I. INTRODUCTION

On December 1, 2004 United States Magistrate Judge Elizabeth LaPorte issued an Order granting Defendants' motion to dismiss the criminal proceedings against them. That Order was based upon briefs filed by the parties and an oral argument heard on November 2, 2004. While the defense is pleased with Magistrate Judge LaPorte's Order, the government has filed a notice of appeal of the Order. The defense will be responding to that government appeal when the government's brief is filed.

This protective appeal, however, is being filed to preserve the defense's objection to *dicta* in Judge LaPorte's Order that indicates she accepted the government's claim that it has title to the tidelands bordering Crissy Field. If the Court denies the government's appeal, there is no need to address the arguments in this protective appeal because the citations issued to Defendants will remain dismissed. Nevertheless, out of an abundance of caution, and as instructed by the Court, Defendants are filing this protective cross-appeal simultaneously with the government's appeal of the dismissal of the citations.

II. THE TRIAL COURT FAILED TO APPLY THE CRIMINAL STANDARD OF PROOF OF BEYOND A REASONABLE DOUBT IN THIS PROCEEDING

Although the trial court noted, at the outset of its Order, that this action involves "related criminal citation matters, ..." (Order Granting Defendants' Motion To Dismiss [hereafter "Order"], p. 1.), the court failed to apply the criminal standard of proof beyond a reasonable doubt but, instead, applied a civil standard of proof of a preponderance of the evidence to the fundamental jurisdictional question of whether the State of California or the federal government owns the tidelands at Crissy Field.[1]

[1/] Because the State of California is not a party to the action, no determination can be made concerning the title to tidelands that were purportedly leased by the United States from the State in 1987. These are public trust lands that are not owned in fee by the United States. Federal Rule of Civil Procedure 19(a) requires that the State be allowed to participate in any action which could effect title to its lands and requires "joinder of persons needed for just adjudication." Under this rule, California is a necessary party to this case if the Court wishes to determine title to the tidelands at Crissy Field, because that title cannot be determined without "impair[ing] or imped[ing]" California's interests. (*Id.*) See, also, *Kettle Range Conservation Group v. U.S.*

(continued...)

Before Magistrate LaPorte, Defendants contended: "These are criminal cases. The government bears the burden of proving each element, including jurisdiction, beyond a reasonable doubt, and when interpreting statutes imposing criminal penalties, the Court must apply the rule of lenity." The rule of lenity requires that "ambiguous criminal statute[s] . . . be construed in favor of the accused." (*Staples v. United States,* 511 U.S. 600, 619, fn. 17 (1994); see, also, *United States v. Granderson*, 511 U.S. 39, 54 (1994) ("where text, structure, and history fail to establish that the Government's position is unambiguously correct," the court should resolve the ambiguity in the defendant's favor.).) As the United States Supreme Court has recognized, this rule "applies not only to interpretations of the substantive ambit of criminal prohibitions, but also to the penalties they impose." (*Albernaz v. United States*, 450 U.S. 333, 342 (1981).) As a result, the Court "will not interpret a federal criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what Congress intended." (*Id*., internal quotations omitted.)

Nevertheless, the trial court did not require the government to prove it possesses title to the tidelands at Crissy Field beyond a reasonable doubt. The government did not submit a deed, title documents, or any persuasive (or admissible) evidence that California had granted title to the Crissy Field tidelands to the federal government. Instead, the government submitted documents drafted by the federal government itself, years prior to 1897, which purport to delineate what the government was attempting to get from the State of California but never actually obtained: a 1913 map of unknown provenance showing the border of the Presidio extending into the Bay; an Answer filed by the State of California in the United States Supreme Court in 1945; and a "jurisdictional summary" (of unknown origin and date) attached to a letter allegedly prepared by the California State Lands Commission in 1974. As Defendants argued below, none of these

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[1/](...continued)
Bureau of Land, 150 F.3d 1083 (9th Cir. 1998), and *United States v. Borneo, Inc.,* 971 F.2d 244 (9th Cir. 1992). Any decision that the federal government has title to the Crissy Field tidelands, without the participation of the State of California in the litigation, is not only *dicta* and unnecessary to the decision below, but is a violation of Rule 19 and does not bind the State. The Court should simply avoid the complicated question of who owns the tidelands, and affirm Magistrate LaPorte's decision to dismiss the citations on procedural grounds.

documents were properly admissible or relevant[2] and even if properly admissible were insufficient to establish that the State of California granted the federal government title to the tidelands at Crissy Field by the Act of March 9, 1897.

Defendants argued below that while an earlier California Legislative Act of March 2, 1897, may have transferred "jurisdiction" (not title) over the Presidio to the federal government, that Act only applies to fast lands connected to the territory of California, and the government has previously submitted a letter to Defendant Sayad stating that it obtained title to the Crissy Field tidelands through that Act. At the hearing (and in its opposition to the motion to dismiss), however, the government abandoned its claim that title to (or jurisdiction over) the tidelands was supported by the Act of March 2, 1897, and instead based its claim of ownership on the Act of March 9, 1897, which the defense claimed only "gave the government jurisdiction over 'islands held by the United States for military purposes or defense'… from [the] high-water mark to 300 yards beyond low-water mark". (Stats. Cal. 1897, p. 74; *United States v. Watkins,* 22 F.2d 437, 438 (N.D. Cal. 1927).)

The trial court rejected the defense claim stating: "*On balance* . . . the Court concludes that the Government's reading [of the March 9, 1897 Act] is *more persuasive*....." (Order, p. 4, emphasis added.) Both this language and the analysis applied by the trial court (and the absence of any mention of a criminal standard of proof) demonstrate that the trial court applied a standard of proof far less stringent than the required beyond a reasonable doubt standard.

Counsel has been unable to find any case discussing the burden the government faces in proving the jurisdictional element of ownership of land. The most similar situation arises in litigation involving the government's failure to prove the jurisdictional element of federal insurance in bank robbery cases. (See, *e.g., United States v. Bellucci,* 995 F.2d 157, 160-61 (9th Cir. 1993).) For example, in *United States v. Allen,* 88 F.3d 765 (9th Cir. 1996), the defendant was charged with robbery of a federally insured credit union in 1989. (88 F.3d at 768.) At trial

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[2/] Documents prepared for litigation are not admissible hearsay evidence of title. (See, *Palmer v. Hoffman,* 318 U.S. 109, 113 (1943); *United States v. Olano*, 62 F.3d 1180 (9th Cir. 1995).)

in 1994, the government sought to establish that the credit union was federally insured by, in part, using the testimony of a bank official named Boyd. When asked by the government whether the credit union was federally insured, Boyd responded, "Yes it is." (*Id.)* The defendant was convicted and the district court denied the defendant's motion for acquittal. The Ninth Circuit reversed, holding that there was insufficient evidence that the credit union was federally insured at the time of the fraudulent conduct. The Court reasoned, "[t]he problem with this testimony is that it took place during trial in January 1994. Boyd answered the prosecutor's questions in the present tense." (*Id.,* at 769.) The official's present tense answers simply did not "support the inference that Southern Credit Union was federally insured at the time of the offenses in 1988 and 1989." (*Id*.) Consequently, the defendant's conviction arising out of his dealings with the credit union was reversed. *(Id.)*

Similarly, in *United States v. Chapel,* 41 F.3d 1338, 1341 (9th Cir. 1994), the defendant was charged with armed robbery of a federally insured bank in violation of 18 U.S.C. Section 2113. The defendant allegedly robbed a bank on August 8, 1991. *(*41 F.3d at 1339.) During trial, the government offered into evidence a FDIC certificate of insurance that antedated the robbery by two years. The government also offered a declaration from a Ms. Fox who was an assistant executive secretary of the FDIC. In her declaration, Ms. Fox stated that she conducted a diligent search and found no record which terminated the bank's insured status after the certificate was issued. (*Id.,* at 1339-1340.) The court found that the antedated FDIC insurance certificate did not establish that the bank was insured at the time of the offense. (*Id.,* at 1341.) Hence, the certificate of insurance was "insufficient to support a finding of federally insured status." *(Id.,* quoting *United States v. Washburn,* 758 F.2d 1339, 1340 (9th Cir. 1985).)

