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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. GRETCHEN BARLEY, STEPHEN S. SAYAD, and DONALD KIESELHORST, Defendant.	Nos. P426479; P426497; P293164; P166667 EDL UNITED STATES' OPPOSITION TO DEFENDANTS' MOTION TO DISMISS Date: October 26, 2004 Time: 1:30 p.m.

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I. INTRODUCTION

National Park Service ("NPS") law enforcement personnel cited Gretchen Barley ("Barley"), Donald Kieselhorst ("Kieselhorst"), and Stephen Sayad ("Sayad") (hereinafter collectively "Defendants") for failing to restrain their pets on leashes as required by the NPS regulation found at Title 36, Code of Federal Regulations ("C.F.R."), Section 2.15(a)(2). This regulation makes it a violation for any individual to "fail[] to crate, cage, restrain on a leash which shall not exceed six feet in length, or otherwise physically confine a pet at all times" while in a NPS unit. 36 C.F.R. § 2.15(a)(2) (2004). The offenses occurred at Crissy Field and more specifically, on the beach and/or in the surf at Crissy Field. Crissy Field is part of the Golden Gate National Recreation Area ("GGNRA"), a unit of the NPS. Defendants seek dismissal of the citations for

lack of jurisdiction. Their defense is based on the belief that while the United States may own the uplands at Crissy Field and the rest of the Presidio, the tide and submerged lands are owned by the State of California (hereinafter "California"). Defendants are incorrect. By the Act of March 9, 1897 ("Act"), California conveyed title to and ceded to the United States jurisdiction over the tide and submerged lands offshore from Crissy Field. Stats. Cal. 1897, p. 75. However, even if the Court were to determine that the United States lacks ownership of the tide and submerged lands off of Crissy Field, the NPS nevertheless holds a lease from California over these lands that expressly authorizes the enforcement of NPS regulations.

Defendants further contend that a special GGNRA policy exists, allowing them to run their dogs off leash. Defendants are incorrect. 36 C.F.R. § 2.15(a)(2) applies to all units within the NPS. GGNRA lacked – and continues to lack – authority to invalidate a properly promulgated regulation applicable to all NPS units.

II. STATEMENT OF FACTS

A. The Citations.

Between January and June of 2004, United States Park Police ("USPP") officers and NPS Law Enforcement Rangers ("Rangers") issued a citation to each defendant for failing to restrain their dogs on a leash while on GGNRA property in violation of 36 C.F.R. Section 2.15(a)(2). Specifically, the USPP officers issued citations to these individuals for failing to restrain their dogs while on the uplands or on tide and/or submerged lands[1] at Crissy field.

In Barley's case, USPP Officer Waldman ("Waldman") observed Barley on the East beach area of Crissy Field with a black, mixed-breed dog on March 13, 2004. The dog was not physically restrained, caged, or in a crate. Upon observing this, Waldman approached Barley asking whether the she owned the dog. Barley stated that she owned the dog. Waldman then issued Barley citation P426479.[2]

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[1] As used in this brief, "uplands" refers to the lands which are not subject to tidal action, "tidelands" refers to lands that are subject to tidal action, and "submerged lands" refers to lands that are always below water of the San Francisco Bay (herein after "SF Bay") or Pacific Ocean.

[2] The citations do not reference whether the Defendants were on the upland beach or in the tide and/or submerged lands. For purposes of this motion only, the United States assumes, without conceding, that each defendant's dog was on tide and/or submerged lands when the citation was issued.

In Kieselhorst's case, Ranger Beckert ("Beckert") observed Kieselhorst on Crissy Field with his unrestrained dog on May 24, 2004. Beckert observed Kieselhorst throw an object for his dog to chase along the beach. Beckert approached Kieselhorst, and Kieselhorst leashed his dog. At that time, Beckert recognized Kieselhorst from previous law enforcement contacts for the same conduct. Ranger Beckert then issued Kieselhorst citation P166667.

