

MONTANA SHOOTING SPORTS ASSOCIATION

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MSSA'S REPLY TO PETITIONERS' RESPONSE TO APPEAL Hatter Petition for Closure of State Trust Lands to Recreational Shooting Gallatin Gateway Area, Gallatin County, Montana

N.B. Counsel for Petitioners characterizes MSSA's Appeal as "mostly extraneous rambling" and captions its response to MSSA's constitutional arguments "CONSTITUTIONAL FEARMONGERING." MSSA will not respond in kind. There is nothing unseemly or frivolous about citizens questioning whether governmental action complies with constitutional limitations. Such inquiry is a fundamental exercise of responsible citizenship. If MSSA's constitutional arguments are incorrect, they should be answered on their merits, not diminished by pejorative characterization. This is particularly so where the Montana Constitution commands that the right at issue "shall not be called in question." MSSA will treat Petitioners as respectable and credible participants in this proceeding and will address the arguments of their counsel accordingly.

The Montana Shooting Sports Association ("MSSA") submits this Reply to Petitioners' Response to MSSA's Appeal of the Department's July 1, 2026 Decision.

Petitioners' Response does not answer the central issues raised by MSSA's Appeal. Petitioners rely heavily upon the authority of the Board of Land Commissioners and the Department of Natural Resources and Conservation ("DNRC" or "Department") to "manage" state trust lands. MSSA does not dispute that the Board and DNRC possess substantial authority to manage state lands. The questions are what that authority permits, what limitations the Legislature has imposed upon its exercise, and, ultimately, whether that authority may be exercised in a manner that infringes constitutional rights.

The Montana Legislature has authorized rules governing recreational use of state lands, including restrictions upon the discharge of weapons. Section 77-1-804, MCA. That statutory authority, however, does not end the inquiry. The Legislature cannot delegate to an administrative agency authority that the Legislature itself does not possess, including authority to override the Montana or United States Constitutions.

Petitioners attempt to avoid that problem by asserting that prohibiting recreational target shooting does not implicate the right to keep and bear arms ("RKBA") because other firearm-related activities remain permissible. That proposition is the principal constitutional defect in Petitioners' argument. Neither the Second Amendment nor Article II, Section 12 of the Montana Constitution protects the RKBA only against its complete destruction. The Second Amendment commands that the right "shall not be infringed." The Montana Constitution provides even more emphatically that the right "shall not be called in question."

A government restriction upon one protected exercise of a constitutional right does not cease to implicate that right merely because government leaves other exercises untouched.

I. MSSA HAS CONSISTENTLY CHALLENGED THE CAUSAL AND EVIDENTIARY BASIS FOR THE DECISION

Petitioners first contend that MSSA waived any evidentiary challenge because its Appeal did not use the word "evidence" or expressly characterize the Decision as "arbitrary and capricious." That argument elevates labels over substance.

MSSA has never asserted that no problems exist on the subject property. To the contrary, MSSA expressly stated in its Appeal: "MSSA does not hold that there is no potential or actual problem that wants resolution." MSSA then explained that a shooting prohibition would move rather than solve those problems and that Gallatin County's shortage of safe, suitable, dedicated shooting locations contributes to conflicts over shooting on public lands.

More importantly, MSSA challenged Petitioners' factual attribution of the identified problems to recreational shooters from its original opposition. Addressing allegations of rutted roads, fence damage, littering, and other misconduct, MSSA stated that Petitioners inferred recreational shooters were responsible although there was "little, if any, proof that recreational shooters are solely or even mostly responsible."

Petitioners respond by emphasizing the volume of material submitted with their Petition: approximately 200 pages of declarations, photographs, recordings, an engineering report, and other information. But quantity of evidence does not establish causation.

There are separate factual propositions involved:

1. Litter, property damage, unsafe behavior, or other problems exist on the parcel.
2. Recreational target shooting occurs on the parcel.
3. Recreational target shooters caused the identified problems.

