

No. 14-36049

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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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.

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF IDAHO

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BRIEF FOR APPELLANTS

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### STATEMENT OF JURISDICTION

Plaintiffs invoked the district court's jurisdiction under 28 U.S.C. § 1331. ER 43. The district court entered summary judgment in favor of plaintiffs on October 13, 2014. ER 4. The government timely filed a notice of appeal on December 10, 2014. ER 1; *see* Fed. R. App. P. 4(a)(1)(B). This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

### STATEMENT OF THE ISSUE

The United States Army Corps of Engineers (Army Corps) constructs, operates, and maintains infrastructure and other public works projects on federal land throughout the United States. As authorized by Congress, the Army Corps allows public access to its land for recreational purposes when consistent with the public interest and national security. An Army Corps regulation generally restricts visitors from carrying loaded firearms and ammunition while on Army Corps land. The regulation permits loaded firearms if possessed by a law enforcement officer and permits loaded firearms if used at designated hunting or fishing areas, or at Army Corps shooting ranges. The issue in this case is whether the agency's regulation violates the Second Amendment.

### STATEMENT OF THE CASE

#### A. Regulatory Background

Federal regulations govern the public use of Corps-managed water-resource development projects. *See* 36 C.F.R. pt. 327. To provide for "more effective



recreation-resource management of the lake and reservoir projects,” the Corps issued regulations in 1973. 38 Fed. Reg. 7,552, 7,552 (Mar. 23, 1973).<sup>1</sup> As amended, the regulation entitled “Explosives, firearms, other weapons and fireworks” provides:

- (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.
- (b) Possession of explosives or explosive devices of any kind, including fireworks or other pyrotechnics, is prohibited unless written permission has been received from the District Commander.

36 C.F.R. § 327.13.

## **B. Facts and Prior Proceedings Challenging the Army Corps Regulation**

1. Plaintiffs are two residents of Idaho who wish to bring their firearms onto Army Corps land. Compl. ¶¶ 4-13, ER 43-44. Plaintiff Baker alleges that in March 2013 he made a reservation to camp at Dent Acres Campground. Compl. ¶ 29, ER 47. Prior to camping, Baker contacted the Corps District Commander to request

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<sup>1</sup> Regulations specific to particular recreation areas existed long before 1973. *See, e.g.* 36 C.F.R. § 322.11 (1947 Supp.) (prohibiting loaded firearms and explosives at Great Salt Plains Dam and Reservoir).

permission to bring a firearm onto Dent Acres. Receiving no response, plaintiff Baker did not bring his firearm on his 2013 camping trip. Compl. ¶¶ 32-34, ER 48. Plaintiff Nesbitt (nee Morris) alleges that she uses Corps-administered lands for recreation purposes. Compl. ¶ 12, ER 44. Nesbitt alleges that “[b]ut for Defendants’ active enforcement of 36 C.F.R. § 327.13” she would bring a firearm with her during her recreational activities. Compl. ¶ 45, ER 50.

2. Plaintiffs filed suit in August 2013, and, at the same time, filed a motion for a preliminary injunction. Plaintiffs argued that possession of a firearm while camping fits within the core Second Amendment right identified by the Supreme Court in *District of Columbia v. Heller*, 554 U.S. 570 (2008). The government opposed the preliminary injunction, explaining that plaintiffs had not suffered irreparable injury and that the *Heller* decision did not speak to Second Amendment rights in temporary dwellings. The government further explained that government-owned land should be analyzed differently for Second Amendment purposes, relying on the Supreme Court’s statement in *Heller* that its decision did not “cast doubt” on “laws forbidding the carrying of firearms in sensitive places.” 554 U.S. at 626. The government moved to dismiss.

In January 2014, the district court denied the government’s motion to dismiss and granted plaintiffs’ motion for a preliminary injunction. Applying this Court’s decision in *United States v. Chovan*, 735 F.3d 1127 (9th Cir. 2013), the district court first held that the regulation burdened the Second Amendment right to carry a firearm for

self-defense purposes. ER 26. The court then applied strict scrutiny to the regulation based on its belief that the core right identified in *Heller* extended to campgrounds. The court held that the regulation failed to withstand strict scrutiny and also held that even under intermediate scrutiny the regulation was “too broad.” ER 26-28.

3. Subsequent to the district court’s preliminary injunction decision in this case, a federal district court in Georgia denied a request to preliminarily enjoin the Corps regulation. *GeorgiaCarry Org., Inc. v. U.S. Army Corps of Eng’rs*, 38 F. Supp. 3d 1365 (N.D. Ga. 2014). As that court explained, it could not “fathom that the framers of the Constitution would have recognized a civilian’s right to carry firearms on property owned and operated by the United States Military, especially when such property contained infrastructure products central to our national security and well being.” *Id.* at 1373. The court accepted the government’s reliance on the Supreme Court’s statement in *Heller* that “nothing in [its] opinion should be taken to cast doubt on longstanding prohibitions on . . . laws forbidding the carrying of firearms in sensitive places such as schools and government buildings.” 554 U.S. at 626. The Georgia district court observed that although “Defendant Army Corps’ property is more expansive than just a ‘building,’ there is no reason to doubt that the Firearms Regulation, which restricts the use of firearms on military property nearby sensitive infrastructure projects,” fits within *Heller*’s discussion of existing “laws forbidding the

carrying of firearms in sensitive places.” *GeorgiaCarry*, 38 F. Supp. 3d at 1373 (quoting *Heller*, 554 U.S. at 626).<sup>2</sup>

4. In October 2014, the district court in this case issued an order permanently enjoining the Corps from enforcing its regulation at Army Corps recreational facilities located in Idaho. ER 14.<sup>3</sup> The court relied almost exclusively on this Court’s (subsequently vacated) decision in *Peruta v. County of San Diego*, 742 F.3d 1144, 1168 (9th Cir. 2014), *vacated*, \_\_\_ F.3d \_\_\_, No. 10-56971 (9th Cir. 2015), which invalidated San Diego’s policy of not issuing permits to carry a concealed weapon unless a specific need was shown. Quoting *Peruta*, the district court held that the Army Corps regulation “destroyed” the Second Amendment right to self-defense and was therefore invalid without regard to level of scrutiny. ER 7. The court accepted that the Corps could “regulate” firearms on its property, but held that a prohibition on loaded handguns did not amount to such a regulation. ER 9. The court further stated that the “sensitive places” described in *Heller* could only be buildings, not outdoor land. *Ibid*.

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<sup>2</sup> Plaintiffs in the Georgia case appealed, and the United States Court of Appeals for the Eleventh Circuit heard oral argument on March 19, 2015.

<sup>3</sup> Although the district court’s injunction refers to the entire regulation, the court’s analysis focused exclusively on subsection (a) of 36 C.F.R. § 327.13, which concerns firearms. Plaintiffs did not raise, and the court did not address, subsection (b), which prohibits possession of fireworks and explosives. The government therefore does not understand the injunction to apply to § 327.13(b).

### SUMMARY OF ARGUMENT

The United States Army Corps of Engineers plays a vital role in constructing, maintaining, and protecting our nation's infrastructure and water resources. In order to further the public's interest in safe and enjoyable recreational activities, the Army Corps has opened up portions of its lands for such uses where it can do so consistently with the public interest and national security. In so doing, it has adopted and implemented a variety of regulations to maintain the safety of both park visitors and the projects located on the Army Corps property.

Army Corps land fits comfortably within the category of sensitive places in which the carrying of firearms may be regulated without implicating the Second Amendment. The Army Corps administers the land because it contains an important water-resource or infrastructure project. These projects are indisputably sensitive, and the district court offered no explanation for the counter-intuitive proposition that the Second Amendment was intended to require the Army Corps to abandon all firearms restrictions when it opens up land near such sensitive projects to recreation.

Even assuming that this Court should apply Second Amendment scrutiny to the Army Corps regulation at issue here, there is no justification for strict scrutiny. The Army Corps regulation applies only to government property, and the government enjoys significant latitude to regulate the use of its property. The regulation imposes limited place restrictions on the carrying of firearms, and plaintiffs are free to carry firearms for self-defense on other public and private properties throughout Idaho. At

most, therefore, intermediate scrutiny applies, and the Army Corps regulation is both reasonable and easily sustainable under that level of review.

The district relied almost exclusively on the panel's decision in *Peruta v. County of San Diego*, 742 F.3d 1144, 1168 (9th Cir. 2014), *vacated*, \_\_\_ F.3d \_\_\_, No. 10-56971 (9th Cir. 2015). But that decision has since been vacated by this Court's order granting rehearing en banc, and, in any event, did not concern a limited regulation on possession of loaded firearms while on property the government has chosen to open to the public for limited purposes. The district court's judgment should be reversed.

#### **STANDARD OF REVIEW**

The grant of a motion for summary judgment is reviewed de novo. *Jesinger v. Nevada Fed. Credit Union*, 24 F.3d 1127, 1130 (9th Cir. 1994).

#### **ARGUMENT**

This Court has established a two-step analysis for deciding Second Amendment challenges. *See United States v. Chovan*, 735 F.3d 1127 (9th Cir. 2013), *cert. denied*, 135 S. Ct. 187 (Mem.) (2014). Under this approach, the Court first “asks whether the challenged law burdens conduct protected by the Second Amendment”; if so, the Court determines the “appropriate level of scrutiny.” *Id.* at 1136.

Plaintiffs' challenge fails both steps of this inquiry. The Army Corps firearms regulation does not burden conduct protected by the Second Amendment. And, even assuming that the Second Amendment is implicated here, the regulation readily satisfies the appropriate level of scrutiny.

**I. The Army Corps Regulation Does Not Burden Conduct Protected by the Second Amendment.**

A. In *District of Columbia v. Heller*, 554 U.S. 570 (2008), the Supreme Court held that the Second Amendment protects an individual's right to bear arms for purposes of self-defense in the home. The Court thus invalidated a District of Columbia statute that the Court characterized as an "absolute prohibition of handguns held and used for self-defense in the home." *Heller*, 554 U.S. at 636.

The Court expressly recognized, however, that "the right secured by the Second Amendment is not unlimited." *Heller*, 554 U.S. at 626. The Court noted that over the course of history, "commentators and courts routinely explained that the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." *Ibid.* The Court emphasized that "nothing in [its] 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." *Id.* at 626–27. The Court "identif[ied] these presumptively lawful regulatory measures only as examples; [the] list does not purport to be exhaustive." *Id.* at 627 n.26.

The Supreme Court in *McDonald v. City of Chicago*, 561 U.S. 742 (2010), reaffirmed its statements in *Heller* regarding the limited nature of the Second Amendment right. In *McDonald*, the Supreme Court considered a Chicago ordinance

that, like the District of Columbia provision at issue in *Heller*, “effectively bann[ed] handgun possession by almost all private citizens who reside in the City.” 561 U.S. at 750. The Court concluded that the right recognized in *Heller* was incorporated against the States. In so doing, a plurality of the Court reiterated the point from *Heller* “that the right to keep and bear arms is not ‘a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose.’” *Id.* at 786 (quoting *Heller*, 554 U.S. at 626) (Alito, J., joined by Roberts, C.J., and Scalia and Kennedy, JJ.). And the plurality further noted that the Court “made it clear in *Heller* that [its] holding did not cast doubt on . . . longstanding regulatory measures” including, as most relevant here, “laws forbidding the carrying of firearms in sensitive places such as schools and government buildings.” *Id.* (quoting *Heller*, 554 U.S. at 626). The plurality continued: “[w]e repeat those assurances here. Despite municipal respondents’ doomsday proclamations, incorporation does not imperil every law regulating firearms.” *Id.*<sup>4</sup>

In the course of upholding a federal statute prohibiting felons from possessing firearms, this Court recognized that the Supreme Court’s explicit statement in *Heller* that it did not mean to cast doubt on certain categories of longstanding regulatory measures meant that a restriction on firearm possession by felons did not burden

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<sup>4</sup> Because Justice Thomas’s analysis of the reasons for incorporation of the right against the states was different from the plurality’s, he did not join this part of the plurality opinion. *See McDonald*, 561 U.S. at 3058 (Thomas, J., concurring in part and



conduct protected by the Second Amendment. *United States v. Vongxay*, 594 F.3d 1111, 1117 (9th Cir. 2010). This Court rejected the defendant's assertion that the Supreme Court's language in *Heller* regarding presumptively lawful regulations was "dicta" and explained that "even given the Second Amendment's individual right to bear arms, felons' Second Amendment rights can be reasonably restricted." *Id.* at 1115, 1117; *see also, e.g., United States v. Rozier*, 598 F.3d 768, 771 (11th Cir. 2010) (statutes "disqualifying felons from possessing a firearm under any and all circumstances do not offend the Second Amendment").

Just as this Court held in *Vongxay* with respect to the restriction that federal law places on the possession of firearms by felons, restrictions on firearm possession in the "sensitive places" described in *Heller* and *McDonald* do not burden conduct protected by the Second Amendment. The Supreme Court in *Heller* provided two examples of such "sensitive places" where firearm prohibitions were presumptively valid: schools and government buildings. The Court made clear, however, that it "identif[ied] these presumptively lawful regulatory measures only as examples; [the] list does not purport to be exhaustive." 554 U.S. at 627 n.26. Relying on this assurance, the Fifth Circuit has recognized, in an unpublished decision, that land adjacent to a Post Office is also a "sensitive place" in which the Postal Service may constitutionally prohibit firearms. *See United States v. Dorosan*, 350 F. App'x 874, 875

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concurring in the judgment). Justice Thomas's separate opinion did not discuss the scope of the Second Amendment right.

(5th Cir. 2009) (unpublished) (upholding firearms prohibition on Postal Service parking lot); *see also United States v. Masciandaro*, 638 F.3d 458, 473 (4th Cir. 2011) (declining to decide whether a national park was a “sensitive place,” but concluding that the prohibition on loaded firearms passed constitutional muster under intermediate scrutiny).

B. Army Corps land is a “sensitive place” within the meaning of *Heller*. Armed visitors to Army Corps recreational facilities raise precisely the concerns raised by weapons in schools and government buildings. As is the case with schools and government buildings, Army Corps land attracts large numbers of individuals and families with children who congregate for recreational activities with dense concentrations of individuals from diverse backgrounds. ER 37 (Declaration of Stephen B. Austin). In order to maintain order and safety on Army Corps land, the Army Corps has regulations governing boating, swimming, sanitation, fires, pets, and quiet hours. ER 38. It is similarly permissible for the Army Corps to restrict possession of firearms in light of the nature of the public’s use of Army Corps land.

