I. INTRODUCTION

The Government's opposition to Defendants' opening brief takes a "ships passing in the night" approach to several significant issues of law and fact raised by Defendants. This approach undermines the government's legal position and the government's arguments are unable to circumvent the relevant reasonable doubt standard overlooked by the trial court concerning title to the Tidelands.

The flaws of the government's contentions include:

1. That the trial court's analysis of the language of the "March 9, 1897" Act, and its reading of the 1987 lease/license by and between the State Lands Commission and the United States, ignored the requirement in this criminal proceeding that the government is required to prove each and every element of the alleged offense, including ownership of the tidelands where the alleged offenses took place, beyond a reasonable doubt;

2. That the questionable parol evidence proffered by the government in support of its argument (and relied on by the trial court) that title to the tidelands had changed hands without a deed or a quiet title judgment in its interpretation of the "March 9, 1897" Act, demonstrated that this Act was ambiguous and the required construction of the Act favoring the accused was erroneously overlooked;

3. That the trial court's finding that the "March 9, 1897" Act was ambiguous constitutes reasonable doubt in itself and provides an ample basis for dismissal of the citations, and required the trial court to construe the Act against the transfer of the tidelands at Crissy Field and in favor of continued State sovereignty over the tidelands;

4. That title issues regarding the public trust impressed over the tidelands is a question of California law and because California property law governs, the government was obliged to show beyond a reasonable doubt that title to the tidelands in question was granted by an authorized representative of the State of California in a written instrument or that the government prevailed in a quiet title action regarding this particular tract of tidelands. Absent such proof of title, the rights of the citizens of the State to enjoy the tidelands for traditional recreational purposes cannot be abrogated by governmental fiat or notions of administrative

convenience (or, according to the government, rendered "dormant") absent rare and extraordinary circumstances and pressing exigencies not present here where the question involves the method of control over a pet in an urban recreational setting;

5. That the government's claim to ownership of the tidelands at Crissy Field is completely undermined by the fact that the 1987 license from the State Lands Commission (under which the government claims it leased the very property it already owned) describes the tidelands at Crissy Field as "Sovereign – **Ungranted** Tide and Submerged Lands" of the State of California;

6. That under controlling California law, the parol evidence rule, a rule of substantive law, precluded the trial court from considering the extrinsic evidence proffered by the government in its attempt to rewrite the Act of March 9, 1897 (which the trial court admittedly did);

7. That the trial court's ruling on the property issues was *dicta* as the court found that the continued existence of the GGNRA's 1979 Pet Policy was a basis for granting Defendants' motion to dismiss;

8. That because the State of California is not a party to this action, no determination can be made that will affect either its ownership over the tidelands at Crissy Field or as to the State's Public Trust obligations over those tidelands, even in the face of any alleged prior transfer thereof; and

9. That the Statute of Frauds (Cal. Civ. Code § 1624, and Cal. Code of Civ. Proc. § 1971) and the conveyancing statutes (Cal. Civ. Code §§ 1091, 1092) require a grant deed in order to transfer title to California real property. To satisfy these requirements, a single writing must show the grantor, the grantee and the legal description of the property. No such document is in evidence.

II. THE STANDARD OF PROOF IS BEYOND A REASONABLE DOUBT

In recognition of the doubtful status of its jurisdiction based upon ownership of a fee simple absolute interest in the tidelands, the government's opposition posits, for the first time on appeal, that it need not prove beyond a reasonable doubt the fundamental "Applicability and

Scope" prerequisite of 36 CFR § 1.2 as to the on-leash regulation of 36 CFR § 2.15(a)(2). That the government's present position on the burden of proof is without citation to legal authority punctuates the dubious merit of this contention. Such a position would violate the very law cited by the government that "[a] criminal defendant is entitled to 'a jury determination that he is guilty of *every element* of the crime with which he is charged, beyond a reasonable doubt.'" (United States' Opposition to Defendants' Cross Appeal, p. 13 (emphasis added), citing *Apprendi v. New Jersey,* 530 U.S. 466, 477 (2000).) According to the government:

> 36 C.F.R § 1.2 does not establish the offense with which defendants are charged. The ownership or title interest of the NPS in Crissy Field is not an element of the offense for which defendants are charged. 36 C.F.R. § 2.15(a)(2) does not include the specific element that the criminal act occur within the maritime and special territorial jurisdiction and it is therefore not an essential element of the specific offense for which proof beyond a reasonable doubt is required. (*Id.*)

