UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

UNITED STATES OF AMERICA, Appellant, v. GRETCHEN BARLEY, DONALD KIESELHORST, STEPHEN S. SAYAD, Appellees.	)	No. CR04-00408 WHA

APPELLEES' BRIEF

CHRISTOPHER J. CANNON, State Bar No. 88034
Sugarman & Cannon
44 Montgomery Street, Suite 2080
San Francisco, CA 94104-6702
Telephone: 415/362-6252
Facsimile: 415/677-9445

Attorney for Defendants GRETCHEN BARLEY
DONALD KIESELHORST

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CHRISTOPHER J. CANNON, State Bar No. 88034
Sugarman & Cannon
44 Montgomery Street, Suite 2080
San Francisco, CA 94104-6702
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I. INTRODUCTION

The government's main argument on appeal is a clever attempt to sidestep the heart of Magistrate LaPorte's Order dismissing the citations. Essentially the government contends that the 1979 Pet Policy, which reaffirmed the long standing policy of permitting off leash dog walking in the Golden Gate National Recreation Area (hereinafter "GGNRA"), a policy which began before the GGNRA came into the Park

System and was recognized in the legislative history of the enabling legislation of the GGNRA, never existed because the government contends the Pet Policy was contradicted by a general park service regulation enacted long before the Crissy Field was brought in to the National Park System (hereinafter "NPS"). The government then raises the specter that Magistrate LaPorte's Order will be used as a bulldozer to undermine the conservation mission of the NPS.

These arguments ignore the legislative and factual history of the GGNRA. Its unique position as an urban recreation area, and the specific Congressional intent that existing recreational uses be allowed to continue at Crissy Field. After considering these matters, this Court should hold Magistrate LaPorte's decision was not clearly erroneous.

In apparent recognition that any decision based on the record below will require this Court to affirm Magistrate LaPorte's Order dismissing these citations, the government has attempted to supplement the record on appeal with evidence not submitted below; tries to muddle the standard of review; tries to confuse the issue of compliance with the Rule Making Procedures required by the APA with the concept of notice to the public; and claims that "Magistrate Judge LaPorte raised sua sponte 36 C.F.R. § 1.5(b)," which provides that highly controversial or significant changes in use must comply with the notice and public comment provisions set out in section 1.5. In fact, the NPS' failure to comply with § 1.5 was the heart of our argument below; this Court must review Magistrate LaPorte's Order for clear error; and F.R.Crim.P 58(g) and the due process clause forbid both the government and amici from their massive

attempt to prejudice this Court with evidence not submitted to the decision maker below.

II. STANDARD OF REVIEW AND SCOPE OF REVIEW.

A. STANDARD OF REVIEW.

While we agree with the government, that this appeal is governed by F.R. Crim.P. 58(g), we do not understand why the government claims, "this Court's review is de novo." GB 6.

The standard of review for this Court is the same as the standard of review from one of this Court's trial decisions to the Ninth Circuit. Findings of fact are reviewed for clear error. Rand v. Rowland, 154 F.3d 952, 957 n.4 (9th Cir. 1998) (en banc). Review under the clearly erroneous standard is significantly deferential, requiring a "definite and firm conviction that a mistake has been committed." See Easley v. Cromartie, 532 U.S. 234, 242 (2001). See also United States v. Smith, 106 F. Supp.2d 1049 (D.Nev. 2000) (The magistrate judge's findings of fact are reviewed for clear error. United States v. Doe, 136 F.3d 631, 636 (9th Cir.1998); F.R.Cr.P. 58(g)(2)(D). Her legal conclusions are reviewed de novo. United States v. Lester, 85 F.3d 1409, 1410 (9th Cir.1996)).

B. SCOPE OF REVIEW.

Although purely legal issues may be subject to de novo review, neither the government nor amici are entitled to submit additional material, not considered by Judge LaPorte, to support their claims, and we are filing a motion to strike that material.

Fed.R. Crim.P. 58(D) governs the scope of this appeal. That Rule expressly

states that:

> (D) Scope of Appeal. The defendant is not entitled to a trial de novo by a district judge. The scope of the appeal is the same as in an appeal to the court of appeals from a judgment entered by a district judge.

Fed.R.Crim.P 58(C) governs the record on appeal. That Rule expressly states that:

> (C) Record. The record consists of the original papers and exhibits in the case; any transcript, tape, or other recording of the proceedings; and a certified copy of the docket entries. For purposes of the appeal, a copy of the record of the proceedings must be made available to a defendant who establishes by affidavit an inability to pay or give security for the record. The Director of the Administrative Office of the United States Courts must pay for those copies.

There is no rule or authority allowing the government, after it has lost below to supplement the record on appeal with new evidence. To the contrary, "It is Hornbook law that neither party can rely on evidence outside the record of the case on appeal (...). We are limited on this appeal to the record made in the court below." Duran v. United States, 413 F.2d 596, 605 (9th Cir. 1969).

In United States v. Rivera-Rosario, 300 F.3d 1 (1st Cir. 2002), the government, relying upon F.R.App. P. 10(e) authorizing appellate courts to supplement the record to correct omissions or misstatements requested that the record on appeal be supplemented by English translations of Spanish tapes that had been played to the jury, after the jury had indicated that they could understand the untranslated, Spanish tapes. The First Circuit held that "[t]hough tantalizingly efficient" there was simply no authority to

allow even such a rudimentary supplementation of the record on appeal. The Court held that "[a] 10(e) motion is designed to only supplement the record on appeal so that it accurately reflects what occurred before the district court. It is not a procedure for putting additional evidence, no matter how relevant, before the court of appeals that was not before the district court." Id.

