a model the workbook for the Development of Arizona Shooting Ranges published by the Arizona Game and Idaho Fish

Department. Under the caption "[I] Location Assessment" said workbook lists the following cautions and liabilities to be part of every assessment:

. . .

b. Down Range Area: Unless a shooting range is completely baffled, an adequate down range safety buffer is necessary as part of the shooting range. The extent of this area is dependent upon the types of firearms that will be used and how they will be used.

c. Buffer Area: Unless a shooting range is completely enclosed, control of noise pollution is a serious issue. Noise effects diminish over distance. Vegetation, terrain, and other environmental factors modify the effects of distance. A sound buffer area is critical to range design. In Arizona, the desert does not provide good sound attenuation. Distance may be your best tool.

. . .

h. Environmental Impact: Development of the site must not create critical conflicts with the natural environment. If the site is on Federal land, there will be many national environmental regulations. Bullet/shot deposit areas should not drain into a watershed.

. . .

k. Local Support: The site must have the support of the local community and government. Local Planning and Zoning Commissions are critical to the selection of a site. A commitment from these organizations is essential.

l. Conflicting Groups: The site must be compatible with the existing community or these conflicts must be capable of being resolved.

m. Conflicting Uses: The site must be compatible with existing and adjacent land uses, or must be capable of being resolved.

. . .

45. The expansion, both as presently completed and as planned for the future, is violative and contradictory to each of the above Arizona model Location Assessment criteria publicly identified or known as follows:

b. Down Range Area: There are presently occupied residences exposed to bullets from firearms within the down range safety buffer.

c. Buffer Area: As set forth above, noise pollution is an existing untreated and untreatable problem. The Arizona recommendation of "distance" is not available. The military recommendation is for a one mile "distance."

h. Environmental Impact: Existing recent expansion and future expansion has and will create critical conflict with the natural habitat of wildlife species and of public uses of Farragut State Park.

k. Local Support: There is almost no local support. The Bayview Chamber of Commerce has opposed expansion. Present zoning and the Kootenai County Comprehensive Plan prevent expansion.

l. Conflict Groups: C.A.R.E. is a conflicting group representing an existing community with which the site is not compatible.

m. Conflicting Uses: Existing uses as a park and as single family residential, recreational and retirement homes are incompatible with a shooting range.

46. The Farragut Shooting Range as presently operated and maintained is not accessible to disabled persons in violation of the International Building Code as presently incorporated in the Kootenai County Building Code.

FIRST CAUSE OF ACTION

47. As described above, the expansion of the Farragut Shooting Range by defendant of Idaho Fish and Game Department is injurious to the health of plaintiffs, offensive to their senses, an obstruction of their free use of property so as to interfere with their comfortable enjoyment of their lives and their property constituting a nuisance as defined in Idaho Code §52-101.

48. As described above, the actions of the defendant of Idaho Fish and Game Department have resulted in a substantial change and great expansion of the use of the range since January 1, 2003.

49. The identified plaintiffs each own property, are affected by the substantial change and bring this action within three years after the commencement of the substantial change.

50. The Farragutt Range is in large measure pine land with a Ph well below 6.5. Under such Ph conditions lead from spent bullets is exceedingly more mobile. The Subject Range is located over the upper end of the Rathdrum Aquifer. All person, including the plaintiffs are therefore exposed to potential lead contamination of their drinking water as are all persons downward toward the western portion of Kootenai County and the entirety of Spokane County.

51. Each of the plaintiffs has suffered damage in excess of \$10,000.

52. Under date of September 22, 2005, plaintiffs prepared and sent to the Idaho Secretary of State who received it on September 26, 2005 a Notice of Tort Claim setting forth the claims of individual defendants for monetary damages as against the Idaho Fish and Game Department and the State of Idaho.

53. No response of any kind to the tort claim has been received from the defendant Idaho Fish and Game Department within the ninety (90) days period specified in Idaho Code §6-909.

54. As authorized by Idaho Code §52-111, plaintiffs are entitled to a permanent injunction that defendants Idaho Fish and Game Department and Director Steven M. Huffaker restore and close the outer access gate at the

previous location one-half mile from the range, prohibit any other or different access road that would go to the range and restore the operational policy existing in July of 2003 and before limiting the maximum number of shooters to ten (10) or in the alternative require defendants Idaho Fish and Game Department and Director Steven M. Huffaker to take other action that will insure that shooting activity be reduced to the level of operation and noise existing in July of 2003.

SECOND CAUSE OF ACTION

55. Paragraphs 1 through 46 as set forth above are incorporated by reference.

56. Plaintiffs, acting in the capacity of private attorney general or ombudsman, bring this action on behalf of the general public constituting the 150,000 annual users of Farragut State Park.

57. The actions of defendant Idaho Fish and Game Department in making a substantial change and expansion of use have caused interference with the comfortable enjoyment of life and public properties in the customary manner of the public park being Farragut State Park, the present operation being a nuisance as defined in Idaho Code §52-101.

58. As authorized by Idaho Code §52-111, the public is entitled to a permanent injunction requiring defendants Idaho Fish and Game Department and Director Steven M. Huffaker to take whatever action is necessary to restore the operational policy existing in July of 2003 and before limiting the maximum number of shooters to ten (10) and restricting the times of operation.

THIRD CAUSE OF ACTION

59. Paragraphs 1 through 46 as set forth above are incorporated by reference.

60. The present use being made by defendant Idaho Fish and Game Department is a violation of the conditions in the grant deed to the Idaho Fish and Game Department made on June 8, 1950 and in violation of the grant deed made to the State of Idaho for park purposes on December 30, 1965.

61. The deed from the United States of America as grantor to the Idaho Fish and Game Department, as grantee, recorded July 10, 1950 was explicitly subject to the following commitment by the grantee:

The said party of the first part, for and in consideration of the use and maintenance by the party of the second part of the property hereinafter described as a reserve for the conservation of wildlife, other than migratory birds, and the benefits which shall accrue to the United States from the continued use of such property for such purpose. . .(grants)

for the use and benefit of the Idaho Fish and Game Department of said State of Idaho having the management for the conservation of wildlife, other than migratory birds, the following described property, being portions of the facility formerly known as Farragut Naval Training and Distribution Center, and Naval Spur Railroad - Farragut to Athol, Idaho situate, lying and being in the county of Kootenai, State of Idaho, to-wit:
... (description follows).

62. At the date of deed and for several prior years since the Farragut Naval Training Center was closed and vacated, the shooting range used by the Navy for training purposes had been closed and was out of use.

63. On July 28, 1964 through agreement made by Idaho Governor Robert E. Smylie, the State of Idaho deeded back to the United States a major portion of the real property received by deed on July 10, 1956 and thereafter on December 30, 1965, the United States deeded the same property to the State of Idaho ". . . in consideration of the continuous use and maintenance of the hereafter described premises as and for public park and public recreational purposes by the State of Idaho."

64. The State of Idaho has faithfully kept and performed the conditions of the grant by creating Farragut State Park and administering the same through the Idaho Parks and Recreation Department.

65. The operation of shooting range is absolutely incompatible with and directly contradictory to management for conservation of wildlife.

66. The June 8, 1950 deed is subject to the following reverter clause:

The premises herein conveyed are to be continuously used only as for the conservation of wildlife, other than migratory birds, and are conveyed upon the conditions that in the event they are no longer used for such purpose, the title thereto shall revert to the United States, and upon which reversion the title of the State of Idaho shall cease and determine and the United States shall have the immediate right of possession thereof.

Book 145 of Deeds, page 264.

67. The condition is for the benefit of wildlife and for the general public including plaintiffs.

68. The Farragut State Park Resource Plan and G15 Database published by the Idaho State Parks and Recreation Department on February 28, 2001 states as follows on page 40 as related to restrictions on the Idaho Fish and Game property:

VII. MANAGEMENT AND OWNERSHIP, STRUCTURES, UTILITIES, AND TRANSPORTATION

A. Management and Ownership

The Idaho Department of Parks and Recreation and the Idaho Department of Fish and Game have a cooperative management agreement. The Idaho Department of Fish and Game (IDFG) is assigned a conditional deed on the north management zone of Farragut State Park. According to the deed, the land can only be used for wildlife purposes. Development and uses other than wildlife are prohibited. Violation of the deed would result in the land reverting back to the GSA. However, hiking, bicycling, equestrian

use, interpretive wildlife and plant programs and wildlife viewing stations may be established in this zone. IDFG has title on four shoreline parcels near Idlewilde Bay, which are also under this agreement.

69. On the same page, the very limited use of the shooting range as then in existence was described as follows:

The Shooting Range has vault toilets and a rain shelter. Site plans are in process for future development.

70. On page 54 in a listing of 42 structures on all of the property, there were only four identified structures on the shooting range, two shooting shelters, restrooms and a storage building.

71. Pursuant to Rule 65, I.R.Civ.P., the Court should issue a permanent injunction prohibiting the use of any of the property granted to defendant Idaho Fish and Game Department for a shooting range in order to prevent irreparable harm as the reversion occurs, ipso facto, upon the violation of the terms of the conditional deed at worse and most assuredly in the event that the federal government at some future time invokes the reverter clause to take back the property now owned by the State of Idaho.

72. Alternatively that the Court should issue a permanent injunction limiting the use of the shooting range to that level being carried on or about 2002 and enjoining and prohibiting any expansion, development or

improvement to said shooting range which would raise the level of use or increase the noise from shooting above that level existing before defendant Idaho Fish and Game Department commenced development and improvement plans.

FOURTH CAUSE OF ACTION

73. Paragraphs 1 through 46 as set forth above are incorporated by reference.

74. The Master Plan for expansion of the Farragut Shooting Range prepared for defendant Idaho Fish and Game Department by C. Vargas & Associates, Inc. dated March 5, 2004 requires an expenditure of several million dollars over the next five to ten years.

75. The expansion according to the Master Plan certainly and inevitably will increase the noise level in the properties of plaintiffs and the surrounding private recreational, retirement and residential properties and the Farragut State Park.

76. As set forth in the Arizona Game and Fish Workbook, Location Assessment, subparagraph "c" in Paragraphs 44 and 45 above, the only certain method to avoid excessive noise is distance and the shooting range does not have and cannot obtain the necessary distance.

77. Plaintiffs are entitled to judgment of this Court that defendants Idaho Fish and Game Department and Director Steven M. Huffaker cease all efforts to obtain funds and to carry out said Master Plan.

FIFTH CAUSE OF ACTION

78. Paragraphs 1 through 46 as set forth above are incorporated by reference.

79. The present operation of the Farragut Shooting Range is in violation of each of the following policies, regulations, ordinances and laws:

A. The Farragut Shooting Range facilities as modified and constructed within the last two years do not meet the required standards of the American Disabilities Act as incorporated in the Kootenai County Building Code.

B. Defendant Idaho Fish and Game Department has not initiated the procedures required under the National Environmental Policy Act as required by the regulations of the United States Fish and Wildlife Service as a condition to receive federal funds.

C. In the September 18, 2003 recommendations of the Citizens Advisory Committee (CAC) presented to the Board of Directors of the Idaho

Department of Parks and Recreation, the following was made for the Farragut State Park Natural Resource Plan (FSPNRP):

6. Revenues generated from timber sales in Farragut Park (which includes Fish & Game ownership) should be held in reserve for FSPNRP non-commercial, natural resource management projects at Farragut Park such as pre-commercial thinning, planting, weed control, etc.

In violation of that recommendation, defendant Fish and Game Department in 2005 took 100% of receipts generated from timber sales totalling \$38,647.50 as site developments exclusively for the Farragut Shooting Range.

80. Based on the foregoing defendant, Idaho Fish and Game Department should be required to close the Farragut Shooting Range until such times as it complies with the applicable policies, regulations, ordinances and laws.

WHEREFORE, plaintiffs pray judgment as follows:

1. Under the First Cause of Action, for judgment awarding plaintiffs damages for injuries and losses incurred personally and to their properties caused by operation of the Farragut Shooting Range since January 1, 2003.

2. Under the First and Second Cause of Actions for a permanent injunction directing the defendants Idaho Fish and Game Department and

Director Steven M. Huffaker to close present access road to the range and any other roads directly to the range and to reduce the average daily and monthly operations on the shooting range to the average use existing prior to January 1, 2003.

3. Under the Third Cause of Action, for a permanent injunction prohibiting defendants Idaho Fish and Game Department and Director Steven M. Huffaker from allowing any use whatsoever of property owned by the State of Idaho at the former Naval Training Center as a shooting range or in the alternative limiting shooting activity to the level in 2002.

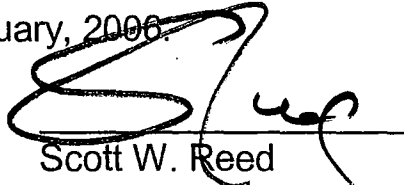
4. Under the Fourth Cause of Action, for judgment that defendants Idaho Fish and Game Department and Director Steven M. Huffaker cease and desist from any further efforts to obtain funds or carry out in any manner the Vargas Master Plan.

5. Under the Fifth Cause of Action for appropriate injunctive relief as set forth therein.

6. For an award of costs and attorney's fees.

7. For such other relief as the Court may deem just and proper.

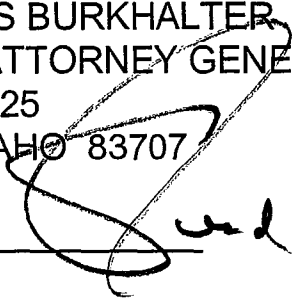
Dated this 10th day of February, 2006.


Scott W. Reed
Attorney for Plaintiffs

CERTIFICATE OF MAILING

I certify that a copy of the above and foregoing is sent by first class mail, postage prepaid, this 10th day of February, 2006 to:

W. DALLAS BURKHALTER,
DEPUTY ATTORNEY GENERAL
P. O. BOX 25
BOISE, IDAHO 83707



STATE OF IDAHO
COUNTY OF KOOTENAI
FILED: **ORIGINAL**

2006 JUL 26 PM 4:48

Shanley
CLERK DISTRICT COURT
DEPUTY

Scott W. Reed, ISB#818
Attorney at Law
P. O. Box A
Coeur d'Alene, ID 83816
Phone (208) 664-2161
FAX (208) 765-5117

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

**CITIZENS AGAINST RANGE)
EXPANSION, an unincorporated)
non-profit Association; JEANNE J.)
HOM, a single woman; EUGENE and)
KATHLEEN RILEY, husband and)
wife; LAMBERT and DENISE RILEY,)
husband and wife; GABRIELLE)
GROTH-MARNAT, a single woman,)
GERALD PRICE, a single man;)
RONALD and DOROTHY)
ELDRIDGE, husband and wife; and,)
GLENN and LUCY CHAPIN, husband)
and wife, SHERYL PUCKETT, a)
single woman; CHARLES MURRAY)
and CYNTHIA MURRAY, husband)
and wife; and DAVE VIG, a single)
man,)**

Plaintiffs,

v.

**IDAHO FISH AND GAME)
DEPARTMENT, an agency of the)
STATE OF IDAHO, and STEVEN M.)
HUFFAKER, Director of the IDAHO)
FISH AND GAME DEPARTMENT,)**

Defendants.

Case No. CV-05-6253

**AFFIDAVIT OF ROY H. RUEL IN
SUPPORT OF PLAINTIFFS' MOTION
FOR SUMMARY JUDGMENT**

AFFIDAVIT OF ROY H. RUEL

STATE OF OREGON)

ss.

COUNTY OF MULTNOMAH

Roy H. Ruel, being first duly sworn, deposes and says:

I am a licensed professional engineer and provide expert consulting services regarding firearms and firearm issues.

Attached hereto is my curriculum vitae and professional resume. The facts stated therein are true and correct.

Counsel for plaintiffs has furnished certain documents related to the Farragut Shooting Range at Farragut State Park operated by the Idaho Fish and Game Department including the proposed expansion. Among the documents reviewed by me are the following:

1. "State of Idaho Master Plan and Definitive Drawing Farragut Shooting Range", July 2004 prepared by C. Vargas & Association, Ltd.
2. One page "Welcome to Farragut State Park" illustrating at scale "shooting ranges" and other present developments in the park.
3. "Farragut Shooting Range Standard Operating Procedures Manual", "Draft", published under the names of Idaho Department of Fish and Game and Idaho Department of Parks and Recreation.
4. Idaho Department of Fish & Game letter of 10 January 2003 to Clark Vargas & Associates, LTD requesting assistance.
5. Idaho Department of Fish & Game Memorandum of 21 August 2003 with attached scope of work.

AFFIDAVIT OF ROY H. RUEL

6. USGS and County maps and aerial photo of the area including the range and surrounding area.

In addition I have examined a number of publications regarding outdoor shooting range design and safety including the following:

1. National Rifle Association of America "The Range Source Book" published by National Rifle Association Range Department, November, 1999 including "Exterior Ballistic Table" for center-fire rifle cartridges.

2. Department Of The Air Force "Engineering Technical Letter: Small Arms Range Design and Construction", 8 Nov 2005

3. Range Safety Army Regulation 385 - 63 MCO 35670.1B dated May 19, 2003.

It is my professional opinion that the shooting range as presently existing and also as set out and described in the State of Idaho Farragut Shooting Range Master Plan and the Standard Operating Procedures Manual poses a hazard to persons in Farragut Park and dwellings and persons downrange from the firing lines.

The documents and drawings pertaining to the Farragut Shooting Range reviewed by the writer as noted above were incomplete in as much as the facility design was specified by Idaho Fish & Game to be only approximately 70% complete. It is, however, apparent from the review that the Farragut Shooting Range, both as now existing and as set out and described in the July 2004 Master Plan, poses a clear and unreasonable safety hazard to park users as well as nearby property and residents. In addition, it was concluded, given the proposed range configuration, that there was no

AFFIDAVIT OF ROY H. RUEL

economically feasible solution to the problem of off-range safety.

From a review of the Idaho Department of Fish and Game's Request For Proposals and their chosen designers Scope of Work the following deficiencies were noted:

- The Idaho Department of Fish and Game's RFP addressed "public safety" but did not specifically require that range design proposals address, evaluate, and insure the safety of the residences in the Farragut Range area.
- The Idaho Department of Fish and Game's RFP failed to include information or documents pertaining to the number of and locations of residences in the Range area.
- The Idaho Department of Fish and Game's consultant's scope of work did not require that the design of the ranges address, evaluate, and insure the safety of the residences in the area.
- The Idaho Department of Fish and Game's consultant's scope of work specified that hi-power rifle ranges be included in the design, but failed to require that the design of these ranges insure the safety of the residences in the area.
- The Idaho Department of Fish and Game's consultant's scope of work did not include addressing safety issues for the residences in the area.
- The Idaho Department of Fish and Game's consultant's scope of work failed to include information or documents pertaining to the

AFFIDAVIT OF ROY H. RUEL

4 of 9

number of and locations of residences in the area.

- The Idaho Department of Fish and Game's Range consultant's design drawings show the potential for bullets impacting off-range, but do not show the residences in the impact area.

Thus it appears from a review of the documents the Farragut Shooting Range designers were unaware of the properties and homes located down-range of the range facilities they had been ordered to design.

A review of the relative locations of the Farragut Shooting Range and the down-range properties and residences determined that the proposed ranges as designed pose a safety hazard as their Surface Danger Zones (SDZ) extend outward to include park lands as well as private non-range controlled property. A SDZ describes that area both vertical and horizontal in which bullets fired from the range can land. This conclusion is confirmed by the SDZ data shown on the Idaho Master Plan drawings.

For example a bullet fired from a military rifle such as a 30.06, can travel for a distance of 5,249 yards or 15,747 feet or 2.98 miles. A pistol bullet can travel 2,077 yards or 6,231 feet or 1.18 miles. Thus bullets from both rifles and pistols can land where persons may walk, drive and live.

My analysis, however, indicates a larger SDZ than shown on the Master Plan drawings. The SDZ indicated on the Idaho Master Plan drawing is understood and appears to be based on military and NRA range standards. These standards, however, have limited application to Farragut as they apply only to shooting ranges with controlled access, certain types of

AFFIDAVIT OF ROY H. RUEL

5 of 9

weapons and cartridges, and most critical, having a high degree continuous on-the-firing-line supervision and timely enforcement of range rules.

The military and NRA standard SDZ are based on relatively minor deviations and ricochets from the true line of site and do not consider the unsupervised intentional or accidental off-range shot. Thus a realistic danger zone for the Farragut ranges must be considerably larger than as shown on the Master Plan drawings.

As noted above, included in the documents reviewed was the "Draft" of the "Farragut Shooting Range Standard Operating Procedures". It was noted that the critical sections regarding supervision and enforcement of the range rules were not included. There is, however, sufficient information presented to clearly establish that there will be unsupervised shooting on the ranges:

- 1) It is understood that as presently operated, use of the shooting range is allowed to the public without supervision.
- 2) It is stated that groups of shooters may provide their own supervision.
- 3) The range will be open to individual shooters at all times during normal days and hours of operation.
- 4) No range staffing plan is included in the operating plan.

It is accepted safety standards that two qualified range officers must be present during all periods of time that any particular range is open. In the case of the Farragut range this would require a minimum of 14 range qualified range officers. Unless each range is supervised when in use,

AFFIDAVIT OF ROY H. RUEL

6 of 9

shooters may fire in directions, and from positions and locations of their choosing. The lack of enforcement of the rules renders the use of baffles, berms, and backstops of limited value in limiting the SDZ as they are easily circumvented by unsupervised shooters either by accident or by intent.

In addition adequate enforcement includes controlling access to range property at all times to prevent unauthorized entrance and use of the ranges.

Limited overhead containment is indicated on the drawings for the 100 and 200 yard rifle ranges and the pistol ranges; however, it would not be completely effective as it would not stop many rifle cartridges and in any event would be readily circumvented by shooters in an unsupervised range. No overhead containment is indicated for the 200-600 yard range, and no adequate overhead containment is considered to be economically feasible.

The same objections apply to the earthen backstops shown on the drawings. That is they are easily circumvented and do nothing to limit the SDZ.

It is clear, from a review of the documents, that the rifle ranges pose the greatest hazard to park occupants, and the properties and homes in the SDZ. Many common rifle cartridges that will be used at the rifle ranges can easily reach residences in the area.

To eliminate the hazard posed, the rifle ranges would have to be redesigned to include containment to eliminate the "blue-sky" view from all potential shooting positions. Containment must not only be from all firing

AFFIDAVIT OF ROY H. RUEL

7 of 9

positions shown on the plans, but all so from the impromptu locations that can be anticipated and available to be established by shooters. From any practical economic standpoint such full containment is considered impractical for high power rifle ranges of the type proposed.

Given the broad cross section of shooters and visitors with a wide range of shooting experience, knowledge and attitudes, range management and adequate knowledgeable staffing with the power to continuously and immediately enforce range rules during shooting is extremely important both to on-range and down-range safety. In addition it is critical to insure that all shooters using the range have a basic knowledge of firearms, their capabilities, and firearms safety. Even given all the above, accidents have and will happen at the best controlled ranges.

Basically there are two principle means to make the existing or proposed Farragut Shooting Range safe for those residences in the nearby areas:

- 1) The range SDZ is contained within range controlled boundaries with limited and controlled access.
- 2) Complete containment to eliminate the "blue-sky" view from all ranges.

Neither of the above solutions appears economically feasible for the Farragut Shooting Range.

Simple modification of the proposed or providing additional backstops, berms, and walls would not change the Surface Danger Zone to exclude the properties and residences in the range vicinity.

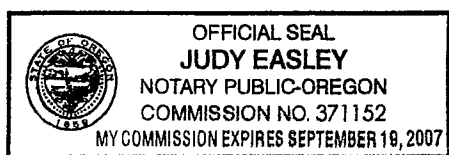
AFFIDAVIT OF ROY H. RUEL

8 of 9

Therefore it is my conclusion that the Farragut Range as it presently exists or as it has been redesigned poses a serious hazard to properties and persons in the vicinity.

Roy H. Ruel
Roy H. Ruel

SUBSCRIBED AND SWORN to before me this 25 day of July, 2006.



Roy H. Ruel
Notary Public for Oregon *Judy Easley*
Residing at *Irisham*
My Commission Expires: *9-19-07*

CERTIFICATE OF MAILING

I certify that a copy of the above and foregoing is sent by first class mail, postage prepaid, this 20th of July, 2006 to:

W. DALLAS BURKHALTER
DEPUTY ATTORNEY GENERAL
P. O. BOX 25
BOISE, IDAHO 83707

W. Dallas Burkhalter

AFFIDAVIT OF ROY H. RUEL

9 of 9

Portland, Oregon

Phone (503) 708-9119

In Hawaii Phone (808) 341-6483

E-Mail: rhr@all-engineers.com

Main Web Page: ALL-ENGINEERS.COM

CURRICULUM VITAE FOR ROY RUEL, ME, PE SHOOTINGS AND FIREARMS CONSULTANT

- ❑ **Licensed Professional Mechanical Engineer**
- ❑ **Experienced in Shooting Litigation, Criminal and Civil**
- ❑ **Firearms, Air/CO₂ Guns, Paintball Guns**
- ❑ **Plaintiffs and Defendants**
- ❑ **Shooting Investigation, Reconstruction and Analysis**
- ❑ **Examination and Analysis of Firearm Design, Function & Safety**
- ❑ **Product Liability Litigation Including Malfunctions and Blow-ups**

PROFESSIONAL OVERVIEW

- Roy Ruel, a graduate licensed professional mechanical engineer, working from Portland, Oregon, consults regarding all types of shooting incidents, investigations, reconstructions, and causation.
- With twenty years background in firearms and firearms function, mechanics, and safety, augmented by seven years of US Army active duty and reserve service with expert qualification in military small arms. Experienced in a broad range of weapons, he consults regarding shootings with pistols, revolvers, rifles, shotguns as well as paintball and CO₂ air-guns. Work has included Glock, Steyr, Colt, Browning, Remington, Smith & Wesson, Sig-Sauer, H&K, Walther, Daisy, Brass-Eagle, and many others.
- As a licensed professional engineer, Roy is particularly well qualified in accidental discharge and product liability litigation including analysis of design, safety, malfunctions, failures, failure-to-warn, and accidental discharges.
- He has provided expert services to the legal profession on shooting investigation, reconstruction, and causation analysis. Casework has involved accidental and intentional shootings for criminal defendants and for both plaintiff and defendant in civil cases.
- He is skilled in analysis and critique of state crime laboratory gun examinations and the preparation of interrogatories, and document requests, and affidavits, reports and presentations.
- "National recognized firearms expert", New York Post and Boston Herald. Expert consultant including televised appearances to channel KATU (ABC Portland, Oregon April 2003).
- Consulted by law enforcement departments on firearms issues in the US and abroad.

EXPERT QUALIFICATIONS:

- Experienced expert consultant to the legal profession in over twenty firearm related civil and criminal cases for both plaintiffs and defendants.
- Federal and State court experience.
- Experienced in accident investigation, reconstruction and analysis.
- Licensed mechanical engineer in three states with over forty years professional experience.
- Published author in the popular press devoted to firearms. Author of articles on design, functioning, and firearms safety (See below).
- Former Contributing Editor on the staff of "HANDGUNS ILLUSTRATED" magazine.
- Military service, Korean Conflict, US Army 7th Cavalry Regiment. US military firearms instructor and qualified expert, M1 rifle, M3 Carbine, M1911 pistol. ROTC rifle team.
- Analysis of short range and interior ballistics.
- Experienced in hand-loading pistol caliber ammunition for both semi-automatic and revolver handguns.
- Extensive testing, studies, evaluation, and range work with all types of firearms.
- Long-term shooter and collector of civilian, military and police firearms of historical and technical interest.

EDUCATION:

- Bachelor of Science in Mechanical Engineering from the University of Washington in Seattle.
- Graduate of the American Management Association Management School.
- Self-directed technical studies in firearms, their function, operation, recoil, mechanics, internal ballistics, and safety.
- Glock armorer's school.

FIREARMS LITIGATION EXPERIENCE:

- Expert consultant in an Oregon case involving the blow-up of a pistol firing out of battery.
- Expert consultant in an Idaho case involving the off-range safety of a multiple use new rifle, pistol, and shotgun range.
- Expert consultant for the plaintiff in a Florida case involving an eye injury and loss of sight with a CO₂ air-gun. (In progress.)
- Expert consultant for the plaintiff in a Texas case involving a fatal accidental discharge of a Glock pistol when being inserted into its Glock plastic box. (In progress.)
- Expert consultant for the plaintiff in a New York case involving an accidental self-inflicted eye injury and loss of sight with a paintball gun (In progress.)
- Expert consultant for the plaintiff in an Oregon case involving the failure and blow-up of a Glock Model 21 45 pistol. (In progress.)
- Expert consultant for the plaintiff in a Texas case involving an accidental shooting and eye injury and loss of sight with a paintball gun. (In progress.)

Page 2 of 4

- Expert consultant for the plaintiff in a New York case involving an accidental shooting with a Glock pistol with a "tactical light" of a police officer during a SWAT operation. (In progress.)
- Expert consultant for the plaintiff in a Missouri civil case involving an accidental shooting and mechanical failure while plaintiff was attempting to load a bolt-action rifle. (In progress.)
- Expert consultant in a Massachusetts criminal case involving review of defendant's life sentence conviction and prison sentence for a homicide involving a semi-automatic pistol. (In progress)
- Expert consultant for the defendant New Your City, civil case involving police shooting of plaintiff armed with a CO₂ powered air pistol resembling a 357 Magnum revolver.
- Expert consultant for the defendant seller in a West Virginia civil case involving an accidental self-inflicted shooting while plaintiff was hunting with a rifle.
- Expert consultant to the plaintiff in a Maine civil case involving an accidental self-inflicted head injury with an air-rifle. (In progress.)
- Expert consultant in a West Virginia civil case involving the accidental shooting by a young child of another with a semi-automatic Glock pistol. (In progress.)
- Expert consultant to a Florida Agency criminal case reviewing defendant's guilty plea and subsequent death penalty conviction for a double homicide involving Glock and Smith & Wesson pistols. Weapons examination and Florida State Court expert testimony. (In progress.)
- Expert consultant in a New York civil case involving severe injuries to another resulting from the unintentional discharge of a County probation officer's Glock pistol.
- Expert consultant to plaintiff in a Nebraska civil case involving a disabling injury resulting from a blow-up when firing a Remington Model 760 rifle.
- Expert consultant in an Oregon criminal case involving inspection held of the evidence to determine if an attempt was made to fire a Ruger semi-automatic pistol.
- Expert consultant in a Florida civil case involving the accidental discharge of a Smith & Wesson revolver.
- Expert consultant in an Illinois criminal case based on the visual identification of a Tokerev semi-auto pistol by a witness during a bank robbery. Based on expert report defendant acquitted of charge
- Expert consultant to defendant in a North Dakota criminal case. Defendant charged with capital murder involving a Marlin 70 .22 rifle. Defense contended that the rifle accidentally discharged when struck lying in the lap of the defendant while wheeling his wheelchair past victim. Based on expert analysis of the shooting the charge was reduced from capital murder to manslaughter.
- Expert consultant to Washington County Oregon, Public Defender in a criminal case involving alleged robbery with a Norinco "Tokarev" pattern pistol.
- Expert consultant to Washington County Oregon, Public Defender in a criminal case involving alleged attempted murder with a Marlin rifle.
- Expert consultant to a Texas based U.S. Customs Service Agent regarding his dismissal from the service as a result of an accidental discharge of his Glock Model 17 Federal issue semi-automatic pistol. Expert testimony in Federal Court.
- Expert consultant in an Arizona civil case involving severe injuries from a self-inflicted gun shot wound with a Star semi-automatic pistol.

- Expert consultant to defendant in Colorado criminal case involving a fatal shooting with a TEC-22 semi-automatic pistol.
- Expert consultant for plaintiff in an Arizona civil lawsuit regarding plaintiff's accidental gunshot wound from a Glock Model 22 police issue semi-automatic pistol.
- Expert consultant for defendant in a Hawaii civil lawsuit regarding plaintiff's accidental self-inflicted gunshot wound. Accident investigation and analysis.

OTHER LITIGATION EXPERIENCE:

- Expert Consultant to plaintiff in a Mississippi civil case involving a fatal accident in a wood chipper..
- Expert consultant to plaintiffs in a Virginia case involving severe injuries resulting from an explosion in a ammo loading machine in operation in a facility during manufacture of frangible ammunition.
- Expert consultant to the defendant in an Ohio civil case regarding plaintiff's injury received when his hand was caught in the ingoing nip between the reel drum and a reel spool.
- Expert consultant for plaintiff in lawsuit regarding plaintiff's accident and loss of life during machine operations in a Washington State lumber mill. Accident investigation, expert hazard assessment report, discovery, document requests, and interrogatories preparation.
- Expert consultant for plaintiff in a Hawaii lawsuit regarding plaintiff's injury accident from machine operations in a food preparation facility.
- Expert consultant for plaintiff in lawsuit regarding plaintiff's accident and loss of life during machine operations in an Oregon wood chipping facility.
- Expert consultant for plaintiff in lawsuit regarding plaintiff's accident and loss of lower limb, during machine construction work in a Washington paper mill.
- Expert consultant to a major worldwide engineering corporation as defendant regarding a lawsuit involving a fatality in a mid-west paper mill. Accident investigation, expert report, discovery and document requests, and deposition.

PUBLICATIONS:

A list of Mr. Ruel's published firearms articles available on request.

Roy Ruel, ME, PE

July 26, 2006

FILED 9-19-06

AT 2:13 O'Clock P M
CLERK OF DISTRICT COURT

[Signature]
Deputy

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

CITIZENS AGAINST RANGE EXPANSION,
et al,

Plaintiffs,

vs.

IDAHO FISH AND GAME DEPARTMENT,
an agency of the STATE OF IDAHO, et al.

Defendants.

Case No. **CV 2005 6253**

**MEMORANDUM DECISION AND
ORDER DENYING PLAINTIFFS'
MOTION FOR SUMMARY
JUDGMENT, AND ORDER SETTING
BRIEFING SCHEDULE**

I. PROCEDURAL BACKGROUND.

On August 22, 2005, plaintiffs filed their Complaint in this matter. Defendants filed an Answer on September 16, 2005. On November 9, 2005, this Court set the matter for a five-day jury trial scheduled to begin on July 17, 2006. On February 9, 2006, plaintiffs filed an Amended Complaint. On March 13, 2006, this Court, pursuant to the parties' stipulation, vacated the July 17, 2006 trial, and scheduled this for a jury trial beginning September 18, 2006. Following a hearing on June 2, 2006, this Court granted plaintiffs' motion to vacate the trial date of September 18, 2006, and scheduled this matter for jury trial beginning December 11, 2006.

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

1. For a permanent injunction prohibiting defendant Idaho Fish and Game Department, its agents and employees from operating or allowing anyone to

use the existing Farragut Shooting Range as a shooting range in its present condition.

2. For a permanent injunction prohibiting defendant Idaho Fish and Game Department, its agents and employees from any further action to implement or carry out the Vargas Master Plan and Definitive Drawings, Farragut Shooting Range, July 2004.

Motion for Summary Judgment, p. 2. The Motion for Summary Judgment was supported by "Brief of Plaintiffs in Support of Plaintiffs' Motion for Summary Judgment", "Plaintiffs' Statement of Material Facts Not in Dispute", "Plaintiffs' Appendix of Relevant Publications in Support of Motion for Summary Judgment", and the Affidavits of Marcelle Richman, Duane Nightengale and Roy H. Ruel. On August 30, 2006, defendants filed "Defendants' Memorandum in Opposition to Plaintiffs' Motion for Summary Judgment", "Defendants' Statement of Material Facts in Dispute", "Defendants' Appendix of Relevant Documents" and affidavits of Clark Vargas, P.E., Randall Butt and David Leptich. On September 5, 2006, plaintiffs filed "Plaintiffs' Reply Brief in Support of Motion for Summary Judgment" and various certifications of documents. On September 7, 2006, plaintiffs re-filed "Plaintiffs' Reply Brief in Support of Motion for Summary Judgment", this time attaching a "Comparison Vargas Affidavit With Vargas Design Criteria".

Oral argument was held on September 13, 2006, on the Plaintiffs' Motion for Summary Judgment. That motion was taken under advisement. Plaintiffs had also filed a Motion to Strike the Affidavit of David Leptich to the extent it included the Range Evaluation Report prepared by Edward M. Santos. The Court granted the motion as it was hearsay. At oral argument on September 13, 2006, defendants' attorney tendered to the Court for filing the Affidavit of Edward M. Santos, attaching his Range Evaluation Report. Plaintiffs objected as to the timeliness of Santos' affidavit. The Court in its discretion overruled the plaintiffs' objection as to timeliness, as the parties have been aware of the Range Evaluation Report for some time.

The Court had reviewed all briefing and affidavits at the time of oral argument, but due to the amount of material presented to the Court, the Court took the matter under advisement to review all submissions again. Accordingly, the matter is at issue.

II. FACTUAL BACKGROUND.

The Farragut Wildlife Management Area was formerly the site of the Farragut Naval Training Center established by the United States Navy in 1942. Land acquisition by the defendant Idaho Department of Fish and Game (IDF&G) started in 1949 when four separate parcels were purchased that bordered Lake Pend Oreille. Idaho Fish and Game's ownership at Farragut Park presently consists of approximately 1,413 acres. This is made up of four parcels totaling 157 acres on the shore of Lake Pend Oreille and one 1,256 acre parcel located west of Bayview, Idaho. The Farragut Shooting Range occupies a site of approximately 160 acres and has been used as a shooting range since the land was owned by the United States Navy. The surrounding neighborhood consists of private residential houses, a public road (Perimeter Drive), school bus stops and hiking trails.

The use of the Farragut Shooting Range has expanded a great deal since 2002. Use went from 176 shooters in 2002, to 370 shooters in 2004, to 509 in 2005 only through August of that year. Plaintiffs' Brief in Support of Motion for Summary Judgment, p. 25, n. 2.

A public proposal for the improvement of the Farragut Shooting Range made by the IDF&G seems to be what precipitated this lawsuit. In 2004, the IDF&G published a proposal to improve the Farragut Shooting Range with the investment of \$3,600,000. That proposal was based on the Vargas Master Plan. The Vargas Master Plan

proposed making improvements to the Farragut Shooting Range in the areas of public safety, public access, noise mitigation, facility quality and management. Plaintiffs claim that although the plan purports to make improvements to the shooting range, the plan will also expand the shooting range by lengthening the range from 500 to 600 yards, adding berms, parking and intermediate firing positions, and including trap and skeet fields, mounted cowboy action areas, and 130 shooting stations.

In 1996, Clark Vargas, a professional engineer, published a paper for the 1996 Third National Shooting Range Symposium, which was intended to provide a general review of range design criteria when selecting a shooting range site. This paper set forth nationally-recognized safety standards for construction and operation of shooting ranges. The Vargas Master Plan is inconsistent with the range design criteria Vargas discussed in his 1996 Third Shooting Range Symposium.

Plaintiff CARE is an unincorporated non-profit association formed for the purpose of unwarranted expansion of the Farragut Shooting Range (Complaint, p. 2, ¶ 1), and the individual plaintiffs live near the Farragut Shooting Range. Plaintiffs claim these expansions cannot be done safely because the IDF&G does not own enough property nor have enough money to make these improvements safe. Plaintiffs seek to enjoin IDF&G from carrying out the Vargas Master Plan. Idaho Fish and Game claims there is no plan to *expand* the Farragut Shooting Range, either in geographic size, shooter capacity, or types of shooting activity, but only to *improve* it.

As set forth above, plaintiffs seek summary judgment, asking this court to permanently enjoin the IDF&G from continued operation of the range and future implementation of the Vargas Master Plan. Specifically, plaintiffs ask this Court in their first cause of action for a permanent injunction that requires IDF&G to restore and close

the outer access gate, prohibit any other or different access road to the range and restore the operational policy that existed in July of 2003. Plaintiffs' second cause of action asks the Court for a permanent injunction against any expansion to the shooting range and restoring it to its July 2003 operations. Plaintiffs assert that if summary judgment is entered in the first two causes of action, they will stipulate to a dismissal of all claims for damages and will dismiss with prejudice their third, fourth and fifth causes of action.

III. PARTIES' POSITIONS.

A. **The claim that the Farragut Shooting Range unsafe, and therefore a nuisance under Idaho Code §52-101, because of its limited size and location.**

The Surface Danger Zone (SDZ) is defined in Army Regulation 385-63 as the "ground and airspace designated within the training complex (to include associated safety areas) for vertical and lateral containment of projectiles, fragments, debris, and components resulting from the firing, launching, or detonation of weapon systems to include ammunition, explosives, and demolition explosives." Plaintiffs argue the Farragut Shooting Range is in violation of all accepted safety standards for shooting ranges, primarily because of its limited size, and therefore constitutes a nuisance. Plaintiffs argue the Surface Danger Zone is too small, and located within the SDZ are homes, public roads and school bus stops where the plaintiffs and the public are at risk of being struck by errant bullets. Plaintiffs' Brief in Support of Motion for Summary Judgment, pp. 5-7; 12-13, 15, 23, Plaintiffs claim the Vargas Master Plan fails to provide the necessary safety standards imperative to keeping errant bullets from straying out of the shooting range and onto private property. Plaintiffs claim the

Farragut Shooting Range, as it presently exists, or as it has been redesigned, poses serious hazards to properties and persons within the vicinity. Plaintiffs argue that in order to eliminate such hazards the shooting range must be redesigned to include complete bullet containment and eliminate the "blue sky" view from all potential shooting positions through the use of overhead baffles. *Id.* pp. 15-17.

Plaintiffs assert the design criteria as stated in the Vargas Master Plan do not live up to the standards Mr. Vargas enunciated in his address to the 1996 Third National Shooting Range Symposium. *Id.* pp. 7-8. Plaintiffs claim Mr. Vargas disregarded most of his own advice by failing to create a plan that allowed for all safety factors to be considered. Plaintiffs argue the distance from the firing lines to the exterior boundaries of the range varies between one-half mile to the north and two miles to the east, falling short of the three miles needed for the types of guns being shot at the range. Plaintiffs claim that approximately three-quarters of a mile down range are private homes, streets, and bus stops that fall within the SDZ. Plaintiffs argue that if a round escapes from the shooting range, it will fall into private property or parkland open to the public.

Plaintiffs also argue that a shooting range that is located in a populated area, such as the Farragut Shooting Range, must be totally baffled so that a round cannot escape. Plaintiffs apply standards from the National Rifle Association (NRA) and the U.S. Army and Air Force to the SDZ and argue that safety cannot be met unless and until the range is fully baffled. Plaintiffs argue the berms and baffles now on the range, as well as those designed in the Vargas Master Plan, fall short of the requirements needed to contain the types of bullets being used on the range.

IDF&G argues the Surface Danger Zone is a concept developed by the Army to

describe the area of imminent danger during **military** training and does not apply to civilian recreational ranges. Defendants' Memorandum in Opposition to Summary Judgment, pp. 9-10. IDF&G also argues the "no blue sky" concept is a design concept that refers to the maximum level of bullet containment through the use of overhead baffles, sideberms and backstops, and most civilian ranges do not warrant or require this degree of safety design. *Id.* pp. 11-12. IDF&G claims the Farragut Shooting Range has a substantial backstop which exceeds the NRA guidelines by ten feet and there is dense forest cover beyond the backstop. IDF&G asserts the Farragut Shooting Range, as currently used and planned, meets and exceeds the minimum NRA guidelines.

IDF&G argues the Vargas Master Plan is merely a proposal to make improvements to the already existing shooting range, not a proposal to expand the range. Mr. Vargas opines that the Farragut Shooting Range, as currently constructed, exceeds the minimum safety guidelines as outlined by the NRA and further believes the Vargas Master Plan will only increase the safety of the range. IDF&G claims they requested a range safety evaluation from the NRA, which concluded that there were no safety issues that conflicted with the NRA safety guidelines, and concluded the Farragut Shooting Range is a safe facility with sufficient operational and physical control systems in place to ensure the safety of both those using the range and the general public.

IDF&G argues plaintiffs have misinterpreted or misapplied military standards, which are not applicable to civilian or recreational ranges. IDF&G argues the NRA Range Source Book is only a guidance document for civilian or recreational shooting range design and management and is not a substitute for professional engineering. IDF&G argues the Farragut Shooting Range exceeds minimum safety guidelines as outlined by the NRA and does not pose an unreasonable safety risk to the public.

IDF&G claims the Vargas symposium paper should not be relied on by the plaintiffs because it was provided as a general review of design criteria to impress the importance of range site selection and was not meant to provide regulatory guidance.

B. Is the Farragut Shooting Range unsafe and therefore a nuisance under Idaho Code §52-101 because there is no direct supervision by the IDF&G?

Plaintiffs argue the Farragut Shooting Range is an unsupervised range where the rules are not strictly enforced nor personally communicated to shooters. Plaintiffs' Brief in Support of Motion for Summary Judgment, pp. 17-23. Plaintiffs claim there is no supervision by IDF&G for groups under ten, and groups over ten must provide their own supervision. Plaintiffs assert the range rules are merely suggestions, and confusing ones at that, because there are four different sets of shooting rules which lack clarity and personal enforcement. Plaintiffs argue the shooting range is not safe because there are no range managers on site to supervise the shooters and shooters are not controlled. Plaintiffs argue this makes the Farragut Shooting Range unsafe and therefore a nuisance under Idaho Code § 52-101 because it interferes with the plaintiffs' use and enjoyment of their homes and surrounding land, life and health. Plaintiffs claim that public use of the range without supervision is unreasonable, and the threat of errant bullets greatly outweighs the utility of the park to the IDF&G.

IDF&G argues direct supervision is not required for civilian recreational shooting ranges. Defendants' Memorandum in Opposition to Summary Judgment, pp. 13-14. IDF&G argues there is no national standard requiring range officers or masters for civilian ranges, and absence of direct supervision in no way implies that a range is unsafe. IDF&G argues operational control of the range is provided in that range users

must check in at the visitors' center, read and acknowledge the range rules, and use the shooting range in compliance with the rules. IDF&G acknowledges that recommended changes have been suggested to the range check-in procedures and range signage that will only help to improve the safety.

IV. ANALYSIS.

There are factors which preclude granting summary judgment for plaintiffs. These factors include factual disputes, the burden of proof upon the plaintiffs, disputes as to the appropriate legal standard and the timing of the Motion for Summary Judgment.

As to the timing of the Motion for Summary Judgment, the trial is but three months away, and plaintiffs are seeking a legitimate but extraordinary remedy short of that jury trial. The range has been in existence for over sixty years. While this Court appreciates the danger of a round leaving the range, when evaluating whether plaintiffs are entitled to the injunctive relief they seek on summary judgment, the Court cannot ignore the immediacy of trial compared to more than sixty years without incident.

At summary judgment, as at trial, the standard placed upon plaintiffs is higher than a preponderance of the evidence. *Larsen v. Village of Lava Hot Springs*, 88 Idaho 64, 73, 396 P.2d 471 (1964), discussed below, essentially places a clear and convincing standard upon plaintiffs. Idaho Code § 52-101 defines a nuisance as:

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

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

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

58 Am Jur. 2d, Nuisance, §211. The locality and surroundings of the challenged operation or thing becomes an important factor in arriving at a judicial decision as to the existence or non-existence of an actionable nuisance. *Oak Haven Trailer Court, Inc. v. Western Wayne County Conservation Association*, 3 Mich.App. 83, 89, 141 N.W. 2d. 645 (1966). All the surrounding circumstances are of extreme importance in determining whether a gun club and its activities do in fact constitute a nuisance. *Id.* Whether some of the activities of the gun club constitute a nuisance is a question of fact for the court to consider. 3 Mich.App. at 90.

In order to obtain an injunction against, or the abatement of, an alleged nuisance, the complaining party must show a *clear case* supporting his right to relief. *Larsen v. Village of Lava Hot Springs*, 88 Idaho 64, 73, 396 P.2d 471 (1964). (emphasis added). A showing that there is a possibility of injury will not sustain the injunctive relief sought. *Id.* Mere apprehension is insufficient to grant injunctive relief against a claimed nuisance and relief cannot be granted to Plaintiffs merely on the claim that there “exists’ a fear in their minds, even though there is no actual danger.” *Smith v. Western Wayne County Conservation Association*, 380 Mich. 526, 543, 158 N.W. 2d 463 (1968). There is no Idaho case law directly on point. However, in *Smith v. Western Wayne County*, the plaintiff claimed the defendant’s shooting range was a nuisance because, even if found safe, the “fears in the minds of the residents resulting from its operation and use” rendered it a nuisance in violation of their right to

“comfortable enjoyment of life or property.” *Id.* at 541. The Michigan court held the range was not a nuisance for which injunctive relief could be sought. That court found there was substantial and credible proof that the use and operation of the range was safe and was constructed according to plans and specifications of the NRA. *Id.* at 542. That court found there had never been an accident on the range and therefore injunctive relief could not be granted merely on a claim that “there exists a fear in the minds” of the plaintiffs. *Id.* at 543.

In this case, plaintiffs seek summary judgment on the argument that the Farragut Shooting Range is not safely operated and is therefore a public and private nuisance. Plaintiffs argue the Farragut Shooting Range meets the criteria of a nuisance because errant bullets may escape range property, striking and injuring the plaintiffs or passers-by. Plaintiffs also argue they are entitled to injunctive relief because their “illusions of safety” have been dissipated by the lack of safety standards and that they are precluded from the enjoyment of their property and home by the threat of being in close proximity to the shooting range and at risk of being struck by errant bullets.

IDF&G argues there are no Federal or State of Idaho standards for public recreational shooting ranges, but that the Farragut Shooting Range meets the Kootenai County standard for gun clubs, rifle ranges and archery ranges and that Mr. Vargas, a professional engineer, has determined that the range meets or exceeds the National Rifle Association Range Source Book’s safety guidelines. IDF&G argues plaintiffs misapply the standards set forth by the U.S. Army and Air Force because those standards do not apply to civilian shooting ranges. IDF&G argues the facility is safe for range users and for the general public and there is no evidence of any projectile escapement. IDF&G argues plaintiffs cannot ask for injunctive relief by alleging a

possibility of injury.

When the Court looks to the operation of the Farragut Shooting Range and all the important circumstances surrounding it to determine whether the shooting range and its activities constitute a nuisance, summary judgment cannot be granted in favor of plaintiffs. There is a question of what standards apply to this range. There are questions of fact as to whether Farragut Shooting Range, as currently operated, or with the planned improvements, meets the safety standards required of civilian or recreational shooting ranges. There are questions of fact as to whether an outdoor shooting range located near residential property can be safely operated if the site is not totally baffled. These are all questions of fact that cannot be resolved on summary judgment.

Also, as in *Smith*, there cannot be a finding of nuisance on summary judgment merely because plaintiffs allege their "illusions of safety [have] been dissipated because the range does not meet safety standards." Plaintiffs' Brief in Support of Motion for Summary Judgment, p. 27. There have been no recorded accidents on the range, and IDF&G assert there is substantial and credible proof that the use and operation of the shooting range is safe according to the assessment of the NRA. As in *Smith*, the fears in the mind of the residents cannot support a finding of summary judgment.

There is a question of law (and perhaps a question of fact) that needs to be resolved as to whether safety guidelines from the NRA, the Kootenai County Building and Planning Department, the U.S. Army, the U.S. Air Force, Clark Vargas' opinion stated on behalf of defendants (Vargas Affidavit, p. 3) or Vargas' standards articulated in his lecture at the 1996 Third National Shooting Range Symposium are applicable to the Farragut Shooting Range. Plaintiffs have made the argument that the Affidavit of

Vargas directly contradicts Vargas' opinion in his 1996 lecture at the Third National Shooting Range Symposium. The inference is that his opinions in his 1996 lecture should be controlling, or that at the very least his opinions in his 1996 lecture impeach his own affidavit prepared for purposes of this litigation. This Court notes Vargas stated: "The Third National Shooting Range Symposium to range owners/operators provided a general review of design criteria to impress the **importance of range site selection and siteing.**" Affidavit of Clark Vargas, p. 3, ¶ 10. (emphasis in original). While there is some logic to plaintiffs' argument that Vargas' 1996 opinion negates his current affidavit, this Court was faced with a similar situation in *Stanley v. Lennox*, Kootenai County Case No. CV 2000 893. In that case, the Court held that a party's expert had submitted two entirely contradictory opinions which canceled each opinion out, or left that party with no opinion at summary judgment, and thus, the other party who had an expert opinion that was credible, logical and not impeached, prevailed at summary judgment. The Idaho Supreme Court reversed this Court's granting of summary judgment in *Stanley v. Lennox*, 140 Idaho 785, 102 P.3d 1104 (2004), holding:

The district court also stated that it discounted the engineer's opinions in his affidavit because they contradicted his prior opinion. It is not proper for the trial judge to assess the credibility of an affiant at the summary judgment stage when credibility can be tested in court before the trier of fact.

140 Idaho at 789, *citing Baxter v. Craney*, 135 Idaho 166, 16 P.3d 263 (2000). The difference in Vargas' opinions is explained as set forth above. Thus, summary judgment is improper. Vargas' credibility and his explanations must be assessed.

The Court makes the following preliminary observations. The parties are free to argue otherwise, but the Court includes these two observations in an effort to focus the

issue on future briefing. First, the Kootenai County Building and Planning Department regulation (Section 33.02) seems to be of little help since, other than stating minimum areas and minimum distance between dwelling and target, the regulation defers to other criteria for safety: "All facilities shall be designed and located with full consideration to the safety factors involved in such use." Kootenai County Ordinance No. 375, Article 33, Section 33.02; Defendants' Memorandum in Opposition to Summary Judgment. Second, this is not a military gun range. It certainly appears military standards might not apply in this situation involving a civilian range (Vargas Affidavit, p. 3, Leptich Affidavit Exhibit 1, NRA Range Evaluation Report, p. 2), but that issue remains to be decided. It is clear to this Court that the issue of appropriate standards and who should decide those standards needs further briefing. These issues must be resolved as far in advance of trial as possible.

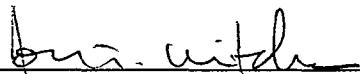
The NRA Range Source Book (NRARSB) specifically states that its material furnishes design strategies and suggestions, and does not furnish necessary design criteria. "For these reasons, this source book may not be utilized to establish design standards or criteria for ranges." Defendants' Memorandum in Opposition to Summary Judgment, p. 7, Affidavit of Clark Vargas, Exhibit 2, p. 1-3. On several occasions the source book states that professional evaluation is necessary. If that is the case, this trial may primarily be a trial of experts as to not only what standard(s) are most appropriate, but what portions of the most applicable standard(s) do and do not apply.

V. CONCLUSION AND ORDER.

IT IS HEREBY ORDERED that plaintiffs' Motion for Summary Judgment is **DENIED**.

IT IS FURTHER ORDERED the parties are ordered to submit simultaneous briefing on October 2, 2006 on the issues of: the applicable standard(s), the legal or factual nature of the standards, and what the Court and jury must decide at trial. The parties shall then file simultaneous response briefs on this issue (responding to their opponent's initial brief) on October 9, 2006, at which time the issue of the appropriate standard and court/jury issues shall be taken under advisement.

ENTERED this 19th day of September, 2006.



John T. Mitchell, District Judge

Certificate of Service

I certify that on the 19 day of September, 2006, a true copy of the foregoing was mailed postage prepaid or was sent by interoffice mail or facsimile to each of the following:

<u>Lawyer</u>	<u>Fax #</u>
Scott W. Reed	208 765-5117
W. Dallas Burkhalter	208 334-2148

<u>Lawyer</u>	<u>Fax #</u>
Harvey Richman	Via mail



Secretary

The Court has ordered briefing on the issues of "the applicable standard(s), the legal or factual nature of the standards, and what the Court and jury must decide at trial." Defendants submit this brief to address those issues.

APPLICABLE STANDARDS

Legal Standards

Defendants submit that the only applicable legal standard for determining the safety of the Farragut shooting range is Kootenai County Ordinance No. 375, Article 33, Section 33.02. There are no other applicable federal or state standards. As the Court has observed, the Kootenai County Ordinance refers to other safety criteria: "All facilities shall be designed and located with full consideration to the safety factors involved in such use." Kootenai County Ordinance No. 375, Article 33, Section 33.02, C.

Defendants assert that the appropriate safety criteria are provided by the National Rifle Association Range Source Book (NRARSB) guidelines. The Kootenai County Building and Planning Department reviewed the NRA Range Evaluation Report and determined that it met the County standard outlined in Section 33.02. Affidavit of David Leptich, Exhibit 2. Kootenai County recognizes the applicability of the NRARSB guidelines. The parties and the submitted expert opinions have all relied on or referenced the NRARSB. Defendants dispute that the NRARSB is a standard by itself, but agree that it is one of the most widely recognized guidance documents for civilian range design and management. The NRARSB provides the only safety guidelines which all the involved parties and the only governmental entity with jurisdiction agree apply to civilian ranges.

The parties may also disagree on the applicable noise standards. Defendants submit that there is no county noise standard for general uses in the rural zone per Kootenai County Zoning Ordinance. There is also no applicable state noise standard. Federal noise guidelines set by the U.S. Environmental Protection Agency (EPA) and the U.S. Department of Housing and Urban Development (HUD) appear to be the most applicable.

The Sport Shooting Range Act (Idaho Code Sections 55-2601 to -2604) limits shooting range liability for noise pollution. The Act uses, but does not define, the term 'substantial change in use' in limiting nuisance actions against shooting ranges. Idaho Code Section 55-2602. Plaintiffs appear to be asserting that simple changes in numbers of users (patronage) are the change in use referenced. Defendants' argue that change in use referenced in Title 55 is not simply change in patronage. Patronage may wax and wane for a variety of reasons outside the control of the range operator including but not limited to changes in availability of alternative recreational shooting sites, local/regional population changes, publicity, and idiosyncratic changes in public recreational interests. The point of the legislation is to protect shooting ranges from civil litigation while still providing communities with legal recourse should a substantial change in capacity or shooting sports activities permitted occur. Defendants argue that change in use refers to substantial changes in the capacity (total shooting points potentially available to the users) and changes in types of use/activity (addition of shooting disciplines such as adding a rifle range to a range that previously only accommodated pistol shooters). Furthermore, improvements that increase the quality, safety, and or noise abatement without increasing the capacity (number of shooting points available) or types of shooting

activities (pistol, rifle, shotgun) permitted would not be the type of changes which the legislature intended to trigger liability under the Act.

Factual Standards

The NRARSB provides guidelines for range design and management which are context and site specific, and require professional evaluation. The various designs and information may or may not apply to a particular range. The application of specific design features requires professional assessment and evaluation by architects or engineers. Further, the NRARSB provides that a determination of whether the range meets the reasonable safety expectations of range users and the public "can only be made by a thorough professional evaluation of the range." Defendant's Memorandum in Opposition to Summary Judgment, pages 6-8, Affidavit of Clark Vargas, Exhibit 2, page I-3.

Defendants submit that the determination of the applicable portions of the NRARSB guidelines is a factual determination and will require expert testimony. The Court's observation that "this trial may primarily be a trial of experts as to ... what portions of the most applicable standard(s) do and do not apply" is precisely on point. Memorandum Decision and Order Denying Plaintiffs' Motion for Summary Judgment and Order Setting Briefing Schedule, page 14.

Both parties have had sound studies of the Farragut Shooting Range prepared. Defendants submit that the interpretation of the sound data and studies will require expert testimony, and is a factual determination.

INAPPLICABLE STANDARDS

As previously argued, Defendants assert that the other standards proffered for determining range safety are inapplicable to the Farragut Shooting Range. The Army and Air Force standards and regulations apply only to military controlled ranges and military personnel. The military uses weapons and training methods which are not allowed on civilian ranges. Defendants' Memorandum in Opposition to Summary Judgment, pages 9 and 10, Affidavit of Clark Vargas, page 3, NRA Range Evaluation Report, page 2.

The Surface Danger Zone (SDZ) concept was developed by the Army to describe the area of danger to troops during military training. The SDZ has limited application to civilian ranges depending on range design, site and context. The "no blue sky" design concept is related to the SDZ concept, and is intended to provide a maximum level of bullet containment by use of overhead baffles, sideberms and backstops. Both concepts might be considered for civilian ranges depending on context and professional evaluation, but are not requirements or standards. Defendants' Memorandum in Opposition to Summary Judgment, pages 11 and 12, Affidavit of Clark Vargas, page 4.

The Plaintiffs have submitted that two full-time range officers are required for civilian range supervision, and that Farragut Shooting Range would require a minimum of 14 range officers. Affidavit of Roy H. Ruel, pages 6 and 7. The source of this supposed requirement is not identified. Defendants assert that there is no recognized standard requiring range officers or a certain number of range officers for civilian ranges. Defendants' Memorandum in Opposition to Summary Judgment, pages 13 and 14, Affidavit of Clark Vargas, page 5, NRA Range Evaluation Report, page 3.

The Vargas Symposium Paper is not a standard for civilian ranges. It has not been recognized as a standard by any governmental or regulatory entity, or the author. The paper is a general review of design and range site selection criteria, which would not apply to all ranges. An evaluation of a professional engineer would be required to determine the applicability for a specific range. Defendants' Memorandum in Opposition to Summary Judgment, page 8.

WHAT THE COURT MUST DECIDE AT TRIAL

The Plaintiffs have waived their damage claims. Counsel have discussed the matter and agree that the remaining claims are for the Court's determination.

Plaintiffs allege that the Farragut Shooting Range constitutes a nuisance under Idaho Code Section 52-101, and seek to enjoin the use of the range and any range improvements under the Master Plan. The two main grounds for Plaintiffs' allegation of nuisance are range safety and noise. Both will involve conflicting expert testimony. Plaintiffs have also alleged several other grounds as support for their request for injunctive relief, including: National Environmental Policy Act and federal funding, Deed restrictions, Americans with Disabilities Act violations, lead exposure, and Citizen Advisory Committee recommendations.

What the Court must decide at trial is whether the Farragut Shooting Range constitutes a nuisance as defined by statute. Defendants believe that the two main issues at trial will be range safety and noise with conflicting expert testimony on both. The applicability of the Sport Shooting Range Act (Idaho Code Sections 55-2601 to -2604) will also be at issue for the noise claim.

Dated this 2nd day of October, 2006.



W. DALLAS BURKHALTER,
Deputy Attorney General

Certificate of Service

I certify that on the 2nd day of October, 2006, a true and correct copy of the foregoing was faxed or mailed postage prepaid to:

Scott W. Reed
Attorney at Law
(208) 765-5117

Harvey Richman
Attorney at Law
19643 N. Perimeter Road
Athol, Idaho 83801

Clerk of the Court (1 to file and 1 for Chambers)
(208) 446-1188



DM

ORIGINAL

Scott W. Reed, ISB#818
Attorney at Law
P. O. Box A
Coeur d'Alene, ID 83816
Phone (208) 664-2161
FAX (208) 765-5117

STATE OF IDAHO } ss
COUNTY OF KOOTENAI }
FILED:

2006 OCT -2 PM 3:49

CLERK DISTRICT COURT
Judy Demphre
DEPUTY

Harvey Richman, ISB#2992
Attorney at Law
19643 N. Perimeter Road
Athol, Idaho 83801
Phone (208) 683-2731

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

CITIZENS AGAINST RANGE)
EXPANSION, an unincorporated non-)
profit Association; JEANNE J. HOM,)
a single woman; EUGENE and)
KATHLEEN RILEY, husband and)
wife; LAMBERT and DENISE RILEY,)
husband and wife; GABRIELLE)
GROTH-MARNAT, a single woman,)
GERALD PRICE, a single man;)
RONALD and DOROTHY)
ELDRIDGE, husband and wife; and,)
GLENN and LUCY CHAPIN, husband)
and wife, SHERYL PUCKETT, a single)
woman; CHARLES MURRAY and)
CYNTHIA MURRAY, husband and)
wife; and DAVE VIG, a single man,)

Case No. CV-05-6253

**PLAINTIFFS' INITIAL RESPONSE TO
MEMORANDUM DECISION AND ORDER,
PAGE 15**

Plaintiffs,

v.

IDAHO FISH AND GAME)
DEPARTMENT, an agency of the)
STATE OF IDAHO, and STEVEN M.)
HUFFAKER, Director of the IDAHO)
FISH AND GAME DEPARTMENT,)

Defendants.

Idaho Code §52-101 defines a private nuisance as "anything which is injurious to health. . . so as to interfere with the comfortable enjoyment of life or property . . ."

Idaho Code §52-101 defines a public nuisance as ". . .one which affects at the same time the entire community or neighborhood, or any considerable number of persons although the extent of . . .damage inflicted upon individuals may be a unequal."

Bullets down range within the half mile to three mile area outside of Fish and Game property can be injurious to health, interfere with comfortable enjoyment of life (perhaps by ending it) and can affect an entire neighborhood, albeit unequally.

Excessive noise, now a present condition, is unlikely to be the basis for a negligence suit. However, bullets off range, if resulting in injury or death, would be the basis for a negligence lawsuit against the shooter and against the Idaho Fish and Game Department as owner, operator and in legal control of the Farragut Shooting Range. Therefore, it is appropriate to look at negligence opinions in seeking standards to be applicable in the case as directed by this Court's concluding Order in its Memorandum Decision.

INITIAL RESPONSE TO MEMORANDUM DECISION ORDER

2

I. NEGLIGENCE STANDARDS APPLICABLE TO SHOOTING

In *Doe v. Garcia*, 131 Idaho 576, 981 P.2d 1181, (1998), the Idaho Supreme

Court stated:

This Court follows the rule that "one owes the duty to every person in our society to use reasonable care to avoid injury to the other person in any situation in which it could be reasonably anticipated or foreseen that a failure to use such care might result in such injury." *Alegra v. Payouk*, 101 Idaho 617, 619, 619 P.2d 135, 137 (1980) (emphasis in original). Furthermore, there is a "general rule that each person has a duty of care to prevent unreasonable, foreseeable risks of harm to others." *Sharp v. W. H. Moore, Inc.*, 118 Idaho 297, 300, 796 P.2d 506, 509 (1990).

131 Idaho at 581.

In the *Garcia* opinion, Justice Johnson cited *Sharp v. W. H. Moore, Inc.*, 118 Idaho 297, 796 P.2d 506 (1990):

Foreseeability "includes whatever result is likely enough in the setting of modern life that a reasonably prudent person would take such into account in guiding reasonable conduct." *Sharp*, 118 Idaho at 301, 796 P.2d at 510 (emphasis added).

131 Idaho at 575.

The National Rifle Association Source Book, the affidavit of Roy H. Ruel and the symposium paper of Clark Vargas, "Design Criteria for Shooting Ranges,"

INITIAL RESPONSE TO MEMORANDUM DECISION ORDER

each submitted to the summary judgment proceedings, give ample notice of what is foreseeable at an open shooting range.⁽¹⁾

In *Sharp v. W. H. Moore, Inc.*, *supra*, the Idaho Supreme Court reversed summary judgment for the defendant building owner and security service in a suit brought by a woman raped in the office. The opinion cited cases from other jurisdiction:

Foreseeability is a flexible concept which varies with the circumstances of each case. Where the degree of result or harm is great, but preventing it is not difficult, a relatively low degree of foreseeability is required. Conversely, where the threatened injury is minor but the burden of preventing such injury is high, a higher degree of foreseeability may be required. See *U.S. v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947) (Judge Learned Hand); *Isaacs v. Huntington Memorial Hosp.*, 38 Cal.3d 112, 211 Cal. Rptr. 356, 695 P.2d 653, 658 (1985). Thus, foreseeability is not to be measured by just what is more probable than not, but also includes whatever result is likely enough in the setting of modern life that a reasonably prudent person would take such into account in guiding reasonable conduct. *Bigbee v. Pacific Tel. & Tel. Co.*, 34 Cal.3d 49, 192 Cal.Rptr. 857, 665 P.2d 947 (1983); *Mullins v. Pine Manor College*, 389 Mass. 47, 449 N.E.2d 331 (1983).⁽²⁾

¹Defendant's Memorandum in Opposition to Summary Judgment states at page 8 the following concerning "Design Criteria for Shooting Ranges": **It does not set or provide safety standards, and all the criteria listed would not apply to all ranges.** Mr. Vargas chose his title carefully with full knowledge of the ordinary meaning of "criteria": **Criterion/noun (plural criteria) - a standard by which something may be judged**, Oxford Color Dictionary (2d Ed, 2001). p. 162

²This standard has subsequently been repeated. *Torpen v. Granier*, 133 Idaho 244, 985 P.2d 669 (1999).

INITIAL RESPONSE TO MEMORANDUM DECISION ORDER

4

118 Idaho at 300 - 301.

With the errant bullets from the shooting range, the degree of harm is great. Clark Vargas and the National Rifle Association have shown how the harm may be prevented without great difficulty by the installation of overhead and side baffles and the application of the "no blue sky" principal. The foreseeability of harm has been written out in detail.

The Idaho Supreme Court rejected the argument of defendants, similar to the argument of Idaho Fish and Game Department here, that a past safety record precluded liability:

The solid and growing national trend has been toward the rejection of the "prior similar incidents" rule. See, e.g., *Rowe v. State Bank of Lombard*, 125 Ill.2d 203, 126 Ill.Dec. 519, 531 N.E.2d 1358 (1988) (simply because no violent crimes had been committed at the office parking area does not render criminal actions unforeseeable as a matter of law); *Samson v. Saginaw Professional Bldg. Inc.*, 393 Mich. 393, 224 N.W.2d 843 (1975); *Aaron v. Havens*, 758 S.W.2d 446 (Mo. 1988) (no need for past similar crimes); *Small v. McKennan Hosp. (Small II)*, 437 No.W.2d 194 (S.D. 1989) (failure to prove any criminal activity in the area is not fatal to the submission of the foreseeability issue to the jury because criminal assaults occur in all neighborhoods);

. . . .

The "prior similar incidents" requirement is not only too demanding, it violates the cardinal negligence law principle that only the general risk of harm need be foreseen, not the specific mechanism of injury. (Citations). Such a requirement would remove far too many issues from the jury's consideration. Foreseeability is ordinarily a question of fact. *Issacs v. Huntington Memorial Hosp.*, 38 Cal.3d 112, 126, 211 Cal. Rptr. 356, 361, 695 P.2d 653, 659 (1985).

118 Idaho at 301.

The argument of the Idaho Fish and Game Department that there is no evidence of projectile escapement in sixty years without incident is a "prior similar incident" rule that must be rejected.⁽³⁾ Clark Vargas, Roy H. Ruel and the National Rifle Association Range Source Book spell out that bullets will escape from an unbaffled range within the Surface Danger Zone. Injury is explicitly foreseeable.

The determination of standards goes beyond this ordinary negligence standard of foreseeability. This Court's Memorandum Decision, after quoting from 58 Am. Jur. 2d, Nuisance, §211, stated the following:

The locality and surroundings of the challenged operation or thing becomes an important factor in arriving at a judicial decision as to the existence or non-existence of an actionable nuisance. *Oak Haven Trailer Court, Inc. v. Western Wayne County Conservation Association*, 3 Mich.App. 83, 89 141 N.W. 2d 645 (1966). All the surrounding circumstances are of extreme importance in determining whether a gun club and its activities do in fact constitute a nuisance. *Id.* Whether some of the activities of the gun club constitute a nuisance is a question of fact for the court to consider. 3 Mich. App. at 90.

Memorandum Decision, p. 10.

As an extension of negligence liability are two additional categories often tied to locality and surroundings: "inherently dangerous activity" and

³Plaintiff will present at trial, evidence of bullet escapement and near fatal accidents.

"ultrahazardous activity." The latter, also called "abnormally dangerous" or "abnormally hazardous" creates strict liability. An argument could be made that a shooting range is in fact a ultra-hazardous activity.

However, for the purposes of this response, plaintiffs will assert that the Farragut Shooting Range is most certainly in the category of "inherently dangerous." The elements of an inherently dangerous activity were set forth in *Melton By and Through Melton v. Larrabee*, 832 P.2d 1069 (Colo. App. 1992) and cited in 57A Am. Jur.2d, Negligence, §370, p. 410:

One court has adopted a three-prong test under which an activity is inherently dangerous if:

- (1) the activity involves an unusual or peculiar risk of harm that is not a normal routine matter of customary human activity;**
- (2) the activity is likely to cause a high probability of harm in the absence of reasonable precautions; and**
- (3) the danger of probability of harm must flow from the activity itself when carried out in its ordinary, expected way, such that reasonable precautions aimed at lessening the risk can be expected to have an effect.**

The Farragut Shooting Range and every other public shooting range meets these three criteria (standards) as an "inherently dangerous activity:"

- (1) Shooting rifles and pistols at targets is an activity that involves a peculiar risk of harm that is not a normal matter of customary human activity.

INITIAL RESPONSE TO MEMORANDUM DECISION ORDER

(2) The absolutely uncontradicted evidence, fully agreed upon by all experts and publications, is that bullets can and will escape in the absence of reasonable precautions. Bullets have a high probability of harm to human beings.

(3) Reasonable precautions aimed at lessening the risk as outlined by Clark Vargas, Roy H. Ruel and the NRA Range Source Book can be expected to have an effect in diminishing the danger or probability of harm.

The Colorado courts have held that the transmission of electricity creates a dangerous situation for others. *Federal Insurance Co. v. Public Service Co.*, 194 Colo. 107, 570 P.2d 239 (1992). So does delivery of liquified propane gas. *Van Hoose v. Blue-flame Gas., Inc.* 642 P.2d 36 (Colo. 1981).

In the most recent reported Colorado case, individuals injured in a gas explosion caused by damage to a pipeline 18 years earlier were awarded \$2.5 million in damages. *Bennett v. Greeley Gas Company*, 969 P.2d 754 (Colo. App. 1998). Although the case was remanded for new trial, the Court of Appeals affirmed that the highest degree of care was required for inherently dangerous activities. 969 P.2d at 764.

In *Saiz v. Belen School District*, 113 N.M. 387, 827 P.2d 102 (N.M. 1992), the school district was held liable for wrongful death of a boy electrocuted by a high voltage lighting system at a high school football game. The New Mexico

INITIAL RESPONSE TO MEMORANDUM DECISION ORDER

Supreme Court held that whether work is inherently dangerous is a question of law. special precautions must be taken where there is a "peculiar risk:"

By "peculiar risk" we mean a risk that is unusual or "not a normal, routine matter of customary human activity," *Restatement* §413 cmt. b., and that is different from one to which persons commonly are subjected by ordinary forms of negligence. *Id.* §416 emt.

827 P.2d at 111.

Shooting rifles is not a normal routine matter of customary human activity such as driving an automobile or climbing a ladder or walking in a commercial building.

For an inherently dangerous activity there must exist a strong probability that harm will result in the absence of reasonable precautions. The Court made this distinction:

Activities that are "inherently dangerous" represent an intermediate category of hazardous activity between those that are nonhazardous (or only slightly so), in which harm is merely a foreseeable consequence of negligence, and activities that are ultra hazardous, in which the potential for harm cannot be eliminated by the highest degree of care. We believe the high probability or relative certainty that harm will arise in the absence of reasonable precautions distinguishes this intermediate category.

827 P.2d at 111.

In *Alcarz v. Vece*, 60 Cal. Rptr. 2d 448, 14 Cal. 4th 1149, 929 P.2d 1239 (Cal. 1997), the California Supreme Court tied inherently dangerous activity

directly to the "locality and surroundings of the challenged operation or thing." The plaintiff was injured by stepping into a broken water meter box. The California Supreme Court held that the landlord could be liable even though the meter box was off the landlord's property:

This duty to maintain land in one's possession in a reasonably safe condition exists even where the dangerous condition on the land is caused by an instrumentality that the landowner does not own or control.

929 P.2d at 1243.

The errant bullet at the Farragut Shooting Range will come from a shooter who is not an employee of the Idaho Fish & Game Department. The Department would nonetheless be liable because it created the dangerous condition, i.e., the shooter is a business invitee. The Department controls the property:

This Court recognized in *Johnston v. De La Guerra Properties, Inc.* (1946) 28 Cal.2d 394, 170 P.2d 5 that a defendant who lacks title to property still may be liable for an injury caused by a dangerous condition on that property if the defendant exercises control over the property.

929 P.2d at 1244.

The opinion repeats with citations again and again that a party who has control is vulnerable to an inherently dangerous verdict. 929 P.2d at 1244 - 1247.

INITIAL RESPONSE TO MEMORANDUM DECISION ORDER

II. NOISE AS NUISANCE

The Court's attention is directed to that subsection of the NRA Range Source Book submitted herewith captioned, "Sound Abatement on Shooting Ranges."

In particular note should be taken of the introductory paragraph 1:

1.02 Introduction

1.02.1 In the past few years, public recognition of sound and how it affects the public has prompted noise abatement programs for all sources of sound. Noise from a variety of sources has been found to reduce the quality of one's life. Prolonged exposure to high levels of sound without hearing protection can result in permanent hearing loss. OSHA -- the Occupational Safety and Health Administration--has determined that a sound level of 90 dBA is the threshold for hearing conservation programs. Because firearms easily exceed this level of sound, users must wear hearing protection.

In *Davis v. Izaak Walton League of America*, 717 P.2d 984 (Colo. App. 1985) the appellate court affirmed a trial court determination that a shooting range constituted a public nuisance because the sound levels exceeded the statutory dBA limits for the area. 717 P.2d at 986.

In the law review article, "Shooting Sports versus Suburban Sprawl -- is Peaceful Coexistence Possible?" by David G. Cotter submitted herewith, the author reviewed and quoted from *Kostad v. Rankin*, 179 Ill. App. 3d 1022, 534 NE2d 1373 (1989) in which the Fourth District, Illinois Court of Appeals affirmed a

INITIAL RESPONSE TO MEMORANDUM DECISION ORDER

nuisance verdict based on noise. David Cotter commented on the change in the law from 20 years earlier:

Thus, it appears that during the twenty years between Smith and Kolstad, courts have substantially lowered the standard for obtaining injunctive relief against a shooting-range owner/operator when noise or safety nuisance is alleged. The requirement that noise causes actual physical harm has given way to a requirement that the noise be an annoyance. The requirement that to be unsafe there must exist a actual present risk of physical harm not given way to a requirement simply that all injury is possible. Id. p. 7.

II. THE APPLICABLE STANDARDS

There are two separate standards, one applicable to range safety (risk of harm) and the other to noise (nuisance).

A. Range Safety

The concern here is safety to the participant shooters, to the public within the reach of bullets from small arm fire and to the plaintiffs and others residing within the reach of small arm fire bullets.

The following are standards both separate and overlapping:

1. Surface Danger Zone of a Shooting Range for Single Small Arms Weapons Firing at Fixed Ground Targets, as exhibited in a hazard assessment for this range.

The SDZ was placed in the Vargas Master Plan, Farragut Shooting Range, p. G-5, and is repeatedly referred to and identified precisely in the Vargas INITIAL RESPONSE TO MEMORANDUM DECISION ORDER

symposium paper, the affidavit of Roy H. Ruel and the NRA Range Source Book.

It is the minimum safety standard for open public shooting ranges.

2. All applicable provisions on the 1999 NRA Range Source Book⁽⁴⁾ and military regulations on ranges. Although the NRA has a disclaimer as being a standard, that disclaimer is lawyer -- written to avoid any claim of liability of NRA by someone injured from a bullet escaping from a shooting range that was designed to meet directions in the NRA Range Source Book.⁽⁵⁾

⁴There are other fields of litigation where standards created by non-governmental entities may be the basis of liability. The most notable is with securities litigation. There are federal and state laws regulating brokers which create standards, but there is also a broad area under the New York Stock Exchange Rule 405 ("know your customer" rule) and the National Association of Securities Dealers, Inc. Art. III §2 Rules of Fair Practice (suitability). Copies are attached of §5.6 from Fromberg & Lowenfels, SECURITIES FRAUD & COMMODITIES FRAUD.

⁵The Minnesota legislature in 2005 enacted The Shooting Range Protective Act. The act directed the Minnesota Department of Natural Resources (DNR) to adopt performance standards. DNR has promulgated an interim standard which is the NRA Range Source Book. This is a portion of the DNR regulation under the act:

Chapter 87A references "Performance Standards". What are these? Primarily, the Performance Standards refer to consideration that need to be taken to ensure the safe operation of a shooting range. The National Rifle Association (NRA) has produced a set of guidelines or recommendations for constructing and operating various shooting ranges. These are contained in the 1999 edition of The Range Source Book: A Guide to Planning and Construction. The NRA uses this document as a reference and teaching tool when they conduct their Range Development and Operations classes throughout the United States. Chapter 87A establishes that, until the DNR adopts permanent performance standards through formal rulemaking processes, *this document will be an interim set of standards for safe range*

INITIAL RESPONSE TO MEMORANDUM DECISION ORDER

3. The duty of every person or entity to avoid injury to any other person in any situation in which it could be reasonably foreseeable that a failure to use care might result in such injury.

4. The highest duty of care is imposed upon every person or entity to make special, reasonable precautions to lessen the risk of harm to others from conducting an inherently dangerous activity.

B. Noise Exposure

1) Department of Defense Noise Management sets the upper limit of 63 dBA max in order to minimize the number of people who are 'highly annoyed.' Their standard for this threshold is established by the study performed by Sorenson and Magnuson, 1979, "Annoyance Caused by Noise from Shooting Ranges."

2) The U.S. Army Center for Health Promotion and Preventive Medicine (USACHPPM) model specifically for assessing the noise impacts of small arms training ranges, "The Small Arms Range Noise Assessment Model" (SARNAM).

3) Kootenai County Industrial Noise Ordinance, Kootenai County Code §11.10 and Special Events Noise with at a threshold of 83 dBA (L peak) of LPEAK and 75 dBA max, respectively.

operations. This source book is available online from the NRA headquarters at www.nrahq.org/shootingrange/sourcebook.asp. (Emphasis supplied).

INITIAL RESPONSE TO MEMORANDUM DECISION ORDER

IV. LEGAL OR FACTUAL NATURE OF STANDARDS

The discussion above supports the law and factual nature of the range safety standards. The June 17, 2005 Farragut Shooting Range Noise Study prepared by Perlworks contains legal and factual data supporting the noise standards.

As to the Range safety and noise standards, plaintiffs are submitting with this brief the following:

- i) Selected copies from the 1999 NRA Range Source Book including both noise and safety.
- ii) David Luke, NRA, "Baffles, Berms and Backstops," Third National Shooting Range Symposium (1996).
- iii) Jack J. Giordano, NRA, "The Four E's of Range Development and Safety." Fourth National Range Symposium.
- iv) David G. Cutler, "Shooting Sports Versus Suburban Sprawl - Is Peaceful Coexistence Possible?", Thomas M. Conley Law School.
- v) Two pages from DNR regulations on Minnesota Shooting Range Protection.
- vi) Perlworks. Duane Nightingale, September 30, 2006 "Acoustical Standards for Assessing Noise Emissions from the Farragut Shooting Range."

INITIAL RESPONSE TO MEMORANDUM DECISION ORDER

vii) Kootenai County Zoning Ordinance No. 348. Section 11.10, Noise, Industrial Zone and Section 33.33 Special Events.

V. WHAT THE COURT MUST DECIDE.

Plaintiffs have filed a waiver of claim for damages with a statement that no jury needs now be used. Counsel for defendants has agreed that the case may now be tried and decided by the Court without a jury.

The Court must decide if the evidence as to range safety and/or the evidence as to noise supports an injunction to close the range and an injunction against proceeding with the Vargas Master Plan.

Respectfully submitted, this 2nd day
of October, 2006



Scott W. Reed

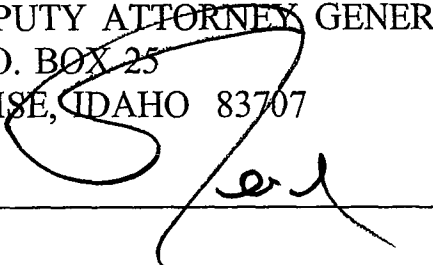
Harvey Richman

Attorneys for Plaintiff

CERTIFICATE OF MAILING

I certify that a copy of the above and foregoing is sent by first class mail, postage prepaid, this 2nd of October, 2006 to:

W. DALLAS BURKHALTER
DEPUTY ATTORNEY GENERAL
P. O. BOX 25
BOISE, IDAHO 83707



INITIAL RESPONSE TO MEMORANDUM DECISION ORDER

5.6 Implied Private Actions Against Broker-Dealers under Stock Exchange and NASD Rules

(100) Introduction. It is interesting to examine the development and the demise of private actions against broker-dealers based upon stock exchange and National Association of Securities Dealers, Inc (NASD) rules. Developments in this area are similar to, if not quite as sharply delineated as, the history of private actions against broker-dealers based upon the margin rules described in Sec. 5.5 above.

Stock exchange and NASD rules cover many facets of the relationship between the broker and his customer. Generally speaking, these rules can be divided into two categories. First, there are rules which have as one of their primary purposes the direct protection of the investing public. These rules regulate the kind of fraudulent conduct which the securities laws were enacted to prevent, help insure the integrity of the securities markets, and sometimes serve as substitutes for SEC regulations. Second, there are rules which are merely housekeeping devices designed to regulate the technicalities of the brokers' day-to-day business activities. These rules are primarily concerned with internal exchange and NASD organization and uniformity of procedure. In certain instances rules in the first category have formed the basis of private actions on behalf of customers against brokers. Rules in the second category have never formed the basis of such private actions.

NYSE Rule 405 ("know your customer" rule) and art III, §2 of the NASD Rules of Fair Practice ("suitability" rule) are the rules most commonly relied upon by customers pursuing private actions against brokers based upon stock exchange and NASD rules. See (200)-(300) below.

NYSE Rule 405 reads in pertinent part as follows:

"Diligence as to Accounts. Every member organization is required through a general partner, a principal executive officer or a [designated supervisory person] to

(1) Use due diligence to learn the essential facts relative to every customer, every order, every cash or margin account accepted or carried by such organization and every person holding power of attorney over any account accepted or carried by such organization.

Supervision of Accounts

(2) Supervise diligently all accounts handled by registered representatives of the organization.

Approval of Accounts

(3) Specifically approve the opening of an account prior to or promptly after the completion of any transaction for the account of or with a customer, provided, however, that in the case of branch offices, the opening of an account for a customer may be approved by the manager of such branch office but the action of such branch office manager shall within a reasonable time be approved by a general partner, a principal executive officer or a [designated supervisory person]. The member, general partner, officer or designated person approving the opening of the account shall, prior to giving his approval, be personally informed as to the essential facts relative to the customer and to the nature of the proposed account and shall indicate his approval in writing on a document which is a part of the permanent records of his office or organization." NYSE Rule 405, 2 NYSE Guide CCH ¶2405 (1970).

Art III, §2 of the NASD Rules of Fair Practice reads in pertinent part as follows:

"Recommendations to Customers. In recommending to a customer the purchase, sale or exchange of any security, a member shall have reasonable grounds for believing that the recommendation is suitable for such customer upon the basis of the facts, if any, disclosed by such customer as to his other security holdings and as to his financial situation and needs." NASD Rules of Fair Practice, art III, §2, NASD Manual CCH ¶2152 (page dated (1976)).

THE RANGE SOURCE BOOK

SECTION ONE

CHAPTER SIX

SOUND ABATEMENT ON SHOOTING RANGES

National Rifle Association
Range Department
11/99

ARTICLE 1. GENERAL

Portions reprinted from *Sound Abatement Techniques and Defending Yourself Against Noise Complaints* by Scott Hansen, Consultant.

1.01 Purpose

- 1.01.1 The purpose of this chapter is to provide a better understanding of the environmental issue of sound or "noise" pollution. Sound will be discussed as it relates to small arms shooting ranges, using a minimum of technical language and complex mathematical formulae.

1.02 Introduction

- 1.02.1 In the past few years, public recognition of sound and how it affects the public has prompted noise abatement programs for all sources of sound. Noise from a variety of sources has been found to reduce the quality of one's life. Prolonged exposure to high levels of sound without hearing protection can result in permanent hearing loss. OSHA -- the Occupational Safety and Health Administration -- has determined that a sound level of 90 dBA is the threshold for hearing conservation programs. Because firearms easily exceed this level of sound, users must wear hearing protection.
- 1.02.2 Today, regulations control sound emissions of most outdoor activities. When examining recreational activities, many of the regulations from federal agencies are not actively enforced. Therefore, state and local laws have been enacted which place great emphasis on community noise from industrial and recreational activities.
- 1.02.3 Shooting ranges reproduce high levels of sound. Sound waves often travel beyond the boundaries of the range property. Escaping sound waves may be perceived as unwanted community noise by neighboring property owners. Remote areas, away from housing developments, etc., no longer exist the way they did 40 years ago. In those rare situations where they do exist, time and distance often detract shooters from using these facilities. It is important for range owners and operators to work with the local zoning board. Shooting ranges should be highlighted as *noise parks*. This designation should make the ranges visible to zoning planners and developers prior to developing neighboring properties. Range owners/operators should implement sound abatement programs into their yearly planning. These noise plans must actively pursue the goal of a sound abatement plan: preventing conflict before it occurs. These plans may entail contacting an acoustical consultant, not three days before a board of zoning hearing, but before a problem develops. This consultation may be prior to the opening of a new range, or at the beginning of the shooting season. Sound levels should be taken at the property lines during normal operation of the range, such as during competitions of day-to-day activity. These documented evaluations will be compared to future levels as changes are made to and around the range. The evaluations will also determine if the range satisfies local sound laws.

- 1.02.4 Sound abatement planning also allows range layouts to change and gives the range design team the flexibility to change locations, directions, and entire sites if necessary.
- 1.02.4.1 Developing good public relations with the range neighbors and community at large is essential. Show the community that you are bringing in money when people visit your facility and subsequently patronize sporting goods shops, hotels, and restaurants. Some ranges have made deals with these types of businesses during weekend shooting events. There are many other examples of good public relations which will be discussed by others. If you show that you are a valuable community asset, the community is more likely to support you.

ARTICLE 2. DEFINITIONS

- 2.00 The following definitions will help the layman understand some of the technical terms used by engineers and others who practice in the field of acoustics, and are not an attempt to teach the reader to be an acoustical expert. It provides only the essential elements of sound and a general description of when sound becomes "noise".

2.01 Sound

- 2.01.1 To develop a complete description of the sound generated by gunfire, consultants measure and describe its frequency spectrum, its overall sound pressure level (SPL), and the variation of both of these quantities with time. Michael Rettinger, consultant on acoustics, in his book Acoustic Design and Noise Control, Volume II, describes sound, "Like a wafted kiss, sound is both a physical phenomenon and a subjective sensation." In the former sense, either a form of mechanical energy or a variation in pressure or stress, it will be called a "sound wave" for ready identification. Sound is the stimulus for hearing, even though not all sounds are audible to the human ear. Sound waves behave like ripples on a pond after someone throws a rock into it. The object thrown becomes the sound source, the ripples the sound pressure waves. In the pond we see a two-dimensional pattern of circular waves, but in the atmosphere sound waves are three-dimensional, spherical and far more complex.

2.02 Noise

- 2.02.1 Wyle Laboratories defines noise, in a publication produced for the EPA as: "Whenever unwanted sounds intrude into our environment, noise exists." An example is when someone is resting or asleep and has sleep interrupted by a neighbor mowing a lawn. To the person mowing the lawn, the sound generated by the mower is necessary and therefore unobtrusive. To the one trying to sleep, it's noise.

2.03 Terms

Absorption Coefficient: The fraction of incident sound not reflected by a surface. Values range from 0.01 for marble slate, to 1.0 for absorbent wedges used in anechoic rooms.

Acoustics: 1. The study of sound, including its generation, transmission, and effect. 2. The properties of such areas as rooms and theaters, which have to do with how clearly sounds are transmitted and heard in it.

Ambient Noise: The totality of noise in a given place and time. It is usually a composite of sounds from varying sources at varying distances. Also see residual noise.

A-Weighted Sound Level (La): Sound pressure level, filtered or weighted to reduce the influences of the low and high frequency noise. It was designed to approximate the response of the human ear. Noise is measured on a dBA scale. Small arms fire is generally measured on the A weighted scale and impulse response mode.

Background Noise: The total noise in a situation or system except the sound that is desired or needed.

Baffle: A shielding structure or series of partitions which reduces noise by lengthening the path of sound transmission between source and receiver.

Daytime: The hours between 7am and 7pm.

Decibel (dB): In layman's terms, the unit used to measure the relative loudness or level of a sound. The range of human hearing is from about 0 decibels to about 140 decibels.

Evening: The hours between 7pm and 10pm.

Impulsive Sound: Noise with an abrupt onset, high intensity, short duration typically less than one second and often rapid changing spectral composition.

Inverse Square Law: The law describing the situation in which the mean square sound pressure changes in inverse proportion to the square of the distance from the source. Under this condition the sound pressure level decreases six decibels for each doubling of the distance from the source.

L(eq) energy equivalent sound level (Leq): Is a measure which describes with a single number the sound level of a fluctuating noise environment over a time period. It is a sound level based on the arithmetic average energy content of the sound.

L(dn): is the Leq (energy averaged sound level) over a 24-hour period. It is adjusted to include a 10 dB penalty for noise occurring during the nighttime hours (10 pm to 7 am). Weight is given to nighttime noise in this way to account for the lower tolerance of people to noise at night.

Microphone: An electroacoustical transducer that responds to sound waves and delivers essentially equivalent electric waves.

Nighttime: The hours between 10pm and 7am.

Noise: Any unwanted sound, and by extension, any unwanted disturbance within the frequency band.

Noise Contour: A continuous line on a map of the area around the noise source connecting all points of the same noise exposure level.

Noise Level Reduction: The amount of noise level reduction achieved through the incorporation of noise attenuation in the design and construction of the structure.

Peak Sound Pressure: The maximum instantaneous sound pressure (a) for a transient or impulsive sound of short duration, or (b) in a specific time interval for a sound of long duration.

Reflection: The throwing back of an image, of the original sound, by a surface.

Refraction: The bending of a sound wave from its original path, either because of passing from one medium to another or because (in air) of a temperature or wind gradient.

Residual Noise Level (ambient): The residual noise level is the level of the unidentifiable noise which remain after eliminating all identifiable noises. For this chapter, L90 has been used as an estimate of the residual (ambient) noise level when no steady state identifiable noises are known to be present.

Shielding: Attenuating the sound by placing walls, buildings or other barriers between the sound source and the receiver.

Sound Level: The weighted sound pressure level obtained by use of a sound level meter having standard frequency-filter for attenuating part of the sound spectrum.

Sound Level Meter: An instrument, comprising of a microphone, an amplifier, an output meter, and frequency-weighting networks. Sound level meters are used for the measurement of noise and sound levels in a specific manner.

Sound Pressure: (1) The minute fluctuations in the atmospheric pressure which accompany the passage of a sound wave. The pressure fluctuations on the tympanic membrane are transmitted to the inner ear and give rise to the sensation of audible sound. (2) For steady sound, the value of the sound pressure averaged over a period time.

Sound Pressure Level (SPL): In dB, is 20 times the logarithm to the base 10 of the ratio of the pressure of this sound to the reference pressure. The reference pressure shall be explicitly stated.

The following reference pressures commonly used are:

- (1) 20 micropascals (2x.0001 microbar)[20 micronewton/meter squared]
- (2) 1 microbar
- (3) 1 pascal

Sound Transmission Coefficient: The ratio of transmitted to incident energy flux at a discontinuity in a transmission medium.

Sound Transmission Loss (TL): A measure of sound insulation provided by a structural configuration. Expressed in decibels, it is ten times the logarithm to the base ten of the reciprocal of the sound transmission coefficient of the configuration.

Yearly Day-Night Average Sound Levels (DNL): The 24-hour average sound level, in decibels, for the period from midnight to midnight. Day night averages are obtained after the addition of ten decibels to sound levels for the periods between midnight and 7 am and between 10 pm and midnight, local time, as averaged over a span of one year. It is the standard metric of the Federal Aviation Administration for determining the cumulative exposure of individuals to noise.

ARTICLE 3. CONCEPTS AND METHODOLOGY

3.01 Concepts

- 3.01.1 The National Rifle Association has developed the information in this chapter to provide a general discussion on sound, its potential effects and sound abatement technologies suited for use on ranges. This will be helpful to ranges which may be required to install sound abatement materials or where future land use criteria deems it necessary. The information pertains to outdoor ranges more than indoor ranges.
- 3.01.1.1 Any observer may or may not consider "sound" generated by a given source to be "noise". Therefore, in most recreational activities, especially with small arms, planners of ranges must consider what effect sounds generated will have on the nearby environment.
- 3.01.1.2 "Noise" exposure is the integrated effect, over a given period of a number of different sound levels and durations. The integration also includes specific weighting factors for the events during certain time periods in which sound affects the environment more severely, such as when people are trying to sleep. The national quiet time is considered to be between 10pm and 7am. The various scales for "noise" exposure in use throughout the country differ by the methods of integration or summation, time period weighting factors and frequency weightings.
- 3.01.1.3 That certain types of noise can affect human health and safety is well documented. Adverse effects depend on their loudness and frequency spectrum. Generally, sounds generated on ranges will have little, if any, effect on the physical or psychological health of inhabitants of the surrounding area. Where they do, it is noted for inclusion in a "noise" plan.

THE RANGE SOURCE BOOK

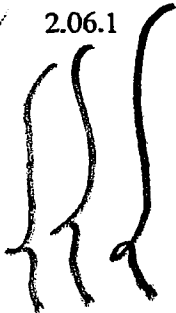
SECTION TWO

CHAPTER TWO

OUTDOOR RANGE DESIGN CRITERIA

- 2.05.2 Earthen side berms must conform to the specifications outlined for backstops, with the exception that wooden cribs used to maintain slopes need not be covered with earth. Concrete panels must have a smooth surface facing the range interior, and a 28-day compressive strength of 3,000 psi. Where wall surfaces must be continuous, interlocking edges must be flush to prevent ricochets from, or damage to, the panel edges. Panel weight must conform to machine lifting requirements and be set using 8 inch industry standard lifts.
- 2.05.2.1 Masonry walls, using voided concrete block are often used on pistol, smallbore, law enforcement and light rifle facilities to separate different functions. As the wall is constructed, the voids are filled with concrete to add strength and impenetrability to the structure. These walls will sustain most direct bullet strikes with minimal damage. For highpower rifles, a direct 90 degree bullet strike in the block web could cause major damage and might even exit the range. Masonry walls should be protected against any inadvertent bullet strike.
- 2.05.2.2 Side baffles or panels can also be made from wood in a thin box arrangement. The minimum inside dimension would be 3 ½ inches or the nominal width of a 2-by-4. Materials used to fill this box must be tested before use and should include a test of all types of ammunition that might be used on the facility. Construct a test panel according to dimensions and materials shown on drawing C-8.

2.06 Safety Baffles

✓ 2.06.1  The term "safety baffle" defines a structure used to restrict bullets to a smaller area than would be possible without them. Safety baffles differ from sound baffles, which are designed to absorb or redirect sound waves, in that safety baffles are more or less impenetrable. The basic concept is based on a "blue sky gap," meaning that baffles are set up so that the shooter, regardless of shooting position, cannot see any blue sky down range. These fixtures may be overhead, on the ground, on top of the backstop, in the roof of a firing line cover, in the form of an elongated box or as a completely enclosed tunnel. The principle behind the design is to equip a range with baffles so that a bullet can leave its confines but will fall to earth within a smaller, more predictable area.

✓ 2.06.1.1 If designed or installed incorrectly, overhead baffles can cause major problems. For any range on which overhead baffles may be used, carefully analyze the application beforehand and seek professional advice. General specification for overhead baffles:

- (1) must be impenetrable for calibers used on the facility
- (2) must be a minimum of 4 feet high (vertical baffles)
- (3) must be relatively maintenance-free
- (4) must be designed to span lengths up to 25 feet. (Span length between columns is a product of design and overall range width. Baffles properly constructed may span 30 feet with minimal deflection, depending upon the specific materials and thicknesses required on a particular range. Several designs are shown on drawings C-7, C-23, C-24, C-25, C-26, C-62, A/A-17, 2/A-21).

2.06.1.2 **Dimensions:** Vertical overhead baffles are a standard 4 feet high with the bottom edge set 6.5-to-7 feet above the horizontal surface of the facility. Width dimensions are the entire width of the range and connection to either side berms or walls. For baffles constructed from plywood and filled with high density material, use 3/8 inch marine plywood on the firing line side, 5/8 inch on the down range side and build into a box with an inside dimension equal to the width of a standard 2-by-4. Again, fill materials must be tested before use. Baffles may be built by laminated baffles using

plywood and 10 gauge steel require a lamination thickness of 3 sheets of plywood with two sheets of steel sandwiched between the sheets of plywood, nominally 2.5 inches thick. Slanted overhead baffles are 9 feet in width and set at a 25 degree angle to the ground as measured from the front edge, are a minimum of 3 inches thick, are pre-stressed slabs and must pass 3,000 pound, 28-day compressive strength test.

2.06.2 Ground baffles reduce the ground surface area a bullet might strike. Properly designed and installed, ground baffles do reduce ricochets. When viewed from the firing line, a shooter will not see the range floor but only the ground baffles. Generally ground baffles are:

- (1) Impenetrable
- (2) Minimum height to correspond with placement and the surface area size
- (3) Relatively maintenance-free. Ground baffles are designed to meet the needs of a particular facility. Drawing C-7 illustrates how overhead and ground baffle locations are determined.

2.06.2.1 Dimensions: Ground baffles should be a minimum of 3 inches thick if made of wood and should be backed up by an earthen berm. (See drawing 2/A-21.)

2.06.2.2 Materials: Materials used for ground baffles may be concrete, pressure treated wood, steal, earth or a combination.

2.06.3 Horizontal Bullet Catcher

2.06.3.1 Horizontal bullet catchers are commonly used on backstops to contain ricochets. The horizontal bullet catcher is designed to retain only those ricochets that occur on the face of the backstop. These devices are installed approximately perpendicular to the backstop face to an extension of 6 feet from the slope. These base of the catcher should be 6 feet from the top of the backstop so bullets will not impact directly onto the catcher (see drawing 1/C-4). To prevent rapid deterioration and maintain integrity of design, overhead baffles should be used to protect the horizontal bullet catcher from direct bullet strikes. The horizontal bullet catcher must be impenetrable to ricochets; thickness of the catcher is a function of range use and may be as thin as 2 inches for smallbore rifle to as thick as 4 inches or more for a highpower rifle. The horizontal bullet catcher extends from side to side and must be incidental with side walls, barriers or berms.

2.06.3.2 Materials: Horizontal bullet catchers may be built from similar materials used for other range barriers, but should incorporate surface treatment that will not allow the redirection of a bullet out of the restricted area. One method is to install the supporting framework when the backstop is under construction, with the final installation of panels afterward. (See drawing 1/C-4.)

THE RANGE SOURCE BOOK

SECTION TWO

CHAPTER SEVEN

OUTDOOR HIGHPOWER RIFLE

National Rifle Association
Range Department
11/99

ARTICLE 2. SAFETY

2.01 General Safety

2.01.1 A safety consideration for highpower rifle ranges is based on the maximum range of ammunition authorized for use on the facility. This dimension provides a guideline for selecting the site and will serve to identify any restriction needed to reduce the size of the impact area. Should barriers be installed to limit bullets to a specific area, each user must be made aware of these limitations and the reasons for them.

2.02 Safety Rules

2.02.1 The uses of outdoor ranges often differ to such an extent that rules for one type of shooting may not necessarily fit another. For each different application, specific rules must apply. The following list is a basic guide and should be modified to conform to actual range use:

2.02.2 Rules for All Highpower Ranges

- (1) Range commands and controls must be obeyed immediately.
- (2) No one is allowed forward of the firing line, unless a cease-fire has been called or the range is clear. A special sign, flag or flashing light should be installed to indicate personnel are in the pits.
- (3) Use of any unauthorized target material, like cans or bottles, is prohibited.
- (4) Eye and ear protection are strongly recommended.
- (5) Shooting a rifle from an unstable position, like shooting from the hip, is prohibited.
- (6) When loading, keep the rifle pointed in a safe direction.
- (7) Loaded rifles must remain pointed down range until such time as they have been unloaded, and then the muzzle should always be pointed in a safe direction.
- (8) During a general cease-fire and at the conclusion of any shooting, all rifles are to be unloaded, actions opened and grounded or cased.
- (9) Rifles are to be loaded and fired single shot, except when firing or practicing for competitive events requiring multiple shot strings.

2.02.3 Rules for Highpower (Centerfire) Rifle

- (1) Tracer or any ammunition considered to be incendiary or explosive is strictly prohibited.
- (2) The use of ammunition having black or carbon steel cartridge cases is prohibited.
Exception: When such ammunition is of recent manufacture, such as European manufactured sporting ammunition.

2.02.4 No set of safety rules is comprehensive, safety is not guaranteed by compliance with this source book, and that individual range organizers should take affirmative steps to ensure safety -- even if that mean taking action not necessarily outlined in this source book. The following safety rules for benchrest rifle are reprinted courtesy of NBRSA Inc. as published in the NBRSA Official Rule book and Bylaws, revised edition No. 33

- (1) **OPEN ACTIONS** - All actions shall be open until the command "Place bolts in Rifle" is given.
- (2) **FIRING** - No shot shall be fired until the command "Commence Firing" has been given nor after the command "Cease Fire."
- (3) **POSITION OF MUZZLE** - The muzzle of every rifle (when in firing position) shall be in front of the front edge of the bench upon which it rests.
- (4) **EMERGENCY COMMANDS** - All competitors must obey at once the command "Cease Fire" and shall not fire again until the command "Resume Fire" is given. In the event that conditions require a suspension of fire, 2 minutes will be added to the remaining time of the relay, "but NOT exceed the original time limit of 7 minutes or 12 minutes."

- (5) **SPORTSMANSHIP** - There shall be no boisterous conduct on the firing line during the firing of any event. A rifle range is no place for pranks, and any shooter failing to observe this fact may be disqualified by the Range Officer after a warning.
- (6) **LITTER** - Clubs expect shooters and campers to put litter in trash barrels.
- (7) **BOLTS** - All rifle bolts must be kept out of all rifles, except as the Range Officer commands. Bolts must be out of all rifles behind the line and in all loading and parking areas of the range.
- (8) **ALCOHOLIC BEVERAGES** - No alcoholic beverages will be consumed on a range during a match until the last match of the day is completed. Violators of this rule will be disqualified.

ARTICLE 3. TECHNICAL SPECIFICATIONS

3.01 Technical Considerations

3.01.1 Firing Line to Target Line

3.01.1.1 For highpower rifle bullseye or benchrest target shooting, the firing point is set up one per target. The firing line and target line are parallel and the direction of fire is perpendicular to both. The centerline of the firing point should be on-line with the centerpoint of the target. The spacing of the firing points and the targets (center to center) are usually the same and are generally determined by the width of the target. Where target width dimensions are smaller than those needed for a firing point, the width of the firing point governs spacing of targets.

3.01.2 Distance Between Targets and Firing Line

3.01.2.1 The distance between the firing line and the target line is determined by the course of fire to be conducted on a particular range. Distances vary from 100 to 1,000 yards. The distance as measured from the firing line to the face of the targets should not be shorter than that specified by the NRA Official rule book that covers highpower. Firing distances must be within plus or minus 1 percent of the specified distance, such as plus or minus 6 feet for 200 yard range. For international 300 meter events, the specified measurements must be metric and a tolerance of plus or minus 1 meter is allowed. No specific tolerances are mentioned in the International Benchrest Shooters (IBS) or the National Benchrest Shooters Association (NBRSA) rule books. The assumption must be made that benchrest range distances must be at least the distance stated.

3.01.3 Direct Fire Zone

3.01.3.1 The direct fire zone is defined as that area into which all shots are fired during a normal course of fire. The direct fire zone includes all directions and angles of fire used on a range while shooting at a specific target corresponding to a specific firing point.

3.01.4 Firing Line Area

3.01.4.1 Firing Line Width

3.01.4.1.1 The width of the firing line is generally determined by the combined widths of the firing points, but there are exceptions. There is no hard and fast requirement for firing lines and target lines to have exactly the same dimensions.

3.01.4.2 Depth

3.01.4.2.1 The firing line depth as measured from front to back of the firing point must be sufficient to accommodate the shooter, his equipment and, if appropriate, a coach, scorer or instructor. The depth of the firing line area may be established by combining the maximum required depth of a firing point with additional space for administrative support, such as staging areas for team activities. Another factor in firing point depth is whether the firing line area is substantially elevated above the range floor. When the firing line is elevated, sufficient amount of level areas must be provided for ease of movement to and from each firing point.

3.01.4.2.2 The firing points should have enough depth behind the firing line to allow for the specific shooting positions used on each type facility. The point should also be large enough to accommodate benches if it is used for benchrest shooting. In addition, the firing points should be elevated 2 feet to 3 feet above the natural contour to provide better target visibility, especially in areas where heavy mirage exists and to allow for drainage.

3.01.4.3 Firing Points

3.01.4.3.1 All firing points should be clearly marked at the front left corner to maintain uniform separation between shooters, and in an ascending order from left to right.

3.01.4.4 Open Space

3.01.4.4.1 All ranges should provide a clear area behind the shooter to allow for unimpeded movement of range officers, other shooters and coaches. For international events (300 meter rifle), there must be an additional area directly behind the firing point for the judges to sit or stand.

3.01.4.4.2 Space for support activities should also be provided behind the firing line. These may include gun racks, control towers, equipment vehicles, equipment tables and seating arrangements for the next relay. These facilities are optional.

3.01.4.4.3 Spectator areas or seating should also be arranged so as not to interfere with normal range operations. This is usually accomplished by adding a 10 yard-to-15 yard buffer area behind the ready line area and set off behind a temporary fence (rope or ribbon). The size and shape of this area will vary according to the event or amount of activity.

3.01.4.4.4 A firing line enclosure or cover is usually an optional feature on high power ranges, with most ranges having none. An enclosure that keeps shooters shielded from prevailing winds is not permitted in NRA high power rules, although a firing line cover is. On most high power ranges, such a cover is not practical, except at the longest distance. For international 300 meter events, enclosures, even temporary, are required. Firing line covers are, in general, nothing more than a roof structure supported on posts and designed to protect shooters from inclement weather. They need not be elaborate.

3.01.5 Target Line Area

3.01.5.1 Pits

3.01.5.1.1 Target pits are generally necessary on ranges 200 yards and longer, allowing targets to be pulled and scored, thus reducing range time. Pit walls and foundations are generally constructed using concrete, masonry, wood or other materials, with concrete preferred. They may be either above or below existing or proposed grade. Pit areas are designed specifically for target carriers that allow the target to be exposed for live fire, retracted and scored, and to protect the target puller. Designers must consider the bullet trajectory from the longest distance. Special shields may be installed to provide additional safety. Construction includes excavating, grading and compaction of soils, installation of retaining wall and target carrier foundations, walkways, construction of retaining walls, precast deadman (concrete anchors), tieback tendons, drainage systems, and the placement and compaction of fill material. (See drawing A/C-18 and B/C-19.)

3.01.5.7.2 When backstops must be constructed, the requirement is to provide a primary impact area that is capable of stopping all bullets striking its surface. Backstop construction must meet certain specific criteria: be wider than the target area; provide a larger surface area than that required by the targets; provide clean earthen surface material to a minimum depth of 18-24 inches; and be built at a slope that does not generate ricochets. (See drawing B/C-1)

3.01.6 Administrative Facilities

3.01.6.1 Areas for statistical work should be set up away from the range area. Buildings need not be very large, unless activities of major proportion are scheduled.

3.01.7 Other Components

3.01.7.1 Surface Grade

3.01.7.1.1 The ideal terrain is relatively flat to gently sloping with a mountain down range. Ranges in rolling hills and mountainous areas when there are extreme variations in elevation between the target and firing lines, require grading operations to bring the elevations to within a few degrees of being on a common horizontal plane. The terrain between the targets and firing line areas, therefore, does not need to be flat and may vary considerably.

3.01.7.2 Side Berms

3.01.7.2.1 Side berms may be needed for ranges where adjacent areas are in use.

3.01.7.3 Baffles (Overhead, Ground and Side)

3.01.7.3.1 Overhead, ground and side baffles are barriers used to keep errant bullets confined to a restricted area of the range property. These devices are often made necessary due to encroachment or the building of residential areas, commercial parks and other land development inside or very near the range. Adding these barriers is often expensive, but properly installed they can reduce acreage requirements. Baffling ranges over 300 meters in length is not practical.

3.01.7.4 Walls

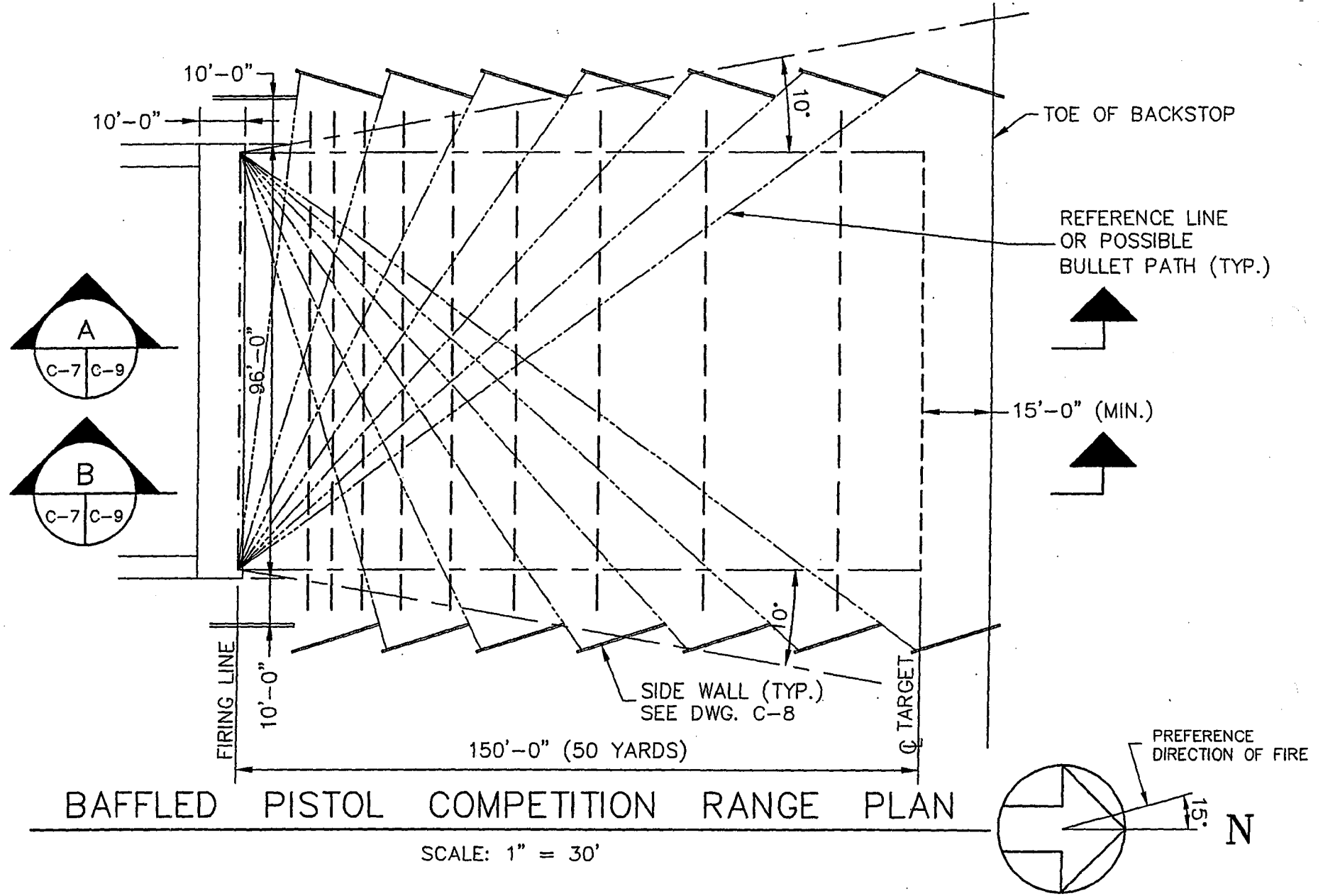
3.01.7.4.1 In place of side berms or earthworks, concrete, wood and crushed rock, washed gravel and masonry walls are often used on shooting facilities to reduce the space needed to protect adjacent ranges or inhabited areas. Such walls serve not only to contain bullets, but may also reduce sound levels, in areas behind them.

ARTICLE 5. APPENDIX

5.01 Exterior Ballistics Table

Calculated maximum ranges for representative center-fire rifle cartridges.

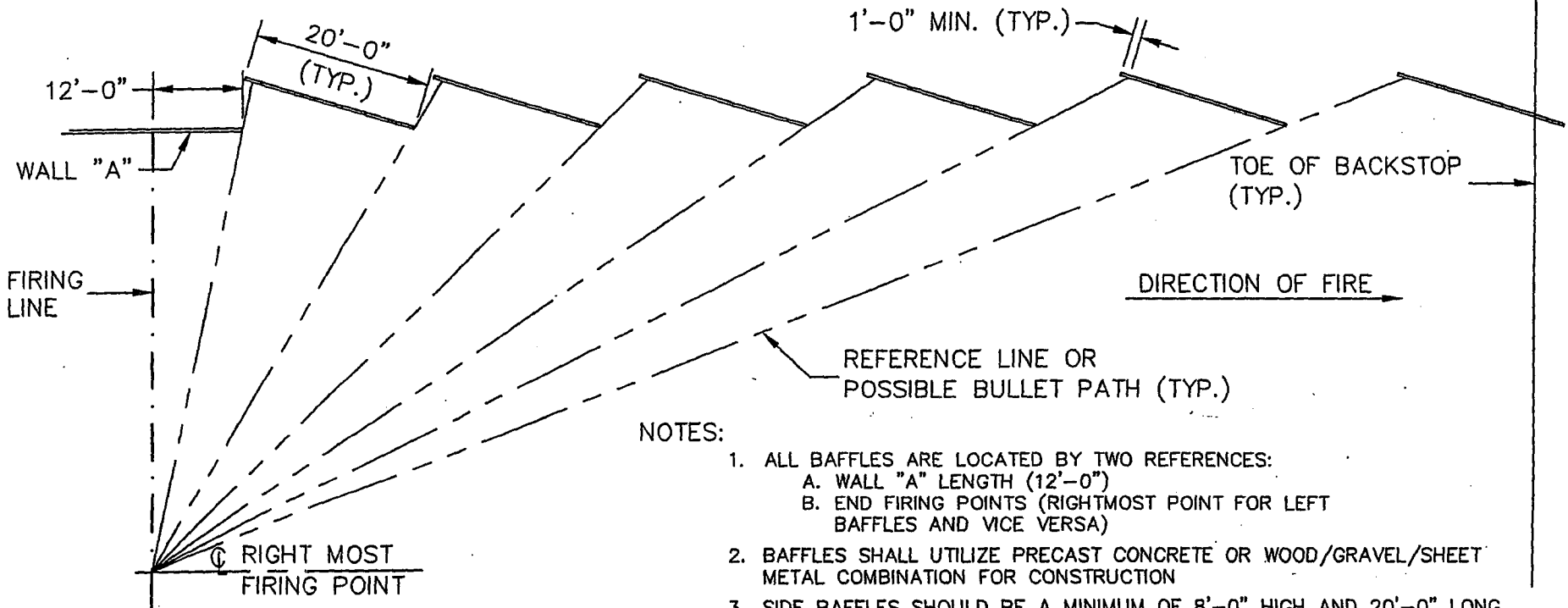
Caliber	Bullet Weight (grains)	Bullet Style	Assumed Muzzle Velocity (Feet per second)	Calculated (yards)
22 Hornet	45	SP	2790	2100
222 Rem	50	PSP	3140	2700
223 Rem	55	FMC	3240	3800
22/250 Rem	55	PSP	3680	3100
220 Swift	45	SP	4300	3200
243 Win	80	PSP	3250	3600
243 Win	100	PP	2960	4500
250 Savage	100	ST	2820	3500
257 Roberts	117	PP	2780	3300
270 Win	130	PP	3060	4700
270 Win	150	PP	2850	4400
280 Rem	140	PP	3050	4200
7mm Rem Mag	175	PP	2860	5100
30-30 Win	150	PP	2390	3000
308 Win	150	FMJ	2800	5000
308 Win	165	SBT	2700	5100
308 Win	168	HPBT	2680	5200
308 Win	180	SBT	2600	5500
30-06 Springfield	150	FMJ	2910	4900
30-06 Springfield	165	BT	2800	5200
30-06 Springfield	168	HPBT	2710	5400
30-06 Springfield	172	FMJBT	2640	5400
300 H&H Mag	180	ST	2880	4700
300 Win Mag	180	PP	2960	5200
8mm Mauser	175	SP	2600	4600
338 Win Mag	250	SBT	2500	6000
375 H&H Mag	270	SP	2690	4600
458 Win Mag	500	FMJ	2050	3400



PLAT DATE: 11/22/99

C-7

CADD FILE C-7.DWG PROJECT NO. 07/89 SHEET	C. VARGAS & ASSOCIATES, LTD. CONSULTING ENGINEERS 8586 ARLINGTON EXPRESSWAY JACKSONVILLE, FLORIDA 32211 (904) 725-7131	NRA NATIONAL RIFLE ASSOCIATION RANGE DEPARTMENT FAIRFAX, VIRGINIA 22030	COMPETITION PISTOL RANGE WITH OVERHEAD BAFFLES AND SIDE WALLS PLAN	NO.	REVISION	DATE	BY
	DRAWN BY D.E.N. CHECKED BY C. VARGAS. DATE 5/98 SUBMITTED BY Idaho Fish and Game Department. RED. ENGR. NO. 16297			3 of 994			

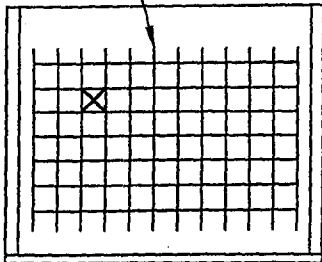


NOTES:

1. ALL BAFFLES ARE LOCATED BY TWO REFERENCES:
 A. WALL "A" LENGTH (12'-0")
 B. END FIRING POINTS (RIGHTMOST POINT FOR LEFT BAFFLES AND VICE VERSA)
2. BAFFLES SHALL UTILIZE PRECAST CONCRETE OR WOOD/GRAVEL/SHEET METAL COMBINATION FOR CONSTRUCTION
3. SIDE BAFFLES SHOULD BE A MINIMUM OF 8'-0" HIGH AND 20'-0" LONG
4. BAFFLE PANELS MUST OVERLAP TO PREVENT BULLET ESCAPE
5. WOODEN BAFFLES USING WASH GRAVEL SHALL BE BUILT SUCH THAT THE BAFFLE STOPS AUTHORIZED AMMUNITION

TEST GRID

TEST BAFFLE



1. 5/8" PLYWOOD SHALL BE USED FRONT AND BACK.
2. 2"x4" LUMBER SHALL BE USED FOR FRAMING.
3. 1 1/4" WOOD SCREWS SHALL BE USED TO HOLD PLYWOOD TO FRAME FOR EASE OF REMOVAL AFTER TESTS ARE COMPLETE.
4. FILL WITH CRUSHED ROCK OR WASHED GRAVEL.
5. ONE SHOT FROM EACH TYPE OF AMMUNITION IS FIRED IN A GRID SQUARE THEN LABEL THE GRID SQUARE WITH TYPE OF AMMUNITION USED.
6. ALTER THE SIZE OF ROCK OR WASH GRAVEL AS TESTS ARE CONDUCTED.
7. SEVERAL TEST BAFFLES MAY BE REQUIRED FOR MULTIPURPOSE RANGES.

C-8

DRAWING

DES. BY S.B.D.

BY N.R.A.

DATE 5/88



SIDE BAFFLE

NATIONAL RIFLE ASSOCIATION
 RANGE DEPARTMENT
 FAIRFAX, VIRGINIA 22030

▲	C.A.D.D. COORDINATION	5/98	C.V.	
NO.	REVISION	134 of 994	DATE	BY

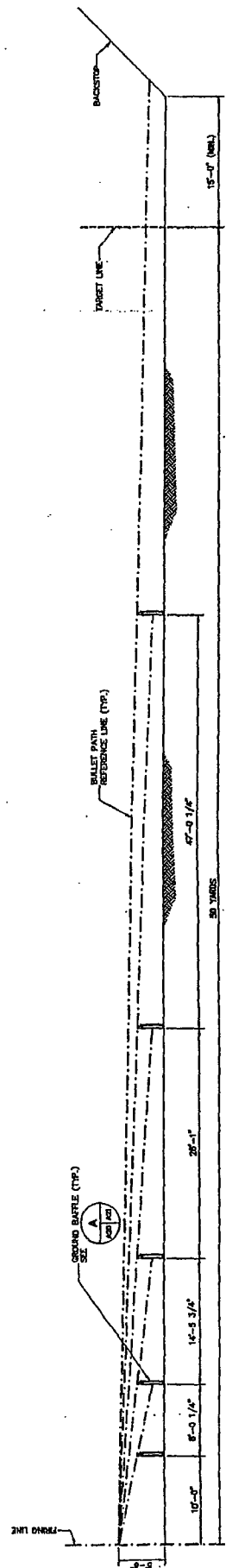
NO.	DATE	REVISION

100 YARD FIRING LINE
BAFFLE SECTIONS

NATIONAL RIFLE ASSOCIATION
RANGE DEPARTMENT
MANAGER, VIRGINIA BEACH
SHOOTING RANGE
DEFINITIVE DRAWINGS

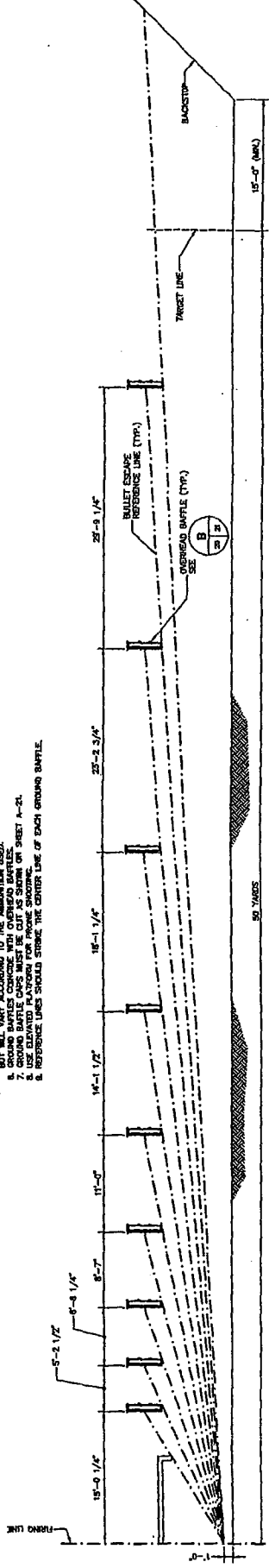


C. VARGAS & ASSOCIATES, LTD.
CONSULTING ENGINEERS
1000 WEST 10TH AVENUE, SUITE 200
DENVER, COLORADO 80202
PROJECT NO. 07299
SHEET 03



50 YARD RANGE GROUND BAFFLE LAYOUT (A)
SCALE: 1" = 6'

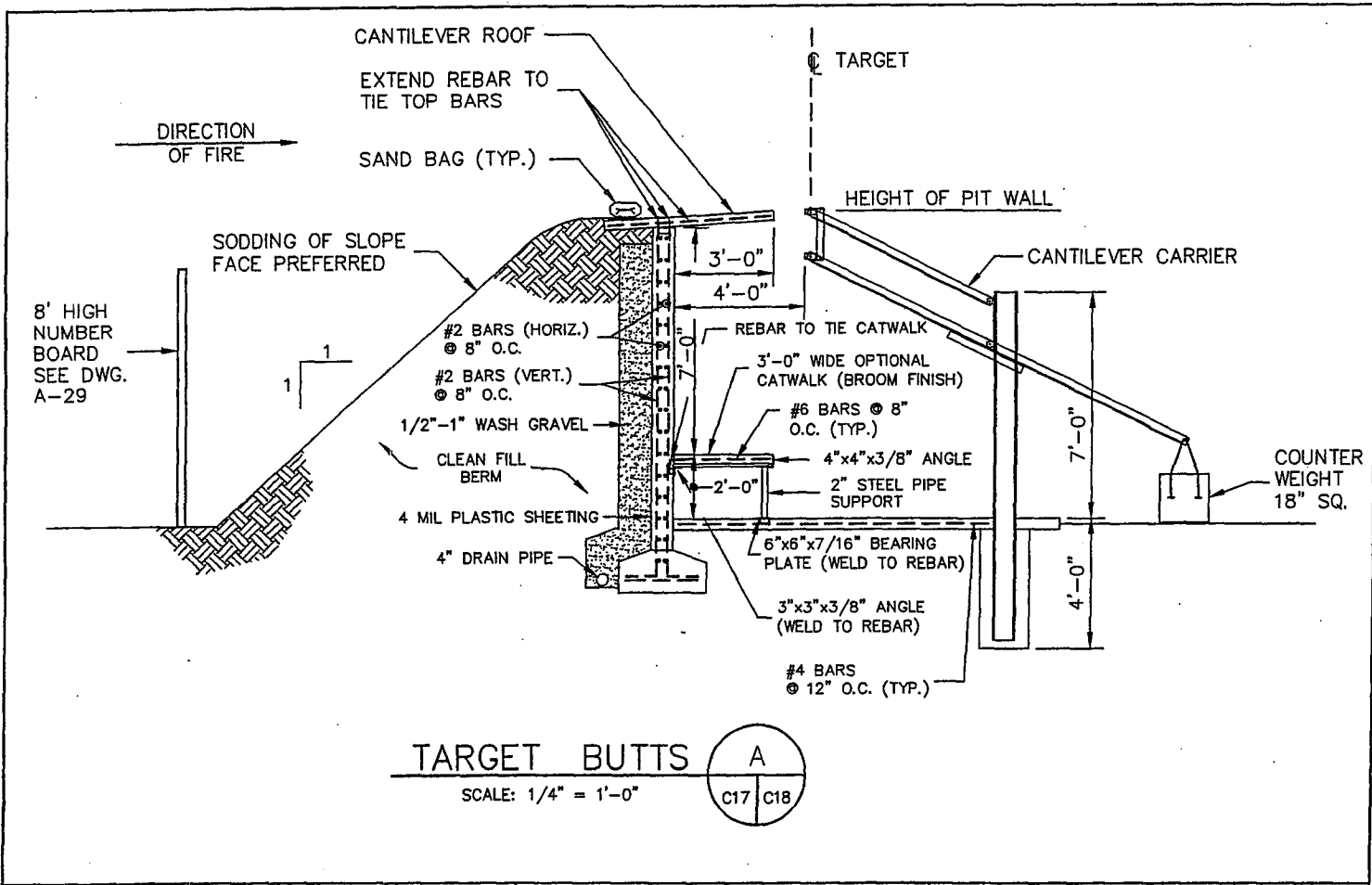
- NOTES:
1. BAFFLE SPACING DEPENDS ON AVAILABLE AREA FOR PROJECTILE CONTAINMENT.
 2. USE MARINE PLYWOOD TO BUILD BAFFLE AND FILL WITH 3/4" CRUSHED ROCK.
 3. ALL MATERIAL MUST BE TESTED PRIOR TO USE IN A TEST BAFFLE.
 4. WITH THE SPACING AS SHOWN THE PROJECTILE CONTAINMENT AREA IS REDUCED.
 5. BUT WILL VARY ACCORDING TO THE AMMUNITION USED.
 6. GROUND BAFFLE CHAINS MUST BE CUT AS SHOWN ON SHEET A-21.
 7. USE ELEVATED PLATFORM FOR PRONE SHOOTING.
 8. REFERENCE LINES SHOULD STAKE THE CENTER LINE OF EACH GROUND BAFFLE.



50 YARD RANGE OVERHEAD BAFFLE LAYOUT (B)
SCALE: 3/16" = 1'-0"

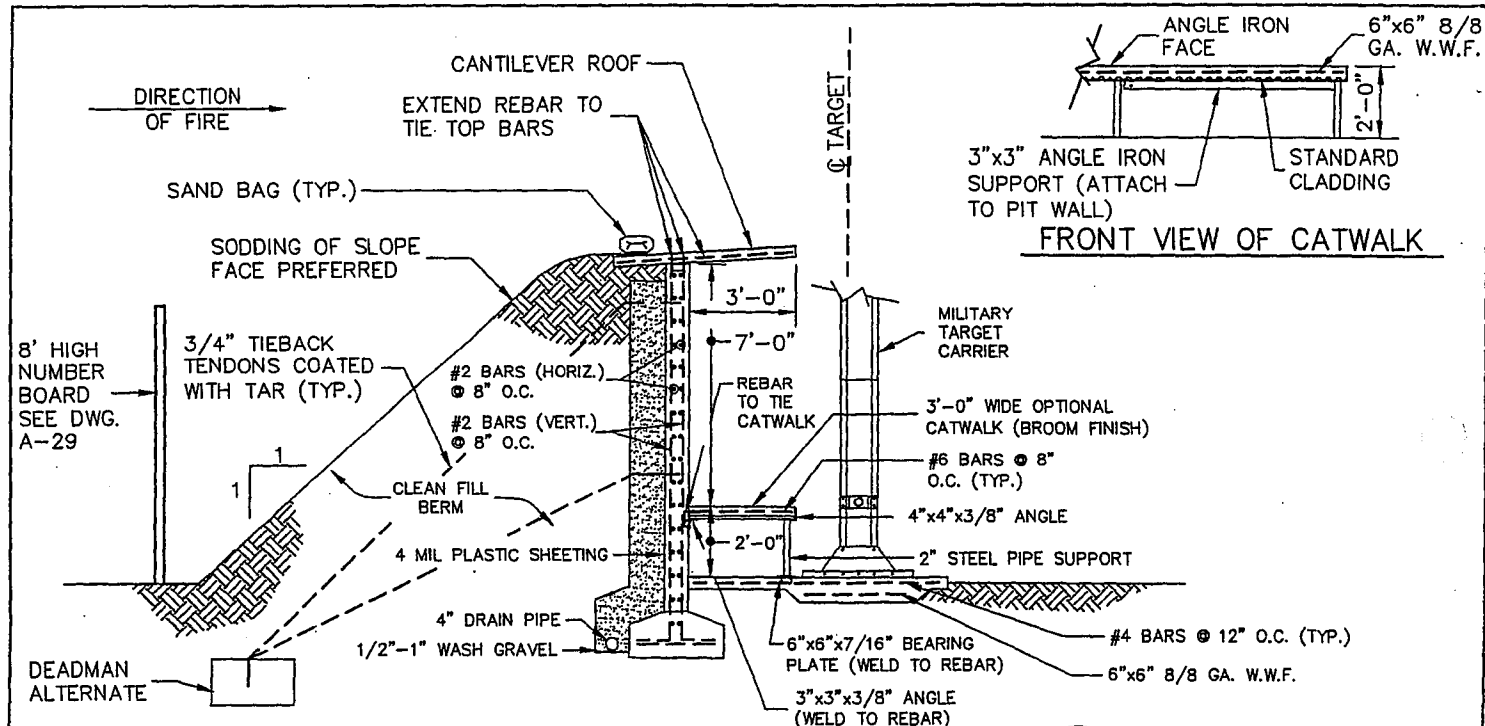
DO NOT SCALE THIS DRAWING.

ANY USE OR REPRODUCTION WITHOUT EXPRESSED WRITTEN PERMISSION OF THE N.R.A. IS PROHIBITED.



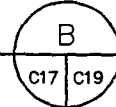
TARGET BUTTS (A)
SCALE: 1/4" = 1'-0"
C17 C18

C-18	DRAWING	DES. BY S.B.D.	NRA	TYPICAL BUTT SECTION				
		BY N.R.A.		NATIONAL RIFLE ASSOCIATION				
		Citizens for the Range, et al v. Idaho Fish and Game Department		RANGE DEPARTMENT FAIRFAX, VIRGINIA 22030	3929-4044	C.A.D.D. COORDINATION	12/87	C.V.
					NO.	REVISION	DATE	BY



TARGET BUTTS (ALTERNATE 'A')

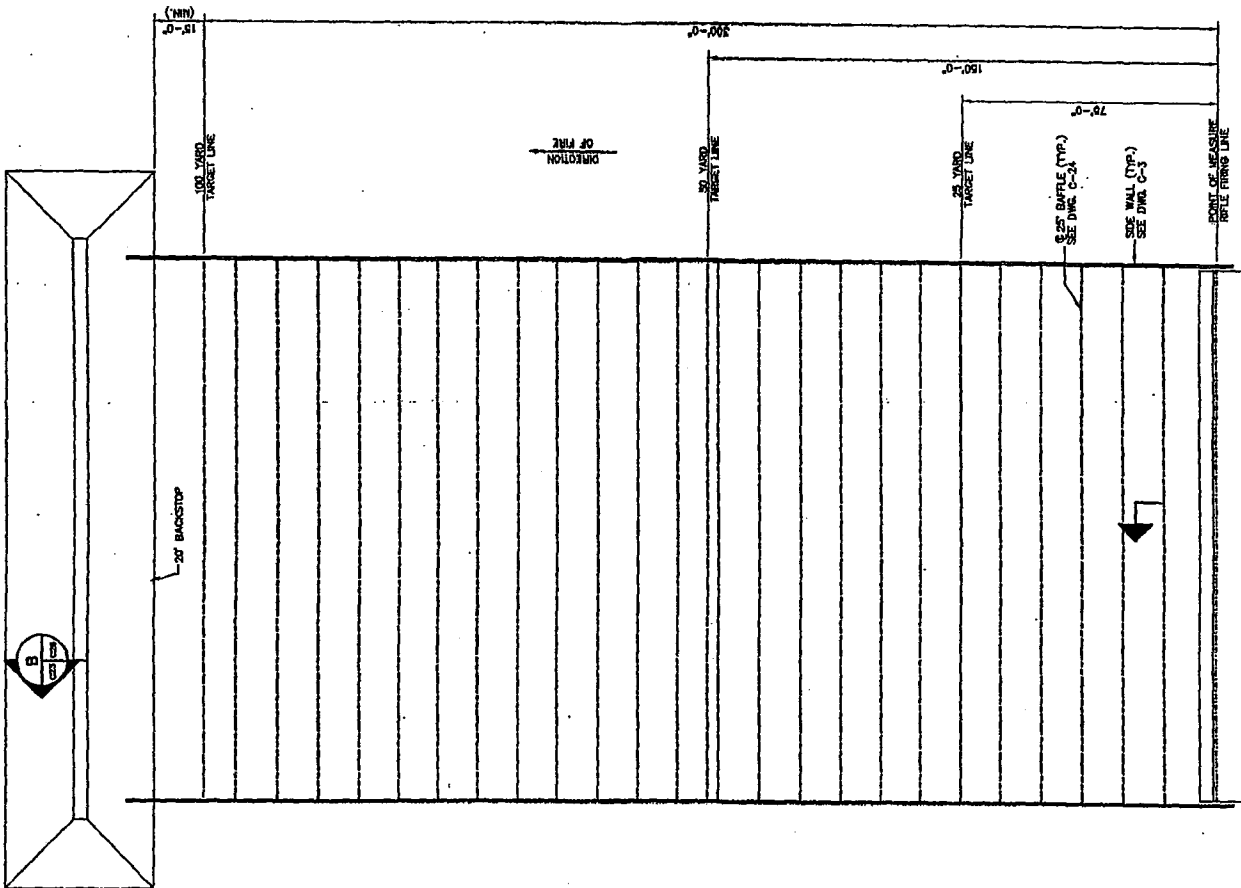
SCALE: 1/4" = 1'-0"



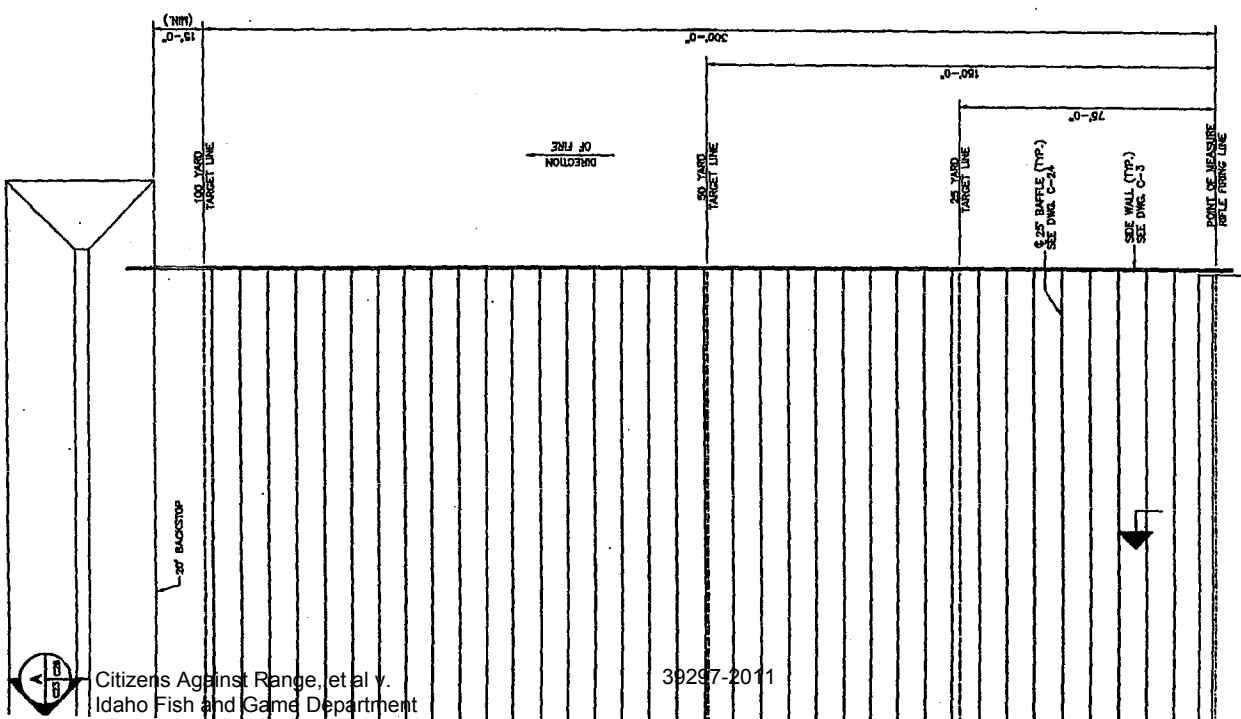
NOTES:

1. PIT INSTALLATIONS SHOULD BE ABOVE GROUND WHERE POSSIBLE.
2. WHERE SEVERE HYDRAULIC PRESSURE WOULD EXIST ON PIT WALL INSTALL FRENCH DRAIN.
3. FOUNDATION WILL BE SITE SPECIFIC BASED ON SOIL CONDITIONS AT SITE.
4. MIN. CONCRETE: 3000 # COMPRESSIVE STRENGTH IN 28 DAYS.(MINIMUM)

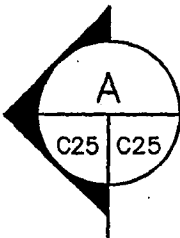
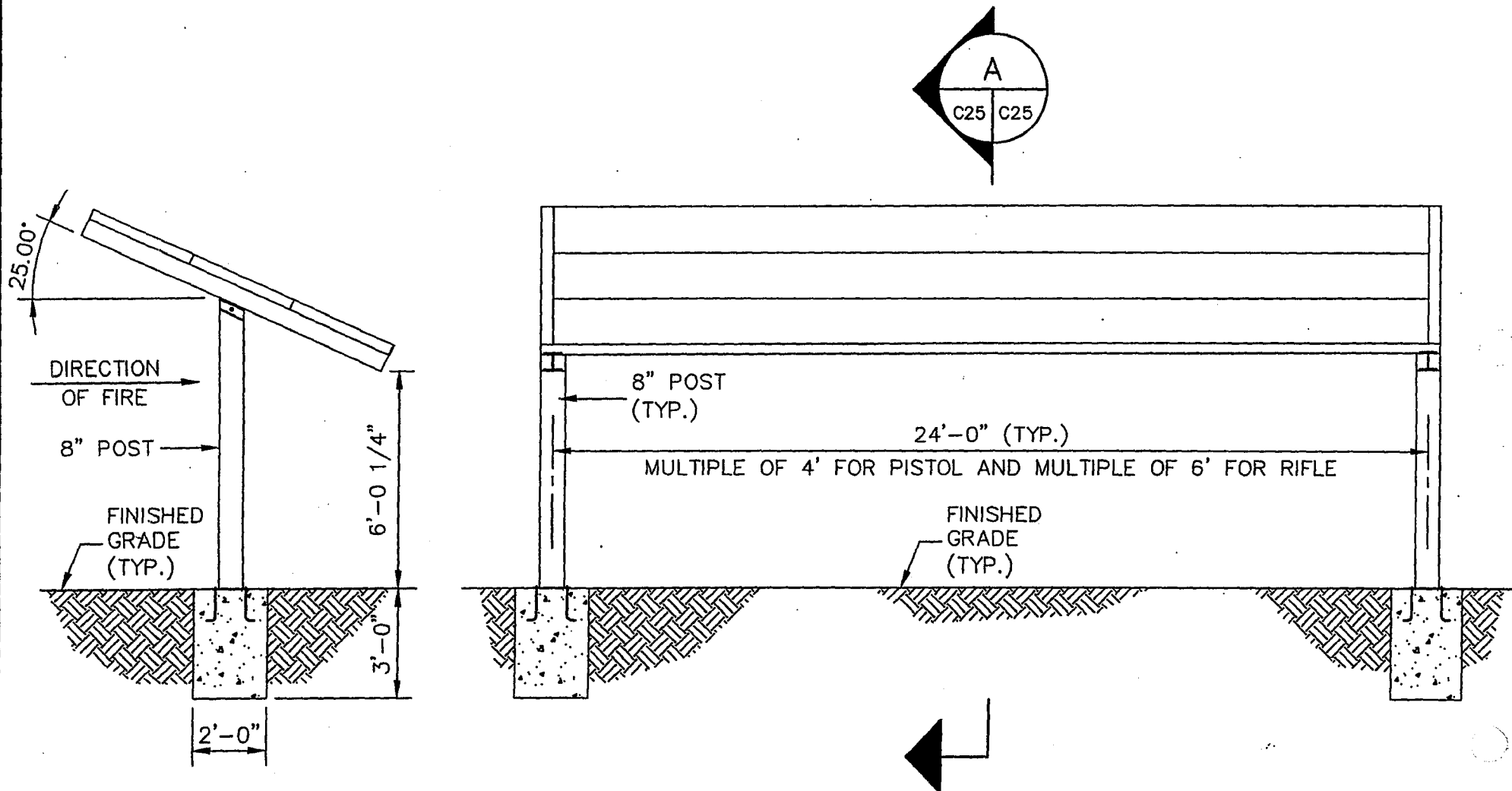
C-19	DRAWING	DES. BY <u>S.B.D.</u>	NRA	RIFLE RANGE TARGET BUTTS ALTERNATE 'A'				
		BY <u>N.R.A.</u>		NATIONAL RIFLE ASSOCIATION				
		DATE <u>12/87</u>		RANGE DEPARTMENT				
				FAIRFAX, VIRGINIA 22030	NO.	REVISION	DATE	BY
					C.A.D.D. COORDINATION	5/98	C.V.	



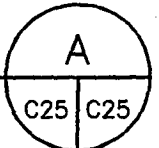
25' Baffle Plan with 45° Angle of Reflection Plan
 SCALE: 1" = 20'
 (DESIGN 'B')



25' Baffle Plan with 90° Angle of Reflection Plan
 SCALE: 1" = 20'
 (DESIGN 'A')





SECTION

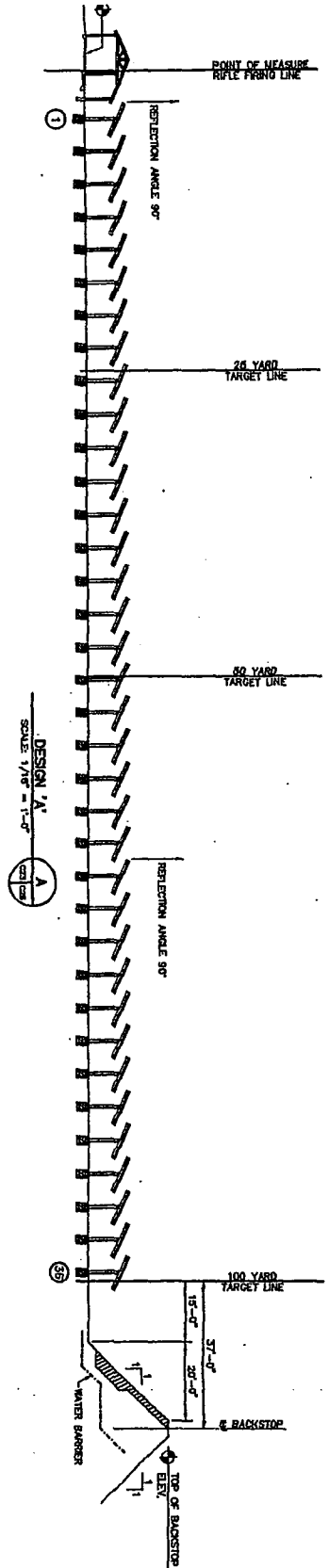
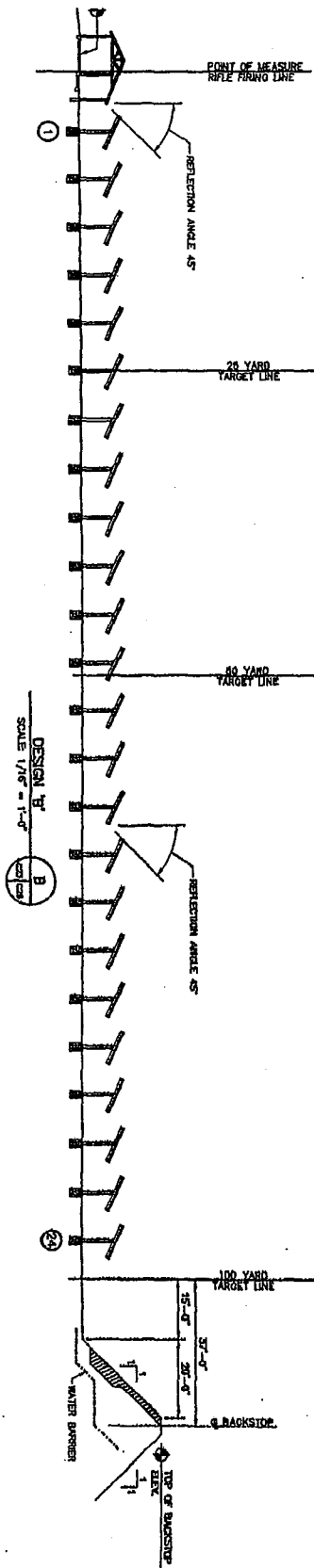


SCALE: 1/4" = 1'-0"

25° BAFFLE ELEVATION



SCALE: 1/4" = 1'-0"

C-25	DRAWING	DES. BY <u>S.B.D.</u>		25° CONCRETE BAFFLE ELEVATION AND SECTION				
		BY <u>N.R.A.</u>		NATIONAL RIFLE ASSOCIATION				
		DATE <u>12/87</u>		RANGE DEPARTMENT		C.A.D.D. COORDINATION	5/98	C.V.
				FAIRFAX, VIRGINIA 22030	NO.	REVISION	DATE	BY

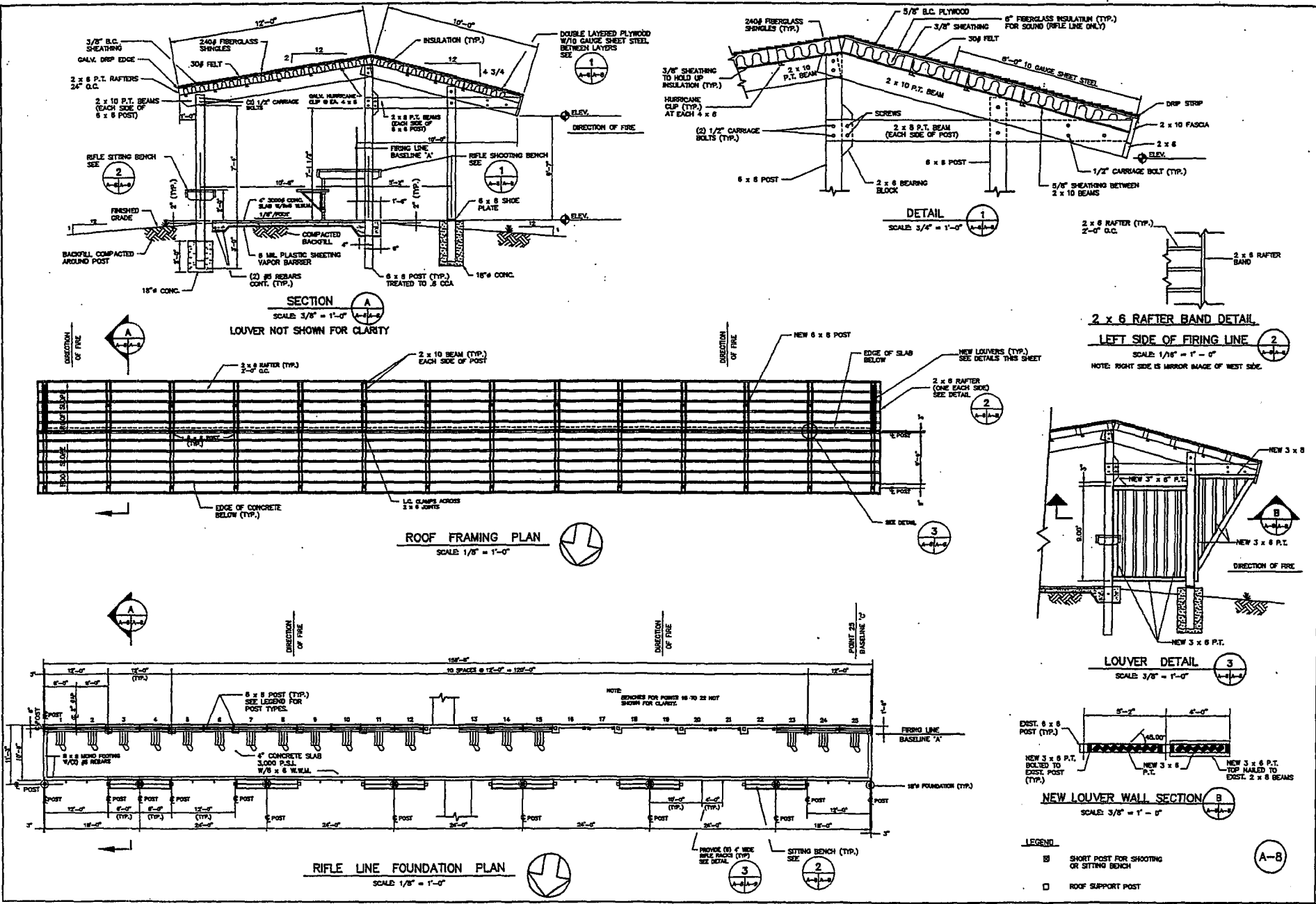


- NOTES:
1. THESE ARE EXAMPLES OF A BAFFLED RANGE.
 2. BAFFLES ARE SPACED ACCORDING TO THE DOMINANT AREA.
 3. BAFFLE INSTALLATION MAY NOT BE RECOMMENDED WHERE TERRAIN FEATURES SUCH AS MOUNDING EXIST.
 4. BAFFLES MAY BE RECOMMENDED AS DISCONTINUITY OCCURS. PLAN A PROGRAM OF INSTALLATION OVER A THE YEAR PERIOD.

C26

 <p>C. VARGAS & ASSOCIATES, LTD. CONSULTING ENGINEERS 8500 ANNINGTON EXPWAY JACKSONVILLE, FLORIDA 32211 (904) 744-7131</p>	 <p>NATIONAL RIFLE ASSOCIATION RANGE DEPARTMENT FAIRFAX, VIRGINIA 22030</p>	<p>25° CONCRETE BAFFLE DESIGN GITUDINAL SECTION</p>	NO.	REVISION	DATE	BY
			141 of 994			

THIS DRAWING IS THE INSTRUMENT OF SERVICE AND PROPERTY OF G. VARGAS & ASSOCIATES, LTD. ANY USE OR REPRODUCTION WITHOUT EXPRESSED WRITTEN PERMISSION OF THIS CORPORATION IS PROHIBITED. ALL RIGHTS OF DESIGN AND INVENTION ARE EXPRESSLY RESERVED.



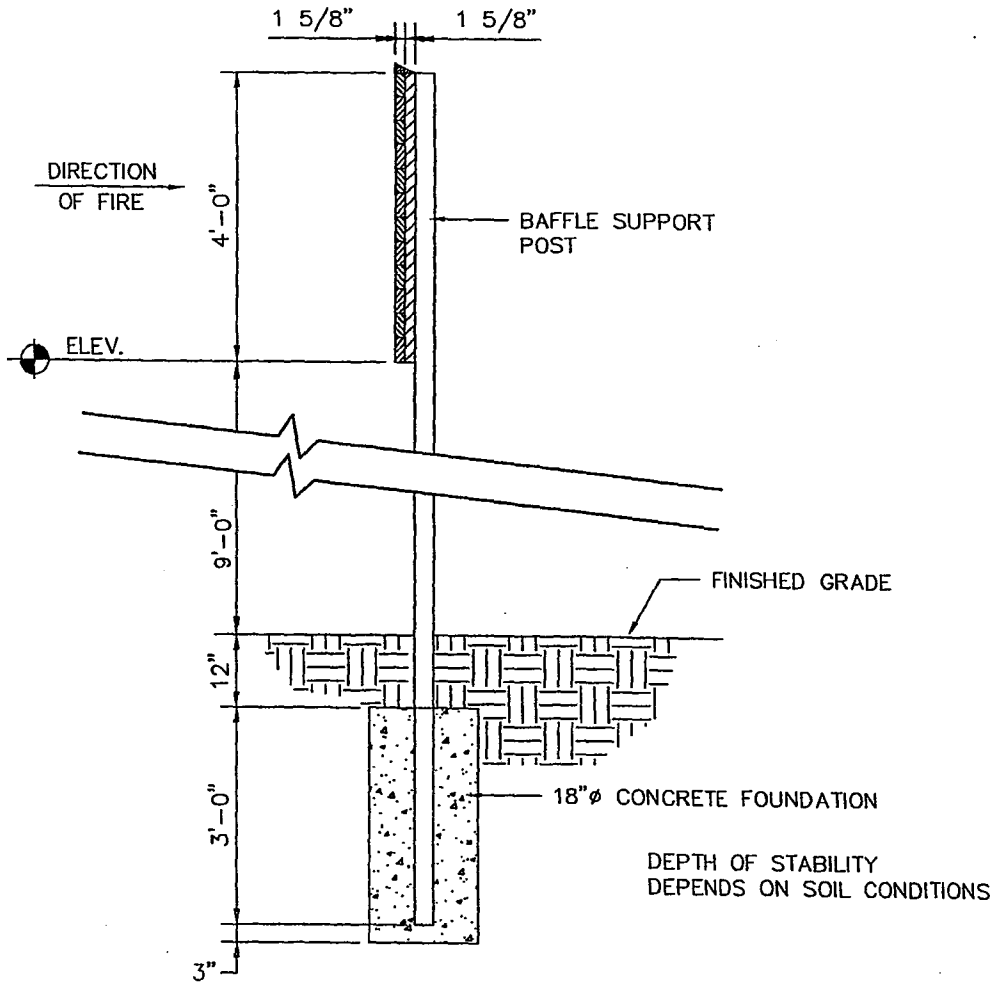
NATIONAL RIFLE ASSOCIATION
 BARBARA DEPARTMENT
 FAIRFAX, VIRGINIA 22030
 SHOOTING RANGE
 DEFINITIVE DRAWINGS

COVERED RIFLE FIRING LINE WITH BAFFLES PLAN AND DETAILS	DATE
NO.	BY
REV.	BY
REV.	BY

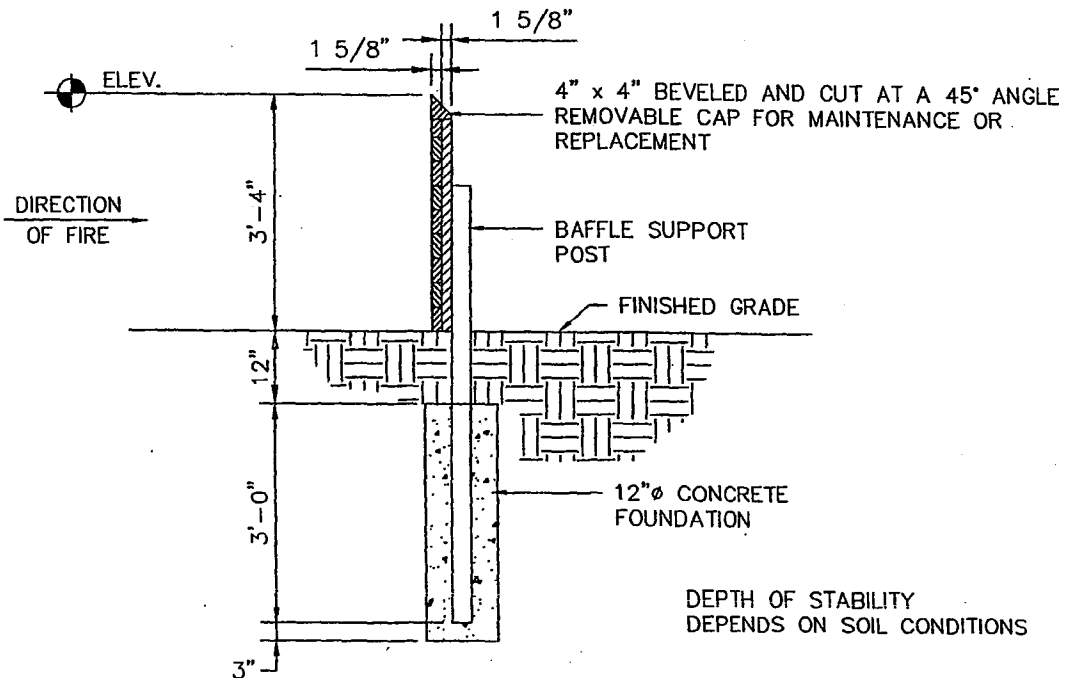
G. VARGAS & ASSOCIATES, LTD.
 CONSULTING ENGINEERS
 1000 W. 10TH AVENUE, SUITE 100
 DENVER, CO. 80202
 PHONE: 303.733.1234
 FAX: 303.733.1235
 WWW: GVA.COM
 REGISTERED PROFESSIONAL ENGINEER
 LICENSE NO. 19287
 PREPARED BY:

CADD FILE
 A-8.DWG
 PROJECT NO.
 0739
 SHEET
 9

THIS DRAWING IS THE INSTRUMENT OF SERVICE AND PROPERTY OF C. VARGAS & ASSOCIATES LTD. ANY USE OR REPRODUCTION WITHOUT EXPRESSED WRITTEN PERMISSION OF THIS CORPORATION IS PROHIBITED. ALL RIGHTS OF DESIGN AND INVENTION ARE EXPRESSLY RESERVED.

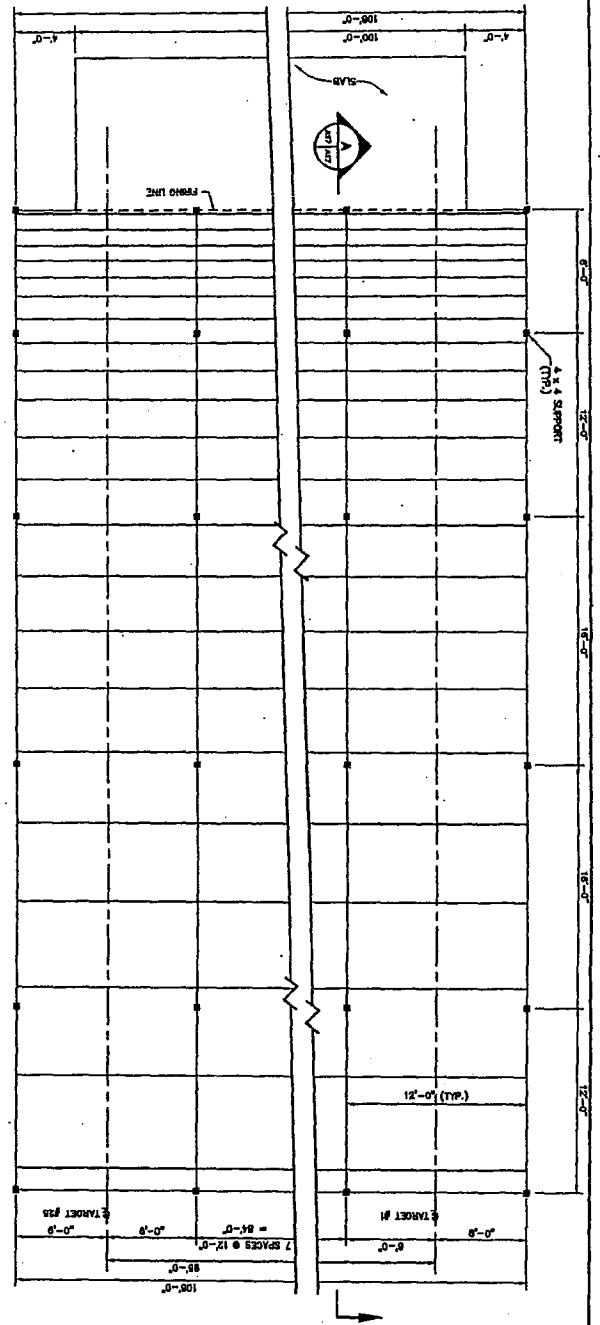


OVERHEAD Baffle DETAIL 1
 SCALE: 3/8" = 1'-0"
 C6 A16

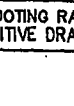
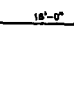
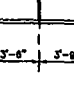


GROUND Baffle DETAIL 2
 SCALE: 3/8" = 1'-0"
 C6 A16

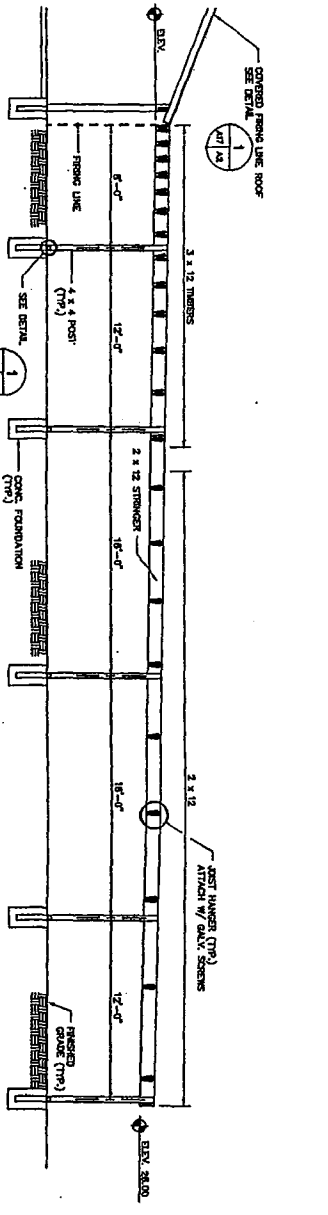
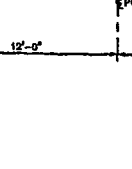
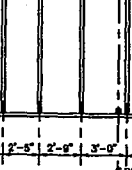
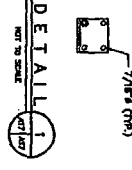
NATIONAL RIFLE ASSOCIATION RANGE DEPARTMENT FAIRFAX, VIRGINIA 22030		PISTOL RANGE OVERHEAD AND GROUND Baffles SECTIONS
SHOOTING RANGE DEFINITIVE DRAWINGS		REVISION NO. DATE BY
C. VARGAS & ASSOCIATES, LTD. CONSULTING ENGINEERS 2508 ARLINGTON EXPRESSWAY JACKSONVILLE, FLORIDA 32211 (904) 725-7131		REG. ENGR. NO. 16297
DRAWN BY D.E.N. CHECKED BY C. VARGAS DATE 5/98		C.A.D.D. FILE A-16.DWG
PROJECT NO. 0759		SHEET
OF		145 of 94



25 POINT PISTOL RANGE
OVERHEAD BAFFLE LOCATION PLAN
SCALE 1" = 20'

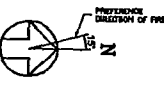
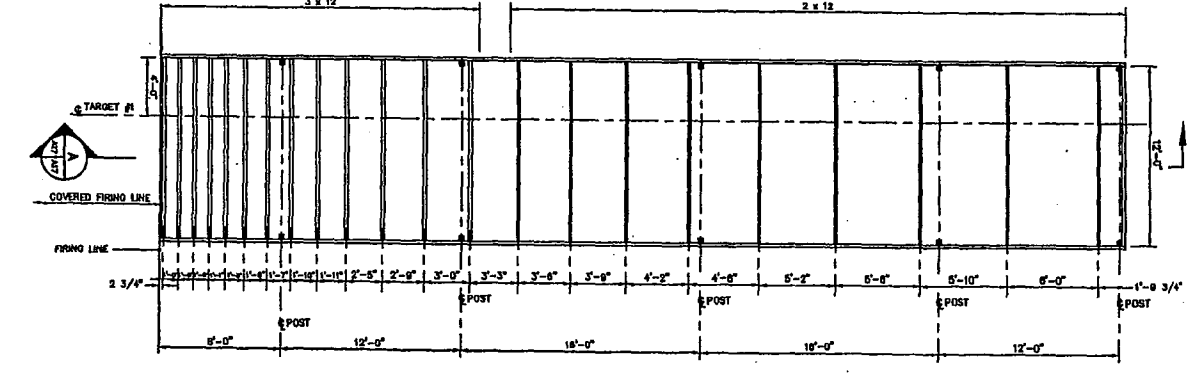


- NOTES:
1. MEASUREMENTS FOR BAFFLE BOARD PLACEMENT ARE CENTER TO CENTER.
 2. ALL LUMBER SHALL BE PRESSURE TREATED (P.T.) HARDWOOD LUMBER.
 3. BAFFLES THINNER THAN 8'-0" WILL REQUIRE CROSS BRACING AT 8'-0" TO REDUCE WAIVER.
 4. JOIST HANGERS SHALL BE USED TO REDUCE LABOR REQUIREMENTS FOR LATER MAINTENANCE OF BAFFLES.
 5. CEILING REQUIRE THE USE OF 4 x 4 THUSERS, MINIMUM.
 6. TO REDUCE SOUND TRANSMISSION, BAFFLES MAY BE COVERED WITH INSULATING BOARD, PLYWOOD AND ROOFING MATERIAL.
 7. FINING LINE ROOF COVER SHALL BE CONSTRUCTED TO WITHSTAND THE USE OF AUTOMATIC MAINTENANCE.
 8. THIS BAFFLE DESIGN IS NOT ADAPTIVE FOR HIGHER PRICES AND WORKER PISTOL LAWS.

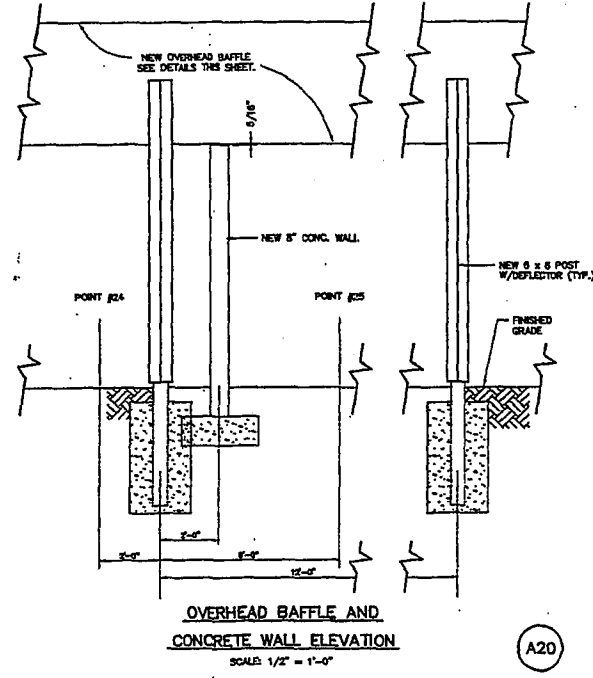
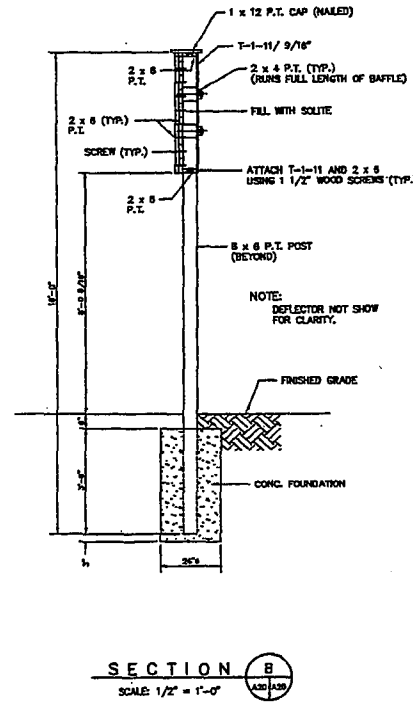
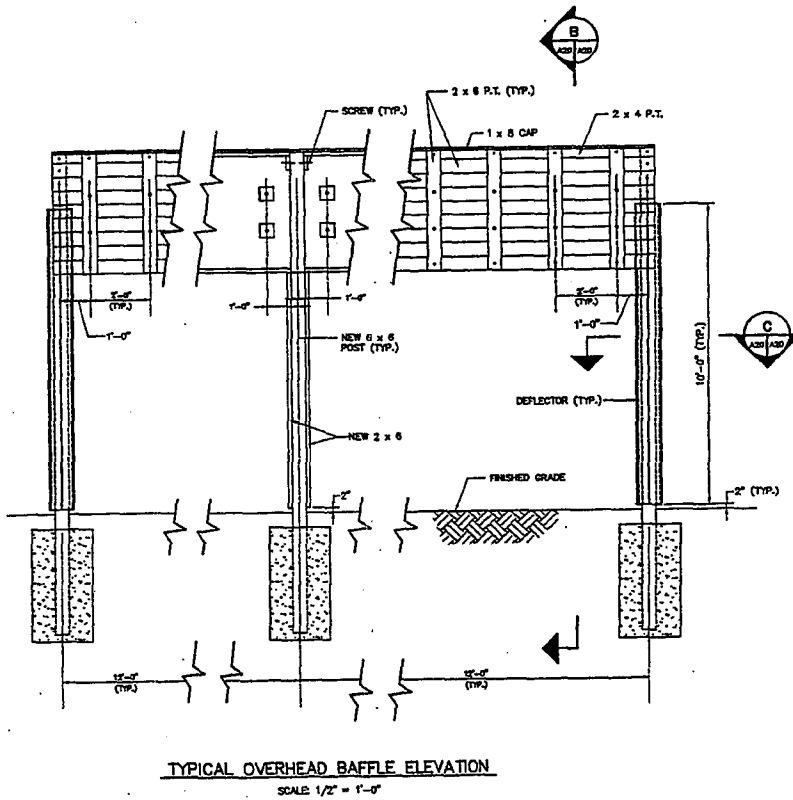
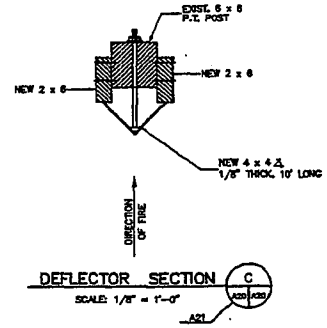
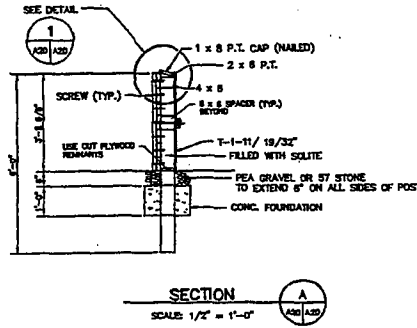
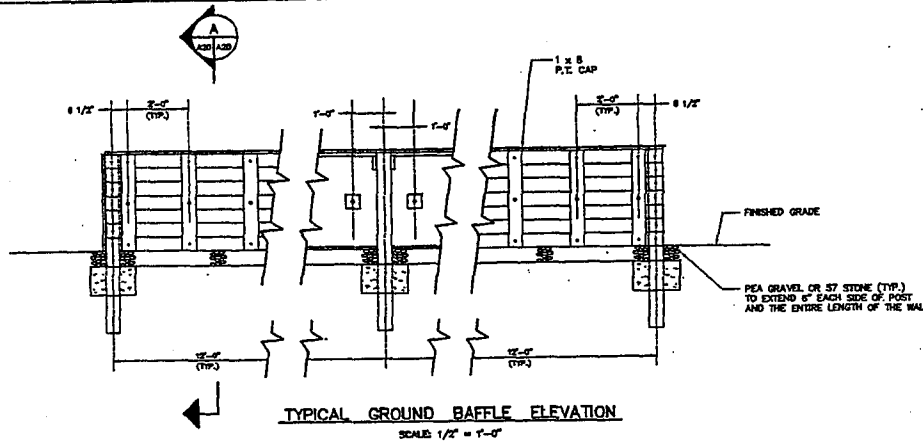


SECTION A-A
SCALE 1/4" = 1'-0"

PISTOL RANGE VENETIAN BLIND BAFFLE PLAN
SCALE 1/4" = 1'-0"

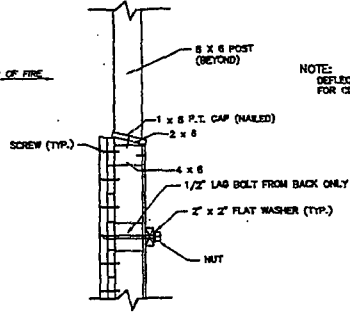


THIS DRAWING IS THE INSTRUMENT OF SERVICE AND PROPERTY OF C. VARGAS & ASSOCIATES LTD. ANY USE OR REPRODUCTION WITHOUT EXPRESSED WRITTEN PERMISSION OF THIS CORPORATION IS PROHIBITED. ALL RIGHTS OF DESIGN AND INVENTION ARE EXPRESSLY RESERVED.



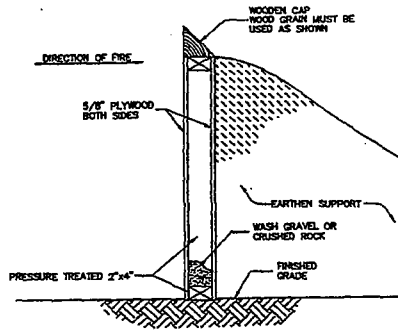
DATE	BY
REVISION	
TYPICAL OVERHEAD BAFFLES AND GROUND BAFFLES DETAILS AND SECTIONS	
NATIONAL RIFLE ASSOCIATION	
BLANKS DEPARTMENT FARMAN, VIRGINIA 22150	
SHOOTING RANGE DEFINITIVE DRAWINGS	
NRA	
C. VARGAS & ASSOCIATES, LTD. CONSULTING ENGINEERS 1000 W. WASHINGTON SPOKANE, IDAHO 83402-1231 PHONE 800-451-7271 FAX 509-325-1111 E-MAIL CVAS@CVA-ASSOCIATES.COM	
C.A.D. FILE	A-20.DWG
PROJECT NO.	0759
SHEET	
OF	

THIS DRAWING IS THE PROPERTY OF SERVICE AND PROTECTIVE OF C. VARGAS & ASSOCIATES LTD. ANY USE OR REPRODUCTION WITHOUT EXPRESSED WRITTEN PERMISSION OF THE CORPORATION IS PROHIBITED. ALL RIGHTS OF DESIGN AND INVENTION ARE EXPRESSLY RESERVED.

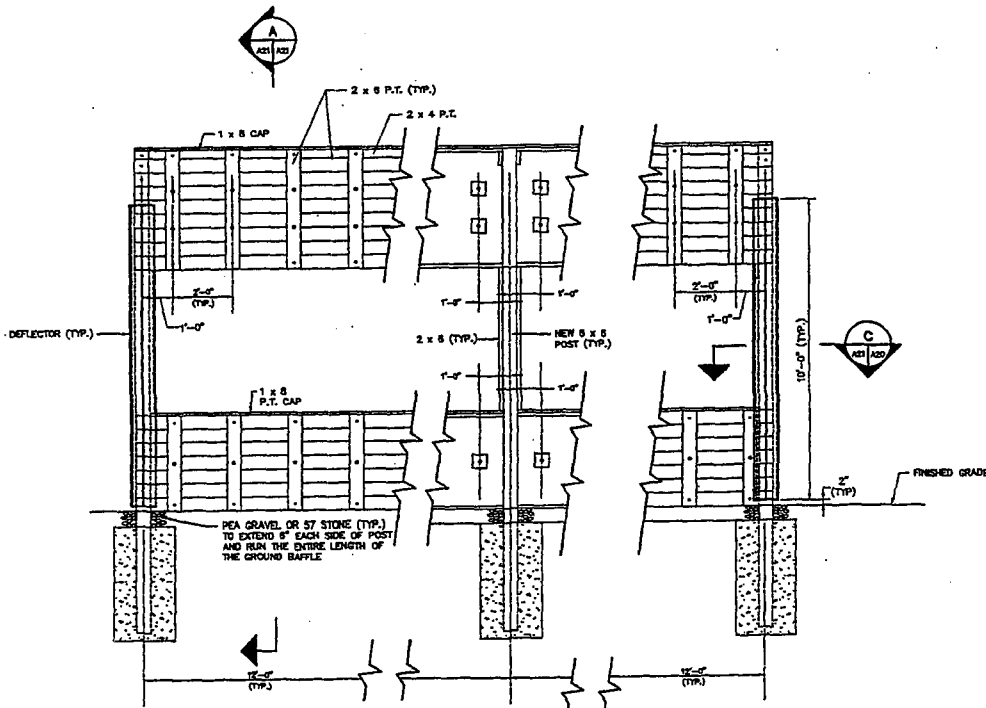


DETAIL 1
SCALE: 1/2" = 1'-0" (A21/A22)

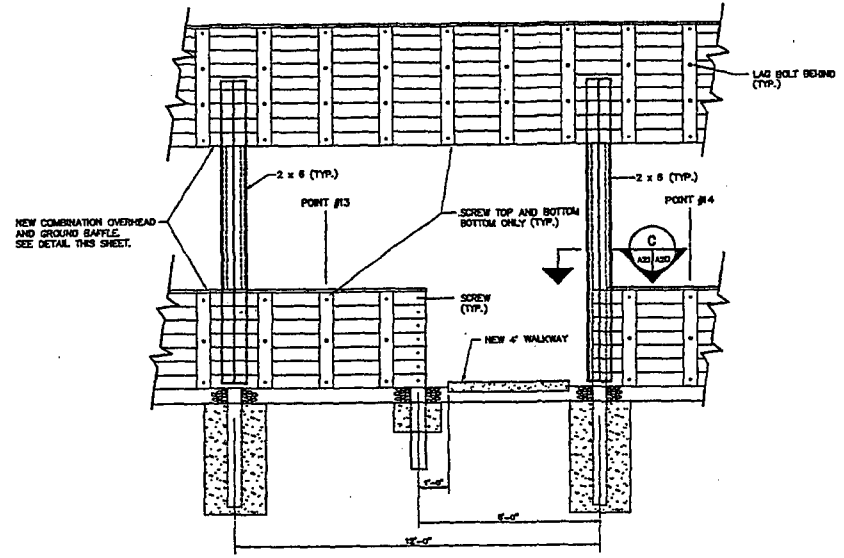
NOTE:
WOOD BAFFLES SHALL BE ASSEMBLED WITH WOOD SCREWS AS MUCH AS POSSIBLE.



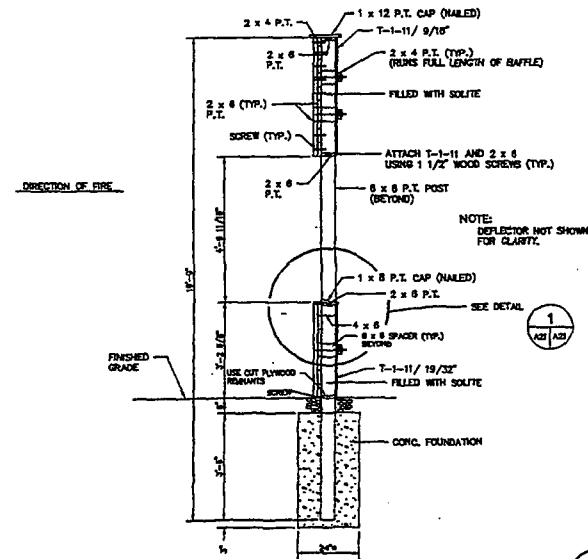
TYPICAL GROUND BAFFLE SECTION 2
NOT TO SCALE (A21)



TYPICAL COMBINATION OVERHEAD AND GROUND BAFFLE ELEVATION
SCALE: 1/2" = 1'-0"



COMBINATION OVERHEAD AND GROUND BAFFLE WITH WALKWAY ELEVATION
SCALE: 1/2" = 1'-0"



SECTION A
SCALE: 1/2" = 1'-0" (A21/A22)

DATE	BY
REVISION	
TYPICAL COMBINATION OVERHEAD AND GROUND BAFFLES DETAILS AND SECTIONS	
NATIONAL RIFLE ASSOCIATION	
RANGE DEPARTMENT FAIRFAX, VIRGINIA 22030	
SHOOTING RANGE DEFINITIVE DRAWINGS	
NRA	
C. VARGAS & ASSOCIATES, LTD. CONSULTING ENGINEERS 10000 W. 10TH AVENUE, SUITE 100 DENVER, CO 80231 PHONE: 303-755-1234 FAX: 303-755-1235 WWW: WWW.CVA-USA.COM	
DESIGNED BY	DATE
CHECKED BY	DATE
FILE NO.	
PROJECT NO.	
SHEET	

Subj: **David Luke, NRA Range Technical Team Advisor!!!Must Read**
 Date: 9/22/2006 2:00:49 AM Pacific Daylight Time
 From: jeannehom@gmail.com (Jeanne Hom)
 To: Scottwreed@imbris.com (Scott Reed), hrichmanattorney@aol.com (hrichmanattorney@aol.com)

I know you have seen this before-but here it is again (Baffles, Berms and Backstops) This says it all

http://www.rangeinfo.org/resource_library/resLibDoc.cfm?filename=facility_mngmnt/design/baffles_berms.htm&CAT=Facility%20Management

Baffles, Berms and Backstops

By David Luke, Range Technical Team Advisor
 National Rifle Association

(This article is reprinted from the Third National Shooting Range Symposium, 1996 with permission from International Association of Fish and Wildlife Agencies, Wildlife Management Institute and U.S. Fish and Wildlife Service.)

During this session, I will talk about points that fall into the "lessons learned" category of shooting range design that, while listed in the "NRA Range Manual," are not always given the appropriate level of importance by the prospective range owner/operator. The detailed and specific minimum construction specifications are in the "NRA Range Manual

3. Purpose of backstops, berms and baffles. Erecting berms, backstops or baffles may be an optional construction consideration for range owners/operators who control 1.5 miles downrange for pistol or 3.5 miles downrange for highpowered rifle, with appropriate left and right ricochet safety zones. I believe all of us would readily agree, that this scenario is the exception rather than the rule. Therefore, the primary purpose for the construction of backstops, berms and baffles is to protect against the injury of people, the damage of property or both. A secondary benefit is to permit the systematic recovery of fired lead projectiles-definitely a recoverable and recyclable resource that can contribute significantly to the positive cash flow of a range facility.

4. Projectile/bullet containment. It is the ultimate responsibility of the range owners/operators to ensure that the projectiles fired on their range are contained within property boundaries. While it is entirely possible for an existing range facility to be grandfathered against noise complaints, it is unlikely any governmental body would make the same concession concerning safety. Therefore, it is paramount that shooting range owners/operators continually evaluate the shooting activities permitted and the requirements necessary to ensure those activities can be conducted with projectile/bullet containment as a primary goal. The level of requirement necessary for the projectile/bullet containment on a shooting range facility will dictate the extent of the backstops, berms and baffle construction.

5. Shooting range safety fan. It is important to frequently remember that while specific range safety fans are specified in the "NRA Range Manual," these safety fans presume a free and open range. As more and more controls and barriers are added to the design (both administrative and physical), the required range safety fan becomes smaller until eventually the range safety fan equals the exterior edges of the barriers. This point is not specifically made in the "NRA Range Manual" and also is not a logical conclusion by those not familiar with range design and construction. These same folks seize on a specification and fail to understand that by adding controls or barriers, the range safety fan specifications are changed, usually significantly reduced. Backstops and side berms do not remove the requirement to include a safety fan.

Backstops

The backstop provides the primary impact area for the bullets being fired on a particular range and under normal conditions prevents the bullet from leaving the range proper. An important factor to remember at this point is the construction of an otherwise proper backstop will not necessarily eliminate the requirement to provide for the

normal downrange safety fan beyond the backstop for the type of firearm or caliber permitted to be fired. The probability of an accidental (firearm malfunction) or unintentional discharge where the bullet escapes the range without first impacting the backstop must be evaluated and considered in the original range design. This must be reevaluated as the surrounding land use changes.

A major consideration for initial construction is to provide sufficient space for ease of backstop repair and lead recovery. All too often, ranges are constructed allowing for the maximum number of firing points and targets in the shortest acceptable width and distance, but with insufficient space to allow regular maintenance or heavy equipment access to the range firing or target line. Special consideration is to provide sufficient space for maneuverability of heavy equipment between the target line and the backstop.

The best outdoor backstop is a manmade earth embankment or a natural hill of appropriate size and shape that meets the specific requirements of a particular site. Alternative backstops may be used when appropriate earthworks are not available. Preferred backstops include: 1) naturally occurring hills or mountainsides (shaping the slope will likely be required), 2) earthen backstops constructed from clean fill, 3) earthen backstops constructed from broken material (concrete or asphalt) and covered with clean fill dirt, 4) earthen backstops constructed from clean fill and stabilized internally, and 5) fabricated backstops using steel or wooden cribs.

Backstop heights can vary according to the site and use. General dimensions are as follows:

1. Height. A minimum height of 15 feet is acceptable but 20 to 25 feet is recommended. This height is the compacted or settled height. Height should also be consistent with other barriers that may be incorporated into the range design.

A ricochet catcher, ricochet baffle or eyebrow can be installed to reduce the incidence of bullets escaping the range by sliding up the face of the backstop. The ricochet catcher is designed to retain only those ricochets that occur on the face of the backstop. While the distance traveled by such a ricochet would be nominal, this factor will nevertheless need to be included in the design calculations. These devices are installed approximately perpendicular to the backstop face and extend 4 to 6 feet out from the slope. The base of the ricochet catcher is typically 12 to 15 feet above the range floor, measured vertically from the ground surface at the target line. This prevents direct bullet impact into the catcher. Once major specification is that the ricochet catcher must be impenetrable to ricochets and should extend completely from side to side and connect the sidewalls. If overhead baffles are employed, the top of the backstop need only be 3 to 5 feet higher than the ricochet catcher. Specific construction details of the ricochet catcher will dictate the amount of material needed to ensure that the catcher is held securely in place.

2. Width. The width of the backstop should extend at least 5 feet beyond the intersection of the toe/bottom edge of the side berm and the outside targets/firing position. If the range has high side berms that closely match the height of the backstop then this requirement does not apply. Keep in mind that repair equipment needs adequate area to maneuver and work behind the target line. Therefore, this allowance may need to be greater.

3. Slope. The range side slope (side facing the shooter) must be as steep as possible, but not less than a 45-degree slope (a ration of 1-to-1). If a soil analysis determines that the soil will not support construction equipment, maintain the minimum required slope angle, or support vegetation, then it may be more economical to remove the poor soils and replace it with more suitable material. Special techniques may be required to stabilize the backstop.

In poor soil areas, gabions or rip-rap may be used on the offside of the backstop to stabilize materials.

Sandbags or automobile tires may be incorporated to maintain the bullet impact side of the slope. A major consideration if automobile tires are to be used is that they will present significant additional work time when the backstop is mined for lead. It is also necessary to fill the interior of the tires as they are put into place and before they are covered with clean fill. Steel-belted radial tires should not be used at all. There are many materials that can be used to stabilize the slope until vegetation can be established. Special netting material is especially useful to establish plants. Heavy vegetation such as large plants or trees should not be permitted on the top or range side of the backstops.

If columns of automobile tires are used as the core of the backstop, these columns must be supported by using

utility poles inside each column with clean fill material added to the interior of each tire as it is put into place. Without filling the interior of each tire, the columns of tires will collapse, requiring the use of more tires. Not using utility poles or some other support for the column may cause the backstop itself to collapse. The use of wooden cribs for a backstop is labor intensive to maintain and is a less desirable construction method. They should be used only as a last resort.

Steel backstops are also an acceptable alternative when soils are inadequate. The primary drawback is the initial cost. However, if the projected quantity of shooting is substantial, the ease of recovering lead may quickly offset the initial cost. Basic maintenance costs also will be lower. Expect foundation work to be required to set and support this type of backstop. Because these backstops are constructed to the same specifications as indoor range backstops, an additional earthen barrier behind them may be needed.

Side berms and walls

These protective barriers may be constructed from earth, precast concrete panels, masonry walls, wooden cribs, wooden box-type structures filled with pea-gravel, crushed rocks, rubber tires filled with soil and/or poured concrete walls or panels. The specific type of structure will depend on available space, type of range being built and the relative initial cost. A major consideration that should be evaluated during the initial planning process is the long-term maintenance cost of the barrier being considered. Most times it is far more cost-effective to select the construction material that will provide the longest life while requiring the least maintenance.

Exposed tires present problems such as bullet bounce-back that must be addressed before they are used. If earthen side berms are selected, the construction methods will be the same as that used for the construction of the backstop. If concrete panels are selected, then some site work will be required to build their foundations. Concrete panels can be tipped into place or set into place using a crane. If masonry walls are selected, only skilled masons should be used. A substantial foundation will be required to prevent settling cracks or major damage caused by ground shifting. Experienced engineers and concrete companies should be employed to erect concrete structures, especially in earthquake-prone areas. If concrete walls (precast or poured-in-place panels) are selected, the specifications cited in the "NRA Range Manual" should be strictly adhered to.

Generally, earthmoving equipment will be used to construct the main backstops. If earthen side berms are the choice then retaining the equipment onsite to construct the side berms is often the most cost effective. Side berms generally vary in dimensions according to the specific need. However, if a side berm is to be used also as a backstop, as some shooting activities may require, then the side berm is considered to be part of the backstop and should conform to the same specifications as the backstop. In this situation, the overall height of the side berm, for at least that portion that is used as a backstop, should be the same as the backstop. It is important to remind all range owners/operators to carefully evaluate the shooting activities to be incorporated into their range facility and include them in the master plan.

Side berm, walls or barrier specifications are as follows:

1. Height. Generally, side berms, walls or barriers are suggested to be a minimum of 8 feet high, with 10 to 12 feet recommended. Side berms may be used on all ranges and on ranges that go a distance of 1,000 yards. Side berms, walls or barriers are used to allow shooters and range personnel to use adjacent ranges simultaneously. Another reminder: backstops, side berms, walls or barriers, in and of themselves do not eliminate the requirement for safety fan areas.
2. Length. Except as indicated above, side berms may be the same height and the full length of the range-from the backstop back to even with the most distant firing line.
3. Slope. The range side (the side facing the shooter) of the side berm should be as steep as is possible, but not less than 45 degrees or a ration of 1-to-1. These specifications are the same as those for the backstop.

Masonry walls are an alternative, but they should not be selected over precast or tip-up walls. The repair work for damaged masonry walls is often both labor intensive and expensive, whereas a precast panel can be removed and replaced with minimal effort and expense. Initially, an additional number of the precast panels can be purchased, which should significantly reduce the cost of such panels over having them cast again at a future date. Masonry walls using voided concrete block should be fully grouted and filled with concrete to add strength and

impenetrability to the structure. Masonry walls should be reasonably protected against bullet strikes.

Wooden side baffles filled with selected materials may be used, but are not easily constructed, repaired or maintained. Obviously, the designs for side baffles will depend upon local site conditions and available materials. A point to be made about wooden box side baffles is that they must be tested before being built to ensure that they will stop the bullet for the caliber to be used. It is the rare exception that will require this type of structure to be more than 4 inches thick. A structure made to the thickness of 6 inches will stop all bullets from normally accepted sporting arms and individual infantry military small arms. If there are doubts, construct a test panel and conduct the appropriate tests before committing to any major construction expense. Test twice before building once. [See the "NRA Range Manual" for dimensions and drawings to construct a test panel.]

Precast concrete panels set at angles on each side of the range can prevent bullets, regardless of the angle fired laterally, from escaping the range. Generally, panels are manufactured onsite and tipped into place. These barriers withstand most bullet strikes without major damage. Stringent range laws can prevent shooters from inadvertently firing into the barriers. Shooters must demonstrate the appropriate skill necessary not to cause damage to range equipment.

Safety baffles

The term safety baffle or overhead safety baffle defines a structure which is used to restrict fired bullets to smaller areas than would otherwise be possible without them. Safety baffles differ significantly from sound baffles, which are designed to absorb or redirect sound waves. Safety baffles are designed to be impenetrable. The basic concept is on the "blue sky gap." This means that baffles are erected so that the shooter, regardless of the shooting position used (or permitted) cannot see any sky downrange, either over the top of the backstop or to the sides of the range. Safety baffles may be overhead, on the ground, on top of the backstop, in the roof of the firing line cover, in the form of an elongated box, or as a completed enclosed tunnel. The principle behind the design is to equip a range with baffles so that if a fired bullet leaves the confines of the range proper, it will fall to earth within a smaller, more predictable area that is acceptable to protect people or property adjacent to the range.

If overhead safety baffles are not designed and installed properly, they can cause problems. They may redirect the fired bullet in the wrong direction, may not absorb the fired bullet as intended, or there may be gaps that will permit a bullet to escape the range. For any range on which overhead baffles are planned, carefully analyze the application beforehand and seek professional advice.

General specifications say that safety baffles must:

1. must be impenetrable for calibers to be used on the facility.
2. must be a minimum of 4-feet-tall for vertical baffles.
3. must be relatively maintenance-free.
4. if using concrete, must be designed to span lengths of up to 25 feet. Span length between columns is a product of design and overall range width.

The specific design and number of baffles that will be needed to protect a given area will be dictated by the amount of free space around a particular range facility.

Vertical overhead baffles are a standard 4 feet high with the bottom edge set 6.5 to 7 feet above the horizontal surface of the range. The width dimensions are the entire width of the range connecting to both side berms or walls.

For baffles constructed from plywood and filled with high-density material, use 3/4-inch marine plywood on the firing line side, 5/8-inch on the downrange side, and built into a box with an inside dimension equal to the width of a standard 2x4-inch piece of lumber. Again, fill materials must be tested before use.

Baffles may be built by laminating wood and steel or by a special concrete panel design. Laminating baffles using plywood and 10-gauge steel requires a lamination thickness of three sheets of plywood with two sheets of steel sandwiched between; nominally the lamination thickness is 2.5 inches.

Slanted overhead baffles are 9 feet wide and set at a 25-degree angle to the ground as measured from the front edge (the firing line edge being higher than the rear edge). The slanted overhead baffles are a minimum of 3-inches-thick, prestressed concrete slabs, and must pass 3,000-pound, 28-day, compressive strength test.

It also is important to keep in mind that it may be necessary to incorporate a series of ground baffles within the overall design. Ground baffles reduce the ground surface area that a bullet might strike. When properly designed and installed, ground baffles do reduce ricochets, but do not totally eliminate them. When the downrange area is viewed from the firing line, the shooter will see overhead baffles, ground baffles and the target and backstop immediately behind the target. No blue sky will be visible, nor will any of the horizontal ground surfaces of the range.

Generally, ground baffles should always be used with overhead baffles and must be:

1. impenetrable.
2. minimum height to correspond with the placement and horizontal surface area to be masked. Multiple ground baffles may be required for a 50- or 100-yard range. The goal is to mask the range floor beyond the first baffle.
3. relatively maintenance free. Ground baffles are designed to meet the needs of a particular facility.

The dimensions for ground baffles are a minimum of 3 inches thick if made of plywood and should be backed up by an earthen berm. If a wooden top cap is used, particular attention should be paid to the direction of the wood grain. It should always curve downward.

Materials for ground baffles may be concrete (firing line surface should be 2-by- wood stock covered to prevent bullets from being redirected toward the firing line, pressure-treated wood, steel (firing line surface should be 2-by- wood stock covered to prevent bullets from being redirected toward the firing line), earth or a combination.

When developing the overall safety plan, when overhead and ground baffles are to be incorporated, the level of protection will be dictated by the free space downrange. For example, will the downrange free space permit a 45-degree ricochet escape, or must the angle be increased to 60 degrees or higher? The maximum protection is to install the overhead baffles to protect against a 90-degree ricochet. That is tantamount to an indoor range level of protection. The amount of free space available outside the range barriers will dictate the level of ricochet protection required.

Summary

The bottom line is to develop a shooting range in harmony with adjacent properties and where safety is provided to prevent adjacent properties from experiencing any encroachment. All neighbors must be safe from injury. The overall responsibility of the range owner/operator is to stop fired bullets before they exit the property line.

----- Headers -----

Return-Path: <jeannehom@gmail.com>

Received: from rly-xb02.mx.aol.com (rly-xb02.mail.aol.com [172.20.64.48]) by air-xb03.mail.aol.com (v112_r1.4) with ESMTTP id MAILINXB34-934513a6263de; Fri, 22 Sep 2006 05:00:48 -0400

Received: from nf-out-0910.google.com (nf-out-0910.google.com [64.233.182.189]) by rly-xb02.mx.aol.com (v112_r1.4) with ESMTTP id MAILRELAYINXB27-934513a6263de; Fri, 22 Sep 2006 05:00:22 -0400

Received: by nf-out-0910.google.com with SMTP id a25so919060nfc
for <hrichmanattorney@aol.com>; Fri, 22 Sep 2006 02:00:18 -0700 (PDT)

Subj: **More NRA Range Technical Team info**
 Date: 9/22/2006 1:04:02 AM Pacific Daylight Time
 From: jeannehom@gmail.com (Jeanne Hom)
 To: hrichmanattorney@aol.com (hrichmanattorney@aol.com), Scottwreed@imbris.com (Scott Reed)

----- Forwarded message -----

From: **Hom, Jeanne M CIV NSWCCD Bayview, 7260** <jeanne.hom@navy.mil>
 Date: Sep 21, 2006 3:38 PM
 Subject: nra
 To: jeannehom@gmail.com

http://www.rangeinfo.org/resource_library/NSRS/12TechTrack/22NRA%20Range%20Technical%20Team%20Advisor%22

The Four "E"s of Range Development and Safety

*By Jack J. Giordano, Range Technical Team Advisor
 National Rifle Association, Edison, New Jersey*

The only way to ensure safety on ranges is to follow the four "E"s: evaluate; engineer; educate; and enforce.

Evaluate (or Reevaluate)

Several questions can help you evaluate your range: What shooting activities would I like to conduct on my new range?; What shooting activities are being conducted on my existing range?; and Has the range been designed to accommodate this type of shooting activity safely?

Engineer

Once we have completed an evaluation, to ensure the safety of range users and the surrounding community, we must engineer or re-engineer our range to accommodate the intended shooting activities safely. Engineering is largely fact sensitive and site specific. An ongoing range maintenance plan also is a vital aspect of range safety; it is important to remember that engineering alone cannot make a range safe!

Educate

Continuing safety education is important for your employees, range users and range operators. Before you hire employees and range operators, you should determine what type of people will best benefit the range. You want to hire people with knowledge, skill and ability. Range personnel should be able to speak, read, write, understand and convey to others the language of the shooting sports, as well as range administration, management, operations and maintenance. Range operators can educate range users through formal training courses, range orientation, testing and signage. Education of your customers/users is critical to ensuring safety on the range. Remember to keep neat, accurate records of all range training.

Enforcement

Once range rules and regulations are developed, they must be enforced. Display all range rules prominently, and include a heading (range name, address and phone number), date (when rules were first established, reviewed and/or rewritten) and preamble (i.e., "These rules are established to enhance the safety and health of range supervisors, range users and the surrounding community"). Clearly define any terminology in the rules that may not be common or understood by everyone.

FOURTH NATIONAL SHOOTING RANGES SYMPOSIUM 311

Technical Track: Outdoor Range Design

Jack J. Giordano is a Range Technical Team Advisor for NRA and retired police officer, previously with Port Authority Police of New York and New Jersey. He is the Principal Firearms Instructor at Hillsborough Outdoor Sports Center —Eastern Firearms Safety and Shooting Academy, and Law Enforcement and Recreational Shooting Facility Design Specialist with AGR Associates, an architectural and design firm in

Newark, New Jersey. In 1999, Mr. Giordano was appointed a Training Counselor Trainer to conduct the training of NRA training counselors.

Prioritize your rules and regulations. Gun-handling rules should be given first priority, because this is your area of high risk. Rules should include: keep the muzzle pointed in a safe direction; keep your finger off the trigger until you are ready to shoot; and keep the firearm unloaded until you are ready to shoot.

Firing rules are second priority: know your target and what is beyond; make sure your gun is safe to operate; know how to use your gun safely; use the correct ammunition; wear eye and ear protection; never use alcohol or drugs before or during shooting; and store your guns safely. Operational rules are third priority. They encompass all rules dealing with range operation, live firing, range use and range procedures, such as authorized ammunition, target specifications and shooting from firing line only.

The fourth priority is administrative rules, such as parking regulations, gate closure, trash policies and so forth.

Determine the most effective ways to disseminate your range rules. You may want to ask people to sign for a copy of the rules; this gives you an accurate record of who has received them.

Consequences for violation of rules, including reprimands, dismissals and/or fines, should be stated clearly on your rule sheet and signage. State who has the authority to make and enforce range rules, and date all written rules. Again, it is vital to keep accurate records of your range rules and policies. If possible, rules should be reviewed consistently in a club or range newsletter.

Basic Range Management

When a range is not doing well, it usually can be attributed to a breakdown in one or more of the following seven management areas. We refer to the first four areas using the acronym PODS.

- **Plan.** *Planning is critical to range success. You will need to develop a master plan, site plan, maintenance plan, program plan, training plan, administrative plan, financial plan, tactical plan, strategic plan and five-year plan.*

- **Organization.** *Organize your staff, procedures, and facility support in terms of division of labor, finances, time, duties, capabilities and limitations.*

- **Direction.** *You must take charge, be responsible and make subordinates accountable.*

- **Supervision.** *Ensure that all staff and range users are acting with the highest degree of care. Direct supervision sometimes is necessary.*

We refer to the next three management areas as the Three Cs.

- **Communication.** *You need to communicate both verbally and in writing through reports, newsletters, regularly scheduled meetings.*

- **Coordination.** *Coordinate your range activities, personnel and uses.*

- **Cooperation.** *It is imperative to work with others and gain their cooperation. Without cooperation, other management concepts will be weak at best.*

It is important to remember that range safety is dependent largely upon how the range is being used. For the most part, there is no such thing as an all-purpose range. Range safety is not dependent upon design alone; consider the Four "E"s on every range to ensure the safety of staff and users.

312 FOURTH NATIONAL SHOOTING RANGES SYMPOSIUM

----- Headers -----

Return-Path: <jeannehom@gmail.com>

Received: from rly-yb04.mx.aol.com (rly-yb04.mail.aol.com [172.18.205.136]) by air-yb01.mail.aol.com (v112_r1.4) with ESMTTP id MAILINYB14-197451398e02ce; Fri, 22 Sep 2006 04:04:01 -0400

Received: from nf-out-0910.google.com (nf-out-0910.google.com [64.233.182.185]) by rly-yb04.mx.aol.com (v112_r1.4) with ESMTTP id MAILRELAYINYB47-197451398e02ce; Fri, 22 Sep 2006 04:03:44 -0400

Received: by nf-out-0910.google.com with SMTP id l24so1002704nfc

for <hrichmanattorney@aol.com>; Fri, 22 Sep 2006 01:03:44 -0700 (PDT)

DomainKey-Signature: a=rsa-sha1; q=dns; c=noFWS;
s=beta; d=gmail.com;

h=received:message-id:date:from:to:subject:mime-version:content-type;

Subj: **Shooting range lawsuit cases off rangeinfo.org**
Date: 9/25/2006 5:40:23 PM Pacific Daylight Time
From: *jeanne.hom@navy.mil (Hom, Jeanne M CIV NSWCCD Bayview, 7260)*
To: *HRichmanAttorney@aol.com, scottwreed@imbris.net*

FYI-

Summaries of lawsuit cases off of rangeinfo.org (safety and noise)

http://www.rangeinfo.org/resource_library/resLibDoc.cfm?filename=business/legal/shooting_sports_versus.htm&CAT=Business

SHOOTING SPORTS VERSUS SUBURBAN SPRAWL - IS PEACEFUL COEXISTENCE POSSIBLE?

By **David G. Cotter**

(Reprinted with permission from the **Thomas M. Cooley Law School**)

"Competition in marksmanship-whether with stones, spears, arrows, or bullets-has a history probably almost as old as the human race."

1. Introduction

"Unrestrained suburban growth will lead to higher local taxes and continued loss of farmland, more groundwater contamination and further deterioration of urban areas." It may also lead to the destruction of many rural traditions. One such tradition that is being threatened nationally is target shooting at established outdoor shooting ranges. Those seeking the tranquility and solitude of country living have been attracted to areas where shooting ranges have existed for many years and in many cases, for many decades. These newcomers seem to dislike the sound of shooting emanating from shooting ranges. Depending upon the physical orientation of the ranges in relation to neighboring properties, these newcomers, who may have no knowledge of guns or shooting sports, may feel that shooting ranges pose a safety hazard.

As might be expected, suburban sprawl has led to increased lawsuits between those seeking stereotypical country living and those whose rural shooting activities have involuntarily become more suburban. These lawsuits fall into four primary categories: noise nuisance; safety hazard nuisance; lead contamination; and zoning violations.

Noise nuisance is by far the most common attach leveled at shooting ranges. However, to say that the sound of shooting is a nuisance is a gross oversimplification. The obvious concern is decibel level. However, many other features may factor into allegations of nuisance. Such factors include the time of day, the day of the week or year, the amount of gunfire, and the duration of the gunfire.

Before analyzing the variations of noise, two features of nuisance must be considered. First, an activity that was not a nuisance may become a nuisance as the community changes. Thus, a shooting range that was not a nuisance in an isolated rural area may become a nuisance when the area becomes suburban and residential in nature. Stated another way, the shooters' contention that "we were here first!" may not provide a legally cognizable defense.

Second, in order for noise to be a nuisance, "it must be of such a character as to be of actual physical discomfort to persons of ordinary sensibilities." However, later cases suggest that mere annoyance, rather than physical discomfort, may constitute an enjoicable nuisance.

Part II of this Article will discuss what constitutes noise and how humans react to noise. Part III reviews specific case holdings over a thirty-five year period involving allegations that shooting ranges constitute a nuisance. The primary focus will be on the allegations that shooting ranges give rise to noise and safety nuisances. Case

authorities have been chosen to demonstrate the chronological evolution of nuisance law as applied to shooting ranges. Thereafter, Part IV isolates and discusses the factors that are given the greatest consideration in a nuisance analysis. Michigan authorities predominate this Article because of the significant amount of shooting range activity in Michigan. Authorities from other states are discussed in Part V to show variations in nuisance law analysis but no attempt has been made to thoroughly cover shooting range litigation from all the states or those cases involving theories other than nuisance. Part VI of this Article discusses attempts by the Michigan Legislature to provide statutory protection for shooting ranges from suits alleging nuisance. Finally, this Article concludes that the best way for a shooting range to avoid a nuisance cause of action is to provide a safe and predictable shooting environment.

Part II: Noise: How Humans React to Sound

In 1981, Professor Sheldon Cohen discussed human reaction to sound and noise. He concluded that "[d]istracting, unwanted sound is part of our every day experience," and "that noise can affect human beings in unexpected ways."

Professor Cohen necessarily distinguishes between sound and noise stating that:

Sound results from changes in air pressure that are detected by the ear. Noise is a psychological term referring to unpleasant, unwanted, or intolerable sound. It follows that noise is in the ear of the beholder. Thus, even loud sounds may sometimes be judged desirable, while soft sounds may be considered noisy.

In order to determine how noise affects people, it is suggested that merely counting complaints might work as a reasonable methodology. However, Professor Cohen notes that counting complaints is "not an accurate measure of reaction to noise" because "[i]n general, better-educated, higher-income, higher social status people complain most often. It is not that they are more annoyed than other people but that they understand the complaint procedure better and more often expect someone to listen to them." On the other hand, this might make it fair to conclude that many "better-educated, higher-income [and] higher social status" persons trading the annoyance of city life for the hoped-for tranquility of rural life are more than likely to complain at the first sound of gunfire.

The specific features of noise causing annoyance that might lead to the noise being deemed a nuisance is of great importance to shooting range owners, operators, and users. On this point, Professor Cohen states the obvious-loudness affects a person's reaction to sound: "[a]nnoyance mounts with the decibels." From a shooting range perspective, two other conclusions drawn by Professor Cohen may be profound.

First, the predictability of the noise will impact on the degree of irritation it may cause. Thus, unexpected gunshots of a low-decibel nature may cause greater annoyance than predictable gunshots at a higher decibel level. For example, the weekly skeet shoot that starts and ends consistently, week after week, may create less annoyance than the lower decibel level of an unexpected small-bore rifle discharge.

Secondly, "there is considerable evidence that psychological factors-attitudes and beliefs about a noise and its source-are of equal or even greater importance than the intensity of a sound." Thus, a person who fears firearms or has an inherent dislike for them may find the sound of gunfire far more annoying than those who do not fear firearms or who themselves actually enjoy shooting as a recreational activity. It appears that people moving from cities to rural areas are particularly prone to anti-gun animus. On a daily basis, metropolitan media sources report criminal use of firearms which results in injury and death, while the sporting and recreational use of firearms is either not covered or covered in a negative light.

1. It's Not a Nuisance; It is a Nuisance - The Broad Spectrum Over Time

1. In May, 1962, the Cortland New York school district sought to enjoin Westchester County from building a sport shooting range on a 1500 acre tract of county-owned land because it was near the future site of an elementary school. The school board claimed that "the dangers inherent in and the noises emanating from the shooting center would constitute a nuisance." After finding that the plaintiff failed to establish that shots fired from the ranges would land on plaintiff's property so as to constitute any danger, the court went on to discuss the noise nuisance aspect of the case." Because the school had not been constructed, the alleged noise nuisance was, at best, based on mere speculation. The injunction sought by the plaintiff was therefore denied. However, twenty-three years later, a Colorado shooting facility was not as successful.

2. Subdivision residents in Colorado brought an action based on noise and dust pollution from a shooting range located on the property of the local chapter of the Izaak Walton League of America. "The shooting range [was] oriented in a direction that focuse[d] all gunfire away from plaintiffs' property." The "range was open daily for shooting from 8:00 a.m. to 10:00 p.m. [and occasionally] shooting started as early as 6:00 a.m. and lasted as late as 2:00 a.m." During shotgun (trap) shoots, 125 discharges of firearms occurred every twelve minutes.
3. The defendants had constructed a dirt road leading to the range. At peak times, the dirt access road carried more than 200 cars each day, resulting in dust settling onto the plaintiffs' property. "the trial court found that the noise emitted by guns fired at defendant's range [was] of a periodic or impulsive nature." Sound measuring devices set for impulse "mode recorded a sound pressure differential from 55 to 80 decibels" (which was higher than the Colorado statutes permitted), when the members engaged in discharging firearms on the defendants' property.
4. The trial court found that the plaintiffs had failed to prove that the use of defendants' property as a shooting facility was a private nuisance. Nevertheless, the trial court held that the fugitive dust problem from the access road and the sound of gunfire constituted a public nuisance. On these findings, the trial "court enjoined [the] defendants' further use of its property as a shooting range until it remedie[d] the fugitive dust problem and [brought] the noise from the discharging firearms within statutory limits." Furthermore, as for the fugitive dust problem from the access road, the trial court held that because the subdivision was in a "residential zone" it constituted a public nuisance.
5. The Colorado Court of Appeals affirmed the trial court's holdings. It found that the sound-level meter the plaintiffs' expert used was appropriate, and was used properly as a noise-level measuring device to establish that the defendants' shooting range constituted a public nuisance. Which mode to use in determining whether noise exceeded permissible noise levels so as to constitute a public nuisance was held to be a question of fact. This determination required employment of "scientific testimony concerning whether the sounds are impulsive, shrill, or periodic and concerning what mode of measurement is proper for that [particular] sound."
6. In affirming the trial court's holding that the evidence supported a determination that the subdivision was a "residential zone" and that the fugitive dust from the league's access road constituted a public nuisance, the court of appeals appears to have placed great weight on the fact that the area was residential. Although this idea was not discussed in depth, a reasonable inference may be drawn that as an area becomes more residential, less noise will be tolerated.

2. The Factors That Make Up A Nuisance

1. The concept that the more urban an area becomes, the less noise will be tolerated, was a prominent factor in *Smith v. Western Wayne County Conservation Ass'n*. The Michigan Court of Appeals adopted the trial court's finding that a gun club, which was constructed in accordance with the standards of the National Rifle Association, was located in a swampy area zoned agricultural and not residential, and was therefore, not a nuisance.
2. *Smith* makes an excellent case study for several reasons. First, the club is relatively large and well-organized. Second, its shooting range facilities and shooting programs are rather extensive. Third, the agricultural area in which it was located has changed dramatically over the ensuing thirty years since the original litigation.
3. The range, when built in 1961 and early 1962, was located in an area made up of undeveloped, open agricultural land. About five years earlier, a residential trailer court consisting of 109 trailer sites was constructed. There had been no further development in the area at the time the suit was filed.
4. The Association's shooting facilities were described in detail:
5. The [defendant's] Range consists of three individual ranges, from north to south, described as a 200-, 100- and 50-yard range. Down range is eastward where targets are placed immediately in front of an earthen mound, or backstop, having a height of 35 feet, a base of 182 feet, a top level of 132 feet, and a slope of 60 degrees. In addition, each range has earthen side walls, 8 to 10 feet high. There are a number of firing positions, which vary for each range. The 100-yard range is under roof shelter, which has no side walls, having benches or tables for the convenience of the shooters. The 200-yard range was constructed with provisions for a 300-yard range accommodation at a future date, by increasing the size of the backstop and doing certain grading.
6. The Range was constructed in accordance with plans and specifications exceeding the requirements of the National Rifle Association. it is used by members and guests of the

- defendant association, as well as for competitive meets.[The Association's members were] limited to persons over eighteen years of age of good character.
7. The filing of the plaintiffs' complaint was prompted by the defendant conducting a high-power rifle match. The trial court calls this type of match a "big-bore" meet. This meet consists of forty to fifty shooters divided into teams of eight shooters with each team of shooters firing 336 rounds. A total of approximately 1,680 to 2,100 shots were thus fired during this "big-bore" meet which occurred over a two-day period.
 8. The day after the meet, the plaintiffs asked the Association to reverse the set up of the ranges so that the target placements would not be in line with the trailer park. This would cause the bullets to travel away from the trailer park, eliminating a perceived safety hazard. However, because of both time and money invested to construct the range, the request was denied.
 9. Two mock "big-bore" meets were staged for the benefit of the trial court. "[S]ound measurements were taken and tap recordings made by a qualified sound engineer at the homes of certain designated plaintiffs, including the closest and farthest from the range, the results of which were subsequently made a part of the [trial] record."
 10. The plaintiffs claimed that the noise emanating from the use of the defendant's range impaired their right to peaceful enjoyment of their homes, and that unless the noise was "silenced"- the nuisance abated - they would be forced to move from the trailer park. The court held that under certain circumstances, noise may be deemed a nuisance and thus enjoined.
 11. The Michigan Supreme Court set forth the test for determining whether a noise constitutes a nuisance in *Borsvold v. United Dairies*. "To render noise a nuisance, it must be of such a character as to be of actual physical discomfort to persons of ordinary sensibilities." When applying this standard, a reviewing court should take into consideration the character of the activity complained of, 'the character, volume, time and duration of the noise, and 'all the facts and circumstances of the case."
 12. Interestingly, it appears that of all the possible factors, time and locality are given the greatest weight in determining whether noise is a nuisance. As to the timing question, the court will look at whether the noise is depriving the plaintiffs' of sleep. If the answer is affirmative, a noise nuisance will likely be found. In the context of shooting ranges, a court must decide whether to enjoin any use of the range, or alternatively, enjoin the use of the range during the sleeping hours of the community. To appreciate the first option, one must keep in mind that shooting sounds during non-sleeping hours might well meet the test for a noise nuisance. As for the location question, the prevailing view is "the more residential the area, the less noise is tolerable."
 13. The Smith court also held that: "[w]hether noise is sufficient to constitute a nuisance depends upon its effect upon a normal person or ordinary habits and sensibilities. Relief cannot be based solely upon the subjective likes and dislikes of a particular plaintiff. To be workable, relief must be based upon an objective standard of reasonableness."
 14. Applying the reasonable person standard to the Western Wayne County Conservation Association, the court found that the noise that emanated from the range could be heard at homes ranging from a quarter of a mile away, to homes located three quarters of a mile from the range. However, the court held that the noise was not of a degree that would shock the senses of a reasonable person. Therefore, the shooting at the defendant's range did not render it a nuisance. This decision was based on the fact that the use of the range was compatible with the makeup of the area considering the location of the plaintiffs' homes in relation to the ranges, and the limited use of the ranges.
 15. **The plaintiffs in this case also claimed "that the Range [was] unsafe; that is use endanger[ed] the lives and property of persons living in the area; and that even if found safe, the fears in the minds of the residents resulting from its operation and use render[ed] it a nuisance.**
 16. **The Smith trial court held that the use and operation of the defendant's range was safe. The court relied on the fact that the range "was constructed according to plans and specifications of the National Rifle Association, incorporating every possible safety feature." The court specifically noted the U-bar on the 200-yard range which prevented bullets from leaving defendants' property; that competent and responsible shooters used the range; and that the 200-yard range was closed during the week and was supervised by a competent range officer on the weekends.**
 17. **The Smith court was convinced that no safety hazards were present. The court's decision was based largely on the fact that the area was not a strictly residential area.**

Instead, the land was undeveloped and zoned agricultural. Furthermore, the zoning law expressly permitted land use for gun clubs. This is rare today. As agricultural areas have evolved into residential areas, far more restrictive zoning laws have been adopted. Where agricultural uses have been retained, shooting clubs are either no longer permitted to operate, or special use permits are required that are nearly impossible to obtain. It is a constant battle for shooting clubs to avoid being deemed nuisances when the rural area in which they were established becomes suburban in nature.

