No. 14-36049

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ELIZABETH E. NESBITT; ALAN C. BAKER,

Plaintiffs-Appellees,

v.

U.S. ARMY CORPS OF ENGINEERS; JOHN McHUGH, Secretary of the Army; THOMAS BOSTICK, Lieutenant General, Commanding General and Chief of Engineers; JOHN S. KEM, Colonel, Northwestern Division Commander; ANDREW D. KELLY, Lieutenant Colonel, Walla Walla District Commander and District Engineer,

Defendants-Appellants.

On Appeal from the U.S. District Court for the District of Idaho,
Civil Action No. 3:13-cv-00336-BLW
The Honorable B. Lynn Winmill, U.S. District Court Judge

APPELLEES' ANSWER BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

Constitutional Provisions

Statutes

Regulations

Federal Register

Rules

Other Authorities

STATEMENT REGARDING JURISDICTION

On August 5, 2013, Plaintiffs-Appellees, Elizabeth E. Nesbitt (née Morris) and Alan C. Baker, filed suit against the U.S. Army Corps of Engineers and federal officials (collectively "Corps"), alleging that the Corps' regulation, 36 C.F.R. § 327.13(a), denied Plaintiffs the right to keep and bear arms for self-defense on Corps-managed lands in violation of the Second Amendment. Complaint ¶¶ 4–19, 46–55; Excerpts of Record ("ER") 43–46, 50–51. The District Court had jurisdiction, pursuant to 28 U.S.C. § 1331, because Plaintiffs' claims arose under the Second Amendment to the U.S. Constitution. Complaint ¶ 2; ER43.

On October 13, 2014, the District Court held that 36 C.F.R. § 327.13(a), was unconstitutional as it denied Plaintiffs the right to keep and bear arms for self-defense on Corps-managed lands, and permanently enjoined the Corps from enforcing its ban in the State of Idaho, where Plaintiffs reside and primarily recreate. ER5–14. On that same day, the District Court entered final judgment in favor of Plaintiffs as to both of their claims for relief. ER4. On December 10, 2014, the Corps appealed. ER1–2. This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

Whether the Corps' regulation, 36 C.F.R. § 327.13(a), which denies Plaintiffs the right to keep and bear arms for self-defense on Corps-managed lands, violates the Second Amendment.

Whether the District Court properly limited the scope of the permanent injunction to Corps-managed lands in Idaho, where Plaintiffs reside and primarily recreate.

STATEMENT OF THE CASE

I. LEGAL BACKGROUND.

A. The Second Amendment.

The Second Amendment provides: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. Const. amend. II. In *District of Columbia v. Heller*, 554 U.S. 570, 579–595 (2008), the Supreme Court ruled that the Second Amendment codifies a pre-existing, individual right to keep and bear arms for the core purpose of self-defense. Two years later, the Court reaffirmed its ruling in *Heller*. *McDonald v. Chicago*, 561 U.S. 742, 767 (2010) ("Self-defense is a basic right" and "the central component" of the Second Amendment's guarantee of an individual's right to keep and bear arms.").

B. The Corps' Ban.

Pursuant to its non-military, civil works mission, the Corps manages 422 water resource development projects in 43 states. ER35; Supplemental Excerpts of Record ("SER") 12. These projects provide the public with recreational opportunities on 12 million acres (land and water).[1] ER35; SER12. These 12 million recreational acres include 55,000 acres of shoreline, 7,700 miles of recreational trails, 92,000 campsites, 3,500 boat launch ramps, 32 shooting ranges, and numerous hunting areas. ER35, 38; SER12. The Corps' authority to manage these lands is derived from 16 U.S.C. § 460d, which provides that the Corps "is authorized to construct, maintain, and operate public park and recreational facilities at water resource development projects under the control of the Department of the Army …." Congress also instructed that these "public park and recreational facilities" be "generally" open to public use. *Id*.

In 1973, the Corps issued 36 C.F.R. § 327.13(a), which makes it unlawful to possess or carry a firearm for-self-defense on Corps-managed lands. 36 Fed. Reg. 7,552, 7,553 (Mar. 23, 1973). Since that time, the regulation has remained largely unchanged.[2] The regulation now provides:

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[1] As used herein "Corps-managed lands" means those 12 million recreational acres (land and water) managed by the Corps.

[2] The Corps last revised the regulation in 2000, eight years before *Heller*. 65 Fed. Reg. 6,891 (Feb. 11, 2000).

> (a) *The possession of loaded firearms, ammunition*, loaded projectile firing devices, bows and arrows, crossbows, or other weapons *is prohibited unless*:
>
> (1) In the possession of a Federal, state or local law enforcement officer;
>
> (2) Being used for hunting or fishing as permitted under § 327.8, with devices being unloaded when transported to, from or between hunting and fishing sites;
>
> (3) Being used at authorized shooting ranges; or
>
> (4) Written permission has been received from the District Commander.

36 C.F.R. § 327.13(a) (all emphasis added).[3]

By its plain language, 36 C.F.R. § 327.13(a) prohibits possessing or carrying either a loaded firearm or an unloaded firearm along with ammunition for self-defense on Corps-managed lands ("Corps' ban").[4] Yet, 36 C.F.R. § 327.13(a) allows loaded firearms to be possessed and carried for hunting and target shooting on Corps-managed lands, so long as the firearms are unloaded when being transported to and from those areas. Violators of 36 C.F.R. § 327.13(a) "may be punished by a fine of not more than $5,000 or imprisonment for not more than six months or both …." 36 C.F.R. § 327.25.

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[3] Subsection (b) of 36 C.F.R. § 327.13 is not at issue in this case.

[4] The regulation apparently contemplates that the District Commander may provide written permission to individuals to possess and carry a loaded firearm for self-defense on Corps-managed lands. But, as demonstrated below, that exception is illusory.

II. FACTUAL BACKGROUND.

Plaintiff, Elizabeth E. Nesbitt (née Morris), is a law-abiding, responsible citizen. SER6–10. She is over 21 years old, has no history of substance abuse, has no criminal record, is not subject to a protection order, has demonstrated competency with a handgun, and has been licensed to carry a concealed handgun in the State of Idaho.[5] SER6. Ms. Nesbitt regularly uses Corps-managed lands in Idaho for recreation, including Dworshak Dam and Reservoir. SER7–8, 15. Although Ms. Nesbitt regularly carries a concealed handgun for self-defense (SER5), the Corps' ban makes it unlawful for her to possess or carry that handgun for self-defense when on Corps-managed lands.[6] SER7–8.

On June 10, 2013, Ms. Nesbitt formally requested that the Corps' District Commander, Andrew D. Kelly, provide her written permission, under 36 C.F.R. § 327.13(a)(4), so that she could possess and carry a firearm for self-defense while on Corps-managed lands.[7] SER8–10. Mr. Kelly has failed to respond to Ms. Nesbitt's request. ER8.

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[5] Because of threats and physical attacks made against Ms. Nesbitt by a former neighbor, she was issued an emergency carry license in 2012. SER6.

[6] But for the ban in 36 C.F.R. § 327.13(a), Ms. Nesbitt would consider camping at Dworshak Dam and Reservoir. SER7.

[7] In light of the previous threats and attacks, Ms. Nesbitt made this request anonymously because she did not want to reveal to her former neighbor that the Corps' ban renders her defenseless when she is on Corps-managed lands. SER8–9.

Plaintiff, Alan C. Baker, is a law abiding, responsible citizen. SER1–3. Mr. Baker is over 21 years old, has no history of substance abuse, has no criminal record, is not subject to a protection order, has demonstrated competency with a handgun, and has been licensed carry a concealed handgun in the State of Idaho.[8] SER1. Mr. Baker is a life-long outdoorsman and regularly recreates and camps on Corps-managed lands in Idaho, including Dworshak Dam and Reservoir. SER07 Although Mr. Baker carries a handgun for self-defense, the Corps' ban makes it unlawful for Mr. Baker to possess or carry that handgun for self-defense when on Corps-managed lands. SER1–2.

On April 22, 2013, Mr. Baker formally requested that the Corps' District Commander, Andrew D. Kelly, provide him written permission, under 36 C.F.R. § 327.13(a)(4), so that he could possess and carry a firearm for self-defense while on Corps-managed lands. SER4–5. Mr. Kelly has failed to respond to Mr. Baker's request. SER2.

III. PROCEDURAL BACKGROUND.

On August 5, 2013, Plaintiffs filed this action against the Corps asserting two claims for relief. First, they alleged that 36 C.F.R. § 327.13(a) violates the Second Amendment because it makes it unlawful for them to possess a loaded

[8] Mr. Baker is also a NRA-Certified Home Firearm Safety, Personal Protection In The Home, Rifle, Pistol, and Shotgun Instructor. SER1. In addition to Idaho, Mr. Baker is licensed to carry a concealed handgun pursuant to the laws of the States of Utah, Oregon, and Arizona. *Id*.

firearm for self-defense in a temporary dwelling, such as a tent, on Corps-managed lands. ER50. Second, they alleged that 36 C.F.R. § 327.13(a) violates the Second Amendment because it makes it unlawful for Plaintiffs to carry—openly, concealed, or in a vehicle—a loaded firearm for self-defense on Corps-managed lands. ER51. Concurrently, Plaintiffs moved for a preliminary injunction to enjoin the Corps from enforcing 36 C.F.R. § 327.13(a) pending a decision on the merits. *See* ER22–32.

Subsequently, the Corps filed an opposition to Plaintiffs' motion for a preliminary injunction and filed a motion to dismiss. *See* ER23–29. In support of its arguments, the Corps provided a self-serving, declaration from a Corps employee. *See* ER33–40.

On January 10, 2014, the District Court issued a Memorandum Decision and Order, granting Plaintiffs' motion for preliminary injunction and denying the Corps' motion to dismiss. ER22–32. In so doing, the District Court first ruled that the Corps' regulation burdened Plaintiffs' Second Amendment rights to possess and carry a firearm for self-defense. ER25. The District Court then ruled that the burden imposed by the regulation on Plaintiffs' Second Amendment rights was substantial—both as to possessing a loaded firearm for self-defense in a tent and as to carrying a loaded firearm for self-defense outside of a tent. ER26–28. In light of these substantial burdens, the District Court ruled that Plaintiffs were likely to

succeed on the merits of their claims, under either strict or intermediate scrutiny. ER28–29. Because Plaintiffs satisfied the other requirements for the issuance of a preliminary injunction, the District Court preliminarily enjoined the Corps from enforcing 36 C.F.R. § 327.13(a) until "further notice." ER32.

Although the District Court enjoined the Corps, it noted that its decision was "preliminary in nature" and that the Corps was entitled to present evidence in support of its ban before a final decision on the merits. ER31 The Corps rejected this invitation. Instead, the Corps simply moved for summary judgment relying largely on the same self-serving, declaration.[9] Subsequently, Plaintiffs timely filed their own motion for summary judgment as to both of their claims and responded to the Corps' motion for summary judgment. *See e.g.*, SER19–35.

On October 13, 2014, the District Court issued a Memorandum Decision, granting summary judgment in favor of Plaintiffs as to both of their claims for relief and denying the Corps' motion for summary judgment. ER5–14. Based upon this Court's decision in *United States v. Chovan*, 735 F.3d 1127, 1136 (9th Cir. 2013), the District Court articulated the two-step test it would use for reviewing Plaintiffs' Second Amendment claims. ER6–7. In accordance with this Court's decision in *Peruta v. Cnty. of San Diego*, 742 F.3d 1144 (9th Cir. 2014)

[9] Prior to moving for summary judgment, the Corps did lodge with the District Court those documents determined by the Corps to comprise its administrative record for the Corps' 2000 revision of 36 C.F.R. Part 327. *See* SER17–18.

reh'g en banc granted, 781 F.3d 1106 (9th Cir. 2015)[10] the District Court also noted that the two-step test is not used when instead of merely burdening the right to bear arms, the law "destroys the right." ER 7. When that occurs, the law is "unconstitutional 'under any light.'" ER7 (quoting *Peruta,* 742 F.3d at 1168).[11]

After stating the standard of review, the District Court ruled that the Second Amendment protects, *inter alia*: "the right to carry a firearm for self-defense purposes" ER8 (citing *Heller*, 554 U.S. at 628). The District Court also ruled that the right to carry a firearm for self-defense purposes "extends outside the home." ER 8 (citing *Peruta*, 742 F.3d at 1166). Based upon these rulings, the District Court ruled that the Corps' ban burdened conduct protected by the Second Amendment:

> The Corps' regulation bans carrying a loaded firearm for the purpose of self-defense. It also bans carrying an unloaded firearm along with its ammunition…. An unloaded firearm is useless for self-defense purposes without its ammunition…. Consequently, the regulation does impose a burden on plaintiffs' Second Amendment rights.

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[10] In granting rehearing en banc, this Court ruled that the three-judge panel opinion in *Peruta* "shall not be cited as precedent by or to any court the Ninth Circuit. *Peruta*, 781 F.3d at 1106. Subsequent citations herein to *Peruta* are for persuasive purposes only. *See Animal Legal Def. Fund v. Veneman*, 490 F.3d 725, 730 (9th Cir. 2007) (Thomas, J., concurring in part and dissenting in part).

[11] This categorical test had its genesis in *Heller* itself. *Peruta*, 742 F.3d at 1168 ("A law effecting a '*destruction* of the right' rather than merely *burdening* it is, after all, an infringement under any light. (quoting *Heller*, 554 U.S. at 629) (emphasis in original) (quotation omitted)).

ER8.

More importantly, the District Court ruled that the Corps' "*complete ban* "goes beyond merely burdening Second Amendment rights but 'destroys' those rights for law-abiding citizens carrying operable firearms for the lawful purpose of self-defense." ER8 (emphasis added). Based upon the destruction of those rights, the District Court held that Corps' ban is categorically unconstitutional because "it is invalid no matter what degree of scrutiny is used in its evaluation." ER8 (citing *Peruta*, 742 F.3d at 1168–70); *see also* ER13 ("While the Corps retains the right to regulate the possession and carrying of handguns on Corps property, this regulation imposes an outright ban, and is therefore unconstitutional under any level of scrutiny, as set forth in *Heller* and *Peruta*."). Accordingly, the District Court entered judgment declaring 36 C.F.R. § 327.13(a) unconstitutional and enjoining the Corps' from enforcing it in the State of Idaho. ER4.

SUMMARY OF ARGUMENT

Self-defense is an inherent personal right and the central component of the Second Amendment's fundamental right to keep and bear arms. The Corps' ban denies law-abiding, responsible citizens the ability to possess or carry firearms for self-defense on Corps-managed lands. The District Court properly ruled that the Corps' ban was categorically unconstitutional because it destroys the Second

Amendment rights of law-abiding, responsible citizens to possess and carry firearms for self-defense on Corps-managed lands.

Even if the Corps' ban is not categorically unconstitutional, the Corps has not proven that its ban is constitutional. The Corps' ban burdens conduct protected by the Second Amendment because the right to keep and bears arms applies outside the home and on Corps-managed lands in Idaho. This burden is severe because it completely eliminates the Second Amendment rights of law-abiding, responsible citizens to possess and carry firearms for self-defense on Corps-managed lands in Idaho. Despite this severe burden, the Corps has provided no evidence of a compelling interest for its ban on Corps-managed lands in Idaho. Nor has the Corps proven that its ban is narrowly tailored to serve a compelling interest because the Corps has less restrictive means available to it, as demonstrated by the laws governing the possession and carrying of firearms on other public lands.

The Corps' ban also fails intermediate scrutiny. Again, the Corps has provided no evidence of a substantial interest for its ban on Corps-managed lands in Idaho. Nor has the Corps proven that its ban is substantially related to its generalized public safety concerns. The Corps ban is simply too broad because it unnecessarily disarms an entire group of individuals, *i.e.*, law-abiding, responsible citizens, who, by definition, pose no public safety concerns.

Finally, the District Court appropriately limited the scope of the permanent injunction to Corps-managed lands in Idaho, where Plaintiffs reside and primarily recreate. Limiting the scope of the permanent injunction further to just Plaintiffs would disserve the interests of the Corps, the taxpayers, and the judiciary.

ARGUMENT

I. STANDARDS OF REVIEW.

A. Summary Judgment.

This Court reviews the grant or denial of a motion for summary judgment *de novo*. *Jesinger v. Nevada Fed. Credit Union*, 24 F.3d 1127, 1130 (9th Cir. 1994).

B. Second Amendment.

According to the Supreme Court, firearm bans are reviewed based upon on the text, history, and tradition of the Second Amendment, not by a balancing test such as strict or intermediate scrutiny.

> The very enumeration of the right [to keep and bear arms] takes out of the hands of government—even the Third Branch of Government—the power to decide on a case-by-case basis whether the right is really worth insisting upon. A constitutional guarantee subject to future judges' assessments of its usefulness is no constitutional guarantee at all. Constitutional rights are enshrined with the scope they were understood to have when the people adopted them, whether or not future legislatures or (yes) even future judges think that scope too broad.

Heller, 554 U.S. at 634–35. This is so, because the Second Amendment itself "is the very *product* of an interest-balancing by the people ...." *Id*. at 635 (emphasis in

original); *McDonald*, 561 U.S. at 785 (plurality opinion) ("In *Heller* ..., we expressly rejected the argument that the scope of the Second Amendment right should be determined by judicial interest balancing …."); *see Heller v. District of Columbia*, 670 F.3d 1244, 1271 (D.C. Cir. 2011) ("*Heller II*") (Kavanaugh, J. dissenting) ("In my view, *Heller* and *McDonald* leave little doubt that courts are to assess gun bans and regulations based on text, history, and tradition, not by a balancing test such as strict or intermediate scrutiny.").