The government, and amici, should not have submitted additional evidence on this appeal, this Court, consistent with accepted standards of review, may not rely upon it, and the government and amici's evidence outside of the record should be stricken. Accordingly, we will not address the additional evidence submitted by the government and amici; and request the Court to strike the Declarations of Denee A. DiLuigi, Barbara Goodyear, Chris Powell, the attachments to those declarations and arguments and references made to material outside the record below, specifically included but not limited to:

Page 5 lines 9-27

Page 8 lines 11-15

Page 11 line 21 –Page 12 line 1

Page 17 line 9-16 and 21-28

Page 20 line 21-Page 24 line 14

Because the argument of amici is primarily based on material and issues not considered below, we ask the Court to strike the material submitted by amici and not consider any of their arguments. Out of an abundance of caution, however, because an

argument could be made that Section III of Amici's Brief, except for the last 5 lines of that section, is based upon arguments made below, we will address those argument in of our brief.

III. THE HISTORY OF DOG WALKING AT CRISSY FIELD PRESENTED TO MAGISTRATE LAPORTE.

As noted in House Report No. 92-1391 dated September 12, 1972 (emphasis added) "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"..."Under the terms of the [enabling] legislation, the area of the Presidio commonly known as Crissy Field (and immediately adjacent lands), as well as the area generally referred to as Baker Beach (and immediately adjacent lands), would be transferred to the Secretary of the Interior for use in conjunction with the recreation area, but the Secretary is authorized to permit the continued use of such lands as are necessary for existing functions for a reasonable period of time."(emphasis added) The enabling legislation[1] specifically noted the urban character of the GGNRA and required management practices to maintain needed recreational open spaces necessary to the urban environment.

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[1] 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 the 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. § 460bb.

Historically dogs have been allowed off leash, under voice-control, along the Crissy Field beach area. See Golden Gate National Recreation Area Advisory Commission Approved Guidelines for a Pet Policy, February 24, 1979 p.2 (Exhibit A); Pet Policy Memorandum, October 6, 1978. Exhibit B. In soliciting public comment concerning creation of the specific policy, the GGNRA circulated a brochure advising the public that "the ordinary guidelines outlined in the Code of Federal Regulations do not really apply in an urban area. People and their animals have been visiting the park for too long to apply an all inclusive arbitrary policy." Exhibit C.

For the next two decades the GGNRA continued to consistently promote its voice control pet policy as an official policy of the GGNRA with authority to deviate from the general leash control regulations that apply in other park areas. Letters from the Department of Interior (hereinafter "DOI") to Senators Seymour and Cranston, July 8, 1992 (Exhibit D), Golden Gate Recreational Area Questions and Answers, September 17, 1996 (Exhibit E), Memorandum from South District Ranger to Chief Ranger, January 4, 1996. Exhibit F.

In 1995, the GGNRA Superintendent confirmed the authority for such official deviation from the general regulation in a letter to the San Francisco SPCA President. Superintendent O'Neill clarified that although the general regulation precluded off leash recreation in other National Parks, the GGNRA believed it had the authority to "set a more flexible and realistic policy, given the history of use and value of certain park areas to dog walkers. Through this avenue, we can clearly and officially designate areas where off leash dog walking is allowed." Exhibit G p. 3.

Appendix C to the Original GGNRA management plan specifically allowed off leash dog walking. Exhibit H.

In the mid 1990's, significant modifications were anticipated and eventually made to the Crissy Field area. The environmental review process specifically addressed the affect of the changes on recreational use of Crissy Field, specifically including continuing the policy of off leash dog use. The GGNRA issued a Finding of No Significant Impact (hereinafter "FONSI") concluding that no further environmental analysis would be necessary and that there would be no adverse impact to recreational access. The FONSI analysis addressed the recreational impact mitigation factor analysis by declaring that the existing off leash policy would not be changed and that any "Proposed changes in off leash dog access will be brought to the attention of the Advisory Commission prior to taking action." Exhibit I.

The off leash pet policy was again recognized by Brian O'Neill, the General Superintendent of the GGNRA on July 8, 1996 when it was set out in the Compendium Amendment to 36 C.F.R. Chapter 1[2]. Exhibit J.

Despite the adoption of the off leash pet policy allowing off leash dog walking in limited portions of the GGNRA, many San Franciscans became worried that the National Park Service was going to attempt to limit off leash dog walking.

[2] Although later versions of the Compendium did not include the Pet Policy, the Policy's inclusion in the 1996 Compendium was simply an acknowledgement of a long term, established use, and Publication of the Policy, but not the Compendium, continued in the following years. See e.g. Exhibit P.

In September 1998, a San Francisco attorney, Garry Koenigsberg wrote Senator Feinstein a letter inquiring whether she supported restriction on off leash recreation. Exhibit K.

On January 15, 1999, Senator Feinstein forwarded Koenigsberg's letter to John J. Reynolds, the Regional Director for the NPS. Exhibit L.

On October 21, 1999, Reynolds wrote to Koenigsberg describing the off leash pet policy:

> GGNRA has adopted a pet policy that is more liberal that the regulations enforced at other national parks throughout the United States, where pets are required to be leashed at all times and are, for the most part, excluded from all but developed areas. GGNRA has, with the assistance of the Park's Advisory Commission, established a pet policy that allows some visitors to enjoy a few designated areas with their pets under less restrictive restraint. Certain areas of the park have been designated as voice-control areas where pets are allowed off leash. Exhibit M.

Similar letters were sent to Senator Pelosi, who was also responding to a constituent inquiry, and Mrs. Lillian Hanahan. In those letters, GGNRA Superintendent Brian O' Neill,[3] also affirmed that "certain areas of the park have been designated as voice-control areas where pets are permitted off leash." Exhibits N, O.

These responses to Senators Boxer and Feinstein were consistent to earlier written responses to the Senators Seymour and Cranston. Exhibit D.

This policy was also reflected in brochures distributed to the public by the Department of the Interior (Exhibit P) informing the public that "Dogs may be off leash

under voice-control on Crissy Field east of the West Gate of the Golden Gate Promenade, and North of New Mason Street." See also Park Notes Exhibit Q.