18. The court also placed great weight on the fact that "hunting in season [was] allowed and [had] been allowed for many years in [this] area." Legalized hunting in an area where a shooting range is alleged to be a nuisance because of safety concerns, makes a strong argument in favor of the shooting club. The structured nature of shooting on established ranges designed and built with safety in mind compared to shooting at an animal without accurate knowledge of what is behind the animal almost always makes shooting ranges safer. Unfortunately, if such a shooting range is deemed to be a nuisance for safety reasons, a ban on hunting in the area is almost sure to follow.
19. Further, the court held that relief cannot "be granted on the supposition that there exists a fear in the plaintiffs' minds." Moreover, the court held that mere apprehension will not justify the granting of an injunction against a claimed nuisance. This holding is of paramount importance when keeping in mind Professor Cohen's findings that sound becomes noise to the listener when its source is disliked or feared. If a mere fear of guns and shooting could deem a shooting range a nuisance, the shooting sports would exist only in books and memories.
20. Because of these findings, the court ordered that the plaintiffs' prayer be denied. However, there were some restrictions placed on the defendants' use of the range.
21. Although the Smith court placed a great deal of weight on the location of the range, the fact that there had been no physical injuries caused to the plaintiffs as a result of shooting range use should not be discounted. Physical injuries may be personal injuries or injuries to property. Personal injuries will almost assuredly cause immediate closure of the range facility until the shooting club can demonstrate the range is safe. After an injury to a person is caused, such a showing may be impossible to make because, arguably, the injury would not have occurred if the range was safe.
22. Injury to property may be as serious. Bullet holes in occupied buildings near a range facility will again most likely cause immediate range closure when the bullets can be traced to shooters at the range. The demonstrated risk to human well being is too great to allow continued shooting until the range operators make a convincing showing of safety. Unfortunately, unfounded allegations of bullets leaving a range facility may just as swiftly cause closure of a range facility. In areas where personal hunting is heavy and a neighboring shooting range is present, it is not unusual for the shooting range to be blamed for any stray bullets. Therefore, tight control of range usage may be absolutely necessary to avoid superior lawsuits alleging safety nuisance.

3. The Factors in Combination

Rural location was the major factor in the outcome of Smith. However, rural location alone is almost never determinative.

1. Missouri Experience

1. In *Racine v. Glendale Shooting Club, Inc.*, the owners of land adjacent to the club's property brought an action against the club alleging both nuisance and trespass. Both parties owned land located in a rural area. The plaintiffs' land was approximately seventy-eight acres, and included a home and outbuildings. The defendant was a shooting club with 200 members. Its property was approximately 107 acres. The plaintiffs sought injunctive relief, compensatory damages and punitive damages. The plaintiffs claimed "that the noise from the defendant's property 'on a daily basis at all hours of the day and night' could be 'plainly and loudly heard at plaintiffs' residence, even when the doors and windows.[were] fully closed.'" This claimed nuisance was due to the club "utiliz[ing] the land 'for target practice, local, regional and national shooting matches conducted with automatic weapons, handguns, shotguns and high powered rifles.'" The trial court entered judgment in favor of the plaintiffs finding that a "technical trespass" occurred "from the 'stray bullets or ricochets.'" On the nuisance claim, the

court permanently enjoined the club:

2. "[f]rom using its property in such a manner as described by the evidence to encourage or permit the frequent discharge of large caliber, high powered firearms. Continuous firing and the conducting of shooting matches or meets is prohibited as is any target shooting before nine o'clock of the morning and after dark or six o'clock of the evening. Occasional[] shooting is not prohibited."
 3. Both the defendant and plaintiffs appealed.
 4. The Racine court held that a property owner has a right to exclusively control his property and use it in any lawful manner. However, the appellate court also held this "use right" is not absolute, and can be enjoined if the use is deemed to be unreasonable. Unreasonable use was defined as "substantially impair[ing] the right of another to peacefully enjoy his property." Unlike the Michigan Supreme Court in Borsvid, the Missouri Court of Appeals did not require any actual physical discomfort before finding noise unreasonable.
 5. The Racine court considered where the club was located in relation to the plaintiffs' property, the character of the neighborhood, the "nature of use, extent and frequency of injury, and the effect upon enjoyment of life, health, and property of the plaintiffs." After weighing these factors, the court then decided whether a nuisance existed - whether the use of the property although lawful was unreasonable. In this situation, the Missouri Court of Appeals agreed with the trial court, finding that the evidence supported a finding that the operation of the defendant gun club at its current level constituted a nuisance. Sounds of shooting "emanating from the [gun club's] property in character, intensity, volume, constancy, and frequency was thoroughly documented by both lay and expert testimony." The sounds of shooting "differed in all five respects from the occasional train traffic or random gun shots heard and expected in this rural area." Again, the observations of Professor Cohen surface in the shooting range context. What one expects to hear is considered mere sound while unexpected or unwanted sounds are often viewed as unreasonable noise. Thus, shooting clubs in areas that are in the process of becoming more suburban in nature are well advised to ensure that new neighbors expect the sounds of shooting during normal shooting hours. Also, steps should be taken to keep decibel levels reasonable in line with or below other rural sounds such as truck and train traffic and sounds emanating from farm implements.
 6. Ultimately, the Racine court decided that the kind of noise emission coming from defendant's shooting range made the "use of plaintiffs' nearby residential property virtually impossible" and thus the noise in this case was a nuisance in spite of the rural nature of the area. By going beyond physical injury when determining what constitutes unreasonable use of property, Racine almost certainly signals future difficulties for shooting clubs everywhere.
2. Illinois Experience

In Kolstad v. Rankin, an Illinois Court of Appeals case with nearly identical facts to Smith regarding location-a rural area zoned for agricultural purposes-the court held that a nuisance was present. Here the neighboring landowners brought a nuisance suit against a defendant who used his property as a shooting ranges. Plaintiffs' claims of nuisance were based on noise and safety.

The defendant's property was located in a rural area of southern Illinois which was zoned for agricultural use. The range was 100 yards wide and had a backstop berm thirty feet high. There was also a rectangular berm enclosing the entire range to allow 360 degree firing. The range was used only by the defendant, his friends, and on occasion law enforcement agencies. The "[d]efendant had[d] never charged a fee for the use of his range [and] there had never been an injury..or complaint" concerning the defendant's use of his range over the twenty-nine years of its use. Even so, defendant Bruce Rankin was sued by his neighbors.

The trial court issued a temporary restraining order (TRO) on the day the suite was filed and seven days later, after an evidentiary hearing, the TRO was replaced with a preliminary injunction. Stunningly, the trial court enjoined all discharge firearms anywhere on defendant's property.

Three plaintiffs actually filed this suit. Mary H. Hays had been a neighbor of the shooting range for about fifteen years. The second plaintiff, Mary L. Hays, had grown up on the family farm, but had moved away and returned about two years before suit was filed. The third plaintiff was Charles Kolstad who had moved into the area only two months before suit was filed. Kolstad and Mary L. Hays both had young children who regularly roamed on plaintiffs' property.

Although use of the defendant's range had been casual for many years, use of the range by law enforcement agencies in the several years that preceded the suit had increased significantly. The Champaign Police Department Strategic Weapons and Tactics (SWAT) team had used the range ten or fifteen times during the year immediately preceding the suit and was using the range with fully automatic weapons, specifically machine guns, the day before the suit was filed. It is impossible to determine whether the SWAT team's use of the range precipitated the suit or whether it was inevitable. It seems rather telling that Kolstad's testimony about the machine gun fire was relied on heavily by the appellate court. In his testimony, Kolstad "described the noise as 'not faint, a clear sound, a clear annoyance.'" The court, alluding to this testimony, held that "[r]egardless of frequency or location, automatic weapon fire on a neighbor's land would cause discomfort or annoyance to an ordinary reasonable person."

Defendant Rankin did not fare any better on the safety issue. The court of appeals rejected the defendant's reliance on Smith. It found that there was "sufficient evidence in the record to support the ruling, as to possible injury." The court of appeals went so far as to say that "even a spent shell could cause some injury." Contrary to the court's holding, the defendant's reliance on Smith seems well founded because the plaintiffs conceded that they had never found any spent bullets on their property.

Thus, it appears that during the twenty years between Smith and Kolstad, courts have substantially lowered the standard for obtaining injunctive relief against a shooting-range owner/operator when noise or safety nuisance is alleged. The requirement that noise causes actual physical harm has given way to a requirement that the noise be an annoyance. The requirement that to be unsafe there must exist an actual present risk of physical harm has given way to a requirement simply that an injury is possible. The very remote possibility of injury in this case makes one wonder whether this case is unique or whether mere fear of injury will suffice to enjoin sport shooting in the future.

1. Ohio Takes The Lead

2. Appellate Court Analysis

1. Compared to the relatively superficial reasoning found in Kolstad on the nuisance issue, the Court of Appeals of Ohio did a splendid job in *Christensen v. Hilltop Sportsman Club*. Four aspects of this case make it noteworthy. First, the club is located in a rural location. Second, the decibel level of the shooting noise was carefully analyzed in the context of both pure noise and relative noise. Third, the law of nuisance was articulately stated, taking into account both absolute and qualified nuisance. And fourth, the appropriate use of injunctive relief in this context was well stated.
2. In *Christensen*, the defendant was the owner of approximately 120 acres of land upon which he conducted various shooting and recreational activities. The land was located in a sparsely populated rural area. The plaintiffs owned "property located in the vicinity of the club" and filed a complaint seeking permanent injunctive relief to stop all shooting at the club. "The complaint alleged that the noise created by the shooting constituted both a public and private nuisance." The trial court found that the club's shooting activities were both a public and private nuisance, "permanently enjoining the club from permitting any shooting on its grounds at any time."
3. The Ohio Court of Appeals held that there was sufficient evidence in the trial record to find that a nuisance existed, but reversed in part because the injunction was too broad. The court stated that "[t]he law of private nuisance is a law of degree; it generally turns on the factual question whether the use to which property is put is a reasonable use under the circumstances, and whether there is an appreciable, substantial, tangible injury resulting in actual, material and physical discomfort." The court's mention of physical discomfort is reassuring after the Kolstad court used only the term annoyance.
4. Reviewing the testimony of the experts in this case, the Christensen court discussed two forms of noise: pure noise, and relative noise. Each expert testified that eighty decibels of noise is too loud for any human to be comfortable with, regardless of the surrounding circumstances. This is pure noise that would give rise to an absolute private nuisance. However, the evidence revealed that only on some occasions did the sounds coming from the club reach a level of even seventy decibels. The nearest resident to the property line was more than 500 yards away. The sound decibel level recorded there was only between forty and sixty decibels.
5. On the other hand, "[r]elative noise is noise that is too loud relative to its time and location." It may give rise to a qualified nuisance. To determine whether a relative noise is a qualified nuisance, one must consider whether the use is reasonable under the existing

circumstances. For example, while the use of a bull-horn is always loud, the noise it makes would not be deemed a nuisance if used to start a race. But, the use of the same bull-horn would be considered a nuisance if used during a classroom discussion. The plaintiffs in Christensen argued that they could hear the discharge of the firearms and that it was offensive to them. Thus, they contended it constituted a nuisance. However, there was not evidence that the sounds they complained of were pure noise. The plaintiffs' case was based entirely on relative noise. Therefore, the issue became: "Is target or trap shooting an unreasonable activity per se on property in a sparsely populated rural area?"

6. The Christensen court found that the activities of the defendant were noisy, but legal nonetheless. While the plaintiffs failed to prove an absolute nuisance existed, the court held there was enough evidence to establish a qualified nuisance. This was based on the court's finding that shooting sometimes occurred early in the morning and late at night. The court also found that those activities took place at random and unpredictable times.
 7. Without discussion, the court recognized the problem noted by Professor Cohen. Sounds that are unexpected and unpredictable become noise to the listener. Using Professor Cohen's distinction between sound and noise - noise being a negative psychological reaction to sound - one concludes that noise causes annoyance. This of course leads to the conclusion that the court's reference to physical discomfort as a requirement of a noise nuisance has in reality given way to mere annoyance constituting a nuisance as seen in Kolstad.
 8. The redeeming part of Christensen for shooting sports was the court's holding that the trial court's injunction "was excessive and far out of proportion." The trial court had permanently enjoined all shooting on defendant's property at any time. This deprived defendant of the reasonable use of its property. "[A]n injunction should restrict the activity 'no more than is required to eliminate the nuisance.'" Therefore, the court remanded the case to the trial court so that reasonable restrictions could be placed on defendant's shooting activities on its property.
3. Difficulty with Local Trial Courts

A final noteworthy feature of the Christensen opinion is its consistency with Smith. This contrasts markedly with the Illinois Court of Appeals rejection of defendant Rankin's reliance on Smith in Kolstad.

On remand, the Christensen trial court limited Hilltop Sportsman Club to shooting on "Wednesday evenings from six p.m. until ten p.m., on Sundays from twelve noon until seven p.m. and on the first Saturday of each month from nine a.m. until seven p.m." The defendant appealed claiming these limits were too restrictive while the plaintiffs cross-appealed claiming the limits were not restrictive enough.

The Ohio Court of Appeals restated much of its 1990 opinion in this case and then held in favor of the defendant finding "the decision of the trial court is unreasonable." In this later opinion, though, the court placed much greater emphasis on the need to balance the annoyance to the plaintiffs against the prohibition of defendant's legal activity. The court literally counted and divided amount the parties the hours in a month. On second remand, the court of appeals directed the trial court to substantially expand shooting hours to no less than thirty hours per week.

Contrasting the views of the Ohio Court of Appeals with those of the trial court in Christensen, a potentially alarming situation might arise in suits against rural shooting clubs. In counties having both significant urban populations and rural areas where shooting clubs are located, voter demographics may result in county trial court judges being more familiar with the values and desires of the urban population. Because the relief sought in these cases is usually equitable in nature - injunctions to abate the nuisance - what is reasonable will be determined by the judge without a jury. The trial court's initial ban on all shooting and subsequent unreasonable limitations on shooting hours demonstrates a refusal to recognize the legitimacy of recreational shooting sports and the need to require tolerance by those who choose to live in the vicinity of sport shooting clubs and ranges.

Urban voters electing judges who may be called on to determine the fate of rural, soon to be suburban shooting clubs is a significant threat to the future of the shooting sports. This threat is evidenced by both the increase in the number of suits filed against shooting clubs and the liberalization of the nuisance law being applied to these suits. One solution to this growing threat is state legislation to protect shooting clubs and range owners from suits based on nuisance theories.

1. Michigan's Legislative Solution

1. Michigan responded by enacting the Sport Shooting Ranges Act (the Act). The Act was promulgated to provide civil and criminal immunity to persons who operate or own sport shooting ranges.
2. The statute specifically provides that sport shooting ranges are immune from criminal and civil suits based on noise nuisance theories provided the clubs' ranges were in compliance with any state or local noise regulations in effect at the time the range was constructed or commenced operations. It appears that at least one court has relied on this statute to dismiss a suit brought against a shooting facility.
3. In 1989, James Klark, Richard Kempf and Juergen Schweizer sued the Ann Arbor (Michigan) Lodge No. 1253, Loyal Order of Moose, Inc., alleging that its operation of a skeet (shotgun) range violated local zoning and noise ordinances, and thus constituted a nuisance. The range had been in operation since 1958 and was not in violation of any ordinance when it was constructed in then rural Dexter Township. The trial court held that the range was protected under the Act. Upon also finding that the sound of shooting emanating from the Moose Lodge range did not exceed eighty-six decibels, the maximum allowed under the noise ordinance, the court dismissed the action because there existed no nuisance in fact. This dismissal was affirmed on appeal.
4. In *Jakuba v. Kingsley Sportsman's Club*, the Act kept the lawsuit from progressing beyond the preliminary stages. Plaintiffs sued the Kingsley club alleging both noise and safety nuisance. The defendant moved for summary judgment with strong evidence that any alleged errant bullets could not have emanated from the defendant's range and further argued that the Act prohibited suit based on noise nuisance. The trial judge took the motion under advisement and admonished the plaintiffs to work out a settlement with the club. The case never went beyond this point.
5. The Act was also helpful when the Capitol City (Michigan) Rifle Club received complaints about noise lodged by new neighbors. The club maintains a shooting range in what was a rural area when constructed in the 1950s. The area became a popular country residential area by the 1980s. Township officials who received the complaints about the range convinced the residential complainants to meet with club officials. The discussions that ensued ended with the club simply adopting predictable uniform hours of operation. During these discussions, the residential complainants were made aware of the club's immunity from lawsuits based on noise nuisance. No lawsuit was ever filed.
6. Unfortunately, the Act was not panacea that shooting clubs and shooting range operators hoped it would be. While the Act prohibits nuisance lawsuits, it expressly provides that shooting ranges are subject to local governmental regulation. Ray Township in Macomb County, Michigan attempted to regulate the B. & B.S. Gun Club out of existence with restrictive ordinances requiring special permits to operate the club's shooting range. The application process for permits was inordinately burdensome. Also, the permits had to be renewed annually. The club informed the township that the ordinances were in conflict with Act and that the club would not comply with the ordinance. The township sued the club. The court held that, to the extent that the ordinances were intended to regulate noise, state law preempted them. However, provisions of the ordinance that were remotely relevant to safety were upheld. The court also held that the Act protected shooting facilities only to the extent that the shooting facilities existed in 1989 when the Act was adopted. The court suggested that governmental regulation could properly prohibit any new club members after 1989, if the shooting facilities existed as a nonconforming use under new zoning laws. Thus, as club members died or relinquished their memberships, the club would slowly cease to exist.
7. **Because the Macomb County experience was so upsetting to the Michigan shooting community, in 1993, further legislative protection was requested. What emerged was a comprehensive revision of the Act. The revised Act contained three new provisions. First an assumption of risk defense for shooting ranges was created. Second, a provision allowing expansion of memberships, shooting facilities and shooting programs was added. And third, all protections of the Act were made contingent on ranges conforming to generally accepted operation practices. The legislature did not define generally accepted operating practices, but instead delegated this task to the Department of Natural Resources (DNR). This was a natural choice because the DNR maintains many shooting ranges in Michigan at recreation areas, state game areas and on other public lands. The DNR adopted the National Rifle Association's Range Manual as the initial source of generally accepted operating practices.**
8. **At first blush, this new statutory scheme seems ideal for shooting clubs and range owners. This is because, upon conforming to generally accepted operating practices,**

shooting range operators are immune from lawsuits based on noise nuisance, free to expand club memberships, shooting activities, and facilities, and, if a range user sues for personal injury, assumption or risk may be interposed as a defense. The trap, however, lies in the term generally accepted operating practices. Adoption of the National Rifle Association (NRA) Range Manual is both an asset and a problem. To the extent that the manual sets specific range requirements, ranges in compliance have statutory protection while those not in compliance have no statutory protection. Unfortunately, even if the provision of the manual to which the range does not conform is in no way related to the statutory protections, these protections may still be lost. Also, many of the Range Manual provisions are often merely guidelines and may be varied depending on conditions in a particular locale. Needless to say, while a great market was created for NRA Range Manuals, the protections sought by shooters may have been rendered somewhat illusory.

9. On the other hand, the new statutory provisions have been immensely beneficial to some shooting clubs. The Lapeer County (Michigan) Sportsmen's Club had its shooting activities severely limited by an injunction obtained by its neighbors in 1964. After passage of the 1994 amendments to Michigan's Sport Shooting Ranges Act, the Michigan Court of Appeals ordered the Lapeer County Circuit Court to dissolve the old injunction so that the club could operate as contemplated by legislature.

2. Conclusion

Thus the battle rages on. One can only conclude that any peace between urban sprawl and the shooting sports may be best attained by constant communication and mutual respect. Operating shooting ranges in a safe, predictable and reasonable manner may be the best ways to avoid a litigation war. Finally, as corporate American knows so well, image is everything. The positive image of the shooting sports must be vigorously promoted in the future if these new rural residents are expected to peacefully coexist with the users of sport shooting ranges.

----- Headers -----

Return-Path: <jeanne.hom@navy.mil>

Received: from rly-yd03.mx.aol.com (rly-yd03.mail.aol.com [172.18.141.67]) by air-yd02.mail.aol.com (v112_r1.5) with ESMTTP id MAILINYD21-205451876df87; Mon, 25 Sep 2006 20:40:23 -0400

Received: from gate4-hawaii.nmci.navy.mil (gate4-hawaii.nmci.navy.mil [138.163.128.44]) by rly-yd03.mx.aol.com (v112_r1.5) with ESMTTP id MAILRELAYINYD37-205451876df87; Mon, 25 Sep 2006 20:40:00 -0400

Received: from naweprlhms03.nmci.navy.mil by gate4-hawaii.nmci.navy.mil via smtpd (for yd.mx.aol.com [205.188.156.249]) with ESMTTP; Tue, 26 Sep 2006 00:39:59 +0000

Received: (private information removed)

Received: (private information removed)

Received: (private information removed)

Received: (private information removed)

Received: (private information removed)

Minnesota's Shooting Range Protection Act

FAQ Sheet, House Research Bill Summary, and 2005 Chapter 105

(Revised 09-21-2005)

In May 2005, Minnesota Governor Tim Pawlenty signed into law the Shooting Range Protection Act. It became effective on May 28, 2005, becoming Minnesota Statutes, Chapter 87A.

Since the law's passage, a number of questions regarding what the law does and does not address or impact have been asked. This page is intended to help answer and clarify those questions.

What is the intent of Chapter 87A?

To provide shooting ranges with the ability to maintain their operating capacity, if local opposition to an existing shooting range facility arises.

What types of facilities are intended to be covered or protected in Chapter 87A?

Firearms and archery shooting facilities, to include licensed shooting preserves.

Related to those types of facilities, what are the key elements that this law addresses?

That shooting ranges are safely operating, meaning they keep all projectiles (i.e., bullets, pellets and arrows) within their facility boundaries, they keep sound levels generated on the range to an acceptable level, and they operate within a reasonable set of hours. If these are precepts are violated, the range has the opportunity to correct their problems within an acceptable time frame.

Does Chapter 87A take precedence over existing local ordinances, rules, regulations, or operating restrictions for shooting ranges or preserves?

No. Any pre-existing conditional use permit, special use permit, operating hours restrictions, covenants or other performance related requirements set in existence by local units of government with legal jurisdiction over a shooting range are to be maintained. In the meantime, if no pre-existing operating hours are in place for a range, they are now, based on the State's Sound Rule (Minnesota Rules, Chapter 7030).

Chapter 87A references "Performance Standards". What are these?

Primarily, the Performance Standards refer to considerations that need to be taken to ensure the safe operation of a shooting range. The National Rifle Association (NRA) has produced a set of guidelines or recommendations for constructing and operating various shooting ranges. These are contained in the

1999 edition of The Range Source Book: A Guide to Planning and Construction. The NRA uses this document as a reference and teaching tool when they conduct their Range Development and Operations classes throughout the United States. Chapter 87A establishes that, until the DNR adopts permanent performance standards through formal rulemaking processes, this document will be an interim set of standards for safe range operations. This source book is available online from the NRA headquarters at www.nrahq.org/shootingrange/sourcebook.asp.

When will final Performance Standards be established by the DNR?

DNR has been given the responsibility to formally adopt Shooting Range Performance Standards, using the expedited rulemaking process, as defined in State statute. A draft rule must be established within 18 months of the date of passage of the law, or by November 28, 2007. These Rules will take into account the interim performance standards, and any additional information that is relevant to the content of Chapter 87A.

Will all shooting ranges need to be built to the same level or degree?

No. The performance standards are recommendations, and are site specific. In urban or suburban settings, more people can be affected by an operating shooting range. In these settings, where projectile containment is absolutely necessary, all safeguards necessary must be taken to ensure that **all** bullets shot on the range stay on the range property. This concept should be also used as the basis for any range that is built, but the number of required safeguards installed will likely be fewer in a more rural setting. Sound containment must also be installed that will make sure the range is in compliance with Chapter 87A. These will also vary, based on the level of local population density.

The Game and Fish Laws of Minnesota restrict the discharge of a firearm to 500 or more feet away from a residence while hunting, unless permission is granted to be closer. Does this standard apply under Chapter 87A?

No. Shooting ranges and preserves are allowed to have bows and firearms discharged within their boundaries, provided that all projectiles remain on the shooting range. The difference here is that the Game and Fish laws refer only to hunting situations on private lands.

Chapter 87A references a range operation becoming a nonconforming use. What does this mean?

Local zoning definitions governing land uses are subject to change, due to land use changes such as residential development. If local zoning changes take place that make a shooting range a nonconforming use where it had previously been allowed to operate, the range operator has the ability to improve the safety and sound conditions of the range, in order to maintain and continue the operation of the range.

Should shooting range operators be concerned that a law pertaining to shooting ranges is now in effect?

No, not at all. Shooting range operators in Minnesota are allowed to maintain the operation of their facilities, provided they are operated safely, conform to sound level standards, and maintain reasonable operating hours. Most shooting ranges are set in relatively rural and undeveloped land areas. Nothing in Chapter 87A will negatively affect these ranges. Instead, when other development occurs on adjacent land, the range will be given the opportunity to continue operating, and not be subject to closure due to that change.

Acoustical Standards for Assessing Noise Emissions From the Farragut Shooting Range

Sound Level Equipment and Measurement Standards

- Sound level meters should be of Type 1 and meet or exceed standards defined within ANSI S1.4-1971
- Sound level meters should be calibrated to standards traceable to the National Institute of Standards and Technology (NIST).
- Environmental noise measurement procedures should comply with standards defined by ANSI S12.18-1996

There are three common sound level measurements that are used to assess noise emissions from shooting range activities. These are

- 1) L_{peak} , the unweighted peak sound level (dB SPL).
- 2) L_{maxA} , the maximum sound level using an A-weighted filter, referred to as dB_{Amax} . Sound level meters should be set to use the IMPULSE rather than FAST averaging mode when measuring impulsive sounds from small arms fire. See sound level meter discussion published by **Bruel&Kaer**.
- 3) L_{eq} , the equivalent sound level is a steady-state sound that has the same energy and A-weighted level as the community noise over a given time interval. Commonly, shooting noise is averaged over a 1 hour period during the noisiest range activity. An L_{eq} measured over a 24 hour period is not appropriate if shooting is not present over that same period.

There are other measurements of sound such as the Day-Night-Level, DNL, that is equivalent to L_{eq} except that a 10dB penalty are applied to noises occurring during night time hours (10PM - 7AM). DNL is used extensively by the FAA, DoD, and HUD in assessing aircraft and highway noise. DNL is not appropriate for assessing the annoyance of gunfire. DNL is a 24 hour average and since the Farragut range is only open during daylight hours, DNL underestimates the impact of this noise by averaging in 'silence' during the non-range hours. Any assessment of the noise from Farragut range based upon DNL should be rejected.

Noise Emission Standards

There are no regulatory standards controlling noise emissions from the Farragut Shooting Range. When this situation occurs it is necessary to examine local, state, national and international standards for guidance in making an assessment.

There are two Kootenai County Zoning Ordinances that should be considered in the assessment of Farragut shooting noise. These are the Industrial Noise Limit (Section 11.10) and Special Events Noise Limit (Section 33.33). This author believes that Kootenai County's Industrial noise regulation can be considered as an upper threshold for noise emissions that must not be exceeded at the boundary of the shooting range. In fact, IDF&G adopted the Industrial Noise threshold limit in developing new noise mitigation procedures for the proposed facility. The threshold of 83db (L_{peak}) specified in this regulation is particularly applicable to the shooting range in that it specifically regulates impact noise and provides concise specifications for the measurement of this noise. The other ordinance is for special events that limits noise to 75dB_{Amax} as measured on the property lines. As this ordinance is for conditional use requiring the approval of several county departments, the application of this acoustical limit for a permanent facility is questionable.

The Department of Defense (DoD) provides acoustical limits that apply to its activities. Specifically, the DoD recognizes that noise from small arms training ranges must be kept below the limit of 63 dB_{Amax} in order to minimize the number of people who are 'highly annoyed'. Their standard for this threshold is established by the study performed by Sorenson and Magnusson, 1979, "Annoyance Caused by Noise from Shooting Ranges". Even at the level of 63dB_{Amax}, the study finds that 10% of the people exposed to gunfire at this level become highly annoyed and the number grows quickly as levels increase above this threshold.

Since DNL and Leq are equivalent for daylight hours, these following DNL standards apply to 1-hour Leq measurements of range noise.

The World Health Organization (WHO) terms a Day-Night-Level (DNL) of 55 dB as engendering serious annoyance and creating an unhealthy environment, and WHO terms a DNL of 50 dB as engendering moderate annoyance. For parks and noise sensitive areas, WHO does not give a limit, but instead gives guidance to preserve the low ambient levels. The National Research Council (NRC) recommends a DNL of 55 dB and in the case of noise sensitive areas, a lower DNL of 45 dB. ("Assessment of Noise Annoyance" Schomer and Associates, April 2001) Given that the Farragut Shooting Range lies in a rural area and within a wildlife preserve, 1-hour Leq emissions should be held below 45 dB.

Bruel&Kaer - Guide to Sound Level Measurements

Impulsive Noise

Impulsive sounds are greater contributors to human annoyance than slower transient sounds even when both produce the same reading on a Sound Level Meter set to its "F" (fast) time weighting. The greater annoyance is partly due to their startling effect as well as to the fact that the human ear responds faster than the circuitry in the Sound Level Meter and therefore perceives a higher "reading" before the sound begins to decay.

Some national standards for measuring environmental noise require the use of Sound Level Meters also equipped with an "I" (Impulse) time weighting to evaluate sources

such as pile drivers, forge hammers and punch presses all of which emit impulsive noise. In the "I" mode the rise time of the circuitry is about 4 times faster than in the "F" mode. This simulates the response time of the human ear. The circuitry also incorporates a hold feature which captures and holds the maximum displayed level for as long as required by the operator.

"Penalty for Impulse Noise, Derived from Annoyance Ratings for Impulse and Road-traffic Sounds"

Joos Vos and Guido F. Smoorenburg

4 July 1984

SECTION 11.10 NOISE

A. Definitions

1. **Impact Noise** - A short duration or rapidly changing sound which causes fluctuations of the sound level meter needle in excess of plus or minus two (2) decibels and is, therefore, incapable of being accurately measured on a sound level meter.
2. **Octave Band** - A prescribed interval of sound frequencies which permits classifying sound according to its pitch. Octave bands specified are those adopted by the American Standards Association as, "Preferred Frequencies for Acoustical Measurements," S1.6-1960.
3. **Sound Level Meter** - An instrument, including a microphone, amplifier, output meter, and frequency weighing network, for the measurement of noise and sound levels in a specified manner.
4. **Sound Pressure Level** - The intensity of sound measured in decibels as recorded or indicated on a sound level meter.

B. Sound levels shall be measured with a sound level meter and an associated octave band analyzer, both manufactured in accordance with standards prescribed by the American Standards Association. Measurements shall be made using the flat network of the sound level meter. Impact noises shall be measured with an impact noise analyzer.

C. Noise emissions from any site shall not cause sound pressure levels greater than those listed in Column Three (3) below, measured at any point beyond the plant property line, either at ground level or at a habitable elevation, whichever is more restrictive.

Sound Pressure Level (decibels, re: 0.0002 Microbar)

Octave Band Center Frequency (cycles per second)	COL.(1)	COL.(2)	COL.(3)
31.5	97	90	83
63	87	77	68
125	78	68	58
250	73	63	52
500	69	58	47
1000	65	55	44
2000	63	50	39
4000	60	48	37
8000	57	46	35
Impact Noise (Overall)	97	90	83

For the convenience of those who may wish to use sound level meters calibrated in accordance with the American Standard Z 24.10-1953, the following table shall be considered equivalent to the table listed above:

Sound Pressure Level (decibels, re: 0.0002 Microbar)

Octave Band Center Frequency (cycles per second)	COL.(1)	COL.(2)	COL.(3)
37.5-75	89	82	75
75-150	81	71	62
150-300	74	64	54
300-600	69	59	48
600-1200	66	55	44
1200-2400	63	53	42
2400-4800	62	49	38
4800-9600	59	47	36

SECTION 11.11 VIBRATION

A. Definitions:

1. Amplitude - The vibration intensity measured in inches of earth borne vibration. The amplitude is one-half (1/2) the total earth displacement, as measured with a three-component measuring system.
2. Earth borne Vibrations - A cyclic movement of the earth due to energy propagation.

B. The amplitude, in inches, of earth borne vibrations caused by the plant shall not exceed:

$$\frac{.0001K}{F}$$

F = The vibration frequency in cycles per second.

K = 15 for measurements made within an Industrial zone at any point on or beyond the plant property line.

K = 3 for measurements made in any residential area outside an Industrial zone.

Impact vibrations with less than one hundred (100) impulses per minute shall be permitted amplitudes of twice those computed above.

SECTION 11.12 GLARE

Any operation or activity shall be conducted so that direct and indirect illumination shall not exceed 0.2 foot candle across lot lines of the subject property.

SECTION 11.13 WASTES AND SURFACE DRAINAGE

A. Liquid Wastes - The volume, quality and point of discharge of industrial and domestic liquid wastes shall not exceed standards approved by the State Department of Health, or such other agency of the State of Idaho which may succeed to its authority.

B. Surface Drainage - Storm drainage and surface runoff shall be segregated from industrial and domestic waste. To avoid contaminating surface drainage, all apparent sources of contamination, such as operating areas, loading or unloading areas, product transfer pump areas, and equipment cleaning and maintenance areas shall be curbed and drained to the waste system. Drainage from tankage area impoundments may be combined with storm drainage and surface runoff if approved by the State Department of Health.

SECTION 33.32 RESIDENTIAL CARE FACILITY

ZONES PERMITTED: Agricultural, Agricultural Suburban, Restricted Residential, Rural, High Density Residential

- A. Minimum parcel area - 21,780 square feet, or the minimum lot size required by the zone, whichever is greater. For licensed group home facilities which were existing prior to adoption of this amendment and which will not be altered to accommodate the 9th resident, the minimum lot size shall not apply.
- B. Use is restricted to 9 residents, not including staff members.
- C. A minimum of 6 off-street parking spaces shall be provided.

SECTION 33.33 SPECIAL EVENTS LOCATION

ZONES PERMITTED - Agricultural, Commercial, Light Industrial, Industrial, Mining and Rural.

- A. Minimum area - The size of the site must be adequate to accommodate the event, attendees, and parking unless provisions have been made for off-site parking. Adequacy of the site shall be reasonably determined by the Hearing Examiner or Board.
- B. A detailed site plan and event description including, but not limited to, security, access, people management, traffic management, parking, waste control and disposition, litter control plans and any reasonable information requested by the Director shall be submitted to the Director with the application. Copies of the site plan and event descriptions shall be submitted to the Kootenai County Sheriff's Department, Panhandle Health District, Idaho Department of Transportation, the appropriate local highway district, the fire district, and any other agencies requested by the Director and opinion letters or letters of approval by each of these agencies shall be submitted to the Director with the application. An application shall not be deemed complete without all applicable agency letters.
- C. Lighting at the special event shall be downward directed and shielded and shall not exceed 0.2 foot candles at the property line.
- D. The Director or Board may impose such reasonable conditions as the record may indicate necessary to visually screen, control dust, reduce nuisance factors such as noise, manage traffic, buffer adjoining uses, mitigate affects on water or air quality, limit the duration of the permit, or otherwise provide for the health, safety, or general welfare of the event participants. Conditions may also include a requirement that agencies review plans for each event to be held at the location.
- E. One (1) parking space will be provided for each three (3) seating spaces and said parking area shall be restricted to a clearly designated area which has clearly delineated boundaries.
- F. Maximum noise threshold shall be 75dBA as measured at the property lines.
- G. There shall be no parking or construction over existing drainfields.

SECTION 33.34 ASPHALT OR CONCRETE BATCH PLANT

ZONES PERMITTED: Mining, Rural

- A. Minimum lot area - five acres.
- B. The plant must be located within an existing mining zone or at a site with an approved and valid Conditional

LAWRENCE WASDEN
ATTORNEY GENERAL

Clive J. Strong
Chief of Natural Resources

W. DALLAS BURKHALTER, ISB# 3286
Deputy Attorney General
PO Box 25
Boise, ID 83707
Telephone: (208) 334-3715
FAX: (208) 334-2148

Attorneys for Defendants
State of Idaho, IDFG and Huffaker

STATE OF IDAHO
COUNTY OF KOOTENAI } SS
FILED: *efo*

2006 OCT 10 AM 9:11

CLERK DISTRICT COURT
[Signature]
DEPUTY

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

CITIZENS AGAINST RANGE)
EXPANSION, an Unincorporated non-profit)
Association; JEANNE J. HOM, a single)
woman; EUGENE and KATHLEEN RILEY,)
husband and wife; LAMBERT and DENISE)
RILEY, husband and wife; GABRIELLE)
GROTH-MARNAT, a single woman,)
GERALD PRICE, a single man; RONALD)
and DOROTHY ELDRIDGE, husband and)
wife; and GLENN and LUCY CHAPIN,)
husband and wife, SHERYL PUCKETT, a)
single woman; CHARLES MURRAY and)
CYNTHIA MURRAY, husband and wife; and)
DAVE VIG, a single man,)

Plaintiffs,)

vs.)

IDAHO FISH AND GAME DEPARTMENT,)
an agency of the STATE OF IDAHO, and)
STEVEN M. HUFFAKER, Director of the)
IDAHO FISH AND GAME DEPARTMENT,)

Defendants)

Case No.: No .CV-05-6253

DEFENDANTS' REPLY BRIEF ON
APPLICABLE STANDARDS

NEGLIGENCE STANDARDS

Plaintiffs argue that it is appropriate to consider several elements of negligence cases to establish the standards requested by the Court. But, this is not a negligence case. Negligence and nuisance are both torts, but are different and distinct concepts. Negligence is not an essential element of a nuisance claim. Although a nuisance may include negligence, negligent acts, by themselves, do not constitute a nuisance. 58 Am Jur 2d Nuisances Section 8, pages 578-579; 66 C.J.S. Nuisances Section 18, pages 556-557. Unlike negligence, nuisance is not predicated on the degree of care exercised. A defendant's failure to act reasonably is "not relevant to a determination of nuisance." 58 Am Jur 2d Nuisances Section 9, page 579. See Also 66 C.J.S. Nuisances Section 18, pages 555-556.

Defendants submit that the negligence elements of foreseeability, prior similar incidents and inherently dangerous activity are immaterial to this case. Plaintiffs are trying to use negligence concepts to bootstrap themselves into arguing a higher standard of care.

Assuming arguendo, that these negligence elements are relevant, Defendants assert that the concepts are already met or are inapplicable. As Plaintiffs have argued, the Idaho Supreme Court has addressed the negligence elements of duty and foreseeability:

This Court follows the rule that "one owes the duty to every person in our society to use reasonable care to avoid injury to the other person *in any situation in which it could be reasonably anticipated or foreseen that a failure to use such care might result in such injury.*" *Alegria v. Payonk*, 101 Idaho 617, 619, 619 P.2d 135, 137 (1980) (*emphasis in original*). Furthermore, there is a "general rule that each person has a duty of care to prevent unreasonable, foreseeable risks of harm to others."

Doe v. Garcia, 131 Idaho, 578, 581, 961 P.2d 1181 (1998). Defendants submit that the NRARSB guidelines are intended to address the issues of 'foreseeable risk' and 'reasonable care.' The NRARSB provides that "an important concern is that the range satisfy reasonable expectations of safety for range participants and the public at large." Further, the NRARSB says the "application of specific design features set out in this source book requires an assessment of the functional utility of any such features for the range subject to evaluation by architects and/or engineers." The design features are context and site specific which is why professional evaluation is required. NRARSB, Introduction, page I-3, Exhibit 2 to Affidavit of Clark Vargas. See also Defendants' Memorandum in Opposition to Summary Judgment, pages 6-8.

Defendants have not argued that evidence of Farragut Shooting Range's prior safety record precludes liability or prevents a finding of nuisance. In *Sharp v. W.H. Moore, Inc.*, 118 Idaho 297, 706 P.2d 297 (1990), the defendants argued that the plaintiff had the burden of proving prior similar incidents of criminal activity before such criminal activity would be foreseeable. The Court noted that: "while prior similar incidents are relevant evidence of foreseeability, they are not the *sine qua non* on the issue of foreseeability." 118 Idaho at 301. While rejecting the 'prior similar incidents' rule which would preclude liability, the Court recognized that the evidence is for the trier of fact to consider and weigh.

Defendants submit that the shooting range's prior safety record is evidence for the court to consider on the question of nuisance based on range safety. The safety record as well as zoning (including unregulated shooting in the rural zone) and hunting in the area are factors for the court to consider. *Smith v. Western Wayne County Conservation*

Ass'n, 380 Mich. 526, 158 N.W. 2d. 463, 471 (1968); *Oak Haven Trailer Ct. v. Western Wayne County Conservation Ass'n*, 3 Mich. App. 83, 141 N.W. 2d. 645, 648 (1966).

Plaintiffs argue that the Farragut Shooting Range is an "inherently dangerous activity." Defendants submit that this negligence concept is irrelevant to this nuisance action, and is merely an attempt to apply a higher standard of care. Assuming for the sake of argument that this concept is applicable, Defendants assert that the shooting range is not an inherently dangerous activity.

Plaintiffs rely on the three pronged inherently dangerous test set forth in 57A Am. Jur. Negligence Section 370, page 410:

- (1) the activity involves an unusual or peculiar risk of harm that is not a normal routine matter of customary human activity;
- (2) the activity is likely to cause a high probability of harm in the absence of reasonable precautions; and
- (3) the danger or probability of harm must flow from the activity itself when carried out in its ordinary, expected way, such that reasonable precautions aimed at lessening the risk can be expected to have an effect.

This section further says "If an activity is a common, everyday occurrence and the public is familiar with the dangers associated with that activity, the activity is not inherently dangerous."

Applying each of these test prongs to the Farragut Shooting Range shows that target shooting is not inherently dangerous.

(1) Target shooting with rifles, pistols and shotguns is a common occurrence in Idaho. The number of shooting ranges, shooting clubs, licensed hunters, hunter education students, stores selling firearms and ammunition, and firearm owners in this state establish this point. Informal target shooting (i.e. not at the range) and hunting in the

area around Farragut further establish shooting as a common occurrence. The public is very familiar with the dangers associated with the use of firearms.

(2) Reasonable precautions are in place for the Farragut Shooting Range as evidenced by the Affidavit of Clark Vargas, the NRA Range Evaluation Report, and the Kootenai County Building and Planning Department letter. Defendants' Memorandum in Opposition to Summary Judgment, pages 4-6. Target shooting does not cause a high probability of harm.

(3) The danger or probability of harm does not flow from the activity of target shooting carried out in its ordinary, expected way. Target shooters engage in aimed fire through targets into adequate backstops in accordance with range rules which they have read and indicated they will comply with. Reasonable precautions are in place and have been effective. Plaintiffs are seeking to stop any range safety improvements outlined in the Vargas Master Plan.

An Illinois court has addressed the question of whether target shooting is an ultrahazardous or abnormally dangerous activity. In *Miller v. Civil Constructors, Inc.*, 272 Ill.App.3d, 263, 651 N.E.2d. 239, 245 (1995), the court found that the use of firearms is not an ultrahazardous activity, the use of firearms is a matter of common usage and the potential harm comes from misuse of the firearms rather than their inherent nature alone. The case involved an injury caused by a ricocheted stray bullet from target shooters in a gravel pit.

Plaintiffs appear to be arguing for a zero-risk standard for range safety. However, the legal standards and all of the referenced range standards, applicable and inapplicable, address the issue in terms of reasonable care and managed risk. Kootenai County

determined that the NRA Range Evaluation met the county zoning standard for shooting ranges. This evaluation is based on the NRARSB which addresses reasonable expectations of safety for range participants and the public at large. Both the NRA Range Evaluation Report and the opinion of Mr. Vargas address reasonable safety accommodations and reasonable safety risks. The military range standards also address risk management and mishap probability. Range Safety Army Regulation 385-63 MCO 3570.1B, Section 2-7 Risk Management; Department of the Air Force Engineering Technical Letter (ETL) 05-5: Small Arms Range Design and Construction, page 2 and Operational Risk Management (ORM) Evaluation of Existing Range Facilities.

This is not a negligence case or an inherently dangerous activity. This is a nuisance case seeking injunctive relief. Private and public nuisance are defined by statute. Defendants assert that the appropriate standard for determining whether the range is a nuisance based on safety concerns will address reasonable care and reasonable safety expectations, not zero-risk or remote possibility of injury.

SHOOTING RANGE SAFETY STANDARDS

As previously asserted, Defendants maintain that the appropriate standard for determining range safety is Kootenai County Ordinance No. 375, Article 33, Section 33.02 and the appropriate safety criteria provided by the National Rifle Association Range Source Book (NRARSB) guidelines. The NRARSB provides the only safety guidelines which all the involved parties and the only governmental entity with jurisdiction agree apply to the Farragut Shooting Range. This will be a factual

determination by the Court based on the submitted expert opinions and the County's finding.

NOISE STANDARDS

The parties have each had sound studies of the Farragut Shooting Range prepared. Interestingly, both experts found that "there are no regulatory standards controlling noise emissions from the Farragut Shooting Range." (Perlworks, Duane Nightingale, Acoustical Standards for Assessing Noise Emissions From the Farragut Shooting Range.) Both studies use other noise standards and guidelines for comparison with measurements from the Farragut Shooting Range, including: U.S. Environmental Protection Agency (EPA) guidelines, U.S. Department of Housing and Urban Development (HUD) site acceptability standards, Department of Defense – Army Regulation – AR200-1 (DoD), World Health Organization (WHO), and other state and county standards. The EPA, HUD and DoD guidelines have all taken annoyance by noise into consideration.

Kootenai County's Zoning Ordinance sets noise standards for special events and industrial noise, neither of which are applicable to the Farragut Shooting Range which can be verified by Kootenai County.

The NRARSB notes that: "If no state or local [sound] ordinances exist, Federal laws do exist through the Environmental Protection Agency (EPA) and Housing and Urban Development (HUD)." NRARSB, Article 2, Section 2.03.5.3.1, page I-3-6. Defendants' sound study addresses these guidelines/standards.

Defendants' expert, Scott D. Hansen, and Plaintiffs' expert have both used a mathematical modeling tool for the sound study called the U.S. Army Corps of Engineers


Small Arms Range Noise Assessment Model (SARNAM). The SARNAM model is a sound analysis and planning tool, not a standard or guideline.

The NRARSB provides guidelines for sound abatement. Included in these guidelines are sound level categories of acceptable, unacceptable, and discretionary sound levels. NRARSB Article 3, Section 3.03.3.01, page I-6-8.

The DoD 63 dBA max limit referred to in Plaintiff is actually a <65 ADNL (A-weighted Day-Night 24 hour level) for land use (LUPZ) zone 1, which includes residential areas, schools and hospitals.

Plaintiffs assert that excessive noise is a present condition at the range. Defendants' expert has found that the Farragut Shooting Range currently complies with EPA, HUD and DoD noise guidelines (and other comparable noise standards), and that the noise abatement provisions of the Vargas Master Plan will further reduce the noise. Further, the Hansen sound study shows that the Farragut Shooting Range meets the NRARSB guidelines for sound abatement. There is no applicable regulatory noise standard. Both parties will be providing expert opinion testimony about sound measurements, comparable noise standards/guidelines, and noise abatement. Defendants submit that the Court's decision on whether noise constitutes a nuisance in the case will be a factual determination based on the submitted expert opinions.

Dated this 9th day of October, 2006.


 W. DALLAS BURKHALTER,
 Deputy Attorney General


ORIGINAL

STATE OF IDAHO } SS
COUNTY OF KOOTENAI }
FILED:

Scott W. Reed, ISB#818
Attorney at Law
P. O. Box A
Coeur d'Alene, ID 83816
Phone (208) 664-2161
FAX (208) 765-5117

2006 OCT 10 PM 2:36

CLERK DISTRICT COURT


DEPUTY

Harvey Richman, ISB# 2992
Attorney at Law
19643 N. Perimeter Road
Athol, Idaho 83801
Phone (208) 683-2731

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

**CITIZENS AGAINST RANGE)
EXPANSION, an unincorporated non-)
profit Association; JEANNE J. HOM,)
a single woman; EUGENE and)
KATHLEEN RILEY, husband and)
wife; LAMBERT and DENISE RILEY,)
husband and wife; GABRIELLE)
GROTH-MARNAT, a single woman,)
GERALD PRICE, a single man;)
RONALD and DOROTHY)
ELDRIDGE, husband and wife; and,)
GLENN and LUCY CHAPIN, husband)
and wife, SHERYL PUCKETT, a single)
woman; CHARLES MURRAY and)
CYNTHIA MURRAY, husband and)
wife; and DAVE VIG, a single man,)**

Case No. CV-05-6253

**PLAINTIFFS' CLOSING RESPONSE TO
MEMORANDUM DECISION AND ORDER
PAGE 15**

Plaintiffs,

v.

**IDAHO FISH AND GAME)
DEPARTMENT, an agency of the)
STATE OF IDAHO, and STEVEN M.)
HUFFAKER, Director of the IDAHO)
FISH AND GAME DEPARTMENT,)**

Defendants.

For ease in comprehension, plaintiffs will follow the format in Defendants' Brief on Applicable Standards.

Legal Standards

Kootenai County Ordinance 375, Section 33.02 proves no guidance whatsoever as to safety criteria:

Section 33.02 C: C. All facilities shall be designed and located with full consideration to the safety factors involved with such a use.

Nowhere in the Kootenai County Code nor in any other county document is there any suggestion mentioned or clue as to what this "safety factor" may be. Just as with airports, or landfills, or community drainfields, or motorcycle race tracks, or other conditional uses, where there is a continuing activity, the "safety factors" are to be determined from other non-county sources.

Idaho Code Sections 55-2601 -2604 relate only to nuisance suits based upon noise. Noise will be an issue subject to controversy in trial between the experts of the parties and subject to the actual experience of residents who have been exposed to shootings at the Range.

The use of the Range according to the information supplied by the Idaho Fish and Game Department has increased from 150 shooters annually in 2002 to 509 through only eight months of the year in 2005 is at least a 339% increase, more if the full year for 2005 were included.

Idaho Fish and Game has a goal of 3,000 shooters per month.

Substantial change is required in this NRA sponsored anti-nuisance statute.

"Substantial" is defined as: "substantial adjective (1) of considerable importance, size, or value. . . .Oxford Color Dictionary, (2d Ed. 2000), p. 703.

Plaintiffs in their initial brief expressed dismay at the affidavit of Clark Vargas attempting to equate the danger to the public from hunters in deer season with the danger from year-round shooters at the Farragut Shooting Range. Affidavit, Paragraph 14.

Both as to safety and as to noise, it must be remembered that there is a multiplier factor. The solitary hunter lucky enough to spot a buck may fire one, two or three shots in a day of hunting. The party of ten or more shooters at the range may each be firing 50 to 100 rounds in one hour or two of practice.

The exposure to the public outside the range to both errant bullets and periods of intense noise is a consequence of these barrages.

Plaintiffs' complaint is against present use and also against the implementation of the Vargas Master Plan which calls for an increase from ten to 100 shooting stands.

It is notable that nowhere in the Vargas Master Plan is there any design nor even mention of what defendants' brief terms "noise abatement." Defendant's Brief, p. 3.

Maximum allowable noise levels set in the Kootenai County Code for the industrial zone and for special events are informative and can be applicable. As set forth in the September 30, 2006 "Acoustical Standards for Assessing Noise Emissions from Farragut Shooting Range" by Duane Nightingale filed by plaintiffs. Initial Response, the Day-Night-Level (DNL) standards used by federal agencies HUD and EPA should not be applicable because DNL is a 24 hour average and the Farragut Shooting Range is only operated during day light hours resulting in a dilution of annoyance statically, but not in fact.

Factional Standards

Defendant's Brief on Applicable Standards correctly sets forth authorities to be examined. With the Court denying summary judgment because the expert opinions conflicted, plaintiffs also agree that the final judgment at trial will be based on deciding who to believe (or which Clark Vargas is more believable). However, plaintiffs strongly disagree with the conclusions drawn by defendants.

Defendants are correct in stating that the Army and Air Force regulations were written for military controlled ranges and military personnel. However, Claude Vargas and other experts on this issue have looked to both the Air Force and the Army standards and regulations as guidelines.

CLOSING RESPONSE TO MEMORANDUM DECISION

Shooting ranges for the military are very like shooting ranges for civilians and involve training military personnel to use rifles and pistols. It does not matter whether the shooter is in uniform or wearing buckskin. The risks created down range and the necessary controls by standards are the same

Defendants denigrate Claude Vargas's Symposium talk and the NRA Range Source Book as being only "guidelines." Using common sense or using simple analysis of easily understood English words lead to a contrary conclusion. Guidelines mean lines to be guided. Guidelines in a literal architectural sense are the outer-perimeters of where a structure may go.

Plaintiffs concur totally with the following statement in Defendants' Brief:

The NRARSB provides guidelines for range design and management which are *context and site specific*, and require professional evaluation. The various designs and information may or may not apply to a particular range. The application of specific design features requires professional assessment and evaluation by architects or engineers. Further, the NRARSB provides that a determination of whether the range meets the reasonable safety expectations of range users and the public "can only be made by a thorough professional evaluation of the range." p. 4. (Emphasis supplied).

The following comment that "Blue Sky" is not applicable as a requirement or standard is error. Yes, there are ranges where there is no need to apply the "Blue Sky View" rule: e.g. ranges where all property within the Safety Danger Zone is owned by and controlled by the range operations, e.g. ranges facing towering hills

CLOSING RESPONSE TO MEMORANDUM DECISION

or fenced to keep out the public, e. g. ranges where the errant bullets fall into impenetrable swamps.

The no "Blue Sky View" Rule is a condition designed to apply directly and explicitly to ranges like Farragut where there is exposure to errant bullets beyond the area controlled by the range.

The key problem in this case, the inherently dangerous condition, the case of exposure to residents and the public to noise and safety nuisance and negligence concerns is the Farragut Shooting Range site. It is too small to contain the SDZ range bullets, too small to limit the noise exposure.

The SDZ is repeated throughout the NRA Range Source Book. The diagram for the SDZ was prepared by Claude Vargas. That SDZ is on page G-5 of the Vargas Master Plan. For reasons that are not clear, Mr. Vargas in his Master Plan paid no heed to the SDZ that he put in that plan.

Claude Vargas was not invited by the NRA to its annual nationwide meeting in 1996 to give an entertaining slide show nor as an architect to show the aesthetic beauty of ranges he had designed for several other sites.

Mr. Vargas's primary and repeated concern was safety. The vast majority of "do's" and "don'ts" were safety related. Mr. Vargas told his audience with regard to safety that "you must" many, many times.

CLOSING RESPONSE TO MEMORANDUM DECISION

The same was true with the NRA commissioned surveyed talk at the same 1996 Symposium by David Luke, Range Technical Team Advisor for NRA, "Baffles, Berms and Backstops."

The NRA Range Source Book supplemented by Army and Air Force regulations and explained by Mr. Vargas in his "Design Criteria for Shooting Ranges" supply the standards to be applied in this case after a hazard analysis by a trained engineer.

Respectfully submitted, this 11th
day of October, 2006.



Harvey Richman

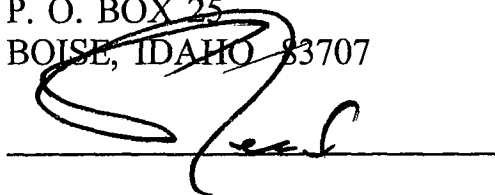


Scott W. Reed
Attorney for Plaintiffs

CERTIFICATE OF MAILING

I certify that a copy of the above and foregoing is sent by first class mail, postage prepaid, this 11th of October, 2006 to:

W. DALLAS BURKHALTER
DEPUTY ATTORNEY GENERAL
P. O. BOX 25
BOISE, IDAHO 83707



CLOSING RESPONSE TO MEMORANDUM DECISION

7

STATE OF IDAHO
COUNTY OF KOOTENAI
CLERK OF DISTRICT COURT
DEPUTY
2006 DEC -8 PM 3:42
ORIGINAL
Cheryl

Scott W. Reed, ISB#818
Attorney at Law
P. O. Box A
Coeur d'Alene, ID 83816
Phone (208) 664-2161
FAX (208) 765-5117

Harvey Richman, ISB#2992
Attorney at Law
19643 N. Perimeter Road
Athol, Idaho 83801
Phone (208) 683-2732

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

**CITIZENS AGAINST RANGE)
EXPANSION, an Unincorporated non-)
profit Association; JEANNE J. HOM,)
a single woman; EUGENE and)
KATHLEEN RILEY, husband and)
wife; LAMBERT and DENISE RILEY,)
husband and wife; GABRIELLE)
GROTH-MARNAT, a single woman,)
GERALD PRICE, a single man;)
RONALD and DOROTHY)
ELDRIDGE, husband and wife; and,)
GLENN and LUCY CHAPIN, husband)
and wife, SHERYL PUCKETT, a single)
woman; CHARLES MURRAY and)
CYNTHIA MURRAY, husband and)
wife; and DAVE VIG, a single man,)**

Plaintiffs,

v.

**IDAHO FISH AND GAME)
DEPARTMENT, an agency of the)
STATE OF IDAHO, and STEVEN M.)
HUFFAKER, Director of the IDAHO)
FISH AND GAME DEPARTMENT,)**

Defendants.

Case No. CV-05-6253

**AMENDMENT TO AMENDED
COMPLAINT MADE BY
INTERLINEATION**

TO THE FIRST CAUSE OF ACTION

54A. As authorized specifically by Idaho Code §52-111 and, in general, by the duty of the courts to protect members of the public from known and controllable dangers, plaintiffs are entitled to a permanent injunction ordering defendants Idaho Fish and Game Department and Director Steven M. Huffaker to close the Farragut Shooting Range from occupancy and use by any persons with pistols, rifles and firearms using or intending to use live ammunition.

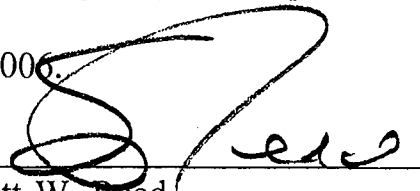
TO THE SECOND CAUSE OF ACTION

57A. As authorized specifically by Idaho Code §52-111 and, in general, by the duty of the courts to protect members of the public from known and controllable dangers, plaintiffs are entitled to a permanent injunction ordering defendants Idaho Fish and Game Department and Director Steven M. Huffaker to close the Farragut Shooting Range from occupancy and use by any persons with pistols, rifles and firearms using or intending to use live ammunition.

TO THE PRAYER

8. For a permanent injunction prohibiting defendant Idaho Fish and Game Department, its agents and employees from operating or allowing anyone to use the existing Farragut Shooting Range as a shooting range in its present condition.

Dated this 8th day of December, 2006.

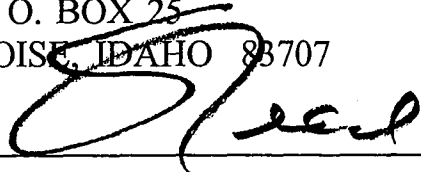


Scott W. Reed
One of the Attorneys for Plaintiffs

CERTIFICATE OF MAILING

I certify that a copy of the above and foregoing is sent by fax, this 8th day of December, 2006 to:

W. DALLAS BURKHALTER
DEPUTY ATTORNEY GENERAL
P. O. BOX 25
BOISE, IDAHO 83707



A handwritten signature in black ink, appearing to read "W. Dallas Burkhalter", is written over a horizontal line.

LAWRENCE WASDEN
ATTORNEY GENERAL

Clive J. Strong
Chief of Natural Resources

W. DALLAS BURKHALTER, ISB# 3286
Deputy Attorneys General
PO Box 25
Boise, ID 83707
Telephone: (208) 334-3715
FAX: (208) 334-2148
Attorneys for Defendants
State of Idaho, IDFG and Huffaker

STATE OF IDAHO }
COUNTY OF KOOTENAI } SS
FILED

2006 DEC 21 PM 2:45

CLERK DISTRICT COURT
[Signature]
DEPUTY

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

CITIZENS AGAINST RANGE)
EXPANSION, an Unincorporated non-profit)
Association; JEANNE J. HOM, a single)
woman; EUGENE and KATHLEEN RILEY,)
husband and wife; LAMBERT and DENISE)
RILEY, husband and wife; GABRIELLE)
GROTH-MARNAT, a single woman,)
GERALD PRICE, a single man; RONALD)
and DOROTHY ELDRIDGE, husband and)
wife; and GLENN and LUCY CHAPIN,)
husband and wife, SHERYL PUCKETT, a)
single woman; CHARLES MURRAY and)
CYNTHIA MURRAY, husband and wife; and)
DAVE VIG, a single man,)
Plaintiff,)

vs.)

IDAHO FISH AND GAME DEPARTMENT,)
an agency of the STATE OF IDAHO, and)
STEVEN M. HUFFAKER, Director of the)
IDAHO FISH AND GAME DEPARTMENT,)
Defendant)

Case No.: No .CV-05-6253

DEFENDANTS' REVISED PROPOSED
FINDINGS OF FACT AND CONCLUSIONS
OF LAW.

Pursuant to the Court's Order, Defendants' submit these Revised Proposed

Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

- 1) The Farragut Shooting Range occupies a site of approximately 160 acres and has been used as a shooting range since approximately 1942.
- 2) Since the Idaho Department of Fish and Game acquired the range in 1950, the Farragut Shooting Range has included partial fencing, direct road access by the North Road and Shooters Road, extensive parking, and a water supply.
- 3) Since 1950, there has been regular and substantial use of the range by both individuals and organized groups.
- 4) The 600-yard portion of the range was established in 1957. (Defendants' Exhibit RR.)
- 5) The Idaho Department of Fish and Game has a Memorandum of Understanding (MOU) with the Idaho Department of Parks and Recreation (IDPR). This MOU provides that IDPR provides daily management oversight of the Farragut Shooting Range including controlling public access, communication of range user expectations/and range rules, and enforcement of rules. (Defendants' Exhibit W.)
- 6) The IDPR sign-in and group registration records are incomplete and range use in 2002, 2003, and 2004 can not be reconstructed with any degree of certainty. Sign-in methodology/protocol was changed between 2005 and 2006 making comparisons between these years inappropriate. Furthermore, the range was closed on an intermittent basis to accommodate logging, road reconstruction, and fence building making the range

not fully available to the public in 2005. 2006 records provide the best data available of recent/current range use.

- 7) The Farragut Shooting Range is located in an area zoned "Rural" by Kootenai County.
- 8) The only regulatory safety standard applicable to the Farragut Shooting Range is Kootenai County Zoning Ordinance No. 375, Article 33, Section 33.02. (Defendants' Exhibit R, page 110.)
- 9) The National Rifle Association Range Source Book (NRARSB) provides safety guidelines which require professional evaluation. (Plaintiffs' Exhibit 3, page I-3 – Article 1 Section 1.02.3, Plaintiffs' Exhibit 38 – prologue, and Defendants' Exhibit D.)
- 10) The NRARSB provides that the reasonable satisfaction of safety expectations "can only be achieved when one considers the entire context in which a particular range will be operating, the types of shooting sports that will be conducted, the rules and controls that will be employed, the overall design of the range, and last, but not least, all aspects of the surrounding environment (terrain, population density, etc.)." (Plaintiffs' Exhibit 3 and Defendants' Exhibit D, page I-3 – Article 1 Section 1.02.2.)
- 11) Zero risk of bullet escapement from a shooting range under normal operating conditions is not the standard recognized by either the NRA or the military. The NRARSB identifies reasonable accommodations for safety and reasonable expectations of safety for range participants and the public at large as the design objective. (Plaintiffs' Exhibit 3, page I-3 Sections 1.02.2 and 1.02.3, and Defendants' Exhibit D.) The Army recognizes range safety as a risk management process that includes residual risk of fragment escapement within the Surface Danger Zone (SDZ). The objective of the Army

SDZ is the residual risk of fragment escapement or other danger to the public which is no greater than one in one million. (Plaintiffs' Exhibit 19, page 7 - Section 2-7.a.)

12) Mr. Roy Ruel is a professional engineer with no shooting range design experience and no formal training in shooting range evaluation. His standard for engineering design is zero risk. Mr. Ruel rejects the NRA safety standard and the military risk management standard of residual risk for shooting ranges. Mr. Ruel asserts that two range officers per firing line are required for a safe range. He did not visit the Farragut Shooting Range until the day before trial.

13) The Farragut Shooting Master Plan was prepared by Clark Vargas, an Idaho licensed Engineer specializing in shooting range design. He has designed over 400 shooting ranges. Mr. Vargas visited the Farragut Shooting Range and surrounding area, and studied U.S.G.S maps and aerial photographs prior to designing the Master Plan. He considered safety on and off the range in his planning.

14) The No Blue Sky concept is not required for public shooting ranges.

15) Full-time on-site supervision is not required for a safe shooting range operation. The NRARSB recognizes both active and passive operational control with passive control "practiced more frequently on ranges where individual users are allowed access." (Defendants' Exhibit D, page I-2-4, Section 2.02.5.)

16) Operational control of the Farragut Shooting Range includes controlled access, sign-in procedures including rules review and compliance agreement, a host program, unscheduled and complaint responsive on-site enforcement visits, and demonstration of presence.

- 17) The range improvements recommended by the Farragut Shooting Range Master Plan will enhance range safety.
- 18) Alleged bullet escapement from the range was not substantiated by physical evidence or copies of law enforcement reports. The witnesses testified that neither IDFG nor IDPR were notified of alleged bullet escapement incidents.
- 19) The Farragut Shooting Range as currently constructed and operated is not a nuisance as defined by Idaho Code Sections 52-101, 52 -102 and 52-107 with regard to range safety.
- 20) The range improvements recommended by the Farragut Shooting Range Master Plan are not a nuisance as defined by Idaho Code Sections 52-101, 52 -102 and 52-107 with regard to range safety.
- 21) There is no Idaho State or Kootenai County regulatory sound or noise standard applicable to the Farragut Shooting Range. (Plaintiffs' Exhibit 16 Part 2, page 3 – first sentence under heading Applicability of Kootenai County Noise Regulations.) (Defendants' Exhibit K, page 2 – first sentence of last paragraph, page 49 – first paragraph under heading DISCUSSION, and page 64 – next to the last paragraph.)
- 22) Duane Nightingale is an acoustical engineer with expertise and experience in hydro acoustics. The CARE commissioned Farragut Shooting Range Noise Study was both the first shooting range evaluation and first outdoor environmental noise study he had conducted. (Plaintiffs' Exhibits 16 and 25.)
- 23) The CARE commissioned Farragut Shooting Range Noise Study used the IMPULSE time response mode for all data collection. (Plaintiffs' Exhibit 16, page 9 – first sentence.) There is up to a 4 decibel difference between measurements taken in

IMPULSE (relatively higher levels recorded) and FAST (relatively lower levels recorded) time response mode. (Plaintiffs' Exhibit 16 Part 2, page 3 – second paragraph.) The noise regulations from other states used by Mr. Nightingale for comparison specified FAST mode in all cases where the mode was specified. (Plaintiffs' Exhibit 16, page 18 – Figure 8, Part 2 page 20 – Appendix B Summary of State Regulations.)

24) Mr. Nightingale's Farragut Shooting Range Noise Study collected only one of the three commonly used sound emissions metrics, and collected no Leq data needed to evaluate sound emissions against Federal Leq based (DNL) standards. (Plaintiffs' Exhibit 16, page 8.) This study used .50 caliber BMG rifles in its in-field testing. (Plaintiffs' Exhibit 16, page 10.) Mr. Nightingale used the SARNAM model to evaluate one full use scenario of the proposed Master Plan range. (Plaintiffs' Exhibit 16, page 21 – second paragraph last sentence and Appendix G.) The model included more shooting points than exist on the proposed Master Plan range, the use of twelve .50 caliber BMG rifles, and the use of a high-powered rifle (.243) on a pistol range. (Plaintiffs' Exhibit 16, Appendix G.) No models reflecting current range use or contrasting the application of the Master Plan features to the current range condition were evaluated.

25) The NRARSB supports the use of either IMPULSE or FAST time response mode in shooting range sound evaluations. (Defendants' Exhibit P, page I-6-7 – Section 3.02.1.1.)

26) Civilian use of .50 caliber BMG rifles is prohibited at the Farragut Shooting Range.

27) Scott Hansen is an acoustical engineer who specializes in shooting range evaluation. He has conducted sound studies on more than 50 shooting ranges, including

work for state agencies, municipal agencies, private companies and gun clubs.

(Defendants' Exhibit CCC.)

28) Mr. Hansen found that the Farragut Shooting Range currently meets the federal sound standards recommended by the Environmental Protection Agency (EPA), Housing and Urban Development (HUD), and Department of Defense-Army Regulation-AR200-1(DoD). (Defendants' Exhibit K, page 2 – bottom of the page to top of page 3, pages 8 and 9, page 22 – next to last sentence in each section, page 57 last paragraph to top of page 58, and page 64 – fourth and fifth paragraphs.) He also opined that the current sound emission from the Farragut Shooting Range fall within the range of comparable state standards and certainly do not represent a gross departure from the same. (Defendants' Exhibit K, page 64 – fifth paragraph.)

29) Mr. Hansen modeled seven test cases of the Farragut Shooting Range using the SARNAM model. He found that the corrected modeling predicted that the Farragut Shooting Range noise emissions would be below the federal standards and comparable state standards. (Defendants' Exhibit 16, page 65 – first full paragraph.)

30) Mr. Hansen found that the improvements recommended by the Farragut Shooting Range Master Plan will further attenuate the noise emissions of the range. (Defendants' Exhibit K, page 18 – last two sentences, page 22 – last sentence in each section, page 29 – last paragraph, page 33 – last paragraph, page 35 – last paragraph, page 38 – third paragraph and last paragraph continuing on to top of page 39, page 48 – last two paragraphs, page 65 – last two paragraphs.)

- 31) The Farragut Shooting Range as currently constructed and operated is not a nuisance as defined by Idaho Code Sections 52-101, 52 -102 and 52-107 with regard to sound or noise emissions.
- 32) The range improvements recommended by the Farragut Shooting Range Master Plan are not a nuisance as defined by Idaho Code Sections 52-101, 52 -102 and 52-107 with regard to sound or noise emissions.
- 33) As currently constructed and operated, the Farragut Shooting Range has not undergone a substantial change in use within the meaning of Idaho Code Section 55-2602.
- 34) The range improvements recommended by the Farragut Shooting Range Master Plan would not constitute a substantial change of use within the meaning of Idaho Code Section 55-2602.

CONCLUSIONS OF LAW

- 1) The Farragut Shooting Range does not constitute a nuisance as defined by Idaho Code Sections 52-101, 52 -102 and 52-107.
- 2) The Farragut Shooting Range, as currently constructed and operated, has not undergone a substantial change in use within the meaning of Idaho Code Section 55-2602.
- 3) The range improvements recommended by the Farragut Shooting Range Master Plan would not constitute a substantial change of use within the meaning of Idaho Code Section 55-2602.

4) The plaintiffs are not entitled to a permanent injunction closing the Farragut Shooting Range, closing any access roads, barring any fund seeking to implement range improvements, or barring implementation of the Farragut Shooting Range Master Plan.

Dated this 21st day of December, 2006.



W. Dallas Burkhalter
Deputy Attorney General


Certificate of Service

I certify that on the 21st day of December, 2006, a true and correct copy of the foregoing was E-mailed to Judge Mitchell and Scott Reed, and faxed or mailed postage prepaid to:

Scott W. Reed
Attorney at Law
(208) 765-5117

Harvey Richman
Attorney at Law
19643 N. Perimeter Road
Athol, Idaho 83801

Clerk of the Court (2 copies)
(208) 446-1188



ORIGINAL
COPY

STATE OF IDAHO }
COUNTY OF KOOTENAI } SS
FILED:

2006 DEC 21 PM 4:49

CLERK DISTRICT COURT
Janet Lawson
DEPUTY

Scott W. Reed, ISB#818
Attorney at Law
P. O. Box A
Coeur d'Alene, ID 83816
Phone (208) 664-2161
FAX (208) 765-5117

Harvey Richman, ISB#2992
Attorney at Law
19643 N. Perimeter Road
Athol, Idaho 83801
Phone (208) 683-2732

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

CITIZENS AGAINST RANGE)
EXPANSION, an Unincorporated non-)
profit Association; JEANNE J. HOM,)
a single woman; EUGENE and)
KATHLEEN RILEY, husband and)
wife; LAMBERT and DENISE RILEY,)
husband and wife; GABRIELLE)
GROTH-MARNAT, a single woman,)
GERALD PRICE, a single man;)
RONALD and DOROTHY)
ELDRIDGE, husband and wife; and,)
GLENN and LUCY CHAPIN, husband)
and wife, SHERYL PUCKETT, a single)
woman; CHARLES MURRAY and)
CYNTHIA MURRAY, husband and)
wife; and DAVE VIG, a single man,)

Plaintiffs,)

v.)

IDAHO FISH AND GAME)
DEPARTMENT, an agency of the)
STATE OF IDAHO, and STEVEN M.)
HUFFAKER, Director of the IDAHO)
FISH AND GAME DEPARTMENT,)

Defendants.)

Case No. CV-05-6253

**PLAINTIFFS' POST TRIAL PROPOSED
FINDINGS OF FACT AND CONCLUSIONS
OF LAW**

Pursuant to direction of this Court at the close of trial, plaintiffs submit the following post trial findings and conclusions based on evidence received in trial.

FINDINGS OF FACT

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

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

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

4. Defendant Steven M. Huffaker is Director of the Idaho Fish and Game Department.

5. The Farragut Shooting Range was established by the United States Naval Training and Distribution Center and was used by the United States Navy from 1942 until 1946 when the Naval Training Center was closed.

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

7. On July 28, 1964, defendant Fish and Game Department deeded the larger portion of said land back to the United States which in turn on December 30, 1965 deeded the same property to the State of Idaho for ". . . the continuous use and maintenance of the hereafter described premises as and for public park and public recreational area purposes." Said described property was thereafter placed by the State of Idaho into the jurisdiction and control of the Idaho Department of Parks and Recreation as Farragut State Park.

8. Defendant Fish and Game Department retained certain of the lands originally granted including the shooting range and surrounding contiguous area.

9. The property owned and controlled by defendant Fish and Game Department extends approximately three quarters of a mile from the shooting lines. The property beyond is owned by either the Idaho Department of Parks and

Recreation or by private individuals and is not available for the Fish and Game Department to acquire.

10. From 1950 through the year 2002, the use of the range was occasional and sporadic with less than two to three hundred shooters a year. In any event, the number of shooters were small and not of concern to the neighbors.

11. In the time period since acquisition in 1950 until 2003, the Farragut Shooting Range was relatively unchanged and lacked power, water, fencing, road access and parking.

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

13. In 2003, defendant Idaho Fish and Game Department used federal money and grants and funds from logging for the development of the Vargas Master Plan, safety fence construction, bringing power to the new building site, redeveloping the access road off of Perimeter Road, bringing water and power to the site, putting in entrance lighting and a sign at Perimeter Road.

14. The development of the access road allowed opening the gate one-half mile from Perimeter Road and allowed parking at the range constituting, in effect, a new access road. Plaintiffs Exhibit 29.

15. Users may now drive this distance to the range during normal hours of operation. The shooting range hours of operation are from 8:00 a.m. to 6:30 p.m. or one-half hour before sunset. Plaintiffs Exhibit 27.

16. The improved access allowing driving to the site and the attendant promotional publicity by defendant Idaho Fish and Game Department has resulted in a substantial change in the use of the Farragut Shooting Range. Regional supervisor Chip Corsi on March 7, 2005 in a published news article estimated the increase in range use at 160% in the past three years. Plaintiffs Exhibit 37.

17. The Farragut State Park shooter sign-up sheets produced by defendant Idaho Fish and Game Department for the years 2002 through September 30, 2006 show the following totals which include counting numbers within groups of 182 shooters for 2002, 427 shooters for 2004, 1,181 shooters for 2005 and 1,413 shooters to September 30, 2006. Plaintiffs Exhibit 26. Testimony of Jeanne Hom.

18. The percentage increase from 2002 to 2004 was 234% and from 2002 through 2004, 649%.

19. All of these figures and estimates constitute a substantial change in use between 2002 and the filing of this lawsuit.

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

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

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

23. For the plaintiffs, expert witness Duane Nightingale made his measurements of gunfire noise on private properties which fell within the range of 80.7 to 50.2 dBA (Table 3 & 4). Scientific studies of gunfire show that at a level of 80.7 dBA, over 40% of human beings are highly annoyed by the noise (Sorreson and Magnesson, 1979). Plaintiffs Exhibit 16.

24. For Mr. Nightingale, the measured peak unweighted noise levels of gunfire fell within the range of 102.7 to 72.1 dB. The Kootenai County Industrial Noise Ordinance specifies a peak, unweighted impulsive threshold of 83 dB. This noise limit was exceeded at 7 of 9 private properties (page 15, para. 2) by as much as 19 dB. Congruent with this, the Kootenai County Special Use Ordinance limit of 75 dBA was violated at 4 of 7 private properties. Plaintiffs Exhibit 16.

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

26. The Nightingale Study uses a Leq or Impulse method of noise measurement as does the Kootenai County Industrial Noise Ordinance. Plaintiffs Exhibit 16.

27. The Hansen study uses a day-night level (DNL) which measure over a 24 hour period. DNL is the standard applied to transportation noise in high-density metropolitan areas. Plaintiffs Exhibit 16.

28. In the rural community of Bayview, which has background ambient sound levels in the range of 25 dBA to 35 dBA, that the acceptable sound pressure level, at the private property line should not exceed 55 dBA, as measured with a certified sound measuring device with an impulse filter. This finding is in accordance with the Shomer studies relied upon by Mr. Nightingale and the guidelines of the World Health Organization (WHO). Plaintiffs Exhibit 16.

29. The Vargas Master Plan providing for great expansion and increase of use does not include any noise mitigation. Development of that plan would greatly

increase the unacceptable noise level surrounding private property owners. Plaintiffs Exhibits 16 and 20.

30. On behalf of plaintiffs, expert witness Roy Ruel testified as to the likelihood of bullet escapement from the real property owned and controlled by defendant Idaho Fish and Game Department.

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

32. Small arms ammunition has a maximum range of just under a mile for .22 caliber pistols and rifles to over three miles for a .30 caliber rifles. Plaintiffs Exhibits 2, 32, 33 and 34.

33. The Surface Danger Zone from the Farragut Shooting Range firing line encompasses a large area of private and public property beyond and down range from the real property owned and controlled by defendant Idaho Fish and Game Department. Plaintiffs Exhibit 1, G-5 and Exhibit 2, figure 2 and Plaintiffs Exhibit 16, figure 10.

34. Approximately three quarters (3/4) of a mile down range are private property homes along the Perimeter Road which parallels the Fish and Game fence.

Park property beyond ownership of the Fish and Game Department commences one-half (1/2) mile from the shooting range. Park visitors may come and do come close to the interior fence from time to time and are thus exposed to bullets within the one-half mile. Plaintiffs Exhibits 13, 14, 15, 16 and 20.

35. School buses make regular stops to pickup or let out school children at several points along the Perimeter Road which is in a direct line of fire and well within the Surface Danger Zone. Plaintiffs Exhibits 1, G-5, 14, 15 and 20.

36. Certain plaintiffs and other residents testified to hearing and seeing evidence of bullets impacting trees upon their properties.

37. The evidence at trial from witness Roy Ruel and from the Range Design Criteria prepared by Clark Vargas and the NRA Range Source Manual establishes the probability that bullets from the firing line at the Farragut Shooting Range have in the past, may now and will in the future travel beyond the boundaries of the Idaho Fish and Game property into the private property of plaintiffs and others and into the Farragut State Park property used by members of the public. Plaintiffs Exhibits 2, 3, 4, 6, 16, 32, 33 and 34.

38. The Farragut Shooting Range is not large enough to contain bullets fired from guns at the firing line within the fenced boundaries of the range. The

Surface Danger Zone fixed at the firing line extends one to over two miles beyond the Farragut Shooting Range boundaries. Plaintiffs Exhibits 13, 14, 15 and 20.

39. There are a least 18 occupied residences, including homes of some of the plaintiffs, located within the Surface Danger Zone. Plaintiffs Exhibit 17 and 20.

40. Hikers, bikers, and riders on trails and motor vehicles, including school buses picking up and letting off school children on Perimeter Road, are within the Surface Danger Zone. Plaintiffs Exhibits 13, 14, 15, 17 and 20.

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

42. The Idaho Fish and Game Department is not able to acquire more adjoining property down range. Plaintiffs Exhibit B.

43. Defendant Idaho Fish and Game Department has created and provided to all persons applying to shoot upon the range written safety instructions. Defendants Exhibit PP. Plaintiffs Exhibit 26.

44. Defendant Fish and Game Department has safety warning signs posted at various prominent locations on its shooting range. Plaintiffs Exhibit 27.

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

46. Plaintiffs' expert witness Roy Ruel testified that two range managers were needed on site whenever shooters were using the range. The Design Criteria of Claude Vargas and the National Shooting Sport Association video support this opinion. Plaintiffs Exhibit 2, figure 2 and Exhibit 38.

47. The testimony of David Leptich and Randall Butts that adequate range supervision had been regularly provided was not supported by their admission that personnel from both departments were on the shooting range for only one hour per week.

48. Defendants' witness Edward M. Santos testified that in his examination of the Farragut Shooting Range he used the NRA standard for "non-attended range."

49. The testimony of defendants' witnesses that there has been adequate supervision is not credible nor is it supported by the record.

50. Defendant Fish and Game Department does not employ or otherwise provide range managers to supervise, enforce or control shooters on the firing line nor does it offer training to potential range managers or range users.

51. No evidence was presented indicating that anyone from the Idaho Fish and Game Department nor from the Farragut State Park has ever enforced any of the posted or circulated printed safety rules not cited any shooter for any violation of those rules.

52. If at least one full time state range manager is present and on the range during all periods that the range is open to shooting to handle the administrative and behind the lines supervision then one on line range officers is sufficient to keep the range safe and orderly at each active range. Plaintiffs Exhibits 2, 3 and 42.

53. As presently operated and funded, the defendant Fish and Game Department has no plans for nor financial support to employ professional or trained range managers.

54. Operation of a shooting range without supervision creates a clear and present danger to all outside the Farragut Shooting Range property lines.

55. The Parks and Recreation Department following state regulations has instituted a requirement that all users of model airplanes are required to provide proof of \$250,000 liability insurance. Plaintiffs Exhibit 28.

56. Firearms are at least, if not more, as dangerous as model airplanes, such that the same insurance requirement should be required for the shooting range. If the shooting range were to reopen at some future time, all signed-up shooters should be required to provide \$250,000 of public liability insurance as set out in IDAPA 26, Title 01 Ch. 20.075.02.

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

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

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

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

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

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

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

"Design Criteria for Shooting Ranges" presented to the Third National Shooting Range Symposium sponsored by the National Rifle Association in 1996 and in the Illinois Department of Natural Resources Shooting Range Safety Plan, rules prepared by Clark Vargas, Plaintiffs Exhibits 2 and 43.

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

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

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

67. The "No Blue Sky" rule is that all pistol and rifle ranges be designed to include containment to eliminate the "Blue-Sky" view from all potential shooting positions. Containment must not only be from all firing positions shown on the

plans, but all so from the impromptu locations that can be anticipated and available to be established by shooters. Plaintiffs Exhibit 2, 6, 38 and 43.

CONCLUSIONS OF LAW

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

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

3. Plaintiff Citizens Against Range Expansion, an unincorporated association, has representative standing.

4. The named individual plaintiffs, as residents and property owners, have standing to enforce the claims made in this case.

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

6. The present operation of the Farragut Shooting Range, which allows escapement of bullets beyond Farragut State Park/Idaho Fish and Game boundaries into the Surface Danger Zone encompassing private property of plaintiffs and Farragut State Park property open to members of the public, constitutes a clear and present danger to the safety and health of plaintiffs and other persons in the area.

7. As authorized specifically by Idaho Code §52-111 and, in general, by the duty of the courts to protect members of the public from known and controllable dangers, plaintiffs are entitled to a permanent injunction ordering defendants Idaho Fish and Game Department and Director Steven M. Huffaker to close the Farragut Wildlife Management Area to all persons with pistols, rifles and firearms using or intending to use live ammunition.

8. The Vargas Master Plan, as presented and accepted by the Idaho Fish and Game Department and admitted in evidence in this case, does not provide required and mandatory baffles, berms and safety measures adequate to prevent bullet escapement beyond the boundaries of the property owned and controlled by defendant Idaho Fish and Game Department.

9. Plaintiffs are entitled to judgment of this Court that defendants Idaho Fish and Game Department and Director Steven M. Huffaker cease all efforts to obtain funds and to carry out the Vargas Master Plan.

10. Defendant Idaho Fish and Game Department in allowing operation of the Farragut Shooting Range in a manner that allowed bullet escapement beyond its property, in increasing use of the range to unacceptable noise levels and in failing to provide range managers and adequate supervision of shooters has acted without reasonable bases in fact and law.

Dated this 21st day of December, 2006.

Scott W. Reed
One of the Attorneys for Plaintiffs


CERTIFICATE OF SERVICE

I certify that a copy of the above and foregoing is sent by first class mail, postage prepaid, this 21st day of December, 2006 to:

W. DALLAS BURKHALTER
DEPUTY ATTORNEY GENERAL
P. O. BOX 25
BOISE, IDAHO 83707

10. Defendant Idaho Fish and Game Department in allowing operation of the Farragut Shooting Range in a manner that allowed bullet escapement beyond its property, in increasing use of the range to unacceptable noise levels and in failing to provide range managers and adequate supervision of shooters has acted without reasonable bases in fact and law.

Dated this 21st day of December, 2006.

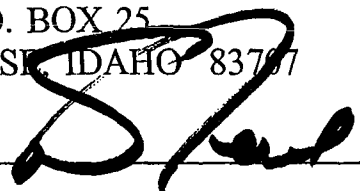


Scott W. Reed
One of the Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I certify that a copy of the above and foregoing is sent by first class mail, postage prepaid, this 21st day of December, 2006 to:

W. DALLAS BURKHALTER
DEPUTY ATTORNEY GENERAL
P. O. BOX 25
BOISE, IDAHO 83707



STATE OF IDAHO)
County of KOOTENAI)^{ss}

FILED 2-23-07

AT 3:00 O'clock P M
CLERK OF DISTRICT COURT

Janet Clausen
Deputy

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

CITIZENS AGAINST RANGE EXPANSION,)
et al,)
Plaintiffs,)
vs.)
IDAHO FISH AND GAME DEPARTMENT,)
an agency of the STATE OF IDAHO, et al.)
Defendants.)

Case No. **CV 2005 6253**

**MEMORANDUM DECISION,
FINDINGS OF FACT,
CONCLUSIONS OF LAW AND
ORDER**

MEMORANDUM DECISION

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

I. PROCEDURAL BACKGROUND.

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

¹ The caption of the case reads Idaho Fish and Game Department, but all exhibits indicate "Idaho Department of Fish and Game" is more accurate.

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

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

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

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

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

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

II. FACTUAL BACKGROUND.

The Farragut Wildlife Management Area was formerly the site of the Farragut Naval Training Center established by the United States Navy in 1942. Defendant Idaho Department of Fish and Game (IDF&G) began land acquisition in 1949 when four

separate parcels were purchased that bordered Lake Pend Oreille. Idaho Fish and Game's ownership at Farragut Park presently consists of approximately 1,413 acres. This is made up of four parcels totaling 157 acres on the shore of Lake Pend Oreille and one 1,256-acre parcel located west of Bayview, Idaho. The Farragut Shooting Range occupies a site of approximately 160 acres and has been used as a shooting range since the land was owned by the United States Navy. The surrounding neighborhood consists of private residential houses, a public road (Perimeter Drive), school bus stops and hiking trails.

The use of the Farragut Shooting Range has expanded significantly since 2002. Use went from 176 shooters in 2002, to 370 shooters in 2004, to 509 in 2005 only through August of that year. Plaintiffs' Brief in Support of Motion for Summary Judgment, p. 25, n. 2. Plaintiffs' Exhibit 26. Testimony of Jeanne Hom.

A public proposal by IDF&G for the improvement of the Farragut Shooting Range seems to be what precipitated this lawsuit. In 2004, the IDF&G published a proposal to improve the Farragut Shooting Range with the investment of \$3,600,000. That proposal was based on the Vargas Master Plan. The Vargas Master Plan proposed making improvements to the Farragut Shooting Range in the areas of public safety, public access, noise mitigation, facility quality and management. Plaintiffs claim that although the plan purports to make improvements to the shooting range, the plan will also expand the shooting range by lengthening the range from 500 to 600 yards, adding berms, parking and intermediate firing positions, and including trap and skeet fields, mounted cowboy action areas, and 130 shooting stations.

In 1996, Clark Vargas, a professional engineer, published a paper for the 1996 Third National Shooting Range Symposium, which was intended to provide a general review of range design criteria. The Vargas Master Plan is inconsistent with the range design criteria Vargas discussed in his 1996 Third Shooting Range Symposium.

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

Plaintiffs seek to permanently enjoin the IDF&G from continued operation of the range and future implementation of the Vargas Master Plan. Plaintiffs' Post Trial Proposed Findings of Fact and Conclusions of Law, p. 17, ¶¶ 7, 9. Specifically, plaintiffs ask this Court in their first cause of action for a permanent injunction that requires IDF&G to restore and close the outer access gate, prohibit any other or different access road to the range and restore the operational policy that existed in July 2003. Amended Complaint, p. 16, ¶ 54. Plaintiffs' second cause of action asks the Court for a permanent injunction against any expansion to the shooting range and to restore it to its July 2003 level of operation. Amended Complaint, p. 17, ¶ 58. Plaintiffs

assert that bullet escapement (Plaintiffs' Post Trial Proposed Findings of Fact and Conclusions of Law, p. 17, ¶ 6) and noise (*Id.* p. 16, ¶ 5) constitute a nuisance. Idaho Department of Fish and Game claims the shooting range as currently constructed and operated has not undergone a substantial change in use within the meaning of Idaho Code § 55-2602. Defendants' Revised Findings of Fact and Conclusions of Law, p. 8, Conclusions of Law ¶ 2.

III. JURISDICTION AND NUISANCE LAW.

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

Courts outside Idaho have further elaborated, holding that the granting of an injunction is within the sound discretion of the trial court to be exercised according to the circumstances of each case. *Alderwood Assocs., v. Washington Env'tl. Council*, 96 Wn.2d 230, 233, 635 P.2d 108, 111 (Wash. 1981); see also *Five Oaks Corp. v. Gathmann*, 190 Md. 348, 58 A.2d 656 (Md. Ct.App. 1948) (holding that actions in which

the abatement of a nuisance is sought, the relief to be awarded rests, as in other cases involving injunctive relief, largely in the discretion of the court). While the court in the exercise of its discretion with respect to the grant or denial of injunctive relief is not controlled by technical legal rules, the power is not an arbitrary and unlimited one, nor does it constitute the mere whimsical will of the court, but rather it is the exercise of a sound judicial discretion. 42 Am.Jur.2d Injunctions § 25, 26.

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

The Idaho Supreme Court in *Lawrence Warehouse Co. v. Rudio Lumber Co.*, 89 Idaho 389, 395, 405 P.2d 634 (1965) indicated there should be a hearing where the injunction "encompasses the entire controversy between the parties." Any injunction in this case could encompass the "entire" controversy, or nearly the entire controversy. Justice Thomas in *Mountain States Tel. & Tel Co. v. Jones*, 75 Idaho 78, 267 P.2d 634 (1954), wrote:

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

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

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

Language found in cases from Idaho and several other jurisdictions allow the court, in its discretion, to grant injunctive relief that would give the defendant the most

reasonable use of his property while still affording plaintiffs a remedy against nuisance. The court therefore has the authority to "fashion a remedy" based upon the circumstances of each individual case. So long as the court does not abuse its discretion or fashion a remedy outside the scope necessary to secure the relief sought, the court has judicial discretion to grant or deny injunctive relief that is not manifestly unreasonable.

None of the plaintiffs who have residences down range from the rifle range resided there before the range was created in 1950. Thus, in that sense, each of the plaintiffs have "come to the nuisance". "Coming to the nuisance" is the notion that if you move to the nuisance after the nuisance already exists, you cannot be heard to complain of the nuisance since you knew what you were getting into. "Coming to the nuisance does not apply unless plaintiffs had actual or constructive knowledge of the objectionable activity before they acquired their property." *Marks v. State ex rel Department of Fish and Wildlife*, 191 Or.App. 563, 575, 84 P.3d 155, 163 (Or.App. 2004); *citing St. Johns Shingle Co. et al. v. Portland*, 195 Or. 505, 527, 246 P.2d 554 (1952). In this case, each of the plaintiffs who testified stated they did not know that there was a gun range nearby *before* they purchased. While that testimony at first glance may seem incredible, it is consistent given the limited use of the range at the times when the various plaintiffs purchased their property. Whether the buyer visited the property one time or ten times before purchasing, it is quite likely they heard no shooting, given the fact that in 2002 and before the range was used by an average of less than one shooter per day. Further, a view by the Court of the range and the surrounding area shows the range itself is not visible from Perimeter Road. Dorothy

Eldridge began living near the range in 1994. She testified she found out about the range about a year after she purchased when someone told her about the range. Jeanne Hom moved near the range in 1997. She testified she heard occasional gunfire after she moved in but assumed it was from a neighbor. She discovered the range when riding a bike in the area, and she testified that when she rode near the range it was never in use. Marcelle Richman testified she moved near the range in the early 1980's and found out about the range about a year later while riding her horse. She testified only occasionally would she hear rifle shots in the 1980's and 1990's. Each witness became aware of the gun range after they had lived there a while. "Coming to the nuisance' is not an absolute and preclusive doctrine; rather, it is simply one of a variety of material considerations in determining the existence of a nuisance and the proper remedy, if any." *Marks v. State ex rel Department of Fish and Wildlife*, 191 Or.App. 563, 575, 84 P.3d 155, 163 (Or.App. 2004).

In 1996, the Idaho Legislature added a provision that codifies the doctrine of "coming to the nuisance" for "sport shooting ranges." Idaho Code § 55-2601 *et. seq.* Specifically, Idaho Code § 55-2602(1) reads: "Except as provided in this section, a person may not maintain a nuisance action for noise against a shooting range located in the vicinity of that person's property if the shooting range was established as of the date the person acquired the property." There is no dispute that all individual plaintiffs fall under that category. That section continues: "If there is a substantial change in use of the range after the person acquires the property, the person may maintain a nuisance action if the action is brought within three (3) years from the beginning of the substantial change."

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

Five Oaks Corp. v. Gathmann, 190 Md. 348, 58 A.2d 656 (Md. Ct.App. 1948) illustrates such a progression may become a nuisance which may be subject to an injunction. Although *Five Oaks* was decided sixty years ago, it has consistently been cited with approval. “The power of a court to enjoin a party from using his own property to interfere with the rights of others ‘is not only a well established jurisdiction of the Court of Chancery, but is one of great utility, and one which is constantly exercised.’” *Becker v. State*, 363 Md. 77, 87, 767 A.2d 816, 821 (Md. 2001), *citing Five Oaks*. In *Five Oaks*, a corporation bought what had been a public swimming pool and a restaurant. The corporation added lights which shone into neighboring residences and kept the restaurant open 24 hours a day, with concomitant traffic, horns blaring, music and loud conversation. After eight days of testimony the trial court noted “...its present operation is a great change from the manner in which it was previously conducted”. 190 Md. at 356, 58 A.2d at 660. The trial court prohibited defendant from causing or permitting noises and sounds to be transmitted to plaintiffs’ property to the extent such

noises and sounds interfered with the reasonable and comfortable enjoyment of their properties, and set out four specific methods by which this was to be done. 190 Md. at 357-58, 58 A.2d at 661. The Maryland Court of Appeals upheld two of those methods, one prohibiting curbside or car-side service after midnight (requiring customers be served inside after midnight), and one changing the aim and brightness of lights. The Court of Appeals found unreasonable the requirement that after midnight no music be played on the premises (because it could be played inside without disturbance) and the requirement that the restaurant be closed from 2 a.m. to 7 a.m. (because the business owner should be able to figure out a way to keep it open all night without disturbing the landowners). The Maryland Court of Appeals then went on to discuss two issues that pertain to the case before this Court: *specificity* in what is being prohibited, and *continuing jurisdiction*:

The Supreme Court of the United States, in a lengthy and important case, concerning the operation of a copper smelting plant, determined that escaping sulphur produced the harmful results, and passed a decree which provided for the keeping of records and for inspection of the plant, so as to determine just how far the final prohibition should go. *State of Georgia v. Tennessee Copper Co.*, 237 U.S. 474, 35 S.Ct. 631, 59 L.Ed. 1054. That case was retained for further action with a right to either party to apply later for appropriate relief. It was in the nature of an experimental decree, justifiable on the assumption that on the one hand specific relief might be burdensome and unnecessary and on the other hand that any specific prohibition laid down by the Court might not produce the result desired. That case was of such magnitude, involving such an extensive operation, that the facts are in no sense comparable to the facts in the case before us. Nevertheless, it is applicable in this respect, that it shows the advisability of not being too explicit in the prohibition first decreed. In harmony with this point of view, we think that in a nuisance case such as the one before us general decrees should be passed with only such specific prohibitions as appear to provide the only remedies. In other respects, the offending party should be allowed to take such measures as in its opinion will reach the desired result. If these measures are not adequate or sufficient, further application can be made to the court, as in

the Washington Cleaners case, supra, appropriate action can be taken, and the decree made more specific where it appears to be necessary. And while we do not assume that the decree will not be obeyed, and that the appellant will not do all in its power to abate the nuisance caused by the noisy operation of its business inside the restaurant after midnight, it is not, we think, out of place to remind it that courts have wide powers in dealing with those who do not obey their decrees. We note this because in modifying the decree we do not wish to be understood as justifying any of the conditions or of placing the appellees in a position where they will have to try this case over again, in case appellant does not remedy the conditions complained of and found to exist.

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

This Court also finds this case is “ripe” for adjudication. While neither side has discussed this issue, the fact that IDF&G’s Vargas Plan has yet to be implemented raises the issue. Ripeness concerns the timing of a suit and asks whether a case is brought too early. *United Investors Life Insurance Co. v. Larry Severson and Carolyn L. Diaz*, 2007 Opinion No. 2, 07.2 ISCR 15, 16 (January 16, 2007), citing *State v. Manley*, 142 Idaho 338, 342, 127 P.3d 954, 958 (2005). “The purpose of the ripeness requirement is to prevent courts from entangling themselves in purely abstract disagreements. Under the ripeness test in Idaho, a party must show (1) the case presents definite and concrete issues; (2) a real and substantial controversy exists (as opposed to hypothetical facts); and (3) there is a present need for adjudication.” *Id.* This case presents definite concrete issues as to whether a nuisance has been proven, and if so, at what level is it a nuisance and what standards should be used to abate that nuisance. While this case concerns a “Vargas Plan” that has yet to be implemented, that Vargas Plan was used to obtain funds which will be used by IDF&G to implement that Vargas Plan. As a result of improvements made possible by the expenditure of those funds, IDF&G has told the source of those funds that the IDF&G expects an

incredibly large increase in the use of this range. Due to recent minor improvements in access to the range, there has been a substantial increase in use between 2002 and the filing of this lawsuit on August 22, 2005. Because of the present substantial change in use and proposed future substantial changes in use, the case is ripe for adjudication.

FINDINGS OF FACT

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

2. Plaintiffs Jeanne J. Hom, Eugene and Kathleen Riley, Lambert and Denise Riley, Gabrielle Groth-Marnat, Gerald Price, Ronald and Dorothy Eldridge, Glenn and Lucy Chapin, Sheryl Puckett, Charles Murray and Cynthia Murray and Dave Vig all reside upon and own real property in close proximity to the Farragut Shooting Range. Clark Vargas, the engineer who developed the Vargas Master Plan, testified there are between eighteen and twenty residences within 1000 feet of the range and a road (Perimeter Road) within 600 feet of the range.

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

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

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

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

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

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

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

10. From 1950 through the year 2002, there is no evidence that the use of the range was anything other than occasional and sporadic. The resident to testify with the

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

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

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

13. The IDF&G has a Memorandum of Understanding (MOU) with the Idaho Department of Parks and Recreation (IDPR). This MOU provides that IDPR provides daily management oversight of the Farragut Shooting Range. This includes controlling

public access, communication of range user expectations and range rules, and enforcement of the rules. Defendants' Exhibit W. Randall Butt testified that they open the range every morning and close the range every night, but anyone can go through the gate and shoot at the range by walking in. Randall Butt testified they use "unscheduled visits" to monitor the range because "we can't be at all places at all times." According to David Leptich, IDF&G manager for IDF&G property inside Farragut State Park, the park comprises some 4,000 acres. Randall Butt testified no records are kept as to how often park rangers visit the range. He testified there are days where there are no visits by park rangers. Randall Butt testified that up to 2006 the primary reason for any park ranger to visit the range was for parking fee compliance, not to monitor activity at the range. David Leptich testified that when he is present at the range, very little time is spent monitoring the firing line.

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

15. The improved access allowing driving to the site and the attendant promotional publicity by IDF&G has resulted in a substantial change in the use of the

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

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

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

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

19. Idaho Department of Fish and Game made a grant application to the National Rifle Association (NRA). The IDF&G told the NRA that based on the area population, IDF&G expected up to 46,426 people per month (or 557,112 shooters per year) to use the facility. Plaintiffs' Exhibit 22, Table 2. This is broken down to 25,063 handgun participants per month and 21,363 rifle participants per month. Further, IDF&G told the NRA "For purposes of this range, we need to assume this facility will capture 100% of the market share because there is so much open land around that whatever is built will compel shooters to come and shot [sic] in an organized fashion." *Id.* There are 450 parking spaces in the paved parking lot in the Vargas Master Plan. David Leptich is the Regional Habitat Biologist and manager of the IDF&G property at Farragut State Park. Leptich testified that IDF&G has approved its goal of \$3.6 million being invested in the implementation of the Vargas Master Plan.

20. IDF&G's estimate of 557,112 shooters per year is **471 times** the 1,181 shooters in the year 2005, and more than **three thousand times** the 182 shooters in 2002. What is being proposed by the IDF&G greatly exceeds a "significant increase" in the 2005 use of the range, let alone the use of the range back in 2002.

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

22. The Farragut Shooting Range is located in an area zoned "rural" by Kootenai County. The Kootenai County regulatory safety standard applicable to the Farragut Shooting Range is Kootenai County Zoning Ordinance No. 375, Article 33, Section 33.02, entitled: "Gun Clubs, Rifle Ranges, Archery Ranges." Defendants' Exhibit R, p. 110. That ordinance states in part that such activities may be located in

“rural” areas, must be located on a minimum of ten acres, and that the target areas shall be six hundred feet from any existing dwelling and three hundred feet from any property. The existing range meets those requirements. The ordinance continues: “All facilities shall be designed and located with full consideration to the safety factors involved in such a use.” The Court finds the range as it presently exists, and as planned in the Vargas Master Plan, fails this requirement. There is not a single overhead baffle at present, and none upon the Court’s review of the Vargas Master Plan. Even a solitary overhead baffle located just in front and above all firing stations will drastically lower the chance of a bullet escaping the range.

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

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

25. For the plaintiffs, expert witness Duane Nightingale made his measurements of gunfire noise on private properties which fell within the range of 80.7 to 50.2 dBA. Plaintiffs’ Exhibit 16, Table 3 &4, pp. 13-16. Scientific studies of gunfire show that at a level of 80 dBA, 40% of human beings are highly annoyed by the noise (Sorensen and Magnusson, 1979). Plaintiffs’ Exhibit 16, Table 7, pp. 16-17.

Nightingale is an acoustical engineer with expertise and experience in hydro acoustics. While Nightingale’s Farragut Shooting Range Noise Study was the first shooting range noise evaluation and first outdoor environmental noise study he had conducted

(Plaintiffs' Exhibit 16, 25), his credentials are more than sufficient for the Court to recognize him as an expert.

26. Defendants' expert is Scott Hansen. Hansen is an acoustical engineer who specializes in shooting range evaluation. Defendants' Exhibit CCC. Hansen testified as to the various "modes" equipment can be adjusted to measure sound pressure. Hansen testified PEAK mode measures the absolute peak sound pressure, with no averaging. Hansen testified FAST mode measures peak sound pressure but averaged over 1/8 of one second. Hansen testified IMPULSE is yet another mode which catches the fast rise of sound, with a .35 second rise and a one second decay. Hansen testified he used the FAST setting. Nightingale testified he used the IMPULSE setting. The Nightingale Study uses a Leq or IMPULSE method of noise measurement as does the Kootenai County Industrial Noise Ordinance. Plaintiffs' Exhibit 16, p. 9.

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

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

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

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

30. The Court viewed the area. It is rural. During the day it was completely quiet. There is no reason to believe nighttime would be otherwise. The Court finds Nightingale credible that DNL should not be used in measuring noise levels at a gun

range. In the rural community of Bayview, which has background ambient sound levels in the range of 25 dBA to 35 dBA, the acceptable sound pressure level at the private property line should not exceed 55 dBA, as measured with a certified sound measuring device with an IMPULSE filter. This finding is in accordance with the Shomer studies relied upon by Nightingale and the guidelines of the World Health Organization (WHO). Plaintiffs' Exhibit 16.

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

Defendant's Exhibit K, pp. 2-3, 8-9, 57-58, 64. Hansen testified that in his modeling the Vargas Master Plan generally reduced the sound levels that would leave the range and only one measurement resulted in a slight increase in sound. Exhibit K, p. 48. But Hansen admitted that the Vargas Master Plan still modeled sound measurements that exceeded some state laws and some federal laws. Hansen also testified that only by using DNL can the rifle range satisfy Department of Defense, HUD and EPA standards. Due to the number of increased shooters, and due to little if any sound attenuation in the Vargas Master Plan, development of the Vargas Master Plan would greatly increase the unacceptable noise level surrounding private property owners. Plaintiffs' Exhibits 16 and 20. The only Kootenai County Ordinances regarding noise are the ordinances for "Industrial Zone", which is a "land use classification for a district suitable for manufacturing and processing of all types." Exhibit 31. Article 11, Section 11.10 deals with noise. Nightingale testified that at the 200-yard firing line, two of the five sites he tested exceed the Kootenai County standards, and at the 500-yard firing line, three of the five sites tested exceed those standards. Nightingale pointed out that this is an **industrial** ordinance which would set sound levels higher than would be acceptable in a residential area. The State of Illinois has statewide noise standards. Exhibit 16, p. 18, Table 8. Idaho does not have such standards. The Illinois standards set maximum noise level at 50 dB, and all sites distant from the Farragut Range measured by Nightingale exceed that standard.

32. The Court finds there is a difference between FAST and IMPULSE settings, but even in the IMPULSE setting advocated by IDF&G's expert Hansen, the noise from the existing range exceeds most standards by agencies and jurisdictions

which have thought to consider and establish such standards. Thus, the distinction between FAST and IMPULSE is without much significance. The Court finds that the DNL averaging used by IDF&G creates a significant difference in sound measurement, and that DNL averaging is not appropriate for a gun range used during the day because at night this area is quiet. The Court notes that regardless of the mode or the analogous standards, the Farragut Range fails from a noise standpoint. The most significant factor for the Court as far as noise and nuisance law is concerned is not the mode in which one measures maximum sound pressure *level* (whether measured by PEAK, FAST or IMPULSE), and it is not which noise standards should apply (EPA, HUD, DoD, Kootenai County Industrial, Illinois or Hawaii). The most significant factor for the Court is the increase since 2002 in the **amount** of gunfire, the *number of times* such gunfire occurs during the day and the *number of rounds* shot during the day...all results of increased *use* of the range. Even more dramatic is the increase in *projected use* of the range by IDF&G.

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

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

35. Small arms ammunition has a maximum range of just under a mile for .22 caliber pistols and rifles to over three miles for .30 caliber rifles. Plaintiffs' Exhibits 2, 32, 33 and 34. Roy Ruel, a professional mechanical engineer, gave expert opinion testimony on behalf of plaintiffs. Ruel has reviewed about 200 other rifle ranges and performed a Hazard Assessment study on this range. Ruel has performed Hazard Assessments on other things, but this is his first hazard assessment on a rifle range. Ruel gave uncontradicted testimony that a 30-0-6 caliber bullet will travel 4,000-5,000 yards, which could hit anyone traveling on Perimeter Road and could hit houses owned by plaintiffs beyond Perimeter Road. A .50-caliber rifle goes even further than 4,000-5,000 yards. There is uninhabited land which is part of Farragut State Park between the back or target end of the range and Perimeter Road. Plaintiffs' Exhibit 16. While this strip of land has no dwellings, there are trails on this strip of land that are part of Farragut State Park. Plaintiffs' Exhibit 13. Thus, it cannot be said that IDF&G "controls" this strip of land between the target end of the range and Perimeter Road. There are dwellings located on the other side of Perimeter Road. At its closest point to the range, Perimeter Road is much less than 1,000 feet from the target end of the rifle range. Clark Vargas testified that there are eighteen to twenty residences within 1,000 feet of the range. Plaintiffs' Exhibit 13 bears this out as well. The residences are just beyond Perimeter Road. Will Collins, who lives at 1801 E. Perimeter Road, testified he has heard the "crack" of a bullet overhead while standing on his property. Collins next-door neighbor Dorothy Eldridge testified about two occasions, one in 2000 where she heard a bullet hit a tree above where she was standing on her deck, and another in 2001 where she heard a bullet hit a rock and ricochet. The Court finds these witnesses

credible. Ruel testified that with a shooter in standing position at the 500-yard range, raising a rifle barrel one inch compared to the target aim would cause a bullet to go over the existing berm. Ruel testified that in the prone position at the 500-yard range, raising the barrel just $\frac{1}{4}$ of an inch compared to the target aim would cause a bullet to go over the existing berm, and raising the barrel one inch would cause a bullet to go over the trees that are well behind the berm. Ruel testified that on the 200-yard range raising the barrel one inch compared to target aim would cause a bullet to go over the existing berm. Ruel testified that unless the range owner controls all land down range, a range needs to be built so no bullet escapes. Ruel testified that as this range is situated adjacent to residences and the Perimeter Road, 100% bullet containment is required. Ruel testified that baffling can reduce bullet escapement. Ruel testified no baffling exists at the range today, and no baffling is called for in the Vargas Master Plan. This is true even though Clark Vargas stated at a national symposium in 1999: **"If you build in a populated area, your range must be totally baffled so that the range owner can demonstrate to a judge that a round cannot escape."** Clark Vargas testified that his Vargas Master Plan has side walls in place to contain cross fire and trellis baffles to reduce the angle of escape, but Vargas did not testify about any overhead baffles to prevent or even reduce a bullet escaping from his proposed improved range. Ruel testified that a "Hazard Assessment" is appropriate whenever there is a public safety concern, and that Vargas had performed no hazard assessment. Ruel testified that as planned under the Vargas Master Plan, the safety factor is reduced as compared to the existing range due to the vast increase in the number of people expected to use this range after the Vargas Master Plan is implemented. Ruel testified that at present the

families down range are at risk of bullet escapement from the range onto their property, and under the Vargas Master Plan they are at an increased risk of bullet escapement onto their property.

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

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

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

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

40. The evidence at trial from the testimony of plaintiffs' expert Roy Ruel, as well as the Range Design Criteria prepared by Clark Vargas and the NRA Range Source Manual establishes the probability that bullets from the firing line at the Farragut Shooting Range have in the past, may now and will in the future travel beyond the boundaries of the IDF&G property into the private property of plaintiffs and others and into the Farragut State Park property used by members of the public. Plaintiffs' Exhibits 2, 3, 4, 6, 16, 32, 33 and 34. None of this was contradicted by the testimony of IDF&G's experts Clark Vargas or Edward Santos. Most notably, as mentioned above, Clark Vargas stated in his "Design Criteria for Shooting Ranges" given at the Third National Shooting Range Symposium in 1996: "If you build in a populated area, your range must be totally baffled so that the range owner can demonstrate to a judge that a round cannot escape. Ranges are very expensive to construct." Exhibit 2, p. 5 under "Site Selection".

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

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

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

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

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

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

47. The testimony of David Leptich and Randall Butt that adequate range supervision had been regularly provided was not supported by their admission that personnel from both departments were on the shooting range for only one hour per week. The testimony of defendants' witnesses that there has been adequate supervision is not credible nor is it supported by the record. The IDF&G does not employ or otherwise provide range managers to supervise, enforce or control shooters

on the firing line nor does it offer training to potential range managers or range users. No evidence was presented indicating that anyone from the IDF&G or from the Farragut State Park has ever enforced any of the posted or circulated printed safety rules or cited any shooter for any violation of those rules.

48. Defendants' "expert" witness Edward M. Santos testified at the trial, but gave no opinions at the trial. Santos' testimony consisted of him merely explaining his training and identifying his report, Exhibit G. On the subject of "range safety", Santos' training is minimal, consisting only of a 4-5 day NRA training seminar, and most of that training consisted of a review of the NRA Range Resource Book. Santos testified that in his examination of the Farragut Shooting Range he used the NRA standard for "non-attended range." The Court has read every word of Exhibit G, Santos' evaluation. The Court has also reviewed Exhibit 3, the NRA Range Source Book, and can find no separate standards for "non-attended ranges." Upon cross examination, Santos could not testify as to what criteria he used from the Range Source Book to render any of his opinions. Accordingly, his opinions in Exhibit G are accorded little weight. The trier of fact must be made aware upon what an opinion is based. Santos did not provide that. Santos' opinions lack the factual foundation required by Idaho Rule of Evidence 703, and *State v. Enyeart*, 123 Idaho 452, 849 P.2d 1255 (Ct.App. 1993). Santos' opinions regarding unattended ranges are not corroborated by the NRA Range Source Book which states: "Rules and Regulations must be established for each specific range" and "If you do promulgate rules and regulations, be sure to enforce them." Exhibit 3, p. I-1-19, § 3.05.2.1; p. I-1-24, § 4.04.1. "Control of a facility implies that appropriate authority is bestowed upon range officers appointed to enforce the rules and regulations."

Exhibit 3, p. I-2-3, § 1.03. "All commands are given by a designated range or safety official, except for cease-fire or misfire." Exhibit 3, p. I-2-8, § 4.03.2.

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

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

49. The Vargas Master Plan does not meet and, in numerous instances, is deficient and falls short of the requirements recommended by Clark Vargas in his "Design Criteria for Shooting Ranges" presented to the Third National Shooting Range Symposium sponsored by the National Rifle Association in 1996 and in the Illinois Department of Natural Resources Shooting Range Safety Plan, rules prepared by Clark Vargas, Plaintiffs' Exhibits 2 and 43. Clark Vargas has been involved in the design of forty-five ranges other than the improvements to the Farragut Range, and those are only his *recent* projects. Affidavit of Clark Vargas dated August 24, 2006, Exhibit 1, pp.

2-13. Given his breadth of experience, if Vargas identified a range similar to Farragut, with a similar number of residences down range which used no baffles, no sound attenuation, and yet was acceptable in its community even after its use doubled in one year and was forecast to increase more than a thousand fold, it would have been very probative. There was no such testimony. The Court can only assume no such similar situation exists in the United States. Vargas was involved in the creation of the National Rifle Association Resource Book (NRARSB). *Id.*, p. 2, ¶3. Vargas states: "The NRARSB is the closest thing to a standard for civilian shooting range design and it is not a standard!" *Id.*, ¶5. Vargas continued: "The NRARSB also states that its guidelines are not a substitute for professional engineering consultation." *Id.* Yet, the preeminent "engineer" of range design refuses to be held to his own "Design Criteria for Shooting Ranges". Vargas states the "Design Criteria for Shooting Ranges" was a symposium "paper which simply lists the myriad of design criteria considerations involved" with "range site selection." *Id.*, p. 3, ¶ 10. A review of Vargas' "Design Criteria for Shooting Ranges" shows that it in no way is limited to "range site selection". Exhibit 2. The title itself, "Design Criteria for Shooting Ranges" tells you it is not limited to range site selection. Vargas tells us in his symposium paper: "I will be presenting guidelines on how to design ranges, but more importantly the reasons for design considerations." Exhibit 2, p. 1. That is not a limitation as to "range site selection." The Court finds Vargas not credible as to his limitation on his own "Design Criteria for Shooting Ranges." Vargas stated in his affidavit that as to the "no blue-sky concept" or "fully contained range", "most civilian ranges do not warrant or require this degree of more expensive engineering safety design to ensure reasonable expectations of safety

to range participants and the public at large.” Affidavit of Clark Vargas dated August 24, 2006, p. 4, ¶12. However, Vargas in his “Design Criteria for Shooting Ranges” states in unequivocal and mandatory language: “If you build in a populated area, your range *must* be *totally* baffled so that the range owner can demonstrate to a judge that a *round cannot escape*. Exhibit 2, p. 5. The Court finds Vargas to be the preeminent expert in his field. However, much of his Vargas Master Plan and many of his opinions expressed for purposes of this litigation conflict with his “Design Criteria for Shooting Ranges”, which was not prepared for litigation purposes. To the extent Vargas’ opinions and the Vargas Master Plan conflict with his “Design Criteria for Shooting Ranges”, the Court finds the opinions expressed in his “Design Criteria for Shooting Ranges” to be more credible and better reasoned.

50. From a shooter safety standpoint, a managed range would be a good idea (Plaintiffs’ Exhibits 2 and 3), but is not required. From the plaintiffs’ standpoint, if the range improvements produce zero bullet escapement, the range need not be supervised. From the plaintiffs’ standpoint, if a baffle is placed above and in front of each firing position, the chance of bullet escapement from the existing range is significantly reduced. If such a baffle is place above and in front of each firing position, and the range is operated at no more than 500 shooters per year, the range need not be supervised.

51. As presently operated and funded, IDF&G has no plans for nor financial support to employ professional or trained range managers. David Leptich testified IDF&G has had six volunteer “Range Hosts” recently, but they require no firearms familiarity or any requirement that they be able bodied. Clark Vargas testified he could

not remember if he looked at the supervision of the range, but expressed the opinion that a full-time supervisor would not be required for civilian ranges. The Court finds that to be inconsistent with his opinions expressed in his "Design Criteria for Shooting Ranges" presented to the Third National Shooting Range Symposium sponsored by the National Rifle Association in 1996. Exhibit 2, p. 1, 2 and 8. Roy Ruel testified that at least two people should be working at the range as supervisors. Otherwise, range rules do not get enforced. The Court finds Ruel's testimony to be more credible and consistent with Vargas' opinions in his "Design Criteria for Shooting Ranges." However, if zero bullet escapement is achieved in the range as constructed, supervision is not required as supervision in that situation only inures to the benefit of the shooters.

52. Operation of a shooting range that lacks any baffles without supervision creates a clear and present danger to all outside the Farragut Shooting Range property lines. NRA Range Source Book, Exhibit 3; Testimony of Roy Ruel; Opinions of Clark Vargas stated in his "Design Criteria for Shooting Ranges" presented to the Third National Shooting Range Symposium sponsored by the National Rifle Association in 1996 and in the Illinois Department of Natural Resources Shooting Range Safety Plan, Plaintiffs' Exhibits 2, pp. 1, 2 and 8.

53. Idaho Department of Fish and Game has committed to the Master Plan created by C. Vargas & Associates, Inc. estimated to cost Three Million Six Hundred Thousand Dollar (\$3,600,000.00) to expand the shooting range. Testimony of David Leptich. The Vargas Master Plan shows the renovation of the existing 200-yard firing line to create lanes for one 200-yard, two 100-yard, and three 50-yard firing lanes. The existing 500-yard range is to be lengthened to 600-yards. The range is planned to

include trap and skeet fields, mounted cowboy action areas and a 600-yard range for 50 caliber rifles. Plaintiffs' Exhibits 1 and 29.

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

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

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

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

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

59. Because property owners are located within the Surface Danger Zone and individual members of the public can walk or ride within the area where bullets from the firing lines could land with lethal force, the applicable safety standards require that the

range be baffled completely from the firing line to the target line. Plaintiffs' Exhibits 2, 3, 6 and 38.

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

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

62. The "No Blue Sky" rule is that all pistol and rifle ranges be designed to include containment to eliminate the "Blue-Sky" view from all potential shooting positions. Containment must not only be from all firing positions shown on the plans, but also from the impromptu locations that can be anticipated and available to be established by shooters. Plaintiffs' Exhibit 2, 6, 38 and 43.

63. David Leptich is the Regional Habitat Biologist for IDF&G and is the IDF&G's lead individual regarding the range improvement project. At trial, Leptich testified that in his opinion baffling is not necessary at present and is not included in the Vargas Master Plan. Leptich admitted this is in part due to cost, but added "Economics isn't the only issue." In an earlier deposition, Leptich testified that "economics" is a "secondary consideration" in choosing not to incorporate baffles. Leptich deposition, p. 146. At trial, Leptich testified IDF&G would consider baffling but it "Depends on if more people move in down range", because then "The risk changes". Leptich acknowledged that the more shooters, the more rounds you will have, and that in turn

increases the chances for bullet escapement. Leptich was asked: "If the number of shooters increases but the population down range remains the same, then the cost benefit analysis gravitates toward baffling?" To which Leptich responded "absolutely". Leptich admitted he wants to turn this into a first-class regional shooting range and bring in more shooters. However, Leptich testified: "I definitely don't consider a change in patronage a change in use." The Court finds Leptich's inconsistent testimony not credible. However, Leptich's testimony shows that as IDF&G's representative in charge of the range project, he is wearing blinders as he proceeds forward with this project. Further evidence of such is Leptich's response to Clark Vargas' statement: "If you build in a populated area it must be totally baffled so the range owner can demonstrate to a judge that a round cannot escape". Exhibit 2, p. 5. Leptich said he interpreted that rather clear language to mean "*highly* populated areas". Further evidence of wearing blinders is the fact that Leptich testified that even though Clark Vargas (designer of the very plan Leptich is following) has the opinion that site selection is **the most important criteria** ("The most important decision in range design is site selection with safety in mind", Exhibit 2, p. 8), IDF&G has never even considered the fact that the site itself may be inappropriate. Leptich was asked: "If the site selection back in 1950 was a mistake, you are not prepared to correct that mistake?", to which Leptich responded: "I would say that's correct, we're not approaching it from that direction." Leptich admitted: "Clark Vargas was not tasked to examine the appropriateness of the site." Toward the end of his testimony Leptich stated: "If this range is improved, the local public benefits because it is a safer, quieter range." Neither the claim of increased safety nor the range being quieter is supported by the evidence.

CONCLUSIONS OF LAW

1. The Farragut Shooting Range is a sport shooting range within the meaning of Idaho Code §§ 55-2601 et. seq.
2. Substantial change in expansion of use of the Farragut Shooting Range has occurred within three years prior to the filing of this lawsuit. Thus, plaintiffs are qualified to bring this lawsuit within the meaning of Idaho Code § 55-2602.
3. Plaintiff Citizens Against Range Expansion, an unincorporated association, has representative standing. The named individual plaintiffs, as residents and property owners, have standing to enforce the claims made in this case.
4. The Court has jurisdiction over the parties. The case is ripe for adjudication. The Court has continuing jurisdiction over the parties and this dispute.
5. Plaintiffs allege nuisance as their first cause of action. Amended Complaint, pp. 16-17, ¶¶ 55-58. Plaintiffs specifically allege private nuisance. Amended Complaint, p. 16, ¶ 57. The Idaho Code defines “nuisance” as follows:

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

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

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

Idaho Code § 52-102. In Idaho, a “private nuisance” is one that is “not defined by law as a public nuisance or as a moral nuisance.” Idaho Code § 52-107. Additionally, the

plaintiffs claim "As authorized by Idaho Code § 52-111, the *public* is entitled to a permanent injunction requiring defendants Idaho Fish and Game Department and Director Steven M. Huffaker to take whatever action is necessary to restore the operational policy existing in July of 2003 and before limiting the maximum number of shooters to ten (10) and restricting the times of operation." (emphasis added).

Amended Complaint, p. 17, ¶ 58. In that the "public" is defined as a community or a neighborhood, a "public nuisance" has been alleged as well as a private nuisance.

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

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

from the beginning of the substantial change.” This Court finds there has been a “substantial change” in the use of the range, beginning in 2002. Thus, plaintiffs are not barred from bringing their nuisance action.

The increased noise from the firing of rifles and pistols on the Farragut Shooting Range in the time period of three years prior to the filing of this lawsuit has been stressful to plaintiffs, offensive to their senses and an obstruction of their free use of property so as to interfere with their comfortable enjoyment of their lives and their property, constituting a nuisance as defined in Idaho Code § 52-101. Plaintiffs so testified and IDF&G put on no evidence to the contrary. No area resident testified that the noise was not a problem. Gabriel Roth-Marnat lives closest to the range. She testified she has been awakened at night due to the shooting, her windows rattle, and twice in 2002 she left her home for a motel due to night shooting. She testified she has a stress-induced illness due to the noise. Chip Corsi, IDF&G Regional Supervisor for the Panhandle Region, testified at trial that he had difficulty hearing shots fired at the range from Bayview, from the park headquarters and from Snowberry Campground. But at Perimeter Road, Corsi testified he could quite clearly hear the shots, that it was noticeably louder. Duane Nightingale is an acoustical engineer for the Department of Defense at the Bayview, Idaho installation. Decibels (dB) measure sound pressure. Nightingale testified that the threshold of human speech is between 0-30 dB, speech is between 40-60 dB, a lawn mower is 80 dB, a jet engine is 140 dB and gunfire is 130-150 dB. Every 10 dB increase is a doubling as humans perceive it (eg. 100 dB is twice as loud as 90 dB). These measurements are near the source. Measured at various distances (various residences along Perimeter Road) from the source (a firing rifle from

the various firing points at the range), Nightingale measured from 50 dB 2.17 miles away (in the town of Bayview) from the source, to 76 dB 493 yards from the source to 144 dB 80 yards from the source. Exhibit 16, pp. 13-15. Nightingale testified that impulsive sound is perceived by humans differently than constant noise like being next to a busy highway. Impulsive sound “spikes” and is more annoying to human beings. Nightingale cited a Swedish study cited by the United States Department of Defense (Sorensen and Magnusson, 1979), which studied 350 people, and found 10% of the population are highly annoyed by gunfire at 63 dB, and 38% of the population are highly annoyed by gunfire at 80 dB. Exhibit 16, p. 16. “It can scarcely be argued that any habitual noise (whether produced by skilled musicians led by the frank and cultivated leaders who testified as here, or by domestic animals as in *Singer v. James*, 130 Md. 382, 100 A. 642) which is so loud, continuous, insistent, not inherent to the character of the neighborhood, and unusual therein, that normal men, women, and children when occupying their own homes, however distant, are so seriously incommoded that they cannot sleep, study, read, converse, or concentrate until it stops is not an unreasonable, unlawful invasion of their rights.” *Five Oaks Corp. v. Gathmann*, 190 Md. 348, 354, 58 A.2d 656, 659 (Ct.App.Md. 1948), citing *Meadowbrook Swimming Club v. Albert*, 173 Md. 641, 197 A. 146, 148 (Ct.App.Md. 1938). “In all such cases, the question is, whether the nuisance complained of, will or does produce such a condition of things as, in the judgment of reasonable men, is naturally productive of actual physical discomfort to persons of ordinary sensibilities, and of ordinary tastes and habits, and as, in view of the circumstances of the case, is unreasonable and in derogation of the rights of the complainant.” *Five Oaks*, 190 Md. at 354, 58 A.2d at

659, citing *Dittman v. Repp*, 50 Md. 516, 33 Am.Rep. 325 (Ct.App.Md. 1879).

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

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

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

trial court that granted an injunction against a rifle range. It was noted "The restraint imposed by an injunction should not be more extensive than is reasonably required to protect the interests of the party in whose favor it is granted, and should not be so broad as to prevent defendant from exercising his rights." 179 Ill.App. at 1034, 534 N.E.2d at 1381.

"Reasonableness" is the watchword in these types of cases. In a case dealing with noise and soot from a dye manufacturing plant, the Supreme Court of Pennsylvania stated:

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

from its plant may be regarded as unnecessary and unreasonable.'

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

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

Davis v. Izaak Walton League of America, 717 P.2d 984 (Colo.Ct.App. 1986)

affirmed the trial court's grant of an injunction based on public nuisance (not on private nuisance) on a shooting range until dust problems were corrected and until the noise from discharging firearms were brought within statutory limits. Safety was not a concern in that case as the range was oriented so all shooting was focused away from plaintiff's property.

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

6. The present operation of the Farragut Shooting Range, which allows escapement of bullets beyond Farragut State Park/IDF&G boundaries into the Surface Danger Zone encompassing plaintiffs' private property and Farragut State Park property open to members of the public, constitutes a clear and present danger to the safety and health of plaintiffs and other persons in the area.

7. Plaintiffs request a permanent injunction "ordering defendants Idaho Department of Fish and Game and Director Steven M. Huffaker to close the Farragut Wildlife Management Area to all persons with pistols, rifles and firearms using or intending to use live ammunition." Plaintiffs' Proposed Findings of Fact and Conclusions of Law, p. 17, ¶ 7. The Court finds this remedy is not warranted. Except for the fact that the existing range contains no baffle, the range is relatively safe as to its level of use up to and including 2002.

Installation of a baffle above and in front of every firing position, to reduce bullet escapement over the berms at the end of the range will result in a significantly safer range at little added expense. There was testimony about various materials used in baffles, that if a bullet strikes a wood baffle it will likely need to be replaced, where baffles made of concrete and other materials are more durable. The IDF&G is free to construct the baffles from any material it chooses, but it must maintain those baffles. Once the IDF&G installs those baffles at each firing station, it is free to operate the range up to 500 shooters per year. As authorized specifically by Idaho Code §52-111 and, in general, by the duty of the courts to protect members of the public from known and controllable dangers, plaintiffs are entitled to an injunction ordering defendants Idaho Department of Fish and Game and Director Steven M. Huffaker to close the Farragut Wildlife Management Area to all persons with pistols, rifles and firearms using or intending to use live ammunition, until a baffle is installed over every firing position. Once baffles are installed, and the Court has lifted that injunction, IDF&G may operate that range in the same manner in which it historically has (ie., without any on site supervision), up to 500 shooters per year. Once IDF&G has realized that number in a given year, it must close the range for the remainder of that calendar year.

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

year is a significant increase in the number of shooters per year, but acceptable. The doubling of use compared to 2002 seems to have been the significant increase that area residents found the start of becoming a nuisance, and use continued to increase even further. The doubling of use compared to 2002 is a significant increase, but the Court finds is not likely to be a nuisance.

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

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

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

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

day. Idaho Department of Fish and Game now desires to expand the use of that range three thousand times, yet refuses to consider the appropriateness (as defined by their own range designer, Clark Vargas) of such an expanded range in its present community.

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

The Idaho Department of Fish and Game is free to seek any funding it wishes. The Idaho Department of Fish and Game is free to build any improvements upon its property. However, use levels will remain capped at 500 shooters per year unless these two concerns have been addressed: 1) include safety measures adequate to **prevent** bullet escapement beyond the boundaries owned and controlled by IDF&G, and 2) include noise abatement measures to reduce noise to a decibel level agreed upon by the parties in the first instance, or, if the parties are unable to agree, to be set by the Court following further evidence. Even if the solution to these two concerns are agreed upon by the parties, in order to close this case IDF&G will need to obtain an order from the Court to exceed 500 shooters per year. The first concern (safety) is satisfied only by the “No Blue Sky” rule, or “totally baffled...so that a round cannot escape”, as espoused by the nation’s preeminent authority on range design and designer of the Vargas Master Plan, Clark Vargas. Exhibit 2, p. 5. Once bullet

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

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

Rule 65 (e). Grounds for Preliminary Injunction.

A preliminary injunction may be granted in the following cases:

(1) When it appears by the complaint that the plaintiff is entitled to the

relief demanded, and such relief, or any part thereof, consists in restraining the commission or continuance of the acts complained of, either for a limited period or perpetually.

(2) When it appears by the complaint or affidavit that the commission or continuance of some act during the litigation would produce waste, or great or irreparable injury to the plaintiff.

(3) When it appears during the litigation that the defendant is doing, or threatens, or is about to do, or is procuring or suffering to be done, some act in violation of the plaintiff's rights, respecting the subject of the action, and tending to render the judgment ineffectual.

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

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

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

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

A preliminary injunction may be granted in the following cases:

(1) When it appears by the complaint that the plaintiff is entitled to the relief demanded, and such relief, or any part thereof, consists in restraining the commission or continuance of the acts complained of, either for a limited period or perpetually.

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

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

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

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

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

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

A preliminary injunction may be granted in the following cases:

(2) When it appears by the complaint or affidavit that the commission or continuance of some act during the litigation would produce waste, or great or irreparable injury to the plaintiff.

The Idaho Supreme Court in *Harris* interpreted Idaho Rule of Civil Procedure 65(b)(2) requirement of "irreparable injury" as follows:

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

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

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

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

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

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

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

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

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

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

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

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

ineffectual." Idaho Rule of Civil Procedure 65(e)(3) appears to have been interpreted

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

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

/

/

/

CONCLUSION AND ORDER.

IT IS HEREBY ORDERED plaintiffs are entitled to an injunction ordering defendants Idaho Department of Fish and Game and Director Steven M. Huffaker to close the Farragut Wildlife Management Area to all persons with pistols, rifles and firearms using or intending to use live ammunition until a baffle is installed over every firing position. The baffle must be placed and be of sufficient size that the shooter, in any position (standing, kneeling, prone), cannot fire his or her weapon above the berm behind the target. Once baffles are installed and either 1) plaintiffs agree that the shooter in any position cannot fire a round above the berm behind the target, or 2) if the plaintiffs cannot agree, the Court so finds after a view of the premises, the injunction will be lifted, and IDF&G may operate that range in the same manner in which it historically has (ie., without any on site supervision), up to 500 shooters per year. Once IDF&G has realized that number in a given year, it must close the range for the remainder of that calendar year.

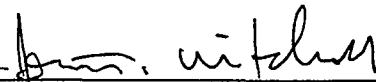
IT IS FURTHER ORDERED the Idaho Department of Fish and Game is free to seek any funding it wishes. The Idaho Department of Fish and Game is free to build any improvements upon its property. However, use levels will remain capped at 500 shooters per year unless the following two concerns have been adequately addressed:

1) Safety: include safety measures adequate to **prevent** bullet escapement beyond the boundaries owned and controlled by IDF&G, and **2) Noise:** include noise abatement measures to reduce noise to a decibel level agreed upon by the parties in the first instance, or, if the parties are unable to agree, to be set by the Court following further evidence. Even if the solution to these two concerns are agreed upon by the parties, in order to close this case IDF&G will need to obtain an order from the Court to

exceed 500 shooters per year. The first concern (safety) can be satisfied only by the

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

ENTERED this 23rd day of February, 2007.



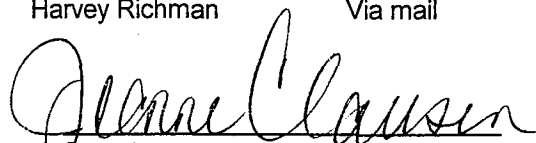
John T. Mitchell, District Judge

Certificate of Service

I certify that on the 23 day of February, 2007, a true copy of the foregoing was mailed postage prepaid or was sent by interoffice mail or facsimile to each of the following:

<u>Lawyer</u>	<u>Fax #</u>
Scott W. Reed	208 765-5117
W. Dallas Burkhalter	208 334-2148

<u>Lawyer</u>	<u>Fax #</u>
Harvey Richman	Via mail



Secretary

This case was tried before this Court on December 11, 12, 13 and 14, 2006. This Court gave due consideration to the testimony of all witnesses, examined all exhibits admitted into evidence, viewed the range and the area surrounding Perimeter Road and read all briefs submitted by the parties and their respective proposed findings of fact and conclusions of law. On February 23, 2007, this Court entered its Memorandum Decision, Findings of Fact, Conclusions of Law and Order. Based thereon,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that defendants Idaho Department of Fish and Game and Director Steven M. Huffaker are directed and enjoined to close the Farragut Wildlife Management Area to all persons with pistols, rifles and firearms using or intending to use live ammunition until a baffle is installed over every firing position. As set forth in the Order entered February 23, 2007, all shooting ranges shall remain closed until the following condition is met regarding the installation of each baffle:

The baffle must be placed and be of sufficient size that the shooter, in any position (standing, kneeling, prone), cannot fire his or her weapon above the berm behind the target. Either the parties shall agree that the baffles have been adequately installed or that issue shall be submitted for view of the premises by the Court.

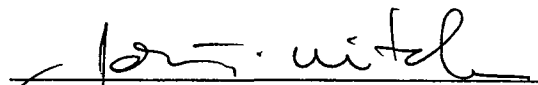
IT IS FURTHER ORDERED, ADJUDGED AND DECREED that at such time as baffles are installed over every firing position and approved in the manner

set forth, defendant Idaho Department of Fish and Game may operate the Farragut Shooting Range in the same manner in which it historically has (i.e., without any on site supervision), for up to 500 shooters per year. Once the Idaho Department of Fish and Game has realized that number in a given year, it must close the Farragut Shooting Range for the remainder of that calendar year.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the annual use level shall not exceed 500 shooters per year until and unless defendant Idaho Department of Fish and Game has constructed and installed safety measures adequate to prevent bullet escapement beyond the boundaries owned and controlled by defendant Idaho Fish and Game and constructed and installed noise abatement measures to reduce noise to a decibel level agreed upon by the parties in the first instance, or, if the parties are unable to agree, to be set by the Court following further evidence. Such further use shall only be commenced upon Order of this Court following hearing establishing that the safety and noise concerns have been eliminated in the manner satisfactory to the Court based upon its Findings of Fact, Conclusions of Law and Order.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that plaintiffs be awarded their costs as prevailing parties in the manner established by Rule 54, I.R.Civ.P.

Dated this 2nd day of March, 2007.


JOHN T. MITCHELL
District Judge

CLERK'S CERTIFICATE OF SERVICE

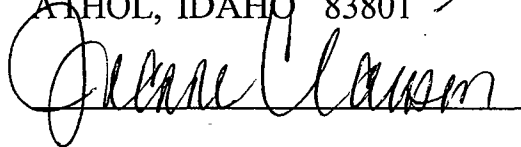
I hereby certify that a copy of the foregoing has been sent by fax this 2 day of March, 2007 to:

W. DALLAS BURKHALTER
DEPUTY ATTORNEY GENERAL
P. O. BOX 25
BOISE, IDAHO 83707
FAX (208) 334-2148

SCOTT W. REED
ATTORNEY AT LAW
P. O. BOX A
COEUR D'ALENE, IDAHO 83816
FAX (208) 765-5117

and by first-class mail, postage prepaid, to:

HARVEY RICHMAN
19643 E. PERIMETER ROAD
ATHOL, IDAHO 83801



STATE OF IDAHO)
County of KOOTENAI)
FILED 10-25-07)^{SS}

AT 3:45 O'Clock P M
J. Anne Clausen
CLERK OF DISTRICT COURT
Deputy

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

CITIZENS AGAINST RANGE EXPANSION,)
et al,)
Plaintiffs,)
vs.)
IDAHO FISH AND GAME DEPARTMENT,)
an agency of the STATE OF IDAHO, et al.)
Defendants.)

Case No. **CV 2005 6253**

**MEMORANDUM DECISION AND
ORDER REGARDING ATTORNEY
FEES**

I. INTRODUCTION AND BACKGROUND.

On March 16, 2007, Plaintiffs Citizens Against Range Expansion filed their Application for Attorney Fees and Memorandum of Costs of Plaintiffs Against Defendant Idaho Fish and Game Department. Plaintiffs have requested costs under I.R.C.P. 54(d)(1) and attorney fees under I.C. §12-117 and I.R.C.P. 54(e)(1). On March 30, 2007, defendant Idaho Department of Fish and Game (IDF&G) filed its Motion to Allow Costs and Attorney Fees and its Brief in Opposition to an Award of Costs and Attorney Fees. On April 9, 2007, plaintiffs filed Plaintiffs' Brief in Support of Costs and Attorney's Fees. Idaho Department of Fish and Game objects to the application for attorney fees on two grounds. First, IDF&G argues plaintiffs are not entitled to attorney fees under I.C. §12-117 because this lawsuit was not defended without a reasonable basis in law or fact.

Second, IDF&G argues plaintiffs are not the prevailing party under I.R.C.P. 54(b)(1) because they did not obtain the relief sought.

Oral argument was heard on April 30, 2007. After counsel presented argument, the Court found plaintiffs to be the prevailing party and awarded costs as a matter of right and certain discretionary costs. The Court took the issue of attorney fees under advisement.

II. ANALYSIS.

Plaintiffs submit they are entitled to reasonable attorney fees because IDF&G acted without a reasonable basis in fact or law when it decided to expand the Farragut Shooting Range without consideration for noise and safety. Idaho Code § 12-117 governs the awarding of attorney fees in civil actions to which a public entity is a party.

It states in part:

(1) Unless otherwise provided by statute, in any administrative or civil judicial proceeding involving as adverse parties a state agency, a city, a county or other taxing district and a person, the court shall award the prevailing party reasonable attorney's fees, witness fees and reasonable expenses, if the court finds that the party against whom the judgment is rendered *acted without a reasonable basis in fact or law*.

(2) If the prevailing party is awarded a partial judgment and the court finds the party against whom partial judgment is rendered acted without a reasonable basis in fact or law, the court shall allow the prevailing party's attorney's fees, witness fees and expenses in an amount which reflects the person's partial recovery.

I.C. § 12-117(1)-(2). (emphasis added).

Where an agency has no authority to take a particular action, it acts without a reasonable basis in fact or law. *Moosman v. Idaho Horse Racing Comm'n*, 117 Idaho 949, 954, 793 P.2d 181, 186. The purpose of the statute is two fold: 1) to serve as a deterrent to groundless or arbitrary agency action; and 2) to provide a remedy for persons

who have borne unfair and unjustified financial burdens attempting to correct mistakes agencies should never have made. *Rincover v. State Department of Finance, Securities Bureau*, 132 Idaho 547, 549, 976 P.2d 473, 475 (1999). Idaho Code §12-117 is not a discretionary statute, but provides that the court *shall* award attorney fees where the state agency did not act with a reasonable basis in fact or law in a proceeding involving persons who prevailed in the action. *Id.* (emphasis in original). The matter of whether the agency acted with a reasonable basis in fact or law is obviously a task committed to the court's discretion, but after exercising its discretion, if the court finds the agency did not act with a reasonable basis in fact or law, the court *shall* award attorney fees.

In *Rincover*, the Idaho Supreme Court upheld the district court's order rejecting a claim for attorney fees under I.C. §12-117 when it found that the State Department of Finance had not acted without a reasonable basis in fact under the law. *Rincover*, 132 Idaho at 550. The Department of Finance had rejected Rincover's application for a license to sell securities after it found Rincover had violated an Idaho statute. The district court reversed the Department's decision after the court disagreed with the Department's interpretation and application of the governing statute. *Id.* The court found that attorney fees were not warranted because the statute had not previously been construed by the courts and therefore the Department's actions were not unreasonable under the circumstances. *Id.* The court denied the award of fees by reasoning that Department "did not act without or contrary to statute authority, or ignore or refuse to comply with duties imposed by statute". *Id.*

Although there is no governing statute in this case, this case can be compared to *Rincover*. The present case was apparently the first time an Idaho court was asked to

construe, or interpret various standards that pertained to the regulation, use, and safety of a public shooting range. This is a case where there was no statute to interpret and no case law to fall back on. There was no county ordinance on point that set forth strict guidelines on shooting ranges found within Kootenai County. As in *Rincover*, the IDF&G did not act contrary to statutory authority. The IDF&G did not misconstrue a statute when it decided to improve or expand the Farragut shooting range, simply because there was no statute. The IDF&G did not ignore or refuse to comply with any duties it had under Kootenai County ordinances or Idaho law.

Furthermore, it could be argued that the IDF&G had the authority to take the action it sought to take. There is no Idaho law or County ordinance *prohibiting* the IDF&G from seeking to expand or improve a shooting range the IDF&G owned and operated. In fact, Idaho has not yet adopted any standards for shooting range safety. All arguments posed by plaintiffs were based on case law from other states law and the NRA's *guidelines* to a safer shooting range.

Plaintiffs argue attorney fees are warranted under I.C. §12-117 because the IDF&G had no facts to support its defense and completely failed to show that the Range, in its current condition, is in anyway safe. Plaintiffs claim IDF&G "went forward with reckless abandon", not giving any heed to the issue safety that an expansion would bring. Plaintiffs' Brief in Support of Costs and Attorney Fees, p. 11. Plaintiffs claim IDF&G's witnesses were not credible and that no credible evidence was received to rebut the plaintiffs' case.

The IDF&G asserts plaintiffs should not receive attorney fees and costs because the Plaintiffs were not "defending against any groundless charges or seeking to correct an

agency mistake”. Brief in Opposition to an Award of Costs and Attorney Fees, p. 4. The IDF&G argues that there was a genuine dispute of the applicable standards for shooting range design, safety, and operation and therefore the defense was not unreasonable under fact or law. *Id.*

The question of whether there was a reasonable basis in *law* is not an issue because there was no underlying statute, case law, or ordinance for the parties to construe. Plaintiffs argue the question therefore is whether the IDF&G had a reasonable basis in *fact* from which to proceed in this case.

At oral argument plaintiffs asserted they are entitled to attorney fees because the IDF&G “did not put on a defense” as to the issue of safety simply “because there wasn’t any.” Plaintiffs further claimed at oral argument that IDF&G put “blinders” on their expert witness, “preventing Mr. Vargas from addressing the issue” of site selection, implying that IDF&G knew all along that it had no defense and therefore kept their expert in the dark. Plaintiffs then argued, based on their reading of Mr. Leptich’s trial testimony, as to what Mr. Vargas was and was not permitted to do. Plaintiffs argue IDF&G prevented Mr. Vargas from applying his own principles regarding site selection and safety issues to the Farragut shooting range and ask this court to thus conclude that the IDF&F acted without a reasonable basis in fact. Plaintiffs’ Brief in Support of Motion for Attorney’s Fees, pp. 7-12.

One problem with plaintiffs’ argument is that the Court does not know specifically what information IDF&G was relying upon. This may be due, at least in part, to this Court’s ruling that as a result of a procedural deficiency cause by IDF&G, Mr. Vargas was not allowed to testify or render his opinion on the issue of safety. On

December 1, 2006, plaintiffs filed Plaintiffs' Motion in Limine to Exclude Testimony of Claude Vargas, Scott D. Hansen and Edward M. Santos. The basis of that motion was plaintiffs' claim that Mr. Vargas submitted an affidavit in opposition to plaintiffs' motion for summary judgment, and other than that, IDF&G had filed no expert witness disclosure. Brief in Support of Motion in Limine, p. 5. Plaintiffs argued such failure violated this Court's pre-trial order, I.R.C.P. 26(e) and I.R.E. 701. *Id.* This Court agreed with the violation, but disagreed with the remedy sought by plaintiffs...outright exclusion of Mr. Vargas as a witness. *Id.* p. 7. The remedy this Court fashioned was to limit Mr. Vargas' trial testimony to his August 24, 2006 affidavit. Order on Motion in Limine filed December 8, 2006. The "consequence" for this procedural defect was to limit IDF&G as to what Mr. Vargas could testify about. It would not be fair at this time to hold that as another "consequence" for this procedural defect, that there should in effect be a "presumption" against IDF&G that they limited Mr. Vargas in his testimony or opinions from addressing the issue of site selection. This Court will not engage in any sort of presumption. While this Court may not know all that was said between IDF&G and Mr. Vargas, the Court is constrained to the record.

After reading Mr. Leptich's trial testimony, it does not appear that Mr. Vargas was in any way "prevented" by IDF&G from rendering an opinion as to site selection or safety issues. Instead, Mr. Leptich testified that he asked Mr. Vargas to "provide us with a design for the site that we had" and that Mr. Leptich was "relying on his expertise to advise me if this was an inappropriate site, and in fact, he's indicated that it's a good site." Trial Transcript, p. 12, Ll. 1-5; Ll. 6-19. Mr. Leptich also testified that the agency

“sought the counsel of experts in the field, and they have not advised us that the site is inappropriate.” Trial Transcript, p. 9, L. 3 – p. 11, L. 7.

At trial, plaintiffs’ counsel asked Mr. Leptich if Mr. Vargas was “specifically not tasked to examine the appropriate site,” to which Mr. Leptich replied “That’s right. He was asked to provide us with a design for the site we had.” Trial Transcript, p. 12, Ll. 4-5. Mr. Leptich did not testify that Mr. Vargas was prevented from applying his own principles to the Farragut shooting range, and in contrast, Mr. Vargas was asked to submit a design that would work for the existing range. Plaintiffs want the court to *infer* from Mr. Leptich’s testimony that Mr. Vargas did not consider the issue of safety or site selection. Unfortunately, the court will never know the entirety of what the IDF&G relied upon because Mr. Vargas was prevented from giving his expert testimony or supporting evidence based on procedural grounds.

It would be just as easy for this court to *infer* that Mr. Vargas did consider site selection and safety issues and that Mr. Vargas did not consider the Farragut shooting range to be an improper site. This can be inferred by the fact that, according to Mr. Leptich, Mr. Vargas never informed the agency that the range was an inappropriate site for expansion. Obviously if Mr. Vargas did consider site selection, his report becomes inconsistent with opinions he has publicly stated and published at other points in time. Just because IDF&G’s expert Mr. Vargas was impeached, does not mean IDF&G *acted without a reasonable basis in fact or law*, as is required under I.C. § 12-117.

Mr. Vargas issued his opinion that the range was an appropriate site for expansion of the range. Mr. Vargas’ opinion was directly contrary to his earlier opinions set forth in his “Design Criteria for Shooting Ranges”. Mr. Vargas then stated the “Design Criteria

for Shooting Ranges” was a symposium “paper which simply lists the myriad of design criteria considerations involved” with “range site selection”. Affidavit of Clark Vargas dated August 24, 2006, p. 3, ¶ 10. As pointed out by this Court in its findings, “A review of Vargas’ ‘Design Criteria for Shooting Ranges’ shows that it in now way is limited to ‘range site selection.’” Memorandum Decision, Findings of Fact, Conclusions of Law and Order, p. 33. Again, just because IDF&G’s witness was found to be inconsistent, or incredible, or his opinions impeached, does not mean IDF&G *acted without a reasonable basis in fact or law*, as is required under I.C. § 12-117.

In many cases there are two or more expert opinions offered by each side. Usually, one side’s expert is found to be more believable, and the other side’s expert is found to be less believable. Idaho Code § 12-117 does not say every time one side’s expert were believed the district court is to awarded attorney’s fees against side whose expert the district court did not believe. Because Mr. Vargas was impeached by **his own opinions** rendered at other points in time, this is a close call. The Court can understand plaintiff’s frustration with an opponent’s expert who blows hot and cold depending upon who hires him. In fifteen years as a trial attorney and over five years as a trial judge, this Court finds an expert’s ability to blow hot and cold depending upon who hires that expert is not at all unusual. Sadly, it may be expected. A statute that reads: “if your expert is not believed by the district court because such expert was found to be impeached by his own earlier testimony, attorney’s fees shall be awarded to the opponent”, might diminish such from happening. But that is not how the applicable statute reads.

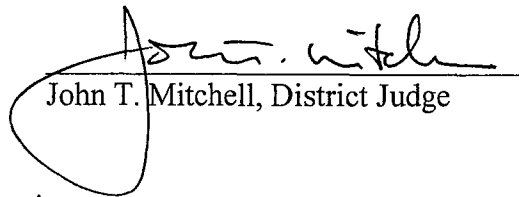
This Court must decide whether IDF&G *acted without a reasonable basis in fact or law*, as is required under I.C. § 12-117. Again, were it **just** Mr. Vargas opinion about

the range expansion, this would be a close call under Idaho Code § 12-117. What takes this case away from being such a close call is the attorney's fee issue it is not related to just Mr. Vargas' opinion about the range expansion design. There is also such a lack of guiding standards on shooting range safety, IDF&G cannot be said to have acted without a reasonable basis in fact or defended this lawsuit frivolously. The IDF&G relied on the expertise and advice of Mr. Vargas and "sought the counsel of experts in the field" to determine whether expansion of the Farragut shooting range was appropriate and safe. Since IDF&G was never told by its own expert that expansion of the Farragut shooting range was improper, this Court cannot find it acted or defended this suit frivolously.

III. ORDER.

IT IS HEREBY ORDERED that based upon the above mentioned reasons, plaintiffs Application for Attorney's Fees is **DENIED**. An award of attorney fees under I.C. §12-117 is not appropriate because the defendant IDF&G did not act without a reasonable basis in fact or law.

ENTERED this 25th day of June, 2007.

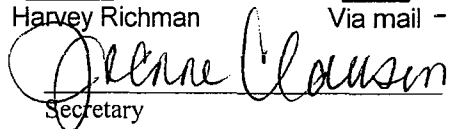

 John T. Mitchell, District Judge

Certificate of Service

I certify that on the 25 day of June, 2007, a true copy of the foregoing was mailed postage prepaid or was sent by interoffice mail or facsimile to each of the following:

<u>Lawyer</u>	<u>Fax #</u>
Scott W. Reed	208 765-5117 ✓
W. Dallas Burkhalter	208 334-2148 ✓

<u>Lawyer</u>	<u>Fax #</u>
Harvey Richman	Via mail -


 Secretary

LAWRENCE G. WARDEN
ATTORNEY GENERAL

Clive J. Strong
Chief of Natural Resources

KATHLEEN E. TREVER, ISB #4862
W. DALLAS BURKHALTER, ISB# 3286
Deputy Attorneys General
PO Box 25
Boise, ID 83707
Telephone: (208) 334-3771
FAX: (208) 334-4885
Attorneys for Defendants
State of Idaho IDFG and Groen*

STATE OF IDAHO }
COUNTY OF KOOTENAI } SS
FILED }
SR #74
2010 JUN -9 PM 3:32

CLERK DISTRICT COURT
DEPUTY
[Signature]
PB

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

CITIZENS AGAINST RANGE)
EXPANSION, an Unincorporated non-profit)
Association; JEANNE J. HOM, a single)
woman; EUGENE and KATHLEEN RILEY,)
husband and wife; LAMBERT and DENISE)
RILEY, husband and wife; GABRIELLE)
GROTH-MARNAT, a single woman,)
GERALD PRICE, a single man; RONALD)
and DOROTHY ELDRIDGE, husband and)
wife; and GLENN and LUCY CHAPIN,)
husband and wife, SHERYL PUCKETT, a)
single woman; CHARLES MURRAY and)
CYNTHIA MURRAY, husband and wife; and)
DAVE VIG, a single man,)
Plaintiffs,)

vs.)

IDAHO FISH AND GAME DEPARTMENT,)
an agency of the STATE OF IDAHO, and)
CAL GROEN*, Director of the IDAHO FISH)
AND GAME DEPARTMENT,)
Defendants)

Case No.: No .CV-05-6253

MOTION FOR PARTIAL LIFTING OF
INJUNCTION

* Pursuant to Idaho Rule of Civil Procedure 25(d), Cal Groen has been substituted as a party as successor to Steven M. Huffaker as the Director of the Idaho Department of Fish and Game.

COMES NOW the Defendants, the Idaho Department of Fish and Game and Cal Groen, Director of IDFG, (collectively IDFG) and move this Court, under the jurisdiction retained in its Order of February 23, 2007, or alternatively pursuant to Idaho Rules of Civil Procedure 60(b)(5) and/or 60(b)(6), for the following relief:

1. A lifting of the Court's February 23, 2007 injunction as it applies to the portion of the Farragut Shooting Range on the Farragut Wildlife Management Area that IDFG has renovated as 100-yard long shooting lanes, with the 100-yard range area, whose approximate location is depicted on the map attached as Exhibit 3 to the Affidavit of Kerry O'Neal filed herewith, satisfying: (A) the Court's safety criteria for up to 500 shooters per year, to install a baffle "over every firing position," "placed and [] of sufficient size such that the shooter, in any position (standing, kneeling, prone), cannot fire his or her weapon above the berm behind the target," and (B) the Court's safety criteria for more than 500 shooters per year that the shooting area be "totally baffled" such that a round cannot escape beyond the boundaries owned and controlled by IDFG.
2. Adoption of the noise standard for state outdoor sport shooting ranges enacted by the Idaho Legislature in 2008 and codified in chapter 91, Title 67 of Idaho Code, as the applicable noise standard to the operations of the Farragut Shooting Range, without regard to shooter numbers, with noise emissions from the range not to exceed an Leq(h) of sixty-four (64) dBA as measured in compliance with Idaho Code §67-9102.

Points and authorities in support of this Motion are provided in the Brief of Defendants' in Support of Motion for Partial Lifting of Injunction and Affidavit of Kerry O'Neal filed concurrently herewith.

Consistent with the terms of the Court's February 23, 2007 Order, IDFG's counsel has conferred with Plaintiffs' counsel. Plaintiffs' counsel has indicated Plaintiffs' disagreement with IDFG as to whether a shooter in any position cannot fire a round above the berm above the target. Plaintiffs also disagree with IDFG as to whether the range has been "totally baffled" such that a round cannot escape beyond the boundaries owned and controlled by IDFG. Plaintiffs also disagree as to the application of the statutory noise standard to operations of the Farragut Shooting Range.

Consistent with the Court's February 23, 2007 Order, it is appropriate for the Court to view the premises regarding the installation of baffles and to make determinations on reopening the 100-yard portion of the Farragut Shooting Range and on the applicability of the state statutory noise standard for state outdoor sport shooting ranges to Farragut Shooting Range operations.

The Court should grant IDFG's requested relief in light of IDFG's satisfaction of the Court's conditions for safety and noise abatement in the 100-yard portion of the Farragut Range and in light of the legislative adoption of statewide statutory noise and other standards for state sport shooting ranges, and alternatively for other reasons of equity and other justifications for relief.

DATED this 9th day of June, 2010.

STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL



KATHLEEN E. TREVER
Deputy Attorney General

CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of JUNE, 2010, a true and correct copy of the foregoing MOTION FOR PARTIAL LIFTING OF INJUNCTION was faxed or mailed postage prepaid to:

<p>Hon. John T. Mitchell 324 West Garden Avenue P.O. Box 9000 Coeur d'Alene, ID 83816-9000</p>	<p><input checked="" type="checkbox"/> United States Mail, Postage Prepaid <input checked="" type="checkbox"/> Facsimile to (208) 446-1132 <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Courier</p>
<p>Harvey Richman Attorney at Law 19643 N. Perimeter Road Athol, Idaho 83801</p>	<p><input checked="" type="checkbox"/> United States Mail, Postage Prepaid <input type="checkbox"/> Facsimile <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Courier</p>
<p>Clerk of the Court: Daniel English 451 Government Way P.O. Box 9000 Coeur d'Alene, ID 83816-9000</p>	<p><input type="checkbox"/> United States Mail, Postage Prepaid <input checked="" type="checkbox"/> Facsimile to (208) 446-1188 <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Courier</p>
<p>Scott W. Reed Attorney at Law (208) 765-5117</p>	<p><input type="checkbox"/> United States Mail, Postage Prepaid <input checked="" type="checkbox"/> Facsimile (208) 765-5117 <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Courier</p>


Kathleen E. Trever

LAWRENCE G. WASDEN
ATTORNEY GENERAL

Clive J. Strong
Chief of Natural Resources

KATHLEEN E. TREVER, ISB #4862
W. DALLAS BURKHALTER, ISB# 3286
Deputy Attorneys General
PO Box 25
Boise, ID 83707
Telephone: (208) 334-3771
FAX: (208) 334-4885

Attorneys for Defendants
State of Idaho, IDFG and Groen

STATE OF IDAHO
COUNTY OF KOOTENAI
FILED *JR* # 74
2010 JUN -9 PM 3:32

DISTRICT COURT
Paul Murray
DEPUTY

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

CITIZENS AGAINST RANGE)
EXPANSION, an Unincorporated non-profit)
Association; JEANNE J. HOM, a single)
woman; EUGENE and KATHLEEN RILEY,)
husband and wife; LAMBERT and DENISE)
RILEY, husband and wife; GABRIELLE)
GROTH-MARNAT, a single woman,)
GERALD PRICE, a single man; RONALD)
and DOROTHY ELDRIDGE, husband and)
wife; and GLENN and LUCY CHAPIN,)
husband and wife, SHERYL PUCKETT, a)
single woman; CHARLES MURRAY and)
CYNTHIA MURRAY, husband and wife; and)
DAVE VIG, a single man,)
Plaintiffs,)

vs.)

IDAHO FISH AND GAME DEPARTMENT,)
an agency of the STATE OF IDAHO, and)
CAL GROEN, Director of the IDAHO FISH)
AND GAME DEPARTMENT,)
Defendants)

Case No.: No .CV-05-6253

**BRIEF IN SUPPORT OF
DEFENDANTS' MOTION FOR
PARTIAL LIFTING OF INJUNCTION**

I. BACKGROUND

On February 23, 2007, the Court issued a Memorandum Decision, Findings of Fact, Conclusions of Law and Order (hereinafter "February 23 Order"). The Court ordered Defendants Idaho Department of Fish and Game and its Director (collectively "IDFG") to close the sport shooting range ("Farragut Shooting Range") on the Farragut Wildlife Management Area (WMA) to all person with pistols, rifles and firearms using or intending to use live ammunition until a baffle is installed over every firing position, such that shooters in any position cannot fire their weapons above the berm behind the target. The Court also indicated that once such baffles were installed, the Court would allow the Farragut Shooting Range to open to up to 500 shooters per year. To allow use of the Range above 500 shooters, the Court required IDFG to address safety and noise concerns, including safety measures adequate to prevent bullet escapement beyond the boundaries owned and controlled by IDFG and to include noise abatement measures to reduce noise to a decibel level agreed upon by the parties or by the Court following further evidence.

A. IDFG's Range Improvements

Since the Court's February 23 Order, IDFG has substantially modified the Farragut Shooting Range to address the concerns identified by the Court. IDFG has moved the shooting area farther away from the closest residences. IDFG has constructed new earthen berms and backstops to contain 50-yard, 100-yard and 200-yard ranges and depressed the floor of these ranges by four to eight feet into the ground. Backstops are twenty to thirty feet tall; side berms along these ranges are twelve to eighteen feet high.

On the 100-yard range, IDFG installed baffles, with firing tests conducted off-site to ensure their adequacy, that encompass each of the shooting positions on the 100-yard range. IDFG installed a series of these baffles on the 100-yard range to achieve bullet containment for shooters from all positions (standing, seated and prone) firing down-range.

IDFG has also installed a three-sided shooting shed on the 100-yard range with an armored canopy to house a shooting line for up to 12 shooters. The depressed range floor, berms, baffles, backstops and shooting shed provide noise abatement and prevent bullet escapement. IDFG retained an expert, Kerry O'Neal, in shooting range design and safety to assist IDFG in ensuring compliance with the terms of the Court's February 23 Order.

B. Idaho Legislative Enactment of Noise Standard

As indicated in IDFG's Status Report, filed with the Court on October 8, 2008, the Idaho Legislature adopted the Idaho Sport Shooting Range Act, which took effect July 1, 2008. The Act establishes various requirements for state outdoor shooting ranges, defined as areas "owned by the state of Idaho or a state agency for the public use of rifles, shotguns, pistols, silhouettes, skeet, trap, black powder, archery or any other similar sport shooting." Idaho Code § 67-9101(3). The Farragut Shooting Range owned by IDFG qualifies as a "state outdoor shooting range" under this definition.

The Act also provides that noise from state outdoor sport shooting ranges will not exceed an Leq(h) of 64 dBA. Idaho Code § 67-9102(3). An Leq(h) is an equivalent sound energy level defined in Idaho Code § 67-9102(6)(d), and a dBA is a sound pressure

unit of measure defined in Idaho Code § 67-9102(6)(b).¹ This noise standard is consistent with a noise standard of an Leq(h) of 64 dBA for state outdoor sport shooting ranges applied in Arizona since 2002. Ariz. Rev. Stat. § 17-602.

II. ARGUMENT

A. IDFG has satisfied the Court's safety conditions to open the 100-yard portion of the Farragut Shooting Range for up to 500 shooters per year.

The Court enjoined shooting at Farragut Shooting Range until a baffle was installed over every firing position, such that shooters in any position cannot fire their weapons above the berm behind the target. The Court also indicated that once the baffles were installed, the Court would allow the range to open to up to 500 shooters per year. The Court's order clearly contemplated lifting the injunction in the event IDFG satisfied the Court's conditions:

Once baffles are installed and either 1) plaintiffs agree that the shooter in any position cannot fire a round above the berm behind the target, or 2) if the plaintiffs cannot agree, the Court so finds after a view of the premises, the injunction will be lifted and IDFG may operate that range in the same manner in which it historically has (i.e., without any site supervision), up to 500 shooters per year.

Court's February 23 Order at 59.

IDFG retained Kerry O'Neal, who has designed over 100 municipal shooting ranges, to evaluate the Farragut Shooting Range. Mr. O'Neal's qualifications regarding range design and range safety are set forth as Exhibit 1 to his Affidavit filed herewith. He confirmed that IDFG has installed ballistic baffles and side berms to prevent firing above the backstop (berm behind the target area) at the 100-yard portion of the range.

¹ In 2008, the Idaho Legislature also passed legislation preempting local governments from adopting noise standards for private sport shooting ranges that were more restrictive than the standard established in Idaho Code § 67-9102. Idaho Code § 55-2605.

Aff. of Kerry O'Neill, ¶ 4. The approximate location of the 100-yard portion of the range is depicted in the map attached as Exhibit 3 to Mr. O'Neill's Affidavit.

Having satisfied the Court's condition as it relates to safety for the 100-yard portion of the range for up to 500 shooters per year, IDFG is entitled to lifting of that component of the injunction.

B. The Court should allow IDFG to operate the 100-yard portion of the Farragut Shooting Range for over 500 shooters per year, consistent with statutory standards for state sport shooting range operations.

1. IDFG has satisfied the Court's safety conditions to open the 100-yard portion of the Farragut Range for more than 500 shooters per year.

The Court's injunction capped use levels at 500 shooters per year unless IDFG addressed safety and noise concerns specified by the Court. Regarding safety concerns, the Court required IDFG to include "measures adequate to prevent bullet escapement beyond the boundaries owned and controlled by IDF&G..." Court's February 23 Order at 59. The Court's safety concern "can be satisfied only by the 'no Blue Sky' rule, or 'totally baffled so that a round cannot escape', as espoused by the nation's preeminent authority on range design and designer of the Vargas Master Plan, Clark Vargas Exhibit 2, p. 5." *Id.* at 59-60.

IDFG has renovated the 100-yard range to include an armored shooting shed enclosing the firing line, a series of ballistic baffles, side berms, recycled wood mulch on the range floor, and a screened sand backstop. Mr. O'Neal evaluated firing positions at the 100-yard range ranging from standing to prone and did not observe blue sky downrange between firing positions and the target area. Aff. of Kerry O'Neal at ¶5. He also determined that renovations made to the 100-yard range ensure that any direct fire, as well as any rounds that hit and skip (ricochets), will be contained within IDFG's

property boundaries. *Id.* at ¶6. Based on his observations and experience, Mr. O'Neal expressed the opinion that the renovations of the 100-yard range meet the Court's safety requirements for prevention of bullet escapement to allow more than 500 shooters per year. *Id.* at ¶7. IDFG has thus also satisfied the Court's judgment as it relates to safety concerns for the 100-yard range.

2. Statutory standards established in 2008 are the appropriate standards for complying with the Court's Order in regards to noise abatement.

In regards to noise concerns, the Court's February 23 Order indicated that use levels for Farragut Range will remain capped at 500 shooters per year unless IDFG included "noise abatement measures to reduce noise to a decibel level agreed upon by the parties in the first instance, or, if the parties are unable to agree, to be set by the Court following further evidence." Order at 59.

The Court noted in its Findings of Fact that Idaho did not have state noise standards in 2007. February 23 Order at 24, ¶31. The February 23 Order did not establish noise standards or a method for measuring noise, deferring the issue to agreement of the parties, or in the event no agreement was reached, making a determination with additional evidence. *Id.* at 60.

In 2008, the Idaho legislature enacted statewide noise and other standards for prospective range operations of all state sport shooting ranges as part of the Idaho Sport Shooting Range Act. "Control of noise is of course deep-seated in the police power of the States." *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 638 (1973) (citations and footnote omitted) (discussing Congressional preemption of state regulation in the field of aircraft noise regulations). In adopting noise standards for state sport shooting ranges, the Legislature exercised its constitutional authority to set state policy.

See Rich v. Williams, 81 Idaho 311, 325, 341 P.2d 432, 440 (1959) (“[b]y our Constitution the power to make and determine policy for the government of the State is vested in the Legislature, Idaho Const. Art. 2, § 1, and Art. 3, § 1”)(citations omitted).

The Legislature’s actions did not modify noise standards consented to by the parties or noise standards set by the Court, since no such standards had been established. Neither did the Legislature require that the newly adopted standards be applied retroactively. Instead, the 2008 Idaho Sport Shooting Range Act established new statewide criteria by which state sport shooting ranges would satisfy their prospective legal obligations.

As to future operation of the Farragut Shooting Range, the February 23 Order has thus been superseded by the 2008 legislation. Prospective relief via injunction should only be given or continued under current law, not past law. *Landgraf v. USI Film Product*, 511 U.S. 244, 273-274 (1994)(finding “relief by injunction operates *in futuro*,’ and that the plaintiff had no ‘vested right’ in the decree entered by the trial court”; intervening statutes should be applied to prospective relief). The Court must now apply Idaho Code § 67-9102 to the facts of the case to determine the appropriate noise standard.

Controlling decision authority underscores this Court's obligation to give effect to the 2008 Act's noise standards. The United States Supreme Court has upheld the application of new laws enacted to pending cases, where the statute did not purport “to direct any particular findings of fact or applications of law, old or new, to fact” and where Congress has not instructed the courts as to whether any particular agency action would violate old law or new law. *Robertson v. Seattle Audubon Soc’y*, 503 U.S. 429, 438-39 (1992) (upholding congressional action to change statutory requirements for timber sales

on certain U.S. Forest Service and Bureau of Land Management lands, even where federal legislation identified pending cases affected by the legislation by caption and file number).

The Idaho Supreme Court has followed suit, citing an earlier United States Supreme Court opinion with regard to the application of Congressional action affecting injunctive relief in discussing whether a judgment was prospective in nature:

The court relied on *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. 421, 431, [citations omitted] (1856), and *United States v. Swift & Co.*, 286 U.S. 106, 114, [citations omitted] (1932). In *Wheeling*, the Court imposed an injunction against a bridge company, ordering an abatement for a bridge that violated federal height regulations governing crossings on the Ohio River. *Wheeling*, 59 U.S. at 429, 15 L.Ed. at 436. When Congress modified the statute to accommodate the bridge, the Court held that the injunction could be lifted, reasoning that the injunction was "executory" because it was necessary depending on whether the bridge violated federal height regulations. *Id.* at 432.

Meyers v. Hansen, 148 Idaho 283, 221 P.3d 81, 88 (2009).

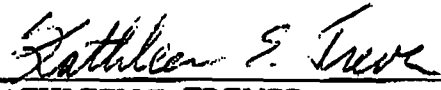
The injunction of the Court's February 23 Order is inherently prospective in nature. It is therefore incumbent upon this Court to apply Idaho Code § 67-9102 to the prospective operation of the Farragut Shooting Range.

III. CONCLUSION

The Court should grant IDFG's requested relief, and lift its February 23, 2007 injunction as it applies to the renovated 100-yard portion of the Farragut Range and, as to noise abatement, adopt the noise standard of the Idaho Sport Shooting Range Act, codified at Idaho Code §§ 67-9101 to 67-9105, as the standard applicable to operation of the Farragut Shooting Range.

DATED this 7th day of June, 2010.

STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL



KATHLEEN E. TREVER
Deputy Attorney General

CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of June, 2010 a true and correct copy of the foregoing **BRIEF IN SUPPORT OF DEFENDANTS' MOTION FOR PARTIAL LIFTING OF INJUNCTION** was faxed or mailed postage prepaid to:

<p>Hon. John T. Mitchell 324 West Garden Avenue P.O. Box 9000 Coeur d'Alene, ID 83816-9000</p>	<p><input checked="" type="checkbox"/> United States Mail, Postage Prepaid <input checked="" type="checkbox"/> Facsimile to (208) 446-1132 <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Courier</p>
<p>Harvey Richman Attorney at Law 19643 N. Perimeter Road Athol, Idaho 83801</p>	<p><input checked="" type="checkbox"/> United States Mail, Postage Prepaid <input type="checkbox"/> Facsimile <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Courier</p>
<p>Clerk of the Court: Daniel English 451 Government Way P.O. Box 9000 Coeur d'Alene, ID 83816-9000</p>	<p><input type="checkbox"/> United States Mail, Postage Prepaid <input checked="" type="checkbox"/> Facsimile to (208) 446-1188 <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Courier</p>
<p>Scott W. Reed Attorney at Law (208) 765-5117</p>	<p><input type="checkbox"/> United States Mail, Postage Prepaid <input checked="" type="checkbox"/> Facsimile (208) 765-5117 <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Courier</p>


Kathleen E. Trever

COMES now the plaintiffs and respond to the defendant's motion for partial lifting of injunction and say:

1. Plaintiffs deny each and every material allegation of the motion except as specifically herein admitted.

2. The plaintiffs admit that some improvements have been made at the Farragut range, specifically as to the hundred-yard long shooting lanes. Notwithstanding said improvements, the Idaho Department of Fish and Game has not brought the range into compliance at the 500 shooter level nor 501 plus shooter level as defined by the Court's final injunctive order entered in this case.

3. The Idaho Code known as Chapter 91 Title 67 is unconstitutional and therefore inapplicable in this cause.

4. Plaintiffs maintain the position that the final injunctive order of this Court, as sought to be amended by the herein motion, is subject to the principles of res judicata, issue preclusion, collateral estoppel and estoppel by judgment, inter alia.

5. The constitutional arguments sought to be imposed relative to Chapter 91, Title 67 include, bill of attainder, equal protection, separation of powers, and special legislation under the State of Idaho Constitution and the U.S. Constitution, inter alia.

6. Plaintiffs agree that the Court is entitled to and should view the premises, but only after the appropriate gathering of discovery and presentation of evidence which will permit the Court to enter an informed judgment.

Dated this 2 day of July, 2010.

I. BACKGROUND

On June 9, 2010, Defendants Idaho Department of Fish and Game and Director Groen (collectively "IDFG") filed a motion asking the Court to: (1) partially lift the Court's February 23, 2007 injunction, as IDFG has complied with the Court's terms for lifting the injunction as it relates to the 100-yard portion of the sport shooting range on IDFG's Farragut Wildlife Management Area (Farragut Shooting Range); (2) recognize the state outdoor sport shooting range noise standards adopted by the Idaho Legislature (Idaho Code § 67-9102(3)) as appropriate for IDFG's future operation of the Farragut Shooting Range. IDFG filed a Memorandum in support of its Motion, including the accompanying Affidavit of Kerry O'Neal, an expert in range safety and design.

Plaintiffs filed a Response in opposition to IDFG's motion based only on a general factual denial and references to the broad legal concepts of *res judicata*, issue preclusion, collateral estoppel, estoppel by judgment, and the unconstitutionality of Chapter 91, Title 67 of the Idaho Code under the principles of bill of attainder, equal protection, separation of powers, and special legislation. Plaintiffs' Response fails to offer any factual evidence, expert opinion, statutory authority or case law to justify Plaintiffs' opposition to IDFG's motion.

II. ARGUMENT

A. IDFG has met the Court's safety conditions for reopening the 100-yard portion of the Farragut Shooting Range.

IDFG's Motion and supporting documents provided factual and expert opinion testimony as to how it has met the Court's safety conditions for reopening the 100-yard portion of the Farragut Shooting Range. Plaintiffs' Response offered no evidence or

expert opinion that the 100-yard shooting area fails to comply with the Court's conditions for baffle installation and prevention of bullet escapement for reopening this portion of the Range.

B. The doctrines of claim preclusion and issue preclusion do not apply to IDFG's motion, which is consistent with the Court's Order.

Plaintiffs' Response does not identify which claims or issues they contend are barred by *res judicata*, issue preclusion, collateral estoppel and estoppel by judgment. Notably, *res judicata*, whether construed as claim preclusion or issue preclusion (also known as collateral estoppel or estoppel by judgment), "is an affirmative defense and the party asserting it must prove all of the essential elements by a preponderance of the evidence." *Oregon Mut. Ins. Co. v. Farm Bureau Mut. Ins. Co. of Idaho*, 148 Idaho 47, 218 P.3d 394-395 (2009), quoting *Waller v. State, Dep't of Health and Welfare*, 146 Idaho 234, 237, 192 P.3d 1058, 1061 (2008) (other quotations omitted). Plaintiffs' Response does not meet that burden.

Moreover, IDFG's request to reopen the 100-yard area for up to 500 shooters is entirely consistent with the Court's Order in light of Plaintiffs' stated (although unsubstantiated) disagreement regarding IDFG's installation of baffles:

Once baffles are installed and either 1) plaintiffs agree that the shooter in any position cannot fire a round above the berm behind the target, or 2) if the plaintiffs cannot agree, the Court so finds after a view of the premises, the injunction will be lifted and IDF&G may operate that range in the same manner in which it historically has (i.e., without any site supervision), up to 500 shooters per year.

Court's February 23 Order at 59.

IDFG's request to reopen the 100-yard portion of the range for more than 500 shooters is also consistent with the Court's Order, especially given Plaintiffs' stated (but

again unsubstantiated) disagreement that IDFG's improvements meet the terms of the Court's Order:

Even if the solution to these two concerns [safety and noise] [is] agreed upon by the parties, in order to close this case IDF&G will need to obtain an order from the Court to exceed 500 shooters per year.

Id.

On the issue of noise, the Court's Order specifically left final determination of the appropriate noise standard subject to future agreement of the parties or to determination of the Court "following further evidence." *Id.* Thus, the noise issue has not been finally decided in this litigation and collateral estoppel/res judicata/issue preclusion/estoppel by judgment does not apply. *See Oregon Mut. Ins. Co.*, 218 P.3d at 395 (2009) (citation omitted) (two of the five factors required for collateral estoppel to bar re-litigation of an issue include: the issue sought to be precluded was actually decided in the prior litigation; and there was a final judgment on the merits in the prior litigation).

Even, assuming *arguendo*, if the Court had adopted a noise standard in its Order, the noise standard for sport shooting ranges adopted subsequently by the Idaho legislature should apply to future operation of the Farragut Shooting Range. *Landgraf v. USI Film Product*, 511 U.S. 244, 273-274 (1994) (finding "the plaintiff had no 'vested right' in the decree entered by the trial court"; intervening statutes should be applied to prospective relief).

The Court's injunction is a "prospective judgment," and can be modified under Rule 60(b)(5) "if it is susceptible to the legal or equitable rights of the parties as they evolve due to changes in law or circumstance." *Meyers v. Hansen*, 148 Idaho 283, 221

P.3d 81, 88 (2009)(citations omitted). The Idaho Legislature's adoption of noise standards for outdoor sport shooting ranges is such a "change in law."

C. The noise standard and related laws adopted by the Idaho Legislature after the Court's Order are constitutional and apply to future operations of Farragut and other state outdoor sport shooting ranges.

Plaintiffs' unspecific claims of separation of powers, equal protection, bill of attainder, and special legislation regarding Idaho's statutory noise standard lack merit.

There is a presumption in favor of the constitutionality of the challenged statute or regulation, and the burden of establishing that the statute or regulation is unconstitutional rests upon the challengers. An appellate court is obligated to seek an interpretation of a statute that upholds [its] constitutionality. The judicial power to declare legislative action unconstitutional should be exercised only in clear cases.

Stuart v. State, 149 Idaho 35, 232 P.3d 818, 818 (2010), quoting *Am. Falls Reservoir*

Dist. No. 2 v. Idaho Dep't of Water Res., 143 Idaho 862, 869, 154 P.3d 433, 440 (2007)

(citations omitted).

The Idaho Legislature properly exercised its constitutional police powers to enact noise standards and related laws for state (and other) outdoor sport shooting ranges in Idaho in 2008, and these standards govern future operations at Farragut Shooting Range.

1. The Idaho Legislature's adoption of sport shooting range standards was a proper exercise of legislature power.

From a separation of powers standpoint, the regulation of sport shooting ranges and the enactment of noise and other standards for them are proper legislative functions and exercise of police power. See *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 638 (1973). The Court's consideration of applicable federal, state and local noise standards in its decision recognized that noise regulation is within the constitutional purview of state and local legislative bodies. Court February 23 Opinion at 23-24 ¶31

(reviewing federal, state and local standards, such as Kootenai County Ordinances, and finding “[t]he State of Illinois has statewide noise standards. . . . Idaho does not have such standards”). Idaho has now addressed its legislative gap regarding noise standards for sport shooting ranges, patterning its standards after those applied in the State of Arizona since 2002. Ariz. Rev. Stat. § 17-602.

As noted above, Court rules such as 60(b)(5) and case law recognize the potential for changes in law to affect prospective judgments. “[W]hen subsequent legislation effects a change in the applicable law, a judgment, legally correct when entered, may become inequitable.” *Harvey v. Johanns*, 494 F.3d 237, 241 (1st Cir. 2007) (explaining that “a forward-looking judgment in equity can succumb to legislative action if the legislature alters the underlying rule of law”) (quotation omitted)¹; see also *Meyers*, 221 P.3d at 88.

In this case, it is not even a matter of the Legislature’s changing a noise standard set by the Court; it is matter of the Legislature setting a standard where one did not exist and the Court had left determination of a standard to future action by the parties or the taking of further evidence.

2. Adopting noise standards for sport shooting ranges is a legitimate government purpose and does not violate constitutional provisions regarding equal protection and bills of attainder.

As to the issue of equal protection, Plaintiffs’ Response did not specify how Chapter 91, Title 67 of Idaho Code violates equal protection. Plaintiff’s Response did not

¹ The *Harvey* case involved a series of lawsuits in which a plaintiff challenged U.S. Department Agriculture regulations under the Organic Foods Protection Act of 1990. Plaintiff received a favorable ruling from the 1st Circuit Court of Appeals, but Congress “responded swiftly and precisely” “to disturb the ground” on which the Court rested its ruling. *Harvey*, 494 F.3d at 241 (noting that “the appellant grudgingly acknowledges that Congress intended to take away at least part of his bounty”).

specify what classification these laws created² to evaluate equal protection considerations, but these Idaho laws clearly do not involve a suspect class or quasi-suspect class (e.g., race, national origin, religion, gender). Therefore, the government need only show that the challenged classification is rationally related to serving a legitimate state interest. *Stuart*, 232 P.3d at 823, citing *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456 (1981); *McGinnis v. Royster*, 410 U.S. 263 (1973); *Liefeld v. Johnson*, 104 Idaho 357, 374, 659 P.2d 111, 128 (1983) (“[u]nder the ‘rational basis’ test which is generally appropriate to use when reviewing statutes which impact social or economic areas, the question becomes whether the classification ‘advances legitimate legislative goals in a rational fashion’”).

The regulation of noise and sport shooting ranges are legitimate state purposes, and the provisions of chapter 91, title 67 (and the corresponding standard for outdoor sport shooting ranges enacted in the same legislative session at Idaho Code §55-2605) are a rational framework for such regulation.

Chapter 91, Title 67 is also not a bill of attainder. “A bill of attainder is a legislative act directed at an easily ascertainable group in such a way as to penalize the group members without benefit of a judicial trial.” *State v. Gee*, 107 Idaho 991, 993, 695 P.2d 376, 378 (1985)(citation omitted). In determining whether legislation is a bill of attainder, courts evaluate two aspects: (1) whether specific individuals are affected by the statute and (2) whether the legislation inflicts a punishment on those individuals. Chapter 91, Title 67 of Idaho Code does neither.

² To bring a constitutional claim, a plaintiff must be a member of the class on whose behalf he argues. *Arel v. T & L Enterprises, Inc.*, 146 Idaho 29, 35-36, 189 P.3d 1149, 1155-1156 (2008), citing *Venters*, 141 Idaho at 252, 108 P.3d at 399 (employee bringing equal protection constitutional claim lacked standing when he was not a member of the class at issue, employers).

The legislation does not specifically identify a person, group of people, or readily ascertainable members of a group, or identify such a person or group by past conduct. See *United States v. Lovett*, 328 U.S. 303, 315 (1946); *Selective Serv. Sys. v. Minnesota Pub. Interest Research Group*, 468 U.S. 841, 847 (1984).

As to the existence of "punishment," the U.S. Supreme Court has applied a functional test, "analyzing whether the law under challenge, viewed in terms of the type and severity of burdens imposed, reasonably can be said to further non-punitive legislative purposes." *State v. Gee*, 695 P.2d at 378, quoting *Nixon v. Administrator of General Services*, 433 U.S. 425, at 475-476 (1977). "It is only where such legitimate legislative purposes are not evident that the Court will conclude that the legislative intent was punishment of individuals disadvantaged thereby." *Id.*

As previously noted, regulation of noise at sport shooting ranges is a legitimate legislative purpose. Even if the interpretation of "punitive" were as expansive as the Plaintiffs might argue, their assertion of "bill of attainder" fails in light of the clear legitimacy of the purpose to regulate noise and sport shooting ranges.

3. The Idaho Legislature's adoption of noise standards for sport shooting ranges statewide is not unconstitutional special legislation.

Article III, §19 of the Idaho Constitution prohibits the legislature from passing "special laws" in certain enumerated cases. Plaintiffs' Response does not identify which provision of Chapter 91, Title 67 of the Idaho Code would constitute unconstitutional "special" law; nor does Plaintiffs' Response identify which of the constitutionally prohibited enumerated cases would render the law unconstitutional.

The standard for determining whether a law is special is "whether the classification is arbitrary, capricious or unreasonable." *Moon v. North Idaho Farmers*

Association, 140 Idaho 536, 546, 96 P.F3d 637, 647, quoting *Concerned Taxpayers of Kootenai County v. Kootenai County*, 137 Idaho 496, 499, 50 P.3d 991, 994 (2002). “A legislative enactment is not special “if its terms apply to, and its provisions operate upon, all persons and subject matter in like situation[s].” *Id.* (quotation omitted).

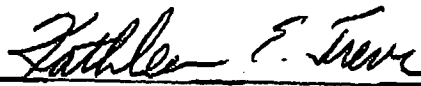
As discussed above, the regulation of outdoor shooting ranges and their noise emissions is a legitimate legislative function. The 2008 legislation set requirements for all state outdoor sport shooting ranges statewide; in the same session the Idaho Legislature also enacted statewide requirements for other outdoor sport shooting ranges, codified at Title 26, Chapter 55. The enacted standards for outdoor sport shooting ranges are rational, support a legitimate purpose, and apply statewide; thus these statutes do not violate the Idaho constitutional prohibition against certain “special” laws.

III. CONCLUSION

The Court should grant IDFG’s requested relief, and lift its February 23, 2007 injunction as it applies to the renovated 100-yard portion of the Farragut Shooting Range and, as to noise abatement, adopt the noise standard of the Idaho Sport Shooting Range Act, codified at Idaho Code §§ 67-9101 to 67-9105, as the standard applicable to operation of the Farragut Shooting Range.

DATED this 7th day of August, 2010.

STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL


KATHLEEN E. TREVER
Deputy Attorney General

CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of August, 2010 a true and correct copy of the foregoing **REPLY BRIEF IN SUPPORT OF DEFENDANTS' MOTION FOR PARTIAL LIFTING OF INJUNCTION** was faxed or mailed postage prepaid to:

<p>Hon. John T. Mitchell 324 West Garden Avenue P.O. Box 9000 Coeur d'Alene, ID 83816-9000</p>	<p><input type="checkbox"/> United States Mail, Postage Prepaid <input checked="" type="checkbox"/> Facsimile to (208) 446-1132 <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Courier</p>
<p>Harvey Richman Attorney at Law 19643 N. Perimeter Road Athol, Idaho 83801</p>	<p><input checked="" type="checkbox"/> United States Mail, Postage Prepaid <input type="checkbox"/> Facsimile + <i>courtesy PDF</i> <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Courier</p>
<p>Clerk of the Court: Daniel English 451 Government Way P.O. Box 9000 Coeur d'Alene, ID 83816-9000</p>	<p><input type="checkbox"/> United States Mail, Postage Prepaid <input checked="" type="checkbox"/> Facsimile to (208) 446-1188 <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Courier</p>
<p>Scott W. Reed Attorney at Law (208) 765-5117</p>	<p><input type="checkbox"/> United States Mail, Postage Prepaid <input checked="" type="checkbox"/> Facsimile (208) 765-5117 <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Courier</p>

Kathleen E. Trever
Kathleen E. Trever

Scott W. Reed, ISB#818
Attorney at Law
P. O. Box A
Coeur d'Alene, ID 83816
Phone (208) 664-2161
FAX (208) 765-5117

Harvey Richman, ISB#2992
Attorney at Law
19643 N. Perimeter Road
Athol, Idaho 83801
Phone (208) 683-2731

STATE OF IDAHO }
COUNTY OF KOOTENAI } SS
FILED:

2010 AUG 18 PM 3:41

CLERK DISTRICT COURT
Patty Barley
DEPUTY

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

**CITIZENS AGAINST RANGE)
EXPANSION, an Unincorporated non-)
profit Association; JEANNE J. HOM, a)
single woman; EUGENE and)
KATHLEEN RILEY, husband and wife;)
LAMBERT and DENISE RILEY, husband)
and wife; GABRIELLE GROTH-)
MARNAT, a single woman, GERALD)
PRICE, a single man; RONALD and)
DOROTHY ELDRIDGE, husband and)
wife; and, GLENN and LUCY CHAPIN,)
husband and wife, SHERYL PUCKETT,)
a single woman; CHARLES MURRAY)
and CYNTHIA MURRAY, husband and)
wife; and DAVE VIG, a single man,)**

Case No. CV-05-6253

Plaintiffs,

v.

**IDAHO FISH AND GAME DEPARTMENT,)
an agency of the STATE OF IDAHO, and)
CAL GROEN HUFFAKER, Director of the)
IDAHO FISH AND GAME DEPARTMENT,)**

AFFIDAVIT OF JEANNE HOM

Defendants.

Affidavit of Jeanne M. Hom

My name is Jeanne M. Hom. I am one of the plaintiff's in this case.

I have attached photographs taken during recent construction at the Farragut range to assist the Court in understanding the facts and circumstances at the site without the necessity of a personal visit.

All of the photographs are true and un-retouched copies of the originals which accurately represent what is displayed therein.

- I. Photos: 7_16_10_01 (July 16, 2010 #01)
7_16_10_02 (July 16, 2010 #02)
7_16_10_03 (July 16, 2010 #03)
7_16_10_04 (July 16, 2010 #04) show blue sky looking down range from the right and left extreme shooting bench locations only slightly off center.
- II. Photos : 7_16_10_09 (July 16, 2010 #09)
10_2_08_01 (October 2, 2008 #01)
10_2_08_02 (October 2, 2008 #02)
3_22_10_03 (March 22, 2010 #03)
11_1_09_05 (November 1, 2009 #05)
11_1_09_07 (November 1, 2009 #07)
11_1_09_08 (November 1, 2009 #08)
11_1_09_09 (November 1, 2009 #09)
11_1_09_10 (November 1, 2009 #10)
11_1_09_11 (November 1, 2009 #11)
11_1_09_12 (November 1, 2009 #12)
11_1_09_13 (November 1, 2009 #13)
11_1_09_14 (November 1, 2009 #14) illustrate the rocky nature of the native soils and the berms, backstop, and range floor; all of which present a major ricochet hazard.

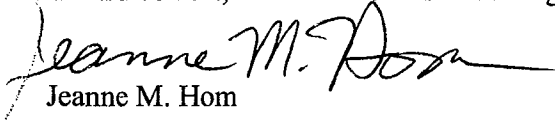
III. Photos: 11_1_09_01 (November 1, 2009 #01)
11_1_09_02 (November 1, 2009 #02)
11_1_09_03 (November 1, 2009 #03)
11_1_09_06 (November 1, 2009 #06) show the stanchions, footings,
bolts and nuts all placed in the direct line of fire, looking downrange from the firing line.
These appear to present a serious ricochet hazard.

IV. Photos: 7_16_10_06 (July 16, 2010 #6)
7_16_10_09 (July 16, 2010 #9)
7_16_10_10 (July 16, 2010 #10)
7_16_10_11 (July 16, 2010 #11)
7_16_10_12 (July 16, 2010 #12) illustrate impromptu shooting
opportunities.

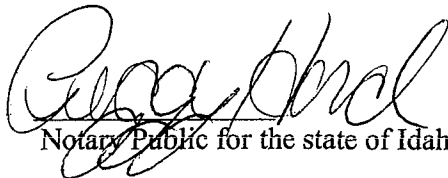
V. Further, the affiant sayeth naught.

Jeanne M. Hom

Before me, the undersigned authority, personally appeared Jeanne M. Hom, to me well known, who by me first being duly sworn deposes and says that the above statement is true and correct, to the best of his knowledge, information, and belief.