The Ninth Circuit found that additional evidence was required and cited several types of evidence which would be sufficient. (41 F.3d at 1341.) In *Chapel,* unlike this case, the prosecution introduced an additional declaration which showed the FDIC certificate remained valid at the time of the offense. (*Id.)* Accordingly, the conviction was upheld.

In this case, the government proffered no documents or evidence demonstrating that it has title to the tidelands at Crissy Field, but simply relied upon statements made in a variety of

litigation for the purposes of that litigation. If such statements made in contemplation of litigation are sufficient to settle claims of title, the government should be bound by its letter to Defendant Sayad in which it based its claim of jurisdiction solely on the Act of March 2, 1897, a claim it has now abandoned.

Moreover, knowledge of the status of the tidelands must come from someone in a position to know. Just as the government cannot simply choose anyone from a bank to offer testimony that the bank is insured, evidence concerning title to land should come from someone whose job requires knowledge of that title and not simply an Answer provided to assist in litigation. (*See, United States v. Phillips,* 606 F.2d 884, 887 (9th Cir. 1979).)

In this case, the government clearly failed to demonstrate that the tidelands at Crissy Field are federally owned property.

The trial court's application of a standard of proof less than beyond a reasonable doubt is clearly erroneous and requires reversal of the Order on the question of ownership of the tidelands at Crissy Field, and on the effect of the 1987 lease/license from the State Lands Commission to the National Park Service. Further, because the State of California is not a party defendant to this matter, the trial court acted beyond its jurisdiction in purporting to find that the federal government has title to tidelands held in public trust by the State of California.[3]

[3/] The United States has taken a position adverse to the title of the State of California and is limiting public access to public trust lands. This action contravenes the provisions of the 1987 lease/license agreement. At a minimum, because the government claims the public trust is "dormant" during the lease/license period, it is obligated to give notice of that to the State so that the public trust can be taken, if possible, under the takings clause and so that the State can be properly compensated. This is one of the reasons that the trial court could not determine title issues adverse to the State. The State was clearly entitled to receive notice of the hearing on the motion to dismiss (in light of the position of the United States on "dormancy" of the public trust) in order to set out the flaws in the government's position.

III. THE TRIAL COURT'S FINDING THAT THE CALIFORNIA LEGISLATIVE ACT OF MARCH 9, 1897 TRANSFERRED OWNERSHIP OF THE TIDELANDS AT CRISSY FIELD TO THE FEDERAL GOVERNMENT IS CLEARLY ERRONEOUS

While Defendants and the government disagreed on virtually every aspect of this dispute, both sides acknowledged that prior to March 9, 1897, the tidelands at Crissy Field were owned by the State of California. The trial court's finding that a California Legislative Act of March 9, 1897 transferred fee ownership of the tidelands at Crissy Field (and other undescribed tidelands as if it were a valid conveyance of public trust lands) out of the State of California in favor the United States is clearly erroneous, as the trial court failed to apply the proper "beyond a reasonable doubt" standard of proof, and because the trial court purported to rely upon inadmissible extrinsic evidence to construe (indeed, rewrite) the Act, after finding it ambiguous. Since the trial court found the language of the March 9, 1897 Act to be ambiguous, the government failed as a matter of law to establish its title beyond a reasonable doubt. The fuzzy claim of right asserted by the government to the tidelands is inadequate to establish fee simple title to the area in question. Moreover, the trial court did not have to decide any property issues, as it held for the Defendants on the regulatory issues (arising out of the GGNRA's 1979 Pet Policy). Moreover, by ruling on property issues the trial court ignored controlling case law on the interpretation of purported transfers of tidelands, is internally inconsistent in its analysis, and disregarded the plain meaning of the Act to the detriment of Defendants and the State of California.

A. CALIFORNIA'S OWNERSHIP OF ITS TIDELANDS

As the United States Supreme Court recognized in *United States v. California,* 436 U.S. 32, fn. 3 (1978), all public lands belonging to the Mexican government became public lands of the United States upon the signing of the Treaty of Guadalupe Hidalgo on February 2, 1848. (*Act for the Admission of California Into the Union*, Volume 9, Statutes at Large, p. 452; [Former] Article VIII, 3 West's California Constitution, p. 727, *et seq*. (1954); see also, *City of Los Angeles v. Venice Peninsula Properties*, 31 Cal.3d 288, 294 (1982), disapproved on another ground, *Summa Corp. v. California ex rel. State Lands Comm*., 466 U.S. 198 (1984).)

In 1851, the federal government passed "An Act To Ascertain and Settle the Private Claims in the State of California." "Under the Act of 1851, all land in California, including tidelands, which had belonged to Mexico and was not patented to private parties, became the property of the United States." (9 Stat. 631, Sec. 13, p. 633; *City of Los Angeles v. Venice Peninsula Properties, supra,* 31 Cal.3d at 294, 296.) The federal government held the interest in tidelands in trust for the future state, and when California was admitted to the Union [in 1850], it succeeded to the rights of the United States as an incident of sovereignty." (*City of Los Angeles v. Venice Peninsula Properties, supra,* 31 Cal.3d at 296, citing *City of Berkeley v. Superior Court,* 26 Cal.3d 515, 521 (1980).) The federal government "retained an interest in the tidelands", but not in a proprietary capacity, and "this interest was acquired by California upon its admission to statehood." (*City of Los Angeles v. Venice Peninsula Properties, supra,* 31 Cal.3d at 300, 302.) As stated by the Supreme Court in *Martin v. Waddell,* 16 Pet. (41 U.S.) 410 [10 L.Ed. 997] (1842): "When the revolution took place, the people of each state became themselves sovereign; and in that character hold the absolute right to all their navigable waters, and the soils under them, for their own common use." (See, *People v. California Fish Co.,* 166 Cal. 576, 584 (1913).) In 1850, California entered "the Union upon equal footing with the original States, absolute property in, and dominion and sovereignty over, all soils under the tidewaters" in the State. (*Weber v. Board of Harbor Commrs.,* 85 U.S. 57, 66-67 (1873).)

In *Borax Consolidated, Ltd. v. City of Los Angeles,* 296 U.S. 10 (1935), the United States Supreme Court set forth the "settled principles governing title to tidelands" as follows: "The soils under tidewaters within the original states were reserved to them respectively, and the states since admitted to the Union have the same sovereignty and jurisdiction in relation to such lands within their borders as the original states possessed." (Citations omitted.) "This doctrine applies to tidelands in California." "Upon the acquisition of the territory [of California] from Mexico, the United States acquired the title to tidelands equally with the title to upland, but held the former only in trust for the future states that might be erected out of that territory." (296 U.S. at 15, citations omitted.) Title to the tidelands held in trust by the United States "passed to California at the time of her admission to the Union in 1850." (296 U.S. at 16; see also, *Knight*

v. United Land Assn., 142 U.S. 161 (1891), and *People v. Hecker,* 179 Cal.App.2d 823, 835-836 (1960).)

In 1872, California enacted Civil Code Section 670, codifying California's ownership of all tidelands within the State.[4] Civil Code Section 670 provides that "[t]he State is the owner of all land below tide water, and below ordinary high-water mark, bordering upon tide water within the State . . .." Section 670 was given its current form by the amendment of 1873-74. (West's Annotated Civil Code Section 670, "Historical and Statutory Notes".) Accordingly, "in California the state is the owner of all land below tide water." (*Miramar Co. v. City of Santa Barbara, supra,* 23 Cal.2d at 174, citing Civil Code Section 670.) The term "tidelands" is defined as "those lands lying between the lines of mean high and mean low tide which are covered and uncovered successively by the ebb and flow thereof." (*Lechuza Villas West v. California Coastal Comm.,* 60 Cal.App.4th 218, 235 (1997), *cert. denied,* 525 U.S. 868 (1997), citing *Marks v. Whitney,* 6 Cal.3d 251, 257-258 (1971); accord, *Littoral Development Co. v. San Francisco Bay Conservation and Dev. Comm.,* 24 Cal.App.4th 1050, 1060-1061 (1994), citing *Borax Consolidated, Ltd. v. City of Los Angeles, supra,* 296 U.S. at 22-23.).)