Title to the tidelands at issue is a matter of fact and not law. Were there a deed or a quiet title judgment the question would be markedly different. For this matter the citations were issued on the wet sand far to the north of the high tide line as of 1850 because the line has been extended by bay fill. The record is devoid of proof of title. Proof positive arises from a lawful grant or judgment from a past quiet title litigation between the United States and the State of California concerning the wetlands at issue. Lacking either of these types of evidence, the government's contention that it has made the requisite showing of ownership is deficient because California law governs and no grant or quiet title judgment is in this record for the real property in question.

The underlying criminal citations are valid only if there is federal jurisdiction over Defendants. The on-leash regulation of 36 CFR § 2.15(a)(2) has no application in the absence of the "Applicability and Scope" provisions of 36 CFR § 1.2. Unless the government can prove that 36 CFR § 2.15(a)(2) "applies" to Defendants, the citations must be dismissed. Indeed, the government states that the offense set forth in Section 2.15(a)(2) must have "occurred within the jurisdiction of the NPS." (Government Opposition, p. 13.) The government suggests that it need only prove that the Defendant's dogs were off-leash while swimming, running, or walking over or upon the tidelands at Crissy Field. Defendants contend that the government's jurisdiction

under 36 CFR § 1.2 is a fundamental and necessary element of a violation of Section 2.15(a)(2). "[T]he due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt *of every fact* necessary to constitute a crime with which he is charged." (*In Re Winship*, 397 U.S. 358, 364, 90 S.Ct 1068, 1073 (1970), emphasis added.)

Under the Fifth and Sixth Amendments, "all facts necessary to constitute a statutory offense" must be proven to the jury[1] beyond a reasonable doubt. (*U.S. v. Booker,* 125 S.Ct. 738, 748, 160 L.Ed.2d 621 (2005); *Apprendi v. New Jersey, supra,* 530 U.S. at 483-84, 499 (Scalia, J., concurring) (the right to jury trial "means that all the facts which must exist in order to subject the defendant to a legally prescribed punishment must be found by the jury"); *id.* at 499-500 (Thomas, J., concurring) ("due process requires that the jury find beyond a reasonable doubt every fact necessary to constitute the crime").) Moreover, "constitutional limits exist to States' authority to define away facts necessary to constitute a criminal offense ...." (*Apprendi,* 530 U.S. at 486.) In other words, the government cannot attempt to avoid the Constitution by simply stating that a necessary fact is not an element of the offense because "if *Winship* were limited to those facts that constitute a crime as defined by state law, a state could undermine many of the interests that decision sought to protect without effecting any substantive change in its law. It would only be necessary to redefine the elements that constitute different crimes...." (*Mullaney v. Wilbur,* 421 U.S. 684, 698 (1975).) In short, the government cannot "reallocate" the burden of proof of certain facts by "labeling" them non-elements to avoid the mandates of the Fifth and Sixth Amendments. (*Patterson v. New York,* 432 U.S. 197, 210 (1977).)

In this case, the government is required to prove ownership of the tidelands to establish jurisdiction beyond a reasonable doubt to the trier of fact. In *United States v. Medjuck,* 48 F.3d 1107, 1110 (9th Cir. 1995), the Ninth Circuit held that the government had the burden of proving jurisdictional facts to the jury. Although the particular statute granting jurisdiction in that case was later modified to allow jurisdictional facts to be determined by the Court, that modification

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[1/] Although Defendants here did not have a right to a jury trial because they were only charged with petty offenses, the government still had the burden to prove facts necessary for a conviction beyond a reasonable doubt.

is constitutionally suspect following *Apprendi*. (See, *U.S. v. Moreno-Morillo,* 334 F.3d 819 (9th Cir. 2003) (Ninth Circuit recognized right to have trier of fact decide elements but defendants failed to preserve jurisdictional objections in plea agreement).)

