5-17-2012

Citizens Against Range Expansion v. Idaho Fish and Game Dept Appellant's Reply 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 ELDRIDGE, 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.

APPELLANTS' REPLY BRIEF

Appeal from the District Court of the First Judicial District

of the State of Idaho, in and for Kootenai County.

The Honorable John T. Mitchell, District Judge presiding.

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Appellants/Defendants Idaho Department of Fish and Game and Director Moore (collectively "IDFG") hereby make the following reply to the Brief of Respondents/Plaintiffs Citizens against Range Expansion *et al.* ("CARE"), submitted to the Court on April 17, 2012.

I. ARGUMENT

"[E]very 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." *Idaho Schools For Equal Educational Opportunity v. State*, 140 Idaho 586, 590, 97 P.3d 453, 457 (2004) ("*ISEEO IV*") (citation omitted).

CARE has not met this burden, and the district court erred in concluding the noise and other standards adopted by the Idaho Legislature for state outdoor sport shooting ranges are unconstitutional under art. V, § 13 and art. III, § 19 of the Idaho Constitution.

A. The Idaho Outdoor Sport Shooting Act is consistent with the Idaho Constitution's separation of judicial and legislative power.

To violate the separation of judicial and legislative powers under the Idaho Constitution, the legislative action must deprive a power or jurisdiction that "rightly pertains" to the judiciary. *ISEEO IV,* 140 Idaho at 590, 97 P.3d at 457, quoting Idaho Constitution, art. V, § 13.

In reaching its conclusion that the Idaho Outdoor Sport Shooting Range Act violated the Idaho Constitution's separation of powers, the district court only cited *ISEEO IV,* stating it has "similarities" with the present case. R[1] 903-4. According to the district court, "[w]hile IDFG did not ask the Idaho Legislature to rewrite the Idaho Rules of Civil Procedure (as the Idaho

[1] In its opening brief, IDFG inadvertently referred to the Clerk's Record using a prefix of "AR" instead of "R." The Reply Brief references correct this oversight.

Supreme Court found the legislature did in *ISSEO* [sic] *IV*), nothing in Article V, § 13 requires so egregious an act." R 904. The district court's analysis, however, never identified what power or jurisdiction rightly pertaining to the judiciary the Idaho Legislature deprived by passing the Idaho Outdoor Sport Shooting Range Act. The scattered references CARE makes in its Response Brief to the separation of powers (e.g., Response Brief at 13-15) shed no additional light on this question.

CARE's primary contention is that the legislation was "aimed specifically at this lawsuit." Response Br. at 15. Unlike the legislation in *ISEEO IV,* which amended court procedures, the Idaho Outdoor Sport Shooting Range Act affected Idaho's nuisance law, a recognized subject of legislative authority. *See* Idaho Code title 52. Idaho precedent repeatedly confirms that legislative modification of common or statutory law in response to court holdings does not violate the separation of powers doctrine. *E.g., Moon v. North Idaho Famers Ass'n,* 140 Idaho 536, 545, 96 P.3d 637, 646 (2004); *see also Meyers v. Hansen*, 148 Idaho 283, 290, 221 P.3d 81, 88 (2009), citing *Pennsylvania v. Wheeling and Belmont Bridge Co.*, 59 U.S. 421, 431-32 (1855) (finding an executory decree directing the abatement of a nuisance ceases to be enforceable if the underlying laws of nuisance are altered legislatively). Indeed, it is well within the Legislature's constitutional authority to craft a solution when litigation identifies a gap in substantive regulations, as with the issue of noise standards in this case.

The district court acknowledged the litigation over the Farragut Range identified a need for a noise standard (R 902). In 2008, the Idaho Legislature agreed there was such a need and acted to address it, consistent with the Idaho Constitution's allocation of legislative and judicial

powers. The Legislature enacted a uniform noise standard for Farragut and all other state outdoor sport shooting ranges the state owned or might acquire in the future. *See* Idaho Code § 67-9102(2) ("[t]he legislature finds that state outdoor sport shooting ranges should be subject to uniform noise standards as specified in this section").

In the absence of statutory noise standards, the district court could determine the level at which noises from the Farragut Range constituted a nuisance; however, once the Legislature exercised its regulatory police powers to establish a noise standard of 64 dbA Leq (h) and other requirements related to future operations of state outdoor sport shooting ranges, the district court was obligated to apply such requirements. This would be the case even if the district court had not left the issue of noise levels for Farragut Range to future determination (R 282).[2]

Without any identifiable deprivation of a power rightly pertaining to the judiciary, the Legislature's enactment of the Idaho Outdoor Sport Shooting Range Act is consistent with the Idaho Constitution's separation of powers.