In Fort Funston Dog Walkers v. Babbit, 96 F.Supp.2d 1021 (N.D.Cal. 2000) this Court specifically recognized the off leash pet policy allows off leash dog walking in certain areas of the GGNRA. "Walking dogs off leash in Fort Funston[4] was expressly permitted." Id. at 1038.

This specific GGNRA policy is different from the general NSP policy which generally requires that pets be on leash in national parks. See 36 C.F.R. § 2.15.

Despite these specific pet policies designating specific off leash areas in the GGNRA, in 2000, the NPS attempted to unilaterally fence off from public access another off leash area in another part of the GGNRA, Fort Funston. Those attempted restrictions were litigated in Fort Funston Dog Walkers and this Court held that the such a significant alteration of the public use pattern was a highly controversial and probably a significant alteration of the public use pattern which could not be taken away without compliance with the procedures required under 36 C.F.R. § 1.5.

> The National Park Service's regulations require notice-and-comment rulemaking procedures before a closure of a park area that is of a "highly controversial nature" or that will result in "a significant alteration in the public use pattern of the park area."
> Id. at 1023.

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[3] The letters were signed by Mary Gibson Scott.
[4] The same regulation applied to both Crissy Field and Fort Funston. Exhibit J p. 2.

Even as the Fort Funston dog walking litigation was proceeding before this Court, the NPS continued its efforts to limit off leash dog walking without the required publication in the Federal Register and opportunity for public comment.

At a January 23, 2001, Advisory Commission Meeting,[5] without prior publication in the Federal Register, Chairman Bartke moved to "Rescind the 1979 Commission Pet Policy as Illegal and Unenforceable,"[6] claiming that "the 1979 Pet Policy, actually adopted by the Commission in 1978, but not printed until 1979, was a recommendation to accommodate off leash dogs in the park. That policy has been determined to be illegal, and the Commission seeks to rescind this advice at this meeting." Exhibit R. The problem with Chairman Bartke's claim is that is that the Advisory Commission does not have the ability to rescind the off leash Pet Policy, simply by declaring that off leash pet policy to be "illegal," because this Court had ruled that the off leash pet policy can not be changed without compliance with the APA. That process has yet to occur.

Moreover, Bartke's motion to rescind the off leash pet policy was rejected by a fourteen to one vote. The Advisory Commission, instead decided to take "no action" on Bartke's motion to rescind the off leash pet policy. Exhibit R p. 9. The meeting, on

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[5] The Advisory Commission to the Golden Gate National Recreational Area and Point Reyes National Seashore.

[6] The Park Service later, and unsuccessfully, used this argument that the off leash Pet Policy was "illegal" in its opposition to the Motion for Attorneys Fees filed by the successful parties in the Fort Funston dog walking litigation. The Park Service claimed that attorney fees should not be awarded because the plaintiffs sought to take advantage of an illegal policy. This Court rejected that argument as not substantially justified and awarded legal fees under the Equal Access to Justice Act, 28 U.S.C. § 2412.

a rainy January night, was attended by more than a thousand dog walkers who sought an opportunity to comment against proposals to rescind the off leash pet policy. The Commission took testimony from many people, including eight members of the San Francisco Board of Supervisors,[7] who spoke against rescission of the off leash pet policy. Commissioner Rodriguez wanted to insure that the off leash pet policy would not be rescinded or taken away. Id. at 7. Finally, at the end of the meeting, all of the Commissioners agreed that the matter should be discussed and investigated and "that the staff make no changes in its enforcement in the next 120 days." Id. at 8. (Undeterred by these facts, the government argues at page 22 of it's brief that "the GGNRA Commission "acknowledged publicly that the 1979 "voice control" policy (Pet Policy) was null and void since it was contrary to NPS regulation." GB 22)

For whatever reason, the NPS decided to ignore the Pet Policy and the advice of the Advisory Commission and began ticketing individuals for walking their dogs off leash in compliance with the 1979 Pet Policy. Gretchen Barley, Steven Sayad and Don Kieselhorst were ticketed. They moved to dismiss those tickets before Magistrate Judge LaPorte.

While those motions were pending, and as required by the Court's earlier order, in Fort Funston Dog Walkers, the GGNRA has finally begun to address this conflict through rulemaking, with a goal of writing a new regulation covering dog management for the GGNRA park. On May 14th of this year, GGNRA Superintendent O'Neil sent a

[7] Including present Mayor Newsom.

letter to various interested parties proposing a Negotiated Rule Making[8] in order to address: "dog management policies, including off leash dog walking, at Golden Gate National Recreation Area (GGNRA)." Exhibit S p. 19. The first phase of the process was to be a "Situation Assessment" conducted under the auspices of the United States Institute for Environmental Conflict Resolution, to determine if it would be possible to assemble a "committee of persons who could adequately express the concerns of affected interest groups "and would be willing to negotiate in good faith to reach a consensus on a proposed rule for GGNRA allowing off leash dog walking." Exhibit S.

On September 14, 2004, that team released a Situation Assessment Report: Proposed Negotiated Rulemaking on Dog Management in the Golden Gate National Recreation Area. Id.

That professional assessment team, chosen by the NPS and described by the NPS as "a highly qualified team of experienced mediators" has reached the conclusion that "There appears to be a broad — not unanimous — expectation that GGNRA ultimately will publish a rule allowing some off leash dog walking," (Id.) and went on to propose a detailed schedule for the proposed rulemaking allowing all stakeholders to be heard and eventually come up with a rule all parties can live with. Id.

[8] Accordingly, before defendants, who are concerned with conservation, and the protection of our National Parks can reasonably decide whether to participate in the negotiated rulemaking, we would like to know, whether the NPS really stands by the arguments in is making in this brief, that the Superintendent has no authority to modify Section 2.15's application to the Crissy Tidelands, and its participation in the ongoing negotiated rule making is just more passive aggressive bad faith activity, or whether the government is simply making this argument here out of an excess of representational zeal and has not really considered its impact on the Rule Making process.

