4-17-2012

Citizens Against Range Expansion v. Idaho Fish and Game Dept Respondent's Brief Dckt. 39297

No. 39297-2011

IN THE SUPREME COURT OF THE STATE OF IDAHO

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 ELDRIGE, husband and wife; GLENN and LUCY CHAPIN, husband and wife; SHERYL PUCKETT, a single woman; CHARLES and CYNTHIA MURRAY, husband and wife; and DAVE VIG, a single man,

Plaintiffs/Respondents,

v.

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

Defendants/Appellants.

RESPONDENTS' BRIEF

Appeal from the District Court of the First Judicial District
of the State of Idaho, in and for Kootenai County.
Honorable John T. Mitchell, District Judge presiding.

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TABLE OF CONTENTS

Note: Symbol (E #) points to the electronic pdf. File page # of the **Clerk's Certificate of Exhibits.**

TABLE OF CASES AND AUTHORITIES

CASES

STATUTES

RULES

TREATISES

CONSTITUTIONAL PROVISIONS

I. STATEMENT OF THE CASE

A. Statement of the Case

The Plaintiff does no violence to the first two paragraphs of the defendant statement of the case.

The Court, however, concluded "...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 downrange and off the property owned by the Idaho Fish and Game Department in the surface danger zone".

B. Statement of Facts

District Judge John T. Mitchell entered a 60 page Memorandum Decision, Findings of Fact, Conclusions of Law and Order on February 23, 2007. (R 220-279) That Order and the Judgment that followed closed the Farragut Shooting Range but directed that the Range could be reopened if defendant Idaho Fish and Game Department (IDFG) met the noise and safety requirements set forth in great detail in that Memorandum Decision. The Court's conclusion set forth a clear path for the IDFG to pursue:

(1) Come up with a construction plan that would meet the necessary noise and safety criteria.

(2) Submit that plan for construction to plaintiffs to determine if agreement could be reached.

(3) If no agreement, submit the IDFG plan to the Court for a hearing upon the merits.

(4) If the Court approved, proceed with construction and open the range.

The final paragraph of the February 23, 2007 Order gave the path to approval:

> **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.** Order, p. 60. (R 279)

Instead of following the Court's recommended post-judgment procedure, IDGF decided to spend a lot of money first and then later see if what it had done satisfied the Court's concern for noise and safety. Final Judgment was entered. IDFG did not appeal.

Within two months after entry of final Judgment, the IDFG had retained its expert in the initial proceeding, Clark Vargas, to design a plan for the Farragut Shooting Range that would meet the requirements set forth in the Order and Judgment at least as to the safety concerns. Initially, IDGF 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). (R 268)

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 the plan was acceptable. If agreement could not be reached, then submit the Vargas plan to the Court, have a hearing and obtain Court guidance.

Instead the IDFG 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. The new construction was made at a cost estimated at $400,000.

The IDGF did not seek agreement with the plaintiffs nor come up with a plan that would control the noise nor present a better idea to the Court. Instead, the IDGF went to the Idaho Legislature. There was not any disclosure to plaintiffs before or during the 2008 legislative session, of IDGF's attempt to have the legislature post hoc negate the final Memorandum Decision Order and Judgment.

The document devised by IDGF and its attorneys to derail the adverse Memorandum Decision, Order and Judgment was the result was House Bill 515, Idaho Code §67-9102, Ch. 116, §1. p. 233 (2008). House Bill 515 applied only to state owned outdoor shooting ranges, specifically not to any other outdoor sport shooting ranges in Idaho.

The legislative record in 2008 is clear and explicit in the direction to nullify the 2007 Memorandum Decision Order and Judgment entered by Judge Mitchell. This is an excerpt from the record of the House Resources and Environment Committee hearing on February 19, 20008, minutes pages 3 and 4.

> **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, 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. 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. (R 651)

This is an excerpt from the Senate Resources and Conservation Committee hearing on March 5, 2008, Minutes, pages 5 and 6: (R 660-661)

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 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.

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.

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 lawsuits 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 Judge Mitchell's Memorandum and Order Decision is precise. Section 67-9101 applies only to Farragut. §67-9102 strikes the finding of fact and conclusion of law that 55 dBA is the applicable standard, applies a different measurement test in Leq (h) and moves the places of measurement. Nuisance suits are 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? Minutes, page 9. (R664)

After stating the obvious that new residences were barred, Keifer identified the 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." Minutes, page 9. (R 664)

The quotation is from page 9 the Court's 2007 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. 9. (R 228)

The 2007 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. (R 229) Section 67-9104 makes no exceptions.

The 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. (R692-693)

C. Course of Proceeding

The complaint herein was filed on August 22, 2005. The Plaintiffs sought an injunction based on nuisance, among other issues, alleging unsafe conditions as to safety and intolerable conditions as to noise. (R 14, R 42)

The trial in the cause resulted in a Memorandum Decision being issued on February 23, 2007 (R 220 – 279) and a Judgment entered on March 2, 2007. (R 280 – 283)

The Defendant did NOT appeal that Judgment. The Judgment therefore became permanent and binding on the parties.

The Court determined, inter alia, that the range was unsafe and presented a clear and present danger to the safety and health of the plaintiffs and other persons (R 265, Conclusions of Law §6; see R 247-248, Findings of Fact (FF) ¶¶36-40) and the noise was a nuisance that needed to be addressed in futuro. The Court did however make specific findings of fact relative to noise. (R239-244)

As a result of the injunction, the Court closed the range to the firing of any and all weapons until improvements were made to meet the terms specified in the injunction. The Court required the baffling of the range, such that a shooter could not fire a weapon above the berm behind the target. (R 281, R 278) The Court counseled the parties to address an agreement relative to accomplishing, in the future, range modifications. (R 282) No agreement was addressed between the parties leaving resolution to a hearing before the Court.