Proof of the first two propositions does not, without more, establish the third. Evidence that trash exists and evidence that people target shoot do not establish that the people engaged in lawful target shooting deposited the trash. The same problem exists with attributing rutted roads, damaged fences, trespass, or other misconduct to recreational shooters.

There is also a second causal question: whether prohibiting lawful target shooting will remedy the misconduct.

MSSA's Addendum expressly raised this issue. It observed that the people who learn about and comply with a new DNRC restriction are not necessarily the people responsible for the misconduct DNRC seeks to prevent. MSSA therefore argued that the restriction would principally affect compliant recreational shooters rather than the persons causing the problems.

Thus, MSSA has not attempted in this Reply to manufacture a new evidentiary issue. From its original opposition through its Appeal and Addendum, MSSA has consistently challenged both causal propositions: that recreational target shooters caused the identified problems and that prohibiting lawful target shooting will solve those problems.

II. DNRC'S AUTHORITY TO "MANAGE" STATE LAND DOES NOT OVERRIDE STATUTORY OR CONSTITUTIONAL LIMITATIONS

Petitioners repeatedly emphasize the Board's and DNRC's authority to "manage" state trust lands and cite cases recognizing the Board's "large discretionary power." MSSA does not dispute substantial land-management authority.

But "manage" is not a talisman that answers every legal question concerning conduct occurring upon state land.

State trust lands exist within a statutory structure. Section 77-1-203, MCA, directs that state lands be managed under a multiple-use concept and provides that state lands generally are open to recreational use, subject to lawful closures and restrictions. Section 77-1-804 directs the Board to adopt rules governing recreational use and expressly permits rules restricting general recreational activities, including the discharge of weapons.

Accordingly, MSSA does not contend that DNRC can never impose any restriction upon firearm discharge on state lands. The more precise issue is whether the authority granted by § 77-1-804 and implemented through administrative rules authorizes this particular restriction consistently with superior constitutional law.

It cannot be enough simply to say that DNRC "manages" the property. Government owns and manages innumerable properties upon which constitutional rights are exercised. Government's status as landowner or land manager does not by itself remove constitutional limitations upon government action.

Nor may an administrative rule supply authority forbidden by superior law. An administrative rule implements statutory authority; it cannot enlarge an agency's authority beyond constitutional limits or permit circumvention or evasion of constitutional protections.

The Legislature likewise cannot delegate authority to DNRC to override Article II, Section 12 of the Montana Constitution or the Second Amendment to the United States Constitution. Thus, even assuming § 77-1-804 authorizes restrictions upon firearm discharge as a general matter, the Department still must exercise that authority within constitutional boundaries.

A. The multiple-use mandate remains relevant.

Petitioners' heavy reliance upon "management" also gives insufficient attention to the Legislature's direction concerning how state lands are to be managed.

Section 77-1-203 adopts a multiple-use management concept and provides that state lands generally are open to recreational use. The statute recognizes that not every use must occur on every acre, but the Legislature plainly contemplated multiple recreational and resource uses rather than treating "management" as unlimited administrative discretion.

The challenged Decision does not close the subject property to recreation altogether. Petitioners themselves emphasize that people may continue to walk upon the parcel, hunt, carry firearms, and engage in other recreational activity.

The Decision instead selects one particular recreational activity - target shooting - for prohibition. Because that activity implicates an enumerated constitutional right, general land-management authority does not conclude the inquiry.

B. Section 77-1-118 illustrates the Legislature's treatment of a particular shooting-related hazard.

The Legislature enacted § 77-1-118, MCA, in 2021. It specifically prohibits exploding targets on properties managed under Title 77 when DNRC determines that fire danger is high, very high, or extreme. Violation is a misdemeanor. The statute thus identifies a particular activity, a particular hazard, particular triggering conditions, and a particular penalty.