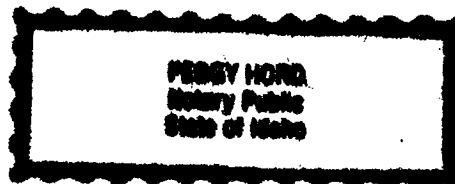

Jeanne M. Hom

Sworn to and subscribed to before me this 17th day of Aug 2010


Notary Public for the state of Idaho

My commission expires: 12-08-2015

SEAL



Page 2 of 27

July 17, 2010

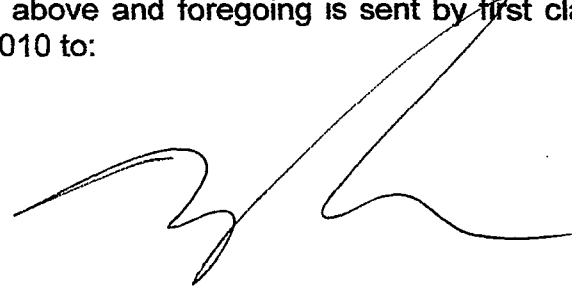


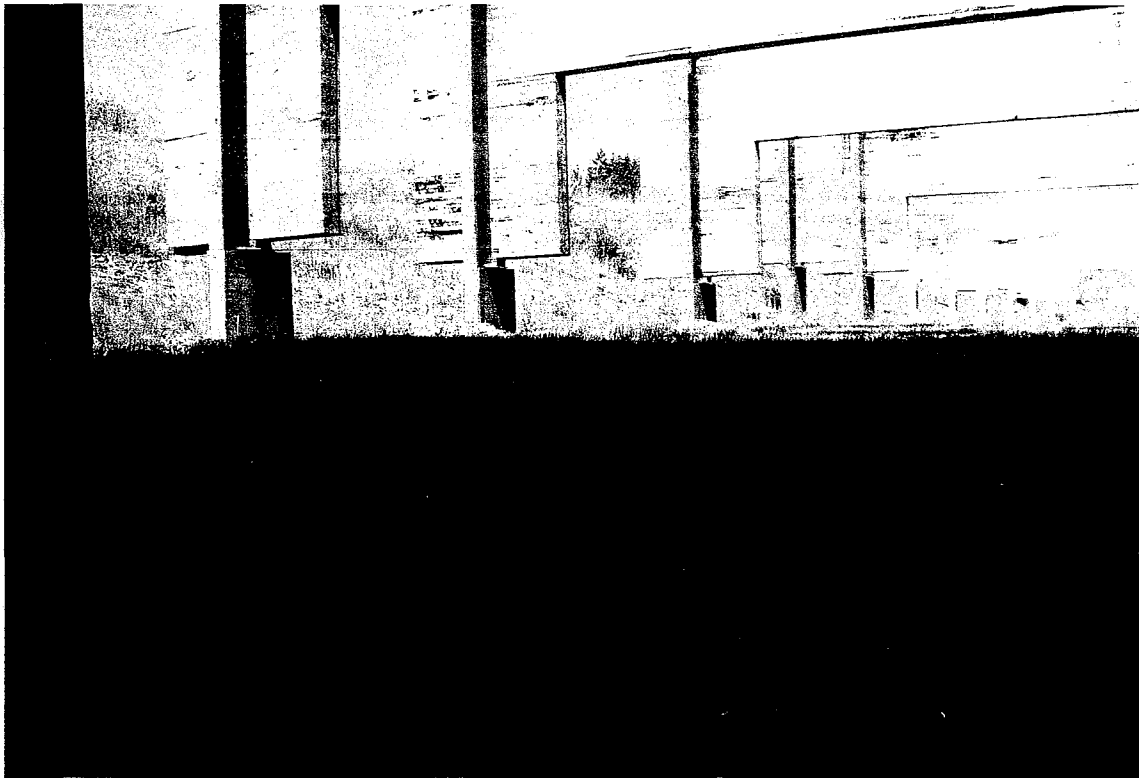
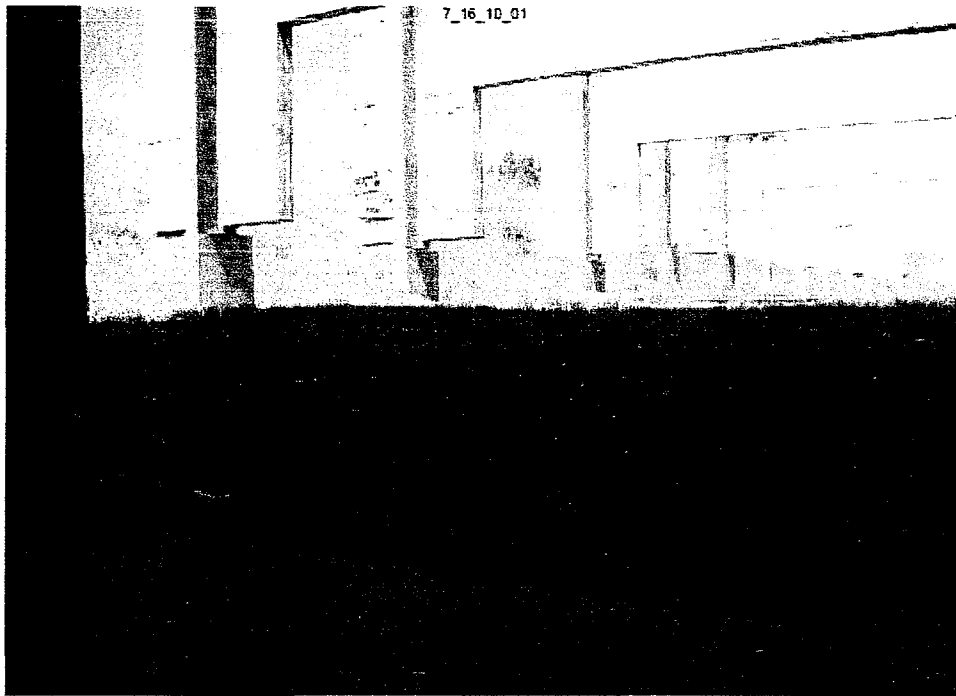
Harvey Richman and Scott W. Reed
Attorneys for Plaintiff

CERTIFICATE OF MAILING

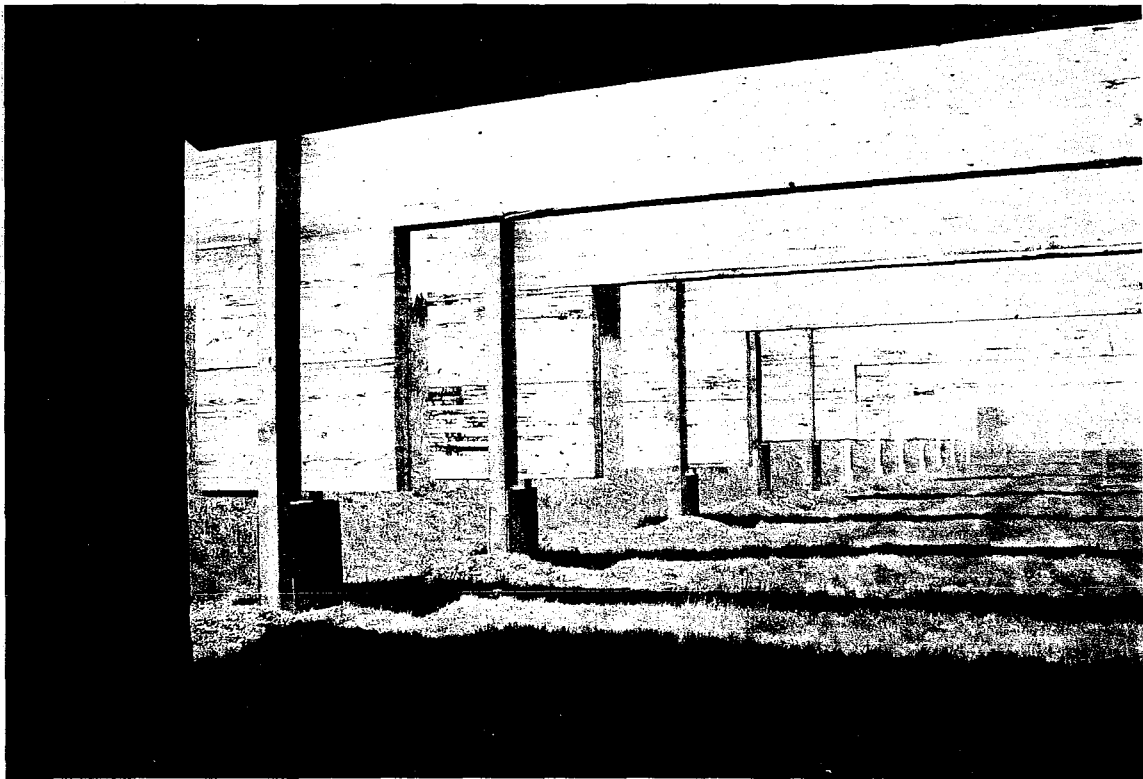
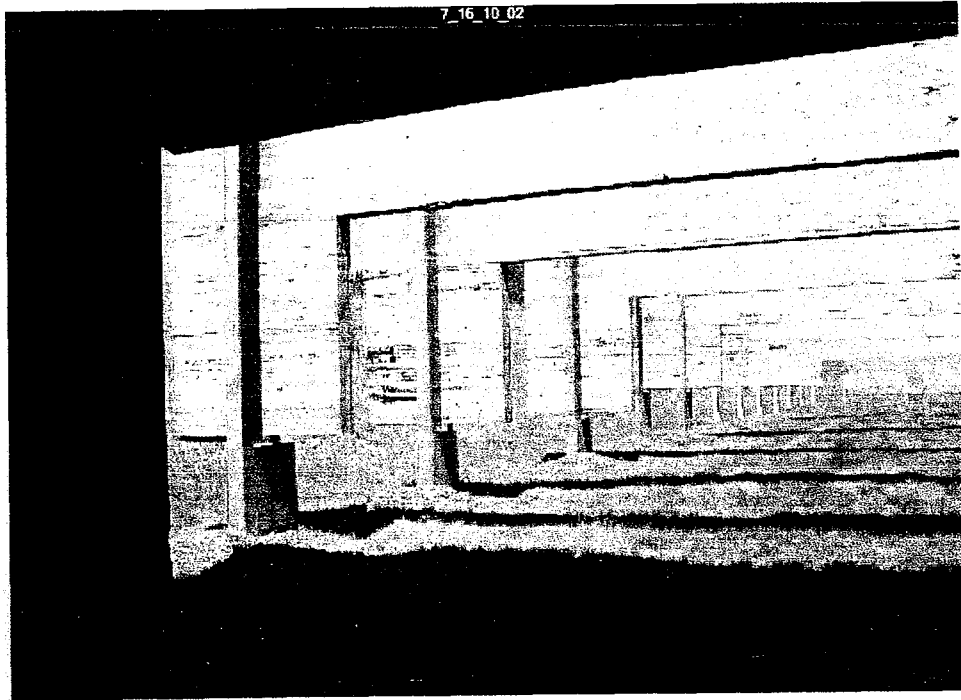
I certify that a copy of the above and foregoing is sent by first class mail, postage prepaid, this 18 day of July, 2010 to:

KATHLEEN E. TREVER
W. DALLAS BURKHALTER
DEPUTY ATTORNEYS GENERAL
P. O. BOX 25
BOISE, IDAHO 83707

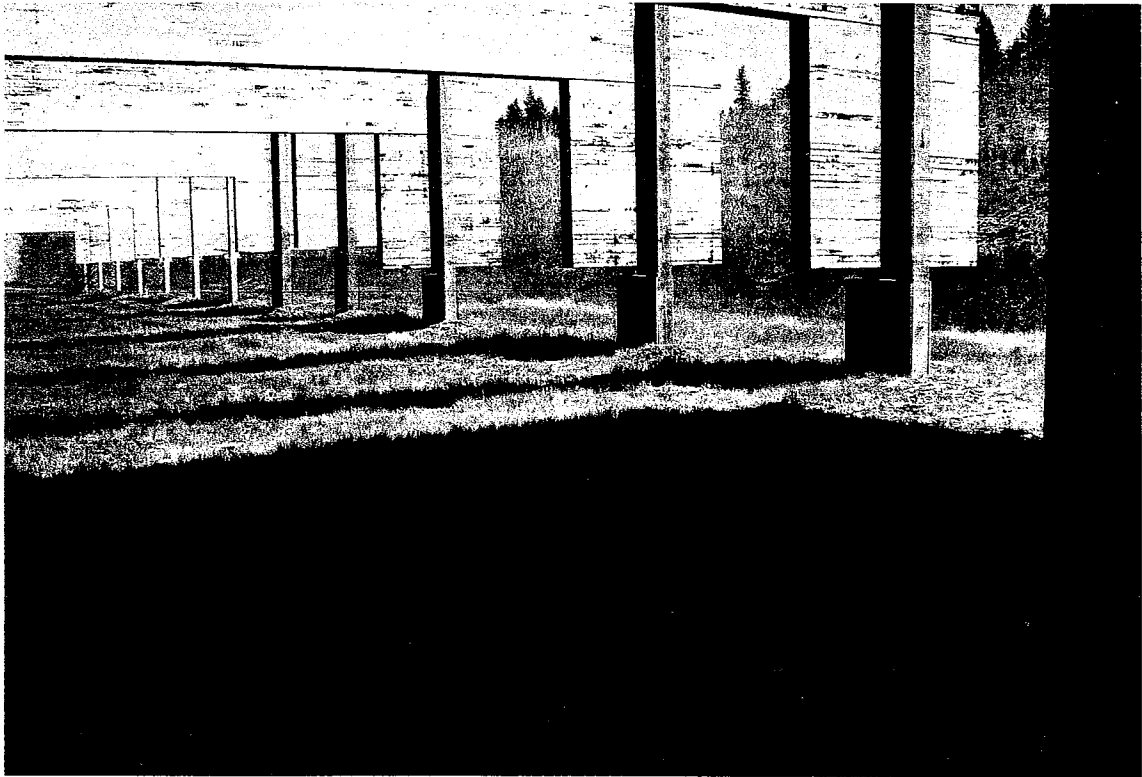
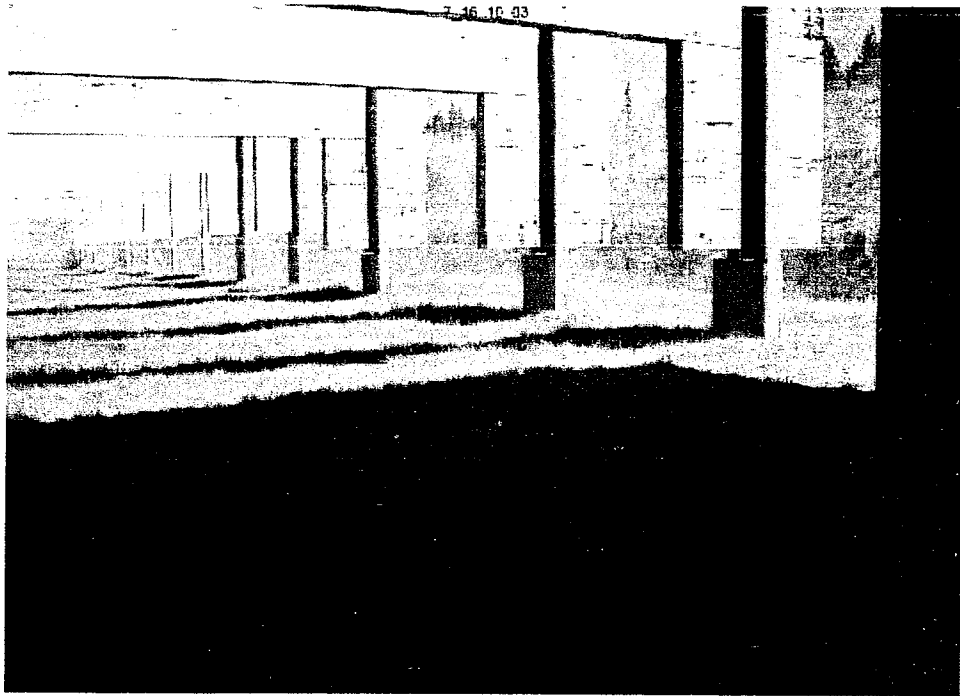




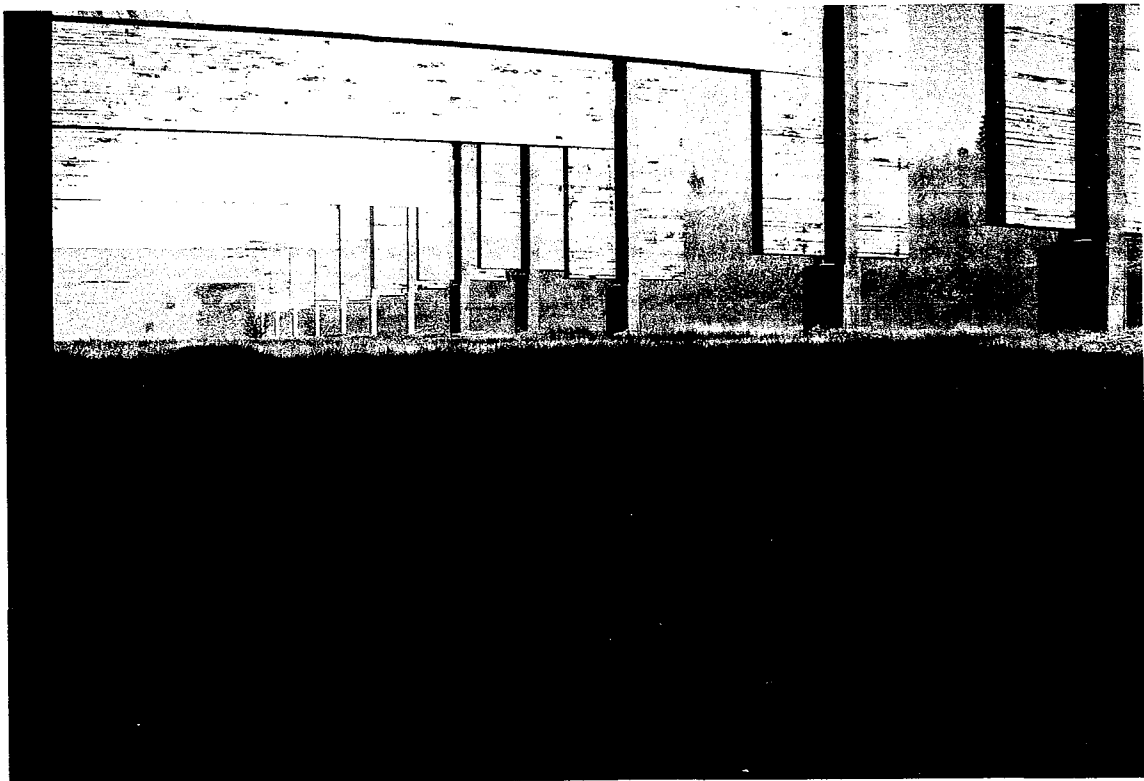
7-16-10-01



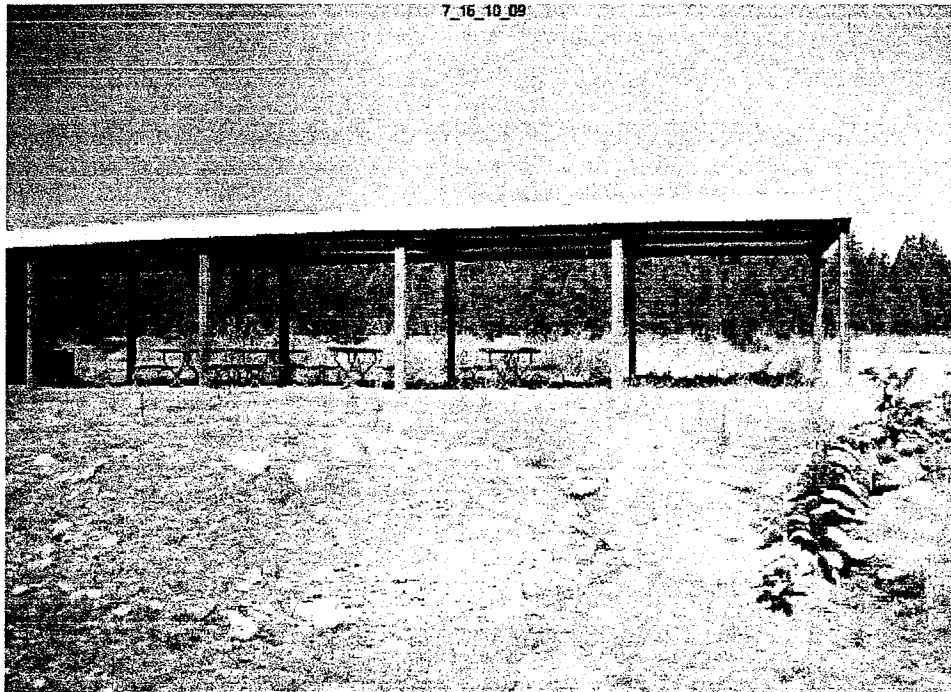
7-16-10-02



7-16-10-03

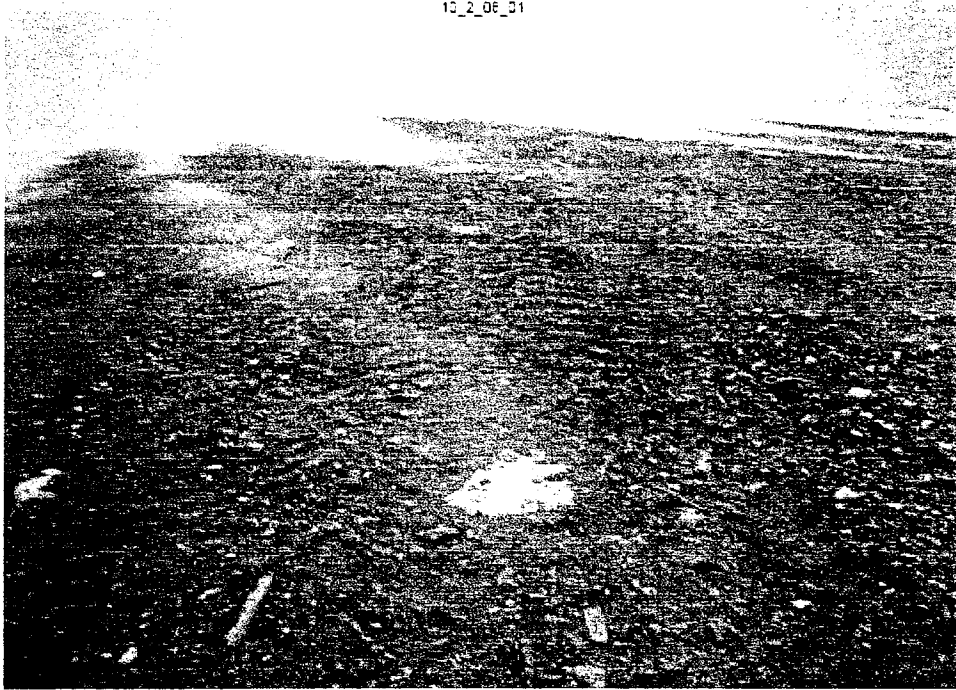


7-16-10-04



7-16-10-09

10_2_06_01



10-2-08-01

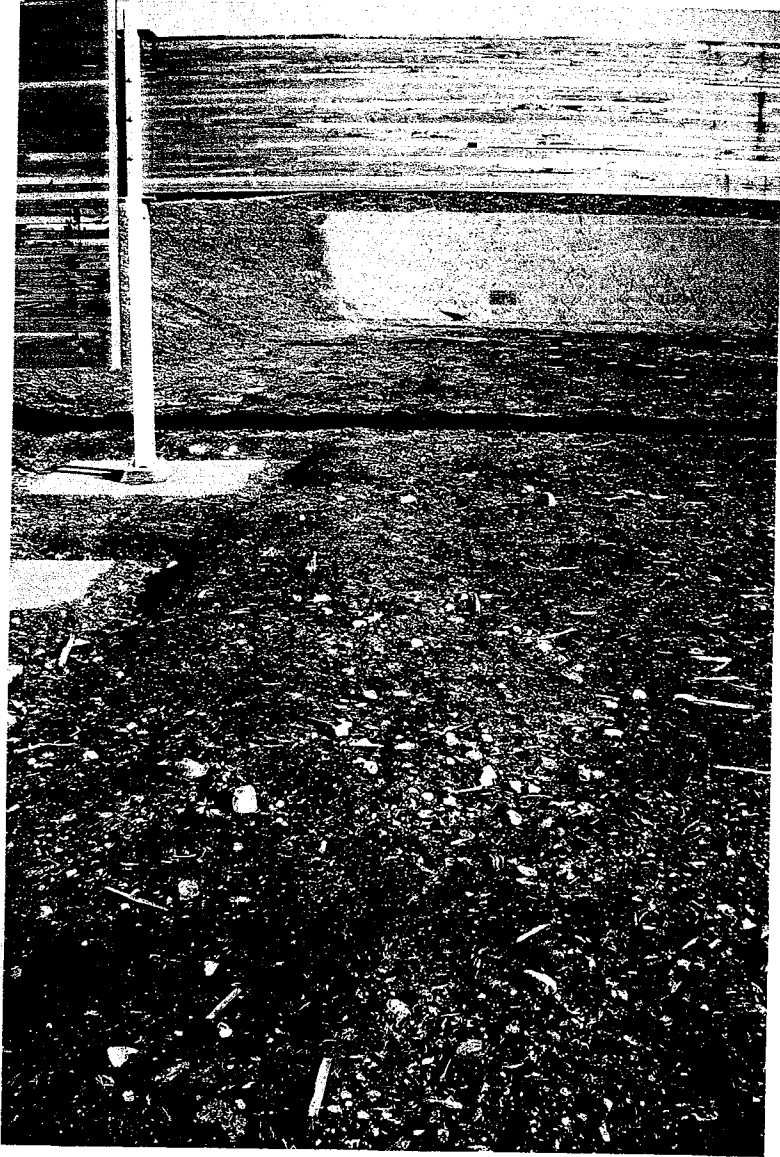


10-2-08-02



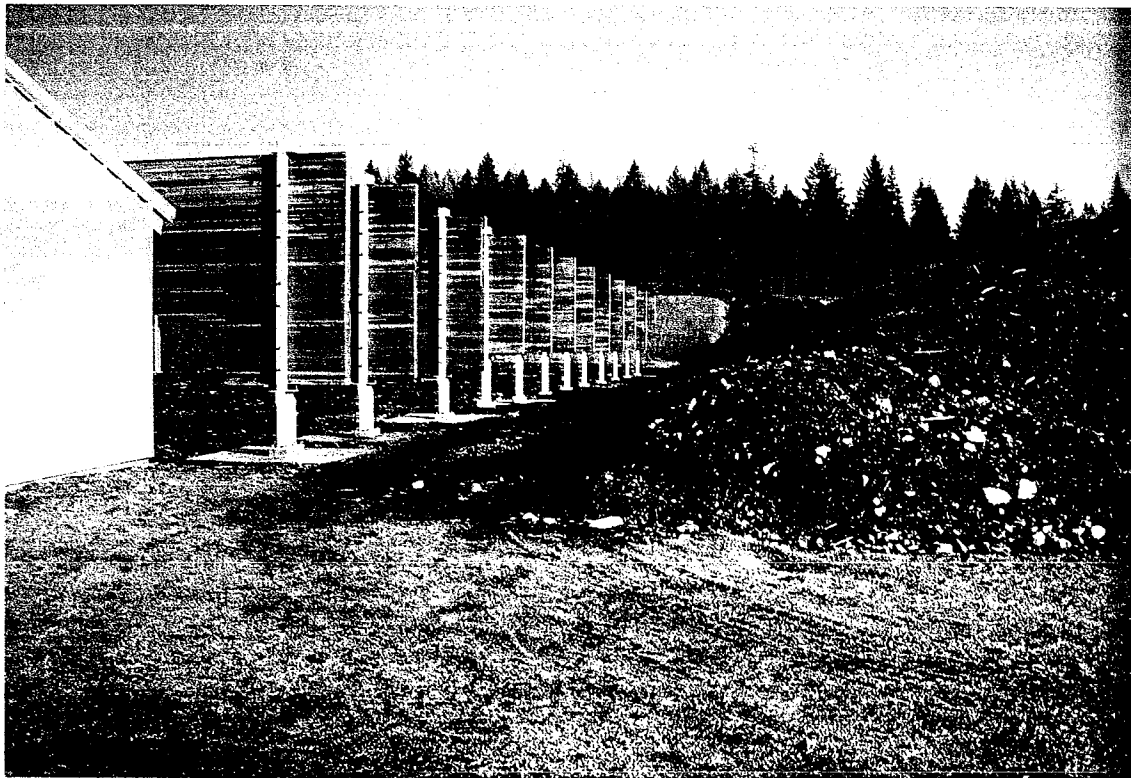
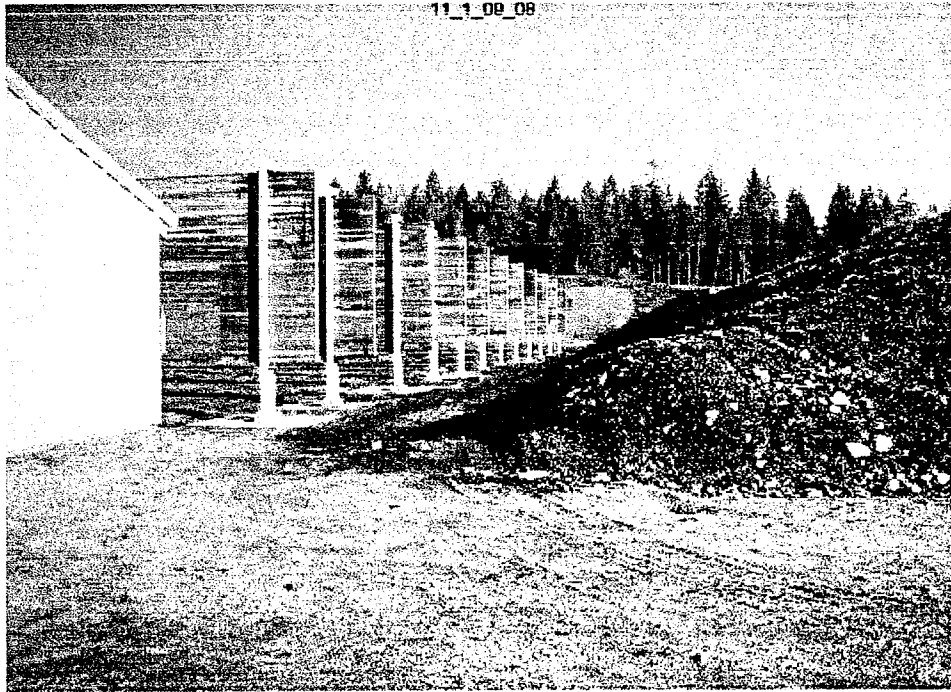
3-22-10-03

11_1_09_06

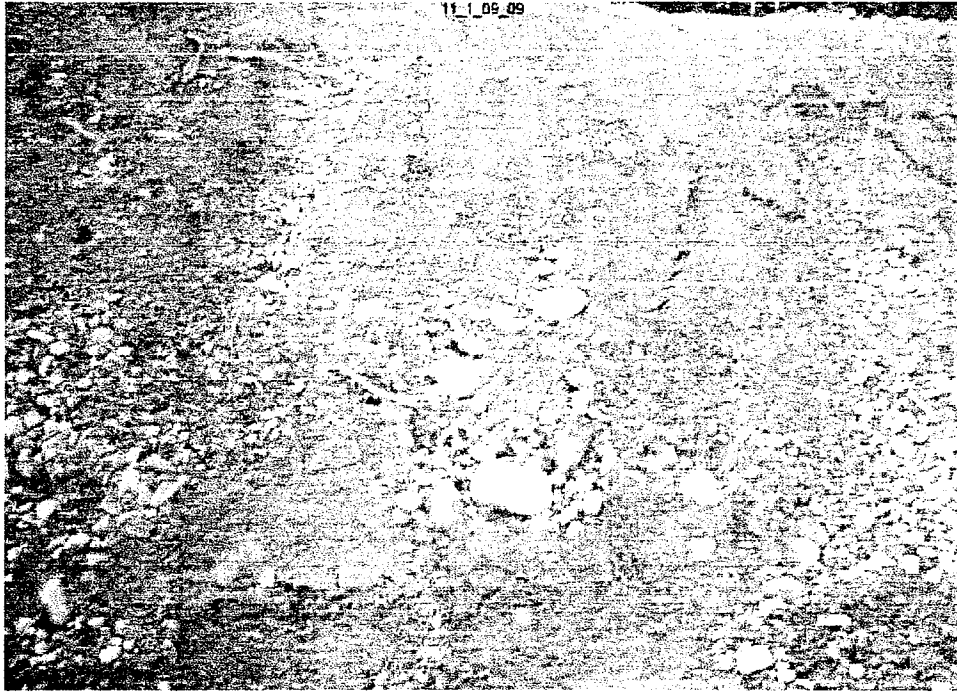


11_1_09_07





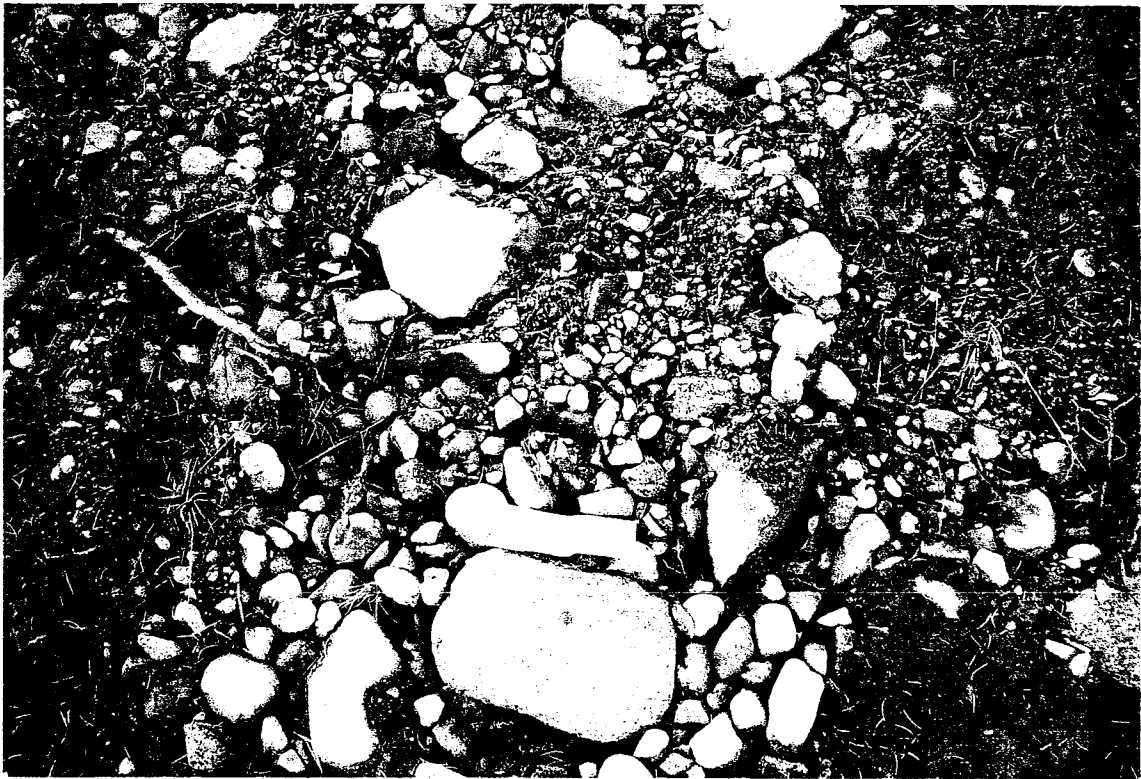
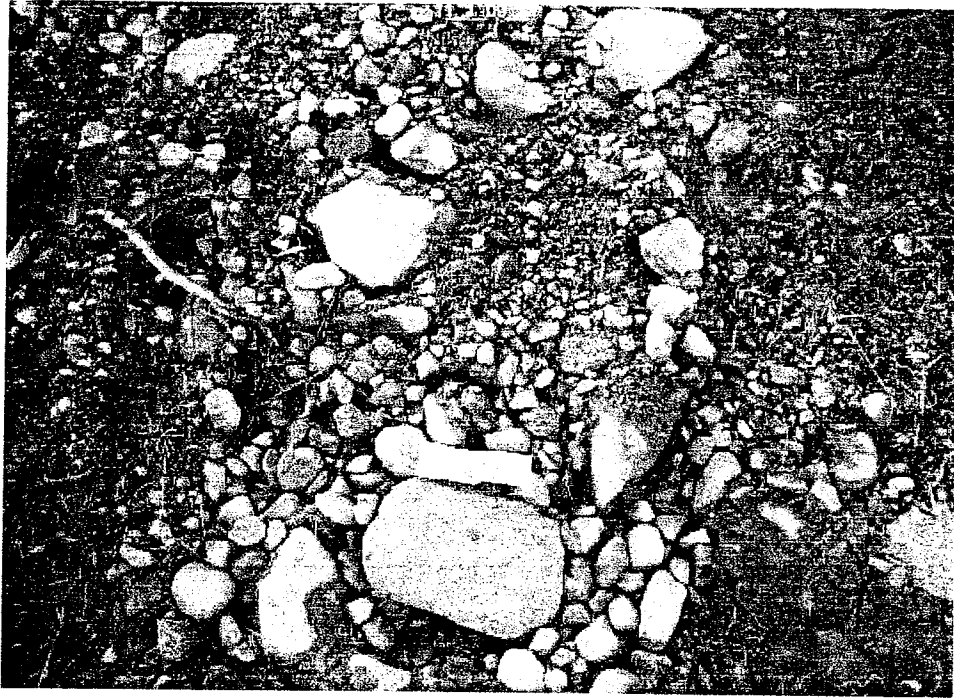
11-1-09-08



11-1-09-10



11-1-09-10



11-1-09-11

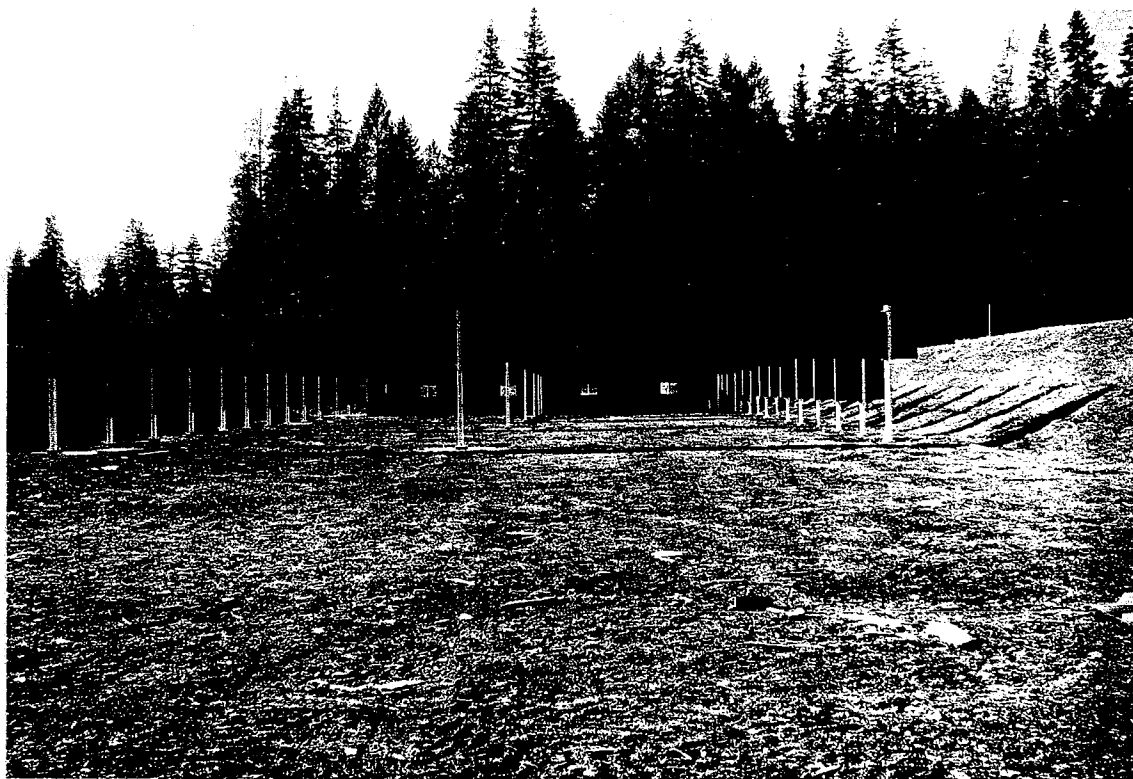


11-1-09-12

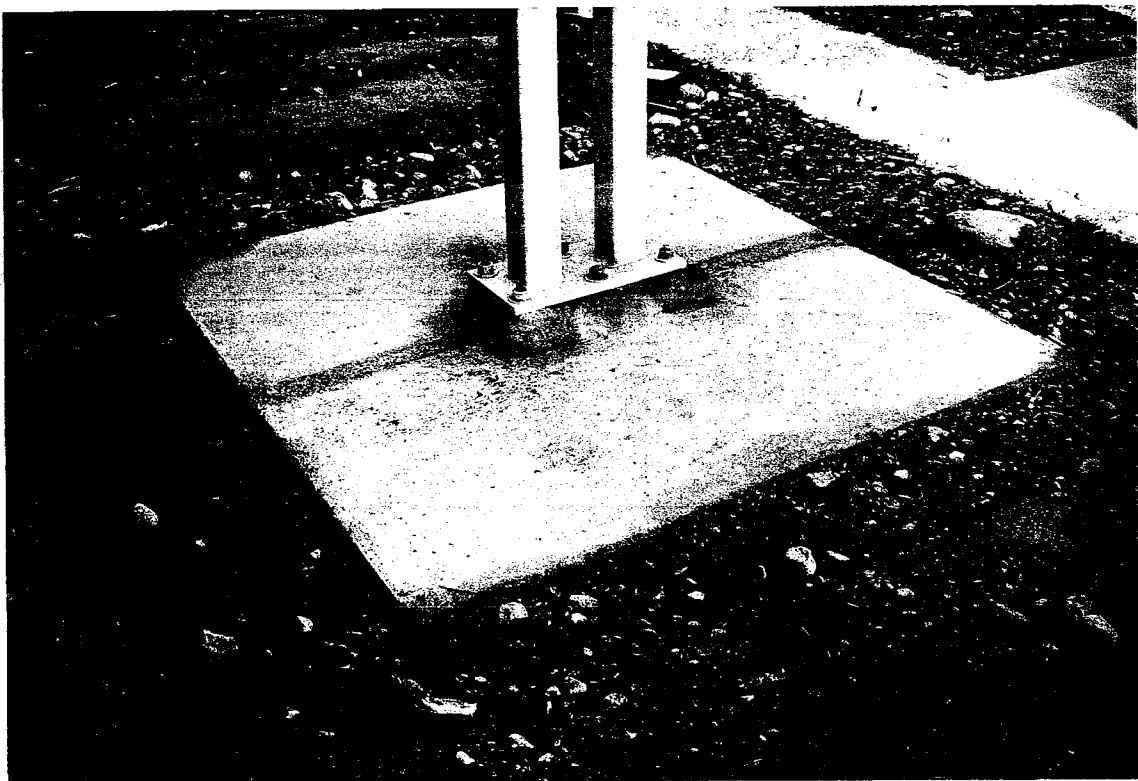
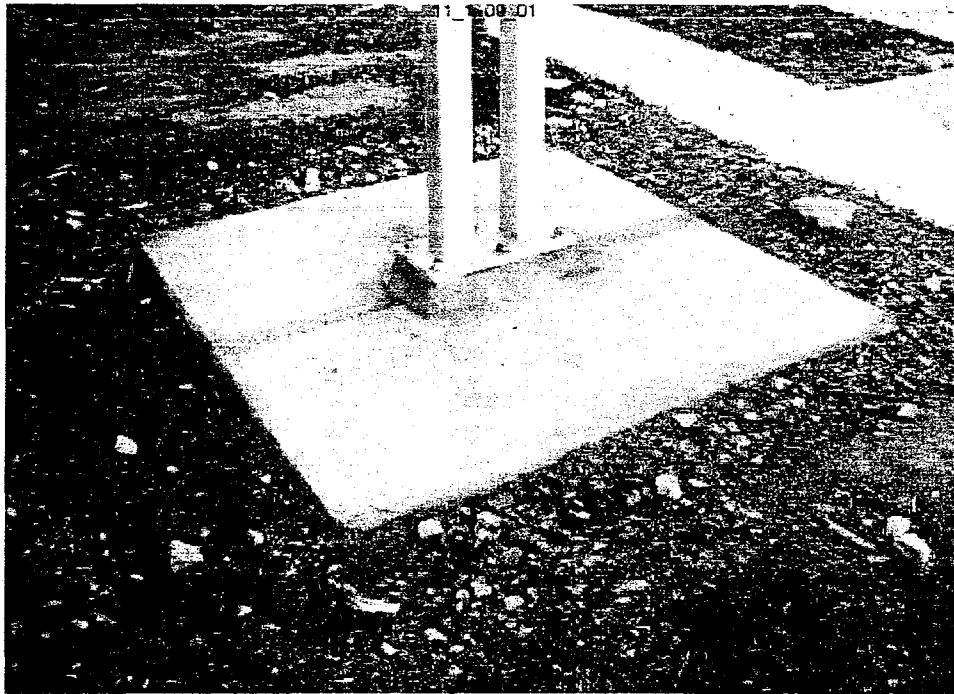
1_1_09_13



11_1_09_14



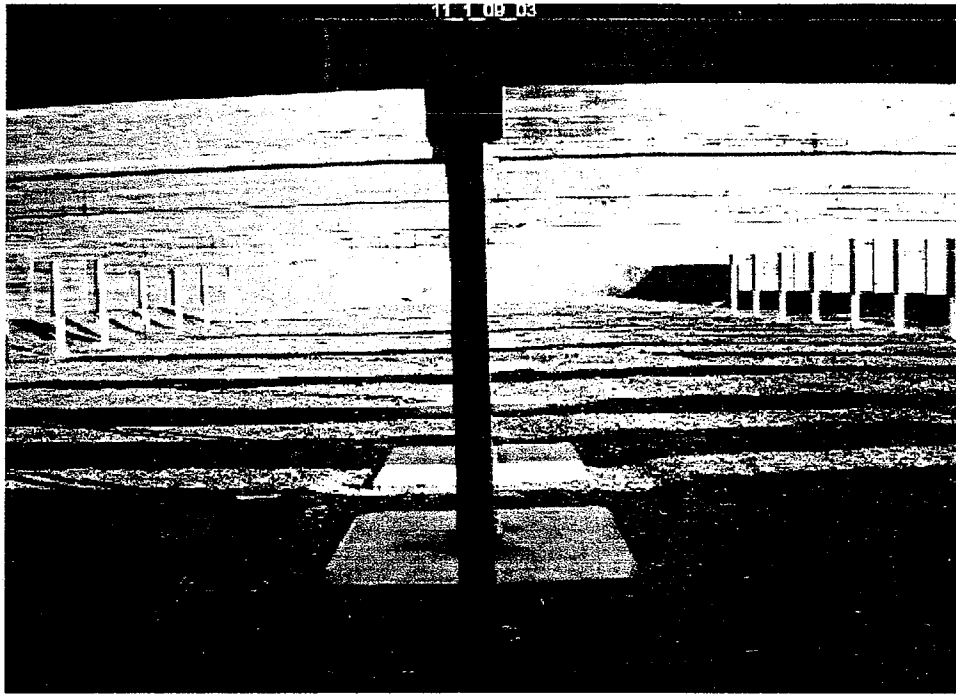
11-1-09-14



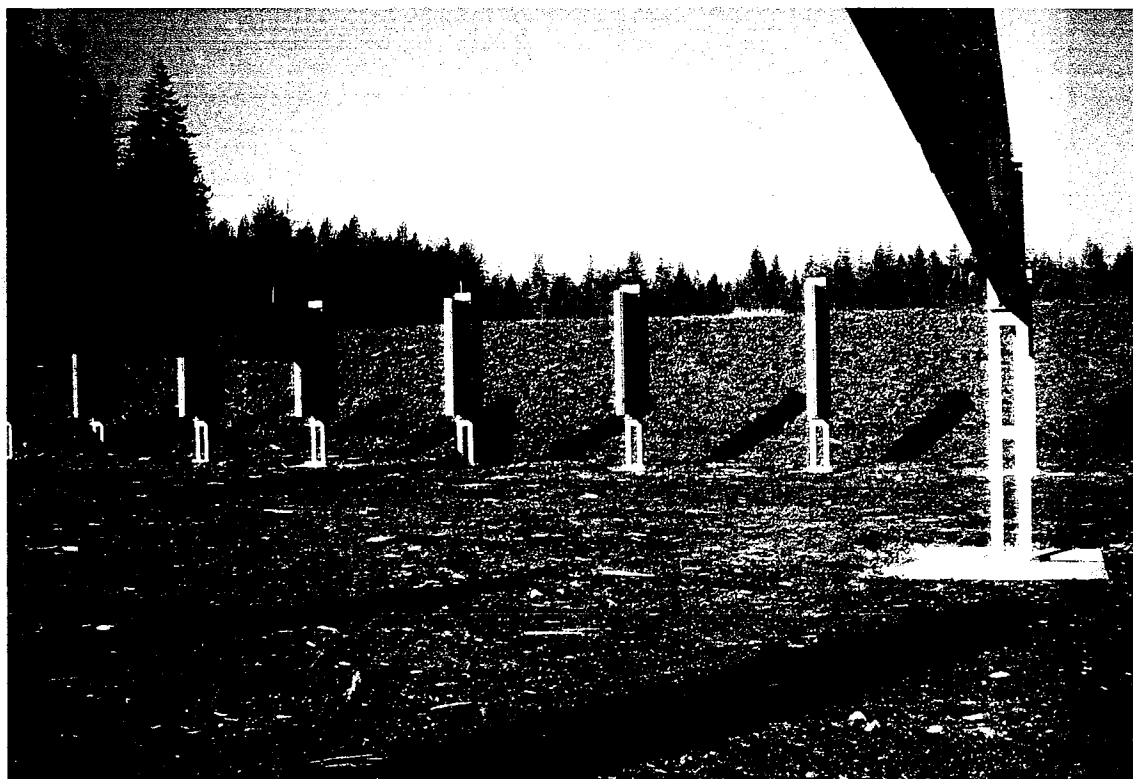
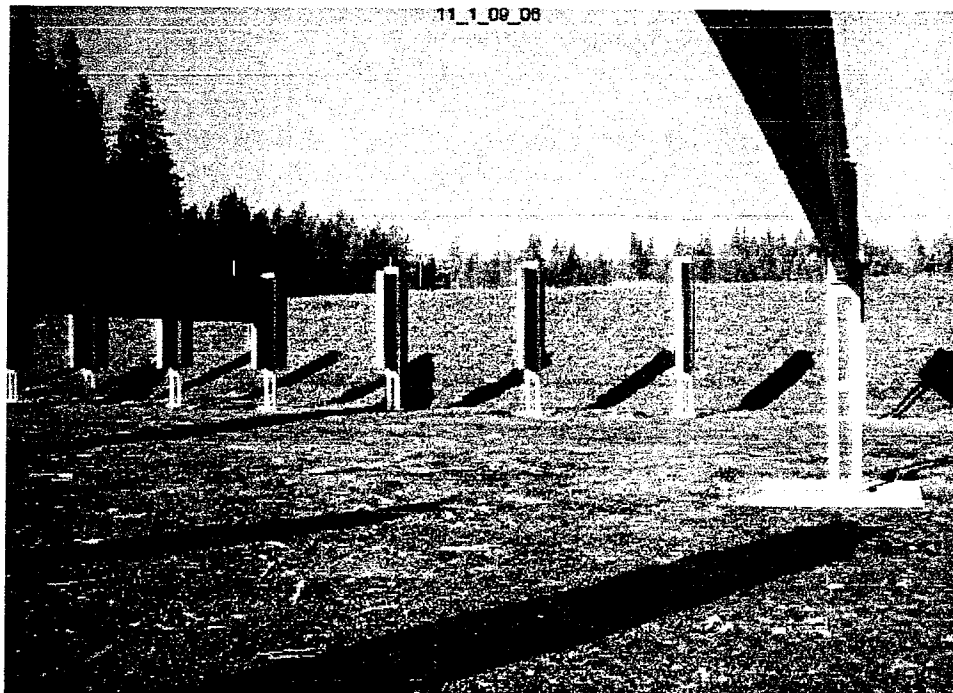
11-1-09-01

11_1_09_02





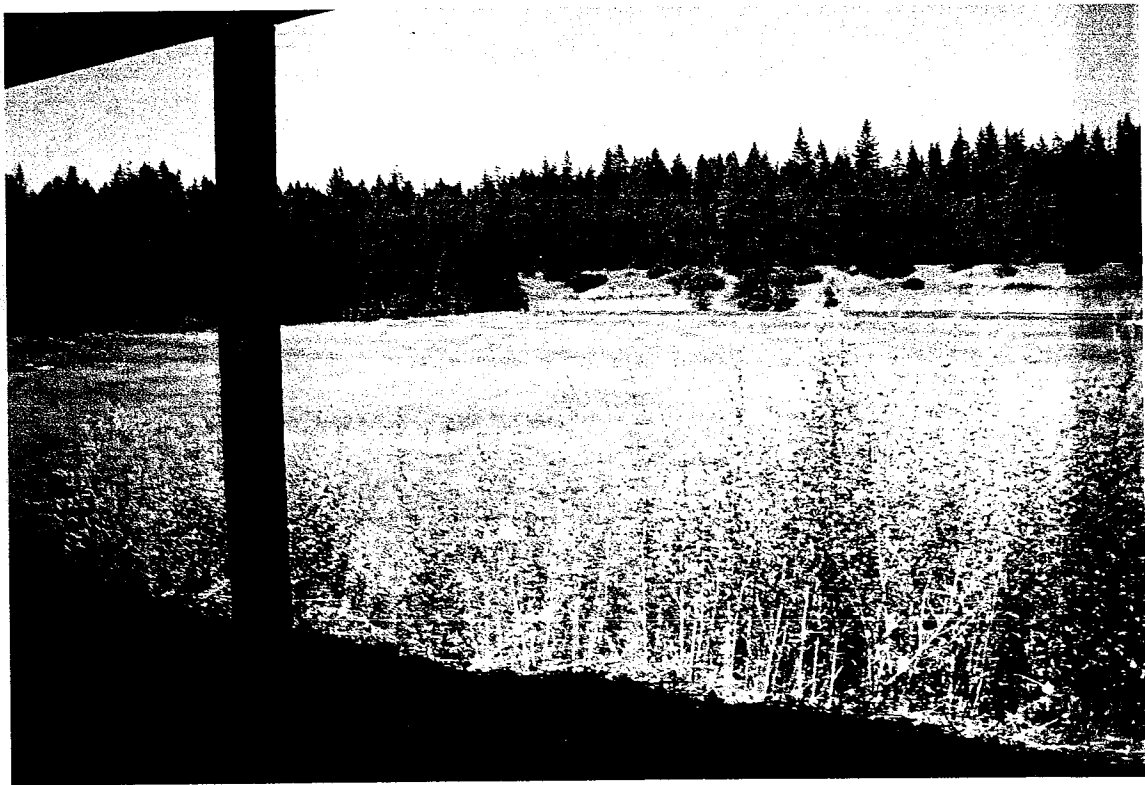
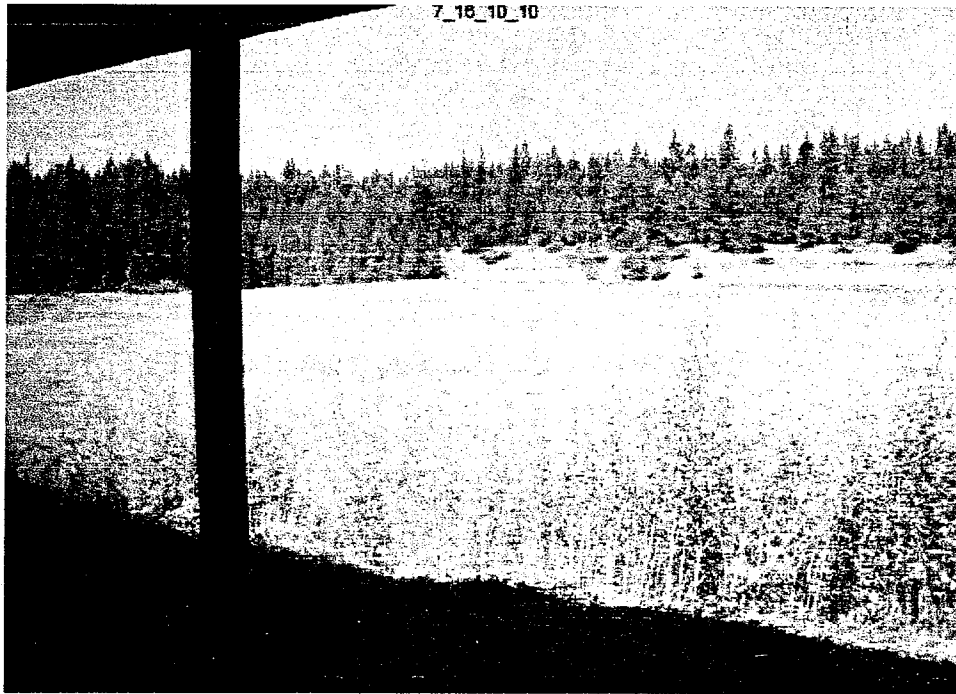
11-1-09-03



11-1-09-06



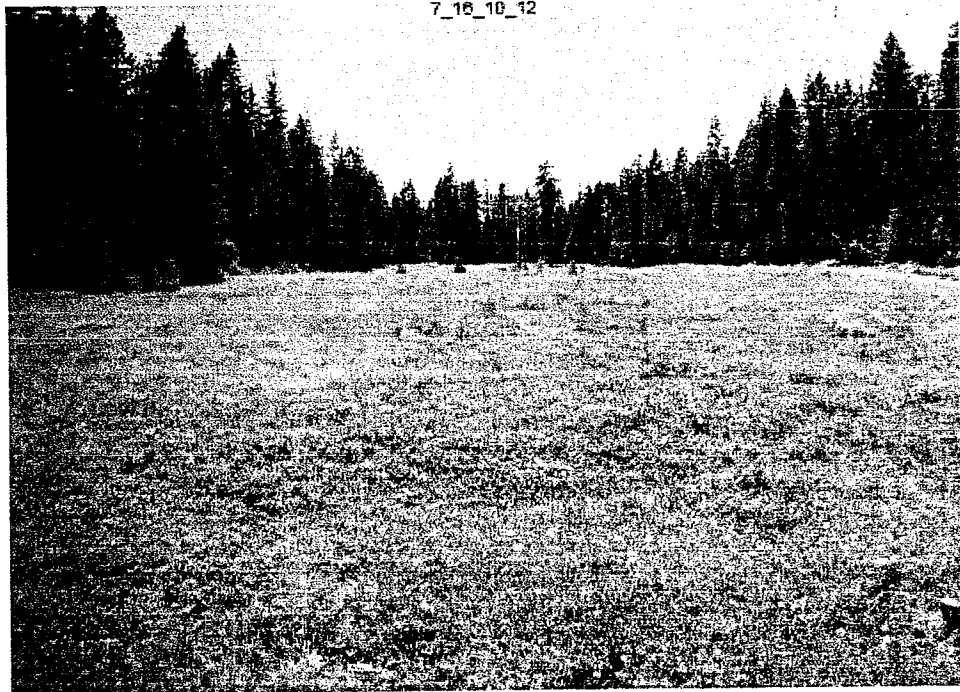
7.16.10.06



7-16-10-10



7-16-10 11



7-16-10-12

LAWRENCE G. WASDEN
ATTORNEY GENERAL
Clive J. Strong
Chief of Natural Resources

KATHLEEN E. TREVER, ISB #4862
W. DALLAS BURKHALTER, ISB# 3286
Deputy Attorneys General
PO Box 25
Boise, ID 83707
Telephone: (208) 334-3771
FAX: (208) 334-4885

Attorneys for Defendants
State of Idaho, IDFG and Groen

STATE OF IDAHO }
COUNTY OF KOOTENAI }
FILED: #4862 }
JSS

2010 DEC 10 PM 4:07

CLERK DISTRICT COURT
Paul C. [Signature]
DEPUTY

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

CITIZENS AGAINST RANGE)
EXPANSION, an Unincorporated non-profit)
Association; JEANNE J. HOM, a single)
woman; EUGENE and KATHLEEN RILEY,)
husband and wife; LAMBERT and DENISE)
RILEY, husband and wife; GABRIELLE)
GROTH-MARNAT, a single woman,)
GERALD PRICE, a single man; RONALD)
and DOROTHY ELDRIDGE, husband and)
wife; and GLENN and LUCY CHAPIN,)
husband and wife, SHERYL PUCKETT, a)
single woman; CHARLES MURRAY and)
CYNTHIA MURRAY, husband and wife; and)
DAVE VIG, a single man,)
Plaintiffs,)

Case No .CV-05-6253

**BRIEF IN SUPPORT OF SUMMARY
DISPOSITION OF
DEFENDANTS' MOTION FOR
PARTIAL LIFTING OF INJUNCTION**

vs.)
IDAHO FISH AND GAME DEPARTMENT,)
an agency of the STATE OF IDAHO, and)
CAL GROEN, Director of the IDAHO FISH)
AND GAME DEPARTMENT,)
Defendants)

Defendants Idaho Department of Fish and Game and its Director (collectively

"IDFG") file this brief in support of summary disposition of its Motion to Partially Lift

Injunction, filed with this Court on June 9, 2010.¹ IDFG will also file a motion for a Court view, consistent with the Court's Order of February 23, 2007, which indicates the Court would view the premises should plaintiffs disagree with IDFG regarding the adequacy of baffle installation at the Range.

I. ISSUES PRESENTED

In its motion, IDFG presents three issues for this Court's determination:

1. Do noise standards enacted by the Idaho Legislature in 2008 for state outdoor sport shooting ranges apply to operations of the Farragut Shooting Range?
2. Has IDFG complied with the Court's February 23 Order to open a renovated 100-yard shooting area at Farragut Range to up to 500 shooters per year, based on installing a baffle over every firing position that is "placed and of sufficient size that the shooter, in any position (standing, kneeling, prone), cannot fire his or her weapon above the berm behind the target" (Court Order at 59 ¶1)?
3. Has IDFG complied with the February 23 Order to open a renovated 100-yard shooting area for more than 500 shooters per year, based on inclusion of "safety measures adequate to prevent bullet escapement beyond the boundaries owned and controlled by IDF&G" by meeting the "'No Blue Sky' rule or 'totally baffled so that a round cannot escape', as espoused by the nation's preeminent authority on range design and designer of the Vargas Master Plan, Clark Vargas Exhibit 2, p 5" (Court Order at 59-60)?

¹ IDFG previously filed a support brief on June 9, 2010, and on August 4, 2010 IDFG filed a Reply brief to Plaintiffs' Response brief. Following the setting of a new briefing schedule for summary disposition of the motion following a status conference on August 30, 2010, IDFG submits this brief in support of summary disposition of its motion.

II. BACKGROUND

On February 23, 2007, the Court issued a Memorandum Decision, Findings of Fact, Conclusions of Law and Order (hereinafter "February 23 Order"). The Court ordered IDFG to close the sport shooting range ("Farragut Shooting Range") on the Farragut Wildlife Management Area (WMA) to all person with pistols, rifles and firearms using or intending to use live ammunition until a baffle is installed over every firing position, such that shooters in any position cannot fire their weapons above the berm behind the target (February 23 Order at 59 ¶1). The Court also indicated that once such baffles were installed, the Court would allow the Farragut Shooting Range to open to up to 500 shooters per year. To allow use of the Range above 500 shooters, the Court required IDFG to address safety and noise concerns, including safety measures adequate to prevent bullet escapement beyond the boundaries owned and controlled by IDFG and to include noise abatement measures to reduce noise to a decibel level agreed upon by the parties or by the Court following further evidence (February 23 Order at 59-60).

A. IDFG's Range Improvements

Since the Court's February 23 Order, IDFG has substantially modified the Farragut Shooting Range to address the concerns identified by the Court. IDFG has moved the shooting areas farther away from the closest residences to mitigate range noise. IDFG has constructed new earthen berms and backstops to contain 50-yard, 100-yard and 200-yard shooting areas with static (fixed) firing lines. IDFG depressed the floor of these areas by four to eight feet into the ground. Backstops are twenty to thirty feet tall; side berms are twelve to eighteen feet high. Aff. of David Leptich ¶7.

On the 100-yard shooting area, IDFG installed baffles, with firing tests conducted off-site to ensure their adequacy, that encompass each of the shooting positions along a designated firing line. Aff. of David Leptich ¶¶10, 17-29. These baffles and berms achieve bullet containment for shooters from all positions (standing, seated and prone) firing downrange.

IDFG installed a three-sided shooting shed on the 100-yard range with an armored canopy to house a shooting line for up to 12 shooters. Aff. of David Leptich ¶8. The depressed range floor, berms, baffles, backstops and shooting shed provide noise abatement and prevent bullet escapement. IDFG retained an expert, Kerry O'Neal, in shooting range design and safety to assist IDFG engineers and managers in ensuring compliance with the terms of the Court's February 23 Order.

B. Idaho Legislative Enactment of Noise Standard

As indicated in IDFG's Status Report, filed with the Court on October 8, 2008, the Idaho Legislature adopted the Idaho Sport Shooting Range Act, which took effect July 1, 2008. The Act establishes various requirements for state outdoor shooting ranges, defined as areas "owned by the state of Idaho or a state agency for the public use of rifles, shotguns, pistols, silhouettes, skeet, trap, black powder, archery or any other similar sport shooting." Idaho Code § 67-9101(3). The Farragut Shooting Range owned by IDFG qualifies as a "state outdoor shooting range" under this definition.

The Act also provides that noise from state outdoor sport shooting ranges will not exceed an Leq(h) of 64 dBA. Idaho Code § 67-9102(3). An Leq(h) is an equivalent sound energy level defined in Idaho Code § 67-9102(6)(d), and a dBA is a sound pressure

unit of measure defined in Idaho Code § 67-9102(6)(b).² This noise standard is consistent with a noise standard of an Leq(h) of 64 dBA for state outdoor sport shooting ranges applied in Arizona since 2002. Ariz. Rev. Stat. § 17-602.

II. STANDARD OF REVIEW

Summary disposition of the motion before the Court is proper where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. See *Blackmore v. Re/Max Tri-Cities, LLC*, 237 P.3d 655, 658 (2010) (citing I.R.C.P. 56(c); other citations omitted).

III. ARGUMENT

A. Statutory standards established in 2008 are the appropriate standards for complying with the Court's Order in regards to noise abatement.

In regards to noise concerns, the Court's February 23 Order indicated that use levels for Farragut Rage will remain capped at 500 shooters per year unless IDFG included "noise abatement measures to reduce noise to a decibel level agreed upon by the parties in the first instance, or, if the parties are unable to agree, to be set by the Court following further evidence." February 23 Order at 59.

The Court noted in its Findings of Fact that Idaho did not have state noise standards in 2007. February 23 Order at 24, ¶31. The February 23 Order did not establish noise standards or a method for measuring noise, deferring the issue to agreement of the parties, or in the event no agreement was reached, making a determination with additional evidence. *Id.* at 60.

² In 2008, the Idaho Legislature also passed legislation preempting local governments from adopting noise standards for private sport shooting ranges that were more restrictive than the standard established in Idaho Code § 67-9102. Idaho Code § 55-2605.

In 2008, the Idaho Legislature enacted statewide noise and other standards for prospective range operations of all state sport shooting ranges as part of the Idaho Sport Shooting Range Act. "Control of noise is of course deep-seated in the police power of the States." *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 638 (1973) (citations and footnote omitted) (discussing Congressional preemption of state regulation in the field of aircraft noise regulations). In adopting noise standards for state sport shooting ranges, the Legislature exercised its constitutional authority to set state policy. *See Rich v. Williams*, 81 Idaho 311, 325, 341 P.2d 432, 440 (1959) ("[b]y our Constitution the power to make and determine policy for the government of the State is vested in the Legislature, Idaho Const. Art. 2, § 1, and Art. 3, § 1")(citations omitted).

The Legislature's actions did not modify noise standards consented to by the parties or noise standards set by the Court, since no such standards had been established. Neither did the Legislature require that the newly adopted standards be applied retroactively. Instead, the 2008 Idaho Sport Shooting Range Act established new statewide criteria by which state sport shooting ranges would satisfy their prospective legal obligations.

As to future operation of the Farragut Shooting Range, the February 23 Order has thus been superseded by the 2008 legislation. Prospective relief via injunction should only be given or continued under current law, not past law. *Landgraf v. USI Film Product*, 511 U.S. 244, 273-274 (1994)(finding "'relief by injunction operates *in futuro*,' and that the plaintiff had no 'vested right' in the decree entered by the trial court"; intervening statutes should be applied to prospective relief). The Court must now give effect to the 2008 Act's noise standard set forth in Idaho Code § 67-9102.

Controlling decision authority underscores this obligation. The U. S. Supreme Court has upheld the application of new laws enacted to pending cases, where the statute did not purport “to direct any particular findings of fact or applications of law, old or new, to fact” and where Congress has not instructed the courts as to whether any particular agency action would violate old law or new law. *Robertson v. Seattle Audubon Soc’y*, 503 U.S. 429, 438-39 (1992) (upholding congressional action to change statutory requirements for timber sales on certain U.S. Forest Service and Bureau of Land Management lands, even where federal legislation identified pending cases affected by the legislation by caption and file number).

The Idaho Supreme Court has followed suit, citing an earlier U.S. Supreme Court opinion with regard to the application of Congressional action affecting injunctive relief in discussing whether a judgment was prospective in nature:

The court relied on *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. 421, 431, [citations omitted] (1856), and *United States v. Swift & Co.*, 286 U.S. 106, 114, [citations omitted] (1932). In *Wheeling*, the Court imposed an injunction against a bridge company, ordering an abatement for a bridge that violated federal height regulations governing crossings on the Ohio River. *Wheeling*, 59 U.S. at 429, 15 L.Ed. at 436. When Congress modified the statute to accommodate the bridge, the Court held that the injunction could be lifted, reasoning that the injunction was “executory” because it was necessary depending on whether the bridge violated federal height regulations. *Id.* at 432.

Meyers v. Hansen, 148 Idaho 283, 221 P.3d 81, 88 (2009).

The injunction of the Court’s February 23 Order is inherently prospective in nature. It is therefore incumbent upon this Court to apply Idaho Code § 67-9102 to the prospective operation of the Farragut Shooting Range.

There is no genuine factual dispute as to whether Farragut Range qualifies as a “state sport shooting range” to which the noise standards of Idaho Code § 67-9102 apply.

As previously determined by the Court, the Farragut Range is owned by IDFG for public use of pistols, rifles and other firearms using or intending to use live ammunition, and clearly meets the definition of a "sport shooting range" under Idaho Code §67-9101(3). Thus, the Court should find that the noise standards of Idaho Code § 67-9102 are the appropriate legal standard for prospective operation of the Farragut Range.

B. IDFG has satisfied the Court's safety conditions to open the 100-yard portion of the Farragut Shooting Range for up to 500 shooters per year.

The Court enjoined shooting at Farragut Shooting Range until a baffle was installed over every firing position, such that shooters in any position (standing, kneeling, prone) cannot fire their weapons above the berm behind the target. The Court also indicated that once the baffles were installed, the Court would allow the range to open to up to 500 shooters per year. The Court's order clearly contemplated lifting the injunction in the event IDFG satisfied the Court's conditions:

Once baffles are installed and either 1) plaintiffs agree that the shooter in any position cannot fire a round above the berm behind the target, or 2) if the plaintiffs cannot agree, the Court so finds after a view of the premises, the injunction will be lifted and IDF&G may operate that range in the same manner in which it historically has (i.e., without any site supervision), up to 500 shooters per year.

Court's February 23 Order at 59.

IDFG seeks to open a portion of the range renovated as a 100-yard shooting area using a static (fixed) firing line. The approximate location of the 100-yard portion of the range is depicted in the map attached as Exhibit 3 to the Affidavit of Kerry O'Neal.

IDFG retained Kerry O'Neal, who has designed over 100 municipal shooting ranges, to evaluate the Farragut Shooting Range. Mr. O'Neal's qualifications regarding range design and range safety are set forth in his Affidavit, and Exhibit 1 attached

thereto, filed herewith. He confirmed that IDFG has installed and placed ballistic baffles of sufficient size to prevent shooters from any position (standing, kneeling, prone) from firing above the backstop (*i.e.*, the berm behind the target area) at the 100-yard portion of the range. Aff. of Kerry O'Neill ¶¶12-17.

In addition, IDFG engineer Jon Whipple evaluated the placement of overhead and side baffles through range visits and the use of engineering software. Aff. of Jon Whipple ¶8. Mr. Whipple evaluated strike elevations from the firing line to the baffles and backstop at the renovated 100-yard shooting area. Based on his observation and evaluation, he concluded that the baffles prevented shooters from firing above the berm behind the target. Aff. of Jon Whipple ¶11.

Finally, the Court's Order contemplated the Court could itself make this factual determination based on a view of the installation of the baffles at the Range, should the plaintiffs disagree with defendants. February 23 Order at 59.

Having satisfied the Court's condition as it relates to safety for the 100-yard portion of the range for up to 500 shooters per year, IDFG is entitled to lifting of that component of the injunction.

C. IDFG has satisfied the Court's safety conditions to open the 100-yard portion of the Farragut Range for more than 500 shooters per year.

The Court's injunction capped use levels at 500 shooters per year unless IDFG addressed safety and noise concerns specified by the Court. As discussed *supra*, statutory noise standards for state sport shooting ranges are now the legal standard for prospective operations of the Farragut Shooting Range. Regarding safety concerns, the Court required IDFG to include "measures adequate to prevent bullet escapement beyond the boundaries owned and controlled by IDF&G...." Court's February 23 Order at 59. The

Court's safety concern "can be satisfied only by the 'No Blue Sky' rule, or 'totally baffled so that a round cannot escape', as espoused by the nation's preeminent authority on range design and designer of the Vargas Master Plan, Clark Vargas Exhibit 2, p. 5." *Id.* at 59-60.

IDFG renovated the 100-yard range to include an armored shooting shed enclosing the firing line, a series of ballistic baffles, side berms, recycled wood mulch on the range floor, and a screened sand backstop. *Aff. of David Leptich at ¶¶7-8; Aff. of Kerry O'Neal ¶11.* The renovations at the 100-yard shooting area ensure that all direct fire will strike within the 100-yard shooting area and that any rounds fired that strike and skip (ricochet) will be contained within the boundaries owned and controlled by IDFG. *Aff. of Kerry O'Neal ¶22.*

The "No Blue Sky" rule or concept means that a range is constructed so that a shooter cannot see any blue sky downrange. *Aff. of Kerry O'Neal ¶19.* This concept ensures all direct fire hits within the shooting area to prevent bullet escapement from controlled property. "Downrange" means in the direction of the designated impact area. The "downrange," intended impact area at the 100-yard shooting area is the earthen backstop. *Aff. of Kerry O'Neal ¶ 20.*

This use of the term "downrange" is also consistent with the mathematical definition presented in the paper by Clark Vargas referenced by the February 23 Court Order. In this paper, Mr. Vargas described the impact area as being able to deviate 10-degrees to each side of a center line of fire (perpendicular from the firing position to the target line) and allowing him to raise the rifle or pistol at a 30- to 35- degree angle.

Plaintiff's Trial Exhibit 2 at 2. This impact sector area is consistent with the descriptions

of the small arms Surface Danger Zone presented for uncontained ranges in Mr. Vargas' paper and elsewhere.³ See Plaintiff's Trial Exhibit 2 at 2 and reference Figure 1. Mr. Vargas' paper also describes a 100-meter (110-yard) secondary danger zone on an uncontained range for fragments from strikes and ricochets (designated as Area A). *Id.*

IDFG has placed baffles at the 100-yard shooting area so that "No Blue Sky" is visible downrange. Aff. of Kerry O'Neal ¶21; Aff. of David Leptich ¶15. Indeed, IDFG's baffles are placed to provide more than double the horizontal containment espoused by Clark Vargas in Plaintiffs' Trial Exhibit 2. Aff. of Jon Whipple at ¶12; Aff. of David Leptich at ¶15. IDFG also measured vertical angles and verified that vertical angles from shooting positions were better than those espoused by Vargas. Aff. of David Leptich at ¶16.

All direct fire from prone, standing, and kneeling positions from along the designated shooting line at the 100-yard range will strike either a baffle, floor or berm, based on fire from within a horizontal arc up to at least 20 degrees to either side of perpendicular from the designated firing line to the target line. Aff. of Jon Whipple ¶12.

The side berms, backstop and baffle are also within the range of design criteria discussed by Mr. Vargas, in conjunction with a professional evaluation of the Farragut site and rounds allowed at the range. See Plaintiffs Trial Exhibit 2. Berms, baffles, and backstops drastically reduce the potential for rounds to skip (ricochet) out of the bermed shooting area because these structures catch most ricochets, which are low-angle, and because projectile travel distances from ricochets are reduced due to tumbling, fragmentation, deformation and energy loss. See Aff. of Kerry O'Neal at ¶23. Based on

³ As noted in Mr. Vargas' paper and other sources, the distances quoted for the Surface Danger zone are for uncontained ranges; these distances would be reduced with the usage of baffles and backstops. Plaintiffs' Trial Exhibit 2 at 2.

his inspection, experience and observation, Mr. O'Neal concluded that renovations made to the 100-yard range ensure the rounds that do skip over berms are contained within IDFG's property boundaries. *Id.* at ¶¶22. Based on his observations and experience, Mr. O'Neal expressed the opinion that the renovations of the 100-yard range meet the Court's safety requirements for prevention of bullet escapement to allow more than 500 shooters per year. *Id.* at ¶25. IDFG has thus also satisfied the Court's judgment as it relates to safety concerns for the 100-yard range.

IV. CONCLUSION

The Court should grant IDFG's requested relief, and lift its February 23, 2007 injunction as it applies to the renovated 100-yard portion of the Farragut Range and, as to noise abatement, adopt the noise standard of the Idaho Sport Shooting Range Act, codified at Idaho Code §§ 67-9101 to 67-9105, as the standard applicable to operation of the Farragut Shooting Range.

DATED this 10th day of December, 2010.

STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL



KATHLEEN E. TREVER
Deputy Attorney General

CERTIFICATE OF MAILING

I hereby certify that on this 10th day of December, 2010 a true and correct copy of the foregoing **BRIEF IN SUPPORT OF SUMMARY DISPOSITION OF DEFENDANTS' MOTION FOR PARTIAL LIFTING OF INJUNCTION** was faxed or mailed postage prepaid to:

Hon. John T. Mitchell 324 West Garden Avenue P.O. Box 9000 Coeur d'Alene, ID 83816-9000	<input checked="" type="checkbox"/> United States Mail, Postage Prepaid <input type="checkbox"/> Facsimile to (208) 446-1132 <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Courier
Harvey Richman Attorney at Law 19643 N. Perimeter Road Athol, Idaho 83801	<input checked="" type="checkbox"/> United States Mail, Postage Prepaid <input type="checkbox"/> Facsimile <i>+ courtesy PDF</i> <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Courier
Clerk of the Court: Daniel English 451 Government Way P.O. Box 9000 Coeur d'Alene, ID 83816-9000	<input type="checkbox"/> United States Mail, Postage Prepaid <input checked="" type="checkbox"/> Facsimile to (208) 446-1188 <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Courier
Scott W. Reed Attorney at Law (208) 765-5117	<input type="checkbox"/> United States Mail, Postage Prepaid <input type="checkbox"/> Facsimile (208) 765-5117 <input type="checkbox"/> Hand Delivery <i>✓ via email</i> <input type="checkbox"/> Overnight Courier

Kathleen E. Trever

Kathleen E. Trever

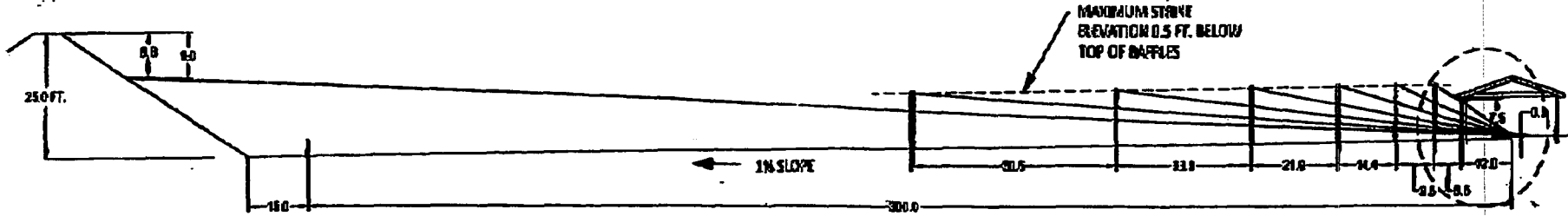
FARRAGUT SHOOTING RANGE 100-YD DISTANCE
 State of Idaho - Fish and Game

P. 01

Dec 10 2010 15:51

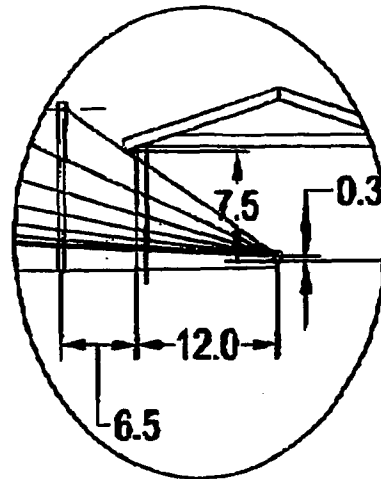
Fax: 208-334-4885

FISH AND GAME



SHOOTING PRONE, 4" FROM FLOOR

- NOTES:**
- GROUND SLOPES DOWN 1% IN THE DOWNRANGE DIRECTION.
 - BAFFLES ARE 4 FT TALL X 82 FT LONG.
 - BOTTOM OF BAFFLES ARE 7.5 FT. FROM THE GROUND.
 - BAFFLE SPACING DESIGNED WITH 0.5 FT. SAFETY DISTANCE FROM TOP OF BAFFLE TO MAXIMUM STRIKE ELEVATIONS.



DATE	ISSUED
STATE OF IDAHO	
DEPARTMENT OF FISH AND GAME	
PROJECT	
PROJECT NO.	200 2000-110
DATE	FARRAGUT SHOOTING RANGE
BY	100-YD DISTANCE
SCALE	PROJECT SHEET
REVISED	002 OF 994

EXHIBIT 2
to
AFFIDAVIT OF
KERRY O'NEAL

TRS RANGE SERVICES**Certified 8(a) Disadvantaged Small Business****April 28, 2010**

**Mr. W. Dallas Burkhalter, Deputy Attorney General
Idaho Department of Fish and Game
2885 West Kathleen Avenue
Coeur d'Alene, Idaho 83815**

**Re: Farragut Shooting Range Site Conditions
Farragut State Park, Bayview, Idaho**

Dear Mr. Burkhalter,

This letter summarizes an inspection conducted on March 11, 2010 by TRS Range Services, LLC (TRS) at the above-referenced shooting range. The Farragut Shooting Range, a cooperative venture of the Idaho Department of Fish and Game (IDFG) and the Idaho Department of Parks and Recreation, was closed while safety improvements were implemented. IDFG contracted TRS to evaluate the current conditions at the shooting range in order to assess the effectiveness of the baffle and berm improvements

As per Judge Mitchell's order, the standard required for the range to re-open is for a baffle to be installed over every firing position and that:

The baffle must be placed and be of sufficient size that the shooter, in any position (standing, kneeling, prone), cannot fire his or her weapon above the berm behind the target.

The order further requires that safety measures be implemented to adequately prevent bullet escapement beyond boundaries owned and controlled by IDFG and specifically requires that:

The first concern (safety) can be satisfied only by the "No Blue Sky" rule, or totally baffled, so that a round cannot escape

The 'No Blue Sky' rule or concept means that the range is constructed so that a shooter, regardless of the shooting position, cannot see any blue sky downrange. Safety features, such as baffles, may be overhead, on the ground, on top of the backstop, in the roof of the firing line cover, in the form of an elongated box, or as a completed enclosed tunnel. The principle behind the design is to equip a range with baffles so that if a fired bullet leaves the confines of the range proper, it will fall to earth within a smaller, more predictable area that is acceptable to protect people or property adjacent to the range.

Based on the March 11, 2010 inspection, TRS has determined that the conditions identified by Judge Mitchell have been satisfied by the range improvements. The range renovation ensures that any rounds that hit and skip will be contained within the property boundaries. In TRS' opinion, IDFG did an outstanding effort in design construction to create a safe and secure shooting facility. It is TRS' opinion, that IDFG has made every effort to surpass industry standards for an outside shooting facility. The following sections of this letter will substantiate this determination; photographs are included at the end of the text.

**www.trsrangeservices.com
TRS RANGE SERVICES, LLC**

**228 E. Plaza St Ste B211 Eagle, Idaho 83616 • 208-938-2891 • 208-938-2892 fax
1739 Maybank Hwy, Ste B Box 326 Charleston, South Carolina 29412 • 843-795-3860 • 843-795-2144 fax**

Letter to D. Burkhalter
April 28, 2010
Page 2 of 8

Range and Berm Construction Improvements

TRS noted the following improvements to the range and berm construction:

- IDFG rebuilt the firing line area; it is currently three-sided and enclosed. (Photos 1, 2, 3, and 4)
- The firing line area ceiling is constructed with the same design as the ballistic baffles for improved safety.
- The backstop is constructed of screened sand. This material should be capable of stopping all rounds including 50 BMG (please note that 50 BMG should not be allowed because it exceeds the baffle design capabilities). The screened sand bullet trap is 20 feet (ft) high. (Photo 5)
- The reconstructed berm design has a 2 to 1 slope; this improvement should minimize erosion and help mitigate any skip outs. The berm is 25 ft high. (Photos 6 and 7)
- IDFG used a recycled wood mulch material for the floor and side berm construction; this material should not only help mediate any ricochet but also be a significant factor in absorbing and minimizing sound. (Photos 8 and 9) The highest point of bullet impact from range floor was 11 ft.
- TRS estimates that the berm construction will result in a sound reduction of 10 to 20 percent; this estimate does not include the wood mulch material which will only further reduce noise.

Ballistic Baffle Installation

TRS noted the following information regarding the baffle installation:

- IDFG installed ballistic baffles to meet rifle-rated specifications up to and including .338 Winchester magnum; baffles are shown in Photos 10, 11, 12, 13. Baffle tests are shown in Photos 22, and 23.
- The bottoms of the ballistic baffles form the range floor and the support posts are protected for added safety. (Photos 14 and 15)

"No Blue Sky" Rule Observations

TRS did not observe any evidence of blue sky down range in either a prone or standing position. These observations are documented in Photos 16, 17, 18, 19, 20, and 21.


www.trsrangeeservices.com
TRS RANGE SERVICES, LLC

228 E. Plaza St Ste B211 Eagle, Idaho 83616 • 208-938-2691 • 208-938-2892 fax
1739 Maybank Hwy, Ste B Box 326 Charleston, South Carolina 29412 • 843-795-3880 • 843-795-2144 fax

Letter to D. Burkhalter
April 28, 2010
Page 3 of 9

As previously stated, it is TRS' opinion that IDFG satisfied the requirements of the court order by the improvements implemented at the Farragut Shooting Range. As requested, a copy of my resume is included at the end of this report. Please contact me at 208-938-2891 if you have any questions regarding this letter.

Sincerely,



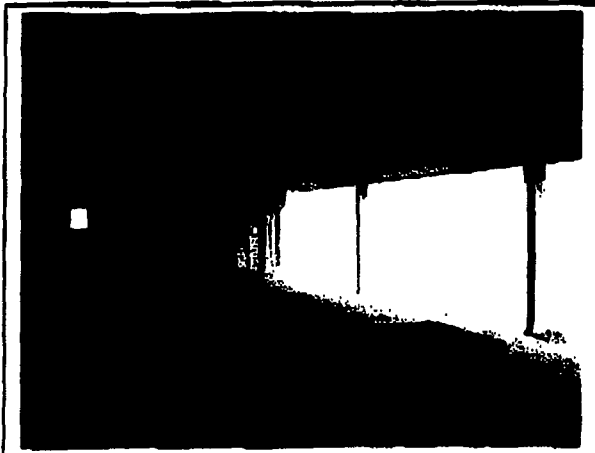
Kerry O'Neal
TRS Range Services

www.trsrangeservices.com
TRS Range Services, LLC

228 E. Plaza St Ste 9211 Eagle, Idaho 83616 • 208-938-2891 • 208-938-2892 fax
1739 Maybank Hwy, Ste B Box 326 Charleston, South Carolina 29412 • 843-795-3860 • 843-795-2144 fax

Letter to D. Burkhalter
April 28, 2010
Page 4 of 9

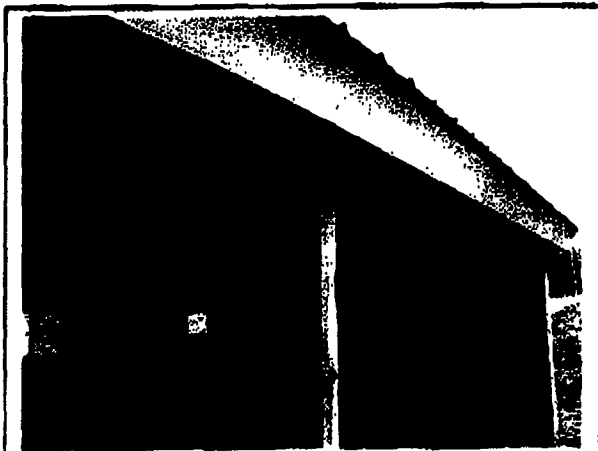
Photos



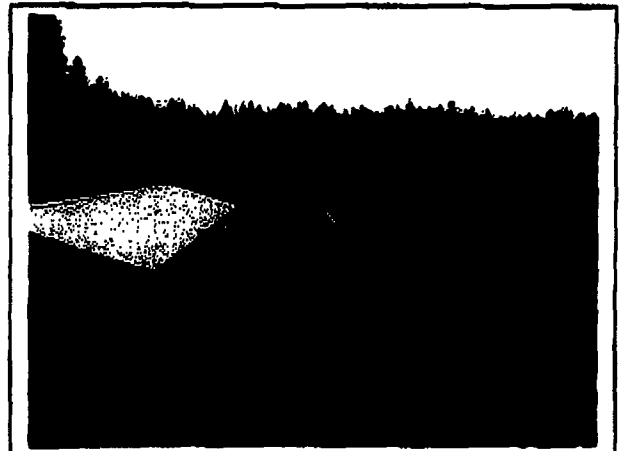
PHOTOGRAPH 1
March 11, 2010
Firing line area



PHOTOGRAPH 3
March 11, 2010
Firing line area



PHOTOGRAPH 2
March 11, 2010
Firing line area



PHOTOGRAPH 4
March 11, 2010
Firing line area and baffles

Letter to D. Burkhalter
April 28, 2010
Page 5 of 9



PHOTOGRAPH 5
March 11, 2010
Screened sand bullet trap



PHOTOGRAPH 7
March 11, 2010
Reconstructed berm slope of 2 to 1

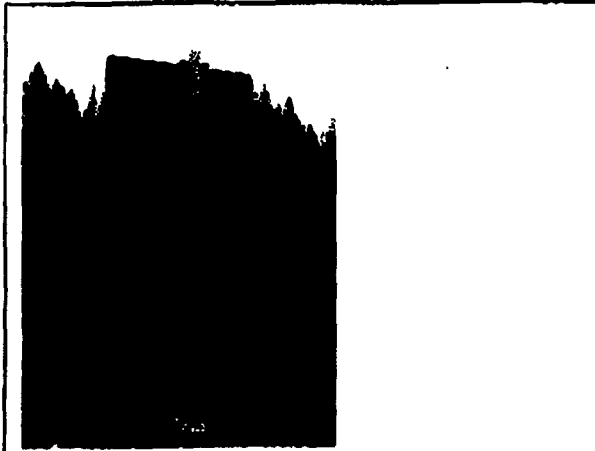


PHOTOGRAPH 6
March 11, 2010
Reconstructed berm, baffles, and sand trap



PHOTOGRAPH 8
March 11, 2010
Recycled mulch material used in floor and side berm construction

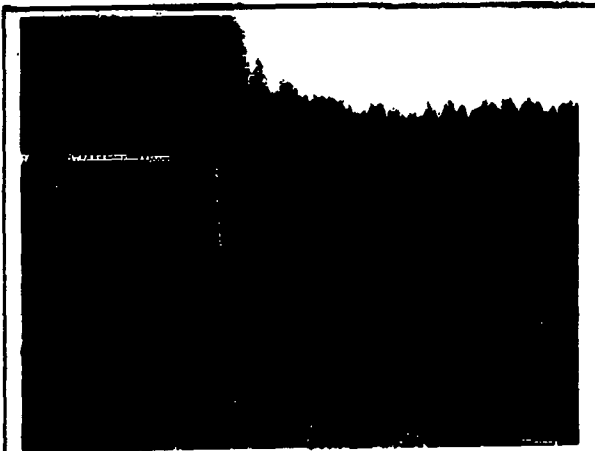
Letter to D. Burkhalter
April 28, 2010
Page 6 of 9



PHOTOGRAPH 9
March 11, 2010
Recycled mulch material used in floor and side berm construction



PHOTOGRAPH 11
March 11, 2010
Baffles



PHOTOGRAPH 10
March 11, 2010
Baffles and side berms

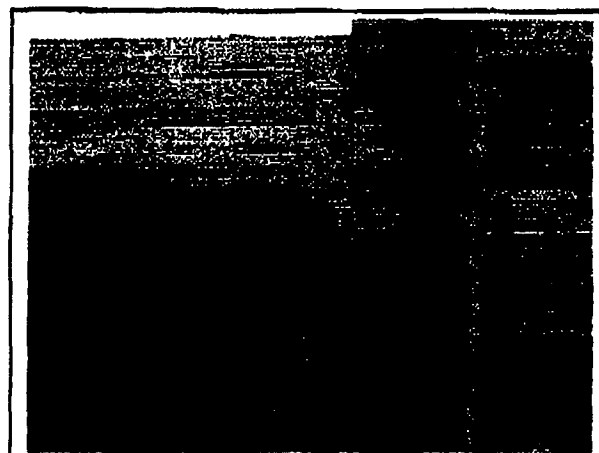


PHOTOGRAPH 12
March 11, 2010
Baffles

Letter to D. Burkhalter
April 28, 2010
Page 7 of 8



PHOTOGRAPH 13
March 11, 2010
Baffles and side berms



PHOTOGRAPH 15
March 11, 2010
Baffle bases form firing range floor



PHOTOGRAPH 14
March 11, 2010
Baffle bases form firing range floor



PHOTOGRAPH 16
March 11, 2010
"No Blue Sky" observation

Letter to D. Burkhalter
April 28, 2010
Page 8 of 9



PHOTOGRAPH 17
March 11, 2010
"No Blue Sky" observation



PHOTOGRAPH 19
March 11, 2010
"No Blue Sky" observation



PHOTOGRAPH 18
March 11, 2010
"No Blue Sky" observation

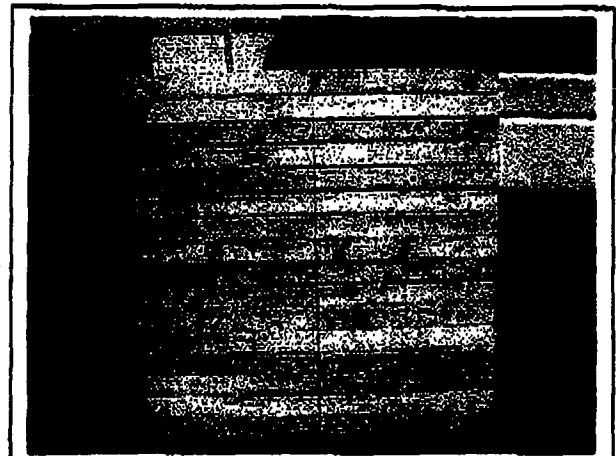


PHOTOGRAPH 20
March 11, 2010
"No Blue Sky" observation

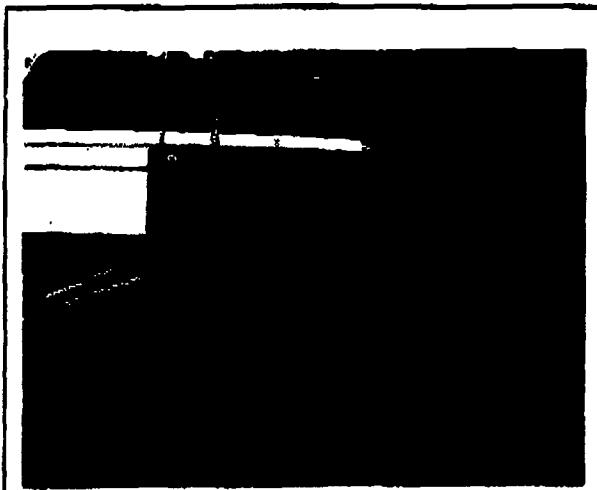
Letter to D. Burkhalter
April 28, 2010
Page 9 of 9



PHOTOGRAPH 21
March 11, 2010
"No Blue Sky" observation



PHOTOGRAPH 23
Test Baffle



PHOTOGRAPH 22
Test Baffle

EXHIBIT 3
to
AFFIDAVIT OF
KERRY O'NEAL

KERRY O'NEAL**TRS RANGE SERVICES****RESUME/EXPERIENCE, CONTINUED****Relevant Project Experience, partial listing**

The following is a partial listing of Mr. O'Neal's project experience. Additional information is available on request.

Indoor Firing Ranges

Mr. O'Neal has worked on the design and planning for indoor firing ranges, including:

- **Idaho Army National Guard, Gowen, Idaho**
Mr. O'Neal is the technical lead and prime construction manager for the design-build of the Live Fire Shoot House and support buildings to include ammunition storage, after action review and operational building.
- **Federal Bureau of Investigation, Washington DC**
Mr. O'Neal completed an evaluation of the existing indoor firing range with recommendations for upgrades and modifications.
- **Meridian Police Department, Meridian, Idaho**
Mr. O'Neal has worked with and developed a conceptual plan for the department's proposed indoor firing range, offices and classroom.
- **US Defense Supply Center, Columbus Ohio**
- Mr. O'Neal designed and installed the bullet containment system, safety ceiling, overhead baffling for the indoor training range.

Outdoor Firing Ranges

Mr. O'Neal has provided his expertise in construction and ranges at over 100 outdoor firing ranges. The following FBI project description is representative of these projects.

- **Federal Bureau of Investigation, Locations Throughout US**
Mr. O'Neal is the Project Manager and lead technical and construction personnel on over 10 FBI firing ranges. The project work has included removal and recycling of lead; upgrades to targetry; modification of backstops and bullet containment systems; installation of overhead baffling systems; design and installation of range-sniper and rappel towers. The project locations (partial listing) include:
 - Quantico, VA
 - Las Vegas, Nevada
 - El Toro Marine Base, California
 - New Haven, Connecticut
 - Chicago, Illinois
 - Kaneohe Marine Base, Hawaii
 - Pass Christian, Mississippi
 - New Orleans, Louisiana

Consulting-Design-Planning Services

Mr. O'Neal has provided his expertise in consulting on range design for law enforcement agencies, range users and expert witness services.

- **Shawnee County Sheriff, Topeka Kansas**
Mr. O'Neal has evaluated the County's existing firing range to determine safety issues. Additional services have included site evaluation of other potential properties for relocating the range. Mr. O'Neal has presented the proposed range designs for county board approval.
- **Boise Police Department, Boise Idaho**
Mr. O'Neal has evaluated the County's existing firing range to determine safety issues. Additional services have included site evaluation of other potential properties for relocating the range. Mr. O'Neal has presented the proposed range designs for county board approval
- **Department of Justice**
Mr. O'Neal provided an evaluation of an existing firing range with emphasis on construction and proposed improvement to the range.

Scott W. Reed, ISB#818
Attorney at Law
P. O. Box A
Coeur d'Alene, ID 83816
Phone (208) 664-2161
FAX (208) 765-5117

Harvey Richman, ISB#2992
Attorney at Law
19643 N. Perimeter Road
Athol, Idaho 83801
Phone (208) 683-2732

STATE OF IDAHO }
COUNTY OF KOOTENAI } SS
FILED:

2010 DEC 20 PM 1:05

CLERK DISTRICT COURT
[Signature]
DEPUTY

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

**CITIZENS AGAINST RANGE EXPANSION,)
an Unincorporated non-profit Association;)
JEANNE J. HOM, a single woman; EUGENE)
and KATHLEEN RILEY, husband and wife;)
LAMBERT and DENISE RILEY, husband)
and wife; GABRIELLE GROTH-MARNAT, a)
single woman, GERALD PRICE, a single man;)
RONALD and DOROTHY ELDRIDGE,)
husband and wife; and, GLENN and LUCY)
CHAPIN, husband and wife, SHERYL)
PUCKETT, a single woman; CHARLES)
MURRAY and CYNTHIA MURRAY, husband)
and wife; and DAVE VIG, a single man,)**

Plaintiffs,

vs.

**IDAHO FISH AND GAME DEPARTMENT,)
an agency of the STATE OF IDAHO, and)
STEVEN M. HUFFAKER, Director of the)
IDAHO FISH AND GAME DEPARTMENT,)**

Defendants.

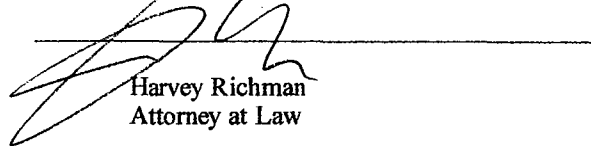
Case No. CV-05-6253

AFFIDAVIT OF HARVEY RICHMAN

AFFIDAVIT OF HARVEY RICHMAN

Affidavit of Harvey Richman before me the undersigned authority personally appeared Harvey Richman who by me first being duly sworn, deposes and says:

1. That he is an attorney of record for the Plaintiffs herein and that attached hereto are true, but highlighted copies of portions of the Deposition of Kerry O'Neal taken on the 8th day of October, 2010; and letter from the State of Idaho, Division of Building and Safety.
2. Further Affiant sayeth not.



Harvey Richman
Attorney at Law

Dated this 21st day of December 2010.

*Sworn to
Oct 21, 2010
D.C./MC*

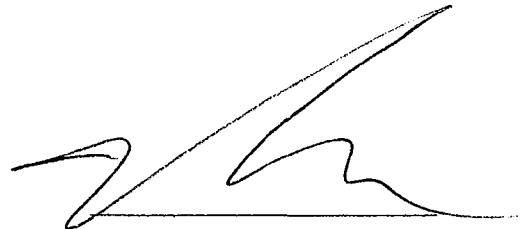
*DANIEL J. [unclear]
Deputy Attorney General
Sworn to*

CERTIFICATE OF MAILING

I hereby certify that on this 21st day of December, 2010 a true and correct copy of the foregoing Affidavit of Harvey Richman was this day sent postage prepaid, by US mail to:

Kathleen E. Trever
W. Dallas Burkhalter
Deputy Attorneys General P.O. Box 25
Boise, ID 83707
Phone (208) 334-3771
FAX (208) 334-4485

Attorneys for Defendants



By: Harvey Richman
Attorney at Law

AFFIDAVIT OF HARVEY RICHMAN

ORIGINAL

Scott W. Reed, ISB#818
Attorney at Law
P. O. Box A
Coeur d'Alene, ID 83816
Phone (208) 664-2161
FAX (208) 765-5117

Harvey Richman, ISB#2992
Attorney at Law
19643 N. Perimeter Road
Athol, Idaho 83801
Phone (208) 683-2732

STATE OF IDAHO
COUNTY OF KOOTENAI } SS
FILED:

2010 DEC 27 PM 3: 51

ORIGINAL

CLERK DISTRICT COURT
Bruce Crumpton
DEPUTY

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

CITIZENS AGAINST RANGE EXPANSION,)
an Unincorporated non-profit Association;)
JEANNE J. HOM, a single woman; EUGENE)
and KATHLEEN RILEY, husband and wife;)
LAMBERT and DENISE RILEY, husband)
and wife; GABRIELLE GROTH-MARNAT, a)
single woman, GERALD PRICE, a single man;)
RONALD and DOROTHY ELDRIDGE,)
husband and wife; and, GLENN and LUCY)
CHAPIN, husband and wife, SHERYL)
PUCKETT, a single woman; CHARLES)
MURRAY and CYNTHIA MURRAY, husband)
and wife; and DAVE VIG, a single man,)

Plaintiffs,

Vs.

IDAHO FISH AND GAME DEPARTMENT,)
an agency of the STATE OF IDAHO, and)
STEVEN M. HUFFAKER, Director of the)
IDAHO FISH AND GAME DEPARTMENT,)

Defendants.

Case No. CV-05-6253

**BRIEF IN RESPONSE DEFENDANTS SUMMARY
DISPOSITION OF THE CAUSE AND BRIEF IN
SUPPORT OF PLAINTIFF'S MOTION FOR
SUMMARY JUDGMENT**

BRIEF IN RESPONSE DEFENDANTS SUMMARY DISPOSITION OF THE CAUSE AND BRIEF IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Comes now the Plaintiffs by and through their undersigned attorney and in response to the briefing of the Defendant and in support of their Motion for Summary Judgment and states:

I. ISSUES PRESENTED

1. Do the noise standards enacted by the Idaho Legislature in 2008 for state outdoor sport shooting ranges apply to operations of the Farragut Shooting Range? In addition, is the noise standard in Idaho Code 67-9102, Constitutional?
2. Has IDFG complied with the Court's February 23 Order sufficiently to open a renovated 100-yard shooting area at Farragut Range up to 500 shooters per year?
3. Has the IDFG complied sufficiently with the February 23 Order to open a renovated 100-yard shooting range area for more than 500 shooters per year?

II. BACKGROUND

As set forth in the Order entered February 23, 2007, all shooting ranges shall remain closed until the following condition is met regarding the installation of each baffle:

The baffle must be placed and be of sufficient size that the shooter, in any position (standing, kneeling, prone), cannot fire his or her weapon above the berm behind the target. Either the parties shall agree that the baffles have been adequately installed or that issue shall be submitted for view of the premises by the Court. . .

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the annual use level shall not exceed 500 shooters per year until and unless defendant Idaho Department of Fish and Game has constructed and installed safety measures adequate to prevent bullet escapement beyond the boundaries owned and controlled by defendant Idaho Department of Fish and Game and constructed and installed noise abatement measures to reduce noise to a decibel level agreed upon by the parties in the first instance, or, if the parties are unable to agree, to be set by the Court following further evidence. Such further use shall only be commenced upon Order of this court following hearing establishing that the safety and noise concerns have been eliminated in the manner satisfactory to the Court based upon its Findings of Fact, Conclusions of Law and Order.

Final Judgment was entered. Defendants did not appeal. There was no further communication by the Department nor its counsel in the following years until the Motion to Lift the Injunction was filed.

In 2007 +/- petitioners and their counsel first saw earth moving and then construction at the range. Construction proceeded for some time until superficially appearing to be completed.

Contact was made with the Board of Fish and Game Commissioners in a meeting at the range by attorney Harvey Richman. The meeting produced little information. Further communication was made with counsel for the defendants, ultimately, leading to defendants' Motion to Lift the Injunction and subsequent pleadings.

Plaintiffs request for discovery and production produced a document previously unknown to plaintiffs. (Exhibit K, Caulder Preservation Deposition) Within two months after final judgment, the Department had retained its expert in the initial proceeding, Clark Vargas, to design a plan for the Farragut Shooting Range that allegedly met the requirements set forth in the Order and Judgment at least as to the safety concerns. The new Vargas Master plan dated March 2007 as above referred.

The Department was heeding the Court's admonition in its Memorandum Decision.

Idaho Department of Fish and Game cannot ignore Vargas's opinion either as to safe range design or as to site selection. (Memorandum Decision, page 49).

In its Memorandum Decision, Order and Judgment, the Court was urging a two step process in the event that the Department chose to comply with the requirements to reopen the range.

- (1) Attempt to reach agreement with plaintiffs as to meeting the required safety and noise restrictions entered by the Court.
- (2) If no agreement was reached, submit the proposed safety and noise issues to the Court for final resolution.

Considering that renovations to the shooting range could be very expensive, the prudent action would have been to submit the new Vargas Master Plan to plaintiffs to see if agreement could be reached; if agreement could not be reached, then submit the Vargas plan to the Court, have a hearing and obtain Court guidance.

Instead the Department proceeded immediately to undertake construction. The new Vargas Master Plan was filed with the Kootenai County Building Department to obtain the requisite permits. No copy was sent to plaintiffs. What is now before the Court is new construction made at a cost of approximately \$400,000 +/- . That construction does not fully comply with this Court's detailed ruling as to safety enough to contain bullets fired from guns at the firing line within the fenced boundaries of the range". (§36) The Court then adopted the "no blue sky" rule or "fully contained range" concept espoused by Clark Vargas. (§49) The Court then said that ... "from the Plaintiffs standpoint, if a baffle is placed above and in front of each firing position, the chance of bullet escapement from the existing range is significantly reduced. If such a baffle is placed above and in front of each firing position, and the range is operated at no more than 500 shooters per year, the range need not be supervised." (Emphasis supplied). The Court then noted, "However, if zero bullet escapement is achieved in the range as constructed, supervision is not required as supervision in that situation only inures to the benefit of the shooters." (§51)

"...the applicable safety standards require that the range be baffled completely from the firing line to the target line...." (§59) "The Farragut shooting range as it presently exists and as proposed for expansion in the

Vargas Master Plan must, for the safety of all persons within the Surface Danger Zone, be subject to the “No Blue Sky” rule. (§61, emphasis supplied)

“The No Blue Sky” rule is that all pistol and rifle ranges be designed to include containment to eliminate “Blue Sky” view from all potential shooting positions. Containment must not only be from all firing positions shown on the plans, but also from the impromptu locations that can be anticipated and available to be established by shooters.” (§62, emphasis supplied)

Inclusion of these afore said Findings of Fact are implicit in the Court Order as contained in the Conclusion and Order. One must read the Order by including everything within the four corners of the document.

These principles cannot be ignored.

III. SUMMARY JUDGMENT POSITION

This is a non-jury cause with cross motions for Summary Judgment having been filed based upon the same set of facts with the same issues of law, i.e. interpretation and meaning of the original Injunctive Order, and the issues of the Constitutionality of the Statute on noise for State owned sport shooting ranges, and an application of the facts raised in affidavits and depositions. In that regard there are some principles of law that must be brought forward. The first is that Summary Judgment may be rendered for any party, not just the moving party, under the Rules of Civil Procedure, I.R.C.P. 56(a),(b),(c),(d). The flexibility in designing Summary Judgment Orders is clearly the intent of the drafters of the Civil Rules. As stated in I.R.C.P 1 (a), “These rules shall be liberally construed to secure the just, speedy and inexpensive determination of every action and proceeding.” *See Brummett v. Ediger 106 Idaho Report 724, 682 P.2 1271*. That case goes on to say that if the record contains conflicting inferences or reasonable minds might reach different conclusions, a Summary Judgment must be denied. The reciprocal is likewise true , that if the inferences are not conflicting and reasonable minds could not reach different

conclusions, then a Summary Judgment should be granted. In this case, since the inferences are not conflicting, no reasonable mind can agree with the Defense position. See *Bonz v. Sudweeks*, 119 Idaho 539, 808 P.2 876. More importantly as to this case, the Court in, *AID Insurance Co v. Armstrong*, 119 Idaho 897, 811 P.2 507, ruled, page 900, “ Usually, when ruling on a Motion for Summary Judgment, the Court is not permitted to weigh the evidence or to resolve controverted factual issues....however, if the Court will be the ultimate fact finder and if both parties move for Summary Judgment, basing their Motions on the same evidentiary facts, theories, and issues, then summary judgment is appropriate even though conflicting inferences are possible, so long as all the evidence is confined entirely to the record.” This is the principle under, which we now proceed. At the time of the writing of this brief the Court has not yet had the opportunity to address the Motions to Strike the Affidavits. For purposes of this Motion only, we will assume the Affidavits will stand. Notwithstanding, with the Court allowing the leeway referenced in *AID Insurance*, supra, it is clear that the Affidavit dated August 12 of and the Preservation Deposition testimony of James Caulder, when reviewed, shows that the range as built will permit bullets to go over the 100 yard back berm and the old Navy back berm; leaving the property controlled by the Idaho Department of Fish and Game, go through the sidewalls; go through the overhead canopy; go through the “blue sky” openings on the right and left side of the 100 yard range; and the largest portion of the range i.e. that area unimproved, is still totally un baffled from the firing line to the back berm; leaving the impromptu shooting positions perilously available on at least 300 yards of the old firing line. It should also be remembered; no supervision, rules or regulations are in place or even existing. In the end, the only engineering opinion i.e. Jim Caulder’s, is that the Defense is not compliant with bullet control as mandated by the Court. Even if the Affidavits of O’Neal and Whipple are allowed, neither one brings bullet control to the zero escape level.

IV. ARGUMENT (SAFETY)

We do not question that a series of “improvements” have been made to the Farragut range. The efficacy of those improvements can only be judged by expert testimony. Whether the testimony supplied of record in this cause, by the Defendant, suffices to meet that standard is a matter to be determined by the Court. We urge that it has wholly failed, by providing conclusions only, through an incompetent range designer, and limited input from Fish and Game’s staff engineer Whipple.

When the Court closed the range, it spoke to the entirety of the old Navy range. Nothing in that Court Order authorized or allowed for a subdividing so that a portion of the range could be opened with the remainder of the range closed. This is not a glass of water that can be half empty. This is more like a pregnant mare. She is in foal or not.

There are issues of fact exist remaining which would prevent summary judgment in favor of the Defendants when the affidavit of Caulder August 12 and his preservation deposition of are reviewed. To suggest that there are no disputed facts on actual bullet escapement or the erection of baffles in front of “every firing position” belies credulity. It is also worthy to note that the deposition of Kerry O’Neal, portions of which are now of record in these proceedings, causes the entirety of the affidavits of O’Neal to be recanted, yet the admissions made by him must be deemed admissions of a party opponent, as he was an authorized speaking agent, whether he is competent as an expert, val non, and held against the Idaho Department of Fish and Game.

When the defense argues that the range is totally baffled, but they ignore the Courts’ wording in ¶62 related to “all potential shooting positions” and from the “impromptu locations that can be anticipated and available to be

established by shooters”, is to put on the same blinders that the Court found the Idaho Department of Fish and Game was wearing, when it testified at the original trial of the cause.

Purely from a logical argument perspective, with one individual inside the shooting shed on the 100 yard range, even with a range officer standing behind him, what is to prevent other shooters from making a shot from the 600 yard range down to the targets? It is this behavior from which the Court sought to protect the downrange homeowners, behavior which Fish and Game seeks to totally ignore.

The observation of O’Neal, that he saw no ‘blue sky’ openings “downrange” is an argument based on a parsing of words. Even the document relied upon by the Defense in its brief, i.e. The Design Criteria For Shooting Ranges, by Clark Vargas, does not define “downrange”, as the defendant would have. A dictionary definition of “downrange”, as found in the Second Edition of Webster’s Dictionary of The English Language, reads “downrange...away from where a missile was fired.” No limitation of downrange can be made out nor can one imply that the Court meant something other than “away from the firing line.” A full 180° arc was contemplated by the Court. Any other interpretation makes no common sense. (See deposition O’Neal page 111).

When safety is an issue, as in this case, an attempt to define safety, as done here by the defense, not only borders on the absurd but creates life and death risks, were their theory to be followed.

Mr. O’Neal admits in his deposition (page 61) that accidental discharges occur and that bullets can and will go through those downrange openings on the left and right as exhibited in the photos attached to the Caulder affidavit and deposition.

This Court could not have meant that bullets going through those openings, whether accidentally or on purpose, and proceeding downrange and landing on private property will be deemed non-existing because of some tortured distortion of an explanation purportedly found in a Vargas document.

Other admissions made by Mr. O’Neal are:

- a. Rounds hitting the concrete footings and going up and downrange (pages 42-43).

- b. The steel in the baffle stanchions represent a ricochet hazard (page 45).
- c. A shooter can see “blue sky” through the open space on each side of the range (page 50).
- d. A shooter can shoot through the “open space” and a round would go over the back berm and probably leave the IDFG ¾ mile property. (pages 74-75).
- e. Cannot represent to the Court that no round will leave the range (page 76).
- f. Accidentally discharged rounds will go over the back berm (page 76).
- g. Walls of shooting shed not armored and a round so shot would go through until gravity pulled it to the earth beyond the Idaho Department of Fish and Game property (pages 82, 84).
- h. Persons could shoot from the 600-yard line over the backstop (pages 85-86).
- i. The concrete baffle supports should be covered (page 89).
- j. Today the range floor is covered with log yard waste, which has the ballistic prevention equivalency of balled up newspaper (pages 8-90)
- k. Persons who shoot too far to the left or right can shoot through the “blue sky” openings (page 109).
- l. Defines “fully contained”, as a range as one in which direct fire and ricochets are totally contained within the limits of the range (page 110).
- m. Defines a “partially contained range” as one which does not control ricochets, they are simply reduced by baffles and side berms (page 111).
- n. “Blue Sky” is visible from the 100 yard shooting line (page 111).
- o. Using the ETL definitions the Farragut range does not qualify as a “partially contained range” because of the “blue sky” openings (page 112).
- p. The difference between a “partially contained range” and a “fully contained range” is the issue of containment of ricochets (page 113).
- q. Log yard waste has the equivalency of balled up newspaper (pages 116-117).

- r. If the soil at Farragut range is excessively rocky, the rocks should be removed (page 117).
- s. The side berm wall should extend one meter behind the firing line to prevent a bullet, fired parallel to the firing line, from leaving the range (page 121).
- t. The present side berm as constructed allows for bullet escape (pages 121, 126).
- u. He cannot certify to the Court that the steel used in the baffles is 10 gauge or that it is the same steel he uses in his standard baffles (pages 126-127).
- v. That the baffles as designed are subject to penetration (page 128).
- w. That a bullet piercing that baffle may go over the back berm (page 129).
- x. If the back berm has concrete debris in the first two feet of the material it would violate his design standards and he has no knowledge of whether that circumstance exists or not. He cannot represent to the Court that the 100 yard range design has achieved zero bullet escapement if he allows for accidental or negligent discharges and under those circumstances a bullet can leave the range and that zero bullet escapement has not been attained (pages 140-141).
- y. That "blue sky" is visible from the old 200 yard shooting line as there are no baffles in that location whatsoever (pages 141-143).
- z. There has been no testing of bullet escapement on the range (page 147).
- aa. No statistical analysis of any hazard assessment has been done at the range (page 149).
- bb. Log yard waste provides little more than a visual beautification to the site (page 168).
- cc. He does not do sound amelioration; he hires others to that (page 159).
- dd. That the downrange baffle stanchions are not covered with dimensional timber or otherwise protected with wood, but should have been (page 161).
- ee. He has never read the Court Order (page 165).
- ff. He has no understanding of the definition of "impromptu" (page 167-168).

- gg. If an individual did not obey the rules that might be in place at the range, a round could leave the range (page 168).
- hh. All shooters are on their honor to obey the rules (page 169).
- ii. He admits a round could leave the range if shooters approach the impromptu locations that can be anticipated and available to be established by shooters and that the range is not compliant with that provision (pages 169-171).
- jj. He admits that when he said the backstop was constructed of screened sand, that he did not know that to be true (page 182).
- kk. When asked to what publish work did he defer as the major guide in range construction, he answered, "none". (page 183).
- ll. When asked what books should be in a range design library, he responded "I would say the best advice would be to develop your own or go out on site and examine the ranges personally, because you're going to find, what's out there is not 100% conclusive" (page 185).
- mm. He can cite to no engineering authority to which he is referable in range design. (page 186).
- nn. He has had no peer review of his work (page 187).
- oo. When asked, do you have any written documentation from any of the people for whom you have worked, to suggest that your work is good, bad, or indifferent, he answered, "I do not". (page 198).

Mr. O'Neal goes on to say in ¶24 of his affidavit that it is "highly improbable" that rounds from the 100 yard shooting area would leave the property controlled by Idaho Department of Fish and Game. Notwithstanding that he admittedly has no scientific or engineering basis for the statement, he impliedly admits that some bullets can, may, and/or will leave the range and go over the back berm, such that 100% containment has not been achieved. (See Deposition (pages 169-171)).

It is important to understand that this Court did not speak to the allowance of some bullets, however small, to escape the range, this Court spoke to absolute 100% zero bullet escapement. (§50-51 Findings of Fact) It is consequential to remember in the testimony of Jim Caulder, both in his affidavit of August 12, and in his Deposition and as consented to by O'Neal in his Deposition (pages 110-111, 113) that a "fully contained range", which verbiage was actually used by this Court, requires that zero ricochets escape the range.

This range has been designed, by intention, to be a "partially contained range", which by definition does not prevent ricochet escape. (See definition in ETL and Deposition of O'Neal pages 111, 113). It is also consequential to note that the affidavits of the Defense and the argument contained in the brief for the Defense pointedly use the phrase "direct fire" and punctiliously avoids addressing the ricochet issue. The only attempt to even approach the ricochet question is through Kerry O'Neal's unsupported comment that most ricochets will remain within the range rectangle. When this squares off against the testimony of Jim Caulder, and the studies upon which he basis his opinion, supporting the 50% SDZ ricochet area rule, then all of the testimony of the Defense falls flat.

The August 12 affidavit of Jim Caulder is supported by his published, peer reviewed work, the Engineering Technical Letter, ETL02 and upgraded ETL08 version, as found in his preservation Deposition, which is the standard by which ranges can be judged. We do not suggest that this Court has adopted that standard as it's' rule. This Court has in fact adopted a zero bullet escapement standard. First 500 and under from the back berm and for over 500, the property line owned and controlled by the Idaho Department of Fish and Game. If the IDFG had built a "fully contained range", and protected the unimproved areas of the range, they might be compliant. This was doable. The Defense never even submitted their proposed range improvement to be reviewed by the Plaintiffs, which certainly would have helped. The drawing by Mr. Vargas, exhibit K page G2 and G4, of the Caulder Preservation Deposition, sums up the case, the Idaho Department of Fish and Game simply does not own enough downrange land if any rounds are able to escape the range rectangle.

We urge that this Court rule upon the admissibility issues argued and presented in the Plaintiffs motions to strike, for if they are successful then the affidavit and Deposition of James Caulder is 100% unopposed. Everything, which he testified to, is untraversed. Notwithstanding, even if the affidavits of the Defense are admitted, the Court's safety requirements have simply not been met. Most importantly, O'Neal admits that bullets can and will go through the unarmored sidewall of the shooting shed or leave the range and bullets can and will go through the unarmored overhead canopy above 10:30 o'clock high and leave the range and that bullets will go through the "open space" or as the Court and Plaintiffs refer to it as "blue sky" openings, and go over the back berm and leave the range, add the ricochets and the impromptu areas and the range is a bullet sieve. For those reasons alone the petition to lift the injunction as to safety issues, fails.

(NOISE)

The Defendant argues that the state may lawfully enact a statewide sport shooting range noise statute because "The February 23 Order did not establish noise standards or a method for measuring noise, deferring the issue to agreement of the parties, or in the event no agreement was reached, making a determination with additional evidence. (See Defendants brief page 5)

This linchpin of their argument is blatantly false. The Court in its' Order specifically set out the level of, method, manner and place of measuring noise at Farragut (Memorandum Decision pages 21-26)

With this fulcrum theory destroyed, the Defendants argument likewise so buttressed, **fails.**

As to noise, the Department undertook a different tack: Change the law. The Memorandum Decision was specific in finding the existing noise level based upon the testimony of two noise experts:

The Court finds Nightingale credible that DNL should not be used in measuring noise levels at a gun range. In the rural community of Bayview, which has background ambient should levels in

the range of 25 dBA to 35 dBA, the acceptable sound pressure level at the private property line should not exceed 55 dBA, as measured with a certified sound measuring device with an IMPULSE filter. This finding is in accordance with the Shomer studies relied upon by Nightingale and the guidelines of the World Health Organization (WHO). (Plaintiffs' Exhibit 16)

(Memorandum Decision, pages 22–23)

In its Conclusions of Law, the Court was specific again in determining that a noise level in excess of 55 dBA, as for example 65 dBA, was in violation:

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

(Memorandum Opinion, page 51).

...NOISE ABATEMENT MEASURES TO REDUCE NOISE TO A DECIBEL LEVEL AGREED UPON BY THE PARTIES...

(Memorandum Opinion Page 61)

The use by the Court of the word "reduce noise" ensures that 55dBA was the accepted maximum level and thus, the law of this case. If users' numbers were to increase materially above the 501 level, then a "reduction of noise" may need to be addressed.

By rejecting the DNL (day night average noise level) fast mode filter measurement criteria concept proposed by the Defense expert Hansen, the Court clearly adopted a single event, impulse mode filter measurement criteria, as its' violation standard, as proposed by Nightingale. The new noise statute's use of LEQ (Equivalent Continuous Sound Level) (h)-fast mode rather than the Courts' 55dBA single event impulse mode standard and the Statute's mandate for LEQ (h) one hour averaging, all allow for greater noise pollution emissions, by reducing overall actual noise measurements by dilution over time of an already diluted (fast mode filter) noise measurement.

The Department again did not seek agreement with the plaintiffs nor come up with a plan that would control the noise or present a better idea to the Court. Instead, the Department went to the Idaho Legislature, again without any disclosure to plaintiffs before or during the 2008 legislative session, of its attempt to have the legislature post hoc change, the final Decision and Judgment of this Court.

The result was House Bill 515, Idaho Code §67-9102, Ch. 116, §1. p. 233 (2008). House Bill 515 applied only to state outdoor shooting range, specifically not to any other outdoor sport shooting ranges in Idaho. The provision directed at this Court's Memorandum Decision, Order and Judgment in this case is in subparagraph:

- (1) The noise emitted from a state outdoor sport shooting range shall not exceed an Leq (h) of sixty-four (64) dBA.**

House Bill 515 is special legislation in violation of the Idaho Constitution. See *Concerned Taxpayers of Kootenai County v. Kootenai County*, 137 Idaho 196, 50 P.3d 991 (2002). House Bill 515 was “. . . a special enactment designed only to affect one particular lawsuit. . .” in violation of separation of powers. See *Idaho Schools of Equal Educational Opportunity v. State of Idaho*, 140 Idaho 586, 592, 97 P.3d 453, _____ (2004).

The legislative record is being filed with the Court. As a factual background, there are only two state owned shooting ranges, both operated by the Idaho Department of Fish and Game at Farragut and Black's Creek. Record State Resources & Environment, March 5, 2008, p. 5.

Black's Creek is on the sagebrush flat south of Boise off Highway 95, north of Mountain Home. There the down range is miles of uninhabited desert land. There are no residents within earshot from any firing at Black's Creek.

We note here that IF&G now contends that the Garden Valley and George Nourse shooting ranges are also "State owned" sport shooting ranges. They did not seem to know of those ranges at the time of their legislative testimony. However, without arguing that point, they too are not affected by noise issues, as they are rural and totally isolated from inhabited dwellings. (See Holder Affidavit with aerial Google pictures of the ranges)

The legislative record is clear and explicit in the direction to reverse this Court Finding's of Fact and Conclusions of Law that 55 dBA was the applicable maximum noise level. These are excerpts from Legislative Committee Record.

HB515 The last item of business on the agenda was HB515. Rep. Eskridge presented this bill which creates a new section in Idaho Code to provide for the operation and use of State outdoor sport shooting ranges. Rep. Eskridge explained that this bill also helps deal with the litigation issue at Farragut State Park and will help protect the State against similar litigation in the future. . . .

Sharon Kiefer Sharon Kiefer, representing the Idaho Fish & Game Dept. (IF&G) stood to testify in favor of HB515. She reviewed the merits of this bill and related that IF&G has worked closely with the Attorney General's Office to address noise related issues raised in litigation at Farragut State Park and future concerns at other ranges. In the absence of any established state noise standard in the issue at Farragut State Park, the Judge was confronted with the decision of balancing noise related concerns of neighbors with the public's use of the shooting range. Therefore, this bill establishes a uniform noise standard for state outdoor sport shooting ranges.

House Resources & Conservation Committee – February 19, 2008

Minutes, p. 3.

Letter to House Resource and Conservation Committee from Sharon Kiefer, February 19, 2008:

As I noted, our interest in this legislation partly stems from current litigation opposing expansion of the Farragut Shooting Range. In the course of that litigation, the judge was confronted with the difficult decision of how to balance noise related concerns of neighbors with the public's use of the range. In the absence of any established state standard, the judge was left to fashion a remedy. As a result of the judge's order, the need for a uniform state noise standard for state owned ranges became apparent. This legislation proposes such a standard providing a balance to protect adjoining landowners while at the same time ensuring the opportunity for the public to have adequate access to state recreational shooting ranges.

TESTIMONY: Ms. Sharon Kiefer, Legislative Liaison for IDFG, was next to testify. A copy of her testimony is inserted into the minutes.

Chairman Schroeder and Committee:

The Idaho Department of Fish and Game (Department) has worked closely with the Attorney General's Office to draft HB515 for three reasons—a need to address noise related concerns raised in litigation over use of the shooting range at Farragut State Park, a need to address a directive from the Idaho Department of Fish and Game Commission to work with the Idaho Department of Parks and Recreation to develop, operate, and main a community, family and sportsmen based shooting range at Farragut State park and last, but not least, a need to properly manage future noise issues at Blacks Creek, our other outdoor state-owned range, or any other ranges the Department may build in the future.

Briefly, this bill:

Creates a new section in Title 67 to provide for the operation and use of state outdoor sport shooting ranges. Only sport shooting ranges owned by the State of Idaho or a state agency and used by the public are affected by this bill. This bill does not affect military and law

enforcement ranges. Private sport shooting ranges continue to be governed under Chapter 26, Title 55 of the Idaho Code.

Senate Resources and Environment, March 5, 2008, Minutes, page 6.

The Idaho Constitution specifically prohibits the legislature from interfering with the courts:
The legislature shall have no power to deprive the judicial department of any power or jurisdiction which rightly pertains to it as a coordinate department of the government:

Idaho Constitution, Article V, §13.

In *ISEEO v. State of Idaho*, the Court identified the challenged new law in this way:

Particular to these findings is the Legislature's indication that this bill was specifically drafted in response to the ISEEO lawsuit and that the bill was meant to apply to the ISEEO case by "altering the procedure of the existing lawsuit" by changing the language of the Constitutionality Based Educational Claims Act (CBECA) statutes.

140 Idaho at 592.

The only difference here is that the statute in House Bill 515 was new not an amendment. The conclusion is directly applicable:

From the above it is very clear that though the State asserts on appeal the Legislature intended to create a general law applicable to a wide class of parties, the Legislature was in reality enacting special legislation directed specifically at the ISEEO case and particularly, the Plaintiffs and their cause of action against the Legislature. Though the State argues that HB 403 applies to all school districts equally, the language of the bill plainly states that it is meant to specifically apply to the current litigation. HB403 is aimed at essentially disbanding the ISEEO case and restructuring it in a manner that destroys the Plaintiffs' cause of action against the Legislature. This is a special enactment designed only to affect one particular lawsuit and is clearly a special law in violation of Article III, §19.

140 Idaho at 562.

In ISEEO, the challenged amendment was directed to school districts equally, most of which were not parties to the lawsuit. Here the statute is directed at all state owned shooting ranges, but there are only two, perhaps four, all of which, save Farragut are so isolated that noise levels have no meaning.

The final conclusion was that the challenged amendment was legislative interference with the judicial department:

Consequently, we find that there is no necessity present pursuant to Article V, §13 of the Idaho Constitution meriting the legislature's attempt to legislate itself out of this lawsuit by rewriting the Idaho Rules of Civil Procedure. We also find HB403 to be a special law pertaining to the practice of the courts aimed specifically at this lawsuit and these plaintiffs, and accordingly find that portion of HB403 amending I.C. §6-2215 of the Idaho Code is unconstitutional.

140 Idaho at 593.

This Court's Conclusion of Law was that the allowable maximum noise level was 55 dBA. That is the law of this case. Defendant Department did not appeal.

In *Concerned Taxpayers of Kootenai County v. Kootenai County*, 137 Idaho 496, 50 P.3d 991, plaintiffs challenge a Resort County Local Option Sales and Use Tax which had allowed Kootenai County to impose a one-half percent sales tax to construct a new jail. Idaho Code §63-2601 et. seq. Although the act was broadly written as if to apply all over the state, the population limitation made it applicable only to Kootenai County. The Idaho Supreme Court held that an act that applied to only one place was special legislation:

Kootenai County's asserted justifications for the population requirements are unpersuasive. They do not demonstrate any reasonable basis for preventing other counties that derive a substantial portion of their income from the tourist industry from enjoying the tax-shifting benefit of the Resort County Act. Stated otherwise, the choice to benefit only Kootenai County was unreasonable, arbitrary, and capricious. Regardless of the rationalizations and social policy arguments offered by Kootenai County, one cannot

escape the fact that I.C. §63-2602 is directly contrary to the prohibitions contained in Article III, §19 of the Idaho Constitution.

Because of the definition contained in I.C. §63-602, the Resort County Act fails to treat similarly situated taxpayers similarly, has a specific local application, and is not supported by a rational or reasonable basis. Consequently, we hold that the Resort County Act is an unconstitutional local and special law.

137 Idaho at 561.

Here House Bill 515 applied only to state owned shooting ranges, not to all shooting ranges in the state. There are only two state owned shooting ranges, both owned by the Idaho Department of Fish and Game. One of these, Black's Creek on the Mountain Home desert, has no one within earshot. (See earlier note on range numerosity)

The Legislative record here even more than in *Concerned Taxpayers* is explicitly aimed only at this Court's ruling at Farragut. The opinion refused to accept the trial court's effort to "amend" the challenged statute to broaden its application:

Additionally, the language of the Resort County Act demonstrates that the legislature was intent on strictly limiting the type of county that may enact a local sales tax. The population requirements were not included by mistake; rather, they constitute one of the major defining characteristics of the Resort County Act. They are therefore integral or indispensable to the operation of the Act. A removal of those limitations by this Court, while perhaps rendering the Resort County Act constitutional, would be a legislative act.

We hold that the population requirements in the Resort County Act are not severable, and the entire Act is unconstitutional.

137 Idaho at 502.

House Bill 515 consisted of five sections. All codified in §§67-9101 et. seq.:

§67-9101 Definitions, which excluded all shooting ranges in Idaho except Farragut and Black's Creek and perhaps Garden Valley and George Nourse.

§67-9102 which set ". . .an Leq (h) of sixty-four (64) dBA "and designated the places of measuring sound and defined standards.

§67-9103 prohibiting nuisance actions based on noise.

§67-9104 applying the act to new residences within one mile of Farragut; and,

§67-9105 pre-empting local government law which would negate this Court's application of the Kootenai County noise ordinance.

There is no severability clause. Therefore, the Court must judge the act as a whole and cannot segregate to uphold part of the act if any section is found to be unconstitutional. *Boundary Backpackers v. Boundary County*, 128 Idaho 371, 378, 913 P.3d 114, (1996); *Concerned Taxpayers of Kootenai County v. Kootenai County*, 133 Idaho 496, 501, 50 P.3d 991, _____ (2002) *State v. Nielsen*, 131 Idaho 494, 492-498, 960 P.2d 177, (1998).

The sharp shooting in House Bill 515 as directed at this Court's findings, conclusions, order and judgment is precise. §67-9101 applies only to Farragut. Black's Creek, Garden Valley and George Nourse have no people to hear.

§67-9102 strikes the finding of fact and conclusion of law that 55 dBA id the applicable standards, applies a different measurement test in Leq (h) and moves the places of measurement.

This is a nuisance suit which is now prohibited under §67-9103.

New owners moving within one mile of Farragut are barred from legally complaining under §67-9104. As part of the presentation to the Senate Resources and Environmental Committee on March 5, 2008, Sharon Keifer for Idaho Department of Fish and Game filed written testimony with this hypothetical question and answer.

5. What does section 67-9104 "Noise Buffering or Attenuation for New Use" mean? p. 8.

After stating the obvious that new residences were barred, Keifer identified what part of this Court's Memorandum Decision she was aiming at:

This clause deals with what it generally called "coming to the nuisance" and was demonstrated in the judge's order on Farragut:

"None of the plaintiffs who have residences down range from the rifle range resided there before the range was created in 1950. Thus, in that sense, each of the plaintiffs have "come to the nuisance." "Coming to the nuisance" is the notion that if you move to the nuisance after the nuisance already exists, you cannot be heard to complain of the nuisance since you knew what you were getting into."

Ibid.

The quotation is from page 9 this Court's Memorandum Decision. That Decision went on to discount "coming to the nuisance" as a defense upon a finding that ". . . each of the plaintiffs who testified stated that they did not know there was a gun range nearby before they purchased" and that ". . . the range itself was not visible from the Perimeter Road." p. 8

The Memorandum Decision noted that Idaho Code §55-2602 (1) had a "coming to the nuisance" defense unless there was a substantial change in range use. Memorandum Decision, p. 10. Section 67-9104 makes no exceptions.

Again, the Idaho Department of Fish and Game in House Bill 515 was using the equivalent of a high powered rifle scope directed almost line by line to nullify the Court's Memorandum Decision in its entirety.

The Kootenai County's noise level applied by this Court is pre-empted by §67-9105.

House Bill 515 was not part of a ". . . larger legislative package. . ." where the Idaho Supreme Court finds that ". . . the state had a legitimate interest. . ." so that the Act ". . . is neither an arbitrary, capricious or unreasonable method for addressing this legitimate societal concern. . ." *Kirkland v. Blaine County Medical Center*, 134 Idaho 464, 470, 4 P.3d 1115, _____ (2000).

In *School District No. 25, Bannock County v. State Tax Commission*, 101 Idaho 283, 612 P.2d 126 (1980), the Idaho Supreme Court upheld a statutory scheme for apportioning electric utility property among various taxing districts. The rationale clearly shows the difference between a statutory scheme that applies everywhere and a challenged law which is local and special legislation as here:

A local law is one that is special in the sense of applying to a particular locality or particular localities to the exclusion of others. 2 Sutherland, Statutes and Statutory Construction §40.01 (4th ed. 1973). A statute is not "local" in operation, so as to render it violative of Art. 3, §19 of the Constitution, when it applies equally to all areas of the state. *District Bd. of Health of Public Health District No. 5 v. Chancey*, 94 Idaho 944, 500 P.2d 845 (1972).

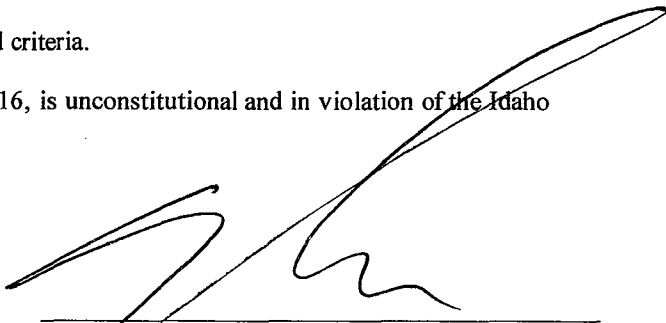
A special law applies only to an individual or number of individuals out of a single class similarly situated and affected or to a special locality. A law is not special simply because it may have only a local application or apply only to a special class if, in fact, it does apply to all such cases and all similar localities and to all belonging to the specified class to which the law is made applicable. (Citations.)

A statute is general and not special if its terms apply to and its provisions operate upon all persons and subject matters in like situations.
101 Idaho at 291.


House Bill 515 does not meet any of these quoted criteria.

We submit, then, that IC, 67-9101 et. seq., ch. 116, is unconstitutional and in violation of the Idaho Constitution Article III §19 and §13.

Respectfully submitted.



Scott Reed and Harvey Richman
Attorneys for the Plaintiffs

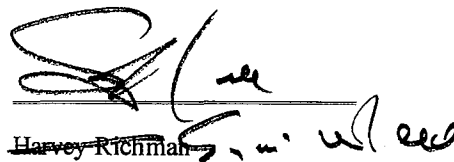


CERTIFICATE OF MAILING

I hereby certify that on this 28 day of December, 2010 a true and correct copy of the foregoing BRIEF IN RESPONSE DEFENDANTS SUMMARY DISPOSITION OF THE CAUSE AND BRIEF IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT was this day sent postage prepaid, by US mail to:

Kathleen E. Trever
W. Dallas Burkhalter
Deputy Attorneys General P.O. Box 25
Boise, ID 83707
Phone (208) 334-3771
FAX (208) 334-4485

Attorneys for Defendants



Harvey Richman
Attorney at Law

Scott W. Reed, ISB#818
Attorney at Law
P. O. Box A
Coeur d'Alene, ID 83816
Phone (208) 664-2161
FAX (208) 765-5117

Harvey Richman, ISB#2992
Attorney at Law
19643 N. Perimeter Road
Athol, Idaho 83801
Phone (208) 683-2732

Original

STATE OF IDAHO
COUNTY OF KOOTENAI } SS
FILED:

ORIGINAL
2010 OCT 27 PM 3: 52

CLERK DISTRICT COURT

DEPUTY

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

CITIZENS AGAINST RANGE EXPANSION,)
an Unincorporated non-profit Association;)
JEANNE J. HOM, a single woman; EUGENE)
and KATHLEEN RILEY, husband and wife;)
LAMBERT and DENISE RILEY, husband and)
wife; GABRIELLE GROTH-MARNAT, a)
single woman, GERALD PRICE, a single)
man; RONALD and DOROTHY ELDRIDGE,)
husband and wife; and, GLENN and LUCY)
CHAPIN, husband and wife, SHERYL)
PUCKETT, a single woman; CHARLES)
MURRAY and CYNTHIA MURRAY, husband)
and wife; and DAVE VIG, a single man,)

Plaintiffs,

vs.

IDAHO FISH AND GAME DEPARTMENT, an)
agency of the STATE OF IDAHO, and)
STEVEN M. HUFFAKER, Director of the)
IDAHO FISH AND GAME DEPARTMENT,)

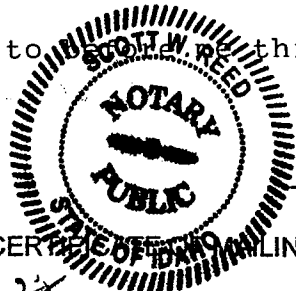
Defendants.

Case No. CV-05-6253

AFFIDAVIT OF JEANNE MARIE HOLDER
Nee HOM

22

Subscribed and sworn to SCOTT W. REED this 27th day of
December, 2010.



A handwritten signature in cursive script, appearing to read "Scott W. Reed", written over a horizontal line.

Notary Public for Idaho
Residing in Coeur d'Alene
Commission expires 7/31/2012

I hereby certify that on this 28 day of December, 2010 a true and correct copy of the foregoing Affidavit of Jeanne Marie Holder nee Horn was this day sent postage prepaid, by US mail to:

Kathleen E. Trever
W. Dallas Burkhalter
Deputy Attorneys General P.O. Box 25
Boise, ID 83707
Phone (208) 334-3771
FAX (208) 334-4485

Attorneys for Defendants

A handwritten signature in cursive script, appearing to read "Harvey Richman", written over a horizontal line.

By: Harvey Richman
Attorney at Law

Affidavit of Jeanne Marie Holder née Hom.

My name is Jeanne Marie Holder née Hom, one of the plaintiffs in this cause.

I have visited the Farragut range (range) on multiple occasions over the past years, and as late as November 2010.

I have lived approximately one mile downrange from the range for the last 13+ years.

I do not profess to be an expert, such that the matters expressed herein are personal observations made as a layman.

I have attached hereto and made a part hereof, the aerial Google exhibit taken from the affidavit of Kerry O'Neal, (his exhibit 03).

I have marked the document in the following particulars:

Inserted a North pointing directional arrow
Marked the old 200 yard Navy firing line as A—B
Marked the old Navy concrete and earthen berm backstop as C
Marked the old 600 yard firing line as D

Along the A--- B firing line, which distance between letters approximates 300 yards +/-, noting each of the three shooting bays approximates 90 yards +/- each, there are no baffles, barricades or obstructions which would inhibit or effect one's ability to shoot down range and over the back berm, some 200 yards downrange...

I am casually familiar with riflery, and own two 22's and one 30/30 rifles.

As the term is used in the Courts Memorandum Opinion and Order, the "potential shooting positions", or "impromptu locations that can be anticipated and available to be established by shooters", are available anywhere along the area D and A---B line. All this to the extent that "Blue-Sky" is clearly visible downrange. (See Finding 62).

In addition there are zero baffles from the above referenced firing positions to the target line in front of the 200 yard back berm as referenced in Finding 59. (See also Conclusions Of Law pages 48-49).

There are simply no physical prohibitions or impediments for shooters to shoot from the above locations. Even if there were personnel on the 100 yard range, they could not see a shooter firing from positions A---B or D.

I have observed, after inspection, no shooting restriction posted to suggest that shooting from the A---B, or D is not allowed, other than the posted range closing order, which closed the range entirely.

I know of personal knowledge, that the A---B line has been used for shooting as a regular location prior the range closing and was used by the U. S. Navy as its target line and there are targets for the 600 yard shooting line which are clearly visible when looking down range, even today.

From the A—B shooting position I could shoot my rifle over the old navy back berm, (C), which was the only back berm in existence at the time of the issuance of the Court's Memorandum Decision and Order, approximately some 200 yards downrange, as it is a clear line of sight shot, or raise my aim and shoot a little higher and hit my own house, as no physical restriction exists to prevent me from so doing.

The same scenario is true for the 600 yard line as above.

I have attached hereto and made a part hereof are three unaltered aerial Goggle pictures of the George Nourse shooting range and three of the Garden Valley Shooting ranges showing their rural uninhabited nature.

The video attached to the Caulder preservation deposition, taken in Lexington S.C. is a copy of the video (CD) attached hereto, which is a true and unretouched copy of the original made under my direct supervision. It and its contents are exactly as they are represented in the attached description of each scene, correct in every detail. The video was taken on September 23, 2010.

The photo exhibits attached to the Caulder preservation deposition exhibits C,D,E,F,G,H and I are photos similar to the O'Neal deposition photo exhibits 15,16,17,18,19,20,21,22,23 and 24. These photos are true, unretouched correct copies of the originals and taken under my supervision at the Farragut range on September 23, 2010.

I collected the log yard waste referred to by Mr. Caulder from the new 100 yard range on November 1, 2009.

Jeanne Marie Holder née Hom

Jeanne Marie Holder née Hom

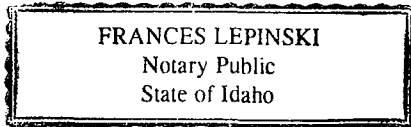
Before me, the undersigned authority, personally appeared Jeanne Marie Holder née Hom, to me well known, who by me first being duly sworn deposes and says that the above statement is true and correct, to the best of her knowledge, information, and belief.

Sworn to and subscribed to before me this 24th day of Dec, 2010

Notary Public for the state of Idaho

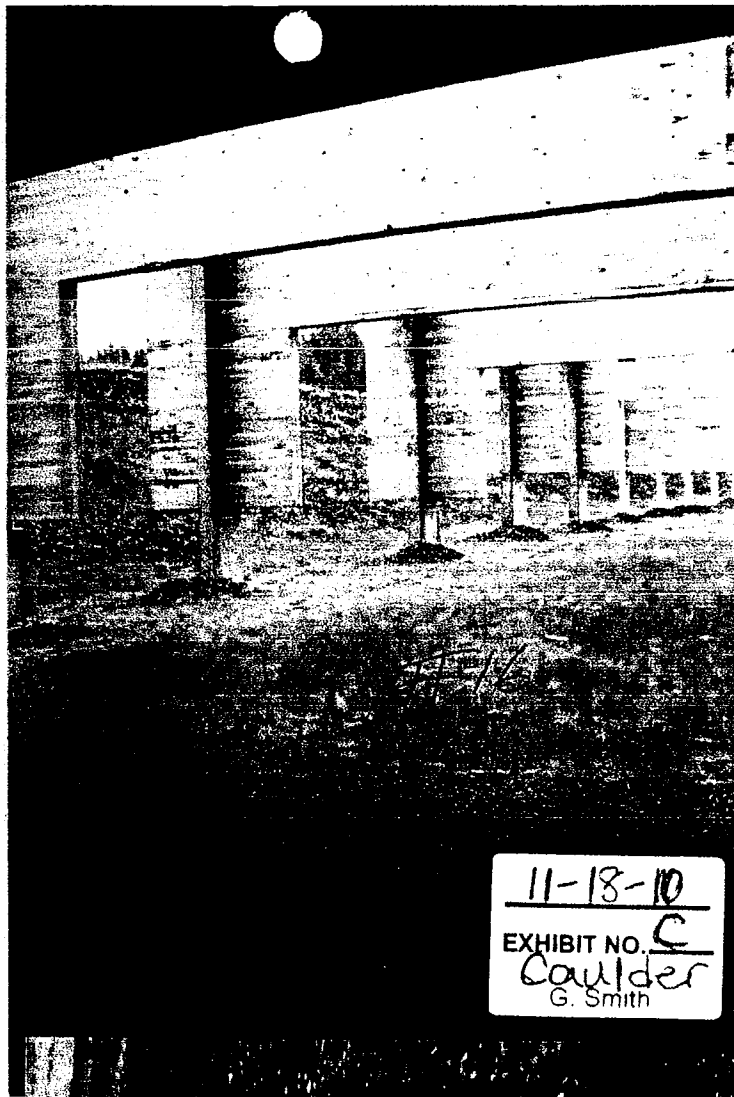
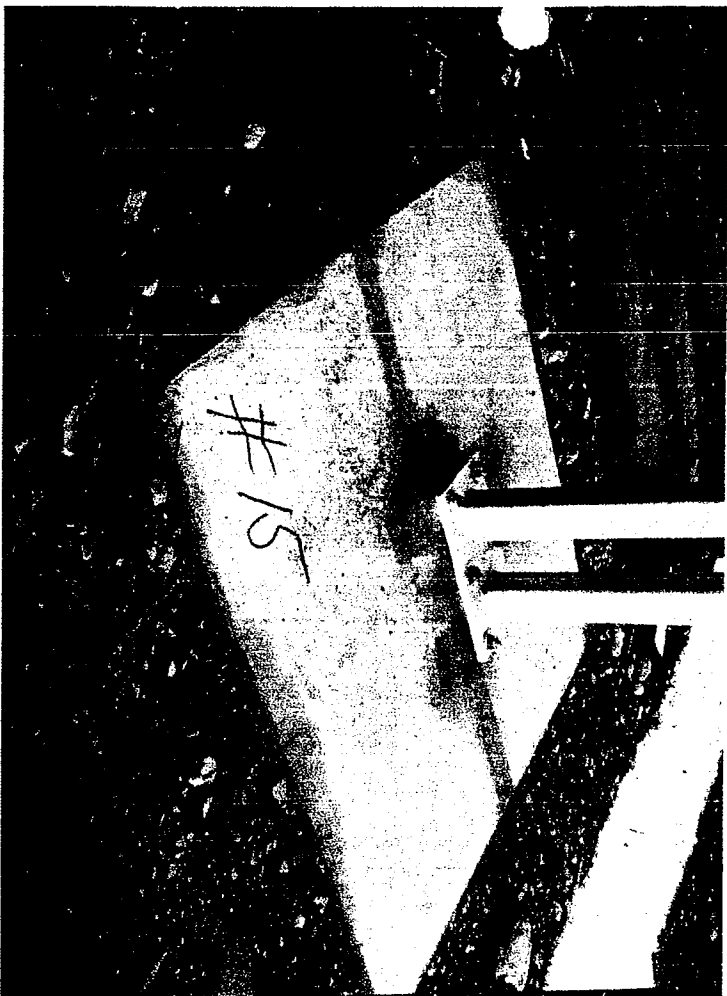
My commission expires: 4/3/2013

SEAL



Frances Lepinski

Notary Public

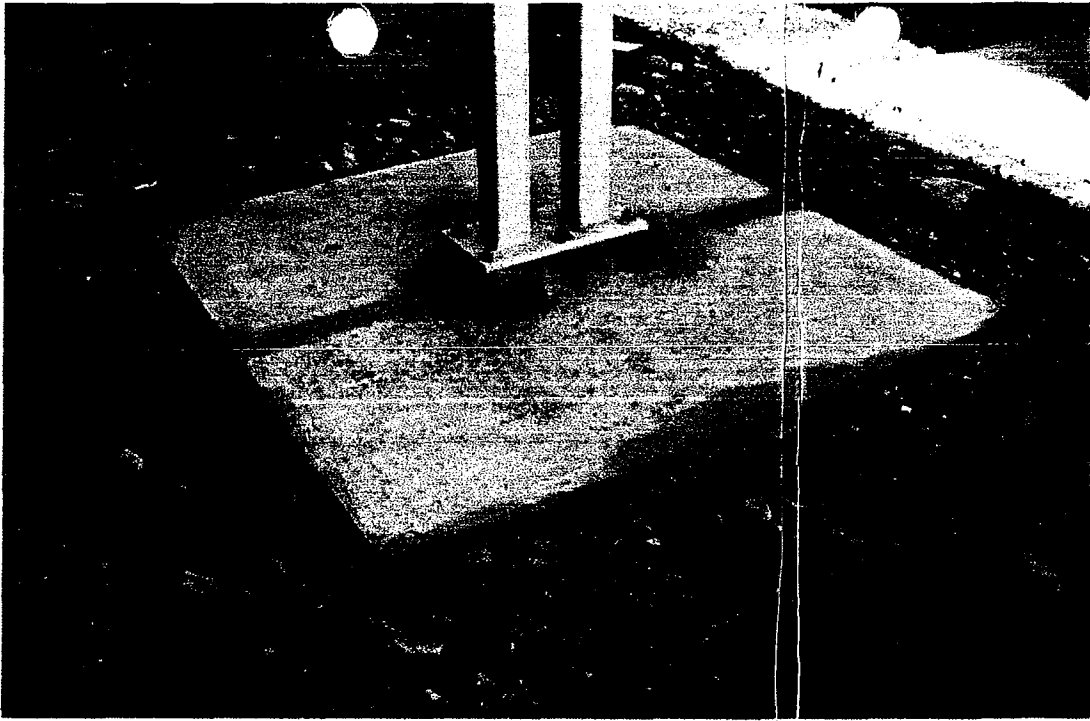




11-8-10
EXHIBIT NO. D
Caulder
G. Smith



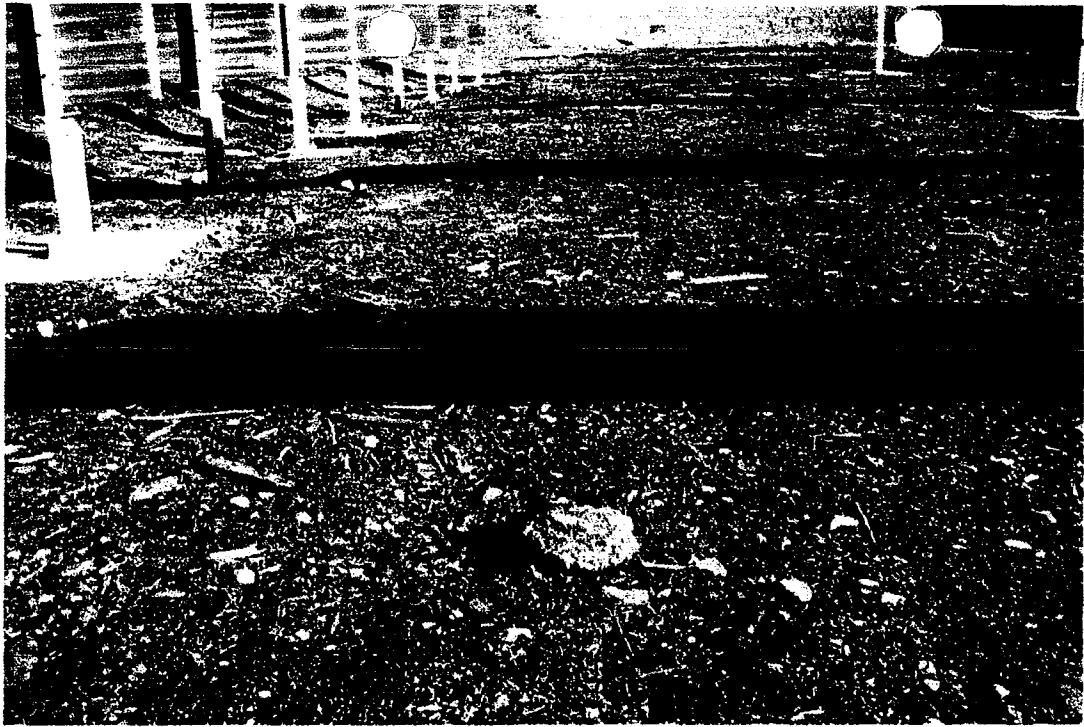
11-18-10
EXHIBIT NO. E
Caulder
G. Smith



1418-10
EXHIBIT NO. F
Caulder
G. Smith



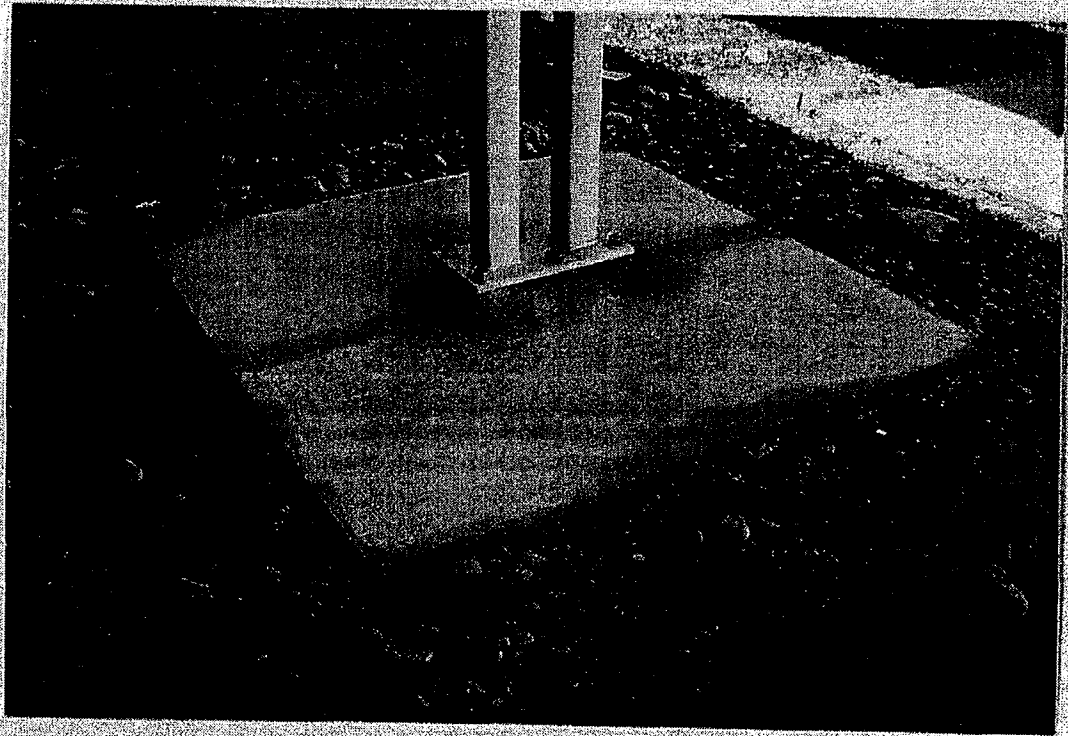
11-18-16
EXHIBIT NO. G
Cauder
G. Smith



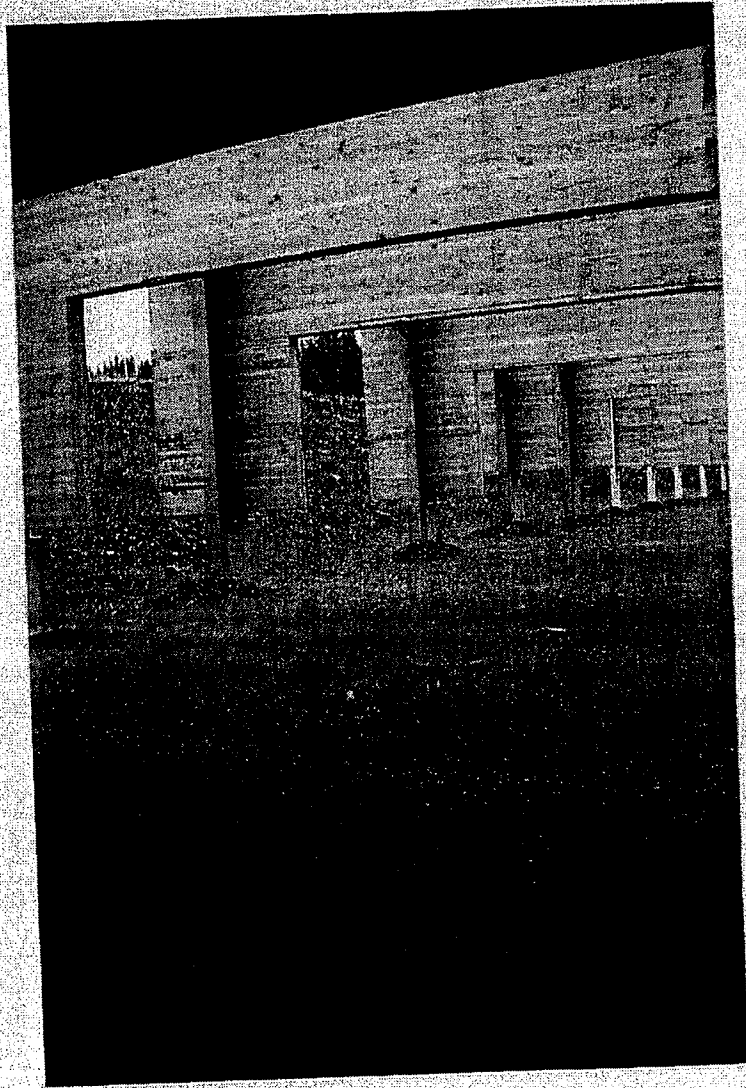
11-18-10
EXHIBIT NO. H
Cawder
G. Smith



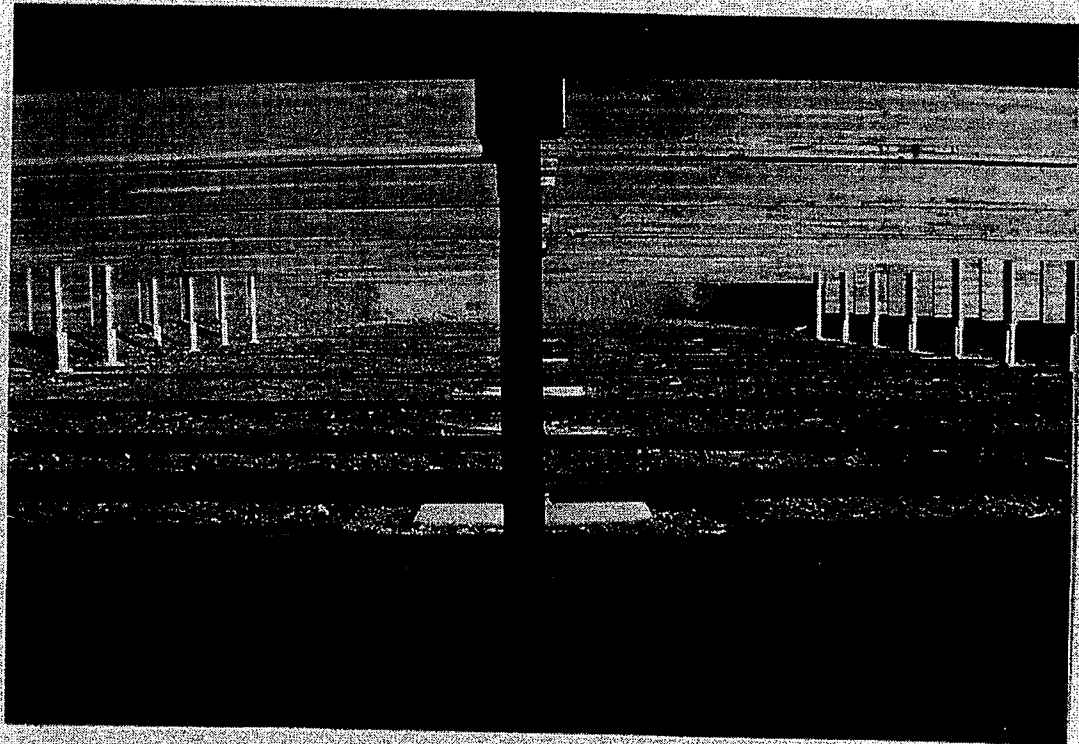
11-18-10
EXHIBIT NO. I
Cauder
G. Smith



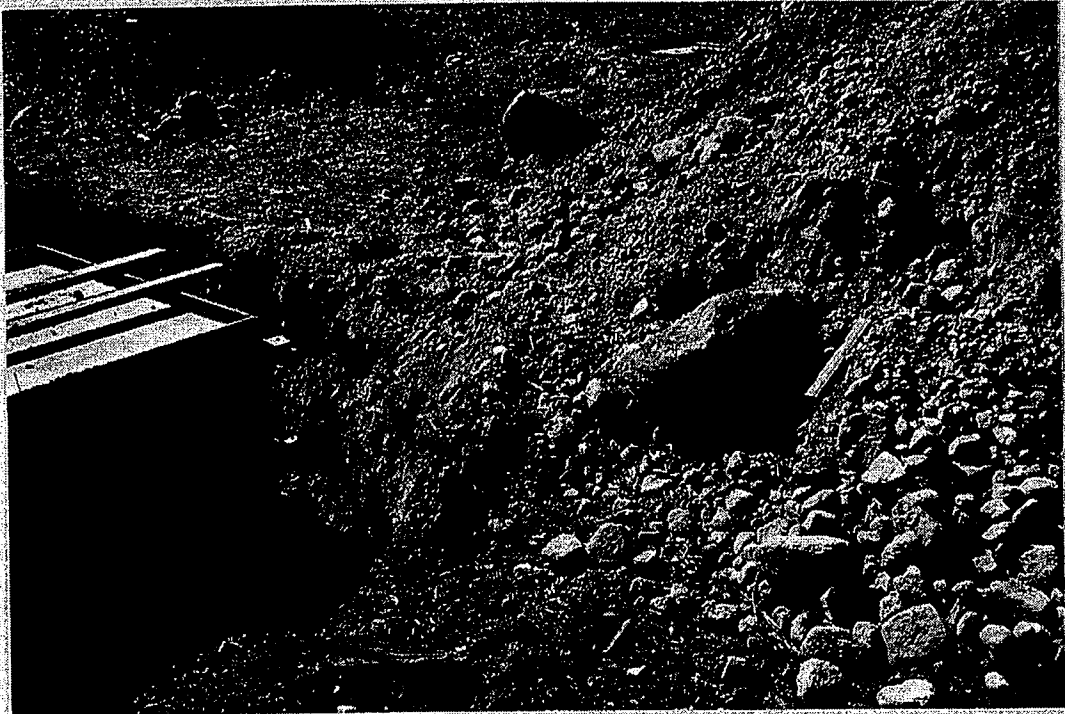
Exh. No. 15
Date 10-8-10
Name O'Neal
M & M Court Reporting



Exh. No. 16
Date 10-8-10
Name O'Neal
M & M Court Reporting



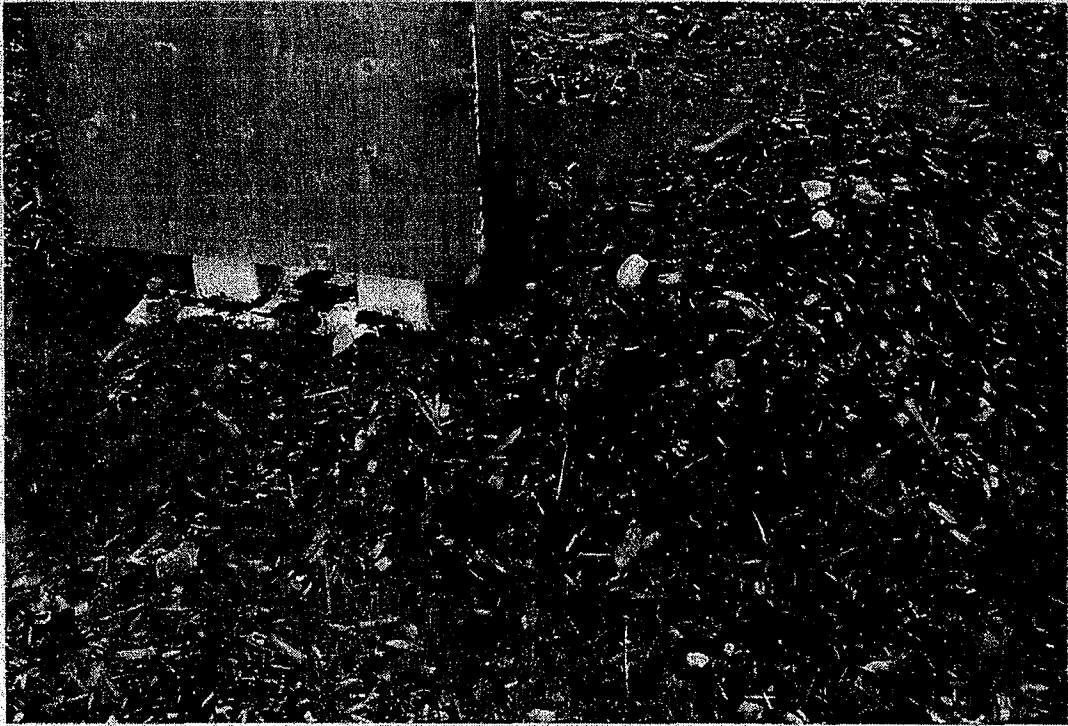
Exh. No. 17
Date 10-8-10
Name O'Neal
M & M Court Reporting



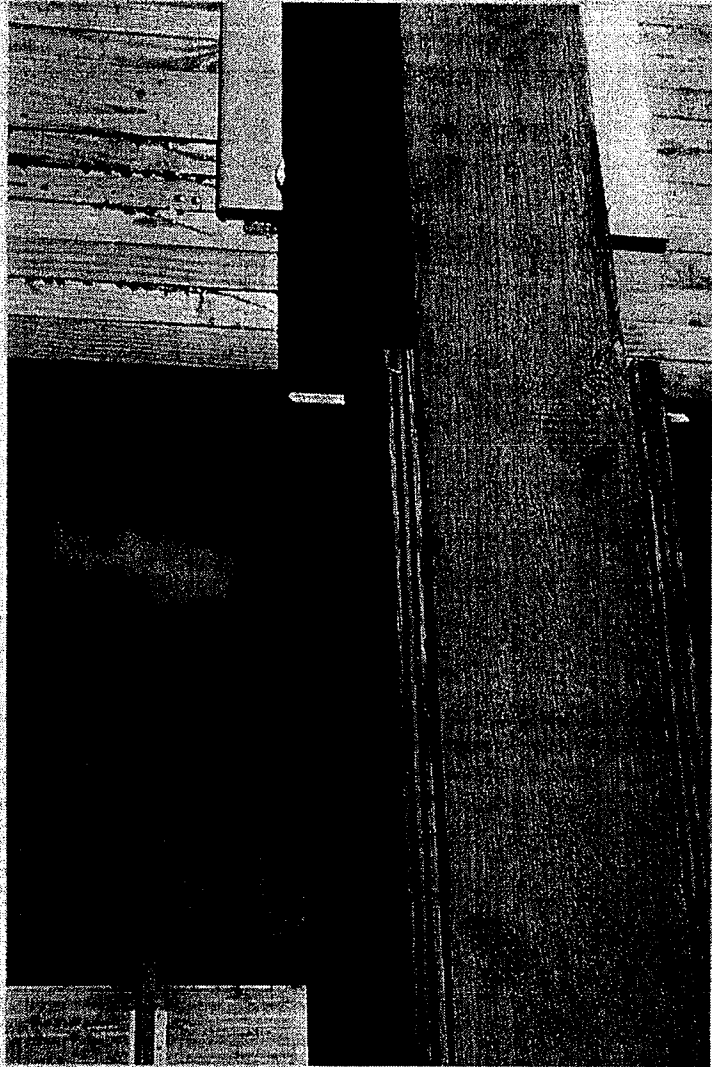
Exh. No. 18
Date 10-8-10
Name O'Neal
J & M Court Reporting



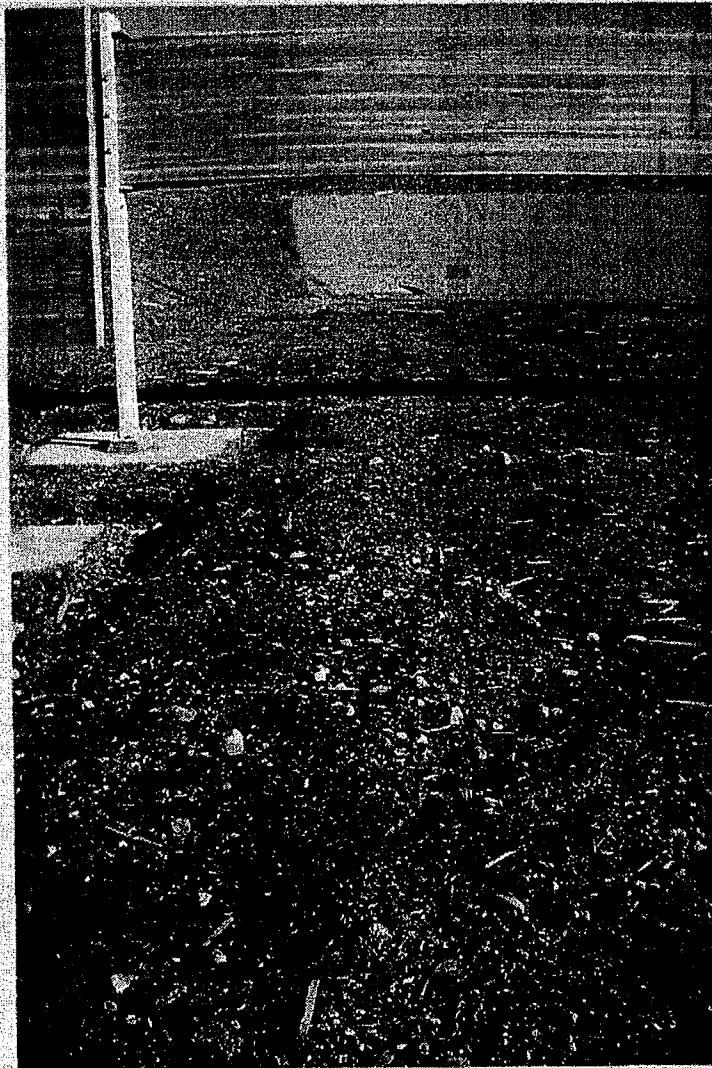
Exh. No.	19
Date	10-8-10
Name	O'Neal
J & M Court Reporting	



Exh. No. 20
Date 10-8-10
Name O'Neal
M & M Court Reporting



Exh. No. 21
Date: 10-8-10
Name: O'Neal
M & M Court Reporting



Exh. No. 22
Date 10-8-10
Name O'Neal
M & M Court Reporting



Exh. No. 23
Date 10-8-10
Name O'Neal
M & M Court Reporting



Exh. No. 24
Date 10-8-10
Name O'Neal
M & M Court Reporting



Imagery Dates: Jun 29, 2005 - Jun 24, 2009

8300 ft

lat 44.070940° lon -115.938077° elev 3271 ft

Image USA Farm Service Agency
Image U.S. Geological Survey
© 2010 Google

2010
Google



Grouse

1 mile

Bart's Lowman Rd, Garden Valley, ID 836

Image Date: Jun 24, 2009

Image: USDA Farm Service Agency
USFWS
© 2010 Google
lat: 44.071726, lon: -115.919527, elev: 3858 ft

© 2010 Google

Eye alt: 40736 ft



Gender Valley Range

Image USDA Farm Service Agency

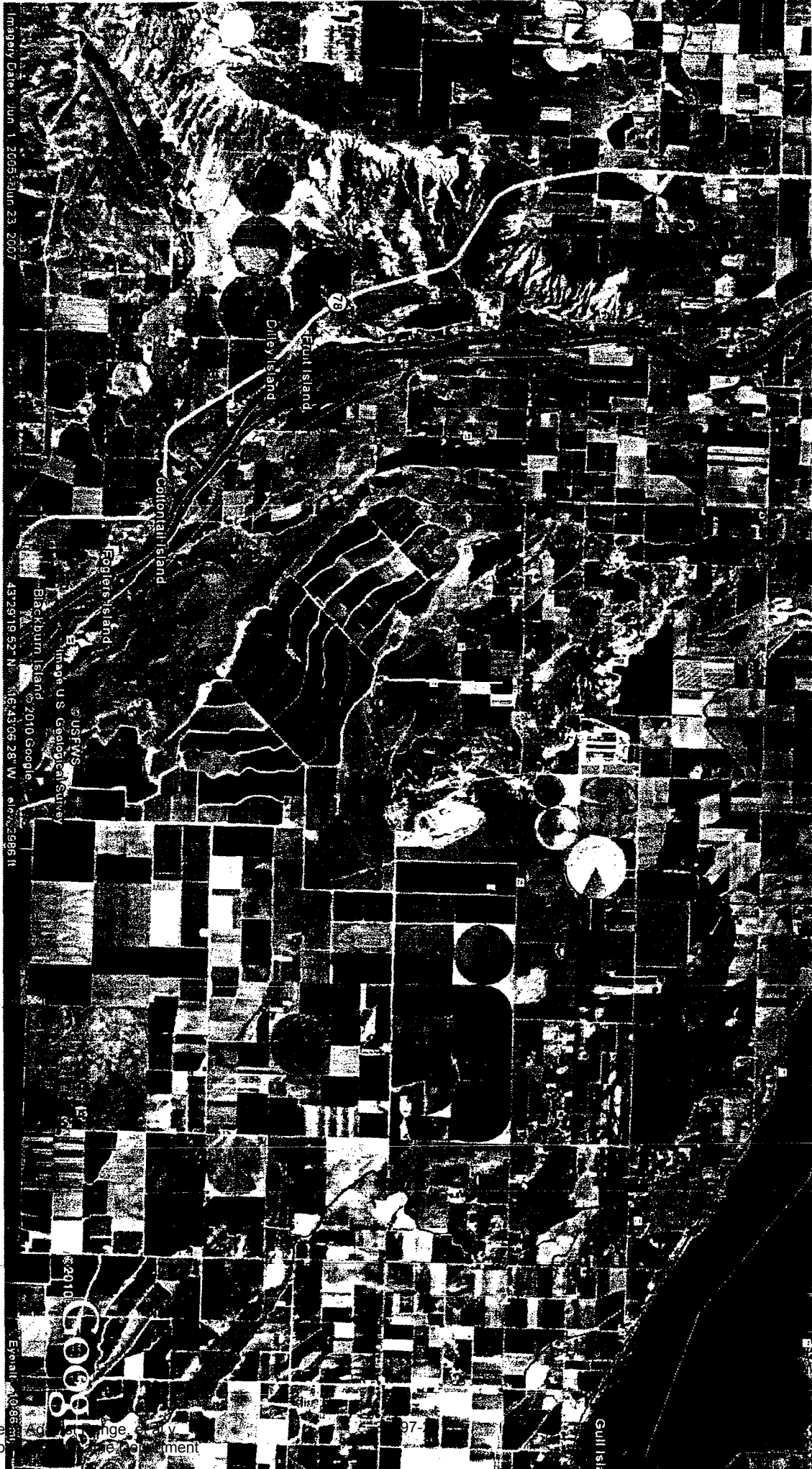
Image © 2010 DigitalGlobe

© 2010 Google

lat: 44.669561° lon: -115.838672° elev: 3332 ft

© 2010 Google

Eye alt: 3723 ft



Imagery Date: Jun 1, 2005; Jul 23, 2007
43°29'19.52" N, 116°43'06.28" W, 0177.39811

© 2010 Google



Imagery Dates: Jun 1, 2005 - Jun 24, 2009

43°28'17.55" N 116°43'18.53" W elev:3006 ft

USFWS
Image U.S. Geological Survey

© 2010 Google

©2010 Google

Eye alt: 4332 ft

Citizen
Idaho



Imagery Dates: Jun 1, 2005 - Jun 24, 2009

43°29'45.74" N 116°43'47.23" W elev: 2,472 ft

USGS
Image U.S. Geological Survey
© 2010 Google

©2010 Google
Google

Eye alt: 4598 ft

Farragut
Shooting
Range
Video (CD)
9/23/10

Farragut Video (CD) recorded September 23, 2010

Scene 1:

This view is taken from shooting bench level. We are filming from the third shooting bench from the westward wall of the new 100 yard shooting shed. We are filming downrange and panning to the left until we see the edge of the new shooting shed. You can clearly see three blue sky openings, from the shooting bench level. One opening happens to be colored green because there are trees blocking the blue sky. As we focus in on the trees, one can clearly see that if it were not for the trees, there is but, blue sky.

Scene 2:

This scene is taken from the prone shooting position. We are filming from the third shooting bench from the westward wall of the 100 yard shooting shed, same as in scene 1. Again one can clearly see the three blue sky openings from the prone shooting position.

Scene 3:

This scene is taken from shooting bench level. We are filming from the sixth shooting bench from the westward wall of the 100 yard shooting shed. We are filming downrange and panning to the left until we see the edge of the shooting shed. Again one can clearly see three blue sky openings, from the shooting bench level.

Scene 4:

This view is taken from the prone shooting position. We are filming from the sixth shooting bench from the westward wall of the 100 yard shooting shed, same as in scene 3. Again one can clearly see not only three blue-sky openings, but also a fourth blue sky opening at the shooting shed's edge.

Scene 5:

This scene is taken from the standing shooting position. We are filming from the sixth shooting bench from the westward wall of the 100-yard shooting shed, same as in scene 3 and 4. Here you can see that there is no baffling in the shooting shed except for the overhead baffling beginning at a 45-degree angle in front of the firing bench.

Scene 6:

We are viewing the side berm in relation to the firing line and the shooting shed of the 100-yard range. The side berm does not extend beyond the firing line.

Scene 7:

This scene shows log yard waste mounded in front of each stanchion at the 100 yard range.

Scene 8:

At the 100 yard range, in front and center of the firing line, you are viewing the first stanchion support with its' steel base, plywood sidewalls and its' dimensional timber in front.

Scene 9:

We then show exposed steel on the upper portion of the first stanchion, which a bullet fired from either side of the firing line can hit.

Scene 10:

At the 100 yard range you are viewing the side baffle stanchions which are unprotected. There are no coverings.

Scene 11:

You are viewing the current (live) excavation of the new 200 yard range. This is the excavated material from the baffle foundation footings. This is the same material that the berms are made from. Looking at the live excavation of the new 200 yard range, here is a view of the footings before re-burial.

Scene 12:

Again at the excavation of the new 200 yard range, you are viewing mined material from ~ 3 foot deep stanchion holes. This is the same mined material as in scene 11, viewing it with a 12-inch ruler for perspective purposes.

Scene 15:

This view is from the existing 200 yard shooting shed. It is one of many enticing impromptu shooting positions. You can clearly see the undisturbed native soils' rocky composition.

Scene 16:

This scene was taken from the existing 200 yard shooting shed. As you view the original backberm through telephoto lens, one notices the old targets.

Scene 17:

Standing at the existing 200 yard firing line, you are viewing the existing 600 yard firing line. As we pan from the 600 yard firing line to the original backstop, you will notice many enticing impromptu shooting locations.

Scott W. Reed, ISB#818
Attorney at Law
P. O. Box A
Coeur d'Alene, ID 83816
Phone (208) 664-2161
FAX (208) 765-5117

Harvey Richman, ISB#2992
Attorney at Law
19643 N. Perimeter Road
Athol, Idaho 83801
Phone (208) 683-2732

STATE OF IDAHO }
COUNTY OF KOOTENAI } SS
FILED:

2010 DEC 27 PM 3:53
ORIGINAL
CLERK DISTRICT COURT
DEPUTY
[Signature]

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

CITIZENS AGAINST RANGE EXPANSION,)
an Unincorporated non-profit Association;)
JEANNE J. HOM, a single woman; EUGENE)
and KATHLEEN RILEY, husband and wife;)
LAMBERT and DENISE RILEY, husband and)
wife; GABRIELLE GROTH-MARNAT, a)
single woman, GERALD PRICE, a single)
man; RONALD and DOROTHY ELDRIDGE,)
husband and wife; and, GLENN and LUCY)
CHAPIN, husband and wife, SHERYL)
PUCKETT, a single woman; CHARLES)
MURRAY and CYNTHIA MURRAY, husband)
and wife; and DAVE VIG, a single man,)

Plaintiffs,)

vs.)

IDAHO FISH AND GAME DEPARTMENT, an)
agency of the STATE OF IDAHO, and)
STEVEN M. HUFFAKER, Director of the)
IDAHO FISH AND GAME DEPARTMENT,)

Defendants.)

Case No. CV-05-6253

AFFIDAVIT OF HARVEY RICHMAN

AFFIDAVIT OF HARVEY RICHMAN

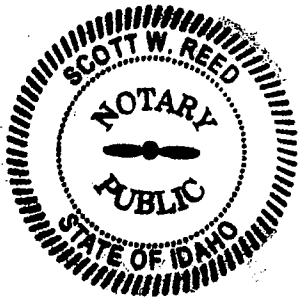
Before me the undersigned authority personally appeared Harvey Richman who by me first being duly sworn, deposes and says:

1. That he is an attorney of record for the Plaintiffs herein and that attached hereto are true copies of portions of the preservation deposition of Jim Caulder, taken on November 18, 2010 and portions of the Deposition of Kerry O'Neal taken on the 8th day of October, 2010.
2. At no time was I, as attorney for the Plaintiffs, nor individually, noticed of any pending hearings before any legislative body relative to noise issues at the Farragut range.
- 3.
4. Further Affiant sayeth not.

Dated this 27th day of December 2010. _____
 Harvey Richman
 Attorney at Law

Sworn to and subscribed before me, this 27 day of December, 2010

 Notary of Public, State of Idaho
 Resigned in Court Order
 Commission Expires 7/31/15



CERTIFICATE OF MAILING

I hereby certify that on this 28 day of December, 2010 a true and correct copy of the foregoing Affidavit of Harvey Richman was this day sent postage prepaid, by US mail to:

Kathleen E. Trever
 W. Dallas Burkhalter
 Deputy Attorneys General P.O. Box 25
 Boise, ID 83707

AFFIDAVIT OF HARVEY RICHMAN

TROOR

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

CITIZENS AGAINST RANGE EXPANSION, an Unincorporated non-profit Association; JEANNE J. HOM, a single woman; EUGENE and KATHLEEN RILEY, husband and wife; LAMBERT and DENISE RILEY, husband and wife; GABRIELLE GROTH-MARNAT, a single woman; GERALD PRICE, a single man; RONALD and DOROTHY ELDRIDGE, husband and wife; and GLENN and LUCY CHAPIN, husband and wife; SHERYL PUCKETT, a single woman; CHARLES MURRAY and CYNTHIA MURRAY, husband and wife; and DAVE VIG, a single man,

Plaintiffs,

vs Case No.: CV-05-6253

IDAHO FISH AND GAME DEPARTMENT, an agency of the STATE OF IDAHO, and CAL GREEN, Director of the IDAHO FISH AND GAME DEPARTMENT, Defendants.

PRESERVATION DEPOSITION WITNESS: JAMES A. CAULDER, JR. DATE: Thursday, November 18, 2010 TIME: 1:21 p.m. LOCATION: Capital City Reporting 218-B East Main Street Lexington, South Carolina TAKEN BY: Attorneys for the Plaintiffs REPORTED BY: GINA M. SMITH Certified Shorthand Reporter Registered Professional Reporter

1 JAMES A. CAULDER, JR., being first
2 duly sworn, testified as follows:
3 EXAMINATION
4 BY MR. RICHMAN:
5 Q. Would you state your name and residence
6 address, please?
7 A. James A. Caulder, Jr., 1 Morning Lake
8 Court, Lexington, South Carolina 29072.
9 Q. As an engineer, I think you can answer
10 this question. Is that more than 100 miles from
11 Kootenai County, Idaho?
12 A. Yes, it is.
13 Q. And do you have any present or future
14 plans of which you are aware of being in Kootenai
15 County, Idaho, in the next 24 months?
16 A. I do not have plans.
17 Q. If you change those plans, will you notify
18 me?
19 A. I will.
20 Q. Thank you.
21 You said that -- did you say that you have
22 a PE after your name?
23 A. I do. I'm sorry. I left the PE off.
24 That was not my name, that's my title.
25 Q. Tell me about the titles after your name.

1 APPEARANCES:
2 ATTORNEYS FOR PLAINTIFF
3 CITIZENS AGAINST RANGE EXPANSION, an
4 Unincorporated non-profit Association;
5 JEANNE J. HOM, a single woman; EUGENE
6 and KATHLEEN RILEY, husband and wife;
7 LAMBERT and DENISE RILEY, husband and
8 wife; GABRIELLE GROTH-MARNAT, a single
9 woman; GERALD PRICE, a sin:
10 HARVEY RICHMAN, ESQ.
11 19643 North Perimeter Road
12 Athol, Idaho 83801
13 ATTORNEYS FOR DEFENDANT
14 IDAHO FISH AND GAME DEPARTMENT, an
15 agency of the STATE OF IDAHO, and CAL
16 GREEN, Director of the IDAHO FISH AND
17 GAME DEPARTMENT:
18 KATHLEEN E. TREVER, ESQ.
19 P.O. Box 25
20 Boise, Idaho 83707

(INDEX AT REAR OF TRANSCRIPT)

1 What's the first one?
2 A. I am a PE, professional engineer,
3 registered in four states. My discipline that I'm
4 specialized in is structural engineering.
5 Q. And do you have any other initials after
6 your name?
7 A. I'm a junior.
8 Q. Okay. Now I understand.
9 Where did you go to college?
10 A. I went to the University of South Carolina
11 for both undergraduate and a master's degree.
12 Q. Did you enter the military?
13 A. I did.
14 Q. And was that the United States Navy?
15 A. I was in the Navy for a total of about 38
16 years.
17 Q. And what is the highest rank attained?
18 A. I was a captain, an O-6.
19 Q. And is that one rank below admiral?
20 A. It is.
21 Q. So that we don't confuse folks who were in
22 the Army and think a captain is a different grade.
23 A. Correct.
24 Q. What did you do in the military?
25 A. I was enlisted for about -- I was enlisted

1 for two years active duty plus about four years
2 reserve duty. I was on a destroyer. I was a
3 boatswain mate, deckhand and also a gunners mate.
4 Gunners mate, worked on small arms range -- small
5 arms themselves and carried small arms, but I was
6 assigned to a five-inch gun mount on the destroyer.

7 Q. And as an officer, what did you do?

8 A. I was a CV.

9 Q. What is a CV?

10 A. CV is a Civil Engineer Corps Officer.
11 It's a staff officer in the Navy as opposed to a
12 line officer, but a CV is a group that builds
13 construction projects but also is tasked with
14 defending themselves and supplying relief in an
15 emergency operation, emergency situations.

16 Q. What projects, major projects, did you
17 work on in your military career over your tour of
18 duty?

19 A. Major.

20 Q. Some prize examples so we know what you've
21 done.

22 A. We'd go to Key West for an extended period
23 of time over the summer with people serving
24 two-week increments, and we would rebuild, you
25 know, recreational facilities like beach houses,

1 control projects. So I've worked on navigation
2 locks with miter gates. I've worked on
3 powerhouses. I've worked on other structures.

4 The district I was assigned to was a civil
5 works district which means they're doing, you know,
6 the civil type, the harbors, the rivers, the
7 navigation, the flood controls as opposed to a
8 military district which would be doing facilities
9 for military installations.

10 So with the Corps of Engineers, I did
11 those types of things, powerhouses, locks, dams,
12 water-related, waterway-related. I then went to
13 work for the Navy, and in Charleston we had 20 -- I
14 think it was 26 states that we handled from Florida
15 up to North Carolina and then went over and caught
16 the middle of the country up through Chicago and
17 Great Lakes, which is right north of Chicago.

18 But we did facilities for all Naval
19 installations as well as some Air Force
20 installations, and after a few years, I became the
21 chief structural engineer for that organization,
22 and it was responsible for ensuring the structural
23 adequacy of all designs that went through our
24 division, southern division.

25 Was there about 17 years maybe -- no,

1 trailer -- RV parks. We would rebuild bathhouses
2 or build bath houses.

3 We would go to Army bases like Fort
4 Jackson, again, for an extended period of time
5 served by people over two-week increments, and we
6 would build more -- most of the time it was more
7 morale, welfare and recreation-type projects,
8 things that would help the soldiers and the
9 civilians that were, you know, on the base, you
10 know, like everything from sidewalks around the
11 shopping areas to, you know, improvements
12 throughout features -- through the base.

13 As maintenance money went away, they used
14 CVs to catch up the deferred maintenance log. So
15 sometimes it was recreational projects, sometimes
16 it was maintenance on existing buildings. It was
17 whatever was, you know, quote, assigned to us.

18 Q. Are you now retired from the Navy?

19 A. I am.

20 Q. And what did you do in civilian life
21 during your professional career?

22 A. I've been a design engineer for my entire
23 professional life. I started off with Corps of
24 Engineers in Nashville, Tennessee, working on
25 rivers, navigation features, locks, dams, flood

1 excuse me, maybe only 15 years. But anyway, more
2 than ten. And then took a job with the Air Force
3 at their headquarters level engineering for a
4 promotion in Florida, AFCESA, Air Force Civil
5 Engineers Support Agency.

6 And there I was just the chief structural
7 engineer, and there I had worldwide responsibility
8 for, again, ensuring the adequacy, the integrity of
9 designs that went out for the Air Force.

10 Q. When you say worldwide, you mean outside
11 the United States as well?

12 A. Oh, yeah, the world.

13 Q. That's the world we live in?

14 A. Uh-huh.

15 Q. The issue of shooting ranges, did you
16 ultimately get involved in that?

17 A. Well, I did with the Air Force. That was
18 a specific task to be the subject matter expert for
19 ranges, and I got to the Air Force right as the
20 very first ETL had been published. So right after
21 the Eagle Look, inspector general, that went around
22 and looked at all the ranges and said we've got a
23 problem, and they did their very first draft or
24 first edition of that ETL, and I got to the -- to
25 them in 2001 and worked on the next five or so.

1 You know, every time we found a better way
2 to do something or if we found an improvement or a
3 mistake, we would reissue it.

4 Q. Why was the Air Force concerned about the
5 condition of the small arms shooting ranges?

6 A. Well, for several reasons. One is, you
7 know, the anecdotal stories that we were hearing
8 that, hey, I found a round next to my M -- next to
9 my F 18 on the flight deck -- flight line or I
10 found it in the parking lot near the exchange.

11 But as I stated, and just a question
12 off -- I guess off the record. Am I continuing
13 what I said this morning or is this totally
14 different?

15 Q. Nothing happened this morning as far as
16 this record is concerned, sir. It's a brand-new
17 day.

18 A. Okay. We -- I just lost what I was
19 thinking now.

20 Q. Take your time. You want her to read it
21 back?

22 MS. TREVER: I would at this point.
23 (Question and answer read back.)

24 BY MR. RICHMAN:

25 Q. Do you know where you are, sir?

1 to be a CV of James A. Caulder, Jr., and ask you if
2 you recognize the same?

3 A. Yeah. The first -- well, the first two
4 documents are I guess a resume. It's a resume.
5 And this one is the CV.

6 Q. So resume and CV is the way you classified
7 it?

8 A. Right.

9 Q. Are they true and correct?

10 A. To the best of my knowledge, they are true
11 and correct.

12 MR. RICHMAN: Ms. Reporter, would you mark
13 that document as a composite exhibit.

14 (DEPO. EXH. A, CV and Resume, was marked
15 for identification.)

16 BY MR. RICHMAN:

17 Q. You talked about the ETL. What is ETL?

18 A. Just a military acronym for engineering
19 technical letter.

20 Q. I show you what purports to be the ETL
21 08-11 dated October 20, 2008, and ask you if you
22 recognize the same?

23 A. I recognize it as being the ETL, yes.

24 MS. TREVER: Would you mark that as
25 Exhibit B, Ms. Reporter.

1 A. Yeah.

2 Q. Go ahead.

3 A. Well, we had --

4 MS. TREVER: And if I might -- sorry to
5 interrupt the chain of thought, but I'm going to
6 interpose a continuing objection as to relevance
7 regarding the use of the development of engineering
8 technical letters for the Air Force which would be
9 subject to a motion in limine because that document
10 was not the subject of the litigation or was not
11 listed as a condition of the Court order that is
12 the subject of the motion before the Court.

13 MR. RICHMAN: Thank you.

14 BY MR. RICHMAN:

15 Q. Go ahead.

16 A. We knew we had a safety problem. We knew
17 that we had to train and maintain proficiency with
18 weapons, and to continue safely training, we had to
19 fix the safety problem.

20 So the inspector general recognized this
21 problem and then directed the chief of engineers,
22 chief of civil engineers, to write criteria that
23 was both enforceable and implementable so that we
24 could build and correct the safety problems.

25 Q. Let me show you five pages, which appear

1 (DEPO. EXH. B, ETL 08-11, was marked for
2 identification.)

3 BY MR. RICHMAN:

4 Q. What was the purpose of the first ETL?

5 A. To address the safety issues.

6 Q. Has the ETL been reviewed and modified
7 over time?

8 A. It has.

9 Q. And is Exhibit B, which is the 08-11, the
10 latest iteration of that to the best of your
11 knowledge, information, and belief?

12 MS. TREVER: Objection as to foundation.
13 The witness stated he retired from the Air Force as
14 a civilian in 2006.

15 BY MR. RICHMAN:

16 Q. If you don't know the answer to a
17 question, please tell me you don't know, but my
18 question to you is: Is this the latest iteration?

19 A. It is. And I've continued to work for the
20 Air Force as a part-time employee, and I've worked
21 on two Air Force ranges, one in Gull Port and one
22 in RAF Feltwell, United Kingdom, where from the ETL
23 they built totally-contained ranges.

24 Q. The ETL says, among other things on the
25 first page, from purpose, paragraph 1, this ETL

1 provides criteria for the design and construction
2 of Air Force small arms ranges and applies to both
3 new construction and major renovations.

4 Is that correct?

5 MS. TREVER: Objection as to relevance.
6 Just to renew my objection, that the Air Force's
7 standards do not apply to the current case which is
8 a civilian range.

9 MR. RICHMAN: I cannot prevent you from
10 making objections to relevance in a deposition, but
11 it is totally unnecessary under the rules and it
12 becomes somewhat --

13 MS. TREVER: I just wanted to clarify from
14 my earlier objection. This will be a continuing
15 objection if that is accepted.

16 MR. RICHMAN: Then fine. Then I have
17 nothing further to say on that subject.

18 BY MR. RICHMAN:

19 Q. Is that correct that this provides
20 criteria for the design and construction as I read?

21 A. You are correct.

22 Q. In your using and applying the contents of
23 the ETL in your examination of Farragut, what is it
24 you intend to do by invoking the terms of the ETL?

25 A. I had done a lot of research. I've

1 document, I was the point of contact. They would
2 contact me, and I would discuss their concerns.

3 Q. And what was your participation in the
4 development of the ETL? What did you do?

5 A. As I earlier stated, I got to the Air
6 Force as the first iteration had been published,
7 and it was a very -- it was not user friendly. It
8 was not in a good, logical order, I didn't think.
9 It didn't read well.

10 And by that time -- anytime you publish
11 something new to the field, people look at it and
12 they automatically discover why they can't do
13 something. So we already had developed a lot of
14 questions and concerns.

15 So in order to meet the requirements for
16 the inspector general, we continued to do research.
17 We researched concerns from the field. We
18 implemented proposed changes that made sense, and
19 it was just a continual annual for a while of
20 republishing this document with the latest and the
21 best to maintain the latest and the best criteria
22 that we could.

23 Q. How many people, professional people,
24 worked under your supervision and control in this
25 capacity?

1 applied that ETL to a lot of ranges, and I knew it
2 was good criteria. And I was using it as
3 criteria -- established criteria, written criteria,
4 accepted criteria to apply it to another range that
5 was being built.

6 Q. Do you understand that the Court order
7 does not incorporate the ETL?

8 A. I do understand that.

9 Q. Are you using the ETL, then, in some other
10 capacity than to mimic the Court order?

11 A. I was using the ETL as analogous to a
12 building code.

13 Q. In the ETL, a reference is made to --
14 excuse me. In the earlier iterations of the ETL,
15 does your name appear?

16 A. It does.

17 Q. In what capacity?

18 A. As the point of contact for the ETL.

19 Q. What does that mean?

20 A. That means that every person that had a
21 question, whether it's a user at the range, an
22 operator, or, you know, the base civil engineer who
23 maintains it or a designer or a constructor who's
24 going to build one that had problems -- or not
25 problems, but questions about contents of the

1 A. Well, I used people at Picatinny Arsenal,
2 that we spoke of earlier, you know, under contract.
3 We'd pay them to do things for us. I had Reserve
4 Air Force officers. I think one was a major and
5 then the other was a lieutenant colonel. They
6 worked for me as their assignment in the Air Force
7 Reserve.

8 I had the combat arms function of the Air
9 Force. That's the group that actually operates the
10 range. You know, they would -- we would have
11 conferences, and the supervisor of all those guys
12 plus a representative from every range we had in
13 the country would get together once a year, and
14 sometimes more often than that, and discuss the
15 range.

16 So anywhere from according to what --
17 which day and what we were doing specifically with
18 it from one or two to 15 or 20.

19 Q. Did you have exhibited to you at any time
20 still photographs of Farragut range?

21 A. Yes. Yes.

22 Q. And approximately how many still
23 photographs have you seen? Do you want to estimate
24 the height of the stack of the photographs?

25 A. An inch and a half of them.

1 Q. Did you have occasion to see a video of
2 the --

3 A. Yes.

4 Q. -- Farragut range?

5 A. Yes.

6 Q. Now, is it true that you have not
7 physically been at the Farragut range?

8 A. That is true.

9 Q. Do you think that your failure to
10 physically attend the range is consequential to
11 your opinions that you have developed?

12 A. I do not.

13 Q. Do you think you have developed sufficient
14 knowledge by review of the drawings ultimately
15 supplied to you, the video, and the pictures --

16 A. I do.

17 Q. -- to feel comfortable with your opinions?

18 A. I do.

19 MS. TREVER: Objection, not to the
20 witness' question but as to the foundation and
21 authentication of any photographs or videos not
22 supplied by the defendants.

23 BY MR. RICHMAN:

24 Q. Let me show you a copy -- a color copy of
25 Exhibit 16 from the deposition of Kerry O'Neal,

1 which purports to be a picture taken from the
2 firing line looking towards the left.

3 Do you see that picture?

4 A. I do see it, yes.

5 Q. What do you see disclosed by that picture
6 that is of interest to you as a shooting range
7 designer?

8 A. I see the blue sky in both -- between
9 those two sets of baffles -- three sets of baffles.

10 Q. Is it fair to say that you're not looking
11 directly downrange in that picture?

12 A. No, you can tell from the orientation of
13 the baffles that you're looking off to the left.

14 Q. Does that alter or change anything that is
15 consequential from an engineering perspective that
16 you're looking to the left?

17 A. No, it does not.

18 Q. If a round were to go through those
19 openings, would that round go over the extended
20 line of the back berm if extended out in each
21 direction to infinity?

22 A. More likely than not, it would go until it
23 hit the earth, which could be its full distance.

24 Q. And I want you to assume that the property
25 owned by Fish and Game is three-quarters of a mile

1 down the left side of that range, and that is found
2 in the Court order, by the way.

3 On a more probable than not basis, would a
4 bullet going through either of those open spaces go
5 over that three-quarter mile property line?

6 A. More likely than not it would.

7 Q. Thank you.

8 Ms. Reporter, would you mark that one
9 photo.

10 (DEPO. EXH. C, Photograph, was marked for
11 identification.)

12 BY MR. RICHMAN:

13 Q. Have you seen pictures of the right side
14 or the starboard side of the range picturing
15 something similar to this?

16 A. I have.

17 Q. And would your opinion be the same there?

18 A. It would be.

19 Q. If a bullet escaped through the right or
20 starboard side of that opening and an individual
21 were on the 200-yard berm checking his targets,
22 would he be in any potential danger?

23 A. He would.

24 Q. I'm going to read to you from page 59 of
25 the Court ordered memorandum, decision, conclusion,

1 and order. I will read the whole paragraph if I
2 may.

3 It is hereby ordered plaintiffs are
4 entitled to an injunction ordering defendants Idaho
5 Department of Fish and Game and Director Steven M
6 Huffaker to close the Farragut wildlife management
7 area to all persons with pistols, rifles, and
8 firearms using or intending to use live ammunition
9 until a baffle is installed over every firing
10 position.

11 The baffles must be placed and be of
12 sufficient size that the shooter in any position,
13 standing, kneeling, prone, cannot fire his or her
14 weapon above the berm behind the target.

15 In your opinion, is Farragut -- the
16 hundred-yard range at Farragut presently in
17 compliance with that provision?

18 A. It is not in my opinion.

19 Q. Let's break down that opinion a little
20 bit.

21 How does the range floor contribute to the
22 noncompliance?

23 A. First off, the range floor, as I've seen
24 pictures, it's cobbles. It's a very irregular
25 nonhomogenous material. It's full of big stones.

1 And I've seen pictures with dollar bills beside
2 some stones that looked like it's three times, four
3 times the dollar bill, and I've seen some with a
4 one-foot ruler beside them and they're bigger than
5 that.

6 All that irregularity of the floor adds to
7 the unpredictable characteristics of the ricochets,
8 but even with the 1 percent depression of the
9 floor, 1 percent slope as you go down toward the
10 target line, which is a very good feature, and the
11 more the better, but as a round hits that softer
12 yielding material like sand or in this case earth
13 with cobbles, it's going to ricochet.

14 And unlike hard materials where the
15 ricochet is relatively flat, this one gets up to be
16 a few degrees, you know, closer to ten degrees or
17 even more than ten degrees.

18 And I took the drawings that you gave me
19 of -- that were presented as production showing --
20 what I was asking for was as-built drawings, but,
21 you know, just from geometry, with a ten-degree
22 ricochet height, looking at what happens and if you
23 strike the floor of the range about 150 feet
24 downrange in the prone position which would only
25 require about a one degree or less than one degree

1 witness has not attested to personal knowledge of
2 the photo. I would object subject to their
3 authentication at trial.

4 MR. RICHMAN: And for the record, so that
5 counsel is aware, we will authenticate these
6 through the photographer at a later time. I cannot
7 do that. Your objection is noted.

8 BY MR. RICHMAN:

9 Q. Go ahead, sir. Tell me what you see here.

10 A. Well, I see, again, very, very large and a
11 lot of stone intermixed with the sands and smaller
12 gravels. What I see is very -- a lot of potential
13 erratic ricochet hazards.

14 MR. RICHMAN: Ms. Reporter, would you mark
15 those.

16 (DEPO. EXH. D, Photograph, was marked for
17 identification.)

18 (DEPO. EXH. E, Photograph, was marked for
19 identification.)

20 BY MR. RICHMAN:

21 Q. Assuming that D and E are in fact the
22 soils and gravels on the 200- and on the 100-yard
23 range, do you find those acceptable for a range
24 floor?

25 A. Not if you don't have enough room to

1 aiming deviation of where you're aiming the weapon,
2 the round would strike the floor and then ricochet
3 at a ten-degree angle and go over the top of the
4 berm.

5 Q. Is that on a more probable than not basis?

6 A. More probable -- more likely than not it
7 would go over the berm.

8 Q. Might that round just as likely go more
9 than three-quarters of a mile and leave the
10 property owned by Fish and Game downrange?

11 A. From the research and the employment of
12 the experts like at Picatinny Arsenal, development
13 of ricochet patterns from different ranges, the --
14 it's very probable that or very likely that that
15 ricochet could go up to half the maximum distance
16 that the weapon could go if it didn't hit the
17 ground.

18 Q. Let me show you two pictures, which will
19 later be identified, but which I represent are
20 pictures of the soil at the 200-yard range, and ask
21 you if you can characterize what is exhibited in
22 those photos?

23 MS. TREVER: And trying to figure out how
24 to make this narrow, but continuing objection in
25 terms of the plaintiff's use of photos to which the

1 contain the ricochets that would be produced by
2 that.

3 Q. And is there enough room to contain the
4 ricochets thus produced?

5 A. As presented to me to date, the Idaho Fish
6 and Game does not have enough room to produce -- to
7 contain ricochets.

8 Q. Let me show you what purports to be a
9 photograph of an approximate
10 three-by-three-by-three reinforced concrete footing
11 with steel stanchions that purportedly support the
12 overhead baffle and ask you if you can speak to the
13 contents of that picture?

14 A. Well, again, anything you put in the
15 potential field of fire of a range is a ricochet
16 hazard, and if you read the ETL, we address these
17 kinds of things.

18 First off, we recommend that you don't
19 have stanchions in the middle, but if you do have
20 supports, then they're covered to, again, direct
21 ricochets downrange. So we would put armored plate
22 that come to a point toward the firing line so that
23 if something were to hit it, it would be deflected
24 and not rebound straight back on the shooter.

25 If this is on the first set of baffles,

1 then the shooter that's -- whichever positions
2 there are on either side of this, you know, they're
3 very probable -- it's probable -- very likely that
4 if they were to hit this, the round would splash
5 back, is the term we use. It would come right back
6 on the shooter as well. So it's shooter safety as
7 well as ricochet and nonrange-related people's
8 safety.

9 Q. Do you understand this Court order is not
10 directed at shooter safety, but at civilian safety
11 downrange? But I don't want you to inhibit your
12 normal safety practice and deny comment when you
13 must. Okay.

14 Ms. Reporter, would you mark this as the
15 next exhibit.

16 (DEPO. EXH. F, Photograph, was marked for
17 identification.)

18 BY MR. RICHMAN:

19 Q. Mr. Caulder, I show you what is purported
20 in the next two pictures to be a downrange view of
21 the range showing the footings just described and
22 the stanchions from two different perspectives and
23 ask you to give us any commentary or erudition that
24 you can on that.

25 A. Well, again, I see numerous, numerous,

1 On the side supports, the timber protection is not
2 there. It's missing.

3 Q. You're talking about the baffles
4 downrange?

5 A. The downrange baffles.

6 Q. On the sides?

7 A. The columns on the sides do not have
8 timber protection. So, you know, there a round, if
9 it hit the steel, it would definitely ricochet and
10 go somewhere.

11 The log yard waste -- that's not an easy
12 word to say -- is -- you know, it's just -- it's
13 cosmetic. It's very nonhomogenous, as we saw from
14 the bag that I brought with me. It's soil. It's
15 bark. It's sawdust. It's a lot of different
16 things. And it's really not -- and to my knowledge
17 they haven't tested it to prove that it has any
18 bullet penetration capabilities.

19 So to put a little bit of stuff in front
20 of the base of the footing -- that we saw from a
21 previous picture that the timber didn't go to the
22 ground, it stopped four plus inches above the
23 foundation -- you know, this is a very temporary
24 cover-up to make it look good, but I don't see it's
25 going to do anything to prevent the ricochets from

1 numerous ricochet potentials, and the ETL took Air
2 Force ranges from this type of construction to a
3 different construction where we had smooth
4 surfaces, continuous surfaces, and we didn't have
5 the potential for unpredictable ricochets.

6 But everyplace that a round hits the
7 concrete, the anchor bolts, the columns for the
8 baffles, even the bolt heads coming out of this
9 side of the -- it's -- again, it's a very
10 unpredictable ricochet potential.

11 MR. RICHMAN: Ms. Reporter.

12 (DEPO. EXH. G, Photograph, was marked for
13 identification.)

14 (DEPO. EXH. H, Photograph, was marked for
15 identification.)

16 BY MR. RICHMAN:

17 Q. I show you now a picture, presumptively
18 taken of the range looking downrange on the
19 hundred-yard range showing the columns supporting
20 the baffles encased in various wood containers with
21 a log yard waste on the floor, and ask you if you
22 can elaborate on what you see here and its
23 relationship to safety?

24 A. Well, one thing I notice is that
25 particularly on the -- well, it is on the sides.

1 occurring.

2 Q. And what about the plywood on the side of
3 the column?

4 A. It's not going to give the same degree of
5 protection from ricochet as the bigger member on
6 the front of the column.

7 MR. RICHMAN: And let us mark this as
8 Exhibit Number I.

9 (DEPO. EXH. I, Photograph, was marked for
10 identification.)

11 BY MR. RICHMAN:

12 Q. Going back and looking at Exhibit
13 Number --

14 A. Here's another one over here.

15 Q. Thank you.

16 Exhibit 10 -- no, excuse me, Exhibit C and
17 Exhibit G, which describe somewhat the downrange
18 baffles, are those baffles vertical?

19 A. They appear to be vertical.

20 Q. Is a vertical baffle something that is
21 generally effective in stopping direct fire?

22 A. If it has the -- enough absorbing material
23 in front, it would not -- you know, again, the
24 critical angle would be such that it would hit the
25 baffle and penetrate.

1 Q. What does a vertical baffle do vis-a-vis a
2 ricocheted round?

3 A. Well, you know, there's a potential that
4 it's going to hit and splatter. Again, shooter
5 safety, the first one or two baffles are close
6 enough that the round would hit and maybe shatter
7 and splash back on the shooter.

8 If you hit the angle that allowed the
9 ricochet to occur, then from the orientation, the
10 round would not be free directed downrange. It
11 would be redirected to the side or to the back
12 or --

13 Q. Let me show you what was marked as
14 Exhibit 5 to the deposition of Kerry O'Neal on
15 10/8/10, which is an NRA drawing called shooting
16 range definitive drawings, and ask you if you've
17 ever seen that before?

18 A. I did read his deposition. That's where
19 you said it came from?

20 Q. Yes, sir.

21 A. Yeah, I read the deposition and saw the
22 attachments, and I've seen this definitive before.

23 Q. What is exhibited on the bottom half of
24 that -- excuse me.

25 Let's mark that for today's deposition as

1 every firing position and, as we discussed earlier,
2 you know, the limits left and right and then
3 sometimes prone is more critical than standing, but
4 it's just because of the elevation of your eye
5 versus the geometry.

6 We look to make sure we don't see
7 openings, you know, quote, blue sky, where a round
8 could pass and not strike something to stop it.

9 Q. That's partially-contained?

10 A. Partially-contained. Of course that
11 implies it's got the proper backstop and the side
12 protection as well.

13 Q. And what is a fully-contained range?

14 A. A fully-contained range is one that -- and
15 I didn't clarify. I didn't even mention the word
16 ricochet before in partially-contained.

17 But ricochets are assumed on a
18 partially-contained range to leave the range
19 proper, you know, the boundary, the proper boundary
20 of the range, and go out into the surrounding past
21 the side berms and the bank berm.

22 A totally-contained range is one such that
23 baffles are constructed either from the extreme of
24 a continuous solid ballistic ceiling, which would
25 be no baffles, but just like, you know, a flat

1 Exhibit J.
2 (DEPO. EXH. J, Shooting Range Definitive
3 Drawings, was marked for identification.)
4 BY MR. RICHMAN:

5 Q. Exhibit J, what's the bottom half a
6 definitive drawing of, pardon my grammar?

7 A. It looks like a partially-contained range
8 to me.

9 Q. And what is the upper half of that same
10 exhibit a typical definitive drawing of?

11 A. I would say it's a schematic of a -- I was
12 going to say totally-contained, but it's -- the
13 baffles are totally-contained baffles, but you're
14 still firing into an earth berm, and so it's a
15 totally-contained baffle system, maybe.

16 Q. Good. That's where I'm going.

17 Now, would you please explain to me,
18 assuming I know absolutely nothing, the difference
19 between a partially-contained and fully-contained
20 range?

21 A. A partially-contained range stops direct
22 fire. It's got no blue sky from the firing line
23 in -- from our criteria through a 160-degree angle
24 from 80 degrees off the horizontal.

25 So, you know, we meticulously look at

1 ceiling, and some people do that, to baffles that
2 are overlapped to the -- such that ricochets, no
3 matter what their orientation, would not leave the
4 range. So you in effect have a zero containment --
5 zero surface danger zone, so, you know, the limits
6 of your building is your danger limit.

7 Q. And that is as described in definitive
8 drawing Number J between the upper and lower baffle
9 layout?

10 A. The baffle layout between those two, the
11 one on the bottom would be a partial baffle layout,
12 the one on the top would be a totally-contained
13 baffle layout.

14 Q. If there were no blue sky openings on the
15 right and left at Farragut as it is presently
16 designed -- I want you to assume that those are
17 repaired -- would Farragut be a partially-contained
18 range, meet that criteria?

19 A. If -- yeah, if you reconstructed or added
20 to those baffles to cover the blue sky, then --

21 Q. Well, leaving out side berm issues, by the
22 way. In other words, I'm not addressing the length
23 of side berms because that's another story. I
24 didn't get there yet.

25 A. If you eliminate the blue sky, then by

1 definition, it is a partially-contained range
2 assuming it's got the right backstop, the right
3 other features that go into bullet containment.

4 Q. When you read the judge's order from
5 page 59 that I read to you earlier where it says a
6 baffle must be placed and be of sufficient size
7 that the shooter in any position, standing,
8 kneeling, or prone, cannot fire his or her weapon
9 over the berm behind the target, what is
10 contemplated there? Is that a partial or a
11 fully-contained range from your perspective,
12 recognizing that ricochets are not addressed in a
13 partially-contained range?

14 A. Right. I was a little bit -- you know, I
15 had to read it a lot and I still don't know if --
16 the intent I think is safety. I think that's what
17 the intent is, safety not only of the people on the
18 range, the hundred-yard or the people that will be
19 on the adjacent ranges, but it's also the safety of
20 the people downrange.

21 Q. That was the Court's prime --

22 A. That's what I think.

23 Q. That's what he said?

24 A. I think that's what he was saying.

25 MS. TREVER: Objecting as to --

1 MR. RICHMAN: I apologize to --
2 THE WITNESS: I'm thinking for the judge
3 now. I realize that.

4 MS. TREVER: And I object in that regard
5 to counsel testifying as to that effect.

6 MR. RICHMAN: And I stand corrected in
7 that regard, exuberance.

8 BY MR. RICHMAN:

9 Q. Go ahead, sir.

10 A. But when he said -- he didn't qualify what
11 he meant by going over the range -- over the berm,
12 and that's the problem I have with it because you
13 can stop the direct fire from going over the berm
14 with a partially-contained range, but you don't
15 stop the ricochets. And so I don't know what he
16 was thinking as far as what he thought was the
17 limit for ricochets.

18 Q. I want you to assume that the judge did
19 consider in his mind that ricochets and direct fire
20 should not go over the back berm. Now what do you
21 have?

22 MS. TREVER: Objection. Argumentative.

23 MR. RICHMAN: It's a hypothetical to the
24 expert witness.

25 BY MR. RICHMAN:

1 Q. Go ahead.

2 A. Well, you have a partially-contained range
3 that doesn't meet his desires.

4 Q. Thank you.

5 Do you have with you today Idaho
6 Department of Fish and Game drawing done by
7 Mr. Vargas that exhibits some of the designs of the
8 range?

9 A. Yes.

10 Q. May I see it, sir. It's a big foldout,
11 sir.

12 A. Yeah. I don't see it. This must be it.

13 Q. Thank you.

14 You have presented to me a document dated
15 October 2007 captioned State of Idaho Farragut
16 shooting range temporary improvements to meet
17 March 2007 Court order with a seal of the great
18 State of Idaho and with consulting engineers
19 C. Clark Vargas and Associates showing thereon. Is
20 that correct?

21 A. That is correct, yes.

22 Q. Let me turn -- let me ask the reporter to
23 mark this as the next exhibit.

24 (DEPO. EXH. K, State of Idaho Farragut
25 Shooting Range Temporary Improvements to Meet March

1 2007 Court Order, was marked for identification.)
2 BY MR. RICHMAN:

3 Q. The second page of Exhibit K, as in
4 Kentucky, known as G, as in George, two, has a
5 drawing on it that I don't know that I fully
6 understand.

7 And I direct your attention to these lines
8 drawn on this map. You see what I'm referring to
9 on the left side of the page?

10 A. I do.

11 Q. What is that, sir?

12 A. It looks like it's an overlay of the
13 surface danger zone for the Farragut range for a
14 weapon that would take the round 1600 feet
15 downrange.

16 Q. Would 30.06 qualify for that?

17 A. Just about exactly to that dimension.

18 Q. Now, again, assume that I know nothing,
19 and I'm the one that's asked the questions, what is
20 being shown in this set of lines here that go out
21 to 3033?

22 A. Well, it's labeled as being the unbaffled
23 range maximum CSDZ. If it's a good set of
24 drawings, it will have an abbreviation list
25 somewhere. And I don't know what the C stands for,

1 but the SDZ is the surface danger zone.
 2 But it's showing that from the firing line
 3 at the Farragut range with an un baffled range as
 4 labeled, then this is the safety danger zone,
 5 surface danger zone for that weapon.
 6 Q. And as exhibited, that's greater than the
 7 property boundaries of the park exhibited thereon?
 8 A. It appears to be about three times
 9 greater, yes.
 10 Q. And then if you went to apply the ricochet
 11 danger zone 50-percent rule, what would that do to
 12 the ricochet danger zone vis-a-vis the park
 13 boundaries?
 14 A. Well, it would bring it in to about 8,000
 15 feet, but it still -- the termination of the
 16 surface danger zone would still fall outside. If
 17 this is the actual property line of the park, it
 18 would fall well past that, again, about twice past
 19 it.
 20 Q. And what about the certitude of it being
 21 over the back berm?
 22 A. Well, the rounds would definitely be over
 23 the back berm, well past the back berm.
 24 Q. Did you see in any of the drawings which
 25 you have reviewed as supplied to you any attention

1 appear to be drawings, we see some issues here
 2 of -- and I'm going to look at, for example, C 7 --
 3 that trees are exhibited. Do you see that?
 4 A. Yes, I do.
 5 Q. Do you give any credence from a bullet
 6 control perspective to those trees in these
 7 drawings?
 8 A. No, I don't. I mean, if the round were to
 9 strike one directly and if the tree were big
 10 enough, it would stop the round, but if it didn't,
 11 it wouldn't.
 12 Q. So are trees a reliable backstop?
 13 A. No. And they're -- you know, they're
 14 harvested. I mean, I think you live in timber
 15 country. That's why you have the log yard waste.
 16 No, it's -- you grow trees to cut them down to make
 17 lumber to grow more trees, so it wouldn't stop them
 18 if they're there all the time, and they won't be
 19 there all the time.
 20 Q. Years ago they used to use ground baffles
 21 to stop ricochets, didn't they?
 22 A. And some people still do. The Air Force
 23 didn't like them, but yes.
 24 Q. Do you think it's out of vogue now from an
 25 engineering perspective?

1 drawn or documentation relative to ricochet issues?
 2 A. No, I did not. This one has surface
 3 danger zones, but they never mention -- it's always
 4 full surface danger zones.
 5 Q. Is that surprising?
 6 A. I'm very surprised that someone would --
 7 in the, you know, responsible position being shown
 8 on this map that had responsibility for this range
 9 would let this range operate with this kind of
 10 spillover outside their areas of control. Yes, I
 11 am surprised.
 12 Q. The vertical baffles as constructed on a
 13 hundred-yard range, do they do anything to address
 14 the surface danger zone issue?
 15 A. Yes. Well, they -- in the criteria that I
 16 accept and I believe in and I think that it's
 17 reasonable, it would produce a surface danger zone
 18 distance by 50 percent, assuming the no blue sky
 19 was corrected, assuming the materials for the floor
 20 were corrected, assuming the materials for the face
 21 of the berms were corrected, and assuming all those
 22 other potential ricochet hazards were corrected.
 23 So, as a partially-contained range, it would reduce
 24 the footprint of the SDZ by half.
 25 Q. In perusing the document known as K, which

1 A. No. No, it's still used. I mean, the
 2 Army uses it some. Again, when you hit the ground,
 3 the round ricochets, and on the soft yielding-type
 4 surface, it's going to ricochet steeper than it
 5 were if it were concrete.
 6 That's the reason we went to concrete
 7 floors with the Air Force because it gives us the
 8 hard surface, the flatter rounds, gives us a
 9 one-degree or two-degree reflection with the
 10 ricochet as opposed to a ten to 12 degree on the
 11 sand, and we replaced that back earth and berm that
 12 you have to maintain with a steel bullet trap. So
 13 there's --
 14 Q. Let me show you what was marked as
 15 Exhibits 9 and 8 of the O'Neal deposition of
 16 10/8/10 which we will mark today as L and M.
 17 (DEPO. EXH. L, Side Baffle, was marked for
 18 identification.)
 19 (DEPO. EXH. M, Shooting Range Definitive
 20 Drawings, was marked for identification.)
 21 BY MR. RICHMAN:
 22 Q. What is being exhibited in L and M?
 23 A. This is a plan view of an arrangement for
 24 side baffling on a range to protect the -- or
 25 prevent the round from going in a direction

1 perpendicular to the axis of the range.
 2 Q. Now, we understand that people make
 3 mistakes, right?
 4 A. I make them.
 5 Q. That's why they put erasers on pencils,
 6 don't they?
 7 A. Correct.
 8 Q. And mistakes occur on ranges, correct?
 9 A. Correct.
 10 Q. Do they occur on supervised as well as
 11 unsupervised ranges?
 12 A. I think accidents occur universally.
 13 Q. And do accidents occur on ranges whereby
 14 the trigger is pulled at some inopportune time and
 15 bullets go where they were not intended to go?
 16 A. Absolutely. I've seen it happen.
 17 Q. Now, in your experience, can a round go,
 18 as exhibited in these Exhibits M and L, pretty much
 19 parallel to the firing line?
 20 A. They could.
 21 Q. And if they did, would they go through the
 22 wall of the shooting shed?
 23 A. If it were not ballistically armored or
 24 constructed of enough material to construct the
 25 round, it would go through the side.

1 Q. And is the side berm intended from a
 2 design perspective to capture such a bullet?
 3 A. In range complexes where you have the
 4 three ranges together, and particularly if they're
 5 ever intended that they're going to operate
 6 simultaneously, then yes, that side berm would have
 7 to protect people in adjacent ranges from
 8 operations within the range being fired.
 9 Q. And if that back berm -- side berm did not
 10 go behind the firing line, would that be a
 11 potential bullet escape problem?
 12 A. It would be.
 13 Q. Let me show you TRS range services drawing
 14 known as Exhibit 1 of the O'Neal deposition of
 15 8/10/10 and ask you if you've ever seen that
 16 before?
 17 A. I have.
 18 Q. And I'm not going to incorporate it here
 19 as it is in the O'Neal deposition.
 20 Does this show from this drawing that the
 21 side berms are designed to go behind the firing
 22 line?
 23 A. No. This drawing shows that the side
 24 berms stop well short of the firing line.
 25 Q. Now let me show you paragraph 14 taken by

1 Mr. Kerry O'Neal and known as Exhibit 27 of the
 2 O'Neal deposition of 10/8/10, and ask you if that
 3 illustrates the nature of the relationship of the
 4 side berms to the shooting -- the firing line?
 5 A. That picture looks very similar to the
 6 layout that you showed me in the previous.
 7 Q. Can you say definitively whether or not
 8 the side berms extend past the firing line?
 9 A. The side berm does not -- the toe of the
 10 side berm, which is where it hits the ground --
 11 Q. Ground level.
 12 A. -- does not even extend to the firing
 13 line. So the mass of the berm, the height, the
 14 protective features of the berm stop well back up
 15 here at the top of the berm. So it's -- does not
 16 come close to the firing line.
 17 MR. RICHMAN: Ms. Reporter, I'm going to
 18 ask you to make photograph 14 of the O'Neal 27 the
 19 next exhibit in this case, but return the original
 20 27 to me at your earliest possible convenience.
 21 (DEPO. EXH. N, Photograph, was marked for
 22 identification.)
 23 BY MR. RICHMAN:
 24 Q. Have you seen any documentation relative
 25 to the composition of the side berms or back berms?

1 A. I have not seen any engineering
 2 construction material reports indicating that it's
 3 anything other than native soils that are pushed
 4 up. I have seen a description that demolition of
 5 the pit area of the one berm was used inside of
 6 some of the berms.
 7 Q. Is it important to have such a technical
 8 description if one is going to speak to the nature
 9 of those berms?
 10 A. Well, it's important to the Department of
 11 Defense because we specifically require that the
 12 top surfaces of these berms be constructed of
 13 material that's suitable to stop the rounds.
 14 Q. Well, why? What if it's made out of rocky
 15 material like the floor of the range?
 16 A. Well, it's just going to increase the
 17 probability and the occurrence of unpredictable
 18 ricochets. The Army directive, that's very similar
 19 and it's kind of a sister copy of what the Air
 20 Force has, even has a statement that goes on to say
 21 that if the range floor or its berms are unusually
 22 rocky, they take that five degree that we looked at
 23 earlier and make it bigger.
 24 So everyone recognizes that predictable --
 25 more predictable ricochets is better than less

1 predictable, and the rocks would make them less
 2 predictable.
 3 Q. I'm going to show you a document which
 4 purports to be a Google aerial. It was Number 14
 5 of this morning's deposition, but I'm going to have
 6 it remarked for today as Number O.
 7 (DEPO. EXH. O, Photograph, was marked for
 8 identification.)
 9 BY MR. RICHMAN:
 10 Q. Let me show you Exhibit O, which is an
 11 aerial of the range, and direct your attention to
 12 that portion of the range which is further on down
 13 the firing line from the three shooting bays going
 14 towards the 600-yard line. That's that long piece
 15 in the upper left.
 16 To your knowledge, are there any baffles
 17 in that approximately 750 yards of old firing line?
 18 A. To my knowledge, there's no improvements
 19 there at all.
 20 Q. Knowing what you now know, do you know
 21 whether or not the old military back berm is still
 22 at the 200-yard line relative to the rest of the
 23 property other than the 200-yard line?
 24 A. Yes. I have seen photographs of -- and
 25 the video indicates that along that line there's

1 supervision?
 2 A. I don't know the operating procedures for
 3 the range. I'm not sure if they're open and
 4 available. I don't know.
 5 Q. You know that the Court spoke about
 6 impromptu shooting positions. Is that correct?
 7 A. Yes, I read that.
 8 Q. In your opinion, would the 600-yard line
 9 or the remainder of the old shooting line, which
 10 does not include the three bays, be an impromptu or
 11 potential shooting position?
 12 A. Yes. Anytime someone walks up on what
 13 appears to be a firing line and a target area or a
 14 shooting range, there -- they would be or could be
 15 attracted to take a shot downrange.
 16 Q. And you said something very interesting to
 17 me. You said that you saw targets down at the end
 18 of the 600-yard line?
 19 A. I've seen the video that's panned across
 20 there and showed targets. Old targets, but
 21 targets.
 22 Q. Do you have that video with you?
 23 A. I do.
 24 Q. May I see it.
 25 (DEPO. EXH. P, Video, was marked for

1 still targets that are there. There's still the
 2 concrete structures that we call the pits that
 3 people raise and lower targets.
 4 Q. What is there to prevent someone from
 5 shooting from the 600-yard line if they chose to?
 6 A. Supervision, limited access, but if they
 7 got on there and had a weapon with a round, nothing
 8 that I see.
 9 Q. If there were someone supervising on the
 10 hundred-yard line and someone on the 200-yard line
 11 and the 50-yard line in those shooting sheds, what
 12 would there be to prevent someone from strolling
 13 out to the 600-yard line and taking a shot?
 14 A. Nothing that I see.
 15 Q. Is that an attractive thing for a shooter
 16 in your opinion?
 17 A. Well, in today's programming, you watch
 18 Sniper on History Channel and those things, people
 19 like to see how far they can hit a golf ball and
 20 how far they can hit a target.
 21 Q. I never miss the Sniper show.
 22 Is this 600-yard line or the other area of
 23 the old shooting line between the three bays and
 24 the remainder of that straight line, are those
 25 available to be appropriated by shooters subject to

1 identification.)
 2 MS. TREVER: Same objection as stated
 3 earlier to the video regarding authentication and
 4 representing current range conditions.
 5 MR. RICHMAN: To be sure we will
 6 authenticate it separately. Thank you, ma'am.
 7 Counsel, I'm going to give you a copy of
 8 Exhibit P, as in Peter, today. I brought it,
 9 intended to give it to you. I got sidetracked and
 10 didn't. So you now have that as a convenience.
 11 BY MR. RICHMAN:
 12 Q. Mr. Caulder, you signed an affidavit in
 13 this case which was dated August 12, 2010. Do you
 14 remember that affidavit?
 15 A. I do.
 16 Q. And that affidavit is already in the Court
 17 file. I want to represent that to you.
 18 And to the extent of some issues on the
 19 second page relative to your breaking down of the
 20 Court order between 500 and 500 plus and to
 21 paragraph wherein you said that Farragut was a
 22 partially-contained range, do you stand by the
 23 assertions in that affidavit?
 24 A. I do.
 25 Q. Is everything you said in there your

1 opinion as of today as well?
 2 A. It is.
 3 Q. In that affidavit, you gave references to
 4 various paragraphs of the ETL, though you used the
 5 2002 version, correct?
 6 A. Correct.
 7 Q. Could that easily be translated to the
 8 2008 version from a point of view of paragraph for
 9 paragraph with the exception of the 50-percent
 10 rule? Withdraw that question. Too confusing.
 11 It's always important for an expert who
 12 gives an opinion to tell us what he bases his
 13 opinion on. In that regard -- that's a precursor
 14 to my question -- is it fair to say that you are
 15 using the ETL as a standard or a guide or a rule to
 16 judge the Farragut range?
 17 A. In my review of the Farragut range from
 18 the safety aspect, I did use it as a building
 19 official would use a building code. It's
 20 published, it's accepted, it's got a proven track
 21 record, I know that it works, and that's what I
 22 used it to judge it against something that is
 23 proven.
 24 Q. Are you telling us that in your opinion
 25 the Farragut, to meet the Court order, must meet

1 Q. Thank you, sir.
 2 Have you seen any documentation on
 3 supervision at the range from Fish and Game?
 4 A. I have just seen the discussion in the
 5 court documents, and it appeared that either it
 6 operated with no supervision or they were planning
 7 to operate with no supervision, but I just -- I
 8 can't understand how that would work with 12 plus
 9 people side by side shooting a hundred yards
 10 downrange. I just don't understand.
 11 Q. Now, I don't want to be repetitive, but I
 12 do want to make sure we know your full opinion on
 13 log yard waste. Can you characterize the efficacy
 14 of log yard waste at a shooting range?
 15 A. I see it as no benefit to the ballistic
 16 safety, ricochet safety. It makes it look pretty
 17 maybe if it's pretty, but it doesn't do anything
 18 for the safety aspects.
 19 Q. Mr. O'Neal in his deposition talked about
 20 issues of accidental, negligent, and deliberate
 21 discharges. Do you have an opinion as to the
 22 potentiality or occurrence of accidental,
 23 negligent, and deliberate discharges?
 24 A. My opinion is they will and they do occur.
 25 Q. I want to give something away here to Fish

1 the ETL?
 2 A. No, I'm not saying that, no.
 3 Q. In order to meet the Court order, it must
 4 meet the Court order?
 5 A. Correct, must keep the rounds from going
 6 downrange.
 7 Q. Are there, in your opinion, as the
 8 hundred-yard range is presently constructed, blue
 9 sky openings downrange?
 10 A. Yes, definitely.
 11 Q. Now, when I deposed Mr. O'Neal, he said
 12 no, those areas that you see on either side are
 13 called open areas because they are not downrange.
 14 Do you agree or disagree with that?
 15 MS. TREVER: Objection as to the extent
 16 counsel mischaracterizes testimony. I don't have a
 17 comparison in front of me.
 18 MR. RICHMAN: I'll rephrase that.
 19 BY MR. RICHMAN:
 20 Q. Do you have to look directly downrange
 21 within the right and left dimension of the back
 22 berm to be looking downrange?
 23 A. When I stand at the firing line, and,
 24 again, with peripheral vision, virtually everything
 25 I see is downrange.

1 and Game. Do you agree that the large majority of
 2 rounds fired are fired on target?
 3 A. I agree that the majority are, yes.
 4 Q. Can you tell me what percentage are not?
 5 A. No, I can't tell you that.
 6 Q. Do you think anybody could?
 7 A. No, not without a huge database.
 8 Q. Let's talk about the applicability of the
 9 principles underlying the ETL at civilian as
 10 opposed to military ranges.
 11 Is there any difference?
 12 A. It's material principles, it's geometry,
 13 it's physics, it's -- you know, it's science. So
 14 science applies to civilians the same way it does
 15 to the military.
 16 Q. Do bullets know whether the shooter's in
 17 uniform or in buckskin?
 18 A. Not to my knowledge.
 19 Q. Let's talk about semiautomatic hunting
 20 rifles.
 21 Do you have any experience that you can
 22 impart to the Court about less-trained or naive or
 23 young shooters accidentally squeezing off the second
 24 round on a semiautomatic weapon?
 25 A. I've seen it occur on the rifle ranges.

1 Q. And why does that happen? Do you know?

2 A. Well, when the round goes off -- again, as
3 I described earlier, you're taught through breath
4 control and trigger control that you're just
5 putting the slightest pressure needed to make the
6 round discharge.

7 And then you have all the motions of the
8 weapon, and the weapon moves, and if you don't have
9 it firmly into your shoulder and if you don't have
10 it cradled correctly or a lot of other reasons,
11 it's, you know -- you can pull that second round
12 before you realize or you pull the second round
13 unintentionally before you realize what's happened.

14 Q. And is that second unintentional round
15 more or less likely to be on target?

16 A. More than likely it's not on target.

17 Q. To your knowledge, has there ever been a
18 death or injury at the Minot, North Dakota,
19 military range?

20 A. I did research on that and talked to my
21 replacement, and I talked to the civilian that's at
22 the Air Force Security Forces Center in Lackland
23 Air Force Base Texas who is the civilian that
24 monitors all the Air Force ranges, and neither of
25 them knew of any incident at Minot, North Dakota.

1 Q. What do you think of the NRA range manual
2 circa 1999, which I think is the latest version?

3 A. I think it's a good planning document, and
4 I think they fall very short just in a few areas.
5 When they speak of, you know, SDZs, they speak of
6 land requirements. They've got a few caveats that
7 are only, you know, three or four words long, but
8 it's a very big caveat that you got to have the
9 land associated with a range to be safe.

10 A lot of the principles, if you look in
11 the ETL -- it's in the bibliography -- it was
12 used -- again, we looked at everything that was
13 available, and it's got good stuff in it, but it's
14 not as definitive as it could be to lead a designer
15 to produce a safe range.

16 Q. Did you ever in your review of the NRA
17 range manual see any reference to controlling
18 ricochets?

19 A. To my recollection, I did not, but it's
20 been a while since I've studied it in depth. I
21 mean, they mention to ensure that you control the
22 area that things -- that you're firing in, but not
23 very definitively.

24 Q. Do they talk about sighting the range,
25 meaning the land you --

1 A. The location.

2 Q. Yeah.

3 A. Yes. As in our document, that's one of
4 the very first things they mention.

5 Q. Why is it first?

6 A. Well, you build a range depending on how
7 much land you have. If you've got enough land, you
8 know, as the Army does in the west or the ranges do
9 in Quantico and Little Creek, and you can fire
10 weapons, point them anywhere you want to and pull
11 the trigger and don't care about where the round
12 falls because you got that much land, then you
13 don't have to build baffles. If you've got less
14 land, then you build baffles. If you've got even
15 less land, then you build a totally-contained
16 range. So --

17 Q. If there was one single problem at
18 Farragut that would characterize the nature of the
19 underlying problems at Farragut, what would it be?

20 A. I think the biggest problem is the range
21 doesn't have enough land downrange. It's not --
22 the State doesn't control the potential danger zone
23 downrange.

24 Q. Could, if you had enough money, Fish and
25 Game build a range compliant with the Court order

1 leaving out issues of noise, which is not what
2 we're addressing today?

3 A. Oh, yes.

4 Q. And what would you call the design of such
5 a range?

6 A. It would be a composite. It would
7 probably be closer to a totally-contained than a
8 partially-contained range. I mean, you go through
9 the process of adding baffles and bullet traps and
10 other means to control the rounds until you get
11 almost to a totally-contained range.

12 But in the location of the range at its
13 current location to its current boundary downrange,
14 you'd have to do the measures that would bring that
15 safety danger -- surface danger zone down to the
16 three-quarter mile limit that would make it -- make
17 sure it falls on the range property they control.

18 Q. Is that a function of money? In other
19 words, if you had enough money, could you do it?

20 A. Oh, if you have money, you can solve most
21 problems. You can engineer and create and correct,
22 yes.

23 Q. Did you see the design from TRS Range
24 Management Services with seven baffles on the
25 hundred-yard range?

1 A. I've seen several iterations of this -- of
2 what I thought were design documents. This one we
3 were just looking at, whatever exhibit --

4 Q. Let's be specific. K. You're talking
5 about K?

6 A. Yes. This one was -- first off, this was
7 the one to correct and comply with the Court
8 orders, and this one has --

9 Q. That's the nine?

10 A. I think it has nine. And then I've seen
11 another set that had seven, and then I've seen
12 this -- what I thought was the submission for the
13 request for the as-built that shows six.

14 Q. If the designer issued a plan with seven
15 and six were built, from a professional
16 perspective, what would you see -- like to see in
17 the record to document that change?

18 A. From a, you know -- from a professional
19 aspect, the seven were designed for a reason, and
20 if they -- if you eliminate something, then you'd
21 want to see evidence that a redesign occurred to
22 prove that the finished product still met the
23 intent and the purpose and the function and the
24 safety of the range.

25 So it's usually calculations, it's usually

1 A. I have.

2 Q. Computer modeling? Computer modeling?

3 A. Uh-huh.

4 Q. You have to say yes or no.

5 A. I have not done it personally. I have --

6 again, in my past employment, I have employed
7 Picatinny to do computer modeling, but I haven't
8 done it personally.

9 Q. Field testing?

10 A. Yes, field testing.

11 Q. Trial and error?

12 A. Oh, yes.

13 Q. Statistical analysis?

14 A. Yes.

15 Q. Did you -- you used the folks at the
16 Picatinny --

17 A. Picatinny.

18 Q. -- at the Picatinny Arsenal to assist you
19 with computer modeling?

20 A. I did.

21 Q. Do you know what the C-A-D program, CAD
22 Computer Assisted Design program is?

23 A. Uh-huh.

24 Q. You do?

25 A. Yes.

1 narratives, it's usually official correspondence,
2 and it's usually a revision mark in the title block
3 of the drawings.

4 Q. Would it surprise you to know that that
5 alteration in design is not documented but only
6 supported by telephone communication or
7 face-to-face communication between people?

8 A. It's usually much more formal than that,
9 so --

10 Q. Does that shock your engineering
11 conscience?

12 A. Well, I know it occurs, but from a, you
13 know, State and Federal level, I'm surprised that
14 it occurred.

15 Q. In the rendering of your opinions, have
16 you used your PE training to assist you?

17 A. Yes.

18 Q. Research from published works?

19 A. I have.

20 Q. The bibliography in the ETL?

21 A. I did.

22 Q. Standard reference books?

23 A. I did.

24 Q. Consultation with colleagues of similar
25 training and grade?

1 Q. And can you do bullet computer modeling
2 with that?

3 A. Not the computer modeling that I'm
4 referencing. I mean, you could -- computer-aided
5 drafting program helps you put lines on a paper the
6 same way or as opposed to using an ink and a
7 straight edge or a pencil and a straight edge. So
8 it's producing drawings. It's not --

9 Q. Not a consulting program?

10 A. When I'm talking about the computer
11 modeling, they would make a physical model of the
12 structure, but then they would simulate the firing
13 of ammunition from a muzzle at different locations
14 and different aiming variations from vertical and
15 horizontal and fire millions of rounds and then
16 look at the output of where these rounds were to
17 fall.

18 Q. Did you in your preparation for today
19 consult professional journals?

20 A. Yes.

21 Q. Published works on the internet?

22 A. Yes.

23 Q. What is your opinion of the range as built
24 as you have been made aware today? What's your
25 comments about the range, general comments as it

1 exists today, the hundred-yard range?
 2 A. The construction of the range?
 3 Q. Yeah.
 4 A. It has some aspects of a good range, and
 5 it has a lot of places where it falls short. The
 6 materials from the baffles -- I mean, early on the
 7 statements were made -- TRS said we've modified our
 8 normal baffle to accommodate materials on hand from
 9 the State, and I never saw where they did anything
 10 to account for that modification, to approve that
 11 modification.
 12 I mean, they did fire some rounds at it.
 13 From the picture I saw, it looked like the rounds
 14 came very, very close to perforating the second
 15 plate, and that was just from one round.
 16 You know, some of these baffles will be --
 17 they'll strike them a lot, particularly the ones
 18 that are closest to the target as the sighting
 19 window narrows down from, you know, parallel-type
 20 sighting, and you'll hit that last one a whole
 21 bunch, and it wouldn't be long.
 22 The Court does say that he has to build --
 23 they have to build stuff that's maintainable, and I
 24 was just concerned about the maintainability and
 25 the safe operation of some of the features I saw,

1 you know, after the initial use.
 2 Q. What about the testing done on the baffles
 3 and the glulams, any comments?
 4 A. Again, I saw the photographs and a
 5 sentence or two, but I didn't see much. You know,
 6 typically a test report lays out what you did, and
 7 I didn't see that.
 8 So it might exist, I just haven't seen it,
 9 but I've seen the photograph with the caption
 10 saying, you know, this is what the result is.
 11 Q. If in fact there were no test report, what
 12 would you -- how would you view the baffle
 13 photographs which were exhibited to you as some
 14 definitive baffle testing results?
 15 A. There was no material specs given for the
 16 steel that I saw, but, you know, the composition of
 17 the baffle from the glulam with the two plates, it
 18 should have been tested, it should have been
 19 proven, it should have been -- unless someone were
 20 going to the expense to do a specialized design,
 21 and typically when do you that, it's to save money,
 22 then you tend to -- you adopt the proven, accepted,
 23 standard ways of doing things, and this baffle
 24 didn't appear to be that. There's a deviation
 25 because of material.