Relative to the 501 and above standard, the Court required additional safety and noise consideration. (R 267, Conclusions of Law, ¶7) The safety features required the prevention of

any bullets escaping beyond the boundaries owned and controlled by the agency. The noise requirements were such that noise emissions would be reduced to a decibel level agreed upon by the parties following further evidence taken by the Court. (R 282, see also R 278–279) The level of safety to be employed at the 501 and above level required the application of the "no blue sky" or "totally baffled" principal such that NO rounds would be permitted to escape the shooting range rectangle, citing the defendant's expert witness Clark Vargas. (R 252-254, 267-270) (Plaintiff's exhibit 2, p.5; E 988 (Site Selection))

Defendant moved to lift the injunction, as to the 100 yard range only, as to the 500 and under and 501 and above levels, without addressing the 50 and 200 yard ranges on either side of the 100 yard range.

On December 28, 2010 Plaintiffs moved for Summary Judgment, asserting that the noise issue, defensively argued by the agency embodied in Idaho Code ¶67–9102 was unconstitutional and both parties moved for Summary Judgment as to compliance, val non, with the 500 and 501 compliance standards. (R 9, R 865–866) The agency moved for a Court view of the range. (R 808, R 295)

On March 11, 2011, the District Court issued a Memorandum Decision (R 835– 911) finding the subject statute unconstitutional, denying Summary Judgment as to the 500 standard , preserving that for trial and granted the Plaintiff's Summary Judgment on the 501 standard and denying the agency's prayer for a Court view. (R 835–911)

The Court addressed the issue of a "Court view" by providing for an evidentiary hearing to make the determination as to the adequacy of the "improvements" made by the agency to the

range and their compliance, val non, with the injunction's required standard.

The Court bottomed its ruling on the unconstitutionality of Idaho Code ¶67–9101, under provisions in the Idaho Constitution Article III, ¶19 and Article V, ¶13.

With addressing the noise no longer reachable by the Defendant, the Court could not and did not address the 501 and above shooter level as to do so required the addressing of noise. (R 910–911)

The hearing conducted by the Court on June 13, 2011 was limited to, the taking of evidence on safety concerns for the 500 and less shooter level. (R 911; see also R 953, Conclusions of Law ¶1)

The Defendant sought an interlocutory appeal from the Summary Judgment Orders but the same was denied on May 26, 2011. (R 912–919, R 927-928)

An evidentiary hearing was held on June 13–14, 2011 (R 928). On August 27, 2011, the District Court denied the Defendant's motion for partial lifting of the injunction. (R 957)

The District Court did find that the modifications made to the range at the hundred yard shooting area did prevent "directly" fired rounds from going over the back-berm behind the target but did NOT prevent the firing of weapons above the berm behind the target as to that portion of the fired rounds which were fired low and which ricocheted. Those rounds, thus fired could, and would go over the back-berm behind the target. (R 949-955)

The District Court concluded that the hundred yard shooting range failed to meet the safety considerations set forth in the 2007 injunction and that should the Defendant choose to make further modifications to the range, it could do so at its pleasure. The Court suggested

potential improvements, but did not require their invocation. In addressing the modifications made by the Defendant, to the range, the Court stressed that the modifications accomplished, ignored ricochet hazards and created NEW ricochet hazards. (R 949- 957, Conclusions of Law ¶12)

The Court recognized that opening ONLY the 100 yard range, which had not been contemplated, required special attention as far as rules and supervision. (R 946, FF 5, R 950 (FF 27, 28))

II. ISSUES PRESENTED ON APPEAL

1. Did the District Court err in finding a noise standard adopted by the Idaho Legislature for state outdoor sport shooting ranges to constitute legislative infringement on judicial power and a "special law" prohibited by the Idaho Constitution?

2. Did the District Court err in interpreting its injunction for reopening the Farragut Shooting Range to 500 shooters per year so as to impose new conditions not specified in the original injunction?

III. ARGUMENT

A. The District Court was correct in concluding noise and other standards adopted by the Idaho Legislature for state outdoor shooting ranges are unconstitutional.

The principal but not the only Idaho constitutional issue is whether the Idaho Outdoor Sport Shooting Range Act, House Bill 515, which became Idaho Code §67-9101, et. seq., is a "local or special law" in violation of Article III, §19, of the Idaho Constitution.

Idaho Constitution Article III, §19 reads in part as follows:

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.

Professor Dennis C. Colson in "Idaho Constitution – The Tie that Binds," University of Idaho Press (1991), gives the Territorial background and the constitution assembly record of the adoption of Article III §19. pp. 202-205. After citing about 20 Supreme Court cases which interpreted that provision, Professor Colson made this comment that directly applies to this case:

These cases are evidence that, just as during territorial days, local interests continue to lobby the state legislature for local legislation. The legislature often cannot resist giving aid, and the litigation that often follows reflects the bitterness caused by the intervention. p. 205

Plaintiffs are indeed very bitter about the action of the Idaho Fish and Game Department (IDFG) in going to the 2008 Legislature to nullify the Court's February 23, 2007 Memorandum Decision, Findings of Fact, Conclusions of Law and Order and Judgment that closed the Farragut Shooting Range.

Rather than appeal from that Order, IDFG drafted House Bill 515, went before the house and senate committees without any notice to any one in Bayview (or anywhere else). IDFG gave misleading information in both hearings both verbally and in writing. The bill was directed solely and only at this case. It was not a "local interest" lobbying the state legislature: It was a state agency that had a responsibility to represent and inform the public.

The upside is that Judge Mitchell devoted 36 pages to the constitutional issues in his March 11, 2011 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 (hereinafter "Memorandum Decision.")

Judge Mitchell was in a unique position to make this thorough analysis. The decision of this Court in M*oon v. North Idaho Farmers Association, Inc.*, 140 Idaho 536, 96 P.3d 637 (2004), the grass field burning case, reversed Judge Mitchell's opinion that Article III §19 had been violated.

This case provides the opportunity for this Court to follow Judge Mitchell's lead in clarifying the application of prohibited local and special laws. Judge Mitchell observed that the *Moon* opinion defined "special" as failing to treat all persons in similar situations alike and that "local" meant not applying equally to all areas of the state. (Memorandum Decision) (R 869-878)

What Judge Mitchell derived from the *Moon* opinion is that the "capricious, unreasonable, arbitrary" test applied to "special laws" but not the "local laws." (Memorandum Decision, p. 38) (R 872)

Article V, §13 in 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.**

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). (ISEEO v. State of Idaho.)