Since the government failed to prove, beyond a reasonable doubt, that it has jurisdiction over Defendants pursuant to 36 CFR § 1.2,[2] the citations must be dismissed.[3]

III. THE UNITED STATES DOES NOT OWN THE TIDELANDS AT CRISSY FIELD

A. THE STRICT LIMITATIONS ON THE ADMISSIBILITY OF PAROL EVIDENCE

The government contends that it is not constrained by controlling California law as to the interpretation of purported grants of tidelands. The government claims that the Act of March 9, 1897 unambiguously somehow transferred ownership of the tidelands at Crissy Field from the State of California to the federal government. If the purported grant is unambiguous, the government is precluded from introducing parol evidence in support of its position. If, on the other hand, as found by the trial court, the alleged transfer is ambiguous, that finding in and of itself creates the reasonable doubt mandating dismissal of the citations. The government cannot have it both ways, as it seeks to do in its opposition.[4] As such, the government seeks to ignore

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[2/] The only two bases of jurisdiction asserted by the government are its alleged ownership of the tidelands under the Act of March 9, 1897, and the 1987 license between it and the State Lands Commission.

[3/] The government presents a fallback argument, for the first time on appeal, that "Defendants' confusion has yielded an argument of novelty of which may raise an issue of first impression." (Opposition, p. 13.) There is no confusion that has been caused by Defendants, but only by government's attempt, for the first time on appeal, to avoid the necessity of proving ownership over the tidelands beyond a reasonable doubt. Because alleged ownership is based on one interpretation of an ambiguous act (not what California law requires, a valid grand deed), the government now seeks to deprive Defendants of their rights to due process by exempting itself from proof of the title upon which its jurisdiction would be based.

[4/] The government cannot even bring itself to mention the standard of review of the trial court's decision, for if, as we have conceded, the standard of review is "clearly erroneous", the government must live with the same standard as respects its appeal of the trial court's finding that the continued existence of the GGNRA's 1979 Pet Policy requires dismissal of the citations.

the California law governing any tideland transfer, and the well-established law on the circumstances in which parol evidence is admissible or which is barred by the Statute of Frauds.

Here, parol evidence is inadmissible because no deed was produced that required interpretation.

Defendants maintain that the trial court's finding that the March 9, 1897 Act is ambiguous should end this matter, as such a finding of uncertainty over the meaning of the Act constitutes reasonable doubt. The government says nothing on this point. If, however, this Court is, notwithstanding the finding of ambiguity by the trial court, inclined to consider the government's parol evidence in order to attempt to ascertain the legislative intent behind the Act, it can only do so if that legislative history is "itself unambiguous." (*Coso Energy Developers v. City of Inyo*, 122 Cal.App.4th 1512, 1526 (2004).)[5] Here, however, the government has not proffered any evidence of the intent of the California legislature in passing the "1897 Act." Indeed, in the first five pages of its Opposition, the government only cites evidence of what "the United States sought" to obtain from the State (p. 2), an April 26, 1890 "letter from the Secretary of War" (p. 3), a "War Department redraft[] [of] the proposed legislation" (*Id.*), other "requests from the War Department" (p. 4), and the 1913 map prepared by the War Department for purposes of the earlier Act of March 2, 1897 – a jurisdiction only transfer that in no way involved tidelands. (*Id.*) Apart from the fact that these documents have not adequately been authenticated and are inadmissible hearsay, they do not shed an iota of evidence on the intention of the California legislature in passing the Act of March 9, 1897.[6] Perhaps more significant is the

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[5/] The government's opposition does not dispute the fact the from the time California became part of the Union in 1850, the interpretation of the scope of subsequent transfers of tidelands by the State is a matter of State law. (*State of California ex rel State Lands Comm. v. United States*, 457 U.S. 273, 282 (1982); *Miramar Co. v. City of Santa Barbara*, 23 Cal.2d 170, 174 (1943) ("Ownership of tidelands is governed by state law.").)

[6/] The government claims that "[a] series of communications written over . . . several months [in 1890] within the War Department indicate that the War Department redrafted the proposed legislation to expand the geographic scope of the conveyance to include . . other Bay Area military installations, some of which were islands (such as Angel Island) . . .." (Opposition, p. 3, citing Government Ex. 3.) The unreliability of such parol evidence is demonstrated by the (continued...)

undisputed fact that while the government claims that an attachment (of unknown origin) to a letter from the State Lands Commission ("SLC") in 1974 purports to interpret the Act as having conveyed the tidelands at the Presidio, thirteen years later, in 1987, when the government "leased" (obtained a "permit" to enter the tidelands under a license agreement) the tidelands from the SLC, those tidelands are described as "**Unconveyed Sovereign Tide and Submerged Lands**." (Government Ex. 13, p. 1.) The government's own evidence establishes that the tidelands belong to California and that the government has no right to exclude traditional recreational public uses on public trust lands. The government has absolutely no answer to this dilemma, but the effect of it is clear: the parol evidence proffered by the government is itself ambiguous and therefore not probative of the intent of the California legislature in passing the March 9, 1897 Act. As such, the parol evidence is inadmissible under California law.

