IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ROME DIVISION

GEORGIACARRY.ORG, INC. And DAVID JAMES,	)	
Plaintiffs	)	CIVIL ACTION FILE NO.
v.	)	4:14-CV-139-HLM
THE U.S. ARMY CORPS OF ENGINEERS, And JON J. CHYTKA, in his official Capacity as Commander, Mobile District of the US Army Corps of Engineers,	)	**EMERGENCY MOTION 7.2B**
Defendants.	)	

PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION

Plaintiffs move for a preliminary injunction to stay enforcement of 36 C.F.R. § 327.13 during the pendency of this case. As grounds for this Motion, Plaintiffs rely on the record and the accompanying Memorandum of Law.

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CERTIFICATE OF SERVICE

I certify that on June 13, 2014, I served a copy of the foregoing via fax and U.S. Mail upon:

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John R. Monroe

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MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION

Introduction

Plaintiffs commenced this action to enjoin Defendants' enforcement of 36 C.F.R. § 327.13. Because the operation of that regulation violates Plaintiffs' rights

to keep and bear arms, and the violation is ongoing, Plaintiffs file this emergency motion for a preliminary injunction during the pendency of this case.

Factual Background

Plaintiff James is a natural person who regularly uses the U.S. Army Corps of Engineers' facilities at Lake Allatoona, particularly during the summer months. Doc. 1, ¶¶ 5-7, 14-17. James is a member of Plaintiff GeorgiaCarry.Org, Inc. ("GCO"), a non-profit Georgia corporation whose mission is to foster the rights of its members to keep and bear arms. *Id.*, ¶ 7. James asked for, and was denied, permission from Defendant Chytka to carry a loaded firearm for self-protection while using Corps facilities, including while James camped at Allatoona. *Id.*, ¶¶ 30-32. James therefore is subject to the prohibition of 36 C.F.R. § 327.13.

Argument

36 C.F.R. § 327.13 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.

A violation of § 327.13 carries a penalty of a $5,000 fine or 6 months' imprisonment or both. 36 C.F.R. § 327.25(a).

Plaintiff James is a frequent user of the camping and boating facilities at Lake Allatoona, and he desires to keep and carry a firearm in case of confrontation while recreating at Lake Allatoona. James does not claim to qualify for any of the exceptions to § 327.13, so on May 21, 2014, he requested the written permission described in § 327.13(a)(4). On June 9, 2014, Defendant Chytka, the District Commander for the Corps' Mobile District (which includes Lake Allatoona) denied James' request.

I. The Corps is Estopped From Re-Litigating This Case

As an initial matter, Plaintiffs note that the very issues brought in this case, and indeed the very issues brought in this Motion, already have been litigated unsuccessfully by the Corps. In *Morris v. U.S. Army Corps of Engineers*, No. 3:13-CV-336-BLW, "Memorandum Decision and Order" (D.Id. January 10, 2014)

("Idaho Order")1, the plaintiffs brought an essentially identical case against the Corps. In granting a preliminary injunction to stay enforcement of § 327.13 during the pendency of the case the Court said, "This ban [contained in § 327.13] poses a substantial burden on a core Second Amendment right and is therefore subject to strict scrutiny." Idaho Order, p. 5. The Court "[Granted] 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." *Id.*, p. 10.

As a result of *Morris*, the Corps should be collaterally estopped from re-litigating the same issues here. *See, e.g., Parklane Hosiery Company, Inc. v. Shore*, 439 U.S. 322 (1979). In *Parklane,* the Court approved the use of "offensive" collateral estoppel when the plaintiff seeking to use it did not have an opportunity to participate in the earlier case. Obviously, neither James nor GCO were involved in similar litigation in Idaho, nor do they assert that they would have had standing to do so.

1 For the Court's Convenience, a copy of the Idaho Order is being filed as an

II. Plaintiffs Are Entitled to a Preliminary Injunction

A district court may grant injunctive relief if the movant shows the following: (1) substantial likelihood of success on the merits; (2) irreparable injury will be suffered unless the injunction issues; (3) the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing party; and (4) if issued, the injunction would not be adverse to the public interest. *McDonald's Corp. v. Robertson*, 147 F.3d 1301, 1306 (11th Cir. 1998). Plaintiffs shall address each factor in turn.