In the proceedings before Magistrate LaPorte, the government did not even attempt to dispute that the closing of traditional off leash dog walking areas was a controversial change of a substantial public use of Crissy Field, rather the government based its argument below on the claim that the GGNRA had no authority to deviate from the general regulation set out in section 2.15. See Government's Opposition to Defendants' Motion to Dismiss,

On December 1, 2004, Magistrate Judge LaPorte granted defendants' motions to dismiss (Exhibit T) finding: "the GGNRA implemented the 1979 Pet Policy for many years as if it were binding, and there is no evidence that officers exercised discretion on a case-by-case basis. Repeal of the Pet Policy affected by switching to a policy of enforcing section 2.15 is a fundamental change that is quite controversial and changes patterns of public use." Exhibit T p. 11.

The government appealed. Defendants have filed a protective Appeal of the issues Judge LaPorte decided adversely to them. Those issues have been briefed by defendant Sayad and joined by defendants Barley and Kieselhorst, but if this Court decides Magistrate Judge LaPorte's decision was not clearly erroneous, there is no need to address those issues.

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IV. MAGISTRATE LAPORTE'S ORDER IS CONSISTENT WITH THE ORGANIC ACT, THIS COURT'S DECISION IN FORT FUNSTON DOGWALKERS, AND THE LEGISLATIVE HISTORY CREATING THE GGNRA.

As we argued below, as Magistrate Judge LaPorte found, and as this Court found in Fort Funston Dog Walkers v. Babbitt, 96 F.Supp.2d 1021, 1032 (N.D.Cal. 2000), San Franciscans have been walking dogs off leash in the GGNRA in general and at Crissy Field in particular before the GGNRA was created. A special GGNRA dog policy, expressly designating off leash areas for pets, was developed pursuant to public review and was incorporated into the GGNRA Natural Resources Management Plan and Environmental Assessment as Appendix C. Exhibit H. In 2000, this Court held that the attempted closure of off leash dogwalking areas in the GGNRA was highly controversial and that additional closures of off leash dog walking areas in the GGNRA could not be imposed without compliance with 36 C.F.R. 1.5(b). Fort Funston Dog Walkers v. Babbitt, 96 F.Supp.2d 1021, 1036 (N.D. Cal. 2000). Because the Park Service has not acted in accordance with the APA and the off leash pet policy has not been rescinded, both this Court has indicated and Magistrate LaPorte has found that the policy allowing off leash dog walking may not be changed without compliance with the Notice and Comment requirements of 36 C.F.R. § 1.5. Ironically, that process is now ongoing and unless the NPS has instituted that process as yet another bad faith attempt to "railroad through the closure..., and to establish a fait accompli," (Fort Funston Dog Walkers at 1038) this Court should allow that at process to continue and affirm Magistrate LaPorte's Order.

V. THE OFF LEASH PET POLICY ALLOWING OFF LEASH DOGWALKING AT CRISSY FIELD WAS PROPERLY ENACTED AND IS IN FORCE TODAY

We strongly contend that this Court has already confirmed the existence of the off leash pet policy in Fort Funston Dog Walkers and that should end this case.

The NPS, however, on this appeal, as it did before Judge LaPorte, claims that the off leash pet policy is "illegal and unenforceable," because it conflicts with a regulation of general application, 36 C.F.R. § 2.15 which generally forbids off leash dog walking in National Parks. Significantly, however, the government does not argue that it does not have the authority to alter a General Regulation by a special regulation.[9]

Accordingly, the government's argument that the Pet Policy is "illegal" is both legally and factually unsupportable.

As noted above, the GGNRA was established in 1972, for the purpose of preserving:

> 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 * * * In the management of the recreation area, the Secretary of the Interior * * * 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.

[9] The government is very careful in its argument concerning the ability of a Superintendent to modify rules of general application. It only claims that a Superintendent may not modify rules of general regulation "where there has been no express delegation of authority." GB 4, 11. There was no evidence before Judge LaPorte that the Superintendent of the GGNRA did not have the appropriate authority.

16 U.S.C. § 460bb.

The NPS Organic Act. 16 U.S. C. § 1, expressly delegates rulemaking authority to the Secretary of the Interior. See Bicycle Trails Council of Marin v. Babbitt, 82 F.3d 1445, 1451 (9th Cir. 1996).

The Organic Act's silence as to the specifics of park management gives the NPS broad discretion in determining how best to achieve the Act's mandate to resolve management issues in the Golden Gate National Recreation Area. City of Sausalito v. O'Neill, 211 F.Supp.2d 1175 (N.D.Cal. 2002).

The NPS' official policy manual in effect at the time of the adoption of the off leash pet policy provided that:

> The National Park Service will manage recreational activities and settings so as to protect park resources, provide for public enjoyment, promote public safety, and minimize conflicts with other visitor activities and park uses....
>
> Appropriate tools for managing recreational activities may include general or special regulations; permit and reservation systems; and local restrictions, public use limits, closures, and designations implemented under the discretion of the superintendent. Any restrictions on recreational use will be limited to the minimum necessary to protect park resources and values and to promote visitor safety and enjoyment.

National Park Service Official Policy Manual (December 1988). quoted in Davis v. United States, 918 F.Supp. 368 (N.D.Fla.1996).

The current NPS official policy manual, NPS Management Policies 2001, also recognizes that Individual Park Superintendents must be able to make specific regulations that comport with the mission of their particular park:

> It is especially important that Superintendents and other park staff review their park's enabling legislation to determine whenever it contains explicit guidance that would prevail over Service-wide policy.
>
> Superintendents may issue, within formal delegations of authority, park-specific instructions, procedures, directives, and other supplementary guidance (such as hours of operation or dates for seasonal openings), provided the guidance does not conflict with Service-wide policy. Exhibit U.