California law is equally clear on the effect of an unambiguous transfer of tidelands on the inadmissibility of parol evidence. In *White v. State of California,* 21 Cal.App.3d 738 (1971), the court was faced with an action to quiet title to 38 acres of tidelands from the State to the plaintiff's predecessors in interest. The court of appeals found that in light of the trial court's determination that the patent from the State of California was unambiguous, the admission of parol evidence proffered by the plaintiff was erroneous and, accordingly, reversed the decision of the trial court in favor of plaintiffs and entered judgment quieting title to the tidelands in favor of the State of California. In rendering its decision, the court made clear that where the language of a grant of tidelands is unambiguous, the parol evidence rule, a rule of substantive law, is irrelevant to prove the intent of the grant. As stated by the court:

> We recognize that this parol evidence was not objected to by the State of California; also we observe that no contention is made that the patent itself was on its face reasonably susceptible of an interpretation that the 38 acres of tideland were included with the patent's defined limits [citation]. The recent case of *Tahoe National Bank v. Phillips*, 4 Cal.3d 11, 22-23 . . . has laid to rest the debated question whether evidence, inadmissible as proof under the parol evidence rule but admitted without objection, "as a matter of substantive law, can

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[6/](...continued)
fact that the 1987 license from the State Lands Commission to the NPS/GGNRA specifically excepts Angel Island (as State-owned land) from the agreement. (Ex. A to Government Ex. 13.)

> serve to create or alter the obligations under the instrument." Such "irrelevant evidence" the court said, even if not objected to, "cannot support a judgment."

(*White v. State of California, supra,* 21 Cal.App.3d at 756-758.) Thus, "[w]here the language of a deed is plain, certain, and unambiguous, the surrounding facts and circumstances will not be considered." (*Id*.)

The government does not take issue with the trial court's finding that the Act of March 9, 1897 is ambiguous. As such, that uncertainty in the transfer demonstrates the reasonable doubt for dismissal of the citations. If, however, the Court finds that the transfer is clear and unambiguous, it necessarily follows that the government's parol evidence was clearly erroneously considered and relied upon by the trial court, requiring reversal of its decision on the question of the ownership of the tidelands at Crissy Field.

B. THE GOVERNMENT IGNORES THE SPECIAL RULES APPLIED TO PURPORTED TRANSFERS OF TIDELANDS

Noticeably absent from the government's opposition is any attempt to address the basic requirement that a grant convey the tidelands at issue. Also absent is discussion of the special rules of construction dealing with any alleged transfer of tidelands from the State of California to either private individuals or governmental bodies, including the federal government. The first of these rules is "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." Thus, "a public grant which is bounded by tidal waters will be construed to extend only to high-water mark." (*White v. State of California, supra,* 21 Cal.App.3d at 756; *People v. California Fish Co.*, 166 Cal. 576, 597 (1913).)

A second fundamental rule applicable to purported tideland transfers 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*, 26 Cal.3d 515, 528 (1980).)

Third, "statutes restricting or derogating the state's sovereignty should be strictly construed in favor of the state"; such purported transfers "must be construed narrowly." (*Coso Energy Developers v. County of Inyo*, 122 Cal.App.4th 1512, 1533 (2004).)[7]

The government's opposition flatly ignores these rules of construction of tideland transfers, as they are, in short, a death-knell to its arguments on the effect of the March 9, 1897 Act and the 1987 agreement with the SLC.

C. THE GOVERNMENT'S INTERPRETATION OF THE MARCH 9, 1897 ACT CONTRADICTS THE LANGUAGE OF THE ACT

In its opposition, the government, in citing the text of the March 9, 1897 Act, does so in a way (just as did the trial court) to rewrite the statute "as if an **'or'** were inserted before the clause, 'lying adjacent and contiguous to any island.'" (Order, p. 4, emphasis added; Opposition, pp. 9-10.) In their Opening Brief, Defendants presented the pertinent provisions of the Act to the Court. (Opening Brief, p. 16.) While Defendants concede that the first clause of the Act refers to State-owned tidelands, there are three additional hurdles the government must prove beyond a reasonable doubt in order to make the Act mean what the War Department wished, desired or hoped to obtain, but in fact did not obtain.