This Court, however, applies a two-step test to Second Amendment challenges. The first step asks "whether the challenged law burdens conduct protected by the Second Amendment" *Chovan*, 735 F.3d at 1136. The scope of the conduct protected is based upon the "text" and "history" and "tradition" of the Amendment. *Peruta*, 742 F.3d at 1150 (citing *Heller*, 554 U.S. at 595; *McDonald*, 561 U.S. at 785 (plurality opinion)). If the government can prove that a challenged restriction burdens only conduct not protected by the Second Amendment, the restriction is not subject to further review. *Ezell v. City of Chicago*, 651 F.3d 684, 702–03 (7th Cir. 2011); *see Chovan*, 735 F.3d at 1137 (ruling that the federal government failed to prove that 18 U.S.C. § 922(g)(9) burdened conduct only outside the scope of the Second Amendment).

If, however, the government fails to meet its burden of proof, a reviewing court must "apply an appropriate level of scrutiny." *Chovan*, 735 F.3d at 1136. A

restriction that destroys or abrogates a core Second Amendment right is categorically unconstitutional. *Peruta*, 742 F.3d at 1167 (citing *Heller*, 554 U.S. at 628–29). A restriction that burdens—but does not abrogate—a core Second Amendment right is subject to heightened scrutiny—either strict or intermediate, depending on: (1) how close the law comes to a core Second Amendment right; and (2) "'the severity of the law's burden on the right.'" *Chovan*, 735 F.3d at 1138 (quoting *Ezell*, 651 F.3d at 703). Under no circumstances is a restriction that burdens conduct protected by the Second Amendment subject to rational basis review. *Heller*, 554 U.S. at 629 n.27 ("If all that was required to overcome the right to keep and bear arms was a rational basis, the Second Amendment would be redundant with the separate constitutional prohibitions on irrational laws, and would have no effect.").

C. Permanent Injunction.

This Court reviews a district court's grant of a permanent injunction "for an abuse of discretion or application of erroneous legal principles." *Dexter v. Kirschner*, 984 F.2d 979, 982 (9th Cir. 1992).

II. THE CORPS' BAN BURDENS CONDUCT PROTECTED BY THE SECOND AMENDMENT.

It is undisputed that the Corps' ban prohibits Plaintiffs from possessing (*e.g.*, in a tent) and carrying (openly, concealed, or in a vehicle) a loaded firearm for self-defense on Corps-managed lands. The "text," "history," and "tradition" of the

Amendment proves that the Corps' ban burdens conduct protected by the Second Amendment.

A. The Second Amendment Applies Outside The Home.

The Supreme Court confirmed that the "central" or "core" purpose of the right to keep and bear arms is self-defense. *Heller*, 554 U.S. at 628 (concluding that "the inherent right of self-defense has been central to the Second Amendment right"); *id*. at 630 (describing self-defense as the right's "core lawful purpose"); *McDonald*, 561 U.S. at 749–50 ("Two years ago, in [*Heller*], we held that the Second Amendment protects the right to keep and bear arms for the purpose of self-defense …."). Although, the specific holding in *Heller* was to strike down the District of Columbia's ban on keeping operable firearms in the home for self-defense, the Court necessarily concluded that the Second Amendment extends outside the home. Indeed, the Court ruled, in no uncertain terms, that, "[a]t the time of the founding, as now, to 'bear' meant to 'carry.'" *Heller*, 554 U.S. at 584. The Court also noted that "[w]hen used with 'arms," the term "bear" refers to carrying for a particular purpose—confrontation." *Id*. Because "confrontations are not limited to the home ... [a] right to bear arms thus implies a right to carry a loaded gun outside the home." *Moore v. Madigan*, 702 F.3d 933, 936 (7th Cir. 2012). Therefore, the Second Amendment applies outside the home.

B. The Second Amendment Applies Inside Tents On Public Lands.

Because the Second Amendment is an individual right that extends outside the home, it would necessarily apply to a temporary dwelling, such as tent, on public lands. For example, this Court has repeatedly held that the people may assert Fourth Amendment rights in tents on public lands. *United States v. Gooch*, 6 F.3d 673, 677–78 (9th Cir. 1993) (state campground); *United States v. Sandoval*, 200 F.3d 659, 660–61 (9th Cir. 2000) (lands managed by the Bureau of Land Management); *United States v. Basher*, 629 F.3d 1161, 1169 (9th Cir. 2011) (lands managed by the U.S. Forest Service). In addition, because both the Second and Fourth Amendments protect individual rights, there is no reason to conclude that "the people" can assert Fourth Amendment rights in tents on public lands, but not Second Amendment rights. *See Heller*, 554 U.S. at 579 (the "right[s] of the people" in the Second and Fourth Amendments "unambiguously refer to individual rights").

This is especially true considering that personal security and the right to be free from unreasonable searches and seizures are similar interests. *Heller*, 554 U.S. at 635 (The Second Amendment "surely elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home."); *Kyllo v. United States*, 533 U.S. 27, 31 (2001) ("'At the very core' of the Fourth Amendment 'stands the right of a man to retreat into his own home and

there be free from unreasonable governmental intrusion.'" (quoting *Silverman v. United States*, 365 U.S. 505, 511 (1961)). Indeed, the District Court recognized the similarity in granting the preliminary injunction:

> While often temporary, a tent is more importantly a place—just like a home—where a person withdraws from public view, and seeks privacy and security for himself and perhaps also for his family and/or his property. Indeed, a typical home at the time the Second Amendment was passed was cramped and drafty with a dirt floor—more akin to a large tent than a modern home. Americans in 1791 … were probably more apt to see a tent as a home than we are today…. Moreover, under Fourth Amendment analysis, "tents are protected … like a more permanent structure," and are deemed to be "more like a house than a car." [*Gooch*, 6 F.3d at 677]. The privacy concerns of the Fourth Amendment carry over well into the Second Amendment's security concerns.

ER25–26; *see* ER26 ("The regulation at issue would ban firearms and ammunition in a tent on the Corps' sites. This ban poses a substantial burden on a core Second Amendment right and is therefore subject to strict scrutiny."). Thus, the Second Amendment applies inside tents on public lands. In fact, the Corps has not suggested otherwise.

C. The Second Amendment Applies On Corps-Managed Lands.

The Corps implicitly concedes that the Second Amendment applies outside the home. *See* Corps Br. at 8–10. Despite this, the Corps takes the position that its ban does not burden conduct protected by the Second Amendment. Corps Br. at 8–15. In an effort to support its illogical position, the Corps argues that its lands

are "sensitive places," as that term was used in *Heller*. Corps Br. at 11–12. In the alternative, the Corps argues that the Second Amendment does not apply on lands owned by the United States or, at a minimum, those lands managed by an agency within the U.S. Army. *Id*. at 12–14. The flaws with the Corps' arguments are manifest.

1. Corps-managed lands are not sensitive places.

The Corps' "sensitive places" argument is based upon this statement in *Heller*:

> [N]othing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or *laws forbidding the carrying of firearms in sensitive places such as schools and government buildings*, or laws imposing conditions and qualifications on the commercial sale of arms.

554 U.S. at 626–27 (emphasis added). According to the Corps, all 12 million acres of land and water that it manages are "sensitive places" and therefore its ban does not burden conduct protected by the Second Amendment.[12] Corps Br. at 11. The

[12] The Corps also tries to characterize its ban as a "longstanding prohibition[]" because it was promulgated in 1973. Corps Br. 12–13. Yet, the firearms ban struck down in *Heller*, was nearly as "longstanding," in that it was enacted in 1975. *See Heller*, 554 U.S. at 676 n.38 (Stevens, J., dissenting). The Corps also tries to age its ban by citing a 1947 Corps' regulation, which prohibited "loaded firearms" at one Corps' site in Oklahoma. Corp Br. at 2 n.1 and 12–13. Because this regulation prohibited only "[l]oaded firearms[,]" presumably visitors could carry unloaded firearms along with ammunition for self-defense purposes. 12 Fed. Reg. 8,725, 8,726 (Dec. 23, 1947). This would make the regulation closer to being constitutional. *See United States v. Masciandaro*, 638 F.3d 458, 473 (4th Cir.

flaw with the Corps' argument is two-fold. First, the Corps has not proven that Corps-managed lands in Idaho are sensitive places. Second, even if Corps-managed lands in Idaho were presumed sensitive places, the Corps' ban would still burden conduct protected by the Second Amendment, requiring the Corps to prove the constitutionality of its ban.

It stretches credulity to believe that Supreme Court was contemplating large, outdoor, recreational areas when it coined the term "sensitive places." *See* ER9 (District Court recognizing that the "'sensitive place' analysis applies to facilities like 'schools and government buildings[,]'' not "'outdoor parks'" as suggested by the Corps.). Nor was the Court contemplating backcountry, recreational areas in Idaho, such as Dworshak Dam and Reservoir, which:

> [C]ontains about 50,800 acres. At normal full pool, the surface area of Dworshak Reservoir is about 20,000 acres. There are about 30,000 acres of project lands surrounding the reservoir used for public recreation purposes, wildlife habitat, wildlife mitigation and log-handling facilities.... Recreation opportunities include boating, water-skiing, fishing, developed and *primitive camping*, picnicking, hiking

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2011) (upholding National Park Service regulation that prohibited visitors from possessing loaded firearms within their motor vehicles, in part, because such visitors were not entirely defenseless in that they could still possess unloaded firearms along with ammunition in their cars). In any event, even if the 1947 regulation were relevant, a regulation of that vintage is not "longstanding" within the meaning of *Heller*. Moreover, the 1947 regulation proves that the Corps can tailor its regulations to specific Corps-managed lands, obviating any need for a one-size-fits-all regulation, such as 36 C.F.R. § 327.13(a). *See Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 499 (2010) (administrative convenience is not a legitimate reason for violating the Constitution).

> and *hunting*.... Visitation to Dworshak during fiscal year 2009 was 146,483.

http://www.nww.usace.army.mil/Locations/DistrictLocksandDams/DworshakDamandReservoir.aspx (last checked July 7, 2015) (all emphasis added).[13]

To the contrary, by listing "schools and government buildings" as two examples of "sensitive places," it is reasonable to assume that the Court intended for the term to be limited to similar locations, *e.g.*, those with four walls and a roof. Or, at a minimum, it is reasonable to assume that the Court intended to limit sensitive places to buildings and areas where public access is restricted (*e.g.*, schools and playgrounds) or where there is security screening and/or an effective law enforcement presence (*e.g.*, courthouses and airports).[14]

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[13] The Corps' information regarding Dworshak Dam and Reservoir is reproduced in Addendum A. This Court may take judicial notice of the Corps' own information.

[14] Plaintiffs acknowledge *United States v. Dorosan*, 350 F. App'x 874 (5th Cir. 2009) and *Bonidy v. USPS*, 2015 WL 3916547 (10th Cir. 2015). In *Dorosan*, a non-public, employee parking lot adjacent to the post office and enclosed by a gate was deemed a sensitive place. *See United States v. Dorosan*, 2008 WL 2622996, at *1 (E.D. La. June 30, 2008) *aff'd*, 2009 WL 273300 (E.D. La. Jan. 28, 2009). In *Bonidy*, both a post office and its adjacent public parking lot were deemed sensitive places. 2015 WL 3916547 at *3; *but see id*. at **11–19 (Tymcovich, J., dissenting) (noting that some post office parking lots could be considered "sensitive places," and concluding that the USPS had not carried its burden of proving that this particular parking lot was so sensitive to warrant the significance burden on the plaintiff's Second Amendment rights). At most, *Dorosan* and *Bonidy* suggest that some post offices and some adjacent parking lots may be sensitive places. They do not stand for the proposition that all government buildings or all lands owned by the United States are sensitive places.

Yet, Corps-managed lands satisfy none of these criteria. Although the Corps-managed lands are generally open to all members of the public, there is neither security screening, nor an effective law enforcement presence. SER7. In fact, the Corps admits that its park rangers are not trained in law enforcement, do not perform typical law enforcement functions, and do not carry firearms. Corps Br. at 22; ER38. Instead, visitors to Corps-manage lands must rely on the ability of state and local authorities to respond in a timely manner for their personal safety. ER38. Without security screening or an effective law enforcement presence, the Corps cannot seriously contend that the lands it manages are sensitive places.

Nevertheless, the Corps argues that its lands must be sensitive places because some of its "dams and related structures" were designated as "critical infrastructure," given that a "catastrophic failure" at one of these locations could have devastating effects. Corps Br. at 12 (citing ER11–12); *see* ER39. No one disputes that a failure of a dam could be devastating. Yet, those "dams and related structures" are not at issue in this case because one would presume that public access to designated "critical infrastructure" is already restricted.[15] *See* SER31

[15] Congress may have already protected these dams and related structures through 18 U.S.C. § 930(a), which makes it generally unlawful to possess a firearm in a "Federal facility." *Id*. § 930(g)(1) (Defining "Federal facility" to mean "a building or part thereof owned or leased by the Federal Government, where Federal employees are regularly present for the purpose of performing their official

("[A]djacent facilities such as powerhouses, may require restricted access which will be controlled by others. Additional security for these areas may be provided by the Park Ranger staff or contract law enforcement personnel."). Instead, what is at issue in this case are the Corps-managed lands that are open to the public for recreational use, such as campsites, trails, water bodies, backcountry areas, and public parking areas.[16] Moreover, if Corps-managed lands near designated "critical infrastructure" were so important to the protection of that infrastructure, Congress would have authorized Corps park rangers to carry firearms.

In any event, 36 C.F.R. § 327.13(a) itself belies the Corps' sensitive places argument. This regulation expressly authorizes the possession and use of loaded firearms for hunting and target shooting on Corp-managed lands. 36 C.F.R. § 327.13(a)(2) (authorizing the possession and use of loaded firearms for hunting); *id* § 327.13(a)(3) (authorizing the possession and use of loaded firearms at shooting ranges). The Corps cannot honestly argue that its managed lands are sensitive places so as to justify a ban on possessing and carrying a firearm for self-defense

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duties."); *see id*. § 930(h) (requiring that notice of the firearms restriction in § 930(a) "shall be posted conspicuously at each public entrance to each Federal facility ….").

[16] Under the Corps' ban, Plaintiffs cannot even store their firearms in a locked, compartment in their vehicles while recreating on Corps-managed lands. 36 C.F.R. § 327.13(a). This effectively disarms them while traveling to and from Corps-managed lands. *See* SER 9–10.

while firearms are being used for hunting and target shooting on those very same lands.[17]

Notwithstanding that hunting and target shooting occur on its lands, the Corps argues that its lands are sensitive places, like schools and government buildings, because its lands may host "dense concentrations" of individuals with "diverse backgrounds." Corps Br. at 11. The Corps' analogy misses the mark.

If sensitive places were determined solely by the presence of a dense concentration of individuals with diverse backgrounds, the Second Amendment would not apply outside the home. Yet, as demonstrated above and as implicitly conceded by the Corps, the Second Amendment does apply outside the home. It also applies outside the home in areas with a high concentration of individuals with diverse backgrounds, like Chicago, Illinois. *See Moore*, 702 F.3d 933, 934–42 (holding that Illinois statutes, which generally prohibited the carrying of firearms outside the home, violated the Second Amendment). Simply put, a dense

[17] Other federal land management agencies generally allow law-abiding, responsible citizens to possess and carry firearms for self-defense. 43 C.F.R. § 423.30 (Bureau of Reclamation); 36 C.F.R. § 261.58(m) (Forest Service); 43 C.F.R. § 8365.1–7 (Bureau of Land Management). In Section 512 of the Credit Card Act of 2009, Pub. L. 111-24, 123 Stat 1734 (2009), which is titled "Protecting Americans From Violent Crime," Congress reaffirmed that law-abiding, responsible citizens could possess and carry firearms for self-defense while recreating in National Parks and National Wildlife Refuges. Section 512 is reproduced in Addendum B.

concentration of individuals with diverse backgrounds cannot nullify constitutional rights.

Even if a dense concentration of individuals with diverse backgrounds could qualify an area as a sensitive place, the Corps has not proven that a dense concentration of individuals ever exists on Corps-managed lands in Idaho. For example, the Corps-managed Dworshak Dam and Reservoir in Idaho had only 146,483 visitors in FY 2009. Addendum A. This equates to approximately 400 visitors per day. Considering that the Corps manages 50,000 acres at the Dworshak Dam and Reservoir (*id.*), the visitor concentration level is 0.8 persons per 100 acres per day. This is not a dense concentration. Therefore, the Corps' argument about dense concentration of individuals with diverse backgrounds simply does not fly with Corps-managed land in Idaho.

The Corps also cites the vacated panel opinion in *Nordyke v. King*, 563 F.3d 439 (9th Cir. 2009),[18] for the proposition that outdoor areas in general can be sensitive places.[19] Corps Br. at 14–15. From this, the Corps concludes that the

[18] On July 12, 2010, the panel opinion was vacated and the case was remanded in light of *McDonald*. *Nordyke v. King*, 611 F.3d 1015 (9th Cir. 2010) (*en banc*).

[19] The Corps also cites *Warden v. Nickels*, 697 F. Supp. 2d 1221, 1228 (W.D. Wash. 2010) in support of its proposition. Corps. Br. at 15. *Warden* is inapposite because it was pre-*McDonald* (which held that the Second Amendment applies against the States), was based upon the Washington State Constitution, and involved a city park. 697 F. Supp. 2d at 1228–29.

lands it manages are sensitive places. *Id*. The Corps' reliance on the vacated panel decision *Nordyke* is badly misplaced.

Nordyke did not involve the right of law-abiding, responsible citizens to possess or carry firearms for self-defense. Instead, *Nordyke* involved a challenge by gun show promoters to a county ordinance that banned firearms at the Alameda County, California fairgrounds, where the gun show promoters sought to display firearms for sale. 563 F.3d at 443–44. Thus, the ordinance only indirectly implicated the Second Amendment by purportedly making it harder for people to purchase guns.[20] *Id*. at 458.

In denying the gun show promoters leave to amend their complaint to add a Second Amendment claim in light of *Heller*, the panel ruled that the proposed amendment would be futile because, *inter alia*, the county fairgrounds was a sensitive place. *Id*. at 459–60. In making this determination, the panel simply equated sensitive places with "gathering places where high numbers of people might congregate" and noted that the gun show promoters admitted that their gun shows attracted 4,000 visitors. *Id*. at 460.