The legislative history of the GGNRA specifically refers to the creation of an urban recreation area and specifically directs the Secretary of the Interior to allow Bay area residents to continue with their existing patterns of use. Accordingly, any argument that the Secretary did not have the power to allow the traditionally recreational activity of off leash dog walking at Crissy Field ignores both the legislative history and the enabling legislation creating the GGNRA.

The GGNRA was created by Congress for the purpose of "public use and enjoyment... and in order to provide for the maintenance of needed recreational open space necessary to urban environment." 16 U.S.C. § 460bb. Congress specifically directed the Secretary of the Interior, through NFS, to "utilize the resources in a manner which will provide for recreation and educational opportunities consistent with sound principles of land use planning and management...." Id. The emphasis on urban recreation also figures prominently in the legislative history of the GGNRA. "This

legislation will... capitalize on the availability of this important unequaled resource in the San Francisco region by establishing a new national urban recreation area which will concentrate on serving the outdoor recreation needs of the people...." H.R. Rep. No. 1391, 92d Cong., 2d Sess. 3 (1972), reprinted in 1972 U.S.C.C.A.N. 4850, 4852 ("House Report"). Certainly preservation of the resource and environment is another important consideration in the operation of the GGNRA, and we applaud the NPS for its nationwide efforts to address those concerns. In this limited instance, however, off leash dog walking is a traditional recreational use of the GGNRA, recreation is fully consistent with the GGNRA enabling act, and existing recreational uses may not be taken away without the required Notice and opportunity to Comment and attempt to affect the change in use.

At the time Crissy Field was brought into the National Park System, the National Park System had a three level management system distinguishing between environmental, recreational and historical parks. In its Opposition to our Motion to Dismiss below at page 24 the government claimed this change of policy was dictated by Congress through a series of amendments to the National Park Organic Act. In fact, Congress never expressly directed the NPS to administer all lands under its jurisdiction in an identical fashion. To the contrary, Congress has often recognized the different functions fulfilled by wilderness areas, historical monuments and the urban recreation area, the GGNRA; and there have been no amendments to the Organic Act changing the management system. As the Court recognized in National Rifle Ass'n of America v. Potter, 628 F.Supp. 903 (D.D.C.

1986) and whose findings were adopted in Bicycles Trails Council of Marin, a 1970 amendment to the Organic Act, known as the General Authorities Act, 16 U.S.C. §§ 1a-1, 1c (1982), and the Redwood National Park Expansion Act, Pub.L. No. 95-250, 92 Stat. 163, were perceived by the NPS as requiring a change in its management policies:

> Perceiving in these amendments an implied reproof for having strayed from the true purpose of the Organic Act (and specifically, for its "management categories" system), the NPS concluded that Congress conceived of the park system as an integrated whole.

National Rifle Ass'n of America, 628 F.Supp. at 906 (emphasis added).

Congress never specifically directed the NPS to eliminate recreational opportunities. To the contrary, in the Redwood National Park Expansion Act, Congress specifically recognized the necessity to manage each particular holding in accordance with its particular statutory mandate:

> [T]he promotion and regulation of the various areas of the National Park System shall be consistent with and founded in the purpose established by [the Organic Act], to the common benefit of all the people of the United States. The authorization of activities shall be construed and the protection, management, and administration of these areas shall be conducted in light of the high public value and integrity of the National Park System and shall not be exercised in derogation of the values and purposes for which these various areas have been established, *except as may have been or shall be directly and specifically provided by Congress.* 16 U.S.C. § 1a-1 (emphasis added). [Redwood National Park Expansion Act, Pub.L. No. 95-250, 92 Stat. 163.]

National Rifle Ass'n of America v. Potter, 628 F.Supp. at 906.

Contemporaneously with these amendments to the Organic Act, the GGNRA was established as an urban recreation area and the Presidio Trust was created in a unique management structure that specifically emphasized recreation and cost efficiency, (16 U.S.C. 1; PL 104-333 (HR 4236) November 12, 1996, Omnibus Parks and Public Lands Management Act of 1996). .

Congress recognized the extreme need for open recreational space in the Bay Area and provided the following additional guidelines regarding the GGNRA in the House Report (H.R. Rept. 1391, 92d Cong., 2d Sess.):

(1) This legislation will . . . [establish] a new national urban recreation area which will *concentrate* on serving the outdoor recreation needs of the people of the metropolitan area. H.R. Rept. 1391 at 3, (emphasis added).

(2) Action is required if . . . the relatively natural areas within the city are to be available to satisfy the growing need for *outdoor recreational opportunities*. Id. (emphasis added).

(3) The San Francisco Unit can contribute a great deal to the overall objective [of the GGNRA]. If approved in its present form, H.R. 16444 would assure *public access to and use of* approximately 12 miles of shoreline from the southern county line to the Golden Gate Bridge on the Pacific . . . Id. at 8 (emphasis added).

(4) The objective of H.R. 16444 is to assure the preservation of open spaces presently prevailing within the proposed *recreation* area, to provide public access along the waterfront, and *to expand to the maximum extent possible the outdoor recreation opportunities available to the region.* Id. at 12 (emphasis added).

At a Senate subcommittee hearing on the proposed legislation, Joseph Caverly, General Manager of the San Francisco Recreation and Park Commission, addressed the importance of the GGNRA. Mr. Caverly stated that the GGNRA would "preserve

valuable open space for citizens." Hearings on S. 2342, S. 3174, H.R. 16444 Before the Subcomm. on Parks and Recreation of the Senate Comm. on Interior and Insular Affairs, 92d Cong., 2d Sess. 117 (1972).

Mr. Caverly added that, "[t]he Recreation and Park Department has worked diligently for the past 2 years with the objective of providing better open space and recreation opportunities for the Bay Area's burgeoning population." Id. He also recognized that, with the population explosion and expansion of leisure time, "we need extensive recreational services within easy reach of people's homes." Id. at 119. The GGNRA itself circulated a brochure advising the public that "the ordinary guidelines outlined in the Code of Federal Regulations do not really apply in an urban area. People and their animals have been visiting the park for too long to apply an all inclusive arbitrary policy." Exhibit C.