In Sayad's case, Ranger Beckert observed Sayad throwing an object into the water for his unrestrained dog to retrieve and bring back to him on the beach on January 25, 2004. Ranger Beckert then approached Sayad, requesting that he leash his dog. Sayad then informed Ranger Beckert that the NPS did not have the authority to request that he leash his dog. Ranger Beckert further informed Sayad that he was a federal law enforcement officer with the NPS and that he was requesting Sayad place his dog on a leash. Sayad then informed Ranger Beckert that his request violated a land treaty. Sayad further requested that Ranger Beckert issue him a citation prior to him leashing his dog. Ranger Beckert ended the contact with Sayad by issuing citation P291164.

Next, on May 22, 2004, Ranger Lasalle observed Sayad on the East Beach area of Crissy Field with a large black dog off leash. Ranger Lasalle approached Sayad and informed him three times that he needed to leash his dog. On three occasions Ranger Lasalle referred Sayad to NPS signage informing visitors of the leash law. Ranger Lasalle then issued Sayad citation P426297.

B. Factual Chronology of Crissy Field And Adjacent Submerged Lands.

Crissy Field is located along the shore of SF Bay within the former United States Army post known as the Presidio of San Francisco. The United States acquired land comprising Crissy Field and the Presidio from Mexico in the Treaty of Guadalupe Hidalgo in 1848. 9 Stat. 922. In the early 1850s, the United States formally established the Presidio as an Army post.[3]

1. Historical War Department documents regarding the conveyance.

In the 1890s, the War Department (now the Department of Defense) requested that California enact legislation conveying title and ceding exclusive jurisdiction over submerged lands adjacent

[3] See Executive Order, Nov. 6, 1850, and Executive Order, Dec. 31, 1851, attached as Exhibits ("Exs. 1-2 to the Declaration ("Decl.") of Barbara Goodyear (hereinafter Attachment ("Attach ") A).

to a number of military installations throughout the state. In its letters to California, the War Department explained that federal appropriations law prohibited the United States from expending funds to construct improvements, such as coastal fortifications, on land not owned by the United States. Therefore, the United States sought the conveyance of numerous tracts of tide and submerged lands adjacent to military posts on the mainland of California and around California islands so that the military could construct coastal defenses below the high water mark. *See generally* Exs. to Decl. of Michael Reed (hereinafter "Attach. B").

In an April 26, 1890 letter from the Secretary of War to the Governor of California, the Secretary explained:

> I have the honor to inform you that in connection with the construction of torpedo casemates, cable galleries, etc., contemplated at a number of points in San Francisco Harbor for its defence, the Engineer Officer in charge reports that it will be necessary to occupy the lands beyond high water mark adjacent and contiguous to Alcatraz Island, Point San Jose, Yerba Buena Island, and the Presidio and Fort Point reservation, all in the County of San Francisco. Under the provisions of section 355, of the Revised Statutes, no public money can be expended for the erection of fortifications until the sites therefor have been acquired by the United States and jurisdiction over the same has been ceded. In order that the United States may acquire the lands in question and obtain the jurisdiction contemplated by this law I submit to you a draught of an act with the request that you may please place the same before the legislature of [California] with your favorable recommendation for its passage.

Attach. B, Ex. 1.

An early draft of the 1890 legislation shows that it was originally divided into two sections. The first sought cession of exclusive jurisdiction over lands within California then held or used for military purposes. The second section sought conveyance of title to tide and submerged lands extending from the high water mark out to 300 yards beyond the low water mark adjacent to Alcatraz Island, Point San Jose, Yerba Buena Island, Fort Point and the Presidio. Attach. B, Ex. 2.[4]

A series of communications written over the next several months within the War Department indicate that the War Department redrafted the legislation to expand the geographic scope of the

[4] As of 1890, it appears that the Act of March 2, 1897 and the Act of March 9, 1897 were originally drafted as one bill and divided into two sections. The first section eventually became the Act of March 2, 1897, which ceded exclusive jurisdiction over all military lands in California to the United States. The second section became the Act of March 9, 1897, but was amended to include all tide and submerged lands adjacent to federal military lands.

conveyance to include tide and submerged lands adjacent to other SF Bay area military installations, some of which were islands (such as Angel Island) and others of which were uplands (Fort Mason and Lime Point, now Fort Baker) and "all the water fronts of tracts of the United States held for defensive purposes" in California. Attach. B, Ex. 3.