1 And my first thought was, well, if you use
 2 a lesser grade material, then to make it an
 3 operational and functional and maintainable baffle
 4 that's safe for a reasonable period of time, you
 5 might have to add more plates to it. Instead of
 6 just two plates, you might need that third plate to
 7 stop when it goes through the first two plates.
 8 Q. On page 59 of the memorandum, decision,
 9 and order, on the last paragraph on that page, it
 10 says, paragraph numeral I, in bold, safety, colon,
 11 include safety measures adequate to prevent, in
 12 bold type, bullet escapement beyond the boundaries
 13 owned and controlled by Idaho Department of Fish
 14 and Game.
 15 In your opinion, is the range compliant to
 16 prevent bullet escapement from the boundaries
 17 controlled by Idaho Department of Fish and Game?
 18 A. It is not.
 19 Q. Any question in your opinion in that
 20 regard or is that absolute?
 21 A. That's absolute. And I was impressed that
 22 safety was a big bold word. It was bold. So you
 23 could tell it's important. And that's really the
 24 way I looked at the whole range was safety.
 25 You know, the people living downrange or

1 the people that might have to drift, you know --
 2 drift or hike or horseback or whatever, drive on
 3 the highway that's outside that controlled area,
 4 you know, they don't know if that's 499 shooters or
 5 if that's 502. So --
 6 Q. The safety fence that exists at Farragut,
 7 I want you to assume that it consists of wooden
 8 posts two or three feet in the ground and from post
 9 to post is strung smooth double-strand wire. We
 10 call it in the horse game baby wire, not barbed.
 11 Does that safety fence afford any
 12 protection from bullets?
 13 A. Oh, no. It's -- a safety fence -- in my
 14 opinion, the safety fence should be at the limits
 15 of the surface danger zone.
 16 Q. Which would be outside the park property?
 17 A. Correct. Correct.
 18 Q. So what is this safety fence affording
 19 from a protective perspective if it's only, as
 20 we've been told, some 300 yards behind the major
 21 backstop?
 22 A. The -- from a general safety perspective,
 23 none. It would keep somebody from walking up and
 24 peering over the back of the berm at the firing
 25 line, but in my opinion, the ricochet's going to be

1 falling outside that safety fence.
 2 Q. Does that safety fence give you much
 3 confidence?
 4 A. No, no confidence.
 5 Q. Do you think that the entire -- I'll
 6 rephrase.
 7 To approach compliance with the Court
 8 order for 500 and for 501, should the entire roof
 9 of the shooting shed have been armored up until
 10 twelve o'clock high to the firing line?
 11 A. Even and maybe -- well, yeah, to
 12 twelve o'clock would be fine, yes. But the problem
 13 with that is if someone puts their rifle over
 14 their -- and fires that way, it's going opposite
 15 downrange. So, you know, again, to be safe and
 16 reasonable, we look at extending that thing a
 17 meter, you know, 3.3 past the firing line.
 18 Q. What about individual shooter
 19 responsibility at a range, how does that figure
 20 into range design?
 21 A. Well, it's assumed that the shooters are
 22 going to be responsible. I mean, that's the
 23 assumption, that the people are going to be out
 24 there that -- you'd asked the question earlier --
 25 you had the word deliberate in there, but you know,

1 particularly the bigger cobbles that are there,
 2 boulders some of them, will definitely increase the
 3 likelihood of ricochets that would leave the range.
 4 BY MR. RICHMAN:
 5 Q. I want you to assume that some of the
 6 downrange baffle steel supports, steel stanchions,
 7 on either side are not covered with dimensional
 8 timber and plywood as the earlier ones are. Is
 9 that a safety problem and a ricochet problem?
 10 A. That is a safety and a ricochet concern,
 11 yes.
 12 Q. What do you call the sophistication of the
 13 range proprietorship to present a range with that
 14 open and notorious error to the Court suggesting
 15 that it's compliant with the Court order?
 16 MS. TREVER: Objection as to
 17 characterization of open and notorious errors not
 18 being what the witness has attested to.
 19 THE WITNESS: The thing -- the only thing
 20 I've hoped was that, as I saw these pictures, that
 21 they were construction sequence pictures and that,
 22 you know, what I didn't see in one picture and
 23 later saw in portions of other pictures, that it
 24 was a construction process that wasn't completed.
 25 If the last set of photographs that you've

1 we're not assuming -- we never assume that
 2 someone's deliberately going to turn and fire the
 3 opposite direction, that they're not going to
 4 deliberately try to shoot their neighbor, you know,
 5 down the firing line toward the next range complex.
 6 So you take and you assume and you train
 7 that everybody is personally responsible and
 8 safety's everybody's responsibility at a range, but
 9 then you have to plan for the unexpected, the
 10 unintentional, the accidental discharges.
 11 Q. In the military vis-a-vis civilian issue
 12 of which there has been some discussion, if
 13 Farragut is a static range, nontactical where
 14 shooters are shooting for marksmanship downrange,
 15 do the principles of the ETL equally apply from a
 16 safety perspective?
 17 A. In my opinion, they do.
 18 Q. From what you know and what you've seen,
 19 is there any ricochet potential portended by the
 20 rubble and/or native rocky soils in the side berms
 21 and the back berm?
 22 A. State that again, please.
 23 MR. RICHMAN: Ms. Reporter.
 24 (Question read.)
 25 THE WITNESS: The rocky soils and

1 shown me is the completed range, and I assume that
 2 means it's finished, it's signed off and completed,
 3 then I'm very surprised to see all of those
 4 ricochet hazards still not addressed.
 5 BY MR. RICHMAN:
 6 Q. If that unprotected stanchion circumstance
 7 existed on the day that the petition to this Court
 8 was filed urging that the range was compliant,
 9 would you consider -- what would you -- how would
 10 you characterize the range design personnels'
 11 professional behavior?
 12 A. That were presenting this as being
 13 compliant?
 14 Q. Yes.
 15 A. I would say they didn't have a basic
 16 understanding of ranges and how they function and
 17 operate.
 18 MR. RICHMAN: Your witness, ma'am.
 19 MS. TREVER: Can we take a break?
 20 MR. RICHMAN: We can take five.
 21 (A recess transpired.)
 22 BY MR. RICHMAN:
 23 Q. Mr. Caulder, is the range as presently
 24 designed capable of controlling 100 percent of the
 25 bullets within Idaho Department of Fish and Game

1 property?
 2 A. No.
 3 Q. And does the range as presently
 4 constructed afford 100 percent bullet containment
 5 on Idaho Fish and Game property?
 6 A. No, it does not.
 7 MR. RICHMAN: I have no further questions.
 8 Thank you for the courtesy, counsel. Your witness.
 9 EXAMINATION
 10 BY MS. TREVER:
 11 Q. Now, Mr. Caulder, you indicate you have
 12 never been to the range, correct?
 13 A. I have not.
 14 Q. And you've never been to Idaho even,
 15 correct?
 16 A. I have not.
 17 Q. In the affidavit previously submitted in
 18 this case, you indicated that it is consequential
 19 to note that you have not visited the Farragut
 20 range at the time of the affidavit, correct?
 21 A. Correct.
 22 Q. If a -- the bullet from a shooter hits the
 23 floor of the range, that shooter is not firing his
 24 weapon directly above the berm behind the target,
 25 is he?

1 A. If he hits the floor where? Before the --
 2 Q. I'll reframe my question.
 3 If a shooter hits the floor of the range,
 4 then that shooter is not firing his weapon above
 5 the berm behind the target, is he?
 6 A. Correct. He's firing toward the berm but
 7 not above, yes.
 8 Q. And I need to look at your blue sky
 9 photos, which -- and I'm going to hand you the
 10 photo marked as Exhibit G.
 11 A. Okay.
 12 Q. And the photo marked as Exhibit C. And if
 13 a shooter were to fire out of the opening showing
 14 blue sky, then that shooter would not be firing his
 15 weapon above the berm behind the target, would he?
 16 A. No, he would not be.
 17 Q. If a shooter on the 100-yard range is more
 18 than 20 degrees off target, that shooter is at
 19 least 100 feet away from his target, isn't he?
 20 A. Uh-huh, I agree with that.
 21 Q. And given that the length of the target
 22 line is 72 feet, that shooter is not firing any
 23 target along the back berm if he does so, correct?
 24 A. That would be correct.
 25 MS. TREVER: And I'm going to ask the

1 reporter to mark this as an exhibit. I don't know
 2 how we want to sequence that or denote that. I'll
 3 leave that up to the reporter's discretion.
 4 (DEPO. EXH. Q, Design Criteria for
 5 Shooting Ranges, was marked for identification.)
 6 BY MS. TREVER:
 7 Q. And I'm going to hand you an exhibit
 8 marked as Exhibit Q entitled Design Criteria For
 9 Shooting Ranges by Clark Vargas.
 10 You indicated in your prior deposition
 11 that you had not reviewed the contents of that in
 12 its entirety. Is that still the case?
 13 A. That is the case.
 14 Q. And you did not rely on this document for
 15 forming your opinion of the Farragut range, did
 16 you?
 17 A. I did not, no.
 18 MS. TREVER: And if I could get that one
 19 marked.
 20 (DEPO. EXH. R, Cross Section of the
 21 Hundred-Yard Range at Farragut, was marked for
 22 identification.)
 23 BY MS. TREVER:
 24 Q. I'm going to hand you a document marked
 25 Exhibit R. This document was presented to you in

1 your prior deposition, was it not?
 2 A. It was.
 3 Q. And with the calculations presented on the
 4 diagram, you previously testified that a shooter
 5 from the firing line would not be able to fire a
 6 weapon above the berm behind the target, correct?
 7 A. Direct fire -- your question is can a
 8 shooter fire above the target -- above the berm --
 9 Q. Behind the target.
 10 A. -- direct fire?
 11 Q. Correct.
 12 MR. RICHMAN: Excuse me. Objection. My
 13 objection is that the witness is not responding to
 14 your question.
 15 MS. TREVER: I will restate the question.
 16 BY MS. TREVER:
 17 Q. You previously testified that a shooter
 18 from the firing line, direct fire from that shooter
 19 would not go above the berm behind the target given
 20 these calculations, correct?
 21 A. Given the baffle layout and the sight
 22 lines that are shown here, again, this thing is I
 23 think not to scale, which really makes it hard to
 24 work with, but it appears from the sight lines that
 25 the sight line intercepts the berm if you're firing

1 at the target.
 2 Q. And that would lead you to conclude that a
 3 shooter from the firing line would not be able to
 4 fire directly above the berm behind the target,
 5 correct?
 6 A. Direct fire.
 7 Q. Correct.
 8 A. I agree with that, direct fire, yes.
 9 Q. And that is true of a shooter in any
 10 position, standing, kneeling, or prone, correct?
 11 A. The documents didn't present the sight
 12 lines for those other positions, but just from a
 13 quick look at it, it appears that is correct. The
 14 baffles would prevent firing above the berm.
 15 Q. And in your prior deposition, you agreed
 16 that the prone shooter presented the most
 17 conservative of those three positions, standing,
 18 kneeling, prone, with regards to view of the
 19 backstop, correct?
 20 A. It is typically the most critical
 21 position, and it gives you -- it requires the most
 22 extensive baffling, yes.
 23 Q. You have not designed any civilian ranges,
 24 have you?
 25 A. I have not.

1 yards, correct?
 2 A. That is correct.
 3 Q. And the Air Force has used native soil in
 4 ranges, correct?
 5 A. That is correct. If it meets the
 6 criteria.
 7 Q. And you referred to using the Air Force
 8 code as a building code, but no such building
 9 code -- it's not been adopted as such a building
 10 code for civilian ranges, has it?
 11 A. Oh, no, I'm just using that as
 12 analogous -- the criteria is very similar to the
 13 building code for a building.
 14 Q. But it's not been adopted for a civilian
 15 range, correct?
 16 A. Not to my knowledge.
 17 Q. I also wanted to confirm one point you
 18 made, that in Air Force planning documents, you
 19 don't engineer for deliberate misconduct of the
 20 shooter. Is that correct?
 21 A. The deliberate conduct that I've mentioned
 22 was when someone turns around and shoots toward the
 23 parking lot. We don't have measures to prevent
 24 rounds from going toward the parking lot. We take
 25 it from the firing line 180 degrees toward the

1 Q. And you indicated in your prior deposition
 2 that you have not fired in a civilian capacity on a
 3 civilian range, correct?
 4 A. I have not.
 5 Q. And you indicated in your prior deposition
 6 that you were unfamiliar with the Tenoroc range in
 7 Lakeland, Florida, correct?
 8 A. Tenoroc I am not familiar with, yes,
 9 that's correct.
 10 Q. You do not know whether other people agree
 11 with your -- or other civilian range designers use
 12 your definition of downrange, do you?
 13 A. Civilians, I didn't confer with many
 14 civilians. We had a Department of Defense group,
 15 criteria group, and I spoke with my counterparts
 16 for the other services. And I wasn't developing
 17 criteria for civilians. I was developing safe
 18 criteria for military.
 19 Q. I wanted to clear up one point in terms of
 20 a question regarding modeling. You did not use
 21 Picatinny personnel to do modeling specific to the
 22 Farragut range, did you?
 23 A. I did not, no.
 24 Q. Prior to 2000, the Air Force surface
 25 danger zone for partially-contained ranges was 300

1 target.
 2 Q. Bullets that are greater than -- fired at
 3 a greater than 35-degree angle have a plunging
 4 trajectory, correct?
 5 A. Correct.
 6 Q. And those bullets do not present a
 7 ricochet potential, correct?
 8 A. That is correct.
 9 Q. And in normal shooting conditions, the
 10 ricochets will typically be occurring -- striking
 11 the range at a low angle, correct?
 12 A. Typically, yes.
 13 Q. In the case of a ricochet that reflects
 14 with a low angle, that would strike the backstop
 15 the majority of the time, correct?
 16 A. I would agree with that. On a surface,
 17 it's, you know, uniform and -- I mean, there's a
 18 lot of reasons it wouldn't do that, but you said
 19 most of the time, I think.
 20 Q. The majority of the time is what I said.
 21 A. The majority of the time, yes.
 22 Q. In fact, it would be most of the time,
 23 would it not?
 24 A. Again, on a surface that's, you know, the
 25 proper surface for the floor. You know, the

1 cobbles and rocks in the pictures that we've seen
2 earlier would cause a lot of errant and unpredicted
3 ricochets. Instead of ricocheting at a --

4 Q. I asked a specific --

5 MR. RICHMAN: I'm sorry. Did the witness
6 finish? Did you finish, sir?

7 MS. TREVER: I was saying I asked a
8 specific yes-or-no question, and you can have the
9 opportunity to --

10 MR. RICHMAN: I understand, but the
11 witness hasn't finished his answer and he's
12 entitled to finish his answer. Did you finish your
13 answer?

14 THE WITNESS: I was just qualifying the
15 question about at a slight angle -- reflect on a
16 slight angle and preceding to the berm, it's
17 dependent on the floor surface.

18 MR. RICHMAN: Have you finished your
19 answer?

20 THE WITNESS: I'm finished.

21 MR. RICHMAN: Thank you.

22 BY MS. TREVER:

23 Q. Although you had not -- indicated you have
24 not reviewed the entire document marked as
25 Exhibit Q, in a previous deposition, you did

1 accommodate training regimens that require the
2 shooter to move laterally across the firing line
3 and also move downrange to engage targets.

4 Is that correct as to your recollection?

5 A. That is correct, yes.

6 Q. The Air Force also stated in the 2005 ETL
7 that the new training courses of fire will go
8 beyond the traditional marksmanship training of the
9 past and will be expanded to provide a tactical
10 employment capability. Is that also correct?

11 A. That is correct.

12 Q. And, additionally, ranges must be designed
13 to allow for vehicle entry to the range for
14 training scenarios or maintenance activities. Is
15 that also correct?

16 A. That is correct.

17 Q. None of the scenarios of lateral or moving
18 up front are not contemplated for use at Farragut
19 range to your knowledge, are they?

20 A. To my knowledge, it's a static firing line
21 with stationary targets.

22 Q. The Air Force also uses armor-penetrating
23 bullets at its ranges, correct?

24 A. No, they don't.

25 Q. Does the ETL provide some literature and

1 indicate that you had familiarity with figure 1 of
2 that document. Is that correct?

3 A. It appears to be very similar to the safe
4 surface danger zones that the military's employed,
5 and I've seen that before.

6 Q. And that surface danger zone is based on a
7 ten-degree impact area and ricochet area. Is that
8 correct?

9 A. Yes. Yes. It's broken down five and
10 five, but if you want to lump it as ten, then yes.

11 Q. And firing more than 20 degrees off target
12 would be outside of that ten-degree arc, would it
13 not?

14 A. Yes.

15 Q. In the Picatinny ricochet study, you
16 indicated in a prior deposition that some of the
17 probabilities used in that were one in ten million.
18 Is that correct?

19 A. That is correct, yes.

20 Q. In terms of the Air Force engineering
21 technical letters, in the 2005 technical letter,
22 the Air Force indicated that there were training
23 requirements that differed greatly from the
24 traditional line-up-and-shoot marksmanship training
25 of the past and that new ranges must be designed to

1 documentation as to the use of armor-penetrating
2 bullets?

3 A. It lists the characteristics and the
4 distances for them. And I probably should qualify
5 my statement. I don't know if they do or not.
6 They could. But routinely they didn't.

7 Q. And in terms of the new tactical
8 requirements involved at the range, then, you do
9 not know what the specifics of those training
10 exercises are, do you?

11 A. The specific of the training exercises?
12 No, I was not involved in the day-to-day
13 operational training of the -- I was just looking
14 at the requirements to support their training.

15 Q. But the Air Force in its engineering
16 technical letter does not purport to set standards
17 for civilian ranges, does it?

18 A. This was not intended for civilian ranges.
19 It is a public document, but it's not intended for
20 them.

21 Q. And you have not made specific
22 calculations on the ground from the Farragut range
23 as to the openings of any baffles or other physical
24 measurements, have you?

25 A. I have not been to the Farragut range in

1 person, so --
2 Q. And because of that, you have not made any
3 on-the-ground measurements from the range, have
4 you?

5 A. Oh, I have not, no.

6 Q. And in terms of the Picatinny
7 probabilistic surface danger zone models, the
8 probability of ricochets striking in a particular
9 area is not uniform, is it?

10 A. Probability of ricochets striking a
11 particular area is not uniform. I'm not sure of
12 your question.

13 Q. I will rephrase it.

14 In the Picatinny probabilistic analysis,
15 ricochets are distributed across an area in varying
16 numbers, are they not?

17 A. They're not uniformly and evenly dispersed
18 across the surface danger zone. They tend to fall
19 in areas that represent irregularities or features
20 of the range as been modeled. So different ranges
21 because of different construction aspects would
22 have different, you know, distribution of
23 ricochets.

24 However, from our definition, from the Air
25 Force's definition of surface danger zone, it's

1 Q. Even under military standards, there are
2 military ranges that are partially-contained that
3 do not meet the 50-percent surface danger zone,
4 correct?

5 A. Yes, I think that's a true statement.
6 Even today with the emphasis we've had, we haven't
7 corrected all the problems.

8 Q. And back to the document marked as
9 Exhibit Q on page 330, which is the site selection
10 paragraph, this document says the Tenoroc shooting
11 range which was part of the field trip tour was
12 constructed using these guidelines and was
13 moderately priced. Tenoroc will contain a round in
14 a prescribed area should it escape through the
15 baffles.

16 Because you have no familiarity with
17 Tenoroc range, you cannot comment on that, can you?

18 A. I cannot comment on it, but I do have a
19 lot of questions. I'm sorry, I'm not familiar with
20 Tenoroc at all, and this appeared to be a
21 presentation at a symposium.

22 MS. TREVER: I don't think I have anything
23 else subject to your redirect.

24 REEXAMINATION

25 BY MR. RICHMAN:

1 that the surface danger zone is an area where you
2 would expect the ricochet to fall anywhere within
3 that surface danger zone.

4 Q. But you would not expect the ricochets to
5 fall uniformly within that surface danger zone?

6 A. No, they would not, no. If you remember
7 from the reports, it's a scatter diagram, yes.

8 Q. And the Air Force -- you mentioned earlier
9 that prior to 2000, the Air Force had
10 partially-contained ranges and had surface danger
11 zones of 300 yards, correct?

12 A. That is correct.

13 Q. And the Air Force new guideline of
14 50 percent is not a firm guideline. Is that
15 correct?

16 A. It is the -- it is a firm guideline, but
17 it's not an absolute. I mean, it's -- there's
18 provisions in there that if you don't meet the
19 50 percent, that you can do other things to keep
20 your range operational. So --

21 Q. So even with military standards, there are
22 cases of ranges not meeting the 50-percent surface
23 danger zone for partially-contained ranges,
24 correct?

25 A. Say that again, please.

1 Q. The Court order on page 59, and counsel
2 inquired about it, speaks to -- and I'm going to
3 begin at an ellipses here, cannot fire his or her
4 weapon above the berm behind the target. Do you
5 remember that phrase?

6 A. Yes.

7 Q. And then counsel showed you Exhibit R and
8 asked you whether or not assuming all other things
9 being equal and this were to scale and all that
10 good stuff, which you said it was not, the prone
11 shooter, which it appears to be in this case, could
12 not fire his weapon above the berm.

13 If the weapon fired low and ricocheted,
14 would the round go above and over the berm?

15 A. More than likely than not it would.

16 Q. So if the intention of the firing
17 individual is to fire at the target, but he fired
18 low and the angle was such that the ricochet was
19 going to go over the berm, would he or she have
20 fired his weapon above the berm behind the target?
21 Do you understand the thrust of my question?

22 A. I understand what you're asking, and in my
23 opinion, that you are firing -- your round is going
24 above the berm, and I think that was the question.
25 Direct fire and ricochet was not used in the

1 requirements.
 2 Q. And Exhibit L and M are examples of
 3 potential misdirected fire. Is that what that is?
 4 A. Well, that's to protect laterally.
 5 Q. But -- I'll rephrase that.
 6 Are these potential firing paths for
 7 bullets that might be misdirected by a shooter
 8 intending to shoot at the target?
 9 A. Yes, that's what I take it to be is
 10 that -- the NRA said that from this position over
 11 here, you should anticipate that somebody's going
 12 to be firing toward this left wall and that you
 13 have baffling that overlaps at least a foot and all
 14 the other dimensions they got in there.
 15 Q. But that type of overlapping side baffling
 16 doesn't exist at Farragut, does it?
 17 A. Well, this is if you were to build
 18 baffling. A properly-constructed edge berm side
 19 wall gives the same function. So --
 20 Q. Directing your attention to C, as in
 21 Charlie, and G which are the pictures of the blue
 22 sky openings.
 23 A. Right.
 24 Q. Do you anticipate over time that there
 25 will be accidental discharges through those spaces?

1 was trying to say is that if you have this
 2 requirement, this requirement's coming. We were
 3 trying to tell people this is what the trainers are
 4 telling us that they want to do and that -- and
 5 it's as much for the programmers and everybody
 6 else.
 7 This is going to cost a little more
 8 because we've got to put more into it, it's going
 9 to be more safety measures, it's going to be higher
 10 ceilings, it's going to be all this other stuff,
 11 it's going to be slabs to support vehicles and
 12 whatnot, but as far as the basic requirements and
 13 safety requirements, it doesn't change it.
 14 Q. Do the safety truisms in the ETL apply
 15 equally in civilian and military ranges?
 16 A. In my opinion they do.
 17 Q. And the bullets used on static military
 18 ranges, do they vary in any material regard from
 19 the bullets used in hunting calibers on civilian
 20 ranges?
 21 A. I don't know the restrictions that the
 22 individual civilian ranges put on what can be fired
 23 there, but to my knowledge, it's virtually the same
 24 round.
 25 Q. Now, pistol shooters call them wad

1 A. I would anticipate that as a designer,
 2 yes.
 3 Q. And do you anticipate on a more probable
 4 than not basis that there are intentional
 5 discharges through those spaces?
 6 A. There could very well be, yes.
 7 Q. And if a round went through those spaces,
 8 on a more probable than not basis, it would leave
 9 Fish and Game property?
 10 A. More likely than not, it would travel
 11 until gravity brought it back to earth, which would
 12 be about three miles.
 13 Q. And that is what would be exhibited on G 2
 14 in Exhibit K?
 15 A. Yes. Might be a different orientation,
 16 but it still could go --
 17 Q. Concept's the same?
 18 A. Yeah.
 19 Q. Does the issue in the ETL '05 -- I think
 20 it's '05. Whatever ETL it is -- where one
 21 discusses the movement of personnel in vehicles --
 22 you remember that colloquy? Does that alter or
 23 change the application of the ETL standards on the
 24 static range civilian versus military?
 25 A. Not in my opinion. It's -- what the ETL

1 cutters. What's that? Are you familiar with the
 2 term wad cutter?
 3 A. I don't use that term.
 4 Q. What kind of bullets -- I use the word
 5 advisedly bullets -- are used by the military on
 6 marksmanship ranges?
 7 A. We use the surface ammunition, which is
 8 the ball ammunition. It's the round they would
 9 take to combat.
 10 MR. RICHMAN: No questions.
 11 REEXAMINATION
 12 BY MS. TREVER:
 13 Q. You indicated a bullet going through one
 14 of the openings would go three miles. That would
 15 depend on the type of round and fire involved,
 16 correct?
 17 A. Again, I was -- assuming the most powerful
 18 weapon that was allowed in the range was that
 19 30.06, that's about the range of a 30.06. So I'm
 20 assuming -- and the designer, you design for the
 21 worst case, for the most stringent requirement, so
 22 you would design for the biggest weapon. So that's
 23 the reason I said that.
 24 Q. But from a probability standpoint of what
 25 round might go through the range, you don't know

1 what the probabilities are without doing more
2 analysis, do you?

3 A. Oh, no, I don't. It would be, you know --
4 but any weapon that was on the range could be fired
5 through that hole. So it wouldn't matter. And the
6 smaller calibers would just go a shorter distance.

7 Q. And there can also be a distinction
8 depending on whether or not .50 calibers are used
9 on a range, correct?

10 A. The distinction is that the .50 caliber
11 has such force behind it and such mass in the
12 projectile that you have to really beef up all
13 aspects of the range. I mean, it's -- not only
14 does it go a long ways, it's got a considerable
15 oomph when it gets there.

16 Q. And you responded that someone could
17 intentionally fire a round through those openings,
18 but again, intentional misconduct, although it may
19 occur, that is not something the designer designs
20 for, correct?

21 A. Intentional or deliberate -- unless it's
22 an attractive nuisance. I mean, there's some
23 things that you don't want to happen that you know
24 may happen, and you do design for those things.

25 So it's -- more likely than not it would

1 MS. TREVER: Yes, I do because it's
2 related to your question.

3 MR. RICHMAN: Actually you don't, but I
4 can't stop you. That's where it ends, but you --

5 MS. TREVER: I will take my prerogative in
6 terms of what we had said earlier, timing of
7 discovery depositions versus --

8 MR. RICHMAN: You go ahead, but you really
9 don't.

10 MS. TREVER: I understand, but in saving
11 future depositions for this, I will do so.

12 REEXAMINATION

13 BY MS. TREVER:

14 Q. In terms of an intentional shot fired
15 through that opening, that is not direct fire above
16 the berm behind the target, is it?

17 MR. RICHMAN: Repetitious. Objection.

18 THE WITNESS: Well, it's the definition of
19 the berm behind the target. And it goes back to
20 what I mentioned earlier is just some of the
21 vagueness of the Court language. When they talk
22 about range, are you talking about the confines of
23 within these baffles or are you talking about the
24 range complex. You know, this was the berm at one
25 time. Maybe it's semantics.

1 be an accidental discharge and instead of a
2 deliberate discharge, but I think there's still a
3 pretty high likelihood that a round would go
4 through there eventually if enough rounds were
5 fired.

6 Q. But you mentioned earlier that the Air
7 Force does not design for fires the shooter fires
8 backwards to the parking lot. Is that correct?

9 A. Correct.

10 REEXAMINATION

11 BY MR. RICHMAN:

12 Q. I'm entitled to very brief readdressing.
13 In your understanding of the Court order
14 where it said to the effect that fire his or her
15 weapon above the berm behind the target, the Court
16 didn't care or speak, as you understand it, to
17 whether it is intentional or deliberate, it spoke
18 to no round beyond the berm. Was that your
19 understanding?

20 A. That's the way I read it. It's no round,
21 and it didn't say if it was direct or ricochet.

22 MR. RICHMAN: Thank you. I'm done.

23 MS. TREVER: And now I have one last
24 question.

25 MR. RICHMAN: Actually you don't.

1 BY MS. TREVER:

2 Q. But from a semantics perspective, it's not
3 the berm behind the target, it's over the side
4 berm, correct?

5 A. The word directly behind the target was
6 left out of the Court order. I agree with that.

7 MR. RICHMAN: Are we done?

8 MS. TREVER: We are.

9 (The deposition concluded at 3:48 p.m.)

CERTIFICATE OF REPORTER

I, Gina M. Smith, Registered Professional Reporter and Notary Public for the State of South Carolina at Large, do hereby certify:

That the foregoing deposition was taken before me on the date and at the time and location stated on page 1 of this transcript; that the deponent was duly sworn to testify to the truth, the whole truth and nothing but the truth; that the testimony of the deponent and all objections made at the time of the examination were recorded stenographically by me and were thereafter transcribed; that the foregoing deposition as typed is a true, accurate and complete record of the testimony of the deponent and of all objections made at the time of the examination to the best of my ability.

I further certify that I am neither related to nor counsel for any party to the cause pending or interested in the events thereof.

Witness my hand, I have hereunto affixed my official seal this 22nd day of November, 2010, at Columbia, Richland County, South Carolina.

Gina M. Smith
RPR, CSR, Notary Public,
State of South Carolina
at Large.
My Commission expires
July 23, 2013.

EXHIBITS(Cont.)

N	Photograph	43
O	Photograph	45
P	Video	47
Q	Design Criteria for Shooting Ranges	71
R	Cross Sections of the Hundred-Yard Range at Farragut	71

INDEX

	Page
EXAMINATION	
BY MR. RICHMAN	3
BY MS. TREVER	69
REEXAMINATION	
BY MR. RICHMAN	83, 90
BY MS. TREVER	88, 91
Certificate of Reporter	93

EXHIBITS

A	CV and Resume	11
B	ETL 08-11	12
C	Photograph	19
D	Photograph	23
E	Photograph	23
F	Photograph	25
G	Photograph	26
H	Photograph	26
I	Photograph	28
J	Shooting Range Definitive Drawings	30
K	State of Idaho Farragut Shooting Range Temporary Improvements to Meet March 2007 Court Order	35
L	Side Baffles	40
M	Shooting Range Definitive Drawings	40

Figure 6 shows flat and plunging trajectories below 30 to 35 degrees, giving maximum trajectories. These are flat trajectories. Those shots are the ones that we're most concerned about as designers. Shot that is fired above 30 to 35 degrees provides plunging trajectories. That trajectory mainly occurs with artillery guns; it is the normal trajectory of an artillery shell. The trajectories that we are discussing are flat trajectories for small-arms ammunition, i.e., direct fire.

Figure 7 shows motion of a bullet being fired. Due to the force of the inertia, and without any gravity, it would move horizontally in perpetuity. A .30-caliber round travels at 2,800 feet per second, and within the first second of flight that bullet is 2,800 feet downrange. By the fifth second of flight, it would be 15,000 feet downrange. This is maximum distance as limited by the pull of gravity.

What actually happens is that Mother Nature has the 32-foot per second acceleration constant that is called the pull of gravity. Gravity starts acting on a bullet immediately as it comes out of the barrel and is no longer supported by the barrel.

Figure 8 shows bullet drop in a vacuum acted on by gravity. In one second the bullet falls 16.1 feet. In five seconds, which is the maximum time of flight for the .30-caliber bullet exiting at a maximum range angle, it would have fallen 402.5 feet, which is quite a distance. If a man, 5 feet 6 inches tall, fired on the horizontal plane, one can calculate that bullet is going to hit the ground quickly, and it does. The design problem is, that by the time that bullet falls 5 feet 6 inches, it is already 2,800 feet downrange. At most ranges, shooting will occur inside of 200 yards. With a very flat trajectory, a bullet has to be contained or slowed down in the design, because so much energy still remains.

Figure 9 (a combination of figures 7 and 8) shows that the motion of a bullet when fired horizontally and acted upon by gravity without air resistance arcs down immediately upon leaving the support of the barrel. What must the shooter do in order for that bullet to hit your bull's eye? The shooter inserts an angle of elevation into the gun, as shown in Figure 10. The angle of elevation is inserted with the sights in order to provide the trajectory that hits your bull's eye. Note that the base of trajectory is the horizontal.

Figure 11 shows the elements of trajectory. It graphically gives a description and summarizes what a trajectory is. There is an ascending branch or summit; this is the point in which the pull of gravity equals or reduces all vertical velocity. Then there is a descending branch. The velocity in the horizontal at the point of impact is called terminal velocity. A .30-caliber going its maximum distance of 15,000 feet impacts with sufficient force to penetrate about 2 inches of wood.

Bullet containment and angle control

Now that we have gone through ballistics, we need to talk about range design to contain bullets and control angles. A typical range, as in Figure 12, requires ample parking for shooters unload gear and feel comfortable. Parking must meet the design criteria of your locality.

The range has to have an assembly area where shooters can check their gear. There must be a ready area for shooters before they go to the firing line. At that time, shooters may start wondering if their sights are set properly. They may want to check their sights and scopes. To remedy this need, range design should provide a safety area. A safety area is nothing more than a place for shooters to handle their guns unsupervisedly. A requirement of a safety area is

that no live ammunition is allowed, since unsupervised gun handling will take place. No ammunition is allowed, period.

After checking their gear in the ready area, shooters go to the ready line. The ready line is a control line to enable officers control over shooters going to the firing line. Some type of fencing must be provided to prevent indiscriminate access from the ready line to the firing line without going through a control point or past a range officer.

At a prescribed distance from the firing line, the range has target lines. The firing fan in Figures 1 and 2 shows a 50-degree angle that set up the ricochet area. In order to catch all ricochets, the side berms must extend far enough to contain any ricochets. That is the main purpose of side berms.

If the designer projects to the backstop a line that is perpendicular to the end of the firing line 90 degrees to it, the designer must provide a backstop with sufficient runoff to the right and left to contain rounds with a 5-degree wobble, which is predicted as normal dispersion.

The designer would provide ground baffles to catch rounds that ricochet. The purpose of ground baffles is to intercept rounds skipping and rising. Theory states that a ricocheting round leaves the point of impact at the same angle under which it impacted. In reality, that's not true because there are a lot of surface irregularities. The designer, however, must follow the theory. The designer places ground baffles to intercept the ascending ricocheting rounds before they get over the backstop.

In front of the firing line, the designer places overhead baffles to contain shots that would otherwise travel over the berm. Figure 12 shows the optimum, most cost effective range that can be designed to contain rounds.

Site selection

One of the most important criteria to control range construction cost is to select a proper site. There must be sufficient distance behind the backstop so that sound does not affect the neighbors. You don't want neighbors to complain. Also, if a round or a ricochet gets out, it should fall within the range's nonaccessible fenced property.

If you build in a populated area, your range must be totally baffled so that the range owner can demonstrate to a judge that a round cannot escape. Ranges are very expensive to construct.

The Tenoroc Shooting Range (see Figure 13), which was part of the field trip tour, was constructed using these guidelines and was moderately priced. Tenoroc will contain a round in a prescribed area should it escape through the baffles.

Baffles

Let's look at an example of baffling requirements. A shooter, at a 5-foot-6-inch eye level, is in a covered pistol line (see Figure 14), so you should design a baffle so that his line of sight goes below the first baffle, as shown by Figure 14's dash outline. The shooter's line of sight would intercept the backstop 5 feet from the top. All shots that are fired within this height go to impact the berm.

TRIED NATIONAL SHOOTING RANGE SYMPOSIUM

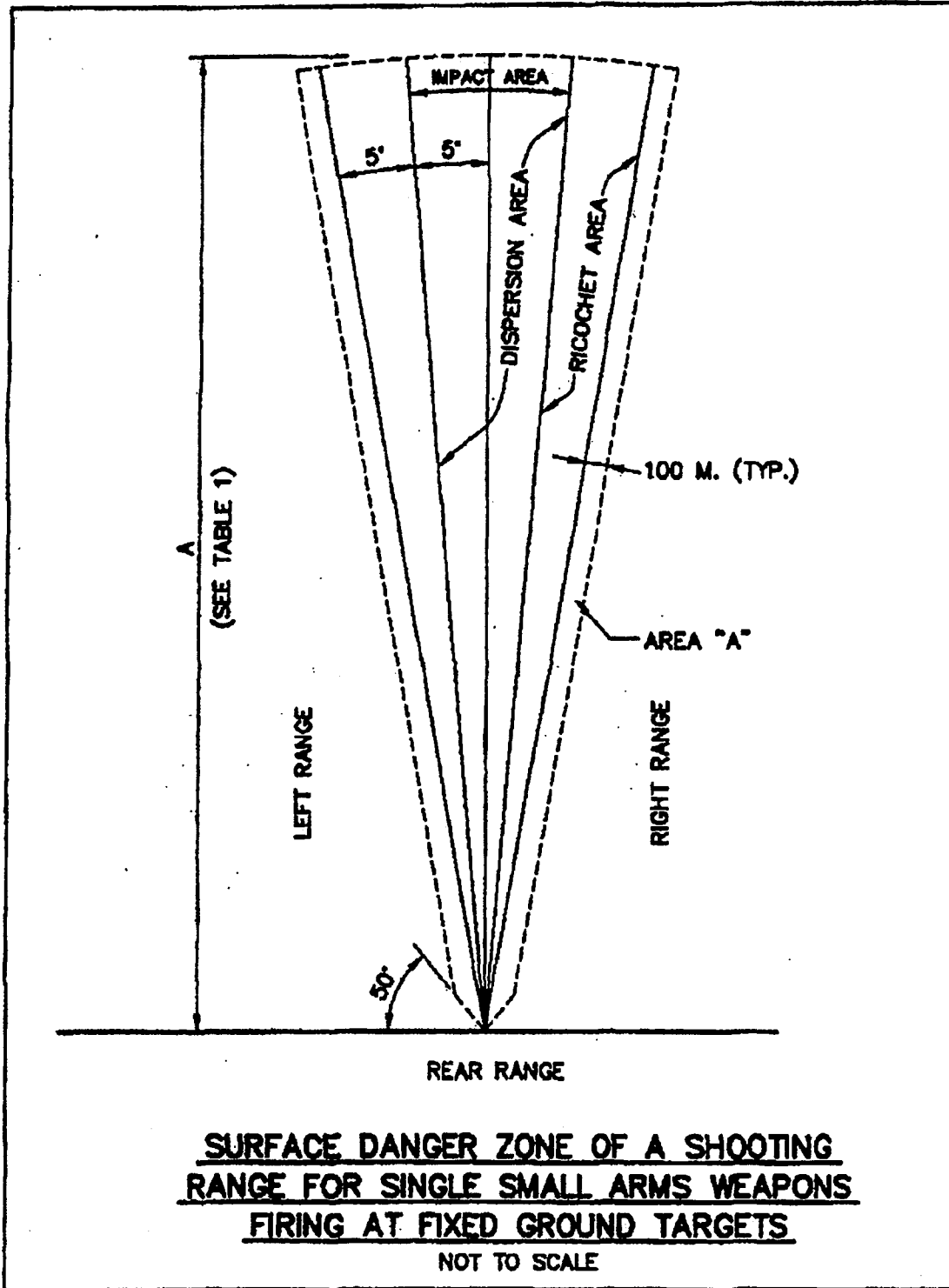


Figure 1

THIRD NATIONAL SHOOTING RANGE SYMPOSIUM

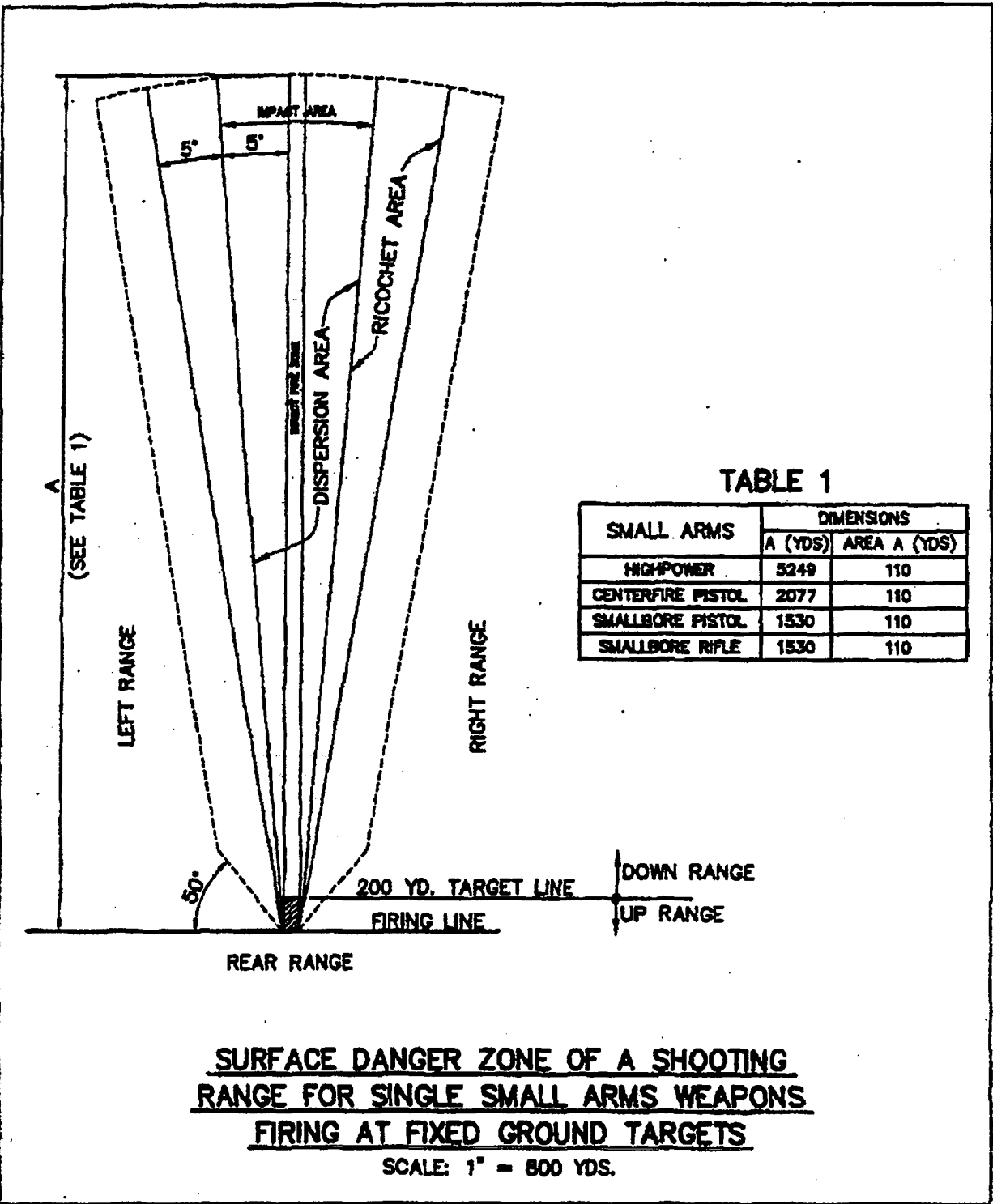


Figure 2

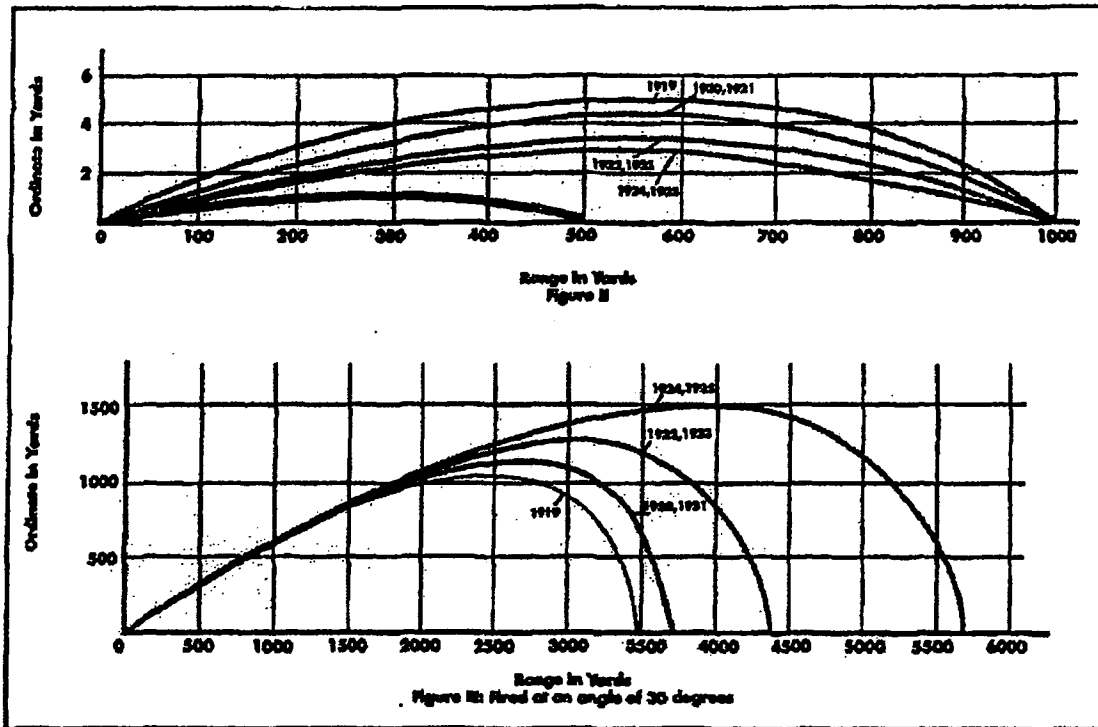


Figure 3: Trajectories of National Match Bullets, .30-caliber
 1919 service, 150-grain, flat-base bullet
 1920, 1921 N.M., 170-grain, flat-base bullet
 1922, 1923 N.M., 170-grain, 6-degree, boat-tail bullet
 1924, 1925 N.M. (new service) 172-grain, 9-degree, boat-tail bullet

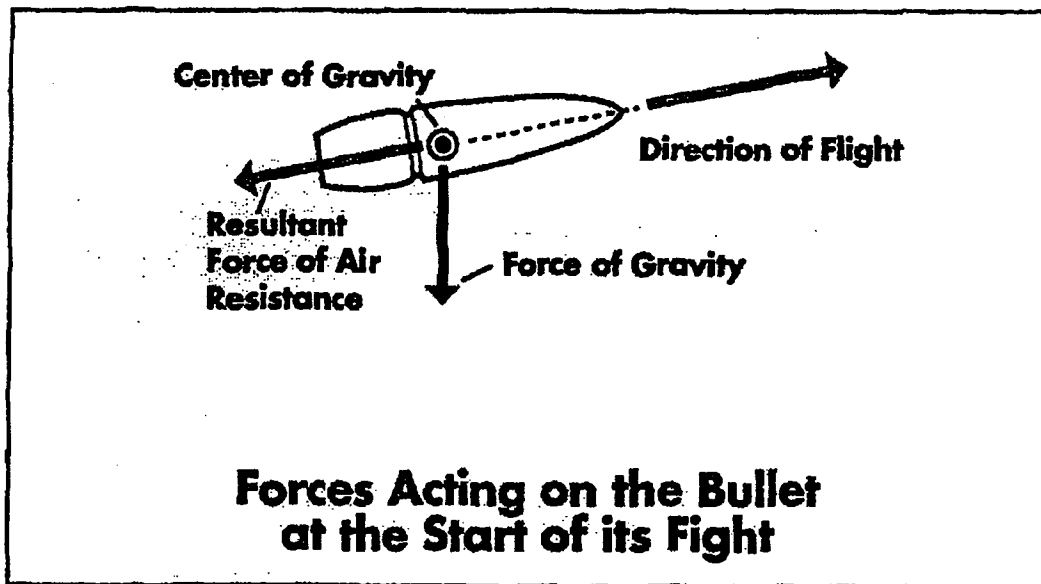


Figure 4

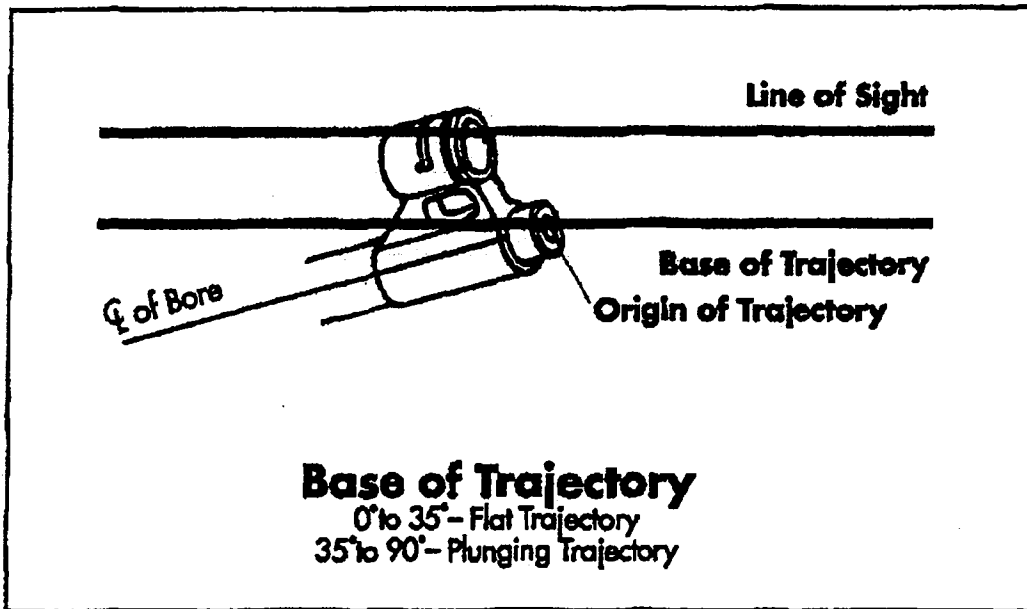


Figure 5

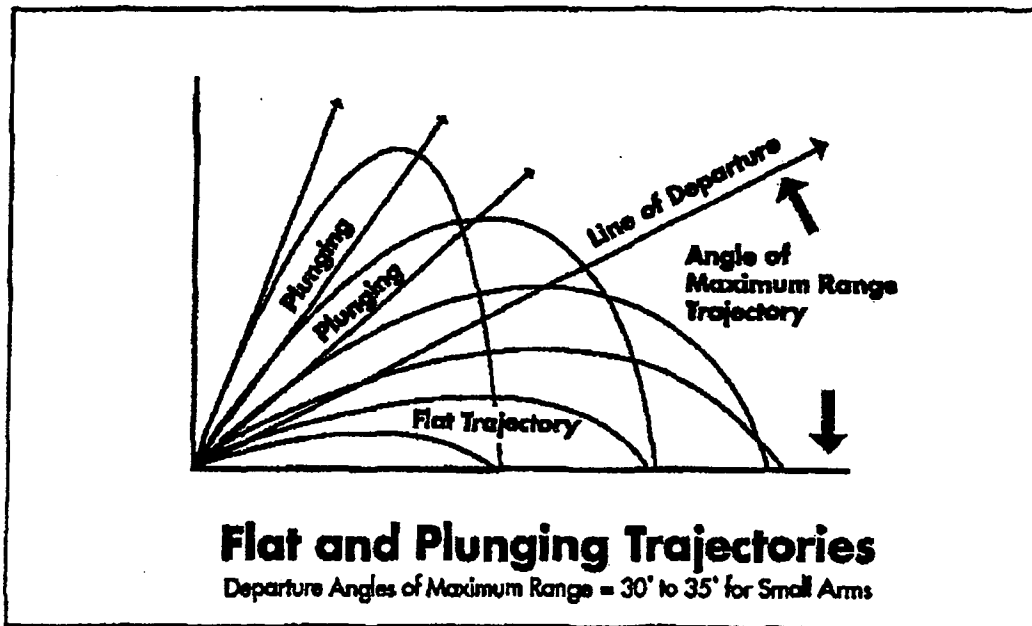


Figure 6

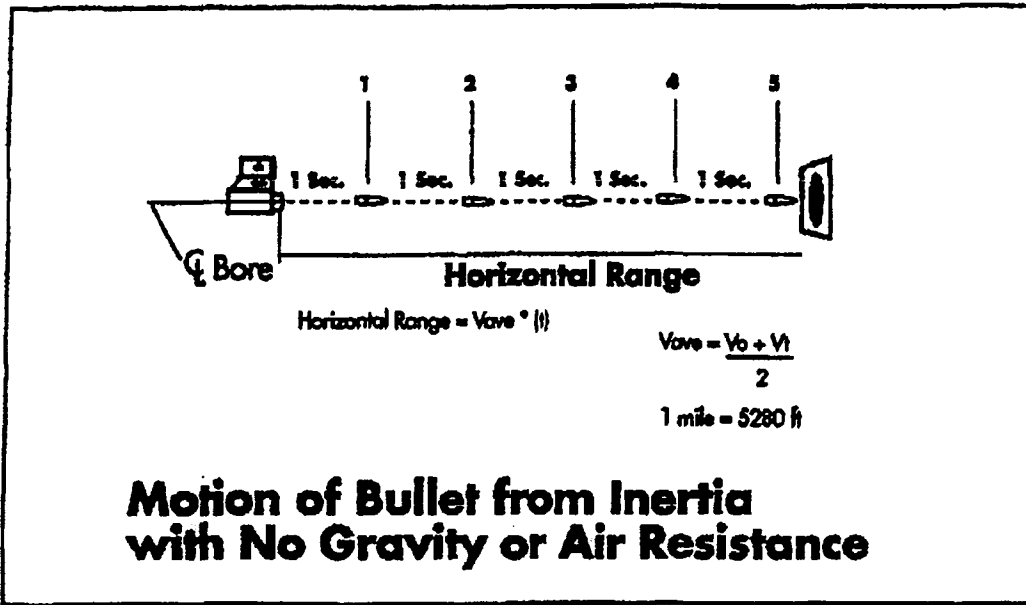


Figure 7

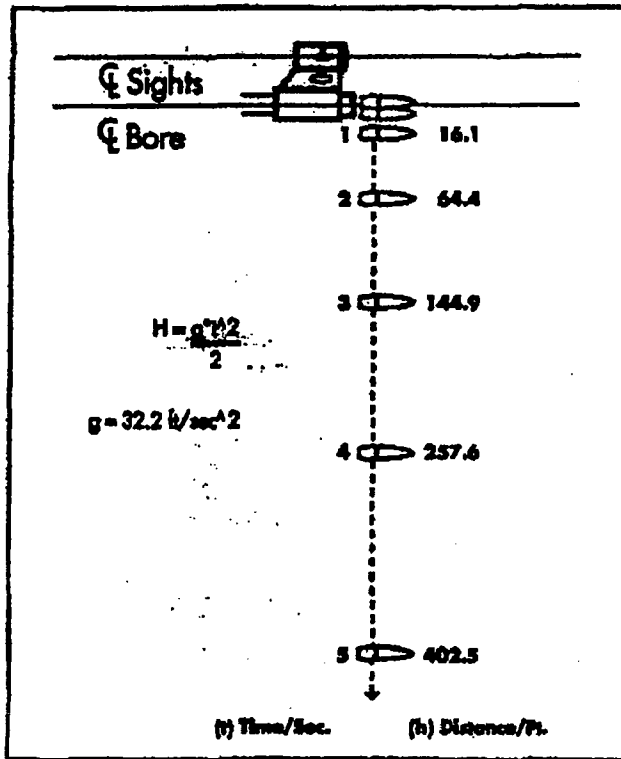


Figure 8: Bullet Drop in a Vacuum

THIRD NATIONAL SHOOTING RANGE SYMPOSIUM

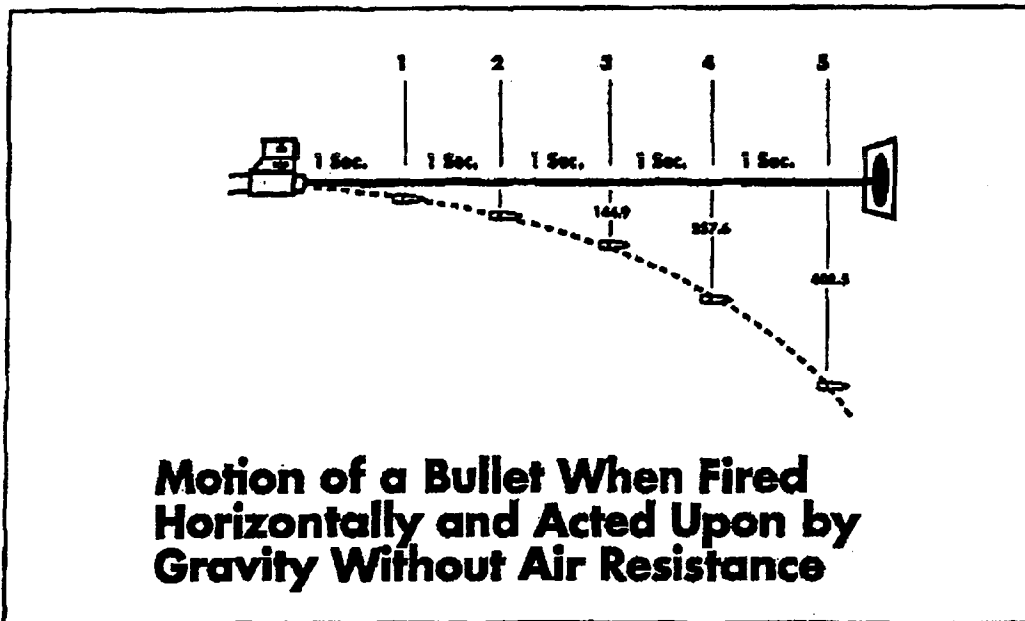


Figure 9

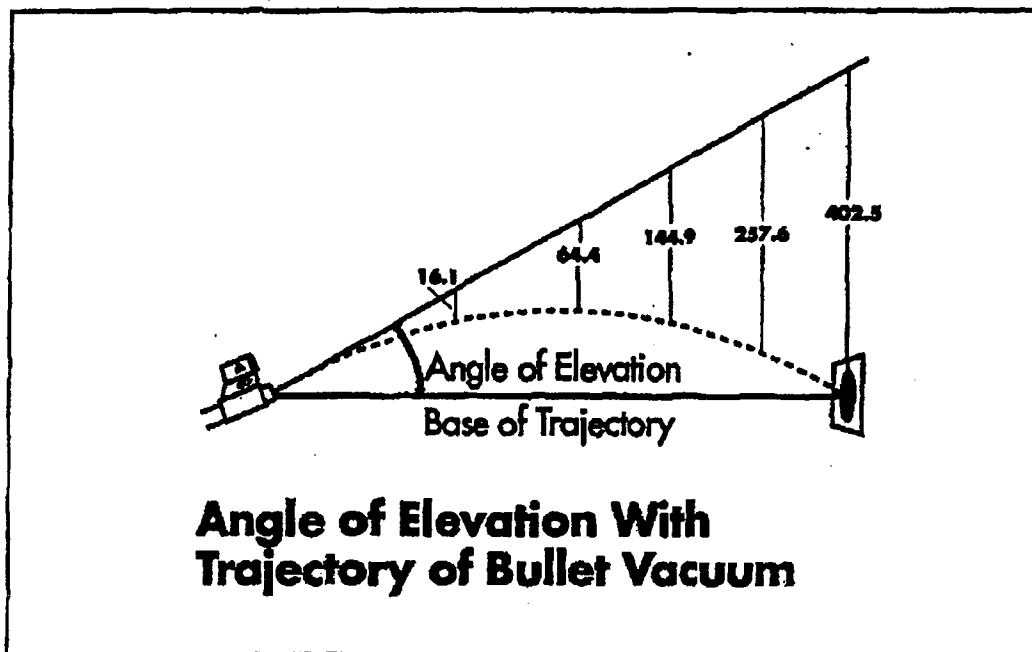


Figure 10

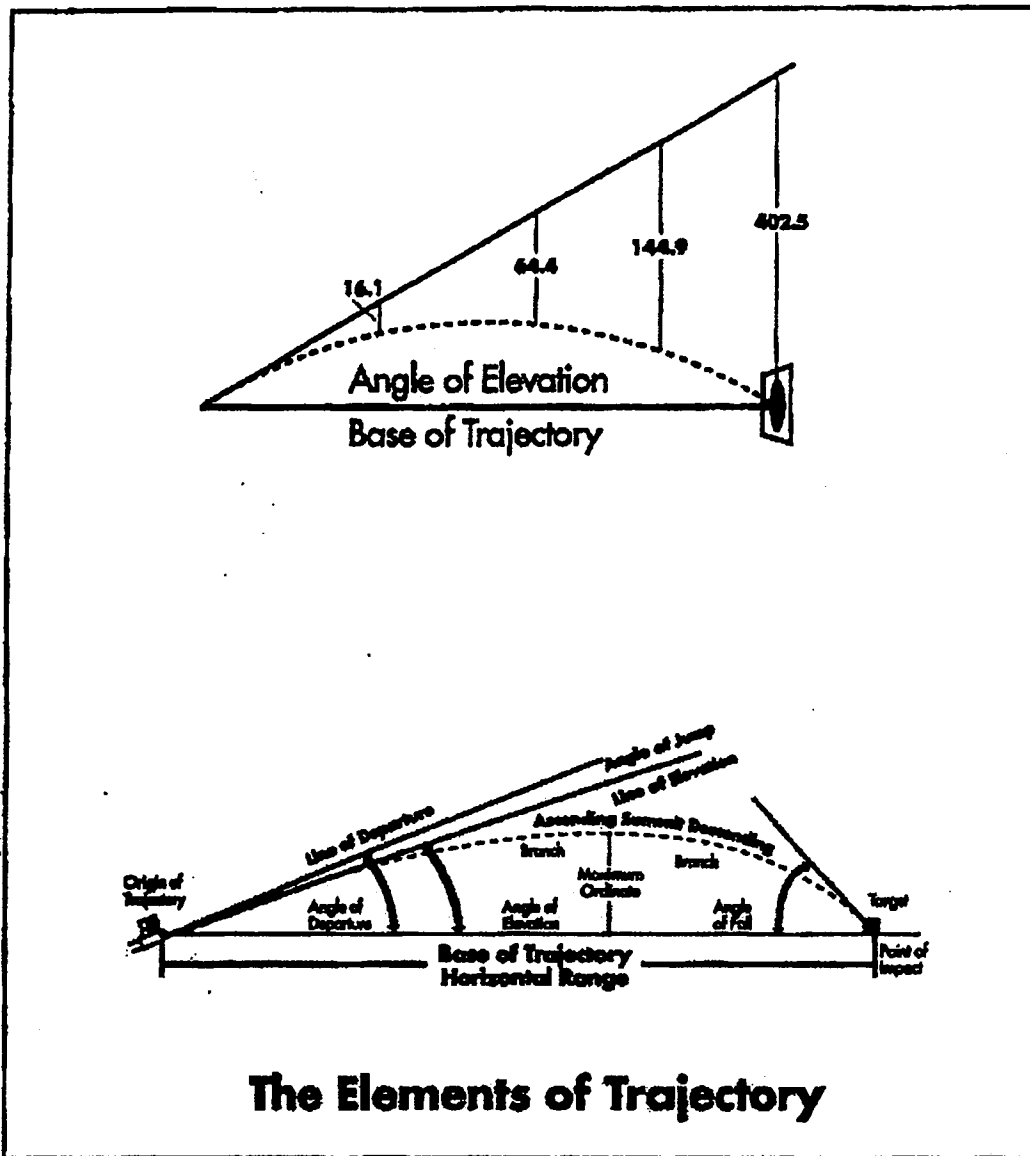


Figure 11

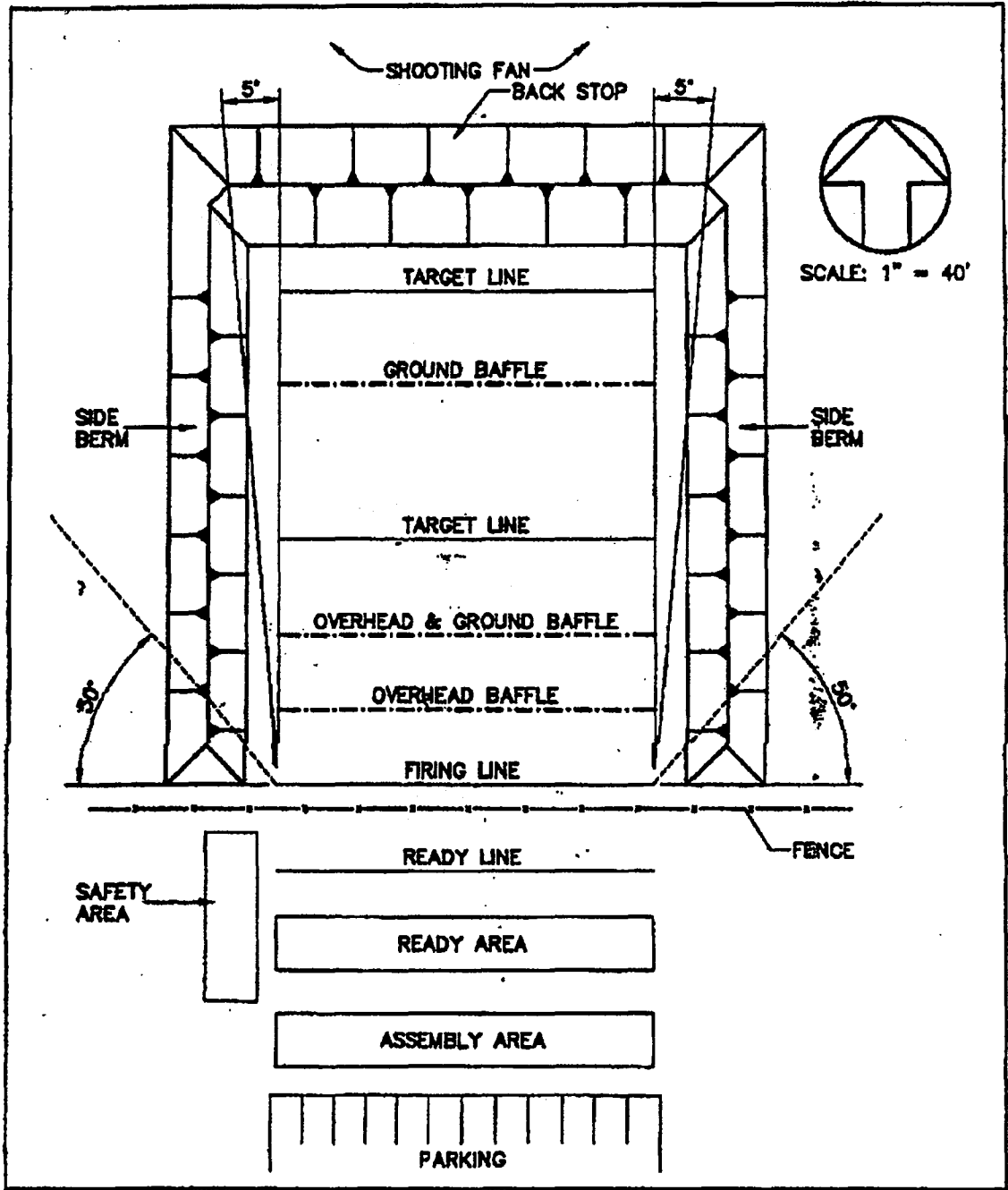


Figure 12: Typical Range Plan

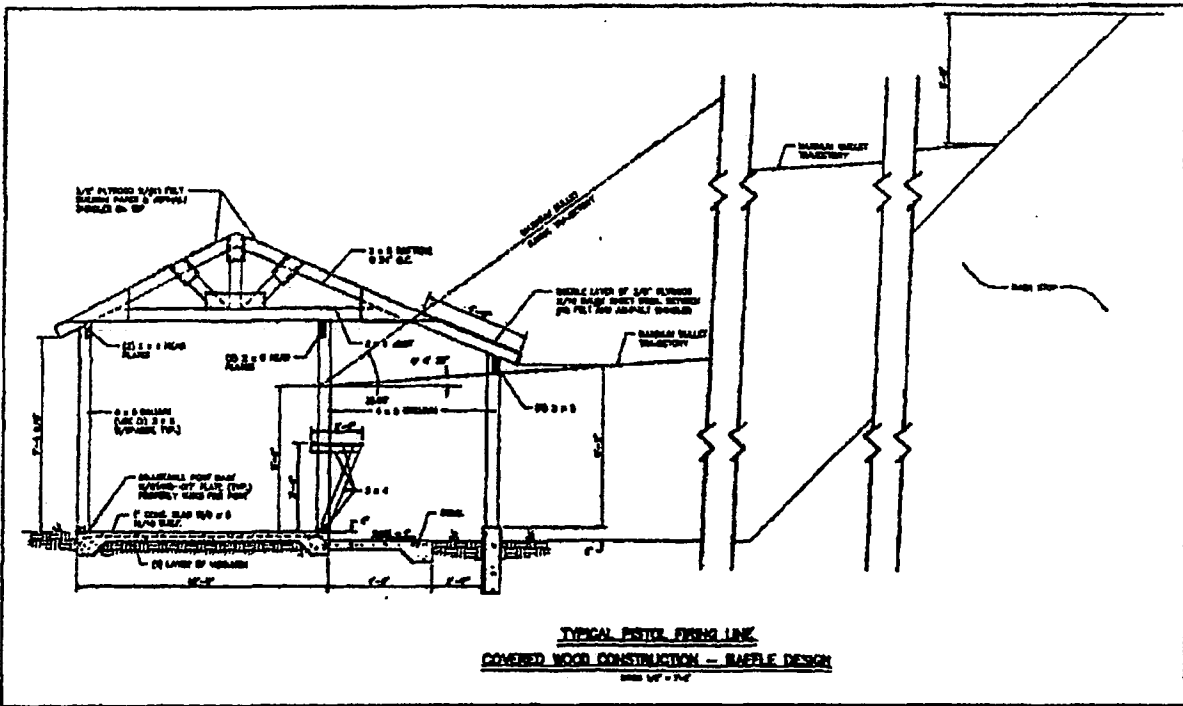


Figure 14: Covered Pistol Line Section

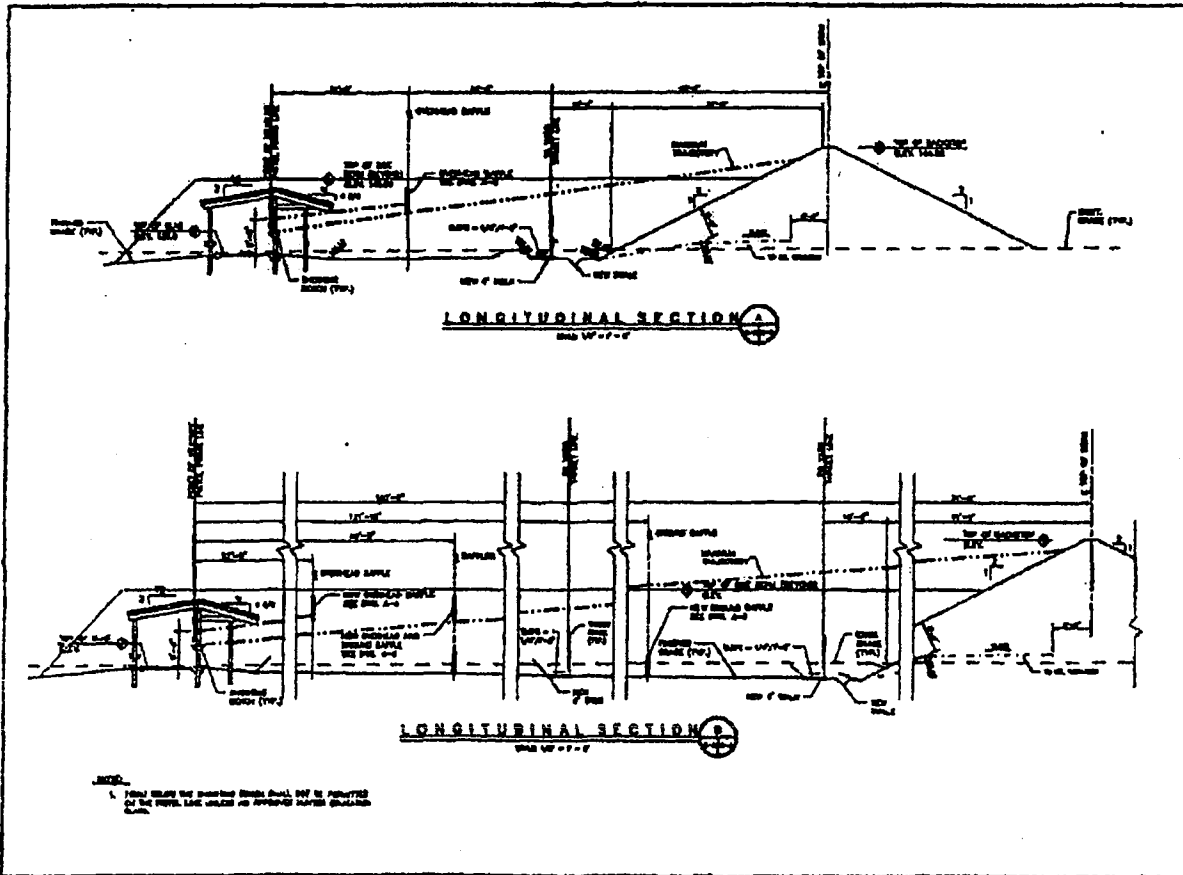


Figure 15: Pistol Range Sections

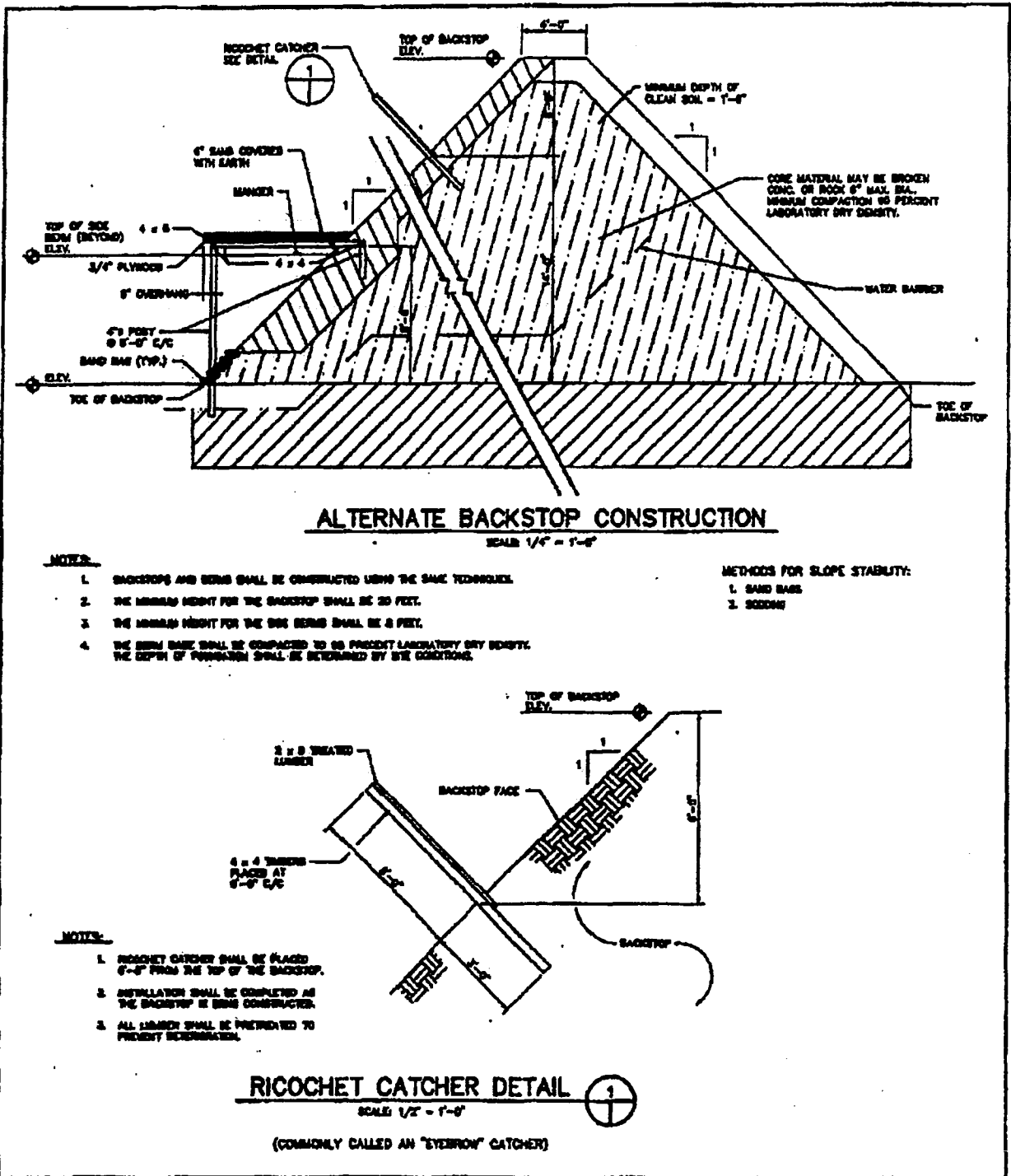


Figure 16: Alternate Berm Construction Backstop With Manager and Eyebrow Ricochet Catcher

2021 THIRD NATIONAL SHOOTING RANGE SYMPOSIUM

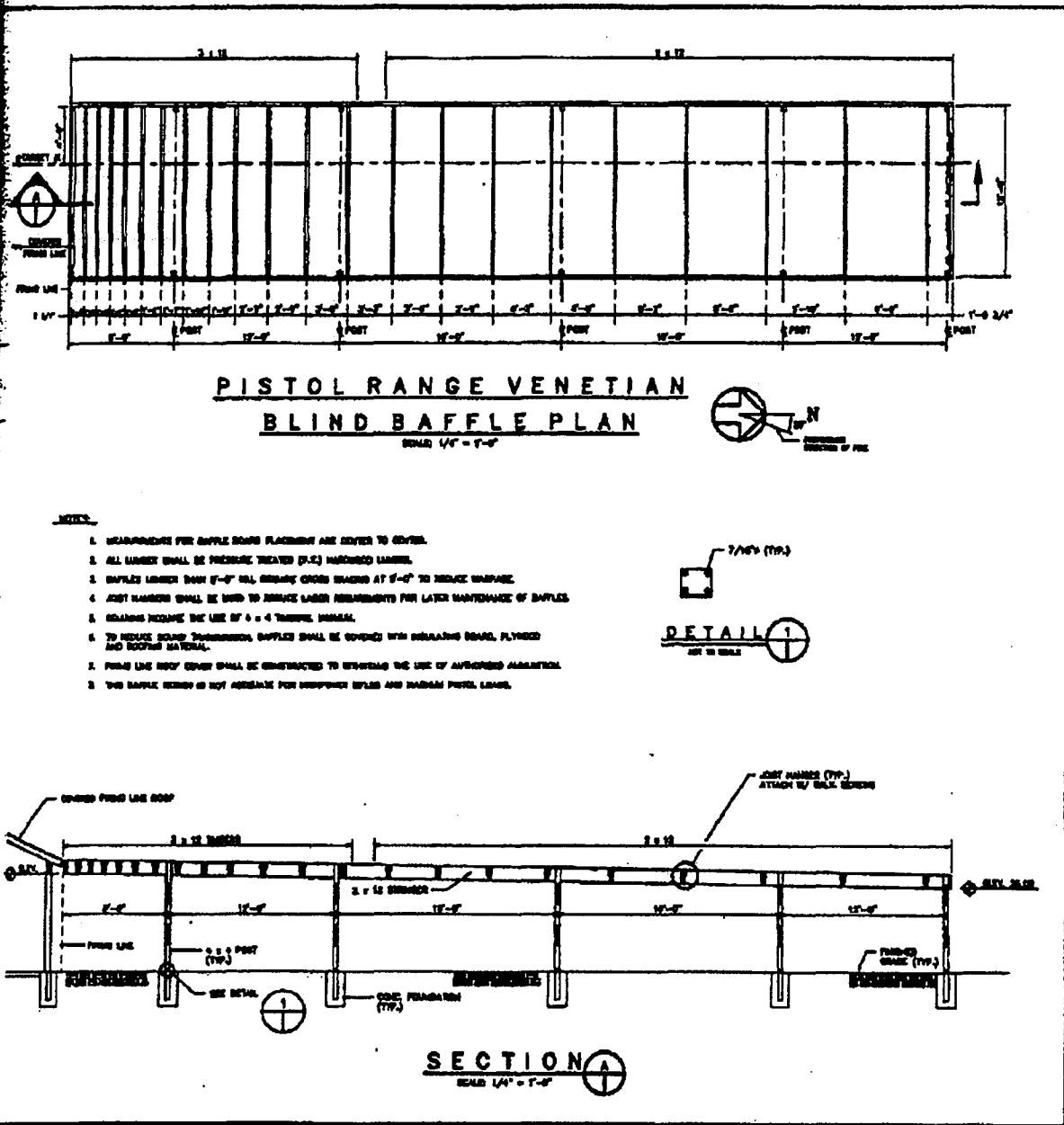


Figure 19: Pistol Range Venetian Blind Baffles Plan and Sections

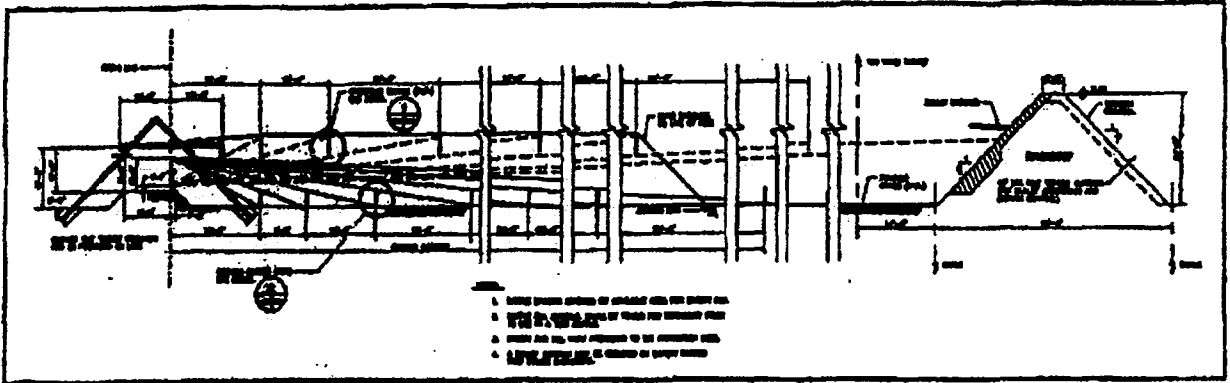


Figure 20: 100-Yard Rifle Range Overhead and Ground Baffle Plan

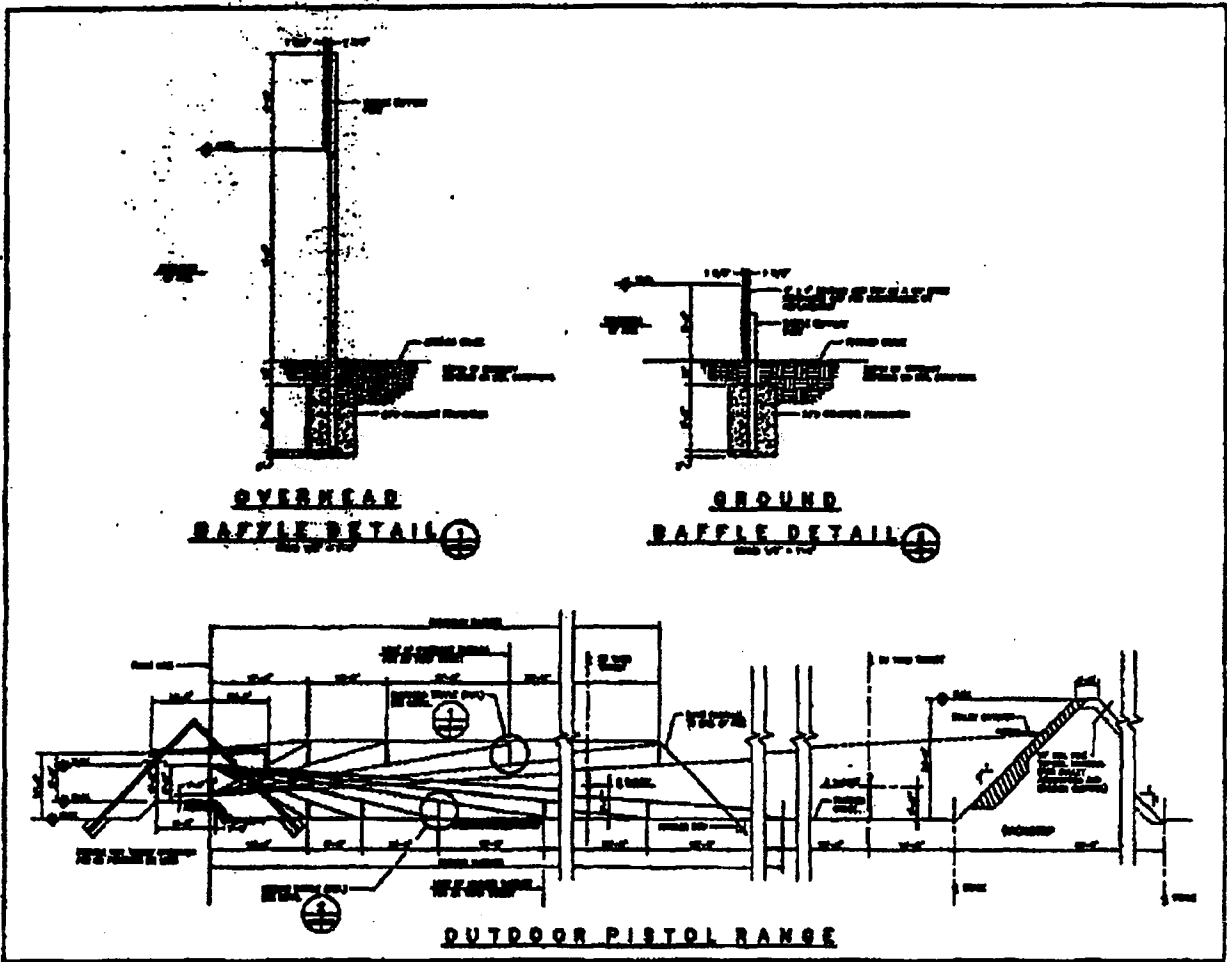


Figure 21: Outdoor Pistol Range Wood Baffles Sections and Details

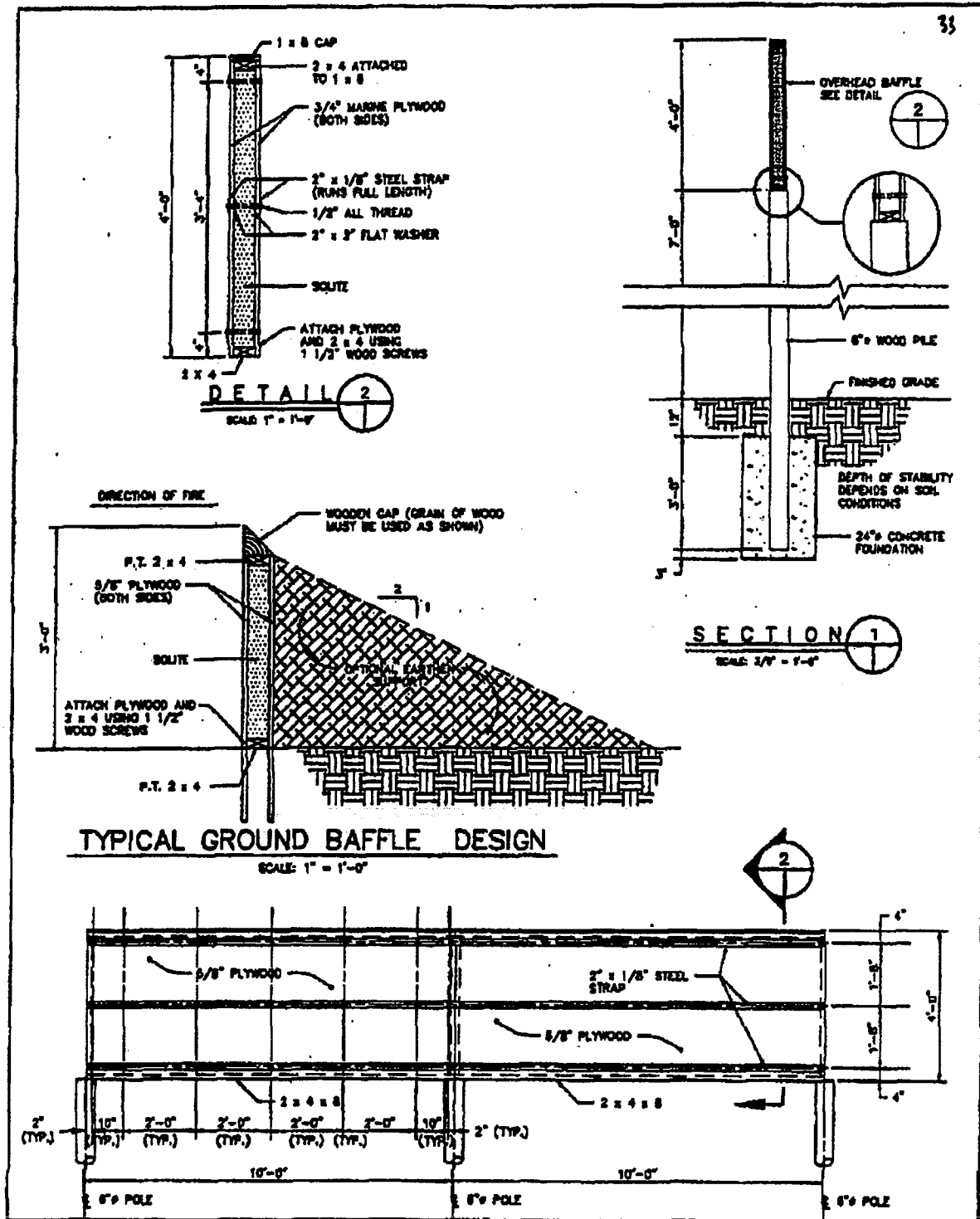


Figure 22: Typical Overhead and Ground Baffles Details and Sections

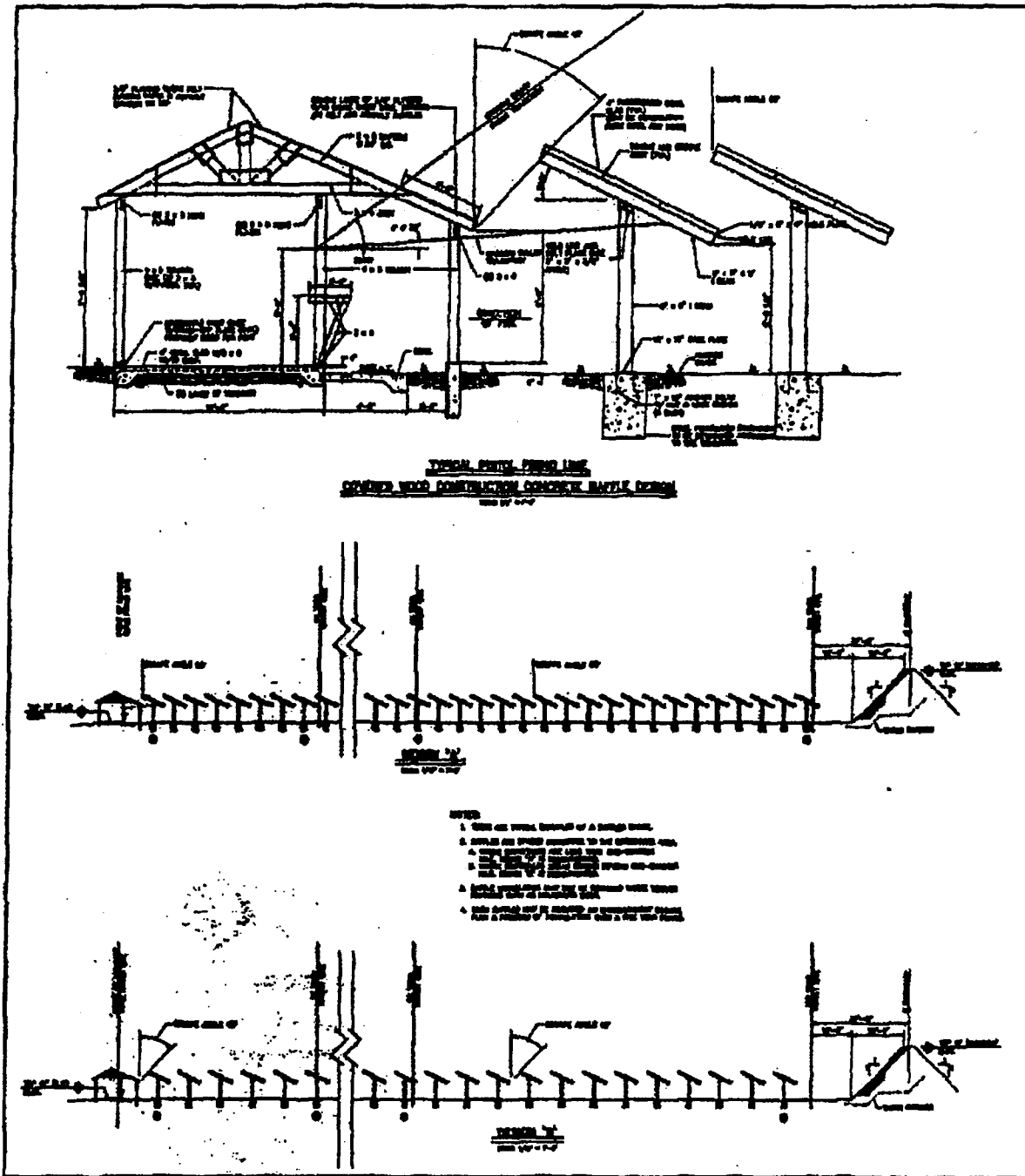


Figure 23: 25° Baffle Design Sections and Details

If you were to take an angle up to 35 degrees up from the muzzle, some type of structural material must be provided on the roof to make sure that a bullet does not go through unimpeded. It must be intercepted so that it will not travel maximum distance. The recommendation for Tenoroc Shooting Range was a construction of sheet steel sandwiched between wood.

Figure 15 shows a pistol range cross section of a typical baffled range design. This example shows the 5-foot-6-inch eye level shooter in Sections A or B. If he makes a shot that is just caught by the bottom of the first baffle, then it is also caught by the top of the second baffle, which gives you an 85 percent reduction in energy for that bullet.

The next design consideration would be shooting from the bench. If the shot clears below the bottom of the second baffle, it is intercepted by the top of the berm. All shots are contained. Obviously, this range should not allow prone shooting. A prone shooter could only shoot safely on top of a table.

You must be able to control the shooting that is done within your range. If you want to allow prone shooting, additional baffles must be built to contain those lower shots. The cost to do so would be considerable.

Figure 16 shows typical backstop construction. The core area is made out of the cheapest material that you can find—a clay or soil to stand up on a 1-to-1 slope. If you use sands, the natural angle to repose will result in about a 1-to-1 slope. This results in a more expensive berm.

Lead considerations

You've heard about lead considerations. One recommended design feature for new ranges is to construct an impervious layer to intercept any lead leachate, so that leachate runoff would be directed into a ditch. That ditch would be directed to some type of pond. If lead migration results, and you have to do a cleanup, you know exactly where you to look for that lead. Adding a soil amendment such as lime to raise the soil pH is also recommended to reduce solubility and lead migration.

Any new design should allow for eventually removing about 3 feet of the front of the back berm's face periodically. There are many opinions about how to handle lead. I believe that to get out from under the Resource Conservation and Recovery Act definitions of hazardous waste, you need to recycle lead. Recycled materials clearly are not a waste. If lead is not waste, it can't be a hazardous waste. When recycling after lead sifting, the remaining tailings can be controlled through soil amendments to prevent groundwater contamination. If all these design features are implemented, a new range should be in fairly good shape with respect to lead.

Another range design consideration to stop shot is to build a manger (see Figure 15) especially in areas where shooting steel targets takes place. The manger will keep ricochets from going over berms in ranges where you shoot steel chickens and plates and other types of reactive targets.

Also, some range managers do not mine the lead on a periodic basis the way they should, or they shoot more and put more lead downrange than they mine. This creates an armor coating situation which causes bullets to ricochet. The manger solves this problem also.

In armored backstops the bullet can impact and skip, or it can roll up the hill or dislodge other bullets which sail back over the berm. In that case, lead can scatter 70 to 75 yards behind

the backstop. The way to stop this would be to put in a ricochet catcher (see Figure 16, Detail 1). Normally the ricochet catcher is built 5 to 6 feet from the backstop crest. It protrudes 5 to 6 feet from the face of the backstop.

Figures 17 and 18 are typical baffle designs.

Figure 19 is another type of range baffling. This is what is called the Venetian blind baffling. To the left in Section A is your firing shed. Approximately 8 feet from the firing shed, the baffles are about 1-foot centers. The baffles are vertical 2-by-12-inch boards.

As you get further away from the firing line, the baffles get spaced out. The theory behind this design is, any shot that could get through passes through two pieces of 2-by-12-inch material to reduce bullet energy.

The designer can do a lot of things to control angles of escape. Figures 20 and 21 are typical Air Force designs. What the designer has chosen to do in this design is to raise the shooting line 3 feet above the ground. Ground baffles are 3 feet high so the shooter is now shooting over the top of the ground baffles when shooting prone. Then, overhead baffles are set 9 feet above the ground.

If you analyze all of the angles of escape, no bullet can get through when firing from the firing line. This type of design then allows for prone shooting to occur. With respect to the Air Force design, it is more expensive than what you saw at Tenoroc Shooting Range yesterday.

Typical ground baffles depicted in Figure 22 are sandwiched composite construction. In Detail 1, it was chosen to put additional earth material behind it in order to stop the shot.

Baffles shown on Figure 23 are what is called the 45- or 90-degree exit angle baffles. The design is recommended by the National Rifle Association for urban areas. Basically, it is steel construction with prestressed hollow core concrete slabs at a 25-degree angle.

The recommendation is that if property owners have built or could build dwellings within one-half mile downrange of your property, you could possibly get by with a 45-degree angle design and should baffle the range completely, from the firing line to the target line.

If neighbors are within one-quarter mile, then the recommendation is to use a 90-degree design. This design is such that if someone pointed a firearm up and fired vertically, the bullet would not leave the range.

Gateway Rifle and Pistol Club

Figure 24 shows a range design of which I'm very proud. This is the Gateway Rifle and Pistol Club, a 2,700-family member club where I'm president. It was designed by competitive shooters. It is made available to the public in Jacksonville, Florida, because we need to provide a place for members of our community to shoot.

Gateway has 16 ranges that are operated by competitive shooters. At least two competitions are conducted every weekend. Gateway is open 363 days out of the year. We let day guests from the general public use our range.

The pistol complex has 15-, 25- and 50-yard lines. The smallbore rifle complex is 100 yards long. Gateway has a 200-meter highpower rifle range. The range has a silhouette range at the center; action pistol has seven ranges to the east. There is a 100-yard rifle practice range in the northwest corner and an air gun range in half of Building 1.

The 15-yard pistol and 100-yard rifle ranges alone provide income for 25 percent of Gateway's budget annually. That is income from paying guests who are coming off the street.

Gateway's ranges face northwest toward airport property, which surrounds us to the north, east and west. We have entered into a lease arrangement for airport property off the easterly property line. We shoot shotgun, and the shot fall is off of our property to the east on leased airport property.

Cultivating your neighbors is something that has to be done by the range operator and is something in which Gateway members and board of directors are very active. We support local politicians; we support 4-H; we help with YMCA. This type of activism has made us a valuable part of the city fabric. The city considers Gateway an asset, as opposed to a sore spot or liability.

Conclusion

Ranges site selection has got to be done with respect to the safety concerns that I just covered. The site selected is going to dictate how much money you're going to spend developing the range.

Before you can get to range construction, a master plan is a must. Go to a professional designer to help you. You're probably going to have more shooting range in mind than you can afford.

After that, come up with a financial plan. Your financial plan is your reality. It separates needs from wants. Your master plan shows your ultimate development, but your financial plan tells you how far you can go budgetwise, or how to stage your construction until you can achieve your total master plan.

If you proceed with your range which is designed by a professional, you then can apply for permitting. Once permits are obtained, then you can do your construction in phases. Again, let me reemphasize, completely safe ranges cannot be designed. Remember that a safe range results from controlling your shooters.

The most important decision in range design is site selection with safety in mind. Selection of the proper site results from a proper range master plan, and reality only happens as a result of a financial business plan. Once the site is selected, preliminary site plans are developed, and estimates of cost are derived.

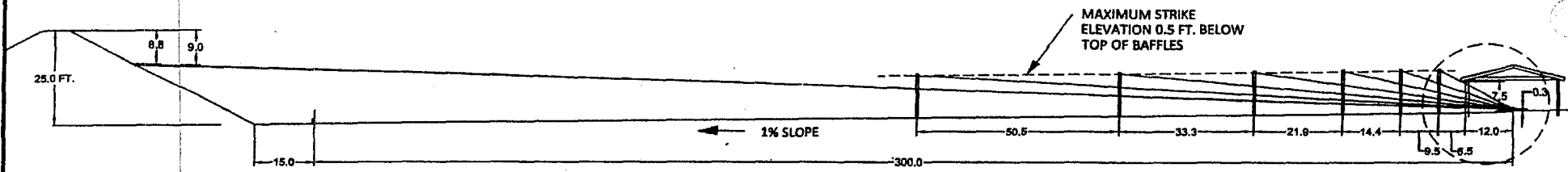
The project should be designed according to phases which will generate income to allow construction of subsequent phases proceeding to completion.

Hopefully, this presentation has informed you as to how a properly engineered range can be cost effectively designed.

FARRAGUT SHOOTING RANGE
 RANGE 100-YD DISTANCE
 State of Idaho - Fish and Game

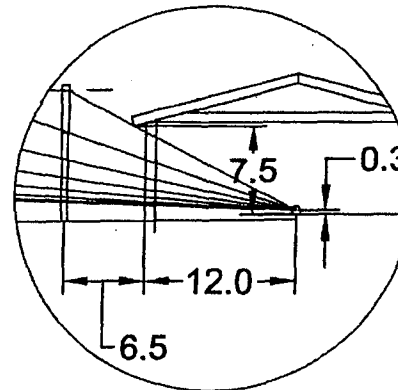
11-18-10
 EXHIBIT NO. R
 Caulder
 G. Smith

11-18-10
 EXHIBIT NO. 3
 Caulder
 G. Smith



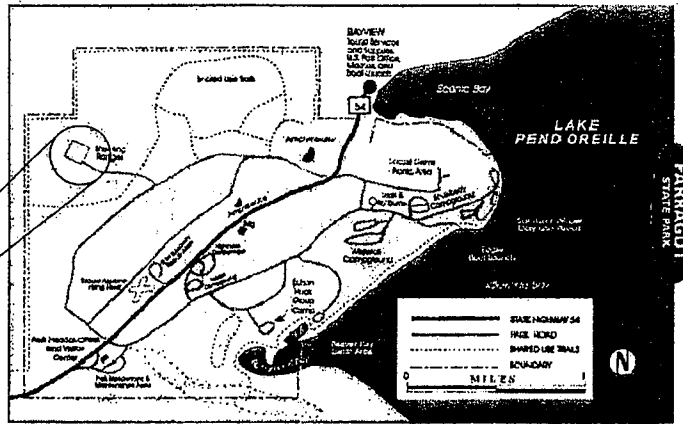
- NOTES:
- GROUND SLOPES DOWNHILL 1% IN THE DOWNRANGE DIRECTION.
 - BAFFLES ARE 4 FT TALL X 82 FT.LONG.
 - BOTTOM OF BAFFLES ARE 7.5 FT. FROM THE GROUND.
 - BAFFLE SPACING DESIGNED WITH 0.5 FT. SAFETY DISTANCE FROM TOP OF BAFFLE TO MAXIMUM STRIKE ELEVATIONS.

SHOOTING PRONE, 4" FROM FLOOR



REV.	DATE	DESCRIPTION	BY
STATE OF IDAHO			
DEPARTMENT OF FISH AND GAME			
BOISE, IDAHO			
DESIGNED	JHW	DFG 8008-115	
DRAWN	JHW	FARRAGUT SHOOTING RANGE	
CHECKED		100-YD DISTANCE	
DATE	07/08	PROFILE VIEW	
SCALE	AS SHOWN		
APPROVED		APPROVED	
CHIEF, BUREAU OF ENGINEERING			
DATE: 11/18/2010		DRAWN: JHW	
		1 OF 2	

STATE OF IDAHO FARRAGUT SHOOTING RANGE TEMPORARY IMPROVEMENTS TO MEET MARCH 2007 COURT ORDER



STATE OF IDAHO

VICINITY MAP

NOT TO SCALE

PREPARED FOR
IDAHO DEPARTMENT OF PARKS AND RECREATION
2750 KATHLEEN AVENUE - SUITE #1
COEUR D'ALENE, IDAHO 83815

PREPARED BY



C. VARGAS & ASSOCIATES, LTD.
CONSULTING ENGINEERS
8808 ARLINGTON EXPRESSWAY
JACKSONVILLE, FLORIDA 32211 (904) 722-2294

11-18-10
EXHIBIT NO. K
Caulder
G. Smith



DATED: OCTOBER, 2007

ENGINEER NO. 06014.01

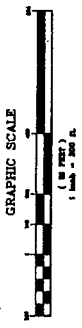
\\O:\server\UR\WAGS1 on F:\06014.01 Farragut Shooting Range\102 Submittal\01.dwg, Oct 31, 2007 - 8:15:55AM, cad

NOTE: If this drawing is printed 11"x17", this drawing is NOT TO SCALE or 1/2 SCALE

FARRAGUT STATE PARK
 RIFLE RANGE
 IN A PORTION OF SEC. 5, T. 53 N., R. 2 W., B.M.,
 KOOTENAI COUNTY, IDAHO

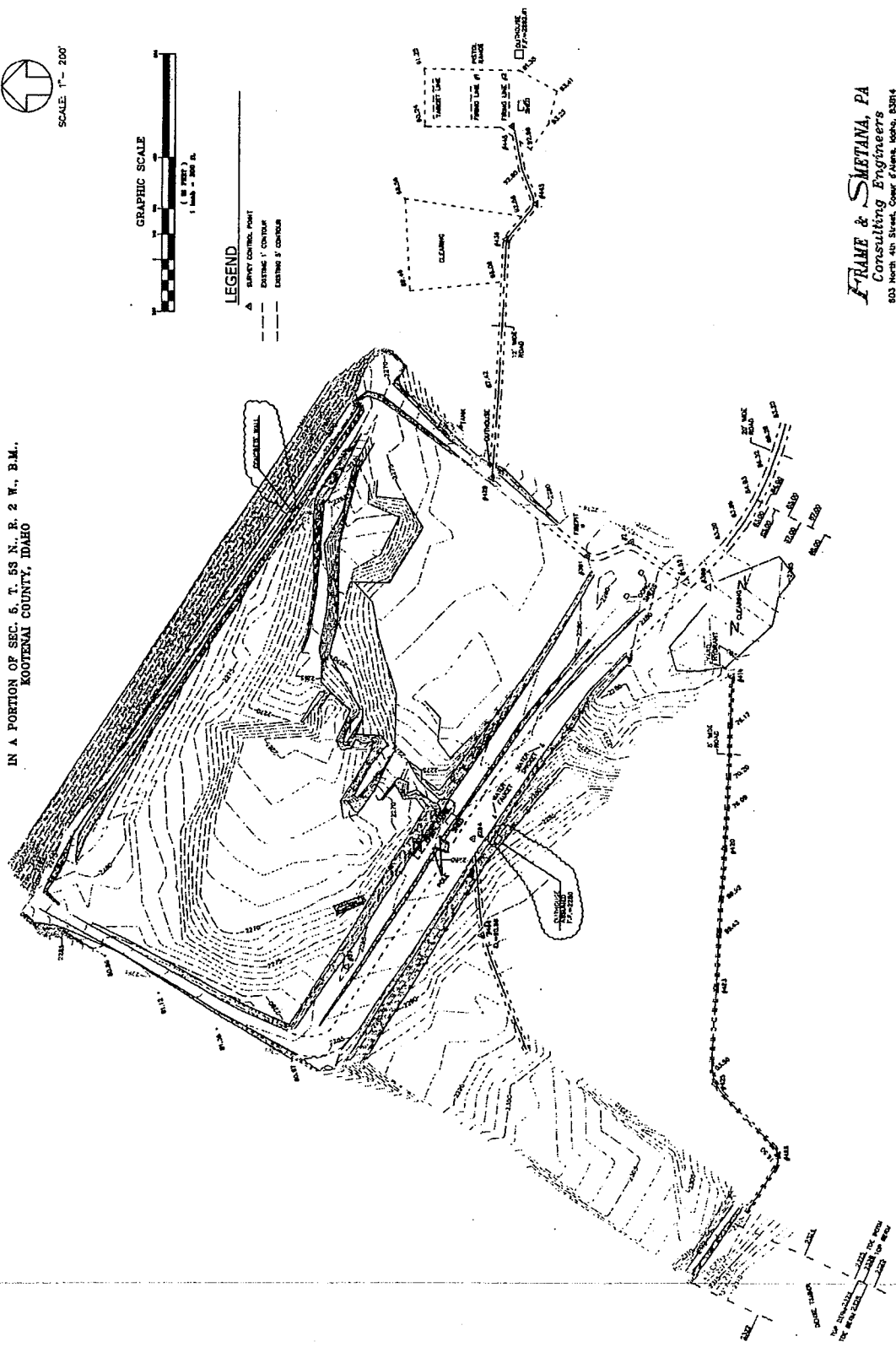


SCALE: 1" = 200'



LEGEND

- ▲ BENCHMARK POINT
- EXISTING 1' CONTOUR
- EXISTING 5' CONTOUR



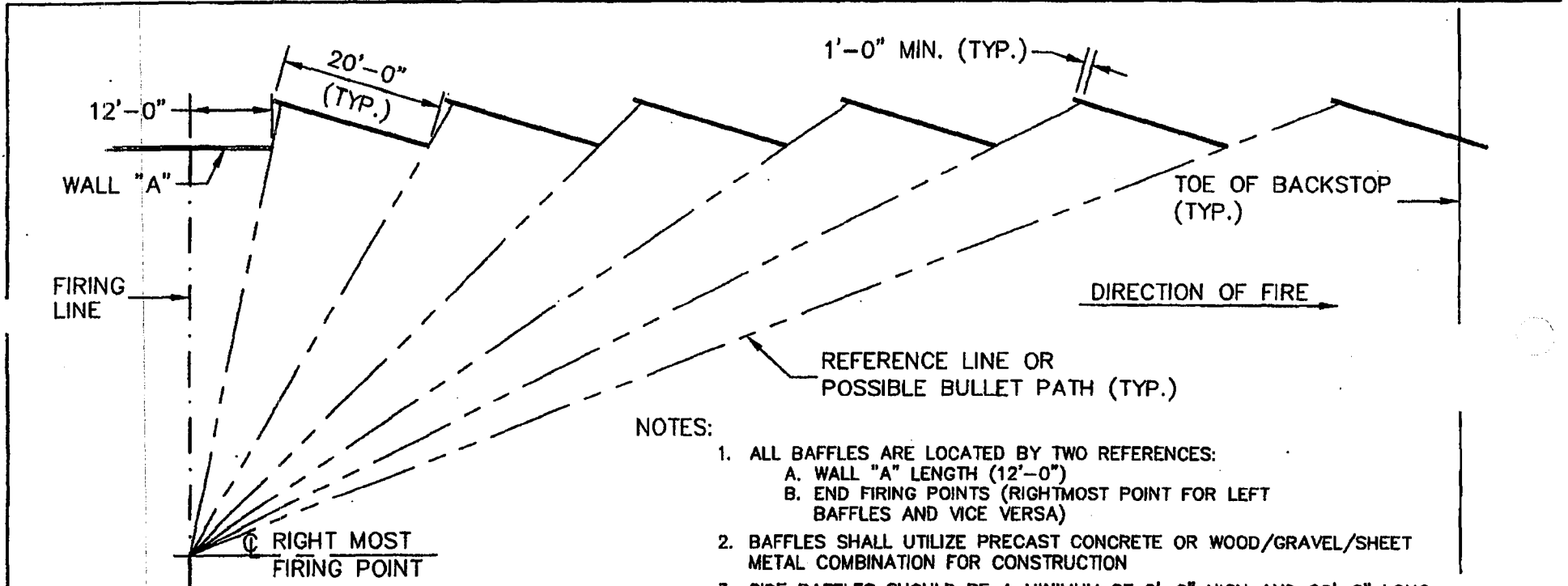
FRAME & SMETANA, PA
 Consulting Engineers
 603 North 4th Street, Coeur d'Alene, Idaho, 83814
 Ph: (208) 664-2121 / Fax: 785-3302
 Email: enr@framesmetana.com

G-3

NOTE: IF THIS DRAWING IS PRINTED 11"X17", DIMENSIONS IN NOT TO SCALE AT 1/2" SCALE

DO NOT SCALE THIS DRAWING.

ANY USE OR REPRODUCTION WITHOUT EXPRESSED WRITTEN PERMISSION OF THE N.R.A. IS PROHIBITED.

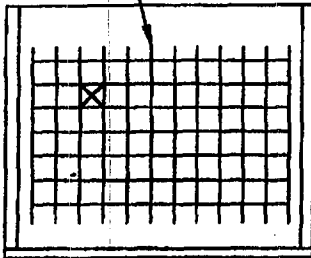


NOTES:

1. ALL BAFFLES ARE LOCATED BY TWO REFERENCES:
 A. WALL "A" LENGTH (12'-0")
 B. END FIRING POINTS (RIGHTMOST POINT FOR LEFT BAFFLES AND VICE VERSA)
2. BAFFLES SHALL UTILIZE PRECAST CONCRETE OR WOOD/GRAVEL/SHEET METAL COMBINATION FOR CONSTRUCTION
3. SIDE BAFFLES SHOULD BE A MINIMUM OF 8'-0" HIGH AND 20'-0" LONG
4. BAFFLE PANELS MUST OVERLAP TO PREVENT BULLET ESCAPE
5. WOODEN BAFFLES USING WASH GRAVEL SHALL BE BUILT SUCH THAT THE BAFFLE STOPS AUTHORIZED AMMUNITION

TEST GRID

TEST BAFFLE

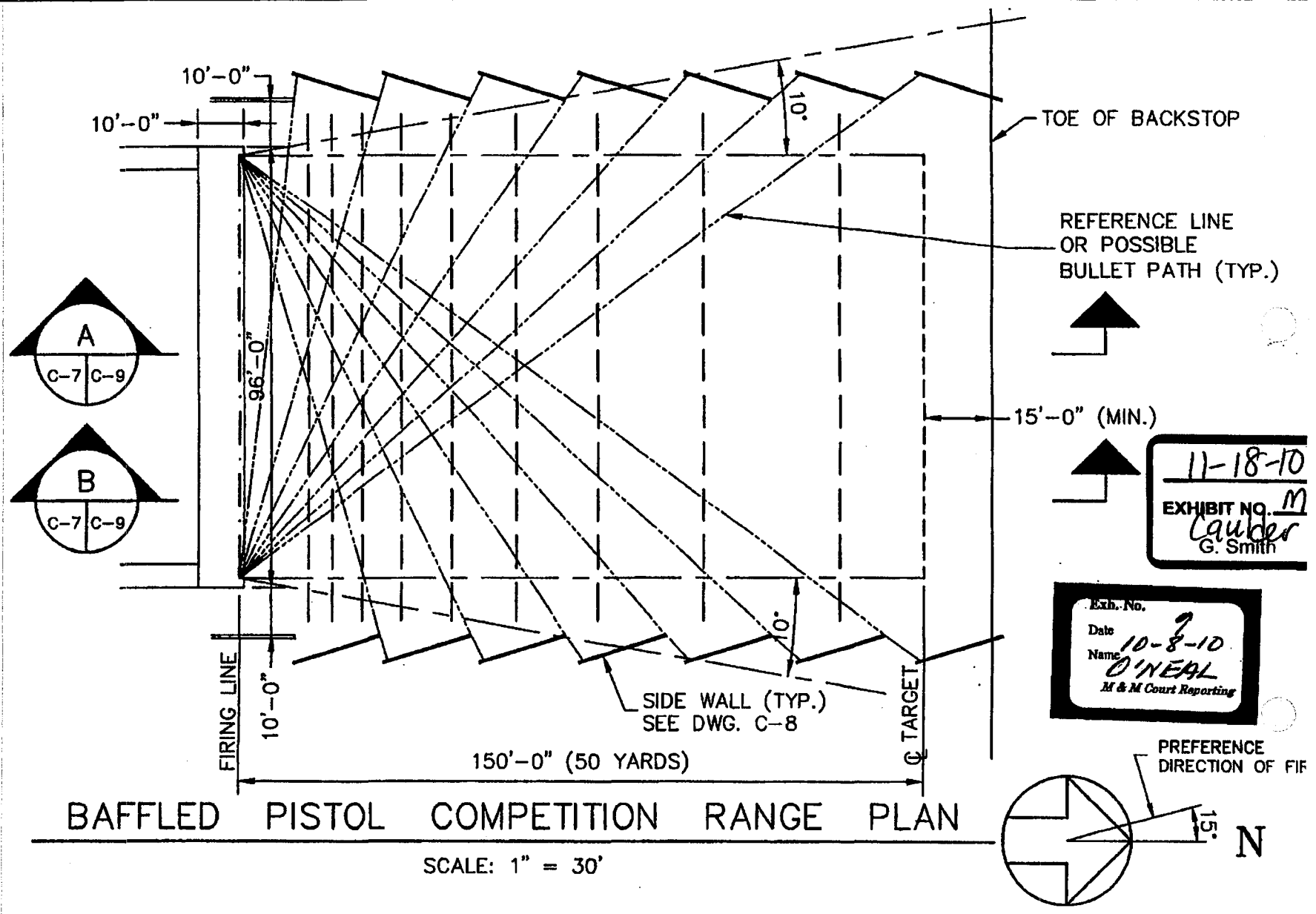


1. 5/8" PLYWOOD SHALL BE USED FRONT AND BACK.
2. 2"x4" LUMBER SHALL BE USED FOR FRAMING.
3. 1 1/4" WOOD SCREWS SHALL BE USED TO HOLD PLYWOOD TO FRAME FOR EASE OF REMOVAL AFTER TESTS ARE COMPLETE.
4. FILL WITH CRUSHED ROCK OR WASHED GRAVEL.
5. ONE SHOT FROM EACH TYPE OF AMMUNITION IS FIRED IN A GRID SQUARE THEN LABEL THE GRID SQUARE WITH TYPE OF AMMUNITION USED.
6. ALTER THE SIZE OF ROCK OR WASH GRAVEL AS TESTS ARE CONDUCTED.
7. SEVERAL TEST BAFFLES MAY BE REQUIRED FOR MULTIPURPOSE RANGES.

11-18-10
 EXHIBIT NO. L
Cauder
 G. Smith

Exh. No. 8
 Date 10-8-10
 Name D'NEAL
 M & M Court Reporting

C-8	DRAWING	DES. BY <u>S.B.D.</u>	NRA	SIDE BAFFLE					
		BY <u>N.R.A.</u>		NATIONAL RIFLE ASSOCIATION					
		DATE <u>5/88</u>		RANGE DEPARTMENT					
				FAIRFAX, VIRGINIA 22030					
						▲	C.A.D.D. COORDINATION	5/98	C.V.
						NO.	REVISION	DATE	BY





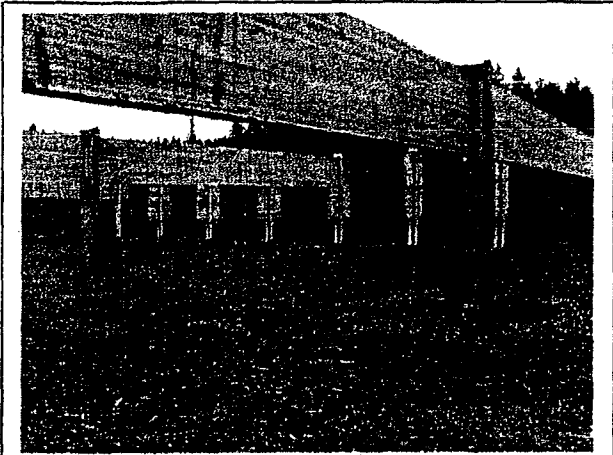
BAFFLED PISTOL COMPETITION RANGE PLAN

SCALE: 1" = 30'

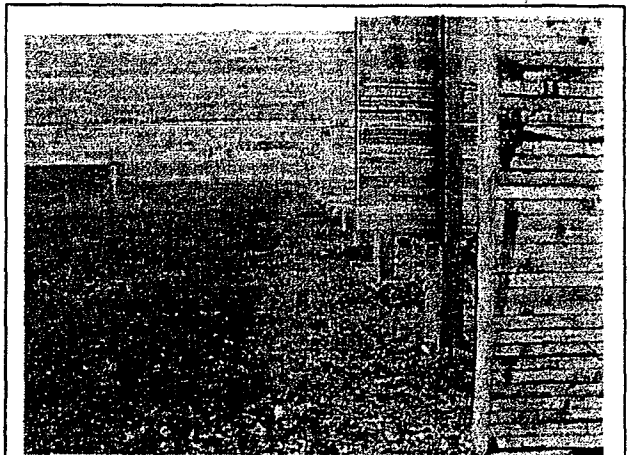
C-7

PLAT DATE: 11/28/99

 C. VARGAS & ASSOCIATES, LTD. CONSULTING ENGINEERS 6040 ALBEMARL EXPWAY JACKSONVILLE, FLORIDA 32216-7131	 NATIONAL RIFLE ASSOCIATION RANGE DEPARTMENT FAIRFAX, VIRGINIA 22030	COMPETITION PISTOL RANGE WITH OVERHEAD BAFFLES AND SIDE WALLS PLAN	NO.	REVISION	DATE

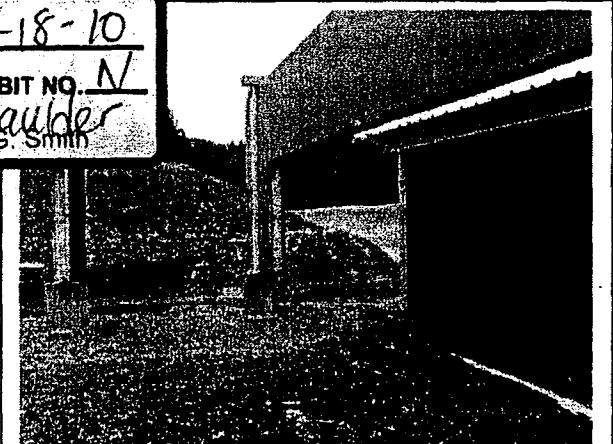


PHOTOGRAPH 13
March 11, 2010
Baffles and side berms



PHOTOGRAPH 15
March 11, 2010
Baffle bases form firing range floor

11-18-10
EXHIBIT NO. *N*
Caulder
G. Smith



PHOTOGRAPH 14
March 11, 2010
Baffle bases form firing range floor



PHOTOGRAPH 16
March 11, 2010
"No Blue Sky" observation

EXH. NO.
Date *27*
Name *10-8-10*
O'NEAL
M & M Court Reporting

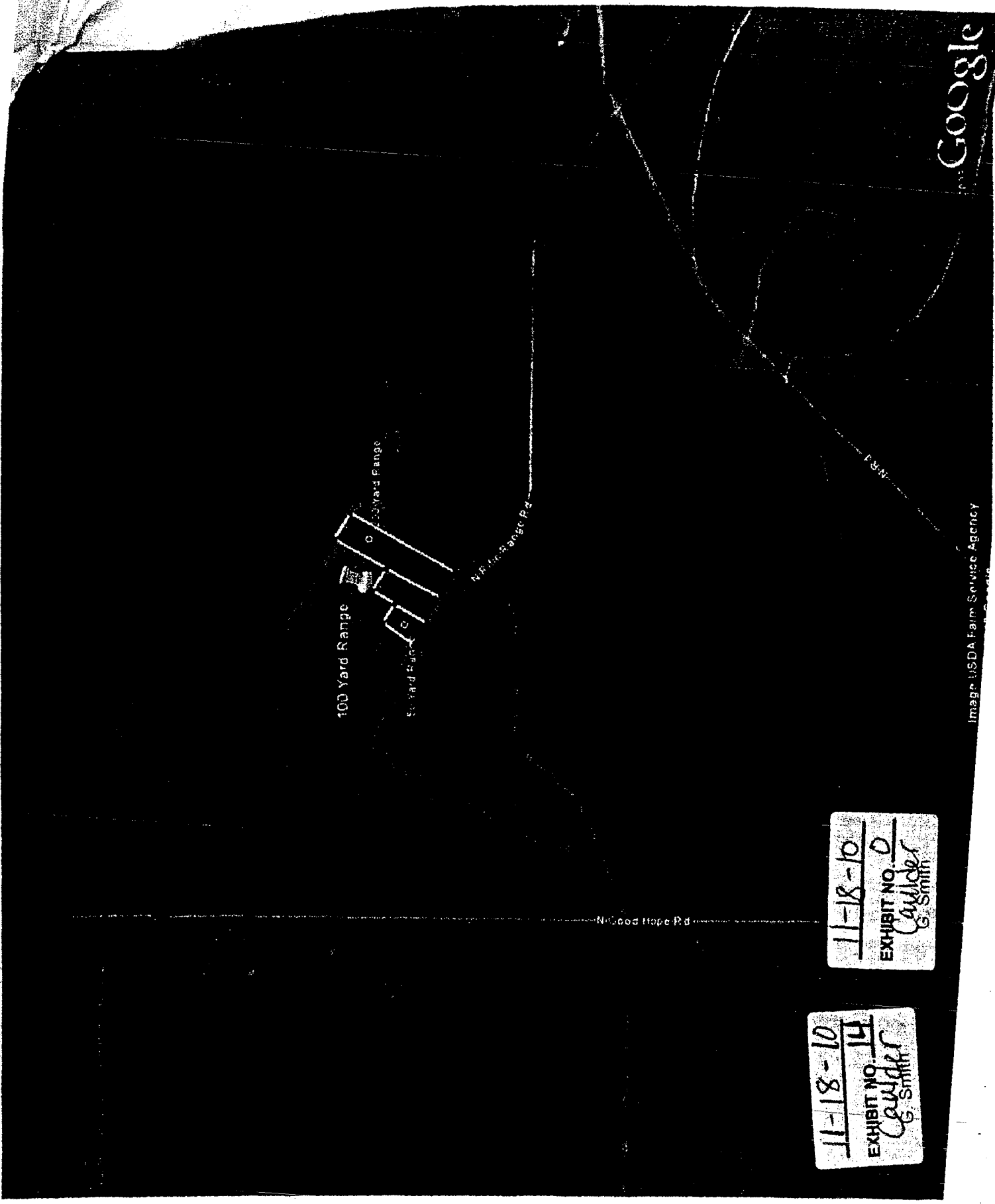


Image © USDA Farm Service Agency

11-18-10
EXHIBIT NO. 0
Cawder & Smith

11-18-10
EXHIBIT NO. 14
Cawder & Smith

↳

FARRAGUT RANGE

10/10

P



11-18-10
EXHIBIT NO. P
Caulder
G. Smith

Farragut Shooting
Range
10/10

Track 3: Range Design Guidelines

Design Criteria for Shooting Ranges

By Clark Vargas, P.E., President
C. Vargas and Associates

I'm a competitive shooter. At one time I shot more than 50,000 rounds a year in practice and competition. I'm also a civil engineer and a small-arms shooting range designer by avocation. I get to do what I love for a living. I'm lucky.

I will be presenting guidelines on how to design ranges, but more importantly the reasons for design considerations.

Safety considerations

There is only one overriding design criterion paramount to the design of shooting ranges and that is safety. There is an adage known by experienced range designers and range operators: *A completely safe range cannot be designed. A safe range results if, and only if, it is safely operated and if the participating shooters are controlled by the rules and safety policies.*

Shooters are controlled by safety rules and safety policy which must be enforced on your range. Rule violations must have consequences. If you don't enforce your rules, then you are just giving advice. It's important to ingrain the idea into shooters' minds that *unintentional discharges can occur to everyone.*

Range managers can create safer ranges by focusing on the following:

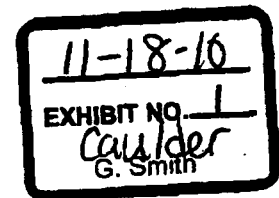
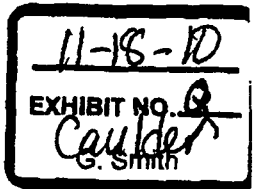
- teaching shooters how to approach the firing line.
- teaching shooters proper gun handling on the firing line.
- providing safety areas.
- teaching shooters that only aimed fire is allowed.
- teaching shooters all range rules.

Cost effective, safe range design can only result if safe, controlled shooters are an assumption.

To reiterate, range managers must ingrain the idea into shooters' minds that unintentional discharges will happen. I have been shooting for more than 30 years. I have had unintentional discharges. When this happens, it is very traumatic. You become very embarrassed. The only thing that can save you is that you have been taught to keep your muzzle pointed downrange so when the discharge occurs, no damage is done.

Clark Vargas is president of C. Vargas and Associates, an 18-year-old environmental engineering firm in Jacksonville, Florida. Vargas also is president of the Gateway, Rifle and Pistol Club which is a 2,200-family member shooting club in Jacksonville. He shoots conventional and international pistol competitively and has been invited to shoot for the U.S. Pistol Team tryouts. He also shoots shotgun and highpower rifle silhouette in National Rifle Association action- and International Practical Shooting Confederation-style shooting. He is treasurer and director of the Florida Sports Shooting Association, NRA's official state association, and is a life member of NRA.

THIRD NATIONAL SHOOTING RANGE SYMPOSIUM 325



Knowing how to approach a firing line is a courtesy that needs to be taught to all shooters. For example when a new shooter walks behind other shooters, that new person must know how to handle firearms behind other shooters in a way that puts them at ease.

At your range, you must insist that shooters will execute aimed fire only, and this does not include how quickly you fire. You can have very accurate rapid fire at your range. However, the type of firing that you allow must be in relation to the distance to the target and has to be a process of: aim, fire and hitting the target (you must insist on this) and not your backstops or wooden frame, which will destroy property. Shooters, of course, must also be made to know the administrative rules.

Cost effective range design results only if the designer assumes that the shooter is going to be controlled. Analyze what I just said. If the designer knows that the shooter is not going to be controlled, the only thing that can be designed would be a box with 16-inch thick walls for the shooter to enter. That would not be a very pleasant shooting experience.

The referenced range specifications and definitive drawings I will be using as examples are from *Army Regulation 385-63 Safety Policy and Procedures for Firing Ammunition for Training, Target Practice and Combat*. This manual clarifies certain requirements on ranges, reviews ballistic data, and incorporates new standardized range design. Other examples are from the National Rifle Association's "NRA Range Manual."

Ballistics background

Let us look at the following diagrams, and then you can see the reasons why ranges are designed the way that they are.

Figure 1 is a surface danger zone diagram of a shooting range for a single small-arms shooter firing at a fixed ground target. The center line is the vertical line through the middle of the firing fan. Each side of the center line, you have a 5-degree sector. That 5-degree sector is the dispersion or wobble that the shooter holding a firearm would be expected to have down-range. On either side of that 10-degree arc, the designer provides another 5 degrees to each side for ricochets and for any misalignment or inaccuracies. Adjacent to that, the designer provides an area that is called an "A" area. Typically, for small arms, it is 100 meters wide. The distance from the firing line to the maximum trajectory line is called the "A" distance. Table 1, Figure 2 provides reasonable ranges for small-arm caliber bullets.

A designer develops the impact sector area by first imagining a person who is firing at ground level at a surface target being able to deviate 10 degrees each side of a center line of fire and allowing him to raise the rifle or the pistol at a 30- to 35-degree angle. These are the angles that will give a maximum trajectory. You now have the maximum distance of impact and a description of the area that is impacted by a range.

This surface danger zone to provide a safe area for one shooter to shoot is a very large area and in most urban locations would be cost prohibitive.

Figure 2 shows a 200-yard range. It is 100 yards wide by 200 yards long. That gives an idea as to the amount of area that is required for a safety fan for that size range if it were non-baffled and did not have a backstop.

To give you an idea of distance, Table 1 shows the maximum range of typical small-arms ammunition. The .22 long rifle is going about 4,590 feet. That's just under a mile. The .223 travels about two miles. The .30-caliber is going about 15,000 feet or three miles. Those are considerable distances.

Table 1
Maximum range of typical small arms ammunition

Dimensions of areas and range					
Caliber	Type	A		Maximum Range	
		(Mtr.)	(Ft.)	(Mtr.)	(Ft.)
Cal. 22	Long rifle	100	(328 ft.)	1,400	(4,590 ft.)
5.56 rifle	Rifle, Ball, M193	100	" "	3,100	(10,170 ft.)
7.62	Rifle and machine gun, Ball M80; Match, M118	100	" "	4,100	(13,451 ft.)
		100	" "	4,800	(15,747 ft.)
Cal. 30	Rifle and machine gun, Ball, M2; AP, M2	100	" "	3,100	(10,170 ft.)
		100	" "	4,400	(14,435 ft.)
Cal. 30	Carbine	100	" "	2,300	(7,546 ft.)
Cal. 45	Pistol; Submachine gun	100	" "	1,300	(4,265 ft.)
		100	" "	1,400	(4,595 ft.)
Cal. 50	Machine gun, Ball, M33; AP, M2	100	" "	6,500	(21,325 ft.)
		100	" "	6,100	(20,013 ft.)
Shotgun	12-gauge riot (00 buckshot)	100	" "	600	(1,968 ft.)
Cal. 38	Revolver, Ball, M41 Ball, PGU-12/8	100	" "	1,600	(5,249 ft.)
		100	" "	1,900	(6,233 ft.)
Maximum range results with muzzle elevation at 30 to 35 degrees above horizontal. 1 mile = 5,280 feet 1/2 mile = 2,640 feet 1/4 mile = 1,320 feet					

Figure 3, Figure III shows the trajectories of national match bullets. These trajectories were developed for the .30-caliber rifle bullet as the bullet was improved. Experimenting started in 1919. Four years later, the bullet was further developed, where there was the 150-grain, .30-caliber bullet with a flat tail which gained 900 feet. Then it was redesigned from 150 to 170 grains. They got 2,700 feet more distance, as shown in Figure 3. For shooting maximum distance, the rifle was aimed at 30 degrees. In Figure 3, Figure III, the bullet basically rises up 1,500 yards and travels 17,100 feet or 5,700 yards.

In 1922 and 1923, bullet design was improved by developing a 6-degree boat tail. The next refinement in 1924 and 1925 resulted in another 3-degree angle in the back to make a 9-degree boat tail, for an additional 3,600 feet. That's how the 10,000- to 15,000-foot trajectory was developed for the .30-caliber match bullet.

To give you an idea of trajectories, Figure 3, Figure II shows typical trajectories when shooting at 1,000 yards. The rise to the summit is about 5 yards. The lower trajectories are shooting to 500 yards.

Table 2
Thickness of material for positive protection against direct impact
for caliber ammunition listed in Table 1

Material	Thickness in inches		
	5.56 mm & .22 cal.	7.62 mm, .308, 30.06	.50 cal
Concrete (5,000 psi)	.5	7	12
Broken stone	14	20	30
Dry sand	16	24	32
Wet sand	25	36	48
Logs wired together (oak)	28	40	56
Earth packed or tamped	32	48	60
Undistributed compact earth	35	52	66
Earth freshly turned	38	56	72
Plastic clay	44	65	100

The bullets to contain in a range design are powerful bullets. Table 2 gives the thickness of materials required for positive protection against direct impact for different calibers of ammunition. Take a look at the .30-caliber ammunition. It takes 7 inches of 5,000 psi concrete to contain it; it takes about 20 inches of broken stone, and it takes about 48 inches of earth.

As a design consideration, if you're going to stop a round, you must completely stop it. Table 2 distances are minimum distances to be provided in designs. If the designer wants to slow the round or contain it within a shot fall area, then one can make the assumption that proportionately, if 7 inches of concrete stops the bullet, then 3 1/2 inches of concrete will take 50 percent of the energy out of a .30-caliber round. Therefore, the designer can make estimates as to how to slow a round and where that round would fall, giving the designer the choice not only to completely baffle, but also fence the shot fall areas to prevent access to those areas.

Let's discuss the physics of a bullet in flight. Figure 4 shows forces acting on a bullet and the start of its flight. The bullet has a center of gravity through which the force of gravity acts. The quick burning powder will give it a pressure impulse at the tail of the bullet which provides direction of flight and exit muzzle velocity. The front of the bullet, however, is going to hit air resistance which will slow it down and generate, along with gravity, a resultant force that retards the bullet.

When we're discussing trajectories, as in Figure 5, the base of trajectory is at the muzzle, the origin of trajectory. It is always horizontal to the earth or perpendicular to the pull of gravity. For shots that are made within 10 degrees up or down from the horizontal, the designer can assume that the line of sight is parallel to the base of the trajectory. This, however, will not be true when shooting down into a valley and also not true when shooting up into a hill steeply.

THE THIRD NATIONAL SHOOTING RANGE SYMPOSIUM

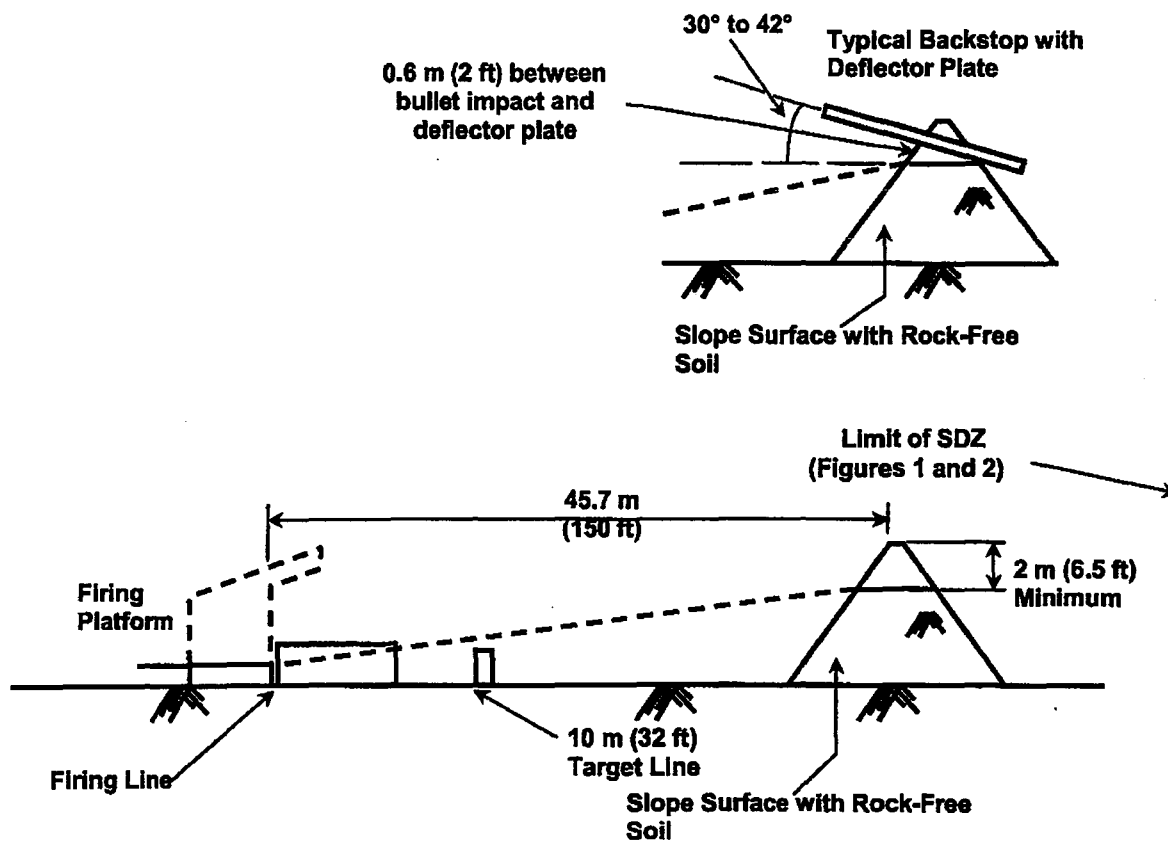


Figure 11. Machine Gun, 10-Meter Tube Range Typical Cross-Section

7.7.3.2. Firing Platform. Ensure that the firing tube placement and the firing platform height will place the muzzle of the machine gun at the approximate center of the tube diameter and at least 150 millimeters (6 inches) inside the tube. A recess in the platform may be needed, about 76 millimeters (3 inches) deep and large enough to accept a tripod.

7.7.3.3. Backstop/Deflector Plate/Bullet Trap. For berm backstops, locate the berm no more than 45.7 meters (150 feet) from the firing line to the centerline of the berm. The minimum height of the backstop is established by determining where a line drawn from the firing line to the backstop, and intersecting the highest point that a bullet could exit the target end of the tube, intersects the berm. This line must intersect the berm not less than 2 meters (6.5 feet) from the top. When a deflector plate is used, locate the deflector plate at least 0.6 meter (2 feet) above the bullet impact point on the berm. For metal trap backstops, locate the trap at least 25 meters (82 feet) away from the firing point. The line drawn from the firing point to trap shall intersect the top plate of the trap not less than 300 millimeters (12 inches) from the top, measured along the slope of the trap.

8. Design Review, Construction Inspection, Test Firing, and Trial Operation.

8.1. Design Approval. The design agent will submit a set of prefinal drawings and project specifications to the respective MAJCOM representatives of combat arms (CA), civil engineering (CE), safety (SE), and bioenvironmental engineering (SGPB) for review to ensure compliance with this ETL.

After MAJCOM approval is complete, HQ AFSFC/SFXW must approve all new range designs and major renovations (changes to the type or function of the range). This approval also applies to portable or trailer type ranges. HQ AFSFC/SFXW is the approval authority for deviations or waivers from design criteria and will coordinate requests with HQ AFCESA/CEOA.

8.2. Baffle Test Before Construction. For baffles which differ from the weapons and construction recommended in Table 3, construct baffle test blocks/cells using the baffle materials and construction details specified in the design documents. Completion of this test is required before construction and installation of the overhead baffles. From a protected position, a shooter will engage the test block/cell with direct fire from the most powerful round authorized for the range. The baffle test should have secondary containment to stop the round if it penetrates the test baffle. Do not test the baffle blocks/cells using tracers. Do not test baffles after they are installed in their overhead position. Conducting direct-fire tests following construction could be very unsafe and costly if the baffles fail to stop the round. Machine gun range tubes do not have to be tested if they meet the material requirements listed in paragraph 7.7.3.1.1.

8.3. Construction Inspection. The BCE will validate that the proper materials have been used and construction complies with the specifications and drawings. The range and its support facilities, when completed, must satisfy or exceed the requirements of this ETL. The materials, distances, and angles are critical to safety. Distances from the firing lines to target lines are critical and must be measured during construction and on completion of the range. On fully contained ranges, visually check baffles to make sure they overlap the required 150 millimeters (6 inches), there is no "blue sky" observed from any firing position or as one travels downrange toward the targets, and the HVAC system has been fully tested and commissioned.

8.4. Test Fire Requirements. After construction or rehabilitation, and before conducting training and qualification operations, CA personnel must accomplish controlled test-firing using tracer ammunition. If tracer ammunition cannot be safely fired on the range, CA personnel will fire ball ammunition with witness screens to conduct the test fire. Representatives of ground safety and CE will act as observers. The CA instructor will use the most powerful ammunition authorized for use on the range for the test. Remove all fire hazards from the range and areas surrounding the range. Make sure firefighting equipment is immediately available when conducting range tests using tracer ammunition. Provide sandbags or other protection for the

shooter during test firing. Hang witness screens of paper when firing non-tracer rounds to see if splash-back ricochets are occurring at the bullet trap when using the M855 round.

8.4.1. Non-contained Ranges. A test-fire is not required for a non-contained range. After the construction inspection confirms that the full SDZ land is available and all barriers, fences and signs are erected, proceed to trial operations.

8.4.2. Fully Contained Ranges. Do not test baffles with direct fire. Test baffles for direct-fired round containment before construction, as described in paragraph 8.2. To test for ricochet containment, the shooter first must fire service ammunition (non-tracer) from the prone position into the backstop and then at the floor. A test screen (witness) may be used to test the ricochet potential of the range floor. A test screen may be constructed from Celotex (National Stock Number [NSN] 5640-00-073-2803) or cardboard material, fashioned into a 1.2-meter by 1.2-meter (3.9-foot by 3.9-foot) four-sided cube. Place the test screen at different locations on the range floor. Fire into the range floor in front of the test screen at various angles from the firing line. To determine if ricochets would have left the range, sight along a small-diameter dowel placed through ricochet holes in the screen material. Take corrective measures if the angle of departure and the sighting verifies that the bullet left the range. To determine ricochet patterns, conduct tracer tests using the same caliber of ammunition to be used on the range. Using tracer ammunition is the fastest and most efficient method of determining ricochet patterns and hazard potential.

8.5. Trial Operations. Trial operation of a new or rehabilitated range is mandatory. The CA NCOIC and installation ground safety representative will be present during trial operations. Document the results of the trial operations in a range trial operation report. One copy of the trial operations report must be included in the construction acceptance documentation. The CA section will retain an additional copy on file for the life of the range. Include the following items in the report:

- Date of construction completion.
- Date of trial operation.
- Course of fire.
- Type of weapon, caliber, and ammunition used for the trial. (This must be the most powerful ammunition intended for use on the range.)
- Target system functioning (may be mechanical or fixed).
- Number of shooters who fired.
- Firing points used.
- Damage incurred or improperly functioning items.

9. Point of Contact. Recommendations for improvements to this ETL are encouraged and should be furnished to the Small Arms Range Program Manager, HQ AFCESA/CEOA, DSN 523-6332, commercial (850) 283-6332, e-mail AFCESAReachbackCenter@tyndall.af.mil

LESLIE C. MARTIN, Colonel, USAF
Director, Operations and Programs Support

3 Atchs

- 1. Minimum VDZ Height Requirements for Small Arms Ammunition for Non-contained Ranges**
- 2. Operational Risk Management (ORM) Evaluation of Existing Range Facilities**
- 3. Distribution List**

**MINIMUM VDZ HEIGHT REQUIREMENTS FOR SMALL ARMS AMMUNITION FOR
NON-CONTAINED RANGES**

Weapon/Caliber	Ammunition	Maximum Ordnate of Ammunition at 30° VDZ Meters (Feet)	Safety Factor Meters (Feet)	VDZ Height in Meters (Feet)
.22 long rifle		500 (1640)	175 (575)	675 (2215)
Handgun, .38 cal.	Ball, M41, PGU-12/B	500 (1640)	175 (575)	675 (2215)
Handgun, .45 cal. pistol		400 (1312)	160 (525)	560 (1837)
Submachine gun, .45 cal.		400 (1312)	160 (525)	560 (1837)
Handgun, .357 magnum		TBD	TBD	TBD
Handgun, 9mm pistol		500 (1640)	175 (575)	675 (2215)
Submachine gun, 9mm		TBD	TBD	TBD
Handgun, .44 magnum		TBD	TBD	TBD
Shotgun, 12 gauge	00 buckshot	200 (656)	130 (427)	330 (1083)
Rifle/machine gun, .30 caliber	Ball and M21	TBD	TBD	TBD
Carbine, .30 caliber		TBD	TBD	TBD
Rifle, 5.56mm	Ball, M193; tracer, M196	800 (2625)	220 (722)	1020 (3347)

Atch 1
(1 of 2)

Weapon/Caliber	Ammunition	Maximum Ordinate of Ammunition at 30° VDZ Meters (Feet)	Safety Factor Meters (Feet)	VDZ Height in Meters (Feet)
Rifle, 5.56mm	Ball M855; tracer, M856	900 (2953)	220 (722)	1120 (3675)
Rifle, 5.56mm	M862	TBD	TBD	TBD
Rifle/machine gun, 7.62mm	Ball, M80	1100 (3609)	265 (869)	1365 (4478)
Rifle/machine gun, 7.62mm	Match, M118	1200 (3937)	280 (919)	1480 (4856)
Machine gun, .50 cal.	Ball, M2 and M33/Tracer M17/M8 API/M20 APIT	1600 (5248)	340 (1115)	1940 (6365)
M79 and M203, 40mm low-velocity	M781/M407A1/M406/M433/M381/M386/M441	100 (328)	115 (377)	215 (705)
MK-19, 40mm high-velocity	M918/280M383/M430	500 (1640)	175 (575)	675 (2215)
M72 LAW, 35mm subcaliber	M73	300 (984)	145 (475)	445 (1460)
M72 Law, 66mm RKT HEAT	M72, 66 mm RKT HEAT	200 (656)	280 (919)	480 (1575)
AT4, 84mm RKT HEAT	M136	TBD	TBD	TBD

Notes:

1. VDZ in excess of 61 meters (200 feet) in height requires coordination with the local airfield manager.
2. Use a VDZ of 500 meters (1640 feet) for partially contained (baffled) ranges.

Atch 1
(2 of 2)

OPERATIONAL RISK MANAGEMENT (ORM) EVALUATION OF EXISTING RANGE FACILITIES

A2.1. Overview. Operational Risk Management (ORM) is a tool used to assess the risks associated with continued use of existing firing ranges that do not satisfy the minimum criteria outlined in this ETL. For further information on ORM, refer to AFI 90-901, *Operational Risk Management*, and AFPAM 90-902, *Operational Risk Management (ORM) Guidelines and Tools*. This attachment gives an example of how the ORM process can be applied to a safety evaluation of an existing range. Briefly, the ORM process can be considered to be a six-step process:

1. Identify the hazard
2. Assess the risk
3. Analyze risk control measures
4. Make control decisions
5. Implement risk controls
6. Supervise and review

A2.2. Action Items. The six steps of the process can be broken down into several sub-steps called "actions." A discussion of each action follows.

A2.2.1. Identify the Hazard. This step has three actions:

- Mission/task analysis (e.g., training personnel to fire weapons)
- Listing the hazards (e.g., fired rounds leaving the range)
- Listing the causes (e.g., baffles are of insufficient thickness)

Listing the causes of the hazards is the action where deficiencies or discrepancies are items that are found to not satisfy the ETL criteria. A tabular method for recording these actions and steps is presented in the following paragraphs.

A2.2.2. Assess the Risk. This step has three actions:

A2.2.2.1. Assess hazard severity category:

- I Catastrophic (i.e., mission failure, death, system loss)
- II Critical (i.e., major mission impact, severe injury, or major system loss)
- III Moderate (i.e., minor mission impact, injury, or system damage)
- IV Negligible (i.e., little mission impact, minor injury, or damage)

A2.2.2.2. Assess the mishap probability:

- A – Frequent, daily, often, 10^{-1} to 10^{-4}
- B – Likely, three weeks, occurs several times, 10^{-2} to 10^{-4}
- C – Occasional, six months, will occur, 10^{-3} to 10^{-5}
- D – Seldom, five years, could occur, 10^{-4} to 10^{-6}
- E – Unlikely, past five years has not occurred, rarely, 10^{-5} to 10^{-7}

Atch 2
(1 of 3)

A2.2.2.3. Assign a numerical rating based on the combination of steps A2.2.2.1 and A2.2.2.2. See Table A2.1 for the numerical value to assign to the risk.

Table A2.1. Mishap Probability

Severity	Frequent A	Likely B	Occasional C	Seldom D	Unlikely E
Catastrophic I	1	2	6	8	12
Critical II	3	4	7	11	15
Moderate III	5	9	10	14	16
Negligible IV	13	17	18	19	20

Note: Lower numbers indicate the highest risk.

A2.2.3. Analyze Risk-Control Measures. This step has three actions:

A2.2.3.1. Identify risk control options: Measures taken to mitigate the risk.

A2.2.3.2. Determine control effects: Select the control options desired for consideration.

A2.2.3.3. Determine the residual risk: Prioritize the control measures and re-score the risk based on the implemented control measures using the same procedures in paragraph A2.2.2.3.

A2.2.4. Make Control Decisions. This step has two actions:

A2.2.4.1. Select the risk control measures to implement.

A2.2.4.2. Decide whether the residual risk level is acceptable or not.

A2.2.5. Implement Risk Controls. This step has three actions:

A2.2.5.1. Make the implementation clear to all parties.

A2.2.5.2. Establish accountability and responsibility for implementing risk-control measures.

A2.2.5.3. Provide support to those tasked to implement the control measures.

A2.2.6. Supervise and Review. There are two actions in this step:

A2.2.6.1. Supervise the implementation of the control measures.

A2.2.6.2. Review the effectiveness of the control measures.

Atch 2
(2 of 3)

A2.3. Example. The following example shows a tabular method for performing the operational risk assessment for existing firing ranges. The example shows discrepancies taken from an actual assessment made at a real world Air Force base.

**BASE "X" FIRING RANGE
OPERATIONAL RISK EVALUATION**

Discrepancy	ORM STEP 1	ORM STEP 2			ORM STEP 3		ORM STEP 4	ORM STEP 5	ORM STEP 6
	Hazard	Severity	Probability	Risk	Control Options	Residual Risk	Decision	Implementation	Results
Baffle materials do not meet ETL guidelines	Shoot through the baffle and bullets leave the range containment	I	C	6	Add additional thickness to baffles, or replace with correct material	Repair or replace will yield I,E=12	12	Make repairs	Compare as-built repairs with ETL guidelines
Baffle materials or slopes do not meet ETL guidelines	Ricochet	II	C	7	Install plywood facing on two baffles nearest the shooter, frangible ammunition	Install plywood facing is II,D=11. Frangible ammunition is II,E=16	16	Buy frangible ammunition	Verify ammunition performs as advertised
Baffle materials or slopes do not meet ETL guidelines	Lead pollution, outside of containment	II	C	7	Lead-free ammunition, frangible ammunition	Lead Free is IV,E=20. Frangible ammo is III, D= 14	20	Buy lead-free ammunition	Verify that lead ammunition is no longer being used
Side wall berm has an opening that is visible to some firing positions	Bullets leave the range containment	I	A	1	Fill in the opening or establish a procedure to not use those firing positions	Fill opening is IV,D=19. Procedure is II,E=15	19	Fill in opening	Re-inspect to verify opening has been closed
Side wall berm has an opening that is visible to some firing positions	Lead pollution, outside of containment	II	A	3	Fill in the opening or establish a procedure to not use those firing positions; lead monitoring program; lead-free ammunition	Fill opening is IV,D=19. Procedure is II,E=15. Lead Monitoring is II,E=15, Lead Free Ammo is IV,E=20	19	Fill in opening	Re-inspect to verify opening has been closed
Surface water runoff can leave the range	Lead pollution, outside of containment	II	C	7	Water monitoring program, including surface water samples and groundwater monitoring wells	Monitoring program is II,E=15	15	Install monitoring wells and hire environmental testing firm	Regular reports documenting monitoring results

Atch 2
(3 of 3)

DISTRIBUTION LIST

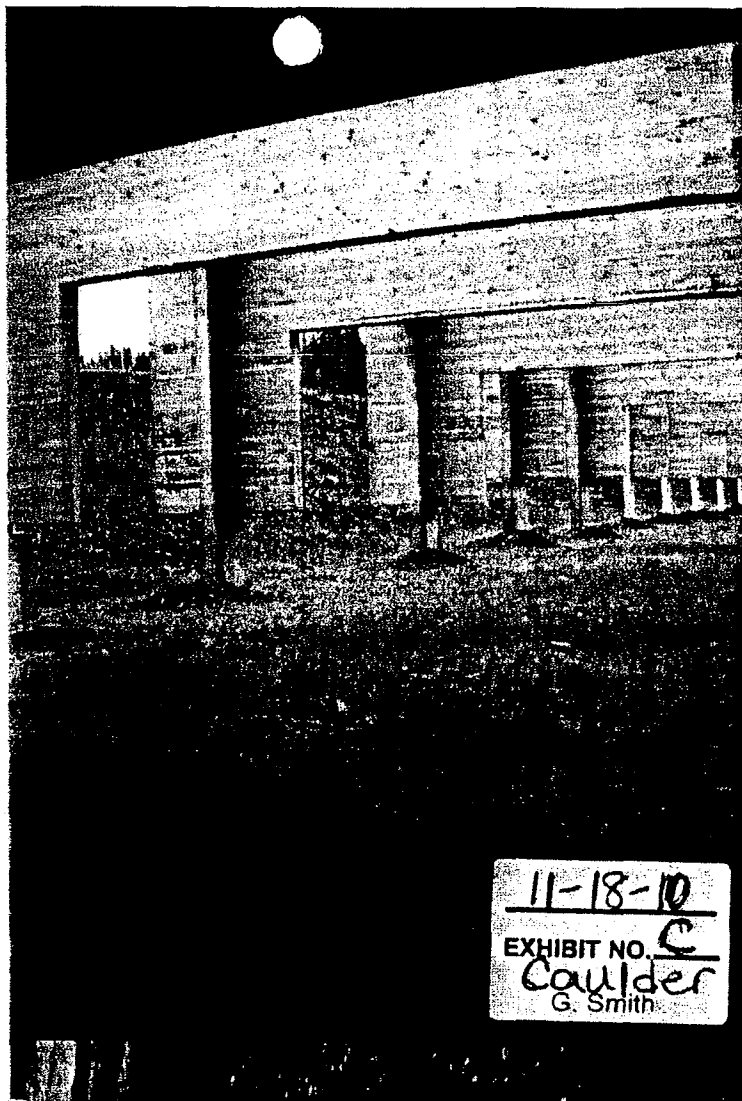
DEPARTMENT OF DEFENSE

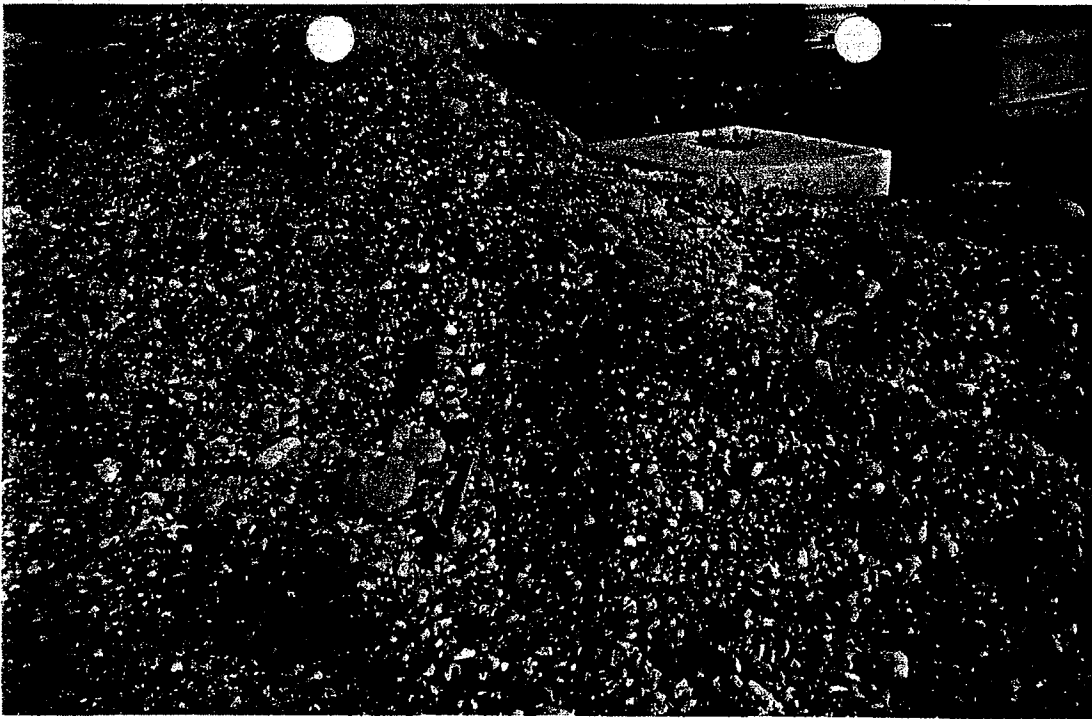
Defense Commissary Agency (1)	AAFES (1)
Design and Construction Division	ATTN: RE-C
2250 Foulis St., Suite 2	PO Box 660202
Lackland AFB, TX 78236	Dallas, TX 75266-0202

SPECIAL INTEREST ORGANIZATIONS

Information Handling Services (1)	Construction Criteria Base (1)
15 Inverness Way East	National Institute of Bldg Sciences
Englewood, CO 80150	Washington, DC 20005

Atch 3
(1 of 1)

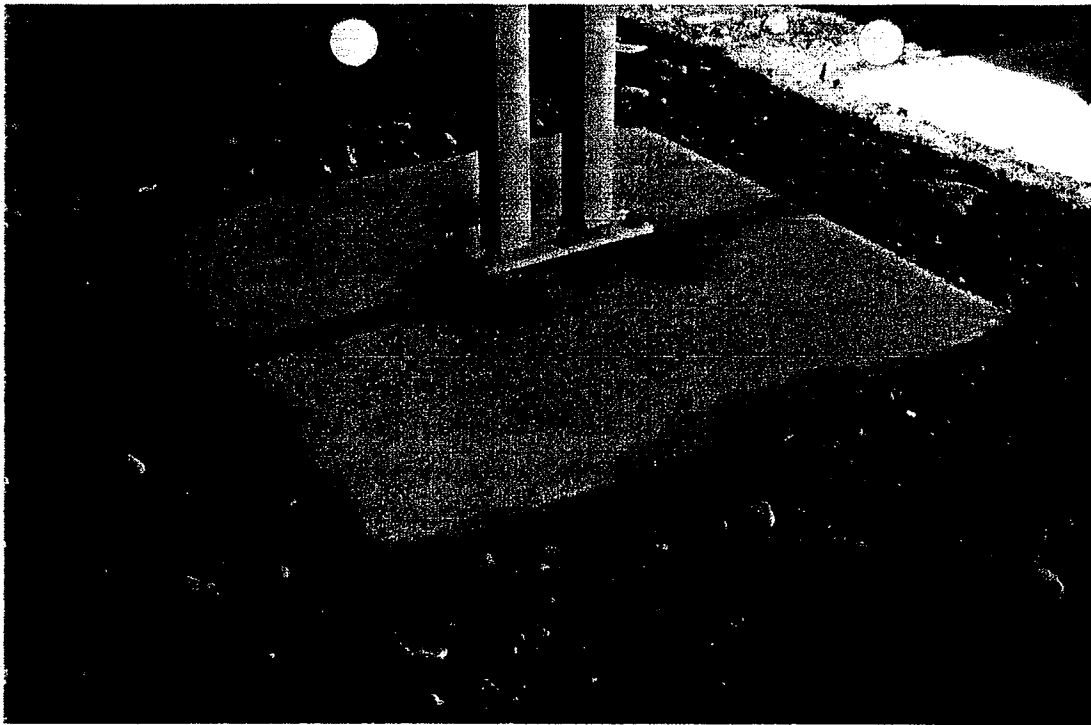




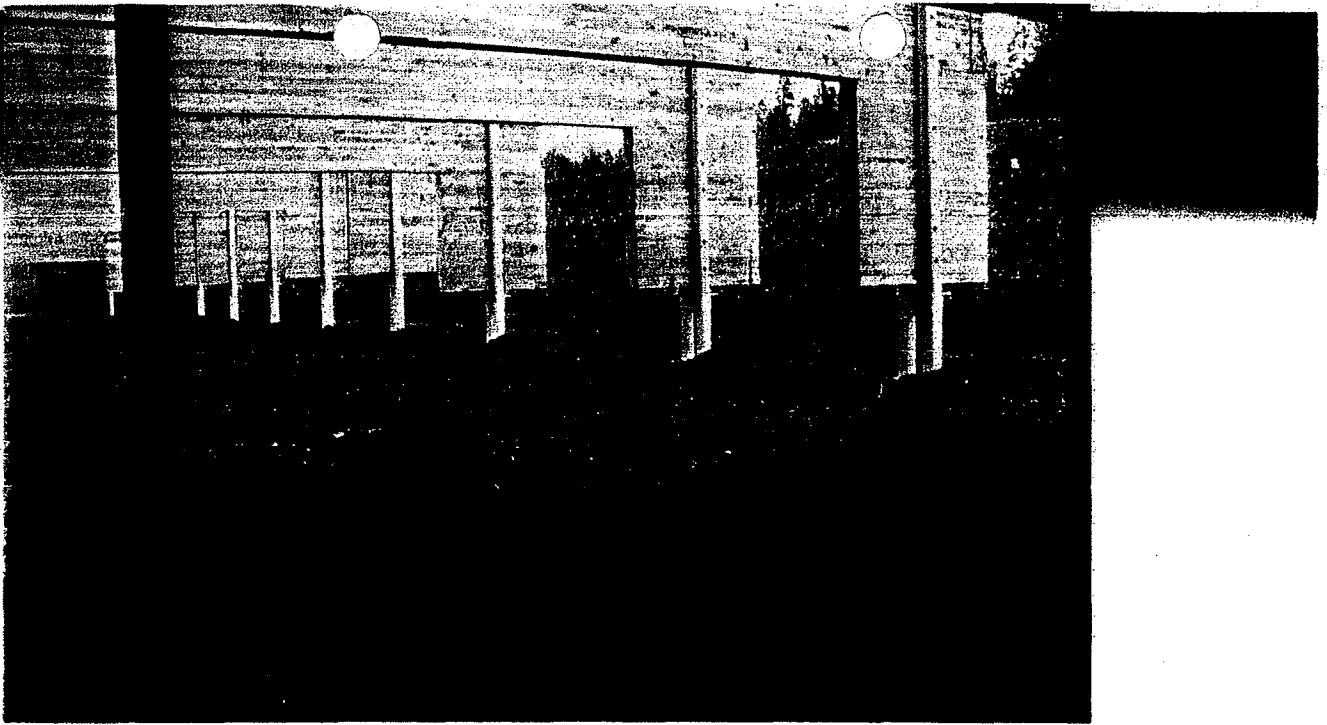
11-8-10
EXHIBIT NO. D
Caulder
G. Smith



11-18-10
EXHIBIT NO. E
Caulder
G. Smith



1H18-10
EXHIBIT NO. F
Caulder
G. Smith



11-18-10
EXHIBIT NO. G
Caulder
G. Smith



11-18-10
EXHIBIT NO. H
Cawder
G. Smith



11-18-10
EXHIBIT NO. I
Cauder
G. Smith

muzzle, ejection port of the weapon, bullet trap, and from the ventilation exhaust to ensure compliance with local, state, and federal regulations. Review NMCPHC-TM 6290.10, *Indoor Firing Ranges Industrial Hygiene Technical Guide*, and the EPA's *Best Management Practices for Lead at Outdoor Shooting Ranges*. Additionally, the designer should coordinate with the base safety and bioenvironmental engineering health offices for additional requirements and review AFOSH standards to ensure compliance with current policy, including, but not limited to, AFOSH Standard 161.2, *Industrial Ventilation*.

7.2.5. Floor Surfaces. Fully contained indoor ranges must have a smooth, steel-trowel-finished concrete floor extending from the firing line to the bullet trap. Fully contained outdoor ranges may have a concrete floor with a broom finish parallel with the firing direction to prevent a slipping hazard. The concrete floor should not be painted and must be protected with a waterproof sealant. The outdoor range floor should slope from the firing line toward the target line. In special circumstances, hardened steel plate of a thickness sufficient to prevent penetration of the projectile may be used for the range floor if the designer provides design criteria, supporting data, and supporting calculations for approval. No protrusions from the floor that could be struck by bullets are permissible. Fully contained range floors should be cleaned using approved "dry" methods, such as HEPA-filtered vacuuming or damp mopping. Water wash-down or dry sweeping is not permitted. Design the range floor as a pavement to support anticipated vehicular loads (training or service vehicles). Design and locate floor slab joints to minimize the potential for unpredictable ricochets. Sawed control joints are permitted. Locate longitudinal floor joints between firing lanes. Traditional chamfered construction joints are not permitted.

7.2.6. Wall Surfaces. Construct wall surfaces for fully contained ranges of reinforced concrete, fully grouted reinforced masonry, or hardened steel plate of a thickness sufficient to prevent penetration by any projectiles fired on the range. If hardened steel plate walls are used, submit data and supporting calculations to the MAJCOM for approval. Steel plate wall designs must address noise abatement in the design and must not have exposed bolts or anchors. If concrete or masonry walls are used, they must remain unpainted to preserve their inherent sound-absorbing properties. Walls should have a continuous smooth surface, with no projections above the wall surface from bolt or rivet heads or the leading edge of deflector plates. Wall expansion/contraction joints should be designed with care to ensure a smooth wall surface is maintained. The typical 19-millimeter (0.75-inch) chamfered wall joint detail is not permitted unless baffle/deflection plates are incorporated in the joint design to span the chamfer. To eliminate erratic ricochets, install baffle/deflection plates to protect any range features attached to the wall. The deflector plates should be recessed into the wall surface to eliminate exposed edges.

7.2.7. Openings. If an existing building is converted for use as a range, all openings downrange of the firing line must be filled in with ballistic safety

structures. All heating, ventilation, and air conditioning (HVAC) equipment downrange of the firing line must be located behind baffles or the backstop. In new buildings, conceal pipes and conduits in the walls, above the ceiling baffles, or behind protective baffles. In converted buildings, relocate exposed pipes or provide protective construction. When doors are required downrange, they must be constructed of ballistic-resistant materials and equipped with hardware to allow opening only from the range side. Protect downrange doors with baffles and provide them with a visual and audible alarm.

7.2.8. Ventilation. The ventilation system must control exposure to lead and heavy metals in accordance with 29 CFR 1910.1025, *Lead*. The supply and exhaust air system is critical to the safe operation of a fully contained indoor or outdoor range and to the health of range inhabitants.

7.2.8.1. Airflow. The ventilation system should provide laminar airflow across the firing line toward the bullet trap. At the firing line, the air velocity should be 23 meters per minute (mpm) (75 feet per minute), ± 5 percent. Airflow should be evenly distributed across the firing line. Noise from the ventilation system will not exceed 85 decibels (dBA) behind the firing line.

7.2.8.2. Air Distribution. To ensure contaminants are ventilated from the firing line, install a perforated air distribution plenum or other distribution fixture along the rear wall to provide unidirectional airflow across the firing line and continuing downrange. The distance from the firing line to the perforated rear wall or plenum will be a minimum of 5 meters (16.4 feet).

7.2.8.3. For an indoor range, the ventilation design must include a positive exhaust system for removing airborne contaminants. Maintain a slight negative air pressure on the range, achieved by exhausting 3 to 7 percent more air than is supplied. Supply and exhaust fan systems must have control interlocks to ensure simultaneous operation. All doors into the negative pressure area must have air locks. Re-circulation of range air is not permitted.

7.2.8.4. Exhaust Intakes. Do not locate exhaust intakes near the firing line, and particularly not above the firing line. To ensure proper airflow, locate exhaust intakes at or behind the bullet trap.

7.2.8.5. Exhaust Air Discharge. Exhaust air discharged from the range and bullet traps must meet local, state, and federal requirements and be separated from the supply air intake to prevent cross-contamination of heavy metal-laden air. If the range is part of a larger building, do not discharge exhaust air at locations which would cause cross-contamination of overall building air.

7.2.8.6. Heavy Metal Dust at Ranges. Clean, hazard-free air is essential for a firing range. The Occupational Safety and Health Administration (OSHA) has

established the permissible exposure limit (PEL) for airborne heavy metal dust at 50 micrograms per cubic meter per hour average for an eight-hour day (total daily exposure may not exceed 400 micrograms). Fully contained ranges (indoor and outdoor) must have ventilation systems designed to control exposure from the use of heavy-metal-containing ammunition. Lead-free ammunition (LFA) is now available and may be used to eliminate the lead contamination concern with older existing ventilation systems.

WARNING

Exposure to heavy metal dust is a severe health hazard associated with the operation of a small arms range.

7.2.9. Noise Reduction. Noise reduction in the range and noise transmission out of the range are different design considerations. Mass and limpness are two desirable attributes for sound absorption. Unpainted heavy masonry walls provide mass. Absorptive acoustical surfacing will reduce the noise level in the range but have little effect on transmission outside the range. Ambient noise levels at the firing line should not exceed 85 dBA, and should be considerably less to improve communication between shooters and the range official. Short-duration noise such as gunfire will exceed the 85 dBA level and may be as high as 160 dBA. The range design must prevent the reflection of these higher noise levels by using sound-absorbing materials where possible. Hearing protection for shooters will provide protection against this noise.

7.2.9.1. Use acoustical treatment on surfaces behind the firing line. Floor areas behind the firing line may be covered with acoustic material (rubber mats) if it will not impede heavy metal dust removal.

7.2.9.2. Do not paint downrange walls or acoustic tile, since paint significantly degrades the sound-absorbing qualities of the materials. Existing ranges may continue using painted surfaces. Special sound-absorbing concrete blocks are available that reduce the noise in the range.

7.2.9.3. Acoustic panels no larger than 1200 millimeters (47 inches) wide may be installed on walls and ceilings in the firing line area. Blown-on acoustic material and carpeting are not permitted due to the difficulty of cleaning accumulated heavy metal dust.

7.2.10. Infrastructure.

7.2.10.1. Range Control Booth. The control booth is a control center from where the chief range officer can observe and control the entire range. All range types should have a control booth. The following criteria apply to the design and construction of control booths.

7.2.10.1.1. Locate the control booth behind the ready line. Place the booth to permit an unrestricted view of all firing positions. The booth location and design must not impede ventilation airflow.

7.2.10.1.2. The minimum size for the control booth platform is 1.5 meters by 3 meters (5 feet by 10 feet). Align the long side parallel to the firing line.

7.2.10.1.3. The booth must be high enough (0.6 meter [2 feet] minimum above the floor) to permit the range official an unrestricted view of the entire firing line and the projectile impact area, including all range entry points. Also, windows and doors within the booth must not restrict or distort the range official's view. Closed-circuit television monitors may be used to enhance, but will not replace, this requirement.

7.2.10.1.4. Provide a worktable or counter at least 0.8 meter by 1.2 meters (2.5 feet by 4 feet) to accommodate reference materials, and provide at least one electrical outlet in the worktable/counter area. Provide red and white lighting for night/limited visibility operations.

7.2.10.2. Communication Systems. The range communication system must support communications between the control booth, the firing line, range control, range support buildings, and emergency response personnel. A permanent, hard-wired public address system is required. On a multiple-range complex, the system must also support communications between individual ranges. If it is not practical to install landlines, or if a break in landline service occurs, radio or cellular communications may be used. The control booth should be wired with connections to the base local area computer network.

7.2.10.3. Lighting. Design downrange lighting (both red and white light) in accordance with the IESNA Lighting Handbook to provide for safety and housekeeping operations as well as general range illumination. Light intensity at the target face should be 914 to 1076 lux (85 to 100 foot-candles) measured 1200 millimeters (47 inches) above the range surface at the target face. Provide approximately 322 lux (30 foot-candles) for white light general range illumination and approximately 107 lux (10 foot-candles) for red lights. Provide controls to vary lighting intensity throughout the range to accommodate subdued-light training requirements. Controls for all lighting will be operated from the control booth. Also provide flashing red and blue lights at the firing line and downrange to simulate emergency situations.

7.2.11. Barriers, Fences, and Signs. Secure the range and SDZ areas to prevent unauthorized entry. Use barriers to block roads, walkways, or paths.

7.2.11.1. Fully contained ranges require barriers in the form of key-operated, locked doors or electrically locked doors to prevent entry while firing is in progress.

7.2.11.2. Non-contained (impact) ranges require a number of barriers and signs to make the range safe. The number of barriers required depends on the number of roads, walkways, and paths that lead into the SDZ. Attach reflective warning signs to barriers.

7.2.11.3. Use fencing to prevent people, animals, and vehicles from entering range SDZs. A chain-link fence around the complete range complex, including the SDZ, is preferred. Use barriers or gates to block access paths. On baffled ranges with earth side berms and an earth/metal backstop, as a minimum, install a 1.82-meter (6-foot) chain-link fence along the sides of the SDZ and on the downrange side of the impact area, incorporating the berms. Install the fence no closer than 5 meters (16 feet) from the toe of the berms and backstop. For fully contained ranges with concrete containment walls and an earth/metal backstop, as a minimum, install the fence from one wall, around the backstop, to the opposite wall when range components are exposed. For example, if the back side of the bullet trap and spent round retrieval system is exposed, erect a fence to restrict access by unauthorized personnel. Provide a locked access gate for maintenance equipment.

7.2.11.4. Typical range signs are shown in Figure 7. Warning signs, and flashing red warning lights for night operations, should be positioned on the approaches to the range and along the perimeter of the SDZ if access is not otherwise restricted. Place red flags and/or rotating/flashing red lights at appropriate locations to signal when the range is in use. Place signs along the normal boundaries of the range. Post the signs no further apart than 100 meters (328 feet) along the range perimeter, parallel to roads or paths. Based on local topography, place signs close enough to give reasonable warning along other areas of the SDZ. Refer to Table 2 for proper location of warning signs. Signs must be bilingual where English is not the national language or multilingual where needed. Post bilingual signs on continental United States (CONUS) ranges located near foreign borders. Consult the installation legal office for local policy on bilingual signs. Construct warning signs in compliance with UFC 3-120-01, *Air Force Sign Standard*. The warning signs should have standard red letters on a white background.

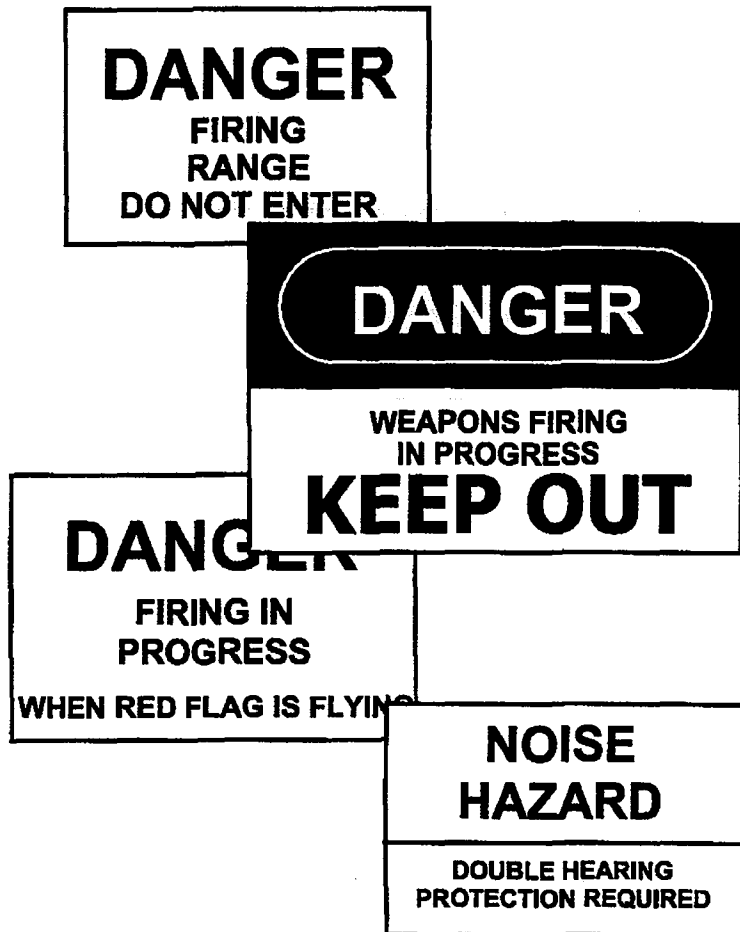


Figure 7. Typical Range Signs

Table 2. Locations of Warning Signs

Warning Sign	Location
<p style="text-align: center;"> Danger Firing in Progress When Red Flag is Flying </p>	<p style="text-align: center;">Approach roads</p>
<p style="text-align: center;"> Danger Firing Range Do Not Enter </p>	<p style="text-align: center;">Fencing and barriers</p>
<p style="text-align: center;"> Danger Weapons Firing in Progress Keep Out </p>	<p style="text-align: center;">Entry road</p>
<p style="text-align: center;"> Noise Hazard Double Hearing Protection Required </p>	<p style="text-align: center;">Firing line</p>

7.2.12. Utilities. Install utilities to prevent damage from normal firing range operations. Do not place any aboveground utilities in the impact zone or the ricochet zone. When utilities are directly behind backstops or berms, provide access for a maintenance vehicle. Underground utilities with proper cover may be placed anywhere on the range complex if maintenance and repair easements are provided.

7.2.12.1. Water and Sanitation. Water must be available for drinking, sanitation, and safety equipment. The required latrine size will be determined using conventional planning criteria and based on the number of people (instructors and trainees) supported.

7.2.12.2. Electrical Power. Provide electrical power for lighting, maintenance equipment, public address systems, HVAC, bullet trap dust collection system, and target-turning mechanisms.

7.2.12.3. HVAC. Heat and/or air conditioning is not recommended. Because re-circulated air within a range is prohibited, heating or cooling a range is costly. Some outdoor ranges in colder climates will require radiant heat or a heated air curtain on the firing line. Outdoor ranges must be oriented so the prevailing wind is at the shooters' backs.

7.2.13. Roads and Parking. Design roads and parking for access by passenger vehicles and light or medium trucks. Provide surfaced all-weather roads for

connector roads from public roads to the range complex. Parking and roadway standoff must comply with UFC 4-010-01, *DoD Minimum Antiterrorism Standards for Buildings*.

7.2.13.1. Range access roads must approach the range complex from behind the firing line and outside the SDZ footprint.

7.2.13.2. Locate parking areas to the rear of the firing platform. On fully contained ranges, the parking area may be beside the range side containment walls. Typically, one parking space per firing position plus an allowance for range personnel is sufficient. Ranges with heavy training loads occasionally require two spaces per firing position. When feasible, surface parking lots for all-weather operation.

7.2.14. Storm Water Runoff and Drainage. Design storm water control structures to prevent storm water erosion of impact berms. Divert surface water runoff within the range (including the SDZ) using best management practices (BMP) for heavy metal management that may include filtration, vegetated detention or retention basin, or other engineered structure to prevent direct discharge to a surface water body. Discharge of effluent to water bodies must meet all requirements of federal, state, and local laws.

7.2.15. Contaminant Monitoring. A contaminant monitoring program provides early indications of heavy metal and contaminant movement. A comprehensive monitoring program should sample the surface soil, surface water, and ground water for soluble lead, dissolved lead, total lead, and nitrates. The frequency of sampling is dependent on how often the range is used and site hydrological conditions. Consult with the installation CE and bioenvironmental engineering personnel to determine if a contaminant monitoring program is required.

7.3. Additional Criteria for Non-contained Ranges.

7.3.1. Siting Considerations. Take advantage of natural geologic formations for use as backstops. Trees are allowed downrange of the impact berm, but not between the firing line and the target line. Take advantage of natural drainage. Where terrain permits, slope the range floor toward the backstop. Flowing watercourses (streams, ditches) in the impact area or near a berm should be avoided. Avoid establishing range impact areas in wetlands or in locations subject to frequent flooding. The non-contained range line of fire should not be in the direction of residential areas or upwind of residential areas.

7.3.2. Provide maintenance vehicle access to all range areas, including the backstop, side earth berm areas, and impact areas.

7.3.3. Soils. Do not use pea gravel to surface or edge the impact area of the range or the area between the firing line and the target line. Naturally occurring

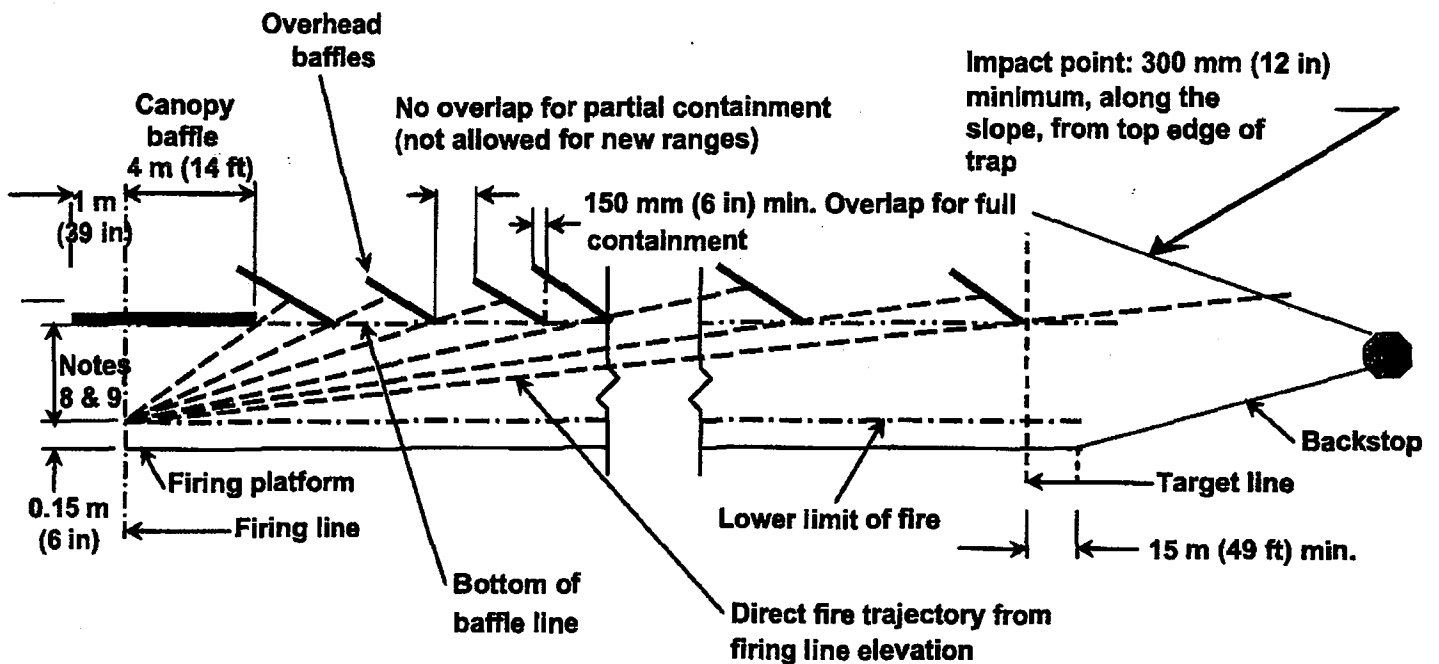
soils that are not excessively rocky may be used between the firing line and the target line. Typically these will be clays, clayey sands, sands, silts, and silty sands that are mostly free of rocks and debris, with no more than 15 percent of the material gradation retained on a 24-millimeter (1-inch) sieve.

7.3.3.1. Soil Amendments. BCE environmental management must test soils within the impact areas for pH levels every two years. The desired pH ranges from 7 to 8. Test soil additives to ensure that they will not cause cementing or hardening of the soil surface. Do not use lime as an additive or soil conditioner when the natural soil gradation includes more than 30 percent passing the #200 sieve, American Society for Testing and Materials (ASTM) C136, *Standard Test Method for Sieve Analysis of Fine and Coarse Aggregates*, and/or the natural soil Plasticity Index is higher than 12.

7.3.3.2. Vegetation. Maintain vegetation on berms and drainage-ways when possible. Plant grass on impact areas. Turf grasses do an especially good job of retaining water and sediment onsite. Choose a grass variety that is native to the area and will require minimal water and fertilizer.

7.3.3.3. Reclamation and Recycling. Remove lead from the impact face of earth berm backstops when there is evidence of lead mass buildup. This will typically require that soil be excavated to a depth of 0.6 to 0.9 meter (2 to 3 feet) and screened using a 4-millimeter (#5) wire screen. Personnel certified in lead reclamation and wearing proper personal protection may sift the lead from the soil by screening onsite after consulting with bioenvironmental engineering personnel and satisfying all environmental requirements. Reclaimed lead must be disposed of or recycled in accordance with federal, state, and local laws and regulations. Consult BCE environmental management, bioenvironmental management, and the Defense Reutilization Management Office (DRMO) about reclaiming, recycling, or disposing of lead. Lead removed from bullet traps and earth berms is not considered a hazardous waste if recycled for metal recovery.

7.4. Additional Criteria for Fully Contained Ranges. Construct fully contained ranges to preclude any bullets from leaving the limits of containment. This requires additional attention to detail so no gaps, openings, or other paths for bullet escape are present. Use ballistic safety structures to provide the containment. For fully contained ranges, construct overhead baffles with a minimum of 150 millimeters (6 inches) of horizontal overlap between the trailing edge of any baffle and the leading edge of the next baffle downrange. This arrangement will provide containment such that a vertical line perpendicular to the range floor and projected upwards does not encounter any "blue sky" space. Figure 8 shows a baffle arrangement for full containment.



NOTES

1. This profile is based on a level range and a fixed firing line.
2. The target distance is established by CA to satisfy the intended training or courses of fire.
3. A tactical, fully contained range will allow shooters to move laterally along the firing line and downrange.
4. Overhead baffles must be angled from 12° to 32° from the horizontal.
5. Fully contained ranges require a 150-mm (6 in) minimum baffle overlap.
6. For existing partially contained ranges, baffles are spaced as required to bring the bullet into the baffle at a point not less than 300 mm (12 in) below the top of the following baffle as measured along its slope.
7. The bullet impact point on the bullet trap is not less than 300 mm (12 in) below the top edge of the trap as measured along the slope.
8. If vehicle access is not required, locate the bottom of the baffles at least 2.45 m (8 ft) above the firing platform.
9. If vehicle access without machine gun pedestal, locate the bottom of the baffles at least 3.68 m (12 ft) above the platform.
10. The canopy baffle may be sloped up to 30 degrees from the horizontal. If sloped, the high point of the canopy is closest to the target line.

Figure 8. Typical Overhead Baffle Configuration

7.4.1. Construct ballistic safety structures for fully contained ranges with attention to the quality of the fabricated parts. Baffle plates with butt joints must fit together closely to prevent any gaps more than 1.6 millimeters (0.0625 inch) wide. Modern plate-cutting techniques can provide precise dimensions, but particular care must be taken in erecting the baffles to ensure a precision fit of parts. The development of construction/erection details that use overlapping joints and joint-closure plates may provide a better, more economical solution than precise fabrication and also may simplify the erection procedures.

7.4.2. Good examples of fully contained ranges are at the Federal Law Enforcement Training Center in Glynco, Georgia. These ranges are considered fully contained and have a track record of millions of rounds fired without a single documented case of a bullet leaving the containment limits.

7.4.3. Additional Criteria for Vehicle Access. New training scenarios will use vehicles for practicing vehicle dismount, cover, and engagement of targets from the vehicle. The design vehicle for range design purposes is a HMMWV ("Humvee") without a pedestal-mounted weapon. Vehicle access requires consideration of higher clearance from range floor to baffles and vehicle paths into the range. See Figure 8.

7.5. Ballistic Safety Structures.

7.5.1. Canopy Baffles. A canopy baffle is an angled or horizontal baffle attached to and directly above the firing platform, extending downrange from the firing line. It prevents direct-fired rounds from escaping the range between the firing line and the first overhead baffle. The bottom of the canopy baffle must be at least 2.45 meters (8 feet) above the level of the firing platform if vehicle access is not required. The canopy will begin at least 1 meter (3.2 feet) behind the firing line and extend at least 4 meters (14 feet) forward of the firing line toward the target line. The canopy baffle must block line-of-sight daylight from any possible firing position. A canopy baffle may be used to provide a covered firing line position. A canopy baffle may be used on a non-contained range without either overhead baffles or side containment. Face the portion of the canopy baffle directly over the firing positions with plywood or lumber of sufficient thickness to capture the ricochet from a round fired directly over the shooters.

7.5.2. Overhead Baffles. An overhead baffle is an angled baffle (vertical baffles are not authorized for new range projects) installed downrange to deflect and contain direct-fired rounds. Install overhead baffles downrange beyond the firing line to prevent line-of-sight daylight when sighting downrange from any firing position. A shallow angle deflects bullets more easily and there is less metal fatigue and denting in the surface of the plate. A fully contained range requires a 150-millimeter (6-inch) minimum overlap of baffles. The overlapping baffles will allow shooter movement throughout the range and will prevent projectiles from leaving the range even if the weapon is accidentally fired straight up. Line-of-

sight analysis shall consider rounds fired from any angle and any training position forward of the firing line. Angled overhead baffles redirect projectiles downrange. Install angled overhead baffles with the bottom edge further downrange than the top edge. Install overhead baffles parallel to the firing line. Under no circumstances may any "blue sky" be visible forward of the firing line from any firing position. Refer to Figure 8 for a typical configuration. Install angled overhead baffles for new ranges and baffle replacement projects.

7.5.3. Ground Baffles. Ground baffles are not permitted on Air Force ranges.

7.5.4. Baffle Construction. As a minimum, use materials specified in Table 3. These materials may also be used for protective construction. For angled steel plate baffles, install plywood facing to prevent "splash-back" ricochets on baffles located within 5 meters (16.4 feet) of the expected position of the shooter. If shooters move downrange and fire, the splash-back protection will be required for baffles at the downrange locations as well. **Note:** Install acoustic materials to canopy baffles to reduce noise. **Note:** The Brinnell Hardness Number (BHN) measures steel hardness. The higher the BHN, the harder the steel.

Table 3. Construction Materials for Canopy and Overhead Baffles

Weapons	Ammunition	Construction*
Handguns	.22 LR, .38 cal., .45 cal., .357 cal., 9mm, .44 cal.	6 mm (0.25 in) steel plate with a nominal 440 BHN or higher, covered with one sheet of 19 mm (0.75 in) and one sheet of 11 mm (0.4375 in) plywood
Rifle, carbine, machine gun	5.56mm, 7.62mm, .30 cal.	10 mm (0.375 in) steel plate with a nominal 500 BHN, covered with one sheet of 19 mm (0.75 in) and one sheet of 11 mm (0.4375 in) plywood

***Notes:**

1. On steel plate baffles, install plywood facing on overhead baffles located within 5 meters (16.4 feet) of the shooter to mitigate the risk of "splash-back" ricochets. Attach the 19-millimeter (0.75-inch) sheathing to the steel using flathead countersunk screws. Attach the 11-millimeter (0.4375-inch) plywood to the 19-millimeter (0.75-inch) sheathing using #8 flathead screws at 300-millimeter (11.8-inch) spacing.

2. Nominal AR500 ballistic plate manufactured to BHN 500 may have BHN values ranging from 480 to 530.

7.5.5. Side Containment or Sidewalls. Sidewalls are required to prevent direct fire from exiting the range. Finished elevation of a sidewall must be above the top edge of the highest overhead baffles. Each sidewall must be at least 1.52 meters (5 feet) from the outside edge of the firing position limits of fire and extend at

least 1 meter (3.2 feet) to the rear of the firing line. Sidewalls may be made of earth, fully grouted reinforced masonry block (CMU), reinforced concrete, or hardened steel.

7.5.5.1. Continuous Walls. Vertical smooth-faced walls constructed of reinforced concrete, CMU with fully filled cores, or hardened steel may be used for sidewalls. Table 4 lists minimum wall thicknesses. Design these walls for all dead and live loads, including lateral forces. See paragraph 7.2.9 for noise reduction requirements. Walls will extend 1 meter (3.2 feet) behind the firing line to prevent a bullet fired parallel to the firing line from leaving the range.

Table 4. Sidewall Minimum Thickness

Material	Caliber			
	.45/9mm	5.56mm	7.62mm	.50
3500 psi concrete	150 mm (6 in)	150 mm (6 in)	200 mm (8 in)	300 mm (12 in)
Grout-filled CMU	200 mm (8 in) CMU	300 mm (12 in) CMU	300 mm (12 in) CMU	600 mm (24 in) CMU

7.5.5.2. Discontinuous Sidewall Baffles. Side baffles are similar to overhead baffles, except they provide discontinuous protection to each side of the range outside the entire length of the line of fire. They are set between 15 and 45 degrees relative to the line of fire and provide an advantage over continuous walls whenever cross-range ventilation is needed.

7.5.5.3. Earth Berms. The slope of earth berms must not exceed a 2:3 vertical-to-horizontal ratio unless materials are stabilized. If native soil characteristics will not produce a stable slope at this angle, use fabric reinforcement in the fill. The soil may require conditioning to achieve satisfactory soil pH levels to prevent lead decomposition. Typical angles of repose for natural soils in loose or least-dense state are shown in Table 5. Use Table 5 only as a guide, since mechanical stabilization may increase the angle of repose. The width of the top of the berm must be at least 3 meters (9.8 feet). Construct the outer layer (2 meters [6.5 feet] thick) of the impact face with sands, silty sands, or clayey sands, free of rocks, and with 100 percent passing the #4 sieve, ASTM C136. Soil with more than 40 percent clay-size particles passing the #200 sieve is not acceptable for the outer 2-meter (6.5-foot) layer of the impact face. Clay may be used for the core. For erosion control, plant a vegetative cover on the faces and tops of berms.

Irrigation devices may be used on the faces and tops of berms not subject to direct fire. Ensure access for maintenance vehicles.

Table 5. Natural Angles of Repose (Internal Friction) for Naturally Occurring Soils

Soil Types	Angle of Repose/ (Internal Friction)
Silty sand/fine sand/clayey sand	30
Coarse sand	35
Silts	25
Gravel/sandy gravel/gravelly sand	34

7.5.6. Backstops. A backstop is used behind the target line. It must stop a direct-fire bullet by media capture or deflect the bullet into a trap.

7.5.6.1. Earth Backstops. Earth backstops are the most common backstop for outdoor ranges. As an example, for a 25-meter (82-foot) outdoor range, locate the backstop so the longitudinal centerline of the berm (backstop) is at least 50 meters (164 feet) from the firing line. The toe of the slope must be located at least 9 meters (29.5 feet) from the target line nearest the backstop. The top of the backstop must be high enough so that a line drawn from the firing line and under the last overhead baffle will intersect the backstop at least 2 meters (6.5 feet) below its top. The impact face of the earth backstop must be soil with 100 percent passing the #4 sieve, ASTM C136, for a depth of 2 meters (6.5 feet). The slopes should be stabilized with grass vegetation with access locations provided for maintenance and repair equipment. Incorporate a steel deflector plate (eyebrow) into the backstop if a higher degree of confidence is required to prevent direct-fired rounds from leaving the impact area of the backstop. Soil with more than 40 percent clay-size particles passing the #200 sieve is not acceptable for use in the impact area face of the backstop. If required, soil should be conditioned to achieve suitable pH levels as indicated in paragraph 7.3.3.1.

7.5.6.2. Metal Backstops. Metal backstops are large plates installed behind the target line to stop direct fire and ricochets. Metal backstops are not approved for new construction. They are typically found on older existing partially contained or fully contained ranges but may be found on non-contained ranges. A metal backstop is not a bullet trap. See paragraph 7.5.6.4 for a discussion of bullet trap requirements. The metal backstop should be located a minimum of 15 meters (49 feet) beyond the target line to allow target and backstop maintenance and to minimize the possibility of splashback ricochets or lead exposure to the shooters executing a

downrange course of fire. Additionally, provide sufficient vehicle access to maintain the backstop. The required direct fire and ricochet containment must not be compromised when providing vehicle access. On outdoor ranges, provide corrosion protection for a metal backstop. Painting does not provide adequate protection. Consider adding an overhead cover to provide protection.

CAUTION

Do not use armor-piercing or incendiary rounds with metal backstops or bullet traps unless the backstops or traps have been designed to accommodate these rounds. If commercially designed range components are used, ensure that the products satisfy the design requirements for the ammunition used on the range.

7.5.6.3. Backstop Deflector Plates (Eyebrows). A deflector plate is not a bullet trap. See paragraph 7.5.6.4 for a discussion of bullet trap requirements. A backstop deflector is typically installed on top of an earth backstop to provide added containment safety. Install the backstop deflector plate at an angle between 30 and 42 degrees from horizontal. Angles other than these are permissible if test data and calculations support the design. Set the highest edge of the deflector plate nearest the firing line. The shallow angle deflects bullets more easily and there is less metal fatigue and denting in the surface of the plate. Anchor steel plates supported by concrete or masonry with flush countersunk heads. Eliminate exposed edges which may produce erratic ricochets. Ensure edges of steel plates are milled at all joints and joints are butted flush and smooth. Plates must be free from buckle or wave. Exposed edges must be chamfered to a 45-degree angle to a fillet approximately 4 millimeters (0.16 inch) wide. Exposed structural members supporting deflector plates are not permitted. Welding must conform to American Welding Society (AWS) D1.1, *Structural Welding Code – Steel*, latest edition. Position steel plates so welds are no closer than 450 millimeters (17.7 inches) from the center of a target position. Steel plate jointed at and supported on structural steel supports must be spot-welded. (See Figure 11.)

7.5.6.4. Bullet Traps. Only commercially designed and constructed bullet traps are permitted. Sand, media or water traps (recycled lubricating water excepted) are not permitted in new construction. Bullet traps are typically used on contained ranges and placed in front of the backstop or rear wall of the range. They are total systems that deflect, stop, trap and contain direct-fired rounds, and may incorporate vacuum or other dust-management systems to capture projectile particles. Bullet traps installed at indoor ranges must have a dust-management system installed to provide heavy metal particle removal from the range environment. The bullet trap must be

designed to accommodate the ammunition/weapon to be fired as well as the expected quantity of ammunition fired (annual rate of fire). The bullet trap should extend the entire width of the firing line. The trap shall not present any blunt surface exposure that would create a ricochet hazard internal to the equipment or at the connection to the sidewalls and floor. All future purchases of bullet traps must incorporate trap designs with a continuous, non-partitioned, and unbroken slot or bullet path into the deceleration chamber. Typical designs have in the past had fabrication details with vertical bulkhead plates in the deceleration chambers. These plates create vertical blunt edges that cause back-splash-type ricochets of the steel penetrator tips of the M855 5.56mm round. There have been documented cases of the steel penetrator tips ricocheting back to the firing line and endangering the shooters. The trap must have the capability to be cleaned of accumulated deposits of bullets and fragments while minimizing lead exposure to the maintainer.

Note: Only trained personnel wearing proper personal protection will remove lead, and only after consulting with bioenvironmental engineering personnel and following the trap manufacturer's recommended procedures.

The space directly behind the bullet trap must be easily accessible for maintenance and repair of the bullet trap and backstop. The bullet trap metal thickness and hardness must meet the minimums listed in Table 6 for each type of ammunition to be fired on the range. If lesser thicknesses are proposed, the range component designer must provide test data and calculations supporting a lesser thickness. Angles of the metal plates must conform to those directed by the manufacturer to handle the munitions fired from varying shooter positions, target distances, and target positions. Design all traps for tracer rounds if a tracer round can be used in the weapon operated on the range.

7.5.6.4.1. Qualifications for Commercial Trap Manufacturers. Commercial bullet trap and range component manufacturers must demonstrate at least five years of continuous component manufacturing and submit a minimum of five examples of similar range components installed by the manufacturer, with customer references.

Table 6. Minimum Steel Plate Thickness for Metal Backstops, Deflector Plates, and Bullet Traps

Max Angle	Ammunition	Armor Plate 300 BHN	440 BHN	500 BHN
42	.22 LR rim fire	6 mm	6 mm	6 mm
42	.38 cal. ball	10 mm	6 mm	6 mm
42	.45 cal./ .357 cal.	10 mm	6 mm	6 mm
42	9mm pistol	10 mm	6 mm	6 mm
42	.44 cal. magnum	12 mm	10 mm	10 mm
30	5.56mm, 7.62mm	12 mm	Not recommended	10 mm
30	.30 cal. carbine	12 mm	Not recommended	10 mm

Note: 0.25-inch and 0.375-inch plate may be substituted for 6-mm and 10-mm plate, respectively.

7.5.7. Metal Backstop, Deflector Plates, and Bullet Trap Material.

7.5.7.1. Construct metal backstops, deflector plates, and bullet traps with the minimum metal thickness and hardness listed in Table 6. Small variations of BHN (less than 5 percent lower than the nominal number) are acceptable.

The design/specification must reference the applicable ASTM standard or MIL SPEC, the grade of steel required, and the hardness. To ensure that the correct grade of steel is installed (all steel plate looks the same), require a certificate of compliance. The plate thickness tests were conducted for the plate angles listed; however, a flatter plate angle is desired (the flatter the angle of the plate, the better). A shallow angle deflects bullets more easily, and there is less metal fatigue and denting on the surface of the plate.

7.5.7.2. Do not use mild structural steel, carbon steel plate, or low-alloy steel conforming to ASTM A36/A36M, *Standard Specification for Carbon Structural Steel*, ASTM A242/A242M, *Standard Specification for High-Strength, Low-Alloy Structural Steel*, or A572/A572M, *Standard Specification for High-Strength, Low-Alloy Columbium-Vanadium Structural Steel*; they lack adequate pitting resistance and deteriorate rapidly on small arms ranges.

7.6. Range Support Facilities. Range support facilities include the CA building and munitions storage room/building (Category Code 171-476), a building for the storage of range supplies and equipment (Category Code 171-472), and a building for target storage and repair (Category Code 171-473).

7.6.1. CA Building. The CA building provides a temperature-controlled environment for the CA section. The building houses classrooms, administrative offices, weapons maintenance areas, space for the cleaning and degreasing of

weapons, an alarmed weapons and munitions storage room, sanitary facilities, a student weapons cleaning room, and miscellaneous storage. Figure 9 presents an example of a typical floor plan. A small arms range with more than 21 firing points or an installation with more than one range or type of range requires proportionately larger facilities. Give consideration for space to accommodate weapons simulator training as mission needs dictate.

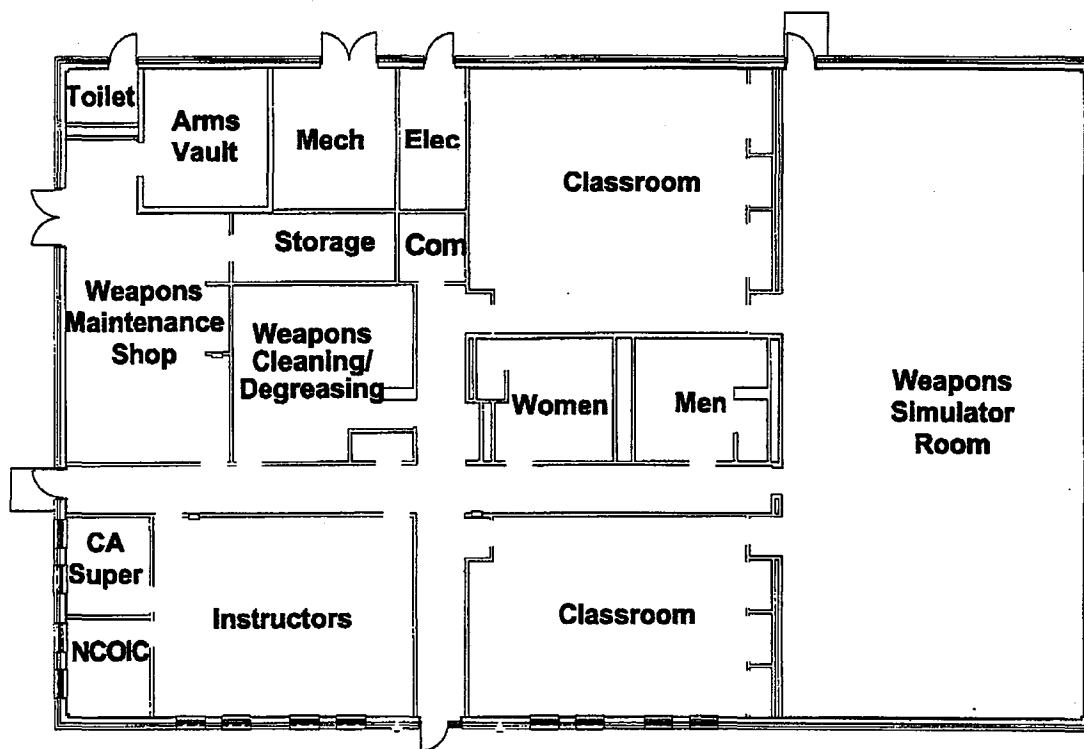


Figure 9. A Typical CA Building Configuration

7.6.1.1. Classrooms. Classrooms must be large enough to provide each student receiving handgun, rifle, shotgun, or submachine gun training a chair and a table work surface of at least 610 by 915 millimeters (24 by 36 inches). Provide space for each student receiving machine gun or LAW training to accommodate a work surface of at least 865 by 1145 millimeters (34 by 45 inches). The classroom will include a raised instructor's platform, aisle space for instructor access to individual tables, and sufficient space and connections for audiovisual equipment and computers.

7.6.1.2. Administrative Space. This area (typically about 13 square meters [140 square feet]) contains offices for program administrators and CA personnel such as the NCOIC and several instructors.

7.6.1.3. Weapons Simulator Room. This room is specifically designed for commercially purchased projection-based weapons simulators. A five-lane system requires a room approximately 10.7 meters by 5.3 meters (35 feet by 17.5 feet). A ten-lane system requires approximately 10.7 meters by 10.7 meters (35 feet by 35 feet). The room should have at least a 2.7-meter (9-foot) ceiling height and no windows. The room must have dimmable lighting, HVAC, and a minimum of four 110-volt and/or 220-volt dedicated power outlets to operate air compressors, projectors, and computers. Two dedicated telephone lines are required for operating the system and for remote diagnostic support.

7.6.1.4. Weapons Maintenance Shop. The weapons maintenance shop must have space for workbenches, hand tools, power tools, equipment, and spare parts storage. A range that supports less than 5,000 weapons requires a 28-square-meter (300-square-foot) shop. An installation that supports over 5,000 weapons will require 37 square meters (400 square feet). Provide a lavatory with potable water in the immediate area. An emergency eyewash station is also required. Provide additional ventilation as required. Maintain relative humidity (RH) below 65 percent.

7.6.1.5. Weapons Cleaning/Degreasing Room. This room accommodates workbenches, degreasing tanks, and spray hoods. Special design requirements include exhaust and ventilation air, vapor-proof electrical fixtures, compressed air service, and solvent-resistant wall and ceiling finishes. The minimum space requirement is typically about 12 square meters (130 square feet). A lavatory with potable water should be in the immediate area. An emergency eyewash station is also required. The installation safety office and bioenvironmental engineering may have additional design requirements. Exhaust make-up air can be transferred from the administrative and classroom area as long as sufficient ventilation air is provided in those areas to prevent negative air pressure in relation to the outside.

7.6.1.6. Weapons and Ammunition Storage. The vault provides secure storage for all weapons for which the CA section is responsible and a less-than-30-day supply of each type of ammunition used on the range. A gross floor area of 14 square meters (151 square feet) is usually adequate. Room construction must satisfy the requirements of AFI 31-101, *The Air Force Installation Security Program (FOUO)*, and UFC 4-020-01, *Security Engineering: Project Development (FOUO)*, for construction materials and specifications. Additionally, requirements of DOD 5100.76-M, *Physical Security of Sensitive Conventional Arms, Ammunition, and Explosives*, must be satisfied. In general, vault construction must provide a minimum ten minutes of forced entry delay. Typical vault construction features walls, floors, and roof of 200-millimeter (7.9-inch) concrete reinforced with two layers of number 4 rebar on 225-millimeter (9-inch) centers, fitted with a class V door. Maintain RH below 65 percent.

7.6.1.7. Latrines (Sanitary Facilities). Provide facilities for both men and women. Provide additional cold water hand-washing stations at the entrance to the CA building and at the firing range. The size of sanitary facilities depends upon the class size at that particular installation. Typically, the women's latrine need only accommodate about one-fourth the number of people as the men's latrine. Because instructors have daily contact with lead/heavy metals and may transfer these contaminants by casual contact, hand-washing stations, showers, changing areas, laundry facilities, and lockers should be provided for instructors to remove lead contamination. Use of these facilities will prevent recurring casual contamination and potential health concerns away from the range facilities. Cold water should be used for body washing to prevent lead absorption; do not use hot water since it opens the pores of the skin and permits easier absorption.

7.6.1.8. Student Weapons Cleaning Area/Room. Students must clean their weapons after completing firing. The cleaning area may be outside as long as it is covered; in cold climates, provide a room large enough to accommodate cleaning tables/benches and cleaning materials. Ensure the room is well ventilated and contains an emergency eye wash station.

7.6.1.9. Miscellaneous Storage. A storage area is required for administrative supplies, training aids, tools, and miscellaneous items. The size of this area is directly related to the type and quantity of training accomplished by the CA section.

7.6.2. Range Supplies and Equipment Storage. This building provides secure storage for miscellaneous range supplies, tools, and equipment. Use prefabricated metal, reinforced concrete, reinforced masonry, or wooden construction. Depending on location, type, and value of items stored, this facility may be combined with the target storage and repair building.

7.6.3. Range Target Storage and Repair Building. This facility provides space for repairing and storing targets and related equipment items, including target mechanisms and construction and repair material. Use prefabricated metal, reinforced concrete, masonry, or wooden construction. The repair space contains tables and workbenches. An electrical power source for operating power tools is required.

7.7. Specialty Weapons Ranges.

7.7.1. 40mm Grenade Launcher Range (Figure 3). The range supports firing of 40mm low-velocity grenades fired from M79 and M203 grenade launchers. The entire surface of the impact area must be cleared of vegetation or clipped extremely close during mowing so grenades will readily detonate on impact and EOD personnel can easily locate dud high-explosive rounds for disposal.

Construct targets using lumber, steel, or concrete. Terrain features, course of fire, and weather conditions determine if a spotting tower may be needed for observing the impact area (to note point of impact for adjustment of fire and for safety). Range personnel must be able to spot and mark dud rounds as they occur. A central tower high enough to permit observation of the entire range may be required. The range must have electrical power and lighting for the night-fire course.

7.7.2. LAW Range (Figure 4). The LAW range is set up for firing the M72 66mm rocket, the M73 35mm sub-caliber training device, and the AT-4. The danger zone to the rear of the launcher (Area F) must be clear of personnel, material, and vegetation. Arrange firing points so individual back-blast areas do not overlap.

7.7.3. Ten-Meter Machine Gun Range. If a non-contained machine gun range is not available, the machine gun must be fired on either a 10-meter tube range or on a fully contained range designed to accommodate the firing of the automatic weapon. Ten-meter machine gun ranges must incorporate range tubes as described in paragraphs 7.7.3.1 through 7.7.3.3. Range tubes function as baffles, thereby reducing the SDZ requirements. When the machine gun tube range is constructed in accordance with Figures 10 and 11, the SDZ length requirement is 700 meters measured downrange from the firing line. Range tubes are not required on a fully contained range designed for firing automatic weapons which has ballistic safety structures (baffles, traps, berms) designed to prevent penetration of the containment based on the ammunition being fired. Range tubes also are not required for a non-contained range with sufficient real estate to accommodate the full SDZ. The machine gun tube range is acceptable for M60/M240B/M249 machine guns.

7.7.3.1. Machine Gun Tubes.

7.7.3.1.1. If a non-contained machine gun range is not available, the 10-meter machine gun range tubes must measure at least 1.52 meters (5 feet) inside diameter by 7.3 meters (24 feet) in length. The tubes may be constructed of sectional pieces as long as the spigot end of the bell-spigot joint is pointed downrange. Tubes may be made of reinforced concrete pipe and must meet ASTM C76, *Standard Specification for Reinforced Concrete Culvert, Storm Drain and Sewer Pipe*, Class V reinforced concrete pipe (RCP) requirements, or may be steel pipe of suitable thickness fabricated from rolled plates. The interior of the tubes must have a smooth continuous surface. Repair any lifting lugs or holes so the tube interior is smooth and does not produce erratic ricochets.

7.7.3.1.2. For drainage, slope the tubes approximately 150 millimeters (6 inches) toward the target line. Firing positions must be at least 3.7 meters (12 feet) apart, measured center-to-center. The end of the tube toward the

shooter should touch the firing line. When firing, the muzzle of the machine gun will be at least 150 millimeters (6 inches) inside the tube (see Figures 10 and 11).

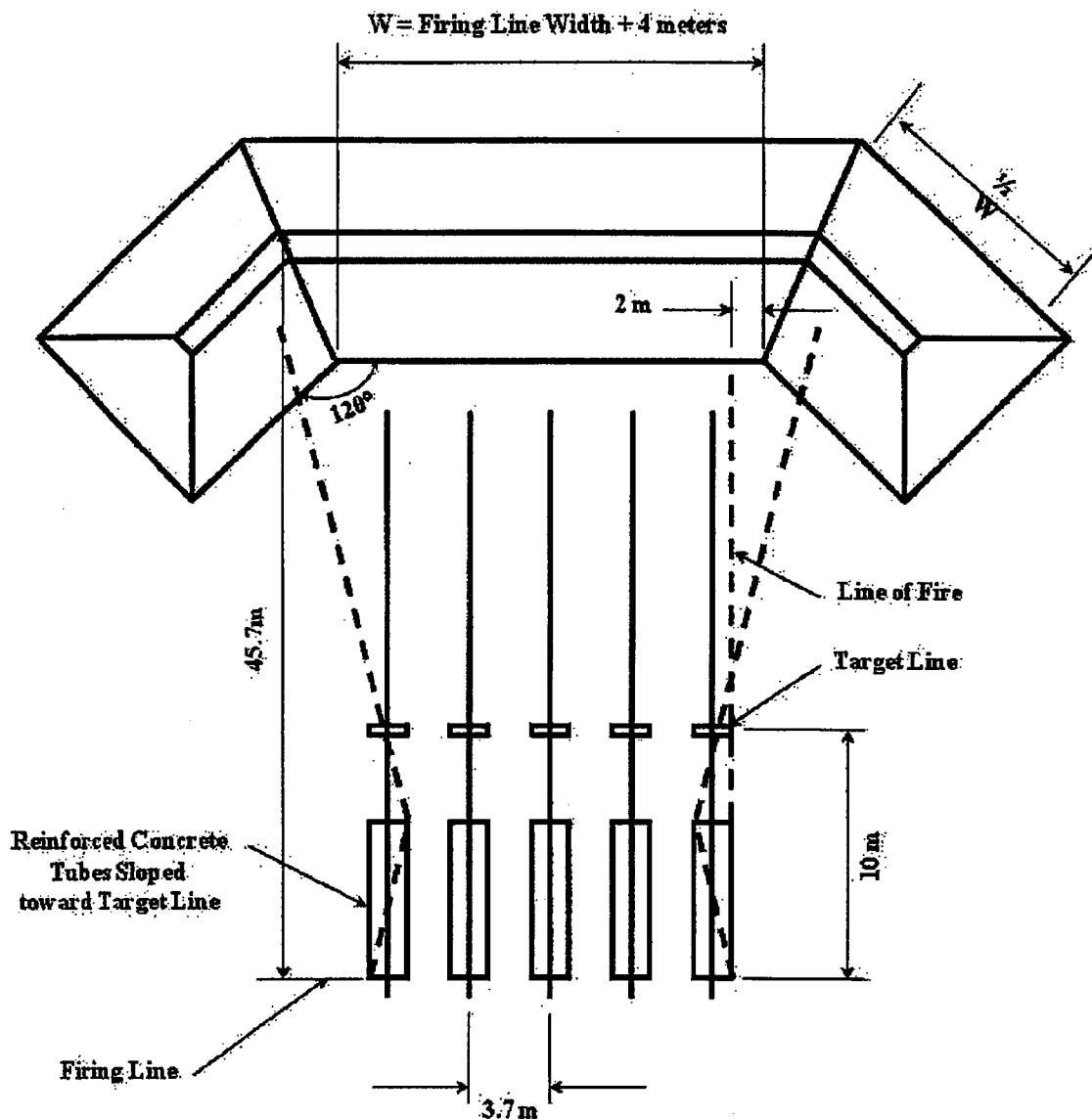


Figure 10. Machine Gun, 10-Meter Tube Range Typical Range Configuration

7.1.2. Combination Ranges. Range designs may be configured to accommodate a variety of weapons and courses of fire. The appropriate configuration must be determined by the types and sequence of weapons used.