ISEEO v. *State of Idaho, supra,* is the near last of ISEEO decisions which the plaintiff school districts won without ever achieving final victory. The ruling of unconstitutionally is a lasting legal legacy. The legislature at the urging of the attorney general enacted a law that sought to negate prior rulings and forestall future adverse decision in a pending case. The Idaho Supreme Court held the legislative action to be a special law in violation of Article III §19.

The Idaho Supreme 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 592.

In ISEEO, the challenged amendment was directed to all 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 four, three of which are so isolated that noise levels have no meaning and two of which are entirely upon open land devoid of any habitation within gun range.

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.

Similarly House Bill 515 was aimed specifically at this lawsuit and is in violation of Article V, §13.

In *Concerned Taxpayers of Kootenai County v. Kootenai County, supra*, plaintiff

challenged 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 lll, §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 501.

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.

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.

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 (41h 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 cited criteria.

As noted in Judge Mitchell's Memorandum Decision (pp. 17-18), the Idaho Supreme Court in *Jones v. State Board of Medicine,* 97 Idaho 859, 555 P.2d 399 (1976), held the Hospital-Medical Liability Act which immunized physicians and acute care hospitals against malpractice actions over $150,000 was unconstitutional:

> **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.** 97 Idaho at 877, cited in *Moon v. Farmers. 140 Idaho at 546.*

In testimony on February 19, 2008 before the House Resources and Conservation Committee, Sharon Kiefer, Legislative liaison for IDFG, said that House Bill 515 was directly

aimed at "litigation or upon use of the shooting range at Farragut State Park." The legislation could not be more special nor more local. (R 650)

On January 16, 2008 an Idaho Fish and Game commissioner told the same House Committee of planned expansion:

> **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. (R823)

It can be argued that the special class of persons referred to in *Jones v. State Board of Medicine* in the 2000 users to be expanded to 3,000. In that case, 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 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 at 876.

Judge Mitchell found application of the general purpose to this act to be conclusive of being special legislation.

> **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. 2011 Memorandum Decision, pages 54 – 55. (R 888-889)

IDFG argues that the Idaho Outdoor Sport Shooting Range Act protects the public health, safety or morals and is therefore a valid exercise of the police power. Judge Mitchell rejected that claim near the closure of his Memorandum Decision pages 64 to 69. (R 898-903) House Bill 515 worked in the opposite of both public health – by raising the noise level – and safety, - by allowing blue sky, ricochets and excluding legal challenge by the Bayview residents who brought the lawsuit. The degree to which this legislation is contrary to public health and safety and maybe even morals is described by Judge Mitchell at the close of his policy power rebuttal.

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 an 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. (Memorandum Decision, pp.

68-69) (R 902-903)

The Court Memorandum Opinion issued February 23, 2007, comes here cloaked with correctness. The findings of fact and conclusions of law made in that decision are likewise binding on the parties.

As to the 2011 rulings, this Court stated... "A trial Court's conclusions following a bench trial will be limited to a determination of whether the evidence supports the trial Court's findings of fact, and whether those findings support the conclusions of law.... This Court will 'liberally construe the trial Court findings of fact in favor of the Judgment entered, as it is within the province of the trial Court to weigh conflicting evidence and testimony and judge the credibility of witnesses'.... This Court will not disturb findings of fact on appeal that is supported by substantial and competent evidence, even if there is conflicting evidence at trial.... This Court has always held that its view of the facts will not be substituted for that of the trial Court." The *Watkins Company, LLC v. Michael Storms and Kathy Burggraf*, (IDSCCI No. 37685) March 2, 2012, (citations omitted)

In as much as the defendant has not addressed the findings of fact of the trial Court in the Order appealed, we urge this Court to accept the findings of fact and conclusions of law as true.

Upon reading the findings of fact (R 233-238 et seq.), the essence of the case is presented. But it is in the conclusions of law, specifically numbers 7 and 9 that the safety meaning of this case is found. (R 265-270) The operative Order and its appended conclusion (R 278), in conjunction with the Judgment (R 280) are the center of the controversy.

It is important in addressing this case, that we list certain critical operative facts:

Idaho Rule of Civil Procedure, 65(d) requires that the injunction describe in reasonable detail... the act... sought to be restrained.

The Plaintiff urges that the Court was punctiliously clear in its Order of February 23, 2007, in describing what is intended to be restrained and the detail was sufficient for an ordinary person reading that Order, to be able to ascertain from the document itself, exactly what conduct is proscribed. See 11 A Wright-Miller-Kane, §2955, at pp. 308-309 (citations omitted)

The fact that the injunction of February 23, 2007 was not appealed does not permit a modification to be made to that injunction by which a losing litigant can attack the Courts decree collaterally. Whether that injunction was a right or wrong, is not subject to impeachment in the application to the conditions that existed at its making. The Court is not at liberty to reverse, under the guise of adjusting, such an un-appealed and final Order. (11A Wright-Miller-Kane, §2961, at page 394 Citations omitted)

When the trial Court in its Order of February 23, 2007 spoke to the issue of firing a weapon over the backstop, its language was ALL inclusive and included ALL rounds fired. No other interpretation makes any sense.

What the appellant seeks to do is to express its dissatisfaction with the Order of February 23, 2007 and effectively modify the injunction by suggesting that it does not say what it clearly says, that it is not all inclusive.

If in fact this Court finds that the language used by the Trial Judge in 2007, clearly includes, in the mind of an ordinary person reading the Order, what conduct is proscribed, and that conduct includes ALL bullets fired, whether high or low, whether direct or by ricochet, then

the case proposed by the Defendant, in so far as the argument on safety, fails, ab initio. It must be remembered that even the defense expert, Mr. O'Neil, admitted that bullets fired could go over the backstop. (R 936) (R 949, FF 23), (R 950, FF 31) The Plaintiff's expert, Mr. Caulder, likewise supported that contention, which the Court accepted as true. (R 942, 944), (R 951-952, FF 35, 36, 38, & 43) Should the Court make this determination early on, then the entirety of the defense safety argument, as the Bard of Avon said, is full of sound and fury and signifies nothing.