[2] CARE contends that the 2008 Act raised the noise level established by the district court (*e.g.,* Response Br. at 6, 20). CARE's contention does not alter the constitutionality analysis, as it is well within the Legislature's constitutional powers to enact noise standards. CARE's contention, however, inaccurately portrays the posture of this case. In its 2011 Memorandum Decision and Order, the district court confirmed it did not establish a noise standard as a conclusion of law in 2007. R 866-68. The district court's 2007 injunction left noise standards to further negotiation between the parties or post-judgment evidentiary hearing. R 282; *see also* R 278-79, 867, 869. The district court's 2007 Findings of Fact identified the absence of an Idaho noise standard (R 243, Find. of Fact ¶ 21), and referenced an array of other noise standards ranging from an Illinois standard of 50 dB to the Kootenai County Industrial Noise Ordinance of 83dB (R 241-43). In its 2007 Decision and Order, the district court offered hypothetical ranges of time-weighted metrics for the parties' consideration, referencing sound levels of between 45 and 65 dB and between 30 dB to 65 dB (R 270, Concl. of Law ¶ 10, R 279).

B. The Idaho Outdoor Sport Shooting Range Act does not constitute special legislation[3] in an enumerated case prohibited by art. III, § 19 of the Idaho Constitution.

1. The Legislature's purpose for the legislation and classification of those it affects are consistent with the requirements of art. III, §19.

The legislative classification employed in the Idaho Outdoor Sport Shooting Range Act is not special, since it rationally classifies state-operated outdoor sport shooting ranges as distinct from other shooting ranges, then applies noise standards to all shooting ranges within the defined class. *Moon,* 140 Idaho at 546, 96 P.3d at 647. IDFG previously addressed the merits of the general purpose of the legislation and the reasonableness of the Legislature's classification, and why the district court's reasoning on these points is unsound. Opening Br. at 19-20. The Legislature has the authority to adopt regulations specific to a certain class of state property even if the properties subject to the classification are limited in number. Such legislation can constitute a general law, even if the state is treated differently than its local or private counterparts. *See Caesar v. State,* 101 Idaho 158, 610 P.2d 517 (1980). CARE's Brief does not offer any additional rationale for objecting to the Idaho Legislature's stated purpose to enact a uniform noise standard for state outdoor sport shooting ranges, especially where no such standard existed prior to this litigation. *See* Idaho Code § 67-9102(2). Nor does CARE's Brief give any rationale in addition to that presented by the district court as to the propriety of the Legislature's classification of state outdoor sport shooting ranges.

[3] Although CARE's Response Brief makes passing reference to the Idaho Outdoor Sport Shooting Range Act as a "local law," (e.g., Response Br. at 17), CARE did not identify any challenge to the district court's conclusion that the Act was not a local law (R 878).

Both CARE and the district court essentially ignore the Legislature's classification of "state outdoor sport shooting ranges" to which the standards of the Idaho Outdoor Sport Shooting Range Act apply. The district court crafted its own classification, finding that "this Act applies only to these citizens around the Farragut range."[4] R 896. CARE also argues that the "special class of persons" may be "the 2,000 users to be expanded to 3,000" users of Farragut Range. Response Br. at 19.

CARE's Response does not offer any reasoning as to why the Court should adopt a classification other than the Legislature's classification. CARE does not offer any reasoning as to why the Court should accept the district court's unprecedented willingness to substitute its judgment for that of the Legislature in evaluating the merits of the Legislature's classification of state outdoor sport shooting ranges. Nor does CARE offer any additional reasoning to justify greatly expanding the level of review and fact-finding through which courts traditionally evaluate the merits of legislative actions. *See* IDFG's Opening Br. at 21-24.

In its Response, CARE also quoted the district court's police powers analysis in challenging the legitimacy of the Legislature's purpose in enacting the Idaho Outdoor Sport Shooting Range Act. Response Br. at 20-21. However, the district court's conclusion that the Idaho Outdoor Sport Shooting Range Act is not a valid exercise of police power is unsound. Although the district court recognized the Act provided a cap on decibels that outdoor state sport

[4]The district court initially noted that "[a]lso, 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." R 877, *see also* R 692-693, ¶¶ 8-9, R 697-700. In creating their own classifications to supplant the Legislature's classification, however, the district court and CARE unaccountably dismissed these residences and users related to other ranges.

shooting ranges can emit from a noise standpoint, and acknowledges "that could be a 'public health' reason," (R 901), the district court's analysis then made a logical U-turn:

> 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.