7.1.2.1. Multi-purpose Ranges. The multi-purpose range provides for simultaneously firing more than one type of weapon. The complex consists of adjacent baffled and/or impact bays. A sidewall separates the two range types to prevent bullets from one range from entering the adjacent range.

7.1.2.2. Superimposed Ranges. A superimposed range accommodates different types of weapons and may be either a non-contained (impact) range or a fully contained (baffled) range; however, only one type of weapon may be fired at one time. The superimposed range allows for the maximum use of land area and is usually the least expensive since there are no sidewalls between firing positions.

7.1.2.3. Special Ranges. Typically, special ranges are non-contained ranges designed to accommodate multiple target lines or arrays and set up for special types of weapons or unique courses of fire. Certain special ranges may exceed the scope of this ETL. Contact HQ AFSFC and HQ AFCESA for additional guidance.

7.1.3. Range Configuration. The range type, size, and configuration is based upon the installation mission, land availability, Air Force and MAJCOM policy, installation population, annual training requirements, and weapon-specific training requirements. Base CA personnel will submit their requirements for ranges through the chain of command to the MAJCOM functional manager. Once the MAJCOM has validated the need, the BCE will begin a feasibility study for the proposed range. Programming and budgeting for range construction must occur within the framework of the normal planning, programming, budgeting and execution (PPBE) process.

7.1.4. Site Selection.

7.1.4.1. BCE. The BCE will identify the available real estate for the site of a small arms range facility that is consistent with the installation's master plan. The installation master plan will indicate the range location, orientation, SDZ, and VDZ.

7.1.4.2. Planning. A project team composed of the CA non-commissioned officer in charge (NCOIC), a land use planner, a BCE representative, and a ground safety representative should collectively review the proposed range usage and location for land use compatibility. Safety is the primary concern when determining the site for a small arms range. Orient the SDZ and VDZ to minimize the effect of range operations on populated areas, aircraft ground and air operations, and land uses within the travel distance of the

ammunition. Where full-containment enclosures have not been provided, the project team should assume that ricochets would land in all portions of the SDZ. The BCE is responsible for plotting the SDZ and the VDZ on the base master plan. Mitigate any conflicts of land use or airspace operations with the SDZ or the VDZ as part of the PPBE process.

7.1.4.3. Real Estate Acquisition. When government-owned property suitable for a small arms range is not available, and where land acquisition is feasible, the BCE will prepare the documents required for purchase or lease.

7.1.4.4. Geographical, Environmental, and Climatic Effects.

7.1.4.4.1. If possible, an outdoor range should be oriented north-to-south to minimize glare. To minimize residue from being blown back to the shooter, site an outdoor range with the prevailing wind blowing from the shooter's back toward the target line. Supplemental ventilation will be required to maintain the recommended air flow across the firing line. Avoid locating the range upwind of residential or populated areas. Site outdoor ranges and their impact areas to minimize projectiles and projectile residue falling in wetlands or waterways.

7.1.4.4.2. Regions subject to snow accumulation and extended periods of continuous sub-freezing temperatures should have indoor ranges. When this is not possible, the outdoor range should be located to minimize drifting snow, ice buildup, and excess water and to facilitate snow removal inside the range periphery.

7.1.4.4.3. Range sites must consider environmental concerns such as storm water management, protection of wetlands, ground and surface waters, historical or archaeological features, previously contaminated sites, and other concerns as may be determined by federal, state, and local environmental laws.

7.1.5. Range Geometric Design. The layout and dimensions of the facility must satisfy safety requirements and user needs. The following criteria are minimums:

7.1.5.1. SDZ Geometry. The range danger zone includes the projectile impact area, the SDZ, and a VDZ. Refer to Figures 1 through 6 for the typical geometry of the SDZ. The VDZ reflects the geometry of the SDZ extended to the VDZ height.

7.1.5.2. Limits of Fire. The limits of fire are imaginary lines drawn from the outermost edges of the endmost firing positions, extended downrange through the target line and terminating at the SDZ limit. The limits of fire may be perpendicular to the firing line or they may depart the firing line at a

designated angle. The range configuration and use determines the departure angle of the limits of fire.

7.1.5.3. Projectile Impact Area or Direct Fire Zone. The projectile impact area is bounded by the left and right limits of fire, the firing line, and extends to the minimum SDZ arc length for the ammunition and range type (Table 1). When the target line and the firing line are the same width, the impact area forms a rectangle (Figure 1). When the target line is wider than the firing line, the impact area becomes a pie-shaped area formed by the limits of fire and the arc of the minimum SDZ length (Figure 2).

7.1.5.4. Ricochet Danger Area. The ricochet danger area is the area between the impact area and the secondary danger area. The ricochet area typically is determined by extending a line drawn at a 10 degree angle off the left and right limits of fire, beginning at the firing line and extending to the minimum SDZ arc (Figures 1, 2, and 3). For a LAW range (Figure 4), the ricochet area is drawn at a 13 degree angle.

7.1.5.5. Secondary Danger Areas. Secondary danger areas are provided to catch fragments from exploding ammunition or ricochets from rounds that impact at the outer edge of the ricochet danger area. A line beginning at the intersection of the firing line and the firing limits is drawn departing from the line of fire at an angle of 40 degrees, extending outward for 1,000 meters (3,280 feet). From the 1,000-meter point, a second line extends to a point on the minimum SDZ arc 100 meters (328 feet) outside the ricochet area limits.

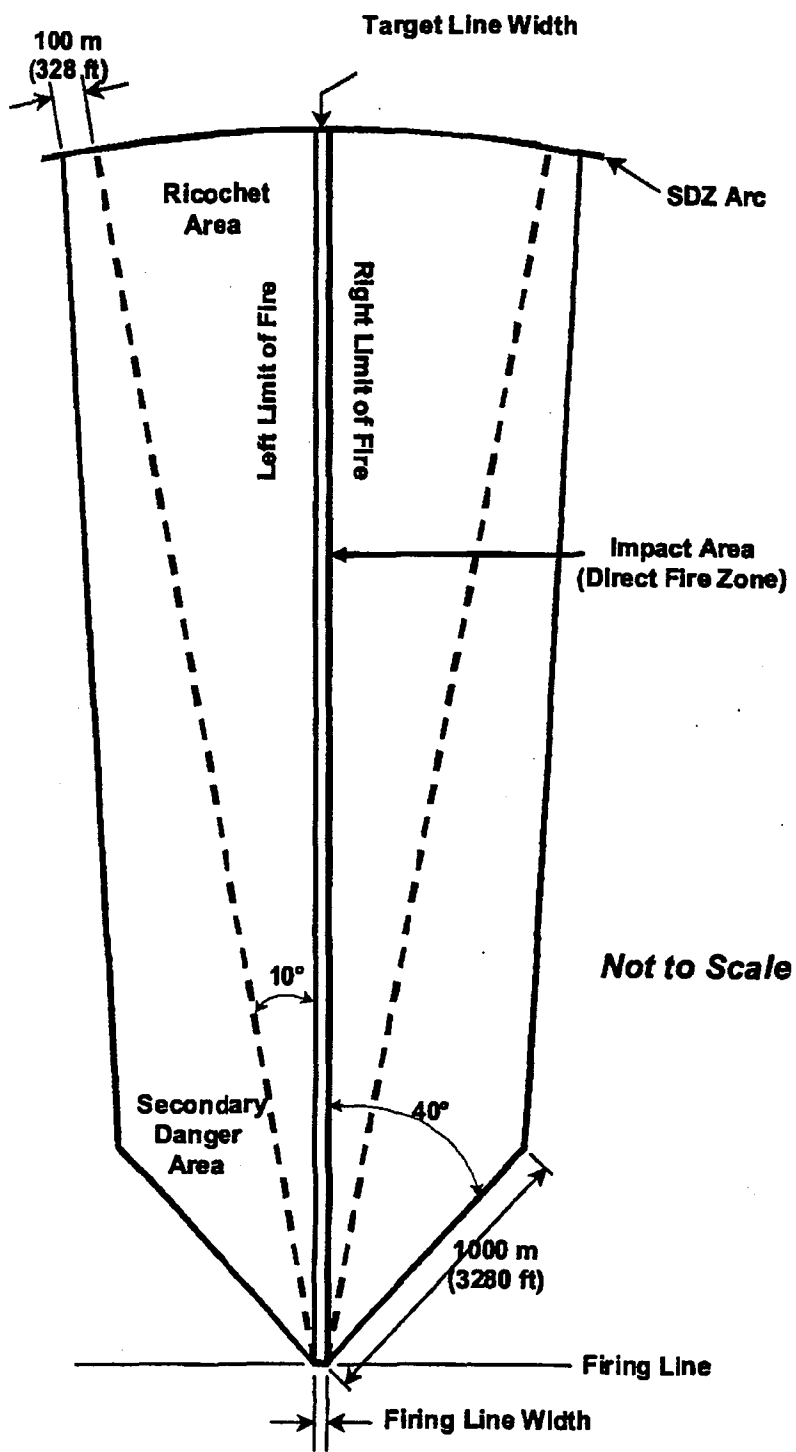


Figure 1. SDZ Configuration — Firing Line Width Equal to Target Line Width

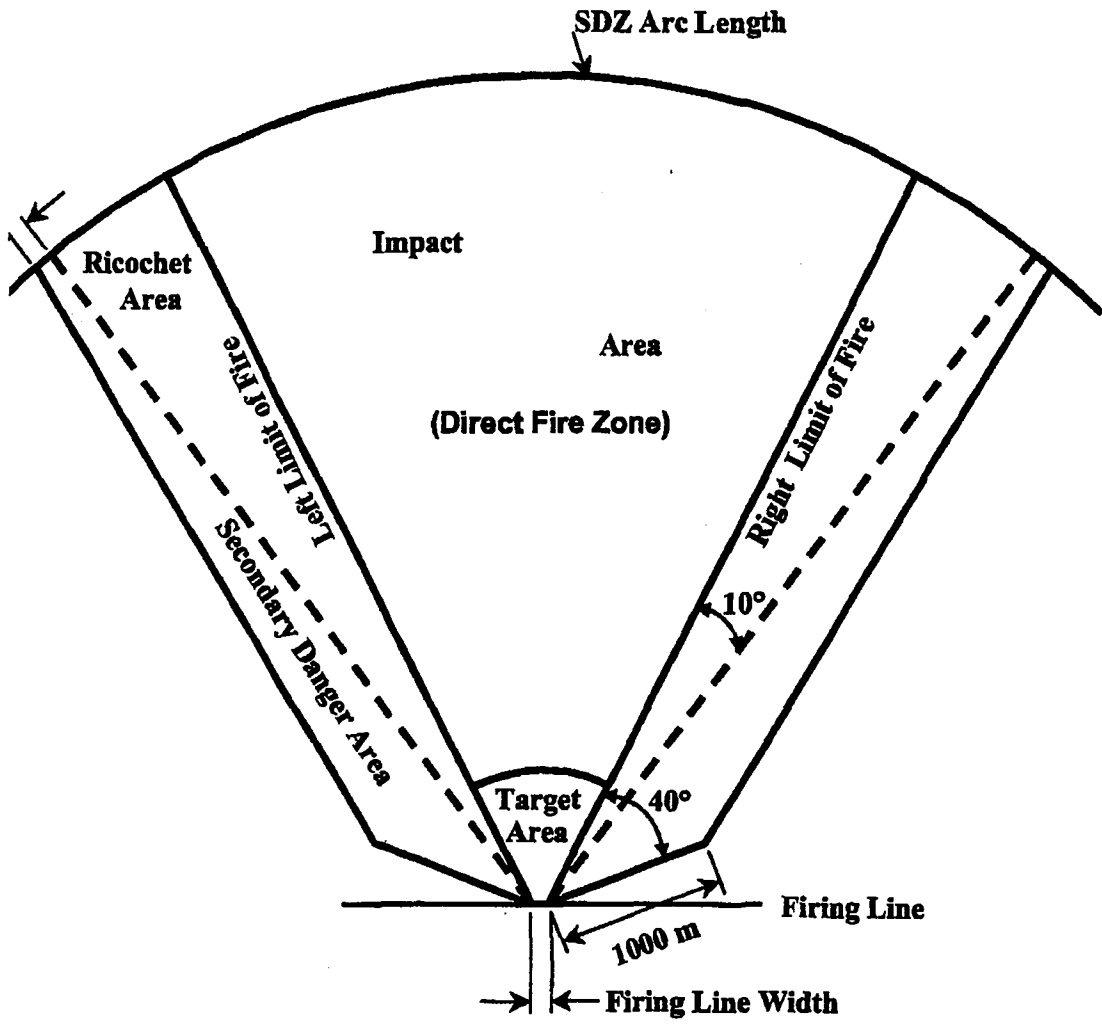
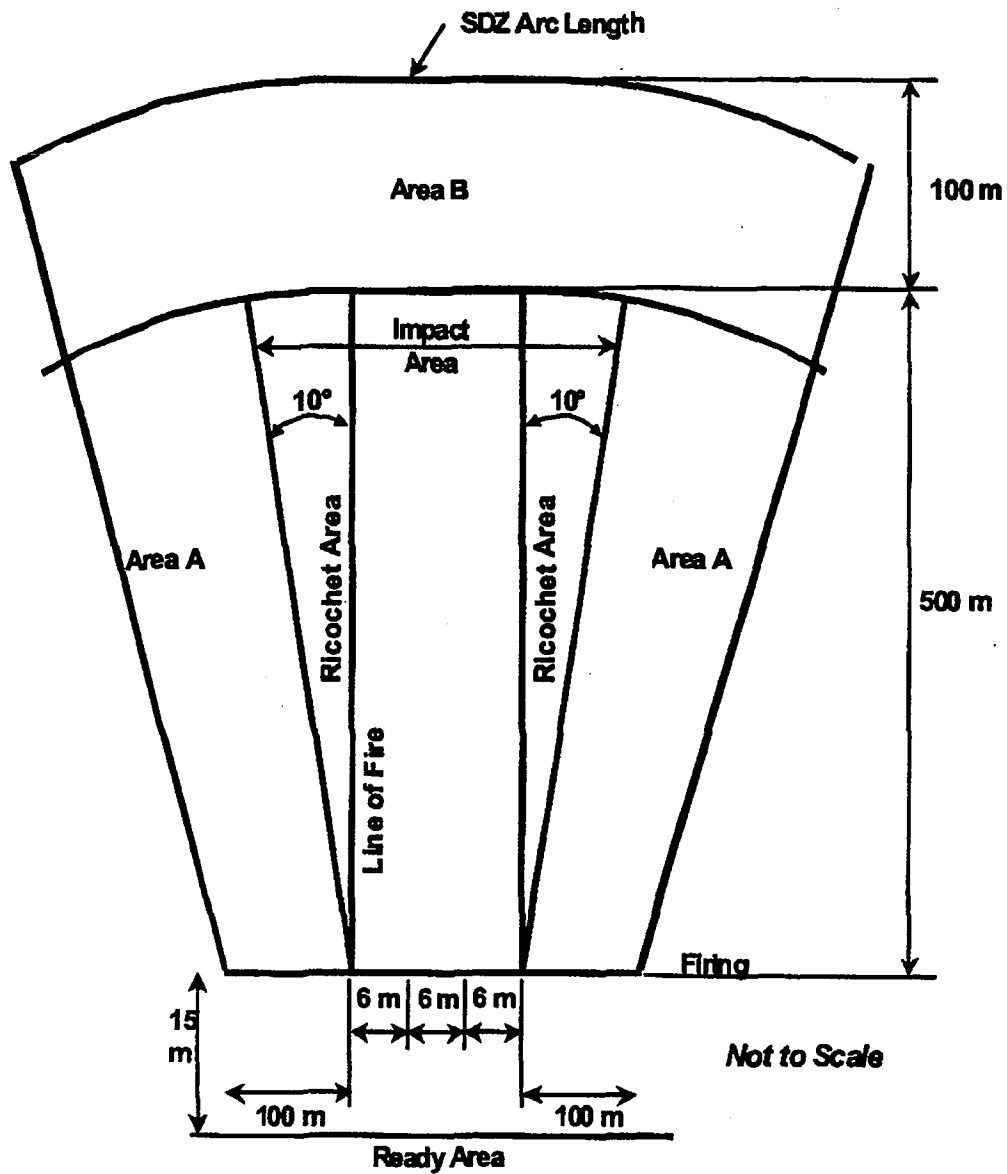


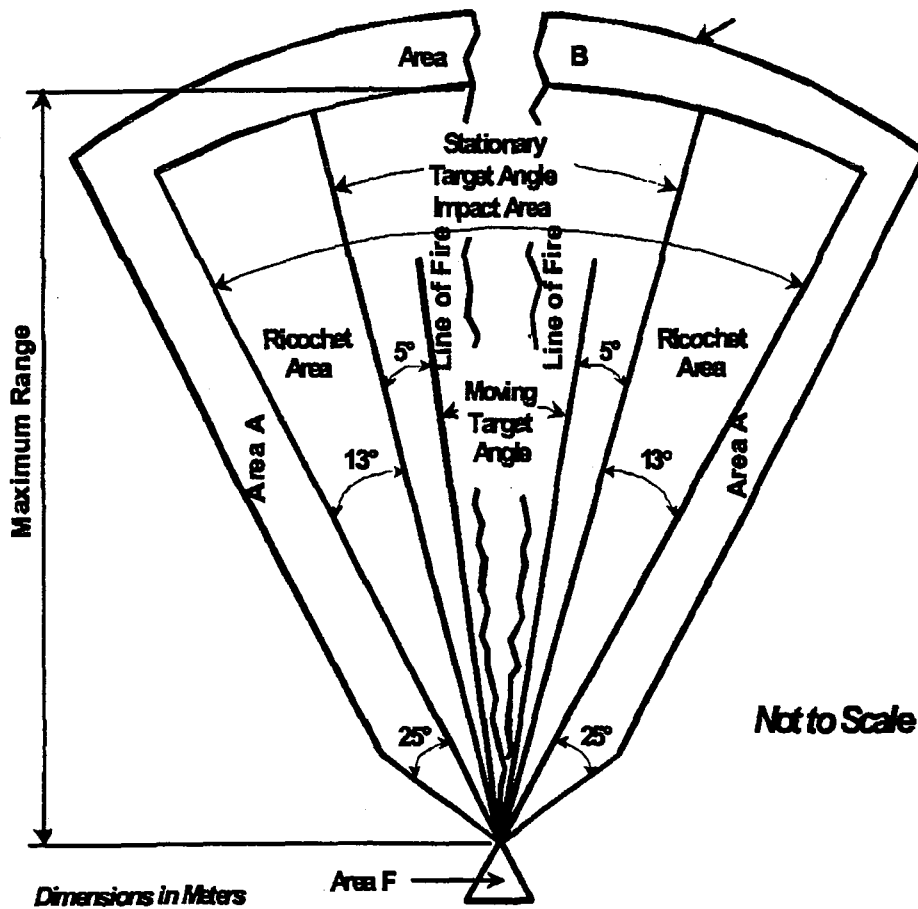
Figure 2. SDZ Configuration — Target Line Wider Than Firing Line



NOTES

1. Additional firing positions may be added provided minimum of 6 m (19 ft) is maintained.
2. Provide a 100-m (328-ft) clear zone (Areas A and B) around the perimeter of the range for EOD disposal of dud rounds with explosive type projectiles.
3. Ranges only certified for use of M781 or other inert projectile rounds are not required to include the 100-m (328-ft) space (Area A) to the left and right of the firing positions.

Figure 3. SDZ Configuration — M79 and M203 Grenade Launcher Range



	Area		Minimum Range to Impact	Maximum Range	Area F	
	A	B			Depth	Base
68mm HEAT Rocket, M72	250	250	75	1250	40	25
35mm Subcaliber, M73	100	100	50	1300	40	25
84mm HEAT Rocket, M136	227	448	50	2100	95	190

Figure 4. SDZ Configuration — Light Anti-Tank Weapons (LAW) Range

7.1.5.6. SDZ for Frangible Ammunition. On existing ranges that do not have the required SDZ, the use of frangible ammunition may mitigate the lack of SDZ and allow the range to continue to operate safely. This may only be used as a temporary measure and the owning unit must program for corrective action to allow firing of full-power ball ammunition. The SDZ depicted in Figures 5 and 6 are based on firing from the firing line only; down-range firing training operations shall not be used unless a projectile trajectory analysis is performed.

7.1.5.6.1. For an existing 25-meter (82-foot) partially contained range with earth side berms and an earth backstop, the required SDZ when using frangible ammunition is 300 yards (274 meters). See Figure 5.

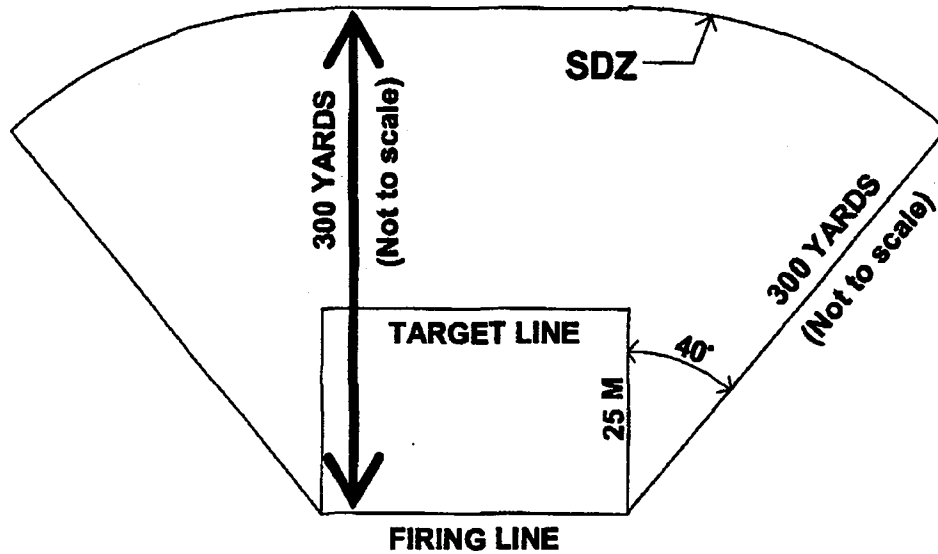


Figure 5. SDZ Requirement for Frangible Ammunition on a 25-Meter (82-Foot) Partially Contained Range with Earth Side Berms and Earth Backstop

7.1.5.6.2. For an existing 25-meter (82-foot) partially contained range with sidewalls of concrete or concrete block, overhead ballistic baffles (angled or vertical), and a bullet trap, the required SDZ when using frangible ammunition is 100 meters (328 feet). See Figure 6.

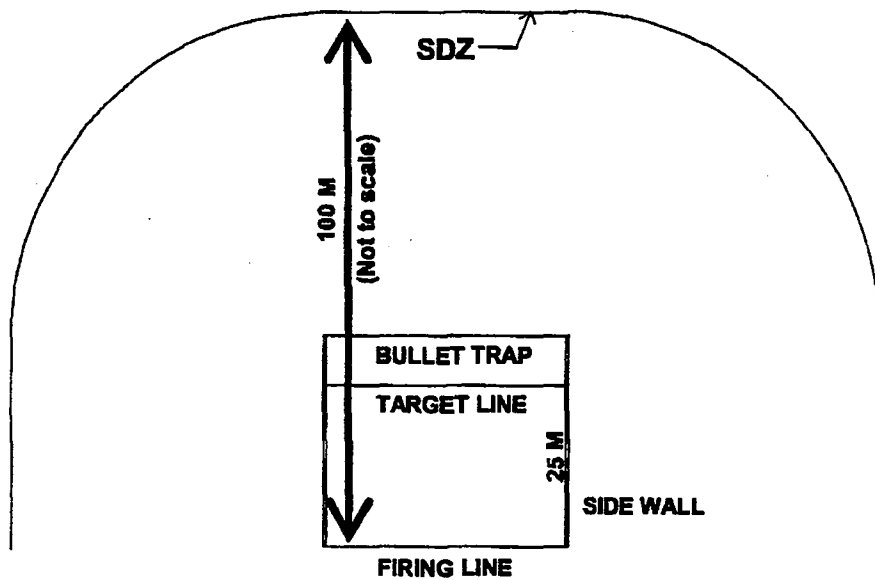


Figure 6. SDZ Requirements for Frangible Ammunition on a 25-Meter (82-Foot) Partially Contained Range with Sidewalls and Bullet Trap

7.1.5.7. Firing Line Positions/Platforms. The number of firing positions establishes the width of the firing line. All small arms (rifle, pistol, and shotgun) ranges must have a minimum of fourteen positions on the firing line. Add additional positions in increments of seven firing positions. The width of the firing positions must be at least 1.52 meters (5 feet) center-to-center. The firing line must be located on a stable horizontal surface that is at least 4.3 meters (14 feet) wide, clear distance, for the length of the firing line. For most ranges, the firing platform is a concrete slab on grade. For non-contained ranges that have fighting positions dug in the ground, sandbags, or other definite structures to identify the firing line, the firing platform can be an earth surface. For special weapons, CA personnel will specify the number of firing positions and the widths of each position based upon training requirements.

7.1.5.7.1. Position Numbering. Each firing position will be numbered beginning from the left when facing the target line. The numbers must be at least 200 millimeters (8 inches) tall and displayed on rectangular backgrounds attached to the position barricade or other location that is clearly visible to all shooters and range officials. Odd-numbered positions will be marked with white numbers on a black background; even-numbered positions will be marked with black numbers on a white background.

7.1.5.7.2. Position Barricades. A wooden barricade in the form of a cross (+) must be installed at the left edge of each firing position. The minimum

nominal dimensions of the wood must be 50 millimeters (2 inches) by 150 millimeters (6 inches). The top surface of the horizontal member must be 1220 millimeters (48 inches) above the platform.

7.1.5.7.3. Firing Line. Paint a red line a minimum of 100 millimeters (4 inches) wide on the leading edge of the firing platform on the target side. For non-contained ranges without concrete firing line platforms, a firing line will be marked definitively in red on the downrange side of the firing positions; examples would include treated timber imbedded along the firing line and painted red or a line of safety cones. This is the stationary firing line and must be continuous for the full length of all the firing positions. For move-and-shoot courses of fire, the firing line is relocated down range as appropriate for the training scenario.

7.1.5.8. Ready Line. Paint a yellow line 100 millimeters (4 inches) wide on the firing line platform at least 2.4 meters (8 feet) behind the firing line (towards the rear of the firing platform). The line must be continuous for the length of the firing platform. This line is designated the ready line.

7.1.5.9. Target Line. Targets are placed along the target line, which runs parallel to the firing line. Targets are placed opposite and aligned with each firing position.

7.1.5.10. Target Line Configuration.

7.1.5.10.1. The distance from the firing line to the target line must be the same for all firing positions. Targets may be placed on turning, pop-up, or stationary mechanisms, or target retrieval systems along the target line. Ensure that the line of sight from the firing line to the target line is clear and structural members, baffles, walls, or improper lighting do not obstruct the shooter's sight picture from any firing position the shooters will use (e.g., prone, kneeling, left barricade, right barricade). Number each target location the same as its corresponding firing position. On non-contained ranges, the target line may be fixed and several firing lines constructed to permit firing at reduced distances. When this option is used, only the rear-most firing line will incorporate a firing platform. If the range has an earthen backstop, ensure there is sufficient distance between the closest firing line and the earthen backstop to eliminate the possibility of backspatter and ricochets affecting the shooter.

7.1.5.10.2. The center of the target must be located between the upper limit of fire (standing position), which is 1500 millimeters (60 inches) above the firing line, and the lower limit of fire (prone position), which is 150 millimeters (6 inches) above the firing platform. The entire target face must be fully displayed to the firing position when exposed to the shooter for engagement.

7.2. Criteria Applicable to All Ranges. Design all range components (including ballistic safety structures and deflector plates) to satisfy the requirements for the weapon and ball ammunition used on the range. Except for non-contained ranges, ballistic safety structures are required for firing ranges. Ballistic safety structures include baffles, side containment, and backstops. Baffles are safety structures classified as canopy baffles or overhead baffles. Side containment is provided by sidewalls, berms, or discontinuous side baffles. A backstop is an impact berm or bullet trap designed to stop direct-fired rounds. See paragraph 7.5 for more detailed descriptions of ballistic safety structures.

7.2.1. Construction Materials. The materials selected for range construction must achieve the longest life-cycle possible considering frequency of use, budget constraints, or other concerns. The desired life expectancy of permanent small arms range construction is 20 years. Permanent construction does not include protective construction, baffles, or sacrificial materials intended to capture projectiles. Evaluate alternative range design options using a life-cycle cost comprised of the initial costs plus all operation and maintenance (O&M) costs for the first five years of range operation. Using the proper materials for sidewalls, baffles, overhead containment, bullet traps, and other areas where a projectile could impact will ensure that the bullet is deflected downrange and not towards the firing line. Ricochet control must be considered when positioning brackets used for baffles, locating bolt heads, and selecting protective construction.

7.2.2. Horizontal and Vertical Control. Establish vertical control by assuming the firing platform surface is equal to elevation 0.0 meter. The firing line is the baseline for horizontal control.

7.2.3. Drains. On outdoor ranges, use positive grading to direct water away from the firing line and toward the target line. When the length of the slope or the natural terrain requires using drains between the target and the firing line, a trench drain should be located at the forward edge of the bullet trap. If a trench drain is installed, the bullet trap should extend into the trench drain to eliminate any exposed edges that may cause unpredictable ricochets. Use grade breaks to prevent exposing vertical surfaces to the firing line. Do not route storm water runoff from any range floor to a stream, pond, or other body of surface water. In some circumstances, if the range is located near a surface water body, it may be necessary to incorporate detention basins or flow-through sand or peat filters to prevent particulate heavy metals that may be present in storm water runoff from reaching surface water bodies. Indoor ranges will not have floor drains downrange of the firing line. See EPA *Best Management Practices for Lead at Outdoor Shooting Ranges* for additional guidance.

7.2.4. Range Occupational Health Standards. All ranges should be designed to allow the use of service ammunition which contains lead and other contaminants. Design the range to control heavy metals and/or dust produced at both the

Discovery & Preservation
Deposition Exhibits
James Caulder Jr.

Nov. 18, 2010

**CURRICULUM VITAE FOR JAMES A. CAULDER, JR., P.E., M.A.S.C.E.
SMALL ARMS RANGE DESIGN AND CONSTRUCTION CONSULTANT**



- Licensed Professional Structural Engineer
- Experienced in Range Design and Construction
- Examination and Analysis of Existing Range Design, Function and Safety
- Plaintiffs and Defendants

PROFESSIONAL OVERVIEW:

- James Caulder, a licensed professional structural engineer, working from Lexington, South Carolina, consults regarding all aspects of the design and construction of small arms ranges, including repair, reconstruction, and safety enhancements.
- Over thirty years of structural design experience for the United States Department of Defense including: Chief Structural Engineer, Southern Division, US Naval Facilities and Chief Structural Engineer Worldwide, US Air Force Civil Engineer Support Agency.
- Subject Matter Expert for small arms ranges for the US Air Force, 2001 to 2006. Developed criteria documents (Engineering Technical Letter- ETL) for the proper design and construction of USAF small arms ranges. Involved in over twenty-four small arms projects located at US Air Force bases across the United States, Europe, Asia, and the Middle East.
- Over 35 years of US Navy active and reserve service with Expert Qualification on the rifle and pistol.
- As a licensed professional engineer, James is particularly well qualified in the investigation, inspection, and analysis of the design of ranges for safety and compliance with prescribed criteria.

EXPERT QUALIFICATIONS:

- Licensed professional engineer in four states (South Carolina, Florida, Maryland, and West Virginia) with over thirty years of structural design experience.
- Military service, two years sea duty as a Boatswains Mate and a Gunners Mate, and thirty years commissioned service as a Navy SEABEE. Qualified Expert on the M16 rifle, M1911, .45 cal pistol and the M9, 9mm pistol.
- Developed design and construction criteria (Engineering Technical Letter- ETL) for US Air Force small arms ranges. Periodically revised and reissued the small arms range criteria to incorporate changing technology and new developments in weapons, ammunition and training philosophy.

EDUCATION:

- Bachelor of Science in Engineering from the University of South Carolina.
- Masters of Engineering from the University of South Carolina.
- Self-directed technical studies in small arms range function, operation, and safety.

LITIGATION EXPERIENCE:

- Expert consultant for the US Department of Justice in a US Army Corps of Engineers case involving commercial barge damage to a navigation lock gate.

PUBLICATIONS:

- Engineering Technical Letter (ETL) 01-13: Small Arms Range Design and Construction, dated Dec 31 2001.
- Engineering Technical Letter (ETL) 02-11: Small Arms Range Design and Construction, dated Nov 22, 2002.

41

- **Engineering Technical Letter (ETL) 05-5: Small Arms Range Design and Construction, dated 8 Nov, 2005.**

James A Caulder, Jr.

James A. Caulder, Jr., P.E.
I Morning Lake Court
Lexington, SC 29072
HOME PHONE: (803) 356-0840
E-MAIL ADDRESS: jacstructengr@yahoo.com

SUMMARY OF SKILLS

Registered Professional Structural Engineer.
Functional expert for structural systems, small arms ranges, antiterrorism/force protection, bridge inspection program, and dam safety program.
Facility Project Execution (MILCON and O&M)
Innovative, developer of design criteria documents, i.e., ETLs, AFIs, UFCs.
Team builder, supervisor, program manager, project manager, contract manager, negotiator
Captain, US Navy Reserve (retired)

EXPERIENCE

March 2001 to March 2006; Structural Engineer, GS-0810-14, HQ AFCESA/CESC, 139 Barnes Drive Suite 1, Tyndall AFB FL 32403-5319.

Chief Structural Engineer, Civil Division, Engineering Support Directorate, directing, implementing, and formulating structural systems related criteria and standards governing the life cycle management of AF infrastructure. Supervised 1 IMA assigned to the division. Initiatives include: Served as the AF representative on the DoD Security Engineering Working Group (SEWG) which produced UFC 4-010-01, DoD Minimum Antiterrorism Standards for Buildings. Served as the AF representative on the Structural Discipline Working Group responsible for updating and converting all structural related criteria to the UFC format. Published ETL on Small Arms Range Design and Construction and worked very closely with Security Forces Center and MAJCOMs to ensure all ranges are operationally safe. Served on the Blast Technical Working Group to update and convert 3 existing Blast criteria documents (Hardened protection, explosive safety, antiterrorism) to the UFC format. Subject Matter Expert in all structural areas including seismic and wind design. Frequently requested to assist installations and MAJCOMs with structural assessments and emergency structural problem resolution. Alternate member of the Security Forces Center Vulnerability Assessment Team.

February 1995 to March 2001, Chief Structural Engineer, GS- 0810-13; Naval Facilities Engineering Command, Southern Division.

Structural Branch Head Supervisor and SOUTHDIIV's Chief Structural Engineer. Responsible for the planning, supervision, evaluation, and management of all work assigned to the Branch. Responsible for the technical adequacy of all structural engineering decisions made by Branch personnel and contracted design A/Es. Reviewed all designs to ensure sound engineering judgment and appropriate criteria are applied to the design documents. Supervised the in-house structural design and production of contract plans and specifications for the command's \$525M annual MILCON and major renovation construction program.

April 1987 to February 1995, GS -0810-12; Design Structural Engineer/Engineer in Charge (EIC), Naval Facilities Engineering Command, Southern Division.

As an EIC, successfully completed over 25 projects which totaled over \$200 million in construction costs. Included many high visibility waterfront projects with technically challenging designs and critical execution

James A Caulder, Jr.

schedules. Contacting Officer's Technical Representative (COTR) for the waterfront and industrial Indefinite Delivery Requirements contract in support of BRAC '93 related MILCONs.
Technical subject matter expert to Naval installations in 46 states.

September 1984 to April 1987, Structural Engineer, GS-0810-12; US Army Corps of Engineers, Charleston District.

Design structural engineer in civil works district. Designed structural features of civil works and military construction O & M projects, performed periodic inspections to assess the overall condition and structural adequacy of facilities.

May 1976 to September 1984, Structural Engineer, GS-0810-9/11/12; US Army Corps of Engineers, Nashville District.

Design structural engineer responsible for the production of in-house design documents for large civil works projects, including flood control and navigation projects. Major projects included Tennessee-Tombigbee Waterway and Replacement Lock and Dam 26. Designed many different features including concrete U-frame drainage structures, concrete gravity navigation locks (Bay Springs - 84 ft lift), concrete gravity dams, flood walls, steel miter gates for navigation lock, tainter gates (L&D 26- Mississippi River) masonry pump stations, and pre-engineered metal and structural timber buildings.

US Navy Reserve Experience

Mandatory retirement on 01 Dec 2006 after 38 years of total service.

October 2005 to December 2006 , Non-pay Status, Volunteer Training Unit 0705, Columbia, SC.

October 2002 to September 2005, Emergency Preparedness Liaison Officer, FEMA Region IV, Atlanta, GA. Coordinate Defense Support to Civilian Authorities (DSCA) as outlined in the National Response Plan. Coordinate and conduct multi-hazard emergency response exercises to include earthquake, hurricane, and terrorist events.

October 2000 to September 2002, Commander, 20th Naval Construction Regiment (Augment), Gulfport MS. 224 man unit that augments 20th NCR to support the recall/mobilization of over 6000 east coast Seabees for 2nd Naval Construction Brigade and CINCLFLT.

October 1999 to September 2000, Assistant Chief of Staff for Operations, Second Naval Construction Brigade, Little Creek, VA. Responsible for managing the construction efforts of 6000 east coast Seabees assigned to 2ndNCB.

October 1997 to September 1999, Commander, CBC Gulfport, Gulfport, MS. 250 man unit that augments CBC Gulfport upon mobilization.

Other significant assignments include:

Commanding Officer, Executive Officer, Operations Officer, Naval Mobile Construction Battalion 14, NAS Jacksonville, FL. 700 man commissioned unit under the operational control of 2nd NCB.

August 1992, deployed a 125 detachment to south Florida to conduct Hurricane Andrew disaster recovery operations.

James A Caulder, Jr.

EDUCATION

B.S. in Engineering (Structures and Mechanics) University of South Carolina, 1974
M.E in Engineering (Structures and Soils) University of South Carolina, 1975

SPECIALIZED TRAINING

Seminar for New Managers June 2004, 2 weeks
US Army Corps of Engineers Security Engineering Course, August 2002, 1 week
Department of Defense Emergency Preparedness Course, December 2002, 1 week
NAVFAC Leadership Development Program, 2000, 10 months
Contingency Contracting / Contract Modifications, 1992, 2 weeks
Department of Defense Executive Leadership Program, 1991, 10 months

LICENSES/CERTIFICATES

Registered Professional Engineer: FL, SC, MD, WV

AWARDS

Performance Awards 2002-2006
Outstanding Performance Awards 1992- 2001
Southern Division NAVFAC, Engineer of the Year, 1993

PROFESSIONAL ASSOCIATIONS

Member, American Society of Civil Engineers since 1972 (South Carolina Section President 1997)
Member, VOLTAG (Volunteer Technical Assistance Group) of SC. VOLTAG works under the State Department of Emergency Preparedness.
FEMA trained structures specialist and former USAR (Urban Search and Rescue) Team member
Member of the Structural Engineers Association of South Carolina Codes Advisory Committee

OTHER

Highest civilian grade held – GS-14
Highest military grade held – Captain, US Navy Reserve



DEPARTMENT OF THE AIR FORCE
HEADQUARTERS AIR FORCE CIVIL ENGINEER SUPPORT AGENCY

20 OCT 2008

FROM: HQ AFCESA/CEO
139 Barnes Drive, Suite 1
Tyndall AFB, FL 32403-5319

SUBJECT: **Engineering Technical Letter (ETL) 08-11: Small Arms Range Design and Construction**

1. Purpose. This ETL provides criteria for the design and construction of Air Force small arms ranges, and applies to both new construction and major renovations. Additionally, this document should be used as a guide for any ranges purchased as equipment items. The intent of this ETL is to provide the minimum design criteria necessary for achieving a safe range design. This ETL assumes users have a formal engineering education and background, or access to local engineering expertise. This ETL does not establish the number of firing points, target distance, targetry, or type of range. A planning team composed of major command (MAJCOM) and installation-level combat arms (CA), civil engineering (CE), bioenvironmental engineer (BE), and safety (SE) personnel will jointly establish the number of firing points, the target distance, and the type of range based on mission, training requirements, and available real estate.

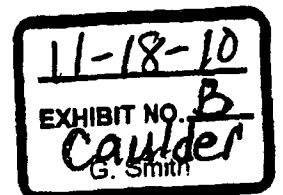
This ETL is directive in accordance with Air Force instruction (AFI) 32-1023, *Design and Construction Standards and Execution of Facility Construction Projects*, and AFI 36-2226, *Combat Arms Program*, and must be used by a range designer when designing a new range or renovating an existing range. The range designer ultimately has the responsibility to ensure the minimum criteria presented in this ETL are used to provide a safe range design. This ETL may not cover all site-specific concerns and it is the designer's responsibility to adapt the intent of the ETL criteria to ensure the range is operationally safe. This ETL is not a specification or a prescriptive checklist and is not intended to replace professional judgment by a competent licensed professional engineer, after coordination with the end-user or installation CA section. Additionally, nothing in this ETL should preclude consideration and use of emerging technologies and commercially available products if these can be proven to result in a safe and otherwise satisfactory range design.

This ETL supersedes ETL 06-11, *Small Arms Range Design and Construction*.

Note: The use of the name or mark of any specific manufacturer, commercial product, commodity, or service in this ETL does not imply endorsement by the Air Force.

2. Summary of Revisions. This ETL is substantially revised and must be completely reviewed. It updates requirements and standards consistent with current technology and lessons learned. Editorial updates were performed to improve clarity and organization. This ETL also includes critical improvement to bullet traps that eliminated any blunt surface that would cause ricochet. This ETL incorporates the common general building

APPROVED FOR PUBLIC RELEASE: DISTRIBUTION UNLIMITED



requirements in accordance with Unified Facilities Criteria (UFC) 1-200-01, *General Building Requirements*. Because these salient safety, health, and environmental features of permanent ranges apply to expeditionary or portable ranges, these ETL standards should apply toward portable ranges purchased as equipment.

3. Application: All Air Force installations.

- The criteria in this ETL shall apply to all small arms ranges where the design phase is 35 percent complete or less on the effective date of this ETL.
- New partially contained ranges will not be designed or constructed. If planned major range or component repairs of an existing range will cost more than 50 percent of the estimated range replacement cost (plant replacement value), the entire facility must be upgraded to comply with this ETL.
- After MAJCOM approval, HQ AFSFC/SFXW may approve deviations from the criteria in this ETL. MAJCOMs will submit requests for deviation to HQ AFSFC/SFXW, who will coordinate with HQ AFCESA for review.

3.1. Authority: Air Force policy directive (AFPD) 32-10, *Installations and Facilities*.

3.2. Effective date: Immediately.

3.3. Intended Users: MAJCOM functional managers; base civil engineers (BCE); bioenvironmental engineers; combat arms (CA), and range designers for the Air Force.

3.4. Coordination: MAJCOM functional managers and HQ AFSFC/SFXW.

4. Referenced Publications. In some instances, the references listed in paragraphs 4.1 through 4.8 may advocate procedures that seem to contradict those in this ETL. In these cases, the information in this ETL supersedes any other design and construction source and policy guidance on range operation and maintenance contained in AFI 36-2226 takes precedence over other sources.

4.1. Public Law:

- Title 29 Code of Federal Regulations (CFR) 1910.1025, *Lead*, available at <http://www.gpoaccess.gov/cfr/index.html>

4.2. Department of Defense (DOD):

- DOD Directive 5100.76-M, *Physical Security of Sensitive Conventional Arms, Ammunition, and Explosives*, available at <http://www.dtic.mil/whs/directives/corres/html/510076m.htm>
- Military Handbook (MIL-HDBK) 1027/3B, *Range Facilities and Miscellaneous Training Facilities Other Than Buildings*, available at http://www.wbdg.org/ccb/browse_cat.php?o=30&c=80
- MIL-HDBK 1013/1A, *Design Guidelines for Physical Security of Facilities*, available at http://www.wbdg.org/ccb/browse_cat.php?o=30&c=80

- UFC 1-200-01, *General Building Requirements*, available at http://www.wbdg.org/ccb/browse_cat.php?o=29&c=4
- UFC 3-120-01, *Air Force Sign Standard*, available at http://www.wbdg.org/ccb/browse_cat.php?o=29&c=4
- UFC 4-010-01, *DoD Minimum Antiterrorism Standards for Buildings*, available at http://www.wbdg.org/ccb/browse_cat.php?o=29&c=4
- UFC 4-020-01FA, *Security Engineering: Project Development* (FOUO), available at http://www.wbdg.org/ccb/browse_cat.php?o=29&c=4

4.3. Air Force:

- AFI 31-101, *The Air Force Installation Security Program* (FOUO), available at <http://www.e-publishing.af.mil>
- AFD 32-10, *Installations and Facilities*, available at <http://www.e-publishing.af.mil>
- AFI 32-1023, *Design and Construction Standards and Execution of Facility Construction Projects*, available at <http://www.e-publishing.af.mil>
- Air Force handbook (AFH) 32-1084, *Facility Requirements*, available at <http://www.e-publishing.af.mil>
- AFI 36-2226, *Combat Arms Program*, available at <http://www.e-publishing.af.mil>
- AFI 90-901, *Operational Risk Management*, available at <http://www.e-publishing.af.mil>
- Air Force pamphlet (AFPAM) 90-902, *Operational Risk Management (ORM) Guidelines and Tools*, available at <http://www.e-publishing.af.mil>
- Air Force Occupational Safety & Health (AFOSH) Standard 161-2, *Industrial Ventilation*, available at <http://www.e-publishing.af.mil> (hardcopy only)

4.4. Navy:

- Navy and Marine Corps Public Health Center Technical Manual (NMCPHC-TM) IH 6290.10, *Indoor Firing Ranges Industrial Hygiene Technical Guide*, available at <http://www-nehc.med.navy.mil/od/CDRomtoc.htm>

4.5. Army:

- Army Pamphlet (PAM) 385-63, *Range Safety*, available at http://www.apd.army.mil/series_range_pubs.asp?range=385
- Training Circular (TC) 25-8, *Training Ranges*
- NGB-AVS-SG, *Policy and Responsibilities for Inspection, Evaluation and Operation of Army National Guard Indoor Firing Ranges*

4.6. Environmental Protection Agency (EPA):

- *Best Management Practices for Lead at Outdoor Shooting Ranges*, available at <http://www.epa.gov/region02/waste/leadshot/>

4.7. Industry:

- American Welding Society (AWS) D1.1, *Structural Welding Code – Steel*, <https://www.awspubs.com>
- ASTM A514/A514M, *Standard Specification for High-Yield-Strength, Quenched and Tempered Alloy Steel Plate, Suitable for Welding*, <http://www.astm.org>
- ASTM C76, *Standard Specification for Reinforced Concrete Culvert, Storm Drain, and Sewer Pipe*, <http://www.astm.org>
- ASTM C136, *Standard Test Method for Sieve Analysis of Fine and Coarse Aggregates*, <http://www.astm.org>
- Illuminating Engineering Society of North America (IESNA) *Lighting Handbook*, <http://www.iesna.org/>
- National Rifle Association (NRA) of America, *The NRA Range Source Book*, latest edition, available at <http://www.nrahq.org/shootingrange/sourcebook.asp>

5. Acronyms and Symbols.

AFCESA	- Air Force Civil Engineer Support Agency
AFH	- Air Force handbook
AFI	- Air Force instruction
AFOSH	- Air Force Occupational Safety & Health
AFPAM	- Air Force pamphlet
AFPD	- Air Force policy directive
AR	- Abrasion Resistant (i.e. AR500 plate)
AR	- Army Regulation
ASTM	- American Society for Testing and Materials
AWS	- American Welding Society
BCE	- base civil engineer
BHN	- Brinnell Hardness Number
BMP	- Best Management Practices
CA	- combat arms
cal.	- caliber
CE	- civil engineering
CFR	- Code of Federal Regulations
CMU	- concrete masonry unit
CONUS	- continental United States
dba	- decibels ("A" scale)
DOD	- Department of Defense
DRMO	- Defense Reutilization Management Office
EOD	- explosive ordnance disposal
EPA	- Environmental Protection Agency
ETL	- Engineering Technical Letter
FOUO	- For Official Use Only
ft	- foot
HEPA	- high-efficiency particulate air (filter)

HMMWV	- high-mobility multi-purpose wheeled vehicle
HQ AFCESA/CEOA	- Headquarters Air Force Civil Engineer Support Agency, Engineer Support Division
HQ AFSFC/SFXW	- Headquarters, Air Force Security Forces Center, Combat Arms
HVAC	- heating, ventilation, and air conditioning
IESNA	- Illuminating Engineering Society of North America
in	- inch
LAW	- light anti-tank weapon
LFA	- lead-free ammunition
LR	- long rifle
m	- meter
MAJCOM	- major command
MIL SPEC	- military specification
MIL-HDBK	- military handbook
mm	- millimeter
mpm	- meters per minute
NCOIC	- noncommissioned officer in charge
NMCPHC	- Navy and Marine Corps Public Health Center
NSN	- National Stock Number
O&M	- operation and maintenance
ORM	- Operational Risk Management
OSHA	- Occupational Safety and Health Administration
PEL	- permissible exposure limit
pH	- symbol for logarithm of reciprocal of hydrogen ion concentration in gram atoms per liter
PPBE	- planning, programming, budgeting, and execution
psi	- pound per square inch
RCP	- reinforced concrete pipe
RH	- relative humidity
RKT-HEAT	- rocket - high-explosive anti-tank
SDZ	- surface danger zone
SE	- safety
SGPB	- bioenvironmental engineer
TACOM-ARDEC	- U.S. Army Tank-Automotive and Armaments Command – Armament Research Development and Engineering Center
TBD	- to be determined
TC	- Training Circular
UFC	- Unified Facilities Criteria
VDZ	- vertical danger zone

6. Definitions.

6.1. Small Arms Range: A live-fire training facility for training and certifying personnel in the use of handguns, shotguns, rifles up to 7.62mm, rifles or machine guns up to .50 caliber, and the MK-19 40mm machine gun. A small arms range may

include special ranges for 40mm grenade launchers, light anti-tank weapons (LAW), and 81mm mortars. Equipment items such as fully (self-) contained portable or expeditionary ranges fall into this category.

6.2. Surface Danger Zone (SDZ): The portions of the range in the horizontal plane that are endangered by firing a particular weapon. The SDZ includes the area between the firing line and the target line, an impact area, a ricochet trajectory area, and a secondary danger area. The SDZ may also include a weapon back-blast area. The SDZ must be located completely within the boundaries of U.S. government-owned or -leased properties. A fully contained range which is incapable of allowing a fired projectile to escape its limits does not have an exterior SDZ.

6.3. Vertical Danger Zone (VDZ): For non-contained and partially contained ranges, the VDZ is the volume of airspace above the SDZ between the ground surface and the maximum ordinate of a direct-fired or ricochet round. The height of the VDZ varies with the weapon and ammunition fired (see Attachment 1). For fully contained ranges, the VDZ is the area between the SDZ and the upper limits of containment.

6.4. Non-contained Range (Impact Range): A non-contained range is an outdoor/open range. The firing line may be covered or uncovered. Direct-fire rounds and ricochets are unimpeded and may fall anywhere within the SDZ. The non-contained range requires an SDZ equal to 100 percent of the maximum range of the most powerful round to be used on the range. This type of range requires the largest amount of real estate to satisfy the SDZ requirements.

6.5. Partially Contained Range: This range has a covered firing line, side containment, overhead baffles, and a bullet backstop. Direct fire is totally contained by the firing line canopy, side containment, baffles and bullet trap (no "blue sky" observed from firing positions). Ricochets are not totally contained, but reduced by the baffles and side containment. A partially contained range requires an SDZ length equal to 50 percent of the maximum range of the most powerful round to be used on the range. A partially contained range will not permit lateral movement along the firing line or movement toward the target line unless the range has the additional baffles required to stop direct fire at the downrange firing lines.

6.6. Fully Contained Range: Range in which direct fire and ricochets are totally contained within the limits of the range. There is no SDZ requirement outside the limits of the containment.

7. Design Criteria. Range design is based on providing facilities that meet the needs of the training courses of fire specified by HQ AFSFC/SFXW and MAJCOMs based on mission needs. Future range designs must consider courses of fire that may differ from traditional "line-up-and-shoot" courses of fire: certain courses of fire may require the shooter to advance downrange toward the target; other scenarios may include driving a vehicle (HMMWV ["Hummmvee"] without pedestal-mounted weapon) into the range to practice vehicle dismount, cover techniques, and target engagement. It is imperative

that a range designer fully understand what types of training and courses of fire will take place on the range and design the range accordingly. The designer should also consider design flexibility that allows for changing courses of fire in the future. Facility design and construction must comply with UFC 1-200-01.

Air Force ranges will not be designed or constructed to only accommodate frangible ammunition. To ensure operational range safety is not compromised, existing ranges that do not have the required SDZ may restrict the range to frangible ammunition only. However, this must be a temporary work-around and the owning organization must program corrective action to permit firing of ball ammunition.

The goal of the new Air Force small arms training philosophy is to increase the current 25-meter standard target distance and expand the diversity of training that can be accomplished on the range. Ranges should be designed to allow the greatest target distance possible within the available land at the site (e.g., 50 meters, 100 meters, 300 meters, 1000 meters). The desired target distance is at or as close as possible to the sight zero distance for the weapon.

CA, CE, bioenvironmental engineering, and safety offices at the base and MAJCOM will jointly develop site-specific designs using the minimum criteria outlined in this ETL. MAJCOMs may submit designs that deviate from the requirements of this ETL to HQ AFSFC/SFXW for review. HQ AFSFC/SFXW will coordinate with HQ AFCESA/CEOA, Engineer Support Division, for review. Submit designs to HQ AFSFC only after MAJCOM approval. Individual MAJCOMs may establish design criteria exceeding the minimums specified in this ETL.

7.1. Range Types, Combination Ranges, Range Configuration, Site Selection, and Range Geometric Design.

7.1.1. Range Types.

7.1.1.1. Non-contained Range (Impact Range). The non-contained range accommodates the controlled and supervised discharge of weapons and has sufficient land area to ensure the discharged projectile does not exit the SDZ. The trajectory of the projectile is along the line of fire (orientation of the range) and the impact of the projectile is designed to be within the limits of the impact area. The firing line may be covered or uncovered. Typically there are no overhead baffles, but surface barriers or sidewalls may be provided to partially limit projectile trajectory. A non-contained range must have the land area to accommodate both the full SDZ and the full VDZ. Ammunition used on the range will establish the required length of the SDZ and the required height of the VDZ. SDZ length must be equal to the longest distance equal to 100 percent of the extreme range for the types of ammunition used on the range. The required SDZ must equal or exceed the minimum SDZ lengths listed in Table 1. For minimum VDZ height requirements, see Attachment 1.

**Table 1. Minimum SDZ Distance Requirements for Small Arms Ammunition —
Non-contained Range**

Weapon/Caliber	Ammunition	Minimum SDZ Length Meters (Feet)
Handgun, 9mm pistol Submachine gun, 9mm	M882	1840 (6036)
Handgun, 9mm pistol	Frangible, lead-free, Winchester	1375 (4511)
Handgun, .44 magnum	Commercial local purchase	2290 (7513)
Shotgun, 12 gauge	00 buckshot	600 (1968)
Rifle, 5.56mm	Ball M193; tracer M196	3100 (10,170)
Rifle, 5.56mm	Ball M855; tracer M856	3600 (11,811)
Rifle, 5.56mm	M862 (plastic)	250 (820)
Rifle, 5.56mm	Frangible, lead-free, Federal Cartridge BC556NT1, PSPCL	2750 (9022)
Rifle/machine gun, 7.62mm	Ball M80; tracer M81	4300 (14,107)
Rifle/machine gun, 7.62mm	Match, M118	4800 (15,748)
Machine gun, .50 caliber	Ball M2 and M33/tracer M17/M8 API/M20 APIT	6700 (21,981)
M79, M203, 40mm low- velocity	M781/M407A1/M406/ M433/M381/M386/M441	500 (1640) 100* (328*)
MK-19, 40mm high-velocity	M918/M383/M430	2650 (8694) 350* (1148*)
M72 LAW, 35mm sub- caliber	M73	1300 (4265) 100* (328*)
M72 LAW, 66mm RKT HEAT	M72	1250 (4101) 250* (820*)
AT-4, 84mm RKT HEAT	M136	2600 (8530) 200* (656*)

*Additional standoff distance that must be added to minimum SDZ length to allow for EOD make-safe procedure.

7.1.1.2. Fully Contained Range (Indoor or Outdoor). A fully contained range is designed to prevent 100 percent of the direct-fired rounds and 100 percent of the ricochets from leaving the limits of the range. This type of range is used when the required minimum SDZ requirements are not available because of lack of land area or compatible land use. These ranges have an overhead containment structure (ballistic safety baffles) and sidewalls. If the range is located in a building (indoor range), the building envelope is typically not

designed to prevent projectile penetration unless it is part of the containment. The structure elements and materials used for the building roof may vary depending upon the type and configuration of interior overhead containment, type of backstop, and method used to trap bullets. The fully contained range design must preclude escape of both direct-fired projectiles and ricochets. No "blue sky" should be visible from any firing position and as one travels downrange towards the target. Construct the overhead baffles with a minimum of 150 millimeters (6 inches) of horizontal overlap between the trailing edge of any baffle and the leading edge of the next baffle downrange (see Figure 8). The range design must also address noise control and environmental hazards resulting from the use of ammunition containing lead and residue resulting from non-lead frangible ammunition. Ammunition residue may contain unburned propellant. Excess build-up of this residue has caused flammable hazards within ranges. This flammability hazard may be controlled using a combination of facility and operational procedures to eliminate the risk of fire. Range personnel must work with local agencies to determine the required frequencies and procedures for removing unburned propellant from the range.

7.1.1.3. Partially Contained Range.

7.1.1.3.1. Partially contained ranges are not permitted for new construction unless specifically approved by HQ AFSFC and HQ AFCESA. There are many existing partially contained ranges in the Air Force inventory.

7.1.1.3.2. All existing partially contained ranges that do not have the required SDZ must be programmed for upgrade or replacement to meet either full-distance, non-contained range criteria, fully contained range criteria, or the footprint of existing deficient SDZ must be increased to meet the 50 percent SDZ requirement for a partially contained range. Existing partially contained ranges and other facilities designed in accordance with previously published criteria may continue to operate if range safety can be verified.

- Verify range safety using the operational risk management (ORM) analysis in accordance with AFI 90-901, *Operational Risk Management*. See Attachment 2 for an ORM example.
- Range computer modeling and simulation is a proven technique for analyzing range safety and identifying necessary improvements.

Range safety violations and unsafe operating conditions must be addressed and corrected as soon as they are identified.

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

CITIZENS AGAINST RANGE)
EXPANSION, an Unincorporated)
non-profit Association;)
JEANNE J. HOM, a single woman;))
EUGENE and KATHLEEN RILEY,)
husband and wife; LAMBERT)
and DENISE RILEY, husband and)
wife; GABRIELLE GROTH-MARNAT,)
a single woman, GERALD PRICE,)
a single man; RONALD and)
DOROTHY ELDRIDGE, husband and)
wife; and GLENN and LUCY)
CHAPIN, husband and wife,)
_____)

DEPOSITION OF KERRY LYNN O'NEAL

OCTOBER 8, 2010

REPORTED BY:

BARBARA BURKE, CSR No. 463

Notary Public

1 SHERYL PUCKETT, a single)
 2 woman; CHARLES MURRAY and)
 3 CYNTHIA MURRAY, husband)
 4 and wife; and DAVE VIG, a)
 5 single man,)
 6 Plaintiffs,)
 7 vs.)
 8 IDAHO FISH AND GAME)
 9 DEPARTMENT, an agency of)
 10 the STATE OF IDAHO, and)
 11 STEVEN M. HUFFAKER,)
 12 Director of the Idaho)
 13 Fish and Game Department,)
 14 Defendants.)
 15 _____)
 16)
 17)
 18)
 19)
 20)
 21)
 22)
 23)
 24)
 25)

1 INDEX

2 TESTIMONY OF KERRY LYNN O'NEAL: PAGE

3 Examination by Mr. Richman 7

4 Examination by Ms. Trever 189

5 Further examination by Mr. Richman 194

6 Further examination by Ms. Trever 198

7 EXHIBITS

8 DEPOSITION EXHIBITS: MARKED

9 1. "Plan View of Range Design 24
 10 with Baffle Layout" - A-1

11 2. "Baffle Test Results" A-9 28

12 3. "Farragut Shooting Range 30
 13 100-Yard Distance - Profile View"

14 4. NRA document entitled "Shooting Range 32
 15 Definitive Drawings - 100-Yard
 16 Firing Line - Baffle Sections"

17 5. NRA document entitled "Shooting 39
 18 Range Definitive Drawings - 25 Degree
 19 Concrete Baffle Design - Longitudinal
 20 Section"

21 6. Letter to D. Burkhalter, 44
 22 dated 4/28/2010 - Photographs 5-8

23 7. Letter to D. Burkhalter, 48
 24 dated 4/28/2010 -Photographs 17-20
 25 (Exhibits continued)

1 THE DEPOSITION OF KERRY LYNN O'NEAL was
 2 taken on behalf of the Plaintiffs at the offices
 3 of the Idaho Department of Fish & Game, 600 South
 4 Walnut Street, Boise, Idaho, commencing at 9:00 a.m.
 5 on October 8, 2010, before Barbara Burke, Certified
 6 Shorthand Reporter and Notary Public with and for
 7 the State of Idaho in the above-entitled matter.
 8

A P P E A R A N C E S

9 For the Plaintiffs:
 10 BY HARVEY RICHMAN
 11 19643 North Perimeter Road
 12 Athol, ID 83801

13 For the Defendants:
 14 KATHLEEN E. TREVER and
 15 W. DALLAS BURKHALTER
 16 Deputy Attorney General
 17 Department of Fish & Game
 18 600 South Walnut
 19 P.O. Box 25
 20 Boise, ID 83707

21 Also Present:
 22 Jeanne J. Hom
 23
 24
 25

1 EXHIBITS
 2 (continued)

3 DEPOSITION EXHIBITS: MARKED

4 8. NRA document entitled "Side Baffle," 56
 5 dated 5/98

6 9. NRA document entitled 62
 7 "Shooting Range Definitive Drawings -
 8 Competition Pistol Range with
 9 Overhead Baffles and Side Walls Plan"

10 10. Haskins Steel Company, Inc., 64
 11 Invoice No. 145646, dated 5/06/2008

12 11. Document entitled, "C. Vargas and 66
 13 Associates, Ltd's Photos - Farragut
 14 Shooting Range," dated 12/18/2009

15 12. Typewritten chart for Baffles 1-12 70

16 13. Letter to D. Burkhalter, 82
 17 dated 4/28/2010 - Photos 1-4,
 18 dated 3/11/2010

19 14. Overhead Google map of 84
 20 Farragut Range

21 15. Color photograph 88

22 16. Color photograph 89

23 17. Color photograph 91

24 18. Color photograph 92
 25 (Exhibits continued)

Page 6

1 **EXHIBITS**
2 (continued)

DEPOSITION EXHIBITS	PAGE
4 19. Color photograph	95
5 20. Color photograph	95
6 21. Color photograph	95
7 22. Color photograph	95
8 23. Color photograph	95
9 24. Color photograph	95
10 25. "Farragut Shooting Range -	124
11 Earthwork Site Plan," dated 08/07/2008	
12 26. TRS Range Services document	131
13 entitled "Farragut Shooting Range -	
14 Covered Firing Area Details"	
15 27. Letter to D. Burkhalter,	138
16 dated 4/28/2010 - Photographs 13-16,	
17 dated 3/11/2010	
18 28. Idaho Department of Fish & Game	155
19 document entitled, "Scope of Work:	
20 TRS Consulting Services (undated)	
21	
22	
23	
24	
25	

Page 7

1 **KERRY LYNN O'NEAL,**
2 first duly sworn to tell the truth relating to
3 said cause, deposes and says:
4 **EXAMINATION**
5 **QUESTIONS BY MR. RICHMAN:**
6 Q. Mr. O'Neal, have you ever been
7 deposed before?
8 A. Yes, I have.
9 Q. In what cases?
10 A. Quite a few cases for the Federal
11 Government.
12 Q. On -- what's the subject matter?
13 A. Shooting ranges.
14 Q. Okay. And in what capacity were you
15 deposed?
16 A. As an expert witness --
17 Q. Okay.
18 A. -- for the government.
19 Q. And in what jurisdictions were those
20 cases?
21 A. Pertaining to environment federal --
22 environmental rounds leaving the ranges.
23 Q. Were there any safety issues in any
24 of those cases?
25 A. There were.

Page 8

1 Q. I'm sorry?
2 A. Yes, sir.
3 Q. Okay. Do you have a list at your place
4 of business of each case in which you participated
5 as a witness in the last ten years?
6 A. We do.
7 Q. Okay. We'll get that independently of
8 this, sir.
9 A. Okay.
10 Q. Where did you attend high school?
11 A. Workman High School.
12 Q. Where?
13 A. In City of Industry, California.
14 Q. And after high school, what education
15 did you have?
16 A. I went three years to college.
17 Q. What college?
18 A. Mt. San Antonio --
19 Q. In --
20 A. In Fullerton.
21 Q. Say again --
22 A. Studying Wildlife Management, Fish &
23 Game related, and also History Architecture.
24 Q. And did you receive a degree?
25 A. I did not.

Page 9

1 Q. And any other university or college
2 level classes since that?
3 A. Just some small university classes
4 pertaining to environmental safety concerns.
5 Q. Okay. Any other educational seminars
6 relative to range-related issues?
7 A. No.
8 Q. Okay. When you finished your three
9 years in college, what kind of work did you do?
10 A. I was a -- I worked part time for
11 California Department of Fish & Game, and I was
12 General Contractor.
13 Q. The Department of Fish & Game for what
14 state?
15 A. California.
16 Q. Oh, California?
17 A. Yes.
18 Q. And what did you do for them?
19 A. Firearms training.
20 Q. And how did you qualify to do firearms
21 training with them?
22 A. I think it came based on abilities that
23 I had using firearms.
24 Q. Okay. Personal experience with
25 firearms?

1 A. Correct.
 2 Q. Were you in the military?
 3 A. No, sir.
 4 Q. This is not a question to embarrass
 5 you -- have you ever been convicted of a felony?
 6 A. I have not.
 7 Q. Good. Thank you.
 8 General Contractor. What kind of
 9 contracting work did you do?
 10 A. Back in the '80s -- '70s, '80s?
 11 Q. Yes. I'm trying to get a little
 12 history about you, sir.
 13 A. Residential construction, high-end
 14 residential construction.
 15 Q. Okay. Let's go into the '90s. What
 16 kind of work did you do?
 17 A. In the mid-'80s, I started to work for
 18 Weatherby Firearms. I worked there as the
 19 Product Development Manager.
 20 Q. Doing --
 21 A. Product development design, ballistican
 22 work.
 23 Q. (Gesturing.)
 24 A. Ballistican, as in shooting on a daily
 25 basis, testing different types of ammunition and

1 State of California and Nevada -- Southern
 2 California and Nevada, State of Nevada.
 3 Q. What are the duties of that position?
 4 A. Charlton Heston Celebrity Shoot,
 5 working with celebrities to teach them to shoot.
 6 It was also finding out the
 7 ramifications -- one of the duties was to find
 8 out why we were having range closures within the
 9 shooting industry.
 10 Fundraising was another portion of it.
 11 Endowment fundraising, as well, was another
 12 portion.
 13 Q. And in that capacity with the NRA, what
 14 supplemental training, if any, did you undergo?
 15 A. I was visiting ranges on a daily or
 16 weekly basis, I would say, but no formal training.
 17 Q. So you were observing; correct?
 18 A. And shooting.
 19 Q. And shooting -- and having the
 20 practical hands-on experience of observing and
 21 shooting?
 22 A. Correct.
 23 Q. Anything else?
 24 A. No, sir.
 25 Q. Your vision is good, I presume?

1 firearms, designing firearms and cartridges.
 2 Q. And your qualifications to get that
 3 job were?
 4 A. My shooting abilities.
 5 Q. Okay. How long did you stay with
 6 Weatherby?
 7 A. About four years.
 8 Q. Okay. And then what did you do?
 9 A. I had a short stint where I went back
 10 into general contracting. I did not enjoy it.
 11 I went back in the shooting industry
 12 and went to work for the National Rifle Association.
 13 Q. Why did you leave Weatherby?
 14 A. I was let go.
 15 Q. Why were you let go?
 16 A. I wanted more expansion within the
 17 company, and I had a conflict with the owner of
 18 the company.
 19 Q. Okay. Now, you said you went back to
 20 the shooting sports?
 21 A. Yes.
 22 Q. And were you with the NRA?
 23 A. Correct.
 24 Q. What did you do for the NRA?
 25 A. I was Field Representative for the

1 A. Not as good as it used to be.
 2 Q. Well, none of us are, sir -- but you
 3 don't have any visual problems?
 4 A. No, I do not.
 5 Q. Okay. How long did you stay employed
 6 with the NRA?
 7 A. Several years. Three years.
 8 Q. And then what happened?
 9 A. I went to work for the Prado Olympic
 10 Shooting Venue, which was the Olympic shooting
 11 site for the 1984 Olympics.
 12 Q. Why did you leave the NRA?
 13 A. I had better financial opportunities.
 14 Q. And when you went to this new financial
 15 opportunity, what were your duties?
 16 A. VP of Operations.
 17 Q. Which entailed what?
 18 A. Running the Olympic shooting venues.
 19 Q. What does that mean?
 20 A. Day to day, it's from -- it started
 21 with safety, morning briefing, started with
 22 operations, financial obligations, coordination
 23 of the shooting events.
 24 Q. Okay. And how long did you stay there?
 25 A. A year-and-a-half.

1 Q. And why did you leave?
 2 A. I started my own company at that point.
 3 Q. Which was --
 4 A. A company called Super Trap.
 5 Q. And what was that?
 6 A. Building shooting ranges.
 7 Q. Okay. How long did that remain in
 8 business?
 9 A. Seven years.
 10 Q. When were you building those shooting
 11 ranges, what is it that you actually did, the --
 12 you did the physical building, is that correct,
 13 moving the dirt?
 14 A. We did both. It was indoor and outdoor
 15 ranges.
 16 Part of it was heavy construction as
 17 in heavy earth moving and things like that,
 18 baffle design, armament, ballistic containment,
 19 sound mitigation, environmental mitigation.
 20 Q. Baffle design. How did you learn
 21 baffle design?
 22 A. We did testing for the Navy. We did
 23 testing within house.
 24 Q. Who was your immediate superior at the
 25 United States Navy?

1 A. I went to work for Tate Environmental
 2 and Engineering.
 3 Q. Doing --
 4 A. Range development and range closures.
 5 Q. Okay. How long were you with them?
 6 A. About three years.
 7 Q. And why did you leave that?
 8 A. To start TRS Range Services.
 9 Q. Okay. So TRS started approximately --
 10 A. Five years ago.
 11 Q. And it's Incorporated where?
 12 A. It's an LLC in Idaho.
 13 Q. An Idaho LLC. Does it have a Public
 14 Works license?
 15 A. It does.
 16 Q. In Idaho?
 17 A. It does.
 18 Q. Under what name?
 19 A. TRS Range Services.
 20 Q. When was it procured, do you know?
 21 A. Five years ago.
 22 Q. Okay. Did you do any work for Idaho
 23 Fish & Game other than Farragut?
 24 A. Yes.
 25 Q. What did you do?

1 A. I didn't have a superior. We worked
 2 just with Purchasing.
 3 Q. Okay. And did you produce documents
 4 for the United States Navy?
 5 A. I did with another company, which was
 6 Tetra Tech.
 7 Q. Pardon?
 8 A. Tetra Tech.
 9 Q. And what kind of documents did you
 10 produce?
 11 A. We did ballistic testing for penetration
 12 testing, and we also did environmental testing
 13 for sedimentation for lead particulate within the
 14 groundwater.
 15 Q. Okay. Can I safely assume that you are
 16 not an engineer?
 17 A. I am not an engineer.
 18 Q. Have you had any engineering training?
 19 A. No, sir.
 20 Q. Did you have engineers in your
 21 organization?
 22 A. Yes, at Tetra Tech -- I went to work
 23 for Tetra Tech, it is an engineering firm.
 24 Q. Okay. After Tetra Tech, what did
 25 you do?

1 A. An evaluation of some of their other
 2 ranges.
 3 Q. Which ranges?
 4 A. One is Black Creek, and the other one --
 5 and I don't remember the name of it, but it's out
 6 towards --
 7 Q. Nourse?
 8 A. It might be. It was an indoor range.
 9 Q. An indoor range?
 10 A. It was an indoor range.
 11 Q. Okay. I'm not interested in the indoor
 12 range. Okay?
 13 A. Okay.
 14 Q. Tell me a little bit about the
 15 evaluation you did at Black Creek. What were the
 16 results?
 17 A. We were there to assess the
 18 environmental concerns and bullet containment.
 19 Q. And how many residential structures are
 20 there in the downrange circle -- three-mile
 21 circle of the firing line at Black Creek?
 22 A. I wouldn't know.
 23 Q. You did a Safety Bullet Containment
 24 Study?
 25 A. Yes.

1 Q. What was the results of the study?
 2 A. A recommendation for modifications
 3 to the range.
 4 Q. Was there a bullet escapement problem?
 5 A. There was none -- that was my knowledge.
 6 That was purely based on recommendation.
 7 Q. Did you issue a written report?
 8 A. We did.
 9 Q. I want to make sure I understand. You
 10 issued a written report on bullet safety, but you
 11 do not know how many residences there are
 12 downrange?
 13 A. I didn't say, "downrange." You said
 14 in a three-mile radius.
 15 Q. I'll rephrase the question.
 16 A. Okay.
 17 Q. Two miles downrange.
 18 A. I believe there's no homes downrange.
 19 Q. Okay. Have you been to any of the
 20 other Garden Valley -- have you been to the
 21 Garden Valley range?
 22 A. No, I have not.
 23 Q. Have you been to the --
 24 MS. HOM: George Nourse.
 25 Q. (BY MR. RICHMAN) -- George Nourse or

1 Q. Okay. Is that recommendation in writing?
 2 A. No, I don't believe it is.
 3 Q. Is that an important recommendation?
 4 A. I believe it is.
 5 Q. If a recommendation is consequential --
 6 excuse me. Is it consequential?
 7 A. I believe so.
 8 Q. If a recommendation is consequential
 9 and important, is there any reason why it was
 10 never committed to writing?
 11 A. No. I think that they understood, and
 12 they agreed with it.
 13 Q. Do you normally make important
 14 recommendations in your evaluations that are not
 15 in writing?
 16 A. Yes.
 17 Q. Why?
 18 A. It's never been an issue where we had
 19 to put it in writing, based on any particular
 20 need.
 21 Q. Did you make any other recommendations
 22 to Fish & Game relative to Farragut?
 23 A. Yes, I did.
 24 Q. What were the nature of those
 25 recommendations?

1 "Noose" range?
 2 A. No, I have not.
 3 Q. Okay. Just to get this question out of
 4 the way:
 5 Is it correct that, to your knowledge,
 6 there is no contemplated supervision of the
 7 Farragut range?
 8 A. I'm not quite understanding the
 9 question.
 10 Q. Okay. Are you aware whether or not
 11 Fish & Game has proposed to have any personnel
 12 supervise the shooting at the Farragut range?
 13 A. I believe they have said that they
 14 would provide supervision throughout all their
 15 shooting hours.
 16 Q. Okay. And did you make any
 17 recommendations on that issue of supervision?
 18 A. Yes, we did.
 19 Q. And what recommendations did you make?
 20 A. That they would need to have supervision
 21 on-site during shooting hours.
 22 Q. So you made a recommendation that if
 23 there was no supervision, that they should not
 24 open from a safety perspective?
 25 A. It was a recommendation, yes.

1 A. To establish a Best Range Management
 2 Plan.
 3 Q. And was that in writing?
 4 A. Yes, it was.
 5 Q. Did you deliver a copy of that to
 6 Fish & Game?
 7 A. I believe we did. We gave them a
 8 proposal to write it.
 9 Q. A proposal -- oh. Has it been written?
 10 A. I am not aware of it.
 11 Q. Okay. The plans for the baffles in
 12 Fish & Game -- that's your product, isn't it?
 13 A. That is.
 14 Q. And that is an LLC product, as opposed
 15 to your personal work?
 16 A. That is correct.
 17 Q. Okay. Are you the prime person in the
 18 preparation of those documents?
 19 A. Yes.
 20 Q. Okay. Any engineers work with you?
 21 A. Yes.
 22 Q. Who?
 23 A. MACTEC Engineering.
 24 Q. (Gesturing.)
 25 A. MACTEC.

1 Q. And who is he?
 2 A. MACTEC is a firm. They're a
 3 \$600 million firm.
 4 Q. And what do they do for you?
 5 A. They do any of our structural design
 6 and engineering pertaining to anything we need
 7 structurally.
 8 Q. So they did structural work?
 9 A. Correct.
 10 Q. Did they do any testing?
 11 A. No.
 12 Q. Did they make any recommendations
 13 relative to safety?
 14 A. No.
 15 Q. Okay. Did you submit written design
 16 drawings to Fish & Game describing the baffle
 17 structure?
 18 A. We did.
 19 Q. Do you know whether or not those
 20 recommendations have been followed in the
 21 as-built range?
 22 A. They have.
 23 Q. In each and every detail?
 24 A. Yes, sir.
 25 Q. Okay. I understood that you made

1 recommendations known as A-1 of documents
 2 produced to me, which contain for the 100-yard
 3 range -- 1, 2, 3, 4, 5, 6, 7 baffles?
 4 A. Correct.
 5 Q. Did they build seven baffles?
 6 A. I believe they did.
 7 Q. Would you question whether or not there
 8 were only six?
 9 A. I have no idea.
 10 Q. No idea?
 11 A. Yes. I look at approximately two to
 12 three ranges a week --
 13 Q. Um-hmm. (Nodding head.)
 14 A. -- and I could not tell you for sure.
 15 I know that I'd worked with Dave Leptich
 16 up there and made modifications to the original
 17 designs, and those original designs were meant to
 18 keep a "no blue sky" range intact from the firing
 19 line.
 20 Q. Okay.
 21 MR. RICHMAN: Ms. Reporter, let me
 22 present to you a document known as Department of
 23 Fish & Game Profile View -- excuse me. Wrong item.
 24 Ms. Reporter, let me give you and ask
 25 you to mark for me a document known as "A-1 TRS

1 Range Services."
 2 (Exhibit 1 marked.)
 3 Q. (BY MR. RICHMAN) Do you recognize that
 4 document?
 5 A. I do.
 6 Q. Is that your work?
 7 A. It's one of our employee's work.
 8 Q. Okay. But that bears your approval?
 9 A. It does.
 10 Q. Okay. Is that the design that you
 11 proposed?
 12 A. I believe we did propose this. There
 13 were modifications to it on-site.
 14 Q. Why?
 15 A. To -- the bottom line was to establish
 16 a "no blue sky" range. I think the berm height
 17 was increased, which meant there were some
 18 modifications in the distances and the elevations
 19 of the berm -- or of the baffles. Excuse me.
 20 Q. Who recommended a change?
 21 A. It was discussed with Dave and myself.
 22 Q. What is Dave's authority, do you know?
 23 A. Dave was managing the site out there.
 24 Q. What are his credentials to make a
 25 recommendation?

1 A. I couldn't tell you.
 2 Q. Did economics have anything to do with
 3 this?
 4 A. No, sir.
 5 Q. There were some documents -- and we'll
 6 get to them as we progress -- that talk about
 7 your recommendations subject to economic
 8 considerations. Do you remember that reference?
 9 A. Not offhand.
 10 Q. Okay. You said --
 11 A. I'm not sure.
 12 Q. Okay. So your recommendation in
 13 Exhibit 1 was modified at the request of
 14 David Leptich?
 15 A. We both discussed it, and I think that
 16 change was made when they were able to get
 17 product -- supplied free product to build and
 18 increase the berm heights.
 19 Q. What product was it?
 20 A. It was like wood waste.
 21 Q. Well, that was only six inches. That
 22 didn't increase it materially, did it?
 23 A. I don't know if it was. They were able
 24 to get -- at one time they were going to have to
 25 pay for soil to be brought in, and then the last

1 I was told, they were getting the berm materials
2 for free.

3 Q. Okay. Your original recommendation is
4 marked as Exhibit 1?

5 A. Okay.

6 Q. Is that correct?

7 A. That would be.

8 Q. Okay. And did you ever have a written
9 modification to that?

10 A. There were modifications, yes.

11 Q. Written modifications?

12 A. Yes.

13 Q. What was that document?

14 A. It would be the as-builts changes made
15 to the plans.

16 Q. And are those as-builts your
17 recommendation?

18 A. Yes.

19 Q. And do you have a written document
20 discussing the nature of the modification?

21 A. As in verbiage or just as in drawings?

22 Q. No. A document describing "the why
23 and the wherefore."

24 A. No, sir.

25 Q. When you designed this document, what

1 (Exhibit 2 marked.)

2 Q. (BY MR. RICHMAN) Other than these
3 pictures -- and there may have been others --
4 I don't know. Is there any testing data as to
5 the nature of the baffles that you received from
6 Fish & Game?

7 A. No, sir.

8 Q. So you --

9 A. I visually went out and looked at them.

10 Q. At what's depicted in the pictures?

11 A. Correct.

12 Q. Well, how do you know the distance at
13 which they were shot?

14 A. By the powder burns associated to the
15 front of the Glulam beam, that they were very
16 close distance.

17 Q. Where is your notations about powder
18 burns?

19 A. You could see it visually. You could
20 see it on these photos.

21 Q. That's not the question I asked.

22 A. Okay.

23 Q. Do you have a notation about powder burns?

24 A. No, sir.

25 Q. How far was the rifle from the Glulam?

1 were the heights of the berms?

2 A. Originally, the berm had to be a
3 minimum of ten feet high.

4 Q. And how high were the berms?

5 A. Now? I couldn't tell you what the
6 actual height is.

7 Q. Well, are they higher than ten feet?

8 A. Yes, sir.

9 Q. How much?

10 A. I couldn't tell you.

11 Q. Well, how can -- and you can explain
12 this to me. I'm not trying to be argumentative.

13 A. I understand.

14 Q. You contemplated a ten-foot berm, you
15 made a recommendation for seven baffles; you then
16 reduced the number of baffles consensually, but
17 you don't know the difference in the height of
18 the berms?

19 A. Not off the top of my head, no, sir.

20 Q. And there's no writing to reference
21 that?

22 A. No, sir.

23 Q. Okay. Let me show you a document,
24 "TRS Range Services A-9," marked by the Reporter
25 as Exhibit 2.

1 A. I would estimate less than ten feet.

2 Q. Did anyone represent to you how far
3 they were?

4 A. Yes.

5 Q. Who?

6 A. Dave Leptich.

7 Q. But never committed to writing?

8 A. No, sir.

9 Q. Were there powder burns on every bullet
10 hole?

11 A. No, sir.

12 Q. So some were further away?

13 A. I couldn't tell you that. I wouldn't
14 know that.

15 Q. Well, was there any documentation as to
16 the nature of the testing, other than the
17 photographs?

18 A. No.

19 Q. Do you consider that a workmanlike
20 testing?

21 A. I would consider it a sufficient

22 testing.

23 Q. Why?

24 A. Because there is no guidelines that say
25 there needs to be documentation.

1 Q. Well, if Mr. Leptich were to be
2 unfortunately taken by "the lower god" tomorrow,
3 what would you have to support the testing?

4 A. The actual physical properties of the
5 baffle itself that were shot.

6 Q. But with no representation as to the
7 actual round used, the bullet used, or the
8 distance fired?

9 A. When I visually inspected it -- and
10 I've shot hundreds of baffles -- it looked like
11 that was and worked the way it was supposed to.

12 He did test baffling on their own that
13 failed, and we made recommendations to come up
14 with a product that wouldn't.

15 Q. Okay. Let me show you Fish & Game
16 Profile View, Exhibit 3.

17 (Exhibit 3 marked.)

18 Q. (BY MR. RICHMAN) Is it fair to say
19 that what's depicted in that picture is a prone
20 shooter firing upwards?

21 A. Yes.

22 Q. And the lines are bullet paths to
23 intercept the varying baffles?

24 A. Correct.

25 Q. Do you have a drawing of firing down

1 from the standing position bullet paths?

2 A. We do not.

3 Q. Do you think that that is a pertinent
4 drawing to have?

5 A. I do not.

6 Q. Are you familiar with the NRA Range
7 Manual?

8 A. Very.

9 Q. And what are your beliefs as to it is
10 a generalized standard or reference?

11 A. I think it has no bearing on ranges
12 being built today. It has failed miserably.

13 Q. Oh. So it's not a good document?

14 A. It's not.

15 Q. It's really underdone, isn't it?

16 A. Well, the opening representation of it
17 says, "This is for reference only."

18 Q. I understand that.

19 A. Okay. Well, I feel and I've seen
20 hundreds of cases where that document has failed.

21 Q. Is it fair to say you're self-taught?

22 A. Yes, sir.

23 Q. Have you ever been peer reviewed by
24 anybody with more knowledge or training than
25 yourself?

1 A. I have spoken at the NRA Range
2 Symposiums where I've had converse with many
3 other people that are, quote/unquote "Experts
4 within the field."

5 Q. Have you ever been tested?

6 A. No.

7 Q. Criticized?

8 A. Yes.

9 Q. By whom?

10 A. Competitors.

11 Q. Do you know Mr. Clarke Vargas?

12 A. I do.

13 Q. Is he a competitor?

14 A. No.

15 Q. Are you a personal acquaintance?

16 A. I just met him in NRA Range Symposiums.

17 Q. What about his work?

18 A. I think it has some flaws.

19 Q. Okay.

20 MR. RICHMAN: Ms. Reporter, would you
21 mark the Shooting Range Definitive Drawing of the
22 NRA C-9 No. 4.

23 (Exhibit 4 marked.)

24 Q. (BY MR. RICHMAN) Let me show you this
25 document and ask you if you have ever seen it

1 before. I represent it comes from the NRA Range
2 Manual -- you may rely on that.

3 A. I have.

4 Q. Okay. What are your comments about the
5 viability of that document, its virtue?

6 A. The interesting thing about the NRA
7 documents is none of them have been proven.

8 Q. They haven't been peer reviewed?

9 A. And they haven't been proven.

10 Q. They haven't been tested?

11 A. That's correct.

12 Q. Okay. Relative to this No. 4, what are
13 your comments about it and its virtue?

14 A. I believe you're looking for the
15 ground baffles?

16 Q. Well, you should not guess my thinking
17 because Burkhalter will tell you it's bizarre.

18 A. Okay. It has ground baffles on it.

19 Q. Do you believe in ground baffles?

20 A. I do not.

21 Q. Okay. I agree with you. I don't

22 believe in ground baffles, either, but what was
23 the original purpose of ground baffles?

24 A. It was originally designed to protect
25 targetry.

1 Q. Targetry?
 2 A. Correct.
 3 Q. Okay. And why have they been
 4 discontinued?
 5 A. Because they have found that they get
 6 shot up frequently, high maintenance, and they
 7 have fragmentation come back to the shooter.
 8 Q. Why do they get shot up frequently?
 9 A. Because they stand next to the target
 10 frame itself.
 11 Q. But there are several ground baffles
 12 going downrange.
 13 A. The ground baffles are typically placed
 14 where the targets are set, just in front of.
 15 Q. Well, looking at Exhibit 4, these
 16 ground baffles are at 1, 2, 3, 4, 5 different
 17 locations going downrange?
 18 A. Yes, sir.
 19 Q. Do they all get shot up?
 20 A. Typically, yes.
 21 Q. Which means shooters sometimes shoot low?
 22 A. Absolutely.
 23 Q. Okay. If you remove the ground baffles,
 24 what happens to the bullet that strikes the
 25 ground?

1 opinion?
 2 A. Years of testing and opinions from
 3 different law enforcement entities.
 4 Q. So people that you cannot -- can you
 5 give me their names?
 6 A. I could definitely probably find
 7 documentation to support that.
 8 Q. Okay. But do you have that available
 9 now or --
 10 A. In front of me?
 11 Q. -- referable?
 12 A. Not in front of me, no.
 13 Q. Okay. But you can't refer me to any
 14 such documentation?
 15 A. No, but I could provide it.
 16 Q. Okay. And what would happen to the
 17 bullet -- I guess I got sidetracked there -- that
 18 went into the sand?
 19 A. That went into the sand?
 20 Q. Yes. It entered the sand.
 21 A. It would fragment or it would remain
 22 partially whole.
 23 Q. Okay. And might it just bury itself
 24 in the sand?
 25 A. Not always.

1 A. Several things can happen. Fragmentation
 2 is the most common, skipping, bouncing.
 3 Q. Skipping and bouncing. How does that
 4 relate to the word "ricochet"?
 5 A. It would be depicted as ricochet.
 6 Q. Okay. Is there a reason that you don't
 7 use that word?
 8 A. No.
 9 Q. Okay. It's not an offensive word in
 10 the industry?
 11 A. No, sir.
 12 Q. Okay. If the floor of the range were
 13 clean sand, what would happen to a bullet that
 14 hit it? Would it enter the sand?
 15 A. Not always.
 16 Q. Sometimes it would skip?
 17 A. Absolutely.
 18 Q. But if it entered the sand, it would
 19 ultimately bury itself?
 20 A. Not always.
 21 Q. It might ricochet out?
 22 A. Typically, it will not ricochet out,
 23 but most ground rounds fired have a projectile
 24 angle of not higher than four feet.
 25 Q. Okay. And what's your basis for that

1 Q. I understand that. Might it --
 2 A. Okay. It might.
 3 Q. Of a number of bullets, some would bury
 4 themselves in the sand?
 5 A. It might.
 6 Q. Then I will rephrase the question.
 7 Would some of the bullets bury themselves
 8 in the sand?
 9 A. Yes.
 10 Q. And would some of them leave the sand
 11 and go further downrange?
 12 A. They could.
 13 Q. Okay. What other options -- fragment?
 14 A. Fragmentation.
 15 Q. Any other options?
 16 A. No.
 17 Q. Okay. If there were an eyebrow or a
 18 bullet catcher on the berm, that would help
 19 capture some of those?
 20 A. We're talking about the backstop
 21 itself?
 22 Q. Yes.
 23 A. To contain the rounds how? That's my
 24 question.
 25 Q. A bullet hit the ground, it leaves the

1 ground, and it goes on downrange.
 2 A. Okay. Yes.
 3 Q. Is a bullet containment feature, such
 4 as an eyebrow, going to be assisting in retaining
 5 those bullets?
 6 A. Yes.
 7 Q. You own a patent on such, don't you?
 8 A. We own a variety of patents, yes.
 9 Q. Do you own a patent on a bullet catcher?
 10 A. Yes, I do.
 11 Q. Did you recommend a bullet catcher to
 12 Fish & Game?
 13 A. I recommended a backstop berm. It's
 14 based on the distance of the property that's
 15 owned within the site and how far those bullets
 16 will travel once they hit the backstop.
 17 Q. Okay. I'm going to rephrase my
 18 question.
 19 A. Okay.
 20 Q. Did you recommend an eyebrow or a
 21 bullet catcher on the berm?
 22 A. No.
 23 Q. Okay. You thought it was unnecessary?
 24 A. Yes.
 25 Q. Even your own design?

1 the angle of the baffle, is it?
 2 A. That's correct.
 3 Q. Okay. When you said it was the angle
 4 of the baffle a moment ago, you misspoke?
 5 A. Okay.
 6 Q. No, you have to tell me whether you did
 7 or you did not. Were you wrong?
 8 A. No, I wasn't wrong. When I say this,
 9 the angle of the baffles are set here -- and it
 10 says on this, "Reflection angle, 45 degrees."
 11 The one above it says, "Reflection angle,
 12 90 degrees," and that's just the spacing
 13 difference of the baffle.
 14 Q. But the question I originally asked you
 15 was, "What is the angle of reflection?" and I
 16 thought you answered it was the angle of the
 17 baffle. Did I mishear you?
 18 A. I misunderstood what you asked.
 19 Q. Okay. All right. So the angle of
 20 reflection is not the angle of the baffle?
 21 A. Correct.
 22 Q. Okay. The angle of reflection then is
 23 the nature of the coverage of the angular baffle?
 24 A. Correct.
 25 Q. Okay. Now, what is the advantage or

1 A. Yes.
 2 Q. Okay. Let me show you from the
 3 NRA Range Manual C-26 known as Exhibit 5.
 4 (Exhibit 5 marked.)
 5 Q. (BY MR. RICHMAN) Are you familiar with
 6 that and have you seen it before? I make the
 7 same representation to you, it's an NRA Range
 8 Manual document?
 9 A. I have seen this.
 10 Q. Okay. They refer here to the "angle of
 11 reflection." What are they talking about?
 12 A. The angle of the baffle.
 13 Q. Okay. And they seem to show two
 14 different baffle angles; is that correct?
 15 A. I do not see two different angles.
 16 Q. Well, there is an upper and lower.
 17 There's a 45 and a 90, is there not?
 18 A. Maybe you can point out to me where
 19 the 90 is.
 20 Q. I would be pleased to do that.
 21 Angle of reflection; angle of
 22 reflection. (Indicating on document.)
 23 A. Okay, but both of them appear to be the
 24 same on the drawing.
 25 Q. Because the angle of reflection is not

1 disadvantage of the angle of reflection of
 2 90 versus 45?
 3 A. There wouldn't be any additional
 4 advantage. It would have to be a negligent or
 5 accidental discharge to have a round go out of
 6 either one.
 7 Q. Are there accidental discharges?
 8 A. Yes.
 9 Q. Are there negligent discharges?
 10 A. Yes.
 11 Q. Do you have any documentation to tell
 12 us of every thousand rounds how many accidental
 13 or negligent discharges there are?
 14 A. I do not.
 15 Q. Would you admit to me that there is no
 16 such information out there?
 17 A. I would probably think there's not.
 18 Q. Okay. So you cannot tell me -- because
 19 there isn't any information -- whether out of
 20 1,000 rounds we have one or ten accidental or
 21 negligent discharges?
 22 A. I couldn't tell you that.
 23 Q. Okay. And, in your opinion, is there
 24 anyone who could?
 25 A. No.

1 Q. Okay. What is the difference between
2 the angular aspect of these baffles in Exhibit 5
3 and the fact that your baffles as designed are
4 perpendicular?

5 A. Those are baffles built to reflect and
6 direct the round at an angle, and ours are
7 designed to absorb the round.

8 Q. Okay. Can a bullet fired downrange
9 hit an object and go up and not hit a baffle?

10 A. Can a round --

11 Q. Could a round --

12 A. Okay.

13 Q. -- fired downrange --

14 A. Yes.

15 Q. -- hit an object and go up through the
16 space between the perpendicular baffles?

17 A. And what type of object are you
18 referring to?

19 Q. Well, let's say a concrete footing that
20 holds the stanchion.

21 A. It could.

22 Q. And in what direction would that bullet
23 travel, do you know?

24 A. It would have go upward.

25 Q. Okay. Might it go upward and downrange?

1 I have here a copy of the Affidavit of
2 Kerry O'Neal. Let me have the Court Reporter
3 mark as Exhibit 6 page 5 of 9.

4 (Exhibit 6 marked.)

5 Q. (BY MR. RICHMAN) Now, I represent to
6 you that I have taken your pictures as supplied
7 to me -- these are black and whites --

8 A. Yes, sir.

9 Q. -- and I have used the highlighting --
10 the highlighting is mine -- all the yellow
11 highlighting is mine. I want you to ignore it,
12 if you would, please.

13 Look at photograph 8 and tell me what
14 is described therein.

15 A. That is the post and the flooring
16 material within the range.

17 Q. Okay. Let me direct your attention
18 to -- is there a steel foot at the bottom of that
19 stanchion?

20 A. I don't know, by looking at this, if
21 this is steel or wood.

22 Q. Well, I'm looking at where the bolts --

23 A. Oh, where the two bolts are?

24 Q. Yes.

25 A. Yes, these are bolts.

1 A. No, sir.

2 Q. Not possible?

3 A. If it's going upward, it wouldn't go up
4 and out or up and down.

5 Q. Well, can it go at an acute angle
6 upward and downward?

7 A. I believe it could.

8 Q. Okay. Do you have any documentary
9 evidence of any nature -- either engineering, or
10 scientific, or testing to tell us the direction
11 of a ricocheted bullet that hit the concrete
12 footing on the stanchions -- that holds the
13 stanchions, rather -- on the Farragut range?

14 A. No.

15 Q. Okay. You made a statement in your
16 Affidavit that you saw no blue sky downrange;
17 is that correct?

18 A. Correct.

19 Q. Okay. Bear with me -- I'm looking for --
20 here it is.

21 Did you bring your file here today?

22 A. I did not.

23 Q. You did not?

24 A. No, sir.

25 Q. Well, I'll help you.

1 Q. And are they going through a piece
2 of steel?

3 A. Where are the bolts going? They're
4 going through concrete.

5 Q. They're coming from the concrete up
6 through the steel at the bottom of the stanchion;
7 is that not correct?

8 A. At the bottom of the footing where it
9 mounts to the steel post.

10 Q. Okay. So the steel post is welded to
11 a flat steel plate --

12 A. Correct.

13 Q. -- that has holes drilled in it through
14 which the bolts or lags go up and are bolted
15 down?

16 A. Correct.

17 Q. Does the steel represent a ricochet
18 hazard?

19 A. It could.

20 Q. Do the bullets represent a ricochet
21 hazard?

22 A. It could.

23 Q. Okay. What happens if a bullet hits
24 that bolt? Where does the bullet go?

25 A. Typically -- I would say all ricochets

1 associated with a direct hit would not fly more
 2 than 50 yards.
 3 Q. What is the basis of that opinion?
 4 A. Walking hundreds and hundreds of ranges
 5 and seeing how far -- by people shooting steel
 6 targetry -- how far the rounds would actually fly --
 7 or steel itself.
 8 Q. But you have no scientific proof of
 9 that?
 10 A. I do not.
 11 Q. Do you have any engineering proof of
 12 that?
 13 A. I do not.
 14 Q. So this is just what you have observed
 15 with your own two eyes?
 16 A. And the opinion of the military and the
 17 opinion of law enforcement.
 18 Q. The military. What military?
 19 A. We've built ranges for the Army, the
 20 Navy, and the Air Force.
 21 Q. Did you use the ETL?
 22 A. We have.
 23 Q. Which ETL did you use?
 24 A. We have gotten guidelines from the
 25 Air Force and the Army Corps of Engineers, both.

1 Q. Why did you use a written document
 2 there, instead of just a phone call or a
 3 face-to-face conference as you do with
 4 Fish & Game?
 5 A. We felt that that was a very evident
 6 issue of safety.
 7 Q. Okay. I want to make sure I'm
 8 following.
 9 Other than your personal observations
 10 and what other people have told you, you don't
 11 have anything to support or sustain your personal
 12 observations as to the nature of ricochets off
 13 the bolts and the steel footing?
 14 A. That's correct.
 15 Q. Okay. Let me show you page 8 of 9
 16 known as Exhibit 7.
 17 (Exhibit 7 marked.)
 18 Q. (BY MR. RICHMAN) Is it true that the
 19 four pictures on that Exhibit 7 are your
 20 photographs?
 21 A. That is correct.
 22 Q. Okay. Let me direct your attention to
 23 photograph No. 11. Okay?
 24 A. Okay.
 25 Q. I have marked in yellow what appears

1 Q. The '02 or '08?
 2 A. I couldn't tell you.
 3 Q. When was the last time you used an
 4 ETL, what year?
 5 A. This year.
 6 Q. Let me share with you -- if you built
 7 this year, you used the '08.
 8 A. Okay.
 9 Q. Okay. Do you comply with the ETL?
 10 A. We've had problems with the ETL,
 11 especially the Air Force ETL.
 12 We built a range in Minot, North Dakota,
 13 that requested baffling within it. We wrote a
 14 document telling the Air Force we felt that this
 15 baffle angle would be hazardous to the shooters
 16 that shot on the range, and we asked to be
 17 dismissed of any liability.
 18 The Air Force responded -- replied
 19 to it; the range has never been open since.
 20 The consequent same range design was
 21 built in another location where a person was
 22 killed shortly after.
 23 Q. Huh. But you sent them a written
 24 document on something like that, didn't you?
 25 A. Yes, we did.

1 to be a --
 2 A. Do you mean 19?
 3 Q. You're correct. Thank you. I'm old.
 4 A. That's all right.
 5 Q. 19. What appears to be an opening on
 6 the right-hand side of the range, do you see
 7 that?
 8 A. I do.
 9 Q. Okay. Is that a blue sky opening?
 10 A. That's not downrange, but yes, it is
 11 blue sky.
 12 Q. What is the definition of "downrange"?
 13 A. That would be where the impact berm is,
 14 is downrange.
 15 Q. Going downrange, are you putting on
 16 blinders and looking just straight downrange?
 17 A. That's correct. That's downrange.
 18 Q. Nothing else is downrange?
 19 A. The direction of fire associated to the
 20 target and the bench itself is considered the
 21 direction or downrange.
 22 Q. And what is to the slight left of
 23 downrange?
 24 A. It wouldn't be downrange.
 25 Q. I didn't ask you that.

1 What is to the left -- slight left of
 2 downrange? What do you call it in English?
 3 A. Whatever you would want to call it.
 4 Q. No. What do you want to call it?
 5 A. I would call it "open area," then.
 6 Q. Open area. Okay. Do we have an open
 7 area also exhibited in No. 20 on the same
 8 Exhibit 7?
 9 A. Yes, sir.
 10 Q. Okay. Those are spaces that a shooter
 11 can see blue sky, can't he?
 12 A. Yes.
 13 Q. Okay. Do you remember -- did you read
 14 the Court Order?
 15 A. I have not lately.
 16 Q. Okay. But did you read it?
 17 A. I think it was discussed, but I don't
 18 remember reading it.
 19 Q. Okay. Let me ask you if you recollect
 20 this phrase: "The first concern (safety) could
 21 be satisfied only by the 'no blue sky' rule or
 22 totally baffled so that a round cannot escape.
 23 The 'no blue sky rule' or concept means that the
 24 range is constructed so that a shooter,
 25 regardless of shooting position, cannot see any

1 do that?
 2 A. I believe so.
 3 Q. Okay. What testing have you done at
 4 the range to assure yourself that a bullet cannot
 5 go over the back berm?
 6 A. At Farragut range?
 7 Q. Yes.
 8 A. There was no shooting allowed, so we
 9 didn't do any testing.
 10 Q. Well, was it possible to ask for
 11 permission to do a test?
 12 A. We could have. We did not.
 13 Q. Why did "we" not?
 14 A. I have felt the design is adequate or
 15 more than adequate when it comes to a civilian
 16 use range; that the backstop is more than
 17 adequate, and the baffling is more than adequate.
 18 Q. Civilian range --
 19 A. Correct.
 20 Q. -- as opposed to military?
 21 A. Correct.
 22 Q. What's the difference?
 23 A. Different guidelines. Combat style
 24 shooting, advance forward, moving forward.
 25 Q. I want you to assume for purposes of my

1 blue sky downrange."
 2 Do you remember that phrase?
 3 A. I am familiar with it.
 4 Q. Okay. Why are you familiar with it?
 5 A. It was taken out of one of the Manuals.
 6 I don't recall which one.
 7 Q. Out of one of the Manuals?
 8 A. Yes, out of one of the Range Manuals.
 9 I don't recall which one.
 10 Q. Do you do any violence or disagree with
 11 that phrase -- that phrasing?
 12 A. No.
 13 Q. You agree that that is the argument --
 14 excuse me. You agree that that is logically
 15 sensibly a good thing to abide by?
 16 A. Yes.
 17 Q. Okay. When you say, "regardless of
 18 shooting position," what if a shooter walked
 19 downrange? Is that a new shooting position?
 20 A. No, sir. This range is not designed
 21 for someone to move forward on.
 22 Q. Okay. And if there's supervision,
 23 he won't be able to do that?
 24 A. Correct.
 25 Q. But if there's no supervision, he could

1 question that we're using a non-tactical range --
 2 A. Okay.
 3 Q. -- there is no moving forward --
 4 A. Okay.
 5 Q. -- firing from a firing line.
 6 A. Yes.
 7 Q. What is the difference between military
 8 and civilian?
 9 A. I couldn't tell you that.
 10 Q. Okay. So is it fair to say, as we sit
 11 here today, that in the non-tactical circumstance
 12 where you're shooting from the firing line,
 13 military and civilian equate?
 14 A. There's different safety protocols and
 15 different guidelines enforced by the military
 16 different than municipality law enforcement and
 17 civilian ranges.
 18 Q. Who creates these municipality and
 19 civilian guidelines, or rules, or regs?
 20 A. There are no official documents.
 21 Q. Okay. Can you differentiate for me why
 22 the military guidelines would not then be
 23 appropriate for civilian ranges?
 24 A. I've been on both, and I've seen
 25 military ranges that one will say, "You need to

1 have a fully baffled range," and I will go to the
 2 next site and there's no baffles at all.
 3 So I don't think there's a standard
 4 protocol when it comes to military construction.
 5 I think it's based upon the circumstances within
 6 the range itself.
 7 Q. Okay. You probably did not hear my
 8 question, so I'm going to do it again.
 9 A. Okay.
 10 Q. What is the difference between a
 11 military and a civilian range from a design
 12 perspective?
 13 A. I think it's designed according to the
 14 rounds being fired and the tactical type of
 15 training that the range is used.
 16 Q. A non-tactical range --
 17 A. I don't know of the military now having
 18 a non-tactical range.
 19 Q. That's not the question I'm asking you.
 20 A. Okay.
 21 Q. In a non-tactical range -- just plain
 22 100-yard shooting from the fire line --
 23 A. Okay.
 24 Q. -- is it fair to say that there isn't
 25 any difference --

1 Q. I think that answers it.
 2 A. Okay.
 3 Q. So if you can see light, you can see
 4 blue sky?
 5 A. That's correct.
 6 Q. It doesn't really mean it has to be
 7 blue, and it doesn't really have to be sky?
 8 A. That's correct.
 9 Q. Okay. And what is a blue sky opening?
 10 A. It means you're able to see light
 11 through an opening.
 12 Q. Okay. Now, you told us that
 13 "downrange" means directly downrange and neither
 14 to the right nor to the left --
 15 A. Correct.
 16 Q. -- is that correct?
 17 A. That is correct.
 18 Q. Let me show you what the Court Reporter
 19 will mark as Exhibit 8.
 20 (Exhibit 8 marked.)
 21 Q. (BY MR. RICHMAN) This is a drawing
 22 from the NRA referencing side baffles.
 23 I'll ask you if you understand the
 24 content of that document. Does it make sense
 25 to you?

1 A. Yes.
 2 Q. -- in the safety design requirements
 3 between military and civilian?
 4 A. I don't know what all their design
 5 requirements are, but I believe the ranges are
 6 the same.
 7 Q. Okay. And you have used the ETL?
 8 A. I have built off of the ETL.
 9 Q. Okay. Have you ever filed a written
 10 statement with any Federal agency, other than the
 11 one you described to me, arguing about the detail
 12 of the ETL?
 13 A. No.
 14 Q. Okay. Do you know James Caulder?
 15 A. I do not.
 16 Q. Do you know of James Caulder?
 17 A. I do not.
 18 Q. Did you ever read his Affidavit filed
 19 in this case?
 20 A. I have not.
 21 Q. Oh, my. What is the definition of
 22 "blue sky"?
 23 A. "Blue sky," seeing light.
 24 Q. Okay. That, I like.
 25 A. Okay.

1 A. It does.
 2 Q. Okay. What is being expressed there?
 3 A. They put baffling on the sides of
 4 the range.
 5 Q. You put baffling on the side of your
 6 range, didn't you?
 7 A. I beg your pardon?
 8 Q. You put baffling on the side of your
 9 range, didn't you?
 10 A. We did not. There is no side baffling
 11 on this range.
 12 Q. There is no side baffling.
 13 When the right and left baffle comes to
 14 the right and left extreme and comes down, you
 15 don't call that a side baffle?
 16 A. No, sir.
 17 Q. What is that called?
 18 A. Just your overhead baffle.
 19 Q. Okay. What is being depicted here
 20 relative to bullet paths?
 21 A. That it is set up for someone to have
 22 an accidental discharge.
 23 Q. Which is within the realm of
 24 possibility?
 25 A. It depends if there's supervision or

1 not and training.
 2 Q. Well, supervision doesn't control the
 3 squeezing of the trigger --
 4 A. And training does.
 5 Q. -- accidents happen.
 6 We're not on a training range at
 7 Farragut, do you agree?
 8 A. I disagree. I think that anyone has a
 9 responsibility when you put a firearm in their
 10 hand, and I think there has to be training and
 11 supervision to prevent accidental discharges.
 12 Q. Okay. Are you suggesting there won't
 13 be any accidental discharges at Farragut?
 14 A. I'm not suggesting that any range
 15 wouldn't have it -- or anywhere as you walk
 16 outside.
 17 Q. Okay. Try not to turn my question --
 18 A. Okay.
 19 Q. I don't want to be argumentative.
 20 A. I understand, but I think what you're
 21 asking me is something that's not realistic.
 22 Q. What statistical proof do you have to
 23 support your statement that accidental discharges
 24 are less likely to happen -- if that's what you
 25 said -- at Farragut range?

1 A. Yes.
 2 Q. Okay. Does this chart speak to the
 3 fact that it must -- that a range must be
 4 designed so as to capture an accidental discharge
 5 that is not directly downrange?
 6 A. Your NRA Guideline shows that.
 7 Q. Do you agree or disagree that that is a
 8 requirement from a safety perspective?
 9 A. I disagree.
 10 Q. Okay. And why do you disagree?
 11 A. Because there has to be responsibility.
 12 When you put your finger into the trigger, were
 13 you aware that the safety was taken off?
 14 Q. Your --
 15 A. I mean, that's --
 16 Q. You're presupposing that every shooter
 17 is doing a 100 percent perfect job, are you not?
 18 A. I am not, but I say there is
 19 responsibility when anyone carries a firearm to
 20 make sure there's principles met.
 21 Q. How do you protect those people living
 22 downrange from the one shooter out of 100 who
 23 screws up and shoots through that open space to
 24 the left?
 25 A. Okay. And then has there been a

1 MR. BURKHALTER: I object. I think
 2 it's argumentative.
 3 Q. (BY MR. RICHMAN) Okay. So be it.
 4 Answer the question.
 5 A. The fact that there's going to be
 6 supervision on-site I think will greatly reduce
 7 any accidental discharge.
 8 Q. I want to tell you a quick story.
 9 A. Okay.
 10 Q. I was hunting. It was cold. I was
 11 looking down from a Forest Service road at a
 12 bunch of deer.
 13 I put my gloved finger in my 30.06
 14 trigger guard and -- boom -- that baby went off.
 15 An accident. I'm a decent shooter. I've been
 16 around guns all my life. I enlisted in the
 17 military in 1957 -- probably before you were
 18 born. Okay?
 19 A. Um-hmm. (Nodding head.)
 20 Q. Accidental discharge. Does it happen
 21 at ranges?
 22 A. Yes.
 23 Q. Okay. Can it happen at Farragut?
 24 A. It could happen anywhere, as you know.
 25 Q. Can it happen at Farragut?

1 Surface Danger Zone assessed?
 2 Q. Yes, there has, actually.
 3 A. All right. And what about the person
 4 that's in the parking lot -- or what about the
 5 Hunter that's in the field?
 6 Q. We're not concerned with those issues.
 7 We are only concerned in this lawsuit, sir --
 8 A. Okay.
 9 Q. -- with the people living downrange.
 10 A. Okay. I understand.
 11 Q. My question is, is it within the realm
 12 of probability that sooner or later a bullet will
 13 go through that open space?
 14 A. I don't think it's very probable.
 15 Q. But it is probable, but not very
 16 probable?
 17 A. It is not very probable.
 18 Q. It is remote?
 19 A. Very remote.
 20 Q. Okay. Do you have any statistics to
 21 support that?
 22 A. I do not.
 23 Q. Just your own personal observation over
 24 the years?
 25 A. Correct.

1 Q. Okay.

2 MR. RICHMAN: Let me show you what the

3 Court Reporter will mark as Exhibit 9.

4 (Exhibit 9 marked.)

5 Q. (BY MR. RICHMAN) Exhibit No. 9, does

6 that also show potential bullet paths?

7 A. Yes, it does.

8 Q. And let's look at the bullet path which

9 from the right side is closest to the firing

10 line. Do bullets historically get misfired like

11 that?

12 A. I couldn't tell you that.

13 Q. In your experience, you haven't seen a

14 bullet misfire like that?

15 A. I have not.

16 Q. Okay. Do you live in Idaho?

17 A. I do.

18 Q. Do you ever see bullet holes in road

19 signs?

20 A. I do.

21 Q. How does that happen?

22 A. Deliberate.

23 Q. Okay. What do you know about the berm,

24 the construction of the berm at Farragut?

25 A. I was not there during the construction

1 material with a wood chip overlay.

2 Q. Okay.

3 (Exhibit 10 marked.)

4 Q. (BY MR. RICHMAN) Are you familiar with

5 the steel used at the range?

6 A. I'm familiar -- I don't have the MSDS

7 on it or anything else, but okay.

8 Q. So you don't know --

9 A. I know what it is, but I don't know

10 what the hardness was.

11 Q. What is it?

12 A. Ten-gauge steel.

13 Q. Okay. What is the BIM factor?

14 A. I couldn't tell you.

15 Q. It's not AR steel, is it?

16 A. That would be an Abrasion Resistant.

17 No, it's not.

18 Q. Okay. You usually recommend AR steel?

19 A. No, I do not.

20 Q. What do you recommend?

21 A. We do multiple. For instance, we could

22 use a mild steel as long as it's double layered

23 with an air space.

24 Q. Okay. Is the steel on this range the

25 steel you recommend?

1 of it, but I examined it after it was built.

2 Q. And what do know about the nature of

3 rubble in the berm?

4 A. I know that it was earth and berm with

5 wood chip put on top.

6 Q. Okay. But what about rubble in the

7 berm, do you know anything about it?

8 A. No.

9 Q. I have read a great deal about ranges,

10 and many of the engineers talk about passing

11 through a No. 4 sieve. Have you ever heard that?

12 A. I have.

13 Q. That's a one-inch sieve, isn't it?

14 A. That's a quarter-inch sieve.

15 Q. A quarter-inch sieve. Thank you.

16 Have you a recommendation on passing

17 any of the earth materials through a No. 4 sieve?

18 A. I don't know if I -- I don't believe

19 I did recommend. I recommend a soft material or

20 particulate for the bullet to be absorbed into.

21 When they refer to a "No. 4 sieve,"

22 that's sand.

23 Q. So you have no idea whether or not the

24 berm is composed of rubble?

25 A. I know that it's composed of earth

1 A. Yes.

2 Q. Where did you make a recommendation of

3 the steel?

4 A. At the baffles.

5 Q. Did you recommend the actual steel that

6 has been selected for use on this range?

7 A. Yes.

8 Q. I thought on this range that you ended

9 up using steel supplied by Fish & Game.

10 A. Partial.

11 Q. Oh, it's been changed?

12 A. No. I believe they had a partial

13 amount of ten-gauge steel available, and then

14 they had to buy additional steel.

15 Q. But they bought the same steel?

16 A. I believe so.

17 Q. Okay. Were you at odds with any of

18 that choice of steel?

19 A. No, sir.

20 Q. Did you ever have a disclaimer about

21 the use of the steel?

22 A. No, sir.

23 Q. Okay. Did Mr. Clarke Vargas have

24 anything to do with the design of this range?

25 A. I am not aware of it.

1 Q. Okay.
 2 (Exhibit 11 marked.)
 3 Q. (BY MR. RICHMAN) Let me show you what
 4 the Reporter has marked as No. 11. This is a
 5 picture of Clarke Vargas' website.
 6 A. Okay.
 7 Q. Do you recognize this as a picture of
 8 the Farragut range? Does it appear to be that?
 9 A. Very similar.
 10 Q. Okay. But is that a representation of
 11 what was built at Farragut?
 12 A. Yes.
 13 Q. Okay. Do you see those concrete
 14 footings holding the stanchions?
 15 A. Yes.
 16 Q. Do they approximate 3 by 3 by 3?
 17 A. I couldn't tell you. It looks like
 18 they're large.
 19 Q. Is that an approximate size?
 20 A. I would assume.
 21 Q. Steel reinforced concrete?
 22 A. I would assume.
 23 Q. Did you design the footing?
 24 A. I did not.
 25 Q. Okay. Does that footing, if exposed

1 difference than a rock on the water.
 2 Q. Where do these definitions come from?
 3 A. I think they're used throughout the
 4 industry.
 5 Q. Okay. You think?
 6 A. Yes.
 7 Q. What manual would I go to to show that?
 8 A. I don't know, but I'm sure if you want,
 9 we could find it.
 10 Q. Well, we could probably spend forever
 11 looking. I can only know what you know.
 12 A. I could not point to a manual.
 13 Q. Okay. Is it fair to say that, in large
 14 measure, you use those because of your experience?
 15 A. I think those terms were brought to me
 16 when I got into the industry.
 17 Q. Okay. Now, putting the log yard waste
 18 six inches on top of the ground surface and those
 19 concrete footings, what does that do to bullet
 20 resistance?
 21 A. I think it will help slow -- mitigate
 22 the bullet speed over time.
 23 Q. Why?
 24 A. Because it's a softer particulate than
 25 hard earth.

1 that way, represent a ricochet factor?
 2 A. It would represent a skip factor, yes.
 3 Q. Okay. Now, why do you -- is there a
 4 reason why you choose to use the word "skip"
 5 versus "ricochet"?
 6 A. I do.
 7 Q. And --
 8 A. Skip, if you shot a bullet across water,
 9 it would skip. If you throw a rock across water,
 10 it would skip. If you shoot a low-lining
 11 surface, it will skip. It's regardless whether
 12 it's sand, grass, or whatever. They skip.
 13 No difference than a rock would if you
 14 skipped it across water.
 15 Q. Is "ricochet" and "skip" interchangeable
 16 phraseology?
 17 A. Not always.
 18 Q. Okay. What is the difference between
 19 ricochet and skip?
 20 A. If you shot -- an example being a piece
 21 of metal or steel target, it would ricochet.
 22 If you shot a metal post that was
 23 rounded, it would ricochet.
 24 If you shoot something across a
 25 relatively low plane, it would skip -- no

1 Q. What scientific engineering or other
 2 documentation do you have to support that theory?
 3 A. We have none.
 4 Q. Did you ever test the material?
 5 A. We did not.
 6 Q. Does it have any known use as flooring
 7 material at a range, other than at Farragut?
 8 A. No.
 9 Q. And it was used at Farragut because it
 10 was free; isn't that true?
 11 A. I don't know if that's the only reason.
 12 Q. Well, it wasn't your recommendation,
 13 was it?
 14 A. It was our recommendation. Once they
 15 brought that they had the opportunity to use it,
 16 we thought it would be an excellent source.
 17 Q. So when Fish & Game told you it was
 18 available, you blessed it?
 19 A. Yes, sir.
 20 Q. Okay. With no scientific or engineering
 21 proof of its potential virtue?
 22 A. What's interesting is you refer to
 23 "scientific or engineering," but there is no
 24 guidelines for ranges -- period -- other than
 25 manuals of suggestion, but there is no -- the NRA

1 Manual is not scientific, and the NRA Manual has
2 no proof to support it -- none whatsoever -- the
3 opening disclaimer says that.

4 When you say, "scientific," there's
5 never been a document that I know that someone
6 says, "This is scientific data that supports this
7 theory based on this round." So when you say
8 that, there's none available for anything.

9 Q. What have you read in the past ten years
10 on range design and safety?

11 A. I've read many documents.

12 Q. Tell me what you've read. Cite me to
13 the most important three documents you have read.

14 A. I have looked at the -- probably in
15 length -- Surface Danger Zone Specifications.

16 I have looked at travel of bullets
17 documentation provided by National Shooting
18 Sports Foundation and SAAMI Guidelines, and
19 I have looked at the NRA Manual recently.

20 Q. Okay. Before I forget, Ms. Reporter,
21 let's mark 12.

22 (Exhibit 12 marked.)

23 Q. (BY MR. RICHMAN) No. 12, what is that?

24 I didn't mean to throw that at you, sir.

25 A. That's fine.

1 Q. Okay. Have you read any studies on
2 ricochets?

3 A. Yes.

4 Q. What studies have you read?

5 A. I couldn't quote the author, but I have
6 read many.

7 Q. Well, can you cite me by name, or
8 author, or location of one major study on
9 ricochets that you have read?

10 A. Not off the top of my head.

11 Q. Okay. What is a fully contained range?

12 A. A range that has no outside blue sky;
13 one that's fully enclosed; that has not only just
14 baffling, but is completely enclosed in a
15 360-degree manner.

16 Q. Is it fair to say that a fully
17 contained range is a range that contains both
18 direct fire and a ricochet fire --

19 A. Yes.

20 Q. -- and skip fire?

21 A. Yes.

22 Q. So that a fully contained range has
23 100 percent containment?

24 A. Yes.

25 Q. Is the Farragut range fully contained?

1 Q. What is No. 12?

2 A. It's a list of distances in feet
3 between baffles.

4 Q. Who drew that?

5 A. I'm not sure.

6 Q. Have you seen it before?

7 A. I don't know if I have.

8 Q. Is it applicable to the range?

9 A. I'm not sure.

10 Q. Okay. So you can tell me nothing about
11 this document --

12 A. I don't know.

13 Q. -- document No. 12?

14 A. I don't remember it, so --

15 Q. Okay. Have you ever done any computer
16 modeling of ranges or baffle designs?

17 A. My staff has.

18 Q. What programs do you use?

19 A. AutoCAD.

20 Q. Well, that's just an engineering design
21 program. That's not a computer modeling, is it?

22 A. It will do modeling, yes.

23 Q. And what does it do?

24 A. It shows us the angles of which --
25 how the baffles will be affected or hit.

1 A. No.

2 Q. What is a partially contained range?

3 A. It would be a range that would
4 partially contain the rounds.

5 Q. Okay. Unfortunately, you cannot define
6 the question by repeating the question.

7 Tell me what a partially contained
8 range is vis-a-vis a fully contained range.

9 A. It would be a range that would have
10 baffling, it would have berms, and an impact area
11 versus one that would be completely made of an
12 armament in a 360 roof and floor.

13 Q. Okay. But a partially contained range
14 would contain direct fire?

15 A. Yes, sir.

16 Q. But not skips or ricochets?

17 A. Not skips or ricochets, yes.

18 Q. Okay. Is it fair to say that with the
19 openings on the side of the range, as presently
20 designed, Farragut range is not a partially
21 contained range?

22 A. No. I think it is a partially
23 contained range.

24 Q. Well, could a bullet not go through
25 those openings?

1 A. Absolutely.
 2 Q. Then it doesn't contain all direct
 3 fire; correct?
 4 A. It's not direct if it's at an angle.
 5 That would be an accidental discharge.
 6 Q. Couldn't someone intentionally shoot
 7 through those spaces?
 8 A. They could intentionally shoot in the
 9 parking lot. I don't know where you're --
 10 Q. Okay.
 11 A. I don't understand what you're saying,
 12 then.
 13 Q. Could a person aim his rifle
 14 intentionally and shoot through those openings?
 15 A. Yes.
 16 Q. And if he did, would that bullet go
 17 over the back berm?
 18 A. Yes.
 19 Q. And would it leave the three-quarters
 20 of a mile of property owned by Fish & Game?
 21 A. We would have to examine that.
 22 Q. Well, the SDZ of a 30.06 --
 23 A. I know how far it is.
 24 Q. How far is it?
 25 A. You could shoot any high powered rifle

1 open.
 2 Q. Okay. I don't think I have an answer
 3 to my question. I'm going to do it again.
 4 A. Okay.
 5 Q. I'll break it down.
 6 A. Okay.
 7 Q. Can you represent to this Judge that no
 8 round can leave the range?
 9 A. I cannot represent that.
 10 Q. Okay. Do you know if that was part of
 11 his Order?
 12 A. I do not know that.
 13 Q. Okay. Can you represent to this Judge
 14 that no round can go over the back berm?
 15 A. No round, unless it's an accidental
 16 discharge or deliberate, could go over this berm.
 17 Correct.
 18 Q. Okay. That was not part of my question.
 19 A. Okay.
 20 Q. Can you represent to this Judge that
 21 no round can go over the back berm as the range
 22 is presently constructed?
 23 A. Yes.
 24 Q. Well, you just told us that an
 25 accidental or deliberate could.

1 up to four miles.
 2 Q. Okay.
 3 A. I'm familiar with that, but --
 4 Q. So a man with a 30.06 who intentionally
 5 or accidentally fired through those side openings
 6 depicted in the earlier exhibits --
 7 A. Um-hmm. (Nodding head.)
 8 Q. -- would have that round, on a
 9 more-probable-than-not basis, leave the
 10 three-quarter mile ownership area of Fish & Game?
 11 A. I don't know if it would, unless you
 12 examine the elevation of that hole, and we have
 13 not done that.
 14 Q. So you don't know?
 15 A. I don't know if it would.
 16 Q. Okay. Can you tell the Judge in this
 17 case that this range permits zero bullet
 18 escapement?
 19 A. I don't know of any range that's not
 20 fully contained that permits it --
 21 Q. Okay.
 22 A. -- and the answer is "Yes."
 23 Q. Yes?
 24 A. Yes. I think I would be able to tell
 25 him that the round could leave any range that's

1 A. Not deliberate. Accidental.
 2 Q. Okay. That an accidental could?
 3 A. Yes, but an accidental could do it
 4 anywhere.
 5 Q. Okay. That's not the question I'm
 6 asking you. You can't change my question, sir.
 7 A. Okay.
 8 Q. Okay. Can you represent to this Judge
 9 that no -- zero -- round -- zero rounds can go
 10 over the back berm as the range is presently
 11 constructed?
 12 A. I cannot.
 13 Q. Thank you. Are you familiar with the
 14 RDZ as used in the ETL?
 15 A. Do you want to explain to me what
 16 it is?
 17 Q. I will. Are you familiar with it?
 18 A. I've read it.
 19 Q. Do you know what "RDZ," means?
 20 A. No. Go ahead.
 21 Q. Okay. It means, "Ricochet Distance Zone."
 22 A. Yes.
 23 Q. Okay. Are you familiar with what the
 24 military has established as the Ricochet Distance
 25 Zone?

1 A. I have seen those Manuals, yes.
 2 Q. Okay. Are you familiar with it?
 3 A. Not adamantly, but I have seen it.
 4 Q. Not "adequately," you mean?
 5 A. No, "adamantly."
 6 Q. "Adamantly" would be --
 7 A. Which means I don't read them regularly.
 8 Q. Okay. Let me represent to you what the
 9 ETL '08 version, which is the latest, which you
 10 say you more than likely built under -- "more
 11 than likely" is the operative word -- has a
 12 Ricochet Distance Zone of 50 percent of the
 13 Surface Danger Zone of the round. Are you
 14 familiar with that?
 15 A. I am not familiar with that.
 16 Q. That's been the case since at least '08.
 17 A. Okay.
 18 Q. And the Navy has been using it for over
 19 ten years. Are you familiar with that?
 20 A. I'm not.
 21 Q. Okay.
 22 A. I also believe that the rounds used on
 23 a military range are not the rounds that will be
 24 used on a public range.
 25 Q. Why?

1 shooter.
 2 Q. And you designed a canopy baffle?
 3 A. Yes, sir.
 4 Q. And is there a reason that the canopy
 5 baffle at Farragut only goes halfway up the
 6 canopy?
 7 A. Do you mean, not behind the shooter?
 8 Q. No. It doesn't go 12:00 from the
 9 firing line.
 10 A. Okay.
 11 Q. It only goes to 10:30; correct?
 12 A. Okay.
 13 Q. You follow what I'm talking about,
 14 a clock?
 15 A. I understand.
 16 Q. Why was it designed that way?
 17 A. In case there was an accidental
 18 discharge associated with a round in a loading
 19 position.
 20 Q. Well, is it not just as likely that an
 21 accidental discharge would occur in, and the
 22 bullet can go off at 11:00 o'clock high, as
 23 opposed to 10:30 o'clock high?
 24 A. I think it would be less likely.
 25 Q. But possible?

1 A. Because they're steel core.
 2 Q. Why can't I fire steel core rounds at
 3 Farragut?
 4 A. Because it would be a military issued
 5 round.
 6 Q. So why can't I use them?
 7 A. I think there are limitations associated.
 8 Also, the military uses larger
 9 ammunition -- as in 50 BMG or things like that
 10 listed in their manual.
 11 Q. Has anyone ever checked your ammunition
 12 at a civilian range?
 13 A. Yes. There's guidelines associated
 14 with calibers to be used and types of ammunition
 15 to be used.
 16 Q. Calibers.
 17 A. And types of ammunition to be used.
 18 Q. But Farragut doesn't have any such
 19 rules today, to your knowledge?
 20 A. I believe they do. I believe that was
 21 written, that they have a limitation on the
 22 rounds and the calibers to be used.
 23 Q. Well, okay. Let's talk about canopy
 24 baffle. What's canopy baffle?
 25 A. It's a baffle over the top of the

1 A. Possible.
 2 Q. And potentially probable?
 3 A. I didn't say, "probable." I don't
 4 believe it's probable -- I don't think very
 5 probable, no.
 6 Q. Have you ever taken statistics?
 7 A. No.
 8 Q. Do you understand the difference
 9 between probabilities and possibilities?
 10 A. Explain them to me.
 11 Q. No. Do you?
 12 A. I think I do.
 13 Q. Tell me the difference.
 14 A. One would be most likely, and one would
 15 be not so likely.
 16 Q. Okay. That's your definition.
 17 Is there any armor in the canopy baffle
 18 between 10:30 o'clock high from the firing line
 19 to 12:00 o'clock high?
 20 A. I don't believe so.
 21 Q. Okay. Let's look at the side of the
 22 shooting shed.
 23 A. Okay.
 24 Q. A portion of the side of the shooting
 25 shed is in front of the firing line, isn't it?

1 A. I would have to see your photos to
 2 recollect or a drawing to recollect.
 3 Q. Okay. Let's look at your photographs,
 4 which I think would be very helpful in that
 5 regard.
 6 A. Okay.
 7 MR. RICHMAN: Do you have that one,
 8 Jeanne?
 9 MS. HOM: Yes.
 10 MR. RICHMAN: Would you pull it out for
 11 me? My assistant here.
 12 THE WITNESS: Okay.
 13 (Exhibit 13 marked.)
 14 Q. (BY MR. RICHMAN) Exhibit NO. 13 are
 15 your photographs; is that not correct?
 16 A. I believe they are.
 17 Q. Okay. I want to direct your attention
 18 to No. 1, which shows a portion of the shooting
 19 shed in front of the firing line. Is that
 20 correct?
 21 A. Yes, it does.
 22 Q. And is it fair to say that that portion
 23 of the shooting shed is unarmored?
 24 A. Yes, it is.
 25 Q. And is it fair to say that on the other

1 A. It would be, once again, an accidental
 2 discharge.
 3 Q. Is it an unfavorable event?
 4 A. Yes.
 5 Q. And is there potential that that bullet
 6 would leave Fish & Game control property?
 7 A. Yes.
 8 Q. Okay. Let me show you what the
 9 Reporter will mark as No. 14.
 10 We're doing very well, Ms. Reporter.
 11 When you're ready for a break, you let me know.
 12 THE REPORTER: Okay. Thank you.
 13 (Exhibit 14 marked.)
 14 Q. (BY MR. RICHMAN) This is an aerial
 15 from your own Affidavit; is that not correct?
 16 A. I do believe so.
 17 Q. I don't want to confuse anybody here.
 18 Would you say, "Yes"?
 19 A. I would believe so, yes.
 20 Q. And I so represent.
 21 A. Okay.
 22 Q. Now, I'm going to take this orange
 23 marker and ask you about what the area that I
 24 have marked as orange is?
 25 A. That would be at a 90-degree angle from

1 side of that shooting shed, there should be a
 2 berm?
 3 A. It's not downrange.
 4 Q. That's not the question I asked.
 5 A. I would say, "No."
 6 Q. Well, if someone shot through that wall
 7 accidentally, as suggested is possible from the
 8 NRA Range Manual --
 9 A. Yes.
 10 Q. -- as we've referenced in No. 6, among
 11 others, that would go through that wall, wouldn't
 12 it?
 13 A. Yes, sir.
 14 Q. And if there were no berm behind it,
 15 what would happen?
 16 A. It would go through the wall, and the
 17 bullet would travel until gravity pulled it down.
 18 Q. And do you know whether there's a berm
 19 behind it?
 20 A. I am not sure if there is.
 21 Q. And if there is no berm behind it, what
 22 would you conclude?
 23 A. I would conclude the bullet would
 24 travel until gravity pulled it to the ground.
 25 Q. Is that an unfavorable event?

1 the firing line.
 2 Q. Okay. Would that be the continuation
 3 of the old 1,000-foot firing line?
 4 A. When you say, "continuation," is this
 5 the 1,000-yard --
 6 Q. This is the 600.
 7 A. Okay. Then what is -- when you say
 8 1,000 yard --
 9 Q. It's 1,000 yards from this corner here
 10 to here.
 11 A. Okay.
 12 Q. Okay. Take that as a representation.
 13 A. Okay.
 14 Q. Is that orange line the continuation of
 15 that old 1,000-yard firing line?
 16 A. Yes, sir.
 17 Q. Okay. And it's 200 yards from that
 18 orange down to what I now mark as the green
 19 backstop.
 20 A. Okay.
 21 Q. And I am going to put an "X." That is
 22 the old 600-yard shooting area.
 23 A. Okay.
 24 Q. What prevents someone from standing at
 25 the 600-yard shooting area and shooting the

1 targets at the back berm?
 2 A. It would have to be based upon the
 3 control within the range site itself.
 4 Q. Okay. But there's no baffle there.
 5 A. No, sir, not that I am aware of.
 6 Q. Okay. You happen to be correct.
 7 A. Okay.
 8 Q. And there's no baffles for anyone who
 9 might choose to shoot from that orange line down
 10 to the green backstop.
 11 A. I am not aware of any.
 12 (Ms. Hom showing document to Counsel.)
 13 MR. RICHMAN: Oh, yeah. Let me go back
 14 to A-1. Thank you, Jeanne.
 15 Q. (BY MR. RICHMAN) In your drawing, A-1,
 16 you show the firing line --
 17 A. Yes, sir.
 18 Q. -- and you show no berm back that far.
 19 A. Yes, sir.
 20 Q. So there isn't any berm --
 21 A. I don't know if they built -- I didn't
 22 build the berms. I couldn't tell you where the
 23 berm ended.
 24 Q. Okay. That's fine.
 25 Should the range floor have been sieved.

1 A. One inch or under.
 2 Q. Okay. Is Farragut range replete with
 3 rock over one inch?
 4 A. I'm not sure.
 5 Q. Okay. Has there been any proctor taken
 6 of the ground?
 7 A. I don't know.
 8 Q. And you don't think it's your duty to
 9 know that?
 10 A. I think it's up to Fish & Game to
 11 manage that.
 12 Q. Well, doesn't your baffle design
 13 somehow relate to the surface of the range floor
 14 and the side berms?
 15 A. No, it does not. It relates to the
 16 backstop.
 17 Q. Okay.
 18 (Exhibit 15 marked.)
 19 Q. (BY MR. RICHMAN) Let me show you
 20 No. 15 and ask you if that is a true and correct
 21 photograph of a typical baffle stanchion floor
 22 plate and concrete footing to which it is
 23 attached at Farragut range?
 24 A. I believe, yes, it is.
 25 Q. Okay. And it is your position that

1 A. No, sir.
 2 Q. Unimportant?
 3 A. Unimportant.
 4 Q. So the fact that it is rocky is of
 5 no concern?
 6 A. Most range floors are rocky.
 7 Q. Okay. That's not the question.
 8 A. It's no concern.
 9 Q. It's no concern. Okay.
 10 Does the ETL speak to rock-free surface
 11 in the range floor?
 12 A. I think it's based on the size of rock
 13 in the ETL.
 14 Q. And what size of rock are we talking
 15 about?
 16 A. I could not tell you.
 17 Q. Does the NRA speak to a rock-free zone?
 18 A. Yes, sir.
 19 Q. So your position is that both the ETL
 20 and the NRA Range Manual are wrong when they show
 21 concern for a rock-free zone on the surface of
 22 the earth at the range?
 23 A. Rock-free in its particular size --
 24 I think small rock.
 25 Q. What size is "small"?

1 that does not portend an issue with skip or
 2 ricochet because it's covered with log yard
 3 waste?
 4 A. And you're referring to the foundation?
 5 Q. The foundation, the footing, the foot
 6 plate which is all available to be acquired by
 7 a bullet.
 8 A. It should be covered with some material.
 9 Q. Okay. And let me show you what the
 10 Reporter is going to mark as No. 16.
 11 (Exhibit 16 marked.)
 12 Q. (BY MR. RICHMAN) Does that show the
 13 material, log yard waste, covering the bottom
 14 of that?
 15 A. I believe it does.
 16 Q. How would you describe to the Court
 17 the bullet resistance portended by that mound of
 18 log yard waste?
 19 A. What will happen when this round is
 20 fired, it will go in through the log waste -- hit
 21 there, fragment or skip, and be defused partially
 22 within the log yard waste.
 23 Q. And the basis for that opinion is your
 24 experience?
 25 A. Yes.

1 Q. What is the difference between using
 2 log yard waste to defuse, as you've just
 3 described, and using balled up newspaper?
 4 A. Probably not much.
 5 Q. Now, I want you to assume that I shoot
 6 and hit that, and that log yard waste goes
 7 hither and yon." What happens the next time
 8 I hit it?
 9 A. It depends on where your "hither and
 10 yon" is. I mean, are you saying it's void now --
 11 Q. Yes.
 12 A. If there's no material there, you're
 13 going to have fragmentation for sure.
 14 Q. What about skip or ricochet?
 15 A. You could have a skip or ricochet, yes.
 16 Q. And how often must the range officer go
 17 down there to check that each and every one of
 18 those mounds are in place?
 19 A. They should go and examine the range
 20 upon each stopping or clear firing line
 21 succession.
 22 Q. And that is typically done at ranges?
 23 A. I don't know if it's typically done at
 24 ranges, but it should be done here where the
 25 baffles are inspected and any part or area that

1 Q. Okay.
 2 A. I don't see any blue sky in this photo.
 3 Q. What is the nature of the first two
 4 feet of the soil on the floor of the Farragut
 5 range?
 6 A. I believe it's earth and berm, but I'm
 7 not sure.
 8 Q. Okay. Let me show you what the
 9 Reporter will mark as Exhibit 18 --
 10 (Exhibit 18 marked.)
 11 Q. (BY MR. RICHMAN) -- which I'll
 12 represent to you is a photograph taken this
 13 September of the 200-yard footings going in --
 14 200-yard range footings going in.
 15 A. Okay.
 16 Q. Is the 100-yard range of the same soil
 17 nature as the 200-yard range?
 18 A. I couldn't tell you.
 19 Q. Would you opine that it is on a
 20 more-probable-than-not basis?
 21 A. Yes.
 22 Q. Do you see the size of the rock
 23 material there?
 24 A. I do.
 25 Q. Okay. Do any of those, if they were in

1 would have a concern towards skip or anything
 2 like that.
 3 Q. What range have you been to where a
 4 range officer makes such an inspection after each
 5 round of firing?
 6 A. I have not.
 7 Q. Okay.
 8 (Exhibit 17 marked.)
 9 Q. (BY MR. RICHMAN) No. 17, sir, I
 10 represent to you that this is Farragut range.
 11 Do you recognize it as such?
 12 A. I believe so.
 13 Q. And does that not truly show the
 14 concrete footings --
 15 A. Yes, it does.
 16 Q. -- and the stanchions?
 17 A. Yes, sir.
 18 Q. -- and the baffles?
 19 A. Yes, sir.
 20 Q. Are there any baffles on the 100-yard
 21 range beyond the 50-yard line?
 22 A. I'd have to look at the measurements.
 23 Q. Should there be?
 24 A. As long as there's no blue sky visible
 25 from your firing position, no.

1 the top two feet -- I'm going to simplify it --
 2 within the top 18 inches of the soil portend
 3 a skip or ricochet factor?
 4 A. I believe so.
 5 Q. Okay. I want you to assume that I go
 6 to the range, and I shoot on the 100-yard range
 7 75 feet and strike the ground --
 8 A. Okay.
 9 Q. -- and hit one of those rocks.
 10 A. Yes, sir.
 11 Q. Can a bullet skip or ricochet over the
 12 back berm?
 13 A. It would be highly improbable. My
 14 answer would be I believe it would not.
 15 Q. Okay. And the basis of your answer is --
 16 your reasoning?
 17 A. Is examining hundreds of ranges.
 18 Q. Your personal experience?
 19 A. And the opinion of law enforcement,
 20 FBI, and everyone else that I have talked with.
 21 (Ms. Kathleen E. Trever
 22 entered the room.)
 23 Q. (BY MR. RICHMAN) Well, who did you
 24 talk to at the FBI who told you these things?
 25 A. Their Training Division.

1 Q. Who? Give me a man's name.
 2 A. Doug Spillers.
 3 Q. Where is he?
 4 A. He's in Kansas City.
 5 Q. And what is his capacity?
 6 A. He's a PFI, Principal Firearms
 7 Instructor.
 8 Q. And he told you what?
 9 A. We were discussing ricochet factor.
 10 Most ricochets do not travel more than two or
 11 three feet above the line of sight.
 12 Q. And you're essentially paraphrasing
 13 what he told you?
 14 A. Yes.
 15 Q. And what was his basis of his
 16 knowledge, do you know?
 17 A. I couldn't tell you.
 18 Q. Okay. Who else told you this?
 19 A. Again, I don't know name specific, but
 20 a majority of all the law enforcement they
 21 actually shoot -- deliberately shoot at the
 22 ground and study where slugs or rifle rounds are
 23 going to go in case there's someone behind a
 24 vehicle, and they have found universally the
 25 rounds will not go -- travel higher than

1 MS. TREVER: For the benefit of the
 2 record, what is the date on the photograph?
 3 MR. RICHMAN: This is before you did
 4 your grass seeding. I don't have the date in
 5 front of me. Okay? We have other pictures with
 6 the grass coming up.
 7 Q. (BY MR. RICHMAN) Is it correct to say
 8 that the front of each stanchion, as you designed
 9 it, is protected by dimensional timber -- maybe
 10 three-by-threes or four-by-fours?
 11 A. It appears, yes.
 12 Q. I'm sorry?
 13 A. Yes.
 14 Q. But the sides are only covered with
 15 plywood?
 16 A. Correct.
 17 Q. So that a bullet would have a greater
 18 potential to penetrate the sides than they would
 19 the front?
 20 A. The bullets can penetrate both.
 21 Q. Will it go through the side and strike
 22 the steel?
 23 A. Yes, sir.
 24 Q. Okay. Potential to ricochet or skip
 25 after it goes through the side?

1 four feet.
 2 Q. And you received that in written form?
 3 A. No, but I'm sure I could find that
 4 data.
 5 Q. Okay. The question is, have you
 6 received it in written form?
 7 A. I have not.
 8 Q. So you have never read that?
 9 A. Yes.
 10 MS. TREVER: Can we take a break now?
 11 MR. RICHMAN: We can take five,
 12 absolutely, Ma'am. Welcome.
 13 MS. TREVER: Thank you.
 14 (Recess taken.)
 15 (Exhibit 19 through 24 marked.)
 16 Q. (BY MR. RICHMAN) Let me show you what
 17 has been marked as Exhibit 19 and ask you if that
 18 is a true and correct copy -- a true and
 19 unretouched photograph, to the best of your
 20 knowledge, of the Farragut 100-yard range showing
 21 the stanchions and the range floor --
 22 A. It is.
 23 Q. -- with the mounding up of the log yard
 24 waste in front?
 25 A. Yes, sir.

1 A. No.
 2 Q. Why?
 3 A. It's going to be fragmented and caught
 4 within the plywood.
 5 Q. Okay. I want to make sure, for the
 6 purposes of clarity -- what documentation do you
 7 have to support or sustain that bullets thus
 8 fragment?
 9 A. I have no documentation.
 10 Q. Is this No. 20 also a close-up shot of
 11 the footing with the mounding, the plywood, and
 12 the lag bolts coming up through the bottom steel?
 13 A. Yes.
 14 Q. And No. 21 is a picture of the back of
 15 the Glulam baffle with the plywood sides?
 16 MS. TREVER: For the purposes of the
 17 record, are these of the same date or do you know
 18 the date?
 19 MR. RICHMAN: Yes. These are all
 20 approximately a year old, taken soon after the
 21 baffles were in. I don't have the date in front
 22 of me.
 23 THE WITNESS: Yes, sir.
 24 Q. (BY MR. RICHMAN) Let me show you
 25 No. 22.

1 Is that a photograph showing the
 2 Glulams, footings, and range floor?
 3 A. Yes, sir.
 4 Q. What about the rocks that are on that
 5 floor? Did you order them removed?
 6 A. I believe I did.
 7 Q. Where? When?
 8 A. I talked to Dave Leptich and asked them
 9 to rake any large rock off the range floor surface.
 10 Q. When did you do that?
 11 A. We had a walk-through -- and I don't
 12 remember the exact date. Quite a while ago.
 13 Q. But you didn't go down into the soil
 14 in any regard?
 15 A. No, sir.
 16 Q. So whatever rocks were two inches down
 17 and obscured by the one inch of soil would
 18 remain?
 19 A. Yes.
 20 Q. And No. 23 would be the range floor
 21 showing rock, as well?
 22 A. I believe so. It doesn't show the
 23 range.
 24 Q. Okay. I'll represent to you that that
 25 is the range floor, and we can establish that

1 MS. TREVER: Objection as to the --
 2 how is this -- may I ask a question in aid of
 3 objection?
 4 How is this reasonably calculated to
 5 lead to admissible evidence?
 6 MR. RICHMAN: We're addressing the
 7 issue of "downrange."
 8 Q. (BY MR. RICHMAN) Go ahead, sir.
 9 A. They're moving forward, yes.
 10 Q. Are they going down field?
 11 A. Yes.
 12 Q. Why is that down field, but a bullet
 13 fired to the side line is not downrange?
 14 A. The intended target is where the target
 15 is placed. It's not on the sidelines or in the
 16 direction of the sides; it is directly forward of
 17 the shooter.
 18 Q. And the intended target of that end is
 19 the goal post within the rectangle of the field,
 20 not off the field; correct?
 21 A. But I think the football advancement is
 22 done in different angles, where a round does not
 23 fly in angles; it flies in a --
 24 Q. Do you have a dictionary definition of
 25 "downrange"?

1 later.
 2 A. Okay.
 3 Q. And No. 24 --
 4 MS. TREVER: Objection to Counsel's
 5 testifying on behalf of the witness as to the
 6 composition of the photo.
 7 Q. (BY MR. RICHMAN) Okay. No. 24, does
 8 that appear to be a condition of the range floor
 9 as you last saw it?
 10 A. Yes.
 11 Q. Thank you. Okay. Do you play football?
 12 A. I do not.
 13 Q. Do you watch football?
 14 A. I do.
 15 Q. Okay. I want you to think about a game
 16 where the quarterback throws a football to an end
 17 downrange and he scores -- down field and he
 18 scores. I apologize.
 19 Then I want you to think about the
 20 quarterback throwing the ball to the end who
 21 doesn't run down field, he runs to the sideline,
 22 and he advances the line of scrimmage by ten yards.
 23 Do you have that picture?
 24 A. Yes.
 25 Q. Has that end run down field?

1 A. I do not.
 2 Q. Have you ever looked it up?
 3 A. I have not.
 4 Q. Is it fair to say that when you have
 5 defined "downrange" for me, it is something that
 6 you have composed on your own?
 7 A. I have not composed that on my own.
 8 Q. Where did you go to get that
 9 definition?
 10 A. I've gotten it through multiple
 11 manuals, and I cannot cite the manuals for you.
 12 Q. It's the 100-yard range fully baffled --
 13 correction -- completely baffled from the firing
 14 line to the target line?
 15 A. When you say, "completely baffled,"
 16 explain that to me, please.
 17 Q. I can't.
 18 A. Well, then I don't know what you're
 19 saying.
 20 Q. That's what the Judge said -- and you
 21 have told us, as I read your Affidavit --
 22 A. It has no blue sky.
 23 Q. No, I'm not talking about blue sky.
 24 A. Okay.
 25 Q. I want to know whether or not you can

Page 102

1 represent to the Judge that the range is
 2 completely baffled from the firing line to the
 3 target line. Can you make that recommendation?
 4 MS. TREVER: Objection to the context
 5 of the question. The basis for the objection is
 6 that it's taken out of context of the Court Order,
 7 which also has the phrase so that -- I don't have
 8 the Court Order right in front of me. Give me a
 9 moment. (Pause.)
 10 MR. RICHMAN: No. 59.
 11 MS. TREVER: Okay. For purposes of
 12 clarification of the record, the Judge's Order
 13 has the phrase, "Totally baffled so that a round
 14 cannot escape as espoused by the nation's
 15 preeminent authority on range design."
 16 That phrase follows the full context,
 17 which is "The first concern (safety) can be
 18 satisfied only by the 'no blue sky rule' or
 19 totally baffled so that a round cannot escape."
 20 Q. (BY MR. RICHMAN) My question, subject
 21 to Counsel's objection, which she need not reassert,
 22 is can you represent to the Judge that the range
 23 is totally baffled from the firing line to the
 24 target line?
 25 A. I believe so.

Page 103

1 Q. Okay. Support that statement.
 2 A. I believe a round cannot escape without
 3 striking a baffle or the backstop, unless it is
 4 an accidental discharge from the firing point --
 5 which is the firing line -- directed downrange.
 6 Q. Which is not the question I asked you.
 7 I'll ask the question again.
 8 A. Okay.
 9 Q. Can you represent to the Court that the
 10 range is totally baffled from the firing line to
 11 the target line?
 12 A. Yes.
 13 Q. Support that statement.
 14 A. Once again, I believe that there's no
 15 round that will escape, due to the baffling or
 16 the backstop material, unless it's an accidental
 17 discharge.
 18 Q. What is "totally baffled"?
 19 A. "Totally baffled" is, in this circumstance,
 20 no blue sky.
 21 Q. You have earlier in this deposition
 22 defined a "totally baffled range," did you not?
 23 A. I believe I did.
 24 Q. What did you define it as -- I'm not
 25 trying to catch you on your phrasing, but it

Page 104

1 becomes consequential.
 2 What is "totally baffled"?
 3 A. A range that has baffling, based on the
 4 shooting techniques, and this one being from one
 5 particular point not advancing forward.
 6 You showed me the NRA Manual Guideline
 7 that showed a fully baffled range designed for
 8 combat style or tactical training.
 9 Q. No, I did not, sir, and I never
 10 represented that to you. So I just want to make
 11 sure that we're not misunderstanding each other.
 12 A. I remember the exhibit in there --
 13 Q. I'll give you the exhibit, and we can
 14 discuss it again.
 15 A. Okay.
 16 Q. I believe you are referring to
 17 Exhibit 5.
 18 A. That is correct.
 19 Q. Okay. Now, what is it you wanted
 20 to say?
 21 A. I told you this was a fully baffled
 22 range.
 23 Q. Which is a fully baffled range?
 24 A. That is a fully tactical --
 25 Q. There's two ranges there.

Page 105

1 A. That's correct.
 2 Q. Okay. Which is fully baffled, both?
 3 A. Both.
 4 Q. Okay. Where does it say, "tactical"
 5 on that -- anywhere?
 6 A. No, it doesn't.
 7 Q. You didn't use the word "tactical" last
 8 time?
 9 A. I said, "combat."
 10 Q. This time you said, "combat"?
 11 A. "Combat" or "tactical."
 12 Q. Okay. Last time -- the record will
 13 speak for itself --
 14 A. Okay.
 15 Q. But my recollection, which is generally
 16 good, you did not use the word "combat" or
 17 "tactical."
 18 A. Okay.
 19 Q. Now, what is represented in this
 20 exhibit No. 5 on the top one?
 21 A. It is a fully baffled range based at a
 22 90-degree reflection angle.
 23 Q. Okay. And what is on the bottom?
 24 A. A fully baffled range with a reflection
 25 of 45 degrees.

Page 106

1 Q. Why is it fully baffled?
2 A. Because it would be based on a tactical
3 style or combat style range where people would
4 move forward.
5 Because -- if you look at the angle
6 here, is there going to be any different shooting
7 from here if they had multiples or you advance?
8 They're trying to establish an exact
9 repose portion of the range -- that no matter
10 where you advance on the range, you have the same
11 deflection.
12 Q. Now, if an engineer -- a PE who is
13 familiar with ranges, who has designed and built
14 ranges disagreed with you, would you defer to him
15 because of his greater knowledge?
16 A. No.
17 Q. Okay. So you know what you know?
18 A. Well --
19 MS. TREVER: If I could state an
20 objection, that Counsel's question assumed that
21 the other person would have greater knowledge
22 when that's not been established.
23 Education alone does not merely -- it
24 is not the only qualification for knowledge.
25 Q. (BY MR. RICHMAN) Go ahead, sir.

Page 107

1 A. I've been in multi-million-dollar
2 ranges built by large engineering firms that are
3 not in operation today.
4 As a matter of fact, the FBI is one of
5 the examples at their academy. Clarke Nixon
6 happened to be the engineering firm, one of the
7 well known range building firms in the country.
8 The range is inoperable. And why is that --
9 because 37 engineers worked on it?
10 I believe there has to be some
11 practical knowledge established with anything,
12 and in this circumstance they have no ballistic
13 background whatsoever -- most likely, they've
14 never fired a gun.
15 Q. And why do you know that?
16 A. Because what they designed did not work.
17 Q. How do you know that "most likely,
18 they've never fired a gun"?
19 A. Because if they would have fired a gun,
20 they would have realized in the design of this it
21 wouldn't have work.
22 Q. You are drawing a conclusion --
23 A. Based on experience.
24 Q. Okay. Notwithstanding No. 5 drawn by
25 Mr. Vargas in the NRA Range Manual, nowhere it

Page 108

1 refers to "combat" or "tactical."
2 A. It's not on that drawing.
3 Q. So it does not refer to "combat" or
4 "tactical"; correct? Is that a "Yes" or "No"?
5 A. It is not defined. No.
6 Q. Does Exhibit 5 contain a word or
7 reference to "combat" or "tactical"?
8 A. No.
9 Q. Okay. It says in the notes, No. 1,
10 "These are examples of a baffled range." Do you
11 agree with that?
12 A. I do not.
13 Q. No. 2. "Baffles are spaced according
14 to downrange area." Do you disagree with that?
15 A. I do not.
16 Q. No. 4. "Baffles may be recommended.
17 As encroachment occurs, plan a program of
18 installation over a five-year period." Do you
19 disagree with that?
20 A. No.
21 Q. Can you represent to the Court that a
22 baffle has been installed above and in front of
23 every firing position to prevent escapement over
24 the berm?
25 A. Yes.

Page 109

1 Q. What about people who walk further
2 downrange than the firing line?
3 A. Then you're going to have an issue.
4 There will be a problem. The baffles are not
5 sufficient --
6 Q. Pardon?
7 A. The baffles are not sufficient if you
8 have left the firing line.
9 Q. What about people who shoot too far
10 left?
11 A. Then they would hit -- strike the berm.
12 Q. What about the openings that we saw in
13 the earlier exhibits?
14 A. Then the rounds would escape through
15 the openings.
16 Q. Is it your position that this range,
17 100-yard range, is totally baffled?
18 A. Yes.
19 Q. Okay. Let's go to the ETL. Do you
20 remember that document?
21 A. I have seen it.
22 Q. All right. I've got to find it here.
23 (Pause.) I have it. Give me a chance -- (Pause.)
24 It defines "fully contained" in 6.6.
25 Is "fully contained" and "totally contained" the

1 same, from your perspective?
 2 A. No.
 3 Q. What's the difference?
 4 A. "Fully contained" would be a complete
 5 enclosure.
 6 Q. And "totally contained"?
 7 A. Is firing from a position where the
 8 bullets are intended to be with the round not
 9 escaping.
 10 Q. And what is the basis for the
 11 formulation of those definitions?
 12 A. Someone had to write it. I'm not sure.
 13 Q. Okay. And where did you read it?
 14 A. I have read "fully contained" as a
 15 representation of a range being at 360 degrees
 16 with a roof.
 17 Q. Okay. Let me ask you if you agree or
 18 disagree with these definitions:
 19 "Fully contained: A range in which
 20 direct fire and ricochets are totally contained
 21 within the limits of the range."
 22 Do you agree or disagree?
 23 A. I agree.
 24 Q. It goes on to say, "There is no SDZ
 25 requirement outside the limits of containment."

1 A. Yes, you can.
 2 Q. So that Farragut doesn't qualify as a
 3 partially contained range.
 4 A. Under your definitions, no, it would
 5 not.
 6 Q. Well, you said you agreed with that
 7 definition.
 8 A. I do.
 9 Q. Well, if you agree, then you should
 10 agree with me that Farragut does not qualify as a
 11 partially contained range.
 12 A. Under those guidelines, yes.
 13 Q. Okay. Do you do violence to those
 14 guidelines?
 15 A. No.
 16 Q. Do you agree with me that the --
 17 forgive me for standing. I'm anxious. I'm an
 18 "A type" person -- (Laughter.)
 19 A. I wouldn't have guessed it.
 20 Q. Is it fair to say that the difference
 21 between "partially contained" and "fully contained"
 22 is the issue of ricochet?
 23 MS. TREVER: If I could just, for
 24 purposes of the record, reflect that we seem to
 25 be discussing the ETL letter definitions as

1 A. Agreed.
 2 Q. Okay. That has been changed from the
 3 '02 version which I just read from; is that
 4 correct?
 5 A. I'm not sure.
 6 Q. Okay. Partially contained range. Tell
 7 me if you agree or disagree.
 8 "The range has a covered firing line,
 9 side containment, overhead baffles, and a bullet
 10 backstop. Direct fire is totally contained by
 11 the fire line canopy. Side containment, baffles,
 12 and bullet trap (no 'blue sky' observed from the
 13 firing positions) ricochets are not totally
 14 contained, but reduced by the baffles and side
 15 containment." Do you agree or disagree insofar
 16 as I've read?
 17 A. I agree.
 18 Q. Now, it's very interesting. It said,
 19 "No blue sky observed from the firing positions,"
 20 and you said you agreed with that.
 21 A. I agree with that.
 22 Q. Can you see blue sky from the firing
 23 positions at the Farragut range, 100-yard?
 24 A. Yes, you can.
 25 Q. (Gesturing.)

1 opposed to those referred to in the Court's Order.
 2 MR. RICHMAN: I'm sorry?
 3 MS. TREVER: We are referring to -- or
 4 Counsel is referring to definitions used in the
 5 engineering -- I just want to make sure that
 6 Counsel is continuing to refer to the definitions
 7 used in the -- is it the Air Force --
 8 MR. RICHMAN: ETL.
 9 MS. TREVER: -- Engineering Technical
 10 Letter --
 11 MR. RICHMAN: ETL, yes.
 12 MS. TREVER: -- rather than the
 13 definitions referred to in the Court's Order.
 14 MR. RICHMAN: You're eminently correct,
 15 and I agree with that.
 16 Q. (BY MR. RICHMAN) My question to you
 17 is, is the difference between a partially
 18 contained range and a fully contained range the
 19 issue of containment of ricochets?
 20 A. Yes.
 21 Q. Do you agree with this definition:
 22 "Surface --" no, wrong one.
 23 Do you agree with this statement from
 24 the ETL -- this is the '02 version for the
 25 purposes of clarity.

1 "Where full containment enclosures have
2 not been provided, the project team should assume
3 that ricochets would land in all portions of the
4 SDZ." Do you agree or disagree?

5 MS. TREVER: If I could just, for the
6 purposes of objection -- because the ETL is not
7 the standard used by the Court, for purposes of
8 this phase of the litigation, how is this likely
9 to lead to admissible evidence?

10 MR. RICHMAN: I'm not going to respond
11 to that, but I'm going to ask the witness the
12 question.

13 MS. TREVER: Then I will state an
14 objection as to relevance as it relates to the
15 objection.

16 Q. (BY MR. RICHMAN) Okay. Subject to
17 Counsel's objection to relevance, do you agree or
18 disagree with this objection -- with this
19 definition:

20 "Where full containment enclosures have
21 not been provided, the project team should assume
22 that ricochets would land in all portions of the
23 Surface Danger Zone, SDZ.

24 A. I believe that they would not.

25 Q. You disagree?

1 Q. Do you agree or disagree with this
2 statement from "Floor surfaces" in the ETL:
3 "No protrusions from the floor that
4 could be struck by bullets are permissible."

5 A. I would agree with that.

6 Q. Well, don't you have obstructions that
7 can be -- from the floor that can be struck by
8 bullets at this range?

9 A. Does that mean grass, or rock -- or
10 what are you -- I need more clarification.

11 Q. Excluding grass, but let's include
12 rock, and steel, and concrete.

13 A. If they could be struck, yes, you could
14 have skips or ricochets.

15 Q. And do you have such at Farragut range?

16 A. I'm not sure. I have not seen it since
17 they've done reconditioning to the floor and put
18 on the bark and grass.

19 Q. Okay. I want to make sure I've covered
20 this. If I'm repetitive, I don't mean to be.

21 A. I understand.

22 Q. You have no engineering, scientific, or
23 literature of any nature discussing the use of
24 log yard waste on a range floor?

25 A. That's correct.

1 A. I disagree.

2 Q. Okay. Here is the definition of
3 Ricochet Danger Area. Tell me if you agree or
4 disagree with the definition.

5 "The Ricochet Danger Zone is the area
6 between the impact area and the secondary danger
7 area. The ricochet area typically is determined
8 by extending a line down at 10 degrees off to the
9 left and right limits of fire beginning at the
10 firing line and extending to the minimum SDZ arc."

11 MS. TREVER: Just for the purposes of
12 the record, I'm going to state a continuing
13 objection for relevance for purposes of this line
14 of questioning.

15 MR. RICHMAN: And you have it.

16 Q. (BY MR. RICHMAN) Do you agree or
17 disagree with that?

18 A. I disagree with that.

19 Q. Okay. And what engineering or
20 scientific data do you have to support your
21 disagreement?

22 A. I think when velocity -- I have no
23 scientific data.

24 Q. Engineering?

25 A. No, sir.

1 Q. And you did tell me that balled up
2 newspaper would behave the same?

3 A. I believe so.

4 Q. Do you agree or disagree with this
5 statement from the ETL on soils -- again, I'm
6 using the 2002 -- '02 version.

7 "Naturally occurring soils that are not
8 excessively rocky may be used between the firing
9 line and the target line." Do you agree with
10 that?

11 A. I do.

12 Q. Okay. Is that what you have at Farragut?

13 A. I don't know what's there today.

14 Q. Isn't it critical that you know?

15 A. It is critical that they know.

16 Q. "They" being --

17 A. Fish & Game Department.

18 Q. And if their soil is excessively rocky --

19 A. They should remove the rocks.

20 Q. And if that hasn't been done, that
21 would be a hazard?

22 A. Yes, sir.

23 Q. Do you know why the ETL, the Air Force,
24 the Army, the Navy, and the Marine Corps all use
25 overhead baffles that are angled between 12 and

Page 118

1 32 degrees from horizontal?
2 A. They don't. I've been to many of their
3 ranges that don't.
4 Q. You have seen older ranges that don't?
5 A. I've seen older ranges and new ranges
6 that have not followed that guideline.
7 Q. What range that has been built within
8 the last -- since '02 have you seen that does not
9 have angled baffles?
10 A. There are ranges at Camp Pendleton that
11 do not have that, El Toro Marine Corps Base.
12 Q. Built since --
13 A. I'm not sure --
14 Q. Oh, okay.
15 A. -- but I know they have been repaired
16 at vertical angles.
17 Q. Okay.
18 A. Fort Murray, as well, recently has been
19 repaired.
20 Q. And those are repairs, are they more or
21 less than 35 percent of the value of the place?
22 A. They are more than 35.
23 Q. How do you know that?
24 A. Because I was there to give them an
25 estimate of doing the work.

Page 119

1 Q. Okay. Do you agree or disagree with
2 this statement as to overhead baffles:
3 "A fully contained range requires
4 150-millimeter (6-inch) minimum overlap baffle."
5 A. "Fully contained," I would agree with.
6 Q. Okay. And that is not the case at
7 Farragut?
8 A. I believe they are 6-inch overlapped.
9 Q. How are they overlapped?
10 A. In line of sight, one overlaps another
11 by a number of six inches, yes, sir.
12 Q. But not angular?
13 A. That's correct.
14 Q. Okay. Thank you.
15 Do you agree or disagree with this
16 relative to side berms:
17 "Walls will continue one meter
18 (3.2 feet) behind the firing line to prevent a
19 bullet fired parallel to the firing line from
20 leaving the range."
21 A. Parallel or perpendicular?
22 Q. Parallel; in other words, someone
23 shooting down the firing line -- holding a weapon
24 at port arms, for example.
25 A. And you're saying that it's behind him?

Page 120

1 Q. No, I'm not saying -- no, sir.
2 A. In front of him?
3 Q. Yes. A man is standing at the firing
4 line holding the arm at port arms --
5 A. Okay.
6 Q. -- drops his left arm a little bit so
7 that the rifle is pointing down, as opposed to
8 45 degrees up --
9 A. Okay.
10 Q. -- and accidentally discharges right
11 down the firing line.
12 A. Okay.
13 Q. Should the berm, the side berm, extend
14 one meter behind the firing line?
15 A. I'm not sure, based on the angle of
16 this gun, where the bullet is going to go.
17 Q. No, you don't --
18 A. I couldn't answer that.
19 Q. Okay. You're not following my question
20 because it's confusing -- and I confused you.
21 Do you agree or disagree with this
22 statement relative to the construction and
23 location of a side berm -- the wall, the side
24 berm.
25 "The wall will extend one meter

Page 121

1 (3.2 feet) behind the firing line to prevent a
2 bullet fired parallel to the firing line from
3 leaving the range."
4 A. Well, if it's fired parallel to the
5 range and not perpendicular, it wouldn't hit the
6 side berm or wall.
7 Q. Parallel to the firing line.
8 A. Oh, I'm seeing what you're saying.
9 I'm sorry. I understand now.
10 Q. Okay.
11 A. Yes, that would be recommended.
12 Q. And to not have it is a potential
13 bullet escape factor?
14 A. It would be.
15 Q. Thank you. Do you agree or disagree
16 with this statement on berms:
17 "Construction of the outer layer
18 2 meters (6.5 feet) thick of the impact face with
19 sands, silty sands, or clay sands free of rocks
20 and with 100 percent passing the No. 4 sieve
21 ASTM C-136. Soils with more than 40 percent clay
22 size particles passing the No. 200 sieve is not
23 acceptable for the outer 2 meters (6.5 feet)
24 layer of the impact face."
25 Do you agree or disagree with that?

Page 122

1 A. On the impact face, yes, I do. That's
2 the backstop.
3 Q. Okay.
4 MS. TREVER: I'm sorry. Just to make
5 sure the record is clear -- did that also talk
6 about the berms?
7 THE WITNESS: No. It's just the
8 impact area.
9 MR. RICHMAN: This is the impact face.
10 MS. TREVER: Okay.
11 Q. (BY MR. RICHMAN) No, I stand corrected.
12 That was earth berms -- yes, earth berms. I'm
13 not into backstops yet.
14 A. Okay.
15 Q. Does that change your answer?
16 A. It does.
17 Q. Go ahead.
18 A. I don't think it's necessary.
19 Q. But if the ETL says it, you just
20 disagree with it?
21 A. I do.
22 Q. Okay.
23 A. A different style of shooting.
24 Does the ETL reference -- just for my
25 knowledge -- the type of shooting from a static

Page 123

1 position or an advancement?
2 Q. I can't respond to that, sir.
3 Do you agree or disagree with this
4 statement:
5 "Do not use mild structural steel,
6 carbon steel plate, or low alloy steel conforming
7 to ASTM A36/A36M standard specification for
8 carbon structural steel ASTM A242/A242M standard
9 specifications for high strength, low alloy
10 structural steel or A572/A572M standard
11 specifications for high strength, alloy
12 Columbium-Vernadium structural steel. They lack
13 adequate pitting resistance and deteriorate
14 rapidly on small arm ranges."
15 Do you agree or disagree with that?
16 A. I couldn't tell. I'm not a
17 metallurgist.
18 Q. Did you make any recommendations as to
19 the nature of the steel to be used at Farragut?
20 A. I did.
21 Q. And is that before or after Fish & Game
22 told you that you would be using the steel they
23 provide?
24 A. I made the recommendations prior
25 to that.

Page 124

1 Q. Okay.
2 (Exhibit 25 marked.)
3 Q. (BY MR. RICHMAN) Exhibit 25 is a
4 document supplied by Fish & Game which shows the
5 construction of the side berms in relation to the
6 covered firing line. Okay? Can you read a
7 blueprint?
8 A. I can.
9 Q. Okay. Is it fair to say that that
10 shows that the side berms do not extend up to the
11 firing line on the sides; that they slope down
12 and, therefore, do not address one meter behind
13 the firing line?
14 A. If you could show me the firing line
15 itself on here.
16 Q. I can. The covered firing line is
17 right there. (Indicating.)
18 A. That is the firing line?
19 Q. Yes, sir.
20 A. Okay.
21 Q. Because it's so marked. I mean --
22 A. It says, "covered firing line," but it
23 does not show the firing line unless that is the
24 hash mark here that goes across here.
25 (Indicating.)

Page 125

1 Q. That's the way I read it -- and I'm
2 not the engineer.
3 A. I don't know if this is the covered
4 firing line itself.
5 Q. Okay.
6 A. So the firing line would then be moved
7 forward.
8 Q. Okay.
9 A. Is this the covered building?
10 Q. This is the covered building, as I
11 read it.
12 A. Okay. Then I believe the firing line,
13 it would be my understanding --
14 Q. Halfway?
15 A. Yes.
16 Q. You're going to put it in?
17 A. I would say it would be like that.
18 (Indicating.)
19 Q. And highlight it with this green pen
20 where you marked it. Highlight what you marked.
21 A. If you're saying, "halfway," it would
22 be across each like this. (Indicating.)
23 Q. Okay. My question to you is, using
24 that drawing -- assuming it to be true --
25 A. Yes, sir.

Page 126

1 Q. Is it fair to say that the side berms
2 do not go behind the firing line?
3 A. They do not go behind the firing line,
4 yes.
5 Q. And that they slope off in advance of
6 that, according to the drawing?
7 A. According to the drawing, yes.
8 Q. Have you made this statement in your
9 baffle design notes:
10 "TRS has modified our standard baffle
11 design, which includes AR or mild steel, to
12 accommodate Idaho Fish & Game's preferred use of
13 material already purchased and stored on-site."
14 A. Okay.
15 Q. Tell me, what is that all about?
16 A. I recommended a mild steel baffle.
17 They had informed me they did have mild steel
18 available.
19 I sent them a drawing depicting two
20 layers of ten-gauge with a five-and-a-half inch
21 glue laminated beam in front.
22 They said that they do have the
23 available ten-gauge, and they wanted to know if
24 they could utilize it because it was going to be
25 used in a roof structure, I believe. I said that

Page 127

1 would be more than adequate.
2 Q. Okay. But it is not what you normally
3 put in?
4 A. That is what we normally put in.
5 Q. Oh. So their steel is what you
6 normally use?
7 A. We use ten-gauge. We just built a
8 Live Fire Shoot House for the Army here, a rifle
9 indoor Live Fire Shoot House, and it is double
10 layer ten-gauge steel.
11 Q. Did you MIC the steel?
12 A. I did not.
13 Q. So you don't know if it's ten-gauge
14 or not?
15 A. I do not.
16 Q. Well, how can you certify that it's
17 ten-gauge to this Court -- excuse me.
18 Are you certifying to this Court that
19 it's ten-gauge?
20 A. I am not.
21 Q. So you don't know if it's ten-gauge
22 or not?
23 A. I do not.
24 Q. "Baffles are designed for use with up
25 to 30.06 caliber rifles."

Page 128

1 Did you make that statement?
2 A. I believe we did.
3 Q. And is that true?
4 A. Yes.
5 Q. What happens if somebody fires a 50?
6 A. It's going to go through it -- 50 BMG.
7 Q. Yes, sir. I stand corrected. You're
8 technically correct.
9 What happens if somebody fires any of
10 the hot big hunting rounds that are --
11 A. It will withstand up to a 458
12 Winchester Magnum.
13 Q. It will?
14 A. Yes.
15 Q. And what happens if it's hit in the
16 same space three or four times?
17 A. It will penetrate it.
18 Q. And if it penetrates, what happens?
19 A. It will go through it.
20 Q. And what happens to the bullet after it
21 penetrates?
22 A. There will be de-acceleration, the
23 bullet will fall, but the bullet will pass
24 through the baffle.
25 Q. But you don't know where it will fall?

Page 129

1 A. No.
2 Q. It might fall over the berm?
3 A. It could.
4 Q. You make this statement:
5 "The test baffle was constructed to
6 specifications within the baffle designed by
7 Idaho Fish & Game."
8 A. Yes, sir.
9 Q. What does that mean?
10 A. They ran a test baffle where they tried
11 their own material, and I believe they used up to
12 one-inch steel that failed.
13 I was asked to provide them with a
14 design that wouldn't fail, so we provided the air
15 space gap with the five-and-a-half-inch that is
16 able to stop the rounds.
17 Q. You go on to say, "The baffle was shot
18 with 12 rounds --"
19 A. Um-hmm. (Nodding head.)
20 Q. -- and you know that because you were
21 told that?
22 A. That is correct.
23 Q. No writing?
24 A. No, sir.
25 Q. "According to the Fish & Game, no

1 single round penetrated to the baffles."
 2 Do you know that of your own knowledge?
 3 A. I do not.
 4 Q. They told you that?
 5 A. Correct.
 6 Q. Did they tell it to you in writing?
 7 A. They did not.
 8 Q. TRS was not present during the baffle
 9 testing. That is true, isn't it?
 10 A. That is true.
 11 Q. Did you design wind sheer features for
 12 those baffles?
 13 A. I did not engineer the wind sheer.
 14 Q. Did you design them?
 15 A. No.
 16 Q. Well, in your A-8 you show steel
 17 supports for wind sheer resistance.
 18 A. Right.
 19 Q. What was that about?
 20 A. That would be additional bracing
 21 needed. That's up to the engineering firm that
 22 they hired or in-house.
 23 Q. So that's an engineering issue of which
 24 you're not concerned?
 25 A. That's right, yes.

1 A. The floor of the range?
 2 Q. The floor of the range, yes.
 3 A. I don't remember.
 4 Q. Does 2.5 ring a bell?
 5 A. That's a normal slope.
 6 Q. And is that what you recommended?
 7 A. I'm not sure.
 8 Q. What did they build?
 9 A. I don't know.
 10 Q. You didn't design the backstops or the
 11 berms, did you?
 12 A. No, sir.
 13 Q. You go on to say in your disclaimer
 14 inter alia, among other things, "TRS acknowledges
 15 that alternative designs may be available to
 16 achieve the same objective."
 17 What does that reference to?
 18 A. Other materials being used.
 19 Q. What about designs? Did that "design"
 20 refer here only to materials?
 21 A. You could use different designs. It's
 22 however they wanted to build the range that met
 23 their needs.
 24 Q. Was money an issue?
 25 A. I don't know if the money was an issue.

1 Q. Whether they fold down or not is an
 2 engineering issue?
 3 A. That's correct.
 4 Q. Your drawing A-7, which the Reporter
 5 will mark as Exhibit 26 --
 6 (Exhibit 26 marked.)
 7 Q. (BY MR. RICHMAN) -- shows -- and again
 8 the highlighting is mine. The yellow highlighting
 9 is mine. I take full responsibility for that.
 10 This shows what we discussed earlier,
 11 of only the front half of the canopy baffle being
 12 armored and the back half not; is that correct?
 13 A. That is correct.
 14 Q. Do you have anything to add to that
 15 from what we discussed?
 16 A. No, sir.
 17 Q. "Baffle Design Notes From TRS."
 18 A. Yes.
 19 Q. No. 3 of A-5. "The firing line should
 20 be clearly marked directly below the center line
 21 of the canopy room." You believe that is the
 22 case?
 23 A. That is the case.
 24 Q. What about the range slope? What did
 25 you recommend?

1 Q. You go on to say, "The current range
 2 design provided to TRS contains a 2.5 upward
 3 slope from the firing line to the target line."
 4 A. Okay.
 5 Q. "Adjustments in baffle design have been
 6 made to accommodate this slope."
 7 A. Yes.
 8 Q. "However, TRS does not recommend this
 9 type of upward slope for firing ranges."
 10 A. Okay.
 11 Q. Is that true?
 12 A. That would typically be true.
 13 Q. And why do you not recommend this?
 14 A. There were two issues: One was --
 15 the drainage issue was the most important; the
 16 secondary was the baffle elevation changes.
 17 Q. So does that change your disclaimer
 18 comment there in any regard?
 19 A. No. I believe it was built sufficiently.
 20 Q. (Gesturing.)
 21 A. No.
 22 MS. TREVER: The second part, just so
 23 you heard it, Harvey, I believe the witness
 24 testified, "No, it was built sufficiently."
 25 MR. RICHMAN: Oh, "sufficiently"?

Page 134

1 I didn't hear that.
2 (Record read by the Reporter.)
3 MR. RICHMAN: Thank you.
4 Q. (BY MR. RICHMAN) Is the word "skip,"
5 as opposed to "ricochet," used anywhere, to your
6 knowledge, in the NRA Range Manual?
7 A. I'm not sure.
8 Q. Is the word "skip," to your knowledge,
9 used anywhere in the ETL?
10 A. I don't know.
11 Q. Is the word "ricochet" used in both
12 documents?
13 A. I believe so.
14 Q. The NRA Range Manual says the following --
15 tell me if you agree or disagree with this:
16 "To reduce ricochets, the facing
17 surface must be free of rocks and debris to a
18 depth of 18 to 24 inches."
19 A. I would disagree because a bullet is
20 not going to penetrate the 18 inches. It depends
21 on the line of fire.
22 A bullet when shot downrange -- you
23 being a shooter would know this -- if you shot at
24 50 yards, 100 yards -- let's say the bullet struck
25 the soils at 75 yards. It's not going to penetrate

Page 135

1 18 inches. It is going to skip.
2 Q. Won't a bullet penetrate 24 inches of
3 dry sand?
4 A. No, sir.
5 Q. What is your authority for that?
6 A. I've read many manuals on penetration,
7 and we have done many penetration testings.
8 Q. Can you cite me to a document that says --
9 A. I cannot cite to you a document.
10 Q. Let me finish the question.
11 A. Okay.
12 Q. -- that a 30.06 round or other similar
13 hunting round will not penetrate 24 inches of
14 dry sand?
15 A. Dry sand, loose sand not contained with
16 a surface around it, there could be a possibility,
17 but something that has compaction or soil around
18 it, I would say, "No."
19 Q. Okay. Was there any floor compacted?
20 A. I would believe it's natural soil, yes.
21 It would be naturally compacted.
22 I don't know if they did a proctor on
23 it and did a compaction test.
24 Q. I'm here to tell you they did not do
25 but one proctor, and the range floor was addressed

Page 136

1 with major equipment, earth moving equipment.
2 A. Okay.
3 Q. Assume, for the purposes of my
4 question, that the range floor was addressed with
5 some earth moving equipment --
6 A. Okay.
7 Q. -- was it compacted?
8 A. I'm not sure, then.
9 Q. Should it have been compacted?
10 A. I'm not sure where you're leading with
11 this, but I would think there needs to be
12 compaction within the range floor.
13 Q. To what degree of compaction?
14 A. I would say 85 percent or greater.
15 Q. Is it fair to say -- because it is a
16 school of thought, 85 to 95 --
17 A. I understand.
18 Q. -- that the range floor should have
19 been compacted to 85 percent dry density?
20 A. I would agree with that.
21 Q. And if it wasn't, that portends a
22 problem?
23 A. It causes a settling, yes.
24 Q. (Gesturing.)
25 A. A settling.

Page 137

1 Q. Other than settling?
2 A. No.
3 Q. From a bullet perspective?
4 A. No.
5 Q. Under "Safety Baffles" in the NRA Range
6 Manual, it says -- and tell me if you agree or
7 disagree:
8 "The basic concept is based on a,
9 'blue sky gap,' meaning that the baffles are set
10 up so that the shooter, regardless of shooting
11 position, cannot see any blue sky downrange."
12 Do you agree or disagree with that?
13 A. Downrange?
14 Q. That's what it says, yes, sir.
15 A. Okay. Downrange, I think that, yes.
16 Q. You agree with this?
17 A. Yes -- downrange.
18 Q. Because you define "downrange --"
19 A. As the impact area.
20 Q. -- as only within the rectangle from
21 the firing line down?
22 A. Correct.
23 Q. And nothing to the right and nothing to
24 the left?
25 A. Correct.

1 Q. And -- let her file her objection.
 2 You don't think that's parsing of
 3 words?
 4 A. I'm not sure if it is.
 5 Q. If the back berm has concrete and/or
 6 rock debris greater than six inches inside the
 7 back berm -- not in the front two feet -- is that
 8 a mistake?
 9 A. It would not be recommended.
 10 Q. And you wouldn't recommend it?
 11 A. I would not.
 12 Q. And you have no idea whether that back
 13 berm was sieved to address that problem?
 14 A. I'm not sure.
 15 Q. You have no knowledge?
 16 A. No knowledge.
 17 Q. Thank you.
 18 Has TRS ever been sued?
 19 A. No.
 20 (Discussion held off the record.)
 21 Q. (BY MR. RICHMAN) Let me show you your
 22 photograph No. 14, page 7 of 8, which the
 23 Reporter will kindly mark as Exhibit 27.
 24 (Exhibit 27 marked.)
 25 Q. (BY MR. RICHMAN) I'm trying to bring

1 Q. Would you have designed it that way?
 2 A. I'm not sure. I don't know if I would
 3 have.
 4 Q. Okay. I'll live with that.
 5 Can you represent to the Court, as to
 6 the 100-yard range, that the design has achieved
 7 zero bullet escapement?
 8 A. Including accidental discharge?
 9 Q. Including accidental discharges.
 10 A. There is no facility in the world that
 11 a round could not get out of that has an
 12 accidental discharge.
 13 Q. Okay. I'm going to ask the question --
 14 A. The answer is, I believe a round could
 15 leave the range.
 16 Q. Okay. Is it fair to say that zero
 17 bullet escapement has not been achieved?
 18 A. And when you say that, in the direction
 19 of the range itself or zero in accidental and
 20 everything combined? I'm just asking for a
 21 clarification.
 22 Q. I can't clarify that for you.
 23 My question to you is, can you
 24 represent to this Court that zero bullet
 25 escapement has been achieved in the range as

1 something to a conclusion here with your
 2 photograph.
 3 Is it fair to say, by examining 14,
 4 that you can state with absolute certainty that
 5 the side berm does not --
 6 MS. TREVER: Harley, if you -- just for
 7 hearing purposes -- (Gesturing.)
 8 Q. (BY MR. RICHMAN) -- that the side berm
 9 does not go beyond and to the firing line?
 10 A. It appears that it does not.
 11 Q. Oh. Thank you. That is not to your
 12 liking, is it?
 13 A. I don't know if it's relevant.
 14 Q. I understand, but it is not to your
 15 liking, is it?
 16 A. I just would say I don't think it's
 17 relevant.
 18 Q. I understand that, but that's a legal
 19 issue.
 20 A. Well, I --
 21 Q. Are you happy about that circumstance?
 22 A. I don't think it's going to -- and here
 23 is where I'm at:
 24 I don't think it is going to change the
 25 position of an accidental discharge.

1 constructed?
 2 MS. TREVER: If I could interpose an
 3 objection in terms of Counsel has to allow the
 4 witness to qualify the answer as it relates to
 5 accidental discharge or to more narrowly limit
 6 his question.
 7 Q. (BY MR. RICHMAN) My question is, can
 8 you represent to this Court that the range as
 9 constructed has achieved zero bullet escapement?
 10 "Yes" or "No" -- and if you want to talk
 11 afterwards, you're entitled to talk all you want,
 12 but I need an answer to my question and then your
 13 explanation, if you wish.
 14 A. Okay. The answer is "No." The reason
 15 is it is designed to trap all rounds fired
 16 downrange.
 17 Any other rounds that are not fired
 18 downrange can escape.
 19 Q. Has the range eliminated blue sky from
 20 all potential shooting positions?
 21 A. As intended, yes.
 22 Q. Okay. Let's look at Exhibit 14.
 23 A. Okay.
 24 Q. Is blue sky viewable from orange No. 1?
 25 A. Yes.

Page 142

1 Q. From orange No. 2?
 2 A. Yes.
 3 Q. That doesn't look very good.
 4 A. That's all right. I can read it. Do
 5 you want a pen over it?
 6 Q. I've got a pen. 2, 1, okay.
 7 So from either of those orange circles,
 8 blue sky is visible; correct?
 9 A. Correct.
 10 Q. Is blue sky blueable (sic) -- viewable
 11 just to the left of the 50-yard enclosure?
 12 A. When you say --
 13 Q. Looking downrange.
 14 A. Looking downrange from -- give me an
 15 angle or give me a point on there, would you?
 16 Q. Yes. I'm going to put an arrow.
 17 A. Yes.
 18 Q. To the best of your knowledge, is the
 19 200-yard range designed essentially the same
 20 baffle-wise as the 100-yard, except its expanded
 21 length and its proportionate adjustments?
 22 A. I don't know.
 23 Q. Did you design it -- in other words,
 24 you don't know how it is designed as built?
 25 A. I don't know the as-builts on it.

Page 143

1 Q. Okay. I understand that.
 2 Is the range, as designed, 100 percent
 3 certain to prevent bullet escapement beyond the
 4 boundaries owned and controlled by Idaho
 5 Department of Fish & Game?
 6 A. The answer is "No," and I would like
 7 to comment.
 8 Q. Sure. You're always allowed to do
 9 that.
 10 A. The range is designed and intended to
 11 keep all rounds within the property if it's shot
 12 in the design it's intended for, which is to be a
 13 round fired downrange into the backstop, yes.
 14 Q. From time to time, rounds are not fired
 15 downrange, then; yes?
 16 A. I couldn't answer that because I don't
 17 know if that's going to happen or not.
 18 Q. In your experience, as you have
 19 described to us, have you ever experienced a
 20 round not being fired downrange?
 21 A. Yes.
 22 Q. You said, "downrange," and what was the
 23 other modifier?
 24 A. Into the backstop.
 25 Q. Have you ever experienced rounds that

Page 144

1 did not hit the backstop in your experience?
 2 A. Yes.
 3 Q. Both of those can and have occurred?
 4 A. Yes.
 5 Q. Could a range have been designed that
 6 would have zero bullet escapement?
 7 MS. TREVER: Excuse me. I believe,
 8 Counsel, that the witness already testified that
 9 no range can provide zero containment for cases
 10 involving accidental discharge.
 11 MR. RICHMAN: I assume that's in the
 12 form of an objection, but go ahead.
 13 Q. (BY MR. RICHMAN) Could a range be
 14 designed to prevent bullet escapement?
 15 A. I have not found one yet.
 16 Q. Okay. If you had angled side baffles --
 17 A. Yes, sir.
 18 Q. -- and angled overhead baffles --
 19 A. Yes, sir.
 20 Q. -- and an eyebrow on the berm, would
 21 that contain 100 percent of the rounds?
 22 A. No.
 23 Q. How would a round escape?
 24 A. If it ricochets or if it skips, it
 25 would leave the range.

Page 145

1 Q. What is your engineering, scientific,
 2 or other authority for that?
 3 A. Engineering and scientific, I have
 4 none, but I have walked hundreds and hundreds of
 5 ranges and viewed rounds on the ground, and I
 6 know how far rounds will travel when they skip
 7 out or when they hit or strike another hard
 8 object, and I've walked many distances to see
 9 that -- probably more than the engineer that's
 10 guessing about the velocity reduction when a
 11 bullet strikes a hard object.
 12 How does anyone determine off a
 13 computer or off a calculator how far that round
 14 is going to travel?
 15 Q. Have you ever heard of Celotex?
 16 A. I have not.
 17 Q. Celotex is a paper-like substance used
 18 to test for ricochets. Have you ever done a
 19 Celotex style test?
 20 A. I have not.
 21 Q. It's mentioned in the ETL.
 22 A. Okay.
 23 Q. Could you not test such a range with a
 24 Celotex board and fire 1,000 rounds and see where
 25 the 1,000 ricochets go?

Page 146

1 A. Maybe they could. I'm not sure.
2 Q. Could you do a computer modeling to
3 detest about bullet escapement?
4 A. I don't think it would be accurate
5 because there's no way to determine where the
6 bullet is going to travel.
7 When a round -- and you being a shooter
8 know this, as well -- when a round strikes an
9 object, how is anyone able to predict the direct
10 or the actual direction of the bullet?
11 Q. So your position is --
12 A. What I'm saying is if you want to
13 create a model that is going to be 100 percent
14 effective and to say that if you shot in a hard
15 surface, it's going to over the berm, that's
16 hearsay.
17 Q. That's what?
18 A. Hearsay. I don't believe that you
19 could say that it's going to go over the berm.
20 Q. But you're not an engineer?
21 A. I'm not.
22 Q. But an engineer might have a different
23 opinion?
24 A. I don't know.
25 Q. But he might?

Page 147

1 A. Okay.
2 Q. Has there been any testing of bullet
3 escapement on the range?
4 A. On the Farragut range?
5 Q. Yes.
6 A. No.
7 Q. The ETL talks about test fire
8 requirements. On a military range, isn't it true
9 that they actually do test fire testing?
10 A. On the materials installed.
11 I have never done -- on any of the
12 products we've put in -- done ricochet testing.
13 Q. Okay. On a fully contained range --
14 I'm reading from "Fully contained" from the ETL.
15 It says, "To test for ricochet containment, the
16 shooter must first fire service ammunition
17 non-tracer from the prone position into the
18 backstop and then at the floor. A test screen
19 (witness) may be used to test the ricochet
20 potential of the range floor. A test screen may
21 be constructed from Celotex (national stock) --"
22 and I'll leave the number out "-- or cardboard
23 material." What about such a test at Farragut?
24 A. I'm not aware of one.
25 Q. You have never done that testing,

Page 148

1 have you?
2 A. No.
3 Q. But if the military follows the
4 Department of Defense rules, they do, don't they?
5 A. I am not aware of it. I have just
6 completed several military ranges, and no tests
7 were done.
8 Q. Is it fair to say you -- do you speak
9 any Latin?
10 A. No.
11 Q. I'm infamous for my Latin. It's
12 called, "ignoscio nescio" (phonetic pronunciation),
13 "He doesn't know what he doesn't know."
14 Does the fact that you have never
15 observed it make it so?
16 A. No.
17 Q. What about this concept -- tell me if
18 you agree or disagree:
19 "To determine if a ricochet would have
20 left the range, site along a small diameter dowel
21 placed through the ricochet hole in the screen
22 material." Isn't that somewhat simplistic to
23 test?
24 A. It sounds that way.
25 Q. And you've never done it?

Page 149

1 A. No, sir.
2 Q. And you've never seen it done?
3 A. I've done dowel testing when I worked
4 at Weatherby Firearms.
5 Q. It goes on to say on "Trial operations":
6 "Trial operations of new or
7 rehabilitated range is mandatory."
8 Have any trial operations been done
9 at Farragut?
10 A. I don't know if the shooting has
11 commenced. I don't know if they've had the
12 opportunity to shoot.
13 Q. Is it fair to say, to the best of your
14 knowledge, no trial operations have been done?
15 A. I do not know.
16 Q. Has any statistical analysis of any
17 hazard assessment been done?
18 A. Not to my knowledge.
19 Q. Have you ever done a hazard assessment?
20 A. Yes.
21 Q. Where?
22 A. FBI.
23 Q. And what did you do on your hazard
24 assessment?
25 A. It's confidential and classified

Page 150

1 information. It was part of a core case that's
2 still pending.
3 Q. That's not confidential.
4 A. Well, it is to them.
5 Q. Did you testify in open court?
6 A. No, we did not. We have not gone to
7 court yet.
8 Q. Can you cite me to the case?
9 A. I cannot. I was told not to bring any
10 part of that case in -- involved with any
11 discussion --
12 MS. TREVER: Counsel, our understanding
13 is that he's not to --
14 Q. (BY MR. RICHMAN) I'm not arguing with
15 you. No, I'm not arguing with you. You've got
16 to do what you've got to do.
17 A. Okay.
18 Q. It's not contempt. You've got to do
19 what you've got to do.
20 I will, through Counsel, ask you to
21 tell us -- and I will do this through counsel,
22 not through you -- every case in which you have
23 testified. We began with that this morning,
24 do you remember?
25 A. Okay. Yes.

Page 151

1 Q. So we're going to get there.
2 A. That's fine.
3 Q. Can you even tell me the U.S. District
4 Court you're in or the name of the U.S. Attorney?
5 A. I cannot.
6 Q. Okay. We'll get it in writing.
7 Tell me what hazard -- maybe you have
8 already answered this -- you can't tell me the
9 nature of the hazard assessment you did?
10 A. I cannot.
11 Q. Okay. Have you ever done any statistical
12 analysis for hazard assessment purposes?
13 A. Yes. The same case.
14 Q. The same case?
15 A. Yes.
16 Q. Okay. And where did you get the
17 statistical pattern that you applied?
18 A. SAAMI was one of our sources.
19 Q. Who?
20 A. SAAMI.
21 Q. SAAMI, SAAMI who?
22 A. SAAMI is the guidelines of the shooting
23 industry.
24 MS. TREVER: It's an acronym, Counsel.
25 Perhaps explain the acronym.

Page 152

1 THE WITNESS: Sporting Arms and
2 Manufacturer's Institute.
3 Q. (BY MR. RICHMAN) Has that been applied
4 here at Farragut?
5 A. No.
6 Q. Have you recommended it?
7 A. No.
8 Q. Why?
9 A. I didn't think it was necessary.
10 Q. What kind of range is it usually
11 necessary at?
12 A. I guess one that's going to litigation.
13 Q. Oh, after an accident happens --
14 A. I have never -- and you can look at our
15 record -- I have never, of the over 100 ranges
16 we've built, over 100 designs, we've never had a
17 callback pertaining to a safety issue.
18 Q. That means either you're perfect or you
19 haven't been caught?
20 A. I have got a question for you -- you're
21 a hunter; correct?
22 Q. I am -- but I don't always answer
23 questions, but try.
24 A. Okay. I'm just wondering, as we're
25 talking about safety and we're getting somewhere,

Page 153

1 and you strike -- shoot at an animal with your
2 30.06 and if you miss and the bullet strikes a
3 hard object, where does that bullet go?
4 Q. Fortunately, I don't answer that.
5 A. Okay.
6 Q. Do you agree or disagree with this
7 dictionary definition:
8 "Downrange: Away from where a missile
9 was fired."
10 A. I think that's very broad.
11 Q. Do you agree or disagree?
12 A. I think it needs to be more defined.
13 I would disagree.
14 Q. Merriam-Webster does what she does.
15 A. Okay.
16 Q. My question is, do you agree or
17 disagree with that definition?
18 A. I would disagree.
19 Q. Okay. You're entitled.
20 MR. RICHMAN: Off the record.
21 (Discussion held off the record.)
22 (Recess taken.)
23 Q. (BY MR. RICHMAN) We're back. I remind
24 you that you're still under oath.
25 During the break, did you have any

1 discussions about this case with any third
2 persons, or attorneys, or representatives of
3 Fish & Game?

4 A. Yes.

5 Q. And what did you discuss?

6 A. We discussed -- just kind of went over
7 the highlights of the items that were discussed
8 between us.

9 Q. Did you get any information back?

10 A. No.

11 Q. Okay. I want to read a definition to
12 you, and tell me whether you agree with it or
13 disagree. It's not a definition; it's a
14 statement:

15 "Ricochet plays a significant role
16 in defining the SDZ contours, and its
17 unpredictability poses some serious difficulties
18 in properly assessing its full impact on the
19 danger zone. There are several factors that
20 influence the behavior of a projectile after it
21 ricochets. These include the impact angle,
22 ricochet media, the bullet construction to name
23 just a few. There are other elements which are
24 suspect (i.e., spin rate) and probably some that
25 we are not aware of."

1 Do you agree or disagree with that?

2 A. I agree with that.

3 Q. Okay.

4 (Exhibit 28 marked.)

5 Q. (BY MR. RICHMAN) I have in my hand
6 Exhibit 28 which purports to be, if I am correct,
7 part of the Scope of Work of TRS Consulting
8 Services. I'm going to give it to you when I'm
9 finished reading.

10 In the second paragraph, it says,
11 "TRS to provide the following: No. 3. Provide
12 baffle geometry and specifications for baffle
13 construction (baffle design to be determined
14 later based on project budget for the following
15 scenarios:)"

16 There's more to it, but that's what
17 I'm focusing on.

18 A. Okay.

19 Q. Is that correct?

20 A. That is correct.

21 Q. Were there budgetary considerations in
22 your design?

23 A. No. The design -- the question to this
24 was meant, would they be advancing downrange?
25 Would this be a tactical or combat style range

1 where law enforcement would be using this for
2 training. If so, there needed to be additional
3 baffles.

4 Q. But what it says here is, "Baffle
5 geometry and specifications for baffle
6 construction (Baffle design to be determined
7 later based on project budget)."

8 A. Correct.

9 Q. So what does that parenthetical phrase,
10 "Baffle design to be determined later based on
11 project budget" mean?

12 MS. TREVER: Objection; asked and
13 answered.

14 Q. (BY MR. RICHMAN) Go ahead.

15 A. They had a former law enforcement
16 entity, I was told, shot in that facility, and
17 they wanted to know what the cost differentiation
18 would be between designing a range like this as a
19 static range versus a tactical range, and they
20 were going to see what was in the budget to be
21 able to do that -- and it was not in their
22 budget.

23 Q. Okay. What was not in the budget?

24 A. The ability to have a combat or a
25 tactical style range.

1 Q. Okay. We sent out, Plaintiffs,
2 Requests For Production, and we got an answer.
3 Requests For Production No. 4 has a document
4 supplied to me by Fish & Game, "Wood And Mill
5 Yard Debris Technical Guidance Manual," which is
6 dated February 1998. Are you familiar with it?

7 A. No.

8 Q. Let me hand it to you.

9 A. Okay.

10 Q. I know you can't read all that sitting
11 there -- and I'm not going to ask you to do that.
12 Have you ever seen that before?

13 A. I have not.

14 Q. I'm going to pull out from it the Table
15 of Contents and working with it -- paragraph 6
16 says: "Alternative uses of wood and mill yard
17 debris: Firewood, hog fuel--" do you know what
18 that is?

19 A. No.

20 Q. That's what they shovel into steam
21 generators.

22 A. Okay.

23 MS. TREVER: Objection to the extent
24 Counsel is characterizing what's in the document.

25 MR. RICHMAN: I will withdraw that.

Page 158

1 Q. (BY MR. RICHMAN) Do you know what
2 hog fuel is?
3 A. I do not.
4 Q. Then I'm not going to tell you.
5 A. Okay.
6 Q. "Landfill alternative daily cover and
7 final cover material. Land reclamation and
8 erosion control. Landscaping materials. Road
9 fill, soil amendments, stockyard bedding, visual
10 and sound barriers, wood and mill yard debris
11 landfills."
12 Does the log yard waste, as employed at
13 Farragut range, from your perspective, come in
14 under any of those sub-heads?
15 I'm going to hand it to you --
16 A. Yes.
17 Q. -- because you may not remember them all.
18 A. Yes, it does.
19 Q. And which one?
20 A. It was the sound -- let me find it
21 here -- visual and sound barriers.
22 Q. Okay. Does it have anything to do with
23 the visual barrier?
24 A. I think it beautifies the site.
25 Q. To be sure. Okay. But anything else

Page 159

1 on the visual side?
2 A. No.
3 Q. And from a sound barrier, what does
4 it do?
5 A. It would have to absorb sound, as
6 opposed to refract it.
7 Q. You will have to say that again, sir.
8 A. It would have to absorb sound, rather
9 than refract sound with a hard surface.
10 Q. Okay. Are you an acoustical engineer?
11 A. I am not.
12 Q. Do you have any training in acoustics?
13 A. No.
14 Q. What's the definition of "DBA"?
15 A. Decibels -- and I couldn't tell you the
16 others.
17 Q. What does that "A" mean?
18 A. I couldn't tell you.
19 Q. Do you do any sound amelioration work
20 at ranges?
21 A. We hire consulting firms to do it.
22 Q. But that's not your field?
23 A. No.
24 Q. Okay. So do you have any scientific or
25 engineering data to suggest that that log yard

Page 160

1 waste would do any sound amelioration at the
2 range?
3 A. I do not.
4 Q. Exhibit 6 is black and white. I should
5 have -- and I failed and I apologize because I
6 actually have a color copy with me.
7 With counsel's permission, can I show
8 you the color copy of No. 7 and ask you if the
9 black and white that you have there and the
10 No. 7 color copy that I have are the same?
11 A. They are.
12 Q. Okay. And you may have both of those
13 while we testify here.
14 MS. TREVER: Excuse me, Counsel. Do
15 you want to make a replacement?
16 MR. RICHMAN: I can, but it doesn't
17 make any difference for the purposes of my
18 question. Thank you.
19 Q. (BY MR. RICHMAN) Is it fair to say
20 that the 100-yard range, which is pictured in
21 No. 7, has no baffles constructed on the last
22 half of the range as depicted in that picture?
23 A. It's hard to say, unless you measure
24 it, but by looking at this, it does not appear to.
25 Q. Thank you. That's all I wanted to

Page 161

1 establish. I will give this back to you.
2 (Handing document to the witness.)
3 Look at Exhibits 22 and 17, I noticed
4 that the steel stanchions that support the
5 overhead baffles, which are further downrange,
6 as opposed to nearer uprange, are not covered
7 with dimensional timber or plywood; is that
8 correct?
9 A. In these pictures, they're not. I
10 believe they were.
11 Q. You would be in error, but --
12 A. Okay.
13 Q. -- that's not important.
14 A. Okay. I do not see dimensional lumber
15 placed on them.
16 Q. Were they supposed to be covered?
17 A. Yes.
18 Q. Do you know why they were not?
19 A. I do not.
20 Q. Okay. In Exhibit No. 4 from the NRA
21 Range Manual, looking at the upper half, would it
22 have been wise to draw such a picture showing
23 bullet -- potential trajectory -- downrange which
24 somehow skips and/or ricochets off the ground
25 media?

1 MS. TREVER: Excuse me. Could you
 2 repeat that?
 3 MR. RICHMAN: Read it, please.
 4 (Record read by the Reporter.)
 5 MS. TREVER: Objection as to the
 6 foundation for the question, not understanding
 7 the context of who it would have been wise to
 8 add drawings for.
 9 MR. RICHMAN: Answer the question.
 10 THE WITNESS: This drawing does not
 11 show ricochet. This shows direct line of fire,
 12 and I feel it's not necessary.
 13 Q. (BY MR. RICHMAN) But what happens to
 14 the bullets depicted on the upper half that
 15 strike stone or other ricochet media?
 16 A. They're going to skip into the backstop.
 17 Q. And what proof do you have of that?
 18 A. Years of looking at relationships
 19 pertaining to ricochets at ranges.
 20 Q. Okay. Would you have -- what ricochet
 21 testing do you have under your belt?
 22 A. We have done ricochet testing years ago
 23 where we put --
 24 Q. Let me -- I must interrupt you.
 25 The question -- I want to know "you."

1 that the reduction from your drawing of seven
 2 to six was blessed by you?
 3 A. Not in writing, but verbally, yes.
 4 Q. (Gesturing.)
 5 A. No -- and yes, we did bless it verbally.
 6 Q. Is it your Standard Operating Procedure
 7 to make drawing changes without documentation?
 8 A. I think this is one of the -- we have
 9 never been asked to make the changes. We have
 10 never had a client that was able to get product
 11 for free and increase the berm height, and this
 12 was one of the exceptions.
 13 Q. Okay. My question was about company
 14 practice?
 15 A. This is the first time we were asked,
 16 and no.
 17 Q. To cover your own corporate fanny --
 18 and I use the vernacular, if I may -- you
 19 designed something with seven baffles.
 20 A. Um-hmm. (Nodding head.)
 21 Q. And they built it with six baffles.
 22 A. Um-hmm. (Nodding head.)
 23 Q. You have to say, "Yes" or "No."
 24 She can't get "Um-umms." (Nodding head.)
 25 A. Okay.

1 A. I did ricochet testing based on media,
 2 and we were testing rubber materials, plastic
 3 materials, and also sand.
 4 We put up large cardboard and large
 5 pieces to eight-foot high paper to see what type
 6 of skip ratio we would obtain from them in short
 7 distance in relationship to live firehouse.
 8 Q. Just like the Celotex testing that
 9 I described earlier.
 10 A. I'm not familiar with Celotex.
 11 Q. Well, it was only the medium.
 12 A. Okay.
 13 Q. Has that been peer reviewed?
 14 A. It has not.
 15 Q. Has anyone reviewed it, other than your
 16 good self?
 17 A. Just my employees.
 18 Q. Who work under you?
 19 A. Who did, yes.
 20 Q. Okay. Looking at Exhibit No. 1, have
 21 you ever issued a baffle design protocol that
 22 shows six baffles?
 23 A. I did not draw a range that I'm aware
 24 of with six baffles.
 25 Q. Did you ever in writing acknowledge

1 MS. TREVER: You haven't asked the
 2 question yet.
 3 MR. RICHMAN: You're correct.
 4 Q. (BY MR. RICHMAN) What do you have to
 5 protect yourself in the future -- your company,
 6 you -- relative to this change?
 7 A. The increased berm height allows the
 8 baffles to be reduced. The protection comes
 9 from -- "Is there still no blue sky downrange?"
 10 and by increasing the berm height, you can
 11 eliminate one baffle and, yes, we feel it's safe.
 12 Q. Which is not the question I asked you.
 13 The question I'm asking is about how
 14 your company protects itself -- if you got sued
 15 by Billy Bob Thornton and there's only six
 16 baffles, where is the documentation that the
 17 seventh baffle has been removed with your
 18 blessing?
 19 A. There is no written documentation.
 20 Q. Okay. I'm going to read to you from
 21 the Court Order.
 22 A. Okay.
 23 Q. It's fair to say you have read the
 24 Court Order at one time?
 25 A. I did not. I have not read the

Page 166

1 Court Order.
2 Q. So you don't know, not having read the
3 Court Order, whether the range is compliant with
4 the Court Order?
5 A. I am not aware.
6 Q. The answer is, you do not know?
7 A. I do not know.
8 Q. Okay. Did you ever ask to read it?
9 A. No. I was asked to build to a certain
10 design standard.
11 Q. Which was given to you in writing?
12 A. That is correct.
13 Q. Okay. Here is what the Court said in
14 paragraph 62:
15 "The 'no blue sky' rule is that all
16 pistol and rifle ranges be designed to include
17 containment to eliminate the, 'blue sky' view
18 from all potential shooting positions."
19 Is the range compliant with that?
20 A. No, but no --
21 Q. I'm hard of hearing, so that's my fault.
22 A. The range is designed with the rounds
23 intended to be shot into the backstop, and it
24 does meet that compliance.
25 Q. Well --

Page 167

1 A. I heard what you said.
2 MS. TREVER: I'm sorry. I want to also
3 make sure -- can you read back where Counsel
4 stopped in quoting the Court Order?
5 (Record read by the Reporter.)
6 MS. TREVER: I would pose an objection
7 that Counsel is not reading from the Order
8 version of the Court Order. I'm just noting for
9 the record of a characterization of the document.
10 MR. RICHMAN: Okay.
11 Q. (BY MR. RICHMAN) The next sentence --
12 tell me if the range is compliant herewith:
13 "Containment must not only be from
14 all firing positions shown on the plans, but also
15 from the impromptu locations that can be
16 anticipated and available to be established
17 by shooters."
18 A. Can you define what "impromptu" is on
19 this range?
20 Q. Use plain English, sir. Either you
21 know or you don't know.
22 A. Okay. I believe that it is designed to
23 contain all the ranges -- excuse me -- all the
24 rounds, and that there is no impromptu with the
25 design of this particular style of range.

Page 168

1 Q. Okay. I want you to assume -- strike
2 that.
3 What does "impromptu" mean?
4 A. The ability to change.
5 Q. Okay. So do you understand what I read
6 to you --
7 A. I do.
8 Q. I didn't finish the sentence.
9 A. Okay.
10 Q. Do you understand what I read to you
11 means that not only the assigned firing
12 positions, but positions that persons may take
13 other than assigned, i.e., impromptu. Do you
14 understand it to mean that?
15 MS. TREVER: Objection. Counsel is
16 asking the witness to testify as to the meaning
17 of the Court's decision.
18 The witness did not participate in,
19 and he's speculating as to what the Court meant
20 in that particular case.
21 Q. (BY MR. RICHMAN) I'm asking what you
22 understand. I want to know what's in your head.
23 A. Okay. If someone does not abide by the
24 rules of the range, I think, yes, a round could
25 leave the range.

Page 169

1 If someone abides by the range rules,
2 I don't believe a round will leave the range
3 site.
4 Q. So people are on their honor?
5 A. They are under the guidance of the
6 range supervision or the Range Master.
7 Q. On their honor to obey?
8 A. Yes.
9 Q. Okay. Do you have a driver's license?
10 A. I do.
11 Q. Ever get a ticket?
12 A. Not since I was 16.
13 Q. Well, what, ticket did you get when you
14 were 16?
15 A. Crossed a yellow line.
16 Q. You didn't obey?
17 A. I didn't obey.
18 Q. Okay. You're human. Okay.
19 I'm going to read this to you again --
20 and I'm looking for a definitive response. You
21 can explain anything you want, but I need a
22 "Yes" or a "No."
23 Is the range compliant with the
24 following:
25 "Containment must not only be from all

Page 170

1 firing positions shown on the plans, but also
2 from the impromptu locations that can be
3 anticipated and available to be established by
4 shooters."
5 MS. TREVER: Objection as to argumentative.
6 Q. (BY MR. RICHMAN) Go ahead.
7 A. Well, I don't understand some of the
8 wording in this, Harvey -- and help me with this
9 and --
10 Q. I'm going to try now --
11 A. When it says, "anticipated" -- and
12 that's where I'm having a hard time deciphering.
13 What is "anticipated" is my question to you? I
14 mean, what do you anticipate someone to do? If I
15 knew that, I would be able to tell you "Yes" or
16 "No," but I don't know what is anticipated.
17 Q. You asked -- and I'm going to try to
18 help to cone down on this.
19 A. Okay.
20 Q. "Anticipated" means that people will
21 from time to time shoot at a position that is not
22 designated that may be desirable or advantageous
23 or affectatious for them at the time, but it
24 isn't a marked shooting position 1 through 12 as
25 contained in the shooting shed there are

Page 171

1 positions 1 through 12. That is what I
2 understanding it to mean.
3 Assuming that that is the case, what is
4 your answer?
5 A. A round could leave the range.
6 Q. And it is not compliant with that
7 provision?
8 MS. TREVER: Objection as to
9 mischaracterizing what "compliant with the
10 Court's Order" means, making assumptions that are
11 not in evidence.
12 Q. (BY MR. RICHMAN) Is it compliant with
13 that phrasing?
14 A. I don't believe it is.
15 Q. Thank you. The Court goes on to say in
16 paragraph 9 of the Order section --
17 MS. TREVER: I don't believe there is a
18 paragraph 9 in the Order section.
19 MR. RICHMAN: The Conclusions of Law
20 section. I stand corrected.
21 In the Conclusions of Law -- and
22 you and I are not going to discuss lawyerly
23 stuff -- paragraph 9 it says, among other things,
24 Paragraph 1 in 9:
25 "Include safety measures adequate to

Page 172

1 prevent escapement beyond the boundaries owned
2 and controlled by Idaho Department of Fish & Game
3 including all potential omissions, mistakes, on
4 purpose, et cetera."
5 Does the range, as presently constructed,
6 prevent bullet escapement beyond the boundaries
7 owned and controlled by Idaho Fish & Game.
8 A. I believe the range does, but I don't
9 believe what was written in there does because
10 what you said was two different things.
11 Q. Okay. Is the range compliant with the
12 following --
13 A. The range is compliant, but if someone
14 were to have an accidental discharge in the
15 parking lot, then I feel -- then you would have
16 a different issue.
17 Q. Okay. We're not talking about
18 accidental discharges in the parking lot.
19 A. Okay, but -- could you repeat that,
20 please.
21 Q. We're talking about someone who is
22 actively intending to shoot -- whether they
23 squeeze the trigger accidentally or on purpose --
24 A. Okay. Well, that's accidental.
25 Q. Is the range as built compliant with

Page 173

1 the following: "1. Include safety measures
2 adequate to prevent bullet escapement beyond the
3 boundaries owned and controlled by IDF&G?"
4 A. I think it meets that compliance.
5 Q. Thank you. And your basis for that?
6 A. I don't believe a round that would
7 strike any of the surfaces in there would leave
8 the property boundaries.
9 Q. And the underlying basis of your
10 opinion for that statement is --
11 A. Visiting hundreds of ranges.
12 Q. Personal experience?
13 A. That is correct.
14 Q. Over which there has never been
15 peer review; correct?
16 A. That is correct.
17 Q. Over which there is no literature to
18 support or sustain your years of viewing?
19 A. Correct.
20 Q. Over which no published literature
21 supports your position; correct?
22 A. Correct.
23 Q. Just what you know from your
24 observations and is contained in your memory?
25 A. That's correct.

1 Q. Thank you. The Court goes on to say --
 2 this is just a statement -- "The first concern
 3 (safety) is satisfied only by the, 'no blue sky
 4 rule,' were totally baffled so that no round can
 5 escape --" ellipses -- it goes on, but it's not
 6 consequential for my question.
 7 Is this range totally baffled?
 8 A. It is totally baffled, yes.
 9 Q. And define "totally baffled" for me.
 10 A. You're not able to see blue sky from
 11 your desired shooting position to the impact
 12 area.
 13 Q. And where is that definition that you
 14 have just shared with me found?
 15 MS. TREVER: Objection; asked and
 16 answered.
 17 THE WITNESS: You have pointed it out
 18 to us earlier on some testimony.
 19 Q. (BY MR. RICHMAN) Okay. I read to you
 20 from the ETL "Fully contained."
 21 A. That's "fully contained," not baffled.
 22 Q. Oh, that's the difference.
 23 A. That's correct.
 24 Q. Okay. And what is the basis -- are you
 25 of the opinion that no round can escape the

1 Relative to the testimony you earlier
 2 gave, that bullets that hit the various downrange
 3 media on the floor -- the steel, the concrete, or
 4 the stone -- will fragment, is your authority for
 5 that the same as the authority you gave me a
 6 moment ago?
 7 A. It is.
 8 Q. Okay. You have no data to support it?
 9 A. No.
 10 Q. You have no engineering reports to
 11 support it?
 12 A. No.
 13 Q. Do you have a test that was conducted
 14 to support it?
 15 A. Not in writing.
 16 Q. Okay. I need the CV. We are up to that.
 17 In your CV, which you have supplied to
 18 us, it says, "Weatherby Farms --" excuse me --
 19 "Weatherby Firearms, South Gate, California, 1986
 20 to 1991. Ballistic expert and product Development
 21 Manager." Bullet -- bullet point: "Provided
 22 warranty service for Weatherby firearms."
 23 A. Correct.
 24 Q. That has nothing to do with your
 25 expertise from a testimonial perspective today,

1 range?
 2 A. Correct.
 3 Q. And your scientific or engineering
 4 basis to support that?
 5 A. Once again, the answer is "No."
 6 Q. It is based solely on your personal
 7 experience?
 8 A. Correct.
 9 Q. Which has not been peer reviewed?
 10 A. Correct.
 11 Q. Which has never been questioned by
 12 anybody?
 13 A. Correct.
 14 Q. Which is all contained in your head
 15 with no written proof to support any of it?
 16 A. That is correct.
 17 Q. Okay. And the picture known as 16 does
 18 not show blue sky?
 19 A. It does show blue sky.
 20 Q. But it doesn't show blue sky downrange?
 21 A. Correct.
 22 Q. But it shows blue sky forward of the
 23 firing line?
 24 A. Yes.
 25 Q. Thank you, sir. I'm almost done.

1 does it?
 2 A. It does.
 3 Q. How so?
 4 A. Because we would check velocities,
 5 check penetration, check deflection of different
 6 bullets and calibers.
 7 Q. And who trained you to do that?
 8 A. No one.
 9 Q. Self-trained?
 10 A. On-the-job.
 11 Q. And then it goes on to say,
 12 "Responsible for design and testing of new
 13 firearms products"?
 14 A. Correct.
 15 Q. Does Weatherby make ammunition?
 16 A. They do.
 17 Q. What did you do in that bullet point
 18 that bears upon your expertise to testify today?
 19 A. I was one of the designers of the 416
 20 Weatherby Magnum. We did penetration testing, we
 21 did bullet deflection testing, we did testing
 22 pertaining to accuracy and pressures.
 23 With this, you also learn by shooting
 24 different media what the bullet is going to do,
 25 how far it's going to fly, what's the ricochet

1 potential, what's the penetration potential. We
 2 would shoot ballistic media.
 3 Q. Who oversaw your work?
 4 A. Fred Jennings.
 5 Q. And who was Fred Jennings?
 6 A. He was the senior engineer.
 7 Q. Did he critique your work in writing?
 8 A. No.
 9 Q. Did you take any tests to qualify for
 10 that position?
 11 A. No.
 12 Q. Do you have in your possession any of
 13 that testing data?
 14 A. Not in my possession.
 15 Q. When was the last time you read that
 16 data?
 17 A. Many years ago.
 18 Q. Would that be when you left Weatherby
 19 in 1991?
 20 A. Yes.
 21 Q. And your recollection factor since 1991
 22 of this is eidetic and perfect?
 23 A. I don't know. It hasn't been tested.
 24 Q. So even you don't know if your memory
 25 is good on this point?

1 Department of Justice on range improvement. Was
 2 that in writing?
 3 A. Yes.
 4 Q. Did you do an evaluation of the
 5 Farragut range?
 6 A. Yes.
 7 Q. Was it in writing?
 8 A. Yes.
 9 Q. How many pages is that document?
 10 A. Three pages, four pages. I don't know.
 11 Somewhere within there.
 12 Q. Is that different than the Affidavit?
 13 A. No.
 14 Q. That is the Affidavit?
 15 A. Correct.
 16 MS. TREVER: Excuse me. For record
 17 correction and clarification purposes, the
 18 document he's referring to is the attachment to
 19 the Affidavit.
 20 MR. RICHMAN: Okay. I stand corrected.
 21 My fault, sir.
 22 THE WITNESS: Okay.
 23 MS. TREVER: Let's just say that the
 24 witness understands -- your understanding is the
 25 same thing.

