

No. 14-36049

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

ELIZABETH E. NESBITT; ALAN C. BAKER,

Plaintiffs-Appellees,

v.

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

Defendants-Appellants.

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

**PLAINTIFFS-APPELLEES' UNOPPOSED
REQUEST FOR JUDICIAL NOTICE**

COME NOW, Plaintiffs-Appellees, Elizabeth E. Nesbitt (née Morris) and
Alan C. Baker, by and through their undersigned attorney, and respectfully request
that this Honorable Court take judicial notice of two sets of facts. Defendants-
Appellants do not oppose this request.

The first set of facts is found on webpages maintained by Defendant-Appellant, U.S. Army Corps of Engineers, entitled, “Walla Walla District, Dworshak Dam and Reservoir.” These pages provide a general overview of the Dworshak Dam and Reservoir in Idaho, which is managed by the U.S. Army Corps of Engineers. These pages may be accessed through the Corps’ website at: <http://www.nww.usace.army.mil/Locations/DistrictLocksandDams/DworshakDamandReservoir.aspx> and by clicking the “Project Fact Sheet” hyperlink (last visited July 9, 2015). These pages are attached hereto as Exhibit 1. The specific facts that are requested to be judicially noticed are:

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

(“Dworshak Facts”) Exhibit 1 at 2. These Dworshak Facts are referenced in Plaintiffs-Appellees’ Answer Brief to give this Court a sense of the Corps-managed lands at issue in this case. Answer Br. at 19–20, 24, 54.

The second set of facts is found on a webpage maintained by the U.S. Census Bureau entitled “Population Estimates, State Totals: Vintage 2014.”

The specific information is found in a spreadsheet entitled “Annual Estimates of the Resident Population for the United States, Regions, States, and Puerto Rico: April 1, 2010 to July 1, 2014.” This spreadsheet provides Census Bureau population data for the 50 States from April 1, 2010 to July 1, 2014. This spreadsheet may be accessed through the Census Bureau’s website at:

<http://www.census.gov/popest/data/state/totals/2014/index.html> and by clicking on the “XLS” hyperlink next to “Annual Estimates of the Resident Population for the United States, Regions, States, and Puerto Rico: April 1, 2010 to July 1, 2014” (last visited July 9, 2015). These spreadsheet pages are attached hereto as Exhibit

2. The specific facts that are requested to be judicially noticed are “Idaho is the 13th least-populated State, with a population of only 1.6 million people” (“Idaho Facts”). Exhibit 2. These Idaho Facts are referenced in Plaintiffs-Appellees’ Answer Brief to give this Court insight into the population of the State of Idaho. Answer Br. at 42.

Under Rule 201 of the Federal Rules of Evidence, this Court “may judicially notice a fact that is not subject to reasonable dispute” because it:

- (1) is generally known within the trial court’s territorial jurisdiction; or
- (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.

Fed. R. Evid. 201(b); *see also id.* 201(c) (“The court may take judicial notice at any stage of the proceeding.”). Both the Dworshak Facts and the Idaho Facts satisfy Fed. R. Evid. 201(b)(2) because they cannot “be subject to reasonable dispute” in that they “can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.”

The Dworshak Facts are published by the Corps on its website. One would presume that information published by the Corps relating to projects that it manages is accurate. Therefore, the Dworshak Facts may be judicially noticed. *Daniels-Hall v. Nat’l Educ. Ass’n*, 629 F.3d 992, 998–99 (9th Cir. 2010) (taking judicial notice of information made publicly available on websites maintained by government entities); *Multi Time Mach., Inc. v. Amazon.com, Inc.*, No. 13-55575, 2015 WL 4068877, at *1 n.1 (9th Cir. July 6, 2015) (taking judicial notice of information on the defendant’s website).

The Idaho Facts are published by the U.S. Census Bureau on its website. This Court and others have judicially noticed Census Bureau facts. *E.g.*, *United States v. Esquivel*, 88 F.3d 722, 726–27 (9th Cir. 1996) (“[T]he census documents meet the requirements of Rule 201(b), Fed. R. Evid., in that they are ‘not subject to reasonable dispute’ because they are ‘capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.’”); *Skolnick v. Bd. of Comm’rs of Cook Cnty.*, 435 F.2d 361, 363 (7th Cir. 1970) (“We therefore

take judicial notice that the most recent and accurate federal census figures available indicate that 61.23% [o]f the population of Cook County resides within the City of Chicago.”). In addition, nothing about the Idaho Facts suggests that the Census Bureau’s accuracy in compiling these facts should be questioned. Therefore, the Idaho Facts may be judicially noticed.

WHEREFORE Plaintiffs-Appellees respectfully request that this Honorable Court judicially notice both the Dworshak Facts and the Idaho Facts.

DATED this 10th day of July 2015.

Respectfully submitted,

/s/ Steven J. Lechner
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Attorney for Plaintiffs-Appellees

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on this 10th day of July 2015.

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

Dated this 10th day of July 2015.

/s/ Steven J. Lechner
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Attorney for Plaintiffs-Appellees

Exhibit 1



US Army Corps of Engineers

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[HOME](#) > [LOCATIONS](#) > DISTRICT LOCKS AND DAMS > DWORSHAK DAM AND RESERVOIR



Dworshak Dam and Reservoir

Dworshak Dam

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

Project Information

[Collapse All](#) [Expand All](#)

- ☒ [Dworshak National Fish Hatchery](#)
- ☐ [Project Fact Sheet](#)

Authorization

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

Progress

Construction of the dam began in 1966, and the project became operational for flood damage reduction in June 1972. Power came online in March 1973. Three power generating units are in service. The development of recreational facilities along the reservoir are complete, and all facilities are operational. A multi-level power intake structure on the upstream face of the dam, which duplicates natural river water temperatures downstream to promote the continuance of existing fish runs, is operational.

Log-handling facilities were completed in May 1979. The facilities were used by the timber industry through the mid-1980s when development of back-country roads provided more cost-effective transportation routes. Mitigation land acquisition and the development of a wildlife browse area is complete.

Dworshak Dam

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

Walla Walla District

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Contact Us

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North Fork Drive
PO Box 48
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Phone: 208-476-1261

Dworshak Recreation



Dworshak Lake Maps

Lake Maps

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Dworshak Public Use Plan

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6/27/2015

Walla Walla District - Dworshak Dam and Reservoir

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

Reservoir

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

Generators

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

Fisheries & Wildlife Mitigation

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

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

Lands

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

People

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

Budget

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

References

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

▣ Project Pertinent Data

Water Data

Dworshak water temp data feed



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Exhibit 2

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

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

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

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

Suggested Citation:

Table 1. Annual Estimates of the Resident Population for the United States, Regions, States, and Puerto Rico: April 1, 2010 to July 1, 2014 (NST-EST2014-01)

Source: U.S. Census Bureau, Population Division

Release Date: December 2014