Among the critical documents received in evidence during the trial that occurred in 2006 were the "Design Criteria for Shooting Ranges", by Clark Vargas, Defendant's trial expert. (Plaintiff's Exhibit 2) (E 984-1009) This document should be read in its entirety to get a taste for the Defendant's position. After reading Plaintiff's Exhibit 6 and portions of Mr. O'Neil's deposition (Court Exhibit 1 @ 42, 89, 98, and 116-117) (E 22, 34, 36, 40-41) it is consequential to note that they conclude that catching ALL ricochets and resolving surface irregularities as well as the employment of angular baffles, which are specifically recommended for urban areas as here exists, is required. It should be noted, further, that the baffles employed in the Vargas design suggest that 36 baffles are preferable with 24 baffles the minimum and ground baffles to address ricochets. (R 942-945) The defendant's actually erected only six baffles when its own range designer specified seven. (R 936) Further, the baffles constructed are perpendicular not angular. There are no ground baffles employed to catch ricochets.

The document (Plaintiff's Exhibit 3) (E 1010-1055), further defines operative words under §4.02. (E 1013) It specifically addresses ground generated ricochets as an issue to be

controlled under §3.0 4.6.2. (E 1022) In addressing safety baffles, Mr. Vargas did an amiable job in §2.0 6.1 and .2. (E 1044-1045) It is also notable that at the first trial, Mr. Vargas actually spoke to addressing low fired rounds in figure C – 9 of his range design drawings. (Plaintiff's Exhibit 4) (E 1056-1078) (E 1075 (C-9drawing)) Mr. Vargas was the primary author of the NRA Range Source Book. (Plaintiff's Exhibits 3 and 4) (E 1010-1055, 1056-1078)

In the first trial, Plaintiff introduced its Exhibit 6 (E 1091-1095), an NRA document, which the Court adopted, wherein it spoke, on page 5, to addressing the very issue of ground bullet strikes. (E 1095) (R 945)

Plaintiff's Exhibit 7 (E 1096), from the first trial, shows the relationship of the shooting range to the down range homes of the Plaintiffs.

We suggest that upon analysis of that documentation, along with the testimony of Mr. Ruel, the Plaintiff's original expert, that the Court's language, in its injunction, intended and clearly included, rounds fired, high and low, direct and ricochet, and all the parties knew that to be the case.

Mr. Roy Ruel submitted his CV. His drawing, in Plaintiff's Exhibit 32 (E 1254), additionally shows the relationship between the shooting range and the downrange homes of the Plaintiffs. Including the distances involved. (Court's Exhibit 4; E 355-439) (See also E 373-375)

In Mr. Ruel's testimony, he referenced ricochets at pages 11-12, 14, 30-32, 39-40 and 62-63. He said, "...If a bullet leaves the firing range and it fires low... (question) Is it likely or not that it can hit the ground and ricochet? (Answer)... If it hit a rock or something, it could go anywhere." He said, "...When a bullet is deflected by a ricochet...can you be sure of its

trajectory... (question) (Answer)...No, no. You cannot." He said, "... (question) So if you partially stop a bullet, does that necessarily improve safety? (Answer)...No, no, no. It does not. In fact, it may make it worse. Once---if the bullet becomes unstable, then it can go anywhere..." (Court's Exhibit 4; E 355-439) (E 365-366, 368, 385-386, 393-394, 416-417)

When the Trial Judge addressed his memory of the Ruel testimony at the first trial, he did not have a transcript to refer to as we now do. The transcript was not transcribed until the filing of the appeal. (Court's Exhibit 4; E 355-439)

For the defendants to suggest, ricochets were not discussed at the first trial, begs the facts in the record.

At the evidentiary trial in 2011 The Court received testimony from Mr. James Caulder, a Master's level engineer for the United States Department of Defense, who authored the Engineering Technical Letter (ETL), which was/is the lead planning instrument for range design for the United States Department of Defense. (Court Exhibit 2, pg.74; E 194), (TR 306, lines 10-18, defendant's expert witness O'Neil), (Defendant's exhibit E, Air Force ETL 05-5, §4-5, pages 3-5; E 566-568)

The District Judge found Mr. Caulder credible in every one of his assertions. He urged that due to the rocky nature of the ground at the Farragut range, the concrete footings installed by the defendant and other design failures, that rounds fired could and would go over the backstop and proceed down range as much as one half of the bullets potential. In as much as the defendant only owned and controlled some three quarters of a mile downrange, a 30.06 round might well land on the public road or on the homes of the downrange Plaintiffs. (R 951-952)

Mr. Caulder further testified that even in the range photographs taken by Mr. O'Neil, the defense expert, "blue sky" openings could be seen on both the left and right extremes of the range, which would have certainly have been violative of the 501 and above standard, assuming the Court ultimately got to that question. (Court's Exhibit 2, pp. 18-19, see also Plaintiff's Exhibits 47 and 48) (E 137-138, 1396-1397)

Plaintiff's exhibits 49-55 show both the extreme rocky nature of the native soil and 6 x 6 concrete footings. There was an instruction from Mr. O'Neil to remove the rocks (E 36, 41), which was not done, and to employ log yard waste (E 29-30), which had no useful purpose except to obscure the rocks and 6x6 footings. (Plaintiff's exhibit 58-61) (E 1398-1404) Further, O'Neil agreed with the ETL requirement that naturally occurring soils may be used on the ranges floor if they are not excessively rocky. (TR 342@3)

What the evidence at the hearing of 2011 accomplished was to inform the District Judge, of what he would have observed had he attended the range for a Court view and explained the significance of those observations. (R 951, FF 34)

Had the Judge attended the range for a view, he would have had to rake away the log yard waste to observe the actual condition of the range floor. Such behavior is not contemplated by a Court view.

The fact that the range is unsafe for the shooters, who might use it because of the baffle stanchions in front of the shooters, inter alia, is important for an understanding by this Appellate Court of the gross lack of attention to detail by virtue of the employment of the defendant's non-engineer design "expert". (Defendants exhibit III; E 938) The District Judge specifically

excluded safety of the shooters on range as that was not relevant to the pleadings before him. (FF 51, Conclusion of law 9; R 253-254, R 269-270) We do no violence to that position.