MSSA does not contend that § 77-1-118 proves DNRC lacks all other authority concerning firearm discharge. Section 77-1-804 demonstrates otherwise. Section 77-1-118 nevertheless illustrates that when the Legislature chose to address a particular shooting-related public-safety concern on Title 77 lands, it knew how to do so expressly and specifically.

More fundamentally, both statutes remain subordinate to the state and federal constitutions.

III. PROHIBITING TARGET SHOOTING IMPLICATES THE RIGHT TO KEEP AND BEAR ARMS

Petitioners' principal constitutional argument is that the Decision does not implicate the RKBA because citizens remain free to carry firearms, hunt, and use firearms defensively on the subject property. Petitioners summarize their position by stating that citizens "just cannot target shoot there."

That argument applies the wrong constitutional threshold.

The Second Amendment does not say that government may not eliminate or destroy the RKBA. It says that the right "shall not be infringed."

Article II, Section 12 of the Montana Constitution is more emphatic: "The right of any person to keep or bear arms in defense of his own home, person, and property, or in aid of the civil power when thereto legally summoned, shall not be called in question...."

The continued availability of some exercises of a constitutional right does not establish that government has not restricted another protected exercise of that right.

The defect in Petitioners' reasoning becomes apparent when applied to other enumerated rights. Under the same reasoning, government could prohibit newspapers and assert that the freedom of the press was not implicated because television and radio remained available. Government might prohibit one form of protected political expression and claim that the First Amendment was untouched because citizens retained other means of expressing their views.

If target practice falls within the protected exercise of the RKBA, government cannot avoid constitutional scrutiny of a prohibition upon that activity simply by identifying other firearm-related activities it has chosen not to prohibit.

A. Firearm practice and training fall within Second Amendment protection.

The United States Court of Appeals for the Seventh Circuit addressed this issue directly in *Ezell v. City of Chicago*, 651 F.3d 684 (7th Cir. 2011). The court recognized that the right to possess firearms implies a corresponding right to acquire and maintain proficiency in their use and held that practice at a firing range falls within Second Amendment protection.

The Seventh Circuit subsequently reaffirmed that principle in *Ezell v. City of Chicago*, 846 F.3d 888 (7th Cir. 2017), recognizing a Second Amendment right to maintain firearm proficiency through target practice.

Ezell is not controlling authority in Montana, but it is persuasive federal appellate authority addressing precisely the proposition Petitioners simply assume away: whether target practice is outside the Second Amendment merely because possession and other uses of firearms remain available.

Petitioners cite no authority establishing that recreational firearm practice falls wholly outside the constitutional protection.

B. Montana has expressly recognized the protected relationship between keeping and bearing arms and using them.

In 2017, the Montana Legislature adopted Senate Joint Resolution 11 to state its understanding of the phrase "shall not be called in question" in Article II, Section 12.

SJ 11 is a joint resolution, not a constitutional amendment or statute, and MSSA does not present it as independently binding law. It nevertheless constitutes a formal expression by the Legislature concerning the meaning of Montana's constitutional RKBA.

Among other things, SJ 11 declared that "the use of arms is an essential and protected child" of the constitutional protection for keeping and bearing arms and stated that regulation of the use of arms should occur "by statute only."

SJ 11 also relied upon the history of Article II, Section 12 and the explanation of 1972 Constitutional Convention Bill of Rights Committee Chairman Wade Dahood that "shall not be called in question" meant that the right was to remain inviolate and not be questioned by a person in authority.

Petitioners' assertion that prohibiting target shooting does not even implicate Article II, Section 12 is difficult to reconcile with that history and legislative understanding.

Article II, Section 12 provides an independent protection under the Montana Constitution and need not be construed as merely coextensive with the Second Amendment. Its distinctive command that the RKBA "shall not be called in question," its historical retention by successive Montana constitutions, and the history summarized in SJ 11 provide independent Montana grounds for determining the nature and scope of that protection.

