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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
v.)
)
GRETCHEN BARLEY,)
DONALD H. KIESELHORST,)
)
Defendants.)
)

Nos. P166667
P426479

MEMORANDUM OF POINTS
AND AUTHORITIES IN SUPPORT
OF MOTION TO DISMISS

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TABLE OF CONTENTS

I. INTRODUCTION.....1

II. THE HISTORY OF DOGWALKING AT CRISSY FIELD.....2

**III. THE OFF LEASH PET POLICY ALLOWING OFF LEASH
DOGWALKING AT CRISSY FIELD WAS PROPERLY ENACTED
AND IS IN FORCE TODAY.....8**

IV. CONCLUSION.....12

1
2
3
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14
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TABLE OF AUTHORITIES

CASES

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) 10

Bicycle Trails Council of Marin v. Babbitt, 82 F.3d 1445 (9th Cir.1996)9

Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984)9

City of Sausalito v. O'Neill, 211 F. Supp. 2d 1175 (N.D. 2002).....9

Davis v. United States, 918 F. Supp. 368 (N.D.Fla. 1996)..... 10

Fort Funston Dog Walkers v. Babbitt, 96 F. Supp. 2d 1021 (N.D.Cal. 2000).....2, 6, 10

Lesoeur v. United States, 21 F.3d 965 (9th Cir.1994) 11

Zumwalt v. United States, 712 F. Supp. 1506 (D.Kan. 1989) 11

STATUTES

36 C.F.R. § 1.2 11

36 C.F.R. 1.5(b) 2, 6, 12

36 C.F.R. § 2.156

16 U.S.C. § 460bb3, 9

16 U.S.C. § 19

28 U.S.C. §24127

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v.)	MEMORANDUM OF POINTS
)	AND AUTHORITIES IN SUPPORT
GRETCHEN BARLEY,)	OF MOTION TO DISMISS
DONALD H. KIESELHORST,)	
)	
Defendants.)	
)	

I. INTRODUCTION

San Franciscans have been walking dogs off leash in the Golden Gate National Recreation Area (hereinafter "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 O. In 2000, Judge Alsup squarely held that the attempted

1 limitation of off leash dogwalking in the GGNRA was highly controversial and that
2 additional restrictions on off leash dogwalking in the GGNRA could not be imposed
3 without publication of a Notice of Proposed Rulemaking in the Federal Register and an
4 opportunity for public comment as required by 36 C.F.R. 1.5(b). Fort Funston Dog
5 Walkers v. Babbitt, 96 F.Supp.2d 1021, 1032 (N.D. Cal. 2000). The Park Service has
6 not published such a Notice of Proposed Rulemaking and the off leash pet policy has
7 not been rescinded. Accordingly, tickets issued for walking dogs in compliance with
8 the off leash pet policy must be dismissed.

11 **II. THE HISTORY OF DOGWALKING AT CRISSY FIELD**

12 As noted in House Report No. 92-1391 dated September 12, 1972 (emphasis
13 added) "the GGNRA is popularly considered the city's front yard. On a nice day, it will
14 satisfy the interests of those who choose to fly kites, sunbathe, walk their dogs, or just
15 idly watch the action along the bay"...."Under the terms of the [enabling] legislation,
16 the area of the Presidio commonly known as Crissy Field (and immediately adjacent
17 lands), as well as the area generally referred to as Baker Beach (and immediately
18 adjacent lands), would be transferred to the Secretary of the Interior for use in
19 conjunction with the recreation area, but the Secretary is authorized to permit the
20 continued use of such lands as are necessary for existing functions for a reasonable
21 period of time." The enabling legislation¹ specifically noted the urban character of the

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26 ¹ In order to preserve for public use and enjoyment certain areas of Marin and San Francisco Counties,
27 California, possessing outstanding natural, historic, scenic, and recreational values, and in order to
28 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

1 GGNRA and required management practices to maintain needed recreational open
2 spaces necessary to urban environment.

3
4 Historically dogs have been allowed off leash, under voice-control, along the
5 Crissy Field beach area. See Golden Gate National Recreation Area Advisory
6 Commission Approved Guidelines for a Pet Policy, February 24, 1979 p.2 (Exhibit H);
7 Pet Policy Memorandum, October 6, 1978 (Exhibit I). In soliciting public comment
8 concerning creation of the specific policy, the GGNRA circulated a brochure advising
9 the public that "the ordinary guidelines outlined in the Code of Federal Regulations do
10 not really apply in an urban area. People and their animals have been visiting the park
11 for too long to apply an all inclusive arbitrary policy." Exhibit P.