The last evidentiary matters from the Plaintiff are contained in Plaintiff's Exhibit 71, 73 and 74 which will give this Court an overview and flavor of what actually exists on the ground so that the Court can understand the nature of the exposure of these Plaintiff's to the rounds that leave the range, regardless of the method or manner. (E 1423, 1425-1427)

We would urge the Court to read, at length, burdensome though this request is, the deposition of Mr. O'Neil, the defense range design expert (Court Exhibit 1) to fully understand why the Court did not find him credible and why the defendant should never have relied upon his counsel. (E 10-119)

Though reading the Mr. James Caulder's depositions (Court Exhibits 2 and 3) (E 120-354) is instructional, we have extracted the most critical quotes and insert the same herein:

(From the preservation deposition; E 120-215)

Page 13: The ETL provides the design criteria for the construction of small arms ranges. (E 132)

Pages 18-19: The current range contains "blue sky" openings on the right and left and if a round went through such an opening it would continue until gravity pulled it to the earth and at a point beyond IDFG property. (E 137-138)

Pages 20 and 63: The range is not compliant with the Court Order. (E 139, 183)

Page 20-22: The range floor with its cobbles contributes to noncompliance. (E 139-141)

Page 23-24: The Fish and Game Department does not own enough down range land to contain ricochets. (E 142-143)

Pages 27 and 51: The log yard waste is only cosmetic and is untested for bullet penetration. It does nothing for ricochets. (E 146, 171)

Page: 37: Ricocheting rounds would definitely go over the back-stop. (E 157)

Pages 31-39: The partially contained range stops only direct fire rounds and not ricocheted rounds. (E 151-159)

Page 31-32: But a totally contained range contains 100% of the rounds fired. (E 151-152)

Page 63: Range is not compliant with Court safety requirements. (E 183)

Page 64: The safety fence at the range affords no protection. (E 184)

Pages 68 and 69: The range as constructed does not represent 100% bullet containment. (E 188-189)

Page 99: Ricochets will travel 50% of their potential distance. (E 314)

Pages 100: IDFG owns about one half of what is needed to control ricochets. (E 315)

From Caulder's ETL he defined the **fully contained range as one that is "...designed to prevent 100% of the direct-fired rounds and 100% of the ricochets from leaving the limits of the range. This type of range is used when the required minimum SDZ {surface danger zone} requirements are not available because of lack of land area.."** (emphasis supplied) (R 561)

A partially contained range has a covered firing line, side containments overhead baffles and a bullet backstop. **"Ricochets are not totally contained, but reduced by the baffles and side containment. A partially contained range requires a SDZ length equal to 50 percent of the maximum range of the most powerful round to be used on the range"** (emphasis

supplied (R 559)

SDZ was defined as "The portions of the range in the horizontal plane that are endangered by firing a particular weapon." (R 559)

At Farragut, there simply is not enough land downrange owned and controlled by the Defendant. The Court made that punctiliously clear.

Though the Judge used language about "implied" inclusion of low fired or ricocheting rounds, we argue that it is in reality more than that. The language included ALL rounds fired without listing ant subset or specifically identified list. Had there been any intended exclusion of ricochets, specifically defined or implied, that would have been the basis for an appeal of the 2007 Order by the Plaintiffs. (R 938-946)

Recognizing the all-inclusive nature of the injunction with the potential bullet escape exposure discussed by the experts at the original 2007 Order, any reasonable person would clearly understand that ANY and EVERY round fired from the firing line may not go over the back berm behind the target.

It is clear is that what the Court wanted was to protect the downrange persons from ANY and All rounds of any nature whatsoever falling on their homes. It is downrange rifle fire, that if not controlled will clearly land on the downrange homes, whether directly fired or by ricochet. SAFETY is and was the Court's concern.

The resulting evidentiary hearing, gave rise to the Memorandum Decision of August 25, 2011, which spent a great deal of time on the concept that "agreement remains the superior resolution". By failing to participate and communicate with the Plaintiffs in its range

development, the defendant created its own problem. (R 928-930) The tragic failure of the defendant to hire a competent range design engineer compounded the error. (R 930-937)

Judge Mitchell's careful analysis of the standard for less than 500 shooters per year, is superior to anything this scrivener could ever do. (R 937-945) The findings of fact entered by the Court are astonishingly insightful and based upon good evidence. Evidence the defendant has not traversed.

The Court's conclusions of law, astutely address the Rule 65 (d) matter, which is now before this Court. (R 955-957)

B. The District Court correctly interpreted its February 23, 2007 Order relative to opening the range for up to 500 shooters.

1. Standard of Review

The Idaho Code of Civil procedure, Rule 65 (d), does indeed provide "an Order granting an injunction... Shall be specific in terms [and] shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained..."

In this regard, the Defendant's citations, in a footnote 4, on page 24 of its brief, are well taken, when it said, "reviewing Courts in other jurisdictions have generally given deference to a District Court's interpretation as the draftsmen of its own Order". See, *Garcia v. Yonkers School Dist.*, 561F. 3d 97, 103 (2nd Cir. 2009). What was not quoted was "...and we will not reverse the Judge's construction of an ambiguity in his own words except for an abuse of discretion. However, when the court addressed the question of the actual issuance or not of the injunction, then the court applied a de novo standard. The de novo standard is applicable when applying the

factual findings and legal conclusions underlying the decision. That is not the case herein. The Defendant miss-applies the ruling by miss-quoting.

Likewise, in *Fredericksburg Construction v. J. W. Wyne Excavating*, 260 Va. 137, 530 S.E. 2d 148 (2000), the court stated " ...the general principle that trial courts have the authority to interpret their own Orders....Furthermore when construing a lower court's Order , a reviewing court should give deference to the interpretation adopted by the lower court" (citations omitted)

Additionally, we do no violence to the Defendant's referral to *Abbot Labs v. TorfPharfm, Inc.* 503 F3d, 1372, 1382-3 (Fed. Cir. 2007) cert denied, 553 U.S. 1031 (2008), quoting *Ford v Kammerer*, 450 F.2d 279, 280 (3d Cir 1971). ("{Injunctions} are binding only to the extent they contain sufficient description of the prohibited or mandated acts.... (The subject Order clearly describes what is prohibited.) The court found no abuse of discretion as it had carefully reviewed the evidence and assessed the credibility of the witnesses. Clear and convincing evidence supported its findings. This is all likewise true in the case herein. But what is more, the court was found to have the power to order an expansion of its original injunction.