Pursuant to these requests from the War Department, California enacted the Act of March 9, 1897: the subject of this litigation. Soon after the Act's passage, the acting engineer officer of the War Department filed with the Surveyor General of California a "Map of the Presidio Military Reservation." The map is dated April, 1897 and shows a strip of submerged lands offshore of the Presidio. The legend indicates the strip is ". . . 300 yards out beyond low water mark." The strip of land contains an additional legend stating: "[p]iece of parcel of land granted, released and ceded to the United States by Act of California Legislature, approved March 9th, 1897." The metes and bounds description on the map states the boundary of the Presidio extends 300 yards out beyond low water both along the Pacific coast of the Presidio and along the SF Bay coast of the Presidio. Attach. A, Ex. 3. [5]

A 1913 map filed in the San Francisco County Recorder's Office by the War Department also depicts the Presidio's boundaries. Like the 1897 map, the 1913 map shows the boundary extends 300 yards out into the water along Crissy Field. This map is attached as Attach. A, Ex. 4.

2. Official State of California documents confirming the conveyance.

In 1946, the scope of the Act of March 9, 1897 was addressed in California's pleadings before the Supreme Court in *California I*. (As an action between the United States and a sovereign state, this was an original action before the Supreme Court. *See California I*, 332 U.S. at 28 n. 5 for a summary of this case.) In its Answer, California admitted that it had "granted" numerous submerged land areas underlying ocean and inland waters to the United States pursuant to the Act. California's Answer confirms that one such grant included the submerged

[5] California submitted a copy of the 1897 map to the United States Supreme Court (hereinafter "Supreme Court") in its Answer in *United States v. State of California*, 332 U.S. 19 (1947) (hereinafter "*California I*"). (This case was an original action filed in the Supreme Court.) At issue was title to submerged lands underlying the Pacific Ocean extending seaward three nautical miles. *Id.* at 22. California contended that it - not the United States – held title to these submerged lands, known as the three-mile belt. California submitted the 1897 map as proof that California held title to submerged lands underlying the ocean, for without such title, California would have had no ability to convey tracts of submerged land to the United States in the first place. California hoped to convince the Court that it held title to all lands within the three mile belt not previously conveyed.

lands along the ocean and bay coasts of the Presidio. Attach. A, Ex. 3 at 93.

Other pleadings filed by California in *California I* similarly affirm the scope of the Act. In its Brief in Opposition to Motion for Judgment ("Opposition Brief"), California admitted that the United States "requested the California Legislature to, and on March 9, 1897 California did, grant to the United States seventeen parcels of submerged lands 300 yards wide below low water mark adjacent to United States military reservations." One of the seventeen grants described in the Opposition Brief is the conveyance of submerged lands adjacent to the Presidio. Attach. A, Ex. 5. Appendices filed by California in support of its Opposition Brief provide additional detail regarding the history of the Act. The State's Appendices confirm that War Department sought the State's surrender of "title to submerged lands adjacent to all tracts of land on tidal waters in California held by the United States for defensive purposes extending from high water mark to a distance of 300 yards beyond low water mark." Attach. A, Ex. 6. The State's Appendices describe the specific tracts conveyed by the March 9, 1897 Act, including the Presidio tract. The Presidio conveyance is described as having granted the United States title to a strip of submerged lands 300 yards wide on the westerly (Pacific Ocean) side of the Presidio as well as on the SF Bay side of the Presidio, where Crissy Field is located.[6]

3. Golden Gate National Recreation Area as well as subsequent state and federal documents confirms the conveyance of Crissy Field's submerged lands.

In 1972, Congress established the GGNRA 16 U.S.C. § 460bb *et. seq.* The GGNRA's congressional boundary included the Presidio and GGNRA legislation provided that should the Presidio ever become excess to the needs of the United States military, the land would transfer to the Department of Interior ("DOI"), becoming part of the GGNRA. 16 U.S.C. § 460bb-2(f).[7] Section 460bb-1 of the enabling legislation states the GGNRA "shall comprise the lands, waters, and submerged lands generally depicted on the map entitled: 'Revised Boundary Map,

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[6] Other submerged land grants made pursuant to the Act adjacent to military reservations not located on islands include: San Diego Harbor Military Reservation; Zuniga Shoal tract, San Diego Harbor; San Pedro Military Reservation; Fort Mason Military Reservation in SF Bay; Benecia Military Reservation; San Diego Military Reservation; Coronado Beach Tract, San Diego Harbor; and the Monterey Military Reservation. Attach. A, Ex. 7.