Therefore, and as found by the trial court, "California, not the federal government, owns all tidelands within the state except those it has granted to others." (Order, p. 2, citing Cal. Civil Code Section 670 and Cal. Civil Code Section 830.) As demonstrated *infra*, because the government failed to prove beyond a reasonable doubt that California has conveyed ownership of the tidelands at Crissy Field to the federal government, the on-leash regulation of 36 C.F.R.

[4/] In *United States v. Bateman,* 34 F. 86, 89 (9th Cir. 1888), the Court found that jurisdiction over the Presidio had passed to California. (Order, p. 2.) Thus, the interpretation of the scope of subsequent transfers of tidelands by California to the federal government is a matter of state law. (*State of California ex rel. State Lands Comm. v. United States,* 457 U.S. 273, 282 (1982); see, also, *Miramar Co. v. City of Santa Barbara,* 23 Cal.2d 170, 174 (1943) ("Ownership of tidelands is governed by state law."), citing *Weber v. State Harbor Commrs.,* 18 Wall. (85 U.S. 57) [21 L.Ed. 798] (1873), *Shively v. Bowlby,* 152 U.S. 1, 14 S.Ct. 548 (1894), and *Borax Consolidated, Ltd. v. City of Los Angeles, supra,* 296 U.S. 10.)

Section 2.15 (a)(2) does not make illegal the recreational activity of Defendants enjoyed on the land held in trust for them by the State of California.[5]

B. THE STATE'S DUTIES AS TRUSTEE OVER THE TIDELANDS

The trial court passed over the fundamental aspect of the State's ownership of its tidelands under the "public trust" doctrine, a doctrine dating back to Roman law and well-entrenched in California law (and in the law of many other states). The public trust doctrine places constitutional impediments on the State's ability to transfer tidelands to private parties and governmental agencies, or to otherwise alienate tidelands for purposes other than those which advance the interests protected by the doctrine. Defendants maintain that the State of California cannot transfer possession (whether by sale or lease) of the tidelands at Crissy Field to the federal government if the effect of any such transfer would result in the exclusion of members of the public using the public trust lands for traditional recreational purposes without notice and hearing to the public and the State of California, compensation to the State, and an order approved by the Court prior to the effective imposition of an on-leash regulation (such as 36 C.F.R.

[5/] It must be emphasized that the government only asserted two bases for jurisdiction over Defendants. On the one hand, the government argued that a March 9, 1897 Act of the California Legislature ceded fee title of the tidelands at Crissy Field from the State to the federal government and hence created jurisdiction-via-ownership over Defendants. At the same time, the government claimed that a 1987 lease/license from the State Lands Commission to the National Park Service gave it jurisdiction (through "the terms of a written instrument") over Defendants under 36 C.F.R. 1.2(a)(2). Prior to the briefing of Defendants' Motion to Dismiss, the government had asserted that another California Legislative Act (one week earlier) of March 2, 1897, which only conveyed "jurisdiction" over lands then held by the United States for military purposes (but without any mention of tidelands), was the basis for enforcement of 36 C.F.R. 2.15(a)(2) on the tidelands. Many individuals likely succumbed to this argument and paid tickets for off-leash dog walking on the tidelands at Crissy Field. However, the government abandoned this position once this litigation commenced and never even mentioned the March 2, 1897 Act in its opposition to Defendants' motion to dismiss.

Section 2.15(a)(2)) where no such regulation previously existed.[6] Alternatively, the Court could terminate the lease because the federal on-leash regulation violates the express terms of the lease.

"The land under tide waters has a special legal character": "submerged tidelands are held by the State in trust for the common use of the public as part of the inherent sovereignty of the people." (*State of California ex rel. State Lands Comm. v. United States,* 512 F.Supp. 36, 40 (N.D. Cal.1981), citing *Illinois Central Railroad Co. v. Illinois,* 146 U.S. 387, 452, 455, 459 (1892).)

In *National Audubon Society v. Superior Court,* 33 Cal.3d 419 (1983), the California Supreme Court set forth a comprehensive analysis of the public trust doctrine. "'By the law of nature these things are common to mankind – the air, running water, the sea and consequently the shores of the sea.'" (33 Cal.3d at 433-434, citing Institutes of Justinian 2.1.1.) "From this origin in Roman law, the English common law evolved the concept of the public trust, under which the sovereign owns 'all of its navigable waterways and the lands lying beneath them as trustee for a public trust for the benefit of the people.'" (33 Cal.3d at 434, citing *Colberg, Inc. v. State of California ex rel Dept. Pub. Works,* 67 Cal.2d 408, 416 (1967).) "The State of California acquired title as trustee to such lands and waterways upon its admission to the union; from the earliest days its judicial decisions have recognized and *enforced the trust obligation*." (33 Cal.3d at 434, emphasis added, citing *City of Berkeley v. Superior Court, supra,* 26 Cal.3d at 521, and *Eldridge v. Cowell,* 4 Cal. 80, 87 (1854).)

While the traditional purposes of the public trust doctrine were defined in terms of navigation, commerce, and fishing, they have evolved over time "to include the right to fish, hunt, bathe, swim, to use for boating and general recreation purposes the navigable waters of the

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6/ The State Lands Commission ("SLC") is charged with the duty of continuous supervision of the public trust doctrine as to the navigable waters of the State and the lands underlying those waters. The SLC "has jurisdiction over tidelands owned by the State as well as residual jurisdiction of tidelands granted by the State." (*City of Berkeley v. Superior Court, supra,* 26 Cal.3d at 519, fn. 3, citing Cal. Public Resources Code Sections 6216 and 6301.) That residual authority includes acting as overseer of the activities of tidelands trustees to ensure that they administer their tidelands grants in conformity with the terms of the grants and the common law public trust. (See, *State of California ex rel. State Lands Comm. v. County of Orange,* 134 Cal.App.3d 20 (1982).)

state . . .." (*National Audubon Society v. Superior Court, supra,* 33 Cal.3d at 434, citing *Marks v. Whitney, supra,* 6 Cal.3d at 251.) Indeed, in *Marks v. Whitney*, the California Supreme Court recognized that the public trust doctrine "protects recreational values." (See, *National Audubon Society v. Superior Court, supra,* 33 Cal.3d at 425.)[7] It is ironic that the GGNRA's enabling legislation specifically indicated that dog walking was one of the recreational activities to be preserved in San Francisco's front yard. As noted in House Report No. 92-1391, dated September 12, 1972, "the GGNRA is popularly considered the city's front yard. On a nice day, it will satisfy the interests of those who choose to fly kites, sunbathe, *walk their dogs*, or just idly watch the action along the bay." (Emphasis added.)

The "dominant theme" of the public trust doctrine "is the state's sovereign power and *duty* to exercise continued supervision over the trust. One consequence, of importance to this and many other cases, is that parties acquiring rights in trust property generally hold those rights subject to the trust, and can assert no vested right to use those rights in a manner harmful to the trust." (*National Audubon Society v. Superior Court, supra,* 33 Cal.3d at 437, emphasis added.) Thus, "'[t]he State can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them, than it can abdicate its police powers in the administration of government and the preservation of the peace.'" (33 Cal.3d at 437-438, citing *Illinois Central Railroad Co. v. Illinois, supra,* 146 U.S. at 453-454.) Accordingly, responsibility for enforcement of trust purposes "'cannot be placed entirely beyond the direction and control of the State.'" (*Id.*)

Because of the mandate that the State actively exercise its continuing power and duty as trustee of its tidelands, the California Supreme Court has made clear that grants of tidelands purportedly made free of the public trust are illegal and subject to retroactive rescission. (See,

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[7/] While the State Supreme Court has not defined with any specificity what "general recreation purposes" are protected by the public trust, there can be no doubt (and Defendants can certainly make the necessary factual showing should the Court so desire) that off-leash dog walking on the tidelands at Crissy Field has been ongoing for decades, if not centuries, and, as will be discussed in detail in Defendants' opposition to the government's appeal, was officially recognized by the GGNRA in its 1979 Pet Policy, an off-leash policy which furthered trust interests and was found to have no adverse impact on the environment.