1 A. I think it's pretty good.
 2 Q. When you worked for Tetra Tech, EM,
 3 Inc., through 2000 and 2002 --
 4 A. Yes.
 5 Q. -- you designed, among others, outdoor
 6 firing ranges?
 7 A. Correct.
 8 Q. Who put a seal on those, an engineering
 9 seal?
 10 A. Tetra Tech did.
 11 Q. Well, who is the engineer?
 12 A. We had various engineers within the
 13 company that did.
 14 Q. But you couldn't seal anything, could
 15 you?
 16 A. I did not have a PE. I'm not an
 17 engineer.
 18 Q. And you're not an engineer today?
 19 A. That's correct.
 20 Q. So the designs that you did at Farragut
 21 Range could not be built upon without some PE's
 22 blessing?
 23 A. Only the structural aspects; not the
 24 ballistics aspects.
 25 Q. Okay. You did an evaluation for the

1 Q. (BY MR. RICHMAN) Counsel was correct
 2 when she corrected you, and you stand corrected
 3 on that?
 4 A. Yes, sir.
 5 Q. Okay. So the document of April 28th to
 6 Dallas Burkhalter is the evaluation of the range?
 7 A. Correct.
 8 Q. You said you didn't read Judge Mitchell's
 9 Order; is that correct?
 10 A. I was told about it. I may have
 11 glanced at it, but I did not thoroughly go
 12 through it; that's correct.
 13 Q. Well, I'm not trying to parse words
 14 here.
 15 A. Okay.
 16 Q. Did you read Judge Mitchell's Order?
 17 A. No.
 18 Q. Okay. It says in your letter to
 19 Mr. Burkhalter:
 20 "As per Judge Mitchell's Order, the
 21 standard required for the range to reopen is for
 22 a baffle to be installed over every firing
 23 position that!"
 24 A. Okay.
 25 Q. You didn't get that from the Court

1 Order; you were given that?
 2 A. That's correct.
 3 Q. The last paragraph on page 1 reads:
 4 "Based on the March 11, 2010, inspection,
 5 TRS has determined that the conditions identified
 6 by Judge Mitchell have been satisfied by the
 7 range improvements." What are those conditions?
 8 A. That they would have a "No blue sky"
 9 downrange shooting facility.
 10 Q. Is that the extent of it?
 11 A. Yes, sir.
 12 Q. When you said on page 2, "The backstop
 13 is constructed of screened sand," you don't know
 14 that to be so -- you were told?
 15 A. That's correct.
 16 Q. It said, "TRS noted the following
 17 improvements to the range and berm construction,"
 18 and you go on to say, "The backstop is constructed
 19 of screened sand"?
 20 A. Correct.
 21 Q. You stand by that?
 22 A. Yes. If you look at the sand and pick
 23 up the sand, the particulate is the same size.
 24 It had to go through a sieve.
 25 Q. How deep?

1 the NRA Range Manual in its present form?
 2 A. I don't know if I'm more knowledgeable;
 3 I'm just saying that it has not been substantiated,
 4 and I haven't gone through every aspect of it,
 5 but I'm very aware of the writings and the
 6 formatting of it.
 7 I believe there needs to be a guideline
 8 set out for everyone to use to be the standard,
 9 and it's been asked for 100 times over --
 10 including by myself -- but it has not been done.
 11 There are no guidelines.
 12 Q. Have you ever written one?
 13 A. I have not.
 14 Q. Do you contemplate writing one?
 15 A. I haven't -- but it needs to be done.
 16 There's your requirement job.
 17 Q. Do you want to partner it with me?
 18 A. It needs to be done -- it really does.
 19 Q. A week in Maui, we can do it.
 20 (Laughter.)
 21 Do you believe that your knowledge is
 22 of greater substantial worth than the ETL that
 23 you worked under?
 24 A. I don't know that it is. I could just
 25 say that I think there are flaws in all the

1 A. I don't know how deep.
 2 Q. (Gesturing.)
 3 A. I do not know how deep.
 4 Q. You don't know if it's an inch or
 5 two feet?
 6 A. Well, it's more than an inch, but I
 7 don't know if it's two feet.
 8 Q. And you conclude with this:
 9 "As previously stated, it is TRS's
 10 opinion that IDF&G satisfied the requirements of
 11 the Court Order by the improvements implemented
 12 at the Farragut Ranch." You said that.
 13 A. That's correct.
 14 Q. (Gesturing.)
 15 A. Yes, sir.
 16 Q. Do you stand by that?
 17 A. I do.
 18 Q. Even though you have never read the
 19 Court Order?
 20 A. Correct.
 21 Q. To what published work do you defer as
 22 the major guide in range construction?
 23 A. None.
 24 Q. Is it your position that you, by virtue
 25 of your experience, are more knowledgeable than

1 different Manuals that I've read. I don't think
 2 any of them are perfect. I think they're
 3 guidelines.
 4 I think people adopt guidelines because
 5 there are no regulations, and there are no true
 6 rules. There's not an international Building
 7 Code for ranges.
 8 Q. I want you to assume that I would like
 9 a job like yours, and I want to open up in
 10 competition across the street.
 11 I want to have in my library documentation
 12 to guide me in the range designs. What should
 13 I have?
 14 A. I would say the best advice would be to
 15 develop your own or go out on-site and examine
 16 the ranges personally because you're going to
 17 find what's out there is not 100 percent
 18 conclusive.
 19 Q. How do I prove my own observations
 20 and opinions?
 21 A. How does a person develop anything
 22 unless they go visit it themselves?
 23 When you start anything -- you start a
 24 new business and it's new, these people are going
 25 off of what experiences?

Page 186

1 The person that wrote the NRA manual
 2 and the different authors within it -- I'm
 3 published in that manual, as well. Have they
 4 ever proved my backstop would work? They never
 5 fired a single round into it. There's no proof
 6 in there that says what I say will work.
 7 Q. Okay. I want to build my own range.
 8 A. Okay.
 9 Q. I ask you to design a range for me, and
 10 I say to you, "I've received your designs." What
 11 can you give me to support the bona fides of your
 12 designs?
 13 A. It would be references -- and I would
 14 write a list of references such as the FBI, such
 15 as the Army, such as the Navy, the Air Force, and
 16 100 other municipality agencies that have used
 17 our design that have worked.
 18 That's what I would give you. "Here
 19 are our list of references. Please call them and
 20 ask if they had one problem or we didn't meet
 21 their expectations.
 22 Q. But you wouldn't be able to give me any
 23 engineering substance; correct?
 24 A. Correct.
 25 Q. No research?

Page 187

1 A. Other than the on-site, no.
 2 Q. No peer review of your work?
 3 A. That's correct.
 4 Q. Okay. I'm trying to --
 5 A. I mean, how many times have you asked
 6 me that same question, though?
 7 Q. If I'm repetitive, Counsel is going to
 8 jump me.
 9 A. Okay.
 10 Q. I'm trying to conclude here, and we're
 11 almost there?
 12 A. Okay.
 13 Q. What is "SAAMI"?
 14 A. Standards of Sporting Arms and Ammunition
 15 Manufacturing Institute -- industry guidelines
 16 towards pressure velocities and standards
 17 within --
 18 Q. Okay. Keep going.
 19 A. -- the ammunition bullet realm.
 20 Q. Okay. I think this is my last area.
 21 Whether the design is akin to a
 22 military range or a civilian range, as long as
 23 it's not tactical it doesn't make a particle of
 24 difference; isn't that correct?
 25 A. No, it does make a difference.

Page 188

1 Q. Okay.
 2 A. The rounds that are applied and fired,
 3 and the limitations within those have a
 4 significant bearing to the design of the range.
 5 Q. Okay.
 6 A. Military rounds, steel core, API,
 7 tracer. There's very different specs and
 8 guidelines in the NATO realm of the rounds to be
 9 used versus a civilian range.
 10 Q. How does that affect bullet escapement?
 11 A. The ricocheting distance and factor;
 12 the hardness of the round itself will penetrate
 13 or ricochet further.
 14 Q. And your authority for that is the
 15 same for the authority that you gave me before;
 16 I wouldn't have to repeat it; is that correct?
 17 A. That is correct.
 18 MR. RICHMAN: Your witness, Ma'am.
 19 MS. TREVER: I would like to just take
 20 a quick break, if I may.
 21 MR. RICHMAN: You bet.
 22 (Recess taken.)
 23 /
 24
 25

Page 189

1 EXAMINATION
 2 QUESTIONS BY MS. TREVER:
 3 Q. I just have a few questions to clear up
 4 a few matters for the record.
 5 One, I am going to ask Mr. O'Neal in
 6 his Affidavit he made a statement that he said he
 7 had reviewed the Court's Memorandum Decision,
 8 Finding of Fact, Conclusions of Law, and Order in
 9 this case.
 10 Since that seems to be at odds with
 11 what you testified earlier, can you explain that
 12 statement?
 13 A. I skimmed through the document and
 14 basically looked for the portions pertaining to
 15 the ballistic containment and range requirements,
 16 but I didn't thoroughly read every sentence
 17 within the scope of the document.
 18 Q. All right. In terms of your -- I can't
 19 remember how Counsel referred to this -- but the
 20 Inspection Summary, you made two statements
 21 regarding the requirements of Judge Mitchell's
 22 Order.
 23 The first was the standard that said
 24 the baffle must be placed and be of sufficient
 25 size that the shooter in any position standing --

1 standing, kneeling, prone -- cannot fire his or
2 her weapon above the berm behind the target.

3 Was that statement related to your
4 skimming of the Court Order, or was that provided
5 to you by Fish & Game?

6 MR. RICHMAN: Objection to the form.

7 Q. (BY MS. TREVER) I won't restate the
8 whole writing, but I will ask -- did you read in
9 the Order, "The baffle must be placed and be of
10 sufficient size that the shooter in any position --
11 standing, kneeling, prone -- cannot fire his or
12 her weapon above the berm behind the target"?

13 A. Yes, I did.

14 Q. The second statement in the summary
15 letter regarding the requirement of the Order
16 indicates a requirement that, "The first concern
17 (safety) can be satisfied only by the 'no blue
18 sky' or totally baffled so that a round cannot
19 escape." Did you read that in the Order?

20 A. I did.

21 Q. Then I just wanted to clear up or at
22 least discuss a few of the terms used by Counsel.

23 Counsel has used the term "peer review,"
24 and I wanted to ask, do you feel that your work
25 has been reviewed by other range professionals?

1 shoots within our ranges.

2 I do believe that I'm one of the
3 authoritative persons when it comes to ranges;
4 that I believe the FBI chose us for a reason when
5 they've had all the other range companies to
6 choose from.

7 Also, the Army has now chosen us.
8 We have won the Design Build Award from the Army
9 this year, which will be awarded in October,
10 pertaining to small arms ranges.

11 I think because someone does not have a
12 scientific or engineering background pertaining
13 to ricochets -- and I'm not aware of a scientific
14 background that that would fall or categorize
15 under, that experience weighs very heavily when
16 it comes to design, construct, and build of a
17 range.

18 Q. Do you feel that your designs have been
19 scrutinized by professionals in your field?

20 MR. RICHMAN: Objection to the form.

21 THE WITNESS: I believe they have.

22 I think that competition and other range
23 engineering firms and builders obviously made
24 comments to it. They made comments to me about
25 it, and we continue to compete against each other.

1 A. I believe all the competitors have
2 reviewed my ranges that have been built --

3 MR. RICHMAN: Objection. Have you
4 finished?

5 MS. TREVER: I don't believe he did.

6 MR. RICHMAN: I jumped in.

7 THE WITNESS: No, I haven't.

8 I think they've scrutinized the ranges
9 that I've designed and built, yet many of them
10 have been copied.

11 MR. RICHMAN: Objection to the answer
12 as calling for a conclusion as to the state of
13 mind of other people and not responsive to the
14 question. Go ahead.

15 THE WITNESS: I believe that --

16 Q. (BY MS. TREVER) I think you answered
17 the question, and the objection can stand.

18 In terms of when you answered Counsel's
19 questions regarding peer review, how did you
20 understand that term to be used?

21 A. That peer would be someone in the
22 engineering or someone with a scientific
23 background, and I believe that peer would be --
24 my understanding of it would be that anyone
25 within the industry that uses our facilities or

1 Q. (BY MS. TREVER) And how would you
2 describe the extent to which your ranges have
3 been tested?

4 A. We are the building entity for the FBI
5 for the last five years, that I'm aware of. We
6 have built all their shooting facilities and have
7 done their design work.

8 We are a design-build firm for the Army
9 right now and Army Corps of Engineers.

10 We are doing the portable bullet trap
11 finalist right now for the Army pertaining to all
12 their capturing of all bullets in a portable
13 trip.

14 We have just won the Design-Build Award
15 for the Live Fire Shoot House and Bullet
16 Containment for SBA, small arms design-build.

17 We have clients such as the Marine
18 Corps, the Navy, the Army, over 100 different
19 municipalities, the FBI, many state agencies.
20 So I feel that they substantiate some credibility.

21 Q. And have your range designs been
22 subject to live round fire?

23 A. Daily. Thousands, millions of rounds.

24 Some of the academy classes will shoot
25 millions of rounds every quarter, and I would say

1 hundreds of millions of rounds nation wide
 2 per quarter.
 3 MS. TREVER: I don't have any further
 4 questions.
 5
 6 FURTHER EXAMINATION
 7 QUESTIONS BY MR. RICHMAN:
 8 Q. What ranges have you built for the
 9 Army, Navy, Marine Corps, or Air Force that are
 10 not compliant with the then existing ETL?
 11 A. We have built -- just recently just
 12 finished -- completed a range at Quantico,
 13 Virginia.
 14 Q. For --
 15 A. The Marine Corps facility in Quantico,
 16 Virginia, that is a non-baffled, open air,
 17 blue sky range.
 18 Q. Oh, it's a non-contained range?
 19 A. That's correct.
 20 Q. Oh. How many of the ranges you built
 21 are non-contained?
 22 A. It depends on the guidelines that they
 23 specify.
 24 Q. No, no. How many? What's the number
 25 of ranges you have built that are non-contained?

1 MS. TREVER: Objection; asked and
 2 answered.
 3 THE WITNESS: The DOD is written for
 4 the DOD.
 5 Q. (BY MR. RICHMAN) Okay. What baffled
 6 ranges -- either partially or completely baffled --
 7 have you designed since 1902 --
 8 A. I wasn't born yet. (Laughter.)
 9 Q. Since '02, 2002, for the military that
 10 have not been ETL compliant?
 11 A. El Toro Marine Corps Base.
 12 Q. El Toro?
 13 A. El Toro Marine Corps Base.
 14 Q. Any others?
 15 A. Fort Murray, St. Louis, Missouri.
 16 Q. Any others?
 17 A. No.
 18 Q. Were those from the ground up buildings,
 19 or were they reconditioning of ranges?
 20 MS. TREVER: Objection as to form.
 21 MR. RICHMAN: I'm sorry?
 22 MS. TREVER: Objection as to form;
 23 compound question.
 24 THE WITNESS: They were reconstructed.
 25 Q. (BY MR. RICHMAN) Reconstructed. Have

1 A. Probably 50 percent.
 2 Q. Okay. So "50 percent non-contained"
 3 means you don't need any baffles?
 4 A. They didn't say they need -- they just
 5 didn't put that in the specifications.
 6 Q. Because you have enough downrange
 7 ground to contain the SDZ?
 8 A. Not always.
 9 Q. Okay. What about this definition:
 10 "Non-contained range. A non-contained
 11 range is an indoor/open range. The firing line
 12 may be covered or uncovered. Direct fire and
 13 ricochets are unimpeded and may fall anywhere
 14 within the SDZ. The non-contained range requires
 15 an SDZ equal to 100 percent of the maximum range
 16 of the most powerful round to be used on the
 17 range. This type of range requires the largest
 18 amount of real estate to satisfy the SDZ
 19 requirements." Is that a definition with which
 20 you agree?
 21 A. On a DOD guideline, yes, but not on a
 22 civilian guideline.
 23 Q. What's the difference between a
 24 civilian and the DOD?
 25 A. The DOD --

1 you built any new ranges since 1902 (sic) for the
 2 military that did not conform to the ETL?
 3 A. I was not born in 1902.
 4 Q. I stand corrected again. My age is
 5 showing. Since 2002?
 6 A. I have not.
 7 Q. When Counsel inquired of you about
 8 peer review, and you answered about your
 9 competition, you used the phrase, "I believe,"
 10 but you don't know on any of those answers except
 11 what you personally believe?
 12 A. Correct.
 13 Q. And if those people say, "You know
 14 what? I don't give a hoot what he does," then
 15 they never even judged you, did they?
 16 A. I believe they did.
 17 Q. I understand you believe that.
 18 A. Okay.
 19 Q. But you don't know that, do you?
 20 A. No.
 21 Q. You're going into your heart of hearts
 22 and telling me the truth as you believe it to be?
 23 A. Correct.
 24 Q. But you don't know?
 25 A. Correct.

1 Q. And you relied, in some regard, on what
2 people have told you about your work?

3 A. Yes.

4 Q. But you have no written document from
5 any of those people saying your work is good,
6 bad, or indifferent?

7 A. Yes.

8 Q. "Yes," you do not?

9 A. I do not.

10 MR. RICHMAN: Nothing further.

11
12 FURTHER EXAMINATION

13 QUESTIONS BY MS. TREVER:

14 Q. One last question.

15 You have been paid for your work that
16 you have done for ranges; correct?

17 A. Since the beginning, yes.

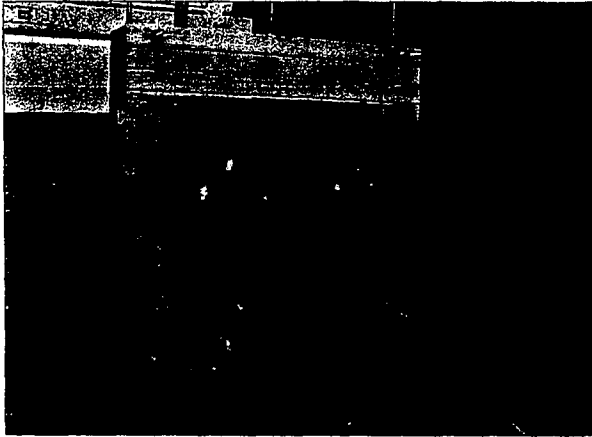
18 MS. TREVER: No further questions.

19 MR. RICHMAN: Okay. Thank you.

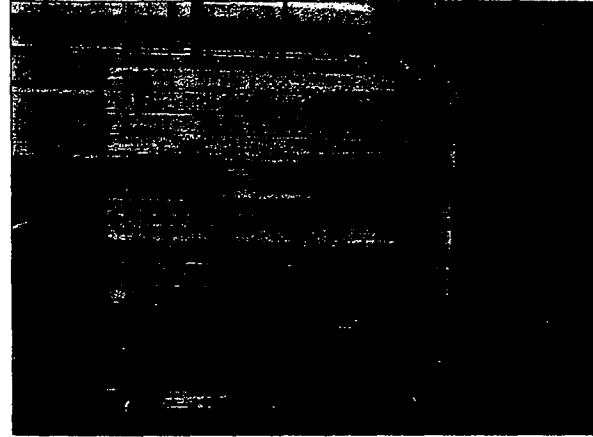
20 (Deposition concluded at 1:42 p.m.)

21 (Signature requested; read and sign
22 secured by Kathleen E. Trever.)
23
24
25

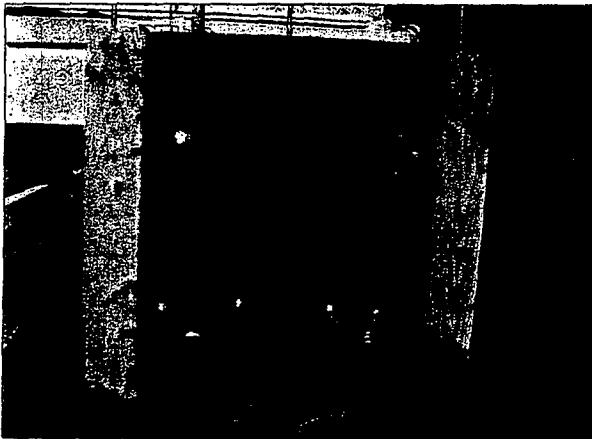
Kerry O'Neal
Exhibits
Oct. 8, 2010
Deposition



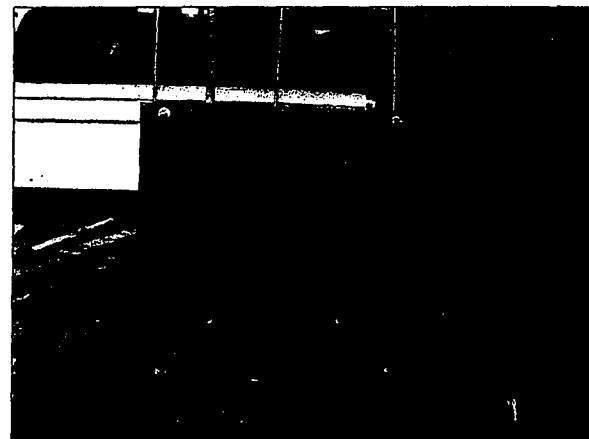
FRONT OF FIRST STEEL PLATE (INTERMEDIATE ARMOR PLATE)
BEHIND GLUE-LAM (NOTE CALIBER MARKED NEAR HOLES)



BACK OF GLUE-LAM (NOTE CALIBER MARKED NEAR HOLES)



BACK OF FIRST STEEL PLATE (INTERMEDIATE ARMOR PLATE)
BEHIND GLUE-LAM (NOTE CALIBER MARKED NEAR HOLES)



BACK OF SECOND STEEL PLATE AT THE REAR OF THE BAFFLE.
FINAL ARMOR PLATE, NO PENETRATION.

BAFFLE TEST RESULTS

E.S. No. _____
 Date 2-10-10
 Name O'NEAL
 M & M Court Reporting

1

TRS Range Services
SMALL ARMS SERVICES • DESIGN • CONSTRUCTION • SPECIALTY SERVICES
 Certified B (e) Small Business

228 E. Plaza St.
 Ste B Box 326
 Eagle Idaho 83616
 208.938.2881

1739 Maybank Hwy.
 Charleston, S.C. 29412
 843.785.3860

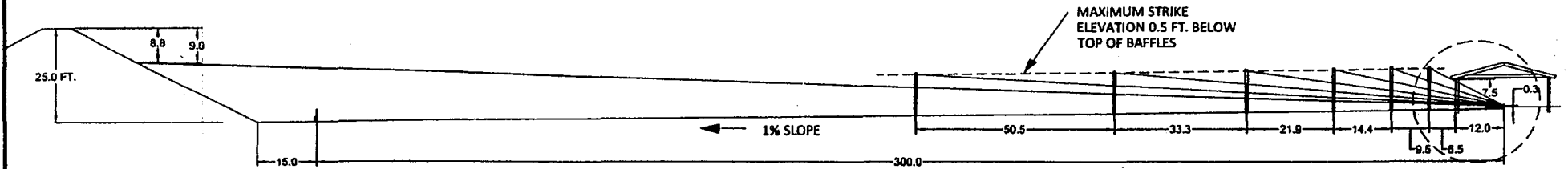
No.	Penetration/Pass	Date

Idaho Department of Fish and Game
 Farragut Shooting Range
 13400 E Ranger Rd, Athol, ID

Battle Test Results

TEST NO.	0R08007	DATE	9-2008	RESULT	A-9
TESTER	As Shown				

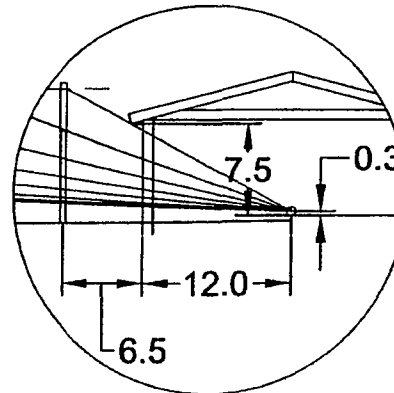
FARRAGUT SHOOTING
 RANGE 100-YD DISTANCE
 State of Idaho - Fish and Game



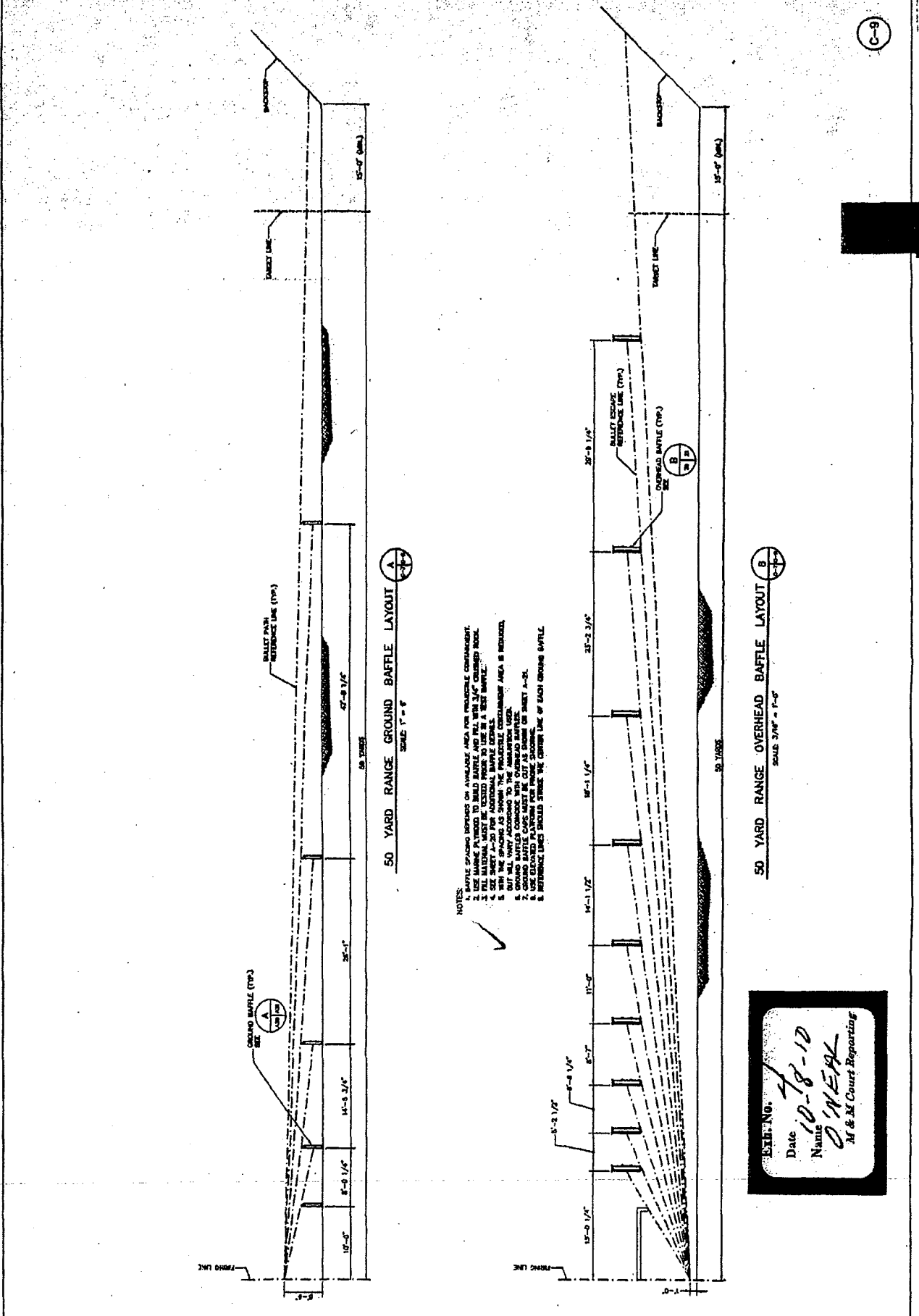
- NOTES:
- GROUND SLOPES DOWNHILL 1% IN THE DOWNRANGE DIRECTION.
 - BAFFLES ARE 4 FT TALL X 82 FT.LONG.
 - BOTTOM OF BAFFLES ARE 7.5 FT. FROM THE GROUND.
 - BAFFLE SPACING DESIGNED WITH 0.5 FT. SAFETY DISTANCE FROM TOP OF BAFFLE TO MAXIMUM STRIKE ELEVATIONS.

SHOOTING PRONE, 4" FROM FLOOR

ESR No.
 Date 3
 10-8-10
 Name O'NEAL
 M & M Court Reporting



REV	DATE	DESCRIPTION	BY
STATE OF IDAHO DEPARTMENT OF FISH AND GAME BOISE, IDAHO			
DESIGNED	JHW	DFG 2009-116	
DRAWN	JHW	FARRAGUT SHOOTING RANGE	
CHECKED		100-YD DISTANCE	
DATE	8/10/09	PROFILE VIEW	
SCALE	AS SHOWN		
APPROVED		APPROVED	
CHPT. GENERAL OF ENGINEERING			
DMS: ahigh@idaho.gov		SHEET 1 OF 2	



50 YARD RANGE GROUND BAFFLE LAYOUT
 SCALE: 1" = 0'

- NOTES:
1. BAFFLE SPACING DEPENDS ON AVAILABLE AREA FOR PROJECTILE CONTAINMENT.
 2. THE MARKS ARE TO BE USED TO MARK THE CENTER LINE OF EACH BAFFLE.
 3. SEE SHEET A-20 FOR ADDITIONAL BAFFLE DETAILS.
 4. SEE SHEET A-20 FOR ADDITIONAL BAFFLE DETAILS.
 5. WITH THE SPACING AS SHOWN, THE PROJECTILE CONTAINMENT AREA IS REDUCED.
 6. GROUND BAFFLES SHOULD BE CUT AS SHOWN ON SHEET A-20.
 7. GROUND BAFFLE CAPS MUST BE CUT AS SHOWN ON SHEET A-20.
 8. REFERENCE LINES SHOULD STRIKE THE CENTER LINE OF EACH GROUND BAFFLE.

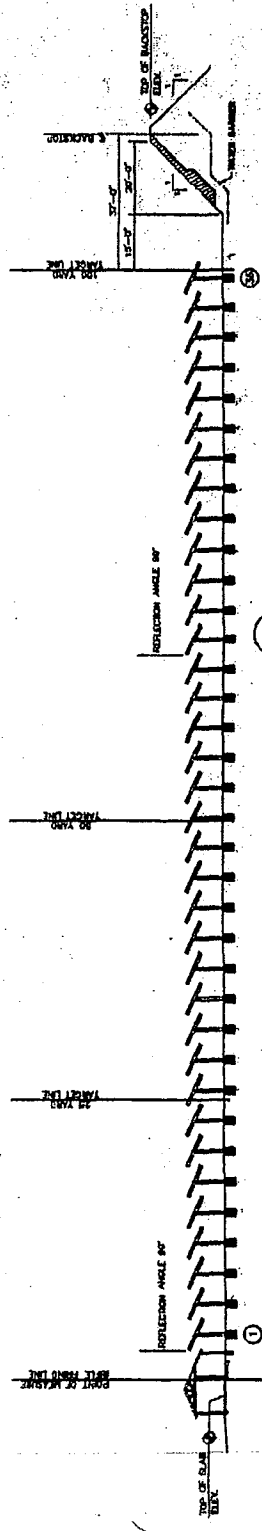
EXH. NO. 4
 Date 10-8-10
 Name O'NEAK
 M & M Court Reporting

C26

DESIGNED BY O. VANOGA
CHECKED BY O. VANOGA
DATE 10-2-59
PROJECT NO. 39297
CITY OF IDAHO
NATIONAL RIFLE ASSOCIATION
MEMBER SINCE 1955
10227

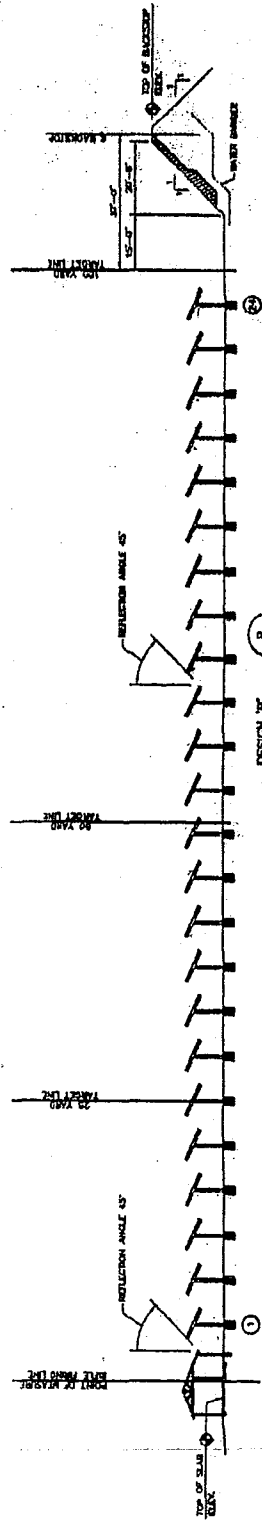
NATIONAL RIFLE ASSOCIATION
BLIND RIFLE ASSOCIATION
PLAZA, VIRGINIA BEACH
SHOOTING RANGE
DEFINITIVE DRAWINGS

25' CONCRETE
BAFFLE DESIGN
LONGITUDINAL SECTION



DESIGN A
SCALE 1/8" = 1'-0"

- NOTES
1. THESE ARE EXAMPLES OF A BAFFLED RANGE.
 2. BAFFLES ARE SPACED ACCORDING TO THE DIMENSION SHOWN.
 3. BAFFLE INSTALLATION MAY NOT BE RECOMMENDED WHERE THERE ARE OBSTACLES SUCH AS BUILDINGS, ETC.
 4. THIS DRAWING MAY BE REPRODUCED AS LONG AS THE NATIONAL RIFLE ASSOCIATION IS ACKNOWLEDGED AS THE SOURCE.

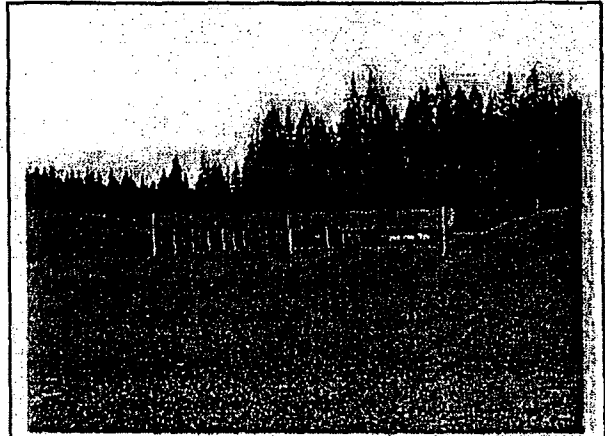


DESIGN B
SCALE 1/8" = 1'-0"

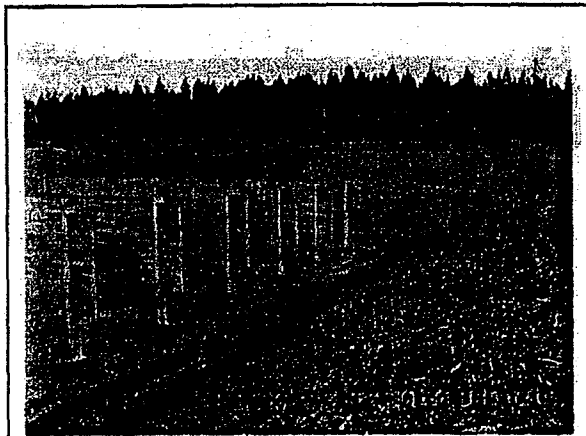
EXH. No. 5
Date 10-8-10
Name O'NEAL
M & M Court Reporting



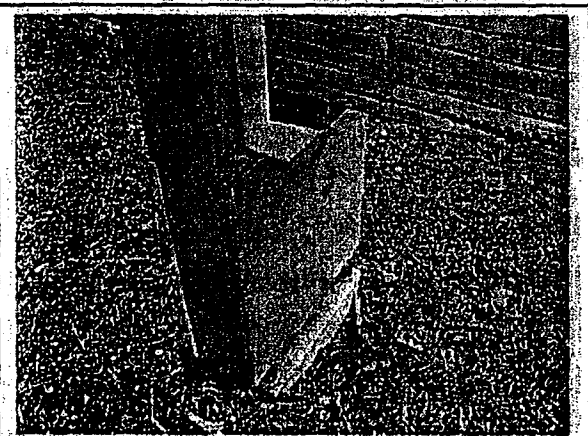
PHOTOGRAPH 5
March 11, 2010
Screened sand bullet trap



PHOTOGRAPH 7
March 11, 2010
Reconstructed berm slope of 2 to 1

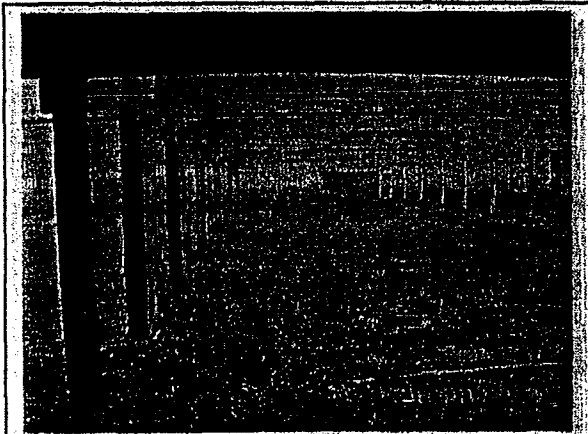


PHOTOGRAPH 6
March 11, 2010
Reconstructed berm, baffles, and sand trap

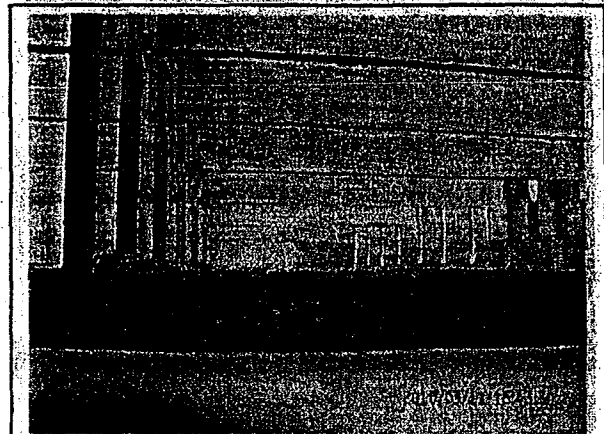


PHOTOGRAPH 8
March 11, 2010
Recycled mulch material used in floor and side berm construction

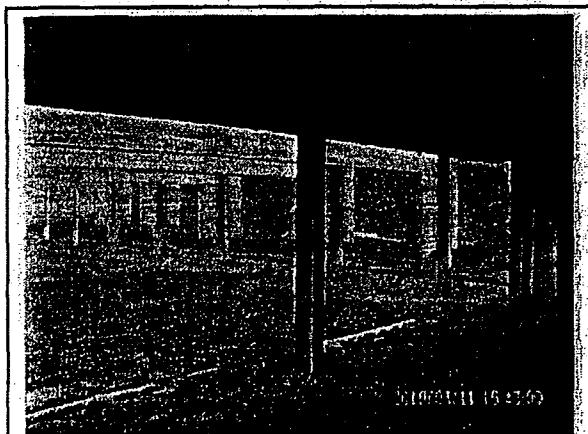
Exh. No. 6
Date 10-8-10
Name O'NEAL
M & M Court Reporting



PHOTOGRAPH 17
March 11, 2010
"No Blue Sky" observation



PHOTOGRAPH 19
March 11, 2010
"No Blue Sky" observation



PHOTOGRAPH 18
March 11, 2010
"No Blue Sky" observation

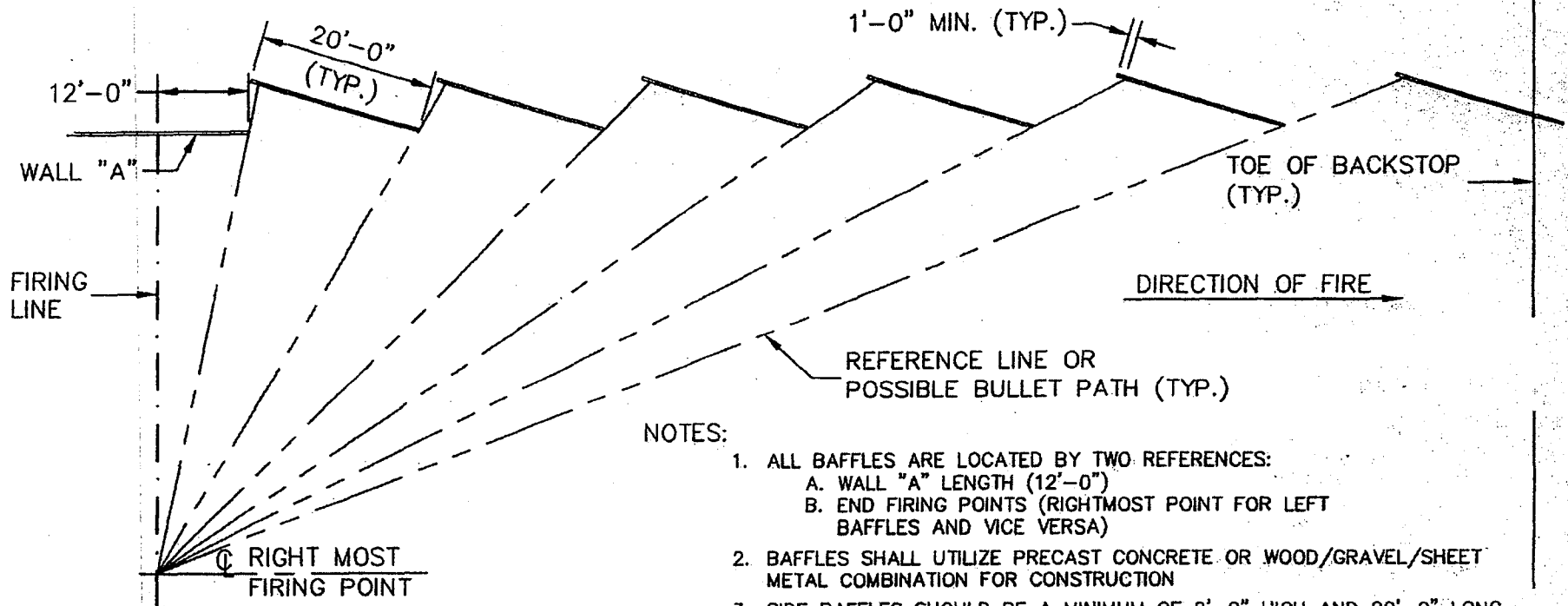


PHOTOGRAPH 20
March 11, 2010
"No Blue Sky" observation

Exh. No. 7
Date 10-8-10
Name O'NEAL
M & M Court Reporting

DO NOT SCALE THIS DRAWING.

ANY USE OR REPRODUCTION WITHOUT EXPRESSED WRITTEN PERMISSION OF THE N.R.A. IS PROHIBITED.

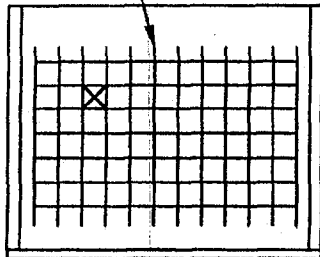


NOTES:

1. ALL BAFFLES ARE LOCATED BY TWO REFERENCES:
 A. WALL "A" LENGTH (12'-0")
 B. END FIRING POINTS (RIGHTMOST POINT FOR LEFT BAFFLES AND VICE VERSA)
2. BAFFLES SHALL UTILIZE PRECAST CONCRETE OR WOOD/GRAVEL/SHEET METAL COMBINATION FOR CONSTRUCTION
3. SIDE BAFFLES SHOULD BE A MINIMUM OF 8'-0" HIGH AND 20'-0" LONG
4. BAFFLE PANELS MUST OVERLAP TO PREVENT BULLET ESCAPE
5. WOODEN BAFFLES USING WASH GRAVEL SHALL BE BUILT SUCH THAT THE BAFFLE STOPS AUTHORIZED AMMUNITION

TEST GRID

TEST BAFFLE



1. 5/8" PLYWOOD SHALL BE USED FRONT AND BACK.
2. 2"x4" LUMBER SHALL BE USED FOR FRAMING.
3. 1 1/4" WOOD SCREWS SHALL BE USED TO HOLD PLYWOOD TO FRAME FOR EASE OF REMOVAL AFTER TESTS ARE COMPLETE.
4. FILL WITH CRUSHED ROCK OR WASHED GRAVEL.
5. ONE SHOT FROM EACH TYPE OF AMMUNITION IS FIRED IN A GRID SQUARE THEN LABEL THE GRID SQUARE WITH TYPE OF AMMUNITION USED.
6. ALTER THE SIZE OF ROCK OR WASH GRAVEL AS TESTS ARE CONDUCTED.
7. SEVERAL TEST BAFFLES MAY BE REQUIRED FOR MULTIPURPOSE RANGES.

Exh. No. 8
 Date 10-8-10
 Name D'NEAL
 M & M Court Reporting

C-8	DRAWING	DES. BY S.B.D.	NRA	SIDE BAFFLE				
		BY N.R.A.		NATIONAL RIFLE ASSOCIATION				
		DATE 5/88		RANGE DEPARTMENT				
				FAIRBAX VIRGINIA 22030	NO.	C.A.D.D. COORDINATION	5/98	C.V.
						REVISION	DATE	BY

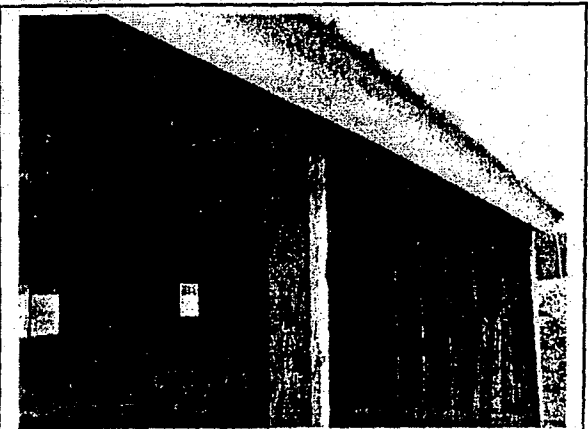
Photos



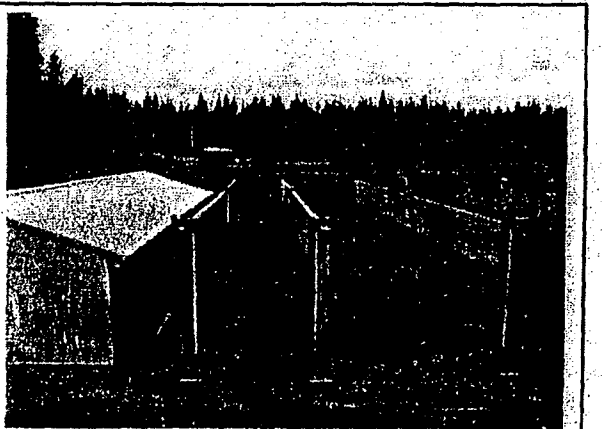
PHOTOGRAPH 1
March 11, 2010
Firing line area



PHOTOGRAPH 3
March 11, 2010
Firing line area

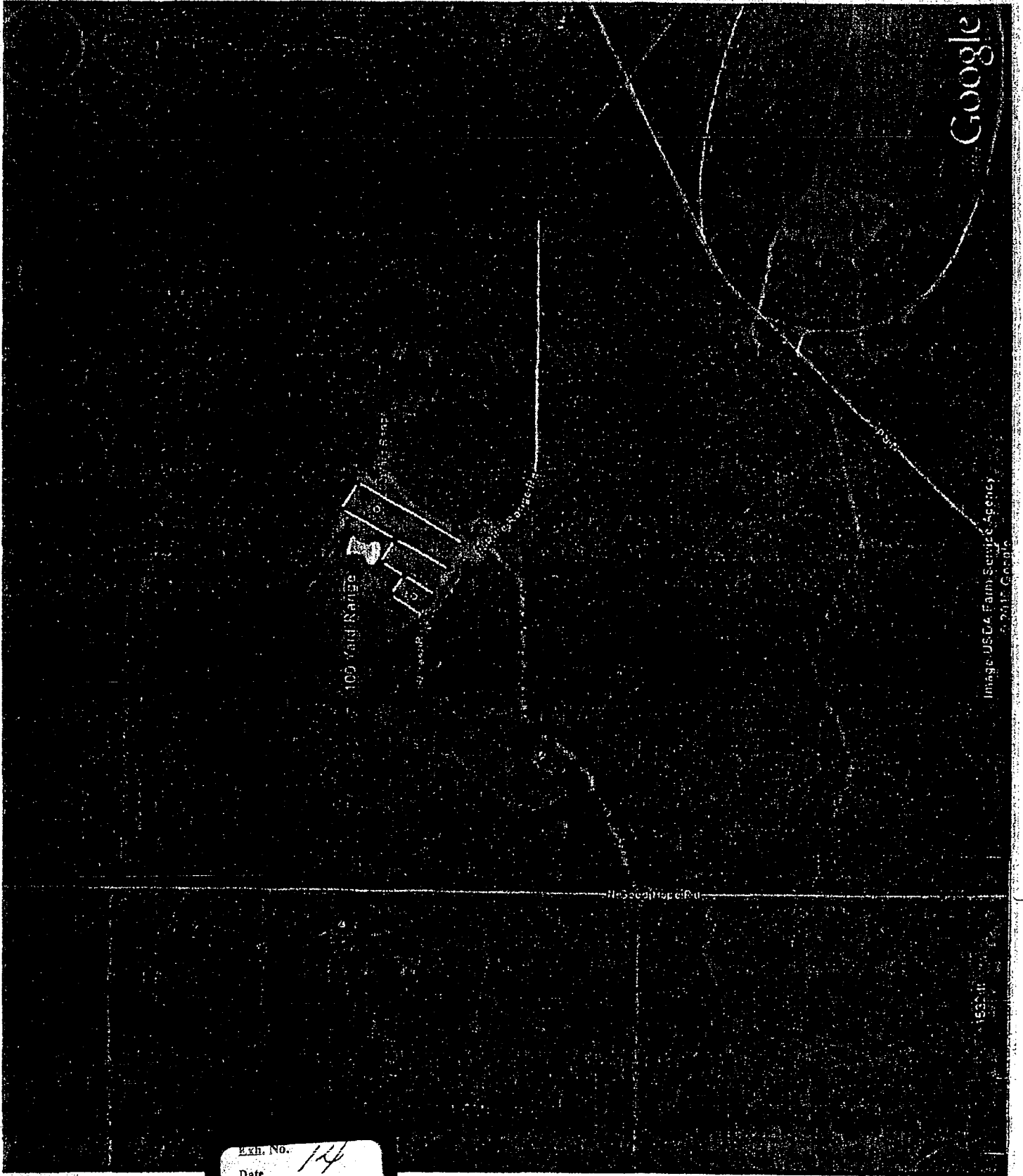


PHOTOGRAPH 2
March 11, 2010
Firing line area



PHOTOGRAPH 4
March 11, 2010
Firing line area and baffles

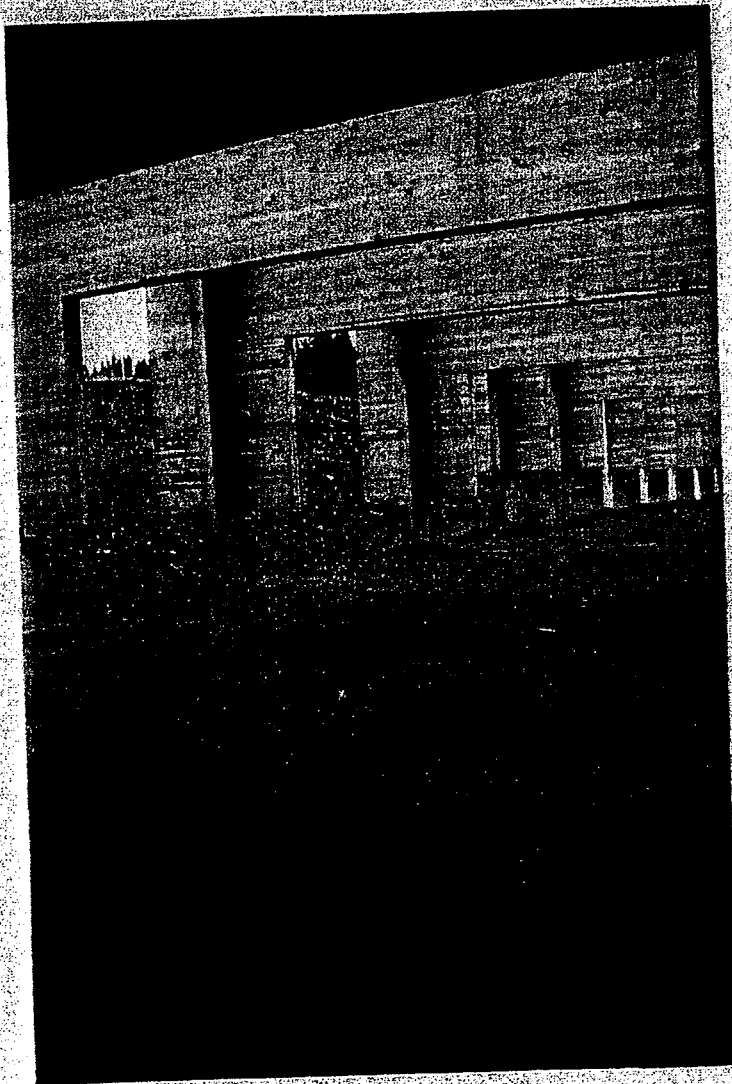
Exh. No.
Date 13
Name 10-8-10
O'NEAL
M & M Court Reporting



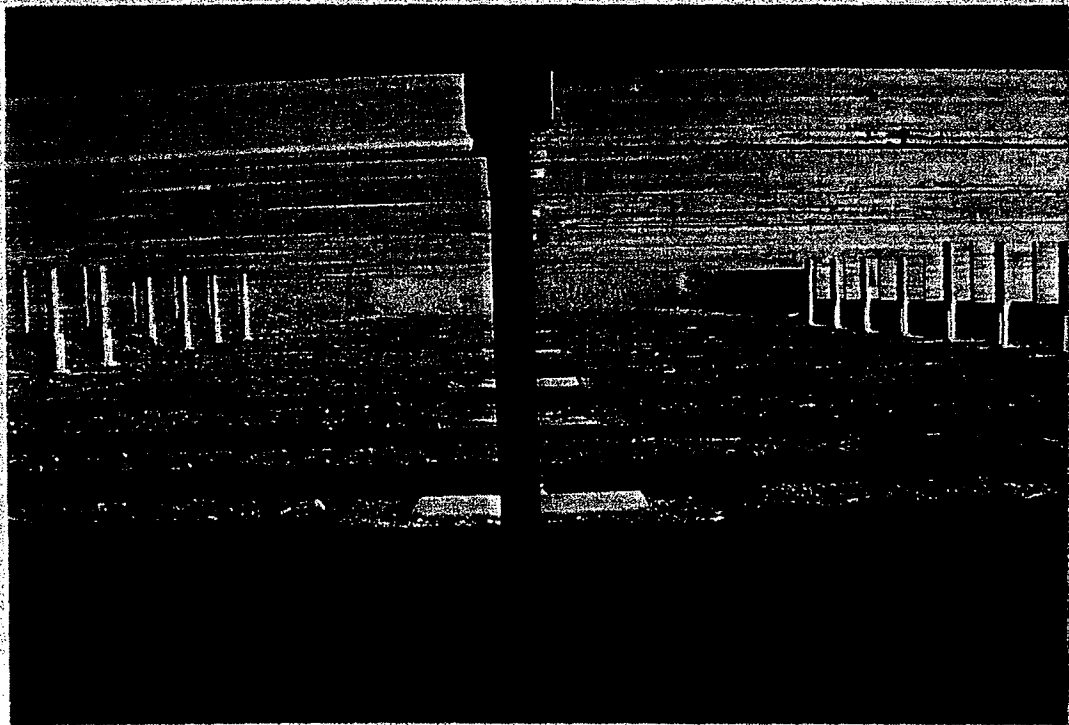
Exh. No. 14
Date 10-8-10
Name O'NEAL
M & M Court Reporting



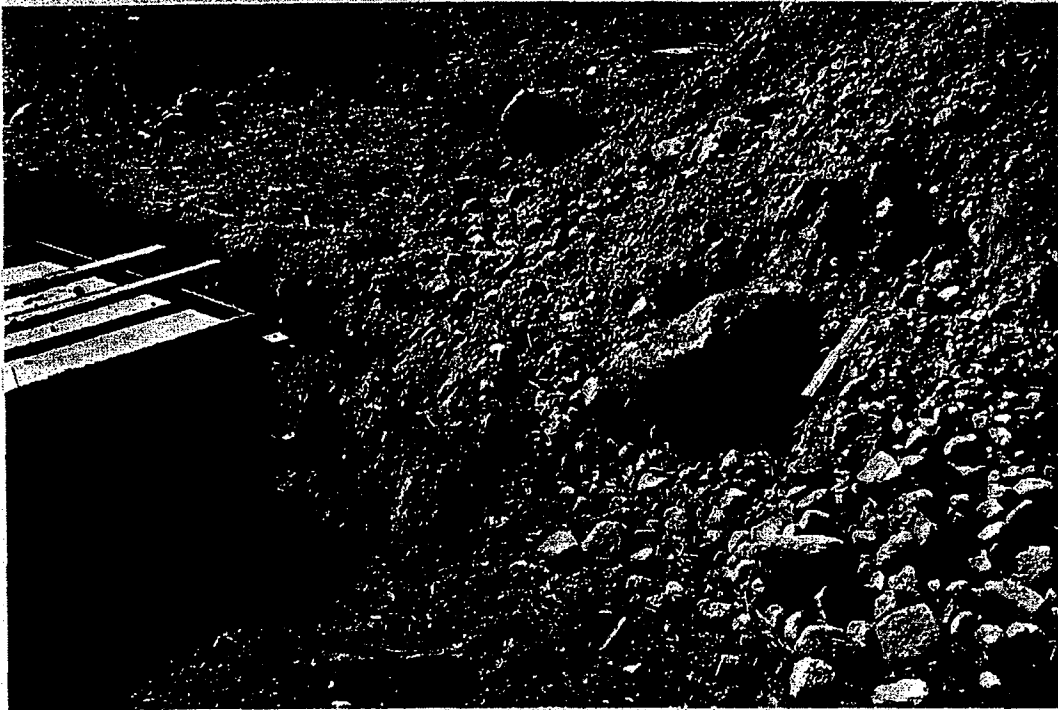
Exh. No. 15
Date 10-8-10
Name O'Neal
M & M Court Reporting
626 01 934



Exh. No. 16
Date 10-8-10
Name O'Neal
M & M Court Reporting



Exh. No. 17
Date 10-8-10
Name O'Neal
M & M Court Reporting



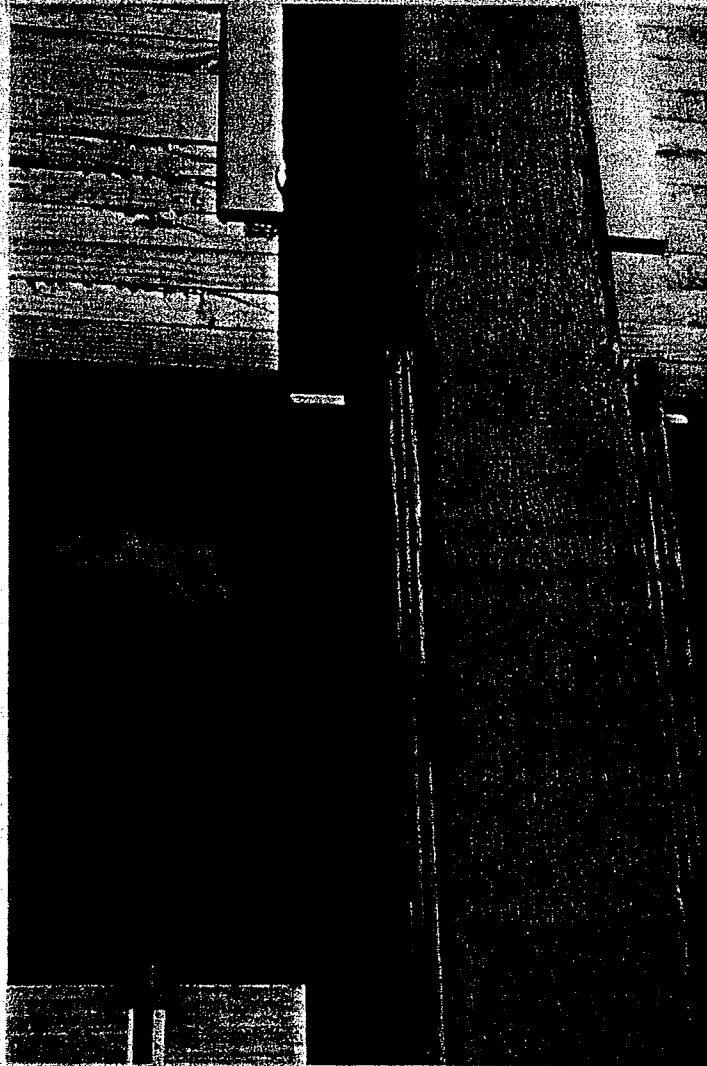
Exh. No. 18
Date 10-8-10
Name O'Neal
& M Court Reporting



Exh. No.	19
Date	10-8-10
Name	O'Neal
I & M Court Reporting 276 01 011	



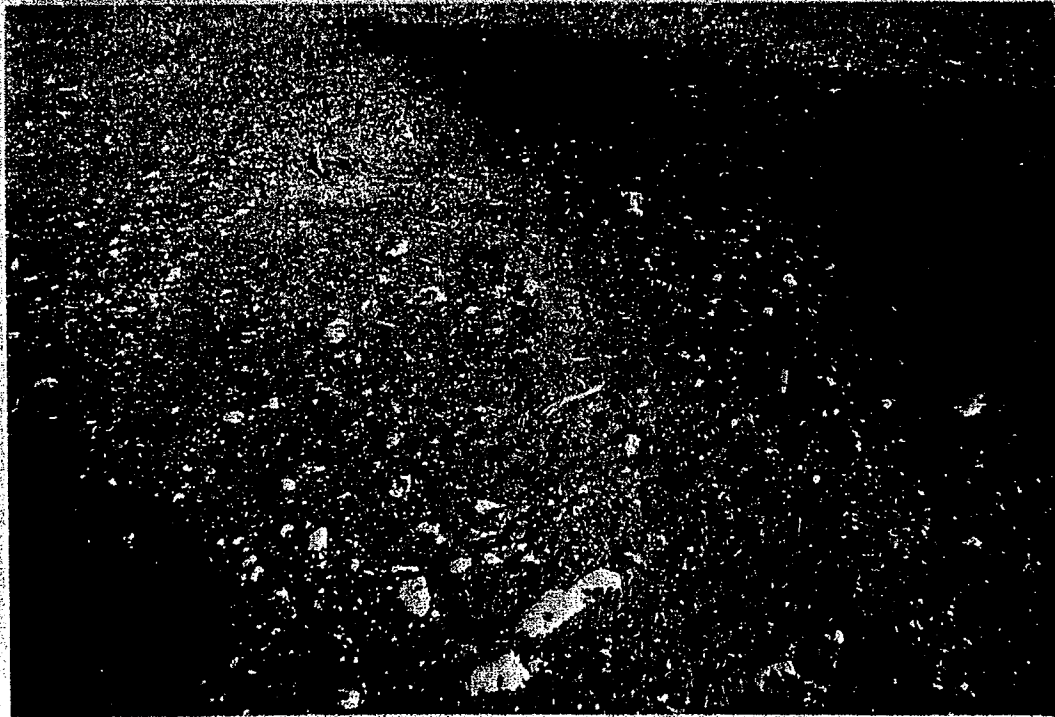
Exh. No. 20
Date 10-8-10
Name O'Neal
M & M Court Reporting



Exh. No. 21
Date 10-8-10
Name O'Neal
M & M Court Reporting



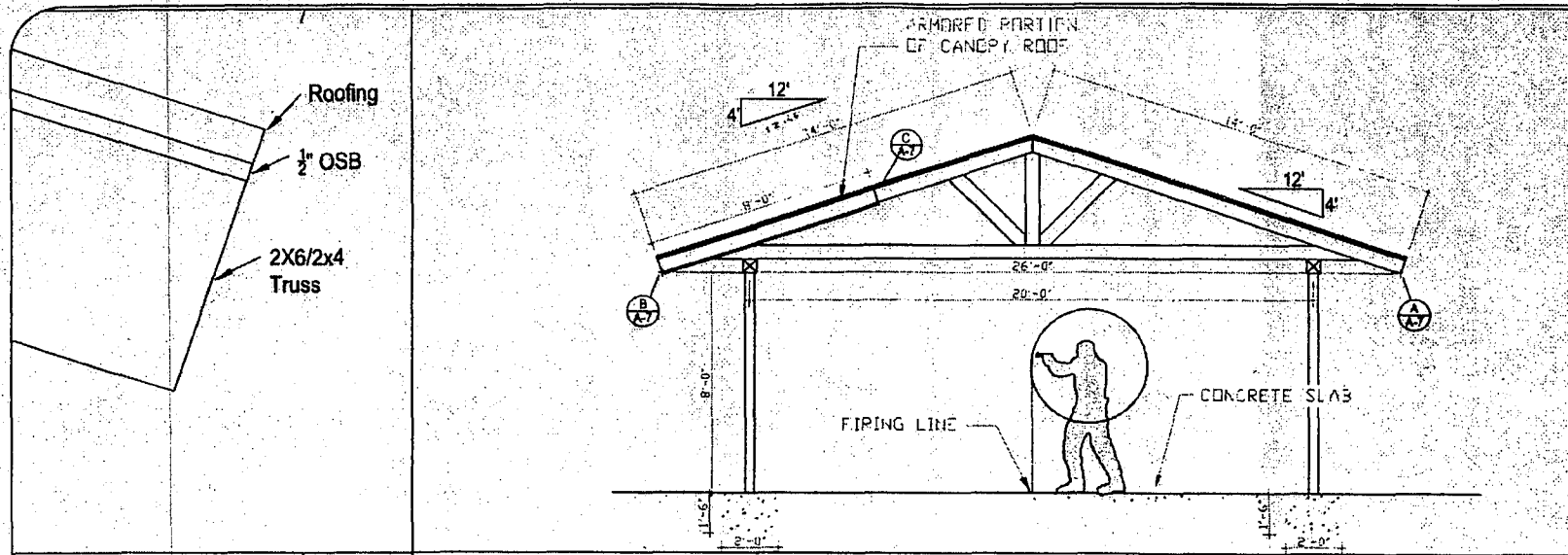
Exh. No. 22
Date 10-8-10
Name O'Neal
M & M Court Reporting



Exh. No. 23
Date 10-8-10
Name O'Neal
M & M Court Reporting

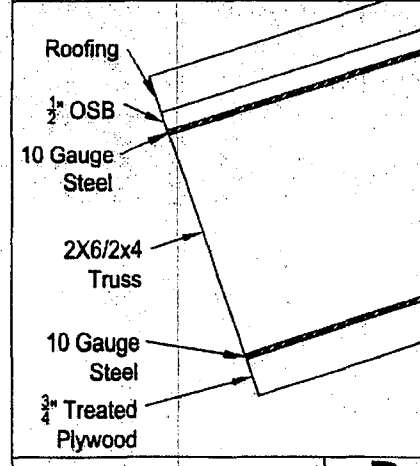


Exh. No. 24
Date 10-8-10
Name O'Neal
M & M Court Reporting

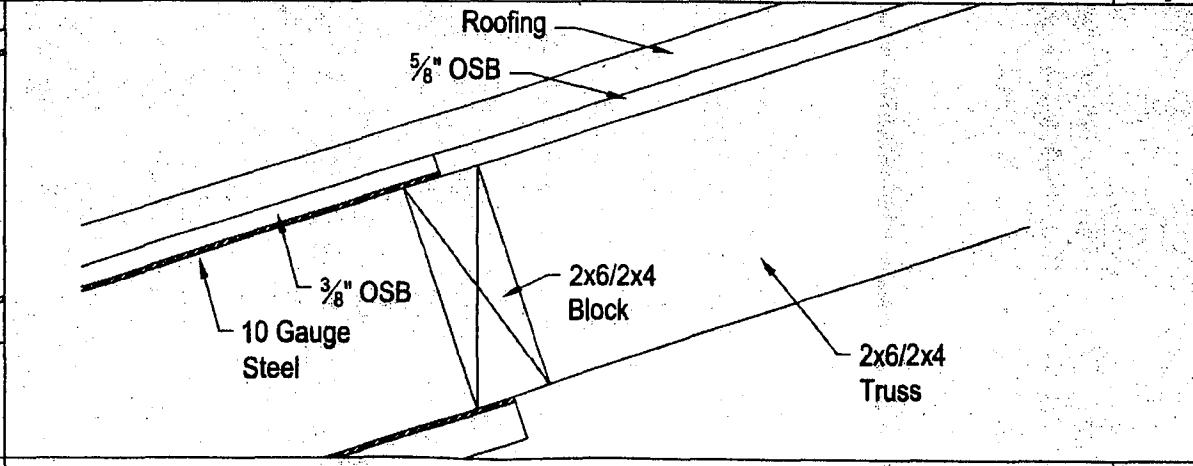


Non-Steel Plated Roof Detail
Scale 1"=3"
Scaled to Print on 11x17"

Covered Firing Canopy Detail
Scale 1"=4"
Scaled to Print on 11x17"



Steel Plated Roof Detail
Scale 1"=3"
Scaled to Print on 11x17"



Transition From Steel Plated to Non-Steel Plated Roof Detail
Scale 1"=3"
Scaled to Print on 11x17"

TRS Range Services
 SMALL BUSINESS - DESIGN - CONSTRUCTION & SPECIALTY SERVICES
 228 E. Plaza St.
 Ste B Box 328
 Eagle Idaho 83616
 :208.939.2861

Certified LVO Small Business

Date: 10-8-08
 Drawn by: D'NEAL
 M & M Coats Representing

Idaho Department of Fish and Game
 Ferragut Shooting Range
 15400 E Ranger Rd, Athol, ID

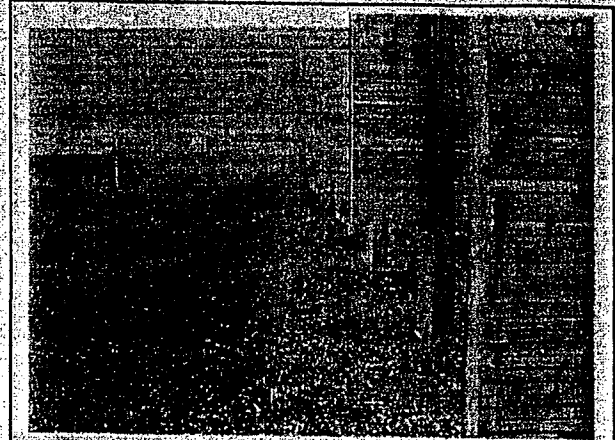
Covered Firing Area Details

Project: OFR08007
 Date: 9-2008
 Scale: As Shown

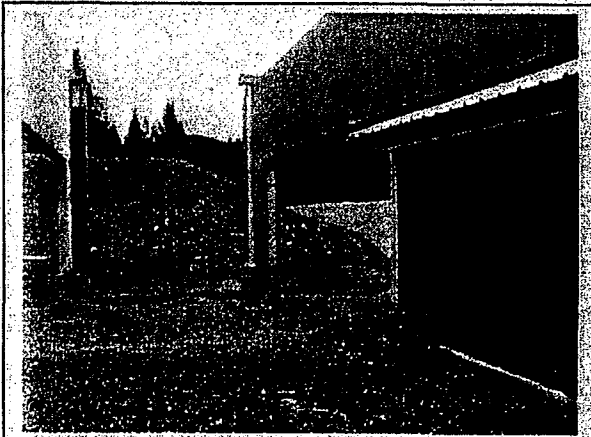
A-7



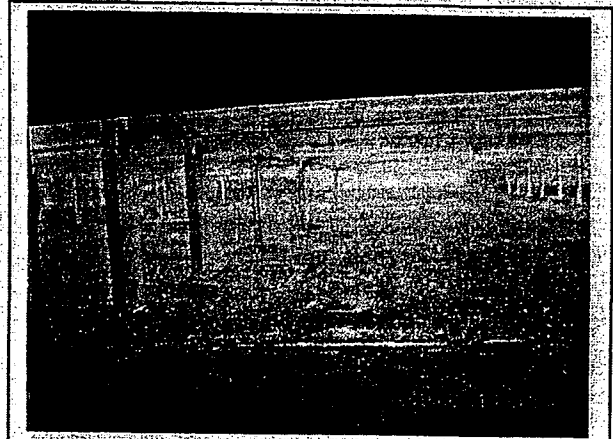
PHOTOGRAPH 13
March 11, 2010
Baffles and side berms



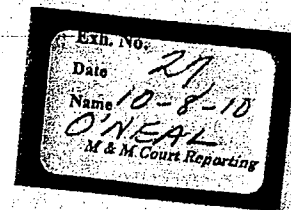
PHOTOGRAPH 15
March 11, 2010
Baffle bases form firing range floor



PHOTOGRAPH 14
March 11, 2010
Baffle bases form firing range floor.



PHOTOGRAPH 16
March 11, 2010
"No Blue Sky" observation





IDAHO DEPARTMENT OF FISH AND GAME

600 South Willing P.O. Box 25
Boise, Idaho 83707

C. L. "Butch" Otter, Governor
Cal. Groen, Director

Scope of Work: TRS Consulting Services

Owner to provide the following:

- existing topographic survey data in AutoCAD format
- topographic data of designed shooting bays with earthen side berm slopes at 1:2 and backstop at 27.5 degrees in AutoCAD format
- shooting shed preliminary design based on NRA manual

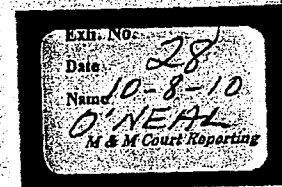
TRS to provide the following:

1. Range site visit with Kerry, to be scheduled by IDFG for June 20th
2. Review of AutoCAD earthen berm design for 3 shooting bays
3. Provide baffle geometry and specifications for baffle construction (baffle design to be determined later based on project budget) for the following scenarios:
 1. Any/all conventional shooting positions from prone to standing
 2. Bench and standing positions only
4. Perform a post construction site visit and letter confirming compliance with February 23, 2007 Court Order.

Deliverables:

TRS will provide electronic CAD file of baffle design and baffle construction specifications

TRS will provide a letter following final inspection confirming compliance with Court Order; letter to be coordinated with the Attorney General's office as an affidavit.



Keeping Idaho's Wildlife Heritage

Equal Opportunity Employer • 208-334-3700 • Fax: 208-334-2111 • Idaho Relay (TDD) Service: 1-800-377-3329 • <http://fishandgame.idaho.gov>

ORIGINAL

STATE OF IDAHO
COUNTY OF KOOTENAI } SS
FILED:

2010 DEC 28 PM 1:32

CLERK DISTRICT COURT
Paul Orumpal
DEPUTY

Scott W. Reed, ISB#818
Attorney at Law
P. O. Box A
Coeur d'Alene, ID 83816
Phone (208) 664-2161
FAX (208) 765-5117

Harvey Richman, ISB#2992
Attorney at Law
19643 N. Perimeter road
Athol, Idaho 83801
Phone (208) 683-2732

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

**CITIZENS AGAINST RANGE)
EXPANSION, an Unincorporated non-)
profit Association; JEANNE J. HOM, a)
single woman; EUGENE and)
KATHLEEN RILEY, husband and wife;)
LAMBERT and DENISE RILEY, husband)
and wife; GABRIELLE GROTH-)
MARNAT, a single woman, GERALD)
PRICE, a single man; RONALD and)
DOROTHY ELDRIDGE, husband and)
wife; and, GLENN and LUCY CHAPIN,)
husband and wife, SHERYL PUCKETT,)
a single woman; CHARLES MURRAY)
and CYNTHIA MURRAY, husband and)
wife; and DAVE VIG, a single man,)**

Plaintiffs,

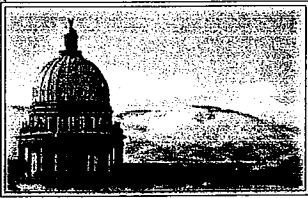
v.

**IDAHO FISH AND GAME DEPARTMENT,)
an agency of the STATE OF IDAHO, and)
STEVEN M. HUFFAKER, Director of the)
IDAHO FISH AND GAME DEPARTMENT,)**

Defendants.

Case No. CV-05-6253

**CERTIFICATION ON IDAHO STATE
LEGISLATIVE HISTORY RECORDS:
HOUSE BILL 515**



Legislative Services Office Idaho State Legislature

Serving Idaho's Citizen Legislature

Jeff Youtz
Director

CERTIFICATION OF DOCUMENTS

Mark Robertson, Library Research Assistant of the Legislative Services Office of the State of Idaho, hereby certifies that each of the following attached documents is a true and correct copy of the original record as filed in the Legislative Services Office:

Legislative history records of 2008 House Bill 515, as passed in the Second Regular Session of the Fifty-ninth Legislature of the State of Idaho:

1. House Bill 515 (two pages);
2. 2008 House Statements of Purpose (one page, containing entry for House Bill 515);
3. 2008 Final Weekly Bill Status (one page, containing entry for House Bill 515);
4. House Resources and Conservation Committee agenda, minutes and attachment related to House Bill 515 from February 11th, 2008 (three pages);
5. House Resources and Conservation Committee agenda, minutes and attachments related to House Bill 515 from February 19th, 2008 (seven pages);
6. House Ways and Means Committee minutes related to House Bill 515 from March 5th, 2008 (one page); and
7. Senate Resources and Environment Committee agenda, minutes and attachments related to House Bill 515 from March 5th, 2008 (nine pages).

DATED this 15th day of November, 2010.

Mark Robertson
Library Research Assistant
Idaho Legislative Services Office

Mike Nugent, Manager
Research & Legislation

Cathy Holland-Smith, Manager
Budget & Policy Analysis

Don H. Berg, Manager
Legislative Audits

Glenn Harris, Manager
Information Technology

IN THE HOUSE OF REPRESENTATIVES

HOUSE BILL NO. 515

BY RESOURCES AND CONSERVATION COMMITTEE

AN ACT

1 RELATING TO SHOOTING RANGES; AMENDING TITLE 67, IDAHO CODE, BY THE ADDITION OF
2 A NEW CHAPTER 91, TITLE 67, IDAHO CODE, TO DEFINE TERMS, TO PROVIDE FOR
3 THE ESTABLISHMENT OF CRITERIA FOR THE OPERATION AND USE OF STATE OUTDOOR
4 SPORT SHOOTING RANGES, TO PROVIDE NOISE STANDARDS, TO PROVIDE FOR SOUND
5 PRESSURE MEASUREMENTS, TO PROHIBIT CERTAIN PUBLIC OR PRIVATE NUISANCE
6 ACTIONS, TO REQUIRE NOISE BUFFERING OR ATTENUATION FOR CERTAIN NEW USE, TO
7 PROHIBIT CERTAIN PUBLIC OR PRIVATE NUISANCE ACTIONS RELATING TO NEW USE
8 AND TO PROVIDE FOR THE PREEMPTION OF CERTAIN LOCAL GOVERNMENTAL LAW.
9

10 Be It Enacted by the Legislature of the State of Idaho:

11 SECTION 1. That Title 67, Idaho Code, be, and the same is hereby amended
12 by the addition thereto of a NEW CHAPTER, to be known and designated as Chap-
13 ter 91, Title 67, Idaho Code, and to read as follows:

CHAPTER 91

IDAHO OUTDOOR SPORT SHOOTING RANGE ACT

14 67-9101. DEFINITIONS. As used in this chapter:

- 15 (1) "Local government" means a county, city or town.
16 (2) "Person" means an individual, corporation, partnership, firm, associ-
17 ation, joint venture, proprietorship, club or any other legal entity.
18 (3) "State outdoor sport shooting range" or "range" means an area owned
19 by the state of Idaho or a state agency for the public use of rifles,
20 shotguns, pistols, silhouettes, skeet, trap, black powder, archery or any
21 other similar sport shooting. "State outdoor sport shooting range" does not
22 include:
23 (a) Any totally enclosed facility that is designed to offer a totally
24 controlled shooting environment that includes impenetrable walls, floors
25 and ceilings, adequate ventilation, lighting systems and acoustical treat-
26 ment for sound attenuation; and
27 (b) Any law enforcement or military shooting range.
28
29

30 67-9102. STATE OUTDOOR SPORT SHOOTING RANGES -- OPERATION AND USE --
31 NOISE STANDARDS -- MEASUREMENT. (1) The state agencies responsible for manag-
32 ing state outdoor sport shooting ranges shall establish criteria for the oper-
33 ation and use for each range. The provisions of chapter 26, title 55, Idaho
34 Code, shall not apply to state outdoor sport shooting ranges.

35 (2) The legislature finds that state outdoor sport shooting ranges should
36 be subject to uniform noise standards as specified in this section.

37 (3) The noise emitted from a state outdoor sport shooting range shall not
38 exceed an Leq(h) of sixty-four (64) dBA.

39 (4) Sound pressure measurements shall be made twenty (20) feet from the
40 nearest existing occupied residence, school, hotel, motel, hospital or church
41 and in a location directly between the range and the nearest existing occupied

1 residence, school, hotel, motel, hospital or church. If there are natural or
2 artificial obstructions that prevent an accurate noise measurement, the mea-
3 surement may be taken within an additional twenty (20) feet radius from the
4 initial measurement location. If access to such location is not available,
5 then sound pressure measurements shall be made at the range property line in a
6 location directly between the range and the nearest existing occupied resi-
7 dence, school, hotel, motel, hospital or church.

8 (5) Sound pressure measurements shall be made on the A-weighted fast
9 response mode scale. Measurements shall be taken during the noisiest hour of
10 peak use during the operation of the range. Measurements shall be taken using
11 a type 1 sound meter meeting the requirements of ANSI S1.4-1983.

12 (6) For the purposes of this section:

13 (a) "A-weighted" means a frequency weighting network used to account for
14 changes in sensitivity as a function of frequency;

15 (b) "dBA" means A-weighted decibels, taking into account human response
16 to sound energy in different frequency bands;

17 (c) "Decibel" means the unit of measure for sound pressure denoting the
18 ratio between two quantities that are proportional to power. The number of
19 decibels is ten (10) times the base ten logarithm of this ratio; and

20 (d) "Leq(h)" means the equivalent energy level that is the steady state
21 level that contains the same amount of sound energy as a time varying
22 sound level for a sixty (60) minute time period.

23 67-9103. NUISANCE ACTION. Notwithstanding any other provision of law to
24 the contrary, a person may not maintain a public or private nuisance action
25 for noise against a state outdoor sport shooting range that is in compliance
26 with this chapter.

27 67-9104. NOISE BUFFERING OR ATTENUATION FOR NEW USE. Any new residential
28 use or other new use within one (1) mile of an existing state outdoor sport
29 shooting range shall provide for noise buffers or attenuation devices neces-
30 sary to satisfy the noise standard prescribed by this chapter. New use as pro-
31 vided by this section shall not give rise to any right of a person to maintain
32 a public or private nuisance action for noise against an existing state out-
33 door sport shooting range.

34 67-9105. PREEMPTION OF LOCAL AUTHORITY. Local governmental law is herein
35 preempted and local governments shall not have authority to regulate the oper-
36 ation and use of state outdoor sport shooting ranges nor shall they have
37 authority to establish noise standards for state outdoor sport shooting
38 ranges.

STATEMENT OF PURPOSE
RS 17827

This bill would create a new section in Title 67 to provide for the operation and use of State outdoor sport shooting ranges. This bill would require State agencies responsible for managing State outdoor sport shooting ranges to establish operation and use standards for each range. The bill also establishes a uniform noise standard for State outdoor sport shooting ranges, precludes both public and private nuisance actions for noise against any State outdoor sport shooting range that is in compliance with this chapter, requires new uses within one mile of an existing shooting range to provide for noise abatement and preempts local standards. This chapter will apply only to State of Idaho owned sport shooting ranges used by the public. Private sport shooting ranges will be governed under Chapter 26, Title 55 of the Idaho Code. This chapter does not apply to any law enforcement or military shooting range.

FISCAL NOTE

No fiscal effect to the General Fund is anticipated because State outdoor sport shooting ranges are developed and maintained with dedicated funds. There will be an effect to Fish and Game funds for sound measurement and any mitigation actions at ranges to meet the State noise standard. The annual estimate of cost to Fish and Game funds to meet the State noise standard ranges from \$5,000 to \$30,000 annually.

Sponsors:

Rep. George Eskridge	Rep. Tom Trail	Rep. Phil Hart
Rep. Donna Pence	Rep. Jim Patrick	Rep. Mike Moyle
Rep. Carlos Bilbao	Rep. Rich Wills	
Rep. Elaine Smith	Rep. Leon Smith	
Rep. Pete Nielsen	Rep. James Ruchti	
Rep. Wendy Jaquet	Rep. Dick Harwood	
Rep. Mary Lou Shepherd	Rep. Eric Anderson	
Rep. Frank Henderson	Rep. Fred Wood	
Rep. Mark Snodgrass	Rep. Liz Chavez	
Rep. Marv Hagedorn	Rep. JoAn Wood	
Sen. Michael Jorgenson	Sen. Gary Schroeder	
Sen. Shawn Keough	Sen. David Langhorst	
Sen. Joyce Broadsword	Sen. John Andreason	

herd(02), Shepherd(08), Shirley, Shively, Smith(30)(Stanek), Snodgrass, Stevenson, Thayne, Thomas, Trail, Wills, Wood(27), Wood(35), Mr. Speaker
NAYS -- None
Absent and excused -- Patrick, Ruchti, Smith(24), Vander Woude
Floor Sponsor - Wood(35)
Title apvd - to Senate
02/28 Senate intro - 1st rdg - to Agric Aff
03/12 Rpt out - to 14th Ord
03/17 Rpt out amen - to 1st rdg as amen
03/18 1st rdg - to 2nd rdg as amen
03/19 2nd rdg - to 3rd rdg as amen
03/20 3rd rdg as amen - **PASSED** - 35-0-0
AYES -- Andreason, Bair, Bastian, Bilyeu, Broadsword, Burkett, Cameron, Coiner, Corder, Darrington, Davis, Fulcher, Gannon, Geddes, Goedde, Hammond, Heinrich, Hill, Jorgenson, Kelly, Keough, Langhorst, Little, Lodge, Malepeai(Sagness), McGee, McKague, McKenzie, Pearce, Richardson, Schroeder, Siddoway, Stegner, Stennett, Werk
NAYS -- None
Absent and excused -- None
Floor Sponsors - Hill & Gannon
Title apvd - to House
03/21 House Held at Desk
03/25 House concurred in Senate amens - to engros
Rpt engros - 1st rdg - to 2nd rdg as amen
03/26 2nd rdg - to 3rd rdg as amen
03/27 3rd rdg as amen - **PASSED** - 66-0-4
AYES -- Anderson, Andrus, Barrett, Bayer, Bell, Bilbao, Black, Block, Bock, Boe, Bolz, Bowers, Brackett, Bradford, Chadderdon, Chavez, Chew, Clark, Collins, Crane, Durst, Eskridge, Hagedorn, Hart, Harwood, Henbest, Henderson, Jaquet, Killen, King, Kren, Lake, LeFavour, Loertscher, Luker, Marriott, Mathews, Mortimer, Nielsen, Nonini, Pasley-Stuart, Patrick, Pence, Raybould, Ringo, Roberts, Ruchti, Rusche, Saylor, Schaefer, Shepherd(02), Shepherd(08), Shirley, Shively, Smith(30), Smith(24), Snodgrass, Stevenson, Thayne, Thomas, Trail, Vander Woude, Wills, Wood(27), Wood(35), Mr. Speaker
NAYS -- None
Absent and excused -- Bedke, Labrador, McGeachin, Moyle
Floor Sponsor - Wood(35)
Title apvd - to enrol
03/28 Rpt enrol - Sp signed
03/31 Pres signed
04/01 To Governor
04/09 Governor signed
Session Law Chapter 383
Effective: 07/01/08

H0515.....by RESOURCES AND CONSERVATION SHOOTING RANGES - Adds to existing law relating to shooting ranges to provide for the establishment of criteria for the operation and use of state outdoor sport shooting ranges; to provide noise provisions and sound pressure measurements; to prohibit certain public or private nuisance actions; to require noise buffering or attenuation for certain new use; and to provide for the preemption of certain local governmental law.
02/12 House intro - 1st rdg - to printing
02/13 Rpt prt - to Res/Con
02/20 Rpt out - rec d/p - to 2nd rdg
02/21 2nd rdg - to 3rd rdg
02/22 3rd rdg - **PASSED** - 63-0-7
AYES -- Anderson, Barrett, Bayer, Bell, Bilbao, Black, Block, Bock, Boe, Bolz, Bowers, Brackett, Bradford, Chadderdon, Chavez, Chew, Clark, Collins, Crane, Durst, Eskridge, Hagedorn, Hart, Harwood, Henbest, Henderson, Jaquet, Killen, King, Labrador, Lake, LeFavour, Loertscher, Luker, Marriott, Mathews,

--Continued--

McGeachin, Mortimer, Moyle, Nielsen, Nonini, Pasley-Stuart, Patrick, Pence, Ringo, Roberts, Ruchti, Rusche, Saylor, Schaefer, Shepherd(02), Shepherd(08), Shirley, Shively, Smith(30)(Stanek), Snodgrass, Thayne, Thomas, Trail, Vander Woude, Wills, Wood(35), Mr. Speaker
NAYS -- None
Absent and excused -- Andrus, Bedke, Kren, Raybould, Smith(24), Stevenson, Wood(27)
Floor Sponsor - Eskridge
Title apvd - to Senate
02/25 Senate intro - 1st rdg - to Res/Env
03/06 Rpt out - rec d/p - to 2nd rdg
03/07 2nd rdg - to 3rd rdg
03/10 3rd rdg - **PASSED** - 34-0-1
AYES -- Andreason, Bair, Bastian, Bilyeu, Broadsword, Burkett, Cameron, Coiner, Corder, Darrington, Davis, Fulcher, Gannon, Geddes, Goedde, Hammond, Heinrich, Hill, Jorgenson, Kelly, Keough, Langhorst, Little, Lodge, Malepeai(Sagness), McGee, McKague, Pearce, Richardson, Schroeder, Siddoway, Stegner, Stennett, Werk
NAYS -- None
Absent and excused -- McKenzie
Floor Sponsor - Jorgenson
Title apvd - to House
03/11 To enrol - Rpt enrol - Sp signed
03/12 Pres signed - To Governor
03/14 Governor signed
Session Law Chapter 116
Effective: 07/01/08

H0516.....by JUDICIARY, RULES AND ADMINISTRATION SUBSTANCE ABUSE CRIMES - Amends existing law to provide additional options for sentencing for certain substance abuse related crimes; and to include additional information required to be reported by the Supreme Court and the Department of Correction to the Legislature and the Governor regarding mental health and substance abuse treatment.

02/12 House intro - 1st rdg - to printing
02/13 Rpt prt - to Jud

H0517aa,aaS.....by JUDICIARY, RULES AND ADMINISTRATION CONSUMER PROTECTION - Amends existing law relating to consumer protection to provide an enhanced penalty for certain conduct perpetrated against an elderly person or a disabled person; to provide priority for restitution; and to define terms.

02/12 House intro - 1st rdg - to printing
02/13 Rpt prt - to Jud
02/20 Rpt out - to Gen Ord
02/26 Rpt out amen - to engros
02/27 Rpt engros - 1st rdg - to 2nd rdg as amen
02/28 2nd rdg - to 3rd rdg as amen
02/29 3rd rdg as amen - **PASSED** - 63-4-3

AYES -- Anderson, Andrus, Bayer, Bedke, Bell, Bilbao, Block, Bock, Boe, Bolz, Bowers, Brackett, Bradford, Chadderdon, Chavez, Chew, Clark, Collins, Crane, Durst, Eskridge, Hagedorn, Hart, Henbest, Henderson, Jaquet, Killen, King, Kren, Labrador, Lake, LeFavour, Loertscher, Luker, Marriott, Mathews, McGeachin, Moyle, Nielsen, Nonini, Pasley-Stuart, Patrick, Pence, Raybould, Ringo, Roberts, Ruchti, Rusche, Saylor, Schaefer, Shepherd(08), Shirley, Shively, Smith(24), Smith(30)(Stanek), Snodgrass, Stevenson, Thayne, Thomas, Trail, Vander Woude, Wood(27), Mr. Speaker
NAYS -- Barrett, Harwood, Mortimer, Wood(35)
Absent and excused -- Black, Shepherd(02), Wills
Floor Sponsor - Ruchti
Title apvd - to Senate
03/03 Senate intro - 1st rdg - to Jud
03/06 Rpt out - to 14th Ord

--Continued--

AGENDA

HOUSE RESOURCES & CONSERVATION COMMITTEE

1:30 P.M.

Room 148

MONDAY, February 11, 2008

BILL NO.	DESCRIPTION	SPONSOR
RS17773	Trapping / Time Check	Sen. Burkett
RS17895	Soil Conservation Districts / Audits	Jerry Nicolescu
RS17827	State Outdoor Shooting Ranges	Rep. Eskridge
RS17898	Licensure / Fish & Game / Critical Worker	Rep. Smith

COMMITTEE MEMBERS:

Rep. John A. Stevenson, Chairman
Rep. JoAn Wood, Vice-Chairman
Rep. Maxine Bell
Rep. Lenore Barrett
Rep. Mike Moyle
Rep. Dell Raybould
Rep. George Eskridge

Rep. Scott Bedke
Rep. Ken Andrus
Rep. Paul Shepherd
Rep. Bert Brackett
Rep. Fred Wood
Rep. John Vander Woude

Rep. George Saylor
Rep. Donna Pence
Rep. Liz Chavez
Rep. Phylis King
Rep. Jerry Shively

RS17895

Chairman Stevenson called on Jerry Nicolescu, Administrator for the Idaho Soil Conservation Commission to present RS17895. Mr. Nicolescu explained that this proposed legislation will bring Conservation Districts under the statute for independent financial audits by governmental entities and would provide for more uniform accountability. He reported that the fiscal impact would be covered by the enhancement included in the Governor's recommendation.

MOTION:

Rep. Bedke made a motion to **introduce RS17895**. There being no further discussion, a voice vote was taken and the **Motion Passed**.

RS17827

The next item of business on the agenda was RS17827 which was presented by Rep. Eskridge who reviewed the merits of this proposed legislation. State agencies responsible for managing State outdoor sport shooting ranges would be required to establish operation, noise and use standards for each range. Rep. Eskridge explained that this proposed legislation would only apply to State owned sport shooting ranges used by the public. Law enforcement and military shooting ranges would not be affected by this proposed legislation.

MOTION:

A motion to introduce RS17827 was presented by Rep. Fred Wood (27). The **Motion Passed** on a voice vote.

RS17898

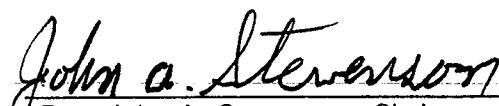
Rep. Elaine Smith took the podium to present this proposed legislation stating that it was a replacement for legislation she previously presented. She advised the committee that she had returned with new language to define a "critical worker" and handed out a list of "Top 50 Hot Jobs". Rep. Smith described this proposed legislation as an economic incentive tool which would grant fish and game licenses to "critical workers" as defined by the Idaho Dept. of Labor. Upon questioning, Rep. Smith clarified that a "critical worker" would have to meet all three of the criteria listed on page 3 of the RS.

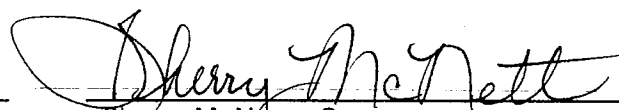
MOTION:

Rep. Eskridge made a motion to **return RS17898 to the sponsor**. After further discussion, a vote was called for by the Chairman. The **Motion Passed** unanimously on a voice vote.

ADJOURN:

Chairman Stevenson thanked all those who participated in the meeting and with all business on the agenda having been completed, he adjourned the meeting at 2:20 p.m.


Rep. John A. Stevenson, Chairman


Sherry McNett, Secretary

Sign-In Sheet

RESOURCES & CONSERVATION COMMITTEE

Date: February 11, 2008

Name, Address, & Phone PLEASE PRINT	Title	Representing Company/Organization	Legislation Interested In	Wish to Testify	PRO	CON
Sharon W. Kiefer	Rep. Liaison	IDFG	RS	No		
Joe De Angelis	Citizen	AFMHAT	Trapping	No	✓	
Lynn Johnston	Citizen	AFMHAT	trapping	No	✓	
John Barrenger		AFMHAT	"	✓	X	
Justin DeAngelis	Citizen	AFMHAT	"	✓		
Nate Helm	Leg. Adv.	SFW-IDA	RS 5	No		
Vingil Moore		IDFG	RS	No		
Jerry Nicolescu	Admin.	SCC	RS 17885	Yes.	X	
Phil Homan	Leg. Adv.	INSA	All	No		
Emily Anderson	Rep	Governor		No		
Dean Sangrey	Administrative	IDFG	RS 17827	No		

AGENDA

HOUSE RESOURCES & CONSERVATION COMMITTEE

1:30 P.M. OR UPON ADJOURNMENT OF THE HOUSE

Room 148

TUESDAY, February 19, 2008

BILL NO.	DESCRIPTION	SPONSOR
HB 405	Scaling Practices, Board, Membership	George Bacon, IDL
HB 407	Log Scaling, Board, Membership	George Bacon, IDL
HB 473	Outfitters / Guides, Unlicensed	Jeremy Pisca, Outfitters & Guides
HB 500	State Land, Lease, Commercial Purpose	Rep. Anderson
HB 515	Outdoor Sport Shooting Range	Rep. Eskridge

If you have written testimony, please provide a copy of it to the committee secretary to ensure accuracy of records.

COMMITTEE MEMBERS:

Rep. John A. Stevenson, Chairman
Rep. ~~JoAn Wood~~, Vice-Chairman
Rep. Maxine Bell
Rep. Lenore Barrett
Rep. Mike Moyle
Rep. Dell Raybould
Rep. George Eskridge

Rep. Scott Bedke
Rep. ~~Ken Andrus~~
Rep. Paul Shepherd
Rep. Bert Brackett
Rep. Fred Wood
Rep. John Vander Woude

Rep. George Saylor
Rep. ~~Donna Pence~~
Rep. Liz Chavez
Rep. Phyllis King
Rep. Jerry Shively

Jake Howard Mr. Jake Howard, Director of the Idaho Outfitters and Guides Licensing Board testified that HB 473 would discourage illegal outfitters and guides and urged passage of this legislation.

MOTION: Following lengthy committee discussion, Rep. Fred Wood (27) made a motion to send HB 473 to the floor with a **DO PASS recommendation**. The **MOTION PASSED** upon a voice vote. Rep. Andrus wished to be recorded as voting "No". Rep. Moyle will sponsor this bill on the floor.

HB 500 Rep. Eric Anderson presented this legislation which defines the term "commercial purposes" as they apply to leases on school endowment lands. Rep. Anderson explained that it would expand the identified renewable resources allowed to include fuel cells, low impact hydro, sun or landfill gas, as well as wind and geothermal resources. He reported that there are approximately 2.5 million acres of state endowment lands and this bill will help not only rural school areas, but provide a further funding mechanism for schools. Rep. Anderson explained that this bill would also free up other money for the state by providing more funding for schools and urged passage of this legislation.

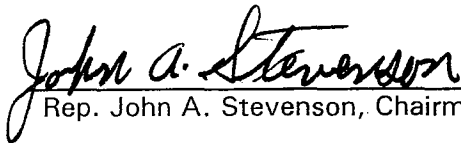
MOTION: Rep. Eskridge made a motion to send HB 500 to the floor with a **DO PASS recommendation**. The voice vote was unanimously in favor and the **MOTION PASSED**. Rep. Anderson will sponsor this bill on the floor.

HB 515 The last item of business on the agenda was HB 515. Rep. Eskridge presented this bill which creates a new section in Idaho Code to provide for the operation and use of State outdoor sport shooting ranges. Rep. Eskridge explained that this bill also helps deal with the litigation issue at Farragut State Park and will help protect the State against similar litigation in the future. Rep. Eskridge deferred to Sharon Kiefer of the Idaho Fish & Game to address technical questions and further testify.

Sharon Kiefer Sharon Kiefer, representing the Idaho Fish & Game Dept. (IF&G) stood to testify in favor of HB 515. She reviewed the merits of this bill and related that IF&G has worked closely with the Attorney General's Office to address noise related issues raised in litigation at Farragut State Park and future concerns at other ranges. In the absence of any established state noise standard in the issue at Farragut State Park, the Judge was confronted with the decision of balancing noise related concerns of neighbors with the public's use of the shooting range. Therefore, this bill establishes a uniform noise standard for state outdoor sport shooting ranges. Mr. Kiefer stressed that private, public, law enforcement and military ranges are excluded from these standards. She also reported that the proposed noise standard follows federal guidance and is based on extensive research and scientific information for noise and sound measurement. In closing, Ms. Kiefer related that a uniform noise standard for state-owned outdoor shooting ranges provides for the mutual protection of communities from excessive noise intrusion while at the same time it recognizes and protects shooting ranges as important and legitimate public resources.

MOTION: Following lengthy committee questions and discussion, Rep. Sayler made a motion to send HB 515 to the floor with a **DO PASS recommendation**. The **MOTION PASSED** upon a voice vote. Rep. Eskridge will sponsor this bill on the floor of the House.

ADJOURN: Having concluded all business on the agenda, Chairman Stevenson adjourned the meeting at 3:30 p.m., with a reminder that the committee will meet on Thursday to hear a status report on the Eastern Snake Plain Aquifer as well as hear other legislation.


Rep. John A. Stevenson, Chairman


Sherry McMett, Secretary

Sign-In Sheet

RESOURCES & CONSERVATION COMMITTEE

Date: February 19, 2008

Name, Address, & Phone PLEASE PRINT	Title	Representing Company/Organization	Legislation Interested In	Wish to Testify	PRO	CON
MICHAEL A. DEMAREST 208-862-6412 HC 83 Box 8000, COSCOPIO ID. 83611	RANCH MANAGER	SHEPP RANCH OUTFITTERS LLC	473	YES ✓	X	
Grant Simonds	Executive Director	IOGA	473	IF NECESSARY ✓	X	
DENNIS TANIKUNI	Lobbyist	Jaen Bureau	all	No		
Holli High	Liason	Energy Development	500	H REC. TH NO	X	
Bob Meinen	Director	Idaho Parks & Rec	4B 515	IF IF NECESSARY	X	
DAVID LEPTICH	REC WICDC HABITAT BIOD	IDaho FISh & GAME	4B 515	AS NEEDED	X	
Sharon Kiefer	Leg. Liaison	Idaho Fish & Game	H 515	YES	X	
Tom Demarest	President	Diamond D Ranch Inc	473	YES ✓	X	
NAROLD OTT	Ex Dir.	IRSA	A11	No		
Roger Hales	Bd. Atty.	Idaho OUTFITTERS & GUIDES LICEN. Bd.	473	IF NEC.	X	
Bonnie Butler		Gov's Office		No		
CORY SMITH	Lobbyist	IFISF		NO		
Shelly Fisher 22900 Conrad Middleton, ID	Volunteer	IOGA	473	IF needed	X	
Jake Howard	Director	IOGLB	473	YES ✓	X	
Jeremy Posa	Atty	IOGA	473	Yes ✓	X	
BENJAMIN DAVENPORT	Lobby	IOGA	473	No	X	
GEORGE BROWN	DIRECTOR	LANDS	405 407	YES	X	
Steve Tobiasson	IFISF	IOGLB	473	Y ✓	X	



IDAHO DEPARTMENT OF FISH AND GAME

600 South Walnut/P.O. Box 25
Boise, Idaho 83707

C.L. "Butch" Otter / Governor
Cal Groen / Director

February 19, 2008

To: The House Resources and Conservation Committee
Testimony of Sharon W. Kiefer, Director's Office, Idaho Department of Fish and Game
House Bill 515

Chairman Stevenson and Committee:

The Idaho Department of Fish and Game (Department) has worked closely with the Attorney General's Office to draft HO515 for three reasons – a need to address noise related concerns raised in litigation over use of the shooting range at Farragut State Park (and to properly manage future concerns at other ranges), a need to address a directive from the Idaho Department of Fish and Game Commission to work with the Idaho Department of Parks and Recreation to develop, operate, and maintain a community, family and sportsmen based shooting range at Farragut State Park and last but not least, a need to properly manage future noise issues at our other ranges.

Before I speak about the merits of the bill, I want to share a perspective about the role that shooting ranges play in supporting the mission, objectives, and activities of state wildlife agency programs because it helps explain the IDFG Commission's directive for the Farragut shooting range and our interest in this legislation. To express this, I've plagiarized comments by the Director of the Arizona Game and Fish Department. There are two very important aspects of our shooting ranges that are central to the Department's objectives, which are support of hunter education programs and providing recruitment/retention opportunities. Like the Arizona hunter education program, we have a mandatory live-firing component in the hunter education curriculum. Access to shooting ranges is critical. But more than that, shooting ranges represent "continuing education" beyond the initial coursework. Ranges are places where hunters visit year-round to improve their shooting skills and to enjoy recreational shooting. To have responsible and safe hunters, we need to provide them with safe and friendly places to practice. Another important role that shooting range programs play in supporting wildlife agency missions is in recruitment and retention. Declining recruitment and participation rates in hunting is a critical trend across the nation. Shooting ranges can offer mentoring with the opportunity to learn and develop skills to help offset that trend.

As I noted, our interest in this legislation partly stems from current litigation opposing expansion of the Farragut Shooting Range. In the course of that litigation, the judge was confronted with the difficult decision of how to balance noise related concerns of neighbors with the public's use of the range. In the absence of any established state standard, the judge was left to fashion a remedy. As a result of the judge's order, the need for a uniform state noise standard for state owned ranges became apparent. This legislation proposes such a standard providing a balance to protect adjoining landowners while at the same time ensuring the opportunity for the public to have adequate access to state recreational shooting ranges. The noise metric measure is straight-

forward and will provide certainty for all. Thus, providing a state-approved noise standard is an important element of HO515.

Briefly, this bill:

- Creates a new section in Title 67 to provide for the operation and use of state outdoor sport shooting ranges. Only sport shooting ranges owned by the State of Idaho or a state agency and used by the public are affected by this bill. This bill does not affect military and law enforcement ranges. Private sport shooting ranges continue to be governed under Chapter 26, Title 55 of the Idaho Code.

- This bill establishes a uniform noise standard for state outdoor sport shooting ranges. Private and public nuisance actions for noise would be precluded when state ranges are in compliance with the noise standard. Currently Idaho has no noise standard for state owned ranges, which leaves noise guidance up to case-by-case determination by courts. Establishing a state noise standard is beneficial to consistent and continued operation of state outdoor sport shooting ranges and to protecting the interests of adjoining landowners.

- This bill requires state agencies responsible for managing state outdoor sport shooting ranges to establish operation and use standards for each range consistent with the uniform noise standard.

We believe a uniform noise standard for state-owned outdoor shooting ranges provides for the mutual protection of communities from excessive noise intrusion from shooting ranges while at the same time recognizes and protects shooting ranges as important and legitimate public resources. All parties benefit when noise levels are managed responsibly and determined objectively. Also, by establishing a consistent benchmark, a uniform noise standard prevents the proliferation of inconsistent and perhaps arbitrary standards by local jurisdictions and the courts.

I won't go into the technical specifics of the noise standard, which is adequately defined in the legislation. However, the Department is prepared to answer technical questions. I do want to inform you that the proposed standard is similar to the standard adopted by the State of Arizona for shooting ranges. After more than 10 years of experience, Arizona officials find that the standard is working well for both ranges and surrounding residents. The standard is slightly more conservative (i.e. more protective of communities) than the guideline in the National Rifle Association Range Source Book, a guidance document for shooting range construction and management. The proposed standard follows federal guidance and is based on extensive research and scientific information for noise and sound measurement.

The Department needs state-owned ranges, current and future, to remain a public resource for reasons I've discussed. We need your support of HO515 to accomplish this objective.

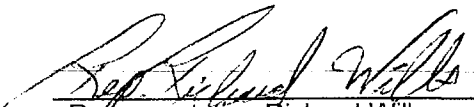
audited by more than one source and in different ways. In response to questions about the drop in revenue as shown on a hand-out (see attached), Senator Corder stated that previously the fee structure was such that interstate truckers not based in Idaho didn't register their trucks in Idaho, but waited until they entered Idaho and then paid for a \$50.00 permit. This loophole created a shortfall in revenues. In response to questions regarding the validity of his study since it was based on his trucking company, Senator Corder responded by stating that ITD was the source of the numbers. Senator Keough, co-sponsor of the legislation, emphasized that ITD and their economist worked with them on this issue. Rep. Moyle questioned the possibility of a lawsuit arising from this legislation. Senator Corder felt that no matter how the revenue issue was resolved, someone would feel it wasn't fair. Senator Keough responded that if a truck was below the 50,000 miles in any commodity the current system treated them unfairly and in favor of long-haul truckers. In response to a question about phasing in this proposed system, Senator Corder felt a phase-in period would be unlikely since additional rules have to be written for 6,000 gross vehicle weight trucks, staff will be needed to implement this process and the bill requires one year for implementation. In addition, because initially we will notice a drop in revenue if a phase-in is done, the State would never catch up.

MOTION: Rep. Bedke made a motion to introduce **RS 17945**. Rep. Jaquet asked if the Governor's office was in favor of this proposal. Senator Keough stated they had talked with the Governor and he has encouraged any and all proposals to come forward. By voice vote, the motion passed.

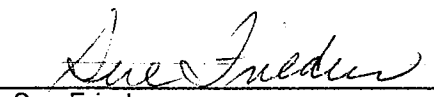
RS 18051: Rep. Moyle referred the committee to **HB515**, which deals with state-owned outdoor shooting ranges. Because privately-owned shooting ranges are having problems, this is being brought forward to address some of those concerns. This proposal will achieve protection for privately-owned ranges just as **HB515** did for state-owned ranges. A concern was raised regarding page 2, beginning on line 36, Preemption of local authority. Rep. Moyle assured the committee that section ties back into standards set in **HB515**, which is Chapter 91, Title 67, *Idaho Code*. Rep. Moyle informed the committee that law enforcement would testify in favor of this legislation should it be introduced.

MOTION: Rep. Bedke made the motion to introduce **RS 18051**. Rep. Jaquet questioned the use of **HB515** (Chapter 91, Title 67, *Idaho Code*) in this legislation since it hasn't been passed by the Senate. Rep. Moyle stated that if a bill passes one House it is appropriate to refer to it in other proposed legislation. Certainly if **HB515** does not pass the Senate, this legislation would be null and void. By voice vote the motion passed.

ADJOURN: There being no further business to come before the committee, Chairman Wills adjourned the meeting at 4:40 p.m.



Representative Richard Wills
Chairman



Sue Frieders
Secretary

AGENDA - Revised/Revised

SENATE RESOURCES & ENVIRONMENT COMMITTEE

1:30 p.m.
 Room 204
 Wednesday, March 5
 Friday, March 7, 2008

BILL NO.	DESCRIPTION	PRESENTED BY
WEDNESDAY		
RS 17997	This Memorial expresses the Idaho Legislature's support for federal officials to make timely decisions on necessary permits	Pete Skamser
S 1449	Navigational encroachment, penalty	Sen. Jorgenson, Schroeder
H 500	State land, lease, commercial purpose	Rep. Anderson, et al
H 498	State land, forest product sales	Jane Wittmeyer, Intermountain Forest Association
H 515	Outdoor sport shooting range	Rep. Eskridge, et al Sen. Jorgenson, et al
H 406a	Endowment lands, lease, residential	George Bacon, IDL
H 432	Lands, royalty, renewable resources	Paul Kjellander
H 474	Irrigation district, board of directors	Rep. Stevenson, Lynn Tominaga, IGWA
H 473	Outfitter/guide, unlicensed, paying	Rep. Moyle Jeremy Pisca, IOGA
FRIDAY		
S 1280	F&G, hound hunter permit fee	Sen. Schroeder
S 1281	F&G, mountain lion tag fee	Sen. Schroeder
H 407	Log Scaling Board, membership	George Bacon, IDL
H 405	Scaling Practices Board, membership	George Bacon, IDL
H 472	Fishing, 2 pole permit	Rep. Chavez

***Please present to the committee secretary
 a written copy of your testimony***

OFFICE
 Juanita Budell, Committee Secretary
 Rm 205, Telephone: (208) 332-1323
 Legislative Switchboard: (208) 332-1000
 e-mail: jbudell@senate.idaho.gov
 WATS: 1-800-626-0471
 Fax: (208) 334-2680

Senate Page - Sharri Swanson

COMMITTEE MEMBERS
 Sen Gary Schroeder, Chairman Sen Clint Stennett
 Sen Monty Pearce, Vice Chairman Sen David Langhorst
 Sen Dean Cameron
 Sen Brad Little
 Sen John Andreason
 Sen Charles Coiner
 Sen Jeff Siddoway

regarding this legislation. **Senator Jorgenson** said that he worked closely with IDL in drafting this legislation. **Mr. George Bacon, Director of IDL**, said that they are in full support of S 1449. He stated that the amount of fines have not increased since 1974 when the Lake Protection Act was established. This legislation speaks to gross environmental damage. **Senator Cameron** asked as to why the fines are retained for the benefit of the Department and to have those fines continuously appropriated. He stated that other entities' fines go to the general fund so that there is not extra incentive for an entity to be aggressive on their fines. **Mr. Bacon** said that it was his understanding that this legislation was crafted to conform with a similar position that already exists for DEQ for environmental damages, air quality, and other things that they oversee. He said his anticipation was that the fines that are levied would probably be spent immediately on repair and mitigation work for whatever damages are done. **Senator Little** said that he is concerned about unintended consequences regarding the fine money to be continuously appropriated. **Mr. Bacon** said the intent of the language was to make the funds available if they were needed for immediate repair, such as the destruction of the kokanee beds.

MOTION: **Senator Andreason** made the **motion** to send S 1449 to the floor with a do pass recommendation. The motion was **seconded** by **Senator Langhorst**.

SUBSTITUTE MOTION: **Senator Cameron** said that there are good features in the bill, but he cannot support it the way subsection (5) is drafted. It goes against public policy that has been made in the past and he does not support the fund being continuously appropriated. He made a **substitute motion** to send S 1449 to the 14th Order. The substitute motion was **seconded** by **Senator Little**. A roll call vote was taken. Voting aye were Senators Langhorst, Stennett, Siddoway, Little, Cameron, and Pearce. Voting nay were Senators Andreason and Schroeder. Senator Coiner was out of the room at the time of voting. The **substitute motion passed 6-2**. **Senator Jorgenson** is the **sponsor** of the bill. Senator Cameron will work with Senator Jorgenson on the amendments.

H 515 **Representative Eskridge** presented H 515. This bill would provide for the operation and use of State outdoor sport shooting ranges and would require State agencies responsible for managing State outdoor sport shooting ranges to establish operation and use standards for each range. It also establishes a uniform noise standard for State outdoor shooting ranges, precludes both public and private nuisance actions for noise against any State outdoor sport shooting range that is in compliance. Currently, the State has no noise standard.

This bill does not affect military and law enforcement ranges and private sports shooting ranges.

TESTIMONY: **Representative Pence** testified on behalf of H 515. A copy of her testimony is inserted into the minutes.

There has surfaced a need to address noise related concerns raised in litigation over the use of the shooting range at Farragut State Park and to properly manage future concerns at other ranges. A need to address a directive from the Idaho Department of Fish and Game Commission to work with the Idaho Department of Parks and Recreation to develop, operate, and maintain a community, family and sportsmen based shooting range at Farragut State Park and last, but not least, a need to properly manage future noise issues at other state shooting ranges.

H 515 creates a new section in title 67 to provide for the operation and use of state outdoor sport shooting ranges. Only sport shooting ranges owned by the state of Idaho or a state agency and used by the public are affected by this bill. This bill does not affect military and law enforcement ranges. Private sport shooting ranges continue to be governed under Chapter 26, Title 55 of the Idaho Code.

This bill establishes a uniform noise standard for state outdoor sport shooting ranges. Private and public nuisance actions for noise would be precluded when state ranges are in compliance with the noise standard. Currently the state has no noise standard, which leaves noise guidance up to courts, which can hamper range use. Establishing a state noise standard is beneficial to continued operation of state outdoor sport shooting ranges and protecting state interests.

This bill requires state agencies responsible for managing state outdoor sport shooting ranges to establish operation and use standards for each Range.

TESTIMONY: Next to testify was **Nate Helm, Executive Director, Sportsmen for Fish and Wildlife Idaho.** He said that they are in support of this bill.

TESTIMONY: **Ms. Sharon Kiefer, Legislative Liaison for IDFG,** was next to testify. A copy of her testimony is inserted into the minutes.

Chairman Schroeder and Committee:

The Idaho Department of Fish and Game (Department) has worked closely with the Attorney General's Office to draft H0515 for three reasons — a need to address noise related concerns raised in litigation over use of the shooting range at Farragut State Park, a need to address a directive from the Idaho Department of Fish and Game Commission to work with the Idaho Department of Parks and Recreation to develop, operate, and maintain a community, family and sportsmen based shooting range at Farragut State Park and last but not least, a need to properly manage future noise issues at Blacks Creek, our other outdoor state-owned range, or any other ranges the Department may build in the future.

Before I speak about the merits of the bill, I want to share a perspective about the role that shooting ranges play in supporting the mission, objectives, and activities of state wildlife agency programs because it helps explain the IDFG Commission's directive for the Farragut shooting range and our interest in this legislation. To express this, I've plagiarized comments by the Director of the Arizona Game and Fish Department. There are two very important aspects of our shooting ranges that are central to the Department's objectives, which are support of hunter education programs and providing recruitment/retention opportunities. Like the Arizona hunter education program, we have a mandatory live-firing component in the hunter education curriculum. Access to shooting ranges is critical. But more than that, shooting ranges represent "continuing education" beyond the initial coursework. Ranges are places where hunters visit year-round to improve their shooting skills and to enjoy recreational shooting. To have responsible and safe hunters, we need to provide them with safe and friendly places to practice. Another important role that shooting range programs play in supporting wildlife agency missions is in recruitment and retention. Declining recruitment and participation rates in hunting is a critical trend across the nation. Shooting ranges can offer mentoring with the opportunity to learn and develop skills to help offset that trend.

As I noted, our interest in this legislation partly stems from current litigation opposing expansion of the Farragut Shooting Range. In the course of that litigation, the judge was confronted with the difficult decision of how to balance noise related concerns of neighbors with the public's use of the range. In the absence of any established state standard, the judge was left to fashion a remedy. As a result of the judge's order, the need for a uniform state noise standard for state owned ranges became apparent. This legislation proposes such a standard providing a balance to protect adjoining landowners while at the same time ensuring the opportunity for the public to have adequate access to state recreational shooting ranges. The noise metric measure is straightforward and will provide certainty for all. Thus, providing a state-approved noise standard is an important element of H 515.

Briefly, this bill:

- Creates a new section in Title 67 to provide for the operation and use of state outdoor sport shooting ranges. Only sport shooting ranges owned by the State of Idaho or a state agency and used by the public are affected by this bill. This bill does not affect military and law enforcement ranges. Private sport shooting ranges continue to be governed under Chapter 26, Title 55 of the Idaho Code.

- This bill establishes a uniform noise standard for state outdoor sport shooting ranges. Private and public nuisance actions for noise would be precluded when state ranges are in compliance with the noise standard. Currently Idaho has no noise standard for state owned ranges, which leaves noise guidance up to case-by-case determination by courts. Establishing a state noise standard is beneficial to consistent and continued operation of state outdoor sport shooting ranges and to protecting the interests of adjoining landowners.

•This bill requires state agencies responsible for managing state outdoor sport shooting ranges to establish operation and use standards for each range consistent with the uniform noise standard.

We believe a uniform noise standard for state-owned outdoor shooting ranges provides for the mutual protection of communities from excessive noise intrusion from shooting ranges while at the same time recognizes and protects shooting ranges as important and legitimate public resources. All parties benefit when noise levels are managed responsibly and determined objectively. Also, by establishing a consistent benchmark, a uniform noise standard prevents the proliferation of inconsistent and perhaps arbitrary standards by local jurisdictions and the courts.

I won't go into the technical specifics of the noise standard, which is adequately defined in the legislation. There is a handout describing some of the technical aspects of this bill provided to each of you. The proposed standard is similar to the standard adopted by the State of Arizona for shooting ranges. After more than 10 years of experience, Arizona officials find that the standard is working well for both ranges and surrounding residents. The standard is slightly more conservative (i.e. more protective of communities) than the guideline in the National Rifle Association Range Source Book, a guidance document for shooting range construction and management. The proposed standard follows federal guidance and is based on extensive research and scientific information for noise and sound measurement.

The Department needs state-owned ranges, current and future, to remain a public resource for reasons I've discussed. We need your support of H 515 to accomplish this objective.

That concluded Ms. Kiefer's testimony. The handout she referred to is inserted into the minutes.

Understanding Noise:

A characteristic of environmental noise is that it is not steady but varies in amplitude from one moment to the next. If you stand on a street corner a bus comes by and departs, a skate boarder passes by (click-click, click-click) over the joints in the sidewalk, the exhaust on a taxi backfires, someone scores a goal at a soccer game and the crowd cheers. There is a constant ebb and flow of noise exposure. To account for these variations and to assess environmental noise in a uniform manner you need a metric that accounts for intermittent noise exposure. Sound and what your ear "hears" are not exactly the same, so that is why we measure noise exposure.

1. What is Leq(h)?

We need a way to translate noise energy into a metric that we can physically measure. Thus, we use Leq.

This is an EPA endorsed noise evaluator that has widespread use and scientific basis. This indicator provides a single numerical

description that “averages” varying noise energy exposure during the time interval to an equivalent measure of energy were it produced at a steady level.

The three important determinants of noise annoyance are sound intensity (how loud), noise duration (how long), and noise frequency (how often). Only time-weighted metrics like the Leq are capable of integrating all three determinants into a single descriptor of noise exposure.

Example:

a. 10 gunshots/hour versus 100 gunshots/hour (assume same gun and same location). Because all gunshots in this example are equally as loud, only an LEQ metric can recognize that 10 versus 100 shots is a 10 fold increase in noise exposure. Un-weighted “threshold” or singular event metrics are insensitive to this difference and would treat these two scenarios as equal noise. Only LEQ can integrate how loud, how often, and how long the community is exposed to noise.

Leq is a time weighted metric. There needs to be a specific understanding that, with the proposed standard, singular events could be louder than 64 CIBA but as they “accumulate” in the average there is a “limit” on how many and the total community noise exposure.

In the case of H515, noise energy for the noise standard is measured over an interval of 1 hour during the noisiest hour of peak use during the operation of the range.

2. What is a dBA?

The decibel (dB) is used to measure sound level, but it is also widely used in electronics, signals and communication. The dB is a logarithmic unit used to describe a ratio.

3. How loud is 64 decibels?

Drawing on resources from the National Institutes of Health, The U.S. Department of Energy, and the Federal Interagency Committee on Noise, the noise is similar to:

60 decibels: Quiet office, Normal Conversation, Loud Conversation, Laughter, Dishwasher (rinse at 10 feet)

65 decibels: Normal Conversation, Loud Conversation, Laughter, Electric Typewriter (at 10 feet), Traffic on a busy street, Cash Register (at 10 feet)

70 decibels: Vacuum Cleaner, Hair dryer, Radio/TV audio, Traffic on a busy street.

4. Why is the measurement point for the noise standard defined at 20 feet from occupied structures?

Noise standards are generally viewed as "receiver standards" i.e. measured as per how the receiver will hear them. This is also the distance used in the Arizona shooting range standard that this is modeled on.

5. What does section 67-9104 "Noise Buffering or Attenuation for New Use" mean?

This section means that if there is an established state range that is currently meeting the noise standard and subsequently, there is new use within 1 mile such that when we do the noise measurement as prescribed in this statute (within 20 feet of the occupied structure), if the range no longer meets the standard, it is not the responsibility of the range to provide for noise buffering to meet the standard. However, if there is new use outside of 1 mile and the range does not meet the standard, then it is the responsibility of the range to provide for noise buffering to meet the standard. Thus the State defines the balance of who bears the nuisance burden.

This clause deals with what is generally called "coming to the nuisance" and was demonstrated in the judge's order on Farragut:

"None of the plaintiffs who have residences down range from the rifle range resided there before the range was created in 1950. Thus, in that sense, each of the plaintiffs have "come to the nuisance". "Coming to the nuisance" is the notion that if you move to the nuisance after the nuisance already exists, you cannot be heard to complain of the nuisance since you knew what you were getting into."

MOTION:

Vice Chairman Pearce made the **motion** to send H 515 to the floor with a do pass recommendation. The motion was **seconded** by **Senator Cameron**.

In the discussion, **Senator Little** questioned the one mile buffer.

Senator Langhorst said he wanted to thank the sponsors of the bill and the sportsmen for their participation.

The motion **passed** by unanimous voice vote. **Senator Jorgenson** will be the **sponsor** of this bill.

H 473

Jeremy Pisca, Attorney, representing the Idaho Outfitters and Guides Association (IOGA), presented H 473.

He said that earlier in the year, IOGA joined with a trade group to form a task force with the licensing board to look at some significant problems in the industry. One of the things that the task force agreed on was the increased amount of illegal activity out in the field. They are seeing more and more of illegal outfitters taking the public on illegally outfitted guided trips. This was a joint effort between the licensing board and the trade group, and this bill is the result of their findings. They consulted prosecuting attorneys in the counties where these violations occur.

Name PLEASE PRINT	Occupation	Representing Company/Organization	Legislation Interested In	Testify Yes/No	Pro	Con
Pete SKAMSER	Lobbyist	Formation Capital	RS 17997	Yes	X	
Lynn Tomlinay	Ex. DIR	IGWA	HB 474	Yes	X	
Sharon Kiefer	Leg. Liaison	IDFG	H515	Yes	X	
Dave Gairs	Journalist	Idaho News Service				
JACK LYMAN	LEAS ADV	IMFA	RS17997	no	X	
Jane Wittmeyer	V.P	IFA	H498	Yes	X	
Ernie Anderson		Governors		no		
Marc Gibbs	FARMER	IOGLB	H 473	NO	X	
Holli High	Liaison	Energy development	HB500	if necc.	X	
BENJAMIN DAVENPORT	Lobby	IOGA	H473	NO		
Erma Neirevic	Intern	IWUA		NO		
Lois Smith	Lobbyist	IFSE		NO		
GEORGE BACON	DIRECTOR	LANDS	H 406a	YES	X	
Jodi Court	Conservation	Venture Advisors		No		
JEREMY REED	Attorney	IOGA	H 473	Yes	X	
Nate Helm	Leg. Advisor	SPWID	H 515	Yes	X	
Grand Sumner	Ex. Director	IOGA	473	if necessary		
David [unclear]	Executive	Truck [unclear]				

Name PLEASE PRINT	Occupation	Representing Company/Organization	Legislation Interested In	Testify Yes/No	Pro	Con
DAVE LEBOY	Atty	Peyette Lakes Home Owners	H 406A	X	X	
Steve Tobiasson	ni	IOGLB	H 473	X	X	
John [unclear]	Director	IOGLB	H 473	X	X	
David [unclear]	Director	IOGLB	H 473	X	X	
John [unclear]		Gov's Office				
Scott [unclear]	OUTFITTER	IOGLB	HB 473	IF NECESSARY	✓	
Ken Smith	OUTFITTER	Ken Smith/Hunters	HB 473	NO	✓	
Shelly Fisher	IOGLB Volunteer	IOGLB	HB 473	IF needed	✓	

LAWRENCE G. WASDEN
ATTORNEY GENERAL
Clive J. Strong
Chief of Natural Resources

KATHLEEN E. TREVER, ISB #4862
W. DALLAS BURKHALTER, ISB# 3286
Deputy Attorneys General
PO Box 25
Boise, ID 83707
Telephone: (208) 334-3771
FAX: (208) 334-4885

Attorneys for Defendants
State of Idaho, IDFG and Groen

STATE OF IDAHO }
COUNTY OF KOOTENAI } SS
FILED:

2011 JAN 10 PM 4: 32

CLERK DISTRICT COURT

Patty Bayley
DEPUTY

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

CITIZENS AGAINST RANGE)
EXPANSION, an Unincorporated non-profit)
Association; JEANNE J. HOM, a single)
woman; EUGENE and KATHLEEN RILEY,)
husband and wife; LAMBERT and DENISE)
RILEY, husband and wife; GABRIELLE)
GROTH-MARNAT, a single woman,)
GERALD PRICE, a single man; RONALD)
and DOROTHY ELDRIDGE, husband and)
wife; and GLENN and LUCY CHAPIN,)
husband and wife, SHERYL PUCKETT, a)
single woman; CHARLES MURRAY and)
CYNTHIA MURRAY, husband and wife; and)
DAVE VIG, a single man,)
Plaintiffs,)

Case No. CV-05-6253

**DEFENDANTS' REPLY BRIEF IN
SUPPORT OF SUMMARY DISPOSITION
OF MOTION FOR
PARTIAL LIFTING OF INJUNCTION**

vs.)
IDAHO FISH AND GAME DEPARTMENT,)
an agency of the STATE OF IDAHO, and)
CAL GROEN, Director of the IDAHO FISH)
AND GAME DEPARTMENT,)
Defendants)

Defendants Idaho Department of Fish and Game and its Director (collectively
"IDFG") file this reply brief in support of summary disposition of their Motion to
Partially Lift Injunction, filed with this Court on June 9, 2010, and in opposition to

Plaintiffs' Motion for Summary Judgment. For the reasons set forth below, the Court should grant Defendants' Motion to Partially Lift Injunction and deny Plaintiffs' Motion for Summary Judgment.

I. BACKGROUND

The Court issued final judgment in this case and a Memorandum Decision, Findings of Fact, Conclusions of Law and Order on Feb. 23, 2007 ("Feb. 23 Order"), enjoining IDFG from allowing shooting at the Farragut Range until certain conditions regarding noise and safety are met.

IDFG, based on direction of the Idaho Fish and Game Commission in November 2007, did not proceed with the Vargas Master Plan presented at trial. IDFG proceeded instead with smaller-scale plans for three pistol/rifle shooting areas with a total of 36 shooting stations. Second Aff. of David Leptich ¶¶3-4. At this time, IDFG has moved the Court to lift the injunction as it pertains to the 12-station, 100-yard shooting area.¹

Before the Court is IDFG's Motion to Partially Lift Injunction, filed on June 9, 2010, for which a joint case management plan was stipulated by the parties and approved by the Court in a Scheduling Order dated September 17, 2010 ("Scheduling Order"). Consistent with the Scheduling Order, the Court is considering summary disposition of IDFG's motion and will hold an evidentiary hearing if necessary to determine whether to grant the motion. The joint case management plan did not contemplate a separate motion by the Plaintiffs for summary judgment.

The Feb. 23 Order provided for the opening of the Range for up to 500 shooters per year upon compliance with the Order's requirement to install a baffle over every

¹ IDFG began to install baffles in the fall of 2010 on the renovated 200-yard shooting area, but has not completed their installation and is not asking the Court to open this portion of the Farragut Range at this time. Second Aff. of David Leptich ¶7.

firing position. As noted by IDFG in the August 30, 2010 status conference in this matter, IDFG interpreted the Feb. 23 Order to mean that the Court would base its determination on a view of the premises if the Parties could not agree regarding compliance with this requirement. The Feb. 23 Order also did not indicate the Court would hear additional evidence on the matter of safety as a prerequisite to a finding of compliance with the “No Blue Sky Rule” to allow the Range to open for more than 500 shooters.² Following the August 2010 status conference, however, the Court allowed for additional briefing, discovery and the offering of expert and other testimony to consider summary disposition of the matter and hold an evidentiary hearing if needed.

To the extent the Court determines further factual and/or opinion testimony is helpful to make findings regarding IDFG’s compliance with safety requirements, IDFG supports its motion with the briefs and affidavits previously filed and with the additional affidavits of David Leptich, Randall Butt, and Kathleen Trever filed herewith.

Plaintiffs have not filed any motion for relief from judgment to seek modifications of the Feb. 23 Order’s requirements but have filed a Motion for Summary Judgment. To the extent Plaintiffs ask the Court to impose new safety requirements to lift the Court’s injunction, such relief is governed by I.R.Civ. P. 60(b). Plaintiffs have made no motion to request relief under Rule 60(b), and have not made any showing sufficient to grant relief under this Rule. Thus, the Court must reject Plaintiffs’ attempts to impose new or different safety standards.

Plaintiffs do not contradict the facts that: (1) IDFG has installed baffles over firing positions at the 100-yard shooting area to prevent firing above the berm behind the

² The only reference in the Feb. 23 Order to the Court’s taking of “further evidence” was related to the setting of a noise standard. Court Order at 59, 60.

target and (2) baffles have been installed in the 100-yard shooting area to prevent bullet escapement and provide more than twice the coverage of the “No Blue Sky Rule” identified by the Court for protection of people in the downrange Surface Danger Zone. Plaintiffs also fail to present a legal basis for the Court to use a noise standard for Farragut Range operations other than that constitutionally adopted by the Legislature. Thus, summary grant of IDFG’s motion to partially lift the injunction is appropriate.

II. ARGUMENT

A. The noise standard and related laws adopted by the Idaho Legislature in 2008 are constitutional and apply to Farragut and other outdoor sport shooting ranges.

Plaintiffs’ claim that Idaho’s statutory noise standard is unconstitutional special legislation lacks merit.

There is a presumption in favor of the constitutionality of the challenged statute or regulation, and the burden of establishing that the statute or regulation is unconstitutional rests upon the challengers. An appellate court is obligated to seek an interpretation of a statute that upholds [its] constitutionality. The judicial power to declare legislative action unconstitutional should be exercised only in clear cases.

Stuart v. State, 232 P.3d 818, 818 (2010) (quotation and citations omitted).

Article III §19 of the Idaho Constitution prohibits the legislature from passing “special laws” in certain enumerated cases. “In our constitution, local and special laws are prohibited only in regard to the matters therein specifically mentioned.” *Jones v. State Bd. of Medicine*, 555 P.2d 399, 417 (1976). The Idaho Constitution “contains no catch-all restriction against special laws where a general law would apply.” *Id.* Here, neither regulation of shooting ranges nor regulation of noise is among the enumerated areas in which local or special laws are prohibited.³ Thus, Article III, § 19 does not

³ The cases Plaintiffs cite regarding “special legislation” are readily distinguishable from this case. In *Idaho Schools for Equal Educational Opportunity (ISEEO) v. State of Idaho*, 97 P.3d 453 (2004), the Idaho

prohibit the Legislature from establishing local or special laws relating to noise standards for shooting ranges.

Even if one or more of the enumerated categories in Article III, § 19 could be stretched to include noise standards for shooting ranges, the standard for determining whether a law is special is “whether the classification is arbitrary, capricious, or unreasonable.” *Moon v. North Idaho Farmers Ass’n*, 96 P.3d 637, 647 (2004) (quotation omitted). “A legislative enactment is not special ‘if its terms apply to, and its provisions operate upon, all persons and subject matter in like situation[s].’” *Id.* (quotation omitted).

HB515 (the State Sport Shooting Act) is constitutional by itself from a “special” legislation standpoint in that it serves a legitimate government interest and applies rational standards to all state outdoor sport shooting ranges equally. Moreover, the Legislature’s broad intent on the subject of shooting ranges and regulation of shooting

Supreme Court found a legislative action unconstitutional where it violated the Article III, §19 prohibition against the Legislature’s passage of special laws to “regulate the practice of the courts of justice.” In *ISEEO*, the Legislature established procedural rules for a particular pending lawsuit, directly contradicting or amending court procedure, without a showing of necessity pursuant to Article V §13 of the Idaho Constitution. The Idaho Supreme Court found that HB 403 unconstitutionally amended procedures to retroactively establish standing. HB 403 also unconstitutionally amended I.R.Civ.P. 41 by mandating dismissal of parties without any court action (Idaho Code §6-2215(3) “school districts that were parties to a lawsuit ... shall no longer be parties and shall be dismissed from any proceedings that were suspended”). It also found that HB403 unconstitutionally amended I.R.Civ.P. 62 by mandating a stay of case proceedings, a decision only the district court can make (amending Idaho Code §6-2215(2) so that “all proceedings in the lawsuit shall be suspended”). *ISEEO v. State*, 97 P.3d at 459-460. In the case before the Court, the Idaho Legislature’s 2008 actions regarding shooting ranges and noise standards involve no such regulation of court practice. *See also Kirkland v. Blaine Co. Medical Ctr.*, 4 P.3d 1115, 1121 (2000) (finding it “properly within the power of the legislature to establish statutes of limitations, statutes of repose, create new causes of action, and otherwise modify the common law without violating separation of power principles” and “when a legislative body, *without regard to facts of a particular case...*, but rather as a matter policy and rule determines for all citizens in all incidents that may occur thereafter will be limited, the function is legislative”).

The other cases cited by Plaintiffs, *Concerned Taxpayers of Kootenai County v. Kootenai County*, 50 P.3d 991(2002), and *School Dist. No. 25, Bannock County v. State Tax Comm’n*, 612 P.2d 126 (1980) involve a different Article III §19 prohibition (“The legislature shall not pass local or special laws in any of the following enumerated cases, that is to say:... For the assessment and collection of taxes”). This case does not involve the assessment or collection of taxes and does not otherwise fall within the specific cases enumerated in §19.

and noise is even more evident in the context of other legislation passed in 2008, and clearly does not constitute “special” law.

Senate Bill 1441 (2008 Session Laws, Ch. 304) resulted in the preemption of certain firearms regulation, in part through newly enacted Idaho Code §18-3302J:

(1)The legislature finds that uniform laws regulating firearms are necessary to protect the individual citizen’s right to bear arms guaranteed by amendment 2 of the United States Constitution and section 11, article I of the constitution of the state of Idaho. It is the legislature’s intent to wholly occupy the field of firearms regulation within the state.

(3) A county may adopt ordinances to regulate, restrict or prohibit the discharge of firearms within its boundaries. Ordinances adopted under this subsection may not apply to or affect:

(d) A person lawfully discharging a firearm on a sport shooting range as defined in section 55-2604, Idaho Code; or

(e) A person discharging a firearm in the course of target shooting on public land if the discharge will not endanger persons or property.

HB 604 amended Idaho Code Title 55, Section 26 regarding regulation of sport shooting ranges, adopting the noise standards of Idaho Code §67-9102 by reference to apply to all other ranges “designed and operated for the use of rifles, shotguns, pistols, ... or any other similar sport shooting, including ranges operated exclusively for the use of law enforcement,” with the exception of completely enclosed facilities designed to offer a totally controlled shooting environment. Idaho Code §55-2604(4).

Local governmental law is herein preempted and local governments shall not have authority to establish or enforce noise standards for outdoor sport shooting ranges, not otherwise exempted from local regulation by this chapter, more restrictive than any standards established for state outdoor shooting ranges in chapter 91, title 67, Idaho Code, nor shall a local government have the authority to make any action described in 55-2604(5), Idaho Code, a violation of a local zoning ordinance nor shall the undertaking of any such action cause an outdoor sport shooting range to be in violation of any zoning ordinance.

Idaho Code §55-2605.

In evaluating 2008 legislation (SB1441, HB515, and HB604), it is clear the Legislature intended to address legitimate interests in shooting range operation and related concerns statewide. The 2008 Legislature explicitly preempted establishment of outdoor shooting range noise standards more restrictive than those established by the Legislature, regardless of whether the outdoor sport shooting range is state-owned, law enforcement or private.

In addition to the Farragut Range, IDFG operates two other state outdoor sport shooting ranges; Canyon County operates the Nourse sport shooting range.⁴ There are other non-state outdoor sport shooting ranges across the state, with at least two such ranges in Kootenai County alone.⁵ Second Aff. of David Leptich ¶10.

From a separation of powers standpoint, the regulation of sport shooting ranges and the enactment of noise and other standards for them are proper legislative functions and exercise of police power. *See City of Burbank v. Lockheed Air Terminal, Inc.* 411 U.S. 624, 638 (1973). The Court has recognized noise regulation is within the constitutional purview of state and local legislative bodies. Feb. 23 Order at 23-24 ¶31 (reviewing federal, state and local standards, such as Kootenai County Ordinances, and finding “[t]he State of Illinois has statewide noise standards. . . . Idaho does not have such standards”). Idaho has addressed its legislative gap regarding noise standards for sport shooting ranges, patterning its standards after those applied in Arizona since 2002. Ariz.Rev.Stat. §17-602 (including a noise standard of 64 dBA leq(h)).

⁴ There are a small number of residences within a mile of IDFG’s Blacks Creek and Garden Valley Ranges, but there is also nearby private land with potential for future development in these areas. *See* Second Aff. of David Leptich ¶¶8-9, Exh. A, B.

⁵ The Coeur d’Alene Pistol and Rifle Club is less than ½ mile from IDFG’s Panhandle Regional Office and has many residences in close proximity. *See* Second Aff. of David Leptich ¶10, Exh. C.

The Court discussed various noise metrics and methods of measurement, but specifically left open the question of noise level:

For example, it may be that 500 shooters per year in an unmitigated range producing 65 decibels is less desirable than 50,000 shooters per year from a range that only produces 30 decibels. It would seem logical for the parties to agree as to noise levels and shooter numbers in advance of any construction, but it is not the Court's place to force such agreement in advance. If the parties in the future cannot agree as to noise levels and maximum shooter numbers, the Court will make that determination with additional evidence.⁶

See Feb. 23 Order at 60.

As discussed above, the regulation of outdoor shooting ranges and their noise emissions is a legitimate legislative function. The 2008 Legislature enacted rational and consistent noise standards for all outdoor sport shooting ranges statewide in furtherance of a legitimate state interest. The noise standards apply prospectively and do not purport to retroactively legalize any past violation of law by state agencies or officers. Nor do they purport to alter or amend noise standards established by court order. Thus, these statutes do not violate the Idaho constitutional prohibitions against "special" laws "[l]egalizing as against the state the unauthorized or invalid act of any officer" or "[r]emitting fines, penalties or forfeitures." Idaho Const. Art. III, § 19.

Whether or not the Court adopted a noise standard, Idaho's adoption of statutory noise standard would properly apply to the Court's prospective judgment under

⁶ Plaintiffs erroneously contend the Court's statement rejecting a DNL standard and citations to the WHO and Shomer studies indicate the Court's adoption of a single event maximum noise standard. Plaintiffs' Br. 13-14. The Court clearly stated, as quoted by the Plaintiffs "The second concern (noise) is a function of the number of shooters (per day or per year) and the peak decibel level." Feb. 23 Order, Conclusions of Law at 51. Only time-weighted noise metrics like the LEQ(h), like those adopted by the Idaho Legislature, are capable of integrating both the number of events and decibel levels recognized by the court. Single event metrics cannot integrate these two components. The purpose of the Shomer studies was to collect and tabulate recommended appropriate minimum criteria values for the DNL metric in various communities and settings. Aff. of Kathleen Trever, Exhibit D at 6. However, the DNL as a time-weighted metric was ultimately viewed unfavorably by the Court. Feb. 23 Order at 22-23 ¶¶29-30. The WHO guidelines actually advocate for the A-weighted LEQ metric based on 16-hours (daytime) as the recommended practice for measurement and regulation of community noise. Aff. of Kathleen Trever, E at viii. The WHO guidelines for dBA max (the single event metric) for impulse sounds from firearms are 140 dBA for adults and 120 dBA for children. *Id.* at xv, Table 1.

I.R.Civ.P. (60)(b)(5). Prospective relief via injunction should only be given or continued under current law, not past law. *Landgraf v. USI Film Product*, 511 U.S. 244, 273-274 (1994)(finding “‘relief by injunction operates *in futuro*,’ and that the plaintiff had no ‘vested right’ in the decree entered by the trial court”); intervening statutes should be applied to prospective relief) *see also Meyers v. Hansen*, 221 P.3d 81, 88 (2009). In this case, however, the Court did not set a standard and left its determination of a standard to future action by the parties or the taking of “further evidence.” Feb. 23 Order at 59, 60. Application of the noise standard of Idaho Code §67-9102 to future operations of Farragut Shooting Range is clearly appropriate.

B. IDFG has met the safety requirements of the Feb. 23 Order to open the 100-yard shooting area on Farragut Range.

1. Partial lifting of the Court’s injunction is proper.

Plaintiffs’ contention that the Court cannot partially lift its injunction is without merit. Prospective injunctive relief is inherently equitable in nature. Partial lifting of injunctive relief upon compliance with safety conditions is appropriate and within the equitable powers of the Court. As the Court noted:

The restraint imposed by an injunction should not be more extensive than is reasonably required to protect the interests of the party in whose favor it is granted, and should not be so broad as to prevent defendant from exercising its rights.... “Reasonableness” is the watchword in these types of cases.”

Feb. 23 Order, Conclusions of Law ¶5 at 44 (citations omitted).

The 100-yard shooting area meets the Court’s safety criteria for opening Farragut Range; it is therefore reasonable and equitable for the Court to allow that portion of the Range to open. Plaintiffs’ claims that the Court should consider the lack of baffling elsewhere on the Range because these areas offer unbaffled “impromptu shooting

positions” ignore the obvious: these portions of the Range would remain closed by Court Order if the injunction were only lifted in regards to the 100-yard range. Compliance with the Range closure has not been an issue to date.⁷ Aff. of Randall Butt ¶¶8-9, 11.

If the Court were to adopt Plaintiffs’ reasoning, restraints imposed by the Court would be more extensive than reasonably required to protect Plaintiffs’ interests and to allow IDFG to exercise its rights in operation of a shooting range for hunter education, recreational and other legitimate purposes, contrary to Court’s Conclusions of Law.

2. The Court’s safety requirements apply to the Surface Danger Zone identified for an unmitigated range.

The Court’s consideration of safety in reaching its judgment clearly revolved around the Surface Danger Zone identified at trial for an unmitigated range.⁸

The Surface Danger Zone from the Farragut Shooting Range firing line encompasses a large area of private and public property and extends beyond and *down range* from the real property owned and controlled by IDFG anywhere from one to two miles.

Feb. 23 Order, Findings of Fact at 28 ¶36 (emphasis added) (citing Plaintiffs’ Exhibits, *inter alia*, the Vargas Design Criteria, Plaintiffs’ Trial Exhibit 2, reference figure 2).

The Vargas Design Criteria Exhibit relied upon by Plaintiffs in seeking injunctive relief, and ultimately referenced by the Feb. 23 Order, identifies a Surface Danger Zone

⁷ Because Bayview and other environs of Farragut State Park are unincorporated portions of Kootenai County, there is however, a wide allowance for area residents to discharge firearms on private and public lands outside the State Park and Wildlife Management Area. *See* Aff. of Randall Butt ¶10. County regulation of firearm discharge and target shooting on public lands is limited under Idaho Code §18-3302J.

⁸ With the addition of protective baffles, it should be noted the Surface Danger Zone (also called a safety fan) would be reduced.

It is important to frequently remember that while specific range safety fans are specified in the "NRA Range Manual," these safety fans presume a free and open range. As more and more controls and barriers are added to the design (both administrative and physical), the required range safety fan becomes smaller until eventually the range safety fan equals the exterior edges of the barriers. This point is not specifically made in the "NRA Range Manual" and also is not a logical conclusion by those not familiar with range design and construction. These same folks seize on a specification and fail to understand that by adding controls or barriers, the range safety fan specifications are changed, usually significantly reduced.

Plaintiffs’ Trial Exh. 6 at 2 (*Berms, Baffles, and Backstops*).

as a ± 10 -degree combined “impact area” and “ricochet area” sector (comprised of ten degrees to either side of the perpendicular from the target line to the firing line).

Plaintiffs’ Trial Exh. 2, at 2, and reference Figure 2 (Aff. of Kathleen Trever, Exh. C, Figure 2) (identical to the Surface Danger Zone presented in Plaintiffs’ Tr. Exh. 1, G-5).⁹

The only evidence regarding the travel of actual bullets related to the Farragut Range came from two individuals with residences within this Surface Danger Zone, Plaintiff Dorothy Eldridge, and her neighbor Will Collins. Feb. 23 Order, Findings of Fact at 26-27 ¶¶35. There was no testimony from Plaintiffs’ about bullets outside the Surface Danger Zone, and the Court limited its safety findings to property within the Surface Danger Zone.

The Farragut Shooting Range as presently exists and as proposed for expansion in the Vargas Master Plan must, for the safety of all persons within the Surface Danger Zone, be subject to the “No Blue Sky” rule.

Feb. 23 Order, Findings of Fact at 37 ¶¶61.

The Vargas Master Plan does not provide for complete baffling to protect all those within the Surface Danger Zone from bullet escapement.

Id. at 37 ¶¶60.

The present operation of the Farragut Shooting Range, which allows escapement of bullets beyond Farragut State Park/[IDFG] boundaries into the Surface Danger Zone encompassing plaintiffs’ private property and Farragut State Park property open to members of the public, constitutes a clear and present danger to the safety and health of plaintiffs and other persons in the area.

Id., Conclusions of Law at 46 ¶¶6.¹⁰

⁹ Plaintiffs’ witness Roy Ruel also presented his drawing of a Surface Danger Zone for the existing 200 to 600-yard range in Plaintiffs’ Trial Exh. 32, indicating the 10-degree arc range design convention for Surface Danger Zones “down range.”

¹⁰ This Conclusion of the Court was consistent with Plaintiff’s Post Trial Proposed Findings of Fact and Conclusions and Law at 17 ¶¶6. Plaintiffs also referenced the Vargas drawings (Pl. Tr. Exh. 2) and Roy Ruel’s presentation (Pl. Tr. Exh. 32) in identifying and discussing the Surface Danger Zone and framed their findings related to endangerment in terms of the Surface Danger Zone. *E.g.*, Plaintiffs Post-Trial Proposed Findings of Fact and Conclusions of Law ¶¶33, 35, 38-40.

Nevertheless, the Court specifically found that Plaintiffs' request for permanent closure of the range to be unwarranted:

Except for the fact that the existing range contains no baffle, the range is relatively safe as to its level of use up to and including 2002.

Id., Conclusions of Law at 46 ¶7.¹¹

The reasonable interpretation of the Feb. 23 Order is that Court intended safety requirements to apply to the “down range” area within the Surface Danger Zone, consistent with range design conventions presented at trial. The Court did not find areas outside the Surface Danger Zone to be unsafe, even for the unmitigated Range. The Surface Danger Zone for the 100-yard shooting area, prior to installation of berms and baffles, would be 10-degree sectors to either side of the perpendicular from the firing line to the target line. *See* Plaintiffs' Tr. Exh. 2 at 2, Fig. 2; *see also* Aff. of Leptich at ¶15.

To widen the downrange Surface Danger Zone as Plaintiffs now suggest, without any finding of endangerment and the Court's findings of relative safety to the contrary, would impose more restraints upon IDFG than are reasonably required to protect Plaintiffs' interests, counter to the Court's prior findings and conclusions.

3. The Court's requirement for installation of a baffle over every firing position to prevent shooters from firing above the “berm behind the target” (backstop) applies to direct fire.

The Court's baffle requirement to allow the Range to open up to 500 shooters is based on preventing a shooters' ability to fire *directly* above the berm behind the target

¹¹ After the 2007 trial, Farragut Park staff located some of the visitation records for the Range from the years 1987-1993. Aff. of Randall Butt ¶3-4, Exh. A. These records indicate annual use levels for these years ranged from a two-month period of 400 in 1988 to at least 2,868 in 1987. Second Aff. of David Leptich ¶1. Although IDFG was unable to corroborate the testimony of IDFG and Farragut Park staff at trial regarding such higher levels of use prior to 2002, these visitation numbers would further bolster the Court's findings of relative safety of use of the unmitigated range and argue against broadening the Court's safety interpretations.

(also known as the backstop). As noted above, the Court found that the range was relatively safe up to and including its 2002 use levels except for its lack of baffles.

The Court noted, “There is not a single overhead baffle at present.... *Even a solitary overhead baffle located just in front and above all firing stations* will drastically lower the chance of a bullet escaping the range.” Feb. 23 Order, Findings of Fact at 20 ¶22 (emphasis added).

The Court discussed baffles in the context of shooters’ being able to fire over the existing berm. The only testimony the Court discussed in detail related to how bullets might escape was that of Plaintiffs’ witness Roy Ruel. The Court described his testimony regarding the raising of a rifle barrel one inch compared to target aim at the standing position, and raising the barrel ¼ inch at the prone position at the 500-yard range causing a bullet to go over the existing berm. *Id.* at 28-29 ¶40; *see also* Plaintiffs Tr. Exh. 33, 34.

Given this context, it is unreasonable to adopt Plaintiffs’ contention that the 500-shooter safety requirement [“so that the shooter in any position...cannot *fire* his or her weapon *above* the berm behind the target” (emphasis added)] requires IDFG to fully prevent lower energy ricochets or fragments from striking the range floor or backstop and skipping over the back berm. This interpretation would subvert the Court’s Order, given that the Courts requirement for *greater* than 500 shooters is to keep bullets within the area owned and controlled by IDFG, not to prevent bullet escapement from the confines of any particular shooting area on the Range. Adopting Plaintiffs’ interpretation would impose more restraints upon IDFG than are reasonably required to protect Plaintiffs’ interests, counter to the Court’s prior findings and conclusions.

4. Plaintiffs do not contradict that IDFG has placed baffles over every firing position at the 100-yard range to prevent shooters (from prone to standing) from firing over the berm behind the target line.

IDFG witnesses Jon Whipple and Kerry O'Neal both made personal observations at the Farragut Range to determine that baffles had been installed over shooting positions so that shooters (from prone to standing) at the 100-yard firing line could not fire over the berm behind the target line (backstop). Aff. of Jon Whipple ¶11; Aff. of Kerry O'Neal (Dec. 10, 2010) ¶17. IDFG engineer Jon Whipple also evaluated strike elevations using computer software that confirmed his on-the-ground observation, supporting his opinion that baffles have been constructed and placed such that a shooter firing from any position along the 100-yard firing line cannot fire above the berm behind the target (backstop). Aff. of Jon Whipple ¶¶12-14, Exh. 1.

Defendants' witness James Caulder reviewed Mr. Whipple's strike elevation diagram (Aff. of Jon Whipple, Exh. 1) and agreed that the placement of the baffles would prevent a shooter from the firing line at the 100-yard from firing above the berm behind the target from any position (standing, kneeling, prone). Aff. of Kathleen Trever, Exh. B (Caulder preservation depo. pages 72-73). Since the Court indicated it would make a determination upon a view of the premises, the Court can see also for itself that baffles have been so installed at the 100-yard range.

Because there is no genuine factual dispute between the Parties on this issue, IDFG is entitled to partial lifting of the injunction as it relates to the 100-yard shooting area. *See*. I.R.Civ.P. 56(c).

5. Plaintiffs do not contradict that IDFG has met the Court's "No Blue Sky" requirement to allow more than 500 shooters in the 100-yard shooting area.

Plaintiffs do not contradict that IDFG has constructed baffles and berms to ensure that “No Blue Sky” is visible within the \pm 10-degree arc covering the unmitigated Surface Danger Zone (and that, in fact, “No Blue Sky” is visible within an arc covering at least twice the Surface Danger Zone) for the 100-yard shooting area. Aff. of David Leptich ¶15; see also Aff. Of Kerry O’Neal ¶¶19-21.¹²

IDFG’s application of the “No Blue Sky Rule” across the unmitigated downrange Surface Danger Zone is consistent with the documents cited by the Court in identifying the “No Blue Sky Rule” in its Findings of Fact at 37 ¶¶61.¹³

The basic concept is on the "blue sky gap." This means that baffles are erected so that the shooter, regardless of the shooting position used (or permitted) cannot see any sky **downrange**, either over the top of the backstop or to the sides of the range. Safety baffles may be overhead, on the ground, on top of the backstop, in the roof of the firing line cover, in the form of an elongated box, or as a completed enclosed tunnel. The principle behind the design is to equip a range with baffles **so that if a fired bullet leaves the confines of the range proper, it will fall to earth within a smaller, more predictable area** that is acceptable to protect people or property adjacent to the range.

Plaintiffs’ Trial Exh. 6 at 5 (*Baffles, Berms and Backstops*, emphasis added, with downrange in context of this Exhibit based on NRA safety fans, *see* footnote 8 above).

Baffles can be added to ranges to keep bullets from traveling beyond the backstop in a direct line of fire. If all shooters fire from the same horizontal level at the same firing line, a single baffle and a range cover can stop bullets from going over the backstop in a direct line of fire. The line of sight across the bottom of the baffle should intersect the backstop at least 5 feet below the top. If shooters will be firing from various positions between prone and standing, additional baffles may be required. Similarly, if shooters will move to firing line positions closer to the backstop, then more baffles may be needed. **This is what Range Designers call the “No Blue Sky” concept. A shooter who cannot see “Blue Sky” cannot shoot a bullet out of the range in a direct line of fire.**

¹² Plaintiffs’ witness Mr. Caulder could provide no estimates as to the visibility of blue sky from the 100-yard firing line. Aff. of Kathleen Trever, Exh.A Caulder Discovery Depo. at 45-46.

¹³ In discussing the “No Blue Sky Rule,” the Court also referenced Plaintiffs’ Trial Exhibits 2 and 43, but these documents do not discuss the “No Blue Sky Rule.”

Plaintiffs' Tr. Exh. 38 (National Ass'n of Shooting Ranges Berms, Baffles, Backstops video, emphasis added to text of audio portion).¹⁴

IDFG's installation of baffles, berms and backstops is also consistent with the Vargas document referenced by the Court:

If you build in a populated area, your range must be totally baffled so that the range owner can demonstrate to a judge that a round cannot escape. Ranges are very expensive to construct.

The Tenoroc Shooting Range (see Figure 13) ... was constructed using these guidelines and was moderately priced. Tenoroc will contain a round in a prescribed area should it escape through the baffles.

Plaintiffs' Tr. Exh. 2, p.5.¹⁵

The grading site plan for Tenoroc Range shown on Figure 13 of Plaintiffs' Trial Exh. 2, indicates the Range Safety Fence is approximately 100 yards behind its backstop. Second Aff. of David Leptich ¶13, Exh. E. Mr. Vargas' 1996 site plan for the 25-point 100-yard Tenoroc rifle range includes 5 overhead baffles (one of which is a combined ground and overhead baffle, 12-foot high side berms and a 15-foot high backstop). *Id.* ¶12, Exh. D.

The Court also referenced Vargas' drawings for the Illinois Dept. of Natural Resources (noting Idaho has not adopted range safety standards). Plaintiffs' Tr. Exh.

¹⁴ As previously noted, the 100-yard shooting area uses a fixed firing line without forward movement by shooters. IDFG has placed sufficient baffling to ensure shooters at positions from prone to standing along the fixed firing line do not see "Blue Sky" downrange (at least double the unmitigated Surface Danger Zone area). Were IDFG to allow movement of shooters downrange, additional baffles would have to be added toward the backstop.

¹⁵ As indicated, the "No Blue Sky Rule" and baffling requirement do not equate to "full containment." There was some confusion on this point in the testimony of Clark Vargas. However, the language referenced above in *Baffles, Berms and Backstops* (Plaintiffs Tr. Exh. 6 at 5), the surrounding context of Vargas' Range Design Criteria in regards to the Tenoroc Range, and the wording of the Court's requirement to "include safety measures adequate to prevent bullet escapement beyond the boundaries owned and controlled by [IDFG]" made it clear that this was requirement was not directed to the confines of any particular shooting area, but to the larger IDFG property. Plaintiffs' witness James also reference Mr. Vargas' equating the no blue sky concept to partially contained ranges. *Aff. of James Caulder* at 5.

43.¹⁶ Vargas' drawings for the 100-yard rifle range section in the Illinois Plan include five overhead baffles and a twenty-foot high backstop, with a maximum strike elevation at 5 feet below the top of the backstop. Plaintiffs' Tr. Exh. 43 at C-3.

For comparison, recognizing the uniqueness of individual ranges, the 100-yard shooting area at Farragut has side berms grading from 12 feet to 15 feet at the backstop, a 25-foot high backstop, and six overhead baffles (in addition to side baffling, screened sand backstop impact area, and armored shooting shed). Aff. of Jon Whipple ¶14; Second Aff. of David Leptich ¶14. The maximum strike elevation on the 100-yard range backstop is at least 8.8 feet, as compared to the 5 foot distance in the various Vargas designs. Aff. of Jon Whipple ¶13.

There is no genuine factual dispute that IDFG has met the "No Blue Sky Rule" and baffling requirement as identified in the Court Order. IDFG is thus entitled to lifting of the Court's injunction as it relates to the 100-yard area for more than 500 shooters.

6. Plaintiffs' attempts to impose additional requirements for partially lifting its injunction are outside the scope of the motions before the Court, and should be rejected.

Plaintiffs attempt to improperly use a summary judgment motion to broaden the application of the Court's safety requirements well outside the Surface Danger Zone and to expand those requirements based on strained interpretations of the Feb. 23 Order and guidance for U.S. Air Force Ranges not relied upon at trial.

Plaintiffs' assertions include broadening the Surface Danger Zone from a ± 10 -degree arc to a ± 90 -degree arc. Their claims that a "full 180° arc was contemplated by the Court," (Plaintiffs Br. at 8) are unsupported by the record. As noted above, Plaintiffs

¹⁶ The Court did not, however, prescribe specific baffle construction, although it stated that IDFG must maintain its baffles. Feb. 23 Order ¶7 at 47.

made no showing at trial that areas outside the Surface Danger Zone were unsafe from Farragut Range activities, including any accidental or intentional misfire (of which there was no evidence in the record). The Court found the Range reasonably safe for up to 2002 levels even when it was unmitigated; there is no suggestion in the Court's findings or conclusions that it intended to apply the "No Blue Sky Rule" or bullet escapement across a 180-degree arc. IDFG has met the "No Blue Sky Rule" for more than double than unmitigated Surface Danger Zone.¹⁷ As indicated by the Court's initial consideration of injunctive relief, it would be unreasonable and inequitable to expand that requirement without any further showing or harm to the Plaintiffs' interests. *See* Feb. 23 Order, Conclusions of Law ¶5 at 44 (citations omitted). Moreover, I.R.Civ.P. 60(b) governs any such attempt to modify the Feb. 23 Order.

Plaintiffs also argue that the 500-shooter requirement to prevent shooters from firing above the backstop and the >500-shooter requirement to prevent bullet escapement should entail keeping all ricochets within individual shooting areas (such as the 100-yard shooting area) rather than within the larger IDFG property. Plaintiffs' Br. at 12.¹⁸ As discussed above, Plaintiffs' post-trial interpretation would unreasonably expand the language and context of the Feb. 23 Order forming the basis for these requirements.

¹⁷ It is unreasonable for Plaintiffs to argue that a person firing out of "openings" in excess of 20-degree shooting angles is firing "downrange," or even "on-range." For reference, a person firing at a 20-degree angle would be firing more than 100-feet off target on the 100-yard range, which is greater than the length of the entire firing line. *Aff. of Kathleen Trever, Exh. B, Caulder preserv. Depo at 70, lines 17-24.*

¹⁸ There was limited showing at trial regarding ricochets, and the Court made no findings regarding them. The Exhibits relied upon by Plaintiffs at trial and referenced by the Court apply a "ricochet zone" within the ± 10 -degree unmitigated Surface Danger Zone. They also refer to a 110-yard (or 100-meter) "Area A" or "Secondary Danger Zone" alongside the Surface Danger Zone for indirect bullet fragments. Plaintiffs Tr. Exh. 2 at 2, 6, Fig. 12, Exh. 2; Plaintiffs Tr. Exh. 43 at G-3. Plaintiffs Trial Exh. 6 at 2 indicates that distances traveled by ricochets over the backstop would be "nominal." Mr. Vargas' *Design Criteria* indicates side berms must extend to within 50 degrees of the firing line to contain any ricochets. *See* Plaintiffs Tr. Exh. 2, Fig. 12. Farragut's side berms exceed this guidance. *Second Aff. of David Leptich at 14. Bullets with trajectories of greater than 35 degrees do not ricochet. See Aff. Of Kathleen Trever, Exh. B, at 76, lines 2-8.*

Plaintiffs also argue that the potential for shooting from “impromptu” positions outside the 100-yard shooting area merit keeping the entire range closed. Plaintiffs’ Br. at 8. As noted above, Plaintiffs have not made any showing that individuals have violated the Court’s Order to date, and they do not make a reasonable case as to why the Court’s injunctive power could not continue to govern shooting from what Plaintiffs allege are “impromptu” shooting positions outside the 100-yard area.¹⁹

Plaintiffs cite “so-called admissions” from Mr. O’Neal regarding “blue sky,” accidental and intentional discharges, and bullets traveling from shooting positions in areas outside the 100-yard area. However, these admissions were in response to Plaintiffs’ questions premised on their unreasonable interpretations of the Surface Danger Zone, “blue sky” visibility, areas outside the 100-yard shooting area, and/or other situations for which the Court has not found endangerment based on operation of the unmitigated range.²⁰

Plaintiffs also seek to impose the Air Force’s 50% Surface Danger Zone Air Force “Rule” on any range that is not fully contained and other requirements from the Air Force . Plaintiffs state they “do not suggest that this Court has adopted” the Air Force Engineering Technical Letter, ETL02 and upgraded ETL08 version as its rules. Plaintiffs’ Br. At 12. However, their brief contradicts this statement. Plaintiffs’ sole post-trial expert made no site visit. Aff. of Kathleen Trever, Ex. B, Caulder preserv. depo.

¹⁹ When one takes into account the liberal allowance for shooting in unincorporated areas outside the park and the relative risks of an individual’s violating the Court’s order in areas outside the 100-yard shooting area, Plaintiffs’ argument is clearly unreasonable from an equitable standpoint.

²⁰ E.g., Aff. of Harvey Richman, O’Neal deposition at 74, 76 (Mr. Richman’s questions focusing on whether someone could *intentionally* shoot through the openings, but to which Mr. O’Neal qualified his answers that “No round, unless it’s an accidental discharge or deliberate, could go over the [back berm]”); O’Neal deposition at 119-121, answering questions regarding the potential for bullet escapement for discharges parallel to the firing line, *i.e.*, at 90 degrees off target). Mr. O’Neal’s deposition interpretation of “downrange,” the “No Blue Sky Rule,” partially contained ranges and baffling requirements are consistent with the Plaintiffs’ Trial Exhibits referenced in the Feb. 23 Order and discussed above.

at 69, lines 11-16). He admittedly used the Air Force ETL “analogous to a building code” to evaluate Farragut Range, (Aff. of Kathleen Trever, Ex. B, Caulder preserv. depo. at 14, lines 11-12), and his affidavit is replete with ETL references. He has no experience with the design or use of civilian ranges. *Id.* at 73-74 (“I wasn’t developing criteria for civilians. I was developing safe criteria for the military.”) Moreover, Mr. Caulder’s definition of “downrange” was a “safety area that goes almost 180 degrees” (Aff. Of Kathleen Trever, Ex. A, Caulder disc. depo. at 31), far greater than that supported by the trial record and greater than even the Surface Danger Zone in the ETL upon which Mr. Caulder relies (*id.* at 29-30), as well as the Court’s Findings and Conclusions in its Feb. 23 Order, as discussed above.

Plaintiffs made little showing at trial regarding military guidelines or standards. Plaintiffs Tr. Exh.18 (Air Force guideline excerpts) and 19 (Army experts). The Court did not reference military guidelines in its findings or conclusions and did not apply them in its Order.²¹

Mr. Caulder’s testimony does not provide any basis under I.R.Civ.P. 60(b) to now impose the Air Force guidelines onto the Farragut Range. Nor does it provide a basis for using them to “interpret” the Court’s requirements.²² The Air Force does not regulate

²¹ Any application of 2008 revisions to the ETL to Farragut Range, issued well after trial would undeniably require modification of the Court’s Order. Plaintiffs have made no showing under I.R.Civ.P.60(b) to warrant such relief.

²² The 2005 Air Force ETL Mr. Caulder relied upon specifically states that it “reflects the new training requirements.”

The new policy identifies training requirements that differ greatly from the traditional ‘line-up-and-shoot’ marksmanship training of the past. New ranges must be designed to accommodate training regimens that require the shooter to move laterally across the firing line and also move downrange to engage targets. The new training course of fire will go beyond the traditional marksmanship training of the past, and will be expanded to provide a tactical employment capability. Additional ranges must be designed to allow for vehicle entry to the range for training scenarios or maintenance activities.

Aff. of Kathleen Trever, Exh. A, (Caulder discov. depo.) at Exh. 2 at 1-2; *see also id.* Exh. 2 at 8.

civilian ranges. The nature of Air Force range use and Air Force polices may make the conservatism²³ the Air Force applies to its ranges suitable to the Air Force's "training the way you fight," but that does not form a basis for applying them to the fixed firing line scenario at Farragut Range.

Plaintiffs' attempts to have the Court impose additional or different safety standards than those previously established by the Court is governed by I.R.Civ.P. 60(b). Plaintiffs have not requested relief under I.R.Civ.P. 60(b) and have not made any showing sufficient to grant relief under this Rule. Indeed, Plaintiffs have presented no reasonable legal or equitable basis to support such increased restraints on IDFG to protect their interests. *See* Feb. 23 Order, Conclusions of Law ¶5 at 44. Thus, the Court should reject the heightened standards urged by Plaintiffs.

Despite stating he was the author of this statement (*id.* at 43-44), Mr. Caulder saw no distinction between Air Force and civilian range use:

So small arms range, again, the rifle and the pistol – and again, for marksmanship, that's mainly what we go to the range for as the normal military person. That's what the hunter goes to the range for is marksmanship. I don't see an appreciable difference between the two. You're both using a similar weapon with similar ammunition. You're standing in one spot, firing at one target, and neither the shooter or the target's moving, so I don't see an appreciable difference between the two."

Id. at 15, lines 2-13. However, Mr. Caulder acknowledged that training requirements to "train the way you fight" including suppressive fire, lateral and forward movement and other evolutions in training procedures increased requirements to contain rounds on Air Force ranges that were typically next to airports. *Id.* at 36-37. Mr. Caulder also acknowledged that tactical shooting conditions increase the possibility of misdirected fire and accidental discharges. *Id.* at 37. The 2008 ETL indicates use of armor-piercing rifle rounds and incendiary tracer rounds, and Mr. Caulder did not know whether or not they were used on Air Force Ranges. *Aff. Of Kathleen Trever, Exh. B, preserv. depo. at 79-80.* Mr. Caulder also testified the Air Force had previously relied upon a 300-yard-long surface danger zone for baffled ranges. *Id.* at 74; *Aff. of Kathleen Trever, Exh. A, disc. depo. at 45.*

²³ Mr. Caulder indicated that probabilistic ricochet modeling simulations conducted by the Picatinny Arsenal formed the basis for the 50% SDZ "Rule" for baffled ranges. *Aff. of Kathleen Trever, Exh. A, disc. depo. at 112.* Mr. Caulder acknowledged that there are Air Force ranges and partially contained National Guard Ranges that do not comply with this "Rule." *Id.* at 109-110.

Mr. Caulder testified that the Air Force used probabilities on the order of one in 10 million as a basis for 50%SDZ recommendation. *Id.* at 112. Mr. Caulder was not aware to what extent the Picatinny Arsenal made any adjustments for conservatism. *Id.* at 105. He acknowledged the Picatinny models made conservative calculations and assumptions, including the admittedly "very conservative" assumption that projectiles continue to fly with the same level of stability after ricochet as they did before ricochet. *Id.* at 59. However, bullets lose energy and stability when they strike other objects. *See id.* at 60-61.

III. CONCLUSION

The Court should deny Plaintiff's motion and grant IDFG's requested relief, and lift its Feb. 23, 2007 injunction as it applies to the renovated 100-yard portion of the Farragut Range and, as to noise abatement, adopt the noise standard of the Idaho Sport Shooting Range Act, codified at Idaho Code §§ 67-9101 to 67-9105, as the standard applicable to operation of the Farragut Shooting Range.

DATED this 10th day of January, 2011.

STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL

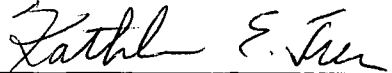


KATHLEEN E. TREVER
Deputy Attorney General

CERTIFICATE OF MAILING

I hereby certify that on this ^{10th} day of January, 2011 a true and correct copy of the foregoing REPLY BRIEF IN SUPPORT OF SUMMARY DISPOSITION OF DEFENDANTS' MOTION FOR PARTIAL LIFTING OF INJUNCTION was faxed or mailed postage prepaid to:

Hon. John T. Mitchell 324 West Garden Avenue P.O. Box 9000 Coeur d'Alene, ID 83816-9000	<input type="checkbox"/> United States Mail, Postage Prepaid <input type="checkbox"/> Facsimile to (208) 446-1132 <input checked="" type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Courier
Harvey Richman Attorney at Law 19643 N. Perimeter Road Athol, Idaho 83801	<input checked="" type="checkbox"/> United States Mail, Postage Prepaid <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> <i>no hand delivery</i> Hand Delivery <input type="checkbox"/> Overnight Courier
Clerk of the Court: Daniel English 451 Government Way P.O. Box 9000 Coeur d'Alene, ID 83816-9000	<input type="checkbox"/> United States Mail, Postage Prepaid <input type="checkbox"/> Facsimile to (208) 446-1188 <input checked="" type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Courier
Scott W. Reed Attorney at Law (208) 765-5117	<input checked="" type="checkbox"/> United States Mail, Postage Prepaid <input type="checkbox"/> Facsimile (208) 765-5117 <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Courier


 Kathleen E. Trever

STATE OF IDAHO }
COUNTY OF KOOTENAI } SS
FILED:

2011 JAN 10 PM 4:32

CLERK DISTRICT COURT

Ratley
DEPUTY

LAWRENCE G. WASDEN
ATTORNEY GENERAL
Clive J. Strong
Chief of Natural Resources

KATHLEEN E. TREVER, ISB #4862
W. DALLAS BURKHALTER, ISB# 3286
Deputy Attorneys General
PO Box 25
Boise, ID 83707
Telephone: (208) 334-3771
FAX: (208) 334-4885

Attorneys for Defendants
State of Idaho, IDFG and Groen

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

CITIZENS AGAINST RANGE)
EXPANSION, an Unincorporated non-profit)
Association; JEANNE J. HOM, a single)
woman; EUGENE and KATHLEEN RILEY,)
husband and wife; LAMBERT and DENISE)
RILEY, husband and wife; GABRIELLE)
GROTH-MARNAT, a single woman,)
GERALD PRICE, a single man; RONALD)
and DOROTHY ELDRIDGE, husband and)
wife; and GLENN and LUCY CHAPIN,)
husband and wife, SHERYL PUCKETT, a)
single woman; CHARLES MURRAY and)
CYNTHIA MURRAY, husband and wife; and)
DAVE VIG, a single man,)

Case No. CV-05-6253

**SECOND AFFIDAVIT OF DAVID
LEPTICH**

Plaintiffs,)

vs.)

IDAHO FISH AND GAME DEPARTMENT,)
an agency of the STATE OF IDAHO, and)
CAL GROEN, Director of the IDAHO FISH)
AND GAME DEPARTMENT,)

Defendants)

SECOND AFFIDAVIT OF DAVID LEPTICH--1

STATE OF IDAHO)

ss.

COUNTY OF KOOTENAI)

David Leptich, being first duly sworn, deposes and says:

1. I reviewed and tabulated visitation records for the years 1987-1993 found at the Farragut State Park Brig Museum by the Farragut State Park staff and provided to me by the Idaho Department of Parks and Recreation. True and correct copies of the records I reviewed are attached as an Exhibit to the Affidavit of Randall Butt to the Court in this lawsuit. Although they do not cover all months during the years 1987 through 1993, the records indicate visitation of the Farragut Shooting Range as follows:

- 1987: 2,868 (there were no use records from October-December)
- 1988: 400 from August-September only (there were no use records from January-July and October-December)
- 1989: 2,391 (the records for the months of June and July are not clearly legible, but it is unequivocal that the use records for these months indicate use greater than or equal to 200 range users)
- 1990: 1,524 (there were no use records for July-August)
- 1991: 668
- 1992: 1,330
- 1993: 2,260 (there were no records for November-December)

2. In November 2007, the Idaho Department of Fish and Game Commission directed IDFG to provide a community, family and sportsmen-based shooting range at Farragut.

3. In response to this direction from the Idaho Fish and Game Commission, IDFG determined not to proceed with the Vargas Master Plan for Farragut Range. As a result

of the Commission's direction, IDFG did not file any version of the Vargas Master Plan with the Kootenai County Building Department.

4. Consistent with the Commission's direction, IDFG planned 50-, 100-, and 200-yard shooting bays at the Range, with 12 shooting stations per bay (for a total of 36 shooting stations). IDFG has also identified space and locations for up to six recreational shotgun shooting points.

5. I obtained a site disturbance permit from Kootenai County for the construction of these shooting areas prior to the beginning of construction.

6. As I have previously testified by affidavit, I am responsible for the development of guidelines for use of Farragut Range. Future operations of the Range will entail at least one range supervisor any time the range is open to public shooting. For comparison, the 2003 Illinois Shooting Range Safety Plan identifies a minimum of one (1) range officer per three (3) ranges (Plaintiffs Trial Exh. 43).

7. IDFG began to install baffles in the fall of 2010 on the renovated 200-yard shooting area, but has not completed installation of the baffles due to winter weather conditions.

8. Attached as Exhibit A is a true and correct copy of Google Earth imagery I downloaded (imagery dated June 23, 2009) depicting Blacks Creek Range and surrounding area. This depiction indicates there are two residences within one-half mile of the range.

9. Attached as Exhibit B is a true and correct copy of Google Earth imagery I downloaded (imagery dated June 23, 2009) depicting the Garden Valley Range and

surround area. This depiction indicates there are several residences within one mile of the range. For scale, the line on the image is approximately one mile.

10. Attached as Exhibit C is a true and correct copy of Google Earth imagery I downloaded (imagery dated April 30, 2009) depicting the Coeur d'Alene Rifle and Pistol Club. I am personally familiar with this Range. It is located within ½-mile of IDFG's Panhandle Regional Office and has many residences in closer proximity. For scale, the line on the image is approximately 1.5 miles. I am also personally familiar with the Fernan Rod and Gun Club, which is also located in Kootenai County.

11. Attached as Exhibit D is a true and correct copy of a Clark Vargas drawing, reduced in size, stamped as being printed by Vargas and Associates on July 18, 1996 depicting design of the 25-point 100 yard rifle range site plan for Tenoroc Range in Lakeland Florida. This drawing was provided to me at my personal request by Adam G. Young, Business Manager, Hunter Safety and Public Shooting Ranges, Division of Hunting and Game Management, Florida Fish and Wildlife Conservation Commission, and this drawing is part of the agency's records related to operation of the range.

12. I have personally reviewed Exhibit D. Mr. Vargas' 1996 site plan for the 25-point 100-yard Tenoroc rifle range includes 5 overhead baffles (one of which is a combined ground and overhead baffle, 12-foot high side berms and a 15-foot high backstop).

13. I have also personally reviewed the grading site plan for Tenoroc Range presented as Figure 13 of Plaintiffs' Trial Exh. 2. This plan indicates the Tenoroc Range Safety Fence is approximately 100 yards behind its backstop. Attached as Exhibit E hereto is a true and correct copy of Figure 13, on which I have highlighted the safety fence indicated in the diagram.

14. The 100-yard shooting area at Farragut has side berms grading from 12 feet to 15 feet at the backstop, a 25-foot high backstop, and six overhead baffles. The 100-yard shooting area also has side baffles, a screened sand backstop impact area, and an armored shooting shed. The top of side berms at the 100-yard range extend to within 50 degrees of the shooting line.

15. I have measured the "straight line" distance using a measuring tape from the face of the backstop to the nearest portion of the Range safety fence, which is not perpendicular to the firing line. The measurement was not exact due to dense timber conditions, but the distance I measured was approximately 315 yards. I also used Google Earth's measuring tool to measure this distance, with the tool indicating a distance of approximately 290 yards. I also used Google Earth's measuring tool to measure the distance from the backstop to the safety fence directly down range (*i.e.*, at an angle perpendicular to the firing line), with the tool indicating a distance of approximately 336 yards.

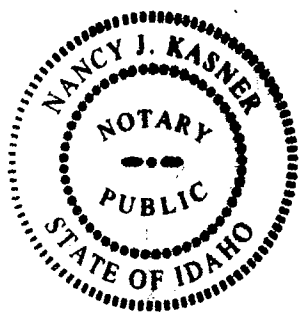
/// /// ///

/// /// ///

David Leptich

David Leptich

SUBSCRIBED AND SWORN to before me this 10th day of January, 2011.



Nancy J. Kasner

Notary Public for Idaho

Residing at Kootenai Co.

My Commission Expires: 10-4-13

CERTIFICATE OF MAILING

I hereby certify that on this 10th day of January, 2011 a true and correct copy of the foregoing SECOND AFFIDAVIT OF DAVID LEPTICH was faxed or mailed postage prepaid to:

Hon. John T. Mitchell 324 West Garden Avenue P.O. Box 9000 Coeur d'Alene, ID 83816-9000	<input type="checkbox"/> United States Mail, Postage Prepaid <input type="checkbox"/> Facsimile to (208) 446-1132 <input checked="" type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Courier
Harvey Richman Attorney at Law 19643 N. Perimeter Road Athol, Idaho 83801	<input checked="" type="checkbox"/> United States Mail, Postage Prepaid <input type="checkbox"/> Facsimile <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Courier
Clerk of the Court: Daniel English 451 Government Way P.O. Box 9000 Coeur d'Alene, ID 83816-9000	<input type="checkbox"/> United States Mail, Postage Prepaid <input type="checkbox"/> Facsimile to (208) 446-1188 <input checked="" type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Courier
Scott W. Reed Attorney at Law (208) 765-5117	<input checked="" type="checkbox"/> United States Mail, Postage Prepaid <input type="checkbox"/> Facsimile (208) 765-5117 <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Courier

Kathleen E. Trever

Kathleen E. Trever

EXHIBIT A
TO
SECOND AFFIDAVIT OF DAVID LEPTICH

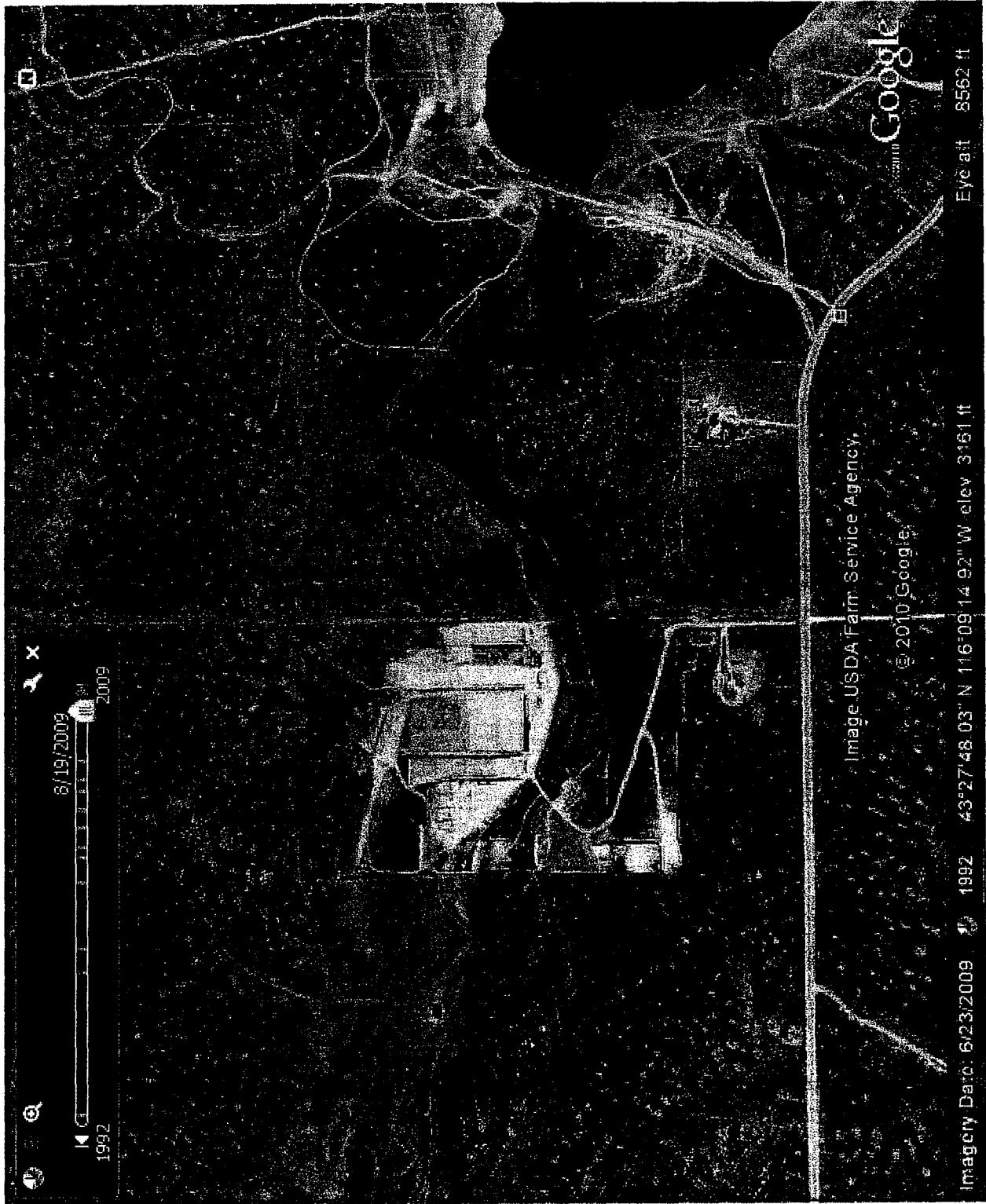


EXHIBIT B
TO
SECOND AFFIDAVIT OF DAVID LEPTICH

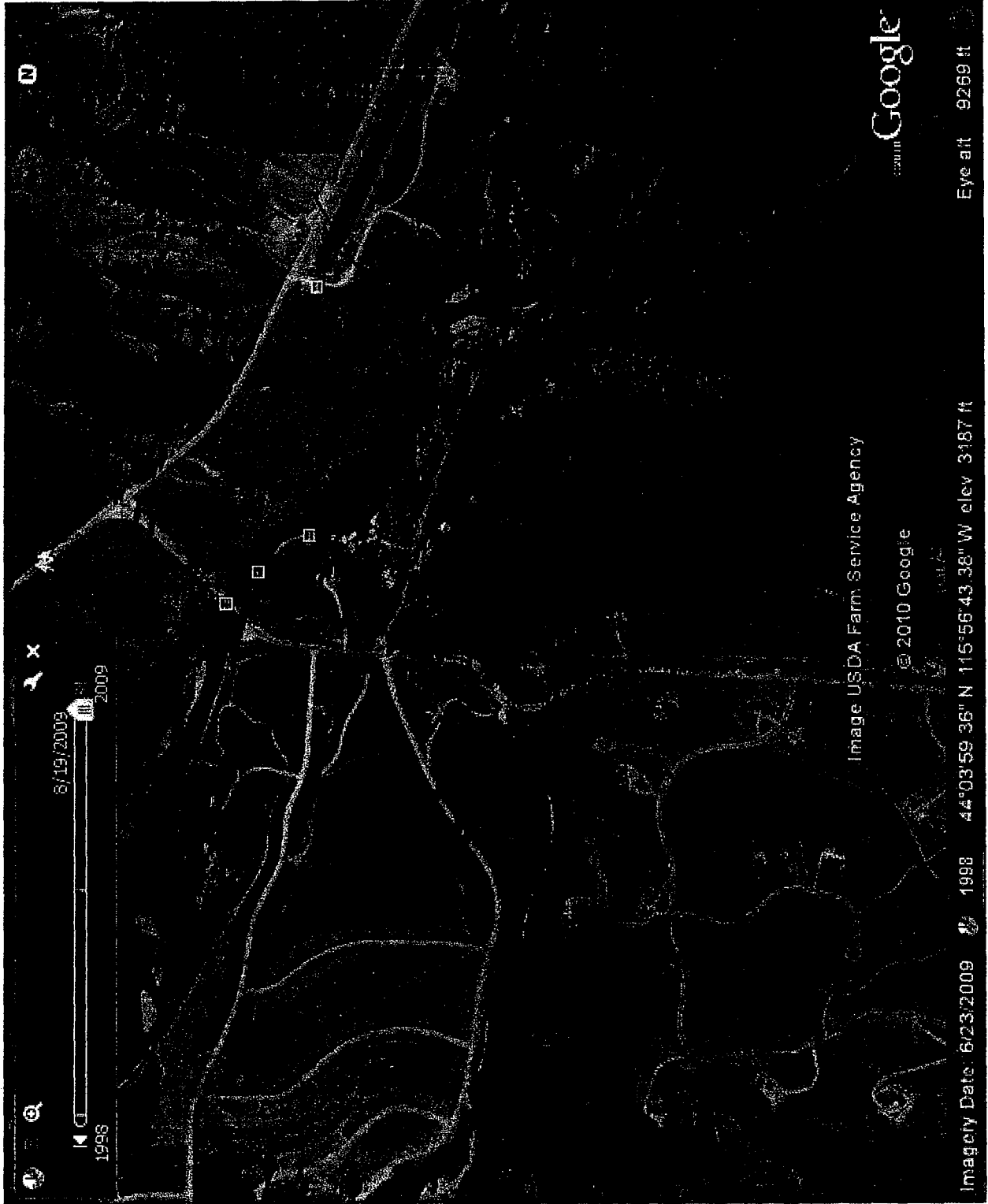


EXHIBIT C
TO
SECOND AFFIDAVIT OF DAVID LEPTICH



EXHIBIT A
TO
SECOND AFFIDAVIT OF DAVID LEPTICH

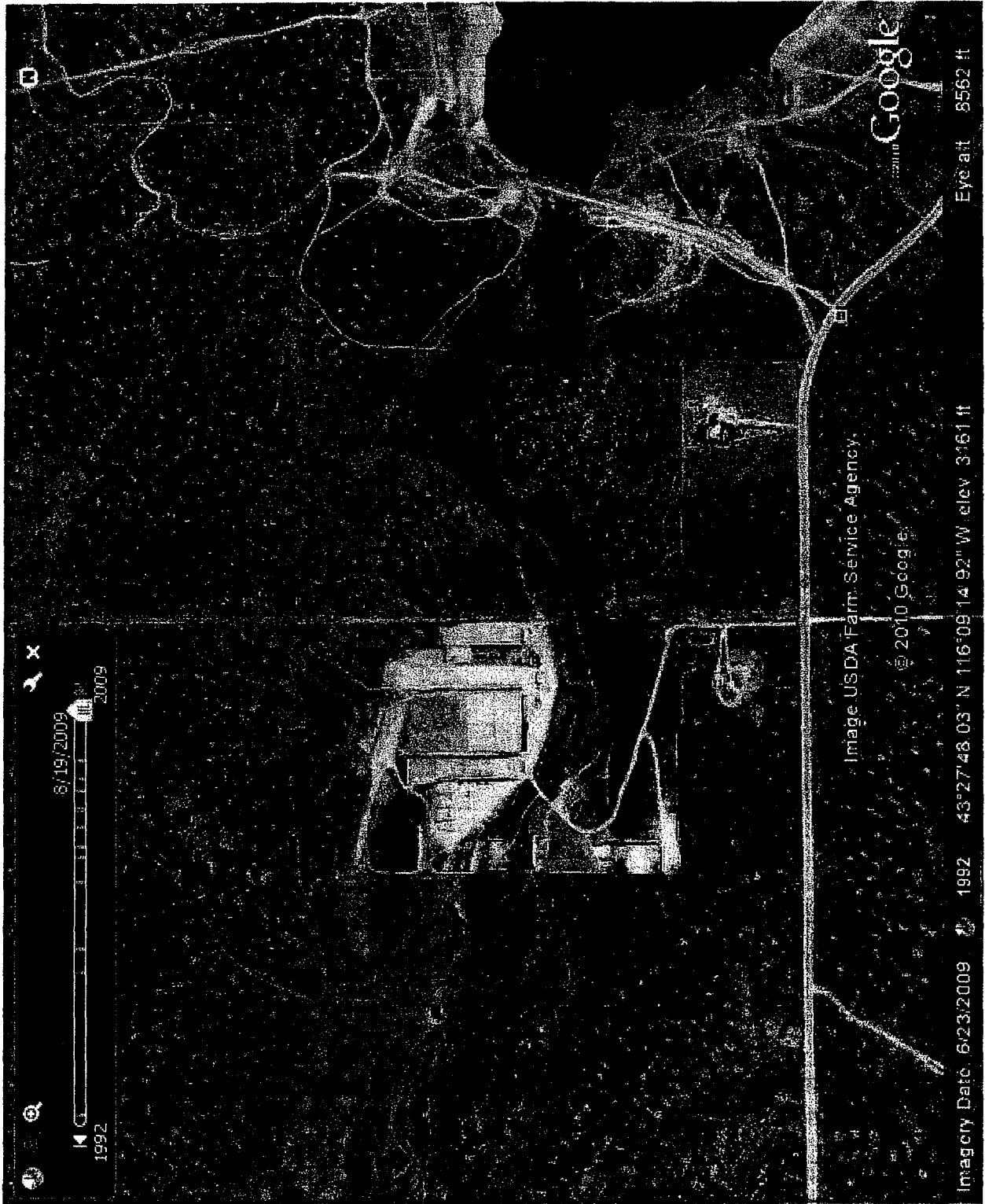


EXHIBIT B
TO
SECOND AFFIDAVIT OF DAVID LEPTICH

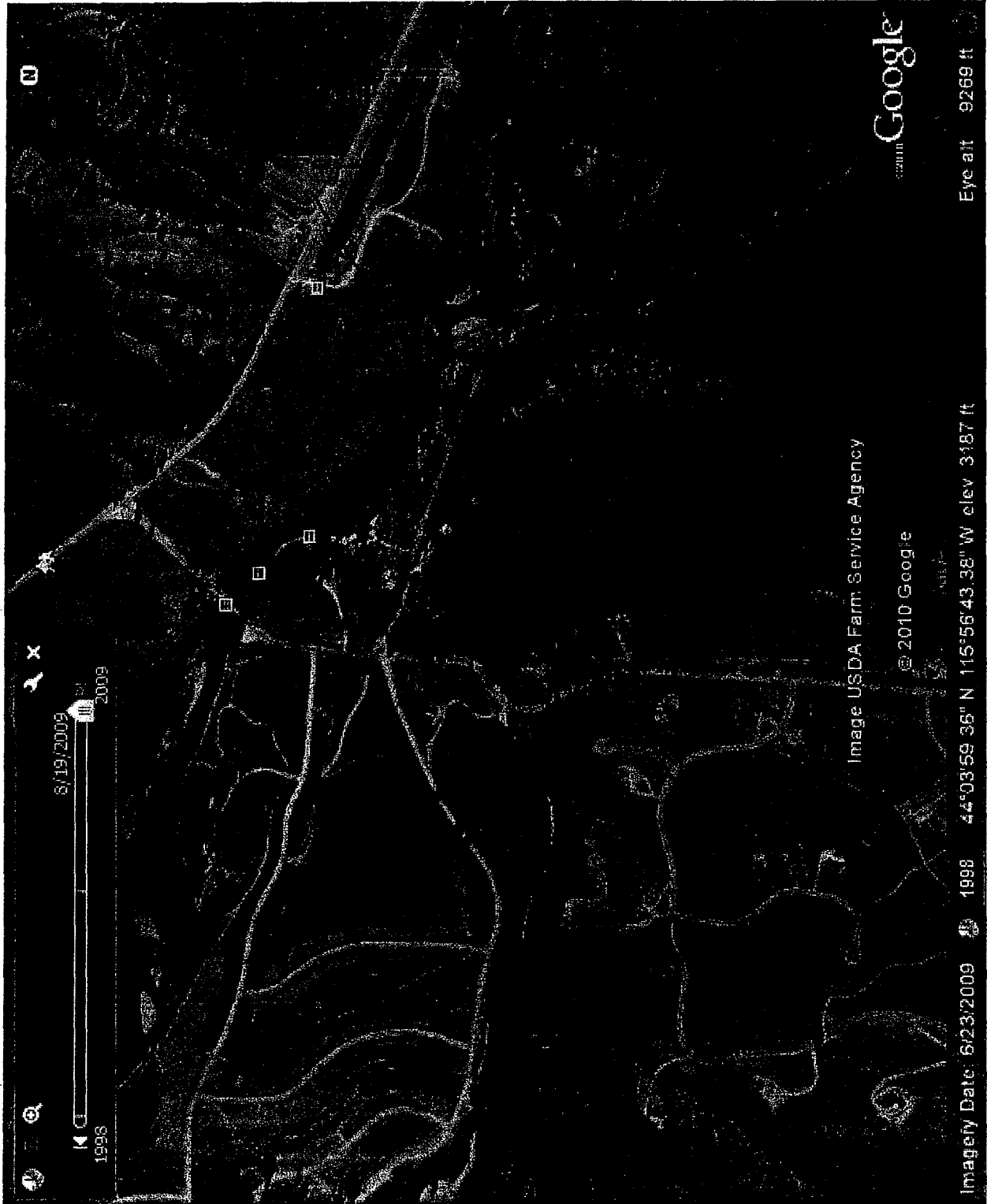


EXHIBIT C
TO
SECOND AFFIDAVIT OF DAVID LEPTICH

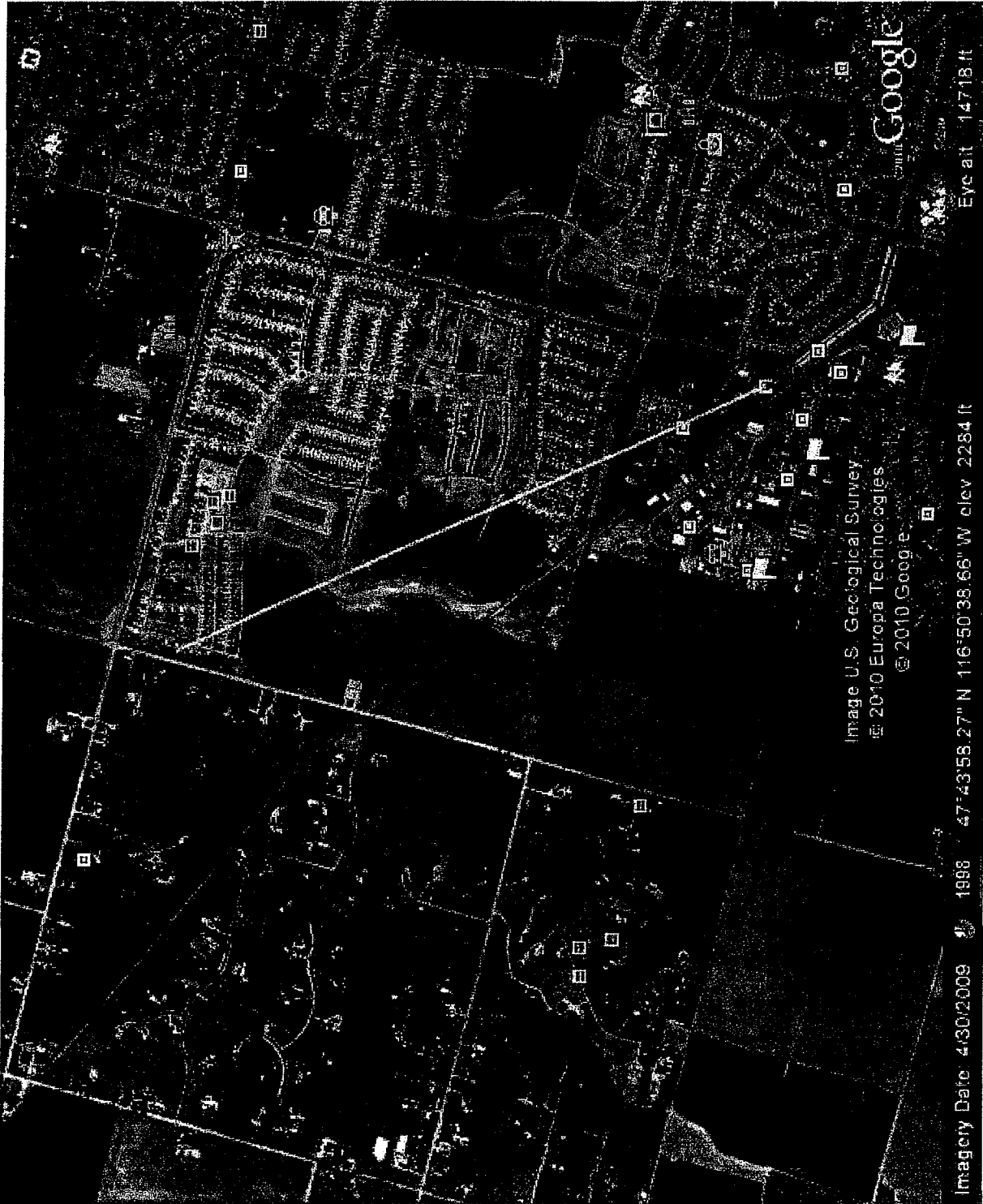


EXHIBIT D
TO
SECOND AFFIDAVIT OF DAVID LEPTICH

EXHIBIT E
TO
SECOND AFFIDAVIT OF DAVID LEPTICH

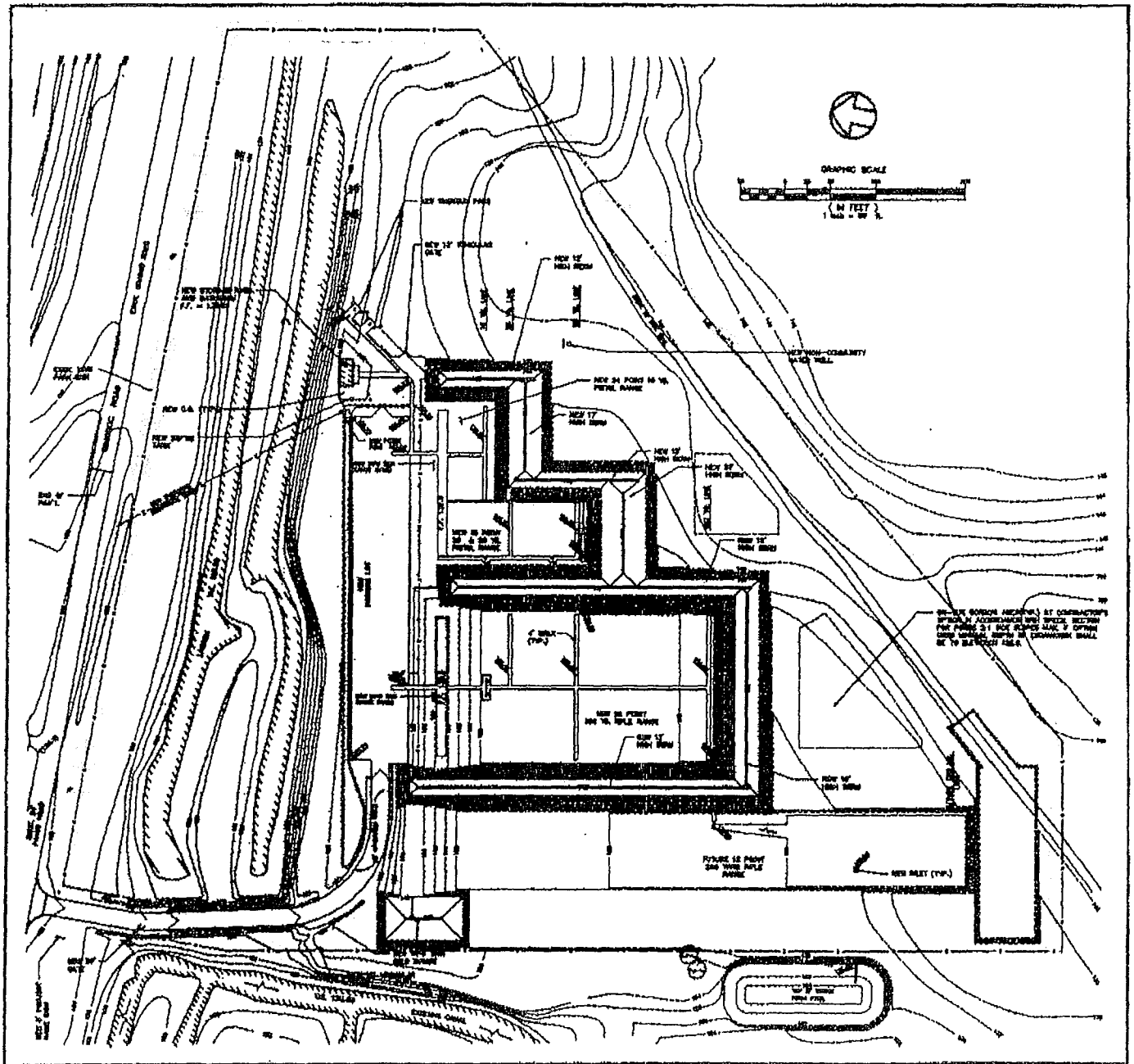


Figure 13: Grading Site Plan for the Tenoroc Shooting Range

LAWRENCE G. WASDEN
ATTORNEY GENERAL
Clive J. Strong
Chief of Natural Resources

KATHLEEN E. TREVER, ISB #4862
W. DALLAS BURKHALTER, ISB# 3286
Deputy Attorneys General
PO Box 25
Boise, ID 83707
Telephone: (208) 334-3771
FAX: (208) 334-4885

Attorneys for Defendants
State of Idaho, IDFG and Groen

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

CITIZENS AGAINST RANGE)
EXPANSION, an Unincorporated non-profit)
Association; JEANNE J. HOM, a single)
woman; EUGENE and KATHLEEN RILEY,)
husband and wife; LAMBERT and DENISE)
RILEY, husband and wife; GABRIELLE)
GROTH-MARNAT, a single woman,)
GERALD PRICE, a single man; RONALD)
and DOROTHY ELDRIDGE, husband and)
wife; and GLENN and LUCY CHAPIN,)
husband and wife, SHERYL PUCKETT, a)
single woman; CHARLES MURRAY and)
CYNTHIA MURRAY, husband and wife; and)
DAVE VIG, a single man,)

Plaintiffs,)

vs.)

IDAHO FISH AND GAME DEPARTMENT,)
an agency of the STATE OF IDAHO, and)
CAL GROEN, Director of the IDAHO FISH)
AND GAME DEPARTMENT,)

Defendants)

STATE OF IDAHO }
COUNTY OF KOOTENAI } SS
FILED:

2011 JAN 10 PM 4:32

CLERK DISTRICT COURT

Randall Butt
DEPUTY

Case No. CV-05-6253

AFFIDAVIT OF RANDALL BUTT

AFFIDAVIT OF RANDALL BUTT--1

1. My name is Randall Butt. I am employed as the Manager of Farragut State Park for the Idaho Department of Parks and Recreation (IDPR). I have been employed in this capacity since 2003.
2. I testified at the December 2006 trial in the above-captioned case.
3. On January 4, 2007, after the December 2006 trial, IDPR staff under my supervision at Farragut State Park discovered five folders in the Park's Brig Building, containing monthly park visitation records for the Farragut Shooting Range and other activities at the Park from between 1987 through 1993. They discovered these records while they were doing work unrelated to the Farragut Shooting Range in an effort to organize the Brig Museum donations, documenting items for transfer into historical archive storage. The Brig building dates back to 1942 and is approximately 17,000 square feet. The Brig has housed multiple rooms of items placed randomly by Park staff for decades.
4. Attached as Exhibit A are true and correct copies of these records.
5. I provided the original copies of these records to the IDPR North Region Manager David White, along with a memo detailing their discovery and possible impact to the recent court case involving Idaho Fish and Game.
6. My staff and I were not aware of these visitation records at the time the Park responded to a Public Records Request from the Plaintiffs prior to trial.
7. My staff and I were not aware of these records when I testified at trial that the Park had no records of the number of shooters before 2002.
8. After the Court issued its order, the Park posted, and has maintained postings, in several prominent locations that the Farragut Shooting Range is closed in accordance with this Court's order.

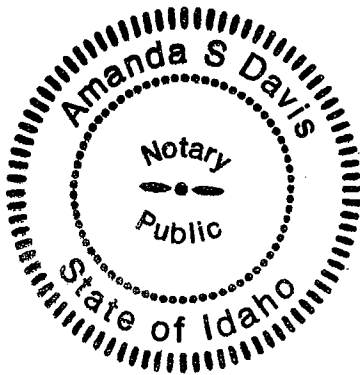
AFFIDAVIT OF RANDALL BUTT--2

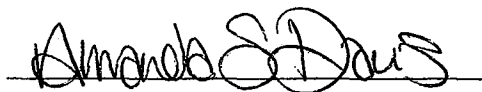
9. Since closure of the Farragut Range in 2007, members of my staff have received a small number of complaints that shooting was occurring at the Range. My staff investigated these complaints and did not find any evidence of shooting occurring at the Range.
10. I have observed some shooting from private properties near the Park since the closure of the Farragut Range in 2007.
11. I have not observed, and my staff have not reported to me, any shooting occurring at the Farragut Range following its closure by this Court's order in 2007.



Randall Butt

SUBSCRIBED AND SWORN to before me this 7th day of January, 2011.





Notary Public for Idaho
Residing at Hayden
My Commission Expires: November 26 2016

CERTIFICATE OF MAILING

I hereby certify that on this ^{10th} day of January, 2011 a true and correct copy of the foregoing AFFIDAVIT OF RANDALL BUTT was faxed or mailed postage prepaid to:

Hon. John T. Mitchell 324 West Garden Avenue P.O. Box 9000 Coeur d'Alene, ID 83816-9000	<input type="checkbox"/> United States Mail, Postage Prepaid <input type="checkbox"/> Facsimile to (208) 446-1132 <input checked="" type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Courier
Harvey Richman Attorney at Law 19643 N. Perimeter Road Athol, Idaho 83801	<input checked="" type="checkbox"/> United States Mail, Postage Prepaid <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Hand Delivery <i>(not hand delivered)</i> <input type="checkbox"/> Overnight Courier
Clerk of the Court: Daniel English 451 Government Way P.O. Box 9000 Coeur d'Alene, ID 83816-9000	<input type="checkbox"/> United States Mail, Postage Prepaid <input type="checkbox"/> Facsimile to (208) 446-1188 <input checked="" type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Courier
Scott W. Reed Attorney at Law (208) 765-5117	<input checked="" type="checkbox"/> United States Mail, Postage Prepaid <input type="checkbox"/> Facsimile (208) 765-5117 <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Courier

Kathleen E. Trever

EXHIBIT A
TO
AFFIDAVIT OF RANDALL BUTT

MONTHLY PARK REPORT

Farragut
Park

Bryan Rowder
Manager

January 1987
Month Year

CAMPING - MONTH'S TOTALS

Tent	<u>0</u>
Tent/Trailer	<u>0</u>
Trailer	<u>0</u>
Self Contained Unit	<u>0</u>
Motorhome	<u>0</u>
Pickup	<u>0</u>
Boat	<u>0</u>
Camping Reservations (incl)	<u>4/6</u>
Senior Citizen/Disabled	<u>0</u>
Special Group Use	<u>0</u>
Turned Away	<u>0</u>
Total Number of Camps	
Resident	<u>2</u>
Non-Resident	<u>2</u>
Total Number of Campers	
Resident	<u>6</u>
Non-Resident	<u>2</u>

DAY USE - MONTH'S TOTALS

Cross Country Skiers	<u>400</u>
Snowmobilers	<u>15</u>
Snowmobilers	<u>18</u>
Boats	<u>0</u>
Boaters	<u>2</u>
Equestrians	<u>5</u>
Motorbikes	<u>0</u>
Interpretive Program	
Attendees	<u>0</u>
Special Group Use	<u>0</u>
Turned Away	<u>0</u>
<u>Visitor Center</u>	<u>502</u>
Total Number of Day Users	
Resident	<u>756</u>
Non-Resident	<u>757</u>

IMPORTANT - Please use other side for month's activities - Include accidents, fires, weather conditions (unusual), vandalism, special events and other items of interest.
NB.366:Parks & Recr. 1730-1249-

FAR June 1987

MONTHLY PARK REPORT

410 117

~~211 188~~

Bryan Rowder
 Manager

FARRAGUT
 Park Feb 1987
~~June~~ ~~1986~~
 Month Year

CAMPING - MONTH TOTALS

Motorcycles

Tent	<u>4671</u>
Tent/Trailer	<u>97</u>
Trailer	<u>495</u>
Vans	<u>90</u>
Motorhome	<u>285</u>
Pickup	<u>262</u>
Boat	<u>4</u>
Camping Reservations	
Senior Citizen/Disabled	<u>70</u>
Special Group Use	
Turned Away	
Thimbleberry Group Area	<u>0</u>
Buttonhook Group Camp	<u>0</u>
Waldron Group Camp	<u>0</u>
Total Number of Camps	
Resident	<u>408 21</u>
Non-Resident	<u>1283 21</u>
Total Number of Campers	
Resident	<u>4318 2</u>
Non-Resident	<u>4404 4</u>

DAY USE - MONTH TOTALS

Cross Country Skiers	<u>5</u>
Snowmobiles	<u>5</u>
Snowmobilers	<u>10</u>
Boats	<u>2</u>
Boaters	<u>8</u>
Equestrians	<u>20</u>
Sledders	<u>0</u>
Interpretive Program	
Attendees	<u>0</u>
Special Group Use	<u>0</u>
Turned Away	<u>0</u>
Model Airplane Flyers	<u>4</u>
Information Center	<u>21</u>
Rifle Range	<u>0</u>
Sunrise/Willow	<u>0</u>
Other	<u>0</u>
Total Number of Day Users	
Resident	<u>610</u>
Non-Resident	<u>220</u>

~~NO~~ ~~115~~ ~~36~~
+3190 +2390

IMPORTANT - Please use other side for month's activities - Include accidents, fires, weather conditions (unusual), vandalism, special events and other items of interest.
 HB.366:Parks & Recr. 1730-1249-

MONTHLY PARK REPORT

Bryan Rowder
Manager

FARRAGUT
Park
March 1987
Month Year

CAMPING - MONTH' TOTALS

Tent	_____
Tent/Trailer	_____
Trailer	_____
Vans	_____
Motorhome	_____
Pickup	_____
Boat	_____
Camping Reservations	<u>0</u>
Senior Citizen/Disabled	<u>0</u>
Special Group Use	_____
Turned Away	_____
<u>Thimbleberry Group Area</u>	<u>50</u>
<u>Buttonhook Group Camp</u>	<u>0</u>
<u>Waldron Group Camp</u>	<u>0</u>
Total Number of Camps	
Resident	<u>14</u>
Non-Resident	<u>8</u>
Total Number of Campers	
Resident	<u>25</u>
Non-Resident	<u>88</u>

DAY USE - MONTH'S TOTALS

Cross Country Skiers	<u>0</u>
Snowmobiles	<u>0</u>
Snowmobilers	<u>0</u>
Boats	<u>10</u>
Boaters	<u>25</u>
Equestrians	<u>15</u>
Sledders	<u>0</u>
Interpretive Program	
Attendees	<u>110</u>
Special Group Use	<u>0</u>
Turned Away	<u>0</u>
<u>Model Airplane Flyers</u>	<u>35</u>
<u>Information Center</u>	<u>160</u>
<u>Rifle Range</u>	<u>20</u>
<u>Sunrise/Willow</u>	<u>20</u>
Other	<u>0</u>
Total Number of Day Users	
Resident	<u>250</u>
Non-Resident	<u>155</u>

IMPORTANT - Please use other side for month's activities - Include accidents, fires, weather conditions (unusual), vandalism, special events and other items of interest.

MB.366:Parks & Recr. 1730-1249-

MONTHLY PARK REPORT

Bryan Rowder
 Manager

FARRAGUT
 Park

APRIL 1981
 Month Year

CAMPING - MONTH' TOTALS

Tent	_____
Tent/Trailer	_____
Trailer	_____
Vans	_____
Motorhome	_____
Pickup	_____
Boat	_____
Camping Reservations	<u>74</u>
Senior Citizen/Disabled	<u>23</u>
Special Group Use	_____
Turned Away	_____
Thimbleberry Group Area	_____
Buttonhook Group Camp	_____
Waldron Group Camp	_____
Total Number of Camps	
Resident	<u>69</u>
Non-Resident	<u>77</u>
Total Number of Campers	
Resident	<u>168</u>
Non-Resident	<u>218</u>

DAY USE - MONTH'S TOTALS

Cross Country Skiers	_____
Snowmobiles	_____
Snowmobilers	_____
Boats	<u>201</u>
Boaters	<u>804</u>
Equestrians	<u>97</u>
Sledders	_____
Interpretive Program	_____
Attendees	_____
Special Group Use	_____
Turned Away	_____
Model Airplane Flyers	<u>80</u>
Information Center	<u>657</u>
Rifle Range	<u>320</u>
Sunrise/Willow	<u>927</u>
Other	_____
Total Number of Day Users	
Resident	<u>5468</u>
Non-Resident	<u>4475</u>

IMPORTANT - Please use other side for month's activities - Include accidents, fires, weather conditions (unusual), vandalism, special events and other items of interest.

HD.366:Parks & Recr. 1730-1249-

MONTHLY PARK REPORT

FARRAGUT
 Park

Bryan Rowder
 Manager

May 1987
 Month Year

CAMPING - MONTH TOTALS

Tent	_____
Tent/Trailer	_____
Trailer	_____
Vans	_____
Motorhome	_____
GROUP RESU Pickup	<u>8</u>
Boat	<u>10</u>
Camping Reservations	<u>118</u>
Senior Citizen/Disabled	<u>70</u>
Special Group Use	_____
Turned Away	_____
Thimbleberry Group Area	<u>150</u>
Buttonhook Group Camp	<u>426</u>
Waldron Group Camp	<u>380</u>
Total Number of Camps	
Resident	<u>464</u>
Non-Resident	<u>444</u>
Total Number of Campers	
Resident	<u>829</u>
Non-Resident	<u>1828</u>

DAY USE - MONTH'S TOTALS

Cross Country Skiers	<u>0</u>
Snowmobiles	<u>0</u>
Snowmobilers	<u>0</u>
Boats	<u>333</u>
Boaters	<u>1332</u>
Equestrians	<u>150</u>
Sledders	<u>0</u>
Interpretive Program	
Attendees	<u>270</u>
Special Group Use	<u>0</u>
Turned Away	<u>0</u>
Model Airplane Flyers	<u>100</u>
Information Center	<u>3639</u>
Rifle Range	<u>400</u>
Sunrise/Willow	<u>1000</u>
Other	_____
Total Number of Day Users	
Resident	<u>10,681</u>
Non-Resident	<u>8,739</u>

IMPORTANT - Please use other side for month's activities - Include accidents, fires, weather conditions (unusual), vandalism, special events and other items of interest.
 HB-366: Parks & Recr. 1730-1249-

MONTHLY PARK REPORT

FARRAGUT
 Park

Bryan Rowder
 Manager

JUNE 1987
 Month Year

CAMPING - MONTH'S TOTALS

Tent	_____
Tent/Trailer	_____
Trailer	_____
Vans	_____
Motorhome	_____
Pickup	_____
Boat	_____
Camping Reservations	146
Senior Citizen/Disabled	71
Special Group Use	0
Turned Away	0
Thimbleberry Group Area	200
Buttonhook Group Camp	797
Waldron Group Camp	1027
Total Number of Camps	910
Resident	1557
Non-Resident	898 900
Total Number of Campers	
Resident	1337
Non-Resident	3860

DAY USE - MONTH'S TOTALS

Cross Country Skiers	_____
Snowmobiles	_____
Snowmobilers	_____
Boats	741
Boaters	2964
Equestrians	100
Sledders	_____
Interpretive Program Attendees	451
Special Group Use	_____
Turned Away	_____
Model Airplane Flyers	2000
Information Center	4616
Rifle Range	650
Sunrise/Willow	5000
Other	_____
Total Number of Day Users	
Resident	21,585
Non-Resident	21,586

IMPORTANT - Please use other side for month's activities - Include accidents, fires, weather conditions (unusual), vandalism, special events and other items of interest.