With the Idaho and Federal rule being the same, we do echo the Defendant's reference to *Alabama Nursing Home Ass'n v. Harris*, 617 F.3d 385, 387 – 88 (5th Cir. 1980) (citation omitted), where it quoted "[a]n injunction does not prohibit those acts that are not within its terms as reasonably construed .... In determining whether a particular act falls within the scope of an injunctions prohibition, particular emphasis must be given to the express terms of the Order. Id". (The operative word is "reasonably".)

In *Little Rock Family Planning Services, P. A. v Dalton*, 860 F.Supp 609 (E.D.Ark 1994)

the Court focused on the application of rule 65(d) and its principal desire to prevent uncertainty and confusion by the persons to whom the injunction is directed. It required that the degree particularity contained in the injunction depends upon the subject matter involved. As in the case at bar the defendant need not guess at what the "subject matter" is, for it is well known that it is THE SAFETY of the downrange property owners, and the general public, which is the underlying purpose of the litigation and its resulting Order. Any ordinary person would know and understand this central message and could not possibly exclude ricochets simply because they were not "specifically" mentioned. The District Court below cited to the companion case of *Hughey v JMS Dis. Corp.*, 78 F3d 1523 (11th Cir. 1996),(citations omitted), which reasons in parallel.

The record discloses ample factual and evidentiary underpinnings to justify the inclusion of ricochets and reject any subtraction or diminution from the all-inclusive language of the Court. The Defendants have shown no abuse of discretion.

2. The District Court's interpretation of its condition to reopen the range for up to 500 shooters is in clear conformance with rule 65 (d).

The original Order in question was entered by the District Court on Feb.23, 2007. That Order was not appealed and comes to this Court without attack by the Defendant's.

"It is hereby ordered and adjudged and decreed that [IDFG is] directed and enjoined to close the Farragut Wildlife Management area to all persons using 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 by the Court. (emphasis supplied)

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, [IDFG] 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." (AR 281-282)

The Plaintiff urges that the language of the Court in referencing the purpose of the use of a baffle is clearly, in the simplest of language, that the Court sought to prevent the firing of a weapon, such that any bullet thus fired shall remain between the firing line and the back-berm, i.e. the weapon may not be fired above the berm. Much as the test in Occam's razor, the simplest explanation is probably correct.

What more simple explanation could the Court have given? Does this not specifically describe, in reasonable detail, the terms of the prohibition? Does not, an ordinary person, when reading this Order fully understand that if while on the Farragut range, were a bullet to be fired downrange, that bullet may not go over the back berm under any circumstances? Cannot the enjoined party ascertain from the four corners of the Order, precisely what acts are forbidden or required? Does not the Order contain a sufficient description of the prohibited or mandated acts? Is not the Court Order sufficiently focused to express the particular emphasis that the

Order seeks to address, that is, the SAFETY of all persons downrange, of persons on public roads, of persons on their private property located directly downrange from the firing line and within the Surface Danger Zone to which all of the experts testifying at the trial in 2007, focused their energies.

What the Court DID NOT do in its Order was detail how the range was to be constructed, what materials were to be used or how to specifically engineer, or configure what baffle or baffles would be required to complete the task; the making safe the area downrange, directly behind the backstop, which was not owned and controlled by the defendant. (R 266, 269, 278)

The germ of the argument proposed by the Defendant, loses sight of, perhaps intentionally, the purpose of and the import of, the Court's Order; the safety of down range persons. It also ignores the clear wording of the Courts Order. It seeks to put the onus on the Plaintiffs to show inclusion of ricochets. The Plaintiffs reject this reversal.

Were this Court to adopt the interpretation suggested by the Defendant, that ricochets are not within the injunction, then the clear purpose of the Court's safety Order would not be met, as some portion of the rounds fired would continue down range as far as one and three quarters of a mile. (NOTE: Defendant only owns and controls three quarters of a mile downrange). Though the Defendant owns the property between the back-berm and the park fence, it does not control it as it is replete with recreational trails and recreational areas available and encouraged for hiking, biking, horseback riding, snowmobiling, mushroom picking, etc... and well beyond the range safety fence. (R 942-946) (Plaintiff Exhibits 13, 14 & 15; E 1120-1122)

If the Defendant applied plain meaning to the words used by the District Judge, it would

have no argument to make. What the Defendant has done in its argument is to suggest that the thrust of the Court Order was not SAFETY at all, but something other. What the Defendant does here is attempt to create wiggle room in an Order they failed to appeal.

Did not the Court Order speak to ALL bullets that might be fired on the range? Is that not the plain meaning of the Order? Did not that Order include bullets fired high, bullets fired low, and even the silver bullet used by the Lone Ranger, that may wend its way down range and go over the backstop. The Defendant seeks to exclude from the injunction, those bullets fired low that do not bury themselves in the ground. The frivolity of that argument is that it simply makes no sense. (R 942-946)

Had the Defendant done as suggested by the Court and confer with the Plaintiff prior to breaking ground, the omissions in the Defendant design would have been made clear. It must be remembered, that in its 2007 Order the Court clearly focused on a range improvement as proposed by the Defendant that included no overhead baffles such that bullets would not be restricted in their scope and travel downrange, for example, a 30. 06 round would go some 3 1/2 miles downrange. (R 244-246, 255, 266) The Court sought to impose baffling, as suggested by the defendant's own expert, Vargas, as well as the Plaintiff's, Ruel, to shorten the potential of bullet travel by limiting rounds going over the backstop.

For the Defendant to suggest that ricochets were not referenced in the Plaintiffs expert's testimony in the original trial is to completely ignore the record. (Plaintiff's Exhibits 2 and 6) (Court Exhibit 4 @ pp. 11, 14, 31, & 62)

Roy Ruel referred to ricochets, but clearly recognized the greater danger was on an un-

baffled range, which occurred when firing high. The Court likewise recognized that by baffling the range, so as to limit bullet travel downrange, downrange persons would have greater protection in their health and safety, certainly, an obligation of the Court. (R 266)

The Defendant was not obliged by the Order to follow Mr. Vargas's advice. It could do whatever it wished. But by not employing Mr. Vargas's wise counsel, the commission made its own bed. Had the Vargas "baffle" design been employed, the Defendant may not now find itself embarrassed with its non-compliant range. An angular range baffle system may well resolve the ricochet issue totally. Sometimes a penny saved just isn't worth the savings. Or better put, let your first cost be your last cost.