R 901.

Neither the district court nor CARE provide a valid explanation as to why it was arbitrary for the Legislature to adopt legislation from a sister state (Ariz. Rev. Stat. § 17-602, added by 2002 Ariz. Sess. Laws, ch. 222 § 1), without conducting its own independent scientific inquiry into the factual basis of the standard. Both the district court and CARE also ignore that the standard the Legislature adopted is within the range of standards discussed by the district court in 2007. *See* footnote 2, *supra.*

The district court's police powers analysis does not comport with the district court's obligation to make "every presumption ... in favor of the constitutionality of the statute." *See ISEEO IV,* 140 Idaho at 590, 97 P.3d at 457. Its premise would prevent the Legislature from enacting laws to address a substantive, regulatory gap identified by the courts as a result of litigation. Such a result is not what the framers of the Idaho Constitution intended. "Just as article II of the Idaho constitution prohibits the Legislature from usurping powers properly belonging to the judicial department, so does that provision prohibit the judiciary from improperly invading the province of the Legislature." *ISEEO IV,* 140 Idaho at 597, 97 P.3d at 464 (citation omitted).

Like the district court's analysis, CARE's dismissal of the legitimacy of the legislative purpose and classification of the 2008 Idaho Outdoor Sport Shooting Range Act also ignores Idaho Code § 55-2605, enacted by HB 604, in the same 2008 legislative session. In HB 604, the Legislature continued to allow county regulation of outdoor shooting ranges other than state outdoor sport shooting ranges, but preempted counties from imposing noise standards more restrictive than those adopted for state outdoor sport shooting ranges in Idaho Code § 67-9102. Together these two laws subject all current and future outdoor sport shooting ranges in Idaho to a regulatory noise standard of no lower than a time-weighted metric of 64 dBA Leq (h). For state outdoor sport shooting ranges, the Legislature chose to select the most restrictive noise standard it identified for local regulation of other shooting ranges. The fact that the Legislature, in conjunction with the Idaho Outdoor Sport Shooting Range Act, established a floor noise standard applicable to *all* shooting ranges negates any argument that the Legislature violated the state Constitution by enacting special laws allowing the Farragut Range special leeway not provided to other shooting ranges.

2. The establishment of noise standards for shooting ranges on state property is not among the enumerated prohibitions of art. III, §19.

Even if the Court were to find the Idaho Outdoor Sport Shooting Range Act to be a special law, "[the Idaho] Constitution prohibits special legislation only if such legislation comes within one of the thirty-two expressly prohibited categories." *State ex rel. Idaho State Park Bd. v. City of Boise*, 95 Idaho 380, 382, 509 P.2d 1301, 1303 (1973). The Idaho Constitution does not prohibit the Legislature from passing special legislation addressing subjects not listed in art. III, § 19. *Id.* at 383, 509 P.2d at 1304. Special laws addressing the management of specific state

lands are not prohibited by art. III, § 19. *Id.* Likewise, there is no constitutional bar to the Legislature's enacting a local or special noise standard, whether on state land or otherwise.

Both the district court and CARE strive to ignore the lack of a specific enumeration prohibiting the Legislature from specially regulating noise standards by asserting that the provisions of the Idaho Outdoor Sport Shooting Range Act amount to a "limitation of civil and criminal actions." R 870. This Court has upheld the Legislature's authority to modify the common law of nuisance even where such legislation is squarely and unambiguously intended to resolve pending litigation. *Moon*, 140 Idaho at 544-545, 96 P.3d at 645-646.

Moreover, both the district court and CARE err in citing this Court's holdings in *ISEEO IV* to support the assertion that legislation "aimed" at a particular lawsuit constitutes a "limitation" of legal actions. The constitutionally enumerated prohibition at issue in the *ISEEO IV* case was the prohibition against special legislation "regulating the practice of the courts of justice." *ISEEO IV*, 140 Idaho at 590, 97 P.2d at 458. CARE and the district court's application of this Court's reasoning in *ISEEO IV* regarding a different constitutionally enumerated prohibition for special legislation results in a significant and unwarranted expansion of *ISEEO IV.* Neither CARE nor the district court explain how this Court's reasoning in *ISEEO IV,* regarding the Legislature's attempt to rewrite court procedural rules, can be expanded to include substantive changes to the common law of nuisance.