With all due respect to the *Nordyke* panel, it is doubtful that the Supreme Court was thinking about "gathering places where high numbers of people might

[20] This attenuated Second Amendment claim, in and of itself, distinguishes *Nordyke* from the instant case, where the core right of possessing and carrying firearms for self-defense is at issue.

congregate" when it stated that that laws prohibiting firearms in sensitive places were presumptively lawful. Such a test is totally subjective and could be used to cabin the Second Amendment to inside the home.[21] Even if "gathering places where high numbers of people might congregate" were the appropriate test, Corps-managed lands in Idaho would not satisfy that test.[22] Nor would a finding that Corps-managed lands in Idaho were sensitive places suddenly end the inquiry, as it apparently did in *Nordyke*.[23] 563 F.3d at 460. Instead, bans on firearms in sensitive places are only presumptively lawful, which means their lawfulness can be challenged in an as-applied challenge. The panel in *Nordyke* simply failed to consider this.

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[21] It is unclear if camping is allowed on the county's fairgrounds. Thus, whatever persuasive value that the vacated panel opinion may have, it sheds no light of the District Court's entry of judgment in favor of Plaintiffs as to their claim regarding possessing loaded firearms for self-defense inside a tent on Corps-managed lands. *See* ER4, ER50. In any event, as demonstrated below, the Corps has waived any challenge to this aspect of the District Court's judgment.

[22] No reasonable person would equate the Alameda County, California fairgrounds with the Corps-managed lands in Idaho, which include backcountry areas where self-defense may be needed against four-legged predators, such as bears, mountain lions, and wolves.

[23] After remand, the county interpreted its ordinance as allowing the display of firearms at the fairgrounds, as long as they were securely fastened to prevent unauthorized use. *Nordyke v. King*, 681 F.3d 1041, 1044 (9th Cir. 2012) (*en banc*). Because this interpretation turned the ordinance into a regulation as to how the firearms were to be displayed, as opposed to an outright ban, the *en banc* panel ruled that ordinance did not violate the Second Amendment (*id.*), effectively rendering the sensitive place discussion in the vacated panel decision *dicta*.

Even if Corps-managed lands in Idaho were presumed sensitive places, nothing in *Heller* suggests that "laws forbidding the carrying of firearms in sensitive places" does not burden conduct protected by the Second Amendment. *Cf. R.A.V. v. City of St. Paul*, 505 U.S. 377, 383–85 (1992) (ruling that prohibitions on obscenity and fighting words burdened First Amendment conduct, even though such speech was long believed to be outside the scope of the First Amendment). Instead, the Court simply stated that such laws were "presumptively lawful." *Heller*, 554 U.S. at 627 n.26. Thus, the Court implicitly recognized that "laws forbidding the carrying of firearms in sensitive places" burdened conduct protected by the Second Amendment. Indeed, by saying such laws are "presumptively lawful," the Court acknowledged that such laws could violate the Second Amendment under specific circumstances presented in an as applied challenge. *See United States v. Barton*, 633 F.3d 168, 173 (3d Cir. 2011) ("*As the Government concedes*, *Heller*'s statement regarding the presumptive validity of felon gun dispossession statutes does not foreclose Barton's as-applied challenge. By describing the felon disarmament ban as "presumptively" lawful …, the Supreme Court implied that the presumption may be rebutted.") (emphasis added); *United States v. Chester*, 628 F.3d 673, 679 (4th Cir. 2010) (same).

Therefore, even if Corps-managed lands in Idaho were presumed sensitive places, the Corps still has to shoulder the burden of litigation in the instant as

applied challenge. For example, as to 18 U.S.C. § 922(g)(1), which disarms felons and which the Supreme Court suggested was presumptively lawful, the Seventh Circuit explained:

> [T]he government does not get a free pass simply because Congress has established a "categorical ban"; it still must prove that the ban is constitutional, a mandate that flows from *Heller* itself. *Heller* referred to felon disarmament bans only as "presumptively lawful," which, by implication, means that there must exist the possibility that the ban could be unconstitutional in the face of an as-applied challenge. *Therefore, putting the government through its paces in proving the constitutionality of § 922(g)(1) is only proper*.

United States v. Williams, 616 F.3d 685, 692 (7th Cir. 2010) (emphasis added). Therefore, at a minimum, the Corps still has to prove the constitutionality of its ban on Corps-managed lands in Idaho.

The Corps tries to avoid shouldering the burden of litigation by citing *United States v. Vongxay*, 594 F.3d 1111, 1118 (9th Cir. 2010). Corps Br. 9–10. According to the Corps, *Vongxay* stands for the broad proposition that none of *Heller*'s "presumptively lawful" restrictions burden conduct protected by the Second Amendment. *Id*. The Corps reads way too much into that case.

In *Vongxay,* a previously convicted felon, challenged his subsequent conviction under 18 U.S.C. § 922(g)(1), arguing that, under *Heller*, the statute was unconstitutional in that it violated his Second Amendment rights. 594 F.3d at 1114. In so doing, the felon argued that the statement in *Heller*, that "longstanding prohibitions on the possession of firearms by felons" were "presumptively lawful"

was *dicta*. *Id*. at 1115. This Court rejected that argument and ruled that 18 U.S.C. § 922(g)(1) did not violate the Second Amendment as applied to the felon, because "felons' Second Amendment rights can be reasonably restricted." *Id*. at 1117. This ruling means felons have Second Amendment rights, but that those rights may be restricted. From this, it is evident that § 922(g)(1) burdens conduct protected by the Second Amendment.[24] Thus, contrary to the Corps' argument, presumptively lawful restrictions do burden conduct protected by the Second Amendment, requiring the Corps to prove the constitutionality of its ban.[25]

2. Lands owned by the United States or lands managed by agencies within the U.S. Army are not Second Amendment-free zones.

Perhaps recognizing the weakness of its sensitive places argument, the Corps also argues that its ban does not burden conduct protected by the Second

[24] The Corps cites *United States v. Rozier*, 598 F.3d 768, 771 (11th Cir. 2010) (*per curiam*) for the same proposition it cites *Vongxay*. Corps. Br. at 10. Yet, like this Court in *Vongxay*, the Eleventh Circuit recognized that presumptively lawful restrictions burden conducted protected by the Second Amendment. *Rozier*, 598 F.3d at 771 ("While felons do not forfeit their constitutional rights upon being convicted, their status as felons substantially affects the level of protection those rights are accorded.").

[25] In *Chovan*, this Court applied intermediate scrutiny in an as applied challenge to 18 U.S.C. § 922(g)(9), which prohibits domestic violence misdemeanants from possessing firearms. 735 F.3d at 1141–42. This indicates that presumptively lawful restrictions do burden conduct protected by the Second Amendment. *See* Corps Br. at 16 (recognizing that *Chovan* got to the second part of the two-part test).

Amendment because the Amendment does not apply to lands owned by the United States:

> Neither plaintiffs nor the district court has pointed to anything in the historical record suggesting that the Second Amendment was designed to protect self-defense rights when on government property ….

Corps Br. at 12.[26] In support of this argument, the Corps invokes the Property Clause (Corps Br. at 13), which provides "Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States …." U.S. Const. art. IV § 3, cl. 2 (emphasis added). According to the Corps, when the federal government is acting as a property owner, it can eliminate the right to keep and bear arms on its property without burdening conduct protected by the Second Amendment. Corps. Br. 12–14.

Whatever power Congress may possess under the Property Clause, that power does not *ipso facto* trump constitutional rights. *See United States v. Kokinda*, 497 U.S. 720, 725 (1990) (plurality opinion) ("The Government, even when acting in its proprietary capacity, does not enjoy absolute freedom from First Amendment constraints, as does a private business …."); *cf. Printz v. United States*, 521 U.S. 898, 938–39 (1997) (Thomas, J., concurring) (suggesting, pre-

[26] The Framers of the Second Amendment would be shocked to read the quoted language. So would the homesteaders and miners who undoubtedly carried firearms for self-defense on lands owned by the United States in the 19th century, while settling Idaho and the other western States.

Heller, that Congress's Commerce Clause power could not *ipso facto* trump Second Amendment rights, if those rights were ultimately determined to be personal rights). Because Congress may not simply declare that the Second Amendment does not apply to lands owned by the United States, a statute banning the possession and carrying of firearms for self-defense on lands owned by the Unites States would necessarily burden conduct protected by the Second Amendment. *See Marbury v. Madison*, 5 U.S. 137, 176–77 (1803) ("The powers of the legislature are defined, and limited; and that those limits may not be mistaken, or forgotten, the constitution is written…. It is a proposition too plain to be contested, that the constitution controls any legislative act repugnant to it; or, that the legislature may alter the constitution by an ordinary act."). It is axiomatic that Corps' authority cannot exceed the scope of Congress's authority. *See Louisiana Public Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986) ("[A]n agency ... has no power to act ... unless and until Congress confers powers upon it."). Therefore, the Corps' ban burdens conduct protected by the Second Amendment.[27]

[27] According to the Corps, *Engquist v. Oregon Dept. of Agr.*, 553 U.S. 591 (2008) supports its argument that when a federal agency acts like a proprietor and bans the possession and carrying of firearms for self-defense on its land it does not burden conduct protected by the Second Amendment. Corps Br. at 13–14. *Engquist*, however, involved an equal protection claim brought by a government employee against a government employer. 553 U.S. at 594. At best, *Engquist* stands for the unremarkable proposition that the "government has significantly greater leeway in its dealings with citizen employees than it does when it brings its sovereign power to bear on citizens at large." *Id*. at 599. Thus, although *Engquist* might allow the

Finally, the Corps also argues that the Second Amendment does not apply to the lands it manages because it is part of the U.S. Army. Corps Br. at 14. That the Corps is part of the U.S. Army does not make Corps-managed lands Second Amendment-free-zones. This is especially true considering that the Corps' manages these lands as part of its civil works mission—not its military mission. ER 35; SER11–12. Thus, contrary to the Corps' suggestion (Corps Br. at 14), the Corps-managed lands at issue in this case are not military installations, where national security concerns are most acute. *See United States v. Apel*, 134 S. Ct. 1144, 1147–49 (2014) (noting that Vandenberg Air Force Base, which contains "sensitive missile and space launch facilities[,]" "would naturally be described as a 'military installation'"). Nor does the fact that the Corps has some discretion to close its lands to public use transform its lands into Second Amendment-free-zones when open to the public. *See* Corps Br. at 14. Presumably, base commanders have even greater authority to close military installations to the public; yet, it is well established that the Bill of Rights still applies on military installations. *United States v. Albertini*, 472 U.S. 675, 688–90 (1985) (recognizing that First and Fifth Amendments apply on military installations open to the public); *Apel*, 134 S. Ct. at 1154–55 (Ginsburg, J., concurring) ("When the Government permits the public

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Corps to prohibit its employees from carrying firearms for self-defense on Corps-managed lands, it does not mean that the Corps can apply the same prohibition to non-employees without burdening conduct protected by the Second Amendment. *See NASA v. Nelson*, 562 U.S. 134, 147–49 (2011).

onto part of its property, in either a traditional or designated public forum, its 'ability to permissibly restrict expressive conduct is very limited.'") (quoting *United States v. Grace*, 461 U.S. 171, 177 (1983)). Because the Bill of Rights applies on military installations, *a fortiori*, the Second Amendment applies on Corps-managed lands. Therefore, the Corps' ban burdens conduct protected by the Second Amendment.

III. THE CORPS' BAN VIOLATES THE SECOND AMENDMENT.

Because the Corps' ban on possessing and carrying loaded firearms for self-defense burdens conduct protected by the Second Amendment, it must be analyzed under either the categorical test or, at a minimum, strict or intermediate scrutiny. As demonstrated below, the ban does not pass muster under any of these tests.

A. The Corps' Ban Is Categorically Unconstitutional.

A restriction that abrogates a core Second Amendment right is categorically unconstitutional. *Heller*, 554 U.S. at 628–29. The Corps' ban prohibits law-abiding, responsible citizens from possessing (in a tent) and carrying (openly, concealed, or in a vehicle) a loaded firearm for self-defense on Corps-managed lands. As determined by the District Court, the Corps' ban is categorically unconstitutional:

> [T]his complete ban goes beyond merely burdening Second Amendment rights but "destroys" those rights for law-abiding citizens carrying operable firearms for the lawful purpose of self-defense." Accordingly, the Corps' regulation is unconstitutional "under any

> light"—that is, it is invalid no matter what degree of scrutiny is used in its evaluation.

ER8 (quoting *Peruta*, 742 F.3d 1168–70); ER13 ("While the Corps retains the right to regulate the possession and carrying of handguns on Corps property, this regulation imposes an outright ban, and is therefore unconstitutional under any level of scrutiny, as set forth in *Heller* and *Peruta*."). Based upon this determination, the District Court entered judgment in favor of Plaintiffs as to both of their claims for relief. SER36–37.

The Corps makes no appreciable effort to defend its ban vis-à-vis the possession of loaded firearms for self-defense in tents on Corps-managed lands. As demonstrated above and as noted by the District Court, a temporary dwelling, like a tent, is analogous to a home. Part II-B, *supra*; ER25–26. Thus, the same Second Amendment rights should apply in both places. Part II-B, *supra*. *Heller* stands for the proposition that a ban on possessing loaded firearms for self-defense in the home is categorically unconstitutional. 554 U.S. at 635–36. The District Court's grant of summary judgment in favor of Plaintiffs' as to their First Claim for Relief is perfectly in line with *Heller*. *See* ER13–14, 25–26, 50, SER36–37. By not addressing these issues in its opening brief, the Corps has waived any argument to the contrary and has effectively conceded that its ban destroys the right of law-abiding, responsible citizens to possess loaded firearms for self-defense in a tent on Corps-managed lands. *Christian Legal Soc. Chapter of Univ.*

of Cal. v. Wu, 626 F.3d 483, 487–88 (9th Cir. 2010) ("[W]e've refused to address claims that were only argued in passing, … or that were bare assertions … with no supporting argument.") (internal quotations, citations, and alterations omitted); *see United States v. Zannino*, 895 F.2d 1, 17 (1st Cir. 1990) ("It is not enough merely to mention a possible argument in the most skeletal way, leaving the court to do counsel's work, create the ossature for the argument, and put flesh on its bones…. Judges are not expected to be mindreaders." (internal quotations omitted)). Therefore, this Court should uphold the District Court's determination that the Corps' ban is categorically unconstitutional as to the possession of loaded firearms for self-defense in tents on Corps-managed lands and affirm the District Court's judgment as to Plaintiffs' First Claim for Relief.

The Corps weakly attempts to defend its ban on carrying loaded firearms for self-defense outside tents by arguing that its ban does not destroy Second Amendment rights, but imposes only a "partial restriction on firearms use on government property …." Corps Br. at 16. This "partial restriction" argument is presumably based on the fact that "Plaintiffs may use firearms at shooting ranges or for hunting in designated areas" on Corps-managed lands. Corps Br. at 18. Although hunting and target shooting are protected by the Second Amendment,

this case is not about those activities.[28] In fact, that hunting and target shooting may occur on Corps-manage lands is cold comfort to Plaintiffs, who want to simply possess and carry loaded firearms for self-defense. Accordingly, the District Court properly ruled that Corps' ban is categorically unconstitutional and this Court should affirm that ruling and the District Court's judgment.

B. The Corps' Ban Does Not Survive Strict Scrutiny.

Even if the Corps' ban is not categorically unconstitutional, it fails strict scrutiny. Strict scrutiny is regularly applied when fundamental rights are involved. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 17 (1973) (laws that "impinge[] upon a fundamental right explicitly or implicitly protected by the Constitution" are subject to strict scrutiny); *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997). It is undeniable that the Second Amendment protects fundamental rights. *McDonald*, 561 U.S. at 778 ("[I]t is clear that the Framers … counted the right to keep and bear arms among those fundamental rights necessary to our system of ordered liberty."); *id*. at 769 ("Antifederalists and Federalists alike agreed that the right to bear arms was fundamental to the newly formed system of government."); *see id*. at 806 (Thomas, J., concurring in part and concurring in the

[28] The Corps has not suggested that 36 C.F.R. § 327.13(a) allows hunters and target shooters to use their firearms in self-defense. *See* Corps Br. at 18. Thus, 36 C.F.R. § 327.13(a) is a complete ban on the use of firearms for self-defense on Corps-managed lands. *See Heller*, 554 U.S. at 630 (refusing to read an implied exception for self-defense into the challenged law).

judgment). These principles—that strict scrutiny applies to laws affecting fundamental rights and that the Second Amendment protects a fundamental right—taken together compel the conclusion that restrictions on the right to keep and bear arms must, at a minimum, be subjected to strict scrutiny.

Indeed, strict scrutiny would also apply under this Court's two-step analysis because the Corps' ban imposes a severe restriction on the core protection of the Second Amendment, *i.e.*, the right to keep and bear arms for self-defense. The Corps' ban prohibits law-abiding, responsible citizens from possessing and carrying a loaded firearm for self-defense on Corps-managed lands. This is undoubtedly a severe restriction triggering strict scrutiny review.

The Corps cites the Fourth Circuit's opinion in *Masciandaro* for the proposition that intermediate, not strict scrutiny, should apply because the lands at issue are managed by a federal agency. Corps Br. 18–19. Yet, the National Park Service regulation at issue in *Masciandaro* was not as severe as the Corps' ban in the instant case. The National Park Service regulation prohibited only the possession of a loaded weapon in a motor vehicle within a National Park area. *Masciandaro*, 638 F.3d at 460. "By permitting park patrons to carry unloaded firearms within their vehicles," the challenged regulation "le[ft] largely intact the right to 'possess and carry weapons in case of confrontation.'" *Id*. at 474 (quoting *Heller*, 554 U.S. at 592). In contrast, the Corps' ban completely prohibits both:

(1) possessing and carrying loaded firearms for self-defense; and (2) possessing and carrying unloaded firearms with ammunition for self-defense. Thus, under the Corps' ban, nothing remains of the right to possess and carry firearms in case of confrontation. Therefore, contrary to the Corps' argument, *Masciandaro* confirms that strict scrutiny must be applied to the Corps ban because of the exponentially greater burden on—if not the destruction of—the right to possess and carry loaded firearms in case of confrontation.