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14 For the next two decades the GGNRA continued to consistently promote its
15 voice control pet policy as an official policy of the GGNRA with authority to deviate
16 from the general leash control regulations that apply in other park areas. Letters from
17 the Department of Interior (hereinafter "DOI") to Senators Seymour and Cranston, July
18 8, 1992 (Exhibit L), Golden Gate Recreational Area Questions and Answers, September
19 17, 1996 (Exhibit G), Memorandum from South District Ranger to Chief Ranger,
20 January 4, 1996 (Exhibit J).

21
22 In 1995, the GGNRA Superintendent confirmed the authority for such official
23 deviation from the general regulation in a letter to the San Francisco SPCA President.
24

25
26 established. In the management of the recreation area, the Secretary of the Interior (hereinafter
27 "Secretary") shall utilize the resources in a manner which will provide for recreation and educational
28 opportunities consistent with sound principles of land use planning and management. 16 U.S.C. §
460bb.

1 Superintendent O'Neill clarified that although the general regulation precluded off
2 leash recreation in other National Parks, the GGNRA believed it had the authority to
3 "set a more flexible and realistic policy, given the history of use and value of certain
4 park areas to dog walkers. Through this avenue, we can clearly and officially designate
5 areas where off leash dog walking is allowed." Exhibit Q p. 3.
6

7
8 Appendix C to the Original GGNRA management plan specifically allowed off
9 leash dogwalking. Exhibit O.

10 In the mid 1990's, significant modifications were anticipated and eventually
11 made to the Crissy Field area. The environmental review process specifically addressed
12 the affect of the changes on recreational use of Crissy Field, specifically including
13 continuing the policy of off leash dog use. The GGNRA issued a Finding of No
14 Significant Impact (hereinafter "FONSI") concluding that no further environmental
15 analysis would be necessary and that there would be no adverse impact to recreational
16 access. The FONSI analysis addressed the recreational impact mitigation factor
17 analysis by declaring that the existing off leash policy would not be changed and that
18 any "Proposed changes in off leash dog access will be brought to the attention of the
19 Advisory Commission prior to taking action." Exhibit R.
20

21
22 The off leash pet policy was again recognized by Brian O'Neill, the General
23 Superintendent of the GGNRA on July 8, 1996. when it was published in the
24 Compendium Amendment to 36 C.F.R. Chapter 1. Exhibit K.
25

26 Despite the adoption of the off leash pet policy allowing off leash dogwalking in
27 limited portions of the GGNRA, many San Franciscans became worried that the
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1 National Park Service (hereinafter "NPS") was going to attempt to limit off leash
2 dogwalking.
3

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

6 Exhibit A.

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

10 On October 21, 1999, Reynolds wrote to Koenigsberg describing the off leash
11 pet policy. Exhibit C.

12
13 GGNRA has adopted a pet policy that is more liberal than the
14 regulations enforced at other national parks throughout the United
15 States, where pets are required to be leashed at all times and are,
16 for the most part, excluded from all but developed areas. GGNRA
17 has, with the assistance of the Park's Advisory Commission,
18 established a pet policy that allows some visitors to enjoy a few
19 designated areas with their pets under less restrictive restraint.
20 Certain areas of the park have been designated as voice-control
21 areas where pets are allowed off leash.

22 Similar letters were sent to Senator Pelosi, who was also responding to a
23 constituent inquiry, and Mrs. Lillian Hanahan. In those letters, GGNRA Superintendent
24 Brian O' Neill,² also affirmed that "certain areas of the park have been designated as
25 voice-control areas where pets are permitted off leash." Exhibits D, M.

26 These responses to Senators Boxer and Feinstein were consistent to an earlier
27 written responses to then Senators Seymour and Cranston. Exhibit L.

28 ² The letters were signed by Mary Gibson Scott.

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This policy was also reflected in brochures distributed to the public by the Department of the Interior (Exhibit E) 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 F.

In Fort Funston Dog Walkers, Judge Alsup specifically recognized the off leash pet policy allows off leash dogwalking in certain areas of the GGNRA. "Walking dogs off leash in Fort Funston³ 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 governing the GGNRA, in 2000, the NPS attempted to restrict the ability to walk dogs off leash in another part of the GGNRA, Fort Funston, to protect a threatened bird. Those attempted restrictions were litigated in Fort Funston Dog Walkers and Judge Alsup held that the existing right to walk dogs off leash in the GGNRA 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.