C. The district court erred in interpreting the 2007 Judgment's conditions for reopening the Range for up to 500 shooters.

Reviewing courts in other jurisdictions have generally given deference to a district court's interpretation as the draftsman of its own order. *See, e.g., Garcia v. Yonkers School Dist.,* 561 F.3d 97, 103 (2nd Cir. 2009). Reviewing courts have not, however, given equal deference to every aspect of a court's interpretation of its own order. "The abuse of discretion standard is used to evaluate the ... court's application of the facts to the appropriate legal standard, and the factual findings and legal conclusions underlying such decisions are evaluated under the clearly erroneous and *de novo* standards, respect[ively]." *Id.* Where the plain language of an order is completely contrary to a court's interpretation of its own order, however, reviewing courts in other jurisdictions have not given deference to the lower court's interpretation. *Direct TV v. Leto,* 467 F.3d 842, 845 (3rd Cir. 2006). Moreover, I.R.C.P. 65(d) constrains whatever discretion district courts may generally have, as the draftsmen of their decisions and orders, to interpret the meaning of such orders. *See* IDFG's Opening Br. at 24-26. 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. (2nd Cir. 2009) (unpublished No. 09-03430-CV) (interpreting F.R.C.P. 65(d)).

1. The district court's interpretation by implication of the requirement for up to 500 shooters cannot reasonably be reconciled with the ordinary meaning of the 2007 Order's express terms.

IDFG acknowledges the purpose of the district court's injunction was to address the district court's concerns for the safety of people in the identified Surface Danger Zone for the unbaffled Farragut Range. This purpose, however, does not, as CARE's Response suggests, give the district court unlimited discretion to interpret the requirements of its 2007 injunction in a manner at odds with their plain meaning and an ordinary person's understanding of them. *See* I.R.C.P. 65(d).

In its 2007 Judgment and underlying Order, the district court balanced the equities and considered the reasonable safety of the Range at 2002 usage levels (R 265, Concl. of Law ¶7)[5] to identify two safety standards to open the Range: a lesser safety standard for up to 500 shooters and a more stringent safety standard to open the Range for more than 500 shooters. The district court also identified the different means by which it would determine compliance with these two standards.

For the lesser standard, the district court identified a particular physical feature—a safety baffle "installed over every shooting position." R 281. "The baffle must be placed and be of sufficient size that the shooter, in any position, (standing, kneeling, prone), cannot fire his or her

[5] At the 2006 trial, CARE presented no testimony regarding actual instances of bullets leaving the unbaffled, native soil Farragut Range after CARE's alleged substantial increase in Range use in 2002. The three instances CARE presented of bullets leaving Farragut Range all occurred *before* CARE alleged increase in Range in 2002: (1) an instance in 1992 of the National Guard firing directly above the berm when the range was closed to public use, reported by twenty-year downrange homeowner Will Collins, Court Exh. 5 at 5-6, and at 8, LL. 1-12; (2) an instance reported by plaintiffs Dorothy and Ron Eldridge involving the sound of a bullet shooting through a tree on their property in 2000, Court Exh. 7 at 3, LL. 15-24 (E 465) and Court Exh. 8 at 2, LL. 14-18 (E 478); and (3) an instance reported by Dorothy Eldridge in 2001involving the sound of a bullet striking on her property. Court Exh. 7 at 4, LL. 1-14 (E 466).

weapon above the berm behind the target." R 281. The district court identified how it would determine compliance with this standard, either by agreement of the parties, or "that issue shall be submitted for view of the premises by the Court." R 281. The Court 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 it historically has (i.e., without any site supervision), for up to 500 shooters per year." R 281-2.

The plain and express language of the 2007 Judgment and Order does not support the district court's subsequent interpretation of its standard to open the Range for up to 500 shooters. In 2011, the district court interpreted its lesser standard for up to 500 shooters, expressed as the installation of a baffle over every firing position to include, by implication, requirements to place baffles on the ground and install safety features other than baffles (an eyebrow berm or bullet catcher). R 955, Concl. of Law ¶ 6, R 957, Concl. of Law ¶ 12. It cannot be reasonably argued under the specificity requirements of I.R.C.P. 65(d) and the plain meaning of the 2007 Judgment that ground baffles and bullet catchers qualify as baffles installed "over" shooting positions.