The Corps tries to downplay the severity of the burden on Plaintiffs' Second Amendment rights by suggesting that Plaintiffs can exercise their Second Amendment rights off of Corps-managed lands. This is a specious argument. The fundamental right to self-defense must be exercised wherever the person "happens to be." *See* Eugene Volokh, *Implementing the Right to Keep and Bear Arms for Self-Defense: An Analytical Framework and a Research Agenda*, 56 UCLA L. Rev. 1443, 1515 (2009) ("And of course people's ability to protect themselves elsewhere is no substitute for their ability to protect themselves where they are…. [S]elf-defense has to take place wherever the person happens to be."). No one should have to relinquish the fundamental right to keep and bear arms for self-defense in order to enjoy the use of public lands, including Corps-managed lands. If the Corps' argument were accepted, the Corps could get away with prohibiting the exercise of all First Amendment rights on its lands simply because those rights

could be exercised elsewhere. Yet, as demonstrated above, when lands owned by the United States are open to the public, the First Amendment applies, even though those rights may be exercised elsewhere. Part __, *supra*. Because the Second Amendment may not "be singled out for special—and specially unfavorable—treatments." *McDonald*, 561 U.S. at 778–79, the severe burden on Plaintiffs' Second Amendment rights is not lessened merely because they may exercise those rights elsewhere.

In fact, the Seventh Circuit has expressly rejected the type of flawed reasoning employed by the Corps here:

> This reasoning assumes that the harm to a constitutional right is measured by the extent to which it can be exercised in another jurisdiction. That's a profoundly mistaken assumption. In the First Amendment context, the Supreme Court long ago made it clear that one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place. The same principle applies here. It's hard to imagine anyone suggesting that Chicago may prohibit the exercise of a free-speech or religious-liberty right within its borders on the rationale that those rights may be freely enjoyed in the suburbs. That sort of argument should be no less unimaginable in the Second Amendment context.

Ezell, 651 F.3d at 697 (internal quotations and citations omitted).

Thus, contrary to the Corps' arguments, the Corps' ban does impose a severe restriction on the core protection of the Second Amendment, *i.e.*, the right to keep and bear arms for self-defense. Therefore, strict scrutiny must be applied to the Corps' ban. As demonstrated below, the Corps' ban flunks that test.

Under strict scrutiny, the Corps' ban is not accorded a presumption of constitutionality. Instead the Corps must carry the heavy burden of proving that its ban is narrowly tailored to serve a compelling government interest. *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 340 (2010) (The government must prove that its restriction "furthers a compelling interest and is narrowly tailored to achieve that interest." (quotation omitted)). The Corps has not satisfied this heavy evidentiary burden.

The Corps' asserted justification for its ban is its interests "in promoting order and public safety on the land it manages, protecting its water resource development projects, and protecting visitors from the risk of firearm violence." Corps Br. at 20. In a facial challenge, these generalized public safety concerns may qualify as a compelling interest. But, in an as applied challenge, such as this case, the compelling interest must be based upon the facts and circumstance of the particular suit. *See Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 329 (2006) ("It is axiomatic that a 'statute may be invalid as applied to one state of facts and yet valid as applied to another.'" (quoting *Dahnke–Walker Milling Co. v. Bondurant*, 257 U.S. 282, 289 (1921)); *Citizens United v. Gessler*, 773 F.3d 200, 216 (10th Cir. 2014) ("Courts can, and often do, recognize the overall propriety of a statutory scheme while still invalidating its application in a specific case."). The Corps has provided no evidence supporting its public safety

concerns vis-a-vis Corps' managed lands in Idaho. *Cf. United States v. Doe*, 968 F.2d 86, 90 (D.C. Cir. 1992) (Whether a restriction is narrowly tailored must be judged "in a realistic manner which takes into account the nature and traditional uses *of the particular park involved*. Lafayette Park is not Okefenokee National Wildlife Refuge, even if both are under the Park Service's supervision." (emphasis added)). Nor has the Corps provided any evidence that law-abiding, responsible citizens, such as Plaintiffs, pose a public safety concern.

The Corps' "evidence" largely consists of the following self-serving statement:

> In general, Corps recreation facilities have a high density of use because many projects are close to major population centers. The Corps must consider potential sources of conflict between visitors and craft regulations to mitigate the sources of conflict. For example, visitors staying at campgrounds sleep, cook meals, socialize with their companions, and enjoy nature all within a limited space. Sources of conflict include preferences for varying tastes of music at different audible levels, loud socializing at times inconvenient to other visitors, consumption of alcohol and general infringements on other users' space…. The presence of a loaded firearm could far more quickly escalate such tension between visitors from a minor disagreement to a significant threat to public safety involving the potential use of deadly force by a visitor against another visitor or unarmed Corps Park Ranger.

ER37–38.

The Corps' "evidence" is pure conjecture and shows that little, if any, consideration was given to the personal security concerns of law abiding, responsible citizens. The Corps' "evidence" also shows nothing about Corps-

managed lands in Idaho—the 13th least-populated State, with a population of only 1.6 million people. Addendum C.[29] Nor do Corps-managed lands in Idaho have high visitor levels. *See* Addendum A. Even if the Corps' "evidence" could be applied to Corps-managed lands in Idaho, what it shows is that alcohol consumption, loud music, and annoying behavior are the real culprits. Yet, the Corps has a regulation allowing it to limit alcohol consumption. 36 C.F.R. § 327.12(e). The Corps also has regulations prohibiting loud music and annoying behavior. 36 C.F.R. §§ 327.12(b), (c), (d), and (f). That the Corps apparently chooses not to enforce these regulations is no reason to infringe on constitutional rights.[30]

The "evidence" also shows that the Corps' primary grievance is that Congress has not authorized its park ranger to carry firearms. Corps Br. at 22–23; ER38. That Congress has not authorized Corps park rangers to carry firearms is no reason to infringe the Second Amendment rights of law-abiding, responsible citizens. Instead, the Corps should take its grievance to Congress.

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[29] Addendum C contains population information published by the U.S. Census Bureau, of which this Court may take judicial notice. *See United States v. Esquivel*, 88 F.3d 722, 726–27 (9th Cir. 1996).

[30] According to the Corps, because it can regulate boating and swimming, it "is similarly permissible for [it] to restrict possession of firearms …." Corps Br. at 11. "[T]he people" do not have a fundamental right to boat and swim, but do have a fundamental right to "keep and bear Arms." U.S. Const. amend. II.

In short, the Corps' generalizeed public safety concerns is not a compelling interest to infringe upon Second Amendment rights of law-abiding, responsible citizens on Corps-managed lands in Idaho. *Cf. United States v. Playboy Entm't Grp., Inc*., 529 U.S. 803, 822 (2000) (Congress "must present more than anecdote and supposition" to establish a compelling interest to justify a nationwide restriction.).[31] This conclusion is supported by the fact that the "[t]he right to keep and bear arms … is not the only constitutional right that has controversial public safety implications." *McDonald*, 561 U.S. at 783. Indeed, as explained, by the District Court,

> The Corps cites [its public safety] considerations to support the ban imposed by its regulation. But *Peruta* and *Heller* rejected that line of argument: "We are well aware that, in the judgment of many governments, the safest sort of firearm-carrying regime is one which restricts the privilege to law enforcement with only narrow exceptions. Nonetheless, the enshrinement of constitutional rights necessarily takes certain policy choices off the table...." *Peruta*, 742 F.3d at 1178.

ER12–13.

Even if the Corps' generalized public safety concerns were a compelling interest vis-à-vis Corps' managed lands in Idaho, the Corps' ban is not narrowly tailored to serve that interest. Central to narrow tailoring is the fit between the compelling interest and the means employed to accomplish that interest. The fit

[31] If Congress cannot rely on "anecdote and supposition" to justify a nationwide restriction, neither may the Corps, which has significant less authority than Congress.

must be precise, like a hand in a glove, which means that the Corps must use the least restrictive means possible to accomplish its stated compelling interest. *Playboy Entm't Grp.,* 529 U.S. at 813 ("If a less restrictive alternative would serve the Government's purpose, the legislature must use that alternative."); *Frisby v. Schultz*, 487 U.S. 474, 485 (1988) ("A statute is narrowly tailored if it targets and eliminates no more than the exact source of the "evil" it seeks to remedy." (citation omitted)). Moreover, "[a] complete ban" on the exercise of fundamental rights can be narrowly tailored, "but only if each activity within the proscription's scope is an appropriately targeted evil." *Id*.

The Corps' regulation, 36 C.F.R. § 327.13(a), completely bans the possession and carrying of loaded firearms (and unloaded firearms along with ammunition) for self-defense. Yet, the Corps has not proven that law-abiding, responsible citizens are an "appropriately targeted evil."[32] Nor has the Corps proven that law-abiding, responsible citizens such as Plaintiffs, who have been issued a license to carry a concealed handgun in the State of Idaho, are an "appropriately targeted evil." Therefore, the Corps' ban is not narrowly tailored.[33]

---

[32] The Framers of the Second Amendment believed "the people," could safely "bear arms" for self-defense despite public safety concerns. U.S. Const. amend. II; David B. Kopel, *The Samurai, The Mountie, And The Cowboy* 420 (1992) ("[T]he leaders of the early republic thought Americans uniquely virtuous and capable of bearing arms responsibly."). The Corps is in no position to question that judgment.

[33] The Corps also tries to justify its ban by arguing that it would allow early detention of any criminal threats to its projects. Corps Br. 22. As the Seventh

This conclusion is supported by the fact that the Corps has less restrictive means by which it can address its generalized public safety concerns. For example, the Bureau of Reclamation (which manages similar lands as the Corps), allows law abiding, responsible citizens to possess and carry firearms for self-defense on its lands. 43 C.F.R. §§ 423.30(a), (b). Congress has also implemented a less restrictive means vis-a-vis National Parks and National Wildlife Refugees, by allowing law-abiding, responsible citizens to possess and carry firearms for self-defense in those areas:

> The Secretary of the Interior shall not promulgate or enforce any regulation that prohibits an individual from possessing a firearm including an assembled or functional firearm in any unit of the National Park System or the National Wildlife Refuge System if—
>
> (1) the individual is not otherwise prohibited by law from possessing the firearm; and
>
> (2) the possession of the firearm is in compliance with the law of the State in which the unit of the National Park System or the National Wildlife Refuge System is located.

Credit Card Act of 2009, § 512(b); Addendum B. In so doing, Congress emphatically stated that:

> [U]nelected bureaucrats … cannot … override the Second Amendment rights of law-abiding citizens on 83,600,000 acres of National Park System land and 90,790,000 acres of land under the jurisdiction of the United States Fish and Wildlife Service.

Circuit noted, banning firearms in order to catch criminals "is a weak argument" because criminals do not brandish their guns— they conceal them, "in order to preserve the element of surprise …." *Moore*, 702 F.3d at 938.

Id. § 512(a)(7).

As the foregoing demonstrates, the Corps' asserted compelling interest is dubious at best. Even if the Corps properly established a compelling interest with respect to Corps-managed lands in Idaho, its firearms ban is not narrowly tailored to serve that compelling interest. Therefore, this Court should affirm the judgment of the District Court.

C. The Corps' Ban Does Not Survive Intermediate Scrutiny.

Under this Court's two-part test, if it were somehow determined that the Corps' ban does not destroy or severely burden the core Second Amendment right to possess and carry loaded firearms for self-defense, the ban must still be subjected to intermediate scrutiny. Under intermediate scrutiny, the Corps must prove a "significant, substantial, or important interest[.]" *Chovan*, 735 F.3d at 1139. The Corps must also prove that there is a substantial relationship between the challenged restriction and the Corps' asserted objective. *See Chovan*, 735 F.3d at 1142 ("[W]e conclude that the application of § 922(g)(9) to Chovan is substantially related to the government's important interest of preventing domestic gun violence."); *Williams*, 616 F.3d at 692 ("[U]nder intermediate scrutiny, the government has the burden of demonstrating that its objective is an important one and that its objective is advanced by means substantially related to that

objective."). Like with strict scrutiny, the Corps has not satisfied its burden of proof.

As demonstrated above, the Corps' generalized public safety concerns may be an important governmental interest if this were a facial challenge. But in this as applied challenge, those generalized concerns fall short. Without any specific evidence vis-à-vis Corps managed lands in Idaho, the Corps has not carried its burden of proof.

Even if the Corps' generalized public safety concerns were an important government interest as to Corps-managed lands in Idaho, it has not proven that its ban is substantially related to its asserted governmental interest. A restriction that infringes on constitutional rights cannot be substantially related if it is overinclusive. *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274, 285 n.19 (1985); *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 569–70 (1980). Thus, for the Corps' ban to survive intermediate scrutiny, the Corps must prove that its ban does not "'burden substantially more [conduct] than is necessary'" to achieve the Corps' asserted interest. *Boardley v. U.S. Dept. of Interior*, 615 F.3d 508, 519 (D.C. Cir. 2010) (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989)). Here, the Corps' ban is way too broad because it denies the right to possess and carry loaded firearms for self-defense to an entire group of individuals who pose no public safety concerns. *See Chovan*, 735 F.3d at

1138 (ruling that 18 U.S.C. § 922(g)(9) was not too broad because it exempts domestic violence misdemeanants "with expunged, pardoned, or set-aside convictions, or those who have had their civil rights restored.").

The unnecessarily burdened group consists of law-abiding, responsible citizens who are over 21 years old, have no history of substance abuse, have no criminal record, are not subject to a protection order, have demonstrated competency with a handgun, have undergone background checks, and have been approved by the State of Idaho to carry a concealed handgun in that State. SER1, 6; Idaho Code 18-3022. By definition, individuals in this group, of which Plaintiffs are a part, pose no public safety concerns. Nor would they pose public safety concerns by possessing and carrying firearms for self-defense on Corps-managed lands. *See* Philip J. Cook *et al*., *Gun Control After Heller: Threats and Sideshows from A Social Welfare Perspective*, 56 UCLA L. Rev. 1041, 1082 (2009) ("The available data about [concealed gun] permit holders also imply that they are at fairly low risk of misusing guns, consistent with the relatively low arrest rates observed to date for permit holders."). In fact, the Corps has not suggested otherwise, except to speculate that *anyone* possessing or carrying a firearm may have a "chilling effect" on its park rangers. Corps Br. at 22–23. Yet, the individuals in this group are law-abiding, responsible citizens who have demonstrated a respect for the law and authority by satisfying the requirements for

the issuance of their concealed carry licenses. *See* SER1, 6. In short, Corps park rangers and other visitors to Corps-managed lands have nothing to fear from the individuals in this group.

Thus, by denying the individuals in this group the right to bear arms for self-defense the Corps is not addressing its asserted public safety concerns. Instead, the Corps is needlessly placing the individuals in this group at increased risk of harm, especially considering there is not an effective law enforcement presence on Corps managed lands. Therefore, because the Corps is burdening substantially more conduct than is necessary to achieve its asserted interest, the Corps' ban fails intermediate scrutiny and this Court should affirm the judgment of the District Court.

D. The Corps' Argument For Reasonableness Review Is Spurious.

The Corps cites First Amendment forum analysis for the proposition that its ban is subject only to reasonableness review because the Corps is allegedly acting like a proprietor. Corps Br. at 17, 19. First Amendment forum analysis essentially asks whether the relevant government property is a traditional public forum or a designated public forum for First Amendment activities. *Perry Education Assn. v. Perry Local Educators' Assn*., 460 U.S. 37, 45–46 (1983). If so, then the restriction is generally subject to strict scrutiny. *Id*. If the relevant government property is a non-public forum, the government may impose reasonable restrictions

that are viewpoint-neutral. *Id*. The Corps' reliance on First Amendment forum analysis is flawed in at least three ways.

First, *Heller* expressly rejected rational basis or reasonableness review vis-à-vis the Second Amendment. *Heller*, 554 U.S. at 628 n.27 ("If all that was required to overcome the right to keep and bear arms was a rational basis, the Second Amendment would be redundant with the separate constitutional prohibitions on irrational laws, and would have no effect."); *accord Chovan*, 735 F.3d at 1137 ("The *Heller* Court did, however, indicate that rational basis review is not appropriate.").

Second, forum analysis makes no sense in the Second Amendment context because no government property is dedicated to self-defense. Instead, the nature of the interest in personal security protected by the Second Amendment demands that the Amendment apply where self-defense is necessary, not just in certain places the government may dedicate to self-defense. In fact, the idea of designating "Second Amendment zones" is ridiculous. *Cf. ISKCON Miami, Inc. v. Metropolitan Dade County*, 147 F.3d 1282, 1290 (11th Cir. 1998) ("[P]ersons wishing to distribute literature are limited to eight areas in the airport designated by the Airport Director as 'First Amendment zones.'").

Finally, assuming forum analysis could be applied in the Second Amendment context and assuming the Corps' managed lands were non-public fora,

courts have acknowledged that an outright ban on constitutionally protected activity—like that imposed by the Corps' ban—would be unconstitutional. *See Initiative and Referendum Institute v. USPS*, 417 F.3d 1299, 1315 (D.C. Cir. 2005) ("It is clear that a broadscale prohibition against asking postal patrons to sign petitions … is unconstitutional even if all postal properties are nonpublic forums."). Likewise, the Corps may not impose a "broadscale prohibition" on self-defense on Corps-managed lands in Idaho.

IV. *GEORGIACARRY.ORG* PROVES THAT THE CORPS HAS NOT SATISFIED ITS EVIDENTIARY BURDEN IN THE INSTANT CASE.

It is anticipated that the Corps will try to justify its ban by citing the recent Eleventh Circuit opinion in *Georgiacarry.org, Inc. v. U.S. Army Corps of Engineers*, 2015 WL 3555822 (11th Cir. 2015) *aff'g*, 38 F. Supp. 3d 1365 (N.D. Ga. 2014). Because of the strategy employed in that case and its procedural posture, *Georgiacarry.org* is not the panacea that the Corps may wish it to be. In fact, *Georgiacarry.org* proves that the Corps has not satisfied it evidentiary burden in the instant case.