And Army Corps property presents unique sensitivities, as well. It is not simply federal land set aside for enjoyment by the public. The Army Corps administers the federal land because it houses one or more public works projects crucial to our infrastructure and national security. *See* ER 39, ¶ 6a (“Recreation is never the sole purpose of a Corps-managed Water Resources Development Project.”). The Army Corps operates 702 dams and controls 14,501 miles of levees. ER 37. The Army

Corps provides 24% of the nation's hydropower capacity and enough drinking water to supply 96 million households. *Id.* Indeed, the district court recognized that “[t]hese dams and related structures have been deemed as ‘critical infrastructure’ by the U.S. Department of Homeland Security’s Office of Inspector General on [the] ground that a catastrophic failure could affect populations exceeding 100,000 and have economic consequences surpassing \$10 billion.” ER 11-12. Protecting such projects is therefore important to both the Army Corps and the public. *See* ER 39, ¶ 6a (explaining that if the Army Corps permitted firearms on its land “the Corps would need to perform a full safety and security assessment of Corps-managed infrastructure to determine how best to secure the facilities”). A prohibition on armed visitors allows the Corps to quickly assess and diffuse threats to these sensitive projects because anyone carrying a loaded firearm outside a designated hunting area is in violation of the regulation and could be stopped on that basis. *Ibid.* (“Early detection of threats to [Corps-managed] infrastructure is aided by current Corps policy, and could be compromised by an a too permissive firearms regulation.”).

C. Even setting aside the question of whether the Army Corps land here is a “sensitive place,” the Army Corps firearms regulation bears no resemblance to the broad prohibitions that were at issue in *Heller* and *McDonald*. 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; nor does anyone dispute that the Army Corps regulation is nearly as

longstanding as some of the restrictions referred to specifically in *Heller*. See ER 36 (regulation at issue here promulgated in 1973); see also *supra* n.1 (explaining that prohibitions on the carrying of loaded firearms at particular recreation sites date back to the 1940's).

The Army Corps regulation at issue here does not purport to regulate firearms in public places generally, and the Army Corps does not relinquish the ability to protect its infrastructure projects and its employees through restrictions on the carrying of loaded firearms when it chooses to open up its property for limited recreational use. Instead the regulation simply constitutes the permissible exercise of authority to issue regulations ancillary to the proper carrying out of governmental functions on government property. Cf. *Adderley v. Florida*, 385 U.S. 39, 47 (1966) (“The State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated.”). In evaluating Second Amendment challenges courts have therefore recognized that it is significant whether the government is acting as a property owner. See *Masciandaro*, 638 F.3d at 473 (“The government, after all, is invested with ‘plenary power’ to protect the public from danger on federal lands under the Property Clause.”(citing U.S. Const. art. IV, § 3, cl. 2)); *Nordyke v. King*, 681 F.3d 1041, 1044-45 (9th Cir. 2012) (en banc) (citing *Engquist v. Oregon Dep’t of Agric.*, 553 U.S. 591, 598 (2008)) (“We have long held the view that there is a crucial difference, with respect to constitutional analysis, between the government exercising ‘the power to regulate or license, as lawmaker,’ and the

government acting ‘as proprietor, to manage [its] internal operation.’”) (alteration in original).

In addition, Army Corps land is not simply government land; it is land owned by the military, which only underscores the control the government exercises over that property. The Army Corps retains a great deal of discretion regarding the public’s use of its land and may close off access entirely where the interest of public safety and national security require. *Cf. United States v. Albertini*, 783 F.2d 1484, 1487 (9th Cir. 1986) (“[T]he interest of the base commander in maintaining control over the entry of persons to Hickam Air Force Base is substantial; indeed, there is a strong tradition of treating that interest as being in a specially protectible class by itself.”); 16 U.S.C. § 460d (allowing the Secretary of the Army to determine that use of Army Corps land by the public is contrary to the public interest). As evidence of the Army Corps’ control of its land, the Army Corps has chosen to close the campgrounds at issue for a significant portion of the year. *See* <http://www.visitidaho.org/lodging/public-lands-campground/dent-acres/>; <http://www.recreation.gov/camping/macks-creek-park/r/campgroundSeasonDates.do?contractCode=NRSO&parkId=72330>.

D. The district court’s decision provided no basis for rejecting the government’s argument at step one of the *Chovan* analysis. The district court declared, without elaboration, that outdoor spaces could not be “sensitive places” within the meaning of *Heller*. ER 9. But nothing in *Heller* suggests that outdoor land, or a large area of land, cannot constitute a sensitive place from which a government may

exclude firearms, as two judges of this Court have observed. *See Nordyke v. King*, 563 F.3d 439, 460 (9th Cir. 2009) (open, public spaces “such as County-owned parks, recreational areas, historic sites, parking lots of public buildings . . . and the County fairgrounds” “fit comfortably within the same category as schools and government buildings”) (omission in original; internal quotation marks omitted), *vacated on reh’g en banc*, 611 F.3d 1015 (9th Cir. 2010); *see also Warden v. Nickels*, 2010 WL 933875, at \*1, \*6 (W.D. Wash. Mar. 11, 2010) (upholding a regulation making it illegal to carry concealed firearms or display firearms at certain park facilities where “children and youth are likely to be present and . . . appropriate signage has been posted to communicate to the public that firearms are not permitted at the facility”) (omission in original; internal quotation marks omitted). Indeed, we do not understand even plaintiffs to dispute that loaded firearms could be prohibited on dams themselves or other outdoor infrastructure projects.

## **II. In Any Event, the Army Corps Regulation Readily Withstands Intermediate Scrutiny.**

### **A. At most, intermediate scrutiny applies to the challenged regulation.**

Even assuming that the Army Corps regulation burdens conduct protected by the Second Amendment, it need only be reasonable and is subject to, at most, intermediate scrutiny.

As this Court has explained in the Second Amendment context, the level of scrutiny applied depends on “the nature of the conduct being regulated and the

degree to which the challenged law burdens the right.” *Chovan*, 735 F.3d at 1138 (internal quotation marks omitted). A partial restriction on firearm use on government property does not implicate the core Second Amendment right, nor does the prohibition generally burden the exercise of that right outside the context of the use of Army Corps property.

In *Chovan*, this Court considered a constitutional challenge to the prohibition on domestic violence misdemeanants possessing firearms. At step one, the Court held that the government had not proved “that domestic violence misdemeanants in particular have historically been restricted from bearing arms.” 735 F.3d at 1137 (emphasis omitted). Moving to the second step, the Court concluded that intermediate scrutiny was appropriate because regulation of “firearm possession for individuals with criminal convictions” does not implicate the core Second Amendment “‘right of law-abiding, responsible citizens to use arms in defense of hearth and home.’” *Id.* at 1138 (quoting *Heller*, 554 U.S. at 635).

When the Corps acts to regulate its land, it is acting as a property owner, and not as an entity exercising its police power. *Cf. GeorgiaCarry.Org, Inc. v. Georgia*, 687 F.3d 1244, 1265 (11th Cir. 2012). The Supreme Court has consistently recognized that, when evaluating government action, a court must consider the context in which the government is acting. *See NASA v. Nelson*, 562 U.S. 134, 148-49 (2011). “It is a long-settled principle that governmental actions are subject to a lower level of [constitutional] scrutiny when the governmental function operating is not the power

to regulate or license, as lawmaker, but, rather, as proprietor, to manage its internal operations.” *United States v. Kokinda*, 497 U.S. 720, 725 (1990) (plurality opinion) (internal quotation marks and alterations omitted).

The government may constitutionally limit the public’s use of its property. In the First Amendment context, for example, government property may generally be “reserve[d] . . . for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker’s view.” *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 46 (1983). This is especially true with respect to military land, which remains a nonpublic forum unless the military expressly makes a contrary designation. *See United States v. Corrigan*, 144 F.3d 763, 767 (11th Cir. 1998) (“There is no question, and the appellants do not dispute, that Fort Benning is a nonpublic forum that, like virtually all military installations, has never been regarded or designated as a place open to public speech activities.”); *United States v. Albertini*, 472 U.S. 675, 686 (1985) (“Military bases generally are not public fora[.]”); *see also Chandler v. Miller*, 520 U.S. 305, 323 (1997) (Fourth Amendment); *United States v. Jelinski*, 411 F.2d 476, 478 (5th Cir. 1969) (Due Process).

In the Second Amendment context in particular, the Supreme Court recognized in *Heller* that restrictions applicable only on government property are not fairly analogized to restrictions applicable within the home, or even in public places generally, by explicitly stating that its decision did not cast doubt on regulations



applicable only to government buildings. *Heller*, 554 U.S. at 626-27. Even if *Heller* did not remove regulations on government property from the scope of the Second Amendment entirely, *see supra* p. 12-15, at a minimum it confirms that in this context, as in the context of other constitutional rights, the government has greater authority to regulate its own property than it might enjoy when regulating other areas.

Moreover, the limited scope of the regulation at issue here makes clear that, at most, intermediate scrutiny applies. Plaintiffs are free to carry their firearms, as permitted by state law, outside Army Corps property. Plaintiffs may carry firearms in their homes, businesses, on privately owned or state-owned outdoor land, and in most public places. And plaintiffs are in no sense required to use Corps recreational facilities. Individuals “can preserve an undiminished right of self-defense” by not entering Army Corps land or, for example, by hunting on Army Corps land but staying in accommodations not located on Army Corps property. *See Moore v. Madigan*, 702 F.3d 933, 940 (7th Cir. 2012) (“[W]hen a state bans guns merely in particular places, such as public schools, a person can preserve an undiminished right of self-defense by not entering those places.”). Nor is plaintiffs’ access to firearms completely prohibited by the Army Corps regulation. Plaintiffs may use firearms at shooting ranges or for hunting in designated areas. And, finally, as explained above, plaintiffs are regulated by the government acting as property owner, not as a sovereign exercising police power. The nature of the conduct regulated by the Army Corps thus plainly does not warrant strict scrutiny. Indeed, the Fourth Circuit properly declined

to apply strict scrutiny in analyzing a similar restriction on carrying firearms on government land. *See, e.g., Masciandaro*, 638 F.3d at 473-74 (upholding National Park Service firearms regulation under intermediate scrutiny).

**B. The regulation at issue here satisfies the appropriate level of review.**

As explained above, this Court need only determine whether the Army Corps regulation is reasonable. *Kokinda*, 497 U.S. at 725-26. And it is entirely reasonable for the Army Corps to protect both visitors and water-resource development projects from the risks posed by armed visitors. This Court should therefore uphold the Army Corps regulation as a permissible regulation of the government's use of its own property.

Even if this Court were to apply more rigorous intermediate scrutiny, the Corps regulation readily passes constitutional muster. Under intermediate scrutiny, a law will be upheld where “(1) the government’s stated objective [is] significant, substantial, or important; and (2) a reasonable fit [exists] between the challenged regulation and the asserted objective.” *Chovan*, 735 F.3d at 1139 (citing *United States v. Chester*, 628 F.3d 673, 683 (4th Cir. 2010)).

Applying intermediate scrutiny, the Fourth Circuit upheld a very similar regulation that prohibited possession of a loaded weapon in a motor vehicle in a

national park area. *See Masciandaro*, 638 F.3d at 459-60.<sup>5</sup> The court concluded “that the government has a substantial interest in providing for the safety of individuals who visit and make use of the national parks.” *Id.* at 473. In fact, “[a]lthough the government’s interest need not be ‘compelling’ under intermediate scrutiny, cases have sometimes described the government’s interest in public safety in that fashion.” *Id.* The court also reasoned that the prohibition at issue was “reasonably adapted to that substantial government interest,” given the dangers of loaded firearms and the reasonableness of concluding that “when concealed within a motor vehicle, a loaded weapon becomes even more dangerous.” *Id.*

Here, the Corps similarly has an important—indeed, compelling—interest 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. As the Supreme Court has repeatedly emphasized, “[t]he government’s interest in preventing crime . . . is both legitimate and compelling.” *United States v. Salerno*, 481 U.S. 739, 749 (1987); *see also Schall v. Martin*, 467 U.S. 253, 264 (1984) (“The legitimate and compelling state interest in protecting the community from crime cannot be doubted.”) (internal quotation marks omitted); *United States v. Skoien*, 614 F.3d 638, 642 (7th Cir. 2010) (en banc) (“[N]o one doubts that the goal of . . . preventing armed mayhem[], is an important governmental objective.”).

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<sup>5</sup> In 2010, Congress enacted a provision allowing loaded firearms on national park land consistent with state law. Credit Card Accountability Responsibility and

And just as in *Masciandaro*, there is a reasonable fit between the safety and security issues the Army Corps faces and its chosen regulation. The projects managed by the Corps—navigational locks and dams, hydropower, water supply, navigation, fish and wildlife—are vast and vital to our nation’s infrastructure and national security. The Army Corps manages hundreds of projects throughout the country, and a substantial number of Americans depend on Army Corps projects for their electricity and drinking water. The land surrounding these projects makes up just a small percentage of federal land, but the Army Corps hosts over 370 million visitors per year. ER 16.

The Army Corps must consider a number of factors when deciding whether the public interest is furthered by opening Corps-managed lands for recreation, and when developing rules for their recreational use. ER 37 ¶ 5a. These rules require the Army Corps to consider the safety of visitors and of Corps employees; the protection of natural, cultural, and developed resources; and the promotion of recreational opportunities. *Id.* The Army Corps recognizes that the large number of visitors it manages at its recreational sites, coupled with the diverse backgrounds of campers (including families and children) and the use of alcohol, lead to significant safety concerns. Army Corps regulations are aimed at ensuring that the inevitable conflicts that arise as a result of disagreements about how different visitors make use of Army Corps recreational areas are resolved as quickly and peacefully as possible. ER 37-38,

¶ 5c. The Army Corps has reasonably concluded that the presence of a loaded firearm could more quickly escalate tensions resulting from such disagreements, and that such firearms therefore present a significant threat to public safety. *Id.*

Moreover, Congress has not provided the Army Corps with authority to perform many typical law enforcement functions, including carrying firearms, making arrests, or executing search warrants; nor are rangers trained in law enforcement functions. ER 38 ¶ 5e. Full police power at Army Corps projects, including the ability to enforce state and local laws and to place persons under arrest, is exercised solely by state and local authorities. *Id.* As the district court recognized, Corps rangers are frequently involved in volatile situations. Past surveys indicate that an assault on a ranger occurred on average every six days and that rangers and park visitors were frequently subject to verbal abuse and threats of violence. ER 12; ER 18 (Statement of Facts).

One of the ways the Army Corps maintains public safety and infrastructure security at its projects—despite this limited law enforcement authority—is to restrict the public’s authority to carry loaded firearms. A permissive firearms policy might very well delay detection of threats to those projects. ER 39 ¶ 6 (“With an overly permissive regulation, Corps officials or other law enforcement officers could be in a position where they would not be able to intervene or ascertain bad intent until a person with a firearm actually uses it.”). And the Army Corps has also reasonably decided that allowing armed visitors on Army Corps-managed lands could create a

chilling effect on the enforcement of Corps regulations, as park rangers might be required to confront armed visitors in violation of facility policies. ER 38 ¶ 5e. Thus, in order to fulfill its mission of “manag[ing] the natural, cultural and developed resources of each project in the public interest, [and] providing the public with safe and healthful recreational opportunities,” 36 C.F.R. § 327.1, the Army Corps has reasonably determined that limiting loaded firearms to certain designated areas best serves its interest in protecting the safety of visitors and infrastructure projects.