The first requirement of the Act is that the State-owned tidelands lie "adjacent and contiguous to . . . lands of the United States . . .." The government's opposition fails to address this point. The only reasonable interpretation of the phrase, "lands of the United States" is land *owned* by the United States.[8] The government has presented no proof (as none exists) that as of March 9, 1897, it owned any land "adjacent and contiguous" (near *and* adjoining) the tidelands at

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[7/] Even the trial court recognized that "[t]here is a strong presumption against expropriation of tidelands to either private grantees or other governmental entities." (Order, p. 2.)

[8/] See, *United States v. Kipp,* 369 F.Supp. 774, 775-776 (D.C. Mont. 1974) ("the term 'public lands of the United States' certainly in popular usage could mean lands owned by the federal government.")

Crissy Field.[9] The government has failed to clear the first hurdle. Prior to or at that point in time the land then considered to be the Presidio lagoon was owned by the State of California. Later in the 1900's the lagoon was filled in and the airfield was developed. Simply put, the wet sand of today where the citations were issued was under the Bay waters until after the airfield was developed. Perhaps also the fee underlying the Presidio that existed in its early years was owned by the State of California as a result of its admission to Statehood. (See, *United States v. Bateman,* 34 F. 86, 89 (9th Cir. 1888).) The government makes no showing that it held fee title to any land south of the lagoon in 1897.

Second, the Act only applies to "lands of the United States in this State **as lie upon tidal waters**. . .." In its opposition, the government claims that "[t]he words on and upon are generally interchangeable", that the language at-issue "mean[s] just the opposite of tidelands" – that such language "is *commonly understood* to mean it is located at the water's edge." (Opposition, p. 10, emphasis added.) The government offers no proof for this allegation, and its reading of the language borders on the inherently incredible. Even accepting, for purposes of argument, that the words "upon" and "on" are interchangeable, what the government ignores is the language "lands . . . as lie upon tidal **waters."** The only reasonable interpretation of this language is that it refers to tidelands. In order for the Court to construe this language as the government would have it do (to mean lands of the United States in this State as lie "*above* the high-water mark"), the Act would have had to been written to refer to "lands of [owned by] the United States in this State as lie adjacent and contiguous" to "tidal **lands**." The Legislature's use of the term "tidal **waters"** is significant. The only lands that lie upon (or "on") "tidal waters" are tidal lands. As the federal government did not own any tidelands "lying adjacent and contiguous" to the tidelands at Crissy

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[9/] The March 2, 1897 Act was a jurisdiction-only transfer which makes no mention of tidelands and which, under California law, could not even have transferred jurisdiction of the tidelands at Crissy Field to the government.

Field as of March 9, 1897, it did not acquire the tidelands at Crissy Field under the March 9, 1897 Act. This is a second strike against the government's argument.[10]

Third, the government must prove, beyond a reasonable doubt, that any tidelands that it owned and that were adjacent and contiguous to the tidelands at Crissy Field were, as of March 9, 1897, "reserved by the United States for any military or naval purposes or for defense . . .." The absence of federal ownership of any tidelands adjacent and contiguous to the tidelands at Crissy Field clearly disproves this third requirement, and the three-strikes against the government's tortured interpretation of the Act have raised all the reasonable doubt necessary to defeat the government's claim to ownership of the Crissy Field tidelands.