IV. BRUEN, NOT INTEREST BALANCING, SUPPLIES THE GOVERNING SECOND AMENDMENT METHODOLOGY

Petitioners rely upon pre-Bruen authority for the general proposition that the RKBA, like other constitutional rights, is "not unlimited." MSSA does not contend that the right is unlimited.

But saying that a constitutional right is "not unlimited" does not identify the constitutional test for determining whether a particular limitation is permissible.

That question is governed by *New York State Rifle & Pistol Association v. Bruen*, 597 U.S. 1 (2022).

Bruen rejected the means-end scrutiny employed by lower courts in many Second Amendment cases after *Heller*. When the Second Amendment's plain text covers an individual's conduct, the conduct is presumptively protected, and government bears the burden of demonstrating that its restriction is consistent with the Nation's historical tradition of firearm regulation.

Government may not satisfy that burden merely by demonstrating that its regulation advances an important or compelling governmental interest.

This distinction is important here. MSSA does not deny that DNRC may have legitimate concerns about littering, unsafe conduct, property damage, wildfire, or conflicts among land users. The constitutional question is not whether those concerns are genuine or important. The question is whether government may respond to those concerns by restricting protected conduct consistently with the constitutional standard prescribed by the United States Supreme Court.

Petitioners avoid Bruen entirely by asserting that target shooting does not "touch" the RKBA. But that conclusion depends upon the premise discussed above - that firearm practice is outside the constitutional protection. Ezell provides persuasive authority to the contrary.

Once protected conduct is implicated, Petitioners cannot avoid Bruen by pointing to governmental interests or by observing that DNRC has left other exercises of the right untouched.

Nor may pre-Bruen cases be used to resurrect a means-end or interest-balancing methodology that the United States Supreme Court subsequently rejected. Pre-Bruen holdings remain authoritative to whatever extent they remain consistent with controlling Supreme Court precedent. But where their reasoning conflicts with the constitutional methodology subsequently prescribed by Bruen, Bruen controls.

Petitioners have offered no historical tradition supporting the restriction at issue. Instead, they contend that no historical analysis is required. If their threshold premise is incorrect, that omission becomes dispositive under Bruen.

V. FLOWERS DOES NOT AUTHORIZE DNRC TO DISREGARD CONSTITUTIONAL LIMITATIONS

Petitioners repeat DNRC's reliance upon Flowers for the statement that constitutional questions properly are decided by judicial bodies rather than administrative officials.

The quotation requires context.

First, the language was not formulated in Flowers. The Flowers Court quoted earlier Montana authority.

Second, Flowers concerned exhaustion of administrative remedies in an employee grievance proceeding. Flowers attempted to obtain judicial review without completing the administrative process, arguing in part that his due-process claim excused exhaustion. The Court held that his asserted constitutional claim did not permit him to bypass the remaining administrative remedy.

Flowers did not concern an agency deciding whether its own proposed substantive action must comply with an enumerated constitutional limitation.

The distinction is fundamental.

Final and binding adjudication of a disputed constitutional question is a judicial function. Compliance with the Constitution is an obligation of every branch of government.

Nothing in Flowers holds that an executive official may ignore constitutional limitations when deciding what executive action to take. Such a rule would produce the remarkable proposition that executive agencies must take unconstitutional action until a court orders them to stop.

That cannot be the meaning of separation of powers.

Public officials swear oaths to support the Constitution. Their inability finally to adjudicate the constitutionality of legislation or resolve constitutional disputes with judicial effect does not relieve them of the obligation to conduct executive business within constitutional boundaries.

Petitioners' own argument demonstrates the problem. On one hand, they invoke Flowers for the proposition that DNRC should not decide constitutional questions. On the other, they ask DNRC to decide the critical constitutional threshold question in Petitioners' favor: that prohibiting target shooting "does not even implicate the right to keep and bear arms."

Those propositions cannot comfortably coexist.

Determining that a governmental restriction does not implicate a constitutional right is itself an interpretation of the scope of that constitutional right.