The safety and security concerns described above are presented to a more limited extent, however, when loaded firearms are used solely in designated hunting areas or at shooting ranges. There is less likelihood of the kinds of confrontations that have occurred in Army Corps campgrounds, and Army Corps staff seeing a loaded weapon in such areas have less reason to fear a threat to a water-resource development project or to a park visitor. *See* ER 38-39, ¶¶ 5f, 6a. Moreover, the Army Corps relies on hunting as part of its strategy for managing wildlife on its property consistently with state hunting regulations. The Army Corps regulation thus reasonably permits loaded firearms under these limited circumstances. And the Army Corps’ judgment in this area is in line with similar judgments made by Congress. For example, under 18 U.S.C. § 930(a) and (d)(3), most individuals are barred from possessing a “firearm or other dangerous weapon in a Federal facility,” except for “lawful carrying of firearms or other dangerous weapons . . . incident to hunting or other lawful purposes.” And Congress has permitted commanders to open up military

land for hunting. 10 U.S.C. § 2671; *See generally* U.S. Army Env'tl. Command, *Army Hunting & Fishing Program History*, <http://aec.army.mil/Services/Conserve/ConservationReimbursablePrograms/HuntingFishingHistory.aspx> (visited April 15, 2015).

**C. The district court's reasoning is flawed.**

In reaching the conclusion that the Army Corps regulation violates the Second Amendment, and permanently enjoining the regulation, the district court relied almost entirely on this Court's decision in *Peruta v. County Of San Diego*, 742 F.3d 1144 (9th Cir. 2014); *see, e.g.*, ER 11 ("This Court, however, is bound by *Peruta*, as discussed above . . . . Thus, the Court declines to follow the analysis of [the United States District Court for the Northern District of Georgia]"). But the panel's decision in *Peruta* has been vacated by this Court's order granting rehearing en banc, and thus may "not be cited as precedent by or to any court of the Ninth Circuit." *Peruta v. County of San Diego*, No. 10-56971, Dkt. No. 193 (Mar. 26, 2015). The foundation upon which the district court built its decision is thus no longer in existence.

In any event, the panel's decision in *Peruta*—even apart from having been vacated—has no bearing here. *Peruta* concerned San Diego County's scheme for issuing permits authorizing the carrying of handguns. California law delegates to counties the authority to issue concealed-carry permits. Plaintiffs challenged San Diego County's policy of granting such licenses only when a person could distinguish

herself from an ordinary individual and “one’s personal safety alone [was] not considered good cause.” *Peruta*, 742 F.3d at 1148.

In striking down San Diego’s scheme, the panel concluded that a restriction on “a responsible, law-abiding citizen’s ability to carry a gun outside the home for self-defense” fell within the Second Amendment right to bear arms. *Peruta*, 742 F.3d at 1150 (footnote omitted). The court held that San Diego’s policy operated, like the law struck down in *Heller*, to “destroy” that right, and could not satisfy any level of scrutiny. *Id.* at 1170.<sup>6</sup> But the majority did not purport to address a regulation of the type at issue here, which concerns only the carrying of firearms on specific government property and not the regulation of firearms in public places generally. And the majority took pains to reaffirm *Heller*’s statement that regulation of firearms is appropriate and that laws forbidding the carrying of firearms into “sensitive places” are presumptively valid. *Id.* at 1178.

As demonstrated above, the Army Corps regulation at issue here concerns a longstanding restriction on the possession of loaded firearms while on sensitive government property. The Army Corps regulation is thus nothing like the broad prohibitions at issue in *Heller* or in *Peruta*, and the Army Corps regulation has no impact on plaintiffs’ ability to carry firearms for self-defense except when plaintiffs

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<sup>6</sup> In dissent, Judge Thomas explained that the law before the Court concerned the carrying of concealed weapons, and *Heller* had made clear that it did not cast doubt on “California’s ‘presumptively lawful’ and longstanding restrictions on carrying concealed weapons in public.” *Peruta*, 742 F.3d at 1179 (Thomas, J., dissenting)



choose to camp on Army Corps land. *See Moore*, 702 F.3d at 940 (“In contrast, when a state bans guns merely in particular places, such as public schools, a person can preserve an undiminished right of self-defense by not entering those places; since that’s a lesser burden, the state doesn’t need to prove so strong a need.”). Plaintiffs remain free to carry firearms in their homes and in unrestricted public areas.

In addition, the district court erred in the scope of the relief that it entered. In the absence of a class action, any injunction should have been limited to the individual plaintiffs named in the complaint. *See Zepeda v. INS*, 753 F.2d 719, 727 (9th Cir. 1983) (“On remand, the injunction must be limited to apply only to the individual plaintiffs unless the district judge certifies a class of plaintiffs.”); *see also Hernandez v. Reno*, 91 F.3d 776, 781 (5th Cir. 1996).

## CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed.

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APRIL 2015

### **STATEMENT OF RELATED CASES**

Counsel for appellants are not aware of any related cases as defined in Ninth Circuit Rule 28-2.6.

**CERTIFICATE OF COMPLIANCE WITH  
FEDERAL RULE OF APPELLATE PROCEDURE 32(a)**

I hereby certify that this brief complies with the requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in 14-point Garamond, a proportionally spaced font.

I further certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 6,274 words excluding the parts of the brief exempted under Rule 32(a)(7)(B)(iii), according to the count of Microsoft Word.

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### **CERTIFICATE OF SERVICE**

I hereby certify that on April 17, 2015, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

The plaintiffs in this case are registered CM/ECF users.

s/ Abby C. Wright  
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IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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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.

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF IDAHO

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EXCERPTS OF RECORD

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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**

**NOTICE OF APPEAL**

PLEASE TAKE NOTICE that defendants United States Army Corps of Engineers; John McHugh, Secretary of the Army; Lieutenant General Thomas Bostick, Commanding General and Chief of Engineers; Colonel John S. Kem, Northwestern Division Commander; and Lieutenant Colonel Timothy Vail, Walla Walla District Commander and District Engineer,



hereby appeal to the United States Court of Appeals for the Ninth Circuit from the Court's Memorandum Decision and Judgment entered October 13, 2014 [ECF Nos. 67, 68].

Dated: December 10, 2014

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 10th day of December 2014, I filed the foregoing Notice of Appeal 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.

**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

**MEMORANDUM DECISION**

**INTRODUCTION**

The Court has before it cross-motions for summary judgment. The Court heard oral argument on August 27, 2014, and took the motions under advisement. After further review, the Court has decided, for reasons set forth below, to grant the plaintiffs' motion and deny the Corps' motion.

**LITIGATION BACKGROUND**

Plaintiffs challenge regulations promulgated by the Army Corp of Engineers that govern the possession of firearms on property administered by the Corps. Plaintiffs argue that the regulations violate their Second Amendment right to keep and bear arms.

The regulations govern over 700 dams – holding back more than 100 trillion gallons of water – built by the Corps, and the surrounding recreation areas that serve over 300 million visitors annually. Adopted in 1973, the regulations were intended to provide for more effective management of the lake and reservoir projects. The regulation at issue here reads as follows:

(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.

(b) Possession of explosives or explosive devices of any kind, including fireworks or other pyrotechnics, is prohibited unless written permission has been received from the District Commander.

36 C.F.R. § 327.13. The plaintiffs' complaint alleges that this regulation violates the Second Amendment by (1) banning the possession of firearms in a tent, and (2) banning the carrying of firearms on Corps' recreation sites. The plaintiffs live in western Idaho, recreate on Corps-administered public lands where this regulation applies, and would possess a functional firearm at those recreation sites but for the Corps' active enforcement of this regulation.

Both sides seek summary judgment. To resolve this dispute, the Court will first identify the legal standards governing the Second Amendment and then evaluate the Corps' regulation under those standards.

## LEGAL STANDARDS

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*. To determine if the Corps' regulation violates the Second Amendment, the Court must examine first "whether the challenged law burdens conduct protected by the Second Amendment." *U.S. v. Chovan*, 735 F.3d 1127, 1136

(9th Cir. 2013). The second step is to “apply an appropriate level of scrutiny.” *Id.* The “appropriate level” depends on (1) “how close the law comes to the core of the Second Amendment right,” and (2) “the severity of the law’s burden on the right.” *Id.* at 1138 (quoting *Ezell v. City of Chicago*, 651 F.3d 684, 705 (7th Cir.2011)). A regulation that threatens a core Second Amendment right is subject to strict scrutiny, while a less severe regulation that does not encroach on a core Second Amendment right is subject to intermediate scrutiny. *Fyock v. City of Sunnyvale*, 2014 WL 984162 (N.D.Cal. Mar. 5, 2014).

However, this sliding scale analysis is not used when instead of merely burdening the right to bear arms, the law “destroys the right.” *Peruta v. County of San Diego*, 742 F.3d 1144, 1168 (9<sup>th</sup> Cir. 2014). In that case, the law is unconstitutional “under any light.” *Id.* “It is a rare law that ‘destroys the right’ requiring *Heller*-style per se invalidation.” *Id.* at 1170. That type of “rare law” was at issue in *Peruta*. There, a firearm registration scheme in San Diego County effectively banned the open and concealed carry of handguns for law-abiding citizens. *Id.* at 1175. The Circuit held that while a State may be able to ban the open *or* concealed carry of firearms, it may not ban *both*. *Id.* at 1172 (holding that “the Second Amendment does require that the states permit some form of carry for self-defense outside the home”). Because the San Diego County law effectively “destroyed” a law-abiding citizen’s Second Amendment right to carry a handgun for self-defense, the Circuit did not apply any level of scrutiny but simply declared the law unconstitutional. *Id.* at 1175.

## ANALYSIS

The Court must ask first whether the Corps' regulation burdens conduct protected by the Second Amendment. It does. The Second Amendment protects the right to carry a firearm for self-defense purposes. *Heller*, 554 U.S. at 628 (stating that "the inherent right of self-defense has been central to the Second Amendment right"). That right extends outside the home. *Peruta*, 742 F.3d at 1166 (holding that "the right to bear arms includes the right to carry an operable firearm outside the home for the lawful purpose of self-defense").

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. At most, it would allow a person to carry an unloaded firearm so long as he was not also carrying its ammunition. An unloaded firearm is useless for self-defense purposes without its ammunition. While those who use firearms for hunting are allowed greater latitude, the regulation grants no such exemption to those carrying firearms solely for purposes of self-defense. Consequently, the regulation does impose a burden on plaintiffs' Second Amendment rights.

Under *Peruta*, this 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. *Id.* at 1168-70.

The Corps certainly retains the right to regulate handguns on its property; the Second Amendment right is "not unlimited." *Heller*, 554 U.S. at 595. It is "not a right to

keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose.” *Id.* at 626. The Ninth Circuit confirms this in *Peruta*:

We conclude by emphasizing, as nearly every authority on the Second Amendment has recognized, regulation of the right to bear arms is not only legitimate but quite appropriate. We repeat *Heller’s* admonition that “nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession”—or carriage—“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.” *Heller*, 554 U.S. at 626–27. Nor should anything in this opinion be taken to cast doubt on the validity of measures designed to make the carrying of firearms for self-defense as safe as possible, both to the carrier and the community. 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 . . . . Undoubtedly some think that the Second Amendment is outmoded in a society where our standing army is the pride of our Nation, where well-trained police forces provide personal security, and where gun violence is a serious problem. That is perhaps debatable, but what is not debatable is that it is not the role of this Court [or ours] to pronounce the Second Amendment extinct.” *Id.* at 636. Nor may we relegate the bearing of arms to a “second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees that we have held to be incorporated into the Due Process Clause.” *McDonald*, 130 S.Ct. at 3044.

*Peruta*, 742 F.3d at 1178. This language confirms the right of the Corps to regulate handguns on its property. But here the Corps is attempting to ban handguns, not regulate them. The Corps justifies the ban by arguing that its parks are a “sensitive place,” a phrase used by *Peruta*, quoting *Heller*, in the excerpt above. But those cases limited the “sensitive place” analysis to facilities like “schools and government buildings.” In contrast, the ban imposed by the Corps applies to outdoor parks.



The Corps argues that it is entitled to be more restrictive because it is a governmental entity acting as a proprietor managing its own property. In support, the Corps cites *Nordyke v King*, 681 F.3d 1041 (9th Cir. 2012) (en banc), a case upholding a firearms ban on the ground that the governmental entity was acting as a proprietor to manage its property. In *Nordyke*, the plaintiffs challenged an Alameda County law making it a misdemeanor to possess a firearm on County property. The ban in that case was just as broad as that faced two years later in *Peruta* – neither law allows a law-abiding citizen to carry a gun for self-defense purposes – but *Nordyke* comes to the opposite result and upholds the ban.

How can the two cases be reconciled? Quite easily, as it turns out. The plaintiffs in *Nordyke* only challenged the Alameda County law as an effective ban on gun shows on County property because no seller could display firearms without running the risk of committing a misdemeanor. Importantly, the plaintiffs did not allege that they wanted to carry guns on county property for the purpose of defending themselves.<sup>1</sup> Having to confront only that aspect of the law that burdened gun shows rather than the core Second Amendment right of self-defense, the Circuit held that the law passed muster because Alameda County was entitled to impose restrictions on gun shows on County property in

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<sup>1</sup> The allegations of the parties in *Nordyke* were made clear in the three-judge panel opinion that was withdrawn when the case was taken en banc. *Nordyke v. King*, 644 F.3d 776, 786 (noting that plaintiffs “complain that they cannot display and sell guns on county property; they do not allege that they wish to carry guns on county property for the purpose of defending themselves while on that property”), *withdrawn by*, 664 F.3d 774 (9<sup>th</sup> Cir. 2011). The Court is not citing the three-judge panel opinion for its precedential value but merely reciting its factual account of the pleadings.

its role as proprietor of its property. Moreover, despite the strict language of the law, the County had interpreted the law to loosen its restriction and allow the display of firearms.

In contrast, the plaintiffs in the present case do allege that their core right of self-defense is infringed, and the Corps has not interpreted its regulation to impose something less than its language conveys. Thus, *Nordyke* offers little guidance here.

The Court recognizes that a District Court in the Eleventh Circuit has evaluated the same Corps' regulation and concluded, in resolving a motion for preliminary injunction, that it is unlikely the plaintiffs' challenge will succeed. *GeorgiaCarry.Org, Inc. v. U.S. Army Corps of Engineers*, 2014 WL 4059375 (N.D.Ga. Aug. 18, 2014). That decision relied on *Nordyke* in applying an intermediate level of scrutiny and finding that the regulation passed muster. This Court, however, is bound by *Peruta*, as discussed above, and finds *Nordyke* distinguishable. Thus, the Court declines to follow the analysis of *GeorgiaCarry.Org*.

The Corps argues that its recreation sites are public venues where large numbers of people congregate, making it imperative that firearms be tightly regulated. The Corps also points out that the sites contain dams and power generation facilities that require heightened protection, especially given homeland security threats.

The Corps manages 422 projects in 42 states, including 702 dams and over 14,000 miles of levees. *See Statement of Facts (Dkt. No. 52-2)* at ¶¶ 1, 9. These dams and related structures have been deemed as "critical infrastructure" by the U.S. Department of Homeland Security's Office of Inspector General on that ground that a catastrophic

failure could affect populations exceeding 100,000 and have economic consequences surpassing \$10 billion. *Id.* at ¶ 10.