This brochure reflects the legislative history, "the Secretary [of the Interior was] authorized to permit the continued use of such lands as are necessary for existing functions for a reasonable period of time." House Report No. 92-1391, September 12, 1972.

These express Congressional directives contrast with the NPS' general, and laudatory, focus on resource preservation, and allow a park specific regulation which may conflict with a general regulation.

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The government does not dispute that for the next two decades the GGNRA continued to consistently promote its "voice control" pet policy as an official policy of the GGNRA and continued to state that the GGNRA had the authority to deviate from the general on leash control regulations that apply in other park areas.[10]

It was not until the Fort Funston Dog Walking litigation was pending before this Court that the government begins to take the position that the policy was illegal because it conflicted with a general park service regulation. Exhibit R. It is noteworthy, however, that the government never took that position before this Court and when the Chairman of the Advisory Commission made a motion to declare the Pet Policy invalid, that motion was rejected by a fourteen to one vote. The Advisory Commission, instead, decided to take "no action" on Bartke's motion to rescind the off leash pet policy. Exhibit R. p. 9.

Many cases have recognized the power of individual park superintendents to make park specific regulations consistent with the particular park's enabling legislation. In Alaska State Snowmobile Ass'n, Inc. v. Babbitt, 79 F.Supp.2d 1116 (D. Ala. 1999), vacated on other grounds 2001 WL 770442 (9th Cir. 2001), there was no dispute regarding the power of the Park Superintendent to issue regulations regarding snow machine use via a Compendium. In Zumwalt v. United States, 712 F.Supp. 1506 (D.Kan. 1989), the court recognized that the Superintendent had discretionary power

[10] It is interesting that the government does not notice any inconsistency in arguing that title to the Tidelands is conclusively determined by a brief mention filed in a legal pleading devoted to other issues (Government Opposition to Motion to Dismiss p. 10), but somehow sees its continued publication of the Pet Policy allowing off leash dog walking as irrelevant.

and held that his discretionary policies were not actionable under Federal Tort Claims Act. Similarly, in Lesoeur v. United States, 21 F.3d 965 (9th Cir. 1994), the Ninth Circuit recognized that the 36 C.F.R. § 1.2 specifically allows for the modification of general regulations by special regulations prescribed for specific park areas, and that these special regulations for specific park areas "may amend, modify relax or make more stringent" park regulations of general applicability.[11] Id. at 768.

The only support the government has provided for its claim that the superintendent does not have the power, either unilaterally or through delegation from the Secretary, to alter general regulations is the Declaration of Barbara Goodyear GB 11-12 and dicta in the case of United States v. Lofton, discussed below. Neither is persuasive authority.[12]

The record shows the GGNRA expressly adopted the 1979 Pet Policy as a Special Regulation and memorialized the existing policy in the Compendium on July 8, 1996. 36 C.F.R. Chapter 1. Exhibit J. No notice and comment period was required for

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[11] (c) The regulations contained in Part 7 and Part 13 of this chapter are special regulations prescribed for specific park areas. Those regulations may amend, modify, relax or make more stringent the regulations contained in Parts 1 through 5 and Part 12 of this chapter.

(d) The regulations contained in parts 2 through 5, part 7, and part 13 of this section shall not be construed to prohibit administrative activities conducted by the NPS, or its agents, in accordance with approved general management and resource management plans, or in emergency operations involving threats to life, property, or park resources. 36 C.F.R.§ 1.2

[10] As well as their predecessors Cranston and Seymour.

that Compendium Amendment, because that Compendium Amendment simply recognized the status quo. It was not controversial and did not change a significant use.

For whatever reason, and without the required notice and comment period that must be followed before a change in use, the Park Service omitted that special regulation from later versions of the Compendium. The Pet Policy, however, continued in effect and it was not until several years later that the government unilaterally came up with its current argument that the Pet Policy was somehow illegal.

The limitation of off leash dog walking is clearly a substantive rule not promulgated in accordance with notice and comment rulemaking proceedings. As such the change is invalid and should not be enforced. See Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 523-24, 98 S.Ct. 1197, 55 L.Ed.2d 460 (1978).

In Mausolf v. Babbitt, 125 F.3d 661 (8th Cir. 1997) an area of the park was closed to snowmobiling by a regulation published in the Compendium relating to Voyageurs Park in Northern Minnesota. The Mauslof Court assumed that the APA would apply to a significant alteration in the public use pattern of the park area but held that the limited closure in that was not such a significant alteration and that requirements of the APA would not apply. Here, this Court has already found that that closing areas where off leash dog walking is permitted is a highly controversial and is most likely also an alteration of a significant use of the GGNRA. Accordingly, that use

[12] The declaration of Goodyear and the exhibits attached to it, were not submitted below and should not be considered by this Court. See Motion to Strike

can not be limited without compliance with the Notice and Comment procedures of the APA.

Mauslof is also instructive because the Mauslof Court refers to the original legislation creating Voyageurs National Park that gave the Secretary of the Interior the discretion to permit snowmobiling in the Park, despite a National no snowmobiling policy.

Amici admit that recreation and dog walking were recognized as activities to continue in the GGNRA, but without any citation to a statute or legislative history claim "it is important to recall that the essential purpose of Congress' urban national park experiment is to bring wilderness closer to people," and compares Crissy Field to the wilderness portions of Yosemite and Death Valley This argument, like most of the arguments of amici and the government, ignores the legislative history and statutory authority that does exist and which uniformly demonstrate that Crissy field was designed as an urban recreation area.