Wholly apart from the fact that the government's reading of the Act cannot be harmonized with the language of the Act, and putting aside the parol evidence proffered by the government (which only demonstrates that what the War Department may have hoped to have obtained but not what it in fact obtained), is a uncontradicted fact (which the government does not confront in its opposition), that the 1987 license between the SLC and the NPS/GGNRA describes the lands subject to the grant (which the government contends and the trial court found, encompass the tidelands at Crissy Field) as **"Sovereign – Ungranted Tide and Submerged Lands**" located in "Marin, San Francisco and San Mateo counties." (Government Ex. 13 [to Declaration of Barbara Goodyear], p. 1, emphasis added.)[11] Clearly, in the eyes of both the federal government and the State of California, the tidelands at Crissy Field remained owned by the State as of 1987. Nothing in the interim has changed that fact. When the strict rules of

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10/ The government's argument that construing the phrase "lands . . . as lie upon tidal waters" to mean tidelands would render the first two lines of the Act "surplusage because those words refer to tidelands" (Opposition, p. 10) is stunning in its brazen disregard for the language of the Act. The first clause of the Act refers to State-owned tidelands. The subsequent language at-issue refers to those tidelands owned by the United States that are adjacent (next to) and contiguous (adjoining) to State-owned tidelands. Simply because the federal government did not own any such tidelands as of March 9, 1897 does not render the latter reference to federally-owned tidelands surplusage.

11/ At page 4 of the license, at paragraph 6, the State, as lessor, "expressly reserves to the public an easement for convenient access across the Lease Premises **to other State-owned lands located near or adjacent to the Lease Premises** . . .." This is yet additional proof that the lands subject to the agreement were and remain State-owned tidelands and submerged lands.

construction of tideland transfers are applied to the language of the Act, there is no reasonable interpretation of the Act consistent with the position of the government.

1. The Absence of a Federal Tidelands Deed Demonstrates That the Federal Government Does Not Own The Crissy Field Tidelands

In response to Defendant's Opening Brief, the government admits that "there is no deed for these lands or any other lands that were conveyed by the March 9, 1897" Act. (Government Opposition, p. 11.) The government claims that no deed is necessary because "[t]he passage of the Act itself constitutes the conveyance." (*Id*.)

The property issues involved in this case are governed by California law because there is no applicable federal common law of real property. Indeed, federal courts look to the property law of the State for the rule of decision. For example, were the government to condemn real property for a governmental purpose, the compensation paid to the tenants, easement holders, occupants, or fee simple owners will vary and State law will determine whether the claimant is an owner in fee simple or has a lesser right or estate in the property. This requires an examination of the particular deed or lease and a construction of the applicable writing under State law.

In this action there is no quiet title judgment or grant deed or grant of easement to the tidelands at Crissy Field to construe. The tidelands can be conveyed only by a valid grant deed. No right of adverse possession obtains because there is no showing that the federal government ever had exclusive possession of the tidelands in question. There has been no showing that any recorded document conveyed tidelands or other wet sand areas out of the State and in favor of the United States. A map is not a deed under California law because a map lacks a grantor and a grantee and generally lacks the legal description. (Cal. Civil Code §§ 1091, 1092.) More significantly, the wet sand area of 1897 is not the wet sand area of 1987, 2004, or 2005 because the air field at Crissy Field was developed over fill and was installed after 1900. Under California law a deed is necessary in order to convey an interest in real property. In order for a transfer of an interest in real property to be valid, it must be evidenced by a writing. As stated in California Code of Civil Procedure Section 1971, enacted in 1872:

> No estate or interest in real property, other than for leases for a term not exceeding one year, nor any power over or concerning it, or in any manner relating thereto, can be created, granted, assigned, surrendered, or declared, otherwise than by operation of law, or a conveyance or other instrument in writing, subscribed by the party creating, granting, assigning, surrendering, or declaring the same, or by the party's lawful agent thereunto authorized by writing.

The Statute of Frauds provides that certain contracts "are invalid, unless they, or some note or memorandum thereof, are in writing and subscribed by the party to be charged or by the party's agent." (Cal. Civil Code § 1624, subd. (a).) The Statute of Frauds governs transfers of real property interests for longer than one year. (Cal. Civ. Code §§ 1624(a)(3), and 1091.) To satisfy the Statute of Frauds, the writing must be signed by the party to be charged and contain the names of the parties to the agreement, the price to be paid, the terms and manner of payment, and a description of the property. (*Fritz v. Mills*, 170 Cal. 449, 458 (1915); *Gaggero v. Yura*, 108 Cal.App.4th 884, 894 (2003).) In order to comply with the Statute of Frauds, the writing must contain the essential terms *with sufficient certainty*. (*Breckinridge v. Crocker,* 78 Cal. 529, 535 (1889).) Here, as found by the trial court, the March 9, 1897 Act is uncertain. Moreover, title to the tidelands only passes on delivery of the grant deed. (California Civil Code § 1054.) The government's parol evidence does not demonstrate that a transfer of title between the State and the United States ever took place. No document was executed by a public officer or public body of the State of California. Accordingly, the government's extrinsic evidence is additionally irrelevant because it fails to show any transfer of an interest in real property as there is no showing of a grantor, a grantee, or of a legal description. California Civil Code Section 1092 provides stock language for a valid deed. The government has not furnished any such deed.