In *Georgiacarry.org,* the plaintiffs filed a similar Second Amendment challenge to the Corps' ban in the United States District Court for the Northern District of Georgia and moved for a preliminary injunction. 38 F. Supp. 3d at 1367–69. In denying the preliminary injunction, the district court ruled that the plaintiffs were not likely to succeed on the merits because, according to the district

court, the Corps' ban did not burden conduct protected by the Second Amendment. *Id*. at 1376. "[O]ut of an abundance caution," the district court also ruled that the Corps' ban satisfied intermediate scrutiny. *Id*. at 1376–78.

In appealing the denial of the preliminary injunction, the plaintiffs "h[u]ng their hats on a single, sweeping argument: that the regulation completely destroys their Second Amendment rights, thereby obviating the need for a traditional scrutiny analysis." *Georgiacarry.org*, 2015 WL 3555822, at *1. The Eleventh Circuit rejected the plaintiffs' all-or-nothing argument because of the heavy burden the plaintiffs faced in seeking to overturn a denial of a preliminary injunction (*id*. at *3) the "scant preliminary injunction record," (*id*. at *5) and because the court found that the Corps' ban did not "destroy the plaintiffs' Second Amendment rights altogether." *Id*. at **6–7.

In ruling that "the Corps ban did not 'destroy the plaintiffs' Second Amendment rights altogether[,]'" the Eleventh Circuit fell for the argument that the Corps makes here, namely that the plaintiffs can "exercise their right to bear arms for self-defense elsewhere …." *Id*. at *7. Yet, one may not be denied a fundamental right simply because it may be exercised elsewhere. Part III-B, *supra*. For example, in *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 76–77 (1981) the borough tried to defend its ban on live entertainment because such speech could be conducted outside the borough. The Court emphatically rejected that

argument: "'[O]ne is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place.'" *Id*. (quoting *Schneider v. State of New Jersey*, 308 U.S. 147, 163 (1939)).

Similarly, the Corps cannot argue that its ban does not destroy the fundamental right to keep and bear arms for self-defense simply because that right may be exercised elsewhere. If that argument were accepted, the Second Amendment would suffer a death by a thousand cuts, as jurisdiction after jurisdiction bans the right to bear arms for self-defense simply because that right may be exercised elsewhere.

Accordingly, *Georgiacarry.org* is not a magic talisman. Any persuasive value that it may have is severely limited by the strategy employed by the plaintiffs and because it was at the preliminary injunction stage.

More importantly, however, *Georgiacarry.org* does prove that the Corps has failed to carry its burden of proof in the instant case. In discussing the evidence that would be required at the merits stage, the Eleventh Circuit stressed that the Corps would have to produce particularized evidence about the Corps-managed lands at issue:

> [W]hether the Corps property constitutes what *Heller* called a "sensitive place," we are missing basic information. Among others, we do not know the size of the Allatoona Dam, a major feature of the water resource development project …. Nor do we know the size of the recreational area at issue in this case-that is, where the plaintiffs seek to carry their weapons in this as-applied challenge.

Georgiacarry.org, 2015 WL 3555822, at *8.[34]

The Eleventh Circuit also strongly hinted that the Corps' generalized public safety concerns would not pass muster in an as applied challenge:

> [W]e lack much of the basic information we would need to assess the risks found at Allatoona Lake…. All we have before us is an affidavit from a single Corps Park Ranger that speaks in generalities about the presence of visitors and their potential sources of conflict. We also have no evidence about the dangers currently facing Allatoona visitors, including the frequency and nature of crimes committed or of altercations amongst visitors…. *In sum, we do not have before us any empirical data that might aid in assessing the fit between the challenged regulation and the government's asserted objective*.

Georgiacarry.org, 2015 WL 3555822, at *9 (emphasis added) (footnote omitted).

Similarly, in the instant case, the Corps failed to produce particularized evidence that would "aid" this Court in "assessing the fit between the challenged regulation and the government's asserted objective." Because the Corps has the burden of proof, whether the level of scrutiny is strict or intermediate, it has to suffer the consequence of its failure to produce the requisite evidence. Therefore, this Court should affirm the judgment of the District Court.

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[34] The Allatoona Dam attracts approximately over 6 million visitors each year (*id*. at *9 n.9), in contrast to Dworshak Dam and Reservoir, which attracts only approximately 150,000 visitors each year. Addendum A. This order of magnitude difference proves that all Corps-managed lands are not identical and proves that the Corps has not satisfied its burden of proof in the instant case.

V. THE PERMANENT INJUNCTION IS APPROPRIATELY LIMITED.

After holding the Corps' ban unconstitutional, the District Court permanently enjoined the Corps from enforcing its ban in the State of Idaho, where Plaintiffs reside and primarily recreate. ER4, ER13. The Corps challenge the scope of the permanent injunction by arguing that it should be limited to only Plaintiffs. Corps Br. at 26. The Corps' argument is unavailing.

"A district court has considerable discretion in fashioning suitable relief and defining the terms of an injunction. Appellate review of those terms 'is correspondingly narrow.'" *Lamb-Weston, Inc. v. McCain Foods, Ltd*., 941 F.2d 970, 974 (9th Cir. 1991) (affirming worldwide preliminary injunction) (quoting *Coca–Cola Co. v. Overland, Inc*., 692 F.2d 1250, 1256 n.16 (9th Cir. 1982)). Although an overbroad injunction may be an abuse of discretion, the District Court appropriately limited the scope of the injunction to Corps-managed lands in Idaho.

For example, if this Court affirms the District Court's judgment that the Corps' ban is unconstitutional, but limits the scope to just Plaintiffs, nothing would prevent other law-abiding, responsible citizens in Idaho from suing the Corps for declaratory and injunctive relief over its unconstitutional ban. If that were to happen, the Corps would surely lose, either on *stare decisis* or collateral estoppel grounds, and in the process needlessly waste taxpayer money. In addition, it would be pure folly for the Corps to seek to enforce its unconstitutional ban in

Idaho. If it did, it would surely lose, and in the process needlessly waste judicial resources.

Instead of worrying about the scope of the permanent injunction, the Corps should be focusing its efforts on making 36 C.F.R. § 327.13(a) constitutional. As noted by the District Court, the regulation "is simply too broad. Drafted long before *Heller* ... [the] regulation needs to be brought up to date." ER28. Accordingly, this Court should affirm the scope of the District Court's permanent injunction because it is appropriately limited and is in the best interests of the Corps, the taxpayers, and the judiciary.

CONCLUSION

This Court should affirm the judgment of the District Court.

Dated this 8th day of July 2015.

Respectfully submitted,

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STATEMENT OF RELATED CASES

The undersigned is unaware of any pending related cases.

Dated this 8th day of July 2015.

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CERTIFICATE OF COMPLIANCE

I certify that, pursuant to Fed. R. App. P 32(a)(7)(C) and Ninth Circuit Rule 32-1, this brief is proportionately spaced, has a typeface of 14 points or more, and contains 13,891 words.

Dated this 8th day of July 2015.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing Appellees' Answering Brief and the attached Appellees' Supplemental Excerpts of Record with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on this 8th day of July 2015.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated this 8th day of July 2015.

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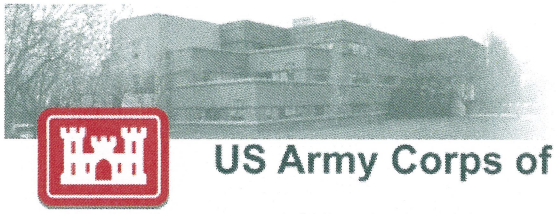
ADDENDUM A



US Army Corps of Engineers

Walla Walla District

Search Walla Walla District

Dworshak Dam and Reservoir

Dworshak Dam
This congressionally authorized project includes Dworshak Dam, Dworshak Reservoir lands, powerhouse, recreation facilities, wildlife mitigation and Dworshak National Fish Hatchery. Since 1972, $2,836,000 in potential flood damages have been prevented by the project. The project has a straight concrete gravity dam with a structural height of 717 feet and a crest length of 3,287 feet at elevation 1,613 Mean Sea Level (MSL). The dam is located on the North Fork Clearwater River at River Mile 1.9. The dam is the highest straight-axis concrete dam in the Western Hemisphere. Only two other dams in the United States exceed it in height.

Project Information

Collapse All Expand All
⊞ Dworshak National Fish Hatchery
⊟ Project Fact Sheet

Authorization
The project was authorized by the Flood Control Act of 1962.

Progress
Construction of the dam began in 1966, and the project became operational for flood damage reduction in June 1972. Power came online in March 1973. Three power generating units are in service. The development of recreational facilities along the reservoir are complete, and all facilities are operational. A multi-level power intake structure on the upstream face of the dam, which duplicates natural river water temperatures downstream to promote the continuance of existing fish runs, is operational.
Log-handling facilities were completed in May 1979. The facilities were used by the timber industry through the mid-1980s when development of back-country roads provided more cost-effective transportation routes. Mitigation land acquisition and the development of a wildlife browse area is complete.

Dworshak Dam
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Dworshak Recreation

Dworshak Lake Maps

Lake Maps

Links

Dworshak Reservoir Operations
Water Management Data ...

Dworshak Public Use Plan

Public Use Plan
Land Use Maps

two other dams in the United States exceed it in height.

Reservoir
Dworshak Reservoir has a gross storage capacity of 3,468,000 acre-feet, of which about 2 million acre-feet is used for local and regional flood control; and for at-site and downstream power generation. At elevation 1,600 MSL, the reservoir is about 54 miles long, has a surface area of about 20,000 acres and extends into the Bitterroot Mountains. The reservoir provides substantial recreational and wildlife benefits.

Generators
The powerhouse has two 90,000-kilowatt units and one 220,000-kilowatt unit – 400 megawatt total powerhouse capacity. During fiscal year 2011, 2.34 billion kilowatt hours of electricity were produced.

Fisheries & Wildlife Mitigation
The filling of the reservoir resulted in the loss of about 15,000 acres of terrestrial habitat. The greatest loss of wildlife habitat was the winter range for Rocky Mountain elk and white-tailed deer. To offset this loss, mitigation lands have been developed and are managed for winter range. About 7,000 acres were purchased are managed specifically for elk mitigation.

The construction of Dworshak Dam resulted in blocking anadromous steelhead trout and converting a river habitat to a reservoir. Mitigation for fish losses led to completion of the Dworshak National Fish Hatchery, constructed and maintained by the Corps and operated by the U.S. Fish and Wildlife Service. The Dworshak hatchery is the largest steelhead hatchery in the world. After Dworshak Reservoir was filled, kokanee salmon and smallmouth bass were stocked and became self-sustaining in the reservoir. The abundance of kokanee salmon in the reservoir has made it a favored sport species in the reservoir.

Lands
The project contains about 50,800 acres. At normal full pool, the surface area of Dworshak Reservoir is about 20,000 acres. There are about 30,000 acres of project lands surrounding the reservoir used for public recreation purposes, wildlife habitat, wildlife mitigation and log-handling facilities. These include federally owned lands managed by the Corps, as well as easement lands managed by the U.S. Forest Service to which the Corps has flowage easement rights. Recreation opportunities include boating, water-skiing, fishing, developed and primitive camping, picnicking, hiking and hunting. Boat launching is available at six locations. Visitation to Dworshak during fiscal year 2009 was 146,483.

People
About 45 Walla Walla District employees work at the Dworshak Project. They serve as electricians, mechanics, welders, a forester, utility workers, heavy equipment operators, park rangers, biologists, environmental resource specialists, administrative staff, engineers and maintenance workers. Together, they ensure the safe and continuous operation of the project.

Budget
During fiscal year 2011, total expenditures were $11,241,215 for the Dworshak Project.

References
Annual Report of the Chief of Engineers on Civil Works Activities, Fiscal Year 2011, Department of the Army Corps of Engineers, Extract Report of the Walla Walla District.

⊞ Project Pertinent Data

Water Data

Dworshak water temp data feed

ADDENDUM B

PL 111-24, May 22, 2009, 123 Stat 1734

UNITED STATES PUBLIC LAWS

111th Congress - First Session

Convening January 04, 2009

Additions and Deletions are not identified in this database.
Vetoed provisions within tabular material are not displayed

PL 111-24 [HR 627]
May 22, 2009
CREDIT CARD ACCOUNTABILITY RESPONSIBILITY AND DISCLOSURE ACT OF 2009 (CREDIT CARD ACT OF 2009)

An Act To amend the Truth in Lending Act to establish fair and transparent practices relating to the extension of credit under an open end consumer credit plan, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

***1764**

"Such rulemaking shall relate to unfair or deceptive acts or practices regarding mortgage loans, which may include unfair or deceptive acts or practices involving loan modification and foreclosure rescue services."; and

(C) by adding at the end the following:

"(2) Paragraph (1) shall not be construed to authorize the Federal Trade Commission to promulgate a rule with respect to an entity that is not subject to enforcement of the Federal Trade Commission Act (15 U.S.C. 41 et seq.) by the Commission.

"(3) Before issuing a final rule pursuant to the proceeding initiated under paragraph (1), the Federal Trade Commission shall consult with the Federal Reserve Board concerning any portion of the proposed rule applicable to acts or practices to which the provisions of the Truth in Lending Act (15 U.S.C. 1601 et seq.) may apply.

"(4) The Federal Trade Commission shall enforce the rules issued under paragraph (1) in the same manner, by the same means, and with the same jurisdiction, powers, and duties as though

all applicable terms and provisions of the Federal Trade Commission Act (15 U.S.C. 41 et seq.) were incorporated into and made part of this section."; and

(2) in subsection (b)--

(A) by striking so much as precedes paragraph (2) and inserting the following:

"(b)(1) Except as provided in paragraph (6), in any case in which the attorney general of a State has reason to believe that an interest of the residents of that State has been or is threatened or adversely affected by the engagement of any person subject to a rule prescribed under subsection (a) in a practice that violates such rule, the State, as parens patriae, may bring a civil action on behalf of the residents of the State in an appropriate district court of the United States or other court of competent jurisdiction--

"(A) to enjoin that practice;

"(B) to enforce compliance with the rule;

"(C) to obtain damages, restitution, or other compensation on behalf of residents of the State; or

"(D) to obtain penalties and relief provided by the Federal Trade Commission Act and such other relief as the court considers appropriate."; and

(B) in paragraphs (2), (3), and (6), by striking "Commission" each place it appears and inserting "primary Federal regulator".

<< 15 USCA § 1638 NOTE >>

(b) EFFECTIVE DATE.--The amendments made by subsection (a) shall take effect on March 12, 2009.

<< 16 USCA § 1a-7b >>

SEC. 512. PROTECTING AMERICANS FROM VIOLENT CRIME.

(a) CONGRESSIONAL FINDINGS.--Congress finds the following:

(1) The Second Amendment to the Constitution provides that "the right of the people to keep and bear Arms, shall not be infringed".

(2) Section 2.4(a)(1) of title 36, Code of Federal Regulations, provides that "except as otherwise provided in this section and parts 7 (special regulations) and 13 (Alaska regulations), the following are prohibited: (i) Possessing a weapon, trap or net (ii) Carrying a weapon, trap or net (iii) Using a weapon, trap or net".

***1765**

(3) Section 27.42 of title 50, Code of Federal Regulations, provides that, except in special circumstances, citizens of the United States may not "possess, use, or transport firearms on national wildlife refuges" of the United States Fish and Wildlife Service.

(4) The regulations described in paragraphs (2) and (3) prevent individuals complying with Federal and State laws from exercising the second amendment rights of the individuals while at units of--

(A) the National Park System; and

(B) the National Wildlife Refuge System.

(5) The existence of different laws relating to the transportation and possession of firearms at different units of the National Park System and the National Wildlife Refuge System entrapped law-abiding gun owners while at units of the National Park System and the National Wildlife Refuge System.

(6) Although the Bush administration issued new regulations relating to the Second Amendment rights of law-abiding citizens in units of the National Park System and National Wildlife Refuge System that went into effect on January 9, 2009--

(A) on March 19, 2009, the United States District Court for the District of Columbia granted a preliminary injunction with respect to the implementation and enforcement of the new regulations; and

(B) the new regulations--

(i) are under review by the administration; and

(ii) may be altered.

(7) Congress needs to weigh in on the new regulations to ensure that unelected bureaucrats and judges cannot again override the Second Amendment rights of law-abiding citizens on 83,600,000 acres of National Park System land and 90,790,000 acres of land under the jurisdiction of the United States Fish and Wildlife Service.

(8) The Federal laws should make it clear that the second amendment rights of an individual at a unit of the National Park System or the National Wildlife Refuge System should not be infringed.

(b) PROTECTING THE RIGHT OF INDIVIDUALS TO BEAR ARMS IN UNITS OF THE NATIONAL PARK SYSTEM AND THE NATIONAL WILDLIFE REFUGE SYSTEM.--The Secretary of the Interior shall not promulgate or enforce any regulation that prohibits an individual from possessing a firearm including an assembled or functional firearm in any unit of the National Park System or the National Wildlife Refuge System if--

(1) the individual is not otherwise prohibited by law from possessing the firearm; and

(2) the possession of the firearm is in compliance with the law of the State in which the unit of the National Park System or the National Wildlife Refuge System is located.

SEC. 513. GAO STUDY AND REPORT ON FLUENCY IN THE ENGLISH LANGUAGE AND FINANCIAL LITERACY.

(a) STUDY.--The Comptroller General of the United States shall conduct a study examining--

(1) the relationship between fluency in the English language and financial literacy; and
***1766**

(2) the extent, if any, to which individuals whose native language is a language other than English are impeded in their conduct of their financial affairs.