The Corps undoubtedly has a substantial interest in “providing the public with safe and healthful recreational opportunities while protecting and enhancing [its] resources.” 36 C.F.R. § 327.1. About 90% of the lakes that support Corps’ projects are located near metropolitan areas. *Id.* at ¶ 2. It follows that most of these facilities have a “high density of use.” *Id.* at ¶ 4. This density leads to conflicts caused by alcohol consumption, overcrowded facilities, visitors’ preference for different types of music played at different sound levels, and the relative loudness of visitors’ conversations. *Id.* at ¶ 18. Based on surveys conducted some twenty years ago, Corps Park Rangers often found themselves in dangerous situations, and were assaulted by visitors once every six days. *Id.* at ¶¶ 21-26. The Corps has concluded that “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.” *See Austin Declaration (Dkt. No. 18-1)* at ¶ 5c. The danger to Corps Park Rangers is especially acute because Congress has not authorized them to carry firearms. *Id.* at ¶ 28.

The Corps cites these 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.

### **Conclusion**

The regulation banning the use of handguns on Corps’ property by law-abiding citizens for self-defense purposes violates the Second Amendment. 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*. The Court recognizes that this result conflicts with *GeorgiaCarry.Org, Inc. v. U.S. Army Corps of Engineers*, 2014 WL 4059375 (N.D.Ga. Aug. 18, 2014), but the Court’s decision is dictated by the law of the Ninth Circuit, namely *Peruta*.

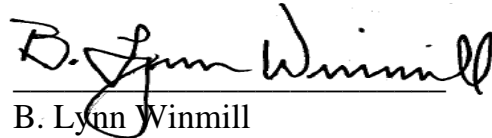
For all of the reasons cited above, the Court will grant plaintiffs’ motion for summary judgment and deny the Corps’ motion. The plaintiffs are therefore entitled to a declaratory judgment that 36 C.F.R. § 327.13 violates the Second Amendment, and an injunction enjoining its enforcement in Idaho. The injunction is limited to Idaho because its scope is dictated by the allegations of the two named plaintiffs – Elizabeth Morris and Alan Baker. *See Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1140 (9th Cir. 2009) (holding that “[t]he district court abused its discretion in enjoining the rules themselves as opposed to enjoining their enforcement as to the plaintiffs before him”). Morris and Baker allege that they use Corps’ campgrounds in Idaho, *see Declarations of Morris and Baker (Dkt. Nos. 9 & 10)*, and so the Court’s injunction will be limited to enjoining enforcement on Corps’ property in Idaho. *See Meinhold v. U.S. Dept. of Defense*, 34 F.3d 1469 (9<sup>th</sup> Cir.

1994) (holding that court could not impose nationwide injunction against application of unconstitutional federal regulation where plaintiffs had not been certified as a class).

The Court will enter a separate Judgment setting forth these rulings as required by Rule 58(a).



DATED: October 13, 2014



B. Lynn Winmill  
Chief Judge  
United States District Court

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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**

**DEFENDANTS' STATEMENT OF  
 MATERIAL FACTS**

Pursuant to Local Civil Rule 7.1(b)(1), Defendants submit this statement of material facts in support of their motion for summary judgment.

1. The U.S. Army Corps of Engineers ("Corps") manages 422 projects (mostly lakes) in 42 states and is the steward of 12 million acres of land and water used for recreation, with

54,879 miles of shoreline. Administrative Record (“AR”) at 0000727, 0001009, 0001633; U.S. Army Corps of Engineers, Information Paper, Subject: Civil Works Program Statistics (March 20, 2012) (“Information Paper”) [ECF No. 18-2].

2. More than 90% of the lakes that support Corps-managed projects are located near metropolitan areas. Information Paper.

3. Roughly 80% of Corps recreation areas are located within 50 miles of an urban area. AR at 0001517; Congressional Research Service, Firearms at Army Corps Water Resources: Proposed Legislation and Issues for Congress (July 12, 2012) (“CRS Report”) [ECF No. 18-3].

4. In general, Corps-managed recreational facilities have a high density of use because many such facilities are located near major population centers. Declaration of Stephen B. Austin ¶ 5.c (“Austin Decl.”) [ECF No. 18-1].

5. Corps-managed projects receive 370 million visits per year, making its projects the most visited of any single federal agency’s sites. AR at 0001009, 0001633; Information Paper.

6. Ten percent of the U.S. population visits a Corps-managed project at least once a year. Information Paper.

7. The Corps hosts 20% of all visits to federal recreation areas on just 2% of the federal land base. Id.

8. Corps-managed projects open to the public for recreation include projects containing important infrastructure such as dams and levees. Id.

9. The Corps owns and operates 702 dams and 227 navigational locks, and has built or controls 14,501 miles of levees. Id.

10. The U.S. Department of Homeland Security’s Office of Inspector General has characterized “[d]ams and related structures,” including those operated and managed by the Corps, as “critical infrastructure,” given that “one catastrophic failure at some locations could affect populations exceeding 100,000 and have economic consequences surpassing \$10 billion.” U.S. Department of Homeland Security, Office of Inspector General, DHS Risk Assessment Efforts in the Dams Sector (2011), at 1, 2, *available at* [http://www.oig.dhs.gov/assets/Mgmt/OIG\\_11-110\\_Sep11.pdf](http://www.oig.dhs.gov/assets/Mgmt/OIG_11-110_Sep11.pdf).

11. The Corps and the U.S. Department of Homeland Security regard some Corps infrastructure as critical to homeland security and the economy; these structures include multi-purpose dams and major navigation locks. CRS Report at 3.

12. According to the Congressional Research Service, many of these Corps-managed facilities require additional protection measures in times of heightened homeland security concerns. *Id.*

13. Public safety on Corps-managed lands is of paramount importance to the Corps, and is the basis for policies, rules, and regulations regarding visitor behavior at Corps projects. AR at 0000613.

14. The Corps must consider a number of factors when deciding whether the public interest is furthered by opening Corps-managed lands for recreation, and when developing rules for their recreational use. Austin Decl. ¶ 5.a.

15. Developing rules regarding the possession of firearms on Corps-managed lands has required a delicate balancing of several of these factors, including the safety of visitors and of Corps employees; protection of natural, cultural, and developed resources; and promotion of



recreational opportunities. Id.

16. The Corps has considered how to structure its firearms rules to ensure the safety of visitors to the lands it manages. Id. ¶ 5.c.

17. The Corps has considered potential sources of conflict among visitors and has enacted rules aimed at minimizing any such conflict. Id.

18. Some sources of conflict among visitors to Corps-managed lands include alcohol consumption, overcrowded facilities, visitors' preference for different types of music played at different sound levels, and the relative loudness of visitors' conversations. Id.; see also AR at 0000556 – 0000559, 0000650, 0000652.

19. Conflicts among visitors to Corps-managed lands are often more acute at Corps-managed recreational areas, as contrasted with U.S. National Park Service recreational areas, because of the higher concentration of visitors on Corps lands. Id.

20. Corps regulations are aimed at ensuring that inevitable conflicts that arise as a result of disagreements about how different visitors make use of Corps recreational areas are resolved as quickly and peacefully as possible. Id.

21. In a 1996 survey, 62% of Corps Park Rangers reported incidents of verbal abuse from one or more visitors to Corps-managed lands, and 46% reported that they had been physically threatened by one or more visitors. AR at 0000558.

22. In a 1996 survey, 53% of Corps Park Rangers reported that they had witnessed between one and ten incidents in which one or more visitors to Corps-managed lands had verbally or physically threatened another visitor or visitors. Id.

23. In a 1995 survey, Corps Park Rangers reported that each day, on average, one

Ranger was physically threatened by one or more visitors to Corps-managed lands, and nearly four Rangers were verbally abused or verbally assaulted by one or more visitors. AR at 0000675.

24. In a 1995 survey, Corps Park Rangers reported that, on average, a Corps Park Ranger was assaulted by one or more visitors to Corps-managed lands once every six days. Id.

25. In a 1995 survey, the number of reported incidents of threats made by visitors to Corps-managed lands against Corps Park Rangers greatly exceeded the number of reported incidents of threats against U.S. National Park Service officers. Id.

26. A 1994 study reported that Corps Park Rangers sometimes found themselves in potentially unsafe and dangerous situations, and that typically, such unsafe situations include those involving alcohol and drug use on project lands, the use of weapons by the visiting public, domestic violence, and patrols in remote areas with little or no back-up from other law enforcement agencies. AR at 0001090.

27. The Corps has concluded that the presence of a loaded firearm could far more quickly escalate tensions resulting from disagreements among visitors to Corps-managed lands and could present a significant threat to public safety, involving the potential use of deadly force against another visitor or a Corps Park Ranger. Austin Decl. ¶ 5.c.

28. Corps Park Rangers are neither equipped nor trained to function as law enforcement officers because Congress has not authorized Corps employees to carry firearms, to execute search warrants, or to enforce any federal laws except for issuing citations for violations of regulations governing Corps-managed lands. AR at 0000491, 0001009.

29. The Corps has determined that allowing armed visitors on Corps-managed lands could create a chilling effect on the enforcement of Corps regulations, because Congress has not

authorized Corps Park Rangers to be armed. Austin Decl. ¶ 5.e.

30. The Corps firearms regulation is premised on the Corps' determination that the public interest is furthered by restricting the possession of loaded firearms on lands the Corps manages, unless the firearms are being used for hunting or target shooting, or being carried by a law enforcement officer or a visitor who has received permission from the District Commander. Austin Decl. ¶ 5.f.

31. Owners of private businesses in Idaho, including campgrounds and open recreational areas, may choose not to permit the carrying of firearms on their property. Office of the Attorney General, State of Idaho, Concealed Weapons License FAQs, No. 16, *available at* [http://www.ag.idaho.gov/concealedWeapons/concealedWeapons\\_index.html](http://www.ag.idaho.gov/concealedWeapons/concealedWeapons_index.html).

Dated: May 19, 2014

Respectfully submitted,

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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

**MEMORANDUM DECISION AND  
ORDER**

**INTRODUCTION**

The Court has before it a motion for preliminary injunction filed by plaintiffs and a motion to dismiss filed by the defendants. The Court heard oral argument on January 7, 2014, and took the motions under advisement. After further review, the Court has decided, for reasons set forth below, to deny the motion to dismiss and grant the motion for preliminary injunction.

**LITIGATION BACKGROUND**

Plaintiffs challenge regulations promulgated by the Army Corp of Engineers. The regulations govern the possession of firearms on property administered by the Corps. Plaintiffs argue that the regulations violate their Second Amendment right to keep and bear arms.

The regulations govern over 700 dams – holding back more than 100 trillion gallons of water – built by the Corps, and the surrounding recreation areas that serve over

300 million visitors annually. Adopted in 1973, the regulations were intended to provide for more effective management of the lake and reservoir projects. The regulation at issue here reads as follows:

- (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.
- (b) Possession of explosives or explosive devices of any kind, including fireworks or other pyrotechnics, is prohibited unless written permission has been received from the District Commander.

36 C.F.R. § 327.13. The plaintiffs' complaint alleges that this regulation violates the Second Amendment by (1) banning the possession of firearms in a tent, and (2) banning the carrying of firearms on Corps' recreation sites. The plaintiffs live in western Idaho, recreate on Corps-administered public lands where this regulation applies, and would possess a functional firearm at those recreation sites but for the Corps' active enforcement of this regulation.<sup>1</sup>

The Court will take up first the Corps' motion to dismiss, and specifically the Corps' argument that the plaintiffs have no Second Amendment rights as a matter of law.

## ANALYSIS

### **Corps' Motion to Dismiss**

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<sup>1</sup> These allegations establish that the plaintiffs have standing and that the case is not moot. The Court therefore refuses to dismiss the case at this time on standing or mootness grounds.

The Corps argues that its recreation sites are public venues where large numbers of people congregate, making it imperative that firearms be tightly regulated. The Corps also points out that the sites contain dams and power generation facilities that require heightened protection, especially given homeland security threats. The Corps distinguishes its sites from those of other agencies like the Forest Service that are required by law to manage for multiple use, including the use by the public for recreation. In contrast, there is no law requiring the Corps to operate recreation sites, and that gives the Corps more leeway to restrict the public under the Second Amendment, the agency argues. For these reasons, the Corps seeks to dismiss the case on the ground that its regulation does not violate the Second Amendment as a matter of law.

To evaluate this argument, the Court will employ the two-step analysis set out in *U.S. v. Chovan*, 735 F.3d 1127 (9<sup>th</sup> Cir. 2013). The Court must determine first “whether the challenged law burdens conduct protected by the Second Amendment.” *Id.* at 1136. The second step is to “apply an appropriate level of scrutiny.” *Id.*

The “appropriate level” depends on (1) “how close the law comes to the core of the Second Amendment right,” and (2) “the severity of the law’s burden on the right.” *Id.* at 1138 (quoting *Ezell v. City of Chicago*, 651 F.3d 684, 705 (7<sup>th</sup> Cir.2011)). A regulation that threatens a core Second Amendment right is subject to strict scrutiny, while a less severe regulation that does not encroach on a core Second Amendment right is subject to intermediate scrutiny. *Silvester v Harris*, 2013 WL 6415670 (E.D.Cal. Dec. 9, 2013).

The Court must ask first whether the Corps' regulation burdens conduct protected by the Second Amendment. It does. The Second Amendment protects the right to carry a firearm for self-defense purposes. *Heller*, 554 U.S. at 628 (stating that "the inherent right of self-defense has been central to the Second Amendment right"). The regulation bans carrying a loaded firearm for the purpose of self-defense. It also bans carrying an unloaded firearm along with its ammunition. At most, it would allow a person to carry an unloaded firearm so long as he was not also carrying its ammunition. An unloaded firearm is useless for self-defense purposes without its ammunition. While those who use firearms for hunting are allowed greater latitude, the regulation grants no such exemption to those carrying firearms solely for purposes of self-defense. Consequently, the regulation does impose a burden on plaintiffs' Second Amendment rights.

The second step is to apply the appropriate level of scrutiny. That inquiry turns on how close the regulation cuts to the core of the Second Amendment and how severe the burden is on that right.

No court has identified those core rights comprehensively. But one core right was described by the Supreme Court: The right of a law-abiding individual to possess a handgun in his home for self-defense. *District of Columbia v. Heller*, 554 U.S. 570 (2008). In addressing the need for self-defense in the home, the Supreme Court held that the home is "where the need for defense of self, family, and property is most acute." *Id.* at 628.

The same analysis applies to a tent. 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 – the year the Second Amendment was ratified – were probably more apt to see a tent as a home than we are today. *Heller*, 554 U.S. at 605 (holding that “public understanding” at time of ratification is “critical tool of constitutional interpretation”). 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.” *U.S. v. Gooch*, 6 F.3d 673 (9<sup>th</sup> Cir. 1993). The privacy concerns of the Fourth Amendment carry over well into the Second Amendment’s security concerns.

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.