National Audubon Society v. Superior Court, supra, 33 Cal.3d at 440-441, and *City of Berkeley v. Superior Court, supra,* 26 Cal.3d at 533-534.) Thus, the public trust doctrine "is more than an affirmation of state power to use public property for public purposes. It is an affirmation of the *duty of the state* to protect the people's common heritage of streams, lakes, marshlands and tidelands, surrendering that right of protection only in the *rare* cases when the abandonment of that right is consistent with the purpose of the trust." The fundamental principle inherent in the public trust is the State's "continuing supervisory control" over its tidelands and the duty "to preserve, so far as consistent with the public interest, the uses protected by the trust." (*National Audubon Society v. Superior Court, supra,* 33 Cal.3d at 441-448, emphasis added.)

The control of the state for the purposes of the trust can never be lost, except as to such parcels as are used in promoting the interests of the public therein, or can be disposed of without any substantial impairment of the public interest in the lands and waters remaining." (*People v. California Fish Co.,* 166 Cal. 576, 584 (1913), citing *Illinois Central Railroad Co. v. Illinois, supra,* 146 U.S. at 452.) The State may not abdicate its role as trustee over its tidelands. (See, *City of Berkeley v. Superior Court, supra,* 26 Cal.3d at 521.)

The widespread abuses in the disposition of tidelands led to the adoption in 1879 of Article XV, Sections 2 and 3 of the California Constitution (now Article X, Sections 3 and 4). These provisions prohibit the sale to private persons of tidelands within two miles of an incorporated city. (*People v. California Fish Co.,* 166 Cal. 576 (1913)). While the California Constitution expressly prohibits the grant of tidelands to private persons, that express prohibition of the Constitution has been construed to apply to purported grants to other governmental entities. (See, e.g., *State of California ex rel. State Lands Comm. v. County of Orange*, 134 Cal.App.3d 20 (1982).)

As will be discussed in more detail *infra,* the government contended that not only did it acquire a fee interest in the tidelands at Crissy Field under the March 9, 1897 Act, but then, some ninety years later, leased that very property (which it claims it already owned) from the State (in 1987). Putting aside the internal inconsistency of this position, the government posited that for the lease period (September 28, 1987 until July 30, 2026), it may enforce its on-leash regulation

on the tidelands at Crissy Field (and on other tidelands) because "[t]he public trust, if it exists at this time, *is dormant* and does not prohibit the application of NPS regulations." (United States' Opposition To Defendants' Motion to Dismiss, at pp. 15 and 18, emphasis added.) The government's "dormant" public trust notion is, of course, freshly minted. Nowhere does the 1987 lease/license (or more properly the license agreement) have language which can be read to mean that the State of California was suspending its rights for the term of the agreement. Further, the "dormancy" doctrine was proffered without citation of legal authority. Somehow the government contends that is has abrogated the State's sovereignty as mandatory trustee over the tidelands. The 1987 agreement between the State and the NPS provides that the agreement will terminate if persons are denied free access to the tidelands. The public possesses the unfettered right of access for recreational purposes and this cannot be alienated by the State of California. That the trial court adopted and endorsed the unsupportable "dormancy" argument of the government was clearly erroneous.[8]

The government also posited the argument (adopted by the trial court) that the public trust doctrine, as a "state constitutional provision," has "no relevance to the United States, a sovereign entity." (Opposition to Motion To Dismiss, p. 16.) The government's position is contrary to law, for as stated by the California Supreme Court in *Marks v. Whitney, supra,* 6 Cal.3d at 250, "the power of the State to control, regulate and utilize its navigable waterways *and the lands lying beneath them, is absolute*, except as limited by the paramount supervisory power of the federal government *over navigable waters*." (Emphasis added.) Thus, the *sovereignty of California* over its *tidelands* (in contrast to navigable waters) is *absolute* and is not subject to

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[8/] As emphasized by the California Supreme Court in *City of Berkeley v. Superior Court, supra*, 26 Cal.3d at 521, the decision of the United States Supreme Court in *Illinois Central Railroad Co. v. Illinois, supra, 146 U.S. 387* (1892) established the principle that a state, as administrator of the public trust in tidelands on behalf of the public, does not have the power to abdicate its role as trustee over the tidelands.

federal preemption or regulation.[9] Moreover, a grant of tidelands, even to the federal government, remains subject to the public trust. (See, *i.e., City of Alameda v. Todd Shipyards,* 635 F.Supp. 1447 (N.D. Cal. 1986).)[10]

C. THE RESTRICTIONS ON THE TRANSFER OR ALIENATION OF TIDELANDS AND FUNDAMENTAL RULES OF CONSTRUCTION OF PURPORTED TRANSFERS OF TIDELANDS

In its analysis of the March 9, 1897 Act and the SLC's 1987 lease/license, the trial court clearly erred in failing to follow long-standing law on the interpretation of purported transfers of tidelands.

There are two fundamental canons of construction of any purported sale or other transfer of tidelands from the State either to a private individual or to a governmental entity, including the federal government.

First, California law has, at least as far back as 1895, been clear "that a statute purporting to authorize sale of the state's tidelands will be invalid unless 'that intent be clearly expressed or necessarily implied.' It will not be implied if any other inference is reasonably possible." As a result, "a public grant which is bounded by tidal waters will be construed to extend only to high-water mark." (*White v. State of California,* 21 Cal.App.3d 738, 756 (1971), citing *Freeman v.*

9/ As noted, the abuses in the disposition of tidelands led to the adoption in 1879 of Article XV, Sections 2 and 3 of the California Constitution (now Article X, Sections 3 and 4) prohibiting the sale of tidelands. This Constitutional protection of tidelands has been reinforced by numerous pieces of legislation such as California Political Code Section 3444, enacted in 1909, prohibiting the sale of tidelands by the State. The current version of that statute is found in Public Resources Code Section 7991, which provides: "The shore and the bed of the ocean or of any navigable channel or stream or bay or inlet within the State, between ordinary high and low water mark, over which the ordinary tide ebbs and flows is hereby withheld from sale." Significantly, "[e]ven where sales antedated these limitations, absolute ownership did not pass; the land remained subject to a public easement for purposes encompassed in the [public] trust." (*Western Oil and Gas Assn. v. California State Lands Comm.,* 105 Cal.App.3d 554, 563 (1980).)

10/ The narrow interpretation of grants of tidelands is demonstrated in a series of cases in which California made grants to other governmental entities for the purposes of harbor development. In each of those cases, the purported grants of tidelands were severely limited, even in the case of grant language expressly containing a transfer of the tidelands portion of the property. (See, *i.e., State of California ex rel. State Lands Comm. v. County of Orange*, 134 Cal.App.3d 20 (1982), and *Mallon v. City of Long Beach*, 44 Cal.2d 199, 204, 207 (1955).)