ADDENDUM C

Table 1. Annual Estimates of the Resident Population for the United States, Regions, States, and Puerto Rico: April 1, 2010 to July 1, 2014							
Geographic Area	April 1, 2010		Population Estimate (as of July 1)				
	Census	Estimates Base	2010	2011	2012	2013	2014
United States	308,745,538	308,758,105	309,347,057	311,721,632	314,112,078	316,497,531	318,857,056
Northeast	55,317,240	55,318,348	55,381,690	55,635,670	55,832,038	56,028,220	56,152,333
Midwest	66,927,001	66,929,898	66,972,390	67,149,657	67,331,458	67,567,871	67,745,108
South	114,555,744	114,562,951	114,871,231	116,089,908	117,346,322	118,522,802	119,771,934
West	71,945,553	71,946,908	72,121,746	72,846,397	73,602,260	74,378,638	75,187,681
Alabama	4,779,736	4,780,127	4,785,822	4,801,695	4,817,484	4,833,996	4,849,377
Alaska	710,231	710,249	713,856	722,572	731,081	737,259	736,732
Arizona	6,392,017	6,392,310	6,411,999	6,472,867	6,556,236	6,634,997	6,731,484
Arkansas	2,915,918	2,915,958	2,922,297	2,938,430	2,949,300	2,958,765	2,966,369
California	37,253,956	37,254,503	37,336,011	37,701,901	38,062,780	38,431,393	38,802,500
Colorado	5,029,196	5,029,324	5,048,575	5,119,661	5,191,709	5,272,086	5,355,866
Connecticut	3,574,097	3,574,096	3,579,345	3,590,537	3,594,362	3,599,341	3,596,677
Delaware	897,934	897,936	899,731	907,829	916,881	925,240	935,614
District of Columbia	601,723	601,767	605,210	620,427	635,040	649,111	658,893
Florida	18,801,310	18,804,623	18,852,220	19,107,900	19,355,257	19,600,311	19,893,297
Georgia	9,687,653	9,688,681	9,714,464	9,813,201	9,919,000	9,994,759	10,097,343
Hawaii	1,360,301	1,360,301	1,363,950	1,378,251	1,392,766	1,408,987	1,419,561
Idaho	1,567,582	1,567,652	1,570,639	1,583,780	1,595,590	1,612,843	1,634,464
Illinois	12,830,632	12,831,587	12,840,097	12,858,725	12,873,763	12,890,552	12,880,580
Indiana	6,483,802	6,484,192	6,490,308	6,516,560	6,537,632	6,570,713	6,596,855
Iowa	3,046,355	3,046,869	3,050,295	3,064,904	3,075,935	3,092,341	3,107,126
Kansas	2,853,118	2,853,132	2,858,949	2,869,965	2,885,966	2,895,801	2,904,021
Kentucky	4,339,367	4,339,349	4,349,838	4,370,038	4,383,465	4,399,583	4,413,457
Louisiana	4,533,372	4,533,479	4,545,581	4,575,972	4,604,744	4,629,284	4,649,676
Maine	1,328,361	1,328,361	1,327,361	1,327,930	1,328,592	1,328,702	1,330,089
Maryland	5,773,552	5,773,785	5,788,101	5,843,833	5,891,819	5,938,737	5,976,407
Massachusetts	6,547,629	6,547,817	6,564,073	6,612,270	6,655,829	6,708,874	6,745,408
Michigan	9,883,640	9,884,133	9,876,498	9,875,736	9,884,781	9,898,193	9,909,877
Minnesota	5,303,925	5,303,925	5,310,418	5,348,036	5,380,615	5,422,060	5,457,173
Mississippi	2,967,297	2,968,103	2,970,811	2,978,464	2,986,137	2,992,206	2,994,079
Missouri	5,988,927	5,988,923	5,996,085	6,010,544	6,025,281	6,044,917	6,063,589
Montana	989,415	989,417	990,575	997,661	1,005,163	1,014,864	1,023,579
Nebraska	1,826,341	1,826,341	1,829,865	1,842,232	1,855,487	1,868,969	1,881,503
Nevada	2,700,551	2,700,692	2,703,493	2,718,586	2,755,245	2,791,494	2,839,099
New Hampshire	1,316,470	1,316,466	1,316,517	1,318,109	1,321,297	1,322,616	1,326,813
New Jersey	8,791,894	8,791,936	8,803,580	8,842,614	8,876,000	8,911,502	8,938,175
New Mexico	2,059,179	2,059,192	2,064,950	2,078,407	2,084,594	2,086,895	2,085,572
New York	19,378,102	19,378,112	19,400,867	19,521,745	19,607,140	19,695,680	19,746,227

Table 1. Annual Estimates of the Resident Population for the United States, Regions, States, and Puerto Rico: April 1, 2010 to July 1, 2014

Geographic Area	April 1, 2010		Population Estimate (as of July 1)				
	Census	Estimates Base	2010	2011	2012	2013	2014
North Carolina	9,535,483	9,535,691	9,559,488	9,651,502	9,748,181	9,848,917	9,943,964
North Dakota	672,591	672,591	674,345	685,242	701,705	723,857	739,482
Ohio	11,536,504	11,536,725	11,540,070	11,544,757	11,550,901	11,572,005	11,594,163
Oklahoma	3,751,351	3,751,616	3,759,481	3,786,527	3,817,059	3,853,118	3,878,051
Oregon	3,831,074	3,831,073	3,837,083	3,867,644	3,898,684	3,928,068	3,970,239
Pennsylvania	12,702,379	12,702,884	12,711,077	12,743,995	12,770,043	12,781,296	12,787,209
Rhode Island	1,052,567	1,052,931	1,053,078	1,052,020	1,052,637	1,053,354	1,055,173
South Carolina	4,625,364	4,625,401	4,636,290	4,673,054	4,722,621	4,771,929	4,832,482
South Dakota	814,180	814,191	816,192	824,171	834,504	845,510	853,175
Tennessee	6,346,105	6,346,275	6,356,628	6,398,389	6,455,177	6,497,269	6,549,352
Texas	25,145,561	25,146,104	25,245,717	25,657,477	26,094,422	26,505,637	26,956,958
Utah	2,763,885	2,763,885	2,774,346	2,815,324	2,855,194	2,902,787	2,942,902
Vermont	625,741	625,745	625,792	626,450	626,138	626,855	626,562
Virginia	8,001,024	8,001,023	8,025,376	8,110,188	8,193,422	8,270,345	8,326,289
Washington	6,724,540	6,724,543	6,741,911	6,822,112	6,896,325	6,973,742	7,061,530
West Virginia	1,852,994	1,853,033	1,854,176	1,854,982	1,856,313	1,853,595	1,850,326
Wisconsin	5,686,986	5,687,289	5,689,268	5,708,785	5,724,888	5,742,953	5,757,564
Wyoming	563,626	563,767	564,358	567,631	576,893	583,223	584,153
Puerto Rico	3,725,789	3,726,157	3,721,527	3,686,771	3,642,281	3,595,839	3,548,397

Note: The estimates are based on the 2010 Census and reflect changes to the April 1, 2010 population due to the Count Question Resolution program and geographic program revisions. See Geographic Terms and Definitions at http://www.census.gov/popest/about/geo/terms.html for a list of the states that are included in each region. All geographic boundaries for the 2014 population estimates series are defined as of January 1, 2014. For population estimates methodology statements, see http://www.census.gov/popest/methodology/index.html.

Suggested Citation:
Table 1. Annual Estimates of the Resident Population for the United States, Regions, States, and Puerto Rico: April 1, 2010 to July 1, 2014 (NST-EST2014-01)
Source: U.S. Census Bureau, Population Division
Release Date: December 2014

No. 14-36049

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ELIZABETH E. NESBITT; ALAN C. BAKER,

Plaintiffs-Appellees,

v.

U.S. ARMY CORPS OF ENGINEERS; JOHN McHUGH, Secretary of the Army; THOMAS BOSTICK, Lieutenant General, Commanding General and Chief of Engineers; JOHN S. KEM, Colonel, Northwestern Division Commander; ANDREW D. KELLY, Lieutenant Colonel, Walla Walla District Commander and District Engineer,

Defendants-Appellants.

On Appeal from the U.S. District Court for the District of Idaho,
Civil Action No. 3:13-cv-00336-BLW
The Honorable B. Lynn Winmill, U.S. District Court Judge

APPELLEES' SUPPLEMENTAL EXCERPTS OF RECORD

Steven J. Lechner
Mountain States Legal Foundation
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Lakewood, Colorado 80227
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Attorney for Plaintiffs-Appellees

INDEX

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

ELIZABETH E. MORRIS; and ALAN C. BAKER, Plaintiffs, v. U.S. ARMY CORPS OF ENGINEERS, et al., Defendants.	Case No. **DECLARATION OF ALAN C. BAKER**

I, Alan C. Baker, declare as follows:

1. I am over 18 years of age and I am competent to testify from my first-hand knowledge as to the matters set forth in this Declaration.

2. I am a citizen of the United States and have resided in Latah County, Idaho, for six years.

3. I am a NRA-Certified Home Firearm Safety, Personal Protection In The Home, Rifle, Pistol, and Shotgun Instructor, as well as a Utah-certified Concealed Firearms Instructor. I am licensed to carry a concealed handgun pursuant to the laws of the States of Idaho, Utah, Oregon, and Arizona. True and accurate copies of these credentials are attached hereto as Exhibit Baker-1.

4. I am over 21 years old, have no history of substance abuse, have no criminal record, am not subject to a protection order, have demonstrated competency with a handgun, and have been approved by the Latah County Sheriff to carry a concealed handgun almost everywhere in the State.

5. I regularly carry a handgun for self-defense.

6. I am a life-long outdoorsman. I regularly camp and hunt in Idaho and have concrete plans to camp on Corps-administered public lands in the future.

7. I fear arrest, prosecution, incarceration, and/or fine if I were to possess a functional firearm while recreating on lands administered by Defendants.

8. On March 22, 2013, I secured a reservation for a campsite at Dent Acres for May 31, 2013, to June 2, 2013. A true and accurate copy of that reservation is attached hereto as Exhibit Baker-2.

9. On April 22, 2013, my counsel contacted District Commander Andrew D. Kelley by letter to request that he recognize my right to bear arms pursuant to 36 C.F.R. § 327.13(a)(4). A true and accurate copy of that letter is attached hereto as Exhibit Baker-3.

10. To date, I have received no response from District Commander Kelley.

11. On May 31, 2013, I camped at Dent Acres as planned, but I could not exercise my right to keep and bear arms due to Defendants' active enforcement of 36 C.F.R. § 327.13.

12. I have reservations to camp at the Corps-administered campground at Macks Creek Park at Lucky Peak Lake from September 27, 2013, to September 29, 2013. A true and accurate copy of that reservation is attached hereto as Exhibit Baker-4.

13. Macks Creek Park is in the Walla Walla District.

14. But for Defendants' active enforcement of 36 C.F.R. § 327.13, I would possess a functional firearm while recreating on Corps-administered public lands.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

DATED this 29th day of July 2013.

Alan C. Baker

MOUNTAIN STATES LEGAL FOUNDATION

2596 South Lewis Way
Lakewood, Colorado 80227
303-292-2021 • FAX 303-292-1980
www.mountainstateslegal.org

April 22, 2013

CERTIFIED MAIL
RETURN RECEIPT # 7004 2510 0006 1985 7096

Lieutenant Colonel Andrew D. Kelly
Walla Walla District Commander and District Engineer
U.S. Army Corps of Engineers
201 North 3rd Avenue
Walla Walla, Washington 99362

Re: Army Corps Firearms Ban, 36 C.F.R. § 327.13

Dear Lieutenant Colonel Kelly:

I write on behalf of my client, Alan Baker. Mr. Baker is a NRA-Certified Home Firearm Safety, Personal Protection In The Home, Rifle, Pistol, and Shotgun Instructor, as well as a Utah Certified Concealed Firearms Instructor. He is licensed in Idaho, Utah, Oregon, and Arizona to carry a concealed handgun. He is also an avid outdoorsmen and he regularly camps throughout Idaho, Nevada, Washington, and Montana. Mr. Baker is also a board member of the Idaho Sport Shooters Alliance, a statewide group dedicated to defending the constitutional rights to keep and bear arms in Idaho.

Mr. Baker plans to camp on Army Corps of Engineers ("Corps") property in the Walla Walla District. Specifically, Mr. Baker has a reservation to camp at Dworshak Dam and Reservoir from May 31, 2013, to June 2, 2013. He also has plans to return to Dworshak and/or other Corps property to camp later this summer. Mr. Baker regularly carries a handgun for self-defense, and when Mr. Baker camps he carries a firearm for personal protection.

Mr. Baker intends to exercise his right to bear arms on Corps property, but is prevented from doing so by the Corps's regulatory firearms ban, 36 C.F.R. § 327.13 (The possession of loaded firearms, ammunition, loaded projectile firing devices, bows and arrows, crossbows, or other weapons is prohibited . . . ."). Mr. Baker fears prosecution under 36 C.F.R. § 327.13 if he carries a firearm on Corps property or possesses a firearm in his tent. Moreover, the threat of prosecution remains even if he stores a firearm in his car while camping, boating, or otherwise recreating, because he normally must park on Corps property.

The Corps's total ban on firearms possession violates "the individual right to possess and carry weapons in case of confrontation" protected by the Second Amendment. *District of Columbia v. Heller*, 554 U.S. 570, 592 (2008); *McDonald v. Chicago*, 561 U.S. ___, 130 S.Ct.

3020, 3042 (2010). This regulatory prohibition is broader than the federal statute governing firearms on federal land, which recognizes the right of individuals to possess firearms in most federal facilities "incident to hunting or other lawful purposes." 18 U.S.C. § 930(d)(3).

The broad reach of 36 C.F.R. § 327.13 "makes it impossible for citizens to use [firearms] for the core lawful purpose of self-defense and is hence unconstitutional." *Heller*, 554 U.S. at 630. My client's right to bear arms is violated by 36 C.F.R. § 327.13 when he is traveling to, from, or through publicly-accessible Corps property because the regulatory ban does not even allow individuals to safely store a firearm in their vehicles. An individual who has a functional firearm in his glove compartment for self-defense would violate the Corps ban simply by driving onto Corps property. The Corps's regulatory ban effectively denies the right to keep and bear arms not just on Corps property, but everywhere a law-abiding gun owner travels before and after visiting Corps property.

Mr. Baker respectfully requests that you recognize his right to bear arms pursuant to your authority under 36 C.F.R. § 327.13(a)(4). Given Mr. Baker's upcoming May 31 camping trip and his future camping plans, I will treat this request as denied if I do not receive a response within 30 calendar days of your receipt of this letter. If you decide not to recognize his right to bear arms, my client will avail himself of other legal remedies available to him.

Thank you for your consideration in this matter.

Sincerely,

MOUNTAIN STATES LEGAL FOUNDATION

James M. Manley
Staff Attorney

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

ELIZABETH E. MORRIS; and
ALAN C. BAKER,

Plaintiffs,

v.

U.S. ARMY CORPS OF ENGINEERS, et al.,

Defendants.

Case No.

DECLARATION OF ELIZABETH E. MORRIS

I, Elizabeth E. Morris, declare as follows:

1. I am over 18 years of age and I am competent to testify from my first-hand knowledge as to the matters set forth in this Declaration.

2. I am a citizen of the United States and have resided in Nez Perce County, Idaho, for three years.

3. Due to threats and physical attacks made against me by a former neighbor, the Nez Perce County Sheriff issued me an emergency license to carry a concealed handgun in 2012. A true and accurate copy of that license is attached hereto as Exhibit Morris-1.

4. I am over 21 years old, have no history of substance abuse, have no criminal record, am not subject to a protection order, have demonstrated competency with a handgun, and have been approved by the Nez Perce County Sheriff to carry a concealed handgun almost everywhere in the State.

5. I regularly carry a handgun for self-defense.

6. I regularly recreate on lands and waters administered by Defendants during the summer.

7. I fear arrest, prosecution, incarceration, and/or fine if I were to possess a functional firearm while recreating on Corps-administered public lands.

8. I use Corps-administered public lands near the Snake River in Lewiston, Idaho, to boat with friends, regularly walk the Corps-administered paths in the area with my dog and/or my family, and must travel across Corps-administered public lands to reach Hells Gate State Park.

9. These Corps-administered public lands are in the Walla Walla District and include the Lower Granite Lake Greenbelt Trail, Swallows Park, the Lewiston Levee Parkway, and the Lewiston Levee Recreation Trail.

10. I also frequent Dworshak Dam and Reservoir and the surrounding areas to hike.

11. I have considered camping at Dworshak, but have decided not to because Defendants' regulations make it unlawful for me to possess a functional firearm while camping.

12. In summer 2012, I used Corps-administered public lands approximately 1–2 times a week.

13. I have done exactly the same in summer 2013 and plan to continue to do so in the future.

14. Security personnel do not electronically screen persons using the Corps-administered public lands I frequent to determine whether persons are carrying firearms or weapons of any kind.

15. Security personnel do not restrict access to the Corps-administered public lands I frequent to only those persons who have been screened and determined to be unarmed.

16. On June 10, 2013, my counsel contacted District Commander Andrew D. Kelly by letter to request that he recognize my right to bear arms pursuant to 36 C.F.R. § 327.13(a)(4). A true and accurate copy of that letter is attached hereto as Exhibit Morris-2.

17. To date, I have received no response from District Commander Kelley.

18. But for Defendants' active enforcement of 36 C.F.R. § 327.13, I would possess a functional firearm while recreating on Corps-administered public lands.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

DATED this 30th day of July 2013.