There is no quiet title judgment or deed in favor of the federal government as to the tidelands at Crissy Field. Thus, there is no showing (by any standard of proof) by the government that it owns the wet sand area to the north of the Crissy Field fill. What the government has produced, a 1987 license (described therein as a "permit") between the SLC and the NPS/GGNRA negates as a matter of law not only all of the government's claims to ownership of a fee simple interest, but any claim to a right to exclusive possession of the tidelands and submerged lands north of the old Crissy Field.

IV. THE 1987 "LEASE" FROM THE STATE TO THE GGNRA DID NOT RENDER THE PUBLIC TRUST OVER THE TIDELANDS "DORMANT"

The government claims dreamily here, as it did below, that "[t]he public trust, if it exists at this time, is dormant and does not prohibit the application of NPS regulations." (Opposition, p. 15.) Because the government has absolutely no basis in law for the novel position that the public trust goes to sleep when the NPS is near, it argues that the public trust doctrine, as a "state constitutional provision, has no relevance to the United States, a sovereign entity." (Opposition, p. 16.)

As set forth in our Opening Brief, the provisions of the agreement between the United States and the State of California are consistent with the State's trust obligation to ensure the continued public use of the tidelands for trust purposes, especially preserving recreational activities. When the government entered into the permit with the SLC in 1987, it expressly limited its authority and agreed that federal laws could only be imposed on the State-owned tidelands and submerged lands "to the extent they are not inconsistent with State law." (Government Ex. 13. p. 3.) Indeed, Paragraph 9 of the agreement sets forth its "Rules and Regulations" and provides: "Lessor and Lessee shall comply with and be bound by all presently existing or subsequently enacted rules, regulations, statutes or ordinances *of the State Lands Commission* or any other governmental agency or entity having lawful authority and jurisdiction." (Government Ex. 13, p. 6, emphasis added.) Any breach of the permit by the GGNRA may result in its "termination." (Ex. 13, p. 7.)

The SLC maintains a website (at www.statelandscommission.com) which contains a statement of the "Public Trust Policy" and a statement of "The Public Trust Doctrine."[12] As set forth in the statement of "Public Trust Policy," "[o]nly in rare cases may the public trust be terminated, and only where consistent with the purposes and needs of the trust." In other words, "[a]lthough the abandonment of the public trust is within the power of the Legislature, such abandonment takes place under limited, unique circumstances." (*California Earth Corps. v.*

12/ These two documents are attached hereto as Exhibits A and B, and Defendants request that the Court take judicial notice of the statements.

California State Lands Comm., 2005 WL 914728 (April 21, 2005), citing *City of Long Beach v. Mansell*, 3 Cal.3d 462, 485 (1970).) Nothing in the record before the Court provides any indication that the State, in granting the permit to the GGNRA in 1987, had any intention of abandoning the public trust over the tidelands and submerged lands that are encompassed in the permit. To the contrary, the fact that the GGNRA must not act inconsistently with State law demonstrates that the State intended that these lands and waters would continue to be available to the public for traditional recreational activities. The "dormant" public trust argument posited by the government is refuted by reference to the terms of the permit and contrary to California law.

Indeed, in the SLC's statement of "The Public Trust Doctrine", the SLC makes clear that the doctrine protects "general recreational purposes." At page 9 of the statement, the SLC emphasizes that "leases of tidelands must be consistent with statutory trust grant purposes, [and] leases which expressly contemplate the promotion of non-trust uses rather than trust uses would not comply with the terms of the trust grants." At page 10 of the statement, the SLC reiterates that "the California Supreme Court has said that just as the state is prohibited from selling its tidelands, it is similarly prohibited from freeing tidelands from the trust and dedicating them to other uses while they remain useable for or susceptible of being used for water-related activities."[13] This law, considered in light of the express provisions of the permit, lays to rest the "view" of the government that the public trust fell "dormant" such that it can usurp the State's absolute sovereignty over its tidelands and make illegal general recreational activities such as off-leash dog walking.[14]

13/ Citing *Atwood v. Hammond*, 4 Cal.2d 31, 42-43 (1935).)