Bellegarde, 108 Cal. 179, 185 (1895), and *People v. California Fish Co., supra,* 166 Cal. at 597.)[11] "The rule has been codified in California by the enactment [in 1872] of Civil Code section 830. This section, as pertinent here, provides: 'Except where the grant under which the land is held indicates a different intent, the owner of the upland, when it borders on tidewater, takes to the ordinary high water mark.' Section 830 is a codification of the common law rule." Purported grants of tidelands "are therefore construed strictly" against their transfer. (*White v. State of California, supra,* 21 Cal.App.3d at 752-753, citing *Martin v. Waddell,* 41 U.S. 367 [10 L.Ed. 997] (1842).) Part and parcel of this rule is that as a matter of substantive law (not merely a rule of evidence), parol evidence (even where not objected to) cannot serve to add to, detract from, or vary the terms of a purported transfer of tidelands. (See, *Tahoe National Bank v. Phillips,* 4 Cal.3d 11, 23 (1971).)

A second fundamental rule of construction of purported transfers of tidelands (which was completely ignored by the trial court) is that "statutes purporting to abandon the public trust are to be strictly construed; the intent to abandon must be clearly expressed or necessarily implied; and if any interpretation of the statute is reasonably possible which would retain the public's interest in tidelands, the court *must* give the statute such an interpretation." (*City of Berkeley v. Superior Court, supra,* 26 Cal.3d at 528, emphasis added.)[12]

[11/] The trial court recognized that "[t]here is a *strong presumption against* expropriation of tidelands to either private grantees or other governmental entities", but then ignored the effect of this "strong presumption" and construed what it found to be an ambiguous transfer (the March 9, 1897 Act) in favor of the government. (Order, p. 2, emphasis added, citing *Shively v. Bowlby,* 152 U.S. 1, 13 (1894), and *California v. City of Orange,* 134 Cal.App.3d 20 (1982).)

[12/] The federal rule is the same. "But, as was pointed out in *Shively v. Bowlby*, 152 U.S. 1, 49, 57, 58, the United States early adopted and constantly has adhered to the policy of regarding lands under navigable waters in acquired territory, while under its sole dominion, as held for the ultimate benefit of future states, and so has refrained from making any disposal thereof, save in exceptional instances when impelled to particular disposals by some international duty or public exigency. It follows from this that disposals by the United States during the territorial period are not lightly inferred, and should not be regarded as intended unless the intention was definitely declared or otherwise made very plain." (*United States v. Holt State Bank*, 270 U.S. 49, 55 (1926).)

In its opposition to Defendants' motion to dismiss, the government did not even meet its burden of demonstrating any statutory bases for either the March 9, 1897 Act, or the 1987 lease/license. As such, the government failed to carry a fundamental burden of proof in even identifying the "statutes" which formed the bases for these alleged transfers.

D. THE CALIFORNIA LEGISLATIVE ACT OF THE MARCH 9, 1897 DID NOT TRANSFER OWNERSHIP OF THE TIDELANDS AT CRISSY FIELD TO THE FEDERAL GOVERNMENT

On March 9, 1897, the California Legislature passed an act (the statutory basis, if any, of which was never demonstrated by the government), which states:

> All the right and title of the State of California in and to the parcels of land extending from high-water mark out to three hundred yards beyond low-water mark, **lying adjacent and contiguous to such lands of the United States in this State as lie upon tidal waters** and are held, occupied, or reserved for military purposes or defense, **lying adjacent and contiguous to any island**, the title to which is in the United States, **or which island** is reserved by the United States for any military or naval purposes or for defense, are hereby granted, released, and ceded to the United States of America . . .. (Emphasis added.)

The trial court, after considering the clearly inadmissible extrinsic evidence proffered by the government (including documents from as late as 1974 purporting to interpret the Act), found the transfer to be "somewhat ambiguous" but nevertheless ruled "that the Government's reading is more persuasive" than that of the Defendants. (Order, pp. 3-4.) Perhaps more remarkably, the trial court rewrote the Act "as if an 'or' were inserted before the clause, 'lying adjacent and contiguous to any island.'" (*Id*.) The trial court based its rewriting of the Act on the unsupported conclusion that construing the Act to include the tidelands at Crissy Field "is more plausible in view of the California legislature's purpose of furthering the nation's goal of military readiness." The trial court also speculated that "[i]t would not have made sense for California to grant the United States only tidelands adjacent to islands when nearby coastal waters off the mainland, such as the Presidio, were at least as important for military purposes." (*Id*.) These unsupported, speculative, and irrelevant views of the trial court are both insufficient and improper as a basis

for rewriting and defeating the language of the Act and controlling case law on the narrow interpretation of purported tideland transfers.[13]

What the trial court did not do, but was required to do, was to construe the Act in accordance with California law. As noted above, the ambiguity in the Act found by the trial court required it to (1) interpret the Act against the transfer of the Crissy Field tidelands from the State to the federal government, and (2) construe the Act in order to preserve the public trust uses to which the tidelands remain subject, including general recreational uses.[14] The trial court's unsupportable construction of the Act was *dicta* and unnecessary to its decision and was, therefore, clearly erroneous and must be reversed.

Defendants submit that there are only two plausible constructions of the Act. The first is that the plain and ordinary meaning of the phrase (in the first clause of the Act) "lands of the United States in this State as lie upon tidal waters" is either: (1) islands owned by the United States within California, or, as urged at the hearing; (2) tidelands owned by the United States in the State of California. If, as the trial court found, construing the first clause as referring to islands "would render certain language [presumably the second clause of the Act, which uses the word "island" twice] surplusage", that should have provided no basis for ignoring the

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13/ As discussed in greater detail in Section IV, *infra*, the 1987 lease/license from the SLC to the GGNRA (which the trial court found to encompass the tidelands at Crissy Field) and which, earlier in its Order the trial court found the government already owned pursuant to the March 9, 1897 Act, describes the tidelands at Crissy Field (and elsewhere) as "Sovereign – *Ungranted* Tide and Submerged Lands" located in "Marin, San Francisco and San Mateo counties." (Government Ex. 13, p. 1.) Thus, as of 1987, neither the federal government nor the State believed that the March 9, 1897 Act had transferred ownership of the tidelands at Crissy Field to the federal government. The government's argument (at the hearing) that the lease/license included the tidelands at Crissy Field "out of an abundance of caution" was legally and factually unsupported.

14/ Again, we must point out long-standing law that "statutes purporting to authorize an abandonment of such public trust will be carefully scanned to ascertain whether or not such was the legislative intention, and that intent must be clearly expressed or necessarily implied. It will not be implied if any other inference is reasonably possible. And if any interpretation of the statute is reasonably possible which would not involve a destruction of the public use or an intention to terminate it in violation of the trust, the courts will give the statute such an interpretation." (*People v. California Fish Co., supra,* 166 Cal. at 597.) The trial court did not engage in this necessary exercise of statutory construction.

fundamental canons of statutory construction against the transfer of tidelands. (Order, p. 4.) But that aside, the court should have found the language ("lands . . . as lie *upon* tidal waters") to constitute the very definition of tidelands; because it is undisputed that the United States did not, as of March 9, 1897, own any tidelands on the mainland of California that were "adjacent and contiguous" (next to and bordering)[15] the tidelands at Crissy Field, the Act did not and could not have transferred the tidelands at Crissy Field to the federal government.[16]

The second, and only other reasonable construction of the phrase, in the first clause of the Act, "lands of the United States as lie upon tidal waters," is a clear definition of an island. Indeed, in *United States v. Watkins,* 22 F.2d 437 (N.D. Cal. 1927), the Court found that the March 9, 1897 Act at-issue here only "relinquishes the title of the state to lands from high-water mark to 300 yards beyond low-water mark, *adjacent to islands held by the United States for military purposes*." (22 F.2d at 439, emphasis added.) Remarkably, the government had, for years, relied upon the decision in *Watkins* for its now abandoned claim to "jurisdiction" over the tidelands at Crissy Field under the earlier Act of March 2, 1897. However, in its opposition to Defendants' motion to dismiss, the government, talking out of the other side of its mouth, claimed that *Watkins* "is of no relevance here." (Opposition, p. 11.) For its part, the trial court ruled that *Watkins* "did not involve submerged lands or tidelands and did not interpret the March 9, 1897 Act." (Order, p. 3.) Little could be further from what was decided. In *Watkins*, the

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15/ In *Sonora Elementary School Dist. v. Tuolume County Board of Education,* 239 Cal.App.2d 824 (1966), the court was called upon to interpret a provision in the California Education Code, "adjacent to the United States forest reserve." The court ruled that "adjacent" does not mean "contiguous" (touching or adjoining) but rather means neighboring or near to or close by. (239 Cal.App.2d at 829.) Thus, the March 9, 1897 Act's reference to lands of the United States "as lie upon tidal waters" (whether it be deemed tidelands then owned by the United States or islands) required that such lands be *both* adjacent (near to) and contiguous (touching or adjoining) to State owned tidelands. The United States indisputably did not own any tidelands (or islands) adjacent and contiguous to the tidelands at Crissy Field as of March 9, 1897.