³ The same regulation applied to both Crissy Field and Fort Funston. Exhibit K. p. 2.

1 Even as the Fort Funston dogwalking litigation was proceeding before Judge
2 Alsup, the NPS continued its efforts to limit off leash dogwalking without the required
3 publication in the Federal Register and opportunity for public comment.
4

5 At a January 23, 2001, Advisory Commission Meeting,⁴ without prior
6 publication in the Federal Register, Chairman Bartke moved to “Rescind the 1979
7 Commission Pet Policy as Illegal and Unenforceable,”⁵ claiming that “the 1979 Pet
8 Policy, actually adopted by the Commission in 1978, but not printed until 1979, was a
9 recommendation to accommodate off leash dogs in the park. That policy has been
10 determined to be illegal, and the Commission seeks to rescind this advice at this
11 meeting.” Exhibit N. The problem with Chairman Bartke’s claim is that is that the
12 Advisory Commission does not have the ability to rescind the off leash Pet Policy,
13 simply by declaring that off leash pet policy to be “illegal,” because Judge Alsup has
14 ruled that the off leash pet policy can not be changed without publication in the Federal
15 Register and an opportunity for public comment.⁶ That process has yet to occur.
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19 Moreover, Bartke’s Motion to rescind the off leash pet policy was rejected by a
20 fourteen to one vote. The Advisory Commission, instead decided to take “no action”
21 on Bartke’s motion to rescind the off leash pet policy. Exhibit N. The meeting, on a
22

23 ⁴ The Advisory Commission to the Golden Gate National Recreational Area and Point Reyes National
24 Seashore.

25 ⁵ The Park Service later, and unsuccessfully, used this argument that the off leash Pet Policy was
26 “illegal” in it’s opposition to the Motion for Attorneys Fees filed by the successful parties in the Fort
27 Funston dogwalking litigation. The Park Service claimed that attorney fees should not be awarded
28 because the plaintiffs sought to take advantage of an illegal policy. Judge Alsup rejected that argument
as not substantially justified and awarded legal fees under the Equal Access to Justice Act, 28 U.S.C.
§2412.

1 rainy January night, was attended by more than a thousand dogwalkers who sought an
2 opportunity to comment against proposals to rescind the off leash pet policy. The
3 Commission took testimony from many people, including eight members of the San
4 Francisco Board of Supervisors,⁷ who spoke against rescision of the off leash pet policy.
5 Commissioner Rodriguez wanted to insure that the off leash pet policy would not be
6 rescinded or taken away. *Id.* at 7. Finally, at the end of the meeting, all of the
7 Commissioners agreed that the matter should be discussed and investigated and “that
8 the staff make no changes in its enforcement in the next 120 days.” *Id.* at 8.
9

10
11 Since that date, no new regulations have been promulgated,⁸ yet the park police
12 continue to ticket in areas where off-leash-dogwalking is specifically allowed under the
13 off leash pet policy. Those tickets must be dismissed.
14

15 **III. THE OFF LEASH PET POLICY ALLOWING OFF LEASH**
16 **DOGWALKING AT CRISSY FIELD WAS PROPERLY ENACTED AND**
17 **IS IN FORCE TODAY**

18 This validity of the off leash pet policy has already been determined by Judge
19 Alsop. Our position is, that should end this matter and these tickets should be
20 dismissed. Because the NPS, however, has repeatedly claimed that the off leash pet
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23 ⁷ Including present Mayor Newsom.

24 ⁸ This Advisory Commission Meeting was grossly mischaracterized, in an Advance Notice of Proposed
25 Rulemaking filed Friday, January 11, 2002, 67 FR 1424-01, in which Joseph E. Doddridge, Acting
26 Assistant Secretary for Fish and Wildlife and Parks claimed that:

26 On January 23, 2001, the GGNRA Citizen's Advisory Commission
27 acknowledged publicly the off leash "voice control" policy was null and void
28 since it was contrary to NPS regulation. As demonstrated above and in the
minutes of the Advisory Commission Meeting (Exhibit N), there has never been
a public acknowledgement of the “illegality” of the off leash pet policy. There is
only Bartke’s failed motion.