A. Likelihood of Success on the Merits.

This factor perhaps merits the bulk of the discussion in this case, and the remaining factors fall out easily in Plaintiffs' favor. Plaintiffs will subdivide it into a claim for carrying a handgun while camping and a claim for carrying a handgun while engaging in non-camping activities on Corps property.

Plaintiffs claim that the Ban (contained in 36 C.F.R. § 327.13) violates their Second Amendment rights. The Second Amendment states, "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." The Second Amendment went largely

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electronic attachment to this Motion.

undiscussed for over 200 years. The 21st Century, however, has seen a spate of Second Amendment litigation.

The discussion can begin in this case with *District of Columbia v. Heller*, 554 U.S. 570 (2008), in which the Supreme Court announced for the first time that the Second Amendment guarantees a fundamental, individual right to keep and carry arms "in case of confrontation. The 11th Circuit recognized the Supreme Court's decision that "the need for defense of self, family, and property is most acute in the home and … the special role of handguns as the most preferred firearm in the nation to keep and use for protection of one's home and family…." *GeorgiaCarry.Org, Inc. v. Georgia*, 687 F.3d 1244, 1259 (11th Cir. 2012).

In both *Heller* and then two years later in *McDonald v. City of Chicago*, 130 S.Ct. 3020 (2010), the Supreme Court struck down total bans on keeping functional firearms in one's home. If any one lesson can be learned from *Heller* and *McDonald*, it is that bans on guns in one's home are unconstitutional.

The Court in *Morris* applied a 9th Circuit holding that a tent was much like a home (*U.S. v. Gooch*, 6 F.3d 673 (9th Cir. 1993)). As such, the *Morris* Court ruled, the Corps is prohibited, by *Heller* and *McDonald*, from banning possessing a gun in a tent, even when that tent is pitched (legally) on Corps property.

Heller, McDonald, and *Morris* should end the inquiry. The Corps is absolutely prohibited from enforcing § 327.13 against law-abiding campers. Plaintiffs will therefore transition to a discussion of non-campers on Corps property (but the Court should keep in mind that the non-camper discussion also would apply to campers).

The Supreme Court declined to articulate the contours of the Second Amendment right, nor of the standard of review for Second Amendment cases, leaving such matters for another day (or for the Circuit Courts of Appeals). The 11th Circuit has not had occasion to announce a standard of review for Second Amendment cases, so we must look to other circuits. Perhaps the most thorough discussion of this topic comes from the 7th Circuit, in *Ezell v. City of Chicago*, 651 F.3d 684 (7th Cir. 2011) and *Moore v. Madigan*, 702 F.3d 933 (7th Cir. 2012).

In *Ezell*, the Court struck down a ban on gun ranges in the City of Chicago, and in *Moore*, the Court ruled unconstitutional Illinois' then-ban on carrying guns in public. Both rulings were based on an analysis of the Second Amendment.

Ezell developed a rather thorough process for evaluating Second Amendment challenges to regulatory provisions:

> [I]f the government can establish that a challenged firearms law regulates activity falling outside the scope of the Second Amendment right as it was understood at the relevant historical moment – 1791 or 1868 – then the analysis can stop there; the regulated activity is categorically unprotected, and the law is not subject to further Second Amendment review.
>
> If the government cannot establish this – if the historical evidence is inconclusive or suggest that the regulated activity is *not* categorically unprotected – then there must be a second inquiry into the strength of the government's justification for restricting or regulating the exercise of Second Amendment rights.

651 F.3d at 702-703. *Ezell* based this approach on *United States v. Marzzarella,* 614 F.3d 85 (3d Cir. 2010) and *United States v. Chester,* 628 F.3d 673 (4th Cir. 2010).

Thus, the burden is on the Corps to establish that the right to carry a firearm on Corps property is ***categorically*** outside the Second Amendment. This burden the government cannot bear.