16/ Moreover, the earlier March 2, 1897 Act, a "jurisdiction" only transfer, did not include tidelands at all. Thus, the government provided no proof (and the trial court never mentioned) that the tidelands at Crissy Field were, as of March 9, 1897, "held, occupied or reserved for military purposes or defense" by the United States as required by the March 9 Act.

Court was attempting to determine whether federal jurisdiction existed over a "defendant [who] was indicted for murder committed in the United States military reservation of the Presidio of San Francisco." (22 F.2d at 438.)[17] To that end, the Court engaged in a comprehensive analysis of several transfers of land from California to the federal government, including the Act of March 9, 1897. Thus, the Court's construction of the Act as involving only the transfer of tidelands adjacent to islands then held by the United States for military purposes or defense, was necessary and proper. Contrary to the finding of the trial court, the District Court in *Watkins* did indeed "interpret" the March 9, 1897 Act.

There is absolutely no basis for the trial court's finding that the March 9, 1897 Act conveyed ownership of the tidelands at Crissy Field from California to the federal government. Moreover, the trial court's finding that the Act "is somewhat ambiguous" is significant. (Order, p. 4.) This finding, under the authority cited *supra,* can only lead to a construction of the Act against the transfer of the tidelands at Crissy Field, and against a finding that the public trust in those tidelands was somehow abolished such that off-leash dog walking could (as of 1987) be made illegal under federal regulation. The trial court's finding is also clearly erroneous because it is contrary to "the rule that statutes restricting or derogating the state's sovereignty should be strictly construed in favor of the state." (*Coso Energy Developers v. County of Inyo,* 122 Cal.App.4th 1512, 1533 (2004) (finding an 1891 statute ceding jurisdiction of land from California to the federal government to be ambiguous.).) Accordingly, "statutes derogating [the] State's sovereignty *must be construed narrowly*." (*Id*.) The trial court's impermissibly broad construction of the Act in favor of the government was clearly erroneous and must be reversed.

17/ Contrary to the trial court's assertion, there is nothing in *Watkins* indicating exactly where the alleged murder occurred and therefore nothing to support the trial court's conclusion that *Watkins* "did not involve submerged lands or tidelands." (Order, p. 3.)

1. The Trial Court Clearly Erred In Considering The Parol Evidence Proffered By The Government Regarding The Meaning Of The March 9, 1897 Act

In an effort to demonstrate that the March 9, 1897 Act transferred the tidelands at Crissy Field from California to the federal government (after abandoning any reliance on the March 2, 1897 Act), the government proffered a plethora of irrelevant and otherwise inadmissible evidence. Simply put, there is no deed in the record. There is no grant or fee or easement or other instrument duly recorded that supports the government's position that it, not the State of California, owns the subject tidelands. Virtually none of the extrinsic evidence had anything to do with the intent of the California Legislature but, instead, consisted of documents *drafted by the federal government itself*, years prior to 1897, which purported to delineate what the government was attempting to obtain from the State of California but which it never obtained. While the government may have attempted to get what it wanted, the Act of March 9, 1897 that was actually passed was substantially different than what the government may have hoped for, and it never gave the government ownership of the tidelands at Crissy Field. In short, the government's correspondence concerning what it wanted bears no relevance to what the California Legislature could have actually granted. Because there is no instrument of conveyance, the government lacks the basic element of its action against Defendants: a federal tidelands title beyond a reasonable doubt.

Defendants objected to the government's extrinsic evidence on the grounds of lack of authenticity and lack of relevance,[18] but the objection was not sustained and the written materials were considered and relied upon by the trial court. The trial court ignored rules of construction requiring strict interpretation of tideland transfers and important limitations on the State's ability to alienate public trust uses of its tidelands. Further, while the trial court found that the government's extrinsic evidence did *not* "establish the legislative intent in 1897" (Order, p. 4), the court nevertheless erroneously concluded that "[b]ased on a *common sense* interpretation of the March 9, 1897 Act *as well as subsequent documents showing that the Act was interpreted to*

[18/] See, Memorandum of Points and Authorities in Reply to Government's Opposition to Motion to Dismiss, p. 2.

cede tidelands at the Presidio to the United States, the tidelands at Crissy Field fall within the United States' jurisdiction." (Order, p. 5, emphasis added.)[19] While Defendants have demonstrated above that the alleged "common sense" interpretation of the Act cannot be harmonized with the language of the Act or with the special rules of construction governing tideland transfers, the extrinsic evidence considered by the trial court was inadmissible and irrelevant as no conveyance is in the record ceding any recreational uses of the tidelands to the United States.

"When a statute is ambiguous, courts can look to legislative history in aid of ascertaining legislative intent." (*Coso Energy Developers v. City of Inyo, supra,* 122 Cal.App.4th at 1526, citing *People v. Robles,* 23 Cal.4th 1106, 1111 (2000).) However, courts consider "legislative history 'as dispositive only when that history is itself unambiguous.'" (*Id.*) Here, there was scant evidence of legislative history concerning the March 9, 1897 Act, and the extrinsic evidence proffered by the government was contradictory to its position and ambiguous.[20]

19/ As aptly stated by the court in *State of California ex rel. State Lands Comm. v. County of Orange*, 134 Cal.App.3d 20, 30 (1982): "Rather, the issue to be decided under the rules of statutory interpretation of *People v. California Fish Co., supra,* 166 Cal. 576, and *City of Berkeley v. Superior Court, supra*, 26 Cal.3d 515, is whether the Legislature clearly evidenced its intent to abandon the public trust and the public interest in tidelands . . .." The trial court's duty was "to strictly construe the statute to, if possible, 'retain the public's interest in tidelands.'"

20/ The trial court's reliance on "*[s]ubsequent* historical maps and other State documents", including a "1913 map" was clearly erroneous. (Order, p. 4, emphasis added.) This "after-the-fact" evidence is not probative of the intent of the California Legislature either prior to or at the time of the purported transfer. In addition, neither a map nor a description by metes and bounds was required by the March 9, 1897 Act. Instead, such a map (and metes and bounds description) was an explicit prerequisite under the earlier "jurisdiction" only (non-tideland) grant of March 2, 1897. The fact that the government waited 15 years to record the map required by the March 2 Act demonstrates not only its failure to comply with the March 2 Act, but the unreliability of a map created so long after the jurisdictional transfer. Yet the irrelevance of the map required under the March 2 Act to the *meaning* of the March 9 Act was lost on (or disregarded by) the trial court. Moreover, the filing of a map by the Army in the San Francisco Recorder's Office in 1913 cannot alter the terms of what the State intended to grant in 1897. The acceptance of such a survey by the Recorder is a purely ministerial Act as Recorders are not authorized to determine whether a survey exceeds the grant of the Legislature. Indeed, the California Supreme Court has overturned claims to tidelands based upon recorded surveys. (See, *People v. California Fish Co., supra,* 166 Cal. at 591-592.*)*

The self-serving extrinsic evidence of what the government hoped to get, when compared to the text of the actual grant, makes clear that regardless of the desires of the federal government, the State's grant can only be construed to have conveyed either State owned tidelands which were adjacent and contiguous to federally owned tidelands (of which there were none), or State owned tidelands adjacent and contiguous to islands within the State. Under no reasonable construction of the transfer can the Act of March 9, 1897 be found to have transferred ownership of the tidelands at Crissy Field from the State to the federal government.[21]

Indeed, under the trial court's interpretation of the 1897 Act, it is difficult to determine if any part of the San Francisco Bay or Estuary would be held by the State of California. The trial court's determination of the property issues should be overruled because the discussion was *dicta*, the State of California was not a party to the matter, and, more importantly because the trial court failed to find that the government's case should be dismissed because the government did not establish beyond a reasonable doubt that it owns a fee simple absolute title to the land where Defendants were letting their dogs run off leash. There is no document of title in the record. Such an instrument cannot be presumed to exist by the trial court merely because it would confer authority on the government to deny the public free access to the public trust lands for historic recreational purposes.