The Defendant argues that the Court did not "explicitly" reference ricochets in his 2007 Order. That however is not the point. The Court included in its Order the entire universe of rounds/bullets fired in its employment of the phrasing, "... Cannot fire his or her weapon above the berm behind the target." What the Court said was ricochets were "implicit" in the injunction, i.e. a subset of "rounds".

The Court made no allowances, no exceptions, of any nature whatsoever. All firings by any shooter on the range were included in the prohibition, which required containment between the firing line and the back-berm. This, by definition, and common sense, employing the concept of "reasonable detail" as required by rule 65 (d), included "direct" and "ricocheted" firing. To suggest to the contrary, is hyperbole.

To open for 501 shooters required a "fully baffled" or "no blue sky" range. This requirement is not now at issue as the 501 and above standard cannot be addressed without

addressing noise. The defendant, will in any event, to become compliant with the higher standard, need to redesign the range. The present range cannot be expanded into a 501 and above level without re-doing the whole of the design, as it cannot meet the definition of a "fully contained" range. (See ETL; R 559-562) If ANY rounds escape the range, it is not "fully contained." (We equate "fully contained" with "fully baffled", as did the Court)

If expansion to the 501 level is contemplated, as it is, then constructing an inadequate foundation upon which to expand is not only foolish economically, but wrong logically. The Court would not have sent the Defendant down such a path.

When the Defendant invoked the issue of attorney's fees under Idaho code §12 – 117, in its' "reasonably based in law or fact" argument, it totally ignored the Court's finding of the issue of "a question of first impression" as the Court's reason for denying fees, (R 979). The denial of fees under the strict statute cannot be extended into more than that.

By arguing that the Defendant did not have to modify the range to prevent the escape of "direct" and "ricochet" fire over the back berm is simply unsupported by the testimony from the first trial on ricochets and the cloak of safety that the Court chose to impose in favor of the plaintiffs and the general public.

When the Court referenced baffling the range, it did not describe how that was to be accomplished but it did make reference to the very design of Mr. Vargas, the Defendant's own expert, (R 267-268), which required 29 baffles on a 100 yard range, as being a minimum per the standards he drafted for the recognized NRA Range Manual, not the six baffles employed by the appellant. (Court Exhibit 1, see Exhibit 5 therein; E 96)

It is important to note the difference between the 500 and under standard and the 501 and above standard reference by the Court in its 2007 Order. The Defendant discusses this on page 31 of its' brief but again muddies the water by distorting the difference.

The difference between those two levels of restriction is that at 500 and under, bullets fired downrange may not go over the backstop. All rounds fired under the 501 and above standard are subject to "the no blue sky" or "fully contained" standard, which means rounds fired through side openings, which are clearly visible at the Farragut range as presently constructed are impermissible. The 501 standard is that of a 'fully contained" range such that 100% of the rounds fired will remain within the range footprint rectangle. The 500 and under standard allows for bullet escape through the side openings by travel to the extreme right and extreme left but NOT over the backstop.

It is common sense that bullets going downrange, if unrestrained, will leave range property. But with a limited number of shooters, right and left escapement is statistically less significant, as most shooters, we will admit, intend to fire on target and not extreme right and left, but rather shoot high and low. This, we urge, is why the Court set the two standards. Mr. Roy Ruel spoke to that issue in his (Plaintiff's Exhibits 32-34; E1254-1256), showing what 1 inch of aiming error will do in the altitude up or depression down and resulting bullet travel. It is without doubt, according to James Caulder, with his Masters in engineering, and years of design experience with the Department of Defense designing small arms rifle ranges, that a ricochet bullet will go one half of its potential distance if not otherwise obstructed. The Court made clear that the Defendant must prevent ALL rounds from going over the backstop to be compliant with

the 500 and under standard. The dichotomy urged by the appellant between a "directly" fired and "indirectly" fired (ricocheted) rounds is simply not a real distinction.

In denying the defendant the relief it sought, the Court did not in any regard, modify, alter or change its 2007 Order. What the Court was asked to do was determine whether or not compliance with its Order was had. In so doing, it examined its own language and did what the case law clearly says it is privileged to do, that is, interpret its own Order. This Court has done so amiably.

The Court referenced, "but the fact that what appears to be an obvious issue (ricochets) was initially overlooked by the attorneys for each side and one Judge was assigned the task of trying to resolve this complex litigation, underscores the need for a collaborative approach in the future." In fact ricochets were not ignored at the trial in 2007 but rather they were not the major focus of the Order as the proposed range was to be completely un-baffled. That difference should not go unmentioned. (Plaintiff's Exhibits 2 and 6) (Court Exhibit 4 @ pp. 11, 14, 31, & 62)

To suggest that the Defendant did not know that allowing rounds to go over the backstop was a violation of the injunction is pure sophistry.

3. Its 2007 Order and Judgment, the District Court addressed a resolution for lifting the injunction to be by agreement of the parties, as the better of the choices, or by a view by the Court. The Court did not exclude directly or impliedly the taking of evidence if relevant and offered or sua sponte, should it desire, in addition to its view. With a Court view now not available, the taking of evidence from experts is sensible and required.

In hearing from experts, the Court did not at all modify its 2007 Order. It simply educated itself, which it could have, and would have done when it observed circumstances that were not contemplated, i.e. failure to remove rocks and cobbles from the ground and (R 944, 949, 952, 955) intentionally hidden by the application of log yard waste. (R952) Also, the placement of ricochet hazards in the form of concrete footings for the overhead baffles and the erection of six baffles contra to the advice of the defense's own expert, Mr. Vargas, for twenty nine plus and/or angular baffles (Plaintiff's Exhibit 2, Fig. 23; E 1008) and for not following any accepted industry standards. Were the Court to view what was constructed, which it in fact it did through still pictures and videos, the Court clearly would have questions in its mind that would need to be answered thus requiring expert opinion on the matter. The Court did not convert the case into an "expert intensive" matter, it always was, nor did it retry portions of the case outside the procedural requirements of Rule 60 (d), but rather asked for information it needed to enter its Judgment on the matter pursuant to a very clear Order.