HB.366:Parks & Recr. 1730-1249-

MONTHLY PARK REPORT

FARRAGUT

Park

Bryan Rowder
Manager

July
Month

1987
Year

CAMPING - MONTH TOTALS

Tent	_____
Tent/Trailer	_____
Trailer	_____
Vans	_____
Motorhome	_____
Pickup	_____
Boat	30
Camping Reservations	442
Senior Citizen/Disabled	97
Special Group Use	-
Turned Away	100
Thimbleberry Group Area	994
Buttonhook Group Camp	1790
Waldron Group Camp	2191
Total Number of Camps	
Resident	902
Non-Resident	1765
Total Number of Campers	
Resident	1964
Non-Resident	7615

DAY USE - MONTH TOTALS

Cross Country Skiers	0
Snowmobiles	0
Snowmobilers	0
Boats	706
Boaters	2827
Equestrians	103
Sledders	0
Interpretive Program	
Attendees	1199
Special Group Use	2000
Turned Away	
Model Airplane Flyers	122
Information Center	6212
Rifle Range	300
Sunrise/Willow	8000
Other	
Total Number of Day Users	
Resident	33,871
Non-Resident	22,580

IMPORTANT - Please use other side for month's activities - include accidents, fires, weather conditions (unusual), vandalism, special events and other items of interest.
HB.366:Parks & Recr. 1730-1249-

MONTHLY PARK REPORT

FARRAGUT
Park

Bryan Rowder
Manager

AUGUST 1987
Month Year

CAMPING - MONTH TOTALS

Tent	_____
Tent/Trailer	_____
Trailer	_____
Vans	_____
Motorhome	_____
Pickup	_____
Boat	<u>50</u>
Camping Reservations	<u>301</u>
Senior Citizen/Disabled	<u>77</u>
Special Group Use	<u>0</u>
Turned Away	<u>200</u>
Thimbleberry Group Area	<u>855</u>
Buttonhook Group Camp	<u>2676</u>
Waldron Group Camp	<u>1080</u>
Total Number of Camps	
Resident	<u>506</u>
Non-Resident	<u>2280</u>
Total Number of Campers	
Resident	<u>1859</u>
Non-Resident	<u>7691</u>

DAY USE - MONTH'S TOTALS

Cross Country Skiers	<u>0</u>
Snowmobiles	<u>0</u>
Snowmobilers	<u>0</u>
Boats	<u>572</u>
Boaters	<u>2288</u>
Equestrians	<u>120</u>
Sledders	<u>0</u>
Interpretive Program Attendees	<u>1130</u>
Special Group Use	<u>1800</u>
Turned Away	<u>0</u>
Model Airplane Flyers	<u>381</u>
Information Center	<u>5511</u>
Rifle Range	<u>728</u>
Sunrise/Willow	<u>10,000</u>
Other	<u>_____</u>
Total Number of Day Users	
Resident	<u>23464</u>
Non-Resident	<u>28678</u>

IMPORTANT - Please use other side for month's activities - Include accidents, fires, weather conditions (unusual), vandalism, special events and other items of interest.
NB.366:Parks & Recr. 1730-1249-

MONTHLY PARK REPORT

FARRAGUT

Park

Bryan Rowder
 Manager

September 1987
 Month Year

CAMPING - MONTH' TOTALS

DAY USE - MONTH'S TOTALS

Tent	_____
Tent/Trailer	_____
Trailer	_____
Vans	_____
Motorhome	_____
Pickup	_____
Boat	<u>80</u>
Camping Reservations	<u>134</u>
Senior Citizen/Disabled	<u>98</u>
Special Group Use	<u>2400 (Pathfinders)</u>
Turned Away	<u>0</u>
Thimbleberry Group Area	<u>304</u>
Buttonhook Group Camp	<u>531</u>
Waldron Group Camp	<u>650</u>
Total Number of Camps	
Resident	<u>321</u>
Non-Resident	<u>897</u>
Total Number of Campers	
Resident	<u>869</u>
Non-Resident	<u>2585</u>

Cross Country Skiers	<u>0</u>
Snowmobiles	<u>0</u>
Snowmobilers	<u>0</u>
Boats	<u>638</u>
Boaters	<u>2553</u>
Equestrians	<u>75</u>
Sledders	<u>0</u>
Interpretive Program Attendees	<u>1500</u>
Special Group Use	<u>40 Sports Writers</u>
Turned Away	<u>0</u>
Model Airplane Flyers	<u>250</u>
Information Center	<u>3000</u>
Rifle Range	<u>450</u>
Sunrise/Willow	<u>900</u>
Other	<u>_____</u>
Total Number of Day Users	
Resident	<u>14,690</u>
Non-Resident	<u>9,794</u>

IMPORTANT - Please use other side for month's activities - Include accidents, fires, weather conditions (unusual), vandalism, special events and other items of interest.
 HB 366: Parks & Recr. 1730-1249-

MONTHLY PARK REPORT

FARRAGUT
 Park

Bryan Rowder
 Manager

AUGUST 1988
 Month Year

CAMPING - MONTH TOTALS

Tent	_____
Tent/Trailer	_____
Trailer	_____
Vans	_____
Motorhome	_____
Pickup	_____
Boat	20
Camping Reservations	309
Senior Citizen/Disabled	68
Special Group Use	_____
Turned Away	200
Thimbleberry Group Area	1121
Buttonhook Group Camp	1041
Waldron Group Camp	970
Total Number of Camps	
Resident	439
Non-Resident	2606
Total Number of Campers	
Resident	1831
Non-Resident	8849

DAY USE - MONTH TOTALS

Cross Country Skiers	0
Snowmobiles	0
Snowmobilers	0
Boats	889
Boaters	3555
Equestrians	120
Sledders	0
Interpretive Program Attendees	1906
Special Group Use	458
Turned Away	_____
Model Airplane Flyers	50
Information Center	5363
Rifle Range	300
Sunrise/Willow	8000
Other	_____
Total Number of Day Users	
Resident	23,275
Non-Resident	34,913

IMPORTANT - Please use other side for month's activities - Include accidents, fires, weather conditions (unusual), vandalism, special events and other items of interest.
 HB 366: Parks & Recr. 1730-1249-

MONTHLY PARK REPORT

FARRAGUT

Park

Bryan Rowder
 Manager

September 1988
 Month Year

CAMPING - MONTH TOTALS

Tent	_____
Tent/Trailer	_____
Trailer	_____
Vans	_____
Motorhome	_____
Pickup	_____
Boat	_____
Camping Reservations	<u>295</u>
Senior Citizen/Disabled	_____
Special Group Use <i>Pathfinders</i>	<u>8500</u>
Turned Away	_____
Thimbleberry Group Area	<u>150</u>
Buttonhook Group Camp	<u>170</u>
Waldron Group Camp	<u>570</u>
Total Number of Camps	
Resident	<u>273</u>
Non-Resident	<u>1181</u>
Total Number of Campers	
Resident	<u>803</u> <i>w/Pathfinders</i> <u>2928</u>
Non-Resident	<u>3171</u> <u>7421</u>

DAY USE - MONTH'S TOTALS

Cross Country Skiers	<u>0</u>
Snowmobiles	<u>0</u>
Snowmobilers	<u>0</u>
Boats	<u>444</u>
Boaters	<u>1777</u>
Equestrians	<u>40</u>
Sledders	<u>0</u>
Interpretive Program Attendees	<u>3821</u>
Special Group Use	_____
Turned Away	_____
Model Airplane Flyers	<u>225</u>
Information Center	<u>3463</u>
Rifle Range	<u>100</u>
Sunrise/Willow	<u>1400</u>
Other	_____
Total Number of Day Users	
Resident	<u>24,790</u>
Non-Resident	<u>37,186</u>

IMPORTANT - Please use other side for month's activities - Include accidents, fires, weather conditions (unusual), vandalism, special events and other items of interest.
 HD 366: Parks & Recr. 1730-1249-

MONTHLY PARK REPORT

FARRAGUT
 Park

Bryan Rowder
 Manager

JAN. 1989
 Month Year

CAMPING - MONTH' TOTALS

Tent	_____
Tent/Trailer	_____
Trailer	_____
Vans	_____
Motorhome	_____
Pickup	_____
Boat	_____
Camping Reservations	_____
Senior Citizen/Disabled	_____
Special Group Use	_____
Turned Away	_____
<u>Thimbleberry Group Area</u>	_____
<u>Buttonhook Group Camp</u>	_____
<u>Waldron Group Camp</u>	_____
Total Number of Camps	
Resident	<u>1</u>
Non-Resident	<u>0</u>
Total Number of Campers	
Resident	<u>4</u>
Non-Resident	<u>0</u>

DAY USE - MONTH'S TOTALS

Cross Country Skiers	<u>1150</u>
Snowmobiles	<u>70</u>
Snowmobilers	<u>92</u>
Boats	_____
Boaters	_____
Equestrians	<u>4</u>
Sledders	<u>312</u>
Interpretive Program Attendees	_____
Special Group Use	_____
Turned Away	_____
<u>Model Airplane Flyers</u>	_____
<u>Information Center</u>	<u>1550</u>
<u>Rifle Range</u>	_____
<u>Sunrise/Willow</u>	_____
Other	_____
Total Number of Day Users	
Resident	<u>2751</u>
Non-Resident	<u>1504</u>

IMPORTANT - Please use other side for month's activities - Include accidents, fires, weather conditions (unusual), vandalism, special events and other items of interest.
 HD 366: Parks & Recr. 1730-1249-

MONTHLY PARK REPORT

Bryan Rawden
 Manager

Sunnagut
 Park
Feb
 Month Year

CAMPING - MONTH TOTALS

Tent	_____
Tent/Trailer	_____
Trailer	_____
Self Contained Unit	_____
Motorhome	_____
Pickup	_____
Boat	_____
Camping Reservations	_____
Senior Citizen/Disabled	_____
Special Group Use	_____
Turned Away	_____
_____	_____
_____	_____
_____	_____
Total Number of Camps	
Resident	<u>4</u>
Non-Resident	<u>0</u>
Total Number of Campers	
Resident	<u>12</u>
Non-Resident	<u>0</u>

DAY USE - MONTH'S TOTALS

Cross Country Skiers	_____
Snowmobiles	_____
Snowmobilers	_____
Boats	_____
Boaters	_____
Equestrians	_____
Motorbikes	_____
Interpretive Program	_____
Attendees	_____
Special Group Use	_____
Turned Away	_____
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____
Total Number of Day Users	
Resident	<u>414</u>
Non-Resident	<u>414</u>

IMPORTANT - Please use other side for month's activities - Include accidents, fires, weather conditions (unusual), vandalism, special events and other items of interest.
 HB 366: Parks & Recr. 1730-1249-

MONTHLY PARK REPORT

FARRAGUT
Park

Bryan Rowder
Manager

MARCH 1989
Month Year

CAMPING - MONTH' TOTALS

Tent	_____
Tent/Trailer	_____
Trailer	_____
Vans	_____
Motorhome	_____
Pickup	_____
Boat	_____
Camping Reservations	_____
Senior Citizen/Disabled	_____
Special Group Use	_____
Turned Away	_____
Thimbleberry Group Area	_____
Buttonhook Group Camp	_____
Waldron Group Camp	_____
Total Number of Camps	
Resident	<u>10</u>
Non-Resident	<u>1</u>
Total Number of Campers	
Resident	<u>20</u>
Non-Resident	<u>7</u>

DAY USE - MONTH'S TOTALS

Cross Country Skiers	<u>302</u>
Snowmobiles	<u>5</u>
Snowmobilers	<u>8</u>
Boats	<u>8</u>
Boaters	<u>16</u>
Equestrians	<u>20</u>
Sledders	<u>0</u>
Interpretive Program Attendees	_____
Special Group Use	_____
Turned Away	_____
Model Airplane Flyers	<u>4</u>
Information Center	<u>515</u>
Rifle Range	<u>4</u>
Sunrise/Willow	<u>271</u>
Other	_____
Total Number of Day Users	
Resident	<u>3720</u>
Non-Resident	<u>3720</u>

IMPORTANT - Please use other side for month's activities - Include accidents, fires, weather conditions (unusual), vandalism, special events and other items of interest.
HW.366:Parks & Recr. 1730-1249-

MONTHLY PARK REPORT

FARRAGUT

Park

Bryan Rowder
 Manager

APRIL
 Month

1989
 Year

CAMPING - MONTH TOTALS

Tent	
Tent/Trailer	
Trailer	
Vans	
Motorhome	
Pickup	
Boat	
Camping Reservations	0
Senior Citizen/Disabled	8
Special Group Use <i>2 NITES</i>	1500 1500
Turned Away	0
Thimbleberry Group Area	0
Buttonhook Group Camp	10 10
Waldron Group Camp	0
Total Number of Camps	
Resident	41
Non-Resident	66
Total Number of Campers	= 1603
Resident	1510 + 93 1510
Non-Resident	165

DAY USE - MONTH TOTALS

Cross Country Skiers	0
Snowmobiles	0
Snowmobilers	0
Boats	280
Boaters	1400
Equestrians	127
Sledders	0
Interpretive Program	
Attendees	355
Special Group Use	
Turned Away	
Model Airplane Flyers	100
Information Center	1801
Rifle Range	470
Sunrise/Willow	1170
Other	
Total Number of Day Users	
Resident	9265
Non-Resident	9264

IMPORTANT - Please use other side for month's activities - Include accidents, fires, weather conditions (unusual), vandalism, special events and other items of interest.

HB 366: Parks & Recr. 1730-1249-

Special Group Use ~~1500~~ 1500
 Citizens Against Range, et al
 Idaho Fish and Game Department

MONTHLY PARK REPORT

FARRAGUT

Park

Bryan Rowder
 Manager

MAY
 Month

1989
 Year

CAMPING - MONTH' TOTALS

Tent	
Tent/Trailer	
Trailer	
Vans	
Motorhome	
Pickup	
Boat	10
Camping Reservations	126
Senior Citizen/Disabled	28
Special Group Use	0
Turned Away	0
Thimbleberry Group Area	100 UNUSUAL
Buttonhook Group Camp	300
Waldron Group Camp	0
Total Number of Camps	
Resident	116
Non-Resident	301
Total Number of Campers	
Resident	200 + 354 = 554
Non-Resident	200 + 898 = 1098

DAY USE - MONTH'S TOTALS

Cross Country Skiers	0
Snowmobiles	0
Snowmobilers	0
Boats	308
Boaters	1472
Equestrians	52
Sledders	0
Interpretive Program Attendees	749
Special Group Use <i>bike race</i>	500
Turned Away	
Model Airplane Flyers	89
Information Center	3221
Rifle Range	490
Sunrise/Willow	4000
Other	
Total Number of Day Users	
Resident	14097
Non-Resident	14097

IMPORTANT - Please use other side for month's activities - Include accidents, fires, weather conditions (unusual), vandalism, special events and other items of interest.
 HB.366:Parks & Recr. 1730-1249-

MONTHLY PARK REPORT

FARRAGUT
 Park
JUNE 1989
 Month Year

Bryan Rowder
 Manager

CAMPING - MONTH TOTALS

Tent	_____
Tent/Trailer	_____
Trailer	_____
Vans	_____
Motorhome	_____
Pickup	_____
Boat	<u>40</u>
Camping Reservations	<u>206</u>
Senior Citizen/Disabled	<u>55</u>
Special Group Use	<u>520</u>
Turned Away	_____
Thimbleberry Group Area	<u>100</u>
Buttonhook Group Camp	<u>383</u>
Waldron Group Camp	<u>620</u>
Total Number of Camps	
Resident	<u>542</u>
Non-Resident	<u>1071</u>
Total Number of Campers	
Resident	<u>552 + 1373 = 1925</u>
Non-Resident	<u>1071 + 4215 = 5286</u>

DAY USE - MONTH'S TOTALS

Cross Country Skiers	<u>0</u>
Snowmobiles	<u>0</u>
Snowmobilers	<u>0</u>
Boats	_____
Boaters	<u>300</u>
Equestrians	_____
Sledders	<u>0</u>
Interpretive Program Attendees	<u>870</u>
Special Group Use	_____
Turned Away	_____
Model Airplane Flyers	<u>500</u>
Information Center	<u>5196</u>
Rifle Range	<u>200</u>
Sunrise/Willow	_____
Other	_____
Total Number of Day Users	
Resident	<u>17622</u>
Non-Resident	<u>17623</u>

IMPORTANT - Please use other side for month's activities - Include accidents, fires, weather conditions (unusual), vandalism, special events and other items of interest.
 HB.366:Parks & Recr. 1730-1249-

MONTHLY PARK REPORT

FARRAGUT
 Park
JULY 1989
 Month Year

BRYAN POWELL
 Manager

CAMPING - MONTH TOTALS

Tent	_____
Tent/Trailer	_____
Trailer	_____
Self Contained Unit	_____
Motorhome	_____
Pickup	_____
Boat	_____
Camping Reservations	<u>150</u>
Senior Citizen/Disabled	<u>427</u>
Special Group Use	<u>91</u>
Turned Away	<u>100</u>
<u>TIMBERSONG</u>	<u>1659</u>
<u>BETONDAVE</u>	<u>2544</u>
<u>WILSON</u>	<u>1968</u>
Total Number of Camps	
Resident	<u>745</u>
Non-Resident	<u>3059</u>
Total Number of Campers	
Resident	<u>2835 + 2116 = 4951</u>
Non-Resident	<u>2836 + 8813 = 11649</u>

DAY USE - MONTH'S TOTALS

Cross Country Skiers	<u>0</u>
Snowmobiles	<u>0</u>
Snowmobilers	<u>0</u>
Boats	<u>776</u>
Boaters	<u>3104</u>
Equestrians	<u>50</u>
Motorbikes	<u>0</u>
Interpretive Program Attendees	<u>3,216</u>
Special Group Use	<u>_____</u>
Turned Away	<u>_____</u>
<u>FLYERS</u>	<u>200</u>
<u>INFO CENTER</u>	<u>7673</u>
<u>RICE RANGE</u>	<u>500</u>
_____	<u>_____</u>
_____	<u>_____</u>
Total Number of Day Users	
Resident	<u>26,208</u>
Non-Resident	<u>26,207</u>

IMPORTANT - Please use other side for month's activities - Include accidents, fires, weather conditions (unusual), vandalism, special events and other items of interest.
 HB.366:Parks & Recr. 1730-1249-

MONTHLY PARK REPORT

FARAGUT
 Park

BRYAN ROUNDELL
 Manager

AUGUST 1989
 Month Year

CAMPING - MONTH'S TOTALS

Tent	_____
Tent/Trailer	_____
Trailer	_____
Self Contained Unit	_____
Motorhome	_____
Pickup	_____
Boat	_____ 50 _____
Camping Reservations	_____ 367 _____
Senior Citizen/Disabled	_____ 89 _____
Special Group Use	_____
Turned Away	_____ 200 _____
<u>THIMBERLAW</u>	_____ 955 _____
<u>BUTTEVIEW</u>	_____ 860 _____
<u>WACORAN</u>	_____ 950 _____
Total Number of Camps	
Resident	_____ 445 _____
Non-Resident	_____ 2471 _____
Total Number of Campers	
Resident	_____ 1383 + 1395 = 2778 _____
Non-Resident	_____ 1382 + 7410 = 8792 _____

DAY USE - MONTH'S TOTALS

Cross Country Skiers	_____ 0 _____
Snowmobiles	_____ 0 _____
Snowmobilers	_____ 0 _____
Boats	_____ 939 _____
Boaters	_____ 3758 _____
Equestrians	_____ 182 _____
Motorbikes	_____ 0 _____
Interpretive Program Attendees	_____ 1486 _____
Special Group Use	_____
Turned Away	_____
<u>FLYERS</u>	_____
<u>INFO CENTER</u>	_____ 6949 _____
<u>RIFLE RANGE</u>	_____ 25 _____
_____	_____
_____	_____
Total Number of Day Users	
Resident	_____ 26905 _____
Non-Resident	_____ 26906 _____

IMPORTANT - Please use other side for month's activities - Include accidents, fires, weather conditions (unusual), vandalism, special events and other items of interest.
 HB.366:Parks & Recr. 1730-1249-

MONTHLY PARK REPORT

FARRAGUT
Park

BRYAN ROWDER
Manager

SEPTEMBER, 1989
Month Year

CAMPING - MONTH' TOTALS

Tent	
Tent/Trailer	
Trailer	
Self Contained Unit	
Motorhome	
Pickup	
Boat	40
Camping Reservations	181
Senior Citizen/Disabled	128
Special Group Use	1385
Turned Away	200
BUTAN HWK	380
WALDRON	486
THIMBLE ROCK	150
Total Number of Camps	
Resident	280
Non-Resident	1261
Total Number of Campers	
Resident	1201 + 676 = 1877
Non-Resident	1200 + 2796 = 3996

DAY USE - MONTH'S TOTALS

Cross Country Skiers	0
Snowmobiles	0
Snowmobilers	0
Boats	911
Boaters	3645
Equestrians	30
Motorbikes	0
Interpretive Program Attendees	
Special Group Use	340 ^{POST} 175 _{RC}
Turned Away	
INER CENTER	4982
FLYERS FIELD	150
RIFLE RANGE	500
Total Number of Day Users	
Resident	20953
Non-Resident	20953

IMPORTANT - Please use other side for month's activities - Include accidents, fires, weather conditions (unusual), vandalism, special events and other items of interest.
HB.366:Parks & Recr. 1730-1249-

MONTHLY PARK REPORT

FARRAGUT
Park

BRYAN ROWAN
Manager

OCT 1989
Month Year

CAMPING - MONTH TOTALS

Tent	_____
Tent/Trailer	_____
Trailer	_____
Self Contained Unit	_____
Motorhome	_____
Pickup	_____
Boat	<u>10</u>
Camping Reservations	<u>0</u>
Senior Citizen/Disabled	<u>58</u>
Special Group Use	_____
Turned Away	_____
<u>BRYAN HALL</u>	<u>0</u>
<u>THIMBLE BERRY</u>	<u>0</u>
<u>WATERFORD</u>	<u>180</u>
Total Number of Camps	
Resident	<u>94</u>
Non-Resident	<u>178</u>
Total Number of Campers	
Resident	<u>90 + 195 = 285</u>
Non-Resident	<u>90 + 413 = 503</u>

DAY USE - MONTH TOTALS

Cross Country Skiers	<u>0</u>
Snowmobiles	<u>0</u>
Snowmobilers	<u>0</u>
Boats	<u>228</u>
Boaters	<u>913</u>
Equestrians	_____
Motorbikes	_____
Interpretive Program Attendees	<u>120</u>
Special Group Use	_____
Turned Away	_____
<u>INFORMATION CENTER</u>	<u>601</u>
<u>FLYING FLEET</u>	<u>52</u>
<u>RIFLE RANGE</u>	<u>122</u>
_____	_____
_____	_____
Total Number of Day Users	
Resident	<u>12,500</u>
Non-Resident	<u>12,425</u>

IMPORTANT - Please use other side for month's activities - Include accidents, fires, weather conditions (unusual), vandalism, special events and other items of interest.
HB.366:Parks & Recr. 1730-1249-

MONTHLY PARK REPORT

Fannagut
 Park

Bryan Rowles
 Manager

Nov
 Month Year

CAMPING - MONTH' TOTALS

Tent	_____
Tent/Trailer	_____
Trailer	_____
Self Contained Unit	_____
Motorhome	_____
Pickup	_____
Boat	_____
Camping Reservations	_____
Senior Citizen/Disabled	_____
Special Group Use	_____
Turned Away	_____
_____	_____
_____	_____
_____	_____
Total Number of Camps	
Resident	<u>25</u>
Non-Resident	<u>0</u>
Total Number of Campers	
Resident	<u>72</u>
Non-Resident	<u>0</u>

DAY USE - MONTH'S TOTALS

Cross Country Skiers	_____
Snowmobiles	_____
Snowmobilers	_____
Boats	_____
Boaters	<u>120</u>
Equestrians	_____
Motorbikes	_____
Interpretive Program	_____
Attendees	_____
Special Group Use	_____
Turned Away	_____
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____
Total Number of Day Users	
Resident	<u>4220</u>
Non-Resident	<u>1962</u>

IMPORTANT - Please use other side for month's activities - Include accidents, fires, weather conditions (unusual), vandalism, special events and other items of interest.
 HB.366:Parks & Recr. 1730-1249-

MONTHLY PARK REPORT

B Rowder
 Manager

Fawn
 Park
Dec 89
 Month Year

CAMPING - MONTH' TOTALS

Tent	_____
Tent/Trailer	_____
Trailer	_____
Self Contained Unit	_____
Motorhome	_____
Pickup	_____
Boat	_____
Camping Reservations	_____
Senior Citizen/Disabled	_____
Special Group Use	_____
Turned Away	_____
_____	_____
_____	_____
_____	_____
Total Number of Camps	
Resident	<u>2</u>
Non-Resident	<u>0</u>
Total Number of Campers	
Resident	<u>4</u>
Non-Resident	<u>0</u>

DAY USE - MONTH'S TOTALS

Cross Country Skiers	<u>2</u>
Snowmobiles	<u>2</u>
Snowmobilers	<u>4</u>
Boats <i>TOTAL 4288</i>	<u>20</u>
Boaters	<u>80</u>
Equestrians	<u>30</u>
Motorbikes	_____
Interpretive Program Attendees	_____
Special Group Use	_____
Turned Away	_____
<u>Info Center</u>	<u>50</u>
_____	_____
_____	_____
_____	_____
_____	_____
Total Number of Day Users	
Resident	<u>3000</u>
Non-Resident	<u>1000</u>

IMPORTANT - Please use other side for month's activities - Include accidents, fires, weather conditions (unusual), vandalism, special events and other items of interest.
 HB.366:Parks & Recr. 1730-1249-

MONTHLY PARK REPORT

FARNABUT
Park
JANUARY 1990
Month Year

BRYAN ROWLER
Manager

CAMPING - MONTH' TOTALS

Tent	_____
Tent/Trailer	_____
Trailer	_____
Self Contained Unit	_____
Motorhome	_____
Pickup	_____
Boat	0
Camping Reservations	0
Senior Citizen/Disabled	0
Special Group Use	0
Turned Away	0
_____	0
_____	0
_____	0
Total Number of Camps	
Resident	0
Non-Resident	0
Total Number of Campers	
Resident	0
Non-Resident	0

DAY USE - MONTH'S TOTALS

Cross Country Skiers	20
Snowmobiles	4
Snowmobilers	8
Boats	0
Boaters	0
Equestrians	0
Motorbikes	0
Interpretive Program Attendees	50
Special Group Use	0
Turned Away	0
<u>Visitor center</u>	708
_____	_____
_____	_____
_____	_____
Total Number of Day Users	
Resident	1008
Non-Resident	1009

IMPORTANT - Please use other side for month's activities - Include accidents, fires, weather conditions (unusual), vandalism, special events and other items of interest.
HB,366:Parks & Recr, 1730-1249-

MONTHLY PARK REPORT

BRYAN Rowell
 Manager

FARRACUT
 Park
FEB 1990
 Month Year

CAMPING - MONTH'S TOTALS

Tent	_____
Tent/Trailer	_____
Trailer	_____
Self Contained Unit	_____
Motorhome	_____
Pickup	_____
Boat	_____
Camping Reservations	_____
Senior Citizen/Disabled	_____
Special Group Use	_____
Turned Away	_____
_____	_____
_____	_____
_____	_____
Total Number of Camps	
Resident	_____ 0
Non-Resident	_____ 0
Total Number of Campers	
Resident	_____ 1
Non-Resident	_____ 1

DAY USE - MONTH'S TOTALS

Cross Country Skiers	_____ 250
Snowmobiles	_____ 40
Snowmobilers	_____ 80
Boats	_____ 2
Boaters	_____ 8
Equestrians	_____ 10
Motorbikes	_____ 1
Interpretive Program Attendees	_____ 0
Special Group Use	_____
Turned Away	_____
<u>WFO CENTER</u>	_____ 500
_____	_____
_____	_____
_____	_____
_____	_____
Total Number of Day Users	
Resident	_____ 2728
Non-Resident	_____ 2526

IMPORTANT - Please use other side for month's activities - Include accidents, fires, weather conditions (unusual), vandalism, special events and other items of interest.
 HB.366:Parks & Recr. 1730-1249-

FARRAGUT STATE PARK

MONTHLY TOTALS

MARCH 1990
 Month Year

Buttonhook	Camps	<u>0</u>	Skiers	<u>2</u>
	Campers	<u>0</u>	Snowmobiles	<u>0</u>
Thimbleberry	Camps	<u>3</u>	Snowmobilers	<u>0</u>
	Campers	<u>135</u>	Boats	<u>10</u>
Waldron	Camps	<u>0</u>	Boaters	<u>40</u>
	Campers	<u>0</u>	Equestrians	<u>38</u>
Special Groups	Camps	<u>0</u>	Interp Attendees	<u>109</u>
	Campers	<u>0</u>	Special Groups	<u>0</u>
Total Groups Camps		<u>3</u>	Shelter Resv.(used)	<u>0</u>
Total Group Campers		<u>135</u>	Sunrise Lg	<u>0</u>
Boat Campers (est)		<u>0</u>	Sunrise Sm	<u>0</u>
Group Camp Resv. (used)		<u>0</u>	Locust Grove	<u>0</u>
Ind. Campsite Resv. (used)		<u>0</u>	Shooting Range Users	<u>142</u>
Sr. Cit/Disabled Disc		<u>0</u>	# of days reserved	<u>4</u>
Turned Away		<u>0</u>	Info Center Visitors	<u>621</u>
Ind. Camps (Resident)		<u>27</u>	Total Group Resv (used)	<u>0</u>
Ind. Camps (Non-Resident)		<u>4</u>		
Campers (Resident)		<u>58</u>		
Campers (Non-Resident)		<u>14</u>		
Total Resident Camps		<u>61</u>	Total Day Users	<u>7764</u>
Non-Resident Camps		<u>4</u>	Resident	<u>4912</u>
Total Resident Campers		<u>193</u>	Non-Resident	<u>2852</u>
Non-Resident Campers		<u>14</u>		

pn1612p

FARRAGUT STATE PARK

MONTHLY TOTALS

Round

APRIL 1990
 Month Year

Buttonhook	Camps	<u>2</u>	Skiers	<u>0</u>
	Campers	<u>32</u>	Snowmobiles	<u>0</u>
Thimbleberry	Camps	<u>1</u>	Snowmobilers	<u>0</u>
	Campers	<u>223</u>	Boats	<u>225</u>
Waldron	Camps	<u>0</u>	Boaters	<u>903</u>
	Campers	<u>0</u>	Equestrians	<u>65</u>
Special Groups	Camps	<u>2</u>	Interp Attendees	<u> </u>
<i>BSA - 2 NITE</i>	Campers	<u>6000</u>	Special Groups ^{1 - BACK COUNTRY}	<u>1000 B.S. SECT VISITORS</u>
Total Groups Camps		<u>5</u>	Shelter Resv.(used)	<u>1</u>
Total Group Campers		<u>6255</u>	Sunrise Lg	<u>0</u>
Boat Campers (est)		<u>25</u>	Sunrise Sm	<u>1</u>
Group Camp Resv. (used)		<u>1</u>	Locust Grove	<u>0</u>
Ind. Campsite Resv. (used)		<u>0</u>	Shooting Range Users	<u>170</u>
Sr. Cit/Disabled Disc		<u>0</u>	# of days reserved	<u>5</u>
Turned Away		<u>0</u>	Info Center Visitors	<u>2576</u>
Ind. Camps (Resident)		<u>84</u>	Total Group Resv (used)	<u>6</u>
Ind. Camps (Non-Resident)		<u>42</u>		
Campers (Resident)		<u>168</u>		
Campers (Non-Resident)		<u>84</u>		
Total Resident Camps		<u>88</u>	Total Day Users	<u>12,356</u>
Non-Resident Camps		<u>44</u>	Resident	<u>6,178</u>
Total Resident Campers		<u>3127 3295</u>	Non-Resident	<u>6,178</u>
Non-Resident Campers		<u>3128 3212</u>		

pn1612p

FARRAGUT STATE PARK

MONTHLY TOTALS

MAY 1990
 Month Year

Buttonhook	Camps	<u>6</u>	Skiers	<u>0</u>
	Campers	<u>260</u>	Snowmobiles	<u>0</u>
Thimbleberry	Camps	<u>5</u>	Snowmobilers	<u>0</u>
	Campers	<u>312</u>	Boats	<u>438</u>
Waldron	Camps	<u>3</u>	Boaters	<u>1752</u>
	Campers	<u>330</u>	Equestrians	<u>30</u>
Special Groups	Camps	<u>0</u>	Interp Attendees	<u>1125</u>
	Campers	<u>02</u>	Special Groups	<u>2350</u>
Total Groups Camps		<u>14</u>	Shelter Resv.(used)	<u>4</u>
Total Group Campers		<u>902</u>	Sunrise Lg	<u>1</u>
Boat Campers (est)		<u>12</u>	Sunrise Sm	<u>3</u>
Group Camp Resv. (used)		<u>7</u>	Locust Grove	<u>0</u>
Ind. Campsite Resv. (used)		<u>103</u>	<small>PC Camps PRCAD</small>	<u>42</u>
Sr. Cit/Disabled Disc		<u>33</u>	Shooting Range Users	<u>202</u>
Turned Away		<u>0</u>	# of days reserved	<u>7</u>
Ind. Camps (Resident)		<u>172</u>	Info Center Visitors	<u>2880</u>
Ind. Camps (Non-Resident)		<u>569</u>	Total Group Resv (used)	<u>8</u>
Campers (Resident)		<u>359</u>		
Campers (Non-Resident)		<u>1418</u>		
Total Resident Camps		<u>179</u>	Total Day Users	<u>26,286</u>
Non-Resident Camps		<u>576</u>	Resident	<u>13,143</u>
Total Resident Campers		<u>810</u>	Non-Resident	<u>13,143</u>
Non-Resident Campers		<u>1869</u>		

pn1612p

FARRAGUT STATE PARK

MONTHLY TOTALS

JUNE 1990
 Month Year

Buttonhook	Camps	<u>6</u>	Skiers	<u>0</u>
	Campers	<u>260</u>	Snowmobiles	<u>0</u>
Thimbleberry	Camps	<u>6</u>	Snowmobilers	<u>0</u>
	Campers	<u>300</u>	Boats	<u>718</u>
Waldron	Camps	<u>9</u>	Boaters	<u>2872</u>
	Campers	<u>952</u>	Equestrians	<u>40</u>
Special Groups	Camps	<u>15</u>	Interp Attendees	<u>984</u>
<i>WANL</i>	Campers	<u>7000</u>	Special Groups <i>BIKERACE</i>	<u>1</u>
Total Groups & Camps		<u>22</u>	Shelter Resv.(used)	<u>23</u>
Total Group Campers		<u>8512</u>	Sunrise Lg	<u>8</u>
Boat Campers (est)		<u>30</u>	Sunrise Sm	<u>9</u>
Group Camp Resv. (used)		<u>8</u>	Locust Grove	<u>5</u>
Ind. Campsite Resv. (used)		<u>254</u>	Shooting Range Users	<u>320</u>
Sr. Cit/Disabled Disc		<u>64</u>	# of days reserved	<u>11</u>
Turned Away		<u>40</u>	Info Center Visitors	<u>6188</u>
Ind. Camps (Resident)		<u>394</u>	Total Group Resv (used)	<u>46</u>
Ind. Camps (Non-Resident)		<u>2154</u>		
Campers (Resident)		<u>1184</u>		
Campers (Non-Resident)		<u>5625</u>		
Total Resident Camps		<u>394</u>	Total Day Users	<u>76,397</u>
Non-Resident Camps		1184 <u>1198</u>	Resident	<u>38,198</u>
Total Resident Campers		<u>2176</u>	Non-Resident	<u>38,199</u>
Non-Resident Campers		<u>19,137</u>		

pn1612p

FARRAGUT STATE PARK

MONTHLY TOTALS

18	14
51	41
6	103
<u>75</u>	<u>13</u>
	167

Oct 1990
Month Year

Buttonhook	Camps	<u>0</u>	Skiers	<u>0</u>
	Campers	<u>0</u>	Snowmobiles	<u>0</u>
Thimbleberry	Camps	<u>0</u>	Snowmobilers	<u>0</u>
	Campers	<u>0</u>	Boats	<u>150</u>
Waldron	Camps	<u>1</u>	Boaters	<u>600</u>
	Campers	<u>70</u>	Equestrians	<u>30</u>
Special Groups	Camps	<u>0</u>	Interp Attendees	<u>40</u>
	Campers	<u>0</u>	Special Groups	<u>284</u>
Total Groups Camps		<u>1</u>	Shelter Resv.(used)	<u>0</u>
Total Group Campers		<u>70</u>	Sunrise Lg	<u>0</u>
Boat Campers (est)		<u>20</u>	Sunrise Sm	<u>0</u>
Group Camp Resv. (used)		<u>0</u>	Locust Grove	<u>0</u>
Ind. Campsite Resv. (used)		<u>0</u>	Shooting Range Users	<u>100</u>
Sr. Cit/Disabled Disc		<u>40</u>	# of days reserved	<u>2</u>
Turned Away		<u>0</u>	Info Center Visitors	<u>50</u>
Ind. Camps (Resident)		<u>75</u>	Total Group Resv (used)	<u>2</u>
Ind. Camps (Non-Resident)		<u>167</u>		
Campers (Resident)		<u>162</u>		
Campers (Non-Resident)		<u>463</u>		
Total Resident Camps		162 <u>75</u>	Total Day Users	<u>14,030</u>
Non-Resident Camps		167 <u>168</u>	Resident	<u>7,015</u>
Total Resident Campers		<u>162</u>	Non-Resident	<u>7,015</u>
Non-Resident Campers		<u>473</u>		

FARRAGUT STATE PARK

MONTHLY TOTALS

November 1990
 Month Year

Buttonhook	Camps	<u>1</u>	Skiers	<u>2</u>
	Campers	<u>15</u>	Snowmobiles	<u>0</u>
Thimbleberry	Camps	<u>0</u>	Snowmobilers	<u>0</u>
	Campers	<u>0</u>	Boats	<u>50</u>
Waldron	Camps	<u>0</u>	Boaters	<u>200</u>
	Campers	<u>0</u>	Equestrians	<u>10</u>
Special Groups	Camps	<u>0</u>	Interp Attendees	<u>0</u>
	Campers	<u>0</u>	Special Groups	<u>0</u>
Total Groups Camps		<u>1</u>	Shelter Resv.(used)	<u>0</u>
Total Group Campers		<u>15</u>	Sunrise Lg	<u>0</u>
Boat Campers (est)		<u>5</u>	Sunrise Sm	<u>0</u>
Group Camp Resv. (used)		<u>0</u>	Locust Grove	<u>0</u>
Ind. Campsite Resv. (used)		<u>0</u>	Shooting Range Users	<u>100</u>
Sr. Cit/Disabled Disc		<u>0</u>	# of days reserved	<u>2</u>
Turned Away		<u>0</u>	Info Center Visitors	<u>100</u>
Ind. Camps (Resident)		<u>2</u>	Total Group Resv (used)	<u>2</u>
Ind. Camps (Non-Resident)		<u>2</u>		
Campers (Resident)		<u>4</u>		
Campers (Non-Resident)		<u>4</u>		
Total Resident Camps		<u>3</u>	Total Day Users	<u>9800</u>
Non-Resident Camps		<u>2</u>	Resident	<u>4900</u>
Total Resident Campers		<u>19</u>	Non-Resident	<u>4900</u>
Non-Resident Campers		<u>4</u>		

pn1612p

FARRAGUT STATE PARK

MONTHLY TOTALS

December 1990
 Month Year

Buttonhook	Camps	<u>0</u>	Skiers	<u>210 210</u>
	Campers	<u>6</u>	Snowmobiles	<u>1.5</u>
Thimbleberry	Camps	<u>0</u>	Snowmobilers	<u>4.5</u>
	Campers	<u>0</u>	Boats	<u>2</u>
Waldron	Camps	<u>0</u>	Boaters	<u>4</u>
	Campers	<u>0</u>	Equestrians	<u>0</u>
Special Groups	Camps	<u>0</u>	Interp Attendees	<u>0</u>
	Campers	<u>0</u>	Special Groups	<u>0</u>
Total Groups Camps		<u>0</u>	Shelter Resv.(used)	<u>0</u>
Total Group Campers		<u>0</u>	Sunrise Lg	<u>0</u>
Boat Campers (est)		<u>0</u>	Sunrise Sm	<u>0</u>
Group Camp Resv. (used)		<u>0</u>	Locust Grove	<u>0</u>
Ind. Campsite Resv. (used)		<u>0</u>	Shooting Range Users	<u>0</u>
Sr. Cit/Disabled Disc		<u>0</u>	# of days reserved	<u>0</u>
Turned Away		<u>0</u>	Info Center Visitors	<u>355</u>
Ind. Camps (Resident)		<u>9</u>	Total Group Resv (used)	<u>0</u>
Ind. Camps (Non-Resident)		<u>2</u>		
Campers (Resident)		<u>18</u>		
Campers (Non-Resident)		<u>6</u>		
Total Resident Camps		<u>9</u>	Total Day Users	<u>355</u>
Non-Resident Camps		<u>2</u>	Resident	<u>355</u>
Total Resident Campers		<u>18</u>	Non-Resident	<u>0</u>
Non-Resident Campers		<u>6</u>		

pn1612p

act. 8000 Hwy, 1 m to
 & WILLIAMS DRUGS

FARRAGUT STATE PARK

MONTHLY TOTALS

JANUARY 1991
 Month Year

Buttonhook	Camps	_____	Skiers	<u>800</u>
	Campers	_____	Snowmobiles	<u>20</u>
Thimbleberry	Camps	_____	Snowmobilers	<u>40</u>
	Campers	_____	Boats	_____
Waldron	Camps	_____	Boaters	_____
	Campers	_____	Equestrians	_____
Special Groups	Camps	<u>8</u>	Interp Attendees	_____
	Campers	<u>15</u>	Special Groups	_____
Total Groups Camps		_____	Shelter Resv. (used)	_____
Total Group Campers		_____	Sunrise Lg	_____
Boat Campers (est)		_____	Sunrise Sm	_____
Group Camp Resv. (used)		_____	Locust Grove	_____
Ind. Campsite Resv. (used)		_____	Shooting Range Users	_____
Sr. Cit/Disabled Disc		_____	# of days reserved	_____
Turned Away		_____	Info Center Visitors	<u>1107</u>
Ind. Camps (Resident)		<u>1</u>	Total Group Resv (used)	_____
Ind. Camps (Non-Resident)		<u>1</u>		
Campers (Resident)		<u>1</u>		
Campers (Non-Resident)		<u>1</u>		
Total Resident Camps		<u>1</u>	Total Day Users	<u>1207</u>
Non-Resident Camps		<u>9</u>	Resident	<u>604</u>
Total Resident Campers		<u>1</u>	Non-Resident	<u>603</u>
Non-Resident Campers		<u>16</u>		

no heavy impact

FARRAGUT STATE PARK

MONTHLY TOTALS

Feb. 1991
 Month Year

Buttonhook	Camps	<u>6</u>	Skiers	<u>0</u>
	Campers	<u>280</u>	Snowmobiles	<u>0</u>
Thimbleberry	Camps	<u>0</u>	Snowmobilers	<u>0</u>
	Campers	<u>0</u>	Boats	<u>2</u>
Waldron	Camps	<u>0</u>	Boaters	<u>4</u>
	Campers	<u>0</u>	Equestrians	<u>2</u>
Special Groups	Camps	<u>0</u>	Interp Attendees	<u>30</u>
	Campers	<u>0</u>	Special Groups	<u>0</u>
Total Groups Camps		<u>6</u>	Shelter Resv.(used)	<u>0</u>
Total Group Campers		<u>280</u>	Sunrise Lg	<u>0</u>
Boat Campers (est)		<u>0</u>	Sunrise Sm	<u>0</u>
Group Camp Resv. (used)		<u>0</u>	Locust Grove	<u>0</u>
Ind. Campsite Resv. (used)		<u>0</u>	Shooting Range Users	<u>0</u>
Sr. Cit/Disabled Disc		<u>0</u>	# of days reserved	<u>0</u>
Turned Away		<u>0</u>	Info Center Visitors	<u>86</u>
Ind. Camps (Resident)		<u>5</u>	Total Group Resv (used)	<u>0</u>
Ind. Camps (Non-Resident)		<u>1</u>		
Campers (Resident)		<u>10</u>		
Campers (Non-Resident)		<u>2</u>		
Total Resident Camps		<u>11</u>	Total Day Users	<u>2200</u>
Non-Resident Camps		<u>2 1</u>	Resident	<u>1500</u>
Total Resident Campers		<u>240</u>	Non-Resident	<u>700</u>
Non-Resident Campers		<u>2</u>		

FARRAGUT STATE PARK

MONTHLY TOTALS

MARCH 1989
 Month Year

Buttonhook	Camps	<u>1</u>	Skiers	<u>0</u>
	Campers	<u>27</u>	Snowmobiles	<u>0</u>
Thimbleberry	Camps	<u></u>	Snowmobilers	<u>0</u>
	Campers	<u></u>	Boats	<u>5</u>
Waldron	Camps	<u>1</u>	Boaters	<u>10</u>
	Campers	<u>260</u>	Equestrians	<u>10</u>
Special Groups	Camps	<u></u>	Interp Attendees	<u>0</u>
	Campers	<u></u>	Special Groups	<u>0</u>
Total Groups Camps		<u>2</u>	Shelter Resv.(used)	<u>1</u>
Total Group Campers		<u>187</u>	Sunrise Lg	<u>1</u>
Boat Campers (est)		<u>0</u>	Sunrise Sm	<u></u>
Group Camp Resv. (used)		<u>0</u>	Locust Grove	<u></u>
Ind. Campsite Resv. (used)		<u>0</u>	Shooting Range Users	<u>10</u>
Sr. Cit/Disabled Disc		<u>0</u>	# of days reserved	<u>0</u>
Turned Away		<u>0</u>	Info Center Visitors	<u>485</u>
Ind. Camps (Resident)		<u>61</u>	Total Group Resv (used)	<u>1</u>
Ind. Camps (Non-Resident)		212 <u>12</u>		
Campers (Resident)		<u>180</u>		
Campers (Non-Resident)		<u>43</u>		
Total Resident Camps		<u>63</u>	Total Day Users <i>est</i>	<u>4000</u>
Non-Resident Camps		<u>12</u>	Resident	<u>2000</u>
Total Resident Campers		429 <u>367</u>	Non-Resident	<u>2000</u>
Non-Resident Campers		<u>43</u>		

FARRAGUT STATE PARK

MONTHLY TOTALS

APRIL 1991
 Month Year

Buttonhook	Camps	<u>2</u>	Skiers	<u>0</u>
<i>1804 SCOTT</i>	Campers	<u>30</u>	Snowmobiles	<u>0</u>
Thimbleberry	Camps	<u>4</u>	Snowmobilers	<u>0</u>
	Campers	<u>120</u>	Boats	<u>150</u>
Waldron	Camps	<u>2</u>	Boaters	<u>600</u>
	Campers	<u>150</u>	Equestrians	<u>50</u>
Special Groups	Camps		Interp Attendees	<u>260</u>
	Campers		Special Groups <i>EARTH RIDE</i>	<u>60</u>
Total Groups Camps		<u>8</u>	Shelter Resv.(used)	<u>1</u>
Total Group Campers		<u>200</u>	Sunrise Lg	<u>1</u>
Boat Campers (est)		<u>10</u>	Sunrise Sm	
Group Camp Resv. (used)		<u>2</u>	Locust Grove	
Ind. Campsite Resv. (used)		<u>0</u>	Shooting Range Users	<u>100</u>
Sr. Cit/Disabled Disc		<u>13</u>	# of days reserved	<u>2</u>
Turned Away		<u>0</u>	Info Center Visitors	<u>1296</u>
Ind. Camps (Resident)		<u>72</u>	Total Group Resv (used)	<u>2</u>
Ind. Camps (Non-Resident)		<u>75</u>		
Campers (Resident)		<u>175</u>		
Campers (Non-Resident)		<u>243</u>		
Total Resident Camps		<u>74</u>	Total Day Users	<u>7526</u>
Non-Resident Camps		<u>81</u>	Resident	<u>4221</u>
Total Resident Campers		<u>215</u>	Non-Resident	<u>3305</u>
Non-Resident Campers		<u>393</u>		

est

FARRAGUT STATE PARK

MONTHLY TOTALS

R	N
204	224
124	192
<u>1</u>	<u>1</u>
333	417

MAY 1991
Month Year

Buttonhook	Camps	<u>7</u>	Skiers	<u>0</u>
	Campers	<u>280</u>	Snowmobiles	<u>0</u>
Thimbleberry	Camps	<u>4</u>	Snowmobilers	<u>0</u>
	Campers	<u>332</u>	Boats	
Waldron	Camps		Boaters	
	Campers		Equestrians	<u>80</u>
Special Groups	Camps		Interp Attendees	
	Campers		Special Groups ^{ROUNDED}	<u>1 - 400</u> 2 dep
Total Groups Camps		<u>11</u>	Shelter Resv.(used)	<u>5</u>
Total Group Campers		<u>616</u>	Sunrise Lg	<u>1</u>
Boat Campers (est)		<u>20</u>	Sunrise Sm	<u>2</u>
Group Camp Resv. (used)		<u>0</u>	Locust Grove	<u>2</u>
Ind. Campsite Resv. (used)		<u>102</u>	Shooting Range Users	<u>150</u>
Sr. Cit/Disabled Disc		<u>16</u>	# of days reserved	<u>5</u> (2000)
Turned Away		<u>10</u>	Info Center Visitors	<u>3017</u>
Ind. Camps (Resident)		<u>333</u>	Total Group Resv (used)	<u>9</u>
Ind. Camps (Non-Resident)		<u>417</u>	<i>new hedges not raising NR buttons for camps</i>	
Campers (Resident)		<u>726</u>		
Campers (Non-Resident)		<u>1636</u>		
Total Resident Camps		<u>333</u>	Total Day Users	<u>26,000</u>
Non-Resident Camps		<u>428</u>	Resident	<u>14,000</u>
Total Resident Campers		<u>726</u>	Non-Resident	<u>12,000</u>
Non-Resident Campers		<u>2252</u>		<u>est.</u>

pn1612p

*Trophy counters parking
Boysen's detector #35 61 954
park.*

FARRAGUT STATE PARK

MONTHLY TOTALS

R
195
193
31
419

NR
830
575
43
1448

JUNE 91
Month Year

Buttonhook	Camps	<u>8</u>	Skiers	<u>0</u>
	Campers	<u>333</u>	Snowmobiles	<u>0</u>
Thimbleberry	Camps	<u>2</u>	Snowmobilers	<u>0</u>
	Campers	<u>122</u>	Boats <i>est</i>	<u>610</u>
Waldron	Camps	<u>16</u>	Boaters	<u>2440</u>
	Campers	<u>1607</u>	Equestrians	<u>72</u>
Special Groups	Camps	<u>6</u>	Interp Attendees	<u>880</u>
<i>1st + 2nd Runner 3</i>	Campers	<u>500</u>	Special Groups	<u>650</u>
			<i>50 MAR 400 BOWMAN 200 TRISHA</i>	
Total Groups Camps		<u>32</u>	Shelter Resv.(used)	<u>24</u>
Total Group Campers	<i>(17 NR)</i>	<u>2562</u>	Sunrise Lg	<u>18</u>
Boat Campers (est)		<u>60</u>	Sunrise Sm	<u>49</u>
Group Camp Resv. (used)		<u>18</u>	Locust Grove	<u>4</u>
Ind. Campsite Resv. (used)		<u>212</u>	Shooting Range Users	<u>220</u>
Sr. Cit/Disabled Disc		<u>69</u>	<i>200 - 201st est</i>	
Turned Away		<u>30</u>	# of days reserved	<u>4</u>
Ind. Camps (Resident)		<u>419</u>	Info Center Visitors	<u>4171</u>
Ind. Camps (Non-Resident)		<u>1448</u>	Total Group Resv (used)	<u>28</u>
Campers (Resident)		<u>1324</u>		
Campers (Non-Resident)		<u>4639</u>		
Total Resident Camps		<u>435</u>	Total Day Users	<u>42,893</u>
Non-Resident Camps		<u>1464</u>	Resident	<u>21,446</u>
Total Resident Campers		<u>2093</u>	Non-Resident	<u>21,447</u>
Non-Resident Campers		<u>6432</u>		

estimate Return the Register
New T.C.s. not in

1321 680
1282
407
2379

BH
1711
1711
1711
1711
1711
1711
1711
1711
1711

FARRAGUT STATE PARK
MONTHLY TOTALS

441
223
4
668
2575
1134
3
3612
2542
138

u 1711
T 6 64776

JULY 1991
Month Year

Buttonhook	Camps	<u>22</u>	Skiers	<u>0</u>
	Campers	<u>2379</u>	Snowmobiles	<u>0</u>
Thimbleberry	Camps	<u>15</u>	Snowmobilers	<u>0</u>
	Campers	<u>711</u>	Boats	<u>900</u>
Waldron	Camps	<u>27</u>	Boaters	<u>3600</u>
	Campers	<u>2285</u>	Equestrians	<u>82</u>
Special Groups	Camps	<u>64</u>	Interp Attendees	<u>1422</u>
	Campers		Special Groups	
Total Groups Camps		<u>64</u>	Shelter Resv.(used)	<u>31</u>
Total Group Campers		<u>5375</u>	Sunrise Lg	<u>16</u>
Boat Campers (est)		<u>240</u>	Sunrise Sm	<u>14</u>
Group Camp Resv. (used)		<u>36</u>	Locust Grove	<u>7</u>
Ind. Campsite Resv. (used)		<u>621</u>	Shooting Range Users	<u>40</u>
Sr. Cit/Disabled Disc		<u>110</u>	# of days reserved	<u>1</u>
Turned Away 300 by phone		<u>150 UNITS</u>	Info Center Visitors	<u>6617</u>
Ind. Camps (Resident)		<u>668</u>	Total Group Resv (used)	<u>32</u>
Ind. Camps (Non-Resident)		<u>3612</u>		
Campers (Resident)		<u>2542</u>		
Campers (Non-Resident)		<u>13,833</u>		
Total Resident Camps		<u>700</u>	Total Day Users	<u>42,000</u>
Non-Resident Camps		<u>3644</u>	Resident	<u>16,800</u>
Total Resident Campers		<u>5229</u>	Non-Resident	<u>25,200</u>
Non-Resident Campers		<u>16,720</u>		

estimate - trophies
counters not filled
60000

pn1612p

FARRAGUT STATE PARK

MONTHLY TOTALS

August 1991
 Month Year

Buttonhook	Camps	<u>75</u>	Skiers	<u>0</u>
	Campers	<u>1827</u>	Snowmobiles	<u>0</u>
Thimbleberry	Camps	<u>23</u>	Snowmobilers	<u>0</u>
	Campers	<u>1269</u>	Boats	<u>950</u>
Waldron	Camps	<u>26</u>	Boaters	<u>3800</u>
	Campers	<u>449</u>	Equestrians	<u>65</u>
Special Groups	Camps	<u>4</u>	Interp Attendees	<u>2843</u>
<i>1898 SCA SLIP</i>	Campers	2000	Special Groups	<u> </u>
Total Groups Camps		<u>128</u>	Shelter Resv.(used)	<u>34</u>
Total Group Campers		<u>5758 6175</u>	Sunrise Lg	<u>12</u>
Boat Campers (est)		<u>230</u> <i>3090</i>	Sunrise Sm	<u>14</u>
Group Camp Resv. (used)		<u>26</u>	Locust Grove	<u>8</u>
Ind. Campsite Resv. (used)		<u>634</u>	Shooting Range Users	<u>52</u>
Sr. Cit/Disabled Disc		<u>89</u>	# of days reserved	<u>2</u>
Turned Away		<u>160 units</u>	Info Center Visitors	<u>6948</u>
Ind. Camps (Resident)		<u>481</u>	Total Group Resv (used)	<u>36</u>
Ind. Camps (Non-Resident)		<u>4205</u>		
Campers (Resident)		<u>1619</u>		
Campers (Non-Resident)		<u>15562</u>		
Total Resident Camps		<u>545</u>	Total Day Users	<u>44,500</u>
Non-Resident Camps		<u>4269</u>	Resident	<u>17,800</u>
Total Resident Campers		<u>5198 4705</u>	Non-Resident	<u>26,700</u>
Non-Resident Campers		<u>19,141 18,648</u>		
			Estimate NR R	<u>60, 40</u>

FARRAGUT STATE PARK

MONTHLY TOTALS

SEPT. 1991
Month Year

P2300

~~156~~
~~127~~
~~12~~
~~065~~
144
166
15
319

846
581
2
1429
1675
632
8
1715

Buttonhook	Camps	<u>7</u>	Skiers	<u>0</u>
	Campers	<u>280</u>	Snowmobiles	<u>0</u>
Thimbleberry	Camps	<u>2</u>	Snowmobilers	<u>0</u>
	Campers	<u>0</u>	Boats	
Waldron	Camps	<u>5</u>	Boaters	
	Campers	<u>480</u>	Equestrians	
Special Groups	Camps	<u>4</u>	Interp Attendees	
SCA	Campers	<u>1898</u>	Special Groups	<u>210</u>
Total Groups Camps		<u>18</u>	Shelter Resv.(used)	<u>14</u>
Total Group Campers		<u>2658</u>	Sunrise Lg	<u>7</u>
Boat Campers (est)		<u>300</u>	Sunrise Sm	<u>5</u>
Group Camp Resv. (used)		<u>9</u>	Locust Grove	<u>2</u>
Ind. Campsite Resv. (used)		<u>157</u>	Shooting Range Users	<u>46</u>
Sr. Cit/Disabled Disc		<u>134</u>	# of days reserved	<u>3</u>
Turned Away		<u>100 units</u>	Info Center Visitors	<u>3706</u>
Ind. Camps (Resident)		<u>319</u>	Total Group Resv (used)	<u>21</u>
Ind. Camps (Non-Resident)		<u>1715</u>		
Campers (Resident)		<u>249</u>		
Campers (Non-Resident)		<u>4408</u>		
Total Resident Camps		<u>327</u>	Total Day Users	<u>27,920</u>
Non-Resident Camps		<u>1715</u>	Resident	<u>13,960</u>
Total Resident Campers		<u>2074</u>	Non-Resident	<u>13,960</u>
Non-Resident Campers		<u>5737</u>		

REBORN 1100
& REBORN 1050

FARRAGUT STATE PARK

MONTHLY TOTALS

R	NR	RC	NR
274	482	35	99
		101	111
		28	6
		<u>164</u>	<u>156</u>

OCTOBER & NOVEMBER 1991
 Month Year

Buttonhook	Camps	<u>0</u>	Skiers	<u>0</u>
	Campers	<u>0</u>	Snowmobiles	<u>0</u>
Thimbleberry	Camps	<u>2</u>	Snowmobilers	<u>0</u>
	Campers	<u>112</u>	Boats	<u>200</u>
Waldron	Camps	<u>2</u>	Boaters	<u>400</u>
	Campers	<u>176</u>	Equestrians	<u>20</u>
Special Groups	Camps	<u>3</u>	Interp Attendees	<u>200</u>
	Campers	<u>30</u>	Special Groups ^{GOLD} _{SPECTOL}	<u>150</u>
Total Groups Camps		<u>7</u>	Shelter Resv.(used)	<u>0</u>
Total Group Campers		<u>318</u>	Sunrise Lg	<u>0</u>
Boat Campers (est)		<u>20</u>	Sunrise Sm	<u>0</u>
Group Camp Resv. (used)		<u>0</u>	Locust Grove	<u>0</u>
Ind. Campsite Resv. (used)		<u>0</u>	Shooting Range Users	<u>50</u>
Sr. Cit/Disabled Disc		<u>59</u>	# of days reserved	<u>0</u>
Turned Away (LOG CLOSED)		<u>20</u>	Info Center Visitors	<u>300</u>
Ind. Camps (Resident)		<u>164</u>	Total Group Resv (used)	<u>0</u>
Ind. Camps (Non-Resident)		<u>166</u>	ARCHERY RANGE - est	<u>600</u>
Campers (Resident)		<u>228</u>		
Campers (Non-Resident)		<u>482</u>		
Total Resident Camps		<u>168</u>	Total Day Users	<u>114,699</u>
Non-Resident Camps		<u>169</u>	Resident	<u>9,577</u>
Total Resident Campers		<u>387</u>	Non-Resident	<u>5,122</u>
Non-Resident Campers		<u>641</u>		

FARRAGUT STATE PARK

MONTHLY TOTALS

Dec. 1991
 Month Year

Buttonhook	Camps	_____	Skiers	<u>2</u>
	Campers	_____	Snowmobiles	<u>0</u>
Thimbleberry	Camps	_____	Snowmobilers	<u>0</u>
	Campers	_____	Boats	<u>30</u>
Waldron	Camps	_____	Boaters	<u>60</u>
	Campers	_____	Equestrians	<u>20</u>
Special Groups	Camps	_____	Interp Attendees	_____
	Campers	_____	Special Groups	<u>0</u>
Total Groups Camps		_____	Shelter Resv.(used)	<u>0</u>
Total Group Campers		_____	Sunrise Lg	_____
Boat Campers (est)		_____	Sunrise Sm	_____
Group Camp Resv. (used)		_____	Locust Grove	_____
Ind. Campsite Resv. (used)		_____	Shooting Range Users	<u>0</u>
Sr. Cit/Disabled Disc		_____	# of days reserved	<u>0</u>
Turned Away		_____	Info Center Visitors	<u>50</u>
Ind. Camps (Resident)	<u>5</u>	_____	Total Group Resv (used)	<u>0</u>
Ind. Camps (Non-Resident)	<u>1</u>	_____		
Campers (Resident)	<u>15</u>	_____		
Campers (Non-Resident)	<u>3</u>	_____		
Total Resident Camps	<u>5</u>	_____ ✓	Total Day Users	<u>1250</u> ✓
Non-Resident Camps	<u>1</u>	_____ ✓	Resident	<u>700</u> ✓
Total Resident Campers	<u>15</u>	_____ ✓	Non-Resident	<u>550</u> ✓
Non-Resident Campers	<u>3</u>	_____ ✓		

FARRAGUT STATE PARK

MONTHLY TOTALS

JANUARY 1992
 Month Year

Buttonhook	Camps	<u>0</u>	Skiers	<u>300</u>
	Campers	<u>0</u>	Snowmobiles	<u>40</u>
Thimbleberry	Camps	<u>0</u>	Snowmobilers	<u>80</u>
	Campers	<u>0</u>	Boats	<u>0</u>
Waldron	Camps	<u>0</u>	Boaters	<u>0</u>
	Campers	<u>0</u>	Equestrians	<u>5</u>
Special Groups	Camps	<u>0</u>	Interp Attendees	<u> </u>
	Campers	<u>0</u>	Special Groups	<u>0</u>
Total Groups Camps		<u>0</u>	Shelter Resv. (used)	<u>0</u>
Total Group Campers		<u>0</u>	Sunrise Lg	<u>0</u>
Boat Campers (est)		<u>0</u>	Sunrise Sm	<u>0</u>
Group Camp Resv. (used)		<u>0</u>	Locust Grove	<u>0</u>
Ind. Campsite Resv. (used)		<u>0</u>	Shooting Range Users	<u>0</u>
Sr. Cit/Disabled Disc		<u>0</u>	# of days reserved	<u>0</u>
Turned Away		<u>0</u>	Info Center Visitors	<u>856</u>
Ind. Camps (Resident)		<u>7</u>	Total Group Resv (used)	<u>0</u>
Ind. Camps (Non-Resident)		<u>2</u>		
Campers (Resident)		<u>14</u>		
Campers (Non-Resident)		<u>4</u>		
Total Resident Camps		<u>7</u>	Total Day Users	<u>1515</u>
Non-Resident Camps		<u>2</u>	Resident	<u>1008</u>
Total Resident Campers		<u>14</u>	Non-Resident	<u>507</u>
Non-Resident Campers		<u>4</u>		

FARRAGUT STATE PARK

MONTHLY TOTALS

February 1972
 Month Year

Buttonhook	Camps	<u> </u>	Skiers	<u>0</u>
	Campers	<u> </u>	Snowmobiles	<u>0</u>
Thimbleberry	Camps	<u> </u>	Snowmobilers	<u>0</u>
	Campers	<u> </u>	Boats	<u>20</u>
Waldron	Camps	<u> </u>	Boaters	<u>40</u>
	Campers	<u> </u>	Equestrians	<u>10</u>
Special Groups	Camps	<u> </u>	Interp Attendees ³⁵⁺	<u>35</u>
	Campers	<u> </u>	Special Groups	<u>20</u>
Total Groups Camps		<u>0</u>	Shelter Resv.(used)	<u>0</u>
Total Group Campers		<u>0</u>	Sunrise Lg	<u> </u>
Boat Campers (est)		<u>10</u>	Sunrise Sm	<u> </u>
Group Camp Resv. (used)		<u> </u>	Locust Grove	<u> </u>
Ind. Campsite Resv. (used)		<u> </u>	Shooting Range Users	<u>0</u>
Sr. Cit/Disabled Disc		<u> </u>	# of days reserved	<u>0</u>
Turned Away		<u> </u>	Info Center Visitors	<u>420</u>
Ind. Camps (Resident)		<u>6</u>	Total Group Resv (used)	<u>0</u>
Ind. Camps (Non-Resident)		<u>1</u>		
Campers (Resident)		<u>13</u>		
Campers (Non-Resident)		<u>4</u>		
Total Resident Camps		<u>6</u>	Total Day Users	<u>2222</u>
Non-Resident Camps		<u>1</u>	Resident	<u>1500</u>
Total Resident Campers		<u>13</u>	Non-Resident	<u>722</u>
Non-Resident Campers		<u>4</u>		

FARRAGUT STATE PARK

MONTHLY TOTALS

MARCH 1972
 Month Year

Buttonhook	Camps		Skiers	0
	Campers		Snowmobiles	0
Thimbleberry	Camps		Snowmobilers	0
	Campers		Boats	50
Waldron	Camps		Boaters	110
	Campers		Equestrians	40
Special Groups	Camps	6	Interp Attendees	220
	Campers	320	Special Groups	
Total Groups Camps		6	Shelter Resv.(used)	0
Total Group Campers		320	Sunrise Lg	0
Boat Campers (est)		10	Sunrise Sm	0
Group Camp Resv. (used)		1	Locust Grove	0
Ind. Campsite Resv. (used)		0	Shooting Range Users	300
Sr. Cit/Disabled Disc		6	# of days reserved	4
Turned Away		0	Info Center Visitors	1001
Ind. Camps (Resident)		55	Total Group Resv (used)	4
Ind. Camps (Non-Resident)		13		
Campers (Resident)		66		
Campers (Non-Resident)		52		
Total Resident Camps		60	Total Day Users	6129
Non-Resident Camps		14	Resident	4221
Total Resident Campers		346	Non-Resident	1908
Non-Resident Campers		92		

act BC

10
51
30

91

19

60
110
3

505

FARRAGUT STATE PARK

MONTHLY TOTALS

173

APRIL 1992
Month Year

Buttonhook	Camps	<u>0</u>	Skiers	<u>0</u>
	Campers	<u>0</u>	Snowmobiles	<u>0</u>
Thimbleberry	Camps	<u>0</u>	Snowmobilers	<u>0</u>
	Campers	<u>0</u>	Boats	<u>203</u>
Waldron	Camps	<u>0</u>	Boaters	<u>812</u>
	Campers	<u>0</u>	Equestrians	<u>60</u>
Special Groups	Camps	<u>0</u>	Interp Attendees	<u> </u>
	Campers	<u>100</u>	Special Groups	<u>30</u>
Total Groups Camps		<u>0</u>	Shelter Resv.(used)	<u>0</u>
Total Group Campers		<u>100</u>	Sunrise Lg	<u> </u>
Boat Campers (est)		<u>20</u>	Sunrise Sm	<u> </u>
Group Camp Resv. (used)		<u>1</u>	Locust Grove	<u> </u>
Ind. Campsite Resv. (used)		<u>0</u>	Shooting Range Users	<u>150</u>
Sr. Cit/Disabled Disc		<u>15</u>	# of days reserved	<u>5</u>
Turned Away		<u>0</u>	Info Center Visitors	<u>1667</u>
Ind. Camps (Resident)		<u>91</u>	Total Group Resv (used)	<u>5</u>
Ind. Camps (Non-Resident)		<u>173</u>		
Campers (Resident)		<u>197</u>		
Campers (Non-Resident)		<u>505</u>		
			SR 1535	
			NR 865	
			15/26 784	
			BR 814	
Total Resident Camps		<u>91</u>	Total Day Users	<u>7110</u>
Non-Resident Camps		<u>173</u>	Resident	<u>3560</u>
Total Resident Campers		<u>173</u>	Non-Resident	<u>3550</u>
Non-Resident Campers		<u>505</u>		

pn1612p

BH: H41

FARRAGUT STATE PARK

MONTHLY TOTALS

R. CAMP
208
149
3
357
CAMPERS

NR CAMP
590
323
4
913
CAMPERS

MAY 1992
Month Year

Buttonhook	Camps	<u>6</u>	Skiers	<u>0</u>
	Campers	<u>220</u>	Snowmobiles	<u>0</u>
Thimbleberry	Camps	<u>5</u>	Snowmobilers	<u>0</u>
	Campers	<u>481</u>	Boats	<u>772</u>
Waldron	Camps	<u>0</u>	Boaters	<u>3088</u>
	Campers	<u>0</u>	Equestrians	<u>110</u>
Special Groups	Camps	<u>2</u>	Interp Attendees	<u>1237</u>
	Campers	<u>1100</u>	Special Groups	
Total Groups	Camps	<u>13</u>	Shelter Resv.(used)	<u>8</u>
Total Group Campers		<u>1801</u>	Sunrise Lg	<u>1</u>
Boat Campers (est)		<u>100</u>	Sunrise Sm	<u>5</u>
Group Camp Resv. (used)		<u>7</u>	Locust Grove	<u>2</u>
Ind. Campsite Resv. (used)		<u>129</u>	Shooting Range Users	<u>80</u>
Sr. Cit/Disabled Disc		<u>44</u>	90+50+ # of days reserved	<u>202</u>
Turned Away		<u>6</u>	Info Center Visitors	<u>4386</u>
Ind. Camps (Resident)		<u>360</u>	Total Group Resv (used)	<u>10</u>
Ind. Camps (Non-Resident)		<u>8771</u>		
Campers (Resident)		<u>1347</u>		
Campers (Non-Resident)		<u>3829</u>		
Total Resident Camps		<u>367</u>	Total Day Users	<u>8592</u>
Non-Resident Camps		<u>883</u>	Resident	<u>4296</u>
Total Resident Campers		<u>2248</u>	Non-Resident	<u>4296</u>
Non-Resident Campers		<u>4779</u>		

pn1612p

FARRAGUT STATE PARK

MONTHLY TOTALS

A # 11
B # 11
C # 11 # 11
11

378
296
368
1042

20
203
172
35
470

NRC
1009
829
71
1899

June 1992
Month Year

RC

NRC

Buttonhook	Camps	<u>28</u>	Skiers	<u>0</u>
	Campers	<u>1042</u>	Snowmobiles	<u>0</u>
Thimbleberry	Camps	<u>9</u>	Snowmobilers	<u>0</u>
	Campers	<u>613</u>	Boats	<u>807</u>
Waldron	Camps	<u>R 1 / N 6</u>	Boaters	<u>3228</u>
	Campers	<u>80 / 920</u>	Equestrians	<u>100</u>
Special Groups	Camps	<u>2</u>	Interp Attendees	
	Campers	<u>?</u>	Special Groups	<u>200</u>
Total Groups Camps		<u>46</u>	Shelter Resv.(used)	<u>27</u>
Total Group Campers		<u>2655</u>	Sunrise Lg.	<u>12</u>
Boat Campers (est)		<u>80</u>	Sunrise Sm	<u>11</u>
Group Camp Resv. (used)		<u>17</u>	Locust Grove	<u>4</u>
Ind. Campsite Resv. (used)		<u>301</u>	Shooting Range Users	<u>250</u>
Sr. Cit/Disabled Disc		<u>71</u>	# of days reserved	<u>7</u>
Turned Away		<u>0</u>	Info Center Visitors	<u>6316</u>
Ind. Camps (Resident)		<u>470</u>	Total Group Resv (used)	<u>37</u>
Ind. Camps (Non-Resident)		<u>1899</u>		
Campers (Resident)		<u>1640</u>		
Campers (Non-Resident)		<u>6164</u>		
Total Resident Camps		<u>502</u>	Total Day Users	<u>4118-14018</u>
Non-Resident Camps		<u>1913</u>	Resident	<u>7069</u>
Total Resident Campers		<u>2437</u>	Non-Resident	<u>2009</u>
Non-Resident Campers		<u>8022</u>		

R -340
 150
 490

N 2090
 11.86
 3
 3829

USE P2200

FARRAGUT STATE PARK

BH 620
 248
 328
 1766

MONTHLY TOTALS

352
 153
 3
 408

2740
 1227
 5
 5972

Month July Year 1992

A IIII IIII IIII
 B IIII IIII
 C IIII IIII IIII

7
 4
 6
 5
 5
 32

Buttonhook	Camps	<u>42</u>	Skiers	<u>0</u>
	Campers	<u>1766</u>	Snowmobiles	<u>0</u>
Thimbleberry	Camps	<u>19</u>	Snowmobilers	<u>0</u>
	Campers	<u>890</u>	Boats	<u>997</u>
Waldron	Camps	<u>13</u> ^{Kos} ^{NITE} <u>14</u>	Boaters	<u>7276</u>
	Campers	<u>800</u> <u>960</u>	Equestrians	<u>100</u>
Special Groups	Camps	<u>0</u>	Interp Attendees	<u>1549</u>
	Campers	<u></u>	Special Groups	<u>0</u>
Total Groups Camps		<u>88</u>	Shelter Resv.(used)	<u>31</u>
Total Group Campers		<u>4416</u>	Sunrise Lg	<u>11</u>
Boat Campers (est)		<u>100-300</u>	Sunrise Sm	<u>12</u>
Group Camp Resv. (used)		<u>32</u>	Locust Grove	<u>8</u>
Ind. Campsite Resv. (used)		<u>685 723</u>	Shooting Range Users	<u>200</u>
Sr. Cit/Disabled Disc		<u>83</u>	# of days reserved	<u>3</u>
Turned Away AT FARR		<u>000</u>	Info Center Visitors	<u>7205</u>
+ Phone & V.C. Resv.			Total Group Resv (used)	<u>35</u>
Ind. Camps (Resident)		<u>408</u>	Flycatcher	<u>1</u>
Ind. Camps (Non-Resident)		<u>3972</u>		
Campers (Resident)		<u>1936</u>		
Campers (Non-Resident)		<u>14,890</u>		
Total Resident Camps		<u>452</u>	Total Day Users	<u>22,537</u>
Non-Resident Camps		<u>4016</u>	Resident	<u>10,192</u>
Total Resident Campers		<u>4144</u>	Non-Resident	<u>12,395</u>
Non-Resident Campers		<u>17,098</u>		

pn1612p

R-Camps
261
126
12
399

N-Camps
290
1110
4
4015

15,357
FARRAGUT STATE PARK
MONTHLY TOTALS

BNA 992
18 B 1598
18 C 565
3155
22

August 1992
Month Year

313
45
30

Buttonhook	Camps	<u>55</u>	Skiers	<u>0</u>
	Camper	<u>3155</u>	Snowmobiles	<u>0</u>
Thimbleberry	Camps	<u>8</u>	Snowmobilers	<u>0</u>
	Camper	<u>1000</u>	Boats	<u>970</u>
Waldman K/N	Camps	<u>13</u> <u>8</u>	Boaters	<u>7260</u>
6 Groups	Camper	<u>1080</u> <u>800</u>	Equestrians	<u>180</u>
Special Groups	Camps	<u>0</u>	Interp Attendees	<u>1310</u>
	Camper	<u>0</u>	Special Groups - 2/ small group EARTHACE BOTTOM	<u>150</u>
Total Groups Camps		<u>80</u>	Shelter Resv. (used)	<u>33</u>
Total Group Camper		<u>6035</u>	Sunrise Lg	<u>14</u>
Boat Camper (est)		<u>200</u>	Sunrise Sm	<u>12</u>
Group Camp Resv. (used)		<u>32</u>	Locust Grove	<u>7</u>
Ind. Campsite Resv. (used)		<u>560</u>	Shooting Range Users	<u>100</u>
Sr. Cit/Disabled Disc		<u>50</u>	# of days reserved	<u>2</u>
Turned Away camp		<u>200</u>	Info Center Visitors	<u>7280</u>
Ind. Camps (Resident)		<u>399</u>	Total Group Resv (used)	<u>37</u>
Ind. Camps (Non-Resident)		<u>4015</u>		
Camper (Resident)		<u>1501</u>		
Camper (Non-Resident)		<u>15354</u>		
Total Resident Camps		<u>439</u>	Total Day Users	<u>24,241</u>
Non-Resident Camps		<u>4055</u>	Resident	<u>16,908</u>
Total Resident Camper		<u>4518</u>	Non-Resident	<u>13,333</u>
Non-Resident Camper		<u>181372</u>		

pn1612p

SRL 14

FARRAGUT STATE PARK

MONTHLY TOTALS

A 80
B 224
376

144
44
1

144
111

SEPT 1992
Month Year

992
376
1368

584
978
1562

Buttonhook	Camps	<u>8</u>	Skiers	<u>0</u>
	Campers	<u>376</u>	Snowmobiles	<u>0</u>
Thimbleberry	Camps	<u>9</u>	Snowmobilers	<u>0</u>
	Campers	<u>392</u>	Boats	<u>495</u>
Waldron	Camps	<u>109</u> <u>0</u>	Boaters	<u>3959</u>
	Campers	<u>400</u> <u>0</u>	Equestrians	<u>70</u>
Special Groups	Camps	<u> </u>	Interp Attendees	<u>340</u>
	Campers	<u> </u>	Special Groups	<u>5000</u>
Total Groups Camps		<u>26</u>	Shelter Resv.(used)	<u>13</u>
Total Group Campers		<u>1168</u>	Sunrise Lg	<u>5</u>
Boat Campers (est)		<u>80</u>	Sunrise Sm	<u>7</u>
Group Camp Resv. (used)		<u>11</u>	Locust Grove	<u>1</u>
Ind. Campsite Resv. (used)		<u>213 351</u>	Shooting Range Users	<u>250</u>
Sr. Cit/Disabled Disc		<u>164</u>	# of days reserved	<u>8</u>
Turned Away		<u>50</u>	Info Center Visitors	<u>4912</u>
Ind. Camps (Resident)		<u>382</u>	Total Group Resv (used)	<u>21</u>
Ind. Camps (Non-Resident)		<u>1715</u>		
Campers (Resident)		<u>998</u>		
Campers (Non-Resident)		<u>4214</u>		
Total Resident Camps		<u>398</u>	Total Day Users	<u>12,727</u>
Non-Resident Camps		<u>1728</u>	Resident	<u>5727</u>
Total Resident Campers		<u>1582</u>	Non-Resident	<u>7000</u>
Non-Resident Campers		<u>4798</u>		

4214
584
4798

pn1612p

FARRAGUT STATE PARK

MONTHLY TOTALS

Oct. 1992
 Month Year

R
 MR
 C
 378
 115
 43
 64
 8
 115
 335

Buttonhook	Camps	<u>7</u>	Skiers	<u>0</u>
	Campers	<u>168</u>	Snowmobiles	<u>0</u>
Thimbleberry	Camps	<u>0</u>	Snowmobilers	<u>0</u>
	Campers	<u>0</u>	Boats	<u>272</u>
Waldron	Camps	<u>0</u>	Boaters	<u>2176</u>
	Campers	<u>0</u>	Equestrians	<u>40</u>
Special Groups	Camps	<u>1</u>	Interp Attendees	<u>60</u>
	Campers	<u>200</u>	Special Groups ^{MR}	<u>200</u>
Total Groups Camps		<u>8</u>	Shelter Resv.(used)	
Total Group Campers		<u>368</u>	Sunrise Lg	
Boat Campers (est)		<u>80</u>	Sunrise Sm	
Group Camp Resv. (used)		<u>2</u>	Locust Grove	
Ind. Campsite Resv. (used)		<u>0</u>	Shooting Range Users	
Sr. Cit/Disabled Disc		<u>41</u>	# of days reserved	
Turned Away		<u>0</u>	Info Center Visitors	<u>337</u>
Ind. Camps (Resident)		<u>115</u>	Total Group Resv (used)	
Ind. Camps (Non-Resident)		<u>115</u>		
Campers (Resident)		<u>378</u>		
Campers (Non-Resident)		<u>335</u>		
Total Resident Camps		<u>115</u>	Total Day Users	<u>4308</u>
Non-Resident Camps		<u>378</u>	Resident	<u>1939</u>
Total Resident Campers		<u>117</u>	Non-Resident	<u>2369</u>
Non-Resident Campers		<u>703</u>		

FARRAGUT STATE PARK

MONTHLY TOTALS

NOV 92
 Month Year

Buttonhook	Camps	<u>0</u>	Skiers	<u>4</u>
	Campers	<u>0</u>	Snowmobiles	<u> </u>
Thimbleberry	Camps	<u>0</u>	Snowmobilers	<u> </u>
	Campers	<u>0</u>	Boats	<u>115</u>
Waldron	Camps	<u>0</u>	Boaters	<u>922</u>
	Campers	<u>0</u>	Equestrians	<u> </u>
Special Groups	Camps	<u>0</u>	Interp Attendees	<u> </u>
	Campers	<u>0</u>	Special Groups ^{USFR}	<u>50</u>
Total Groups Camps		<u>0</u>	Shelter Resv.(used)	<u>0</u>
Total Group Campers		<u>0</u>	Sunrise Lg	<u>0</u>
Boat Campers (est)		<u>0</u>	Sunrise Sm	<u>0</u>
Group Camp Resv. (used)		<u>0</u>	Locust Grove	<u>0</u>
Ind. Campsite Resv. (used)		<u>0</u>	Shooting Range Users	<u> </u>
Sr. Cit/Disabled Disc		<u>0</u>	# of days reserved	<u> </u>
Turned Away		<u>0</u>	Info Center Visitors	<u>273</u>
Ind. Camps (Resident)		<u>11</u>	Total Group Resv (used)	<u>0</u>
Ind. Camps (Non-Resident)		<u>11</u>	HUNTER RMS	<u>328</u>
Campers (Resident)		<u>100</u>	PLR KILL	<u>5</u>
Campers (Non-Resident)		<u>82</u>		<u>215 30</u>
Total Resident Camps		<u>11</u>	Total Day Users	<u>2265</u>
Non-Resident Camps		<u>11</u>	Resident	<u>1133</u>
Total Resident Campers		<u>100</u>	Non-Resident	<u>1133</u>
Non-Resident Campers		<u>82</u>		

FARRAGUT STATE PARK

MONTHLY TOTALS

Jan. 1993
 Month Year

Buttonhook	Camps	_____	Skiers	<u>1400</u>
	Campers	_____	Snowmobiles	<u>150</u>
Thimbleberry	Camps	_____	Snowmobilers	<u>200</u>
	Campers	_____	<i>500 miles</i>	<u>200</u>
Waldron	Camps	_____	Boats	_____
	Campers	_____	Boaters	_____
Special Groups	Camps	_____	Equestrians	_____
	Campers	_____	Interp Attendees	_____
Total Groups Camps		_____	Special Groups	_____
Total Group Campers		_____	Shelter Resv.(used)	_____
Boat Campers (est)		_____	Sunrise Lg	_____
Group Camp Resv. (used)		_____	Sunrise Sm	_____
Ind. Campsite Resv. (used)		_____	Locust Grove	_____
Sr. Cit/Disabled Disc		_____	Shooting Range Users	_____
Turned Away		_____	# of days reserved	_____
Ind. Camps (Resident)	<u>2</u>	_____	Info Center Visitors	<u>2295</u>
Ind. Camps (Non-Resident)		_____	Total Group Resv (used)	_____
Campers (Resident)	<u>16</u>	_____		
Campers (Non-Resident)		_____		
Total Resident Camps	<u>2</u>	_____	Total Day Users	<u>2700</u>
Non-Resident Camps		_____	Resident	<u>2400</u>
Total Resident Campers	<u>16</u>	_____	Non-Resident	<u>300</u>
Non-Resident Campers		_____		

pn1612p

FARRAGUT STATE PARK

MONTHLY TOTALS

FEB 1993
 Month Year

Buttonhook	Camps	_____	Skiers	<u>600</u>
	Campers	_____	Snowmobiles	<u>25</u>
Thimbleberry	Camps	_____	Snowmobilers	<u>50</u>
	Campers	_____	Boats	_____
Waldron	Camps	_____	Boaters <i>5000's</i>	<u>100</u>
	Campers	_____	Equestrians	_____
Special Groups	Camps	_____	Interp Attendees	_____
	Campers	_____	Special Groups	_____
Total Groups Camps		_____	Shelter Resv. (used)	_____
Total Group Campers		_____	Sunrise Lg	_____
Boat Campers (est)		_____	Sunrise Sm	_____
Group Camp Resv. (used)		_____	Locust Grove	_____
Ind. Campsite Resv. (used)		_____	Shooting Range Users	_____
Sr. Cit/Disabled Disc		_____	# of days reserved	_____
Turned Away		_____	Info Center Visitors	<u>843</u>
Ind. Camps (Resident)		_____	Total Group Resv (used)	_____
Ind. Camps (Non-Resident)		_____		
Campers (Resident)		_____		
Campers (Non-Resident)		_____		
Total Resident Camps		_____	Total Day Users	<u>1205</u>
Non-Resident Camps	<u>3</u>	_____	Resident	<u>800</u>
Total Resident Campers		_____	Non-Resident	<u>405</u>
Non-Resident Campers	<u>8</u>	_____		

pn1612p

FARRAGUT STATE PARK

MONTHLY TOTALS

MARCH 1993
 Month Year

Buttonhook	Camps	_____	Skiers	<u>150</u>
	Campers	_____	Snowmobiles	<u>10</u>
Thimbleberry	Camps	_____	Snowmobilers	<u>10</u>
	Campers	_____	Boats	<u>10</u>
Waldron	Camps	_____	Boaters	<u>20</u>
	Campers	_____	Equestrians	<u>4</u>
Special Groups	Camps	_____	Interp Attendees	_____
	Campers	_____	^{Bowling} Special Groups	<u>280</u>
Total Groups Camps		<u>0</u>	Shelter Resv.(used)	<u>0</u>
Total Group Campers		<u>0</u>	Sunrise Lg	_____
Boat Campers (est)		<u>0</u>	Sunrise Sm	_____
Group Camp Resv. (used)		<u>0</u>	Locust Grove	_____
Ind. Campsite Resv. (used)		_____	Shooting Range Users	<u>0</u>
Sr. Cit/Disabled Disc		_____	# of days reserved	_____
Turned Away		_____	Info Center Visitors	<u>602</u>
Ind. Camps (Resident)		<u>6</u>	Total Group Resv (used)	<u>1</u>
Ind. Camps (Non-Resident)		<u>9</u>		
Campers (Resident)		<u>12</u>		
Campers (Non-Resident)		<u>18</u>		
Total Resident Camps		<u>6</u>	Total Day Users	<u>2070</u>
Non-Resident Camps		<u>9</u>	Resident	<u>1550</u>
Total Resident Campers		<u>12</u>	Non-Resident	<u>520</u>
Non-Resident Campers		<u>18</u>		

pn1612p

R		N R	
15	16	37	39
32	45	50	51
15	12	5	1
<u>62</u>	<u>73</u>	<u>92</u>	<u>91</u>

FARRAGUT STATE PARK

MONTHLY TOTALS

APRIL 93
 Month Year

Buttonhook	Camps		Skiers	<u>0</u>
	Campers		Snowmobiles	<u>0</u>
Thimbleberry	Camps	<u>2</u>	Snowmobilers	<u>0</u>
	Campers	<u>154</u>	Boats	<u>115</u>
Waldron	Camps	<u>1</u>	Boaters	<u>920</u>
	Campers	<u>1</u>	Equestrians	<u>40</u>
Special Groups	Camps	<u>2</u>	Interp Attendees	<u>225</u>
<i>SCUBA</i>	Campers	<u>310</u>	Special Groups	<u></u>
Total Groups Camps		<u>4</u>	<i>Bike Ride</i>	<u>1</u>
Total Group Campers		<u>464</u>	Shelter Resv. (used)	<u>1</u>
Boat Campers (est)		<u>100</u>	Sunrise Lg	<u>1</u>
Group Camp Resv. (used)		<u>2</u>	Sunrise Sm	<u></u>
Ind. Campsite Resv. (used)		<u>0</u>	Locust Grove	<u></u>
Sr. Cit/Disabled Disc		<u>20</u>	Shooting Range Users	<u>150</u>
Turned Away		<u></u>	# of days reserved	<u>3</u>
Ind. Camps (Resident)		<u>73</u>	Info Center Visitors	<u>1282</u>
Ind. Camps (Non-Resident)		<u>91</u>	Total Group Resv (used)	<u>4</u>
Campers (Resident)		<u>178</u>		
Campers (Non-Resident)		<u>278</u>		
Total Resident Camps		<u>73</u>	Total Day Users	<u>4224</u>
Non-Resident Camps		<u>95</u>	Resident	<u>2112</u>
Total Resident Campers		<u>178</u>	Non-Resident	<u>2112</u>
Non-Resident Campers		<u>742</u>		

pn1612p

R 1138
N 2259

FARRAGUT STATE PARK

RC 220
138
358
NC 415
291
3
709

MONTHLY TOTALS

1/1/11
BPH
FIS M
11/11
HHT
11/11
11

MAY 1993
Month Year

Buttonhook	Camps	<u>10</u>	Skiers	<u>0</u>
	Campers	<u>304</u>	Snowmobiles	<u>0</u>
Thimbleberry	Camps	<u>7</u>	Snowmobilers	<u>0</u>
	Campers	<u>535</u>	Boats	<u>577</u>
Wateron	Camps	<u>0</u>	Boaters	<u>4616</u>
	Campers	<u>0</u>	Equestrians	<u>62</u>
Special Groups	Camps	<u>2</u>	Interp Attendees	<u>389</u>
	Campers	<u>310</u>	Special Groups	<u>70</u>
Total Groups Camps		<u>19</u>	Shelter Resv. (used)	<u>13</u>
Total Group Campers		<u>1149</u>	Sunrise Lg	<u>9</u>
Boat Campers (est)		<u>0/200</u>	Sunrise Sm	<u>4</u>
Group Camp Resv. (used)		<u>8</u>	Locust Grove	<u>0</u>
Ind. Campsite Resv. (used)		<u>119</u>	Shooting Range Users	<u>250</u>
Sr. Cit/Disabled Disc		<u>40</u>	# of days reserved	<u>10</u>
Turned Away		<u>0</u>	Info Center Visitors	<u>3553</u>
Ind. Camps (Resident)		<u>358</u>	Total Group Resv (used)	<u>23</u>
Ind. Camps (Non-Resident)		<u>709</u>		
Campers (Resident)		<u>1136</u>		
Campers (Non-Resident)		<u>2259</u>		
Total Resident Camps		<u>368</u>	Total Day Users	<u>8876</u>
Non-Resident Camps		<u>718</u>	Resident	<u>4438</u>
Total Resident Campers		<u>1710</u>	Non-Resident	<u>4438</u>
Non-Resident Campers		<u>2829</u>		

pn1612p

BSA 1-11-11
1-11-11

FARRAGUT STATE PARK
MONTHLY TOTALS

C	K	NK
	205	181
163	163	703
	44	25
	<u>432</u>	<u>1509</u>

JUNE 1993
Month Year

Buttonhook	Camps	<u>27</u>	Skiers	<u>0</u>
	Campers	<u>1123</u>	Snowmobiles	<u>0</u>
Thimbleberry	Camps	<u>8</u>	Snowmobilers	<u>0</u>
	Campers	<u>560</u>	Boats	<u>583</u>
Waldron	Camps	<u>2 / 6</u>	Boaters	<u>4616</u>
	Campers	<u>293 / 1356</u>	Equestrians	<u>60</u>
Special Groups	Camps		Interp Attendees	<u>1197</u>
	Campers		Special Groups	<u>2 - million AC</u>
Total Groups-Camps		<u>43</u>	Shelter Resv.(used)	<u>22</u>
Total Group Campers		<u>3332</u>	Sunrise Lg	<u>12</u>
Boat Campers (est)		<u>300</u>	Sunrise Sm	<u>7</u>
Group Camp Resv. (used)		<u>18</u>	Locust Grove	<u>3</u>
Ind. Campsite Resv. (used)		<u>197</u>	Shooting Range Users	<u>280</u>
Sr. Cit/Disabled Disc		<u>46</u>	# of days reserved	<u>4</u>
Turned Away <u>HOCKEY</u>			Info Center Visitors	<u>4866</u>
Ind. Camps (Resident)		<u>432</u>	Total Group Resv (used)	<u>28</u>
Ind. Camps (Non-Resident)		<u>1509</u>		<u>21K</u>
Campers (Resident)		<u>1292</u>		
Campers (Non-Resident)		<u>4925</u>		
Total Resident Camps		<u>453</u>	Total Day Users	<u>14,194</u>
Non-Resident Camps	<u>1531</u>	1531	Resident	<u>7,097</u>
Total Resident Campers		<u>2958</u>	Non-Resident	<u>7,097</u>
Non-Resident Campers		<u>6591</u>		

pn1612p

SR 6-12
S-7

H H H H H H H H
 H H H H H H H H
 H H H H H H H H

89
 499
 1900

FARRAGUT STATE PARK

MONTHLY TOTALS

369
 201
 0
 570
 1993
 1044
 0
 3036

July 1993
 Month Year

Buttonhook	Camps	<u>47</u>	Skiers	<u>10</u>
	Campers	<u>1900</u>	Snowmobiles	<u>0</u>
Thimbleberry	Camps	<u>12</u>	Snowmobilers	<u>0</u>
	Campers	<u>392</u>	Boats	<u>887</u>
Waldron	Camps	<u>10 / 11</u>	Boaters	<u>6839</u>
<i>K/N</i>	Campers	<u>793 / 384</u>	Equestrians	<u>60</u>
Special Groups	Camps	<u>0</u>	Interp Attendees	<u>1183</u>
	Campers	<u>0</u>	Special Groups	<u>0</u>
Total Groups Camps		<u>80</u>	Shelter Resv. (used)	<u>33</u>
Total Group Campers		<u>3469</u>	Sunrise Lg	<u>10</u>
Boat Campers (est)		<u>300</u>	Sunrise Sm	<u>14</u>
Group Camp Resv. (used)		<u>25</u>	Locust Grove	<u>9</u>
Ind. Campsite Resv. (used)		<u>702 (576)</u>	Shooting Range Users	<u>180</u>
Sr. Cit/Disabled Disc		<u>118</u>	# of days reserved	<u>3</u>
Turned Away		<u>100 / 300</u>	Info Center Visitors	<u>6445</u>
Ind. Camps (Resident)		<u>520</u>	Total Group Resv (used)	<u>36</u>
Ind. Camps (Non-Resident)		<u>3036</u>		
Campers (Resident)		<u>2098</u>		
Campers (Non-Resident)		<u>11,248</u>		
Total Resident Camps		<u>610</u>	Total Day Users	<u>19,850</u>
Non-Resident Camps		<u>3076</u>	Resident	<u>9905</u>
Total Resident Campers		<u>3833</u>	Non-Resident	<u>9925</u>
Non-Resident Campers		<u>10,982</u>		

pn1612p

1789

353
165
578

385
192
6
583

348
1086
13
4047

FARRAGUT STATE PARK

MONTHLY TOTALS

520
1755
488
2163

177 177
177 177
177 177
11

AVG 1993
Month Year

Buttonhook	Camps	<u>42</u>	Skiers	<u>10</u>
	Campers	<u>2163</u>	Snowmobiles	<u>05</u>
Thimbleberry	Camps	<u>22</u>	Snowmobilers	<u>00</u>
	Campers	<u>1965</u>	Boats	<u>994</u> 2538
Waldron <i>K/N</i>	Camps	<u>14 4</u>	Boaters	<u>2257</u>
	Campers	<u>1344 1536</u>	Equestrians	<u>50</u>
Special Groups	Camps	<u>2</u>	Interp Attendees	<u>814</u>
	Campers	<u>80</u>	Special Groups	<u>2</u>
Total Groups Camps		<u>84</u>	Shelter Resv. (Used)	<u>38</u>
Total Group Campers		<u>7088</u>	Sunrise Lg	<u>13</u>
Boat Campers (est)		<u>300</u>	Sunrise Sm	<u>14</u>
Group Camp Resv. (Used)		<u>32</u>	Locust Grove	<u>11</u>
Ind. Campsite Resv. (Used)		<u>589</u>	Shooting Range Users <i>+ Resv. at</i>	<u>1000</u>
Sr. Cit/Disabled Disc		<u>111</u>	# of days reserved	<u>5</u>
Turned Away		<u>50</u>	Info Center Visitors	<u>2377</u>
Ind. Camps (Resident)		<u>583</u>	Total Group Resv (Used)	<u>42</u>
Ind. Camps (Non-Resident)		<u>3714</u> 4047		
Campers (Resident)		<u>1939</u>		
Campers (Non-Resident)		<u>15145</u>		
Total Resident Camps		<u>625</u>	Total Day Users	<u>25989</u>
Non-Resident Camps		<u>4089</u>	Resident	<u>16677</u>
Total Resident Campers		<u>5483</u>	Non-Resident	<u>14122</u>
Non-Resident Campers		<u>18889</u>		

pn1612p

FARRAGUT STATE PARK

MONTHLY TOTALS

Sept 1993
Month Year

Buttonhook	Camps	11 13	Skiers	100
	Campers	111 261	Snowmobiles	05
Thimbleberry	Camps	10	Snowmobilers	00
	Campers	555	Boats	650
Waldron K/N	Camps (K)	7	Boaters	5200
	Campers (K)	480	Equestrians	35
Special Groups	Camps		Interp Attendees	535
	Campers		Special Groups	
Total Groups Camps		30	Shelter Resv. (used)	21
Total Group Campers		1296	Sunrise Lg	7
Boat Campers (est)		175	Sunrise Sm	8
Group Camp Resv. (used)		4	Locust Grove	6
Ind. Campsite Resv. (used)		268	Shooting Range Users	300
Sr. Cit/Disabled Disc		151	# of days reserved	6
Turned Away		10	Info Center Visitors	4279
Ind. Camps (Resident)		462	Total Group Resv (used)	27
Ind. Camps (Non-Resident)		1548		
Campers (Resident)		1036		
Campers (Non-Resident)		3733		
Total Resident Camps		1111 477	Total Day Users	16,635
Non-Resident Camps		1111 1563	Resident	9149
Total Resident Campers		1684	Non-Resident	7486
Non-Resident Campers		4381		

pn1612p

FARRAGUT STATE PARK

MONTHLY TOTALS

R	N
39	58
97	132
23	0
<u>159</u>	<u>190</u>

05 93
 Month Year

Buttonhook	Camps	<u>0</u>	Skiers	<u>10</u>
	Campers	<u>0</u>	Snowmobiles	<u>0</u>
Thimbleberry	Camps	<u>0</u>	Snowmobilers	<u>0</u>
	Campers	<u>0</u>	Boats	<u>726</u>
Waldron	Camps	<u>0</u>	Boaters	<u>4353</u>
	Campers	<u>0</u>	Equestrians	<u>40</u>
Special Groups	Camps	<u>5</u>	Interp Attendees	<u>147</u>
<i>SCOUTS</i>			Special Groups	<u>0</u>
<i>SENIOR PRIST</i>	Campers	<u>200</u>	Shelter Resv. (Used)	<u>2</u>
<i>NOT IN TOTAL</i>			Sunrise Lg	<u>2</u>
Total Groups Camps		<u>0</u>	Sunrise Sm	<u>0</u>
Total Group Campers		<u>0</u>	Locust Grove	<u>0</u>
Boat Campers (est)		<u>20</u>	Shooting Range Users	<u>100</u>
Group Camp Resv. (Used)		<u>0</u>	# of days reserved	<u>4</u>
Ind. Campsite Resv. (used)		<u>0</u>	Info Center Visitors	<u>1157</u>
Sr. Cit/Disabled Disc		<u>66</u>	Total Group Resv (used)	<u>4</u>
Turned Away				
Ind. Camps (Resident)		<u>159</u>		
Ind. Camps (Non-Resident)		<u>190</u>		
Campers (Resident)		<u>301</u>		
Campers (Non-Resident)		<u>538</u>		
Total Resident Camps		<u>159</u>	Total Day Users	<u>5257</u>
Non-Resident Camps		<u>190</u>	Resident	<u>2891</u>
Total Resident Campers		<u>301</u>	Non-Resident	<u>2366</u>
Non-Resident Campers		<u>538</u>		

pn1612p

Scott W. Reed, ISB#818
 Attorney at Law
 P. O. Box A
 Coeur d'Alene, ID 83816
 Phone (208) 664-2161
 FAX (208) 765-5117

Harvey Richman, ISB#2992
 Attorney at Law
 19643 N. Perimeter Road
 Athol, Idaho 83801
 Phone (208) 683-2732

STATE OF IDAHO }
 COUNTY OF KOOTENAI } SS
 FILED:

2011 JUN 19 AM 10:34

CLERK DISTRICT COURT

Molly Resenduh
 DEPUTY

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

**CITIZENS AGAINST RANGE EXPANSION, an)
 Unincorporated non-profit Association;)
 JEANNE J. HOM, a single woman; EUGENE)
 and KATHLEEN RILEY, husband and wife;)
 LAMBERT and DENISE RILEY, husband and)
 wife; GABRIELLE GROTH-MARNAT, a)
 single woman, GERALD PRICE, a single)
 man; RONALD and DOROTHY ELDRIDGE,)
 husband and wife; and, GLENN and LUCY)
 CHAPIN, husband and wife, SHERYL)
 PUCKETT, a single woman; CHARLES)
 MURRAY and CYNTHIA MURRAY, husband)
 and wife; and DAVE VIG, a single man,)**

Plaintiffs,

vs.

**IDAHO FISH AND GAME DEPARTMENT, an)
 agency of the STATE OF IDAHO, and)
 STEVEN M. HUFFAKER, Director of the)
 IDAHO FISH AND GAME DEPARTMENT,)**

Defendants.

Case No. CV-05-6253

**CONSOLIDATED REPLY BRIEF IN SUPPORT OF
 PLAINTIFF'S MOTION FOR SUMMARY
 JUDGEMENT AND MOTION TO STRIKE
 AND/OR EXCLUDE TESTIMONY OF JAMES
 CAULDER**

**CONSOLIDATED REPLY BRIEF IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY
 JUDGEMENT AND MOTION TO STRIKE AND/OR EXCLUDE TESTIMONY OF JAMES
 CAULDER**

We commence with the Motion To Strike and/or Exclude Testimony of James Caulder. First and foremost Idaho Rule of Civil Procedure 12(f) relates solely and exclusively to pleadings not to affidavits. See Idaho Rule of Civil Procedure 5(f), 7(a) 7(b) (1) (7) (b) (3). An affidavit is not defined in the Idaho Rules of Civil Procedure as a pleading as referenced in 12(f).

The Motion under Idaho Rule of Civil Procedure 32(b) to strike the Preservation Deposition is the appropriate vehicle. The question is the grounds upon which it is made.

One must look to the CV to suggest the totality of Mr. Caulder's knowledge, skill, experience, training, and education. If that is not fully expressed in his CV then the Plaintiffs are at a loss to further argue the point.

What the Defense seems to urge, is that there is some dichotomy between Civilian and Military experience. They suggest that bullets behave differently when shot by a man in uniform or a man in buckskin or that engineering principles, like traffic laws, change from State to State. They cite no authority for their assertion.

Further, Mr. Caulder does not, as urged by the Defense, "rely" on the comparison of Farragut to Air Force standards. Mr. Caulder's testimony, which must be read in totality, relates to using Air Force standards, engineering principles, ballistic studies, inter alia, as the methodology to produce an opinion. (Caulder Preservation Deposition pp.44, 66-67)

There is nothing before this Court to suggest in the slightest, that military experience disqualifies an engineer with a Master's Degree in Engineering and a lifetime of professional experience, from testifying as to range design, bullet paths and behavior. It is not just that Mr. Caulder is trained as an engineer but it is also that he is published, with peer review, on the subject of small arms ranges. (See Caulder CV and Preservation Deposition pp.8-16).

The Defense further alleges that Mr. Caulder's opinion is inadmissible as a lay opinion because his rational perceptions are unhelpful to determine Idaho Department of Fish and Game's compliance with the safety requirements established by the Court Order. Giving consideration for Mr. Caulder's expertise we cannot understand why his rational perceptions, were he a layman, which he is not, would be unhelpful to determine compliance with a published safety requirements in the Court's Order of February 23, 2007.

Whether you accept or reject his opinions, they certainly help the trier of fact as they are clearly on point. *Carnell v. Barker Mgmt., Inc.*, 137 Idaho 322, 327, 48 P.3d 651, 656 (2002). In *Idaho Department of Health and Welfare v. Doe*, 149 Idaho 474, 235 P.3d 1195 (Idaho) 2010.

Plaintiffs will respond to such objections made in the Deposition at such time as those matters are brought before the Court.

Relative to the Affidavit of Randall Butt:

The Plaintiff is at a loss to understand the nature and purpose of the Affidavit. On January 4, 2007, Mr. Butt alleges that he and/or his staff discovered certain documentation that had been in the State's possession since at least 1993.

Assuming that they had evidentiary worth as to their bona fides, which we do not now argue but do not admit, they were discovered on or about January 4, 2007, forwarded to the IDF&G, presumptively on or about that date, as ¶5 of the Butt Affidavit asserts to a delivery memo, which is not attached.

Idaho Rule of Civil Procedure 60(b) permits newly discovered evidence, which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b), but is limited by the Rule to "not more than six months after the Judgment" such that this evidence has remained in the possession of the Defendants for over three years and never before addressed.

We do not understand how it can have any meaningful impact in this cause and is therefore argued to be irrelevant, without foundation as to genuineness and tardy.

The remainder of the Randall Butt Affidavit, other than foundational issues in ¶8, is likewise irrelevant, as it addresses, not at all, issues before this Court.

In sum and substance the Affidavit of Randall Butt should be taken for naught and or stricken as irrelevant, hearsay, incompetent and without foundation.

As to the second Affidavit of David Leptich we reply: That ¶1 constitutes hearsay and is wholly irrelevant and in violation of principles of Idaho Rule of Civil Procedures 60(b) as argued above.

¶¶2-5 constitutes hearsay and/or are without foundation but are certainly irrelevant to the issues before this Court.

The second sentence in ¶6 of the Affidavit appears to be a promise of how the IDF&G will behave in the future, which is irrelevant to the petition lately pending before this Court, without foundation as to the authority to bind the defendant and not referenced in the Defendants asserted pleading. ¶¶8-9 are irrelevant in that they lack foundation.

Exhibit A. The pictures do not reveal anything about the buildings, whether they are residences, active or abandoned or shelters for the keeping and maintaining of goats.

The Plaintiffs are at a loss to understand the reasoning for the inclusion of ¶10 and thus cannot respond further.

¶11 references the Tenoroc Range in Lakeland Florida. The reason for inclusion of this paragraph is beyond the understanding of the Plaintiffs. The document is hearsay, and they are not appropriately identified as to genuineness under the Idaho Rules of Civil Procedure. What is more, it is not relevant.

¶¶12-14 are irrelevant and without foundation and beyond any expertise alleged to be had by Mr. Leptich. He appears in these paragraphs to be alluding to the fact that

Farragut is built similarly to Tenoroc, to which we say, so what, perhaps an expert could draw some conclusion, Mr. Leptich cannot. (IRE 702)

As to ¶15, though we cannot contest the bona fides of the measurement we are at a loss to understand the relevance of a wire "safety fence" in relation to the range. Certainly it is not being suggested that the "safety fence" stops bullets.

In the main, the second Affidavit of David Leptich is immaterial, irrelevant, without foundation, imposes expert opinions from an unqualified person and therefore should be held for naught, stricken and/or deemed void for want of foundation.

We now address the Defendant's Reply Brief in the main.

We are at odds with the reference that IDF&G did not proceed with the Vargas Master Plan as presented at trial, as the document by Vargas, was amended in some particulars and formed the basis for the range construction. (See Exhibit K, to the Preservation Deposition testimony of James Caulder). Secondly, the Court has clearly informed the parties that the Idaho Rules of Civil Procedure apply, ergo, Summary Judgment, i.e. Rule 56 is likewise applicable. The fact that the Defendant was limited to a time within which to file a Summary Judgment does not mean that the privilege provided by the rule is denied to the Plaintiffs'.

Fortunately, this Court will inform us all of what it meant by what it said in the plain English which the Court used to compose its Order of February 23, 2007.

We disagree that the Court intended to base its future behavior solely and exclusively on a view of the premises without the taking of evidence, input from experts and a hearing. To argue that the Court could magically divine, without the assistance of experts, the technical compliance with the Court's Order is pure sophistry.

The Defense is simply wrong when it suggests that the Plaintiffs seek to modify the February 23, 2007 Order or to impose new safety requirements. In point of fact the Plaintiffs have steadfastly maintained that both sides are bound by the Order unless and until it is modified by a subsequent Order. (res judicata)

As argued by the Defense, it is true that the IDF&G has installed baffles over "some" of the firing positions in what is now known as the 100 yard shooting area, with an effort to prevent firing above the berm behind the target. But we also insist that the "no blue-sky concept" or "fully contained range" (Memorandum Decision p.35 ¶49) has not been met in two major locations: A. to the right and left extremes of the now 100 yard shooting range, and B. at all of the remainder of the shooting range which includes the unimproved area and the proposed 50 yard and 200 yard ranges, at each of those locations blue-sky is clearly visible in all directions (the impromptu areas) as baffles are non-existent, so says

James Caulder and Jeanne Hom-Holder. The pictures to support that position are attached to the Caulder and Holder Affidavits and the Caulder Preservation Deposition.

II

A. Noise Standard:

Defendant's Reply Brief diverts the direct legislative attack of House Bill 515 upon this Court's opinion and judgment in this case by conflating this targeted legislation with two other generalized bills aimed at ranges not owned by the State: Senate Bill 1441 and House Bill 604.

This Affidavit of David Leptich has an aerial photo of Blacks Creek Range to which reference was made in the testimony before the legislative committee as being the only other state owned range. Leptich avers that there are two residences within one-half mile of the range. What he omits to state is that these two residences are up range, i.e., behind the shooting range, thusly less affected by noise. The Garden Valley Range was not mentioned in any testimony before the legislature as being state owned. Those buildings, if they be occupied residences are likewise up range. The Coeur d'Alene range is not state owned. Why it is mentioned is a puzzlement.

Note should be taken of Sharon Keifer's testimony to the Senate Committee, ". . . and last, but not least, a need to properly *manage future noise issues at Black's Creek, our other outdoor state-owned range. . .*"

Senate Resources and Environment, March 5, 2008, p. 5.

House Bill 515 was aimed directly to nullify the judgment entered in this case as shown in these excerpts. . .

. . . Rep. Eskridge explained that this bill also helps deal with the litigation issue at Farragut State Park . . .

. . . IF&G has worked closely with the Attorney General's Office to address noise related issues raised in litigation at Farragut State Park and future concerns at other ranges. In the absence of any established state noise standard in the issue at Farragut State Park, the Judge was confronted with the decision of balancing noise related concerns of neighbors with the public's use of the shooting range.

House Resources & Conservation Committee, February 19, 2008 –
Minutes – Page 3

. . . To draft HB515 for three reasons - a need to address noise related concerns raised in litigation over use of the shooting range at Farragut State Park (and to properly manage future concerns at other ranges), a need to address a directive from the Idaho Department of Fish and Game Commission to work with the Idaho Department of Parks and Recreation to develop, operate, and maintain a community, family and sportsmen based shooting range at Farragut State Park. . .

. . . it helps explain the IDFG Commission's directive for the Farragut shooting range and our interest in this legislation. . . .

Senate Resources & Environmental Committee, March 5, 2008 –
Minutes – Page 5

As I noted, our interest in this legislation partly stems from current litigation opposing expansion of the Farragut Shooting Range. In the course of that litigation, the judge was confronted with the difficult decision of how to balance noise related concerns of neighbors with the public's use of the range.

Only sport shooting ranges owned by the State of Idaho or a state agency and used by the public are affected by this bill.

Senate Resources & Environmental Committee, March 5, 2008 –
Minutes – Page 6

There has surfaced a need to address noise related concerns raised in litigation over the use of the shooting ranges. A need to address a directive from the Idaho Department of Fish and Game Commission to work with the Idaho Department of Parks and Recreation to develop, operate, and maintain a community, family and sportsmen based shooting range at Farragut State Park. . .

Senate Resources & Environment – March 5, 2008 – Minutes, Page 4

As I noted, our interest in this legislation partly stems from current litigation opposing expansion of the Farragut Shooting Range.

Senate Resources & Environment – March 5, 2008 – Minutes – Page 6.

Just as in *ISEEO v. State of Idaho*, 140 Idaho 586, 97 P.3d 453 (2004), House Bill 515

“. . . was meant to apply to this case by altering the procedure of the existing lawsuit.” 140 Idaho at 592.

In *ISEEO*, the Idaho Supreme Court concluded with a sentence that is equally applicable to this case:

This is a special enactment designed only to affect one particular lawsuit and is clearly a special law in violation of Article III, §19.

140 Idaho at 562.

The support by IDF&G for House Bill 515 was so specifically directed at this Court's opinion that the wording and the explanation changed the noise standard that the Court clearly adopted, a 55dBA single event, impulse mode filter measurement criteria, as measured at the private property line, as its violation standard, as proposed by Nightingale. (See Memorandum Decision Findings Of Fact ¶30) The new noise statute's use of 64dBA LEQ (h) (Equivalent Continuous Sound Level-one hour averaging) fast mode, measured 20 feet away from the nearest occupied residence/building and the Statute's mandate for LEQ (h) one hour averaging, all allow for greater noise pollution emissions, by reducing overall actual noise measurements, by dilution over time and distance of an already diluted (fast mode filter) noise measurement, rather than the Court's 55dBA single event impulse mode as measured

at the private property line standard.

The legislative record has three pages trying to explain "LEQ (h)" to the Senate Committee. March 5, 2008, pp. 7 –9. As noted in Plaintiffs' initial brief in response, Idaho Department of Fish and Game's lobbyist was so tied into nullifying this Court's opinion that she explained and then in the proposed legislation tried to implement and strengthen the defense of "coming to the nuisance." See, Sections 67-9103 and 67-9104 in House Bill 515 and the special explanation of "coming to the nuisance", which this court directly addressed and ruled upon, before the Senate Committee. March 5, 2008, pp. 8-9.

As to the noise issue, House Bill 515, now amplified and promoted in Defendants' Reply Brief, is an effort by legislature to change the judicial decision, well after it became final, in violation of the separation of powers provisions of the Idaho Constitution.

The Order of this Court dated February 23, 2007, did not permanently close the Farragut Range. The Court gave IDF&G the opportunity to reconstruct the range in a design with improvements that would make it safe and reduce the noise. The Court further provided an example to explain why permanent closure was not warranted, where it stated: "For example, if IDF&G were to find sufficient funding and build an enclosed range, plaintiffs could not be heard to complain about safety or noise

considerations." (Memorandum Decision Conclusions Of Law ¶19)

All that could have been done with the cooperation of Plaintiffs, or failing that, with the guidance of the Court after plans were presented, reviewed and verified as doable.

Instead, IDF&G proceeded to build and legislate. The result is a range that is unsafe and a law on noise that's unconstitutional and allows for a **substantial increase of noise**, instead of the Court's noise provision which stated: "...2) **include noise abatement measures to reduce noise** to a decibel level agreed upon by the parties in the first instance,..." i.e. reduce below the 55 dBA, the maximum allowed for 500 shooters or less. (Memorandum Decision Conclusions Of Law ¶19) (emphasis supplied)

B. Has IDF&G met the safety requirements?

1. The Affidavit of James Caulder (August 12, 2010) and the Preservation Deposition of James Caulder, clearly show that the safety requirements and intent of the Court Order, that bullets not leave the range or IDF&G controlled property, has not occurred. The Affidavit of Jeanne Hom-Holder shows clearly that she can fire a rifle from the 600-yard firing line over the berm and hit her own house.

Assuming arguendo, that the range could be practically sectioned off, it begs the Court Order that requires the restriction which addresses the impromptu shooting positions which include any of the hundred locations, more or less, that a shooter could acquire even were there to be one official on the range.

What the Court required was a baffle over and in front of **EVERY** firing position, including the **impromptu** positions, not just the enumerated firing positions.

Whether range patrolling could or could not prevent shooting from impromptu locations is not the question, so much as what the Court ordered? The Court ordered, as to Supervision: "However, if **zero bullet escapement is achieved** in the range as constructed, supervision is not required as supervision in that situation only inures to the benefit of the shooters." (Memorandum Decision p.36 line 16) (emphasis supplied)
We submit that both sides are bound by that Order.

2. There is no question that the Court used the phrase "down range". However the Court defined "down range", when it stated the following: "Ruel testified that unless the range owner controls **all land down range**, a range needs to be built so no bullet escapes." and it clearly defined Surface Danger Zone as within the "down range" area as stated: "... The Surface Danger Zone from the Farragut Shooting Range firing line encompasses a large area of private and public property and extends beyond and down range from the real property owned and controlled by IDF&G anywhere from one to two

miles...." (Memorandum Decision p.28 line 2 & p.29 ¶36) (emphasis supplied) The Defense wishes to convert that "down range" from its plain meaning, to a limited meaning, to suggest that the Court incorporated in and meant by "down range" only the safety fan with its 10 degree sectors on either side of perpendicular.

That is not as we read the Court Order and certainly not as we perceive the intent of the Court Order. We have in our opening Brief given the Court a Dictionary definition of down range. We submit that everything in the 180 degree arc forward of the firing line is down range. (See Caulder Preservation Deposition, p. 50)

If one were to take that safety fan and move the barrel of the gun held by the shooter, standing on the firing line, whether accidentally or on purpose, 25 degrees more or less to either side, such that it were pointing at the blue-sky opening pictured in the photographs attached to the Depositions and the photographs taken by O'Neal, the Defendants alleged expert, then that rifle barrel with its concomitant safety fan, would be aimed through those blue-sky openings. The round thus discharged would go the full length of its potential and leave the range/park. Accidents do happen and that is exactly what the Court order was designed to prevent.

If in fact the Court was concerned with "safety," as it clearly was, then the Court could not and would not have closed its eyes to a blue-sky opening as wide as appears in the photographic evidence.

We again, of course, reassert that the down range safety fan must apply to each shooting position on that range including the impromptu shooting positions. If there are ten shooting positions on the 100 yard range then there are approximately 100+/- shooting positions along the old firing line, which remain available to shooters (See aerial Google Earth Hom-Holder Affidavit) The "ricochet area" is not imaginary, it is real and it is a place where Caulder has testified rounds will on a more probable than not basis go and leave the confines of the range rectangle, go over the berm, and leave property owned and controlled by IDF&G. (See Preservation Deposition pp.44, 66-67) This fact, if nothing else, prevents deciding in favor of the Defense. If this fact however, considering none other, were unopposed because of the rejection of the opinions of O'Neal for any of the reasons earlier argued, then that would be it an un-traversed opinion and entitle the Plaintiff to Judgment.

The Defense argues to the testimony that at trial that bullet escapement came from a limited number of individuals. This is true, only three (Eldridge, Eldridge and Collins) individuals testified to bullet escape but the Court was not concerned about the numerosity of escapes but rather the fact of escapes. In its Order, the Court clearly required that **zero bullets escape (100% containment)**. There is no testimony from any of the Defense experts that the range permits for zero bullet escape. James Caulder testified that bullets can and will escape the range (See Affidavit, inter alia).

This too prevents the entry, at a Summary proceeding, of an Order favorable to the Defense and mandates an Order favorable to the Plaintiffs.

We are at odds that this Court intended, as urged by the Defense, to limit bullet escapement, to only the "down range" area within the surface danger zone. That is not what the Court said and it is clearly not what the Court meant. The Court intended, that bullets not escape property owned by IDF&G or otherwise controlled by them. If bullets can leave that area and/or if bullets can go over the back berm, then the Defendant's position fails, ab initio. Jim Caulder has clearly stated that, that is the state of affairs, bullets can and will escape over the berm and from IDF&G controlled property.

3. Baffles over every firing position: The Defense inserts the word "directly," into its assertions. This is a word not used by the Court. It simply does not make sense that if the Court were concerned with safety, it would limit bullet escape to direct bullets and ignore ricochet bullets. IDF&G's argument that ricochets fragment and become low energy bullets is belied by the testimony of an engineer and urged by the testimony of a non-engineer. What O'Neal does not say is no ricochet round will leave the range rectangle. He never asserts 100 % bullet containment with any degree of certainty, with any cited proof. (See O'Neal Deposition pp.76-77) Adopting the Plaintiff's interpretation of the Court Order imposes no more restraint on IDF&G than was imposed by the clear

imposed by the clear language that **zero** bullet escapement was the operative rule and full bullet containment was necessary.

4. **Baffles over every shooting position:** It is true that baffles have been placed over some shooting positions, specifically over the 100 yard shooting position. We have earlier argued as to the other locations on the range. But what the Court actually ordered was that, "the range would remain closed...until a baffle is installed over every firing position," No Blue-sky "...from all potential shooting positions...not only from all firing positions shown on the plans but also from the impromptu locations that can be anticipated and as available to be established by shooters." And as importantly, that the "safety measures (be) adequate to **prevent** bullet escapement beyond the boundaries owned and controlled by IDF&G". That has not been accomplished. Ricochets have simply not been addressed at all. It should be remembered that Vargas spoke to ground baffles to control ricochets. This range has no ground baffles and thus no ricochet control. Caulder's testimony clearly says that bullets that are fired too low will hit the rocky ground and ricochet over the berm without hitting the overhead baffles. (See Preservation Deposition pp.44, 66-67 also Caulder Affidavit)

5. **No Blue Sky:** The Defendant's position on interpreting down range as to mean something other than "away from the firing line", must be a tongue in cheek argument, as it ignores the real life fact and testimony of James Caulder that bullet

paths will follow an arc from extreme left of the firing line all the way around to extreme right of the firing line (180 degrees). This behavior occurs either on purpose or by accident, but is nonetheless real. Further, Vargas himself defines "no blue-sky concept" as a "fully contained range". (See Memorandum Decision p.35 ¶49) The range is at best only a "partially contained", assuming the deficiencies listed by Caulder were remedied. (See Preservation Deposition pp.31-35, 38) The Plaintiffs blue-sky argument is simply made from whole cloth.

The Defendants reference to the Tenoroc shooting range and safety fence, it is simply not in evidence in these proceedings nor is it presented through appropriate testimony. The "safety fence" provides no bullet protection, in any event. Its purpose here is unknown.

The Tenoroc range reference, without expert testimony, serves no evidentiary purpose.

When the Defense suggests that there is no genuine factual dispute that IDF&G has met the no blue-sky rule we say, read Mr. Caulder's testimony and then we can rest.

6. Imposition of additional requirements: The Plaintiffs do not seek now to impose any additional requirements of any nature nor do we seek to alter or amend the final Order of this Court. The Plaintiffs do not intend to broaden the surface danger

zone; they rather suggest that this Court intended the full 180 degree arc, i.e. "down range" as found in the Court Order.

Mr. Caulder has testified that ricochets will go over the berm and leave IDF&G controlled property. We disagree strenuously with the opening sentence of footnote 17 in Defendant's Brief. The Defense says, "It is unreasonable for Plaintiffs to argue that a person firing out of "openings" in excess of 20 degree shooting angles is firing "down range," or even "on range." We submit that it is not only reasonable but also real. It is not unreasonable for the bullets that go through those openings and hit persons down range to kill or maim. (See Preservation Deposition pp.18, 50, 85, 88-89)

Does the Defense submit that those bullets are incapable of injury or those bullets cannot by accident or by choice go through those openings?

The Defense urges that because there has been no proof that anyone has violated the Court Order to date, that the Court Order should somehow be relaxed. The Court spoke to absolutes, it said all shooting positions including impromptu positions and that's what it meant, it said no bullet escapement and that's what it meant. It is the Defense that seeks to modify the Court Order because it choose to build an improvidently designed range in the wrong location and ignore all design principles which Caulder referenced, which were publicly available since 2002 and to which the NRA Range Source Book likewise spoke.

It is untrue that the Plaintiffs seek to impose the Air Force 50% surface danger zone rule. The Court imposed a 100% bullet non-escapement rule. Mr. Caulder testified that on a more probable than not basis, absent proof to the contrary, that engineering principles require, ricochets that do escape the range will travel 50% of the ammunition's SDZ. His testimonial reference to an engineering rule is not imposing a burden on the Defendant, it rather states an engineering fact, developed by the Department of Defense and a group of engineers using the best computer modeling and science available, and who developed engineering theory over period of time. The Court can at trial accept or reject an expert's opinion as appropriate.

Mr. Caulder has said that there is no material difference between civilian and military ranges (See Caulder Preservation Deposition pp.9-16) and there is no one with any credential who has contradicted him in this regard. It must be remembered that Mr. Caulder testified that he is not intending to impose upon this Court the ETL regulations. They are simply guidance to aid and assist him in his engineering opinions. (See Caulder Preservation Deposition pp.11-14)

It is consequential to note that had the IDF&G wisely designed the range and constructed a "fully contained range" as the Court referenced, (Memorandum Decision page 28 line 11 and page 35 line 5) and as Vargas defined, "no blue-sky concept" or "fully contained range" in his Affidavit dated August 24, 2006, p. 4, ¶12, as noted in the

(Memorandum Decision page 35 line 5) and it could have used the ETL to aid and assist as guidance, to the extent it wished to use it, as the ETL has been public property since 2002, they would have built a range for which **zero** bullet escapement would be assured and **100% containment accomplished**, thus be compliant with the Court Order. IDF&G choose to deny the old adage, let your first cost be your last cost, and attempted to build a range on the cheap. Even Mr. Vargas told us, if you build in the wrong location it would be expensive. Compliance with the Court Order was and is possible; it is simply a function of good engineering and money. IDF&G has utterly failed in this regard. IDF&G attempts to use tortured definitions and a twisting of the Court Order to make its inadequate performance appear adequate. The Fish and Game Commission simply has delusions of adequacy. In this regard the Defendants are non-compliant. The Court insisted on a "**SAFE**" range, the Plaintiffs pray for a safe range and when one is built, if one is built, the Plaintiffs will be pleased and proud to say so.

Regrettably, the Plaintiffs must ask the Court to read the Affidavit of James Caulder, dated August 12, 2010, the Preservation of James Caulder, at length, as it is proof from start to finish, and its attached exhibits with portions of the 08 version of the ETL attached (1, 4, 6, figure 8, page 30, and 8), the two affidavits of Hom-Holder, to connect the photo evidence, inter alia; and lastly the deposition of Kerry O'Neal, unless his affidavits have been stricken.

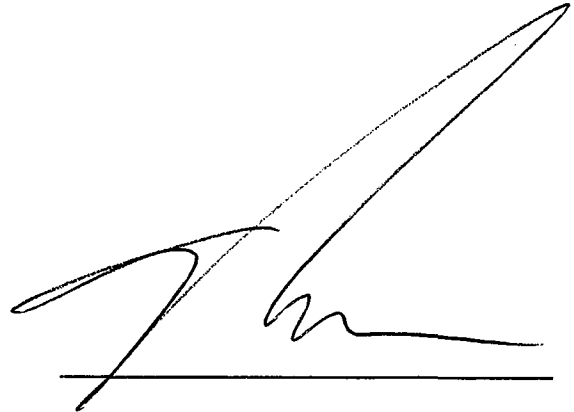
22

CONSOLIDATED REPLY BRIEF IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGEMENT AND MOTION TO STRIKE AND/OR EXCLUDE TESTIMONY OF JAMES CAULDER

Plaintiffs urge this Court, to enter an Order in their favor, as the Caulder testimony compels, to keep the injunction in place until compliance with its terms is had and find that the Defendant is not now compliant.

Respectfully submitted.

Dated this 19th day of January 2011.

A handwritten signature in black ink, consisting of two distinct parts, one above the other, both written in a cursive style. The signature is positioned above a horizontal line.

Harvey Richman and Scott Reed

Attorneys for the Plaintiffs

CERTIFICATE OF MAILING

I hereby certify that on this 19 day of January 2011 a true and correct copy of the foregoing CONSOLIDATED REPLY BRIEF IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGEMENT AND MOTION TO STRIKE AND/OR EXCLUDE TESTIMONY OF JAMES CAULDER, was mailed postage prepaid and delivered to:

Kathleen E. Trever
W. Dallas Burkhalter
Deputy Attorneys General P.O. Box 25
Boise, ID 83707
Phone (208) 334-3771
FAX (208) 334-4485

Attorneys for Defendants

A handwritten signature in black ink, appearing to read 'Harvey Richman', is written over a horizontal line.

By: Harvey Richman
Attorney at Law

STATE OF IDAHO }
COUNTY OF KOOTENAI } SS
FILED: 638 } *dc*

2011 JAN 24 PM 2:57

CLERK DISTRICT COURT
Mally Pearson
DEPUTY

**LAWRENCE G. WASDEN
ATTORNEY GENERAL**

**Clive J. Strong
Chief of Natural Resources**

**KATHLEEN B. TREVER, ISB #4862
W. DALLAS BURKHALTER, ISB# 3286
Deputy Attorneys General
PO Box 25
Boise, ID 83707
Telephone: (208) 334-3771
FAX: (208) 334-4885**

**Attorneys for Defendants
State of Idaho, IDFG and Groen**

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

**CITIZENS AGAINST RANGE)
EXPANSION, an Unincorporated non-profit)
Association; JEANNE J. HOM, a single)
woman; EUGENE and KATHLEEN RILEY,)
husband and wife; LAMBERT and DENISE)
RILEY, husband and wife; GABRIELLE)
GROTH-MARNAT, a single woman,)
GERALD PRICE, a single man; RONALD)
and DOROTHY ELDRIDGE, husband and)
wife; and GLENN and LUCY CHAPIN,)
husband and wife, SHERYL PUCKETT, a)
single woman; CHARLES MURRAY and)
CYNTHIA MURRAY, husband and wife; and)
DAVE VIG, a single man,)
Plaintiffs,)**

Case No. CV-05-6253

MOTION FOR COURT VIEW

**vs.)
IDAHO FISH AND GAME DEPARTMENT,)
an agency of the STATE OF IDAHO, and)
CAL GROEN, Director of the IDAHO FISH)
AND GAME DEPARTMENT,)
Defendants)**

COMES NOW Defendants, the Idaho Department of Fish and Game and Cal

Groen, Director of IDFG, (collectively IDFG) and move this Court to view the premises

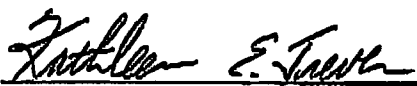
of the 100-yard shooting area of the Farragut Range pursuant to the Court's Order of February 23, 2007, and alternatively I.R.Civ.P. 43(f), in aid of the Court's consideration of IDFG's Motion to Partially Lift Injunction and determination of IDFG's compliance with the Court's terms for lifting injunctive relief regarding the use of Farragut Shooting Range.

Plaintiffs' Counsel indicates that Plaintiffs oppose a view by the Court at this time.

Because of the straightforward nature of this motion, IDFG submits this motion without additional briefing. IDFG will request a date for hearing on this motion.

DATED this 24th day of January, 2011.

STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL


KATHLEEN E. TREVER
Deputy Attorney General

CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of January, 2011 a true and correct copy of the foregoing MOTION FOR COURT VIEW was faxed or mailed postage prepaid to:

<p>Hon. John T. Mitchell 324 West Garden Avenue P.O. Box 9000 Coeur d'Alene, ID 83816-9000</p>	<p><input type="checkbox"/> United States Mail, Postage Prepaid <input checked="" type="checkbox"/> Facsimile to (208) 446-1132 <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Courier</p>
<p>Harvey Richman Attorney at Law 19643 N. Perimeter Road Athol, Idaho 83801</p>	<p><input checked="" type="checkbox"/> United States Mail, Postage Prepaid <input type="checkbox"/> Facsimile <i>+ courtesy PDF</i> <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Courier</p>
<p>Clerk of the Court: Daniel English 451 Government Way P.O. Box 9000 Coeur d'Alene, ID 83816-9000</p>	<p><input type="checkbox"/> United States Mail, Postage Prepaid <input checked="" type="checkbox"/> Facsimile to (208) 446-1188 <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Courier</p>
<p>Scott W. Reed Attorney at Law (208) 765-5117</p>	<p><input type="checkbox"/> United States Mail, Postage Prepaid <input checked="" type="checkbox"/> Facsimile (208) 765-5117 <input type="checkbox"/> Hand Delivery <i>+ courtesy PDF</i> <input type="checkbox"/> Overnight Courier</p>

Kathleen E. Trever
Kathleen E. Trever

STATE OF IDAHO }
COUNTY OF KOOTENAI } SS
FILED:

2011 JAN 24 PM 2: 56

CLERK DISTRICT COURT
[Signature]
DEPUTY

LAWRENCE G. WASDEN
ATTORNEY GENERAL
Clive J. Strong
Chief of Natural Resources

KATHLEEN E. TREVER, ISB #4862
W. DALLAS BURKHALTER, ISB# 3286
Deputy Attorneys General
PO Box 25
Boise, ID 83707
Telephone: (208) 334-3771
FAX: (208) 334-4885

Attorneys for Defendants
State of Idaho, IDFG and Groen

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

CITIZENS AGAINST RANGE)
EXPANSION, an Unincorporated non-profit)
Association; JEANNE J. HOM, a single)
woman; EUGENE and KATHLEEN RILEY,)
husband and wife; LAMBERT and DENISE)
RILEY, husband and wife; GABRIELLE)
GROTH-MARNAT, a single woman,)
GERALD PRICE, a single man; RONALD)
and DOROTHY ELDRIDGE, husband and)
wife; and GLENN and LUCY CHAPIN,)
husband and wife, SHERYL PUCKETT, a)
single woman; CHARLES MURRAY and)
CYNTHIA MURRAY, husband and wife; and)
DAVE VIG, a single man,)
Plaintiffs,)

Case No .CV-05-6253

SECOND AFFIDAVIT OF
KATHLEEN TREVER,
IN SUPPORT OF
MOTION TO STRIKE

vs.)
IDAHO FISH AND GAME DEPARTMENT,)
an agency of the STATE OF IDAHO, and)
CAL GROEN, Director of the IDAHO FISH)
AND GAME DEPARTMENT,)
Defendants)

CERTIFICATE OF MAILING

I hereby certify that on this 24th day of January, 2011 a true and correct copy of the foregoing **SECOND AFFIDAVIT OF KATHLEEN TREVER** was faxed or mailed postage prepaid to:

<p>Hon. John T. Mitchell 324 West Garden Avenue P.O. Box 9000 Coeur d'Alene, ID 83816-9000</p>	<p><input type="checkbox"/> United States Mail, Postage Prepaid <input checked="" type="checkbox"/> Facsimile to (208) 446-1132 <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Courier</p>
<p>Harvey Richman Attorney at Law 19643 N. Perimeter Road Athol, Idaho 83801</p>	<p><input checked="" type="checkbox"/> United States Mail, Postage Prepaid <input type="checkbox"/> Facsimile + courtesy PDF <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Courier</p>
<p>Clerk of the Court: Daniel English 451 Government Way P.O. Box 9000 Coeur d'Alene, ID 83816-9000</p>	<p><input type="checkbox"/> United States Mail, Postage Prepaid <input checked="" type="checkbox"/> Facsimile to (208) 446-1188 <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Courier</p>
<p>Scott W. Reed Attorney at Law (208) 765-5117</p>	<p><input type="checkbox"/> United States Mail, Postage Prepaid <input checked="" type="checkbox"/> Facsimile (208) 765-5117 <input type="checkbox"/> Hand Delivery + courtesy PDF <input type="checkbox"/> Overnight Courier</p>


Kathleen E. Trever

EXHIBIT A
TO SECOND AFFIDAVIT OF KATHLEEN TREVER,
IN SUPPORT OF MOTION TO STRIKE

From: Jim Caulder (jaostruotengr@yahoo.com)
To: HRichmanAttorney@aol.com;
Date: Tue, August 17, 2010 5:40:17 PM
Cc:
Subject: Re: CARE

ETL 02-11, paragraph 3 states the criteria applies to new facilities that are at 30% design or less.

It also states that existing facilities designed to other criteria may continue to operate as long as range safety can be verified.

Range safety can be verified through an ORM process or a computer modeling and simulation analysis.

Para 9.2.6 requires concrete floor for new fully contained and for new partially contained. New non-contained can have soil floors.

At this point in time, the AF had recognized the old criteria they had been using was causing problems.

The old criteria said to use pea gravel. This ETL states no pea gravel

Virtually all of the existing AF ranges were partially baffled at the time of this ETL.

The old type range was earth berm on three side, pea gravel range floor and vertical baffles spaced to prevent blue sky.

This ETL requires concrete floors in partially baffled ranges, because the AF had been replacing soil/earth/pea gravel floors with concrete to better control ricochets.

Through testing and computer modeling, the new criteria was evolving.

The new features would be concrete floors, angled ballistic steel baffles, solid full height concrete sidewalls, and steel bullet traps.

Para 9.3.2 is under the heading of 9.3 .1 Siting Consideration.

If the naturally occurring soils are not too rocky, they can be used. The 150 mm depth requirement for surfaces of impact ranges may have been a carry-over from old criteria. The 150 mm depth requirement is not listed in the next revision of the ETL.

Para 9.6.6 is under the heading of 9.6 Ballistic Safety Structures

Para 9.6.6 states requirements for any earth berm that is placed around the range. These berms require the top 1' meter of material passing the #4. These earth berms will be struck by direct fired rounds and ricochets, but they are not behind the target area, which receives most of the rounds.

Para 9.6.9.1 Earth Backstops addresses the earth berms that are also the bullet backstops. The impact face of the backstop must be 2 meters deep with soil passing the #4.

AF criteria, AFH 10-222 vol 14 , Table 6 "Protection from Projectiles for Various Thickness of Material" (attached) , lists 24 inches of dry sand (48 inches wet sand) to provide protection against a 7.62 round fired at 100 yards.

Since we have an outdoor range, you would have to plan for the wet sand case.

When a round hits the range floor, it has a flat (small) angle, relative to the floor surface.

Assume a shooter in the standing position, with the muzzle at 5 feet above the ground surface.

If, on a 25 meter range (82 feet firing line to target), the round hits the floor at the base of the target, the angle of impact is approximately 5 degrees.

Assume the range floor is 12 inches of properly graded sand.
If the round hits the floor at 5 degrees, and if you assume that it penetrates the floor along its original line of travel, the round will travel 137 inches before it reaches the bottom of the sand layer. If it then ricochets vertically, it is still below 12 inches of sand.

If the round hits the range floor about 20 feet from the firing line, the the round will strike the range floor at about 15 degrees.
Again, if it continues on its original line of travel, it will travel 44 inches before it reaches the bottom of the sand layer.

Tests show that for flat angles, the round typically ricochets.
The change to a concrete floor was to assure consistent ricochets, ones that would continue down range to the backstop (earth berm, bullet trap, etc.)

[The DoD usually adopts criteria that is more stringent than others.
For example, NRA 18 to 24 inches rock free on backstops, the ETL requires 2 meters (6.5 feet).]

I hope this helps.
Call if you want to discuss.
v/r
Jim Caulder

From: "HRichmanAttorney@aol.com" <HRichmanAttorney@aol.com>
To: jacstructengr@yahoo.com
Sent: Tue, August 17, 2010 11:50:45 AM
Subject: CARE

By way of review on range floor issue:

From ETL 9.2.6--Floors concrete only, but for partially contained then front 50% concrete;

9.3.2 speaks to 6 inches (150 mm.);

9.6.6 re: berms--top 1 meter passing through #4 sieve (1 inch);

but see 9.6.9.1 backstop Impact face, 2 meters pass #4 sieve;

NRA Range Manual--2.04.15 Backstop 18-24 inches rock free see also 3.01.3.4.1 and 3.01.6.1.1

There appears to be some confusion.

It would ETL required a concrete floor, that full consideration was not given to the depth of the remaining range floor rock free nature.

It would only make sense to me, that if a round can penetrate two feet of sand, that at least two feet of compacted earth, rock free on an earthen floor would be required. But of course, I am not an engineer.

Harvey

Scott W. Reed, ISB#818
Attorney at Law
P. O. Box A
Coeur d'Alene, ID 83816
Phone (208) 664-2161
FAX (208) 765-5117

Harvey Richman, ISB#2992
Attorney at Law
19643 N. Perimeter road
Athol, Idaho 83801
Phone (208) 683-2732

STATE OF IDAHO
COUNTY OF KOOTENAI

ORIGINAL

FILED: *SR #552*

2011 FEB 10 PM 4:06

CLERK DISTRICT COURT

Patty Bayle
DEPUTY

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

**CITIZENS AGAINST RANGE
EXPANSION, an Unincorporated non-
profit Association; JEANNE J. HOM, a
single woman; EUGENE and
KATHLEEN RILEY, husband and wife;
LAMBERT and DENISE RILEY, husband
and wife; GABRIELLE GROTH-
MARNAT, a single woman, GERALD
PRICE, a single man; RONALD and
DOROTHY ELDRIDGE, husband and
wife; and, GLENN and LUCY CHAPIN,
husband and wife, SHERYL PUCKETT,
a single woman; CHARLES MURRAY
and CYNTHIA MURRAY, husband and
wife; and DAVE VIG, a single man,**

Plaintiffs,

v.

**IDAHO FISH AND GAME DEPARTMENT,
an agency of the STATE OF IDAHO, and
STEVEN M. HUFFAKER, Director of the
IDAHO FISH AND GAME DEPARTMENT,**

Defendants.

Case No. CV-05-6253

**AFFIDAVIT UPON LEGISLATIVE
RECORDS 2008 LEGISLATURE**


STATE OF IDAHO)
)
) ss.
COUNTY OF KOOTENAI)

Scott W. Reed, being first duly sworn, deposes and says:

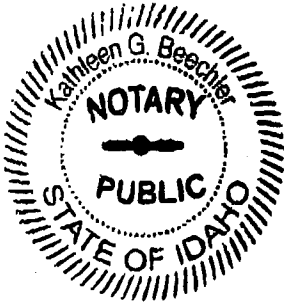
At all relevant times, I have been one of the attorneys for plaintiffs. As such, I obtained from the Idaho Legislative Library the record on 2008 House Bill 515 filed December 28, 2010 in this case as a certification.

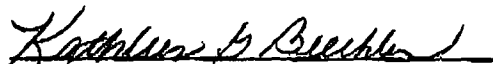
On this date, I discovered that the two attached documents, being minutes, on January 15, 2008 before the House Resources & Conservation Committee and minutes on January 16, 2008 before the Senate Resources and Conservation Committee, were directly relevant to House Bill 515 prior to the same being printed.

The attached are true copies of such minutes.


Scott W. Reed

SUBSCRIBED AND SWORN to before me this 10th day of February, 2011.




Notary Public for Idaho
Residing at Coeur d'Alene
My Commission Expires: 9/1/11

AFFIDAVIT UPON LEGISLATIVE
RECORDS 2008 LEGISLATURE

CERTIFICATE OF MAILING

I certify that a true copy of the foregoing was sent by fax, this 10th day of February, 2011 to:

KATHLEEN E. TREVER AND
W. DALLAS BURKHALTER
DEPUTY ATTORNEYS GENERAL
P. O. BOX 25
BOISE, IDAHO 83707



A handwritten signature in black ink, appearing to read 'K. Trever', is written over a horizontal line.

AFFIDAVIT UPON LEGISLATIVE
RECORDS, 2008 LEGISLATURE

MINUTES

HOUSE RESOURCES & CONSERVATION COMMITTEE

DATE: January 15, 2008

TIME: 1:30 P.M.

PLACE: Room 148

MEMBERS PRESENT: Chairman Stevenson, Vice Chairman Wood, Representatives Bell, Barrett, Moyle, Eskridge, Bedke, Raybould, Andrus, Shepherd (8), Brackett, Wood (27), Vander Woude, Saylor, Pence, Chavez, King, Shively

ABSENT/ EXCUSED: None

GUESTS: Please see attached guest list.

The meeting was called to order promptly at 1:30 p.m. by Chairman Stevenson who welcomed all in attendance. The minutes of the previous meeting were read and approved upon a motion by Rep. Raybould.

Chairman Stevenson introduced Cal Groen, the Director the Idaho Fish & Game Dept. (IDFG) and also recognized Cameron Wheeler, a former Representative who is now Chairman of the IDFG Commission. The Chairman then called on Mr. Groen to proceed with presentation of the Fish & Game Annual Report.

Cal Groen Mr. Groen took the podium and stated that the IDFG has unique challenges to deal with such as wolf management, grizzly bear depredation issues, elk harvesting and funding concerns. He then requested that each of the Fish & Game Commission members report on their various regions. Chairman Stevenson was in accordance, and Mr. Groen turned the meeting over to Cameron Wheeler, Chairman of the Idaho Fish & Game Commission.

Cameron Wheeler Mr. Wheeler introduced each member of the Dept.; namely, Fred Trevey of the Clearwater Region; Wayne Wright, Vice-Chairman, from the Magic Valley Region; Bob Barowsky of the Southwest Region, Randall Budge of the Southeast Region, Gary Power of the Salmon Region and Tony McDermott of the Panhandle Region. He then deferred to Fred Trevey to report on issues in the Clearwater Region.

Fred Trevey Mr. Trevey reported that he is new on the Commission, although he has been a life-long outdoorsman. He related that he served for 35 years with the Forest Service before he retired and worked in the private sector for 10 years. Mr. Trevey proceeded to report that elk populations in the Selway and Lolo regions are in trouble due to habitat issues such as invasion of noxious weeds, citing that they are difficult problems to deal with. He described the work done to improve elk herd populations during the last three years.

Mr. Trevey proceeded to discuss the Salmon Fishery and welcomed committee members to come up to northern Idaho to visit. He stated that salmon recovery is an economic advantage to the State and reported that a record number of spring chinook is anticipated this year, based on the number of young males going up river last year.

Cameron Wheeler Mr. Wheeler stood again to report that the Ad Hoc Committee is doing a good job and their interaction with the public has created a "two way street" of communication. He identified numerous factors which can affect acquisition and disposal of land. Sometimes they are able to trade forest land with ranchers, or acquire land through donation, and they have also been dealing with several Indian tribes in Northern Idaho.

Gary Powers Mr. Powers spoke on the wolf issue and provided members of the committee with a map identifying wolf activity areas in the State of Idaho for 2007 as well as Idaho Wolf Statistics. (Please see handout attached hereto). He reported that presently there are approximately 850 wolves in the State of Idaho, forming 80 packs with 42 to 43 pairs. Mr. Powers pointed out that the wolf issue is the most emotional issue which the Dept. has had to face. Further addressing the committee, Mr. Powers reported that delisting of the wolf is scheduled to take place February 28th of this year. The committee discussed the harvest rates, season quotas and the determination thereof. Mr. Powers reported that the primary tool for wolf population management is regulated harvest through standard seasons. Fish & Game sets the seasons and in more livestock populated areas, the takings there would likely be higher than other less populated regions. Mr. Powers again directed the committee to the map on wolf statistics and referred to the graph depicting wolf packs and breeding pairs from 1995-2007 as well as confirmed livestock depredations. When asked if any lawsuits have been filed regarding wolf issues, Mr. Powers reported there are presently about 27 groups lined up to take action.

Tony McDermott Cameron Wheeler took the podium to introduce Mr. McDermott who reported on the controversy surrounding the Farragut Shooting Range which is located at the Southeast end of Lake Pend O'Reille. This controversy involves a group called CARE (Citizens Against Range Expansion) who have filed a lawsuit against the shooting range. Mr. McDermott reported that this group has refused to compromise on the issue and their lawsuit will have a devastating effect on shooting ranges throughout the State. He urged the committee to do all it can to remedy the problem.

Speaking next was

Commissioner McDermott. Referring back to the

discussion of sage brush seed, he said there are two million seeds in a one pound packet. The topic he was given for review was the Farragut Shooting Range and what has occurred there during the past year.

There is a group called CARE (Citizens Against Range Expansion) living along the northern boundary of the range road. They filed a lawsuit in 2006 to stop Fish and Game's plan to improve and expand the range.

The Judge made a decision in 2007 and imposed severe restrictions. (1) No rounds would leave the range; (2) The noise decibel level cannot exceed 55 decibels; and (3) Restricted 'users days' to 500 days per year.

A 'user day' is one shooter, one day, one round. The Department purchased the land in 1950 and it consisted of 3,850 acres. In 1964, 2,500 acres was transferred to the federal government and through negotiations by the Department of Parks and Recreation, they now own it.

There are two portions - Farragut Wildlife Management Area and the Farragut State Park. The shooting range is on the north side and is managed by Parks and Rec. User groups of the range include individual citizens, Boy Scout troops, hunter education, agency clinics, law enforcement officers, as well as some military training. Mr. McDermott

said in the past, 'user days' averaged about 2,000 'user days' per year.

The Commission would like to increase it to 3,000 and they plan to petition the Judge.

Scott W. Reed, ISB#818
Attorney at Law
P. O. Box A
Coeur d'Alene, ID 83816
Phone (208) 664-2161
FAX (208) 765-5117

Harvey Richman, ISB#2992
Attorney at Law
19643 N. Perimeter road
Athol, Idaho 83801
Phone (208) 683-2732

STATE OF IDAHO }
COUNTY OF KOOTENAI } SS
ORIGINAL
SR #807
2011 FEB 11 PM 3:27

CLERK DISTRICT COURT
Patty Boyle
DEPUTY

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

**CITIZENS AGAINST RANGE)
EXPANSION, an Unincorporated non-)
profit Association; JEANNE J. HOM, a)
single woman; EUGENE and)
KATHLEEN RILEY, husband and wife;)
LAMBERT and DENISE RILEY, husband)
and wife; GABRIELLE GROTH-)
MARNAT, a single woman, GERALD)
PRICE, a single man; RONALD and)
DOROTHY ELDRIDGE, husband and)
wife; and, GLENN and LUCY CHAPIN,)
husband and wife, SHERYL PUCKETT,)
a single woman; CHARLES MURRAY)
and CYNTHIA MURRAY, husband and)
wife; and DAVE VIG, a single man,)**

Plaintiffs,

v.

**IDAHO FISH AND GAME DEPARTMENT,)
an agency of the STATE OF IDAHO, and)
STEVEN M. HUFFAKER, Director of the)
IDAHO FISH AND GAME DEPARTMENT,)**

Defendants.

Case No. CV-05-6253

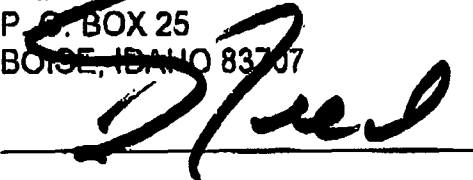
**SUPPLEMENTAL AND AMENDED
AFFIDAVIT UPON LEGISLATIVE
RECORDS 2008 LEGISLATURE**

CERTIFICATE OF MAILING

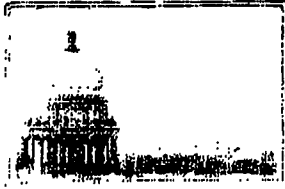
1176

I certify that a true copy of the foregoing was sent by fax, this 20th day of February, 2011 to:

KATHLEEN E. TREVER AND
W. DALLAS BURKHALTER
DEPUTY ATTORNEYS GENERAL
P. O. BOX 25
BOISE, IDAHO 83707



SUPPLEMENTAL AND AMENDED
AFFIDAVIT UPON LEGISLATIVE
RECORDS 2008 LEGISLATURE



Legislative Services Office Idaho State Legislature

Serving Idaho's Citizen Legislature

Jeff Youtz
Director

CERTIFICATION OF DOCUMENTS

Mark Robertson, Library Research Assistant of the Legislative Services Office of the State of Idaho, hereby certifies that each of the following attached documents is a true and correct copy of the original record as filed in the Legislative Services Office:

Committee minutes of the House Resources and Conservation Committee and Senate Resources and Environment Committee from the Second Regular Session of the Fifty-ninth Idaho Legislature:

1. House Resources and Conservation Committee minutes of January 15th, 2008 (3 pages); and
2. Senate Resources and Environment Committee minutes of January 16th, 2008 (4 pages).

DATED this 10th day of February, 2011.

Mark Robertson
Library Research Assistant
Idaho Legislative Services Office

Mike Nugent, Manager
Research & Legislation

Cathy Holland-Smith, Manager
Budget & Policy Analysis

Don H. Berg, Manager
Legislative Audits

Glenn Harris, Manager
Information Technology

MINUTES

HOUSE RESOURCES & CONSERVATION COMMITTEE

DATE: January 15, 2008

TIME: 1:30 P.M.

PLACE: Room 148

MEMBERS PRESENT: Chairman Stevenson, Vice Chairman Wood, Representatives Bell, Barrett, Moyle, Eskridge, Bedke, Raybould, Andrus, Shepherd (8), Brackett, Wood (27), Vander Woude, Saylor, Pence, Chavez, King, Shively

**ABSENT/
EXCUSED:** None

GUESTS: Please see attached guest list.

The meeting was called to order promptly at 1:30 p.m. by Chairman Stevenson who welcomed all in attendance. The minutes of the previous meeting were read and approved upon a motion by Rep. Raybould.

Chairman Stevenson introduced Cal Groen, the Director the Idaho Fish & Game Dept. (IDFG) and also recognized Cameron Wheeler, a former Representative who is now Chairman of the IDFG Commission. The Chairman then called on Mr. Groen to proceed with presentation of the Fish & Game Annual Report.

Cal Groen Mr. Groen took the podium and stated that the IDFG has unique challenges to deal with such as wolf management, grizzly bear depredation issues, elk harvesting and funding concerns. He then requested that each of the Fish & Game Commission members report on their various regions. Chairman Stevenson was in accordance, and Mr. Groen turned the meeting over to Cameron Wheeler, Chairman of the Idaho Fish & Game Commission.

Cameron Wheeler Mr. Wheeler introduced each member of the Dept.; namely, Fred Trevey of the Clearwater Region; Wayne Wright, Vice-Chairman, from the Magic Valley Region; Bob Barowsky of the Southwest Region, Randall Budge of the Southeast Region, Gary Power of the Salmon Region and Tony McDermott of the Panhandle Region. He then deferred to Fred Trevey to report on issues in the Clearwater Region.

Fred Trevey Mr. Trevey reported that he is new on the Commission, although he has been a life-long outdoorsman. He related that he served for 35 years with the Forest Service before he retired and worked in the private sector for 10 years. Mr. Trevey proceeded to report that elk populations in the Selway and Lolo regions are in trouble due to habitat issues such as invasion of noxious weeds, citing that they are difficult problems to deal with. He described the work done to improve elk herd populations during the last three years.

Mr. Trevey proceeded to discuss the Salmon Fishery and welcomed committee members to come up to northern Idaho to visit. He stated that salmon recovery is an economic advantage to the State and reported that a record number of spring chinook is anticipated this year, based on the number of young males going up river last year.

Cameron Wheeler Mr. Wheeler stood again to report that the Ad Hoc Committee is doing a good job and their interaction with the public has created a "two way street" of communication. He identified numerous factors which can affect acquisition and disposal of land. Sometimes they are able to trade forest land with ranchers, or acquire land through donation, and they have also been dealing with several Indian tribes in Northern Idaho.

Gary Powers Mr. Powers spoke on the wolf issue and provided members of the committee with a map identifying wolf activity areas in the State of Idaho for 2007 as well as Idaho Wolf Statistics. (Please see handout attached hereto). He reported that presently there are approximately 850 wolves in the State of Idaho, forming 80 packs with 42 to 43 pairs. Mr. Powers pointed out that the wolf issue is the most emotional issue which the Dept. has had to face. Further addressing the committee, Mr. Powers reported that delisting of the wolf is scheduled to take place February 28th of this year. The committee discussed the harvest rates, season quotas and the determination thereof. Mr. Powers reported that the primary tool for wolf population management is regulated harvest through standard seasons. Fish & Game sets the seasons and in more livestock populated areas, the takings there would likely be higher than other less populated regions. Mr. Powers again directed the committee to the map on wolf statistics and referred to the graph depicting wolf packs and breeding pairs from 1995-2007 as well as confirmed livestock depredations. When asked if any lawsuits have been filed regarding wolf issues, Mr. Powers reported there are presently about 27 groups lined up to take action.

Tony McDermott Cameron Wheeler took the podium to introduce Mr. McDermott who reported on the controversy surrounding the Farragut Shooting Range which is located at the Southeast end of Lake Pend O'Reille. This controversy involves a group called CARE (Citizens Against Range Expansion) who have filed a lawsuit against the shooting range. Mr. McDermott reported that this group has refused to compromise on the issue and their lawsuit will have a devastating effect on shooting ranges throughout the State. He urged the committee to do all it can to remedy the problem.

Wayne
Wright

Mr. Wright reported on the Murphy Complex fire which burned over 650,000 acres of land, creating huge problems to wildlife, as well as the environment. The Governor responded immediately and was very supportive. A restoration project was begun with 1,000 volunteers who helped to collect 3,600 lbs. of sagebrush seed for reseeded which was very helpful.

Randy
Budge

Mr. Budge addressed the Mule Deer issue and elaborated on management issues, saying that management is not easy and Mule Deer numbers have been declining, especially in southeast Idaho. He pointed out that improved habitat is the key to this management issue and reported that they have received approval of a ten (10) year management plan. Mr. Budge also referred to a University of Idaho survey which shows that sportsmen want more trophy Mule Deer.

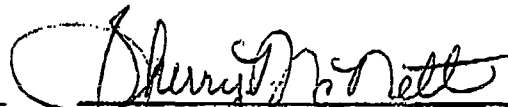
Bob
Barowsky

Mr. Barowsky addressed the issue of ATV, 6-wheel, and other motorized vehicles and their impact in wilderness areas. He reported that there are presently around 100,000 ATV's in the state and therefore designation of areas and trails to ride is very important because of potential damage done by the vehicles. He reported the Commission is working to cite and better map designated trail areas for the public. Mr. Barowsky also recognized the need to mark "dead-end" areas on maps so that riders can be better informed and not have to go off road and potentially cause damage to the terrain. He related that some erosion problems have been caused by off road activity. Answering questions, Mr. Barowsky affirmed that there are fines and penalties in place for violations. He also related that there is a joint effort with the Parks and Recreation Department and BLM to formulate and establish trails in areas where they overlap.

Cameron
Wheeler

Mr. Wheeler expressed his appreciation to appear before the committee and make this annual report. Chairman Stevenson reminded the committee that the Fish & Game Commission will hold a public meeting Wednesday night at their offices. He thanked all those who participated in the presentation and with no further business, the meeting was adjourned at 3:00 p.m.


Rep. John A. Stevenson, Chairman


Sherry McNett, Secretary

MINUTES

SENATE RESOURCES & ENVIRONMENT COMMITTEE

DATE: January 16, 2008

TIME: 1:30 p.m.

PLACE: Room 204

MEMBERS PRESENT: Chairman Schroeder, Vice Chairman Pearce, Senators Cameron, Little, Coiner, Siddoway, Stennett, and Langhorst

MEMBERS ABSENT/ EXCUSED: Senator Andreason

NOTE: *The sign-in sheet, testimonies, and other related materials will be retained with the minutes in the Committee's office until the end of the session and will then be located on file with the minutes in Legislative Services Library.*

MINUTES: Chairman Schroeder called the meeting to order at 1:30 p.m.

ANNOUNCEMENTS: He announced that Professor Barbara Cozens will be speaking Friday on Idaho's water law. Next Monday, Jay O'Laughlin will be presenting a program on "Fire, Smoke and Forest Fuel Management". At 7 a.m. on Wednesday, the Board members of Parks and Recreation will be in attendance at an informal meeting.

INTRODUCTIONS: Chairman Schroeder welcomed Cal Groen, Director of the Department of Fish and Game and the Board members of Fish and Game. Mr. Groen introduced the members and they are as follows:
Tony McDermott - Panhandle Region
Fred Trevey - Clearwater Region
Bob Barowsky - Southwest Region
Dr. Wayne Wright - Magic Valley Region
Cameron Wheeler - Upper Snake Region
Gary Power - Salmon Region
Randall Budge - Southeast Region (was unable to attend.)

The Chairman asked the Board members - for those that want to - to tell the committee (1) What hunting is to each of them; (2) Is the department a managing or policy agency; (3) Should it be involved in research and (4) How you feel about the International and National organizations that might dictate to our state about what we do here?. He then asked the committee members if they had questions for the Board.

Senator Cameron said one of the dilemmas the department has is that we are in a changing arena and there are many more demands now. Some of those demands that we are asking the department to pay for with Sportsmen's dollars really have a more statewide impact, such as management of wolves and the Rex Rammell situation. He said he would

also be interested in hearing the Board's vision as to how (the committee) needs to handle the finances in order to meet the demands made on the department. Another area he has concerns with is that other states have done some things to address 'Access'. Idaho has the 'Access Yes' program, but he wondered if there was a way to move the discussion along in order to maintain and/or improve access to the public on state and federal lands.

The Chairman then turned the meeting to Director Groen. The Director said the Board members take their job seriously and provide the policy for Fish and Game. With regards to the 'Access Yes' program, they have opened up about one-half million acres and wished they had more. In Northern Idaho, a survey indicated that about half of the users do not have hunting or fishing licenses. On a trail head of Fish and Game land (locally), a sensor indicated that 14,000 hikers were using it, and very few had hunting or fishing licenses. This is one of the things that the department is struggling with and needs help and support. Director Groen said they are working on some options. He then said that he wished to recognize Ms. Sharon Kiefer, Legislative Liaison, and Virgil Moore, Deputy Director, who are in the audience.

He then introduced Cameron Wheeler who will talk about the Ad Hoc Committee.

Commissioner Wheeler said he was appreciative to serve on the Ad Hoc Committee. He said they are hopeful and very optimistic about situations with the department. One of the things he said that he felt strongly about was land access and what it takes for land legacy. They realize it takes money and they are working on that issue. He also feels the Commission does not have any desire in joining any national organizations, as the department has enough problems.

A question was asked regarding a land exchange with the state. Mr. Wheeler said the exchange he was familiar with was the exchange with Craig Mountain. The exchange was based on the way they grazed and there was equal value; a trade of convenience for management purposes only.

Another question was concerning the Big Horn sheep versus domestic sheep in Hells Canyon. Mr. Wheeler said he doesn't have an answer to that specific question, but they are putting together a plan for the long term, and asking for guidance from the Governor's Office. This issue is being treated as a high priority.

Commissioner Wright reported on the Murphy Complex fire and fire rehabilitation. He said the fire had a huge economic impact on a lot of ranchers. One sheep rancher will be decreasing the number of sheep he puts on the range by two to three bands. Another rancher lost 12 quarter horses that burned to death. The Commission feels honored that the Director, at the request of the Governor, lead the efforts for rehab on the Murphy Complex fire. He also wanted to publically commend and thank all the volunteers for assisting in gathering 3,500 pounds of sage brush seed. As a result, re-seeding has already begun. They plan to seed

300,000 acres. The remaining 650,000 acres that were burned will be seeded with wildlife grasses, which include five different grasses. He feels the effort is going well, but there is much work left to do. They are looking at ways to prevent this from happening again. As Commissioners, Mr. Wheeler feels they are supposed to be managers. As far as science and research might interlace with that - good management depends on good science and good research.

Senator Little inquired about the kind of seed planted - soil type, elevation, aspect, etc. He also was concerned about sage brush seed not being genetically inclined to survive on the site where it was planted. Senator Little expressed concern about hasty seeding after a fire and inquired about research that the department has done. Dr. Wright said he feels the Committee would have been impressed if they had been at the Lucky Peak Nursery this morning with the Board members. All of the sage brush seed is segregated, is regional specific, and will be replanted in those areas where it came from.

Speaking next was Commissioner McDermott. Referring back to the discussion of sage brush seed, he said there are two million seeds in a one pound packet. The topic he was given for review was the Farragut Shooting Range and what has occurred there during the past year. There is a group called CARE (Citizens Against Range Expansion) living along the northern boundary of the range road. They filed a lawsuit in 2006 to stop Fish and Game's plan to improve and expand the range. The Judge made a decision in 2007 and imposed severe restrictions. (1) No rounds would leave the range; (2) The noise decibel level cannot exceed 55 decibels; and (3) Restricted 'users days' to 500 days per year. A 'user day' is one shooter, one day, one round. The Department purchased the land in 1950 and it consisted of 3,850 acres. In 1964, 2,500 acres was transferred to the federal government and through negotiations by the Department of Parks and Recreation, they now own it. There are two portions - Farragut Wildlife Management Area and the Farragut State Park. The shooting range is on the north side and is co-managed by Parks and Rec. User groups of the range include individual citizens, Boy Scout troops, hunter education, agency clinics, law enforcement officers, as well as some military training. Mr. McDermott said in the past, 'user days' averaged about 2,000 'user days' per year. The Commission would like to increase it to 3,000 and they plan to petition the Judge.

Commissioner Trevey, who is yet to be confirmed, said he lives in Idaho by choice and his background is in natural resource management. His interest is in the future of natural resources, mainly because of his dedication to his grandchildren. He gave a synopsis of the elk situation in the Clearwater Region. He said most of the land is in the national forest. 1996-97 were tough winters and with previous fires, the habitat has been assessed and they are trying to re-energize the habitat issue. He said the good news is they have a good forecast for spring chinook. It is an important economic activity for that area and they are looking forward to it. As to his thoughts about what hunting means to him, Mr. Trevey said that as a youngster, it was more about keeping score. However, his mother depended on him to provide meat for their home. Through the

years, he said he has enjoyed hunting, but now he is eager to teach his grandson to learn to appreciate the outdoors and to match wits with a "critter".

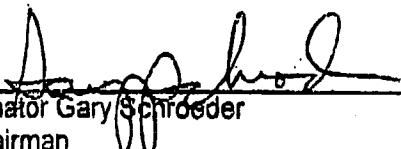
Commissioner Barowsky reported on ATVs (all terrain vehicles). He said officers are spending about one-third of their time searching for ATVs who go off-road. They create problems by getting off designated trails, tear up hillsides, and do damage, including watershed. These areas are problematic and on state lands, they have to be enforced. He said they are working with Parks and Rec, as a joint effort, to put together designated trails for the use of these vehicles. There are over 100,000 ATVs in the state and the trails should include scenic routes and other points of interest, not just a secondary route. Mr. Barowsky said they will have a joint proposal to bring before the Legislature at a future date. **Senator Stennett** inquired about the ATV trail at Challis. Mr. Barowsky said he didn't know anything about that trail. Chairman Schroeder suggested that an inquiry be made to the Parks Department, as they are the lead agency for that trail.

The last Commissioner to speak was **Commissioner Gary Power**. He said his assignment was to talk about wolves, but that subject had been covered last week. He said in answer to the Chairman's question as to what hunting meant to him, he said that he started following his dad when he was 10 years old and it was primarily a meat proposition. He spent most of his time outside, enjoying natural experiences, and hopes to pass that on. The latest survey shows that most Idahoans want to hunt every year and they would like to get bigger bucks. He feels that we are blessed now. With regards to management and research, there has been a shift within the department, and research should be geared toward management. **Chairman Schroeder** asked Mr. Power where are they (the Commission) going to find the money to manage wolves. Mr. Power said the management plan is over a five year period and there would also be money from tag sales. The Advisory committee is also working on issues regarding depredation.


That concluded the reports from the Commissioners. Chairman Schroeder then allowed time for the committee to ask questions of any Commissioner.

ADJOURN:

Chairman Schroeder thanked Director Groen and the Commissioners for their presentation. He then adjourned the meeting at 2:55 p.m.



Senator Gary Schroeder
Chairman



Juanita Budell
Secretary

FILED 3-11-11

AT 8:00 O'Clock A, M
CLERK OF DISTRICT COURT

Janne Clausen
Deputy

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

CITIZENS AGAINST RANGE EXPANSION,)
et al,)

Plaintiff,)

vs.)

IDAHO DEPARTMENT OF FISH AND)
GAME, an agency of the STATE OF)
IDAHO, et al.,)

Defendant.)

Case No. **CV 2005 6253**

**MEMORANDUM DECISION AND
ORDER ON MOTIONS TO STRIKE,
DEFENDANT'S MOTION FOR VIEW,
DEFENDANT'S MOTION PARTIAL
LIFTING OF INJUNCTION AND
PLAINTIFF'S MOTION FOR
SUMMARY JUDGMENT; and
ORDER SCHEDULING COURT
TRIAL**

I. FACTUAL BACKGROUND.

This case is before this Court on a variety of motions by each party. At the heart of the present controversy is Idaho Department of Fish and Game's (IDFG) claim that the Idaho Outdoor Sport Shooting Range Act solves the "noise" concerns set forth in this Court's February 23, 2007, Memorandum Decision, Findings of Fact, Conclusions of Law and Order, and Citizens Against Range Expansion's (CARE) claim that the Idaho Outdoor Sport Shooting Range Act is unconstitutional. This Court finds the Idaho Outdoor Sport Shooting Range Act violates Idaho State Constitution Article III, Section 19, and its prohibition against "special laws" contained therein.

The Farragut Wildlife Management Area was formerly the site of the Farragut Naval Training Center established by the United States Navy in 1942. Land began being acquisitioned by the IDFG in 1949, when four separate parcels bordering Lake

Pend Oreille were purchased. IDFG's ownership at Farragut Park presently consists of approximately 1,413 acres. This is made up of four parcels totaling 157 acres on the shore of Lake Pend Oreille and one 1,256-acre parcel located west of Bayview, Idaho. The Farragut Shooting Range occupies a site of approximately 160 acres and has been used as a shooting range since the land was owned by the United States Navy. The surrounding neighborhood consists of private residential houses, a public road (Perimeter Drive), school bus stops and hiking trails.

The use of the Farragut Shooting Range has expanded a great deal since 2002. Use went from 176 shooters in 2002, to 370 shooters in 2004, to 509 in 2005 only through August of that year. Plaintiffs' Brief in Support of Motion for Summary Judgment, p. 25, n. 2.

A public proposal for the improvement of the Farragut Shooting Range made by the IDFG seems to be what precipitated this lawsuit. In 2004, the IDFG published a proposal to improve the Farragut Shooting Range with the investment of \$3,600,000. That proposal was based on the Vargas Master Plan. The Vargas Master Plan proposed making improvements to the Farragut Shooting Range in the areas of public safety, public access, noise mitigation, facility quality and management.

Plaintiff CARE is an unincorporated non-profit association formed for the purpose of stemming unwarranted expansion of the Farragut Shooting Range (Complaint, p. 2, ¶ 1), and the individual plaintiffs who live near the Farragut Shooting Range. CARE claims these expansions cannot be done safely because the IDFG does not own enough property nor have enough money to make these improvements safe. CARE seeks to enjoin IDFG from carrying out the Vargas Master Plan. CARE claims that although the plan purports to make improvements to the shooting range, the plan

will also expand the shooting range by lengthening the range from 500 to 600 yards, adding berms, parking and intermediate firing positions, and including trap and skeet fields, mounted cowboy action areas, and 130 shooting stations.

IDFG claims there is no plan to *expand* the Farragut Shooting Range, either in geographic size, shooter capacity, or types of shooting activity, but only to *improve* it.

In 1996, Clark Vargas, a professional engineer, published a paper for the 1996 Third National Shooting Range Symposium, which was intended to provide a general review of range design criteria when selecting a shooting range site. This paper set forth nationally-recognized safety standards for construction and operation of shooting ranges. The Vargas Master Plan is inconsistent with the range design criteria Vargas discussed in his 1996 Third Shooting Range Symposium.

II. PROCEDURAL BACKGROUND.

On August 22, 2005, plaintiff CARE filed its Complaint in this matter. Defendant IDFG filed an Answer on September 16, 2005. On November 9, 2005, this Court set the matter for a five-day jury trial scheduled to begin on July 17, 2006. On February 9, 2006, CARE filed an Amended Complaint. On March 13, 2006, this Court, pursuant to the parties' stipulation, vacated the July 17, 2006, trial and scheduled this for a jury trial beginning September 18, 2006. Following a hearing on June 2, 2006, this Court granted CARE's motion to vacate the trial date of September 18, 2006, and scheduled this matter for jury trial beginning December 11, 2006.

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

1. For a permanent injunction prohibiting defendant Idaho Fish and Game Department, its agents and employees from operating or allowing anyone to use the existing Farragut Shooting Range as a shooting range in its present condition.

2. For a permanent injunction prohibiting defendant Idaho Fish and Game Department, its agents and employees from any further action to implement or carry out the Vargas Master Plan and Definitive Drawings, Farragut Shooting Range, July 2004.

Motion for Summary Judgment, p. 2. CARE sought summary judgment, asking this court to permanently enjoin the IDFG from continued operation of the range and future implementation of the Vargas Master Plan. Specifically, CARE asked this Court in their first cause of action for a permanent injunction that requires IDFG to restore and close the outer access gate, prohibit any other or different access road to the range and restore the operational policy that existed in July of 2003. CARE's second cause of action asked the Court for a permanent injunction against any expansion to the shooting range and restoring it to its July 2003 operations. CARE at the time asserted that if summary judgment were entered in the first two causes of action, CARE would stipulate to a dismissal of all claims for damages and would dismiss with prejudice their third, fourth and fifth causes of action.

Briefing was submitted by both sides. Additionally, the Court considered: "Plaintiffs' Statement of Material Facts Not in Dispute", "Plaintiffs' Appendix of Relevant Publications in Support of Motion for Summary Judgment", Affidavits of Marcelle Richman, Duane Nightengale and Roy H. Ruel; "Defendants' Statement of Material Facts in Dispute", "Defendants' Appendix of Relevant Documents" and affidavits of Clark Vargas, P.E., Randall Butt and David Leptich. On September 5, 2006, CARE filed "Plaintiffs' Reply Brief in Support of Motion for Summary Judgment" and various certifications of documents. On September 7, 2006, CARE re-filed "Plaintiffs' Reply Brief in Support of Motion for Summary Judgment", this time attaching a "Comparison Vargas Affidavit With Vargas Design Criteria".

Oral argument on CARE's Motion for Summary Judgment was held on September

13, 2006. That motion was taken under advisement. CARE had also filed a Motion to Strike the Affidavit of David Leptich to the extent it included the Range Evaluation Report prepared by Edward M. Santos. The Court granted the motion as it was hearsay. At oral argument on September 13, 2006, IDFG's attorney tendered to the Court for filing the Affidavit of Edward M. Santos, attaching his Range Evaluation Report. CARE objected as to the timeliness of Santos' affidavit. The Court in its discretion overruled CARE's objection as to timeliness, as the parties had been aware of the Range Evaluation Report for some time.

On September 19, 2006, this Court denied CARE's Motion for Summary Judgment, and ordered the parties to submit simultaneous briefing on the issues of: the applicable standard(s), the legal or factual nature of the standards, and what the Court and jury must decide at trial. Memorandum Decision and Order Denying Plaintiffs' Motion for Summary Judgment, and Order Setting Briefing Schedule, pp. 14-15. That briefing was submitted.

On February 23, 2007, this Court issued its sixty-page Memorandum Decision, Findings of Fact, Conclusions of Law and Order. In that decision, this Court stated:

IT IS HEREBY ORDERED plaintiffs are entitled to an injunction ordering defendants Idaho Department of Fish and Game and Director Steven M. Huffaker to close the Farragut Wildlife Management Area to all persons with pistols, rifles and firearms using or intending to use live ammunition until a baffle is installed over every firing position. The baffle must be placed and be of sufficient size that the shooter, in any position (standing, kneeling, prone), cannot fire his or her weapon above the berm behind the target. Once baffles are installed and either 1) plaintiffs agree that the shooter in any position cannot fire a round above the berm behind the target, or 2) if the plaintiffs cannot agree, the Court so finds after a view of the premises, the injunction will be lifted, and IDF&G may operate that range in the same manner in which it historically has (ie., without any on site supervision), up to 500 shooters per year. Once IDF&G has realized that number in a given year, it must close the range for the remainder of that calendar year.

IT IS FURTHER ORDERED the Idaho Department of Fish and Game is free to seek any funding it wishes. The Idaho Department of Fish and Game is free to build any improvements upon its property. However, use levels will remain capped at 500 shooters per year unless the following two concerns have been adequately addressed: **1) Safety:** include safety measures adequate to **prevent** bullet escapement beyond the boundaries owned and controlled by IDF&G, and **2) Noise:** include noise abatement measures to reduce noise to a decibel level agreed upon by the parties in the first instance, or, if the parties are unable to agree, to be set by the Court following further evidence. Even if the solution to these two concerns are agreed upon by the parties, in order to close this case IDF&G will need to obtain an order from the Court to exceed 500 shooters per year. The first concern (safety) can be satisfied only by the "No Blue Sky" rule, or "totally baffled...so that a round cannot escape", as espoused by the nation's preeminent authority on range design and designer of the Vargas Master Plan, Clark Vargas. Exhibit 2, p. 5. Once bullet containment is achieved, it matters not for purposes of this litigation if the range is supervised (with bullet containment, supervision would only inure to the benefit of the participants, an important consideration, but not the subject of this lawsuit). The second concern (noise) is a function of the number of shooters (per year or per day) and peak decibel level. For example, it may be that 500 shooters per year in an unmitigated range producing 65 decibels is less desirable than 50,000 shooters per year from a range that only produces 30 decibels. It would seem logical for the parties to agree as to noise levels and shooter numbers in advance of any construction, but it is not the Court's place to force such agreement in advance. If the parties in the future cannot agree as to noise levels and maximum shooter numbers, the Court will make that determination with additional evidence. If IDF&G makes improvements but does not successfully address safety and noise concerns, IDF&G will not be allowed to exceed 500 shooters per year.

Memorandum Decision, Findings of Fact, Conclusions of Law and Order, pp. 61-62 (emphasis in original). No appeal was taken from that order.

Since 2007, IDFG has made changes to the Farragut Shooting Range. IDFG now requests the Court lift the February 23, 2007, injunction "as it applies to the renovated 100-yard portion of the Farragut Range and, as to noise abatement, adopt the noise standard of the Idaho Sport Shooting Range Act, codified at Idaho Code §§ 67-9101 to 67-9105, as the standard applicable to operation of the Farragut Shooting Range." Brief in Support of Motion for Partial Lifting of Injunction, p. 12.

On September 16, 2010, the parties submitted a Joint Case Management Plan, and this Court entered its Order on the Joint Case Management Plan on September 17, 2010. The Plan set forth discovery deadlines along with the timeline within which the parties are to file briefs in support of or opposition to the partial lifting of the injunction.

On December 12, 2010, IDFG filed its Brief in Support of Summary Disposition of Defendants' Motion for Partial Lifting of Injunction. Along with the brief, IDFG filed a Statement of Undisputed Facts and the Affidavits of David Leptich, Kerry O'Neal, and Jon Whipple. On December 20, 2010, CARE filed its Motion to Strike the Affidavits of Jon Whipple and Kerry O'Neal, and a Motion to Strike the Testimony of Kerry O'Neal Based on Lack of Expertise and Lack of Foundation. IDFG filed its memoranda opposing both motions, supported by the Affidavit of Kathleen Trever, on January 3, 2010. Oral argument on these motions was held on January 11, 2011. Following that hearing, this Court took these motions under advisement.

Hearing on IDFG's Motion to Strike Affidavit of James Caulder, IDFG's Motion for Summary Disposition of Motion for Partial Lifting of Injunction, and IDFG's Motion for View, as well as CARE's Motion for Summary Judgment were all held on February 14, 2011. Following that hearing, this Court took those motions under advisement as well.

III. CARE'S MOTIONS TO STRIKE.

A. Introduction.

This matter is before the Court on IDFG's motion for Partial Lifting of Injunction. Before that issue is discussed, the Court must make evidentiary rulings.

On December 20, 2010, CARE filed "Plaintiff's Motion to Strike Testimony of Kerry O'Neal Based on Lack of Expertise and Lack of Foundation", and "Plaintiff's Motion to Strike the December 9, 2010 Affidavits of Jon Whipple and Kerry O'Neal".

The briefing on these motions was contained within the motions. On December 27, 2010, CARE filed the "Affidavit of Harvey Richman", which had attached deposition transcripts of Jim Caulder and Kerry O'Neal. On January 3, 2011, IDFG filed "Defendants' Memorandum in Opposition to Plaintiff's Motion to Strike Affidavits of Jon Whipple and Kerry O'Neal", "Defendants' Memorandum in Opposition to Plaintiff's Motion to Strike Affidavit of Kerry O'Neal Based on Lack of expertise and Lack of Foundation", and the "Affidavit of Kathleen Trever in Opposition to Motion to Strike Affidavits of Jon Whipple and Kerry O'Neal and Motion to Strike Affidavit of Kerry O'Neal." On January 7, 2011, CARE filed its "Consolidated Reply Brief of Plaintiffs to Motions to Strike."

B. Standard of Review.

When considering evidence presented in support of or opposition to a motion for summary judgment, a court can only consider material which would be admissible at trial. *Gem State Ins. Co. v. Hutchinson*, 145 Idaho 10, 13, 175 P.3d 172, 175 (2007), citing *Petricevich v. Salmon River Canal, Co.*, 92 Idaho 865, 869, 452 P.2d 362, 366 (1969). If the admissibility of evidence presented in support of a motion for summary judgment is raised by objection by one of the parties, the court must first make a threshold determination as to the admissibility of the evidence "before proceeding to the ultimate issue, whether summary judgment is appropriate. *Id.*, citing *Bromley v. Garey*, 132 Idaho 807, 811, 979 P.2d 1165, 1169 (1999), quoting *Ryan v. Beisner*, 123 Idaho 42 45, 844 P.2d 24, 27 (Ct.App. 1992).

The admissibility of evidence contained in affidavits and depositions in support of or in opposition to a motion for summary judgment is a threshold question to be answered before applying the liberal construction and reasonable inferences rule to determine whether the evidence is sufficient to create a genuine issue for trial. *Gem State Ins. Co. v. Hutchinson*, 145 Idaho 10, 13, 175 P.3d 172, 175 (2007) (citing

Carnell v. Barker Mgmt., Inc., 137 Idaho 322, 327, 48 P.3d 651, 656 (2002)). This Court applies the abuse of discretion standard when reviewing a trial court's determination of the admissibility of testimony in connection with a motion for summary judgment. *Id.*, at 15, 175 P.3d at 177. (citing *McDaniel v. Inland Northwest Renal Care Group-Idaho, LLC*, 144 Idaho 219, 221, 159 P.3d 856, 858 (2007)).

J-U-B Engineers, Inc. v. Security Ins. Co. of Hartford, 146 Idaho 311, 314-15, 193 P.3d 858, 861-62 (2008). Abuse of discretion involves a three-tiered inquiry by the appellate court, "to determine: (1) whether the lower court correctly perceived the issue as one of discretion; (2) whether the court acted within the boundaries of such discretion and consistently with any legal standards applicable to the specific choices before it; and (3) whether the court reached its decision by an exercise of reason. *Id.*, citing *Sun Valley Shopping Center, Inc. v. Idaho Power Co.*, 119 Idaho 87, 94, 803 P.2d 993, 1000 (1991).

C. Analysis.

In its motions to strike, CARE makes two arguments: (1) the testimony of Kerry O'Neal should be stricken because he is not an expert and his opinions are unsupported, and therefore lack foundation; and (2) the December 9, 2010, Affidavit of Kerry O'Neal and the Affidavit of Jon Whipple should be stricken as untimely under the parties' joint case management plan.

1. CARE'S Motion to Strike Affidavit of Kerry O'Neal Based on Lack of Expertise and Lack of Foundation.

CARE moves to strike the testimony of Kerry O'Neal, arguing "he is not qualified to speak as an expert and testimony elicited in his affidavits of June 6, 2009 and December 9, 2010 are without foundation." Motion to Strike Testimony of Kerry O'Neal Based on Lack of Expertise and Lack of Foundation, p. 2. CARE states O'Neal's affidavit shows no qualifications based on knowledge, skill, training or education; it

references experience alone. *Id.*, pp. 2-3. CARE criticizes O'Neal's experience as being "...self-taught, non-peer reviewed, not tested, and not in conformance with any recognized industry accepted reference books." *Id.*, p. 2. CARE notes O'Neal did not rely on professional standards or reference manuals in forming his opinion, and has failed to set forth the basis of his opinion as required by I.R.C.P. 26(b)(4)(A)(i). *Id.* CARE argues because O'Neal does not have a public works license for a project of the nature and scope at issue, he is "therefore not competent to even perform the services provided." *Id.*, p. 3.

In response, IDFG argues the language of Idaho Rule of Evidence 702 is disjunctive; therefore, an expert may be qualified by virtue of his knowledge, skill, experience, training, or education. IDFG quotes *Idaho Department of Health and Welfare v. Doe*, 235 P.3d 1195, 1198 (2010), for the propositions that formal training or a degree are not necessary to qualify a witness as an expert, and ultimately the question for the Court is whether the expert's knowledge will assist the trier of fact. Defendants' Memorandum in Opposition to Motion to Strike, p. 3. IDFG notes O'Neal's affidavit and *curriculum vita* properly address his extensive experience regarding the range industry and his personal observations of the Farragut Shooting Range, thus O'Neal is qualified as an expert and has laid the foundation for his opinion. *Id.* IDFG also argues CARE's criticism of O'Neal concerning his lack of a public works license is a misapplication of the statute because O'Neal was retained as a consultant and construction activities were performed by properly licensed contractors. *Id.*, p. 4.

IDFG's arguments are well-taken. Rule 702 reads:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

I.R.E. 702. The decision to permit or deny expert witness testimony is one left to the discretion of the Court. *J-U-B Engineers*, 146 Idaho 311, 314-15, 193 P.3d 858, 861-62. And, upon making that decision, the Court (as trier of fact at the summary judgment stage of proceedings) is also entitled to give such testimony the weight to which it deems such testimony is entitled. *Christensen v. Nelson*, 125 Idaho 663, 666, 873 P.2d 917, 920 (Ct.App. 1994) (“As a trier of fact, the district court was allowed to make the final decision on how much weight, if any, to give to an expert’s testimony. Provided that the trier of fact does not act arbitrarily, an expert’s opinion may be rejected even when uncontradicted. *Simpson v. Johnson*, 100 Idaho 357, 362, 597 P.2d 600, 605 (1979).”) A proper foundation for O’Neal’s opinions has been laid here. Idaho Rule of Evidence 703 permits the facts or data upon which an expert’s opinion are based to be “those perceived by or made known to the expert at or before the hearing.” I.R.E. 703. There is no dispute here that O’Neal perceived certain facts and data regarding the Farragut Shooting Range and formed his opinion from the facts and data he observed. To the extent O’Neal relies exclusively upon facts or data not “reasonably relied upon by experts in [his] particular field”, this Court may nonetheless admit his opinion testimony if it finds the probative value in assisting the trier of fact to evaluate O’Neal’s opinion substantially outweighs any prejudicial effect. I.R.E. 703. While the objections raised by CARE may go to the extent of the probative value of O’Neal’s affidavit, and thus the weight given by the Court to opinions contained in O’Neal’s affidavit, O’Neal’s opinion still has probative value. CARE has not articulated any prejudice which would result from the admission of O’Neal’s opinion.

At oral argument, the focus of CARE’s attorney turned to *Carnell v. Barker Management, Inc.*, 137 Idaho 322, 48 P.3d 651 (2002), a case not mentioned in either

side's briefing, for the proposition that the expert must explain his or her methodology, and a failure to explain that methodology makes that expert's opinion inadmissible. A review of *Carnell* shows that the "expert's" failure to explain his methodology was but one of several defects in that expert's affidavit (the most fatal according to the Idaho Supreme Court was the fact that this "expert" had never been *disclosed* as an expert) which resulted in the trial court's striking that expert's affidavit. That decision was upheld by the Idaho Supreme Court. The pertinent portion of *Carnell* reads:

The district court was cognizant of the fact that this Court has not adopted *Daubert*, and conducted a bare analysis of Bidstrup's second affidavit under I.R.E. 104 and 702. In its decision, the court first addressed whether Bidstrup was qualified as a fire causation and origin expert. Citing the lack of information in his affidavit concerning his education, training, and experience in the area of fire investigation, coupled with no mention of how Bidstrup gained his knowledge in fire causation, the district court found that Bidstrup was "unqualified to testify as to the cause, place of origin, or spread of fire...." The court next tried to determine if Bidstrup's testimony was based on "scientific, technical, or other specialized knowledge" as required by I.R.E. 702. The court found that other than the one sentence stating that fire burns towards fuel or oxygen, a common fact known by most lay people, there was no other explanation of the methodology Bidstrup used to determine the cause of the fire or exclude possible causes. The court also found that Bidstrup's testimony lacked factual foundation. Even though Bidstrup claimed to have reviewed the depositions in the case, his conclusions contradicted the testimony given in those depositions. The court also noted that much of Bidstrup's affidavit was nothing more than conclusions as to questions of law. Witnesses are not allowed to give opinions on questions of law; thus, the district court properly found that those conclusions were not admissible.

137 Idaho 322, 328, 48 P.3d 651, 657. This Court's reading of *Carnell* is that it does not *require* "methodology" be set forth, but "methodology" is certainly a factor to be considered by the trial court. In his affidavit, O'Neal sets forth his experience (he owns a business established to meet the service needs of the firing range industry including design and construction of new indoor and outdoor firing ranges, Affidavit of Kerry O'Neal, p. 2, ¶ 1, he has designed more than 100 municipality shooting range facilities,

Id., and he is familiar with the NRA Range Source Book and other range guidance documents, *Id.*, ¶ 4), and his foundation (he was retained by IDFG as a consultant for this range's improvements, *Id.*, ¶ 6, he has inspected the 100-yard shooting area, *Id.*, p. 3, ¶ 8, he has reviewed this Court's orders, *Id.*, p. 2, 4, ¶¶ 5, 18). Affidavit of Kerry O'Neal, pp. 2-4.

O'Neal claims:

Based on my experience and observation, the renovations at the 100-yard shooting area ensure that any rounds fired that hit and skip will be contained within the boundaries owned and controlled by IDFG.

Based on my inspection, experience and observation, it is my opinion that the improvements at the Farragut Shooting Range have satisfied the conditions for bullet containment set by the Court's Order to re-open the 100-yard portion of the range.

Id., p. 4, ¶¶ 22, 25. The Court agrees there is little methodology, but that goes to the issue of weight, not admissibility, at least in this case. O'Neal sets forth his expertise and foundation for his opinions. The lack of methodology, somewhat conclusory nature of his opinions, and the fact that his affidavit omits the exhibits he relied upon in making his opinion (they are not attached to the affidavit filed with the Clerk of Court) all go to the weight of his opinion.

Given that this matter is left to the discretion of the Court, both as to admissibility and weight of O'Neal's testimony, CARE's motion to strike O'Neal's affidavits in whole on the grounds of lack of expertise and lack of foundation is denied.

2. CARE's Motion to Strike the December 9, 2010, Affidavits of Jon Whipple and Kerry O'Neal.

CARE also moves to strike the December 9, 2010, Affidavits of Jon Whipple and Kerry O'Neal as untimely under the parties' joint case management plan. CARE states the parties stipulated to October 4, 2010, as the deadline for filing of expert witness

disclosures. Motion to Strike the December 9, 2010, Affidavits of Jon Whipple and Kerry O'Neal, p. 2. CARE states IDFG "provided little more than the names of the purported experts" and failed to set forth the basis for opinions as required by I.R.C.P. 26(b)(4)(A)(i). *Id.* As such, CARE was unable to "anticipate questions relative to any Defense expert..." and "could not and did not posit, to the Plaintiff's expert, any questions to traverse the opinions of defendants [sic] surprise expert Whipple or the new opinions of Mr. O'Neal..." *Id.* In response, IDFG argues neither the Court's Order on the parties' Joint Case Management Plan, nor the Joint Case Management plan itself required expert witness disclosure to include all of the information required by Rule 26(b)(4). Defendants' Memorandum in Opposition to Motion to Strike, p. 3. "Consistent with the Joint Case Management Order, IDFG disclosed the identity of its expert witnesses, the subject matter of the expert testimony, and the substance of the expert opinions"; IDFG states the opinions of both Whipple and O'Neal were disclosed in this manner. *Id.* IDFG goes on to note that CARE availed itself of the opportunity to depose O'Neal and to proffer an interrogatory directed at the information addressed by Rule 26(b)(4)(A)(i) as to Whipple. *Id.*, p. 4. Further, IDFG argues the Exhibit to Whipple's December 9, 2010, Affidavit had previously been provided to CARE on September 15, 2010. *Id.*

Idaho Rule of Civil Procedure 26(b)(4)(A)(i) identifies the facts known and opinions held by experts expected to testify which must be disclosed. That rule states such facts and opinions may be obtained by interrogatory and/or deposition, and include:

A complete statement of all opinions to be expressed and the basis and reasons therefore; the data or other information considered by the witness in forming the opinions; any qualifications of the witness, including a list of all publications authored by the witness in the

preceding ten years; the compensation to be paid for the testimony; and a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years.

I.R.C.P. 26(b)(4)(A)(i).

Here, the disclosure of the facts known by and opinions disclosed by Whipple were fully disclosed in response to CARE's Interrogatory No. 1 on December 1, 2010. Exhibit D to the Affidavit of Kathleen Trever, pp. 2-3. This discovery response set forth the underlying basis of Whipple's opinion in a manner much more thorough and complete than the Defendants' Disclosure of Experts regarding Whipple had been. No objection was made by CARE regarding the October 4, 2010, Defendants' Disclosure of Experts. October 4, 2010, was the date to which the parties stipulated expert witness disclosure would be due. Nor is there any evidence before the Court that CARE sought to depose Whipple, and was unable to do so because of insufficient disclosure by IDFG by the October 4, 2010, deadline. Further, as to O'Neal, the expert witness disclosure on October 4, 2010, was more thorough than that for Whipple. And, it is well within the Court's province to find that O'Neal's December 9, 2010, Affidavit is a supplementation of previously given discovery responses within the meaning of I.R.C.P. 26(e).

At oral argument, counsel for IDFG claimed counsel for CARE did not speak to the issue of "surprise", in CARE's argument, which is an accurate claim. In response, CARE's attorney mentioned *Carnell v. Barker Management, Inc.*, 137 Idaho 322, 48 P.3d 651, "only pertains to the issue of surprise." This Court has read *Carnell*, and while the defects in the affidavit in question in that case were numerous, surprise was not really an issue in *Carnell*.

CARE had the option of seeking information known to Whipple and O'Neal by deposition, interrogatory, or both. CARE opted to depose only O'Neal and to utilize

interrogatories more fully with regard to Whipple. However, this Court does not find that IDFG acted improperly in disclosing either their expert witnesses or the opinions of the individuals indentified.

D. Conclusion.

For the reasons set forth above, the Court denies both of CARE's Motions to Strike: Plaintiff's Motion to Strike Testimony of Kerry O'Neal Based on Lack of Expertise and Lack of Foundation, and Plaintiff's Motion to Strike the December 9, 2010, Affidavits of Jon Whipple and Kerry O'Neal.

IV. IDFG'S MOTION TO STRIKE AFFIDAVIT OF JAMES CAULDER.

A. Standard of Review.

The standard of review has been set forth above in this Court's discussion of CARE's Motions to Strike. The Court is mindful of that standard but will not reiterate such here in its discussion of IDFG's motion to strike.

B. Analysis.

On January 10, 2011, IDFG filed its "Motion to Strike and/or Exclude Testimony of James Caulder (CARE's expert)", which contained some briefing in support of that motion. On January 19, 2011, CARE responded to this issue in part of its brief entitled "Consolidated Reply Brief in Support of Plaintiff's Motion for Summary Judgment and Motion to Strike and/or Exclude Testimony of James Caulder." On January 24, 2011, IDFG filed "Defendant's Brief in Support of Motion to Strike." On January 28, 2011, CARE filed "Plaintiff's Reply to the Defendant's 24 January 2011 Brief in Support of Motion to Strike Testimony of James Caulder."

IDFG moves to strike the testimony of James Caulder (Caulder), arguing
Caulder:

...may demonstrate expertise regarding Air Force range standards. However, his testimony does not meet Idaho Rule of Evidence 702's requirement to demonstrate "knowledge, skill, experience, training, or education' as to the safety requirements for Farragut Range as established by the Court's February 23, 2007 Order."

Brief in Support of Motion to Strike, p. 2. IDFG argues Caulder's knowledge of Air Force safety criteria is sufficiently distinct from the criteria established by this Court such that his testimony would not assist the trier of fact within the meaning of I.R.E 702.

Id. IDFG argues there exists a fundamental difference between Air Force small arms range design standards and this Court's requirements regarding Farragut Range. *Id.*, p. 3. IDFG notes for the Court how problematic it is that Caulder "was unable to acknowledge differences" between Air Force standards and those set forth by this Court and "also does not demonstrate comprehension of the Court's criteria." *Id.*, p. 4, *et seq.* Caulder's discussion of Air Force criteria, 2007 drawings by Clark Vargas and NRA Sourcebook drawings, and on-range shooter safety is, according to IDFG, not relevant to the Court's February 23, 2007, Order and therefore would not assist the Court in evaluating IDFG's compliance with the Court's requirements for lifting the injunction. *Id.*, pp. 6-8. IDFG points out for the Court that its February 23, 2007, Order did not require containment of ricochet rounds within berms; the Court actually required the prevention of bullet escapement from IDFG's property. *Id.*, p. 7.

In its reply, CARE asserts that no expert for either party has suggested a difference exists between civilian and military ranges with regard to safety issues or the behavior of bullets fired. Plaintiff's Reply to the Defendant's 24 Jan. 2011, Brief in Support of Motion to Strike Testimony of James Caulder, p. 2. CARE argues Caulder's opinions are based upon his review of documentation provided by IDFG, pictures and video taken by the parties, his own engineering experience, and review of current

literature *inter alia*. *Id.*, pp. 3-4. CARE argues reference to Air Force standards was “not intended to be incorporated as the law applicable to Farragut, it is rather a standard to look to, to aid and assist in describing when bullets will escape the range and under what circumstances.” *Id.*, p. 4. CARE asserts Caulder’s opinion on the issue of ricochet bullets goes to the heart of the Court’s Order where such ricocheting bullets travel over the back berm and/or leave the property owned and controlled by IDFG. *Id.* CARE urges the Court to admit the testimony of Caulder as his methodology and resulting conclusions are helpful to the Court. *Id.*, p. 7

Again, the language of Idaho Rule of Evidence 702 is disjunctive; therefore, an expert may be qualified by virtue of his knowledge, skill, experience, training, or education; the ultimate question is whether the expert’s knowledge will assist the trier of fact. Rule 702 reads:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

I.R.E. 702. The decision to permit or deny expert witness testimony is one left to the discretion of the Court. *J-U-B Engineers*, 146 Idaho 311, 314-15, 193 P.3d 858, 861-62. And, again, upon making that decision, the Court (as trier of fact at the summary judgment stage of proceedings) is also entitled to give such testimony the weight to which it deems such testimony is entitled. *Christensen*, 125 Idaho 663, 666, 873 P.2d 917, 920; *Simpson*, 100 Idaho 357, 362, 597 P.2d 600, 605.

A proper foundation for Caulder’s opinions has been laid here. Idaho Rule of Evidence 703 permits the facts or data upon which an expert’s opinions are based to be “those perceived by or made known to the expert at or before the hearing.” I.R.E. 703. There is no dispute here that Caulder perceived certain facts and data regarding the

Farragut Shooting Range and formed his opinion from the facts and data he observed. Given that this matter is left to the discretion of the Court, both as to admissibility of and weight to be given to Caulder's testimony, IDFG's motion to strike Caulder's affidavit must be denied.

V. CARE'S MOTION TO STRIKE AMENDED AFFIDAVIT OF KERRY O'NEAL.

A. Standard of Review.

The standard of review has been set forth above in this Court's discussion of CARE's Motions to Strike, *supra*. The Court is mindful of that standard but will not reiterate such here in its discussion of CARE's motion to strike the *amended* affidavit of O'Neal.

B. Analysis.

On February 10, 2011, shortly before hearing on the motions before the Court, CARE filed a Motion to Strike and Objection to the Amended Affidavit of Kerry O'Neal. This motion was not noticed up for hearing. The Amended Affidavit of Kerry O'Neal was filed on February 4, 2011. CARE argues that the affidavit is untimely under summary judgment standards and that CARE is prejudiced by its inability to respond to an affidavit it received one week before hearing on the matter. Motion to Strike and Objection to the Amended Affidavit of Kerry O'Neal, Dated February 3, 2011, pp. 4-5. CARE goes on to list its individualized objections to the Amended Affidavit of Kerry O'Neal and clarifies that the motion is also supported by the arguments CARE made in support of its earlier motion to strike the affidavits of O'Neal and John Whipple. IDFG did not respond to this motion prior to the hearing on February 14, 2011.

Again, the decision to permit or deny expert witness testimony is one left to the discretion of the Court. *J-U-B Engineers*, 146 Idaho 311, 314-15, 193 P.3d 858, 861-

62. And, the weight, if any, to be given an expert's testimony is also well within the province of the Court. *Christensen*, 125 Idaho 663, 666, 873 P.2d 917, 920. CARE argues ¶ 14 of O'Neal's February 3, 2011, fails to comply with the Court's February 23, 2007, Order and, when taken in conjunction with ¶ 15, the hearsay in ¶ 15 makes ¶ 14 an "admission of non-compliance." Motion to Strike and Objection to the Amended Affidavit of Kerry O'Neal, Dated February 3, 2011, p. 5. O'Neal states in ¶ 14 that IDFG must maintain baffles as repeated strikes would eventually lead to penetration, and it is O'Neal's "understanding" that IDFG will conduct inspection and maintenance. Amended Affidavit of Kerry O'Neal, p. 3, ¶ 14. Paragraph 15 states O'Neal was informed no .50 caliber or greater rounds (along with armor-penetrating, incendiary, or tracer rounds) would be permitted at the range; this statement (likely not offered for the truth of the matter asserted) qualifies the first statement in ¶ 15 that, based on O'Neal's experience, baffles would not stop .50 caliber rounds. *Id.*, at ¶ 15. O'Neal testifies to the fact that baffles must be maintained and are more susceptible to penetration when certain large caliber bullets are used. Given there is no authority to strike testimony for "admission of non-compliance" (which would weigh in favor of CARE if present) and given that O'Neal being told .50 caliber rounds not being permitted is likely not offered for the truth of the matter asserted, there is no basis upon which to strike the paragraphs. CARE next takes issue with ¶ 20, stating it is at odds with IDFG's own evidence; it is CARE's contention that the term "downrange" contemplates more than merely "the designated impact area or a safe direction of fire" or "the intended impact area, which is the earthen backstop." Motion to Strike and Objection to the Amended Affidavit of Kerry O'Neal, Dated February 3, 2011, pp. 6-7, citing Amended Affidavit of Kerry O'Neal, p. 4, ¶ 20. CARE argues O'Neal's observation in ¶ 21 is fallacious and

made without a proper methodology. *Id.*, p. 7. O'Neal's testimony in ¶ 21 is that he made downrange observations from shooting positions at the 100-yard area and observed no blue sky from any position between prone to standing. Amended Affidavit of Kerry O'Neal, p. 4, ¶ 21. This statement is likely not an opinion without foundational basis in fact, but is rather an observation made based on facts perceived by O'Neal within the meaning of I.R.E. 703. CARE's problem with ¶¶ 23 and 24 is that while the Court has required zero bullet escapement, O'Neal discusses the possibility of bullets striking the floor of the range and then traveling over the berm. CARE's argument to strike these paragraphs is inapt; there is no support for the contention that testimony which does not support IDFG's ability to achieve zero bullet escapement must be stricken (and, in fact, this testimony likely weighs in favor of CARE's position).

Paragraph 26 is challenged on the basis of hearsay; the paragraph refers to Exhibits 4 and 5, which are copies of letters of reference. *Id.*, p. 8, citing Amended Affidavit of Kerry O'Neal, p. 4, ¶ 26. Because O'Neal does not testify he received these letters and has not provided affidavits authenticating these Exhibits from their authors, CARE's objection thereto is proper. CARE's objection to ¶ 27 is, again, that no proper methodology is set forth. Motion to Strike and Objection to the Amended Affidavit of Kerry O'Neal, Dated February 3, 2011, p. 8. But, no methodology need be set forth regarding O'Neal's mere statement that range projects with which he has been involved have been tested through actual operational use. Amended Affidavit of Kerry O'Neal, p. 4, ¶ 27. CARE challenges ¶ 28, a correction of previous deposition testimony that O'Neal's company had a public works license (when it in fact had an Idaho Contractor's Board license), as "cast[ing] a pall over the entirety of his testimony." Motion to Strike and Objection to the Amended Affidavit of Kerry O'Neal, Dated February 3, 2011, p. 8.

Again, the decision to admit expert testimony and the weight to be given to such testimony is a matter committed to this Court's discretion; correcting previous deposition testimony goes to the weight, not admissibility, of O'Neal's testimony. CARE challenges ¶¶ 29 and 30, regarding O'Neal's patented bullet containment system, are irrelevant; and ¶ 31 is an "unsubstantiated self-aggrandizing statement." O'Neal's testimony in this regard may more properly belong in his curriculum vitae, but certainly speaks to his expertise regarding ranges and bullet containment. The Court remains free to give the testimony the weight to which it feels it is entitled. Similarly, ¶¶ 32-34, which CARE argues are irrelevant, simply set forth O'Neal's experience. Contrary to CARE's contention, there is simply no requirement in I.R.E. 702 and 703 that an expert is not qualified "unless and until he has formalized training or peer review or researched outside his own zone of comfort or other similar expert basis..." Motion to Strike and Objection to the Amended Affidavit of Kerry O'Neal, Dated February 3, 2011, p. 9. Other than ¶ 26, and the attendant Exhibits 4 and 5, the Court denies CARE's motion to strike the Amended Affidavit of O'Neal. CARE has responded to the substance of the affidavit and, regardless of the untimeliness of the affidavit, has likely not been prejudiced by its filing. Nor has CARE set forth proper grounds for this Court to strike any portion of the Affidavit, save for ¶26, and the attendant Exhibits.

VI. DEFENDANT'S MOTION FOR COURT VIEW.

On January 24, 2011, IDFG moved the Court for a view of the 100-yard shooting area pursuant to both the Court's February 23, 2007, Order and I.R.C.P. 43(f). In its motion IDFG states, "Plaintiff's Counsel indicates that Plaintiffs oppose a view by the Court at this time." Motion for Court View, p. 2. IDFG states that "Because of the straightforward nature of this motion, IDFG submits this motion without additional

briefing.” The Court can understand why IDFG would consider its present request for a view to be “straightforward” because the Court years ago viewed the site, but only to gain general perspective of the location (the only reference this Court can find regarding the view was in its Memorandum Decision, Findings of Fact, Conclusions of Law and Order, pp. 22-23, Finding of Fact No. 30, where the Court stated: “The Court viewed the area. It is rural. During the day it was completely quiet. There is no reason to believe nighttime would be otherwise.”). Since the time of that first view, an Idaho Supreme Court case has issued which shows the motion for a view is far from straightforward. CARE did not file a pleading directly aimed at the motion for a view, but CARE stated its position in its brief in response to IDFG’s motion for partial lifting of the injunction:

Plaintiffs agree that the Court is entitled to and should view the premises, but only after the appropriate gathering of discovery and presentation of evidence which will permit the Court to enter an informed judgment.

Response to Motion for Partial Lifting of Injunction, p. 2.

A motion for court view is addressed to the sound discretion of the court. *Golden Condor, Inc. v. Bell*, 106 Idaho 280, 283, 678 P.2d 72, 75 (Ct.App. 1984). In *Golden Condor*, the Idaho Court of Appeals found no error in the district court’s denial of a motion to view the site where the issue was whether Golden Condor had performed certain required annual labor on disputed claims during the summer of 1978. *Id.* “The physical appearance of the site when the case was tried would have had little or no probative impact upon the annual labor question.” *Id.* The facts of this case are readily distinguishable from those in *Golden Condor*. While at first blush the physical appearance of the range (and the impact of improvements made by IDFG) may seem to have a probative impact on the question of whether or not the Court is to lift the injunction as requested by IDFG, ultimately, that is not the case.

The Idaho Supreme Court's opinion in *Akers v. Mortenson and D.L. White Construction, Inc.*, 147 Idaho 39, 205 P.3d 1175 (2009), was preceded by an opinion issued six months earlier on June 4, 2008. That decision, 2008 Opinion No. 68, can still be found on the Idaho Supreme Court's website as civil opinion no. 309, and was published as 08.12 ISCR 555. The earlier decision was particularly instructive on the issue of a court view. The published decision in 2009 inexplicably mentions not a word about the court view. This Court finds that even though the 2008 opinion was withdrawn, it at least shows the thinking of the Idaho Supreme Court in 2008 as pertains to a court view and the facts of that case, and its recitation of the law is controlling:

The district court relied upon its personal on-site view of the subject property to find certain facts relating to the scope of Appellants' prescriptive easement. This was error. * * *

The district court's finding that Appellants' prescriptive easement was 12.2 feet wide was based substantially on its view of the property. The district court specifically found that "[Appellants'] argument that the easement should be 25 feet wide is simply unsupported by the record and a view of the premises." Appellants argued that the easement should be 25 feet wide, including ditches and shoulders. The district court, however, found that: "The view and the exhibits show that not all of the length of the roadway has ditches on either or both sides, nor did the view show any consistent 'shoulders.'" We conclude that the district court's reliance on its site view was error. It is well established in Idaho that the knowledge obtained by a jury view of a premises can only be used to determine the weight and applicability of the evidence introduced at trial and that a view of the premises "is not of itself evidence upon which a verdict may be based." *Tyson Creek R.R. Co. v. Empire Mill Co.*, 31 Idaho 580, 590, 174 P. 1004, 1007 (1918). When construing a prior Idaho statute that permitted a jury to view the premises in question, this Court held: "The purpose of the statute is not to permit the taking of evidence out of court, but simply to permit the jury to view the place where the transaction is shown to have occurred, in order that they may the better understand the evidence that has been introduced." *State v. McClurg*, 50 Idaho 762, 796, 300 P. 898, 911 (1931)(quoting *State v. Main*, 37 Idaho 449, 459, 216 P. 731, 734 (1923)). Although these cases involve a viewing of the property by a jury, for purposes of appellate review, there is no analytical difference between a jury view and a court view. The policy underlying this rule of law is clear: the record must reflect the evidence upon which the finder of fact made its decision. This Court is simply unable to evaluate the basis of factual determinations

made upon the basis of a view.

The rules remained intact when this Court adopted the Idaho Rules of Civil Procedure in 1958. Under I.R.C.P. 43(f), during a trial, the court may order that the court or jury may view the property that is subject to the action. This Court addressed the substantive weight afforded to a court view in *Lobdell v. State ex rel. Bd. Of Highway Dir.*, a case involving an inverse condemnation. 89 Idaho 559, 407 P.2d 135 (1965). In *Lobdell*, after the judge had viewed the property in question, the district court granted an offset to the plaintiff for restoration of access to their property that had been limited by curbing constructed by the defendant. *Id.* At 563, 407 P.2d at 137. This Court held the district court erred when it entered findings based on the results of an examination of the premises and noted that an inspection of the premises is only useful to evaluate and apply the evidence submitted at trial. *Id.* at 567-68, 407 P.2d at 139-40.

Idaho is not alone in adhering to this rule: *Bd. Of Educ. Of Claymont Special Sch. Dist. V. 13 Acres of Land in Brandywine Hundred*, 131 A.2d 180 (Del. 1957); *Dade County v. Renedo*, 147 So.2d 313 (Fla. 1962); *Derrick v. Rabun County*, 129 S.E.2d 583 (Ga. 1963); *State v. Simerlein*, 325 N.E.2d 503 (Ind.App. 1975); *Guinn v. Iowa & St. L. R. Co.*, 109 N.W. 209 (Iowa 1096); *State v. Lee*, 63 P.2d 135 (Mont. 1936); *State by State Highway Comm'r v. Gorga*, 149 A.2d 266 (N.J. 1959); *Myra Found v. U.S.*, 267 F.2d 612 (8th Cir. 1959)(applying North Dakota law); *In re Appropriation of Worth*, 183 N.E.2d 159 (Ohio 1962); *Port of Newport v. Haydon*, 478 P.2d 445 (Or.App. 1970); *Durika v. Sch. Dist. Of Derry Twntship*, 203 A.2d 474 (Pa. 1964); *Ajootian v. Dir of Pub. Works*, 155 A.2d 244 (R.I. 1959)(stating rule in dicta only); *Townsend v. State*, 43 N.W.2d 458 (Wis. 1950).

08.12 ISCR 555, 556-57, 2008 Opinion No. 68, Idaho Supreme Court's website civil opinion no. 309, pp. 6-7. This Court is of the opinion that while it may make sense at first blush for this Court to have a view, no good can come from such. This is an expert intensive case. What really matters is whether a bullet can escape. A view is unlikely to be probative on that fact, and if it were probative, the Court shouldn't be looking at the site and having that view be part of its evidence taken. Neither party has explained how this Court's view of the premises could be used "to determine the weight and applicability of the evidence introduced at trial," the only legitimate reason for a view according to the Idaho Supreme Court. A view of the premises is an invitation to commit error. The motion for a view of the premises must be denied.

**VII. CROSS MOTIONS FOR SUMMARY JUDGMENT:
-CARE'S MOTION FOR SUMMARY JUDGMENT.
-IDFG'S MOTION TO LIFT PARTIAL INJUNCTION.**

A. Introduction.

Since this Court's February 23, 2007, decision, IDFG has made changes to the Farragut Shooting Range. On June 9, 2010, IDFG filed its Motion for Partial Lifting of Injunction and Brief in Support of Motion for Partial Lifting of Injunction. This motion is "partial" in that it only pertains to the 100-yard portion of the Farragut Range, and not the 50-yard range or the 200-yard range. IDFG requests the Court lift the February 23, 2007, injunction "as it applies to the renovated 100-yard portion of the Farragut Range, and, as to noise abatement, adopt the noise standard of the Idaho Sport Shooting Range Act, codified at Idaho Code §§ 67-9101 to 67-9105, as the standard applicable to operation of the Farragut Shooting Range." Brief in Support of Motion for Partial Lifting of Injunction, p. 12. The Idaho Sport Shooting Range Act, which went into effect on July 1, 2008, established noise standards for state outdoor shooting ranges.

On August 30, 2010, this Court held a scheduling conference and determined the parties should seek relief via the procedure applicable to motions for summary judgment. Thereafter, IDFG filed its motion for summary disposition of defendants' motion for partial lifting of injunction, and CARE, filed its brief supporting its cross motion for summary judgment.

On September 16, 2010, the parties submitted a Joint Case Management Plan and this Court entered its Order on the Joint Case Management Plan on September 17, 2010. The Plan set forth discovery deadlines along with the timeline within which the parties are to file briefs in support of or opposition to the partial lifting of the injunction.

On December 12, 2010, IDFG filed its Brief in Support of Summary Disposition

of Defendants' Motion for Partial Lifting of Injunction; along with the brief, IDFG filed a Statement of Undisputed Facts and the Affidavits of David Leptich, Kerry O'Neal, and Jon Whipple. Pertinent to these cross-motions for summary judgment are the motions made by both sides to strike the other side's expert witness affidavits and IDFG's motion for a view. As discussed above, those motions have been denied. Hearing on the motion for partial lifting of the injunction was held on February 14, 2011.

B. Standard of Review.

Idaho Rule of Civil Procedure 56 sets forth that, in considering a motion for summary judgment, the Court is mindful that summary judgment may properly be granted only where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. I.R.C.P. 56(c). In determining whether any issue of material fact exists, this court must construe all facts and inferences contained in the pleadings, depositions, and admissions, together with the affidavits, if any, in the light most favorable to the non-moving party. I.R.C.P. 56(c); *Sewell v. Neilson, Monroe Inc.*, 109 Idaho 192, 194, 706 P.2d 81, 83 (Ct. App. 1985). Summary judgment must be denied if reasonable persons could reach differing conclusions or draw conflicting inferences from the evidence. *Smith v. Meridian Joint School District No. 2*, 128 Idaho 714, 718, 918 P.2d 583, 587 (1996).

Where, as here, both parties file motions for summary judgment relying on the same facts, issues and theories, the judge, as trier of fact, may resolve conflicting inferences if the record reasonably supports the inferences. *Riverside Dev. Co. v. Ritchie*, 103 Idaho 515, 518-20, 650 P.2d 657, 661-62 (1982). Where both parties file motions for summary judgment relying on the same facts, issues and theories, the fact that both parties have filed summary judgment motions alone does not in itself establish

that there is no genuine issue of material fact. 103 Idaho 515, 518, 650 P.2d 657, 661, n. 1. This is so because by filing a motion for summary judgment a party concedes that no genuine issue of material fact exists under the theory that he is advancing, but does not thereby concede that no issues remain in the event that his adversary seeks summary judgment upon different issues of theories. *Id.*

In any case which will be tried to the court, rather than to a jury, the trial judge is not constrained to draw inferences in favor of the party opposing a motion for summary judgment, but instead, can arrive at the most probable inferences to be drawn from uncontroverted evidentiary facts. *Id.*

Regarding constitutionality, the Idaho Supreme Court has stated:

A challenge to the constitutionality of a statute is a question of law over which this Court exercises free review. *Lu Ranching Co. v. U.S.*, 138 Idaho 606, 608, 67 P.3d 85, 87 (2003). "The challenge must show the statute to be unconstitutional as a whole, without any valid application." *Id.* "When a constitutional challenge is made, every presumption is in favor of the constitutionality of the statute, and the burden of establishing the unconstitutionality of a statutory provision rests upon the challenger." *Osmunson v. State*, 135 Idaho 292, 294, 17 P.3d 236, 238 (2000).

Idaho Schools of Equal Educational Opportunity v. State of Idaho, 140 Idaho 586, 590, 97 P.3d 453, 457 (2004). (*ISSEO IV*).

C. Analysis of Cross-Motions for Summary Judgment.

1. Introduction.

On June 9, 2010, IDFG filed its initial Brief in Support of Motion for Partial Lifting of Injunction. IDFG first argued baffles had been installed over every firing position, resulting in shooters being unable to fire above the berms behind targets. Brief in Support of Motion for Partial Lifting of Injunction, p. 4. IDFG posited it had fulfilled the Court's requirements as to the 100-yard portion of the range for up to 500 shooters per year. *Id.*, p. 5. IDFG's second argument was that it had complied with the Court's

conditions regarding: (a) safety, by implementing the "No Blue Sky Rule" to the 100-yard range; and (b) noise concerns, by implementing the standard established in 2008 as part of the Idaho Sport Shooting Range Act. *Id.*, pp. 5 *et seq.*

In its response to IDFG's opening brief, CARE admitted that some improvements to the Farragut range had been made, but that the range had not been brought into compliance with the Court's Order. CARE also argued the Court's February 23, 2007, Order is subject to the principles of *res judicata*, issue preclusion, collateral estoppel, and estoppel by judgment, *inter alia*, and CARE emphasized its position that I.C. § 67-9101 *et seq.* (the Idaho Sport Shooting Range Act) is unconstitutional and therefore has no application to this case. Response to Motion for Partial Lifting of Injunction, p. 2.

IDFG argues CARE has failed to meet its burden regarding *res judicata*, an affirmative defense which CARE must prove by a preponderance of the evidence as to each essential element. Reply Brief in Support of Partial Lifting of Injunction, p. 3. IDFG goes on to argue that, because the Court left open the final determination of appropriate noise standards (leaving the same to an agreement of the parties or a determination by the Court following the taking of additional evidence), the noise issue had not been finally decided such that issue or claim preclusion would apply. *Id.*, p. 4. Finally, IDFG argues the Idaho Sport Shooting Range Act's adoption was a proper exercise of legislative power, does not implicate any protected class, does not punish or rise to the level of a bill of attainder, and applies to all persons and subject matter in like situations, therefore not operating as a prohibited special law. *Id.*, pp. 5-9.

/

/

/

2. Noise Abatement Issues and the Idaho Sport Shooting Range Act.

a. The Idaho Sport Shooting Range Act is a Prohibited "Special Law" and is Unconstitutional.

In its December 10, 2010, Brief in Support of Summary Disposition of Defendants' Motion for Partial Lifting of Injunction, IDFG asserts the Idaho Legislature in 2008 passed the Idaho Sport Shooting Range Act which established noise level requirements which had not been in existence at the time the Court entered its February 23, 2007, Order. IDFG states:

As to future operation of the Farragut Shooting Range, the February 23 Order has thus been superseded by the 2008 legislation. Prospective relief via injunction should only be given or continued under current law, not past law. *Landgraf v. USI Film Product*, 511 U.S. 244, 273-274 (1994) (finding "relief by injunction operates *in futuro*," and that the plaintiff had no 'vested right' in the decree entered by the trial court"; intervening statutes should be applied to prospective relief). The Court must now give effect to the 2007 Act's noise standard as set forth in Idaho Code § 67-9102.