1 policy is "illegal and unenforceable," we are including this section to demonstrate that
2 repeated claims of "illegality" is both legally and factually unsupportable.
3

4 The GGNRA was established in 1972, for the purpose of preserving:
5
6 for public use and enjoyment certain areas of Marin and San
7 Francisco Counties, California, possessing outstanding
8 natural, historic, scenic, and recreational values, and in order
9 to provide for the maintenance of needed recreational open
10 space necessary to urban environment and planning * * * In
11 the management of the recreation area, the Secretary of the
12 Interior * * * shall utilize the resources in a manner which
13 will provide for recreation and educational opportunities
14 consistent with sound principles of land use planning and
15 management.

16 16 U.S.C. § 460bb.

17 The NPS Organic Act, 16 U.S. C. § 1, expressly delegates rulemaking authority
18 to the Secretary of the Interior. See Bicycle Trails Council of Marin v. Babbitt, 82 F.3d
19 1445, 1451 (9th Cir. 1996). Regulations and policies promulgated pursuant to such
20 express authority will be upheld " unless they are arbitrary, capricious or manifestly
21 contrary to the statute." Id. at 1451, quoting Chevron U.S.A., Inc. v. Natural
22 Resources Defense Council, Inc., 467 U.S. 837, 844 (1984).

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

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

1 The National Park Service will manage recreational activities
2 and settings so as to protect park resources, provide for public
3 enjoyment, promote public safety, and minimize conflicts
4 with other visitor activities and park uses....

5 Appropriate tools for managing recreational activities may
6 include general or special regulations; permit and reservation
7 systems; and local restrictions, public use limits, closures, and
8 designations implemented under the discretion of the
9 superintendent. Any restrictions on recreational use will be
10 limited to the minimum necessary to protect park resources
11 and values and to promote visitor safety and enjoyment.

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

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

17 It is especially important that Superintendents and other park
18 staff review their park's enabling legislation to determine
19 whenever it contains explicit guidance that would prevail
20 over Service-wide policy.

21 Superintendents may issue, within formal delegations of
22 authority, park-specific instructions, procedures, directives,
23 and other supplementary guidance (such as hours of operation
24 or dates for seasonal openings), provided the guidance does
25 not conflict with Service-wide policy. Exhibit S.

26 In Fort Funston Dog Walkers, no one questioned the authority of the
27 Superintendent to allow off leash dogwaking and there are no reported cases
28 undermining a Superintendent's authority to issue such a regulation. To the contrary, 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

1 regarding the power of the Park Superintendent to issue regulations regarding snow
2 machine use via a Compendium. In Zunwalt v. United States, 712 F.Supp. 1506
3 (D.Kan. 1989), the court recognized that the Superintendent had discretionary power
4 and held that his discretionary policies were not actionable under Federal Tort Claims
5 Act. Similarly, in Lesoeur v. United States, 21 F.3d 965 (9th Cir. 1994), the Ninth
6 Circuit recognized that the 36 C.F.R. § 1.2 specifically allows for the modification of
7 general regulations by special regulations prescribed for specific park areas, and that
8 these special regulations for specific park areas "may amend, modify relax or make
9 more stringent" park regulations of general applicability.⁹ Id. at 768.

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There is no question that the off leash pet policy was properly adopted and reflected long established patterns and practices of urban recreation affecting thousands of San Franciscans. 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. Because the pet policy governs a substantial use of Crissy Field and because its modification is controversial, it may not be rescinded, ignored or simply unilaterally

⁹ (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.

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declared unenforceable without publication in the Federal Register and an opportunity to comment. The park police may not issue tickets to individuals walking their dogs on the Beach at Crissy Field, in accordance with long standing practice and in compliance with the off leash pet policy. Accordingly, the tickets issued to Barley and Keiselhorst should be dismissed.

IV. CONCLUSION

Historically, off leash dogwalking has been allowed at Crissy Field. That policy is supported by present California Senators,¹⁰ the San Francisco Board of Supervisors (including the present mayor), the legislative history of the GGNRA enabling legislation, and the off leash pet policy. 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. Judge Alsup’s opinion establishes that as a matter of law, the termination of the ability to walk dogs off leash is highly controversial. The facts cited in his opinion and the more than one thousand people who turned out to oppose the Superintendent’s unilateral attempt to eliminate off leash dogwalking, establish that not only is the attempted closure controversial, but that it also is a significant alteration in the public use pattern of the GGNRA, the front porch to the City. Gretchen Barley

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and Don Kieselhorst 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 must take away that right by notice and public comment. Because it has not done so here, the citations against Barley and Kieselhorst must be dismissed.

DATED: 9/23/04

Respectfully Submitted,



Christopher J. Cannon
Attorney for Gretchen Barley
and Donald Kieselhorst