The district court interpreted its express requirement to place the baffle such that a shooter cannot fire his or her weapon above the target to include, by implication, "shooters firing at, below, or in directions to the side of or away from the berm behind the target." R 955 Concl. of Law ¶6. Finally, the district court modified its expressly stated means for determining compliance with the lesser standard in the event the parties did not agree--a court view. Despite the express language of the Judgment and Order mandating submission of the issue for a court view, the district court denied IDFG's Motion for Court View as an "invitation to commit error."

R 857; *see* IDFG's Opening Br. at 33. Instead of applying the language of its 2007 Order, the district court *sua sponte* made compliance with the standard for up to 500 shooters the subject of evidentiary hearing. R 911.[6]

The district court's interpretation of its overhead baffle requirement to open the Range to up to 500 shooters and its means for determining compliance with this requirement turns the ordinary meanings of the injunction's terms on their heads, and should be reversed.

2. A comparison with the more stringent standard to exceed 500 shooters further substantiates the unreasonableness of the district court's interpretation of its less stringent standard to allow up to 500 shooters.

Because the district court's more stringent safety standard to *exceed* 500 shooters does not require containment of ricochets between the firing line and back berm, it is unreasonable to interpret the less stringent safety standard to do so.

To exceed 500 shooters, the district court ordered that IDFG must construct and install "safety measures adequate to prevent bullet escapement beyond the boundaries owned and controlled by [IDFG] ...." R 282. The court identified that its safety concern for opening the Range to exceed 500 shooters "can be satisfied only by the 'No Blue Sky' rule" or by baffle criteria espoused by Clark Vargas in his Design Criteria for Shooting Ranges (distinct from the NRA Source Book, referencing Plaintiffs' Exh. 2, p.5). R 278-79.

[6] To open the Range for more than 500 shooters, the district court clearly identified a need for hearing, regardless of whether the parties agreed. R 282. The district court held that use of the Range for more than 500 shooters "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." R 282. The phrasing for determining compliance with the requirement to exceed 500 shooters is in clear contrast to the means by which the district court identified it would determine compliance with its standard to open the Range for up to 500 shooters: by agreement of the parties or "view of the premises by the Court" (*i.e.*, by visual inspection). R 281.

The "boundaries owned and controlled by [IDFG]" extend beyond the area between the shooting areas of the Range proper (the area between the firing line and berms). The downrange property owned and controlled by IDFG extends approximately three quarters of a mile from the shooting lines. R 234 (Find. of Fact ¶ 9). To open the Range to more than 500 shooters, the district court's Order does not require containment within the Range proper, it requires the prevention of bullet escapement "beyond the boundaries owned and controlled by IDFG."

In addition, the district court referenced the "No Blue Sky" rule, a safety standard CARE specifically advocated (R 215-16 at ¶¶66-67), as one of only two alternatives for satisfying the safety requirement to open the Range for more than 500 shooters. R 278-279; *see also* R 256, Find. of Fact ¶¶ 61-62 (referencing Plaintiffs' Exhibits 2, 6, 38 and 43[7]). As described in the documents referenced by the Court in 2007, the "No Blue Sky" rule does not require ricochets to be contained between the firing line and berm.

Plaintiffs' Exh. 38 (a video exhibit) states: "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." Plaintiffs' Exh. 38, whose audio portion is transcribed in Court Exh. 4, at 11, LL. 13-20 (E 365). Plaintiffs' Exh. 6, describes the "No Blue Sky" principle: "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' Exh. 6, p. 11 (E 1094). In its Order denying CARE's application for attorneys' fees and costs, the district court acknowledged that the "No Blue Sky" rule addressed

[7] Of these Exhibits, IDFG found references to "No Blue Sky" only in Exhibits 6 and 38.

only direct shots and that that was the focus of the parties at the 2006 proceeding and the district court's 2007 decision. R 983.

If the more stringent "No Blue Sky" rule to exceed 500 shooters does not require that ricochets remain within the range proper (the area between firing lines and berms), it is unreasonable to interpret the less stringent standard for up to 500 shooters to do so.

3. The district court erred in relying upon documents outside the 2007 record and related testimony to interpret its 2007 order.