Flowers cannot operate as a one-way rule under which DNRC may consider the Constitution sufficiently to determine that no constitutional protection applies, but is forbidden to consider the Constitution sufficiently to recognize that proposed agency action may exceed constitutional limits.

VI. PETITIONERS' EXAMPLES FROM FISHING ACCESS SITES AND COLORADO DO NOT ESTABLISH THE CONSTITUTIONALITY OF THIS DECISION

Petitioners point to firearm-discharge restrictions at Montana fishing access sites and to restrictions upon target practice on Colorado State Trust Lands.

Neither example answers MSSA's constitutional argument.

The existence of another governmental restriction does not establish the validity of this restriction. A Montana fishing-access-site restriction must rest upon its own statutory and regulatory authority and remain subject to applicable constitutional limitations.

Likewise, Colorado's regulation arises under Colorado's constitutional, statutory, and regulatory framework. The fact that another state has adopted a regulation does not establish that Montana's Constitution permits the same restriction or that the regulation satisfies the federal constitutional standard prescribed by Bruen.

Most importantly, identifying modern restrictions in Montana or Colorado does not satisfy Bruen's historical inquiry. A contemporary regulation cannot establish the historical tradition against which another contemporary regulation must be measured.

VII. PETITIONERS' ENFORCEMENT EXAMPLE DOES NOT ANSWER MSSA'S PRACTICAL OBJECTION

Petitioners cite a declaration from a person living near another closed parcel who reports that he has not personally observed shooting there following a closure. From this Petitioners conclude that people generally comply with DNRC closures.

That does not answer MSSA's argument.

MSSA's point is not simply that no person will comply with a closure. MSSA has argued nearly the opposite: compliant citizens likely will comply.

The problem is that the people willing to learn about and obey a new restriction are not necessarily the people littering, trespassing, damaging fences, engaging in negligent firearm use, or committing other misconduct.

A closure may therefore succeed in stopping lawful recreational shooters from shooting on a parcel without solving the misconduct used to justify the closure. Indeed, displacement may merely move recreational shooting to other public or private lands, perpetuating rather than solving the underlying shortage of safe and suitable shooting opportunities in Gallatin County.

MSSA has consistently advocated a constructive alternative: development and facilitation of safe, suitable, designated places for people to shoot.

VIII. CONCLUSION

MSSA does not deny that problems exist on the subject parcel. It disputes Petitioners' assumption that lawful recreational target shooters caused the various forms of misconduct attributed to them and disputes that prohibiting lawful target shooting will remedy those problems.

MSSA likewise does not deny that the Board and DNRC possess substantial statutory authority to manage state trust lands or that § 77-1-804 authorizes rules restricting recreational activities, including discharge of weapons.

But statutory management authority is not constitutional supremacy.

The Legislature cannot authorize an administrative agency to override the Montana Constitution or the United States Constitution, and an administrative rule cannot accomplish what superior law forbids.

Petitioners' attempt to avoid the constitutional question rests upon a faulty premise: that because DNRC leaves some firearm-related activities untouched, prohibiting target shooting does not implicate the RKBA.

The Second Amendment does not prohibit only the destruction of the right. It prohibits infringement.

Article II, Section 12 does not say that the right may not be abolished. It provides that the right "shall not be called in question."

Persuasive federal appellate authority recognizes firearm practice and training as protected Second Amendment activity. Once the restriction implicates protected conduct, Bruen requires the government to demonstrate consistency with the Nation's historical tradition of firearm regulation. Petitioners have made no such showing because they contend the required inquiry never begins.

Finally, Flowers does not relieve DNRC of its constitutional obligations. Courts finally adjudicate constitutional disputes; executive officials nevertheless remain obligated to obey the Constitution when exercising executive authority.

For these reasons, MSSA respectfully requests that DNRC reverse its July 1, 2026 Decision and deny the Petition for Closure.

Respectfully submitted,

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Date: _____

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