The plaintiffs also challenge the ban on their right to carry firearms outside their tents for self-defense purposes. As the Court discussed above, the regulation prohibits carrying firearms for self-defense purposes despite *Heller*’s recognition that “the inherent right of self-defense has been central to the Second Amendment right.” *Heller*, 554 U.S. at 628. In interpreting the phrase “bear arms” in the Second Amendment, the *Heller* majority held that “[w]hen used with ‘arms,’ . . . the term [“bear”] has a meaning that refers to carrying for a particular purpose – confrontation.” *Heller*, 554 U.S. at 584.

“*Heller* does not simply reaffirm the traditional right to act in self-defense when threatened. Rather, it recognizes a right to have and carry guns in case the need for such

an action should arise.” Blocher, *The Right Not To Keep or Bear Arms*, 64 Stanford L. Rev. 1, 16 (2012).

The right of self-defense is not, however, unlimited. *Heller* stated that “nothing in our opinion should be taken to cast doubt on . . . laws forbidding the carrying of firearms in sensitive places such as schools and government buildings . . . .” *Heller*, 554 U.S. at 626-27. “[A]s we move outside the home, firearm rights have always been more limited, because public safety interests often outweigh individual interests in self-defense.” *U.S. v. Masciandaro*, 638 F.3d 458, 470 (4th Cir. 2011).

Still, a solid line of cases decided after *Heller* examines a regulation’s impact on self-defense even when the conduct governed is a public venue outside the home. For example, *Masciandaro* upheld a regulation that banned loaded firearms in a National Park because the regulation contained an exception that struck a balance between public safety and self-defense. *Id.* at 474 (holding that the regulation “leaves largely intact the right to possess and carry weapons in case of confrontation”).

The opposite result was reached in *Moore v. Madigan*, 702 F.3d 933, 936 (7<sup>th</sup> Cir. 2012) (Posner, J.). The Seventh Circuit examined an Illinois regulation with a reach similar to the regulation at issue here – it banned carrying even unloaded firearms if ammunition was accessible. *Id.* at 934. Judge Posner, writing the majority opinion, described the Illinois law as “the most restrictive gun law of any of the 50 states,” and held that it violated the Second Amendment because it “flat[ly] ban[ned] . . . carrying ready-to-use guns outside the home” with no self-defense exception. *Id.* at 940–41.

The ban imposed by the Corps places this case closer to *Moore* than *Masciandaro*. The Corps' regulation contains a flat ban on carrying a firearm for self-defense purposes. By completely ignoring the right of self-defense, the regulation cannot be saved by the line of cases, like *Masciandaro*, that upheld gun restrictions accommodating the right of self-defense. *See also, U.S. v Parker*, 919 F.Supp.2d 1072 (E.D.Cal. Jan 22 2013) (upholding concealed weapon regulation in Yosemite Park that allowed for self-defense); *Nichols v Brown*, 2013 WL 3368922 (C.D.Cal. July 3 2013) (upholding California gun control laws that allowed for self-defense).

While the ban on carrying firearms for self-defense may impose a burden on this core right of the Second Amendment severe enough to call for strict scrutiny, it is unnecessary for the Court to decide that issue because the regulation fails to pass muster even if intermediate scrutiny is applied. The intermediate scrutiny standard requires: (1) that the government's stated objective must be significant, substantial, or important, and (2) that there is a reasonable fit between the challenged regulation and the government's asserted objective. *Chovan*, 735 F.3d at 1138. For there to be a "reasonable fit," the regulation must not be substantially broader than necessary to achieve the government's interest. *Id.*

Here, the regulation is designed to protect both critical infrastructure and the public. If the regulation ended there, it would satisfy the "reasonable fit" test. But it extends to ban firearms entirely from being carried for self-defense. It is simply too broad. Drafted long before *Heller*, it violates the Supreme Court's description of Second Amendment rights in that case. This regulation needs to be brought up to date.

The Corps argues that the impact of its regulation is felt only on federal land that it administers, and that it is entitled to have the regulation evaluated under a rational basis test. The Corps cites *Nordyke v King*, 681 F.3d 1041 (9th Cir. 2012) where the Circuit upheld a county law regulating firearms at commercial gun sales on county property. In making that ruling, the Circuit cited *U.S. v. Kokinda*, 497 U.S. 720, 725 (1990) for the proposition that there is a distinction between governmental exercise of the “power to regulate or license, as law-maker” and governmental actions taken in its role “as proprietor, to manage its internal operations.”

But *Nordyke* never discussed the right of self-defense, and cannot be used to justify the use of a rational basis test here. The cases cited above where self-defense was discussed – *Masciandaro*, *Moore*, *Parker*, and *Nichols* – all applied more than a rational basis test to evaluate the laws under scrutiny. The Court finds that line of authority persuasive.

The Corps argues that it should be treated differently than other agencies because unlike them, the Corps is not statutorily required to open its sites to the public. But the Corps cites no case exempting the Government from constitutional requirements whenever it acts voluntarily. The Court can find no reason to adopt such a rule.

For all these reasons, the Court will deny the Corps’ motion to dismiss.

### **Plaintiffs’ Motion for Preliminary Injunction**

Plaintiffs seek to enjoin the Corps from enforcing its ban on law-abiding citizens possessing functional firearms on Corps-administered public lands for the purpose of self-defense. The Corps responds that plaintiffs are seeking a mandatory injunction that

is more difficult to obtain than a standard injunction. “A mandatory injunction orders a responsible party to take action,” and therefore “goes well beyond simply maintaining the status quo.” *Marlyn Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co.*, 571 F.3d 873, 879 (9th Cir.2009). Accordingly, mandatory injunctions are “particularly disfavored.” *Id.*

Plaintiffs are not, however, seeking a mandatory injunction – they are not asking the Corps to take affirmative action but are asking instead that a regulatory ban not be enforced. While this would require the Corps to change its practices, that type of change does not convert the injunction into a mandatory injunction. In the leading case of *Winter v. Natural Resources Defense Council*, 555 U.S. 7 (2008), the injunction required the Navy to stop using sonar in its training exercises – in other words, it caused the Navy to change its practices – but the Supreme Court evaluated the injunction under the standard test. This case presents the same type of prohibitory injunction, and the Court will therefore not apply the stricter test applicable to mandatory injunctions.

To be entitled to injunctive relief under that standard test, plaintiffs must show each of the following: (1) a likelihood of success on the merits; (2) that irreparable harm is likely, not just possible, if the injunction is not granted; (3) that the balance of equities tips in its favor; and (4) that an injunction is in the public interest. *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127 (9th Cir. 2011). If requirements (2) and (4) are satisfied, and the balance of hardships “tips sharply in the plaintiffs’ favor,” the plaintiff need only raise “serious questions going to the merits” to be entitled to injunctive relief.

*Id.* at 1134-35 (holding that this aspect of the Ninth Circuit’s sliding scale test survived *Winter v. Natural Resources Defense Council*, 555 U.S. 7 (2008)).

From the discussion above concerning the motion to dismiss, it is apparent that plaintiffs have shown a very strong likelihood of success on the merits. Moreover, irreparable harm is likely because the plaintiffs have made out a colorable claim that their Second Amendment rights have been threatened. *See Sanders County Republican Cent. Committee v. Bullock*, 698 F.3d 741, 744 (9<sup>th</sup> Cir. 2012) (holding that colorable claim of constitutional violation satisfies irreparable harm element). This threat tips the balance of equities in favor of plaintiffs because the harms complained of by the Corps could be “addressed by a more closely tailored regulatory measure[.]” *Ezell*, 651 F.3d at 710. For the same reasons, an injunction would be in the public interest.

Accordingly, the Court will grant the injunction requested by plaintiffs enjoining the Corps from enforcing 36 C.F.R. § 327.13 as to law-abiding individuals possessing functional firearms on Corps-administered public lands for the purpose of self-defense.<sup>2</sup>

### **Conclusion**

This is a preliminary injunction, and hence the Court’s decision here is preliminary in nature. The Corps remains entitled to an evidentiary hearing or trial to establish a factual record before the Court reaches any final resolution. To move toward

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<sup>2</sup> The Court waives the bond requirement under Rule 65(c). *Barahona-Gomez v. Reno*, 167 F.3d 1228, 1237 (9<sup>th</sup> Cir. 1999).

that point, counsel are directed to contact the Court's Clerk to set up a status conference to determine how the case should proceed from here.

### ORDER

In accordance with the Memorandum Decision set forth above,

NOW THEREFORE IT IS HEREBY ORDERED, that the motion to dismiss (docket no. 30) is DENIED.

IT IS FURTHER ORDERED, that the motion for preliminary injunction (docket no. 4) is GRANTED. The Corps is enjoined from enforcing 36 C.F.R. § 327.13 as to law-abiding individuals possessing functional firearms on Corps-administered public lands for the purpose of self-defense. This preliminary injunction shall remain in force until further notice of the Court.

IT IS FURTHER ORDERED, that counsel shall contact the Court's Clerk ([jamie\\_gearhart@id.uscourts.gov](mailto:jamie_gearhart@id.uscourts.gov)) to set up a telephone status conference to determine how this case should proceed.



DATED: January 10, 2014

B. Lynn Winmill  
Chief Judge  
United States District Court



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UNITED STATES DISTRICT COURT  
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**DECLARATION OF STEPHEN B.  
AUSTIN**

**Declaration of Stephen B. Austin**

I, Stephen B. Austin, pursuant to 28 U.S.C. § 1746, do hereby declare and state as follows:

1. I have been employed as a Park Ranger/Outdoor Recreation Planner/Natural Resources Manager by the U.S. Army Corps of Engineers (Corps) for 36 years. I received my Bachelor of Science degree in Forest Management from Washington State University in 1975 and completed some graduate level course work prior to accepting a permanent position with the Corps in 1977. Since 1988, I have been the Senior Policy Advisor for Park Ranger Activities in the Natural Resources Management Branch, Operations Division, at Corps headquarters in Washington, D.C.



2. In my current position in the Natural Resources Management Branch, I oversee the Corps Park Ranger Program to include the Visitor Assistance, Interpretation, Uniform, Public Safety, Youth Conservation Services, and Career Development programs. I am responsible for developing strategic goals/objectives and implementing and directing national policy within these programs. These programs further the Corps mission to manage the natural, cultural, and developed resources under Corps jurisdiction in the public interest, providing the public with safe and healthful recreational opportunities while protecting and enhancing these resources. I am familiar with the laws and authorities for the Corps Natural Resources Management Program, including 36 C.F.R. Part 327, Rules and Regulations Governing Public Use of Corps of Engineers Water Resource Development Projects. I directed the 1995 Visitor Assistance Program study and rulemaking that resulted in the current May 2000 version of 36 C.F.R. Part 327. This declaration is based on my personal knowledge, as well as knowledge made available to me in the course of my duties with the Corps. I make this declaration in support of Defendants' Opposition to the Plaintiffs' Motion for a Preliminary Injunction.

### 3. General Background

a. Congress authorized the Corps of Engineers to operate recreation areas on Water Resource Development Projects for general public use in Section 4 of the Flood Control Act of 1944. This authority is codified in its current form at 16 U.S.C. § 460d. In relevant part:

The Chief of Engineers, under the supervision of the Secretary of the Army, 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. . .

The water areas of all such projects shall be open to public use generally for boating, swimming, bathing, fishing, and other recreational purposes, and ready access to and exit from such areas along the shores of such projects shall be maintained for general public use, when such use is determined by the Secretary of the Army not to be contrary to the public interest, all under such rules and regulations as the Secretary of the Army may deem necessary, including but not limited to prohibitions of dumping and unauthorized disposal in any manner of refuse, garbage, rubbish, trash, debris, or litter of any kind at such water resource development projects, either into the waters of such projects or onto any land federally owned and administered by the Chief of Engineers.

b. Under the authority at 16 U.S.C. § 460d, the Corps issued regulations governing the use of these projects by the public. The Corps first issued regulations in the Federal Register on March 23, 1973. 38 Fed. Reg. 7552. The regulations were published at 36 C.F.R. Part 327. The Corps published the current version of the regulations in the Federal Register on February 11, 2000. The Corps "designed [the regulations] to ensure safe, enjoyable and environmentally sound visitation on the public lands, free from unwarranted disturbances." 65 Fed. Reg. 6896. The regulations state that the Corps policy is "to manage the natural, cultural and developed resources of each project in the public interest, providing the public with safe and



healthful recreational opportunities while protecting and enhancing these resources.” 36 C.F.R. § 327.1 (a).

c. The Corps manages the operation and maintenance of Water Resource Development Projects throughout the United States. These projects include navigational locks and dams, as well as multiple-purpose dams that have been authorized for flood control (or, more accurately, flood-damage risk reduction), hydropower, water supply, navigation, fish and wildlife conservation and/or recreation. Under the Operations-Natural Resources Management Program, the Corps manages 422 lake and river projects in 43 states and is the steward of 12 million acres of land and water used for recreation, with 54,879 miles of shoreline. See U.S. Army Corps of Engineers, Information Paper, Subject: Civil Works Program Statistics (March 20, 2012) (attached as Exhibit 1). Many of these projects serve as popular recreation destinations with 92,844 campsites, 3544 boat launch ramps, and 7700 miles of trails. *Id.* The Corps is the largest Federal provider of outdoor recreation with 370 million visits per year. *Id.* The Corps hosts 20% of all visits to federal recreation areas on just 2% of the Federal land base. *Id.* By comparison, the National Park System comprises 84 million acres and hosts 279 million visitors per year while Corps projects host 370 million visitors per year on only 12 million acres – which amounts to 10 times the density of use experienced in the National Parks. *Id.* and <http://www.nps.gov/faqs.htm>. This high-density, concentrated level of public use often results in very crowded conditions in many Corps park areas with accompanying safety, management, and rule enforcement challenges.

#### 4. Corps Regulation of Firearm Possession and Usage

a. The Corps regulates but does not ban firearm possession and use at Water Resource Development Projects. Corps regulations allow for the carry and use of firearms and other weapons for hunting on a substantial portion of Corps project lands and waters totaling millions of acres as long as the hunting is in compliance with state and local law. 36 C.F.R. § 327.13(a)(2). In addition, firearm use and possession is authorized at approximately 32 public shooting ranges located at Corps projects. 36 C.F.R. § 327.13(a)(3). Federal, state and local law enforcement officers are also allowed to possess loaded firearms. 36 C.F.R. § 327.13(a)(1). Firearm possession is also authorized if the Corps District Commander has issued written permission. 36 C.F.R. § 327.13(a)(4). The possession of loaded firearms is otherwise prohibited. 36 C.F.R. § 327.13(a).

b. These restrictions have historically been part of the Corps regulations for these lands. Issued over 40 years ago, the first set of proposed regulations governing the use of Corps-managed Water Resource Development Projects contained a section on firearms. The proposed regulations were published in the September 21, 1972, Federal Register. 37 Fed. Reg. 19632, 19633. The proposed regulations contained the following section on firearms:

§ 327.13 Explosives, firearms, other weapons and fireworks.

(a) The possession of firearms, ammunition, and projectal [sic] firing devices, bows and arrows, crossbow, and explosives of any kind is prohibited unless:

(1) In the possession of a law enforcement officer or Government employee on

official duty;

(2) used for hunting during the hunting season as permitted under § 327.8; or

(3) a permit therefor [sic] has been issued by the District Engineer.