14/ The public trust area "leased" to the United States was not a transfer that changed title. It did not, as the government asserts, put the public trust doctrine to sleep because the language granting access rights provides to the contrary. The tidelands are open to the public and closure of the right of public access is a breach of the agreement giving rise to its termination. Thus, when the government excludes persons using the land for recreation, the government breaches the permit and suspends its operation giving the government no claim of right to exclude any member of the public from using the tidelands for recreation, be it swimming, picnicking, fishing, running, or running a pet under voice control. The government lacks a true lease over the public trust lands because it was never given the right of exclusion possession to the property.

The government's preemption and supremacy arguments are equally unavailing, and are made contrary to scores of decision of the United States Supreme Court on the State's sovereignty as trustee over its tidelands. As this Court has stated, "[t]he 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), emphasis added, citing *Illinois Central Railroad Co. v. Illinois*, 146 U.S. 387, 452, 455, 459 (1892).) The sovereignty of the State of California over its tidelands "is absolute" and not subject to federal preemption. (*Marks v. Whitney,* 6 Cal.3d 251, 260 (1971).) As stated by the California Supreme Court in *State of California ex rel. State Lands Comm. v. Superior Court*, 11 Cal.4th 50 (1995):

> The United States Supreme Court has explained . . . [that] "[t]he trust devolving upon the State for the public, and which can only be discharged by the management and control of property in which the public has an interest, cannot be relinquished by a transfer of the property. 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. The State can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them, so as to leave them entirely under the use and control of private parties, except in the instances of parcels mentioned for the improvement of the navigation and use of the waters, or when parcels can be disposed of without impairment of the public interest in what remains, than it can abdicate its police powers in the administration of government and the preservation of the peace."

(11 Cal.4th at 63-64, citing *Illinois Central Railroad Co. v. Illinois*, *supra*, 146 U.S. at 452-453, and *City of Berkeley v. Superior Court,* 26 Cal.3d 515, 521 (1980).)

"Under our federal system, property ownership is not governed by a general federal law, but rather by the laws of the several States." (*State Land Board v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 370 (1977). "This principle applies to the banks and shores of waterways, and we have consistently so held." (*Id*., at 379; see also, *State of California v. Superior Court (Lyon)*, 29 Cal.3d 210, 216 (1981) ("The United States Supreme Court has made it plain that the ownership of such lands is a matter of state rather than federal law.").) Accordingly, "[t]he power of the state to control, regulate and utilize its navigable waterways and the lands lying beneath them,

when acting within the terms of the trust, is *absolute*, except as limited by the paramount supervisory power of the federal government *over navigable waters*." (*Marks v. Whitney, supra,* 6 Cal.3d at 260, citing *People v. California Fish Co*., 166 Cal. 576, 597 (1913), and *Colberg, Inc. v. State of California*, 67 Cal.2d 408, 416-422 (1967).)[15] The government's preemption argument is without merit with respect to the State's tideland property as the authorities each hold contrary to the government's position.

V. CONCLUSION

The citations must be dismissed for each or any of the above stated reasons. The government has not shown its ownership of the tidelands in question by any standard acceptable under California law. Accordingly, an essential element of the proof is absent and the citations issued against the Defendant must be dismissed

Respectfully submitted,

Dated: May 9, 2005

Stephen Samuel Sayad
Defendant In Pro Per

15/ The government's preemption and supremacy clause arguments are undermined, in the most basic manner, because of the fact the California acquired title to the navigable waters and tidelands by virtue of her sovereignty when admitted to the Union in 1850. (*Borax, Ltd. v. Los Angeles*, 296 U.S. 10, 15-16 (1935).) In *Martin v. Waddell*, 16 Pet. (41 U.S.) 410, 10 L.Ed. 997 (1842), the United States Supreme Court made clear that "[w]hen 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." (Emphasis added.)

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:

REPLY BRIEF OF DEFENDANTS IN SUPPORT OF PROTECTIVE CROSS-APPEAL

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

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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.

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Executed on May 9, 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

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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

REPLY BRIEF OF DEFENDANTS IN SUPPORT OF PROTECTIVE CROSS-APPEAL

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