Moreover, defendants would like to emphasize again that they are concerned that the resources that they have enjoyed will be protected for future generations. Defendants are reasonable individuals, and have attempted to participate in the process of determining how best to accommodate the interests of all parties concerned with recreation at Crissy field. As this Court has indicated, decisions regarding appropriate recreational use at Crissy field are difficult and controversial; and whatever resolution is ultimately arrived at, that decision will be better if all interested parties have input into the decision making process. Defendants, however, deeply object to the unilateral

actions of the government attempting to terminate a recreational activity they and other San Franciscans have enjoyed for years and would welcome the chance to participate in the required rule making process.

Of course, recreation is not the only end to be served in administering the GGNRA. It is nonetheless a central objective, and one to which the agency gave no meaningful, objective analysis. It simply presented the change as a fait accompli and ever since has been trying to support that decision, instead of reaching a decision through the Notification and Comment Period required by Section 1.5.

As this Court recognized in Fort Funston Dog Walkers, for its own reasons the Park Service decided to eliminate off leash dog walking, at least in certain areas, and attempted to execute planned elimination without any public input or comment. The park service went to great lengths to hide its plans, then after the fact claimed that it had made findings to support it actions. "That record shows the lengths to which the closure architects went in suppressing input." Fort Funston Dog Walkers at 1035.

Apparently, one of the tactics the Park Service attempted to employ in suppress input on its closure policy was its stealth failure to republish the Compendium Amendment. Both Mauslof and Bicyle Trails of Marin teach us that regulations contained in the compendium may not be modified if they alter a significant use or are controversial, without compliance with the APA. Again ignoring the APA, the Park Service unilaterally failed to republish the Compendium Amendment, and now takes the position that any modification of the national ban on off leash dog walking is illegal. This argument ignores its power under 36 C.F.R. § 1.2 to "amend, modify,

relax or make more stringent" general regulations by enacting a special regulation effecting the GGNRA only.

Accepting the government's position would gut the APA and allow the government to change any protective regulation by the simply expedient of failing to republish it in the Compendium[13]. While the government and amici cry that affirmance of Magistrate LaPorte's Order would somehow allow individual Park Superintendent to gut environmental protections, in fact their position gives the government the ability to delete special regulations at will, no matter how controversial or significant the result of those deletions may be.

Moreover, the ongoing negotiated rule making process is either proof the NPS does not believe the legal position that they are asserting in this case, that the Superintendent has no discretion to allow off leash dog walking, or is simply more evidence the government is obstinately continuing with the type of bad faith behavior that this Court has previously remarked upon in Ft. Funston Dog Walkers:

> The outreach was not for the purpose of receiving input on the closure itself. That was a *fait accompli*. The outreach was a public-relations campaign to sell the closure and to create the appearance that the National Park Service wanted the public's input.

Ft. Funston Dog Walkers, 96 F.Supp.2d at page 1031.

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[13] Magistrate LaPorte's Order did not depend upon the publication of the Pet Policy in the Compendium. She expressly found that "the 1979 Pet Policy was the de facto policy in effect for many years." Exhibit T p. 11.

VI. THE CASES UPON WHICH THE GOVERNMENT RELIES ACTUALLY SUPPORT THE DEFENDANTS' POSITION.

The first two cases upon which the government relies are siblings of the cases, Mausolf v. Babbitt, 125 F.3d 661 (8th Cir.1997) and Spiegel v. Babbitt, 855 F.Supp. 402 (D.D.C.1994), considered by this Court in Fort Funston Dog Walkers. This Court was not convinced by the government's arguments then. The same argument should not now convince this Court that Magistrate LaPorte's Order is clearly erroneous.

Voyageurs National Park Association v. Norton, 381 F.3d 759 (8th Cir. 2004) fails to aid the government because the closure there was temporary, specifically envisioned in regulations relating to the Park, and was found by the district court not to be a significant alteration of the public use of the Park. Here, this Court has previously found that the elimination of off leash dog walking is highly controversial and is probably also a significant alteration of public use pattern. Fort Funston Dog Walkers at 1039. Given this Court's prior findings, the government has a heavy burden to prove that Magistrate LaPorte's similar findings are clearly erroneous.

Similarly, Washington Tour Guides Ass'n v. National Park Service, 808 F.Supp. 877 (D.D.C.1992), also fails to support the government's claims. Washington Tour Guides, was not about a controversial termination of an accepted public use. Washington Tour Guides is a contract case where the dissatisfied tour operations were complaining about the termination of their commercial permits and the exclusive award to another operator.

Finally, in United States v. Lofton, 233 F. 3d 313 (4th Cir. 2000) a defendant was convicted for carrying a gun in a national park in contravention to a regulation forbidding such gun possession. In Lofton, unlike the situation in this case, there was no time honored local pattern of gun possession in the park or direction from Congress to allow gun use in the Park. Moreover, the Lofton court specifically recognized that specific statute and regulations may forbid or allow conduct in one park but not in another. Finally, the Lofton court's statement in dicta that the Superintendent would not have discretion to modify the National Regulation, is not supported by any authority and is an inaccurate explanation of the power of the Superintendent see above[14].

The defeated Motion at the January 23, 2001 Advisory Commission was a Motion to "Rescind 1979 Commission Pet Policy as illegal and unenforceable." If the pet policy did not exist, there would be no need to rescind it. As this Court has noted, that 1979 Pet Policy, memorialized in the Compendium, may not be rescinded without compliance with the APA.