[7] Because the Army and the NPS are both federal agencies, the transfer of land is typically an administrative transfer, or transfer of administrative jurisdiction. Property title does not change because federally owned land is held in the name of the United States. Thus, title to the fast and submerged lands at the Presidio is held by the United States regardless of which federal agency exercises administrative control.

[GGNRA]', numbered NRA-GG-80,003K, and dated October 1978 . . . ."[8] 16 U.S.C. § 460bb-1. GGNRA's boundary map shows that tide and submerged lands offshore from Crissy Field were included within GGNRA's Congressional boundary. Attach. A, Ex. 8.

Soon after GGRNA's creation, the DOI Solicitor's Office requested California's State Lands Commission ("SLC") provide "jurisdictional summaries" regarding nine military installations that were included within the boundaries of the newly created GGNRA.[9] The SLC responded that, as to the Presidio, "[b]y act approved March 9, 1897, [California] ceded title to the tidelands adjacent and contiguous to the existing reservation and laying between the high-water mark and a line 300 yards beyond the low water mark . . . ." Attach. A, Ex. 9.

During the 1988 military base realignment and closure process, the Army decided to close its operations at the Presidio, declaring it excess to the needs of the military.[10] Several years later, in 1994, the Army transferred full administrative control over the Presidio to the NPS consistent with § 460bb-2(f).[11] As part of the transfer process, the Army provided the NPS with boundary maps and other documentation describing the extent of real property transferred to the NPS. The official boundary map, dated September 1994, shows "a meander line 300 yards out beyond the low water line" off the shore of Crissy Field. Attach. A, Ex. 10. A September 12, 1994 survey also indicates that the Presidio's boundary extends 300 yards out beyond and parallel with the low water line of SF Bay.[12] Attach. A, Ex. 11. Other official real property transfer records

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[8] GGNRA boundaries were expanded soon after the park's establishment in 1972. As a result, a new legislative boundary map was prepared in 1978

[9] Some areas were previously transferred to the NPS, and others, like the Presidio, would transfer to NPS in the future. One military installation addressed in a detailed jurisdictional statement provided by the SLC was the Presidio. Other former military installations within GGNRA that were subject to grants of tide and submerged lands under the Act of March 9, 1897 include Fort Mason and Alcatraz Island. –

[10] *See* Defense Authorization Amendments and Base Closure and Realignment Act of 1988, Title II of P.L. 100-526, 10 U.S.C. § 2687 note.

[11] Although most of the Presidio is now under the administrative control of the Presidio Trust, Crissy Field remains under the administrative control of the NPS. *See* 16 U.S.C. § 460bb appendix, P.L. 104-333.

[12] Altanseat Land Surveyors, Inc. completed a legal description of the Presidio on September 12, 1994. This legal description accompanied the transfer letter executed by the DOD and DOI on September 30, 1994 indicating the extent of the Presidio property to be transferred to the DOI. The legal description specifically states that "certain real property situated in the city and county of San Francisco, State of California, described as . . . along said northerly line, North 51°41'49" West, 191.61 feet; thence at Right angles to the high water line of the Pacific Ocean, North 51°50'05" West, 981.32 feet to a Point in a meander line lying 300 yards out beyond and parallel with the low water line of the Pacific Ocean; thence along said meander line, and along a meander line 300 yards out beyond and parallel with the low water line of the SF Bay, the following fifty-five courses: 1) North 31°03'58" East, 74.96 feet . . 55) North 60°18'11" East, 42.12 feet to a point on the northerly extension of the aforementioned westerly line of Lyon Street . . . ." *See* Attach. A, Ex. 11 at 6-9.

describe the land transferred as including "approximately 1800 acres of land (uplands app. 1436 acres; tidelands app. 364 acres) . . . ." Attach. A, Ex. 12.