[21/] Again, while the trial court considered and erroneously relied upon the government's inadmissible extrinsic evidence, it did not consider the fact that the 1987 lease/license from the SLC to the GGNRA (which the trial court found included the tidelands at Crissy Field) states (in Section 1) the "Land Type" involved to be "Sovereign – *Ungranted* Tide and Submerged Lands" located in "Marin, San Francisco and San Mateo counties." (Government Ex. 13, p. 1, emphasis added.) This evidence not only contradicts the evidence proffered by the government (thereby creating reasonable doubt of any Legislative intent), but actually demonstrates that as of 1987, neither the SLC nor the NPS believed that the federal government owned the tidelands at Crissy Field (and elsewhere). Moreover, the lease excepts any transfer of tidelands "adjacent to Angel Island in San Francisco Bay." (Government Ex.13, Exhibit A.) Thus, exactly what the March 9, 1897 Act actually conveyed, if anything, remains in substantial doubt.

IV. THE 1987 LEASE/LICENSE FROM THE STATE LANDS COMMISSION TO THE NATIONAL PARK SERVICE CANNOT OVERRIDE THE PUBLIC'S RIGHT TO THE RECREATIONAL USE OF CRISSY FIELD

The 1987 lease/license by the SLC to the NPS/GGNRA was not a valid exercise of the SLC's continuing duty as trustee over the tidelands at Crissy Field (and elsewhere) if the effect of that transfer was to impose a federal on-leash regulation on tidelands which were not then subject to an on-leash regulation, as such a regulation would constitute an impermissible ban on off-leash dog walking. As noted, "'[s]tatutes purporting to authorize an abandonment of public use will be carefully scanned to ascertain whether or not such was the legislative intention, and that intent must be clearly expressed or necessarily implied. It will not be implied if any other reference is reasonably possible. And if any interpretation of the statute is reasonably possible which would not involve a destruction of the public use or an intention to terminate it in violation of the trust, the courts will give the statute such interpretation.'" (*National Audubon Society v. Superior Court, supra,* 33 Cal.3d at 438, citing *People v. California Fish Co., supra,* 166 Cal. at 597.) The government failed to carry its burden of proof beyond a reasonable doubt to support its argument that it may impose the on-leash regulation of 36 C.F.R. Section 2.15(a)(2) under the 1987 lease/license as it never identified any statutory basis for the alleged transfer.[22]

As even the government recognized in the GGNRA's 1979 Pet Policy (and in the legislative history of the GGNRA), one of the traditional recreational uses of Crissy Field has long included off leash dog walking. Indeed, the SLC lease/license itself specifically recognized that its purpose was "[t]o enhance the public safety, *use* and *enjoyment* of the lands and waters of the subject lands." This stated purpose of the SLC lease/license is completely consistent with the State's public trust obligations and is substantially different than the NPS' task of promoting and regulating national parks to conform to the fundamental purpose of conserving the scenery and the wildlife so as to leave them unimpaired for the enjoyment of future generations. (16 U.S.C. Section 1; *Wilderness Public Rights Fund v. Kleppe,* 608 F.2d 1250 (9th Cir. 1979).) In direct

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22/ "The public trust doctrine serves the function in that integrated system of preserving the continuing sovereign power of the state to protect public trust uses, a power which precludes *anyone* from acquiring a vested right to harm the public trust . . .." (*National Audubon Society v. Superior Court, supra,* 33 Cal.3d at 452, emphasis added.)

contrast to the general conservation mandate of the NPS, the SLC lease/license specifically requires that there be continuing "public access to, and use of, the existing beaches and sand" and that the beach and sand "will remain open and available for public use." (Government Ex. 13, p. 3.)[23]

This conflict between continued use and preservation is ongoing and is an area in which reasonable minds can differ. Some conservation absolutists would ban all activities from the parks because both man and animal can tread with a heavy foot. Other individuals and groups promote so-called wise use as a guise for the pillage of the landscape and the devastation of its natural beauty. This is not such an extreme case.[24] Literally thousands of San Franciscans (and others in the Bay Area) have walked their dogs off-leash at Crissy Field since before the turn of the century. The SLC lease/license is designed to enhance the public use and specifically requires that the existing beaches will remain open and available for public use, including "recreation." (Government Ex. 13, p. 3.) Indeed, when the agreement was signed in 1987, the GGNRA's 1979 Pet Policy (as continuously recognized by one of the signers of the agreement,

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[23] The government argued, and the trial court found, that imposition of the on leash regulation at 36 C.F.R. Section 2.15(a)(2) under the lease was permissible under 36 C.F.R. Section 1.2(a)(3). This was clearly erroneous. The agreement only allows for imposition of federal regulations on the subject land and waters "to the extent that they are not inconsistent with State law." (Government Ex. 13, p. 3.) Thus, the only plausible provision (assuming that the on-leash law can be imposed on non-federally owned lands and waters, as discussed in Section V, *infra*) which would enable Section 2.15(a)(2) to apply under the lease is 36 C.F.R. Section 1.2(a)(5), which applies to "[o]ther lands and waters over which the United States hold a less-than-fee interest, to the extent necessary to fulfill the purpose of the National Park Service administered interest *and compatible with the nonfederal interest*." (Emphasis added.) Because, however, imposition of the on-leash regulation is, under the agreement, "inconsistent with State law", and under Section 1.2(a)(5) *not* "compatible with the nonfederal interest" (that is, the recreational uses of the tidelands under California public trust law), application of the federal on-leash regulation is impermissible under the lease.

[24] The government misrepresented Defendants' position as contending that "the public trust allows them carte blanche to recreate at Crissy Field in whatever manner they choose." (Opposition to Motion to Dismiss, p. 19.) Defendants are not seeking carte blanche to engage in any activity they contend might be recreational but only to continue the very type of traditional recreational activity that has been ongoing at Crissy Field for decades, and which was officially recognized as permissible by the GGNRA (under its 1979 Pet Policy) as of 1987 and at present by the trial court.

GGNRA Superintendent Brian O'Neill) was in effect and both the NPS and the State expected that use to be preserved.[25]

The terms of the SLC lease/license are consistent with the statutory mandate of the GGNRA. The GGNRA, however, has a somewhat different statutory dedication to recreation than most national parks, which emphasize conservation. As will be emphasized in our opposition to the government's appeal, the GGNRA's enabling legislation[26] specifically recognized the urban character of the GGNRA and specifically required management practices to maintain traditional recreational open spaces necessary to an urban environment. The GGNRA's legislative history specifically reflects that existing recreational functions are to continue and that those functions include flying kites, sunbathing, and off leash dog walking.

The trial court's myopic analysis of the SLC lease/license only focused on the provisions allowing for the imposition of NPS regulations, but failed to even mention that the agreement precludes imposition of any such regulation that is "inconsistent with State law."[27] There has never existed, to Defendants' knowledge, a State on-leash law regulating the use of the tidelands at Crissy Field; imposition of the federal on-leash law would be clearly inconsistent with the traditional uses of the tidelands recognized by the public trust doctrine, a doctrine almost

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25/ The trial court's ruling on the lease is internally inconsistent. The GGNRA's 1979 Pet Policy was in effect as of the effective date of the lease, and, as found by the trial court, has never been properly rescinded and remains in effect today. Thus, the 1987 lease/license could not work to impose the very federal on-leash regulation which the trial court found had been suspended and is of no force and effect in light of the continuing existence of the 1979 Pet Policy.