To expand its interpretation beyond the ordinary meaning of the terms of the 2007 Order, the district court made new findings of fact and conclusions of law without addressing the requirements of I.R.C.P. 65(d) and I.R.C.P. 60(b). *See Rudd v. Rudd,* 105 Idaho 112, 118-119, 666 P.2d 639, 645-46 (1983). This is reversible error, regardless of the standard of review the Court applies.

In the post-judgment proceedings below, and again in its Response Brief, CARE presents an array of issues it had the opportunity to present at the original trial. Many of these features were in fact before the district court in 2007, and the district court did not deem them worthy of reference in its requirements to lift its injunction. *See* IDFG's Opening Br. at 34, 36.

In its Response, CARE also relies heavily on the testimony of post-judgment expert James Caulder, who in turn relies on 2005 and 2008 Air Force Engineering Technical Letters (ETL). *E.g.,* Response Br. at 25, 27-28, 37-38. CARE had the opportunity to ask the district court to apply the then-current version of the Air Force ETL or other Air Force guidelines in conjunction with the 2006 trial, but chose not to do so. The district court did not refer to any

version of any Air Force ETL or the NRA Source Book in establishing its requirements to lift its injunction, and there is no mention whatsoever of an Air Force ETL in the entire length of the 2007 Memorandum Decision, Findings of Fact, Conclusions of Law, Order and 2007 Judgment. The "requirements" contained in these documents were not included in the 2007 Judgment. Without complying with I.R.C.P. 60(b), it is improper for the district court to interpret the requirements of its 2007 Judgment and Order based on post-judgment findings of fact and conclusions of law regarding IDFG's compliance with such documents. An interpretation of the injunction that incorporates these requirements post-judgment is also entirely at odds with the specificity, equity, and due process considerations of I.R.C.P. 65(d).

In its Response, CARE contends the district court's interpretation of its 2007 Order is justified because of post-judgment findings of fact that ricochets would travel 50 % of the maximum distance of the ammunition's capability in the surface danger zone (R 951 Find. of Fact ¶ 36) and the conclusion of law that a ricochet will travel as far as one and one half mile[8] (R 953, Concl. of Law ¶ 3). Response Br. at 25, 28, 34, 38. Indeed, this finding and conclusion on the travel distance of ricochets appear to be the cornerstone on which the district court based its decision that IDFG did not meet the standard to lift the injunction for up to 500 shooters and that IDFG must also install ground baffles and a bullet catcher or eyebrow berm. [9]

[8] In its Response Brief, CARE expanded this distance to one and three quarters mile. Response Br. at 34.
[9] The district court's application of its ricochet travel distance finding to the need for an eyebrow berm or bullet catcher is inconsistent with Plaintiffs' Exh. 6, an NRA document that states that the bullet catcher or eyebrow is designed to retain only those ricochets that occur on the face of the backstop, ricochets whose travel distance would be "nominal." Plaintiffs' Exh. 6 at 2 (E 1092).

The district court attributes its 50% travel distance finding to the testimony of James Caulder. R 951. As indicated, Mr. Caulder's testimony is based on the 2005 and 2008 Air Force Engineering Technical Letters and related documents that were not relied upon in the 2006 trial or the 2007 Order, and whose requirements should not apply in the absence of compliance with I.R.C.P. 60(b). In addition to this procedural error, the adoption of a 50% travel distance is flawed from a substantive standpoint as well. A reading of the Air Force ETL and a review of Mr. Caulder's testimony in the post-judgment record supports neither the district court's finding of fact or conclusion of law related to the travel distance of ricochets, regardless of the review standard applied. In contrast to the district court's finding and conclusion, the Air Force ETL uses the "50 % Rule" as a "safety ceiling" to represent a distance at which the Air Force is confident no ricochets will travel, even after incorporating a combination of conservative assumptions and probabilities that maximize ricochet travel estimates. Court Exh. 3 at 111, LL. 2-13 (E 326); 113, l. 9-23 (E 328); 56-60 (E 271-274). The one and one-half mile and "50% Rule" references do not represent actual travel distance for ricochets; instead they represent a property ownership convention the Air Force adopted for partially contained ranges based on 50% maximum travel distance of rounds used at the range. Court Exh. 3 at 106-07 (E 321-322).