Brief in Support of Motion for Partial Lifting of Injunction, p. 6. Idaho Code § 67-9102 is part of the Idaho Outdoor Sport Shooting Range Act, and reads:

State outdoor sport shooting ranges – Operation and use – Noise standards – Measurement. –

(1) The state agencies responsible for managing state outdoor sport shooting ranges shall establish criteria for the operation and use for each range. The provisions of chapter 26, title 55, Idaho Code, shall not apply to state outdoor sport shooting ranges.

(2) The legislature finds that state outdoor sport shooting ranges should be subject to uniform noise standards as specified in this section.

(3) The noise emitted from a state outdoor sport shooting range shall not exceed an Leq(h) of sixty-four (64) dBA.

Subsections (4), (5) and (6) explain the methodology used to arrive at the maximum 64 dBA. The Act also has a section which reads:

Preemption of local authority. – Local governmental law is herein preempted and local governments (defined in I.C. § as a "county, city or town") shall not have authority to regulate the operation and use of state outdoor sport shooting ranges nor shall they have authority to establish

noise standards for state outdoor sport shooting ranges.

I.C. § 67-9105.

In response, CARE argues this Court did, in fact, set forth the “level of, method, manner and place of measuring noise at Farragut”. Brief in Response to Defendants [sic] Summary Disposition of the Cause and Brief in Support of Plaintiff’s Motion for Summary Judgment, p. 13. CARE writes:

This Court’s Conclusion of Law was that the allowable maximum noise level was 55 dBA. That is the law of this case. Defendant Department did not appeal.

Id., p. 19. As discussed below, this claim by CARE is not accurate. CARE argues IDFG undertook to change the law (and succeeded) and argues this new statute allows for greater noise pollution emissions by utilizing a diluted noise measurement further diluted over time to reduce overall noise measurements. *Id.*, p. 15. CARE argues the Idaho Outdoor Sport Shooting Range Act is “special legislation” designed to only affect the outcome of the instant litigation. *Id.* CARE apparently makes this argument under Article III, § 19 of the Idaho Constitution, which provides: “The legislature shall not pass local or special laws in any of the following enumerated cases...” *Id.*, p. 18. CARE also makes this argument under Article V, § 13 of the Idaho Constitution, which specifies: “The legislature shall have no power to deprive the judicial department of any power or jurisdiction which rightly pertains to it as a coordinate department of the government.” *Id.*, p. 18. The Idaho Outdoor Sport Shooting Range Act applies only to state outdoor shooting ranges, of which there are two: the Farragut range and Black’s Creek range. CARE argues Black’s Creek’s down range is uninhabited desert land without any residents in earshot of the range. *Id.*, p. 16. [CARE also notes that, to the extent the Garden Valley and George Nourse shooting ranges are also state owned, they are also,

unlike Farragut, rural and “totally isolated from inhabited dwellings.” *Id.*, p. 16]. CARE argues the legislation was drafted in response to the underlying lawsuit in this matter, “altering the procedure of the existing lawsuit”, and affecting only the parties to this case, not a wide class of parties. *Id.*, p. 18 quoting *ISEEO v. State of Idaho*, 140 Idaho 586, 592, 97 P.3d 453, 459 (2004).

IDFG responds Article III, § 19 of the Idaho Constitution does not directly address regulation of shooting ranges or of noise in its prohibition of local or special laws. Defendants’ Reply Brief in Support of Summary Disposition of Motion for Partial Lifting of Injunction, pp. 4-5. IDFG posits the Idaho Sport Shooting Range Act is not “special”, i.e. arbitrary, capricious, or unreasonable, because its terms and provisions apply to and operate on all persons and subject matter in like situations. *Id.*, p. 5. IDFG points out that the legislature enacted other laws (Senate Bill 1441 and House Bill 604) in 2008 which also addressed sport shooting safety and noise; “[t]he 2008 legislature explicitly preempted establishment of outdoor shooting range noise standards more restrictive than those established by the Legislature, regardless of whether the outdoor sport shooting range is state-owned, law enforcement or private.” *Id.*, p. 7. [This is discussed by the Court at the end of this section of this opinion]. IDFG states the noise standards in the Idaho Outdoor Sport Shooting Range Act apply prospectively, do not retroactively legalize past violations by state agencies, and do not alter or amend noise standards established by Court order. *Id.*, 9.

First, the parties’ positions and history of this litigation must be analyzed. As mentioned above, CARE argues:

This Court’s Conclusion of Law was that the allowable maximum noise level was 55 dBA. That is the law of this case. Defendant Department did not appeal.

Brief in Response to Defendant's Summary Disposition of the Cause and Brief in Support of Plaintiff's Motion for Summary Judgment, p. 19. That statement is not accurate, but the Court appreciates it could have made the issue more clear. The only reference this Court made to a 55 dBA limit was in the following finding of fact:

30. The Court viewed the area. It is rural. During the day it was completely quiet. There is no reason to believe nighttime would be otherwise. The Court finds Nightingale credible that DNL should not be used in measuring noise levels at a gun range. In the rural community of Bayview, which has background ambient sound levels in the range of 25 dBA to 35 dBA, the acceptable sound pressure level at the private property line should not exceed 55 dBA, as measured with a certified sound measuring device with an IMPULSE filter. This finding is in accordance with the Shomer studies relied upon by Nightingale and the guidelines of the World Health Organization (WHO). Plaintiffs' Exhibit 16.

Memorandum Decision, Findings of Fact, Conclusions of Law and Order, pp. 22-23, Finding of Fact No. 30. In making that finding, the Court merely stated what "should" be an "acceptable" limit, given Nightingale's opinion: "In the rural community of Bayview, which has background ambient sound levels in the range of 25 dBA to 35 dBA, the acceptable sound pressure level at the private property line *should* not exceed 55 dBA, as measured with a certified sound measuring device with an IMPULSE filter." *Id.* (italics added). The Court made it clear in the following Conclusion of Law that the parties were to try to agree to a reasonable noise limit in the first instance, and then, absent such agreement, to return to the Court in the second instance:

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

500 shooters per year.

Id., p. 51, Conclusion of Law No. 9. That concept was reiterated in this Court's Order:

IT IS FURTHER ORDERED the Idaho Department of Fish and Game is free to seek any funding it wishes. The Idaho Department of Fish and Game is free to build any improvements upon its property. However, use levels will remain capped at 500 shooters per year unless the following two concerns have been adequately addressed: **1) Safety:** include safety measures adequate to **prevent** bullet escapement beyond the boundaries owned and controlled by IDF&G, and **2) Noise:** include noise abatement measures to reduce noise to a decibel level agreed upon by the parties in the first instance, or, if the parties are unable to agree, to be set by the Court following further evidence. Even if the solution to these two concerns are agreed upon by the parties, in order to close this case IDF&G will need to obtain an order from the Court to exceed 500 shooters per year. The first concern (safety) can be satisfied only by the "No Blue Sky" rule, or "totally baffled...so that a round cannot escape", as espoused by the nation's preeminent authority on range design and designer of the Vargas Master Plan, Clark Vargas. Exhibit 2, p. 5. Once bullet containment is achieved, it matters not for purposes of this litigation if the range is supervised (with bullet containment, supervision would only inure to the benefit of the participants, an important consideration, but not the subject of this lawsuit). The second concern (noise) is a function of the number of shooters (per year or per day) and peak decibel level. For example, it may be that 500 shooters per year in an unmitigated range producing 65 decibels is less desirable than 50,000 shooters per year from a range that only produces 30 decibels. It would seem logical for the parties to agree as to noise levels and shooter numbers in advance of any construction, but it is not the Court's place to force such agreement in advance. If the parties in the future cannot agree as to noise levels and maximum shooter numbers, the Court will make that determination with additional evidence. If IDF&G makes improvements but does not successfully address safety and noise concerns, IDF&G will not be allowed to exceed 500 shooters per year.

Id., Conclusion and Order, pp. 59-60. CARE's "law of the case" argument fails.

CARE's *res judicata*, issue preclusion, collateral estoppel and estoppel by judgment arguments likewise fail. The Court did not conclude that the allowable maximum noise level was 55 dBA. Again, the Court appreciates the misunderstanding the finding of fact in its 2007 opinion may have created. However, this Court finds the noise limit is still at issue.

Rather than follow this Court's directive that the parties were to try to agree to a reasonable noise limit in the first instance, and then, absent such agreement, to return to the Court in the second instance, IDFG chose another route...legislation in the 2008 legislative session. Certainly, nothing in this Court's 2007 order prohibited such a course of action. CARE now claims the way this course was pursued, the legislation passed is a "special law" and is unconstitutional.

In turning to the "special law" analysis, the Court is mindful that CARE faces the steep burden of overcoming the presumption that a statute is constitutional. The Idaho Supreme Court has stated:

There is a presumption in favor of the constitutionality of the challenged statute or regulation, and the burden of establishing that the statute or regulation is unconstitutional rests upon the challengers. An appellate court is obligated to seek an interpretation of a statute that upholds it [sic] constitutionality. The judicial power to declare legislative action unconstitutional should be exercised only in clear cases.

Am. Falls Reservoir Dist. No. 2 v. Idaho Dep't of Water Res., 143 Idaho 862, 869, 154 P.3d 433, 440 (2007) (internal citations omitted).

With that in mind, the Court turns its attention to the "special law" analysis. In this Court's February 23, 2007, sixty-page Memorandum Decision, Findings of Fact, Conclusions of Law and Order, this Court set up a specific protocol to address the noise issue in a civilized, organized manner. Since that time, the Idaho Legislature has passed House Bill 515, which became Idaho Code §67-9101, et.seq., Idaho Session Law §1, p. 233 (2008). The question this Court must now answer is whether the legislature in its adoption of the Idaho Outdoor Sport Shooting Range Act inappropriately passed a "special law" in violation of Article III, § 19, of the Idaho Constitution.

IDAHO CONST. Article III, § 19. Article III, § 19 reads:

Local and special laws prohibited. – The legislature shall not pass local or special laws in any of the following enumerated cases, that is to say:

* * *

For limitation of civil or criminal actions.

Although CARE in its briefing does not explicitly state which of the enumerated instances of Article III § 19 was purportedly violated, presumably CARE refers to the prohibition of “limitation of civil and criminal actions.”

In *Moon v. North Idaho Farmers Ass’n*, 140 Idaho 536, 96 P.3d 637 (2004), the Idaho Supreme Court distinguished between “special” laws and “local” laws:

A law “is not special when it treats all persons in similar situations alike.” *Sun Valley Co. v. City of Sun Valley*, 109 Idaho 424, 429, 708 P.2d 147, 152 (1985); *Twin Falls Clinic and Hospital Bldg. v. Hamill*, 103 Idaho 19, 26, 644 P.2d 341, 348 (1982). Nor is a law local “when it applies equally to all areas of the state.” *Sun Valley Co.*, 109 Idaho at 429, 708 P.2d 147; *School Dist. No. 25 v. State Tax Comm’n*, 101 Idaho 283, 291, 612 P.2d 126, 134 (1980). “A law is not special simply because it may have only a local application or apply only to a special class, if in fact it does apply to all such classes and all similar localities and to all belonging to the specified class to which the law is made applicable.” *Bd. of County Comm’rs of Lemhi County v. Swensen*, 80 Idaho 198, 201, 327 P.2d 361, 362 (1958), citing *Mix v. Bd. of Comm’rs*, 18 Idaho 695, 705, 112 P. 215 (1910).

140 Idaho 536, 546, 96 P.3d 637, 647. Thus, we now know a law is “special” when it fails to treat all persons in similar situations alike. We now know a law is “local” when it does not apply equally to all areas of the state. This part of *Moon* is fairly clear. The Idaho Supreme Court in *Moon* then immediately turned its attention to “test” to be applied to “special” laws, and the separate “test” to be applied to “local” laws. This portion of *Moon* is not as easily read. In *Moon*, the Idaho Supreme Court wrote:

The standard for determining whether a law is local or special was most recently set forth in *Concerned Taxpayers of Kootenai County v. Kootenai County*, 137 Idaho 496, 499, 50 P.3d 991, 994 (2002). The Court stated therein, “The test for determining whether a law is local or special is whether the classification is arbitrary, capricious, or unreasonable.” *Id.* at 499, 50 P.3d at 994. This enunciation of the test

was derived from *Sun Valley Co.*, 109 Idaho at 429, 708 P.2d 147, citing *Washington County v. Paradis*, 38 Idaho 364, 369, 222 P. 775, 777 (1923). A close reading of *Paradis*, however, indicates the source of the test as *Jones v. Power County*, 27 Idaho 656, 150 P. 35 (1915), where the Court said in discussing general and special laws:

A statute is general if its terms apply to, and its provisions operate upon, all persons and subject matters in like situation. (See DILLON ON MUNICIPAL CORPORATIONS, 5th ed., sec. 142.) The true test seems to be: Is the classification capricious, unreasonable or arbitrary?

Id. at 665, 150 P. at 37. Local and special laws are defined separately and apply to different situations. The *Jones* case applies the "capricious, unreasonable arbitrary" test to special laws not local laws. To the extent *Sun Valley Co. v. City of Sun Valley*, is said to apply to local laws, it is disavowed.

The district court in its memorandum decision rephrased the test for analyzing whether a law is local or special, when it stated: "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 at 499, 50 P.3d at 994, citing *Jones v. Bd. of Medicine*, 97 Idaho 859, 877, 555 P.2d 399, 417 (1976). This test also incorrectly links the local and special laws under the same test. In *Jones*, the court specifically held:

It has been indicated that the distinction between general and special legislation is that a law is general if "all persons subject to it are treated alike as to privileges, protection and in every other respect." *Wanke v. Ziebarth Const. Co.*, 69 Idaho 64, 202 P.2d 384, 393 (1948). Stated in other terms, "A statute is general if its terms apply to, and its provisions operate upon, all persons and subject-matter in like situation[s]." *Jones v. Power County*, 27 Idaho 656, 150 P. 35, 37 (1915); *In re Bottjer*, 45 Idaho 168, 260 P. 1095 (1927). "It is well settled that a law is not special in character 'if all persons subject to it are treated alike, under similar circumstances and conditions, in respect to both the privileges conferred and the liabilities imposed.'" *State v. Horn*, 27 Idaho 782, 793, 152 P. 275, 279 (1915). [Citations omitted.]

Clearly it is arguable at least that the Act in question here is special in that it selects from a class of persons otherwise subject to liability for their negligent acts, physicians and hospitals, and releases or extinguishes, in part at least, their otherwise liability contrary to the interdiction of special laws in Art. III, § 19.

140 Idaho 536, 546, 96 P.3d 637, 647, citing *Jones v. Bd. of Medicine*, 97 Idaho 859,

876-77, 555 P.2d 399, 416-17. Hats off to anyone who can read that in one sitting and then articulate the present test for what “special laws”, the present test for “local laws”, and what prior appellate precedent is abrogated.

To illustrate that this portion of *Moon* is not easily read, consider that the editorial board of West’s Publishing, had this to say in the editorial comments at the beginning of *Moon*:

(5) “capricious, unreasonable, arbitrary test applies to special laws, not local laws, abrogating *Concerned Taxpayers of Kootenai County v. Kootenai County*, 137 Idaho 496, 50 P.3d 991 [(2002)], *Sun Valley Co. v. City of Sun Valley*, 109 Idaho 424, 708 P.2d 147 [(1985)].

140 Idaho 536, 537, 96 P.3d 637, 638. The only problem is nowhere in *Moon* does the Idaho Supreme Court say that it is “abrogating” either *Concerned Taxpayers* or *Sun Valley Co.* The Idaho Supreme Court in *Moon* only stated: “To the extent *Sun Valley Co. v. City of Sun Valley*, is said to apply to local laws, it is disavowed.” This Court finds West’s editorial board mis-read this portion of *Moon*. West’s editorial board is correct that “capricious, unreasonable, arbitrary test applies to special laws, not local laws”, as set forth in *Moon*. Part of the difficulty in reading this portion of *Moon* is that the Idaho Supreme Court discusses two different *Jones* cases: 1) *Jones v. Power County*, 27 Idaho 656, 150 P. 35 (1915), to which the genesis of the “special laws” test is traced by the *Moon* Court, and 2) *Jones v. State Bd. of Medicine*, 97 Idaho 859, 555 P.2d 399 (1976), to which the *Moon* Court noted the district court in *Moon* had cited along with *Concerned Taxpayers*, but at least as to *Concerned Taxpayers*, the *Moon* Court stated the district court errantly relied upon *Concerned Taxpayers* because it “incorrectly links the local and special laws under the same test.” 140 Idaho 536, 546, 96 P.3d 637, 647. The end of the lengthy quote from *Moon* above, is a direct quote from *Jones v. State Bd. of Medicine*, and that quote does not indicate that *Jones v. State Bd. of Medicine*

“incorrectly link[ed] the local and special laws under the same test.”

The Idaho Supreme Court in *Moon* stated:

The *Jones [v. State Bd. of Medicine]* case applies the “capricious, unreasonable arbitrary” test to special laws not local laws. To the extent *Sun Valley Co. v. City of Sun Valley*, is said to apply to local laws, it is disavowed.

140 Idaho 536, 546, 96 P.3d 637, 647. To clarify, the Idaho Supreme Court said in analyzing a claim of “special laws”, the “capricious, unreasonable, arbitrary” test applies to special laws, **along with** the test that “all persons subject to it are [not] treated alike as to privileges, protection and in every other respect”. Implicitly, the Idaho Supreme Court seems to be saying the “capricious, unreasonable, arbitrary” test does not apply to a “local law” analysis.

A close reading of the above quote from *Moon* shows the following: First, the Idaho Supreme Court in *Moon* makes the observation that; “The standard for determining whether a law is local or special was most recently set forth in *Concerned Taxpayers of Kootenai County v. Kootenai County*, 137 Idaho 496, 499, 50 P.3d 991, 994 (2002)” and “The Court stated therein [in *Concerned Taxpayers*], ‘The test for determining whether a law is local or special is whether the classification is arbitrary, capricious, or unreasonable.’ *Id.* at 499, 50 P.3d at 994.” The underlined portion shows the key distinction which the Idaho Supreme Court *later* in *Moon* declares is error, but only as to “local law” analysis. The Idaho Supreme Court truly could have made this portion of *Moon* crystal clear if, after writing; “The standard for determining whether a law is local or special was most recently set forth in *Concerned Taxpayers...*”, the Idaho Supreme Court would have then written; “The tests for local legislation is different from the test for special legislation, and we, the Idaho Supreme Court, confused that fact in both *Concerned Taxpayers* and *Sun Valley Co.*” But they did not.

The Idaho Supreme Court was direct in stating the test used by the district court in *Moon* was erroneous when the Supreme Court wrote: "This test also incorrectly links the local and special laws under the same test." The Idaho Supreme Court was able to ignore the fact that the district court was applying the linked local and special law test that the Idaho Supreme Court itself had handed down in *Concerned Taxpayers and Sun Valley Co.* The Idaho Supreme Court was more oblique when turning the mirror on itself, as it wrote; "To the extent *Sun Valley Co. v. City of Sun Valley*, is said to apply to local laws, it is disavowed." 140 P. 2d Idaho 536, 546, 96 P.3d 637, 647. The Idaho Supreme Court could have just as easily written in *Moon*: "In two of our earlier decisions we errantly combined the test for local laws and for special laws, and in this case the district court committed error in relying those two earlier decisions, and to that extent *Concerned Taxpayers and Sun Valley Co.* are overruled as is the district court in this case."

So, what is the test for "special laws"? The Idaho Supreme Court in *Moon* stated the "capricious, unreasonable and arbitrary test" found in *Concerned Taxpayers* "was derived from *Sun Valley Co.*", which cited *Washington County v. Paradis*, 38 Idaho 364, 369, 222 P. 775, 777 (1923)", and "[a] close reading of *Paradis*, however, indicates the source of the test as *Jones v. Power County*, 27 Idaho 656, 150 P. 35 (1915), where the Court said in discussing general and special laws; "A statute is general if its terms apply to, and its provisions operate upon, all persons and subject matters in like situation." But then *Jones v. Power County*, as noted and quoted by the Idaho Supreme Court in *Moon*, after citing DILLON ON MUNICIPAL CORPORATIONS, states; "The true test seems to be: Is the classification capricious, unreasonable or arbitrary?" It is confusing because the Idaho Supreme Court starts out seeming to knock the "arbitrary,

capricious, or unreasonable” test, but then after tracing the roots back comes up with both that test and the test that it “operates upon all persons and subject matters in like situation.” A more condensed reading of the sequence is as follows, and at least allowed this Court to conclude the Idaho Supreme Court wants both tests to be used to determine if a statute is special legislation: The “arbitrary, capricious, or unreasonable test” most recently set forth in *Concerned Taxpayers*, was built on *Sun Valley Co.*, which was built on *Paradis*, but a close reading of *Paradis* shows the source of the test as *Jones v. Power Co.*, which has both the arbitrary, capricious or unreasonable test and the “operates upon all persons and subject matters in like situation” test. It takes a few readings of the *Moon* decision, but it is clear that the Idaho Supreme Court in *Moon* quotes from *Jones v. Power County* with complete approval. That portion of *Jones v. Power County*, quoted immediately above within *Moon*, only concerns the rule to be used to determine if legislation is constitutionally prohibited “special laws” or “special legislation” (this Court comes to that conclusion because nowhere in *Jones v. Power County* are “local laws” discussed). From that quoted portion of *Jones v. Power County* found in *Moon*, coupled with the extensive quote from *Jones v. Bd. of Medicine* found in *Moon* (which also only discusses “special legislation” and never discusses “local legislation”), it can be distilled that *the* feature of “special laws” or “special legislation” is: all persons subject to it are not treated alike as to privileges, protection and in every other respect (or, stated differently, *the* feature of “special laws” or “special legislation” is that: the statute does not apply to all persons and subject-matter in like situations) and, the legislation is “capricious, unreasonable or arbitrary” language is added to that test (under *Jones v. Power County*, as recognized in *Moon*).

The Idaho Supreme Court in *Moon*, citing *Jones v. Bd. of Medicine*, noted:

Clearly it is arguable at least that the Act in question here is special in that it selects from a class of persons otherwise subject to liability for their negligent acts, physicians and hospitals, and releases or extinguishes, in part at least, their otherwise liability contrary to the interdiction of special laws in Art. III, § 19.

140 Idaho 536, 546, 96 P.3d 637, 647. This is the “all persons subject to it are not treated alike as to privileges, protection and in every other respect” part of the test for “special laws.” While the Idaho Supreme Court found the former I.C. § 22-4803 (later repealed and now found in I.C. 39-114) in *Moon* was not a “local and a special law” as it applied to all farmers in the State of Idaho regardless of location of the farm and regardless of the crop grown, and immunized those farmers for burning their residue, the Idaho Supreme Court in *Jones v. State Bd. of Medicine* held the Hospital-Medical Liability Act which immunized physicians and acute care hospitals against malpractice actions over \$150,000, as noted by the Idaho Supreme Court in *Jones v. Bd. of Medicine*: “...is special in that it selects from a class of persons otherwise subject to liability for their negligent acts, physicians and hospitals, and releases or extinguishes, in part at least, their otherwise liability contrary to the interdiction of special laws in Art. III, § 19.”

That seeming incongruity may be explained by the fact that while the Idaho Supreme Court concluded that the field burning statute was not a local or special law (“We reverse the district court’s conclusion that the statute is a local and a special law”, 140 Idaho 536, 548, 96 P.3d 637, 649), it is clear from the analysis preceding that conclusion that the Idaho Supreme Court was analyzing the field burning statute in *Moon* under the “local law” standard, not the “special law” standard. This Court reaches that conclusion because: 1) the Idaho Supreme Court noted that the district court in *Moon* concluded there was “simply no proof that the legislature has singled out ‘persons

or corporations for preferred treatment” (140 Idaho 536, 547, 96 P.3d 637, 648), and 2) because the Idaho Supreme Court at the conclusion of that analysis held “...therefore, I.C. § 22-4803A(6) is not a local law.” 140 Idaho 536, 548, 96 P.3d 637, 649.

The Idaho Outdoor Sport Shooting Range Act itself, as conceded by CARE, applies equally to both Farragut range in Kootenai County and Black’s Creek range in Elmore County (and arguably the Garden Valley and Nourse ranges as well). This would be the “local law” analysis, which does not seem to be an issue in the present case. CARE argues it is problematic that the ranges subject to the Act, other than Farragut Range, are isolated and do not have adjacent private residences. However, the law itself does not operate to limit its applicability only to ranges within earshot of private residences. Also, as IDFG argues, Black’s Creek and Garden Valley ranges do have a small number of residences within a mile and further and are near private land with the potential for future development. Reply Brief in Support of Motion for Lifting of Injunction, p. 7, fn. 4.

In *Moon*, the Idaho Supreme Court reversed the district court’s conclusion that I.C. § 22-4803A was specific to the ten northern counties, and was thus, arbitrary, capricious, and unreasonable. 140 Idaho 536, 547, 96 P.3d 637, 648. Because the Idaho Supreme Court found that, despite some particularized reference to the ten northern counties including stricter requirements on Northern Idaho Counties in the statute, the statute applied to all Idaho counties, it reversed the district court’s conclusion that the statute was a special or local law. 140 Idaho 536, 548, 96 P.3d 637, 649. While the Idaho Supreme Court did reverse the district court’s conclusion that the field burning statute was a special or local law, the above discussion also shows the Idaho Supreme Court’s analysis was focused on the “local law” issue, not the “special

law” issue.

Similarly, in the instant matter, although the Idaho Outdoor Sport Shooting Range Act has specific impact upon the Farragut range, and the litigation before this Court was discussed and referred to by the legislature with regard to the Act, the Act applies equally to all state-owned shooting ranges in the State of Idaho. That is the analysis of the “local law” constitution prohibition, and again the Idaho Sport Shooting Range Act does not seem to run afoul of that “local law” constitutional provision.

But that is not the end of the inquiry. The Court must analyze whether the Idaho Sport Shooting Range Act is a “special law.” To establish the Idaho Outdoor Sport Shooting Range Act is a “special law”, CARE must demonstrate to this Court that Act “does not apply to all persons and subject-matter in like situations” and is “arbitrary, capricious or unreasonable.”

The parties have cited this Court to cases other than *Moon*. This Court will discuss each of these cases, and others, which interpret the prohibition of “special laws.”

In *Idaho Schools of Equal Educational Opportunity v. State of Idaho*, 140 Idaho 586, 592, 97 P.3d 453, 459 (2004) (*ISSEO IV*), the plaintiff Idaho Schools for Equal Education Opportunity (ISEEO) was an unincorporated association of school district superintendents of several Idaho public school districts and several parents of school children attending public schools in Idaho who brought suit against the State alleging the Idaho Legislature had failed to carry out its constitutionally mandated duty to provide “a general, uniform and thorough system of public, free common schools” as required by Article IX, § 1 of the Idaho Constitution. 140 Idaho 586, 588-89, 97 P.3d 453, 455-56. Over the course of a decade, that case resulted in several district court decisions which

made three trips to the Idaho Supreme Court. On remand from the third trip, the district judge found unconstitutional HB 403 from the 2003 legislative session, which established among other requirements: that the plaintiffs and the State sue school districts where unsafe school buildings exist; that venue for these suits would be changed to the judicial districts in which the defendant school districts lie; that the parties of the current case would be dismissed if they did not follow the procedures of HB 403; and that state district courts could impose an educational necessity levy to repair or replace unsafe school buildings. 140 Idaho 586, 589-90, 97 P.3d 453, 456-57. The appeal resulted in *ISSEO IV*, the 2004 Idaho Supreme Court decision. In that decision, the Idaho Supreme Court held:

A special law applies only to an individual or number of individuals out of a single class similarly situated and affected or to a special locality. A law is not special simply because it may have only a local application or apply only to a special class if, in fact, it does apply to all such cases and all similar localities and to all belonging to the specified class to which the law is made applicable. A statute is general and not special if its terms apply to and its provisions operate upon all persons and subject matters in like situations.

School Dist. No. 25, Bannock County v. State Tax Commission, 101 Idaho 283, 291, 612 P.2d 126, 134 (1980). "The test for determining whether a law is local or special is whether the classification is arbitrary, capricious, or unreasonable." *Concerned Taxpayers of Kootenai County v. Kootenai County*, 137 Idaho 496, 499, 50 P.3d 991, 994 (2002). In evaluating whether legislation passed by the Idaho Legislature was special or local, this Court has found that when the Legislature was pursuing a legitimate interest in protecting citizens of the state and the statute passed was not arbitrary, capricious, or unreasonable, then the law was not special. *Kirkland v. Blaine County Medical Center*, 134 Idaho 464, 470, 4 P.3d 1115, 1121 (2000).

140 Idaho 586, 591, 97 P.3d 453, 458. In the present case, it is difficult to see what "legitimate interest in protecting the citizens of the state" is accomplished by the Idaho Outdoor Sport Shooting Range Act. The Act preempts not only the people living

around a range from having any say in any amount of expansion of a state range. The Act also preempts any county from having any say in any amount of expansion of that state range. I.C. § 67-1905. Who is being “protected” by this Act? It certainly is not the citizens surrounding the Farragut range. It certainly is not the citizens of the State of Idaho. The Act protects the Idaho Department of Fish and Game. Certainly there is a noise standard being established, and that protects citizens, but the real focus of the Act is to immunize the “state”. In reality, since the Farragut Range is the only applicable range, the focus of the Act is to immunize IDFG for the Farragut Range expansion. That fact is made more unpalatable by the fact that it was the IDFG that created this expansion and thus, created this litigation because IDFG obtained a grant which would increase the use of this range several hundred-fold. IDFG created its own expansion and when confronted with the not unexpected reality that surrounding residents might be concerned, IDFG proposed to the legislature a bill which would set an arbitrary noise limit and forever immunize the IDFG for its actions in expanding the Farragut range.

IDFG argues: “Plaintiffs’ Response does not identify which provision of [the Act] would constitute unconstitutional ‘special law’...” Reply Brief in Support of Partial Lifting of Injunction, p. 8. *ISSEO IV* shows the analysis is not limited to the language of the Act, but encompasses the context in which the Act was discussed before and passed by the Idaho Legislature.

In *ISSEO IV*, the Idaho Legislature wore its feelings on its House Bill sleeve. House Bill 403 stated in section one:

The Legislature finds that over twelve years of litigation regarding Idaho's system of school funding has not productively used the state's resources to ensure that there is a general, uniform and thorough system of public, free common schools. Trial was held in the spring of 2000, but no final

judgment or appealable order has been issued and no findings of fact specifying which school districts are unable to provide safe and healthy school facilities under the current system of school financing have been issued. Current proceedings are likely to be even more protracted if a special master is appointed and there is further delay until final judgment, an appealable order, or findings of fact specifying which school districts are unable to provide safe and healthy school facilities under the current system of school financing have been issued. The Legislature therefore determines it can best exercise its constitutional duty to establish and maintain a general, uniform and thorough system of public, free common schools by altering the procedure of the existing lawsuit to bring it under the Constitutionally Based Educational Claims Act, which will allow the parties to focus on districts having the most serious health and safety problems, and to provide a remedy of an educational necessity levy as necessary to abate unsafe or unhealthy conditions.

140 Idaho 586, 592, 97 P.3d 453, 459. The Idaho Supreme Court made short work of finding this to be a "special law". The Idaho Supreme Court held:

Particular to these findings is the Legislature's indication that this bill was specifically drafted in response to the ISEEO lawsuit and that the bill was meant to apply to the ISEEO case by "altering the procedure of the existing lawsuit" by changing the language of the Constitutionally Based Educational Claims Act (CBECA) statutes. Section Three of the bill changes the wording of I.C. § 6-2215, which had previously excluded the ISEEO case from its application, to specifically include any case which had not reached final judgment at the effective date of the legislation; that could only mean the currently pending ISEEO case. Section Three also contains provisions that act to dismiss certain parties to the ISEEO suit and to redefine the defendants and plaintiffs in this litigation under new claims and causes of action. Section Three also establishes that venue for all such suits brought against the school districts pursuant to this law shall be brought in the judicial district where the school district is located.

From the above it is very clear that, though the State asserts on appeal the Legislature intended to create a general law applicable to a wide class of parties, the Legislature was in reality enacting special legislation directed specifically at the ISEEO case and particularly, the Plaintiffs and their cause of action against the Legislature. Though the State argues that HB 403 applies to all school districts equally, the language of the bill plainly states that it is meant to specifically apply to the current litigation. HB 403 is aimed at essentially disbanding the ISEEO case and restructuring it in a manner that destroys the Plaintiffs' cause of action against the Legislature. This is a special enactment designed only to affect one particular lawsuit and is clearly a special law in violation of Article III, § 19.

140 Idaho 586, 592, 97 P.3d 453, 459.

We also find HB 403 to be a special law pertaining to the practice of the courts aimed specifically at this lawsuit and these plaintiffs, and accordingly find that portion of HB 403 amending I.C. § 6-2215 of the Idaho Code is unconstitutional.

140 Idaho 586, 593, 97 P.3d 453, 460. In the present case, the Idaho Legislature seems to have learned from its mistake made public in *ISSEO IV* where it advertised its legislative response to a judicial action in the first paragraph of the bill, because the Idaho Legislature in the present case did not reference this lawsuit in the text of 2008 House Bill 515. While not boldly proclaiming its intent in the text of the actual legislation, the Legislative Record has been presented to the Court. It speaks for itself.

The Idaho Outdoor Sport Shooting Range Act appears to have started in Boise before the Idaho Legislature on January 15, 2008, when Tony McDermott, Idaho Fish & Game Commissioner from the Panhandle Region, was introduced to the House Resources & Conservation Committee by Cameron Wheeler, "a former [State of Idaho] Representative who is now Chairman of the IDFG Commission". House Resources & Conservation Committee – January 15, 2008, Minutes, p. 1. Those minutes read:

Cameron Wheeler took the podium to introduce **Mr. McDermott who reported on the controversy surrounding the Farragut Shooting Range** which is located at the Southeast end of Lake Pend O'Reille. This controversy involves a group called CARE (Citizens Against Range Expansion) who have filed a **lawsuit** against the shooting range. Mr. McDermott reported that this group has refused to compromise on the issue and **their lawsuit** will have a devastating effect on shooting ranges throughout the State. **He urged the committee to do all it can to remedy the problem.**

Id., p. 2. (bold added). This is just as egregious as the opening stanza of the bill in *ISSEO IV*. Not only is the "purpose" of the bill flawed and illegal, but this unsubstantiated claim by Idaho Fish & Game Commissioner McDermott that "this lawsuit will have a devastating effect on shooting ranges throughout the State" has two glaring problems. **First**, it finds no support in the legislative record. This Court is

unable to find *any* reference to the Legislature, to *any* other State range, military range or private range found anywhere in the State of Idaho, in any of the record of the 2008 Idaho legislative session, *other* than a) one reference by Sharon Kiefer, Legislative Liason for IDFG on February 19, 2008, to the House Resources and Conservation Committee, where she references "future concerns at other ranges" after mentioning "litigation over use of shooting range at Farragut State Park", and b) a reference by Kiefer on March 5, 2008, to the Senate Resources and Environment Committee, where she referenced "...and last but not least, a need to properly manage future noise issues at Blacks Creek, our other outdoor state-owned range..." *Everything* else in the legislative record specifically references *only* the Farragut Shooting Range. **Second**, the statement made by Idaho Fish & Game Commissioner McDermott to the State of Idaho House Resources & Conservation Committee, that "this lawsuit will have a devastating effect on shooting ranges throughout the State", is also *patently false*. There is nothing about this litigation that pertains to anything other than the Farragut range. There is nothing about this Court's prior decision that pertains to anything other than the Farragut range.

The next day, on January 16, 2008, Idaho Fish & Game Commissioner McDermott told the State of Idaho House Resources & Conservation Committee the following:

The topic he was given for review was the Farragut Shooting Range and what has occurred there during the past year. There is a group called CARE (Citizens Against Range Expansion) living along the northern boundary of the range road. **They filed a lawsuit** in 2006 to stop Fish and Game's plan to improve and expand the range. The Judge made a decision in 2007 and imposed severe restrictions. (1) No rounds would leave the range; (2) The noise decibel level cannot exceed 55 decibels; and (3) Restricted 'users days' to 500 days per year. A 'user day' is one shooter, one day, one round. The Department purchases the land in 1950 and it consisted of 3,850 acres. In 1964, 2,500 acres was

transferred to the federal government and through negotiations by the Department of Parks and Recreation, they now own it. There are two portions – Farragut Wildlife Management Area and the Farragut State Park. The shooting range is on the north side and is co-managed by Parks and Rec. User groups of the range include individual citizens, Boy Scout troops, hunter education, agency clinics, law enforcement officers, as well as some military training. Mr. McDermott said in the past, 'user days' averaged about 2,000 'user days' per year. The Commission would like to increase it to 3,000 and they plan to petition the judge.

House Resources & Conservation Committee – January 16, 2008, Minutes, p. 3. (bold added). There are a host of inaccuracies in this statement. The lawsuit was filed in 2005, not 2006. This Court did not state that "The noise decibel level cannot exceed 55 decibels". That has been discussed above. The "restriction" to 500 days per year is correct, but hardly a "restriction" given the fact that in 2002 and before the range was used by an average of less than one shooter per day. Memorandum Decision, Findings of Fact, Conclusions of Law and Order, p. 9, pp. 49-50. The documentation showed 182 users in 2002, and this Court more than doubled that to give IDFG the benefit of the doubt that there could have been 500 shooters per day historical use. *Id.*, pp. 47-48. There is no concept of "user day" mentioned in this Court's decision; there is no restriction as to the number of rounds that could be fired by any user (and certainly "one round", or one shot is palpably absurd). But what takes the cake is the statement by Idaho Department of Fish & Game Commissioner McDermott that the Commission would like to increase the amount of users to 3,000 per year. This Court previously found as an established matter of fact:

19. Idaho Department of Fish and Game made a grant application to the National Rifle Association (NRA). The IDF&G told the NRA that based on the area population, IDF&G expected up to 46,426 people per month (or 557,112 shooters per year) to use the facility. Plaintiffs' Exhibit 22, Table 2. This is broken down to 25,063 handgun participants per month and 21,363 rifle participants per month. Further, IDF&G told the NRA "For purposes of this range, we need to assume this facility will capture 100% of the market share because there is so much open land

around that whatever is built will compel shooters to come and shot [sic] in an organized fashion." *Id.* There are 450 parking spaces in the paved parking lot in the Vargas Master Plan. David Leptich is the Regional Habitat Biologist and manager of the IDF&G property at Farragut State Park. Leptich testified that IDF&G has approved its goal of \$3.6 million being invested in the implementation of the Vargas Master Plan.

20. IDF&G's estimate of 557,112 shooters per year is **471 times** the 1,181 shooters in the year 2005, and more than **three thousand times** the 182 shooters in 2002. What is being proposed by the IDF&G greatly exceeds a "significant increase" in the 2005 use of the range, let alone the use of the range back in 2002.

Id., p. 19. (emphasis in original). The findings were based on IDFG's own evidence submitted to this Court. IDFG did not appeal this decision or any part of it. There is a difference between 182 shooters per year (historic established use by IDFG in 2002) and 500 (what this Court allowed with improvements). There is a difference between 500 shooters and 3,000 shooters per year. But there is a HUGE difference between 500 or 3,000 shooters per year and 557,112 shooters per year. So IDFG tells the granting authority one thing to get the \$3.6 million, and an entirely different thing to the Idaho Legislature in its effort to circumvent this litigation in which it finds itself.

The records of the State of Idaho House Resources and Conservation Committee on February 9, 2008, read:

HB515 The last item of business on the agenda was HB 515. Rep. Eskridge presented this bill which creates a new section in Idaho Code to provide for the operation and use of State outdoor sport shooting ranges. **Rep. Eskridge explained that this bill also helps deal with the litigation issue at Farragut State Park** and will help protect the State against similar litigation in the future. * * *

Sharon Kiefer Sharon Kiefer, representing the Idaho Fish & Game Dept. (IF&G) stood to testify in favor of HB515. She reviewed the merits of this bill and related that **IF&G has worked closely with the Attorney General's Office to address noise related issues raised in litigation at Farragut State Park** and future concerns at other ranges. In the absence of any established state noise standard in the issue at Farragut State Park, the Judge was confronted with the decision of balancing noise related concerns of neighbors with the public's use of the shooting range. Therefore, this bill establishes a uniform noise standard for state outdoor sport shooting ranges.

House Resources & Conservation Committee – February 19, 2008, Minutes, p. 3. (bold added). No other “State outdoor sport shooting range” is identified *other* than Farragut.

Representative Eskridge was candid in explaining to his colleagues: “...this bill also helps deal with the litigation issue at Farragut State Park...” *Id.* Sharon Keifer was nearly as candid in her February 19, 2008, letter to the House Resources and Conservation Committee (which appears to be her actual testimony as compared to what is found in the minutes: “As I noted, our [IDFG] interest in this legislation partly stems from current litigation opposing expansion of the Farragut Shooting Range.”

Certification on Idaho State Legislative History Records: House Bill 515, February 19, 2008, letter of Sharon Keifer to the House Resources and Conservation Committee, p.

1. At no point in that two-page letter does Sharon Keifer identify any other state gun range. Keifer tells the House Resources and Conservation Committee that, “The noise metric measure is straightforward and will provide certainty for all.” *Id.*, pp. 2-3. But of course there is no mention in her letter as to what that metric is, and the legislation itself incorporates a metric that this Court found flawed, as explained at length in its earlier decision. Memorandum Decision, Findings of Fact, Conclusions of Law and Order, p. 21. That determination was made by this Court after reviewing much material on the subject and listening to expert testimony from both sides. Even Mr. Hansen, the expert IDFG used before this Court (but not before the Idaho Legislature) “...admitted IMPULSE is maybe a more true measure of the impulsive nature of sounds.” *Id.* Of course that was not mentioned by Keifer. In fact, Keifer’s statement in her letter that, “The noise metric measure is straightforward...” is the only “technical” bit of “testimony” apparently ever given to the House Resources and Conservation Committee.

Certification on Idaho State Legislative History Records: House Bill 515, February 19,

2008, letter of Sharon Keifer to the House Resources and Conservation Committee, p. 1. Kiefer apparently read into the record before the Senate Resources & Environment Committee on March 5, 2008, the same February 19, 2008, letter read to the House Resources and Conservation Committee. Senate Resources & Environment Committee March 5, 2008, Minutes, p. 7. Kiefer tells them: "I won't go into the technical specifics of the noise standard, which is adequately defined in the legislation." At least Kiefer gave this committee a "handout" as to how noise is measured (*Id.*), but omitted from that "handout" was any reference to what IDFG's own expert Hansen had testified to before this Court regarding the fact that the "IMPULSE is maybe a more true measure of the impulsive nature of sounds."

On March 5, 2008, Representative Eskridge told the Senate Resources and Environment Committee HB 515 "does not affect military and law enforcement ranges and private sports shooting ranges". Senate Resources and Environment, March 5, 2008, Minutes, p. 4. This will be discussed further in the analysis of "special laws". Representative Eskridge did not reference this instant litigation before the Senate Resources and Environment Committee, but Representative Pence certainly did: "There has surfaced a need to address noise related concerns raise in litigation over the use of the shooting range at Farragut State Park and to properly manage future concerns at other ranges. *Id.*, p. 5. Sharon Kiefer mentioned the situation at Farragut State Park and then stated: "...and last but not least, a need to properly manage future noise issues at Blacks Creek, our other outdoor state-owned range." *Id.*

To sum up, to the extent the Idaho Legislature was given information about House Bill 515, at every juncture it included a reference to this litigation. The information given was at every juncture incomplete (compared to the information given

this Court) and at one occasion, the information about the litigation and the range was almost completely false. In reality, there is very little to distinguish the facts of this case from *ISSEO IV*.

At oral argument, counsel for CARE argued *Jones v. State Board of Medicine*, 97 Idaho 859, 555 P.2d 399 (1976), as being instructive. In that case, the Idaho Supreme Court made an extensive analysis of whether the 1975 Hospital-Medical Liability Act (which set a \$150,000 limit for malpractice actions against physicians and acute care hospitals, and required all physicians and hospitals to obtain malpractice insurance as a condition for licensure) was consistent with Article I, § 18 of the Idaho Constitution and consistent with due process and equal protection considerations. Then, the Idaho Supreme Court, since it was remanding the matter to district court, *sua sponte* raised the issue of whether that Act was consistent with Article III, § 19 of the Idaho Constitution, which provides: "The legislature shall not pass local or special laws in any of the following enumerated cases..." 97 Idaho 859, 876-77, 555 P.2d 399, 416-17.

The Idaho Supreme Court stated the general purpose of Article III, § 19:

That provision of the Idaho Constitution was patterned after those which occurred in many state constitutions in the late nineteenth century following a proliferation of special and local laws in post-Civil War legislatures. Clow & Marcus, 'Special and Local Legislation,' 24 Ky.Law Journal 351, 355-358 (1936). The general purpose of such constitutional provisions was 'to prevent legislation bestowing favors on preferred groups or localities. *State ex rel. Idaho State Park Board v. City of Boise*, 95 Idaho 380, 383, 509 P.2d 1301, 1304 (1973).

97 Idaho 859, 876, 555 P.2d 399, 416. If the "general purpose" of Article III, § 19 is "to prevent legislation bestowing favors on preferred groups or localities", then this Court finds without a doubt the Idaho Outdoor Sport Shooting Range Act violates that general purpose. The legislation on its face only inures to the benefit of the State, and the legislative history shows it was designed to inure to

the benefit only of IDFG and only (or at least primarily) for *this* litigation. Then, the Idaho Supreme Court in *Jones v. State Bd. of Medicine* stated the “test” used to determine if the Act was “special legislation”, and engaged in some analysis of that question (without actually deciding that question, as presumably they recognized they were remanding back to district court):

It has been indicated that the distinction between general and special legislation is that a law is general if ‘all persons subject to it are treated alike as to privileges, protection and in every other respect.’ *Wanke v. Ziebarth Const. Co.*, 69 Idaho 64, 202 P.2d 384, 393 (1948). Stated in other terms, ‘A statute is general if its terms apply to, and its provisions operate upon, all persons and subject-matter in like situation(s).’ *Jones v. Power County*, 27 Idaho 656, 150 P. 35, 37 (1915); *In re Bottjer*, 45 Idaho 168, 260 P. 1095 (1927). ‘It is well settled that a law is not special in character ‘if all persons subject to it are treated alike, under similar circumstances and conditions, and respect to both the privileges conferred and the liabilities imposed.’ *State v. Horn*, 27 Idaho 782, 793, 152 P. 275, 279 (1915). *See also, In re Crane*, 27 Idaho 671, 151 P. 1006 (1915); *Ada County v. Wright*, 60 Idaho 394, 92 P.2d 134 (1939); *State v. Lindstrom*, 68 Idaho 226, 191 P.2d 1009 (1948).

Clearly it is arguable at least that the Act in question here is special in that it selects from a class of persons otherwise subject to liability for their negligent acts, physicians and hospitals, and releases or extinguishes, in part at least, their otherwise liability contrary to the interdiction of special laws in Art. III, § 19. The limitations of Art. III, § 19, are not, however, absolute in their application.

97 Idaho 859, 876-77, 555 P.2d 399, 416-17. Finally, the Idaho Supreme Court stated:

If as asserted by appellants here the Act in question is found to have been enacted in response to a problem of statewide concern in Idaho and by alleviation of that problem, it is found to serve the health and welfare of the people of the state of Idaho, and the means adopted in the Act are held to be reasonably related to the solution of those problems, then the Act will survive the challenge that it is offensive to Art. III, § 19, of the Idaho Constitution. Therefore, the challenges posed to the Act as offensive to Art. III, § 19, are likewise remanded to the district court for additional evidence, findings and conclusions by that court.

97 Idaho 859, 877, 555 P.2d 399, 417.

What this Court takes away from *Jones v. State Bd. of Medicine* is that while the usual test is: “A statute is general if its terms apply to, and its provisions operate upon,

all persons and subject-matter in like situation(s)", other factors come into play. **First** is the extent of the "like situation". Is the "like situation" all doctors in a specific area in Idaho, is it all doctors in Idaho as compared to other professions in Idaho? In *Jones v. State Bd. of Medicine*, the Idaho Supreme Court made it clear it was the latter. In other words, the "like situation" was pretty general. The Idaho Supreme Court in *Jones v. State Bd. of Medicine* held that even though the statute in that case treated all doctors and hospitals in the State of Idaho alike, the Idaho Supreme Court obviously had difficulty with the fact that it treated those individuals and entities different than other individuals, other professions and other entities. "Clearly it is arguable at least that the Act in question here is special in that it selects from a class of persons otherwise subject to liability for their negligent acts, physicians and hospitals, and releases or extinguishes, in part at least, their otherwise liability contrary to the interdiction of special laws in Art. III, § 19..." In the present case, other than the Farragut range, there *is no other* state gun range that exists around other resident citizens. So on a specific comparison, there is no "like basis" upon which to compare. As Farragut is the one and only, the only conclusion can be that this is "special legislation." That is a specific comparison. As just mentioned above, the comparison in *Jones v. State Bd. of Medicine* was general. That general comparison gets even worse for IDFG, as on March 5, 2008, Representative Eskridge told the Senate Resources and Environment Committee HB 515 "does not affect military and law enforcement ranges and private sports shooting ranges". Senate Resources and Environment, March 5, 2008, Minutes, p. 4. Thus, the Idaho Legislature in HB 515 is treating the Farragut Range and one other State range entirely different than military, law enforcement and private ranges. That is a bad thing for the Idaho Legislature to do, because it creates a "special law".

But that bad thing is exactly what the IDFG asked the Idaho Legislature to do. If the Idaho Supreme Court in *Jones v. State Bd. of Medicine* held that even though the statute in that case treated all doctors and hospitals in the State of Idaho alike, the Idaho Supreme Court obviously had difficulty with the fact that it treated those individuals and entities different than other individuals and entities, then how can HB 515 survive that same analysis? House Bill 515 admittedly treats the Farragut Range *different* than military, law enforcement and private ranges. Under this sort of general analysis, the Idaho Outdoor Sport Shooting Range Act truly is a “special law.”

Second, the Idaho Supreme Court in *Jones v. State Bd. of Medicine* made it clear that if the legislation addresses a “statewide problem”, it is not special legislation. The Idaho Supreme Court held: “If as asserted by appellants here the Act in question is found to have been enacted in response to a problem of statewide concern in Idaho and by alleviation of that problem [then the Act will survive the “special legislation” challenge].” That distinction illustrates a problem with the present case. The materials submitted by CARE establish that the Idaho Sport Shooting Range Act was created to address IDFG’s “problems” that have developed only with the Farragut range, specifically, only the *litigation* involved in the Farragut range.

A case cited in *Moon* is helpful. As mentioned above, the Idaho Supreme Court in *Moon*, in discussing special laws wrote:

“A law is not special simply because it may have only a local application or apply only to a special class, if in fact it does apply to all such classes and all similar localities and to all belonging to the specified class to which the law is made applicable.” *Bd. of County Comm'rs of Lemhi County v. Swensen*, 80 Idaho 198, 201, 327 P.2d 361, 362 (1958), *citing Mix v. Bd. of Comm'rs*, 18 Idaho 695, 705, 112 P. 215 (1910).

140 Idaho 536, 546, 96 P.3d 637, 647. It does seem the Idaho Outdoor Sport Shooting

Range Act has only a “local application” to the Farragut range since, of the other three

other ranges in the State of Idaho to which the Act could apply, one (the one referenced to the Idaho Legislature) has no people and no residences around it, and the other two have little or no people or residences around those them. Under *Board of County Commissioners of Lemhi County v. Swensen*, 80 Idaho 198, 201, 327 P.2d 361, 362 (1958), the legislation in the present case certainly appears to be a law having “only a local application”. But *Swensen* tells us that such in and of itself is not fatal (ie., not a “special law”). But it is only not fatal “...if in fact it does apply to all such classes and all similar localities and to all belonging to the specified class to which the law is made applicable.” Note the language in *Swensen* is the conjunctive “and”, meaning all three must be present for a law with a “local application” to not be a “special law”. In other words this law which has “local application”, must 1) apply to all such classes, and 2) apply to all similar localities, and 3) apply to all belonging to the specified class to which the law is made applicable, in order to avoid being a “special law.” The important issue under *Swensen*, then, is the fact a law which has a “local application” is something that can be overcome “...if in fact [the Act] does apply to all such classes and *all similar localities* and to all belonging to the specified class to which the law is made applicable.” (emphasis added). Representative Eskridge tells us the Act meets *none* of these three requirements, and again, all three must be present to overcome the “local application” problem. On March 5, 2008, Representative Eskridge told the Senate Resources and Environment Committee HB 515 “does not affect military and law enforcement ranges and private sports shooting ranges”. Senate Resources and Environment, March 5, 2008, Minutes, p. 4. The Act does not apply to “all such classes”. The Act does not apply to “all similar localities” as mentioned in *Swensen*. Accordingly, it is a “special law.” When *Swensen* mentions “similar localities”, what is the “locality”? Is it the locality

of the range or of the citizens surrounding the range? It really does not matter as HB 515 fails in either regard. It would seem to be the latter, the "locality" is the "citizens surrounding the range". In this case, we know the Farragut range is the only state range with people in residences in its path. We also know HB 515 is in direct response to this litigation. Thus, there is absolutely no way this legislation applies to "all similar localities." This is the only locality. If the "locality" is the "range" itself, then there are no comparisons as well. There was one other state range referenced before the legislature, there are perhaps two others, and none of them have people in residences in their path. Turning from the language in *Swensen* to the language in *Jones v. State Bd. of Medicine*, the comparisons of the "citizens surrounding the range" are not "subject matters in like situation" because there are no "like situations" in the State of Idaho to "other citizens surrounding other ranges." If the comparison is to the "range" itself, then under the language of *Jones v. State Bd. of Medicine*, there is no "subject matters in like situation" because there are no "other ranges."

In *Swensen*, the State of Idaho Auditor (Swensen) was sued for a writ of mandate by the Lemhi Board of County Commissioners because Swensen refused to issue a \$35,000 warrant to Lemhi County, even though the Idaho State Legislature had appropriated that money to Lemhi County for road repairs. The Auditor claimed the act of the Legislature violated Article III, Section 19, prohibiting special and local laws. The Idaho Supreme Court agreed with Swensen, found Senate Bill 41 of the 1957 Session Laws, Chapter 295 to be a local and special law prohibited by Article III, § 19, and quashed the writ of mandate sought by the Lemhi Board of County Commissioners. 80 Idaho 198, 201, 327 P.2d 361, 362. The Idaho Supreme Court's analysis in *Swensen* is as follows:

We have heretofore discussed this constitutional provision in *Ada County v. Wright*, 60 Idaho 394, 92 P.2d 134, 138. The rule as laid down in that case is well established and supported by prior decisions of this Court. It is said therein:

It is next contended that the act is a local and special law and, as such violates par. 7. sec. 19, of art. 3, of the Const. That contention is unsound. The act applies to all counties alike; it applies to all highways and good road districts alike. Its application is general and uniform as to all that fall within its classifications. A special law applies only to an individual or number of individuals out of a single class similarly situated and affected, or to a special locality. A law is not special simply because it may have only a local application or apply only to a special class, if in fact it does apply to *all such classes and all similar localities* and to *all belonging to the specified class* to which the law is made applicable. *Mix v. Board of Com'rs, etc.*, 18 Idaho 695, 705, 112 P. 215, 32 L.R.A.,N.S., 534; *Hettinger v. Good Road District No. 1*, 19 Idaho 313, 318, 113 P. 721; *In re Crane*, 27 Idaho 671, at page 690, 151 P. 1006, L.R.A.1918A, 942.

80 Idaho 198, 201, 327 P.2d 361, 362. (Italics in original). The italicized portion was obviously critical to the Idaho Supreme Court's decision in *Swensen*. The quoted portion in *Swensen* comes from *Ada County v. Wright*, 60 Idaho 394, 92 P.2d 134 (1939). In that case, Wright, the State Auditor was sued. The claim was made by the Ada County Commissioners that a new statute authorizing appropriations to counties from state highway fund for highway purposes was a local or special law. As shown by the above quoted portion of *Wright* within *Swensen*, the Idaho Supreme Court disagreed, because that statute which authorized the laying out, opening, altering, maintaining, working on or vacating highways, and "the statute applied to all counties, highways and good roads districts alike." 60 Idaho 394, 403, 92 P.2d 134, 138-39. *Mix v. Board of County Commissioners of Nez Perce County*, 18 Idaho 695, 112 P. 215 (1910), is another case cited in the quote from *Wright* found within *Swensen*. The facts of *Mix* are not on point. An action was brought to determine the applicability of the State of Idaho's local option law (which gave the counties the ability to determine whether

liquor would be sold within the county) to the city of Lewiston. Nez Perce County decided to forbid liquor sales and the City of Lewiston wished to have liquor sales so the city challenged the State of Idaho local option law. However, the law and analysis in *Mix* is pertinent.

A special law is one which applies only to an individual or to a number of individuals selected out of the class to which they belong, or to a special locality. *State v. Cal. Min. Co.*, 15 Nev. 234. A law may be general, however, and have but a local application, and it is none the less general and uniform because it may apply to a designated class if it operates equally upon all subjects for which the rule is adopted. In determining whether a law is general or special, the court will look to its substance and necessary operation as well as to its form and phraseology. *Ladd v. Holmes*, 40 Or. 167, 66 Pac. 714, 91 Am. St. Rep. 457; 7 Words & Phrases, pp. 6578, 6579; Black's Law Dictionary, p. 535, under title "General Law."

In *People v. Hoffman*, 116 Ill. 587, 5 N. E. 596, 56 Am. Rep. 793, the court had under consideration the question whether a certain law was general or special, and said: "Whether laws are general or not does not depend upon the number of those within the scope of their operation. They are general, 'not because they operate upon every person in the state, for they do not, but because every person who is brought within the relations and circumstances provided for is affected by the laws.' Nor is it necessary, in order to make a statute general, that 'it should be equally applicable to all parts of the state. It is sufficient if it extends to all persons doing or omitting to do an act within the territorial limits described in the statute.'" See, also, *Cox v. State*, 8 Tex. App. 254, 34 Am. Rep. 746; *People v. Wright*, 70 Ill. 388.

In the case of *Paul v. Gloucester Co.*, 50 N. J. Law, 585, 15 Atl. 272, 1 L. R. A. 86, the court had under consideration a local option law. The law was attacked on the ground that it was local or special in its application, and the court held: "The law is not in contravention of our constitutional provision that 'the Legislature shall not pass private, local or special laws regulating the internal affairs of towns and counties.' This inhibition in the Constitution is not intended to secure uniformity in the exercise of delegated police powers, but to forbid the passing of a law vesting in one town or county a power of local government not granted to another." The local option law is of general application to every county in the state. While it is left with the people of each county to say whether it shall be enforced in the county, that fact does not make it any the less a general law. It is applicable to every county in the state, and under its terms and provisions the electors of each county have a right to vote upon the question whether the sale or disposal of intoxicating liquors as a beverage shall be prohibited in such county. Every county in the state may accept or reject it upon the same terms and conditions. It is clearly a

“general law” within the meaning of that phrase as defined by the leading law writers and the courts of last resort of the nation. The Legislature has undertaken by this act to make a general law applicable to all of the counties in the state alike, as to whether the sale of intoxicating liquors shall be prohibited or not.

18 Idaho 695, 705-07, 112 P. 215, 218-19. The beginning quote: “A special law is one which applies only to an individual or to a number of individuals selected out of the class to which they belong, or to a special locality” (18 Idaho 695, 705, 112 P. 215, 218, citing *State v. California Mining. Co.*, 15 Nev. 234 (1880), certainly seems to apply to the citizens around the Farragut range. The “class to which they belong” are citizens of Idaho, and, given the fact that the other ranges are in uninhabited areas where sound isn’t a factor, this Act applies only to these citizens around the Farragut range. The next phrase: “A law may be general, however, and have but a local application, and it is none the less general and uniform because it may apply to a designated class if it operates equally upon all subjects for which the rule is adopted” (18 Idaho 695, 705-06, 112 P. 215, 218, citing *Ladd v. Holmes*, 40 Or. 167, 66 Pac. 714 (1901), 91 Am. St. Rep. 457;) is also applicable. The Act is general in that it applies all over the State of Idaho, but the Act has a “local application” to only possibly four ranges (three of which are in uninhabited areas), and it does not “operate equally upon all subjects for which the rule is adopted”, if “subjects” are citizens of Idaho. And, unlike the local option law which is “of general application to every county in the state” and “every county in the state may accept or reject it”, the citizens around the Farragut range are saddled with a noise *statute* which was passed on a state level, but which only truly impacts these citizens. A statute in which, unlike a local ordinance, those citizens had comparatively little input.

There is a quote from *State v. California Mining. Co.*, 15 Nev. 234 (1880) which places the entire issue before this Court in the appropriate context: “The question is,

not what a court of last resort may do in defiance of law, but what the legislature may expressly authorize an officer to do, who has and can have no judicial powers." 1880 WL 4278, p. 13. Certainly IDFG's position would be that this Court would be defying the Idaho Legislature if it were not to follow the terms of the Idaho Outdoor Sport Shooting Range Act. In reality, if this is a "special law", then the State of Idaho Legislature has authorized the State of Idaho Department of Fish and Game, one of the state's agencies, to have powers that would prohibit and completely preempt local government and the courts that uphold that local government. I.C. § 67-9105. Another quote from the *California Mining* case is applicable:

"It is manifestly contrary to the first principles of civil liberty and natural justice, and to the spirit of our constitution and laws, that any one citizen should enjoy privileges and advantages which are denied to all others under like circumstances, or that any one should be subjected to losses, damages, suits, or actions, from which all others, under like circumstances, are exempted." (*Holden v. James, Adm'r*, 11 Mass. 404.)

1880 WL 4278, p. 14. *California Mining* concerned a Nevada district attorney who compromised a tax case for back taxes against a mine by waiving all penalties when the statute in force did not allow that discretion. Given that context, the converse of that quote would apply to the citizens around the Farragut range: "It is manifestly contrary to the first principles of civil liberty and natural justice, and to the spirit of our constitution and laws, that any one citizen should [suffer detriments] which are [spared] to all others under like circumstances, or that any one should be subjected to losses, damages, suits, or actions, from which all others, under like circumstances, are exempted."

Hettinger v. Good Road District No. 1, 19 Idaho 313, 113 P. 721 (1911) is cited by the Idaho Supreme Court in *Swensen*. In finding the "good roads law" did not violate Article III, § 19 as a "special law", the Idaho Supreme Court held:

This section of the Constitution prohibits the Legislature from passing a law which is local or special with reference to "opening, altering, maintaining, working on, or vacating roads, highways," etc. The good roads law, however, is not local or special as used in this section of the Constitution. It is general in its application, and applies alike to all sections of the state where the taxpayers thereof are willing to assume the burden of additional taxation for the purpose of improving the roads within such section, and applies to all good road districts within the state, and relates to all of a class, and is like, in its operation to the organization of cities and villages within the state, irrigation districts and other municipalities, which are provided for by a general law. *Boise Irrigation, etc., v. Stewart*, 10 Idaho, 38, 77 Pac. 25, 321.

19 Idaho 313, 318, 113 P. 721, 723. The Idaho Outdoor Sport Shooting Range Act applies to the entire state, but it only affects four possible ranges, and the noise requirement really only affects the Farragut range. And, unlike the "good roads law", the local government is not only not allowed to decide how it will affect its taxpayers, the Act preempts all local authority. I.C. § 67-9105.

This Court finds the Idaho Outdoor Sport Shooting Range Act, I.C. § 67-9101, et seq., violates the "special law" prohibition of Article III, § 19 of the Idaho Constitution, and is thus, unconstitutional. For that reason alone, the injunction cannot be lifted in favor of IDFG at the present time. CARE is entitled to summary judgment in its favor as to the unconstitutional nature of the Act. This Court appreciates that it is obligated to seek an interpretation of the Act that upholds its constitutionality, and that its power to declare legislative action unconstitutional should be exercised only in clear cases.

Stuart v. State, 149 Idaho 35, 232 P.3d 813, 818 (2010), quoting *American Falls Reservoir Dist. No 2 v. Idaho Dep't of Water Resources*, 143 Idaho 862, 869, 154 P.3d 433, 440 (2007). For the reasons set forth above, this Court is unable to find an interpretation of the Act that upholds its constitutionality. This is a clear case where the Act is unconstitutional.

/

b. Arbitrary, Capricious and Unreasonable Analysis.

As mentioned above, the other part of the "special law" test is whether the proposed legislation is arbitrary, capricious or unreasonable. *Moon, Jones v. Power County* and *Jones v. Bd. of Medicine*. The specific language is set in the disjunctive "or", meaning only one of the three need be found. This Court finds all three. Since the Idaho Legislature passed a law regarding noise limitations, and in doing so: a) did not ask for any scientific information, b) accepted information which is incomplete and at times false, and c) either failed to realize (best case) or ignored the fact (worst case) that what they were being asked to do was in direct response to litigation, the action of the legislature in passing this Act was "arbitrary." The action of the legislature was "capricious". The action of the legislature was "unreasonable." But, again, the legislature did exactly what it was being asked to do, by IDFG.

c. Police Power Analysis.

The right to own and enjoy property is of the highest order, but may nonetheless be subject to reasonable limitation and regulation by the state in the interest of common welfare; "a statute imposing any limit upon the right must be supported by such purpose." *Newland v. Child*, 73 Idaho 530, 537, 254, P.2d 1066, 1069 (1953) (citing *State v. Omaechevviaria*, 27 Idaho 797, 152 P. 280 (1915), 246 U.S. 343, 38 S.Ct. 323 (1918); *Chambers v. McCollum*, 47 Idaho 74, 272 P. 707 (1928). In *Ex Parte Hull*, 18 Idaho 475, 110 P. 256 (1910), the Idaho Supreme Court held that prohibition of public amusements on Sunday, pursuant to the Sunday Rest Law, to be upheld as an exercise of the State's police power, must be necessary for the protection of public morals, public health, or public peace and safety. 18 Idaho 475, 481, 110 P. 256, 257.

The questions for this Court, with regard to whether the Idaho Outdoor Sport

Shooting Range Act is a valid exercise of the State's police power, are whether in enacting the Act: (1) did the state act to protect the public health, morals or public safety; and (2) did the state have a real and substantial relation to the object of protection? See *Ex Parte Crane*, 27 Idaho 671, 674, 151 P. 1006, 1008 (1915).

In the so-called "Milk Case" the United States Supreme Court held that police power of the state to regulate business in the public interest included price-fixing for commodities. *Nebbia v. People of New York*, 291 U.S. 502, 54 S.Ct. 505 (1934). The United States Supreme Court wrote:

Under our form of government the use of property and the making of contracts are normally matters of private and not of public concern. The general rule is that both shall be free of governmental interference. But neither property rights nor contract rights are absolute; for the government cannot exist if the citizen may at will use his property to the detriment of his fellows, or exercise his freedom of contract to work for harm. Equally fundamental with the private right is that of the public to regulate it in the common interest.

291 U.S. 502, 510, 54 S.Ct. 505, 523. The United States Supreme Court went on to quote Justice Barbour:

...it is not only the right, but the bounden and solemn duty of a state, to advance the safety, happiness and prosperity of its people, and to provide for its general welfare by any and every act of legislation, which it may deem to be conducive to these ends; where the power over the particular subject, or the manner of its exercise is not surrendered or restrained, in the manner just stated. That all those powers which relate to merely municipal legislation; or what may, perhaps, more properly be called internal police, are not thus surrendered or restrained; and that, consequently, in relation to these, the authority of a state is complete, unqualified, and exclusive.

291 U.S. 502, 510, 54 S.Ct. 505, 523-24, quoting *City of New York*, 36 U.S. 102, 139 (1837).

"Pursuant to the state's police power, the Idaho Legislature has the authority to enact laws concerning the health, safety and welfare of the people so long as the regulations are not arbitrary or unreasonable." *Van Orden v. Department of Health &*

Welfare, 102 Idaho 663, 667, 637 P.2d 1159, 1163 (1981). But, every statute enacted is not necessarily a legitimate exercise of the state's police power. See *Ex Parte Crane*, 27 Idaho 671, 675, 151 P. 1006, 1009 (1915). Although every presumption is indulged in favor of the validity of a statute, there are limits beyond which legislation cannot go. *Id.*, citing *Union Pacific Railroad Co. v. United States*, *Central Pacific Railroad Co. v. Gallatin*, 99 U.S. 700 (1878) (Sinking Fund Cases). Where a statute purports to have been enacted to protect the public health, safety and morals, but has no substantial relation to those objects, or where the legislation is a palpable invasion of fundamental rights, courts must give effect to the Constitution by deeming such legislation unlawful. *Ex Parte Crane*, 27 Idaho 671, 675, 151 P. 1006, 1009.

It is difficult to see how the Idaho Outdoor Sport Shooting Range Act protects the public health, safety or morals. It does provide a cap on decibels an outdoor state range can emit from a noise standpoint, and that could be a "public health" reason. However, when one considers the purpose of the Act as stated to the Idaho legislature (as discussed above), was to whipsaw the negotiated or litigated decibel limit in the present litigation, this legislation isn't in any way about protecting "public health". This legislation is about the legislature establishing an arbitrary decibel limit, with little or no scientific input, the sole purpose of which was to circumvent this litigation. While that is an unflattering thing to say about the Idaho legislature, the legislature simply did what they were asked to by IDFG. This Court finds this is not an appropriate use of police power.

IDFG argues:

"Control of noise is of course deep-seated in the police power of the States." *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 538 [93 S.Ct. 1854, 1862] (1973).

Brief in Support of Motion for Partial Lifting of Injunction, p. 6; Reply Brief in Support of Partial Lifting of Injunction, pp. 5-6. While that is a quote from *City of Burbank*, a reading of that case shows that it is a “preemption” analysis engaged in by the United States Supreme Court, not a “police power” analysis. *City of Burbank* is simply not applicable to the questions before this Court.

IDFG makes the argument: “The Legislature’s actions did not modify standards consented to by the parties or noise standards set by the Court, since no such standards had been established.” *Id.*, p. 7. That is a true statement, but one which must be placed in context to understand the non-sequitur involved. Prior to 2002, the use of the range was so limited in use that witnesses testified before this Court they had no idea there was even a range existing. Arms being discharged at the range were so infrequent that it raised no suspicion with the landowners who testified, they simply thought it was another landowner using a firearm on his or her own land. That testimony is understandable. In 2002 there were 182 users. So up to 2002, *there was no need for a noise standard* because the range was so under-utilized that some residents did not even know it existed. The *only* reason there is now a need for a noise standard is due to this litigation, and the *only* reason for this litigation is IDFG’s increased use of the Farragut range and the impact that will have on surrounding residents. In 2008, IDFG told the legislature they want to take that to 3,000 users per year and IDFG told the granting source they want to increase use to 557,112 shooters per year. Essentially, IDFG created the expansion of the range with a grant, the expansion of the range would cause a increase in annual use from 182 shooters per year to an anticipated 557,112 shooters per year, that increased caused concern for the surrounding residents who filed this lawsuit, and IDFG was able to convince the Idaho

Legislature that the Idaho Outdoor Sport Shooting Range Act was a good idea. The Act is a way for IDFG to insulate itself from liability for a situation which it, and only it, created. That is not a valid use of police power.

In this Court's review of "police power" cases, this Court was only able to locate cases that dealt with regulation of activity, and this Court was unable to find a case where the legislation effectively created, expanded or established more rights to the government while simultaneously "taking" from its citizens. That is essentially what is occurring here. The United States Supreme Court in *Nebbia* stated above: "But neither property rights nor contract rights are absolute; for the government cannot exist if the citizen may at will use his property to the detriment of his fellows, or exercise his freedom of contract to work for harm." The citizens down range of the Farragut range are not "using their property to the detriment of their fellows", and as a result, need to be "regulated" by a valid use of the State's "police power." The citizens down range of the Farragut range are simply "existing", using their property for their residences. The Idaho Outdoor Sport Shooting Range Act does not regulate their activity, it regulates the State's activity. However, it does much more than "regulate" the State's activity, it "insulates" the State's activity. In so doing, it effectively "takes" (or partially takes) plaintiffs' land without any compensation. The Act is simply not a valid exercise of the State's police power.

d. Article V, § 13 of the Idaho Constitution was Violated.

Also at issue is whether the legislature interfered with this litigation and violated Article V, § 13 of the Idaho Constitution. Article V, § 13 of the Idaho Constitution specifies: "The legislature shall have no power to deprive the judicial department of any power or jurisdiction which rightly pertains to it as a coordinate department of the

government.” CARE argues the following quote from *ISSEO IV*:

Consequently, we find that there is no necessity present pursuant to Article V, §13 of the Idaho Constitution meriting the legislature’s attempt to legislate itself out of this lawsuit by rewriting the Idaho Rules of Civil Procedure. We also find HB403 to be a special law pertaining to the practice of the courts aimed specifically at this lawsuit and these plaintiffs, and accordingly find that portion of HB 403 amending I.C. §6-2215 of the Idaho Code is unconstitutional.

Brief in Response Defendants’ Summary Disposition of the Cause and Brief in Support of Plaintiff’s Motion for Summary Judgment, p. 19. There are certainly similarities in the present case. In the present case the State of Idaho, through its agency the Department of Fish and Game, asked the Idaho Legislature to “legislate itself” [IDFG] out of this lawsuit. That is precisely what IDFG is asking this Court to do in its motion to partially lift the stay. While IDFG did not ask the Idaho Legislature to rewrite the Idaho Rules of Civil Procedure (as the Idaho Supreme Court found the legislature did in *ISSEO IV*), nothing in Article V, § 13 requires so egregious an act. This Court finds the Idaho Legislature, in passing the Idaho Outdoor Sport Shooting Range Act, violated Article V, § 13.

e. Miscellaneous.

Discussed in this Court’s earlier decision:

In 1996, the Idaho Legislature added a provision that codifies the doctrine of “coming to the nuisance” for “sport shooting ranges.” Idaho Code § 55-2601 *et. seq.* Specifically, Idaho Code § 55-2602(1) reads: “Except as provided in this section, a person may not maintain a nuisance action for noise against a shooting range located in the vicinity of that person’s property if the shooting range was established as of the date the person acquired the property.” There is no dispute that all individual plaintiffs fall under that category. That section continues: “If there is a substantial change in use of the range after the person acquires the property, the person may maintain a nuisance action if the action is brought within three (3) years from the beginning of the substantial change.”

Memorandum Decision, Findings of Fact, Conclusions of Law and Order, p. 10. The

Idaho Sport Shooting Range Act, specifically I.C. § 67-9103 states a person may not maintain a public or private nuisance action for noise against a state outdoor sport shooting range that is in compliance with this chapter. There was a concomitant modification in 2008 that was made in I.C. § 55-2604 (3) and (4), which specifically excepts out of the "Sport Shooting Ranges" Act (I.C. § 55-2601 et.seq.), any "Outdoor sport shooting range" described in the Idaho Outdoor Sport Shooting Range Act (I.C. § 67-9101, et.seq.). I.C. § 55-2604(4)(b). Let's contemplate what this means. If IDFG builds this range, and, as IDFG told the granting entity would occur, over a half-million people a year visit this range (up from 182 per year in 2002), no citizen in the area, no resident in the area, will ever be able to do anything about that, even though one statute, I.C. § 55-2602, up until 2008 anyway, specifically gave them three years to bring a lawsuit for "substantial change in the use of the range." Not only that, but no local governmental entity will ever be able to do anything about any of this. I.C. § 67-9105, I.C. § 55-2605.

Finally, CARE raises claims that the Act violates equal protection and claims the Act is a bill of attainder. Because the Court finds the Act is unconstitutional for the reasons stated above, this Court will not reach the equal protection and bill of attainder claims.

2. Safety Issues.

With regard to the Court's safety concerns, IDFG argues it has installed ballistic baffles and side berms at the 100-yard portion of the range to prevent firing above the backstop (the berm behind the target area.) Brief in Support of Motion for Partial Lifting of Injunction, p. 4. IDFG argues: "Having satisfied the Court's condition as it related to safety for the 100-yard portion of the range for up to 500 shooters per year, IDFG is

entitled to lifting of that component of the injunction.” *Id.*, p. 5. IDFG goes on to argue it has satisfied the Court’s safety conditions to open the 100-yard portion of the range for more than 500 shooters per year in light of its compliance with noise standards (by virtue of complying with the Idaho Sport Shooting Range Act, discussed *supra*) and with the No-Blue-Sky Rule. *Id.*, p. 5 *et seq.* IDFG lists its improvements to the 100-yard range as including: an armored shooting shed enclosing the firing line, a series of ballistic baffles, side berms, recycled wood mulch on the range floor, and a screened sand backstop. *Id.*, p. 5. IDFG goes on to argue its expert, Kerry O’Neal, evaluated the firing positions at the 100-yard range in standing and prone positions and “did not observe blue sky downrange between firing positions and the target area.” *Id.*, citing Affidavit of Kerry O’Neal, ¶ 5. O’Neal also testified in his affidavit that any direct fire and any ricochets “will be contained within IDFG’s property boundaries.” *Id.*, at ¶ 6.

CARE concedes that IDFG made “improvements”, but argues the expert testimony set forth by IDFG regarding the efficacy of these improvements has failed to meet the summary judgment standard “by providing conclusions only, through an incompetent range designer, and limited input from Fish and Game’s staff engineer Whipple.” Brief in Response Defendants [sic] Summary Disposition of the Cause and Brief in Support of Plaintiff’s Motion for Summary Judgment, p. 7. CARE argues the inappropriateness of the partial lifting of the injunction IDFG now seeks:

When the Court closed the range, it spoke to the entirety of the old Navy range. Nothing in that Court Order authorized or allowed for a subdividing so that a portion of the range could be opened with the remainder of the range closed. This is not a glass of water that can be half empty. This is more like a pregnant mare. She is in foal or not.

Id. CARE argues issues of fact remain which preclude a grant of summary judgment in favor of IDFG. CARE notes that nothing would prevent a shooter from shooting at a

range distance other than the 100-yard portion IDFG now seeks to reopen; and, O'Neal's testimony regarding there being No-Blue-Sky and no bullet escapement at the standing and prone positions from the 100-yard line does not address the Court's requirement that the range be totally baffled from "all potential shooting positions" and from "impromptu locations that can be anticipated and available to be established by shooters." *Id.*, pp. 7-8. CARE goes on to note that, while the Court required 100% bullet containment, IDFG's expert, O'Neal, only states it would be "highly improbable" that rounds from the 100-yard shooting area would leave IDFG's property. *Id.*, pp. 11-12. CARE's argument is that the Court adopted a zero bullet escapement standard, and by IDFG's own admission, this is not the standard which has been met. *Id.*, pp. 12-13. CARE notes:

O'Neal admits that bullets can and will go through the unarmored sidewall of the shooting shed or leave the range and bullets can and will go through the unarmored overhead canopy above the 10:30 o'clock high and leave the range and bullets will go through the "open space" or as the Court and Plaintiffs refer to it as "blue sky" openings, and go over the back berm and leave the range, add ricochets and the impromptu areas and the range is a bullet sieve.

Id., p. 13.

CARE argues that the No-Blue-Sky rule and "fully contained range" concept has not been met in at least two locations, the left and right extremes of the 100-yard range and the proposed 50-yard and 200-yard ranges. Consolidated Reply Brief in Support of Plaintiff's Motion for Summary Judgment and Motion to Strike and/or Exclude Testimony of James Caulder, p. 7. CARE also cites the Affidavit of Jeanne Hom-Holder, stating that she can fire a rifle from the 600-yard firing line over the berm and hit her own house. *Id.*, p. 13. CARE concedes that baffles were placed over the 100-yard shooting positions, but argues that the Court required a baffle over every firing position, from all

potential shooting positions including impromptu locations. *Id.*, p. 18.

In its Order, this Court required a baffle be placed over every firing position. For the injunction to be lifted:

The baffle must be placed and be of sufficient size that the shooter, in any position (standing, kneeling, prone), cannot fire his or her weapon above the berm behind the target. Once baffles are installed and either 1) plaintiffs agree that the shooter in any position cannot fire a round above the berm behind the target, or 2) if the plaintiffs cannot agree, the Court so finds after a view of the premises...

Memorandum Decision, Findings of Fact, Conclusions of Law and Order, pp. 61-62. If this standard is met, and the injunction is lifted, IDFG may only open the range to more than 500 shooters per year *if* the noise abatement issues, *supra*, are addressed *and* safety measures adequate to prevent bullet escapement beyond the boundaries owned and controlled by IDF&G are in place. The No-Blue-Sky Rule is the standard applicable to IDFG's request to open the range to more than 500 shooters per year, not lifting the injunction for up to 500 shooters per year. Although not addressed directly by IDFG, CARE cites no authority for its contention that the injunction must be lifted in whole and cannot be lifted in part by the Court. In fact, the Court's February 23, 2007, Order contemplates different standards and requirements for addressing different portions of the injunction.

The summary judgment standard of review is not affected by the fact that both parties have filed cross-motions for summary judgment; "rather, each motion must be separately considered on its own merits, with the court drawing all reasonable inferences against the party whose motion is under consideration." *Treasure Valley Gastroenterology Specialists, PA v. Woods*, 135 Idaho 485, 489, 20 P.3d 21, 25 (Ct.App. 2001) (citing *Stafford v. Klosterman*, 134 Idaho 205, 998 P.2d 1118, 1119 (2000); *Bear Island Water Ass'n, Inc. v. Brown*, 125 Idaho 717, 721, 874 P.2d 528, 532

(1994)). The issue before the Court is whether IDFG has installed a baffle over every firing position such that a shooter cannot fire his or her weapon above the berm behind the target from any shooting position. If this requirement *alone* is met by IDFG, the injunction can be lifted for up to 500 shooters per year. Only after this requirement has been met will the Court consider the requirements for lifting the injunction for more than 500 shooters per year: safety measures to prevent bullet escapement and noise abatement must be in place. The Court has stated that for each of these requirements, the parties may agree that the requirements have been met, or the Court will make such a determination after a view of the premises and consideration of additional evidence. As set forth above, there will be no additional view of the premises. There will need to be a trial on this issue.

The parties set forth conflicting evidence with regard to whether the baffles installed over the 100-yard shooting area prevent a shooter from firing over the berm. At this juncture, neither party has set forth sufficient evidence, even when all inferences are taken in favor of either CARE or IDFG, such that summary judgment is appropriate. IDFG has not made the claim that the 100-yard range will be monitored (except for a passing reference by its counsel in oral argument), such that people using the 100-yard range could not go over and shoot at the un-baffled 50 and 200 yard ranges without an IDFG attendant or monitor noticing. Nor has IDFG made the claim that the 50 and 200 yard ranges will be made secure such that no one can go into those un-baffled ranges and shoot.

VIII. CONCLUSION AND ORDER.

For the reasons set forth above;

IT IS HEREBY ORDERED plaintiff CARE's Motion to Strike Testimony of Kerry

O'Neal Based on Lack of Expertise and Lack of Foundation, is DENIED, and CARE's Motion to Strike the December 9, 2010 Affidavits of Jon Whipple and Kerry O'Neal is DENIED.

IT IS FURTHER ORDERED IDFG's motion to strike Caulder's affidavit is DENIED.

IT IS FURTHER ORDERED other than ¶ 26, and the attendant Exhibits 4 and 5, CARE's motion to strike the Amended Affidavit of O'Neal is DENIED.

IT IS FURTHER ORDERED IDFG's motion for a view of the premises is DENIED. Any future action which contemplated a view of the premises by the Court will have to be accomplished by trial.

IT IS FURTHER ORDERED this Court finds the Idaho Outdoor Sport Shooting Range Act, I.C. § 67-9101, et seq., violates the "special law" prohibition of Article III, § 19 of the Idaho Constitution, and is thus, unconstitutional. CARE's motion for summary judgment as to the unconstitutional nature of the Act is GRANTED.

IT IS FURTHER ORDERED due solely to the finding that the Idaho Outdoor Sport Shooting Range Act is unconstitutional, due to failure to address noise considerations alone, IDFG's motion to partially lift the injunction and IDFG's motion for summary disposition of its motion to partially lift the injunction are DENIED at this time.

IT IS FURTHER ORDERED this Court finds the Idaho Outdoor Sport Shooting Range Act, I.C. § 67-9101, et seq., violates the Article V, § 13 of the Idaho Constitution, and is thus, unconstitutional. CARE's motion for summary judgment as to the unconstitutional nature of the Act is GRANTED.

IT IS FURTHER ORDERED cross motions for summary judgment on the issue of range safety are DENIED as material issues of fact remain. Issues of material fact

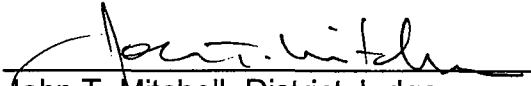
remain in dispute as to range safety issues (as well as noise issues since the Idaho Outdoor Sport Shooting Range Act has been found to be unconstitutional) to allow IDFG to expand beyond 500 users per year. Issues of material fact remain in dispute both as to the injunction to prevent IDFG opening the range to up to 500 persons per year. While it is beyond dispute that baffles have been installed, the following criteria imposed by the Court on February 23, 2007, have not been met:

Once baffles are installed and either 1) plaintiffs agree that the shooter in any position cannot fire a round above the berm behind the target, or 2) if the plaintiffs cannot agree, the Court so finds after a view of the premises, the injunction will be lifted, and IDF&G may operate that range in the same manner in which it historically has (ie., without any on site supervision), up to 500 shooters per year.

Memorandum Decision, Findings of Fact, Conclusions of Law and Order, p. 61. As the Court has decided any additional view of the premises is not appropriate, the determination of whether safety considerations have been met (whether any shooter in any position cannot fire a round above the berm behind the target) will be through trial before the Court.

IT IS FURTHER ORDERED that a Court trial on the issue of safety considerations for up to 500 shooters is scheduled to begin June 13, 2011, at 9:00 a.m.

ENTERED this 10th day of March, 2011.



John T. Mitchell, District Judge

Certificate of Service

I certify that on the 11 day of March, 2011, a true copy of the foregoing was mailed postage prepaid or was sent by interoffice mail or facsimile to each of the following:

<u>Lawyer</u>	<u>Fax #</u>
Scott W. Reed	208 765-5117 ✓
W. Dallas Burkhalter and Kathleen E. Trever	208 334-2148 ✓

<u>Lawyer</u>	<u>Fax #</u>
Harvey Richman	Via mail ✓


Secretary

STATE OF IDAHO)
County of KOOTENAI)^{ss}

FILED 4/20/11

AT 131 O'Clock 0 M
CLERK OF DISTRICT COURT

Wanda Butler
Deputy

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

CITIZENS AGAINST RANGE EXPANSION,)
et al,)

Plaintiff,)
vs.)

IDAHO FISH AND GAME DEPARTMENT,)
an agency of the STATE OF IDAHO, et al,)

Defendant.)

Case No. **CV 2005 6253**

**MEMORANDUM DECISION AND
ORDER DENYING DEFENDANTS'
MOTION FOR PERMISSION TO
APPEAL UNDER I.A.R. 12**

I. PROCEDURAL HISTORY AND FACTUAL BACKGROUND.

This matter is before the Court on defendant Idaho Fish and Game Department's (IDFG) motion for permission to appeal this Court's March 10, 2011, "Memorandum Decision and Order on Motions to Strike, Defendant's Motion for View, Defendant's Motion for Partial Lifting of Injunction and Plaintiff's Motion for Summary Judgment; and Order Scheduling Court Trial."

On February 23, 2007, this Court entered its 63-page Memorandum stating:

IT IS HEREBY ORDERED plaintiffs are entitled to an injunction ordering defendants Idaho Department of Fish and Game and Director Steven M. Huffaker to close the Farragut Wildlife Management Area to all persons with pistols, rifles and firearms using or intending to use live ammunition until a baffle is installed over every firing position. The baffle must be placed and be of sufficient size that the shooter, in any position (standing, kneeling, prone), cannot fire his or her weapon above the berm behind the target. Once baffles are installed and either 1) plaintiffs agree that the shooter in any position cannot fire a round above the berm behind the target, or 2) if the plaintiffs cannot agree, the Court so finds after a view of the premises, the injunction will be lifted, and IDFG may operate that range in the same manner in which

it historically has (ie., without any on site supervision), up to 500 shooters per year. Once IDF&G has realized that number in a given year, it must close the range for the remainder of that calendar year.

IT IS FURTHER ORDERED the Idaho Department of Fish and Game is free to seek any funding it wishes. The Idaho Department of Fish and Game is free to build any improvements upon its property. However, use levels will remain capped at 500 shooters per year unless the following two concerns have been adequately addressed: **1) Safety:** include safety measures adequate to **prevent** bullet escapement beyond the boundaries owned and controlled by IDF&G, and **2) Noise:** include noise abatement measures to reduce noise to a decibel level agreed upon by the parties in the first instance, or, if the parties are unable to agree, to be set by the Court following further evidence. Even if the solution to these two concerns are agreed upon by the parties, in order to close this case IDF&G will need to obtain an order from the Court to exceed 500 shooters per year. The first concern (safety) can be satisfied only by the "No Blue Sky" rule, or "totally baffled... so that a round cannot escape", as espoused by the nation's preeminent authority on range design and designer of the Vargas Master Plan, Clark Vargas. Exhibit 2, p. 5. Once bullet containment is achieved, it matters not for purposes of this litigation if the range is supervised (with bullet containment, supervision would only inure to the benefit of the participants, an important consideration, but not the subject of this lawsuit). The second concern (noise) is a function of the number of shooters (per year or per day) and peak decibel level. For example, it may be that 500 shooters per year in an unmitigated range producing 65 decibels is less desirable than 50,000 shooters per year from a range that only produces 30 decibels. It would seem logical for the parties to agree as to noise levels and shooter numbers in advance of any construction, but it is not the Court's place to force such agreement in advance. If the parties in the future cannot agree as to noise levels and maximum shooter numbers, the Court will make that determination with additional evidence. If IDF&G makes improvements but does not successfully address safety and noise concerns, IDF&G will not be allowed to exceed 500 shooters per year.

Memorandum Decision, Findings of Fact, Conclusions of Law and Order, pp. 61-62

(emphasis in original). Since 2007, IDFG has made changes to the Farragut Shooting Range and requested the Court lift the February 23, 2007, injunction "as it applies to the renovated 100-yard portion of the Farragut Range and, as to noise abatement, adopt the noise standard of the Idaho Sport Shooting Range Act, codified at Idaho

Code §§ 67-9101-67-9105, as the standard applicable to operation of the Farragut

Shooting Range.” Brief in Support of Motion for Partial Lifting of Injunction, p. 12.

Hearing on the motion for partial lifting of the injunction was held on February 14, 2011, and this Court issued a 77-page Memorandum Decision and Order on March 10, 2011.

In that decision this Court found the Idaho Outdoor Sport Shooting Range Act, I.C. § 67-9101, et seq., violates the “special law” prohibition of Article III, § 19 of the Idaho Constitution, and is thus, unconstitutional. Memorandum Decision and Order on Motions to Strike, Motion for View, Motion for Partial Lifting of Injunction and Motion for Summary Judgment, p. 78. This Court also found the Act violated Article V, § 13 of the Idaho Constitution.

On March 25, 2011, IDFG filed its Defendants’ Motion for Permission to Appeal Under I.A.R. 12, and a Brief in Support of Defendants’ Motion for Permission to Appeal.

On April 4, 2011, CARE filed Plaintiffs’ Response to Defendants’ Motion for Permission to Appeal Under I.A.R. 12. Oral argument on the motion was held on April 20, 2011.

II. STANDARD OF REVIEW.

Where an order is not appealable as a matter of right under Idaho Appellate Rule 11, it can in some circumstances be accepted as a permissive appeal of an interlocutory order. I.A.R. 12; *Idaho Dept. of Labor v. Sunset Marts, Inc.*, 140 Idaho 207, 91 P.3d 1111 (2004). I.A.R. 12 states that permission may be granted to appeal an interlocutory order or decree of the district court which “involves a controlling question of law as to which there is substantial grounds for difference of opinion and as to which an immediate appeal from the order or decree may materially advance the orderly resolution of the litigation.”

III. ANALYSIS OF MOTION FOR PERMISSIVE APPEAL UNDER I.A.R. 12.

IDFG requests permission of this Court to appeal the Court’s March 10, 2011,

Appellate Rule 12(b). Defendants' Motion for Permission to Appeal, p. 2. The Rule requires filing of a motion for permission to appeal from an interlocutory order or judgment within fourteen days of date of entry. I.A.R. 12(b). This Court's Memorandum Decision and Order was dated March 10, 2011, but filed March 11, 2011. As such, IDFG's motion was timely filed on March 25, 2011.

IDFG moves the Court to permit an appeal of its interlocutory order on numerous grounds, claiming: the "substantial grounds for difference of opinion" requirement of I.A.R. 12 is met given this Court's holding the Idaho Outdoor Sport Shooting Range Act unconstitutional under this Court's "special law" analysis; the impact of the Court's holding the Idaho Outdoor Sport Shooting Range Act unconstitutional upon Idaho Code § 55-2605 (concerning the preemption of local governmental law and its ability to establish or enforce noise standards for outdoor sport shooting ranges); and, because evidence regarding safety requirements for up to 500 and over 500 shooter overlaps, "consideration of the appeal [by the reviewing court] would allow more efficient conduct of an evidentiary hearing [by this Court at a later date than that currently scheduled] to address factual issues." Brief in Support of Defendants' Motion for Permission to Appeal, pp. 4, *et seq.*

In response, CARE recognizes the difference of opinions held by the parties, but notes any appeal prior to a trial on the underlying safety requirements which must be met before noise standards are addressed, "serves no useful purpose towards the goal of advancing the orderly resolution of the litigation to permit piecemeal appeal." Plaintiffs' Response to Defendants' Motion for Permission to Appeal Under I.A.R 12, p. 4. CARE goes on to argue no pending cases would benefit from any expedited handling of an appeal as to the Court's holding I.C. § 67-9102 unconstitutional. *Id.*,

An appeal of an interlocutory Order may be accepted as a permissive appeal under Idaho Appellate Rule 12 even where the Order is not appealable as a matter of right. *Taylor v. Maile*, 142 Idaho 253, 257, 127 P.3d 156, 160 (2005). The Supreme Court of Idaho treats appeals as interlocutory appeals under I.A.R. 12 where the parties have briefed and argued issues on appeal, the District Court issues an Order involving a controlling question of law regarding which there are substantial grounds for difference of opinion, and an immediate appeal would materially advance orderly resolution of the litigation. *Id.* In *Budell v. Todd*, 105 Idaho 2, 665 P.2d 701 (1983), the Supreme Court wrote:

In accepting or rejecting an appeal by certification under I.A.R. 12, this Court considers a number of factors in addition to the threshold questions of whether there is a controlling question of law and whether an immediate appeal would advance the orderly resolution of the litigation. It was the intent of I.A.R. 12 to provide an immediate appeal from an interlocutory order if substantial legal issues of great public interest or legal questions of first impression are involved. The Court also considers such factors as the impact of an immediate appeal upon the parties, the effect of the delay of the proceedings in the district court pending the appeal, the likelihood or possibility of a second appeal after judgment is finally entered by the district court, and the case workload of the appellate courts. No single factor is controlling in the Court's decision of acceptance or rejection of an appeal by certification, but the Court intends Rule 12 to create an appeal in the exceptional case and does not intend by the rule to broaden the appeals which may be taken as a matter of right under I.A.R. 11. For these reasons, the Court has, over the six year experience of the use of Rule 12, accepted only a limited number of the applications for appeal by certification.

105 Idaho 2, 4, 665 P.2d 701, 703. Two things are needed: 1) "substantial issues of great public interest" or "legal questions of first impression" and "an immediate appeal would advance the underlying resolution of the litigation."

Here, while the parties' opinions regarding the Court's March 10, 2011, Memorandum Decision and Order differ, and the question of the constitutionality of the Idaho Sport Shooting Range Act is one of first impression, the Court's very reasoning

sets forth the fact that the instant case only gives rise to legal questions applicable to the parties involved (and thus, is not a "legal issue of great public interest"). The Court specifically stated:

There is nothing about this litigation that pertains to anything other than the Farragut range. There is nothing about the Court's prior decision that pertains to anything other than the Farragut range.

Memorandum Decision and Order on Motions to Strike, Defendant's Motion for View, Defendant's Motion for Partial Lifting of Injunction and Plaintiff's Motion for Summary Judgment; and Order Scheduling Court Trial, p. 49. The Court found no other state gun ranges exist near residences, there is no "like basis" upon which to compare Farragut range to others, and one can only conclude that "special litigation" is at issue. *Id.*, p. 56. Further, as argued by CARE, an appeal of the safety requirement issue (at a minimum) would "certainly" take place following trial. See Plaintiff's Response to Defendants' Motion for Permission to Appeal Under I.A.R. 12, p. 4. An immediate appeal of the noise standard constitutionality questions would certainly delay the June 13, 2011, trial on the safety issues.

If this Court were to grant IDFG's I.A.R. 12 motion for permissive appeal, it would be about a year for the appellate decision. If this Court's decision on the unconstitutional nature of the statute regarding the noise issue is upheld, then, at the time of the appellate court's decision and subsequent remittitur, this Court would have to schedule and hold a trial on the safety issue and the noise issue. There is no reason why those could not be at the same trial. If this Court's decision on the unconstitutional nature of the statute regarding the noise issue is overturned by the appellate court, then, at the time of the appellate court's decision as subsequent remittitur, this Court would have to schedule and hold a trial on the safety issue. No matter how this Court

If this Court denies IDFG's I.A.R. 12 motion for permissive appeal, then, after this Court's decision following the June 13, 2011, trial on the safety issues, IDFG can appeal the unconstitutionality of the act pertaining to the noise issue (and this appeal is a given according to IDFG's attorney at the April 20, 2011, hearing), and, if the safety issue is decided against IDFG, then IDFG can appeal this Court's decision on that issue at the same time. If, following trial, this Court decides the safety issue against CARE, then CARE can cross-appeal that issue. The end result, *there is only one appeal*.

Given the fact that this matter is currently scheduled for a court trial on the safety issues beginning June 13, 2011, and given the certainty of IDFG's appeal on the unconstitutionality of the act pertaining to the noise issue, the I.A.R. 12 motion must be denied.

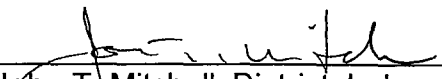
None of the factors listed in *Budell* weigh in favor of IDFG's instant motion for permission to appeal under I.A.R. 12. An immediate appeal would simply not advance the orderly resolution of this litigation. This case is less than two months away from being resolved, at least at the trial court level. A permissive appeal now would likely protract the resolution of the safety issues more than a year, and could produce two appeals rather than one (an appeal of the constitutionality issues involving the Idaho Outdoor Sport Shooting Range Act, followed by a trial on the safety issues and an appeal on the Court's determination of that issue). Such a scenario is not "orderly resolution". While this litigation is important to the parties, it is only germane to the parties...there is no "substantial legal issues of great public interest." Under I.A.R. 12, one needs both for the District Court to grant a permissive appeal...in this case neither are present. While the constitutionality of the Idaho Outdoor Sport Shooting Range Act is a "legal issue of first impression, it only pertains to the noise issue in this litigation and

IV. CONCLUSION AND ORDER.

For the reasons stated above, this Court must deny IDFG's motion for permission to appeal under I.A.R 12.

IT IS HEREBY ORDERED IDFG's Motion for Permissive Appeal Under I.A.R. 12 is DENIED.

Entered this 20th day of April, 2011.



John T. Mitchell, District Judge

Certificate of Service

I certify that on the 20th day of April, 2011, a true copy of the foregoing was mailed postage prepaid or was sent by interoffice mail or facsimile to each of the following:

Lawyer
Scott W. Reed


Fax #
208 765-5117

W. Dallas Burkhalter/Kathleen Trever

208 334-2148

Lawyer
Harvey Richman (via mail)
19643 Perimeter Rd.
Atlanta ID 83801

#2073



Jeanne Clausen, Deputy Clerk

STATE OF IDAHO)
County of KOOTENAI)^{SS}

FILED 8/25/11

AT 1:15 O'Clock P. M
CLERK OF DISTRICT COURT

Jane Clausen
Deputy

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

CITIZENS AGAINST RANGE EXPANSION,)
et al,)
)
) *Plaintiff,*)
)
vs.)
)
IDAHO DEPARTMENT OF FISH AND)
GAME, an agency of the STATE OF)
IDAHO, et al.,)
)
) *Defendant.*)
)

Case No. **CV 2005 6253**

**MEMORANDUM DECISION,
FINDINGS OF FACT, CONCLUSIONS
OF LAW AND ORDER FOLLOWING
COURT TRIAL ON DEFENDANT'S
MOTION PARTIAL LIFTING OF
INJUNCTION (SAFETY ISSUES)**

I. FACTUAL BACKGROUND.

The following is taken from this Court's March 11, 2011, Memorandum Decision and Order on Motions to Strike, Defendant's Motion for View, Defendant's Motion for Partial Lifting of Injunction and Plaintiff's Motion for Summary Judgment, and Order Scheduling Court Trial:

The Farragut Wildlife Management Area was formerly the site of the Farragut Naval Training Center established by the United States Navy in 1942. Land began being acquisitioned by the defendant, Idaho Department of Fish and Game (IDFG) in 1949, when four separate parcels bordering Lake Pend Oreille were purchased. IDFG's ownership at Farragut Park presently consists of approximately 1,413 acres. This is made up of four parcels totaling 157 acres on the shore of Lake Pend Oreille and one 1,256-acre parcel located west of Bayview, Idaho. The Farragut Shooting Range occupies a site of approximately 160 acres and has been used as a shooting range since the land was owned by the United States Navy. The surrounding neighborhood consists of private residential houses, a public road (Perimeter Drive), school bus stops and hiking trails.

The use of the Farragut Shooting Range expanded a great deal since 2002. Use went from 176 shooters in 2002, to 370 shooters in 2004, to 509 in 2005 only through August of that year. Plaintiffs' Brief in Support of Motion for Summary Judgment, p. 25, n. 2.

A public proposal for the improvement of the Farragut Shooting Range made by the IDFG seems to be what precipitated this lawsuit. In 2004, the IDFG published a proposal to improve the Farragut Shooting Range with the investment of \$3,600,000. That proposal was based on the Vargas Master Plan. The Vargas Master Plan proposed making improvements to the Farragut Shooting Range in the areas of public safety, public access, noise mitigation, facility quality and management.

Plaintiff CARE is an unincorporated non-profit association formed for the purpose of stemming unwarranted expansion of the Farragut Shooting Range (Complaint, p. 2, ¶ 1), and the individual plaintiffs who live near the Farragut Shooting Range. CARE claims these expansions cannot be done safely because the IDFG does not own enough property nor have enough money to make these improvements safe. CARE seeks to enjoin IDFG from carrying out the Vargas Master Plan. CARE claims that although the plan purports to make improvements to the shooting range, the plan will also expand the shooting range by lengthening the range from 500 to 600 yards, adding berms, parking and intermediate firing positions, and including trap and skeet fields, mounted cowboy action areas, and 130 shooting stations.

IDFG claims there is no plan to *expand* the Farragut Shooting Range, either in geographic size, shooter capacity, or types of shooting activity, but only to *improve* it.

In 1996, Clark Vargas, a professional engineer, published a paper for the 1996 Third National Shooting Range Symposium, which was intended to provide a general review of range design criteria when selecting a shooting range site. This paper set forth nationally-recognized safety standards for construction and operation of shooting ranges. The Vargas Master Plan is inconsistent with the range design criteria Vargas discussed in his 1996 Third Shooting Range Symposium.

Memorandum Decision and Order on Motions to Strike, Defendant's Motion for View, Defendant's Motion for Partial Lifting of Injunction and Plaintiff's Motion for Summary Judgment, and Order Scheduling Court Trial, pp. 1-3.

II. PROCEDURAL BACKGROUND.

On August 22, 2005, CARE filed its Complaint in this matter. IDFG filed an Answer on September 16, 2005. On November 9, 2005, this Court set the matter for a five-day jury trial scheduled to begin on July 17, 2006. On February 9, 2006, CARE filed

an Amended Complaint. On March 13, 2006, this Court, pursuant to the parties' stipulation, vacated the July 17, 2006, trial and scheduled this for a jury trial beginning September 18, 2006. Following a hearing on June 2, 2006, this Court granted CARE's motion to vacate the trial date of September 18, 2006, and scheduled this matter for jury trial beginning December 11, 2006.

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

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

Motion for Summary Judgment, p. 2. CARE sought summary judgment, asking this court to permanently enjoin the IDFG from continued operation of the range and future implementation of the Vargas Master Plan. Specifically, CARE asked this Court in their first cause of action for a permanent injunction that requires IDFG to restore and close the outer access gate, prohibit any other or different access road to the range and restore the operational policy that existed in July of 2003. CARE's second cause of action asked the Court for a permanent injunction against any expansion to the shooting range and restoring it to its July 2003 operations. CARE at the time asserted that if summary judgment were entered in the first two causes of action, CARE would stipulate to a dismissal of all claims for damages and would dismiss with prejudice their third, fourth and fifth causes of action.

Briefing was submitted by both sides. Additionally, the Court considered:

"Plaintiffs' Statement of Material Facts Not in Dispute", "Plaintiffs' Appendix of Relevant

Publications in Support of Motion for Summary Judgment”, Affidavits of Marcelle Richman, Duane Nightengale and Roy H. Ruel; “Defendants’ Statement of Material Facts in Dispute”, “Defendants’ Appendix of Relevant Documents” and affidavits of Clark Vargas, P.E., Randall Butt and David Leptich. On September 5, 2006, CARE filed “Plaintiffs’ Reply Brief in Support of Motion for Summary Judgment” and various certifications of documents. On September 7, 2006, CARE re-filed “Plaintiffs’ Reply Brief in Support of Motion for Summary Judgment”, this time attaching a “Comparison Vargas Affidavit With Vargas Design Criteria”.

Oral argument on CARE’s Motion for Summary Judgment was held on September 13, 2006. That motion was taken under advisement. CARE had also filed a Motion to Strike the Affidavit of David Leptich to the extent it included the Range Evaluation Report prepared by Edward M. Santos. The Court granted the motion as it was hearsay. At oral argument on September 13, 2006, IDFG’s attorney tendered to the Court for filing the Affidavit of Edward M. Santos, attaching his Range Evaluation Report. CARE objected as to the timeliness of Santos’ affidavit. The Court in its discretion overruled CARE’s objection as to timeliness, as the parties had been aware of the Range Evaluation Report for some time.

On September 19, 2006, this Court denied CARE’s Motion for Summary Judgment, and ordered the parties to submit simultaneous briefing on the issues of: the applicable standard(s), the legal or factual nature of the standards, and what the Court and jury must decide at trial. Memorandum Decision and Order Denying Plaintiffs’ Motion for Summary Judgment, and Order Setting Briefing Schedule, pp. 14-15. That briefing was submitted.

On February 23, 2007, this Court issued its sixty-page Memorandum Decision,

Findings of Fact, Conclusions of Law and Order. In that decision, this Court stated:

IT IS HEREBY ORDERED plaintiffs are entitled to an injunction ordering defendants Idaho Department of Fish and Game and Director Steven M. Huffaker to close the Farragut Wildlife Management Area to all persons with pistols, rifles and firearms using or intending to use live ammunition until a baffle is installed over every firing position. The baffle must be placed and be of sufficient size that the shooter, in any position (standing, kneeling, prone), cannot fire his or her weapon above the berm behind the target. Once baffles are installed and either 1) plaintiffs agree that the shooter in any position cannot fire a round above the berm behind the target, or 2) if the plaintiffs cannot agree, the Court so finds after a view of the premises, the injunction will be lifted, and IDF&G may operate that range in the same manner in which it historically has (ie., without any on site supervision), up to 500 shooters per year. Once IDF&G has realized that number in a given year, it must close the range for the remainder of that calendar year.

IT IS FURTHER ORDERED the Idaho Department of Fish and Game is free to seek any funding it wishes. The Idaho Department of Fish and Game is free to build any improvements upon its property. However, use levels will remain capped at 500 shooters per year unless the following two concerns have been adequately addressed: 1) **Safety**: include safety measures adequate to **prevent** bullet escapement beyond the boundaries owned and controlled by IDF&G, and 2) **Noise**: include noise abatement measures to reduce noise to a decibel level agreed upon by the parties in the first instance, or, if the parties are unable to agree, to be set by the Court following further evidence. Even if the solution to these two concerns are agreed upon by the parties, in order to close this case IDF&G will need to obtain an order from the Court to exceed 500 shooters per year. The first concern (safety) can be satisfied only by the "No Blue Sky" rule, or "totally baffled...so that a round cannot escape", as espoused by the nation's preeminent authority on range design and designer of the Vargas Master Plan, Clark Vargas. Exhibit 2, p. 5. Once bullet containment is achieved, it matters not for purposes of this litigation if the range is supervised (with bullet containment, supervision would only inure to the benefit of the participants, an important consideration, but not the subject of this lawsuit). The second concern (noise) is a function of the number of shooters (per year or per day) and peak decibel level. For example, it may be that 500 shooters per year in an unmitigated range producing 65 decibels is less desirable than 50,000 shooters per year from a range that only produces 30 decibels. It would seem logical for the parties to agree as to noise levels and shooter numbers in advance of any construction, but it is not the Court's place to force such agreement in advance. If the parties in the future cannot agree as to noise levels and maximum shooter numbers, the Court will make that determination with additional evidence. If IDF&G makes improvements

but does not successfully address safety and noise concerns, IDF&G will not be allowed to exceed 500 shooters per year.

Memorandum Decision, Findings of Fact, Conclusions of Law and Order, pp. 61-62.

(emphasis in original). No appeal was taken from that order.

Since 2007, IDFG has made changes to the Farragut Shooting Range. IDFG now requests the Court lift the February 23, 2007, injunction “as it applies to the renovated 100-yard portion of the Farragut Range and, as to noise abatement, adopt the noise standard of the Idaho Sport Shooting Range Act, codified at Idaho Code §§ 67-9101 to 67-9105, as the standard applicable to operation of the Farragut Shooting Range.” Brief in Support of Motion for Partial Lifting of Injunction, p. 12.

On June 9, 2010, IDFG filed its Motion for Partial Lifting of Injunction, along with an Affidavit of Kerry O’Neal, and a Brief in Support of Defendants’ Motion for Partial Lifting of Injunction. On July 6, 2010, CARE filed Plaintiffs’ Response to Motion for Partial Lifting of Injunction and an Amended Response to Motion for Partial Lifting of Injunction. On August 4, 2010, IDFG filed its Reply Brief in Support of Motion for Partial Lifting of Injunction. On August 16, 2010, CARE filed the Affidavit of James A. Caulder and Affidavit of Jeanne Hom. On September 16, 2010, the parties submitted a Joint Case Management Plan, and this Court entered its Order on the Joint Case Management Plan on September 17, 2010. The Plan set forth discovery deadlines along with the timeline within which the parties are to file briefs in support of or opposition to the partial lifting of the injunction.

On December 12, 2010, IDFG filed its Brief in Support of Summary Disposition of Defendants’ Motion for Partial Lifting of Injunction. Along with the brief, IDFG filed a Statement of Undisputed Facts and the Affidavits of David Leptich, Kerry O’Neal, and Jon Whipple. On December 20, 2010, CARE filed its Motion to Strike the Affidavits of

Jon Whipple and Kerry O'Neal, and a Motion to Strike the Testimony of Kerry O'Neal Based on Lack of Expertise and Lack of Foundation. IDFG filed its memoranda opposing both motions, supported by the Affidavit of Kathleen Trever, on January 3, 2010. Oral argument on these motions was held on January 11, 2011. Following that hearing, this Court took these motions under advisement.

Hearing on IDFG's Motion to Strike Affidavit of James Caulder, IDFG's Motion for Summary Disposition of Motion for Partial Lifting of Injunction, and IDFG's Motion for View, as well as CARE's Motion for Summary Judgment were all held on February 14, 2011. In its seventy-seven page March 11, 2011, Memorandum Decision and Order on Motions to Strike, Defendant's Motion for View, Defendant's Motion for Partial Lifting of Injunction and Plaintiff's Motion for Summary Judgment, and Order Scheduling Court Trial, the Court held:

IT IS HEREBY ORDERED plaintiff CARE's Motion to Strike Testimony of Kerry O'Neal Based on Lack of Expertise and Lack of Foundation, is DENIED, and CARE's Motion to Strike the December 9, 2010 Affidavits of Jon Whipple and Kerry O'Neal is DENIED.

IT IS FURTHER ORDERED IDFG's motion to strike Caulder's affidavit is DENIED.

IT IS FURTHER ORDERED other than ¶ 26, and the attendant Exhibits 4 and 5, CARE's motion to strike the Amended Affidavit of O'Neal is DENIED.

IT IS FURTHER ORDERED IDFG's motion for a view of the premises is DENIED. Any future action which contemplated a view of the premises by the Court will have to be accomplished by trial.

IT IS FURTHER ORDERED this Court finds the Idaho Outdoor Sport Shooting Range Act, I.C. § 67-9101, et seq., violates the "special law" prohibition of Article III, § 19 of the Idaho Constitution, and is thus, unconstitutional. CARE's motion for summary judgment as to the unconstitutional nature of the Act is GRANTED.

IT IS FURTHER ORDERED due solely to the finding that the Idaho Outdoor Sport Shooting Range Act is unconstitutional, due to failure to address noise considerations alone, IDFG's motion to partially lift the injunction and IDFG's motion for summary disposition of its motion to partially lift the injunction are DENIED at this time. **IT IS FURTHER ORDERED** this Court finds the Idaho Outdoor Sport Shooting Range Act, I.C. § 67-9101, et seq., violates the Article V, § 13 of the Idaho

Constitution, and is thus, unconstitutional. CARE's motion for summary judgment as to the unconstitutional nature of the Act is GRANTED.

IT IS FURTHER ORDERED cross motions for summary judgment on the issue of range safety are DENIED as material issues of fact remain. Issues of material fact remain in dispute as to range safety issues (as well as noise issues since the Idaho Outdoor Sport Shooting Range Act has been found to be unconstitutional) to allow IDFG to expand beyond 500 users per year. Issues of material fact remain in dispute both as to the injunction to prevent IDFG opening the range to up to 500 persons per year. While it is beyond dispute that baffles have been installed, the following criteria imposed by the Court on February 23, 2007, have not been met:

Once baffles are installed and either 1) plaintiffs agree that the shooter in any position cannot fire a round above the berm behind the target, or 2) if the plaintiffs cannot agree, the Court so finds after a view of the premises, the injunction will be lifted, and IDF&G may operate that range in the same manner in which it historically has (ie., without any on site supervision), up to 500 shooters per year.

Memorandum Decision, Findings of Fact, Conclusions of Law and Order, p. 61. As the Court has decided any additional view of the premises is not appropriate, the determination of whether safety considerations have been met (whether any shooter in any position cannot fire a round above the berm behind the target) will be through trial before the Court.

IT IS FURTHER ORDERED that a Court trial on the issue of safety considerations for up to 500 shooters is scheduled to begin June 13, 2011, at 9:00 a.m.

Memorandum Decision and Order on Motions to Strike, Defendant's Motion for View, Defendant's Motion for Partial Lifting of Injunction and Plaintiff's Motion for Summary Judgment, and Order Scheduling Court Trial, pp. 75-77.

On March 25, 2011, IDFG filed Defendants' Motion for Permission to Appeal Under I.A.R. 12 this Court's decision finding the Idaho Sport Shooting Range Act unconstitutional, and a memorandum in support thereof. On April 4, 2011, CARE filed Plaintiffs' Response to Defendants' Motion for Permission to Appeal Under I.A.R. 12. Oral argument was held on April 20, 2011, and later that day this Court entered its Memorandum Decision and Order Denying Defendants' Motion for Permission to Appeal Under I.A.R. 12. IDFG also filed a similar motion with the Idaho Supreme

Court, which was denied on May 26, 2011.

On June 6, 2011, CARE filed Plaintiffs' Pretrial Memorandum, and on June 8, 2011, IDFG filed Defendants' Pre-Trial Brief. On June 10, 2011, the parties submitted a Joint Stipulation on Evidence and Facts. The Court trial was held June 13-14, 2011. On June 28, 2011, CARE filed Plaintiffs' Proposed Findings of Fact and Conclusions of Law, and IDFG filed Defendants' Post-Trial Brief and Defendants' Proposed Findings of Fact, Conclusions of Law and Draft Order. On June 29, 2011, CARE filed its Plaintiffs' Closing Brief.

III. ANALYSIS.

A. AGREEMENT REMAINS THE SUPERIOR RESOLUTION.

Four and one-half years ago this Court implored the parties to this lawsuit to agree as to noise and safety issues going forward. February 23, 2007, Memorandum Decision, Findings of Fact, Conclusions of Law and Order, pp. 50-51, 59-60.

Resort to the courts for resolution is a method of working through this problem between the IDFG, which wants to increase the number of people using this range, and CARE, representing those citizens down range who would be impacted by that increased use. However, in the long term, given the fact the parties will have to co-exist regardless of the outcome, litigation is unlikely the superior method of resolving these issues. This is obviously, and understandably, an emotionally charged issue for both sides. It is unknown what, if anything, CARE has tried as far as working with IDFG. In the record, up to this point in time, IDFG has done little to work toward agreement or to lessen the emotions involved. To begin with, IDFG told the granting agency, the National Rifle Association (NRA) that it expected 46,426 people per month or 557,112 people per year would visit the range once it was modified (February 23, 2007,

Memorandum Decision, Findings of Fact, Conclusions of Law and Order, p. 19, ¶ 19; Plaintiffs' Exhibit 22, Table 2), yet did not tell area residents about those projected numbers in public meetings. Even after litigation commenced, IDFG claimed the \$3.6 million investment in the range was not any sort of *expansion* to the range but was simply an *improvement* of the range (*Id.*, pp. 4-5; Defendant's Memorandum in Opposition to Summary Judgment, p. 3; Defendant's Answers to Plaintiffs' Interrogatory No. 8), even though IDFG was in fact planning to increase usage from less than 500 people per year to more than one half million per year. IDFG made its grant application based upon the Vargas Plan, yet that Vargas Plan is at odds with what Clark Vargas himself considers to be safe as set forth in his Design Criteria, which he authored ten years before he created the Vargas Plan for this range. *Id.*, pp. 13-14; pp. 32-24, ¶ 49. Next, rather than establish noise standards by agreement as encouraged by this Court, IDFG chose the legislative path, which IDFG is allowed to do. IDFG was successful in its legislative effort. However, in the evidence that came before this Court regarding what IDFG was telling Idaho's legislators, IDFG was caught making several false claims in its effort to get its legislation passed. This Court found such legislation to be "special legislation", and thus, unconstitutional. All of this was discussed in detail in a previous decision. March 11, 2011, Memorandum Decision and Order on Motions to Strike, Motion for View, Motion for Partial Lifting of Injunction and Plaintiff's Motion for Summary Judgment and Order Scheduling Court Trial, pp. 48-54. More recently, IDFG has shown its reluctance to follow advice it has been given by its own retained experts. IDFG did not build the existing improvements to the plans and specifications established by IDFG's new expert Kerry Lynn O'Neal. IDFG filed a construction plan with Kootenai County in 2007 to obtain a building permit, but did not provide a copy to

CARE. Plaintiff's Proposed Findings of Fact and Conclusions of Law, p. 4. While IDFG was not required to notify CARE of its request for a building permit, either by Idaho law or by prior Court orders, not keeping CARE informed certainly does nothing to engender trust. IDFG then commenced and completed building its improvements to the range without running those improvements by CARE or by the Court. Again, IDFG was not required to provide prior notice. However, failing to keep CARE informed of what IDFG was building until after those improvements were completed when IDFG filed its Motion for Partial Lifting of Injunction certainly creates tension in the community and does nothing to build trust, let alone a collaborative solution. Further, its lack of communication puts IDFG and its expenditures at risk by building improvements that might later be determined to be unacceptable.

Given the history, it is understandable why CARE does not trust IDFG's future promise to have a supervisor on the premises at all times it is open for operation, or IDFG's promise to create detailed rules and post those rules throughout the facility. This is why future dialogue between the parties is truly superior compared to resorting to litigation. Litigation will produce an answer, but litigation will probably not produce the superior answer and litigation will never restore trust between these parties. It is inescapable that these parties will be required to continue to co-exist into the future. That co-existence can be by court directive, or could be by a collaborative agreement reached by thoughtful discussion between the parties. This Court simply encourages the parties to at least try to communicate and attempt to collaborate.

B. O'NEAL'S QUALIFICATION AS AN EXPERT WITNESS.

IDFG hired Kerry Lynn O'Neal to make recommendations for safety of IDFG's range through his business, TRS Range Services. O'Neal testified at length on June

13, 2011. O'Neal testified he is the president and CEO of TRS Range Services Corporation. O'Neal's credentials are listed in Exhibit III. O'Neal has experience in firearm design, shooting firearms, testing firearms, testing baffles and looking at bullet penetration and fragmentation. O'Neal admitted his experience comes from on-the-job training. He has taken no tests, and relies on books for authority. O'Neal is not an engineer. At trial on June 13, 2011, the Court conditionally ruled O'Neal's testimony admissible. O'Neal was asked whether a whole bullet could go through the side openings on the IDFG range with the modifications that had been made, and O'Neal testified that was possible. O'Neal was asked whether a whole bullet could go over the backstop of the range, and he did not think that was possible. When asked for the basis of those opinions, O'Neal, refreshingly honestly, but starkly deficient, said "Based on my expert witness ability."

In spite of that deficient basis, O'Neal has experience and is minimally qualified as an expert. Because little has changed in the Court's analysis, the following is taken from this Court's March 11, 2011, Memorandum Decision and Order on Motions to Strike, Defendant's Motion for View, Defendant's Motion for Partial Lifting of Injunction and Plaintiff's Motion for Summary Judgment; and Order Scheduling Court Trial:

IDFG's arguments are well-taken. Rule 702 reads:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

I.R.E. 702. The decision to permit or deny expert witness testimony is one left to the discretion of the Court. *J-U-B Engineers*, 146 Idaho 311, 314-15, 193 P.3d 858, 861-62. And, upon making that decision, the Court (as trier of fact at the summary judgment stage of proceedings) is also entitled to give such testimony the weight to which it deems such testimony is entitled. *Christensen v. Nelson*, 125 Idaho 663, 666, 873

P.2d 917, 920 (Ct.App. 1994) (“As a trier of fact, the district court was allowed to make the final decision on how much weight, if any, to give to an expert’s testimony. Provided that the trier of fact does not act arbitrarily, an expert’s opinion may be rejected even when uncontradicted. *Simpson v. Johnson*, 100 Idaho 357, 362, 597 P.2d 600, 605 (1979).”) A proper foundation for O’Neal’s opinions has been laid here. Idaho Rule of Evidence 703 permits the facts or data upon which an expert’s opinion are based to be “those perceived by or made known to the expert at or before the hearing.” I.R.E. 703. There is no dispute here that O’Neal perceived certain facts and data regarding the Farragut Shooting Range and formed his opinion from the facts and data he observed. To the extent O’Neal relies exclusively upon facts or data not “reasonably relied upon by experts in [his] particular field”, this Court may nonetheless admit his opinion testimony if it finds the probative value in assisting the trier of fact to evaluate O’Neal’s opinion substantially outweighs any prejudicial effect. I.R.E. 703. While the objections raised by CARE may go to the extent of the probative value of O’Neal’s affidavit, and thus the weight given by the Court to opinions contained in O’Neal’s affidavit, O’Neal’s opinion still has probative value. CARE has not articulated any prejudice which would result from the admission of O’Neal’s opinion.

At oral argument, the focus of CARE’s attorney turned to *Carnell v. Barker Management, Inc.*, 137 Idaho 322, 48 P.3d 651 (2002), a case not mentioned in either side’s briefing, for the proposition that the expert must explain his or her methodology, and a failure to explain that methodology makes that expert’s opinion inadmissible. A review of *Carnell* shows that the “expert’s” failure to explain his methodology was but one of several defects in that expert’s affidavit (the most fatal according to the Idaho Supreme Court was the fact that this “expert” had never been *disclosed* as an expert) which resulted in the trial court’s striking that expert’s affidavit. That decision was upheld by the Idaho Supreme Court. The pertinent portion of *Carnell* reads:

The district court was cognizant of the fact that this Court has not adopted *Daubert*, and conducted a bare analysis of Bidstrup’s second affidavit under I.R.E. 104 and 702. In its decision, the court first addressed whether Bidstrup was qualified as a fire causation and origin expert. Citing the lack of information in his affidavit concerning his education, training, and experience in the area of fire investigation, coupled with no mention of how Bidstrup gained his knowledge in fire causation, the district court found that Bidstrup was “unqualified to testify as to the cause, place of origin, or spread of fire....” The court next tried to determine if Bidstrup’s testimony was based on “scientific, technical, or other specialized knowledge” as required by I.R.E. 702. The court found that other than the one sentence stating that fire burns towards fuel or oxygen,

a common fact known by most lay people, there was no other explanation of the methodology Bidstrup used to determine the cause of the fire or exclude possible causes. The court also found that Bidstrup's testimony lacked factual foundation. Even though Bidstrup claimed to have reviewed the depositions in the case, his conclusions contradicted the testimony given in those depositions. The court also noted that much of Bidstrup's affidavit was nothing more than conclusions as to questions of law. Witnesses are not allowed to give opinions on questions of law; thus, the district court properly found that those conclusions were not admissible.

137 Idaho 322, 328, 48 P.3d 651, 657. This Court's reading of *Carnell* is that it does not *require* "methodology" be set forth, but "methodology" is certainly a factor to be considered by the trial court. In his affidavit, O'Neal sets forth his experience (he owns a business established to meet the service needs of the firing range industry including design and construction of new indoor and outdoor firing ranges, Affidavit of Kerry O'Neal, p. 2, ¶ 1, he has designed more than 100 municipality shooting range facilities, *Id.*, and he is familiar with the NRA Range Source Book and other range guidance documents, *Id.*, ¶ 4), and his foundation (he was retained by IDFG as a consultant for this range's improvements, *Id.*, ¶ 6, he has inspected the 100-yard shooting area, *Id.*, p. 3, ¶ 8, he has reviewed this Court's orders, *Id.*, p. 2, 4, ¶¶ 5, 18). Affidavit of Kerry O'Neal, pp. 2-4.

O'Neal claims:

Based on my experience and observation, the renovations at the 100-yard shooting area ensure that any rounds fired that hit and skip will be contained within the boundaries owned and controlled by IDFG.

Based on my inspection, experience and observation, it is my opinion that the improvements at the Farragut Shooting Range have satisfied the conditions for bullet containment set by the Court's Order to re-open the 100-yard portion of the range.

Id., p. 4, ¶¶ 22, 25. The Court agrees there is little methodology, but that goes to the issue of weight, not admissibility, at least in this case. O'Neal sets forth his expertise and foundation for his opinions. The lack of methodology, somewhat conclusory nature of his opinions, and the fact that his affidavit omits the exhibits he relied upon in making his opinion (they are not attached to the affidavit filed with the Clerk of Court) all go to the weight of his opinion.

Given that this matter is left to the discretion of the Court, both as to admissibility and weight of O'Neal's testimony, CARE's motion to strike O'Neal's affidavits in whole on the grounds of lack of expertise and lack of foundation is denied.

Memorandum Decision and Order on Motions to Strike, Defendant's Motion for View, Defendant's Motion for Partial Lifting of Injunction and Plaintiff's Motion for Summary Judgment; and Order Scheduling Court Trial, pp. 10-13. After hearing O'Neal's testimony at trial, CARE's Motion to Strike is denied. O'Neal is minimally qualified, only through experience, as an expert on ranges and weapons.

Just because O'Neal has been found minimally qualified as an expert does not mean the Court finds all of O'Neal's testimony is credible. CARE points out O'Neal's financial bias, being the President and CEO of TRS Range Services. Plaintiff's Closing Brief, pp. 14-15. O'Neal was hired by IDFG and as CARE points out, could be held liable if his design fails. *Id.* This Court agrees. O'Neal is financially biased, and accordingly, that is one of the reasons his opinions are given little weight.

Some of O'Neal's testimony is simply incredible. For example, O'Neal's opinion that ground baffles are used primarily to protect the target, and not to retain or reduce ricochets, is simply untenable. This opinion of O'Neal's is contrary to: 1) the NRA (CARE's Trial Exhibit 3, p. I-6, I-8, I-1-8, I-1-16, I-1-17); 2) David Luke (NRA Technical Team Advisory authored by David Luke: "Therefore, the primary purpose for the construction of backstops, berms and baffles is to protect against the injury of people, the damage of property or both. A secondary benefit is to permit the systemic recovery of fired lead projectiles..." There was no tertiary benefit listed by Luke. CARE's Trial Exhibit 6, p. 1.); 3) the testimony of James A. Caulder, Jr., (Caulder deposition, November 18, 2010, p. 26, L. 18 – p. 27, L. 4); and 4) Clark Vargas (CARE's Trial Exhibit 2, p. 5, Figure 12; Figure 22). O'Neal's testimony doesn't even begin to make

sense. The shooter is shooting at the target, and the shooter hopes to hit the target. Once the target is hit often enough, the target is destroyed. O'Neal's opinion that ground baffles protect the target is simply unsupported. At the June 13, 2011, hearing, O'Neal testified he "Doesn't support ground baffles", and when asked why he testified "They are earthen berms, and they become impacted with bullets which create other ricochet hazards." Aside from being absurd, this statement is directly contradicted by O'Neal's other testimony. First of all, O'Neal testified he would remove all rocks six inches deep in the earth. A spent lead bullet is smaller than a rock, and softer than a rock, thus, why would a spent bullet not be an acceptable material on the floor of the range? Second, O'Neal testified he did not know if there would be accidental discharges at the range; yet, the ground baffle earthen berm that would become so impacted with lead bullets that the berm itself becomes a ricochet hazard, *would only happen with misfires...people aiming too low.*

The Court finds believable O'Neal's testimony that the supports for the baffles, the rocks in the ground, are all ricochet hazards. But such opinion is only common sense, hardly expert testimony. O'Neal's testimony on that issue is at least consistent with the obvious and with laws of physics. At the June 13, 2011, hearing, O'Neal testified that there is "No telling where it [a ricochet] is going to go", and that a ricochet can be a fragment or a whole bullet. However, the fact that there is no telling where a ricochet is going to go is directly at odds with O'Neal's testimony at that hearing that he has personally observed ricochets tumbling over the end berm at some other unspecified high use law enforcement range, and "most tumble less than fifty yards."

O'Neal was asked whether a whole bullet could go through the side openings on the IDFG range with the modifications that had been made, and O'Neal testified that

was possible. The Court finds such to be credible, as it is corroborated by the evidence...many openings are visible from the photographs taken. CARE's Trial Exhibit 47, 48.

O'Neal was asked whether a whole bullet could go over the backstop of the range, and he did not think that was possible. When asked at the June 13, 2011, hearing for the basis of those opinions, O'Neal, refreshingly honestly, but starkly deficient, said "Based on my expert witness ability." Because O'Neal provided no legitimate basis for that opinion, it is accorded no weight. Later on, O'Neal conceded a ricochet could go over the backstop. Still later, O'Neal changed his testimony again. When asked "But some will ricochet over the back berm?", O'Neal answered: "I don't know that." Then, O'Neal changed again and testified that he didn't know the percentages of bullets that would ricochet over the back berm.

O'Neal testified that "IDFG changed my plan—they didn't build what I designed." The Court finds such to be credible. O'Neal designed seven baffles, IDFG built its improvements with six baffles. Exhibit 56.

O'Neal testified that he "didn't know" if ground baffles would help reduce or prevent ricochet, an answer the Court finds not credible. Such an answer overlooks the obvious. O'Neal was asked whether he agreed or disagreed with the NRA Technical Team Advisory authored by David Luke that "Ground baffles should always be used with overhead baffles". CARE's Trial Exhibit 6, p. 5. O'Neal stated he disagreed, but did not state why he disagreed, only to argue that he did not know where the NRA's Luke got his information from. The very beginning of Luke's article shows it was "reprinted from the Third National Shooting Range Symposium, 1996 with permission from International Association of Fish and Wildlife Agencies, Wildlife Management

Institute and U.S. Fish and Wildlife Service”, and makes it clear everything discussed is found in the “NRA Range Manual”, but that he would be going into more depth based on “lessons learned” in shooting range design. *Id.*, p. 1.

At the June 13, 2011, hearing, O’Neal testified that “We do not design for accidental discharge”, O’Neal admitted a mistake in shooting was an “accidental discharge”, and O’Neal would not answer the question as to whether they design for deliberate misuse (eg., firing into the floor of the range causing a ricochet). If such is true, O’Neal’s firm’s work is of little value since misfires, accidental discharges and deliberate misuse, in fact, occur. O’Neal himself testified that at a high use *law enforcement* range, he observed ricochets tumbling over the back berm. If law enforcement has misfires, misuse, accidental discharge, and aiming too low, it would seem a *civilian* range would have an even greater percentage of such.

Speaking of misfires, O’Neal was asked at trial whether there will be accidental discharges that occur at the Farragut Range, O’Neal testified: “I couldn’t tell you that”. Such answer by O’Neal strains credulity. Such answer is also inconsistent with O’Neal’s testimony under oath on other occasions. O’Neal was a little more forthright in his deposition when he responded as to accidental discharges: “It could happen anywhere, as you know.” O’Neal deposition, October 8, 2010, p. 59, LI. 20-22.

O’Neal did not know that the ETL (Engineering Technical Letter) recommends removing rocks from the soil one meter deep. O’Neal didn’t think he had ever read Vargas’ Design criteria for shooting ranges. At the June 13, 2011, hearing, O’Neal testified he does not agree with the NRA manual.

C. THE STANDARD FOR LESS THAN 500 SHOOTERS PER YEAR.

As set forth above, in its February 23, 2007, Memorandum Decision, Findings of

Fact, Conclusions of Law and Order, this Court held that for the range to be re-opened, for less than 500 shooters per year, IDFG must do the following:

The baffle must be placed and be of sufficient size that the shooter, in any position (standing, kneeling, prone), cannot fire his or her weapon above the berm behind the target. Once baffles are installed and either 1) plaintiffs agree that the shooter in any position cannot fire a round above the berm behind the target, or 2) if the plaintiffs cannot agree, the Court so finds after a view of the premises, the injunction will be lifted, and IDF&G may operate that range in the same manner in which it historically has (ie., without any on site supervision), up to 500 shooters per year. Once IDF&G has realized that number in a given year, it must close the range for the remainder of that calendar year.

Memorandum Decision, Findings of Fact, Conclusions of Law and Order, p. 61.

For a variety of reasons, IDFG now claims all it had to do was install a baffle, and IDFG could open the range up to 500 people, and that since IDFG has installed a baffle, IDFG is entitled to a partial lifting of the injunction. CARE takes a different position.

IDFG made this present claim known at the outset of the June 13, 2011, court trial when counsel for IDFG made a motion *in limine* asking for a ruling that IDFG had met this Court's safety requirement by installing the baffle. Counsel for IDFG argued that by installing the baffle, the "no blue sky" rule was satisfied. "No blue sky" means from any shooter's position, no open area is visible at the end of the range, all that is visible is the ground (floor) of the range, the target and the berm behind the target, and the overhead baffle. Counsel for IDFG argued that by "direct fire" (meaning the bullet hitting nothing from the instant it left the barrel until the bullet contacted the target), a bullet would have to be contained within the range, and that the issue of ricochets were not before the Court back in 2007. The Court, on the record, immediately after hearing argument from both sides on IDFG's motion *in limine*, denied the motion *in limine*. The Court held that while its 2007 decision did not mention "ricochets", neither did it mention

“direct fire”. The Court went on to state that the Court’s 2007 decision did state that a round can’t be fired above the berm, and that whether that round gets there by direct fire or by ricochet is of little consequence when the only reason this topic is being discussed in the first place is *public safety*.

Although the Court denied IDFG’s motion in limine, IDFG’s claim (that all it needed to do to open the range for up to 500 shooters per year was install an overhead baffle) is still at issue following the presentation of evidence at the court trial.

IDFG now argues there is significance in this Court’s choice of the word “baffle” (singular) and not “baffles” (plural) in its 2007 opinion. IDFG argues such word choice means this Court did not intend to include ricochet rounds escaping the range. IDFG writes: “Notably, the Court consistently refers to ‘baffle’ in the singular and not the plural in its findings and conclusions related to up to 500 shooters.” Defendants’ Post-Trial Brief, p. 6. IDFG then argues in its post-trial brief:

IDFG made motions *in limine* at the commencement of trial in response to Plaintiffs’ description of their offered evidence and their late-breaking concession that baffles at the 100-yard shooting area were sufficient to prevent shooters from firing high. IDFG asked the Court to exclude evidence related to ricochets and the other issues described in Plaintiffs’ pre-trial memo unrelated to the plain-language and contextual reading of the Court’s 2007 Order. In ruling on these motions, the Court acknowledged that its 2007 Order lends itself to IDFG’s interpretation that as long as direct fire has been addressed the injunction should be relieved as to particular shooting positions.

Id., p. 7. While this is accurate, it is also incomplete. Reviewing the notes taken by this Court’s Court Reporter, what was said by this Court on June 13, 2011, was:

The opinion does lend itself to an interpretation that as long as direct fire has been addressed, then the injunction should be relieved...at least as to this shooting position. But it also clearly says that it’s in effect until it is shown either by agreement or to the court’s satisfaction that a round can’t be fired above the berm behind the target, and when we’re considering issues of public safety, I think it would be naïve to limit the language of the decision to only direct fire. * * * It’s clear from the decision that something

less than zero bullet escapement is contemplated, but it is clear that something more than just direct fire was contemplated back in 2007.

Without citation to any authority, evidence or prior opinion, IDFG then makes the claim:

“As a fundamental matter, the mere identification of ricochet ‘hazards’ on the Range does not demonstrate harm to the Plaintiffs.” Defendants’ Post-Trial Brief, p. 13. This claim is incredible.

As written by this Court in 2007: “There can be no more ‘irreparable’ injury than death or injury from a bullet.” Memorandum Decision, Findings of Fact, Conclusions of Law and Order, p. 57. Whether the bullet that penetrates the skull of the innocent citizen tending his or her downrange garden arrived there by direct fire or by ricochet is of little consequence to that now deceased gardener. Ricochets were not discussed much during the 2006 court trial. The fact that ricochets were discussed in the June 2011 court trial (and much of that discussion was by IDFG witnesses) does not provide any logic to IDFG’s claim that “As a fundamental matter, the mere identification of ricochet ‘hazards’ on the Range does not demonstrate harm to the Plaintiffs.”

IDFG supports its claim that “As a fundamental matter, the mere identification of ricochet ‘hazards’ on the Range does not demonstrate harm to the Plaintiffs”, with the following convoluted reasoning:

In 2006, the Plaintiffs had the burden of showing clear endangerment to those outside the area owned and controlled by IDFG. However, the Court found the Range relatively safe for use up to 500 shooters “[e]xcept for the fact that the existing range contains no baffle. 2007 Order at 46.

Id., p. 13. Because of the words IDFG omitted from this portion of this Court’s prior decision, IDFG’s claim is completely false and intentionally misleading. Here is what the Court wrote, in context and in its entirety:

The Court finds this remedy [closing Farragut range to everyone] is not warranted. Except for the fact that the existing range contains no baffle,

the range is relatively safe as to its level of use up to and including 2002. February 23, 2007, Findings of Fact, Conclusions of Law and Order, p. 46. AS found by this Court the level of use in 2002 was 176 shooters for that entire year. *Id.*, p. 4. This Court found that as of the 2006 trial, the level of use “has expanded significantly since 2002.” *Id.* Thus, for IDFG to make the claim “However, the Court found the Range relatively safe for use up to 500 shooters “[e]xcept for the fact that the existing range contains no baffle”, and cite this Court’s February 23, 2007, opinion as authority is simply disingenuous. IDFG’s making that false claim by using an incomplete quote of the Court, can only be construed by this Court as an intentional act by counsel, an act that may warrant a sanction. The issue of a sanction will be left for another day, and counsel’s misconduct will not be held against IDFG. What is pertinent today is that this Court has *never* held *all* that was needed to make the range safe for up to 500 shooters was the installation of a baffle.

What the Court did hold was: “The baffle must be placed and be of sufficient size that the shooter, in any position (standing, kneeling, prone), cannot fire his or her weapon above the berm behind the target.” While the Court did not mention “ricochets” in so holding, neither did the Court mention “direct fire”. A review of this Court’s notes from the December 11, 12, 14, 14, 2006, trial shows “ricochet” was only mentioned once, in passing, by IDFG’s expert Roy Ruel, when he mentioned a ricochet can occur off the ground or floor of the range. If a shooter, intentionally or accidentally, shoots into the floor, and doing so causes a good likelihood of that bullet travelling over the berm behind the target, then the requirement that the shooter “cannot fire his or her weapon above the berm behind the target”, has not been met.

While ricochets were not discussed in 2006, IDFG has not made any cogent

argument as to why the problem of ricochets should *not* be considered by this Court relative to IDFG's motion to partially lift the injunction. In 2007, this Court was concerned with bullets that went over the back berm. Whether by ricochet or direct fire, the problem is still bullets going over the back berm.

D. THE PROBLEM OF RICOCHETS.

The problem of ricochets must be addressed and cannot be ignored. The problem of ricochets was not obviated by this Court's prior order. The problem of ricochets cannot be fully solved simply by supervision at the range and by trusting that no shooter will ever intentionally or accidentally misfire his weapon such that a bullet hits the floor of the range at a slightly acute angle, ricocheting over the back berm.

Caulder explained how ricochets *will* occur at the range. Shooting at the target but shooting low (only about one degree off the target) causes the round to strike the floor of the range about 150 feet down range, which then ricochets up about ten degrees, which in turn results in some ricochet bullets going over the back berm.

Ricochets can be addressed by either containing them within the range, or by having enough land surrounding the range that any ricochet will land in property closed off to the public. IDFG does not have sufficient land it can close off to the public, within which to contain ricochets. Caulder Deposition, November 18, 2010, Court's Exhibit 3, p. 63, Ll. 5-21; p. 69, L. 6 – p. 75, L. 16. The land IDFG does control is not closed off to the public. Jeanne Hom testified at trial that she could easily roam the entire property entering through the half-gates in the fence (used for game migration).

Ricochets over the back berm at other ranges happen apparently quite often. Often enough that O'Neal *watched* rounds go over the back berm, but go no further than fifty yards. O'Neal testified that rounds would go over the back berm of the newly

modified Farragut Range, as a result of a bullet being fired too low. The bullet strikes the earth at a low angle and ricochets forward and up. While this Court finds O'Neal's testimony that he watched rounds go over the back berm at some unidentified range to be credible, the testimony that from his observation *all* of the rounds went no further than fifty yards is not credible. First, while O'Neal did not state where he was located when he made these observations, it is simply impossible for O'Neal to have been in a position to watch and note exactly where every ricochet round landed. Second, to come to that conclusion (that all rounds went no further than fifty yards), O'Neal would have had to have located and measured the exact location of every round that was not contained by the back berm. O'Neal did not testify that he had done so. Third, O'Neal's testimony (that all rounds went no further than fifty yards over the back berm) defies laws of physics. The object any given bullet hits and the angle with which it hits that object on the ground (short of the berm) determines how far over the berm that bullet will travel. Certainly some bullets will travel less than fifty yards over the back berm, but not all bullets which ricochet will fall within that fifty yard boundary to which O'Neal testified. Fourth, O'Neal's testimony that all ricochets land within fifty yards of the back berm flies in the face of the ETL (that ricochets can travel half the distance of a direct fired bullet), and Air Force experience that even 300 yards was insufficient, which led to the development of the ETL in 1999. Caulder deposition, November 18, 2010, p. 70, L. 5 – p. 75, L. 22. The Court finds O'Neal credible to the extent that he watched rounds go over the back berm (which demonstrates the *frequency* of the problem of ricochets occurring), and that he observed *some* ricochet rounds fall within the fifty yard boundary. Again, the Court finds O'Neal's testimony that *all* rounds fell within fifty yards of the back berm is not credible.

This Court's prior decision did not require all parties to ignore the problem of ricochets. For IDFG to claim that for the Court to now address the problem of ricochets violates the Idaho Civil Rules of Procedure regarding injunctive relief, is wholly unpersuasive.

At trial, O'Neal testified that misfires can happen and will occur at the Farragut Range. At trial, O'Neal testified he could not tell us that misfires would happen at the Farragut Range. Again, this was inconsistent with his earlier testimony under oath. O'Neal deposition, October 8, 2010, p. 59, LI. 20-22. In his earlier deposition, O'Neal places the problem of unintentional discharges all upon the shooter. O'Neal stated that whether accidental discharge was within the realm of possibility "...depends if there's supervision or not and training." *Id.*, p. 57, L. 19 - p. 58, L. 1. While supervision and training may help reduce accidental discharges, there is no evidence that supervision and training will eliminate accidental discharges. O'Neal begrudgingly admitted to such. *Id.*, p. 58, L. 2 – p. 62, L. 1.

At trial, O'Neal agreed the range should be supervised and that supervision would reduce (but not eliminate) accidental discharges. Caulder agrees supervision will improve safety as opposed to an unsupervised range. Caulder deposition, November 18, 2010, p. 78, LI. 12-18.

IDFG's current design actually *adds* to the ricochet problem, as compared to the range configuration in 2002 and 2006. Section 7.2.5 of the ETL (Engineering Technical Letter, Caulder deposition, November 18, 2010, Exhibit B, p. 21, Section 7.2.5) states that "No protrusions from the floor that can be struck by bullets are permissible." The overhead baffles have created protrusions down range at the Farragut Range. O'Neal deposition, October 8, 2010, Exhibits 2, 6, 7, 11, 13, 15, 16, 17, 18, 19, 20, 21, 22, 27;

CARE's Trial Exhibits 46, 47, 48, 51, 53, 57, 58, 59, 60, 61, 62, 63. The solution would have been to have baffles engineered so there is no bracing in the middle, but certainly, that would have been more expensive to engineer and construct, given the span of the baffle. However, choosing the less expensive alternative has created a ricochet problem for IDFG. Another choice made by IDFG is to have overhead baffles which are vertical, rather than baffles which are tilted such that the top of the baffle is closer to the shooting line and the bottom of the baffle is closer to the target, in contravention of the ETL. Caulder deposition, November 18, 2010, Exhibit B, p. 31, Section 7.5.2. That angle helps contain ricochets off the ground better than a vertical baffle, merely because there is more baffle surface area exposed to the ricochet and the ricochet will hit that angled baffle at a more direct angle than a vertical angle. *Id.*

IDFG's own expert O'Neal has figured out a way to partially deal with the problem of ricochets, but the IDFG has not employed that solution on its remodeled range. O'Neal deposition, October 8, 2010, p. 37, L. 17 – p. 39, L. 1. Part of the problem was in the "Scope of Work" memorandum from IDFG to O'Neal, the IDFG did not ask O'Neal to address the problem of ricochets. *Id.*, p. 154, L. 11 – p. 156, L. 25; Exhibit 28 to that deposition; CARE's Trial Exhibit 20. O'Neal recognized that ricochets are a hazard (*Id.*, p. LI. 20-22), that ricochets presented a problem in establishing the Surface Danger Zone (*Id.*, p. 154, LI. 11-25), yet O'Neal was not asked to design for ricochets. *Id.*, CARE's Trial Exhibit 28. ETL Section 7.5.6.3 also talks about the eyebrow. Caulder Deposition, November 18, 2010, Exhibit B, p. 35, Section 7.5.6.3.

NRA Technical Team Advisory authored by David Luke discusses eyebrows. CARE's Trial Exhibit 6, p. 5. Also, that "Ground baffles should always be used with overhead baffles". *Id.* Vargas details the plans for an "Eyebrow Ricochet Catcher".

CARE's Trial Exhibit 2, Figure 16.

IV. FINDINGS OF FACT

1. On February 23, 2007, this Court made an Order directing that all shooting ranges shall remain closed until conditions supporting the Order were met regarding the installation of each baffle. The February 23, 2007, Order provided in part as follows:

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the annual use level shall not exceed 500 shooters per year until and unless defendant Idaho Department of Fish and Game has constructed and installed safety measures adequate to prevent bullet escapement beyond the boundaries owned and controlled by defendant Idaho Department of Fish and Game and constructed and installed noise abatement measures to reduce noise to a decibel level agreed upon by the parties in the first instance, or, if the parties are unable to agree, to be set by the Court following further evidence. Such further use shall only be commenced upon Order of this court following hearing establishing that the safety and noise concerns have been eliminated in the manner satisfactory to the Court based upon its Findings of Fact, Conclusions of Law and Order.

2. In its Memorandum of Decision, the Court proposed that CARE and IDFG agree to meet the required safety and noise restrictions. IDFG chose not to attempt to reach agreement. In that Memorandum of Decision, the Court did not require that if no agreement was reached, the safety and noise issues would be submitted to the Court for final resolution *prior to* construction. IDFG was free to make improvements prior to any approval by the Court.

3. IDFG filed a construction plan with Kootenai County in 2007 to obtain a building permit but did not provide a copy to CARE.

4. In 2007 IDFG commenced construction of a partially contained range which was completed in 2010.

5. The Memorandum of Decision, Order and Judgment of this Court in 2007 is applicable to the entire shooting range without contemplation that a portion of the range could be opened while the rest of the range remained closed.

6. On June 9, 2010, IDFG filed its Motion for Partial Lifting of Injunction.
7. In the period of time between said motion and commencement of trial on June 13, 2011, the Court made certain decisions which are incorporated by reference.
8. Trial was conducted on June 13 and 14, 2011, with witnesses testifying and depositions and partial transcripts from the first trial being entered as evidence by stipulation.
10. In its June 9, 2010, Motion to Partially Lift Injunction, IDFG asked the Court to allow IDFG to open the 100-yard shooting area at the Farragut Shooting Range to the use of live ammunition. The area IDFG proposes to open to the use of live ammunition consists of 12 shooting positions, each approximately six feet by six feet along an approximately 72-foot designated firing line, whose approximate location is identified in red on Exhibit NNN; target positions at the 100-yard shooting area are parallel to the shooting positions. IDFG's Exhibits MMM, NNN and PPP; testimony of David Leptich.
11. At this time IDFG is not seeking to open areas of the Farragut Shooting Range outside the 12 shooting positions at the 100-yard shooting area to the use of live ammunition. Testimony of Chip Corsi.
12. IDFG is no longer pursuing the Vargas Master Plan for Farragut Range, and has scaled back its plans for use of the Farragut Shooting Range. Testimony of Chip Corsi and David Leptich.
13. IDFG has made improvements to the Farragut Shooting Range since the February 23, 2007, Order of this Court. June 10, 2011 Joint Stipulation on Evidence and Facts.
14. IDFG has constructed earthen side berms and backstops (berms behind target positions) to contain a 50-yard, 100-yard and 200-yard shooting range and depressed

the floor of these areas by four to eight feet at a downslope of approximately one degree. Joint Stipulation.

15. IDFG has installed a three-sided shooting shed on the 100-yard range with an armored canopy to house a static (fixed) shooting line for up to 12 shooters. The degree of vertical elevation from designated shooting positions to the upper edge of the roof armament is approximately 40 degrees. Joint Stipulation.

16. The backstop (berm behind the target) at the 100-yard shooting area is 25 feet tall. Side berms for the 100-yard shooting area are 12 to 18 feet high, as measured from the down-sloped range floor. Joint Stipulation.

17. IDFG has installed a series of six overhead ballistic baffles over the 12 firing positions at the 100-yard shooting area, as well as six additional side baffles along each side of the range. Testimony of Jon Whipple. The baffles extend downrange for approximately 50 yards. Joint Stipulation.

18. The baffles consist of a 5-½" glu-laminated wooden beam, a sheet of 10-gauge steel, 2x4 wooden spacers, a 1-½" tumble gap, and a second sheet of 10-gauge steel. Testimony of Kerry O'Neal, David Leptich, Exhibit HHH.

19. The approximate placement of the overhead and side baffles is documented in Exhibit GGG and visually presented in Exhibit PPP. Testimony of Jon Whipple and David Leptich.

20. Baffle design, placement, and construction are consistent with acceptable engineering and construction practices and standards. Testimony of Jon Whipple; Exhibit HHH. However, that construction itself creates ricochet hazards.

21. Direct fire from rounds fired by shooters from the 100-yard shooting area will strike no closer to the top of the back berm than 8.8 feet. Testimony of Jon Whipple; Exhibit FFF.

22. All direct fire from prone, standing, and kneeling positions from along the designated shooting line at the 100-yard range will strike either a baffle, floor, berm or stanchion if fired within a horizontal arc up to at least 20 degrees to either side of perpendicular from the designated firing line to the target line. Joint Stipulation; Exhibits NNN and PPP, Testimony of David Leptich. However, it is when a bullet strikes the floor or stanchion that a ricochet will occur.

23. The baffles at the 100-yard shooting area are sufficient to prevent shooters from “directly” firing above the berm behind the target from any of the 12 shooting positions (from prone to standing). Testimony of Jon Whipple, Kerry O’Neal, David Leptich, Jon Haus, Michael Loy, and Jeanne Hom Holder; Exhibits FFF and PPP; CARE’s Pre-trial Memo., p. 8. However, the baffles do nothing to contain ricochets that hit the floor of the range from escaping the range.

24. IDFG will need to maintain baffles at the 100-yard range because repeated strikes at a single location over time would eventually lead to baffle penetration. Joint Stipulation.

25. IDFG and the Idaho Department of Parks and Recreation (IDPR) have used signs, gates and fences to identify that the Range is closed to shooting under the 2007 Order. Testimony of Randall Butt, David Leptich and Chip Corsi; Exhibit PPP.

26. No shooting has occurred at the Farragut Range since its closure by court order in 2007. Testimony of Randall Butt.

27. IDFG and IDPR have drafted standard operating procedures for the Farragut Range in preparation for reopening of the range. The agencies intend to review procedures for compliance with any court order prior to finalizing them. Testimony of Randall Butt, Chip Corsi, and David Leptich; Exhibit EEE. The approved operating procedures will need to be made a requirement in a future court order, and will need to be made part of a judgment, so that IDFG does not unilaterally change these procedures in the future, after this litigation has concluded.

28. IDFG and IDPR have decided to provide a range supervisor any time in the future that the Farragut Shooting Range is open to public shooting. The agencies' draft standard operating procedures for the Farragut Shooting Range reflect this decision. Testimony of Randall Butt, Chip Corsi, and David Leptich; Exhibit EEE. This will need to be made a requirement in a future court order, and will need to be made part of a judgment, so that IDFG does not unilaterally change this decision after this litigation has concluded.

29. The design criteria offered for a shooting range offered by Clark Vargas required safety from bullet escapement down range as being anywhere away from where a missile was fired.

30. Down range would include a 180° arc away from the firing line.

31. Evidence submitted on behalf of CARE, confirmed on cross-examination of IDFG's witnesses, established that a partially contained range as constructed by IDFG would not provide complete protection against escapement of bullets that ricochet. While complete containment is not required at this juncture (500 shooters per year or less), IDFG has not incorporated any of the relatively simple and inexpensive measures to

attempt to contain ricochets. Those methods are: ground baffles in conjunction with overhead baffles, and an eyebrow berm or bullet catcher near the top of the back berm.

32. IDFG's witness Jon Whipple, a licensed engineer with full time employment with IDFG, testified that direct rounds fired from any shooting position would not go over the back berm if fired between 20 degrees of perpendicular, right or left.

33. On cross-examination, Whipple testified that ricochets can and do occur with ricochets defined by him as bullets which strike an object and then go off in a different or unintended direction.

34. IDFG presented a video of Farragut Range which was informative and would serve in lieu of a Court visit to the range allowing the Court to be familiarized with the physical nature of the range as improved.

35. By stipulation, the deposition of James A. Caulder, a career engineer for the Department of Defense and author of the Air Force Engineering Technical Letter 2008 (ETL), was entered. Joint Stipulation on Evidence and Facts, pp. 2-4. None of the objections made in that deposition change any of the above findings, and the objection by IDFG as to the 2008 ETL are overruled. There was no express stipulation by IDFG that Caulder was qualified as an expert witness, but such is inferred. *Id.* In any event, the Court finds Caulder to be qualified as an expert witness.

36. Caulder testified that ricochets would travel 50% of the maximum distance of the ammunition's capability in the surface danger zone.

37. Caulder testified that from his examination of records and photographs it is apparent that IDFG owns less than half the down range surface danger zone.

38. Caulder was aware of the rocky nature of the soil at Farragut and concluded that Farragut range does not include enough down range land behind the back berm to prevent ricochets from escape over the back berm.

39. Evidence presented by IDFG established that log yard waste had been placed over the down range firing area in immediate proximity to the firing line.

40. Down range from the firing line are steel foot plates and stanchions and six-by-six-foot concrete footings, all of which create a ricochet hazard.

41. Log yard waste placed by IDFG has not previously been used in a shooting range and would not, in Caulder's opinion, provide any significant deterrent to ricochets.

42. In addition to relying on the ETL, Caulder also relied upon the National Rifle Association Source Book (1999 version) as suitable planning documents.

43. Making reference to these planning documents, Caulder was of the opinion that the partially contained range as constructed would not, within a reasonable degree of probability, prevent ricochets from going over the berm and creating a safety hazard on and off range property.

44. Jeanne Hom-Holder, one of the individual plaintiffs and member of CARE, testified she could easily roam the entire firing range property going through the half-gates located on the west side of the property and be within the 600-yard line and the old 200-yard line, being vulnerable to exposure from shooting.

45. IDFG called as witnesses: Randall Butt, Park Manager of Farragut Park; and John House and Mike Lowe, volunteers related to supervision of shooting ranges. These witnesses established that if the range were open there would be adequate range supervision by qualified persons.

46. IDFG called as an expert witness Kerry Lynn O'Neal who was accepted as an expert witness with the Court reserving a ruling to determine later if his qualifications complied with Idaho Rules of Evidence 702 and 703. The Court finds O'Neal marginally qualified as an expert.

47. O'Neal testified that he did not consider the National Rifle Association Range Source Book or the Air Force Engineering Technical Letter of 2008 (ETL) to be of any assistance in setting range standards.

48. O'Neal was subject to cross-examination which raised serious questions as to his expertise, bias and soundness of opinions.

V. CONCLUSIONS OF LAW.

1. In its Order of March 11, 2011, this Court limited the scope of the evidentiary hearing held on June 13 and 14, 2011, to the issue of safety considerations at Farragut Range for up to 500 shooters.

2. As a result of his experience, this Court has concluded as a matter of law that Kerry Lynn O'Neal is marginally qualified as an expert witness under the standards set forth in Idaho Rule of Evidence 702 and 703. However, for the reasons set forth above, this Court is not persuaded by most of O'Neal's opinions and conclusions.

3. The Court concludes that the partially contained range as presently in place will not contain rounds that ricochet over the back berm and could travel as far as one and one-half miles down range and off the property owned by the Idaho Fish and Game Department in the surface danger zone.

4. On February 23, 2007, this Court enjoined IDFG from opening the Farragut Shooting Range to the use or intended use of live ammunition until IDFG met the following condition to open for up to 500 shooters per year:

[a] baffle is installed over every firing position. The baffle must be placed and of sufficient size that the shooter, in any position (standing, kneeling, prone), cannot fire his or her weapon above the berm behind the target.

2007 Order at 59.

5. “[I]n a case of conflicting rights, where neither party can enjoy his own [property] without in some measure restricting the liberty of the other in the use of property, the law must make the best arrangement it can between the contending parties, with a view to preserving to each one the largest measure of liberty possible under the circumstances.” *Payne v. Skaar*, 127 Idaho 341, 348, 900 P.2d 1352, 1359 (1995)(citations omitted). For the purpose of fashioning equitable relief in a nuisance case, “[t]he restraint imposed by an injunction should not be more extensive than is reasonably required to protect the interests of the party in whose favor it is granted, and should not be so broad as to prevent defendant from exercising its rights....” *Kolstad v. Rankin*, 179 Ill. App. 3d 1022, 1034, 534 NE 2d 1373, 1381 (Ill App. 1989).

“Reasonableness” is the watchword in these types of cases. Consistent with these equitable principles, the Court has discretion to partially lift its 2007 injunction to allow opening only part of the range, or to allow opening part of the range up to only 500 shooters per year.

6. Idaho Rule of Civil Procedure 65(d) sets specificity requirements for injunctive relief applicable to the Court’s 2007 Order. The rule reads:

Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained; and is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.

In the absence of Idaho case law on the subject of specificity under Rule 65(d),

case law on the corresponding federal rule is pertinent.

[Federal] Rule 65 serves to protect those who are enjoined “by informing them of what they are called upon to do or to refrain from doing in order to comply with the injunction or restraining order.... The drafting standard established by Rule 65(d) is that an ordinary person reading the court's order should be able to ascertain from the document itself exactly what conduct is proscribed.

11A Wright, Miller & Kane, *Federal Practice and Procedure: Civil 2d* § 2955 (1995), quoted in *Hughey v. JMS Development Corp.*, 78 F.3d 1523, 1531, *reh'g denied*, 89 F.3d 857 (11th Cir. 1996), *cert. denied*, 519 U.S. 993 (1996). Rule 65(d) “is satisfied only if the enjoined party can ascertain from the four corners of the order precisely what acts are forbidden or required.” *Petrello v. White*, 533 F.3d 110, 114 (2nd Cir. 2008)(citations omitted), *affirmed*, 344 Fed.Appx. 651 (2nd Cir. 2009) (unpublished, No. 09-0343-CV).

Because the subject of ricochets were not discussed at the 2006 trial; because the improvements IDFG has since placed on the range actually increase the frequency of ricochets; because the Court finds the word “round” (in the language of this Court’s 2007 Order which required a “...shooter in any position cannot fire a round above the berm behind the target...”) also includes “ricochets”; and because the 500 person limit under that Order reflected an allowable *increase* in shooter numbers from 200 per year in 2002 to 500 with minimal improvements; it does not violate I.R.C.P 65(d) to interpret the plain language and context of the Court’s 2007 Order condition for up to 500 shooters (the installation of a baffle over every shooting position to prevent a shooter from firing over the berm behind the target), to encompass shooters firing at, below, or in directions to the side of or away from the berm behind the target. Simply because IDFG has installed at least one baffle over all 12 designated shooting positions at the 100-yard shooting area, and such baffles are placed and of sufficient size that a

shooter in any position (standing, kneeling, prone) cannot fire his or her weapon above the berm behind the target at the 100-yard shooting area does not mean IDFG has complied with the Court's 2007 condition to lift its 2007 injunction for these 12 designated shooting positions, for up to 500 shooters per year. While ricochets were not discussed in 2006, IDFG has not made any cogent argument as to why the problem of ricochets should *not* be considered by this Court relative to IDFG's motion to partially lift the injunction. In 2007, this Court was concerned with bullets that went over the back berm. Whether by ricochet or direct fire, the problem is still bullets going over the back berm.

7. Standards set forth in the Memorandum of Decision, Order and Judgment entered in 2007 are for public safety of anyone within the surface danger zone.

8. There was never any intention in the Order entered in 2007 to exempt ricochets from the safety requirement. The subject of ricochets was not discussed at any length. A ricochet bullet violates the restrictions on public safety in the Memorandum of Decision, Order and Judgment entered in 2007 to the same extent as a directly fired bullet.

9. IDFG has not addressed the problem of ricochets in its constructed improvements. The following are solutions to that failure, based upon the evidence from the 2006 trial and the June 2011 trial: The range construction as completed does not include ground baffles and additional overhead baffles that appear to be necessary to be placed on ranges to address ricochets off the floor of the range. The range construction as completed does not include an eyebrow device at or near the top of the back berm to address ricochets that occur as a result of striking the floor at a shallow angle just before the toe of the back berm. The range construction as completed does not

address ricochets off to the side as there are gaps in the baffles shown in the photographs.

10. The partially contained range was not designed and constructed by IDFG to meet the professional standards set forth by Clark Vargas in the National Rifle Association Range Source Book (1999 version) and the ETL.

11. Danger remains that a smaller but unknown number of rounds will ricochet off the rock filled range floor or the steel and stanchion footings and go over the side berm, back berm, and the backstop behind the target and create safety danger down range and off the range in the surface danger zone.

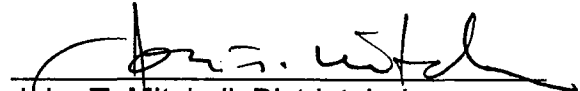
12. The partially contained range as constructed remains in violation of safety considerations set forth in 2007. While complete containment is not required at this juncture (500 shooters per year or less), IDFG has not incorporated any of the simple and relatively inexpensive measures to attempt to contain ricochets. Those methods are: ground baffles in conjunction with overhead baffles (to reduce ground ricochets caused by striking the floor of the range short of the back berm), and an eyebrow berm or bullet catcher near the top of the back berm (to reduce ground ricochets caused by striking the floor of the range near the back berm). Once these measures are implemented, partial lifting should occur. This can be by another hearing after the fact of that construction, before the fact of that construction, or (preferably), by agreement between the parties.

13. The Motion for Partial Lifting of Injunction filed in 2010 by IDFG must be denied.

VI. CONCLUSIONS OF LAW.

IT IS HEREBY ORDERED that IDFG's Motion for Partial Lifting of Injunction filed on June 9, 2010, is DENIED.

ENTERED this 25th day of August, 2011.



John T. Mitchell, District Judge

Certificate of Service

I certify that on the 25 day of August, 2011, a true copy of the foregoing was mailed postage prepaid or was sent by interoffice mail or facsimile to each of the following:

<u>Lawyer</u>	<u>Fax #</u>
Scott W. Reed	208 765-5117
W. Dallas Burkhalter and Kathleen E. Trever	4885 208 334-2148

<u>Lawyer</u>	<u>Fax #</u>
Harvey Richman	Via mail


Secretary

STATE OF IDAHO }
COUNTY OF KOOTENAI } SS
FILED:

2011 OCT -5 PM 3:46

CLERK DISTRICT COURT

[Signature]
DEPUTY

LAWRENCE G. WASDEN
ATTORNEY GENERAL
Clive J. Strong
Chief of Natural Resources

KATHLEEN E. TREVER, ISB #4862
W. DALLAS BURKHALTER, ISB# 3286
Deputy Attorneys General
PO Box 25
Boise, ID 83707
Telephone: (208) 334-3771
FAX: (208) 334-4885
Email: kathleen.trever@idfg.idaho.gov

Attorneys for Appellants
IDFG and Moore

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

CITIZENS AGAINST RANGE)
EXPANSION, an Unincorporated non-profit)
Association; JEANNE J. HOM, a single)
woman; EUGENE and KATHLEEN RILEY,)
husband and wife; LAMBERT and DENISE)
RILEY, husband and wife; GABRIELLE)
GROTH-MARNAT, a single woman,)
GERALD PRICE, a single man; RONALD)
and DOROTHY ELDRIDGE, husband and)
wife; and GLENN and LUCY CHAPIN,)
husband and wife, SHERYL PUCKETT, a)
single woman; CHARLES MURRAY and)
CYNTHIA MURRAY, husband and wife; and)
DAVE VIG, a single man,)

Plaintiffs (Respondents),)

vs.)

IDAHO FISH AND GAME DEPARTMENT,)
an agency of the STATE OF IDAHO, and)
VIRGIL MOORE, Director of the IDAHO)
FISH AND GAME DEPARTMENT,)

Defendants (Appellants))

Case No. CV-05-6253

NOTICE OF APPEAL

Fee: Exempt

TO: THE ABOVE-NAMED RESPONDENTS, CITIZENS AGAINST RANGE
EXPANSTION *ET AL.*, AND THE PARTIES' ATTORNEYS, AND THE CLERK OF THE
ABOVE-ENTITLED COURT.

NOTICE IS HEREBY GIVEN THAT:

1. The above-named appellants, Idaho Department of Fish and Game and its Director Virgil Moore (collectively "Appellants") appeal against the above-named respondents to the Idaho Supreme Court from the *Order Denying Motion for Partial Lifting of Injunction* entered on August 29, 2011 (hereinafter August 29, 2011 Order), in the above-entitled action, Honorable Judge John T. Mitchell, presiding. Appellants received this Order via U.S. mail on August 31, 2011. This Order incorporated the district court's August 25, 2011 *Memorandum Decision, Findings of Fact, Conclusions of Law and Order Following Court Trial on Defendant's Motion [for] Partial Lifting of Injunction (Safety Issues)* (hereinafter "August 25, 2011 Order"), and interlocutory March 11, 2011 *Memorandum Decision and Order on Motions to Strike, Defendant's Motion for View, Defendant's Motion [for] Partial Lifting of Injunction and Plaintiff's Motion for Summary Judgment; and Order Scheduling Court Trial* (hereinafter "March 11, 2011 Order").
2. Appellants have a right to appeal to the Idaho Supreme Court, and the orders described in Paragraph 1 above are appealable post-judgment orders under and pursuant to Rule 11(a)(7) I.A.R. The district court entered judgment in the above-captioned case on March 2, 2007 (hereinafter March 2, 2007 Judgment), granting injunctive relief and establishing conditions for the lifting of that relief, for reasons identified in its *Memorandum Decision, Findings of Fact, Conclusions of Law and Order*, filed February 23, 2007 (hereinafter February 23, 2007 Order).

3. The following is a preliminary statement of the issues that Appellants intend to assert on appeal, with Appellants reserving the right to assert other issues on appeal:
 - a. Whether the district court erred in denying Appellants' June 9, 2010 Motion for Partial Lifting of Injunction and in partially granting Respondents' December 27, 2010 Motion for Summary Judgment by:
 - i. Concluding that the Idaho Outdoor Sport Shooting Range Act, Idaho Code § 67-9101 *et seq.*, including the noise standards established by the Legislature therein, violates the "special law" prohibition of Article III, § 19 of the Idaho Constitution, and is therefore unconstitutional;
 - ii. Concluding that the Idaho Outdoor Sport Shooting Range Act, Idaho Code § 67-9191 *et seq.*, including the noise standards established by the Legislature therein, violates Article V, § 13 of the Idaho Constitution, and is therefore unconstitutional;
 - iii. Imposing requirements in addition to and/or in modification of those requirements imposed by the plain language of its March 2, 2007 Judgment and February 23, 2007 Order, contravening I.R.Civ.P. Rule 65(d) and the principles of equitable relief, where the district court's findings indicate that Appellants had met the requirements set forth in the March 2, 2007 Judgment and February 23, 2007 Order;
 - iv. Modifying the findings of facts and conclusions of law in its February 23, 2007 Order and imposing requirements in addition to and/or in modification of those requirements imposed by the plain language of its March 2, 2007 Judgment and February 23, 2007 Order, without motion by plaintiffs and compliance with I.R.Civ.P. Rule 60(b), where the district court's findings indicate the Appellants had met the requirements set forth in the March 2, 2007 Judgment and February 23, 2007 Order; and

- v. Making findings of fact and conclusions of law regarding matters outside the scope (as limited by the district court in its March 11, 2011 Order) of the June 13-14, 2011 evidentiary hearing for determining compliance with its condition for lifting injunctive relief for up to 500 shooters; and
- b. Whether the district court erred by denying IDFG's Motion for Court View and by not conducting a view of the premises, where the district court had identified its visual inspection by view of the premises as the means of determining the Farragut Shooting Range's compliance with conditions established for lifting injunctive relief as described in the district court's February 23, 2007 Order and March 2, 2007 Judgment, in the event there was not agreement as to compliance by the parties.
- 4. An order has not been issued sealing all or a part of the record.
- 5. Pursuant to Rule 25(a) I.A.R., Appellants request the preparation of the following portions of the reporter's transcript in electronic format:
 - a. August 30, 2010 status conference
 - b. February 14, 2011 oral argument on motions
 - c. June 13-14, 2011 evidentiary hearing in its entirety
- 6. Appellants request the following documents to be included in the clerk's record in addition to those automatically included under Rule 28 I.A.R.:
 - a. 10/2/2006 Plaintiffs' Initial Response to Memorandum Decision and Order
 - b. 10/2/2006 Defendants/ Brief on Applicable Standards
 - c. 10/10/2006 Plaintiffs' Closing Response to Memorandum Decision and Order
 - d. 10/10/2006 Defendants' Reply Brief on Applicable Standards
 - e. 12/21/2006 Plaintiffs' Post-trial Proposed Findings of Fact and Conclusions of Law

- f. 12/21/2006 Defendants' Revised Proposed Findings of Fact and Conclusions of Law
 - g. 6/9/2010 Motion for Partial Lifting of Injunction
 - h. 6/9/2010 Brief in support of Defendants' Motion for Partial Lifting of Injunction
 - i. 7/6/2010 Amended Plaintiffs' Response to Motion for Partial Lifting of Injunction
 - j. 8/4/2010 Reply Brief in Support of Defendants' Motion for Partial Lifting of Injunction
 - k. 12/12/2010 Brief in Support of Summary Disposition of Defendants' Motion for Partial Lifting of Injunction
 - l. 12/27/2010 Plaintiffs Brief in Response to Defendants Summary Disposition of the Cause and Brief in Support of Plaintiffs Motion for Summary Judgment
 - m. 12/28/2010 Certification on Idaho State Legislative history Records: House Bill 515
 - n. 1/10/2011 Defendants' Reply Brief in Support of Summary Disposition of Motion for Partial Lifting of Injunction
 - o. 1/10/2011 Second Affidavit of David Leptich and accompanying exhibits
 - p. 1/10/2011 Affidavit of Randall Butt and accompanying exhibits
 - q. 1/19/2011 Consolidated Reply Brief in Support of Plaintiffs Motion for Summary Judgment and Motion to Strike and/or Exclude Testimony of James Caulder
 - r. 1/24/2011 Defendants' Motion for Court View
 - s. 1/24/2011 Second Affidavit of Kathleen Trever, in Support of Motion to Strike, and accompanying Exhibit A
7. Appellants request the following documents and video admitted as exhibits to be copied and sent to the Supreme Court:

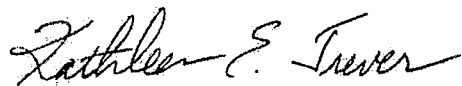
- a. Plaintiffs' Trial Exhibits 2, 6, 32, 33, 34, 38
- b. Defendants' Trial Exhibits EEE, FFF, GGG, III, JJJ, KKK, MMM, NNN, PPP
- c. Court Exhibits 1, 3, 4, 5, 6, 7, 8, 9.

8. I certify:

- a. That a copy of this notice of appeal has been served on each reporter of whom a transcript has been requested as named below at the address set out below:
 - Julie Foland, Court Reporter, P.O. Box 9000, Coeur d'Alene, Idaho 83816.
- b. That Appellants have paid the clerk of the district court the estimated fee for preparation of the reporter's transcript.
- c. That Appellants are exempt from paying the estimated fee for preparation of the clerk's record pursuant to Idaho Code §31-3212, as the Idaho Department of Fish and Game is an executive agency of the state of Idaho.
- d. That Appellants are exempt from paying the appellate filing fee pursuant to I.R.Civ.P. 23(a), as the Idaho Department of Fish and Game is an executive agency of the state of Idaho.
- e. That service has been made upon all parties required to be served pursuant to I.A.R. 20.

DATED this 5th day of October, 2011.

STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL



KATHLEEN E. TREVER
Deputy Attorney General
Attorney for Appellants

CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of October, 2011 a true and correct copy of the foregoing NOTICE OF APPEAL was faxed or mailed postage prepaid to:

Harvey Richman Attorney at Law 19643 N. Perimeter Road Athol, Idaho 83801	<input checked="" type="checkbox"/> United States Mail, Postage Prepaid <input type="checkbox"/> Facsimile <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Courier
Scott W. Reed Attorney at Law P.O. Box A Coeur d'Alene, ID 83814	<input checked="" type="checkbox"/> United States Mail, Postage Prepaid <input type="checkbox"/> Facsimile (208) 765-5117 <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Courier


Kathleen E. Trever

Scott W. Reed, ISB#818
Attorney at Law
P. O. Box A
Coeur d'Alene, ID 83816
Phone (208) 664-2161
FAX (208) 765-5117

2011 OCT 18 PM 4:44

CLERK DISTRICT COURT
[Signature]
DEPUTY

Harvey Richman, ISB#2992
Attorney at Law
19643 N. Perimeter road
Athol, Idaho 83801
Phone (208) 683-2732

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

CITIZENS AGAINST RANGE)
EXPANSION, an Unincorporated non-)
profit Association; JEANNE J. HOM, a)
single woman; EUGENE and)
KATHLEEN RILEY, husband and wife;)
LAMBERT and DENISE RILEY, husband)
and wife; GABRIELLE GROTH-)
MARNAT, a single woman, GERALD)
PRICE, a single man; RONALD and)
DOROTHY ELDRIDGE, husband and)
wife; and, GLENN and LUCY CHAPIN,)
husband and wife, SHERYL PUCKETT,)
a single woman; CHARLES MURRAY)
and CYNTHIA MURRAY, husband and)
wife; and DAVE VIG, a single man,)

Case No. CV-05-6253

PLAINTIFFS/RESPONDENTS REQUEST
FOR ADDITIONAL RECORDS

Plaintiffs,)

v.)

IDAHO FISH AND GAME DEPARTMENT,)
an agency of the STATE OF IDAHO, and)
STEVEN M. HUFFAKER, Director of the)
IDAHO FISH AND GAME DEPARTMENT,)

Defendants.)

REQUEST FOR ADDITIONAL RECORDS

TO: THE ABOVE NAMED APPELLANTS AND THE PARTY'S ATTORNEY, AND THE ABOVE-ENTITLED COURT

NOTICE IS HEREBY GIVEN, that the plaintiffs/respondents in the above-entitled proceeding hereby request pursuant to Rule 19, I.A.R., the inclusion of the following material in the clerk's record in addition to that required to be included by the I.A.R. and the Notice of Appeal received October 10, 2011. Any additional record is to be provided in hard copy.

1. Affidavit of Harvey Richman filed December 20, 2010.
2. Affidavit of Harvey Richman filed December 27, 2010.
3. Affidavit upon legislative records of 2008 Legislature filed February 10, 2011.
4. Certificate on Idaho state legislature's history records House Bill 515 filed December 28, 2010.
5. Supplemental and Amended Affidavit upon legislative records of 2008 Legislature filed February 11, 2011.
6. Affidavit of Jeanne Marie Hom Holder filed December 27, 2010.
7. Affidavit of Ray Rule filed July 26, 2006.

If not already included in appellant's request, the following plaintiff's exhibits in trial are requested: Exhibits 3, 4, 6, 17, 24, 38, 45 though 74 and Court Exhibit No. 2.

Dated this 18th day of October, 2011.



Scott W. Reed, One of the
Attorneys for Plaintiffs

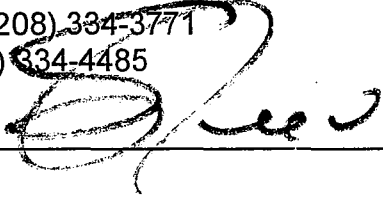
REQUEST FOR ADDITIONAL RECORDS

2

CERTIFICATE OF MAILING

I certify that a copy of the above and foregoing is sent by first class mail, postage prepaid, this 18th day of October, 2011 to:

KATHLEEN E. TREVOR
W. DALLAS BURKHALTER
DEPUTY ATTORNEY GENERALS
P. O. BOX 25
BOISE, IDAHO 83707
PHONE (208) 334-3771
FAX (208) 334-4485



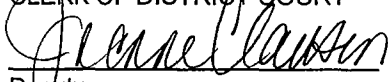
REQUEST FOR ADDITIONAL RECORDS

3

STATE OF IDAHO)
County of KOOTENAI)^{ss}

FILED 11-14-11

AT 10:40 O'clock A. M
CLERK OF DISTRICT COURT


Deputy

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

CITIZENS AGAINST RANGE EXPANSION,)
et al,)
Plaintiff,)
vs.)
IDAHO DEPARTMENT OF FISH AND)
GAME, an agency of the STATE OF)
IDAHO, et al.,)
Defendant.)
_____)

Case No. **CV 2005 6253**

**MEMORANDUM DECISION AND
ORDER DENYING PLAINTIFF'S
APPLICATION FOR ATTORNEY
FEES AND GRANTING
DEFENDANT'S MOTION TO
DISALLOW ATTORNEY FEES AND
COSTS**

I. FACTUAL BACKGROUND.

At issue is Citizens Against Range Expansion's (CARE) Application for Attorney's Fees Against the defendant Idaho Fish and Game Department (IDFG), and IDFG's Notice of Objection and Motion to Disallow Attorney Fees and Costs.

On September 9, 2011, CARE filed its "Application of the Plaintiff for Attorneys Fees Against the Defendant Idaho Department of Fish and Game", "Plaintiffs' Memorandum of Costs Against the Defendant Idaho Department of Fish and Game", and "Plaintiffs' Brief in Support of Award of Costs and Attorneys' Fees". On September 12, 2011, CARE filed its "Application of the Plaintiff for Attorneys Fees Against the Defendant Idaho Department of Fish and Game as Related to Attorney Scott W. Reed". On September 23, 2011, IDFG filed "Defendants' Notice of Objection and Motion to Disallow Attorney Fees and Costs", and on October 3, 2011, IDFG filed an "Affidavit of Charles 'Chip' Corsi", "Affidavit of David Leptich", "Affidavit of Mary Boyer", and "Brief in

Support of Defendants' Notice of Objection and Motion to Disallow Attorney Fees and Costs." On November 2, 2011, CARE filed its "Corrected Application of the Plaintiff for Attorneys Fees Against the Defendant Idaho Department Fish and Game" (which simply added a page seven that was inadvertently omitted in the initial filing).

On February 23, 2007, this Court entered its 63-page Memorandum Decision, Findings of Fact, Conclusions of Law and Order. The Court stated:

IT IS HEREBY ORDERED plaintiffs are entitled to an injunction ordering defendants Idaho Department of Fish and Game and Director Steven M. Huffaker to close the Farragut Wildlife Management Area to all persons with pistols, rifles and firearms using or intending to use live ammunition until a baffle is installed over every firing position. The baffle must be placed and be of sufficient size that the shooter, in any position (standing, kneeling, prone), cannot fire his or her weapon above the berm behind the target. Once baffles are installed and either 1) plaintiffs agree that the shooter in any position cannot fire a round above the berm behind the target, or 2) if the plaintiffs cannot agree, the Court so finds after a view of the premises, the injunction will be lifted, and IDF&G may operate that range in the same manner in which it historically has (ie., without any on site supervision), up to 500 shooters per year. Once IDF&G has realized that number in a given year, it must close the range for the remainder of that calendar year.

IT IS FURTHER ORDERED the Idaho Department of Fish and Game is free to seek any funding it wishes. The Idaho Department of Fish and Game is free to build any improvements upon its property. However, use levels will remain capped at 500 shooters per year unless the following two concerns have been adequately addressed: **1) Safety:** include safety measures adequate to **prevent** bullet escapement beyond the boundaries owned and controlled by IDF&G, and **2) Noise:** include noise abatement measures to reduce noise to a decibel level agreed upon by the parties in the first instance, or, if the parties are unable to agree, to be set by the Court following further evidence. Even if the solution to these two concerns are agreed upon by the parties, in order to close this case IDF&G will need to obtain an order from the Court to exceed 500 shooters per year. The first concern (safety) can be satisfied only by the "No Blue Sky" rule, or "totally baffled...so that a round cannot escape", as espoused by the nation's preeminent authority on range design and designer of the Vargas Master Plan, Clark Vargas. Exhibit 2, p. 5. Once bullet containment is achieved, it matters not for purposes of this litigation if the range is supervised (with bullet containment, supervision would only inure to the benefit of the participants, an important consideration, but not the subject of this lawsuit). The second concern (noise) is a function of the

number of shooters (per year or per day) and peak decibel level. For example, it may be that 500 shooters per year in an unmitigated range producing 65 decibels is less desirable than 50,000 shooters per year from a range that only produces 30 decibels. It would seem logical for the parties to agree as to noise levels and shooter numbers in advance of any construction, but it is not the Court's place to force such agreement in advance. If the parties in the future cannot agree as to noise levels and maximum shooter numbers, the Court will make that determination with additional evidence. If IDF&G makes improvements but does not successfully address safety and noise concerns, IDF&G will not be allowed to exceed 500 shooters per year.

Memorandum Decision, Findings of Fact, Conclusions of Law and Order, pp. 61-62 (emphasis in original). Beginning in June, 2010 IDFG sought an Order of this Court lifting portions of the February 23, 2007, Injunction. IDFG sought a partial lifting of the Court's injunction because of its own efforts in modifying the Farragut range to address the Court's concerns and in light of the Idaho legislature's enactment of the Idaho Sport Shooting Range Act, which went into effect on July 1, 2008, and established noise standards for state outdoor shooting ranges.

On February 14, 2011, the Court heard IDFG's Motion to Strike the Affidavit of James Caulder, IDFG's Motion for Summary Disposition of Motion for Partial Lifting of Injunction, and IDFG's Motion for View. On March 11, 2011, the Court issued its seventy-seven page Memorandum Decision and Order on Motions to Strike, Defendant's Motion for View, Defendant's Motion for Partial Lifting of Injunction and Plaintiff's Motion for Summary Judgment, and Order Scheduling Court Trial. This Court denied IDFG's motion to strike, denied CARE's motion to strike the Affidavit of O'Neal (except for ¶ 26 and the attendant Exhibits 4 and 5), denied IDFG's motion for view, granted CARE's motion for summary judgment as to the Idaho Outdoor Sport Shooting Range Act being unconstitutional (specifically finding the Idaho Outdoor Sport Shooting Range Act to be an unconstitutional "special law"), and denied IDFG's motion to

partially lift the injunction and IDFG's motion for summary disposition of the motion to partially lift the injunction. The Court denied cross motions for summary judgment on safety issues as material questions of fact remained and set a Court trial for June 13, 2011, to address those questions.

IDFG filed a motion for permission to appeal on March 25, 2011. That motion was heard on April 20, 2011, following which this Court filed its Memorandum Decision and Order Denying Defendants' Motion for Permission to Appeal Under I.A.R. 12.

Court trial was held for two days on June 13 and 14, 2011, following which the parties submitted post-trial briefing and proposed findings of fact and conclusions of law. On August 25, 2011, this Court entered its 39-page Memorandum Decision, Findings of Fact, Conclusions of Law and Order Following Court Trial on Defendant's Motion for Partial Lifting of Injunction (Safety Issues). An "Order Denying Motion for Partial Lifting of Injunction" was submitted by CARE, signed by the Court on August 29, 2011, and filed on that date. That Order denied IDFG's motion for partial lifting of injunction, and awarded CARE its costs against IDFG pursuant to I.R.C.P. 54(d)(1). The filing of that Order prompted the above described application for fees and costs by CARE and IDFG's objection to those fees and costs.

Hearing was held November 9, 2011, on CARE's motion for fees and costs, and the attendant objection and motion to disallow fees and costs by IDFG, and those matters are now at issue.

II. STANDARD OF REVIEW.

The district court's decision to award attorney fees is a discretionary decision, subject to the abuse of discretion standard of review. *Bailey v. Sanford*, 139 Idaho 744, 753, 86 P.3d 458, 467 (2004).

III. ANALYSIS.

CARE moves the Court to award attorney's fees and costs pursuant to I.R.C.P. 54 and I.C. § 12-117. Plaintiff's Brief in Support of Award of Costs and Attorneys' Fees, p. 2. It is CARE's contention that IDFG has acted without a reasonable basis in fact or law. Specifically, CARE argues IDFG failed to present any credible evidence at trial demonstrating that a round would not be able to travel over the back berm behind the target. *Id.*, pp. 2-3. CARE continues that IDFG acted unreasonably in positing it had complied with the Court's requirements for lifting the February 23, 2007, injunction through the building of a single baffle. *Id.*, p. 3. Further, CARE writes this Court has detailed the "failures of Mr. O'Neal's [range] design. The members of the [Idaho Fish and Game] Commission [who is not a party to this case] ignored that deficient design for it built less baffles than O'Neal suggested." *Id.*, p. 5. CARE argues that while it attempted to meet and review the issues with IDFG, this Court has noted the Idaho Fish and Game Commission's failure to attempt to resolve issues by conferring with CARE. *Id.* CARE urges the Court to overlook the unconstitutionality of the Idaho Sport Shooting Range Act issue for purposes of the instant motion for attorney's fees, because noise would only have become an issue had IDFG prevailed on its safety claims. *Id.*, p. 6. "The fact that the statute's viability was potentially arguable mattered not one wit, as the precursor was rounds over the back berm. Until that barrier has been breached, noise was not an issue." *Id.* Finally, CARE states the "alleged" expert testimony provided by IDFG was "met with little credulity by this Court", and the "deficiencies" of IDFG's expert witness' status were long known to IDFG. *Id.*, p. 7.

In response, IDFG makes several arguments. First, IDFG states it made reasonable efforts to meet and confer with CARE and list "[s]everal conversations

illustrat[ing] Plaintiffs' unwillingness to discuss mutually agreeable solutions." Brief in Support of Notice of Objection and Motion to Disallow Attorney Fees and Costs, pp. 4-5. Related to this claim, IDFG urges the Court not to consider failed settlement negotiations in determining the propriety of an award of fees and costs. *Id.*, pp. 5-6. IDFG argues it acted with a reasonable basis in fact and law regarding the unconstitutionality of the Idaho Outdoor Sport Shooting Range Act in light of the issue being one of first impression and this Court's own questions regarding the "special law" vs. "local law" analysis previously utilized by Idaho Appellate Courts. *Id.*, p. 8. IDFG argues at length that it acted with reasonable basis in fact and law in moving for partial lifting of the injunction, conceding that its interpretation of the February 23, 2007, Memorandum Decision and Order may have been an erroneous interpretation, but arguing it was nonetheless reasonable. *Id.*, p. 10. IDFG states it met the plain language of the 2007 Order, despite this Court's later conclusion that the injunction would not be lifted without ground baffles and an eyebrow berm or bullet catcher. *Id.* IDFG also notes its erroneous belief that ricochets would not be considered in relation to the requirements for lifting the injunction for up to 500 shooters, but argues it acted in conformance with the plans by the range designer, which were approved by a professional engineer. *Id.*, pp. 11-12. Finally, IDFG argues the amount of fees sought by counsel for CARE are not reasonable because: (1) fees of \$325 per hour are above the prevailing rate and above the \$200-\$250 per hour rate previously listed by CARE's counsel in an application for fees; (2) the hours billed exceed the hours listed in timekeeping references by almost 41 hours; (3) the hours billed for research, drafting, and review of materials by Mr. Richman relating to the unconstitutionality issue resulted in only a one-page response "with bare assertions of constitutional arguments

unsupported by any reference to case law” and overlap with Mr. Reed’s hours separately billed; and (4) there is billing overlap with regard to the attorney’s fees issue now before the Court, and Mr. Richman’s billing for drafting and briefing was related to issues which predated the Court’s August 25, 2011, Order. *Id.*, pp. 14-15.

Here, CARE filed its application for fees and supporting affidavit and brief on September 9, 2011, within fourteen days of entry of this Court’s Order Denying Motion for Partial Lifting of Injunction which was filed on August 29, 2011, as contemplated by I.R.C.P. 54(d)(5). An additional Application of the Plaintiff for Attorney’s Fees Against the Department of Fish and Game as Related to Attorney Scott Reed was filed on September 13, 2011, beyond the 14-day deadline, but this merely added a page that was earlier omitted. IDFG filed its objection on September 23, 2011, which was timely filed within fourteen days of their receipt of the memorandum of costs. I.R.C.P. 54(d)(6).

In determining the prevailing party entitled to costs, the Court is to “consider the final judgment or result of the action in relation to the relief sought by the respective parties.” I.R.C.P. 54(d)(1)(B). In their objection, IDFG does not dispute CARE’s being the prevailing party. Indeed, it would be impossible for the Court to not find CARE the prevailing party in light of the August 25, 2011, Memorandum Decision, Findings of Fact and Conclusions of Law and Order Following Court Trial on Defendants’ Motion for Partial Lifting of Stay (Safety Issues), which denied IDFG’s motion for partial lifting of the injunction. The Court specifically finds CARE to be the prevailing party on the Motion for Partial Lifting of Stay.

An “Order Denying Motion for Partial Lifting of Injunction” was signed by the Court on August 29, 2011, and filed on that date. That Order denied IDFG’s motion for

partial lifting of injunction, and awarded CARE its costs against IDFG pursuant to I.R.C.P. 54(d)(1). The Court signed that Order as presented by CARE's counsel because the Court had just denied IDFG's motion to partially lift the injunction, and it was patently obvious CARE was the prevailing party as far as costs (exclusive of attorney fees) were concerned. To the extent that the Court already ordered costs (not including attorney fees) against IDFG, in favor of CARE, IDFG essentially requests this Court to reconsider that August 29, 2011, Order.

IDFG argues that an award of fees (not costs) is inappropriate because IDFG did not act without a reasonable basis in fact or law pursuant to I.C. § 12-117.

Attorney fees under I.C. § 12-117 are awarded where it is shown that the non-prevailing party acted without a reasonable basis in fact or law. *Stacey v. Idaho Dep't of Labor*, 134 Idaho 727, 9 P.3d 530 (2000). In 2010, I.C. § 12-117 was amended so as to do away with the practice of Courts being permitted to award fees on petitions for judicial review; an award of fees under I.C. § 12-117 is limited to civil judicial proceedings and administrative proceedings. *Smith v. Washington County*, 150 Idaho 388, ___, 247 P.3d 615, 618 (2010). Idaho Code § 12-117 also applies to witness fees and other reasonable expenses and, therefore, "provide[s] the exclusive basis for awarding court costs." *Lake CDA Investments, LLC v. Idaho Dept. of Lands*, 149 Idaho 274, 285, 233 P.3d 721, 732 (2010). Thus, for an award of costs and fees in the instant matter, CARE would have to demonstrate it was the prevailing party, and that IDFG acted without a reasonable basis in fact or law.

In *Allied Bail Bonds v. County of Kootenai*, the Idaho Supreme Court awarded Kootenai County fees pursuant to I.C. § 12-117 because the nonprevailing party, Allied, acted without a reasonable basis in fact or law by misrepresenting controlling

precedent, abandoning several arguments made in briefing at oral argument, and unreasonably pursuing the appeal without compliance with the Idaho Tort Claims Act or bond requirements. 151 Idaho 405, ___, 258 P.3d 340, ___ (2011). As discussed by IDFG, the Idaho Supreme Court has stated, “when dealing with an issue of first impression, this Court is generally reluctant to find an action unreasonable.” *Ciszek v. Kootenai County Board of Commissioners*, 151 Idaho 123, ___, 254 P.3d 24, 36 (2011) (citing *Kootenai Med. Ctr. Ex rel. Teresa K. v. Idaho Department of Health and Welfare*, 147 Idaho 872, 886, 216 P.3d 630, 644 (2009)).

It cannot be said that any action of IDFG in the instant matter was as egregious as the non-prevailing party’s action in *Allied*. Preliminarily, as to the issue of the unconstitutionality of the Idaho Outdoor Sport Shooting Range Act, CARE’s contention that the issue not be found relevant to addressing attorney fees is correct. This Court specifically concluded:

In its Order of March 11, 2011, this Court limited the scope of the evidentiary hearing held on June 13, and 14, 2011, to the issue of safety considerations at Farragut Range for up to 500 shooters.

Memorandum Decision, Findings of Fact, Conclusions of Law and Order Following Court Trial on Defendant’s Motion for Partial Lifting of Injunction (Safety Issues), p. 34. The court trial was thus limited to safety considerations, and the question of whether IDFG acted without a reasonable basis in fact or law in arguing for the constitutionality of the Idaho Outdoor Sport Shooting Range Act as related to the noise issue is not before the Court. However, CARE is seeking attorney’s fees specific to work done regarding the issue of the Act’s constitutionality. CARE also contends IDFG acted unreasonably in failing to meet its burden of proving that rounds could not go over the berm behind the targets. Plaintiffs’ Brief in Support of Award of Costs and Attorneys’

Fees, p. 3. “[IDFG] simply ignored the circumstances surrounding rounds fired low, which would strike a whole series of impermissibly placed ricochet potential sites and, on a more probable than not basis, rounds would go over the back berm behind the target as a direct result of ricochet.” *Id.* IDFG argues it reasonably believed it had met and even surpassed the Court’s baffle requirements by installing baffles to prevent firing over the back berm and by, additionally, installing side berms to address ricochets. Brief in Support of Notice of Objection and Motion to Disallow Attorney Fees and Costs, pp. 11-12. While the subject of ricochets was not discussed in the 2006 trial, the Court determined the use of the term “round” in the 2007 Order requiring that a “shooter in any position cannot fire a round above the berm behind the target” included “ricochets.” Memorandum Decision, Findings of Fact, Conclusions of Law and Order Following Court Trial on Defendant’s Motion for Partial Lifting of Injunction (Safety Issues), p. 36. Importantly, the Court concluded:

...that the partially contained range as presently in place will not contain rounds that ricochet over the back berm and could travel as far as one and one-half miles down range and off the property owned by the Idaho Fish and Game Department in the surface danger zone.

Id., p. 34. This conclusion of law, however, does not go so far as to hold that IDFG acted without a reasonable basis in fact or law, or in bad faith, in bringing its motion for partial lifting of the 2007 injunction. The question of whether the improvements to the range made by IDFG subsequent to 2007 were sufficient such that IDFG could reasonably move the Court for a partial lifting of the injunction is necessarily a question of first impression for the Court; IDFG’s motion provided the Court with the first opportunity since 2006 to review range construction. The Court concluded that the failure of IDFG to utilize (1) ground baffles, (2) additional overhead baffles to address ricochets off the floor of the range, (3) an eyebrow device at or near the top of the back

berm to address ricochets resulting from the striking of the floor at a shallow angle just before the toe of the back berm, and (4) measures to address the gaps in the baffles which could result in ricochets off to the side, resulted in "...violation of safety considerations set forth in 2007". Memorandum Decision, Findings of Fact, Conclusions of Law and Order Following Court Trial on Defendant's Motion for Partial Lifting of Injunction (Safety Issues), pp. 37-38. And, as presently constructed, the Court has determined the range currently does not meet professional standards set forth by Clark Vargas in the National Rifle Association Range Source Book or the ETL. *Id.*, p. 38. However, these conclusions by the Court do not necessarily result in a finding that IDFG acted without a reasonable basis in fact or law in bringing its motion for partial lifting of the injunction.

Both parties, perhaps taking heed of this Court's encouragement since 2007 to communicate and attempt to collaborate on a resolution, have argued to the Court that each made attempts to meet and confer on the issues which were ultimately resolved via this Court's August 25, 2011, Order. See [Plaintiffs'] Affidavit of Counsel, filed September 9, 2011; Brief in Support of Defendants' Notice of Objection and Motion to Disallow Attorney Fees and Costs, pp. 3-5. At oral argument on November 9, 2011, this Court made it clear that a lack of attempts to resolve this matter by the parties themselves was not a criteria for determining costs and fees. The Court has never *ordered* the parties to attempt resolution of this case or any issue in this case. While the Court has certainly encouraged such negotiated resolution, failure to follow that encouragement is simply not competent evidence that IDFG acted without a reasonable basis in fact or in law.

Indeed, the parties' inability to reach any sort of agreement on any of the issues necessarily is some evidence that IDFG acted with at least some reasonable basis in fact and law in bringing its motion to partially lift the injunction. In no other way could this case move toward final resolution. In *St. Luke's Magic Valley Regional Medical Ctr. V. Board of County Commissioners of Gooding County*, the hospital sought review of the commissioners' determination that a patient was not medically indigent, meaning that the County would not be liable to the hospital for reimbursement of costs of treatment, the District Court affirmed the commissioners and upon appeal, the Idaho Supreme Court affirmed again. 149 Idaho 584, 591, 237 P.3d 1210, 1217 (2010). In denying an award of fees under I.C. § 12-117, the Supreme Court noted two factors supporting the conclusion that, despite being unsuccessful, St. Luke's did not act without reasonable basis in fact or law: (1) the question of whether "potential income" could be considered a resource was a question of first impression and (2) a pre-litigation screening panel found the patient to be medically indigent, "suggesting that St. Luke's factual assertions may have had merit." *Id.* Here, IDFG sought this Court's opinion of the improvements made to the range following the 2007 injunction issuing. The question before the Court was unique and fact-specific; there was no manner by which the Court could have reviewed the changes to the Farragut Range and analyzed those changes in light of the 2007 injunction but for IDFG's ultimately unsuccessful motion for partial lifting of the injunction and the attendant Court trial. An agency acts without a reasonable basis in fact or law when it does not have the authority to take a particular action. *Fischer v. City of Ketchum*, 141 Idaho 349, 356, 109 P.3d 1091, 1098 (2005); *Reardon v. Magic Valley Sand and Gravel, Inc.*, 140 Idaho 115, 120, 90 P.3d 340, 345 (2004) (citing *Moosman v. Idaho Horse Racing Comm'n*, 117 Idaho 949, 954,

793 P.2d 181, 186 (1990). Although wrong in its interpretation of this Court's 2007 Order, it cannot be said IDFG acted in excess of its authority in bringing the motion. In *Matter of Russet Valley Produce, Inc.*, 127 Idaho 654, 904 P.2d 566 (1995), the Idaho Supreme Court reversed an award of costs and fees to Russet Valley pursuant to I.C. § 12-117 because, although the Idaho Potato Commission was wrong in interpreting the term "continuing violations", the Idaho Supreme Court found the Idaho Potato Commission had not "altogether acted without a reasonable basis in fact or law" as its interpretations were a "reasonable, but erroneous interpretation of an ambiguous statute." 127 Idaho 654, 661, 904 P.2d 566, 573. See also *Payette River Property Owners Ass'n v. Board of Comm'rs of Valley County*, 132 Idaho 551, 558, 976 P.2d 477, 484 (1999) (upholding the District Court's statement that "the County Commission misapplied the law, it acted with a reasonable though erroneous basis in fact and law.")

In the present case, IDFG was later found to be "wrong" or "erroneous" in its interpretation of this Court's 2007 Order, but it cannot be said that IDFG acted without a reasonable basis in fact or law in bringing an arguably legitimate dispute as to how to interpret that 2007 Order.

CARE cites to *Bogner v. State Dept. of Revenue and Tax*, 107 Idaho 854, 859, 693 P.2d 1056, 1061 (1984), for the proposition that the purpose of I.C. § 12-117 is: "(1) to serve as a deterrent to groundless or arbitrary agency action; and (2) to provide a remedy for persons who have borne unfair and unjustified financial burdens defending against groundless charges or attempting to correct mistakes agencies should never had made." Plaintiffs' Brief in Support of Award of Costs and Attorneys' Fees, p. 4.

It is undisputed IDFG made improvements to the range. It is undisputed that the types of improvements (baffles, covering on the ground, etc.), were intended by IDFG to

improve safety. The Court in 2007 did not specify that safety improvements had to include addressing ricochets, but that is because the topic of ricochets was not directly raised in 2007. What was discussed was safety and noise, and safety includes ricochets. While it seems odd for IDFG to ignore the issue of ricochets, it is understandable that IDFG would focus on live rounds escaping the range, given that the focus at the 2006 proceeding on safety concerns was the “no blue sky” concept, which addressed only direct shots at the target. Since that was *the focus by the parties* of the 2006 proceeding, it was the focus of this Court’ February 23, 2007, decision.

Having made its improvements following that 2007 decision, absent agreement from CARE, IDFG *had* to apply to the Court in some fashion in order for the Court to determine the adequacies of IDFG’s improvements. The motion for partial relief was certainly a method to bring the issue before the Court. From the safety standpoint, this Court cannot find IDFG’s petition to partially lift the injunction was “without a reasonable basis in fact or in law.” The Court cannot say IDFG’s improvements and subsequent attempt to have the Court approve the adequacy of those improvements was a “groundless or arbitrary agency action.” While CARE paying for its attorney’s work is certainly from CARE’s standpoint, an “unfair” or “unjustified” “financial burden”, this Court cannot find it to be an “unfair” or “unjustified” “financial burden”, as it was CARE which filed this complaint, CARE has been vigilant in its prosecution, and CARE stands to benefit from its continued prosecution. The range was there before any of the individual plaintiffs (the members of CARE) moved into or built their homes. The dispute arose because IDFG planned and secured funding for a massive expansion of this little used range. This Court cannot say IDFG’s improvements and subsequent attempt to have the Court approve the adequacy of those improvements was a

“defense of groundless charges” or “an attempt to correct mistakes the agency should never have made.” To hold otherwise would turn the standard in I.C. § 12-117 (agency acting without a reasonable basis in fact or in law) into simply the prevailing party analysis found in certain civil cases (not involving the State) under I.C. § 12-120.

If the issue is one which has not previously been addressed by a court, then attorney fees will not be awarded under I.C. § 12-117. *Henderson v. Eclipse Traffic Control and Flagging, Inc.*, 147 Idaho 628, 213 P.3d 718 (2009); *St. Alphonsus Regional Medical Center, Inc., v. Board of County Commissioners of Ada County*, 146 Idaho 51, 190 P.3d 870 (2008). That is the situation in the present case. The improvements made by IDFG have not “previously been addressed by a court.”

For the June 2011, trial, IDFG hired experts Jon Whipple and Kerry O’Neal. The Court found CARE’s expert (Jim Caulder) to be more credible and to have more believable opinions as compared to IDFG’s experts. However, the only way to test the credibility of any witness is in the crucible of trial, hearing, or deposition, presented before the finder of fact. The Court found CARE’s expert more believable, but just because IDFG presented its expert does not mean IDFG acted without a reasonable basis in fact or in law. The safety issues in the present case are somewhat complex, and there is no one agreed upon industry standard. In the past, this Court has looked to a variety of sources, including the NRA Sourcebook Drawings (standards written by the National Rifle Association), and Clark Vargas’ 1996 Third National Shooting Range Symposium. Vargas was the expert engineer IDFG hired in 2004 to create the Vargas Master Plan, which detailed the \$3.6 million expansion the IDFG was planning to implement. However, one problem with the Vargas Master Plan was it was at times inconsistent with Vargas’ 1996 Third National Shooting Range Symposium. This Court

explained this in its March 11, 2011, Memorandum Decision and Order on Motions to Strike, Defendant's Motion for View, Defendant's Motion for Partial Lifting of Injunction and Plaintiff's Motion for Summary Judgment and Order Scheduling Court Trial:

In 1996, Clark Vargas, a professional engineer, published a paper for the 1996 Third National Shooting Range Symposium, which was intended to provide a general review of range design criteria when selecting a shooting range site. This paper set forth nationally-recognized safety standards for construction and operation of shooting ranges. The Vargas Master Plan is inconsistent with the range design criteria Vargas discussed in his 1996 Third Shooting Range Symposium.

Memorandum Decision and Order on Motions to Strike, Defendant's Motion for View, Defendant's Motion for Partial Lifting of Injunction and Plaintiff's Motion for Summary Judgment and Order Scheduling Court Trial, p. 3.

In its motion to partially lift the injunction, IDFG overlooked the issue of ricochets. Ricochets were not *explicitly* discussed in 2007. However, ricochets were certainly *implicitly* discussed in 2007 when the Court mentioned bullet "containment". This Court wrote:

The first concern (safety) can be satisfied only by the "No Blue Sky" rule, or "totally baffled...so that a round cannot escape", as espoused by the nation's preeminent authority on range design and designer of the Vargas Master Plan, Clark Vargas. Exhibit 2, p. 5. Once bullet containment is achieved, it matters not for purposes of this litigation if the range is supervised (with bullet containment, supervision would only inure to the benefit of the participants, an important consideration, but not the subject of this lawsuit).

February 23, 2007, Memorandum Decision, Findings of Fact, Conclusions of Law and Order, pp. 61-62.

Simply because IDFG ignored the issue of bullet containment and ignored the practical fact that ricochets are bullets too, does not equate to IDFG acting without a reasonable basis in fact or in law. This is a complex case spanning several years. The fact is the parties did not initially (in 2006) directly discuss ricochets, and initially (in

2007), the Court did not discuss ricochets. But the fact that what appears to be an obvious issue (ricochets) was initially overlooked by the attorneys for each side and the one judge who was assigned the task of trying to resolve this complex litigation, underscores the need for a collaborative approach in the future. If all the stakeholders involved in this litigation worked together, the odds of overlooking an important issue are greatly reduced.

CARE also argues that IDFG's defense of the Idaho Sport Shooting Range Act should not be considered by this Court when determining attorney fees under I.C. § 12-117, because the motion to partially lift the injunction only pertained to getting the range to the point where up to 500 shooters per year could use the range, and thus, the noise issue was not at issue. Plaintiffs' Brief in Support of Award of Costs and Attorney Fees, p. 6. CARE then goes on to alternatively discuss why IDFG's defense of that statute warrants attorney fees. *Id.*, pp. 6-8.

The Court finds the Idaho Outdoor Sport Shooting Range Act issue must be discussed regarding attorney fees, but only because I.C. § 12-117 presently reads the Court "...shall award the partially prevailing party reasonable attorney's fees, witness fees and other reasonable expenses with respect to that portion of the case on which it prevailed." CARE is also the prevailing party on the constitutional challenge to the Act. However, the Court agrees with CARE that the defense of the Idaho Outdoor Sport Shooting Range Act is not a factor in this Court's analysis of the attorney fee issue for the simple reason that noise at the under 500 shooters per year level was not a factor, and the under 500 shooters per year was the level to which IDFG's motion to partially lift the injunction was focused. Alternatively, even were the Court to analyze the Idaho Outdoor Sport Shooting Range aspect of this case, I.C. § 12-117 only applies to

litigation, not legislation. This is an unusual case, in which litigation ensued, a decision by this Court was made, IDFG went to the legislature with special legislation to overturn part of this Court's decision, and the legislature enacted the special legislation which was later determined by this Court in that same litigation to be an unconstitutional "special law." While the "special law" legislative effort is bookended by litigation in this case, the "special law" is still legislation, and not litigation as covered under I.C. § 12-117. Title 12 of the Idaho Code governs "Costs and Miscellaneous Matters in Civil Actions"; in other words, litigation, not legislation.

Because IDFG acted erroneously, but not without a reasonable basis in fact or law, this Court need not reach IDFG's contentions that the hourly rate claimed is excessive, or that specific hours claimed are unreasonable.

In the Order Denying Partial Lifting of Injunction, this Court ordered CARE's costs be paid by IDFG "as allowed by Rule 54(d)(1) I.R.Civ.P." Order Denying Partial Lifting of Injunction, p. 2. That portion of the Order Denying Partial Lifting of Injunction is in error. The Idaho Supreme Court in *Lake CDA Investments, LLC, v. Idaho Department of Lands*, 149 Idaho 274, 285, 233 P.3d 721, 732 (2010), held: "Because [I.C. § 12-117] also applies to the award of 'witness fees and reasonable expenses,' it would also provide the exclusive basis for awarding court costs." This Court is more than a little familiar with *Lake CDA Investments*, and should have stricken that portion of the Order Denying Partial Lifting of Injunction. As set forth above, this Court finds attorney fees under I.C. § 12-117 are not justified against IDFG for bringing its motion to partially lift injunction. For the same reason attorney fees are not justified, under *Lake CDA Investments*, neither are costs.

For the reasons set forth above, this court denies CARE's motion for fees and costs.

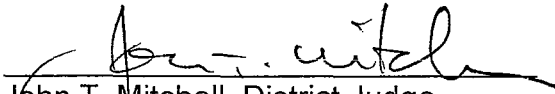
IV. CONCLUSION AND ORDER.

IT IS HEREBY ORDERED CARE's "Application of the Plaintiff for Attorneys Fees Against the Defendant Idaho Department of Fish and Game" is DENIED.

IT IS FURTHER ORDERED that IDFG's "Defendants' Notice of Objection and Motion to Disallow Attorney Fees and Costs" is GRANTED.

IT IS FURTHER ORDERED that the portion of the Order Denying Partial Lifting of Injunction, which reads: "IT IS FURTHER ORDERED that plaintiffs Citizens Against Range Expansion, et al, be and they are hereby awarded their costs as against defendant Idaho Fish and Game Department as allowed by Rule 54(d)(1) I.R.Civ.P."; is RESCINDED.

ENTERED this 14th day of November, 2011.


John T. Mitchell, District Judge

Certificate of Service

I certify that on the 14 day of November, 2011, a true copy of the foregoing was mailed postage prepaid or was sent by interoffice mail or facsimile to each of the following:

Lawyer
Scott W. Reed
W. Dallas Burkhalter and
Kathleen E. Trever

Fax #
208 765-5117 ✓ #185
208 334-2148 ✓ #190

Lawyer
Harvey Richman

Fax #
Via mail - By Scott Reed


Secretary

STATE OF IDAHO
COUNTY OF KOOTENAI
FILED:

Scott W. Reed, ISB#818
Attorney at Law
P. O. Box A
Coeur d'Alene, ID 83816
Phone (208) 664-2161
FAX (208) 765-5117

2011 NOV 22 AM 10:41

CLERK DISTRICT COURT

[Signature]
DEPUTY

Harvey Richman, ISB#2992
Attorney at Law
19643 N. Perimeter road
Athol, Idaho 83801
Phone (208) 683-2732

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

**CITIZENS AGAINST RANGE)
EXPANSION, an Unincorporated non-)
profit Association; JEANNE J. HOM, a)
single woman; EUGENE and)
KATHLEEN RILEY, husband and wife;)
LAMBERT and DENISE RILEY, husband)
and wife; GABRIELLE GROTH-)
MARNAT, a single woman, GERALD)
PRICE, a single man; RONALD and)
DOROTHY ELDRIDGE, husband and)
wife; and, GLENN and LUCY CHAPIN,)
husband and wife, SHERYL PUCKETT,)
a single woman; CHARLES MURRAY)
and CYNTHIA MURRAY, husband and)
wife; and DAVE VIG, a single man,)**

Case No. CV-05-6253

**AMENDED AND CORRECTED
PLAINTIFFS/RESPONDENTS REQUEST
FOR ADDITIONAL RECORDS**

Plaintiffs,

v.

**IDAHO FISH AND GAME DEPARTMENT,)
an agency of the STATE OF IDAHO, and)
STEVEN M. HUFFAKER, Director of the)
IDAHO FISH AND GAME DEPARTMENT,)**

Defendants.

TO: THE ABOVE NAMED APPELLANTS AND THE PARTY'S ATTORNEY, AND THE ABOVE-ENTITLED COURT

NOTICE IS HEREBY GIVEN, that the plaintiffs/respondents in the above-entitled proceeding hereby requests pursuant to Rule 19, I.A.R., the inclusion of the following material in the clerk's record in addition to that required to be included by the I.A.R. and the notice of appeal received October 10, 2011. Any additional transcript is to be provided in hard copy.

1. Affidavit of Harvey Richman filed December 20, 2010 (omitting attachments.)
2. Affidavit of Harvey Richman filed December 27, 2010.
3. Affidavit upon legislative records of 2008 legislation filed February 10, 2011.
4. Certificate on Idaho state legislative's history records House Bill 515 filed December 28, 2010.
5. Supplemental and Amended Affidavit upon legislative records of 2008 legislation filed February 11, 2011.
6. Affidavit of Jeanne Marie Hom Holder filed December 27, 2010 and August 18, 2010.
7. Affidavit of Ray Rule filed July 26, 2006.

If not already included in appellant's request, the following plaintiff's exhibits in trial are requested: Exhibits 3, 4, 6, 17, 24, 38, 45 though 74 and Court Exhibit No. 2.

Dated this 21st day of November, 2011



Harvey Richman, One of the
Attorneys for Plaintiff

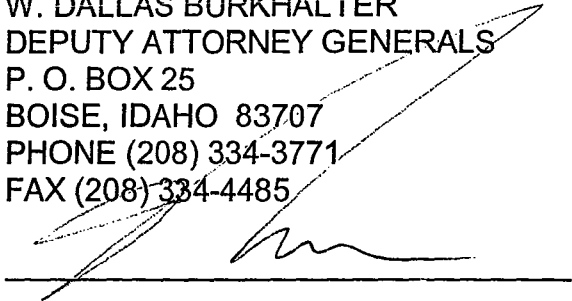
REQUEST FOR ADDITIONAL RECORDS

2

CERTIFICATE OF MAILING

I certify that a copy of the above and foregoing is sent by first class mail, postage prepaid, this 21st day of November, 2011 to:

KATHLEEN E. TREVOR
W. DALLAS BURKHALTER
DEPUTY ATTORNEY GENERALS
P. O. BOX 25
BOISE, IDAHO 83707
PHONE (208) 334-3771
FAX (208) 334-4485



REQUEST FOR ADDITIONAL RECORDS

3

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

CITIZENS AGAINST RANGE)
 EXPANSION, an Unincorporated non-profit)
 Association; JEANNE J. HOM, a single woman;)
 EUGENE and KATHLEEN RILEY, husband)
 and wife; LAMBERT and DENISE RILEY,)
 husband and wife; GABRIELLE)
 GROTH-MARNAT, a single woman, GERALD)
 PRICE, a single man; RONALD and DOROTHY)
 ELDRIDGE, husband and wife; and GLENN)
 and LUCY CHAPIN, husband and wife, SHERYL)
 PUCKETT, a single woman; CHARLES MURRAY)
 and CYNTHIA MURRAY, husband and wife;)
 and DAVIE VIG, a single man,)

DOCKET NO. 39297-2011

CIVIL CASE NO. 2005-6253

Plaintiffs (Respondents),)
)

IDAHO FISH AND GAME DEPARTMENT)
 an agency of the STATE OF IDAHO, and)
 VIRGIL MOORE, Director of the IDAHO)
 FISH AND GAME DEPARTMENT,)

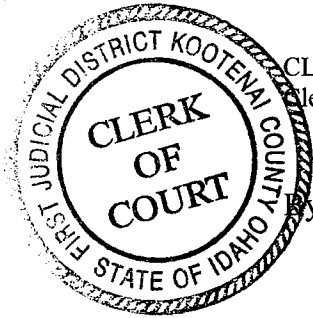
Defendants (Appellants).)
)

I, Clifford T. Hayes, Clerk of the District Court of the First Judicial District of the State of Idaho, in and for the County of Kootenai, do hereby certify that the above and foregoing record in the above entitled cause was compiled and bound under my direction as, and is a true, full and correct record of the pleadings and documents under Rule 28 of the Idaho Appellate Rules.

I certify that the Attorneys for the Appellant and Respondent were notified that the Clerk's Record was complete and ready to be picked up, or if the attorney is out of town, the copies were mailed by U.S. mail, postage prepaid on the 22nd day of December 2011.

I do further certify that the Clerk's Record will be duly lodged with the Clerk of the Supreme Court.

In witness whereof, I have hereunto set my hand and affixed the seal of said Court at Kootenai County, Idaho this 22nd day of December, 2011.



CLIFFORD T. HAYES
Clerk of the District Court

By: *Nicole Vizzi*
Deputy Clerk

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

CITIZENS AGAINST RANGE)
EXPANSION, an Unincorporated non-profit)
Association; JEANNE J. HOM, a single woman;)
EUGENE and KATHLEEN RILEY, husband)
and wife; LAMBERT and DENISE RILEY,)
husband and wife; GABRIELLE)
GROTH-MARNAT, a single woman, GERALD)
PRICE, a single man; RONALD and DOROTHY)
ELDRIDGE, husband and wife; and GLENN)
and LUCY CHAPIN, husband and wife, SHERYL)
PUCKETT, a single woman; CHARLES MURRAY)
and CYNTHIA MURRAY, husband and wife;)
and DAVIE VIG, a single man,)

DOCKET NO. 39297-2011

CIVIL CASE NO. 2005-6253

Plaintiffs (Respondents),)

IDAHO FISH AND GAME DEPARTMENT)
an agency of the STATE OF IDAHO, and)
VIRGIL MOORE, Director of the IDAHO)
FISH AND GAME DEPARTMENT,)

Defendants (Appellants).)

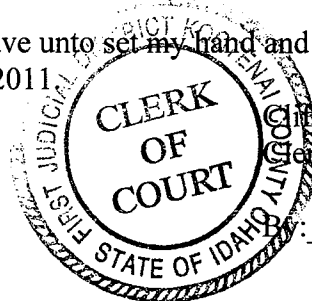
CLERK'S CERTIFICATE OF SERVICE

I, Clifford T. Hayes, Clerk of the District Court of the First Judicial District of the State of Idaho, in and for the County of Kootenai, do hereby certify that I have personally served or mailed, by United States mail, one copy of the Clerk's Record to each of the Attorneys of record in this cause as follows:

SCOTT W. REED
PO Box A
Coeur D'Alene, ID 83816

KATHLEEN TREVER
Deputy Attorney General
PO Box 25
Boise, ID 83707

IN WITNESS WHEREOF, I have unto set my hand and affixed the seal of the said Court this 22nd day of December, 2011.



Clifford T. Hayes
Clerk of District Court

Acrole Vigii