26/ "In order to preserve for public use and enjoyment certain areas of Marin and San Francisco Counties, California, possessing outstanding natural, historic, scenic, and recreational values, and in order to provide for the maintenance of needed recreational open space necessary to urban environment and planning, the Golden Gate National Recreation Area (hereinafter 'recreation area') is hereby established. In the management of the recreation area, the Secretary of Interior (hereinafter 'Secretary') shall utilize the resources in a manner which will provide for recreation and educational opportunities consistent with sound principles of land use planning and management." (16 U.S.C. Section 460bb.)

27/ Again, the GGNRA's 1979 Pet Policy, which includes Crissy Field, made that area an off-leash (or "voice command") area, and neither the government nor the trial court offered any explanation as to how the lease could have superceded the then-existing and presently existing off-leash policy of the GGNRA at Crissy Field, and which the trial court relied upon in dismissing the citations against Defendants.

completely ignored by the trial court. In addition, imposition of the federal leash law under the SLC lease/license on the tidelands at Crissy Field would clearly violate the provisions of the lease as being contrary to California law. The tidelands encompassed by the SLC lease/license remain subject to the public trust doctrine and cannot work to deprive Defendants of (and make illegal) their historical right to recreational uses of the Crissy Field tidelands.

V. THE TRIAL COURT CLEARLY ERRED IN FINDING THAT THE FEDERAL GOVERNMENT NEED NOT OWN THE TIDELANDS AT CRISSY FIELD IN ORDER TO ENFORCE 36 C.F.R. SECTION 2.15 THEREON

Defendants were issued citations for allegedly violating 36 C.F.R. Section 2.15(a)(2), which makes it unlawful for any individual to "fail to crate, cage, restrain on a leash which shall not exceed six feet in length, or otherwise physically confine a pet at all times." As noted by the trial court, Defendants each received citations under 36 C.F.R. Section 2.15(a)(2) for having their dogs off leash while using the tidelands at Crissy Field for recreation. (Order, p. 1.)

In order for the on-leash regulation embodied in 36 C.F.R. Section 2.15 to form a lawful basis for the citations issued to Defendants, the government was required to demonstrate, beyond a reasonable doubt, that the on-leash regulation fits within the "Applicability and Scope" provisions of 36 C.F.R. Section 1.2. The trial court's analysis of Section 1.2 is clearly erroneous, as the regulation only allows the NPS to issue citations to off-leash dog walkers on "federally owned lands and waters." The government has not shown by admissible evidence beyond a reasonable doubt that it owned the tidelands at Crissy Field on the dates the citations were issued.

Subdivision (a) of 36 C.F.R. Section 1.2 sets forth the jurisdiction of the NPS to enforce its regulations. These areas generally include "federally owned lands and waters" administered by the NPS [subd. (a)(1)], lands administered by the NPS pursuant to the terms of a written instrument [subd. (a)(2)], and waters subject to federal jurisdiction within the NPS [subd. (a)(3)]. However, subdivision (b) of 36 C.F.R. Section 1.2 places a significant restriction on the areas in which the on-leash regulation applies. Subdivision (b) states that "[t]he regulations contained in parts 1 through 5, part 7, and part 13 of this chapter do not apply on non-federally owned lands and waters *or* on Indian tribal trust lands located within National Park System boundaries, *except*

as provided in paragraph (a) or in regulations specifically written to be applicable on such lands and waters." (Emphasis added.) Thus, the on-leash regulation contained in Chapter 2 of Title 36 may not be enforced on "non-federally owned lands and waters." This "ownership" limitation on jurisdiction is not saved by the language which follows the first clause of subdivision (b) of 36 C.F.R. Section 1.2 ("except as provided in paragraph (a)") as that language only qualifies and is clearly limited to "Indian tribal trust lands located within National Park System boundaries . . .." Had Congress intended otherwise, it surely would have written subsection (b) such that it began with the language, "Except as provided in paragraph (a) . . .." Congress did not do so, however, and the plain meaning of 36 C.F.R. Section 1.2(b) thereby prohibits the on-leash regulation contained in Part 2 of Title 36 from being enforced "on non-federally owned lands and waters...."

The trial court overlooked subdivision (b). Subdivision (b) provides express limitations on subdivision (a). The trial court was clearly mistaken when it determined that the application of criminal jurisdiction under 36 C.F.R. Section 2.15(a)(2) "does not require ownership of the tidelands." (Order, p. 8.) The trial court failed to undertake any analysis of the interplay between subdivision (a) and subdivision (b) of 36 C.F.R. Section 1.2. Defendants submit that subdivision (b) places a clear and explicit limitation on the government's ability to enforce its regulations on land owned by the State of California. Most importantly, subdivision (b) plainly states that the on-leash regulation in Chapter 2 "do[es] not apply on non-federally owned lands and waters . . .." The trial court's ruling to the contrary is clearly erroneous and should be reversed.

VI. CONCLUSION

For the reasons set forth herein, the Court should reverse the clearly erroneous rulings of the trial court regarding the ownership of the tidelands at Crissy Field, and the effect of the 1987 lease/license between the SLC and the NPS, and uphold the dismissals of the citations issued to the Defendants.

Respectfully submitted,

Dated: March 28, 2005

Stephen Samuel Sayad
Defendant In Pro Per

PROOF OF SERVICE

The undersigned hereby declares/certifies as follows:

___ I am: an active member of the State Bar of California, whose business address is:

__X__ I am: a resident of or employed in the City and County of San Francisco, California, over 18 years of age, and not a party to the within cause; my business address is: 221 Pine Street, Suite 600, San Francisco, CA 94104.

On the date hereon I served the foregoing documents described as:

DEFENDANTS' OPENING BRIEF ON PROTECTIVE CROSS APPEAL

on the interested parties in this action by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

Denee A. DiLuigi, Esq.
Special Assistant U.S. Attorney
U.S. Department of Justice
Northern District of California
11th Floor, Federal Building
450 Golden Gate Avenue
San Francisco, CA 94102
Tel: 415.436.7112
*Fax: 415.436.7234

Courtesy copy to:
Magistrate Judge Elizabeth LaPorte
U.S. District Court
Northern District of California
San Francisco Division
Courtroom E, 15h Floor
450 Golden Gate Avenue
San Francisco, CA 94102

Christopher J. Cannon, Esq.
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_____ (BY FEDERAL EXPRESS) I caused such envelope to be delivered by hand to the offices of the addressee(s) via Federal Express overnight service.

__X__ (BY MAIL) I placed such envelope with postage thereon fully prepaid to be placed in the U.S. mail at San Francisco, CA.

_____ (BY PERSONAL SERVICE) I caused such envelope to be hand delivered to the above address.

_____ (BY FAX) I transmitted by facsimile copying machine a true copy thereof to telephone number * (above) or represented to me to be the receiving telephone number for facsimile copy transmission of the parties/persons/firms listed above.

Executed on March 28, 2005, at San Francisco, California.

__X__ (FEDERAL) I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

CONNIE J. WELLEN
PRINT NAME

_____
SIGNATURE

TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES

Page(s)

Cases

Codes

Miscellaneous

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Defendant In Pro Per

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. GRETCHEN BARLEY, DONALD KIESELHORST, and STEPHEN S. SAYAD, Defendants.	Case No. CR-04-00408 WHA

DEFENDANTS' OPENING BRIEF ON PROTECTIVE CROSS APPEAL

[Protective Cross-Appeal from the December 1, 2004 "Order Granting Defendants' Motion To Dismiss" EDL]