(b) The possession and use of fireworks is prohibited unless a permit therefor [sic] has been issued by the District Engineer.

The final rule was published in March 23, 1973, edition of the Federal Register. 38 Fed. Reg. 7552, 7553. The final rule added the clarification that only loaded firearms were prohibited unless one of the three exceptions was met. The text of the final regulation:

§ 327.13 Explosives, firearms, other weapons, and fireworks.

(a) The possession of loaded firearms, ammunition, projectile firing devices, bows and arrows, cross bows, and explosives of any kind is prohibited unless:

(1) In the possession of a law enforcement officer or Government employee on official duty;

(2) used for hunting or fishing during the hunting or fishing season as permitted under § 327.8, or

(3) unless written permission has been received from the District Engineer.

(b) The possession or use of fireworks is prohibited unless written permission has been received from the District Engineer.

c. 36 CFR Part 327, including § 327.13, has been amended three times since 1973. Section 327.13 was amended in 1979 to add a provision allowing firearm use at authorized shooting ranges and to make changes to the exception for law enforcement officers. Proposed rule 43 Fed. Reg. 5545, 5547 (Feb. 9, 1978) and Final Rule 44 Fed. Reg. 12671, 12674 (Mar 8, 1979). § 327.13 was amended again in 1985 to consolidate the exception for law enforcement officers and to add the requirement that “devices,” including firearms, be unloaded when being “transported from or between hunting and fishing sites.” Final Rule 50 Fed. Reg. 35,555 (Sept. 3, 1985). The Corps most recently re-issued the part 327 regulations, including § 327.13, as a proposed rule in the Federal Register on July 20, 1999, and requested public comments. 64 Fed. Reg. 38,854. The Corps did not receive any comments or objections on the re-issuance of 36 C.F.R. 327.13 and published the final rule in the February 11, 2000, Federal Register. 65 Fed. Reg. 6896. The text of the current rule:

§ 327.13 -- Explosives, firearms, other weapons and fireworks.

(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.

(b) Possession of explosives or explosive devices of any kind, including fireworks



or other pyrotechnics, is prohibited unless written permission has been received from the District Commander.

5. Rationale behind Corps Regulation of Firearm Possession and Usage

a. 36 C.F.R. §327.1 outlines the policy of the Secretary of the Army, acting through the Chief of Engineers, to manage the natural, cultural and developed resources of each project in the public interest, providing the public with safe and healthful recreational opportunities while protecting and enhancing these resources. The Corps must consider many factors when deciding whether it is in the public interest to open Water Resource Development Project areas for recreation and when developing the rules and regulations for the recreational use of the projects. These factors generally include the safety of the visiting public, the safety of Corps employees and other government officials, the protection of the natural, cultural and developed resources and the promotion of recreation opportunities. The rules regarding the use and possession of firearms at Corps-administered areas also require a delicate balancing of these competing factors. The Corps has considered whether to allow for visitors to carry concealed weapons in accordance with state laws where the project was located. See, for example, U.S. Army Corps of Engineers, Visitor and Ranger Safety Review, Appendix I, Recommended Changes to Title 36 at p. I-3 (Sept. 1995)(Appendix I is attached as Exhibit 2). The Corps has also considered prohibiting firearms, loaded or unloaded. Id. The approach in § 327.13 reflects the result of the Corps' balancing of these competing factors with the ultimate goal of providing a safe recreational experience for the visiting public.

b. As part of its consideration of these many factors, the Corps must consider the overall project purposes and whether the use and possession of firearms for recreation related reasons is consistent with that purpose. Areas on Corps projects designated for recreation are often co-located with infrastructure that requires heightened security measures. This infrastructure includes flood control (or, more accurately, flood-damage risk reduction) structures such as dams and levees. The Corps operates 702 dams and has built or controls 14,501 miles of levees. Exhibit 1. The Corps-managed infrastructure also includes power-generation facilities, where the Corps provides 24 percent of the Nation's hydropower capacity. Id. Also part of Corps-managed infrastructure are reservoirs that provide an important source of drinking water for millions of Americans; these reservoirs contain three trillion gallons of water storage used for municipal and industrial water with a yield sufficient to meet the needs of 96 million households. Id.

c. The Corps also must consider how to structure the regulation to provide for the safety of visitors. Corps-managed recreation areas bring together a diverse mixture of visitors with their own lifestyles that influence how they enjoy their stay. 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. These problems are more acute at Corps recreation areas because of the high density of usage as compared to National Parks. Corps regulations must be crafted to minimize these conflicts. Corps regulations, for example, address these issues by setting rules on operation of vessels (§ 327.3), swimming (§ 327.5), sanitation (§ 327.9), fires (§ 327.10), pet control (§ 327.11), and establishing quiet hours (§ 327.12). The Corps must ensure that the inevitable conflicts in how people enjoy such places are resolved as quickly and peacefully as possible. 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.

d. Another factor the Corps must consider is providing recreation opportunities that involve the use of firearms, such as hunting and target shooting. The Corps regulations at 36 C.F.R. § 327.8 allow hunting on large areas of projects consistent with all federal, state and local laws. There are approximately 32 shooting ranges located on Corps-managed projects. These activities can be undertaken in appropriate locations and in a manner that does not endanger other visitors' safety or threaten infrastructure. The regulations allow the Corps District Commander responsible for the project to make the local determination where these activities can take place. The Corps regulations accommodate the use and possession of firearms incident to these activities.

e. The Corps must also consider what law enforcement options are available to the agency. The primary duty of Corps Park Rangers is visitor assistance - not a law enforcement officer - and accordingly, Corps Park Rangers do not carry weapons. Congress has not authorized the Corps to have employees exercise full law enforcement powers at Water Resource Development project recreation areas. Congress has only authorized the Corps Park Rangers to issue citations for violations of the regulations adopted under 16 U.S.C. 460d. 36 C.F.R. § 327.25. Congress has not provided authority for Corps employees to carry firearms, execute search warrants or enforce other federal laws on Corps projects. This is in contrast to the authority given the National Park Service, which allows designated Department of Interior employees to carry firearms, execute warrants, and enforce other federal laws within the National Park System. 16 U.S.C. § 1a-6(b)(1)-(3). Accordingly, Corps Park Rangers are not trained and equipped to be law enforcement officers. Corps Park Rangers could not enforce other federal firearms laws that could control firearm possession in some Corps facilities, such as Corps operated power-generation plants, because of their limited law enforcement authority. Additionally, the potential of having armed visitors could have a chilling effect on the overall enforcement of Corps regulations since Corps Park Rangers would not be armed. Congress has authorized the Corps to supplement law enforcement presence at projects during peak visitation periods through cooperative agreements that compensate local law enforcement agencies to provide increased patrols on Corps lands and waters. Local law enforcement officers, however, can only enforce state and local laws and may be limited by other state and local law enforcement demands. Local law enforcement officers cannot enforce federal laws including 36 C.F.R. Part 327.

f. Taking all factors into consideration, the Corps determined that it is in the best overall public interest to restrict the possession of loaded firearms unless being used for



hunting, target shooting or being carried by a law enforcement officer. Structuring the regulation in this manner has accommodated the sporting use and possession of firearms, while appropriately accounting for infrastructure protection, visitor and Corps Park Ranger safety, and the limits of Corps law enforcement authority.

6. The Corps would need to address a number of issues before repealing the current regulation on the use and possession of firearms and issuing a rule with a lesser prohibition on the possession of loaded firearms.

a. In particular, the Corps would need to perform a full safety and security assessment of Corps-managed infrastructure to determine how best to secure the facilities in light of the heightened potential for the presence of firearms. The Corps and the Department of Homeland Security have identified certain Corps-managed infrastructure as critical to homeland security and the economy, but the full evaluation is ongoing. This is due to the fact that the majority of Corps facilities have multiple Congressionally authorized purposes, including navigation, flood control and water supply. Recreation is never the sole purpose of a Corps-managed Water Resource Development Project. Early detection of threats to this infrastructure, is aided by current Corps policy, and could be compromised by a too-permissive firearms regulation. With an overly permissive regulation, Corps officials or other law enforcement officers could be in a position where they would not be able to intervene or ascertain any bad intent until a person with a firearm actually uses it. If such a threat could not be mitigated, the Corps could consider further restriction for public access, which could stop popular tours and even close recreation areas completely.


b. The Corps would also have to evaluate whether additional alcohol and other public-use restrictions on Corps projects would be necessary to maintain visitor and Corps Park Ranger security. The Corps would need to consider current budgetary constraints that could limit available measures to mitigate safety issues associated with the increased presence of firearms, such as providing body armor for Corps Park Rangers.

c. Additionally, the Corps would need to evaluate whether the current Congressionally-set funding limit for cooperative law enforcement agreements for increased law enforcement services would be adequate to support any additional armed law enforcement officers at Corps projects. Finally, the Corps would need to publicize the new rule to visitors who might not see the rule in the Federal Register and would need to update signage at 4,248 (Exhibit 1) impacted recreation areas, which would be a significant budgetary impact.

d. Finally, in order to change the regulation, the Corps would need to promulgate a new rule following the Administrative Procedures Act rulemaking requirements.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: *Sept 5, 2013*

  
\_\_\_\_\_  
Stephen B. Austin

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 5<sup>th</sup> day of September, 2013, the foregoing **DECLARATION OF STEPHEN B. AUSTIN** was electronically filed with the Clerk of the Court using the CM/ECF system which sent a Notice of Electronic Filing to the following person(s):


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I HEREBY CERTIFY that on this same day a copy was mailed via United States Postal Service-prepaid to the following person(s):

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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;  
 JOHN MCHUGH, Secretary of the  
 Army; LIEUTENANT GENERAL  
 THOMAS BOSTICK, Commanding  
 General and Chief of Engineers;  
 COLONEL JOHN S. KEM,  
 Northwestern Division Commander; and  
 LIEUTENANT COLONEL ANDREW  
 D. KELLY, Walla Walla District  
 Commander and District Engineer,

Defendants.

Case No.

**COMPLAINT FOR DECLARATORY AND  
 INJUNCTIVE RELIEF**

Plaintiffs, by and through their undersigned attorneys, hereby file this Complaint against Defendants and allege as follows:

### **NATURE OF THE CLAIMS**

1. Plaintiffs seek declaratory and injunctive relief for Defendants' deprivation of the right to keep and bear arms guaranteed by the United States Constitution.

### **JURISDICTION**

2. This Court has federal question jurisdiction over Plaintiffs' claims for relief, pursuant to 28 U.S.C. § 1331, because the claims arise under the United States Constitution.

### **VENUE**

3. Venue rests properly in this Court pursuant to 28 U.S.C. § 1391(e) and Dist. Idaho Loc. Civ. R. 3.1 because, *inter alia*, a substantial part of the events or omissions giving rise to the claim occurred in Nez Perce and Clearwater Counties, Idaho.

### **PARTIES**

4. Plaintiff Alan C. Baker is a citizen of the United States and a resident of Latah County, Idaho.

5. 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 to carry a concealed handgun pursuant to the laws of the States of Idaho, Utah, Oregon, and Arizona. He regularly carries a handgun for self-defense.

6. 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 approved by the Latah County Sheriff to carry a concealed handgun almost everywhere in the State. *See* I.C. § 18-3302.

7. Mr. Baker is a life-long outdoorsman. He regularly camps and hunts in Idaho and has concrete plans to camp on lands administered by Defendants. He has a credible fear of arrest, prosecution, incarceration, and/or fine if he were to possess a functional firearm while recreating on lands administered by Defendants.

8. Defendants, by creating and enforcing the policy complained of in this action, are currently depriving Mr. Baker of the right to keep and bear arms guaranteed by the United States Constitution.

9. Plaintiff Elizabeth E. Morris is a citizen of the United States and a resident of Nez Perce County, Idaho.

10. 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. She regularly carries a handgun for self-defense.

11. Ms. Morris 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 approved by the Nez Perce County Sheriff to carry a concealed handgun almost everywhere in the State. *See* I.C. § 18-3302.

12. Ms. Morris regularly recreates on lands and waters administered by Defendants during the summer, as described in more detail below. She has a credible fear of arrest, prosecution, incarceration, and/or fine if she were to possess a functional firearm while recreating on lands administered by Defendants.

13. Defendants, by creating and enforcing the policy complained of in this action, are currently depriving Ms. Morris of the right to keep and bear arms guaranteed by the United States Constitution.

14. 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. Moreover,

The water areas of all such projects shall be open to public use generally for boating, swimming, bathing, fishing, and other recreational purposes, and ready access to and exit from such areas along the shores of such projects shall be maintained for general public use, when such use is determined by the Secretary of the Army not to be contrary to the public interest, all under such rules and regulations as the Secretary of the Army may deem necessary . . . .

*Id.* The Corps, by creating and enforcing the policy complained of in this action, currently is depriving Plaintiffs of the right to keep and bear arms guaranteed by the United States Constitution.

15. The Corps is the largest provider of water-based outdoor recreation in the nation. <http://www.usace.army.mil/Missions/CivilWorks/Recreation.aspx>. 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. *Id.* Corps-administered waters provide 33 percent of all U.S. freshwater fishing. *Id.*

16. 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 and, by creating and enforcing the policies complained of in this action, currently is depriving Plaintiffs of the right to keep and bear arms guaranteed by the United States Constitution. Defendant McHugh is sued in his official capacity.

17. 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 and, by creating and enforcing the policies complained of in this action, currently is depriving Plaintiffs of the right to keep and bear arms guaranteed by the United States Constitution. Defendant Bostick is sued in his official capacity.

18. 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 and, by creating and enforcing the policies complained of in this action, currently is depriving Plaintiffs of the right to keep and bear arms guaranteed by the United States Constitution. Defendant Kem is sued in his official capacity.

19. 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. By creating and enforcing the policies complained of in this action, he currently is depriving Plaintiffs of the right to keep and bear arms guaranteed by the United States Constitution. Defendant Kelley is sued in his official capacity.

### **LEGAL BACKGROUND**

20. The Second Amendment to the United States Constitution 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.”

21. The Second Amendment guarantees individuals a fundamental right to possess functional firearms in a dwelling for self-defense.

22. A tent is a temporary dwelling to which the guarantees of the Second Amendment apply.

23. The Second Amendment guarantees individuals a fundamental right to carry functional firearms for self-defense.

24. With certain limited exceptions not applicable to Plaintiffs, Defendants' regulations prohibit law-abiding individuals from possessing or carrying functional firearms—openly, concealed, and in a vehicle—on any water resources development project administered by the Chief of Engineers (“Corps-administered public lands”). 36 C.F.R. § 327.13.

25. Violation of 36 C.F.R. § 327.13 is punishable by fine, imprisonment, or both. 36 C.F.R. § 327.25.

26. The District Commander is empowered to authorize possession of firearms on Corps-administered public lands. 36 C.F.R. § 327.13(a)(4).

### **STATEMENT OF FACTS**

#### **Alan C. Baker**

27. Dworshak Dam and Reservoir (“Dworshak”) was constructed in 1972. Dworshak is located on the North Fork Clearwater River in Clearwater County, Idaho. It is located in the Walla Walla District.