Elizabeth E. Morris

MOUNTAIN STATES LEGAL FOUNDATION

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Lakewood, Colorado 80227
303-292-2021 • FAX 303-292-1980
www.mountainstateslegal.org

June 10, 2013

CERTIFIED MAIL
RETURN RECEIPT #7000 0520 0023 3266 1490

Lieutenant Colonel Andrew D. Kelly
Walla Walla District Commander and District Engineer
U.S. Army Corps of Engineers
201 North 3rd Avenue
Walla Walla, Washington 99362

Re: Army Corps Firearms Ban, 36 C.F.R. § 327.13

Dear Lieutenant Colonel Kelly:

I write on behalf of my client, a young woman who resides in Nez Perce County, Idaho. Due to threats and physical attacks made against her by a former neighbor, the Nez Perce County Sheriff issued my client an emergency license to carry a concealed handgun in 2012. She regularly carries a handgun for self-defense.[1]

My client's summertime recreation regularly takes her to lands and waters administered by the Corps. Specifically, she uses Army Corps lands near the Snake River in Lewiston, Idaho, to set out boating with friends, regularly walks the Army Corps paths in the area with her dog and/or her family, and also must travel across Corps-administered property to reach Hells Gate State Park. She also frequents Dworshak Dam and the surrounding areas to hike and swim. Last summer she used Corps-administered property approximately 1–2 times a week. She plans to do exactly the same this summer.

My client intends to exercise her right to bear arms on Corps property, but is prevented from doing so by the Corps's regulatory firearms ban, 36 C.F.R. § 327.13 (The possession of loaded firearms, ammunition, loaded projectile firing devices, bows and arrows, crossbows, or other weapons is prohibited . . . ."). My client fears prosecution under 36 C.F.R. § 327.13 if she carries a firearm on Corps property. Moreover, the threat of prosecution remains even if she stores a firearm in her car while hiking, boating, or otherwise recreating, because she normally must park on Corps property.

---

[1] The unstable individual who made these threats and physical attacks knows my client by name. Accordingly, she does not wish to broadcast the fact that she is regularly disarmed due to 36 C.F.R. § 327.13. *See United States v. Doe*, 655 F.2d 920, 922 n.1 (9th Cir. 1981). Please feel free to contact me if you have questions about my client's identity.

The Corps's total ban on firearms possession violates "the individual right to possess and carry weapons in case of confrontation" protected by the Second Amendment. *District of Columbia v. Heller*, 554 U.S. 570, 592 (2008); *McDonald v. Chicago*, 561 U.S. ___, 130 S.Ct. 3020, 3042 (2010). This regulatory prohibition is broader than the federal statute governing firearms on federal land, which recognizes the right of individuals to possess firearms in most federal facilities "incident to hunting or other lawful purposes." 18 U.S.C. § 930(d)(3).

The broad reach of 36 C.F.R. § 327.13 "makes it impossible for citizens to use [firearms] for the core lawful purpose of self-defense and is hence unconstitutional." *Heller*, 554 U.S. at 630. My client's right to bear arms is violated by 36 C.F.R. § 327.13 when she is traveling to, from, or through publicly-accessible Corps property because the regulatory ban does not even allow individuals to safely store a firearm in their vehicles. An individual who has a functional firearm in her glove compartment for self-defense would violate the Corps ban simply by driving onto Corps property. The Corps's regulatory ban effectively denies the right to keep and bear arms not just on Corps property, but everywhere a law-abiding gun owner travels before and after visiting Corps property.

My client respectfully requests that you recognize her right to bear arms pursuant to your authority under 36 C.F.R. § 327.13(a)(4). Given my client's plans to recreate on Corps-administered property this summer, I will treat this request as denied if I do not receive a response within 30 calendar days of your receipt of this letter. If you decide not to recognize her right to beat arms, my client will avail herself of other legal remedies available to her.

Thank you for your consideration in this matter.

Sincerely,

MOUNTAIN STATES LEGAL FOUNDATION

James M. Manley
Staff Attorney

INFORMATION PAPER

CECW-ZD
20 March 2013

SUBJECT: Civil Works Program Statistics

PURPOSE: To provide a scope of the Civil Works mission carried out by the U.S. Army Corps of Engineers. *Statistics are as of 30 September 2012, or for the fiscal year ending that date, unless otherwise specified as most recent data available.*

FACTS:

1. PEOPLE
--Civilian employee work years (FTE's): **23,033**
--Military personnel authorized: **294**

2. DIVISIONS & DISTRICTS:
-- Number of division offices with Civil Works mission: **8**
-- Number of district offices: **38**

3. FUNDING:
--Fiscal Year 2012 appropriations: **$6.721 billion**.
(**$4.997 billion** regular plus **$1.724 billion** supplemental for repair/ rehabilitation of projects affected by 2011 Floods)
USACE is operating under a Continuing Resolution in FY13 at FY12 regular appropriation levels plus 0.612% until 27 Mar 13.
- -- Construction: **$1.694 billion**
- -- Operation and Maintenance: **$2.946 billion**
- -- Mississippi River and Tributaries: **$1.054 billion**
- -- Investigations (e.g. new project studies): **$125 million**
- -- Regulatory Program: **$193 million**
- -- Flood Control & Coastal Emergencies: **$415 million**
- -- Formerly Used Sites Remedial Action Pgm. (FUSRAP radiological environmental cleanup): **$109 million**
- -- Expenses and Other: **$185 million**

-- Other Revenue (estimated)
- -- Non-Federal (cost-sharing - estimated): **$540 million**
- -- Coastal Wetlands Restoration Trust: **$85 million**
- -- Permanent Appropriation: **$15 million**

-- Total program: **$7.361 billion**

4. FUNDING BY BUSINESS LINE (FY 2012, regular appropriation only):
- -- Navigation: **$1.883 billion (37.7%)**
- -- Flood Risk Management: **$1.425 billion (28.5%)**
- -- Environmental (Including FUSRAP& Infrastructure): **$751 million (15.0%)**
- -- Regulatory Programs: **$193 million (3.9%)**
- -- Hydropower: **$192 million (3.8%)**
- -- Recreation: **$243 million (4.9%)**
- -- Water Supply: **$6 million (0.1%)**
- -- Emergency Management: **$119 million (2.4%)**
- -- Executive Direction & Other: **$185 million (3.7%)**

5. APPROPRIATIONS FOR CIVIL WORKS, PAST 50 YEARS (FY 1963-2012 reg. & supp): **$210,975,938,000**
-- Adjusted for inflation to Sep 2012: **$406,739,617,000**

6. PROJECTS UNDER CONSTRUCTION, FY 12: **933**
-- Specifically authorized by Congress: **500**
- -- Flood Risk Management: **236**
- -- Hydropower: **19**
- -- Navigation: **72**
- -- Environmental Restoration: **62**
- -- Environmental Infrastructure: **57**
- -- Shoreline erosion: **54**

-- "Continuing Authorities" Projects: **404** (Nine authorities, including environmental)
-- FUSRAP: **29**

7. FUNDS OBLIGATED: (Current program and prior year funding carryover): **$6,744.132,000**

8. CONTRACTS LET: **$4.76 billion**
- -- To Small Businesses: **$2.31 billion (48.5%)**
- -- Small Disadvantaged Firms: **$898 million (18.9%)**

9. DAMS owned/operated by Corps (all purposes) **702**
-- Tallest dam: **Dworshak Dam, North Fork Clearwater River, ID, 717 ft.**
-- Largest reservoir: **Lake Sakakawea, Garrison Dam, Missouri River, ND, 24,500,000 acre-feet**
-- Largest embankment dam (in entire U.S.): **Fort Peck Dam, Missouri River, MT, 125,628,000 cubic yards**

10. REAL ESTATE
-- USACE owns **136,000** land tracts, totaling more than **7.6 million acres (~11,875 square miles)**
-- USACE manages another **4.1 million acres (~6,400 square miles)**
--Total lake surface area at full pool: **26.25 million acres (41,015 square miles–area slightly larger than Kentucky)**
--Largest lake: **Lake Oahe, ND & SD, 587.5 square miles**

11. NAVIGATION
-- States directly served by Corps ports & waterways: **41 (including all States east of Mississippi River)**
-- Commercial deep draft channels (greater than 14 feet deep) operated/maintained: **13,000 miles**
-- Commercial inland channels operated/ maintained: **12,000 miles (would stretch halfway around the world)**
-- Percentage of U.S. domestic freight carried by water (by ton-miles, excluding air & pipeline): **16%**
-- Navigation lock chambers: **239**, at **193** sites
- --Corps operated and maintained: **227**, at **185** sites
- --Locks chambers in operation over 50 years old: **139**; Average age of locks: **59.1 years**
- --Combined lift of all Corps locks: **6,791 ft.**
- --Highest: **John Day Lock, Columbia R., OR, 113 ft.**
- -- Most cargo moved: **Ohio R. Lock #52, 91.4 million tons** (FY 2012)

-- Coastal, Great Lakes and inland harbors maintained: **926**
- --Harbors handling over 250,000 tons of cargo: **179 (153** Coastal, including **42** Great Lakes, **26** inland)
- --Port handling most cargo: **South Louisiana, 246.5 million tons**
- --Value of foreign commerce handled at ports: **$1.724 trillion**

-- Tonnage handled by U.S. ports and waterways: **2,367.5 million tons**
- --Inbound foreign: **869.1 million tons**, Outbound foreign: 610.4 **million tons**, Domestic: **887.9 million tons**
- --Major commodities: **Crude oil, 472.5 million tons; petroleum products, 531.3 million tons; coal & coke, 325.6 million tons; food & farm products, 283.0 million tons**

12. DREDGING
-- Material dredged (construction and maintenance, preliminary FY 2012 data): **235 million cubic yards**
-- Cost: **$1,211 million.** Average cost per cubic yard: **$5.15**
-- Percentage of material dredged by private firms: **81.3%**
  -- Companies dredging for Corps: **63 (42** small businesses) submitted **347** bids for **160** contracts (**45** of which went to small & emerging businesses)
  -- Percentage of dredging funds going to contractors: **90.3%**
-- Corps-owned dredges: **11 (4** hopper, **7** other)

13. FLOOD RISK MANAGEMENT
--Dams managed by Corps: **702** at **556** projects
--Federal levees built or controlled by Corps: **~14,501 miles**
--Damages prevented by Corps projects, 2012: **$149.6 billion**
  --Damages prevented by Miss. and Missouri River flood risk reduction systems in 2011 floods: **$118 billion**
--Average annual damages prevented by Corps projects (2003-2012): **$37.1 billion**
--Damages prevented per $1 invested (adjusted for inflation), 1928-2012: **$7.89**

14. ENVIRONMENTAL PROTECTION & RESTORATION
--Largest projects ($20M+ in FY11):
  South Florida Ecosystem Restoration Program
  Columbia River Fish Mitigation
  Missouri River Fish & Wildlife Recovery

15. REGULATORY PROGRAM
--Final Actions, FY12: ~ **90,000**
  --Standard Permits and Letters of Permission: **~3,800**
  --Activities covered by Regional General Permits: **~16,000**
  --Covered by Programmatic General Permits: **~8,000**
  --Covered by Nationwide Permits: **~33,000**
  --Permits Denied: **167**
  --Permits Modified: **~3,100**
  --Applications Withdrawn: **~9,800**
  -- "No Permit Required" Determinations: **~10,700**
--Percent of minor permits completed within 60 days: **~89%**
--Jurisdictional Determinations: **~58,000**
--Number of approved mitigation banks: **over 1,100**
--Compliance visits done on **~12%** of mitigation sites and **~35%** of mitigation banks or In Lieu Fee sites

16. HYDROPOWER
--Number of projects in operation: **75**, with **353** generating units
--Installed generating capacity: **23,900** megawatts
--Largest USACE power plants:
  --Capacity - **2,611 megawatts, Chief Joseph Dam, Columbia River, WA**
  --Most units: **27, Chief Joseph Dam, Columbia R., WA**
  --Largest generating unit: **220 megawatts, Dworshak Dam, North Fork Clearwater River, ID**
--Annual power generation: **77.4** billion kilowatt-hours
--Annual gross revenue generated: **~$5 billion**
--Repayment to U.S. Treasury from power sales (estimate): **$1.5 billion**
-- Rank among U.S. hydropower producers: **#1**
--USACE owns & operates **24%** of U.S. hydropower capacity, or **3%** of total U.S. electric capacity
--FERC licensed non-federal power plants at Corps facilities (not counted above): **60**, with **2,300** megawatts capacity

17. RECREATION
--Rank among Federal providers of Outdoor Recreation: **#1**
--Visits per year: **370 million**
-- **10%** of U.S. population visits a Corps project at least once each year
--Number of sites: **4,248** at **422** projects (mostly lakes)
  --**more than 90% of the lakes are near metropolitan areas (within 50 miles of a MSA)**
--Land & water used for recreation: **12 million acres**
  --USACE hosts **20%** of visits to Federal recreation areas on **2%** of Federal lands
--Miles of shoreline: **54,879**
--Number of campsites: **92,844**
--Miles of trails: **7,700**
--Number of boat launch ramps: **3,544**
--Share of all U.S. freshwater lake fishing: **33%**
  --**20,000** fishing tournaments a year
--Spent by visitors at Corps projects: **$16 billion**
  --Jobs (full or part time) supported by visitation: **270,000**
-- Marinas on Corps projects: **511**, with gross fixed assets of **$1 billion**
--Volunteers at Corps projects: **53,000**; Hours worked: **1.9 million,** Value of their labor: **$43 million**

18. WATER SUPPLY
--Total capacity of Corps lakes: **329.2 million acre-feet**
--Total authorized municipal & industrial water supply storage: **9.76 million acre-feet**
--Projects with authorized municipal & industrial water supply storage: **134 in 25 States**
--Dollars returned to U.S. Treasury per $1 funded (not adjusted for inflation), 2007-2011: **$10.44.**
--Yield from water supply storage: **6.5 billion gallons per day** (sufficient to provide daily indoor needs **of 96 million** households)
--Projects with authorized irrigation storage: **38,** in **12** States
  --Joint use storage space for irrigation and other purposes; **70.97 million acre-feet**
-- Acres irrigated: **2.38 million (3,719 square miles)**

19. EMERGENCY OPERATIONS
-- Largest events: **Continued recovery from Mississippi and Missouri River Floods; Hurricane Irene; Tropical Storm Lee; "October Surprise" Snowstorm (Northeast U.S.); Midwest Drought (channel dredging and rock removal in Mississippi River); Ohio Valley/Mid Atlantic "Derecho" (Jun 2012); Hurricane Isaac (New Orleans Area, Aug 2012)**

20. SUPPORT TO OTHER (NON-DEFENSE) AGENCIES:
-- Number of Federal agencies supported: **70+**
-- Expenditures for FY12: **$ 1.6 billion**
-- Biggest Customers:
  Dept. of Homeland Security – Customs & Border Protection, $511 million
  Dept. of Veterans Affairs, $340 million
  Environmental Protection Agency, $298 million
  Dept. of Homeland Security – Federal Emergency Management Agency, $94 million
  Dept. of State, $25 million
21 SUPPORT TO OPERATION *ENDURING FREEDOM:*
-- Personnel engaged (17 Dec 2012): **814 (92 military/722 civilian)**

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

ELIZABETH E. MORRIS; and ALAN C. BAKER, Plaintiffs, v. U.S. ARMY CORPS OF ENGINEERS, et al., Defendants.	Case No. 3:13-CV-00336-BLW **DECLARATION OF ALAN C. BAKER**

I, Alan C. Baker, declare as follows:

1. I am over 18 years of age and I am competent to testify from my first-hand knowledge as to the matters set forth in this Declaration.

2. I am a citizen of the United States and have resided in Latah County, Idaho, for six years.

3. I am a life-long outdoorsman. For the last 15 years I have regularly camped and hunted in Idaho. On several occasions, I have camped on Corps-administered public lands, including Chief Timothy Park at Lower Granite Lake and Dent Acres Campground at Dworshak Dam and Reservoir.

4. I have concrete plans to camp on Corps-administered public lands in the future.

5. When the Complaint in this case was filed, I had a reservation to camp at Macks Creek Park at Lucky Peak Lake from September 27, 2013, to September 29, 2013.

6. On September 28, 2013, I attended a local training class to become a NRA Certified Instructor in Personal Protection Outside the Home. Accordingly, I was unable to camp at Macks Creek Park as planned.

7. On September 11, 2013, I secured a reservation for a cabin at Chief Timothy Park at Lower Granite Lake for November 1, 2013, to November 2, 2013. A true and accurate copy of that reservation is attached hereto as Exhibit Baker-5.

8. On November 1, 2013, to November 2, 2013, I stayed at Chief Timothy Park as planned, but I could not exercise my right to keep and bear arms due to Defendants' active enforcement of 36 C.F.R. § 327.13.

9. On November 4, 2013, I secured a reservation for a cabin at Chief Timothy Park at Lower Granite Lake for April 25, 2014, to April 26, 2014. A true and accurate copy of that reservation is attached hereto as Exhibit Baker-6.

10. Lower Granite Lake and Chief Timothy Park are Corps properties in the Walla Walla District.

11. I have concrete plans to make a reservation for a campsite at Dent Acres Campground at Dworshak Dam and Reservoir for June 2014; however, the www.recration.gov reservation system will not allow me to make such a reservation until December 13, 2013. Therefore, I intend to make a reservation for a campsite at Dent Acres Campground on or about December 13, 2013.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

DATED this 20th day of November 2013.

Alan C. Baker

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

ELIZABETH E. MORRIS; and ALAN C. BAKER, Plaintiffs, v. U.S. ARMY CORPS OF ENGINEERS, et al., Defendants.	Case No. 3:13-CV-00336-BLW **DECLARATION OF ELIZABETH E. MORRIS**

I, Elizabeth E. Morris, declare as follows:

1. I am over 18 years of age and I am competent to testify from my first-hand knowledge as to the matters set forth in this Declaration.

2. I am a citizen of the United States and have resided in Nez Perce County, Idaho, for three years.

3. I regularly use Corps-administered public lands near the Snake River in Lewiston, Idaho, during the winter to walk my and my parents' dogs. I walk the dogs at least once per week.

4. I will walk the dogs on these public lands during the winter of 2013–2014 at least once per week.

5. These Corps-administered public lands are in the Walla Walla District and include the Lower Granite Lake Greenbelt Trail, Swallows Park, the Lewiston Levee Parkway, and the Lewiston Levee Recreation Trail.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

DATED this 21 day of November 2013.