4. The District Court's interpretation of its Order is in conformance with the burdens placed upon parties asking to vacate an injunction.

On page 35 of the appellant's brief, it stated, "IDFG reasonably installed baffles to prevent shooters from firing above the berm behind the target." The question is, therefore, was the installation of the baffles "reasonable" so as to comply with the Court Order to prevent shooters from firing above the berm behind the target?

There is ample evidence in the record from the testimony of Mr. Caulder and from the testimony of the defendants own "expert witness" Mr. O'Neil, that even after the installation of

the six baffles, rounds can and will go over the backstop. (see plaintiff's (R942-945)

The defendant urges that the Court has "overlooked" the issue of ricocheting rounds when in fact ALL rounds of every nature whatsoever were included in, and contemplated by the Court Order relative to "fir[ing] weapons above the berm behind the target", albeit the Order did not say "ricochet", but it also did not say "direct fired". (R 955-957)

The Court received testimony from Mr. Caulder, who explained, using the Air Force Engineering Technical Letter (ETL), the import of range design and the dangers which the original injunction sought to avoid, that was, bullets going over the backstop. The testimony taken did not expand the Court Order; it rather explained the dangers then existing in the range, allowing the District Judge to address the very problem he was obliged to resolve when he wrote his 2007 injunction.

The principles in *State v. Hartwig*, 150 Idaho 326, 240 P.3d 379 (2011) and *Rudd v. Rudd*, 105 Idaho 112, 666P.2d 639 (1983), as cited by the appellant, are simply not applicable, as the Court has not altered or changed its Order of 2007, but rather determined whether or not its terms have been met. This Court was asked to do just that by the Defendant and so it did.

In the Defendant's footnote 12, on page 38 of its brief it asks ... "What will satisfy the Court to lift the injunction for up to 500 shooters." It need only read the Court Order to know the answer. To open for 500 and under shooters, the range must be so constructed that a shooter "...cannot fire his or her weapon above the berm behind the target." The Court was not concerned with how to accomplish it; save that baffling was the way the defense expert proposed to address the fact that the defendant did not have enough land to build a safe range. The Court

did not engineer the range and the Defendant failed to use an "engineer" to design the range, all to its chagrin. Had the defendant employed sound engineering, i.e. such as: a plan described in the NRA Range Source Book, the safety issue of this litigation would never have come to pass.

We would have this Court assume, arguendo, that ricochets are not covered by the injunction and the Defendant has also resolved the noise issue by agreement with the Plaintiff. Can the agency now address opening the range for 501 and over? The clear answer is yes, but they will fail as a matter of law, because both Plaintiffs and Defendants experts admit that ricocheting rounds will go over the backstop and through side openings, thus the ranged is not "fully contained" by definition. (R 559-561)

C. REQUEST FOR ATTORNEY'S FEES ON APPEAL

1. Standard of Review

Idaho code §12–117 (2) provides that to the extent that a party prevails on a portion of a claim and that the claim was presented without any reasonable basis in law or fact, then attorney's fees on appeal is appropriate. We concede that the issue of unconstitutionality is not addressed by this request.

In *Krebbs, v Krebbs*, 759 P2d 77, 114, I 571, the court set the standard that simply being dissatisfied with the findings of the trial court, though they be supported by substantial evidence, is not enough to establish that the findings are clearly erroneous. The appeal must be more than an invitation to the appellate court to second guess the trial courts findings on the evidence. Without a clear showing of error, an appellate court does not invade the trial court's domain; therefore such an appeal is without foundation.

So too in *Chicoine v Bignall*, 899 P2d 438, 127,I 225, where in the court found that simply being unsatisfied with a trial court resolution, is not a basis to maintain an appeal.

2. Plaintiffs are entitled to attorneys fees on appeal as the appeal is without any reasonable basis in law or fact but rather an attempt to revisit an otherwise unsatisfactory Trial Court Decision.

The Defendant finds no fault with the findings of fact made by the trial Court or conclusions of law, save, that the phrase "... that a shooter...cannot fire his or her weapon above the berm behind the target..." did not specifically address ricochets and should thus exclude them. (R 956)

The Defendant is simply dissatisfied with the courts conclusions. No credible argument is made out to attack the findings of fact underlying the trial court's reasoning, other than dissatisfaction.

The fact that the cases cited above are bottomed on I.C. §12-120, does not alter the logic of the argument one iota. If a clear showing of error is not made out, but rather a rehashing of the same argument and an attempt to retry the same fact to the appellate court is all there is, as here, then the appeal is frivolous and without any reasonable basis in law of fact.

IV CONCLUSION

This court should affirm the District Court's decision that the Idaho Outdoor Sports Shooting Range Act is unconstitutional under the provisions of the Idaho Constitution asserted.

This court should confirm the decision appealed from the District Court concluding that ricochet rounds can and will escape the range as presently constructed, and that such is a

violation of the Court Order of March 23, 2007 in that ricochet rounds and direct fired rounds are within the ambit of the order that the range shall not be reopened until baffles are installed over each firing position such that no shooter can't fire his or her weapon above the berm behind the target.

To the extent that this cause is returned to the trial court, that the trial court has the power to add such safety requirements in the nature of the range of rules and supervision requirements, inter alia, so as to provide necessary safety, especially if a partial range opening is affected, and so as to meet such other reasonable requirements to afford safety to down range homeowners, supportive of the original injunction entered on March 23, 2007.

This Court should find that the Defendants appeal as to the safety issue was made without any basis in law or fact. The Defendant's appeal was nothing more than dissatisfaction with the trial courts finding of fact. That the Plaintiffs are entitled to an award of attorney's fees and costs on appeal.

DATED THIS 16 day of April 2012.

SCOTT REED

HARVEY RICHMAN

Attorneys for the Plaintiffs

CERTIFICATE OF MAILING

I hereby certify that on this 16 day of April 2012 a true and correct copy of the foregoing Respondents' Brief was mailed postage prepaid and delivered to:

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