Mr. Caulder acknowledged the Air Force adopted the "50% rule" based on admittedly "very conservative" assumptions, such as the assumption that bullets continue to fly with the same level of stability after ricochet as they did before ricochet, and the application of probabilities on the order of one in ten million. Court Exh. 3 at 59-61, 112 (E 274-76), Exh. 6 at 12-13. Mr. Caulder also acknowledged that there are "a lot" of Air Force and National Guard

partially contained ranges that continue to operate without meeting the Air Force "50 % Rule." Court Exh. 3 at 109, l. 10 (E 324). Prior versions of the Air Force ETL used a property control criteria of 300 yards for partially contained ranges. Court. Ex. 3 at 45, l. 16-19 (E 260); 109, l. 19-21 (E 324).[10]

It is inconsistent with I.R.C.P. 60(b) and I.R.C.P. 65(d) for the district court to rely on Mr. Caulder's testimony regarding the Air Force's "50% Rule" property control convention to read additional requirements into the 2007 Judgment. Given the "50 % Rule's" reliance on remote, conservative possibilities, the district court's post-judgment application of the "50% Rule" is also firmly at odds with the parties' burdens in nuisance cases in Idaho. "A complaining party must show a *clear case* supporting his right to relief. A showing that there is a possibility of injury will not sustain the relief sought." *Larsen v. Village of Lava Hot Springs,* 88 Idaho 64, 73, 396 P.2d 471 (1964) (citation omitted), as cited by the district court at R 89.

As previously noted, CARE had ample opportunity to present expert testimony and argue an array of potential recommendations and guidelines regarding ricochets in the 2006 summary judgment proceedings and trial. *See* IDFG's Opening Brief 31-32, 34-35. Yet, the district court acknowledged the "topic of ricochets was not directly raised in 2007." R 963. CARE cannot properly use post-judgment proceedings to retry its original case.

[10] Mr. Caulder also acknowledged that the Air Force had revised the 2005 and 2008 ETLs to address changes in Air Force training requirements (*e.g.,* mobile shooters and vehicle entry) that were inapplicable to the Farragut Range. Court Exh. 3 at 43-45 (E 258-60); Court Exh. 2 at 78-79 (E 198-99). Mr. Caulder also admitted he was not a ballistic expert (Court Exh. 3 at 57, lines 21-25) (E 272), did not have any knowledge regarding the travel of ricochets beyond what he had read (*id.*), and did not have knowledge regarding Air Force ricochet model assumptions and relied upon the modelers and their application of assumptions. Court Exh. 3 at 104-105 (E 319-20).

Should the Court's inquiry extend to evaluating the documents and testimony that form the basis for the district court's 2011 conclusions and findings, the Court should reject the district court's reliance on 2011 findings of fact and conclusions of law that are unsupported by the record, are based on improper reconsideration of 2006 trial documents, or involve consideration of entirely new testimony and documents admitted over IDFG's objection (*See, e.g.,* R 685-687, including footnotes 21-23, R 850-53, R 951, Find. of Fact ¶ 35).

II. CONCLUSION

IDFG renews its request for the following relief:

- That the Court conclude as a matter of law that IDFG has met the 2007 Judgment's condition to reopen the 100-yard shooting area for up to 500 shooters per year, given the district court's Finding of Fact (R 949 ¶ 23) (per CARE's agreement and as otherwise evidenced by the record), that IDFG has installed baffles over each of the 12 shooting positions in the 100-yard shooting area sufficient to prevent shooters (from prone to standing) from firing above the berm behind the target; and that the Court remand the proceedings to the district court to partially lift the injunction to reopen the 100-yard shooting area at Farragut Range for up to 500 shooters per year consistent with this conclusion;
- That the Court reverse the district court's decision regarding the constitutionality of the Idaho Outdoor Sport Shooting Range Act and conclude as a matter of law that the Idaho Outdoor Sport Shooting Range Act is constitutional and applicable to the Farragut Shooting Range; and

- That the Court remand the proceedings to the district court to determine IDFG's compliance with the conditions to reopen the Range for more than 500 shooters, by compliance with the "No Blue Sky Rule" or, alternatively, the criteria espoused by Clark Vargas, as stated in the district court's 2007 Memorandum Decision and Order in support of the 2007 Judgment.

DATED this 17th day of May 2012.

STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL

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CERTIFICATE OF SERVICE

I certify that on the 17th day of May 2012, I caused to be served two copies of the APPELLANTS' REPLY BRIEF on each of the following persons by U.S. Mail, postage prepaid and addressed as follows:

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