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[14] Lofton, however, does support our contentions regarding the appropriate standard of review in this case and undermines the government's claims in that area. "The propriety of Lofton's conviction, then, is simply a question of whether there is sufficient evidence in the record to support the magistrate judge's factual determination that Lofton was in possession of a weapon on park lands. See Fed.R.Crim.P. 58(g)(2)(D) (In an appeal from a conviction by a magistrate judge, "[t]he defendant shall not be entitled to a trial de novo by a district judge. The scope of appeal shall be the same as an appeal from a judgment of a district court to a court of appeals."); United States v. Peck, 545 F.2d 962, 964 (5th Cir.1977) ("Review by the district court of a conviction before the magistrate is not a trial de novo but is the same as review by a court of appeals of a decision by a district court.... In our review we apply to the magistrate the same standard used by the district court."). Because substantial evidence supports the magistrate judge's findings, Lofton's conviction must be affirmed. See United States v. Burgos, 94 F.3d 849, 862-63 (4th Cir.1996) (en banc). United States v. Lofton, 233 F. 3d 313, 317(4th Cir. 2000)

VII. THE GOVERNMENT'S ARGUMENT THAT THE PUBLIC AND NPS COULD SUFFER IRREPARABLE HARM WAS NOT MADE BELOW, IS A GROSS EXAGGERATION OF MAGISTRATE LAPORTE'S HOLDING, IGNORES THE UNIQUE HISTORY OF THE GGNRA AND IS MOST CHARITABLEY CONSIDERED AN ATTEMPT TO PROTECT THE GOVERNMENT FROM THE CONSEQUENCES OF ITS UNREASONABLE AND DECEPTIVE ACTION.

The government argues that if this Court affirms Magistrate LaPorte's order the entire regulatory framework controlling fishing and grazing in national parks could be undermined by individual NPS superintendent taking actions at odds with NPS conservation directives. This argument is preposterous.

First, we strongly support the conservation mission of the NPS and would not be involved in this action if the specter raised by the government was possible. Second, Section 1.5 expressly protects from the possible, potential parade of horrible posited by the government. If the NPS chooses to change the regulations of national applicability governing fishing and cattle grazing, they are free to do so, following the publication and comment procedures set out in Section 1.5. Moreover, as this Court pointed in Fort Funston Dog Walkers, decisions arrived at after the public input process are more likely to be reasonably considered and well thought out.

Finally, this argument that if Magistrate LaPorte's Order is allowed to stand ignores the special situation of Crissy Field. Crissy Field is not like the Yosemite or Death Valley back country wilderness, it is an urban recreation area.

The predecessor to the current general regulation 36 C.F.R. § 2.15 forbidding off leash dog use, was set out long before the creation of the GGNRA. The enabling legislation for the GGNRA specifically contemplated that Crissy field would be

administered as an urban recreation area, rather than as conservation preserve. Under this specific factual scenario, that does not apply to any other NPS holding in this Circuit, Magistrate LaPorte's Order can not be used as a bulldozer to assist those who want to clear the wilderness. Moreover, we would submit that affirming Magistrate Judge LaPorte, will strengthen, rather than weaken environmental protections; by preventing the NPS from acting unilaterally and in secret based upon shifting political winds and will allow changes to environmental rules only after those proposed changes have been publicized and examined by both sides. As this Court noted in Fort Funston Dog Walkers at 1036:

> the ultimate issue is whether the public should be allowed their say before a closure. In the latter context, the more controversial a proposal in the classic sense of strongly-divided public opinion, the more appropriate is an opportunity for public input, so that the decision-maker has the benefit of all views and advice. The input may not stop a project, but it may revise and improve it.

Despite this Court's clear statement regarding the importance of public input, the NPS has ignored this Court's advice and continues to act, unilaterally, obstinately and without the required input from the public.

VIII. CONCLUSION

Historically, off leash dogwalking has been allowed at Crissy Field. That policy is supported by present California Senators, the San Francisco Board of Supervisors (including the present mayor), the legislative history of the GGNRA enabling legislation, the off leash pet policy and was memoralized in a Compendium

Amendment. 36 C.F. R. § 1.5(b) requires that "a closure, designation, use or activity restriction or condition, or the termination or relaxation of such, which is of a nature, magnitude and duration that will result in a significant alteration in the public use pattern of the park area, or is of a highly controversial nature, shall be published as rulemaking in the Federal Register" before any such change can become effective. The continued interest and litigation over this subject are just more evidence that this Court's decision in Fort Funston Dog Walkers was correct. The attempted termination of the ability to walk dogs off leash is highly controversial and is also a significant alteration in the public use pattern of the GGNRA, the front porch to the City. Gretchen Barley, Don Kieselhorst and Steve Sayad have been ticketed for their attempts to enjoy their front porch, with their dogs. If the NPS wants to prevent San Franciscans from enjoying their front porch, as they have done for more than 20 years, it can only take away that right by after providing advance notice and an opportunity for public comment under 36 C.F.R.§ 1.5. Because the government has not shown that Magistrate LaPorte's findings that (1) the 1979 Pet Policy was the de facto policy at Crissy field for many years, and (2) that policy may not be changed without compliance with the APA, are clearly erroneous, Judge LaPorte's Order should be affirmed.

DATED: April 28, 2005

Respectfully Submitted,

Christopher J. Cannon
Attorney for Gretchen Barley
and Donald Kieselhorst

DECLARATION OF SERVICE BY MAIL

I, the undersigned, declare:

I am employed in the City and County of San Francisco, State of California. I am over the age of 18 years and not a party to the within action; my business address is 44 Montgomery Street, Suite 2080, San Francisco, California 94104-6702.

On April 28, 2005, I served the within:

APPELLEES' BRIEF

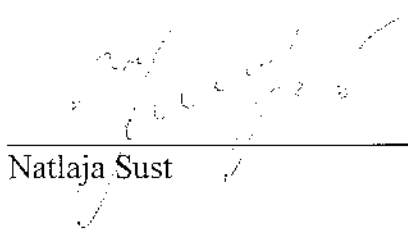
on the parties in said cause, by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at San Francisco, California, addressed as follows:

Denee DeLuigi
Special Assistant United States Attorney
450 Golden Gate Ave., 11th Floor
San Francisco, CA 94102

Brent Plater
Center for Biological Diversity
1095 Market St Ste 511
San Francisco, CA 94103-1628

Stephen Sayad
P O Box 330100
San Francisco, CA 94133

I declare under the penalty of perjury that the foregoing is true and correct, and that this declaration was executed on April 28, 2005, at San Francisco, California.



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