1

Elizabeth E. Morris

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UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

ELIZABETH E. MORRIS and ALAN C. BAKER, Plaintiffs, v. U.S. ARMY CORPS OF ENGINEERS et al., Defendants.	Case No. 3:13-CV-00336-BLW **CERTIFICATION OF THE ADMINISTRATIVE RECORD**

I, Stephen B. Austin, am currently employed as a Natural Resources Manager for the U.S. Army Corps of Engineers, Headquarters, 441 G Street NW, Washington, D.C. In that capacity, I was responsible for overseeing the most recent promulgation of the U.S. Army Corps of Engineers' (Corps) rules on the public use of Water Resources Development projects administered by the Corps.

I certify that the documents identified in the attached Index to the Administrative Record are a true and correct copy of all non-privileged materials located by the Corps that comprise the administrative record to the 36 C.F.R. Part 327, Final Rule, "Public Use of Water Resources Development Projects Administered by the Chief of Engineers" published in the Federal Register on February 11, 2000 (65 Fed. Reg. 6896).

After an extensive search, the Corps was unable to locate original copies of the public comments that the Corps received in response to the 36 C.F.R. Part 327, Notice of Proposed Rulemaking, "Public Use of Water Resources Development Projects Administered by the Chief of Engineers" published in the Federal Register on July 20, 1999 (64 Fed. Reg. 38,854). Additionally, the Corps was unable to locate a hard-copy file compiled between 1984 and 1986 that contained the comprehensive history and rationale behind 36 C.F.R. Part 327 up until the time the file was created.

In accordance with 28 U.S.C. § 1746, I certify and declare, under penalty of perjury, that the foregoing is true and correct to the best of my knowledge, information, and belief.

Dated: April 21, 2014

Stephen B. Austin

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

ELIZABETH E. MORRIS and ALAN C. BAKER, Plaintiffs, v. U.S. ARMY CORPS OF ENGINEERS, *et al.*, Defendants.	Case No. 3:13-CV-00336-BLW **PLAINTIFFS' CROSS-MOTION FOR SUMMARY JUDGMENT**

Plaintiffs, by and through their undersigned attorneys, respectfully move pursuant to Fed. R. Civ. P. 56 for summary judgment because Plaintiffs are entitled to judgment as a matter of law with respect to both of their claims. Pursuant to the Parties' agreement and this Court's February 27, 2014, Scheduling Order (Dkt. 45), support for this Motion and Plaintiffs' response in opposition to Defendants' Motion for Summary Judgment is contained in the Memorandum In

Support Of Plaintiffs' Cross-Motion For Summary Judgment And Response In Opposition To Defendants' Motion For Summary Judgment, which is filed concurrently herewith. Plaintiffs have also filed concurrently statements of facts, as required by Local Civil Rule 7.1(b)(1) and (c)(2).

DATED this 19th day of June 2014.

Respectfully submitted,

/s/ James M. Manley
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 19th day of June, 2014, I filed the foregoing electronically through the CM/ECF system, which caused the following parties or counsel to be served by electronic means, as more fully reflected on the Notice of Electronic Filing:

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

ELIZABETH E. MORRIS and ALAN C. BAKER, Plaintiffs, v. U.S. ARMY CORPS OF ENGINEERS, *et al.*, Defendants.	Case No. 3:13-CV-00336-BLW **PLAINTIFFS' STATEMENT OF UNDISPUTED MATERIAL FACTS**

Pursuant to Local Civil Rule 7.1(b)(1), Plaintiffs submit this statement of undisputed material facts in support of their Motion for Summary Judgment.

1. Defendant U.S. Army Corps of Engineers ("the Corps"), under the direction of the Chief of Engineers and the supervision of the Secretary of the Army, is authorized to

"operate public park and recreational facilities at water resource development projects under the control of the Department of the Army . . . ." 16 U.S.C. § 460d.

2. The Corps is the largest provider of water-based outdoor recreation in the nation. It administers 422 lake and river projects in 43 states, spanning 12 million acres, 55,000 miles of shoreline, 4,500 miles of trails, 90,000 campsites, and 3,400 boat launch ramps. Corps-administered waters provide 33 percent of all U.S. freshwater fishing. http://www.usace.army.mil/Missions/CivilWorks/Recreation.aspx; Complaint For Declaratory And Injunctive Relief ("Compl.") (Dkt. 1) ¶ 15; Answer To Complaint For Declaratory And Injunctive Relief ("Answer") (Dkt. 46) ¶ 15.

3. Defendant John McHugh is the Secretary of the Army. Defendant McHugh is responsible for the administration of the public park and recreational uses at water resource development projects under the control of the Department of the Army. Compl. ¶ 16; Answer ¶ 16.

4. Defendant Lieutenant General Thomas Bostick is the Commanding General and Chief of Engineers for the Army Corps of Engineers. Defendant Bostick is responsible for the administration of the public park and recreational uses at water resource development projects under the control of the Department of the Army. Compl. ¶ 17; Answer ¶ 17.

5. Defendant Colonel John S. Kem is the Northwestern Division Commander. Defendant Kem is responsible for the administration of the public park and recreational uses in the Northwestern Division. Compl. ¶ 18; Answer ¶ 18.

6. Defendant Lieutenant Colonel Andrew D. Kelly is the Walla Walla District Commander and District Engineer. Defendant Kelley is responsible for the administration of the public park and recreational uses in the Walla Walla District. Compl. ¶ 19; Answer ¶ 19.

7. Defendants prohibit law-abiding citizens from possessing functional firearms on Corps-administered public lands for the purpose of self-defense. Compl. ¶ 24; 36 C.F.R. § 327.13; Feb. 19, 2010, Email of Michael Ensch (Dkt. 8).

8. Corps park rangers are not law enforcement officers. AR at 0000043–45.

9. Surveys collected between 1994–96 of Corps park rangers' self-reported interactions with visitors did not address law-abiding individuals carrying firearms for self-defense. AR at 0000558; 0000675; 0001090.

10. At least 80 percent of Corps projects have cooperative agreements that allow state and local law enforcement to patrol Corps lands. AR at 0000570; 0000051–52.

11. The existence of law enforcement agreements helps to guarantee that local law enforcement officials assist with law enforcement at Corps projects. AR at 0000570.

12. A majority of Corps employees surveyed agreed that law enforcement agreements with state and local law enforcement were very adequate or adequate. *Id.*

13. The number of Corps employees surveyed who indicated that they had trouble contacting law enforcement authorities was "not statistically significant." *Id.*

14. Security personnel do not screen persons entering Corps-administered public lands to determine whether persons are carrying firearms or weapons of any kind. Compl. ¶¶ 30, 40; Answer ¶¶ 30, 40.

15. Security personnel do not restrict access to Corps-administered public lands to only those persons who have been screened and determined to be unarmed. Compl. ¶¶ 31, 41; Answer ¶¶ 31, 41.

16. Defendants have not formally proposed revisions to 36 C.F.R. § 327.13 in light of or subsequent to the Supreme Court's decision in *District of Columbia v. Heller*, 554 U.S. 570

(2008). *See Morris v. U.S. Army Corps of Engineers*, No. 3:13-CV-00336-BLW, Index to the Administrative Record.

17. Plaintiff Alan C. Baker is a citizen of the United States and a resident of Latah County, Idaho. Declaration of Alan C. Baker (Dkt. 9) ¶ 2.

18. Mr. Baker is a NRA-Certified Home Firearm Safety, Personal Protection In The Home, Rifle, Pistol, and Shotgun Instructor, as well as a Utah-certified Concealed Firearms Instructor. *Id.* ¶ 3.

19. Mr. Baker has concealed handgun licenses from the States of Idaho, Utah, Oregon, and Arizona. *Id.*

20. Mr. Baker regularly camps and hunts in Idaho and has plans to camp on Corps-administered public lands. *Id.* ¶¶ 6, 8, 11, 12.

21. Dworshak Dam and Reservoir was constructed in 1972. It is located on the North Fork Clearwater River in Clearwater County, Idaho. It is located in the Walla Walla District. Compl. ¶ 27; Answer ¶ 27.

22. Dworshak Dam and Reservoir's Dent Acres Campground is a Corps-administered campground with 50 campsites, and it accommodates both tents and recreational vehicles. The day use area of the campground provides picnic tables, group shelters, grills, drinking water, showers, a boat launch, and other amenities. Compl. ¶ 28; Answer ¶ 28.

23. Mr. Baker regularly carries a handgun for self-defense. Baker Declaration (Dkt. 9) ¶ 5.

24. On March 22, 2013, Mr. Baker secured a reservation for a campsite at Dent Acres Campground for May 31, 2013 to June 2, 2013. *Id.* ¶ 8.

25. On April 22, 2013, Mr. Baker's counsel contacted District Commander Kelley to request that he recognize Mr. Baker's right to bear arms pursuant to 36 C.F.R. § 327.13(a)(4). Baker Declaration (Dkt. 9) ¶ 9; Compl. ¶ 32; Answer ¶ 32.

26. Given Mr. Baker's scheduled trip to Dent Acres, he requested a response to his letter within 30 calendar days of its delivery to District Commander Kelley. Baker Declaration (Dkt. 9) ¶ 9.

27. Mr. Baker has received no response. *Id.* ¶ 10; Compl. ¶ 33; Answer ¶ 33.

28. On May 31, 2013, Mr. Baker camped at Dent Acres as planned, but could not exercise his right to keep and bear arms due to Defendants' active enforcement of 36 C.F.R. § 327.13. Baker Declaration (Dkt. 9) ¶ 11.

29. On several occasions, Mr. Baker has camped on Corps-administered public lands, including Chief Timothy Park at Lower Granite Lake and Dent Acres Campground at Dworshak Dam and Reservoir. Second Declaration of Alan C. Baker (Dkt. 33-1) ¶ 3.

30. On November 1, 2013, to November 2, 2013, Mr. Baker stayed at Chief Timothy Park at Lower Granite Lake, but could not exercise his right to keep and bear arms due to Defendants' active enforcement of 36 C.F.R. § 327.13. *Id.* ¶ 8.

31. Mr. Baker has concrete plans to camp on Corps-administered public lands in the future. *Id.* ¶ 4.

32. Plaintiff Elizabeth E. Morris is a citizen of the United States and a resident of Nez Perce County, Idaho. Declaration of Elizabeth E. Morris (Dkt. 10) ¶ 2.

33. Due to threats and physical attacks made against her by a former neighbor, the Nez Perce County Sheriff issued Ms. Morris an emergency license to carry a concealed handgun in 2012. *Id.* ¶ 3.

34. Ms. Morris regularly carries a handgun for self-defense. *Id.* ¶ 5.

35. Ms. Morris uses Corps-administered public lands near the Snake River in Lewiston, Idaho, to boat with friends, she regularly walks Corps-administered paths in the area with her dog and/or her family, and she must travel across Corps-administered land to reach Hells Gate State Park. *Id.* ¶ 8.

36. These Corps-administered public lands are in the Walla Walla District and include the Lower Granite Lake Greenbelt Trail, Swallows Park, the Lewiston Levee Parkway, and the Lewiston Levee Recreation Trail. *Id.* ¶ 9.

37. Ms. Morris also frequents Dworshak Reservoir and the surrounding areas to hike. *Id.* ¶ 10.

38. Ms. Morris has considered camping at Dworshak Reservoir, but has decided not to because Corps regulations make it unlawful for her to possess a functional firearm while camping. *Id.* ¶ 11.

39. In summer 2012, Ms. Morris used Corps-administered public lands approximately 1–2 times a week. *Id.* ¶ 12.

40. Ms. Morris did exactly the same in summer 2013 and plans to continue to do so in the future. *Id.* ¶ 13.

41. On June 10, 2013, Ms. Morris's counsel contacted District Commander Kelley to request that he recognize Ms. Morris's right to bear arms pursuant to 36 C.F.R. § 327.13(a)(4). *Id.* ¶ 16.

42. Given Ms. Morris's practice of regularly recreating on Corps-administered public lands during the summertime, she requested a response to her letter within 30 calendar days of its delivery to District Commander Kelley. *Id.* ¶ 16.

43. Ms. Morris has received no response. *Id.* ¶ 17.

44. Ms. Morris also uses Corps-administered public lands in the Walla Walla District at least once per week during the winter, including the Lower Granite Lake Greenbelt Trail, Swallows Park, the Lewiston Levee Parkway, and the Lewiston Levee Recreation Trail. Second Declaration of Elizabeth E. Morris (Dkt. 33-2) ¶¶ 3–5.

DATED this 19th day of June 2014.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 19th day of June, 2014, I filed the foregoing electronically through the CM/ECF system, which caused the following parties or counsel to be served by electronic means, as more fully reflected on the Notice of Electronic Filing:

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

ELIZABETH E. MORRIS and ALAN C. BAKER, Plaintiffs, v. U.S. ARMY CORPS OF ENGINEERS, *et al.*, Defendants.	Case No. 3:13-CV-00336-BLW **PLAINTIFFS' RESPONSE TO DEFENDANTS' STATEMENT OF MATERIAL FACTS**

Pursuant to Local Civil Rule 7.1(c)(2), Plaintiffs submit this response to Defendants' Statement of Material Facts (Dkt. 52-2), using the same paragraph numbering found in Defendants' Statement. Plaintiffs do not concede the materiality, relevance, or admissibility of anything contained in or referenced by Defendants' Statement.

1. Undisputed.

2. Disputed, to the extent ¶ 2 conflicts with or misrepresents information contained in ¶ 3 of Defendants' Statement of Material Facts.

3. Disputed, to the extent ¶ 3 conflicts with or misrepresents information contained ¶ 2 of Defendants' Statement of Material Facts.

4. Undisputed that ¶ 4 reflects the opinion of Stephen B. Austin.

5. Undisputed.

6. Undisputed.

7. Undisputed.

8. Disputed, to the extent ¶ 8 suggests "important infrastructure such as dams and levees" are "open to the public." *See* AR at 0001148 ("At many Visitor Centers, adjacent facilities such as powerhouses, may require restricted access which will be controlled by others. Additional security for these areas may be provided by the Park Ranger staff or contract law enforcement personnel.").

9. Undisputed.

10. Undisputed, with the qualification that "critical dam assets are owned by private entities, federal agencies, and state and local governments. Dam assets are regulated by a variety of entities." U.S. Department of Homeland Security, Office of Inspector General, DHS Risk Assessment Efforts in the Dams Sector (2011), at 2, *available at* http://www.oig.dhs.gov/assets/Mgmt/OIG_11-110_Sep11.pdf.

11. Undisputed.

12. Undisputed.

13. Undisputed that ¶ 13 substantially reflects a statement contained in the "VISITOR AND RANGER SAFETY REVIEW FINAL REPORT - SEPTEMBER 1995." AR at 0000613.

14. Undisputed that ¶ 14 reflects the opinion of Stephen B. Austin.

15. Undisputed that ¶ 15 reflects the opinion of Stephen B. Austin.

16. Undisputed that ¶ 16 reflects the opinion of Stephen B. Austin.

17. Undisputed that ¶ 17 reflects the opinion of Stephen B. Austin.

18. Undisputed.

19. Disputed to the extent that ¶ 19 suggests that the cited sources draw any comparisons between Corps-managed lands and "U.S. National Park Service recreational areas." Rather, "[i]t is important to note here that a comparative analysis cannot be performed between the Corps and other Federal land management agencies. *Poor record keeping on the part of the Corps has precluded such an analysis*." AR at 0000660; 0000676 (emphasis added).

20. Undisputed that ¶ 20 reflects the opinion of Stephen B. Austin.

21. Undisputed.

22. Undisputed.

23. Undisputed, with the qualification that "[i]t is important to note here that a comparative analysis cannot be performed between the Corps and other Federal land management agencies. Poor record keeping on the part of the Corps has precluded such an analysis." AR at 0000660; 0000676.

24. Undisputed, with the qualification that "[i]t is important to note here that a comparative analysis cannot be performed between the Corps and other Federal land management agencies. Poor record keeping on the part of the Corps has precluded such an analysis." AR at 0000660; 0000676.

25. Undisputed, with the qualification that "[i]t is important to note here that a comparative analysis cannot be performed between the Corps and other Federal land

management agencies. Poor record keeping on the part of the Corps has precluded such an analysis." AR at 0000660; 0000676.

26. Undisputed, with qualification that the survey did not report any unsafe or dangerous situations as the result of law-abiding individuals carrying firearms for self-defense. *See* AR at 0001090.

27. Undisputed that ¶ 27 reflects the opinion of Stephen B. Austin.

28. Undisputed and demonstrates that the Corps' complaint is with Congress, not the requirements of the Second Amendment.

29. Undisputed that ¶ 29 reflects the opinion of Stephen B. Austin and demonstrates that the Corps' complaint is with Congress, not the requirements of the Second Amendment.

30. Undisputed that ¶ 30 reflects the opinion of Stephen B. Austin.

31. Undisputed.

DATED this 19th day of June 2014.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 19th day of June, 2014, I filed the foregoing electronically through the CM/ECF system, which caused the following parties or counsel to be served by electronic means, as more fully reflected on the Notice of Electronic Filing:

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

ELIZABETH E. MORRIS; and ALAN C. BAKER,

Plaintiffs,

v.

U.S. ARMY CORPS OF ENGINEERS, *et al.*,

Defendants.

Case No. 3:13-CV-00336-BLW

JUDGMENT

In accordance with the Memorandum Decision filed with this Judgment,

NOW THEREFORE IT IS HEREBY ORDERED, ADJUDGED, AND DECREED, that the plaintiffs' motion for summary judgment (docket no. 54) is GRANTED and the defendants' motion for summary judgment (docket no. 52) is DENIED.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED, that 36 C.F.R. § 327.13 violates the Second Amendment and is declared unconstitutional.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED, that defendants are enjoined from enforcing 36 C.F.R. § 327.13 on any Corps' property in Idaho.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED, that Clerk close this case.

DATED: October 13, 2014

B. Lynn Winmill
Chief Judge
United States District Court

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on this 8th day of July 2015.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated this 8th day of July 2015.

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