28. Dworshak’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.

29. On March 22, 2013, Mr. Baker secured a reservation for a campsite at Dent Acres for May 31, 2013, to June 2, 2013.

30. Security personnel do not electronically screen persons entering Corps-administered campgrounds to determine whether persons are carrying firearms or weapons of any kind.

31. Security personnel do not restrict access to Corps-administered campgrounds to only those persons who have been screened and determined to be unarmed.

32. On April 22, 2013, Mr. Baker, through 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).

33. 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. The letter was delivered on April 29, 2013; to date, Mr. Baker has received no response.

34. 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.

35. Mr. Baker suffers an injury to his constitutionally protected right to keep and bear arms due to Defendants' active enforcement of 36 C.F.R. § 327.13.

36. Mr. Baker has reservations to camp at the Corps-administered campground at Macks Creek Park at Lucky Peak Lake from September 27, 2013, to September 29, 2013.

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

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

**Elizabeth E. Morris**

39. Ms. Morris uses Corps-administered public lands near the Snake River in Lewiston, Idaho, to boat with friends, regularly walks the Corps-administered paths in the area with her dog and/or her family, and must travel across Corps-administered public lands to reach Hells Gate State Park. 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. She also frequents Dworshak and the surrounding areas to hike. She has considered camping at Dworshak, but has decided not to because Defendants' regulations make it unlawful for her to possess a functional firearm while camping. In summer 2012, she used Corps-administered public lands approximately 1–2 times a week. She has done exactly the same in summer 2013 and plans to continue to do so in the future.

40. Security personnel do not electronically screen persons using the Corps-administered public lands frequented by Ms. Morris to determine whether persons are carrying firearms or weapons of any kind.

41. Security personnel do not restrict access to the Corps-administered public lands frequented by Ms. Morris to only those persons who have been screened and determined to be unarmed.

42. On June 10, 2013, Ms. Morris, through 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).

43. Given Ms. Morris's practice of regularly recreating on Corps-administered public lands during the summer, she requested a response to her letter within 30 calendar days of its



delivery to District Commander Kelley. The letter was delivered on June 14, 2013; to date, Ms. Morris has received no response.

44. Ms. Morris suffers an injury to her constitutionally protected right to keep and bear arms due to Defendants' active enforcement of 36 C.F.R. § 327.13.

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

**FIRST CLAIM FOR RELIEF**  
**(Ban on Possession of Firearms in a Tent)**  
**(Right to Keep and Bear Arms)**  
**(Declaratory and Injunctive Relief)**

46. Plaintiffs hereby incorporate the allegations in the preceding paragraphs as if the same were fully set forth here.

47. The right to keep and bear functional firearms for the core lawful purpose of self-defense is guaranteed by the Second Amendment to the United States Constitution.

48. Defendants' regulations prohibit law-abiding individuals, including Plaintiffs, from possessing a functional firearm in a temporary dwelling, such as a tent, on Corps-administered public lands. 36 C.F.R. § 327.13.

49. By prohibiting Plaintiffs from possessing a functional firearm in a temporary dwelling, such as a tent, on Corps-administered public lands, Defendants currently maintain and actively enforce a set of laws, practices, and policies that deprive Plaintiffs of the right to keep and bear arms, in violation of the Second Amendment.

50. Plaintiffs are therefore entitled to declaratory and permanent injunctive relief against continued enforcement and maintenance of Defendants' unconstitutional laws, practices, and policies. *See* 28 U.S.C. §§ 2201, 2202.

**SECOND CLAIM FOR RELIEF**  
**(Ban on Carrying Firearms)**  
**(Right to Keep and Bear Arms)**  
**(Declaratory and Injunctive Relief)**

51. Plaintiffs hereby incorporate the allegations in the preceding paragraphs as if the same were fully set forth here.

52. The right to keep and bear functional firearms for the core lawful purpose of self-defense is guaranteed by the Second Amendment to the United States Constitution.

53. Defendants' regulations prohibit law-abiding individuals, including Plaintiffs, from carrying a functional firearm—openly, concealed, and in a vehicle—on Corps-administered public lands. 36 C.F.R. § 327.13.

54. By prohibiting Plaintiffs from carrying a functional firearm—openly, concealed, and in a vehicle—on Corps-administered public lands, Defendants currently maintain and actively enforce a set of laws, practices, and policies that deprive Plaintiffs of the right to keep and bear arms, in violation of the Second Amendment.

55. Plaintiffs are therefore entitled to declaratory and permanent injunctive relief against continued enforcement and maintenance of Defendants' unconstitutional laws, practices, and policies. *See* 28 U.S.C. §§ 2201, 2202.

**PRAYER FOR RELIEF**

Wherefore, Plaintiffs respectfully request that this Court enter judgment for Plaintiffs as follows:

A. Declare that 36 C.F.R. § 327.13 deprives Plaintiffs of the right to keep and bear arms for self-defense guaranteed by the Second Amendment by prohibiting Plaintiffs from possessing functional firearms in tents on Corps-administered public lands;

B. Declare that 36 C.F.R. § 327.13 deprives Plaintiffs of the right to keep and bear arms for self-defense guaranteed by the Second Amendment by prohibiting Plaintiffs from carrying functional firearms—openly, concealed, and in a vehicle—on Corps-administered public lands;

C. Permanently enjoin Defendants, their officers, agents, servants, employees, and all persons in active concert or participation with them from enforcing 36 C.F.R. § 327.13, which prohibits possession and carrying of functional firearms on Corps-administered public lands;

D. Award Plaintiffs their costs, attorneys' fees, and other expenses in accordance with law;

E. Award Plaintiffs any further relief this Court deems just and equitable.

DATED this 5th day of August 2013.

Respectfully submitted,

/s/ John L. Runft  
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Attorneys for Plaintiffs

## US District Court Civil Docket

U.S. District - Idaho  
(Moscow - Central)

3:13cv336

**Morris et al v. U.S. Army Corps of Engineers et al**

This case was retrieved from the court on Tuesday, October 14, 2014

Date Filed: 08/05/2013	Class Code: CLOSED
Assigned To: Judge B. Lynn Winmill	Closed: 10/13/2014
Referred To:	Statute: <a href="#">28:1331</a>
Nature of suit: Other Civil Rights (440)	Jury Demand: None
Cause: Fed. Question	Demand Amount: \$0
Lead Docket: None	NOS Description: Other Civil Rights
Other Docket: None	
Jurisdiction: Federal Question	

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Plaintiff

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Date	#	Proceeding Text	Source
08/05/2013	1	COMPLAINT against All Defendants ( Filing fee \$ 400 receipt number 0976-1045347.), filed by All Plaintiffs. (Attachments: # 1 Cover Sheet, # 2 Summons, # 3 Summons, # 4 Summons, # 5 Summons, # 6 Summons)(Runft, John)	
08/05/2013	2	MOTION FOR PRO HAC VICE APPEARANCE by James M. Manley. ( Filing fee \$ 225 receipt number 0976-1045359.)John L Runft appearing for Plaintiffs Alan C. Baker, Elizabeth Morris. Responses due by 8/29/2013 (Runft, John)	
08/05/2013	3	MOTION FOR PRO HAC VICE APPEARANCE by Steven J. Lechner. ( Filing fee \$ 225 receipt number 0976-1045383.)John L Runft appearing for Plaintiffs Alan C. Baker, Elizabeth Morris. Responses due by 8/29/2013 (Runft, John)	
08/05/2013	4	MOTION for Preliminary Injunction John L Runft appearing for Plaintiffs Alan C. Baker, Elizabeth Morris. Responses due by 8/29/2013 (Attachments: # 1 Memorandum in Support, # 2 Exhibit 1, # 3 Exhibit 2, # 4 Exhibit 3)(Runft, John)	
08/06/2013	5	DOCKET ENTRY ORDER reassigning case to a district judge to consider the motion for preliminary injunction (Dkt. 4). There are no consents to magistrate judge jurisdiction filed in this case and magistrate judges lack jurisdiction to consider requests for injunctive relief without the consent of all parties. 28 U.S.C. § 636. Accordingly, the Clerk of the Court shall reassign this case to a district judge. Signed by Judge Ronald E. Bush. ((kb)	
08/07/2013		DOCKET ENTRY NOTICE of Case Number Change, Case reassigned to Judge B. Lynn Winmill for all further proceedings. Judge Ronald E. Bush no longer assigned to case. Please use this case number on all future pleadings, 3:13-cv-00336-BLW (krb)	

- Case 1:13-cv-00177-2015-01-9499839-DktEntry-14-2 Page 58 of 63
- 08/07/2013 DOCKET ENTRY ORDER approving 2 Motion for Pro Hac Vice Appearance of attorney James M Manley for Alan C. Baker, James M Manley for Elizabeth Morris Per General Order 206, out-of-state counsel shall immediately register for ECF. (Notice sent to CM/ECF Registration Clerk). Signed by Judge B. Lynn Winmill. (caused to be mailed to non Registered Participants at the addresses listed on the Notice of Electronic Filing (NEF) by (krb)
- 08/07/2013 6 DOCKET ENTRY ORDER approving 3 Motion for Pro Hac Vice Appearance of attorney Steven J Lechner for Alan C. Baker, Steven J Lechner for Elizabeth Morris Per General Order 206, out-of-state counsel shall immediately register for ECF. (Notice sent to CM/ECF Registration Clerk) (caused to be mailed to non Registered Participants at the addresses listed on the Notice of Electronic Filing (NEF) by (krb)
- 08/07/2013 7 Summons Issued as to All Defendants (Print attached Summons for service.) (Attachments: # 1 Summons 2, # 2 Summons 3, # 3 Summons 4, # 4 Summons 5) (krb)
- 08/07/2013 8 SUPPLEMENT by Plaintiffs Alan C. Baker, Elizabeth Morris re 4 MOTION for Preliminary Injunction Replacement Exhibit 1 to Memorandum. (Runft, John)
- 08/07/2013 9 SUPPLEMENT by Plaintiffs Alan C. Baker, Elizabeth Morris re 4 MOTION for Preliminary Injunction Replacement Exh 2 to Memorandum. (Runft, John)
- 08/07/2013 10 SUPPLEMENT by Plaintiffs Alan C. Baker, Elizabeth Morris re 4 MOTION for Preliminary Injunction Replacement Exh 3 to Memorandum. (Runft, John)
- 08/07/2013 11 Summons Issued as to U.S. Attorney and U.S. Attorney General (Print attached Summons for service.) (Attachments: # 1 Summons 2)(krb)
- 08/07/2013 12 CERTIFICATE OF SERVICE by Alan C. Baker, Elizabeth Morris re 4 MOTION for Preliminary Injunction (Lechner, Steven)
- 08/15/2013 13 NOTICE of Appearance by Joanne P Rodriguez on behalf of Thomas Bostick, Andrew D. Kelly, John S. Kem, John McHugh, U.S. Army Corps of Engineers (Rodriguez, Joanne)
- 08/15/2013 14 MOTION for Extension of Time to File Response/Reply as to 4 MOTION for Preliminary Injunction Joanne P Rodriguez appearing for Defendants Thomas Bostick, Andrew D. Kelly, John S. Kem, John McHugh, U.S. Army Corps of Engineers. Responses due by 9/9/2013 (Rodriguez, Joanne)
- 08/20/2013 15 SUMMONS Returned Executed by Elizabeth Morris, Alan C. Baker. All Defendants. (Attachments: # 1 Summons Summons Returned Executed as to JOHN MCHUGH, # 2 Summons Returned Executed as to THOMAS BOSTICK, # 3 Summons Returned Executed as to JOHN S. KEM, # 4 Summons Returned Executed as to ANDREW D. KELLY, # 5 Summons Returned Executed as to ERIC HOLDER, # 6 Summons Returned Executed as to CIVIL PROCESS CLERK)(Manley, James)
- 09/02/2013 16 DOCKET ENTRY ORDER granting 14 Motion for Extension of Time to File Response/Reply. The Government shall file its response to the motion for preliminary injunction 4 on or before September 6, 2013. Signed by Judge B. Lynn Winmill. (caused to be mailed to non Registered Participants at the addresses listed on the Notice of Electronic Filing (NEF) by (dm)
- 09/03/2013 Reset Deadlines as to 4 MOTION for Preliminary Injunction. Responses due by 9/6/2013. Per Order dkt #16. (cjm)
- 09/05/2013 17 MOTION for Leave to File Excess Pages in Response Brief Joanne P Rodriguez appearing for Defendants Thomas Bostick, Andrew D. Kelly, John S. Kem, John McHugh, U.S. Army Corps of Engineers. Responses due by 9/30/2013 (Rodriguez, Joanne)
- 09/05/2013 18 MEMORANDUM in Opposition re 4 MOTION for Preliminary Injunction filed by Thomas Bostick, Andrew D. Kelly, John S. Kem, John McHugh, U.S. Army Corps of Engineers. Replies due by 9/23/2013. (Attachments: # 1 Affidavit Declaration of Stephen B. Austin, # 2 Exhibit Declaration Exhibit 1, # 3 Exhibit Declaration Exhibit 2)(Rodriguez, Joanne)
- 09/06/2013 19 DOCKET ENTRY ORDER granting 17 Motion for Leave to File Excess Pages. Signed by Judge B. Lynn Winmill. (caused to be mailed to non Registered Participants at the addresses listed on the Notice of Electronic Filing (NEF) by (dm)
- 09/23/2013 20 First MOTION for Leave to File Excess Pages James M Manley appearing for Plaintiffs Alan C. Baker, Elizabeth Morris. Responses due by 10/18/2013 (Manley, James)
- 09/23/2013 21 REPLY to Response to Motion re 4 MOTION for Preliminary Injunction filed by Alan C. Baker, Elizabeth Morris.(Manley, James)
- 09/25/2013 22 ORDER GRANTING PLAINTIFFS' UNOPPOSED MOTION TO EXCEED PAGE LIMITS granting 20 Motion for Leave to File Excess Pages. Signed by Judge B. Lynn Winmill. (caused to be mailed to non Registered Participants at the addresses