In *Moore,* the 7th Circuit, in an opinion written by Judge Posner, rejected the Illinois carry ban because it "flat[ly] ban[ned] … carrying ready-to-use guns outside the home" with no self-defense exception. 702 F.3d at 940-41. The *Morris* Court found the *Moore* decision persuasive, because the Corps' Ban "contains a flat ban on carrying a firearm for self-defense purposes." Idaho Opinion, p. 7. The *Morris* Court further said the Corps Ban probably should be subject to strict scrutiny, but

that the Ban could not even pass muster under intermediate scrutiny. *Id.* The Court went on to say that the Ban, "drafter long before *Heller,* … violates the Supreme Court's description of Second Amendment rights in that case. This regulation needs to be brought up to date." *Id.*

In summary, Plaintiffs are highly likely to succeed on the merits, both for their claim associated with camping on Corps property and associated with other recreational activities on Corps property.

B. Irreparable Injury

As promised, the remaining factors for issuing a preliminary injunction fall out rather easily in Plaintiffs' favor. "Generally, an alleged deprivation of a constitutional right is sufficient to constitute an irreparable injury." *Cate v. Oldham,* 707 F.2d 1176, 1188 (11th Cir. 1983). Plaintiffs have not only alleged a deprivation of a constitutional right, but they have shown that they are likely to succeed on the merits in their alleged deprivation.

Aside from the *per se* irreparable injury, however, Plaintiffs also show that they cannot be financially compensated for their harm, and they are suffering the harm now, and on a continual basis, at the height of the outdoor recreational season in Georgia.

C. Balance of Harms

Again, this factor easily resolves in favor of Plaintiffs. The harm to them is deprivation of a fundamental constitutional right. The harm to the Corps if the injunction issues is nonexistent. In fact, arguably the Corps would benefit by no longer having to spend resources enforcing the illegal Ban. Moreover, the Corps already has been enjoined by the District Court of Idaho from enforcing the Ban. It is difficult to imagine any incremental harm to the Corps by extending the injunction to the Northern District of Georgia.

D. Public Interest

There can be little argument that the public has an interest in seeing a deprivation of fundamental constitutional rights being imposed. The public policy in Georgia has shifted more and more in the past six years toward liberalized carrying of firearms in public. In 2008, the State decriminalized carrying guns in restaurants that serve alcohol and in ***state parks,*** and imposed sanctions on license issuers who fail to issue a timely license to carry pistols. 2008 Act 802 (House Bill 89). In 2010, the State repealed the 140-year old "public gathering law," a Jim Crow law that banned carrying guns in many public places, and replaced it instead with a list of 8 locations where a gun may not be carried in public. 2010 Act 643

(Senate Bill 308); *GeorgiaCarry.Org, Inc. v. Georgia*, 687 F.3d at 1248. Just this year, the State further decriminalized carrying guns in bars and schools, and lessened the penalty for carrying guns in churches. 2014 Act 575 (House Bill 826); 2014 Act 604 (House Bill 60). Finally, state law preempts local bans on carrying guns in parks. *GeorgiaCarry.Org, Inc. v. Coweta County*, 288 Ga.App. 748 (2007); *GeorgiaCarry.Org, Inc. v. City of Roswell*, 298 Ga.App. 686 (2009).

Given that the public policy in Georgia strongly favors carrying firearms in state and local parks for people with licenses to carry weapons, it is all but impossible to assert that the public would be harmed by allowing carrying firearms in federally-controlled recreational facilities in Georgia. This is especially true now that Congress preempted bans on national parks in 2010 via the so-called "Coburn Amendment." The Forest Service already did not ban guns in national forests, so now the vast majority of non-Corps federally-controlled recreation areas do not ban guns for self defense.

Conclusion

Plaintiffs have shown that they are likely to succeed on the merits, that they are being irreparably harmed, that the balance of harms favors granting a preliminary injunction, and that a preliminary injunction would be in the public

interest. They therefore have satisfied all four factors for obtaining a preliminary injunction and ask the Court to do so.

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I certify that on June 13, 2014, I served a copy of the foregoing via fax and U.S. Mail upon:

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John R. Monroe

RULE 7.1D CERTIFICATION

I certify that this brief was prepared in accordance with the page, font, size, margin and other requirements of Rules 7.1D and 5.1C.

/s/ John R. Monroe
John R. Monroe

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.[1]

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

[1] 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 (9th 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 (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. *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 (9th 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 (7th 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 (9th 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.[2]

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

[2] The Court waives the bond requirement under Rule 65(c). *Barahona-Gomez v. Reno*, 167 F.3d 1228, 1237 (9th 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) 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