- 09/30/2013 23 UNOPPOSED MOTION for Hearing re 4 MOTION for Preliminary Injunction James M Manley appearing for Plaintiffs Alan C. Baker, Elizabeth Morris. Responses due by 10/24/2013 (Manley, James) Modified on 9/30/2013 to edit text (jp).
- 10/01/2013 24 MOTION to Stay Joanne P Rodriguez appearing for Defendant U.S. Army Corps of Engineers. Responses due by 10/25/2013 (Rodriguez, Joanne)
- 10/01/2013 25 ORDER granting 24 Motion to Stay. Signed by Judge B. Lynn Winmill. (caused to be mailed to non Registered Participants at the addresses listed on the Notice of Electronic Filing (NEF) by (jp)
- 10/01/2013 26 DOCKET ENTRY ORDER The Stay 25 is LIFTED AND WITHDRAWN. It did not apply to applications for emergency relief of any type including the application in this case. Accordingly, the Clerk may set this matter for oral argument and the case may proceed. Signed by Judge B. Lynn Winmill. (caused to be mailed to non Registered Participants at the addresses listed on the Notice of Electronic Filing (NEF) by (dm)
- 10/02/2013 27 DOCKET ENTRY ORDERThe prior decision 26 lifting the stay is hereby MODIFIED. The stay granted by Order 25 remains in full force and effect as to all aspects of this case except the briefing and resolution of the motion for preliminary injunction 4 . Signed by Judge B. Lynn Winmill. (caused to be mailed to non Registered Participants at the addresses listed on the Notice of Electronic Filing (NEF) by (dm)
- 10/28/2013 28 NOTICE of Appearance by Daniel M Riess on behalf of All Defendants (Riess, Daniel)
- 10/28/2013 29 ORDER The stay (docket nos. 25 & 27 ) is LIFTED and the motion for hearing (docket no. 23 ) is GRANTED. It is further ordered, that a hearing be held on the motion for preliminary injunction (docket no. 4 ) on 12/5/13 at 9:00 a.m. in the Federal Courthouse in Boise Idaho. Signed by Judge B. Lynn Winmill. (caused to be mailed to non Registered Participants at the addresses listed on the Notice of Electronic Filing (NEF) by (jp)
- 10/28/2013 Set/Reset Deadlines as to 4 MOTION for Preliminary Injunction . Per Order dkt 29 Motion Hearing set for 12/5/2013 09:00 AM in Boise - Courtroom 3 before Judge B. Lynn Winmill. (jp)
- 11/01/2013 30 MOTION to Dismiss for Lack of Jurisdiction , MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM ( Responses due by 11/25/2013)Daniel M Riess appearing for Defendants Thomas Bostick, Andrew D. Kelly, John S. Kem, John McHugh, U.S. Army Corps of Engineers. (Attachments: # 1 Memorandum in Support, # 2 Exhibit 1, # 3 Exhibit 2)(Riess, Daniel)
- 11/19/2013 31 AMENDED DOCKET ENTRY NOTICE OF HEARING: The Motion hearing set for 12/5/2013 is RESCHEDULED for 1/7/2014 at 10:00 AM in Boise - Courtroom 3 before Judge B. Lynn Winmill. The following motions will be addressed at the hearing: 4 Motion for Preliminary Injunction and 30 Motion to Dismiss. (jlg)
- 11/20/2013 32 NOTICE by Thomas Bostick, Andrew D. Kelly, John S. Kem, John McHugh, U.S. Army Corps of Engineers of Recent Authority (Attachments: # 1 Exhibit United States v Chovan)(Riess, Daniel)
- 11/25/2013 33 MEMORANDUM in Opposition re 30 MOTION to Dismiss for Lack of Jurisdiction MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM filed by Alan C. Baker, Elizabeth Morris. Replies due by 12/12/2013. (Attachments: # 1 Exhibit Exhibit 1, # 2 Exhibit Exhibit 2)(Manley, James)
- 12/03/2013 34 Consent MOTION for Extension of Time to File Response/Reply as to 30 MOTION to Dismiss for Lack of Jurisdiction MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM Daniel M Riess appearing for Defendants Thomas Bostick, Andrew D. Kelly, John S. Kem, John McHugh, U.S. Army Corps of Engineers. Responses due by 12/27/2013 (Riess, Daniel)
- 12/04/2013 35 DOCKET ENTRY ORDER granting 34 Motion for Extension of Time to File Response/Reply. The defendant shall file a reply brief regarding its motion to dismiss on or before December 19, 2013. Signed by Judge B. Lynn Winmill. (caused to be mailed to non Registered Participants at the addresses listed on the Notice of Electronic Filing (NEF) by (dm)
- 12/06/2013 Set/Reset Deadlines as to 30 MOTION to Dismiss for Lack of Jurisdiction MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM .Per Order dkt 35 Replies due by 12/19/2013. (jp)
- 12/12/2013 36 Consent MOTION for Leave to File Excess Pages in Reply Brief Daniel M Riess appearing for Defendants Thomas Bostick, Andrew D. Kelly, John S. Kem, John McHugh, U.S. Army Corps of Engineers. Responses due by 1/6/2014 (Riess, Daniel)
- 12/13/2013 37 DOCKET ENTRY ORDER denying 36 Motion for Leave to File Excess Pages. Signed by Judge B. Lynn Winmill. (caused to be mailed to non Registered Participants at the addresses listed on the Notice of Electronic Filing (NEF) by (dm)



- Case 14-36049-04/17/2015 ID: 9499839 DktEntry 14-2 Page 60 of 63
- 12/19/2013 38 REPLY to Response to Motion re 30 MOTION to Dismiss for Lack of Jurisdiction MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM filed by Thomas Bostick, Andrew D. Kelly, John S. Kem, John McHugh, U.S. Army Corps of Engineers. (Riess, Daniel)
- 12/19/2013 CORRECTIVE ENTRY - The entry docket number 38 Reply to Response to Motion, filed by Thomas Bostick, U.S. Army Corps of Engineers, John S. Kem, John McHugh, Andrew D. Kelly was filed incorrectly in this case as it pertains to the Certificate of Service only. The filing party shall refer to ECF Procedures #8 and re-submit their correct certificate of service using event of "Certificate of Service" located under Service of Process and link to docket 38. (cjm)
- 12/19/2013 39 CERTIFICATE OF SERVICE by Thomas Bostick, Andrew D. Kelly, John S. Kem, John McHugh, U.S. Army Corps of Engineers re 38 Reply to Response to Motion, (Riess, Daniel)
- 01/03/2014 40 NOTICE by Alan C. Baker, Elizabeth Morris Supplemental Authority (Attachments: # 1 Exhibit)(Manley, James) Modified on 1/3/2014 to remove all capitalization (cjm).
- 01/07/2014 41 Minute Entry for proceedings held before Judge B. Lynn Winmill: Motion Hearing held on 1/7/2014 re 4 Motion for Preliminary Injunction, and 30 Motion to Dismiss. The matter was taken under advisement. (Court Reporter Tammy Hohenleitner.) (jlg)
- 01/10/2014 42 MEMORANDUM DECISION & ORDER The motion to dismiss (docket no. 30 ) is DENIED. The motion for preliminary injunction (docket no. 4 ) is GRANTED. The Corps is enjoined from enforcing 36 C.F.R. § 327.13 as to law-abiding individuals possessing functional firearms on Corps-administered public lands for the purpose of self-defense. This preliminary injunction shall remain in force until further notice of the Court. Signed by Judge B. Lynn Winmill. (caused to be mailed to non Registered Participants at the addresses listed on the Notice of Electronic Filing (NEF) by (jp)
- 01/17/2014 43 DOCKET ENTRY NOTICE OF HEARING: A Telephonic Status Conference is set for 2/19/2014 at 10:00 AM before Judge B. Lynn Winmill. The plaintiff is directed to initiate the conference call. The Court can be reached at 208-334-9145. (jlg)
- 02/26/2014 44 Joint MOTION to Enter Proposed Schedule Daniel M Riess appearing for Defendants Thomas Bostick, Andrew D. Kelly, John S. Kem, John McHugh, U.S. Army Corps of Engineers. Responses due by 3/24/2014 (Riess, Daniel)
- 02/27/2014 45 ORDER Granting 44 Joint MOTION to Enter Proposed Schedule. Defendants shall file an answer in this case on or before 3/19/14. Defendants shall file the administrative record in this case on or before 4/19/14. Defendants' motion for summary judgment shall be due on or before 5/19/14. Plaintiffs' cross-motion for summary judgment and opposition to Defendants' motion for summary judgment (including any opposition under Federal Rule of Civil Procedure 56(d)) shall be due on or before 6/19/14. ( Admin Record due by 4/19/14: Case Mgmt ddl set for 4/19/2014, Motions for Summary Judgment due by 5/19/2014, Cross Motions due by 6/19/2014). Signed by Judge B. Lynn Winmill. (caused to be mailed to non Registered Participants at the addresses listed on the Notice of Electronic Filing (NEF) by (jp)
- 03/19/2014 46 ANSWER to 1 Complaint by Thomas Bostick, Andrew D. Kelly, John S. Kem, John McHugh, U.S. Army Corps of Engineers.(Riess, Daniel)
- 04/15/2014 47 Consent MOTION for Extension of Time to File Administrative Record Daniel M Riess appearing for Defendants Thomas Bostick, Andrew D. Kelly, John S. Kem, John McHugh, U.S. Army Corps of Engineers. Responses due by 5/9/2014 (Riess, Daniel)
- 04/16/2014 48 DOCKET ENTRY ORDER granting 47 Motion for Extension of Time to File. The administrative record shall be filed on or before April 22, 2014. Signed by Judge B. Lynn Winmill. (caused to be mailed to non Registered Participants at the addresses listed on the Notice of Electronic Filing (NEF) by (dm)
- 04/22/2014 49 Administrative Record by Daniel M Riess on behalf of Thomas Bostick, Andrew D. Kelly, John S. Kem, John McHugh, U.S. Army Corps of Engineers. (Disc on shelf in Clerk's Office) (jp)
- 04/22/2014 50 NOTICE by Thomas Bostick, Andrew D. Kelly, John S. Kem, John McHugh, U.S. Army Corps of Engineers of Conventional Filing of Certified Administrative Record (Riess, Daniel)
- 05/14/2014 51 Consent MOTION for Leave to File Excess Pages in Motion for Summary Judgment Daniel M Riess appearing for Defendants Thomas Bostick, Andrew D. Kelly, John S. Kem, John McHugh, U.S. Army Corps of Engineers. Responses due by 6/9/2014 (Riess, Daniel)
- 05/19/2014 52 MOTION for Summary Judgment Daniel M Riess appearing for Defendants Thomas Bostick, Andrew D. Kelly, John S. Kem, John McHugh, U.S. Army Corps of Engineers.

- 05/20/2014 53 DOCKET ENTRY NOTICE OF HEARING regarding 52 Motion for Summary Judgment: A Motion Hearing is set for 8/27/2014 at 2:00 PM in Coeur d Alene - District Courtroom before Judge B. Lynn Winmill. (jlg)
- 06/19/2014 54 Cross MOTION for Summary Judgment James M Manley appearing for Plaintiffs Alan C. Baker, Elizabeth Morris. Responses due by 7/14/2014 (Attachments: # 1 Memorandum in Support Memorandum In Support Of Plaintiffs Cross-Motion For Summary Judgment And Response In Opposition To Defendants Motion For Summary Judgment, # 2 Exhibit Plaintiffs Statement Of Undisputed Material Facts, # 3 Exhibit Plaintiffs Response To Defendants Statement Of Material Facts) (Manley, James)
- 06/20/2014 55 DOCKET ENTRY NOTICE OF HEARING regarding 52 Motion for Summary Judgment and 54 Cross Motion for Summary Judgment: A Motion Hearing is set for both motions on 8/27/2014 at 2:00 PM in Coeur d Alene - District Courtroom before Judge B. Lynn Winmill. (jlg)
- 07/14/2014 56 Consent MOTION for Extension of Time to File Response/Reply (Closing Merits Brief) Daniel M Riess appearing for Defendants Thomas Bostick, Andrew D. Kelly, John S. Kem, John McHugh, U.S. Army Corps of Engineers. Responses due by 8/7/2014 (Riess, Daniel)
- 07/14/2014 57 DOCKET ENTRY ORDER granting 51 Motion for Leave to File Excess Pages. Signed by Judge B. Lynn Winmill. (caused to be mailed to non Registered Participants at the addresses listed on the Notice of Electronic Filing (NEF) by (dm)
- 07/14/2014 58 ORDER Defendants' unopposed motion for extension of time to file their closing merits brief [ECF No. 56] is GRANTED. Defendants shall file their reply brief on or before 7/25/14. Signed by Judge B. Lynn Winmill. (caused to be mailed to non Registered Participants at the addresses listed on the Notice of Electronic Filing (NEF) by (jp) (Entered: 07/15/2014)
- 07/25/2014 59 MEMORANDUM in Opposition re 54 Cross MOTION for Summary Judgment filed by Thomas Bostick, Andrew D. Kelly, John S. Kem, John McHugh, U.S. Army Corps of Engineers. Replies due by 8/11/2014. (Attachments: # 1 Response to Plaintiffs' Statement of Material Facts)(Riess, Daniel)
- 07/25/2014 60 REPLY to Response to Motion re 52 MOTION for Summary Judgment filed by Thomas Bostick, Andrew D. Kelly, John S. Kem, John McHugh, U.S. Army Corps of Engineers.(Riess, Daniel)
- 08/19/2014 61 NOTICE by Thomas Bostick, Andrew D. Kelly, John S. Kem, John McHugh, U.S. Army Corps of Engineers of Recent Authority (Attachments: # 1 Exhibit)(Riess, Daniel)
- 08/21/2014 62 AMENDED DOCKET ENTRY NOTICE OF HEARING regarding 52 Motion for Summary Judgment and 54 Cross Motion for Summary Judgment: Due to the Court's trial calendar, the Motion Hearing set for 8/27/2014 at 2:00 PM is rescheduled to begin at 3:30 PM in Coeur d Alene - District Courtroom before Judge B. Lynn Winmill. Please note, this is a time change only. (jlg)
- 08/21/2014 63 REPLY to Response to Motion re 54 Cross MOTION for Summary Judgment filed by Alan C. Baker, Elizabeth Morris.(Manley, James)
- 08/26/2014 64 MOTION to Withdraw as Attorney James M Manley appearing for Plaintiffs Alan C. Baker, Elizabeth Morris. Responses due by 9/19/2014 (Manley, James)
- 08/27/2014 65 DOCKET ENTRY ORDER granting 64 Motion to Withdraw as Attorney. Attorney James M Manley terminated. Signed by Judge B. Lynn Winmill. (caused to be mailed to non Registered Participants at the addresses listed on the Notice of Electronic Filing (NEF) by (dm)
- 08/27/2014 66 Minute Entry for proceedings held before Judge B. Lynn Winmill: Motion Hearing held on 8/27/2014 re 52 Motion for Summary Judgment and 54 Cross Motion for Summary Judgment. Motions taken under advisement. A written decision is forthcoming. (ESR Bonnie Crowder.) (jlg)
- 10/13/2014 67 MEMORANDUM DECISION. Signed by Judge B. Lynn Winmill. (caused to be mailed to non Registered Participants at the addresses listed on the Notice of Electronic Filing (NEF) by (jp) (Entered: 10/13/2014)
- 10/13/2014 68 JUDGMENT the plaintiffs' motion for summary judgment (docket no. 54 ) isGRANTED and the defendants' motion for summary judgment (docket no. 52 ) isDENIED. Signed by Judge B. Lynn Winmill. (caused to be mailed to non Registered Participants at the addresses listed on the Notice of Electronic Filing (NEF) by (jp) (Entered: 10/13/2014)

Events  
 <br>since&nbsplast  
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 Events  
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**CERTIFICATE OF SERVICE**

I hereby certify that on April 17, 2015, 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.

The plaintiffs in this case are registered CM/ECF users.

s/ Abby C. Wright  
ABBY C. WRIGHT  
Counsel for Appellants