III. ARGUMENT

A. The National Park Service Regulations Apply to Defendants Because the United States Owns the Tide and Submerged Land Areas Adjacent to Crissy Field Out to 300 Yards Beyond the Low Water Mark.

The United States gained title to the tide and submerged lands adjacent to Crissy Field through the Act of March 9, 1897 ("Act"). Stats. Cal. 1897. In relevant part, the Act states:

> All the right and title of [California] in and to the parcels of land extending from high-water mark out to three hundred yards beyond low-water mark, lying adjacent and contiguous to such lands of the United States in this State as lie upon tidal waters and are held, occupied, or reserved for military purposes or defense, lying adjacent and contiguous to any island, the title to which is in the United States, or which island is reserved by the United States for any military or naval purposes or for defense, are hereby granted, released, and ceded to the United States of American; the boundaries of each parcel of land hereby granted, released, and ceded to the United States to be a line along high-water mark, a line three hundred yards out beyond low-water mark, and lines at right angles to high-water mark at the points where the boundaries of the adjacent lands of the United States touch high-water mark . . . .

Id.

Defendants argue that the Act only conveyed title to submerged lands surrounding islands occupied by the United States military and not to submerged lands adjacent to military bases on the mainland. Defendants' Motion to Dismiss ("Defs.' Br."), at 17-18.

At the outset, a plain reading of the Act shows the error of this argument. To read the Act as only applying to islands would ignore most of the words in the first part of the Act. For example, it would render the phrase "lying adjacent and contiguous to such lands of the United States in this State as lie upon tidal waters and are held, occupied, or reserved for military purposes or defense" as surplusage. This ignores the basic rule of statutory construction that all words must be given effect. *Heckler v. Chaney*, 470 U.S. 821, 829 (1985) ("the common-sense principle of statutory construction that sections of a statute generally should be read to give effect, if possible, to every clause . . ."), *citing United States v. Menasche*, 348 U.S. 528, 538-539 (1955) (internal quotations omitted).

Moreover, as detailed below, the lengthy historical record regarding the Act's scope and effect confirms it did effect a conveyance of tide and submerged lands adjacent to Crissy Field.

1. Correspondence prior to the Act's passage indicates that the Act applied to tide and submerged lands adjacent to islands and mainland military installations.

Prior to its enactment, official correspondence between the War Department and the Governor of California establishes that submerged lands adjacent to the Presidio were within the scope of the Act. An April 26, 1890 letter to the Governor from the Secretary of War lists the Presidio as one of the areas where the United States wished to construct in-water coastal defenses but was prevented from doing so absent fee title to the submerged lands. Attach. B, Ex. 1. An early version of the Act thus listed the Presidio as area where a 300 yard-wide strip of submerged lands would be conveyed to the United States by California. Attach. B, Ex. 2. It is of no consequence that the final text of the Act no longer specifically identified the Presidio. Correspondence between the United States and California following the Act's passage indicates the geographic scope of the legislation was expanded beyond the SF Bay area military posts listed in the early correspondence to include tide and submerged lands adjacent to any tract of land within California then used or occupied for military purposes.

As indicated in the first endorsement (dated June 4, 1890)[13] on the May 19, 1890 letter to the Chief of Engineers from Colonel Wendell, the Chief of Engineers recommended to the Secretary of War that the terms of the Act be "extended in Section 2 to include the submerged waterfronts of all the military reservations belonging to the United States, within the limits of . . . California." The ninth endorsement to this same letter by the Acting Judge Advocate General (dated January 10, 1891), indicates the "form of the Act to be forwarded to the Governor of California has been amended so as to cover all of the additional submerged lands proposed in these papers." Attach. B, Ex. 3. This correspondence establishes the Act applied to the waterfronts of all military installations in California, not just those on islands. There is no indication anywhere in the historical record that the Act applied only to tide and submerged land around islands nor can such an interpretation be supported given the specific mention in this correspondence of installations such as the Presidio and Fort Point, which are not islands.

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[13] These early War Department documents bear "endorsements" by military officials. These written endorsements are affixed to each document, and they reflect the comments of the military officials within the chain of command on the subject of each document as it made its way through the War Department's various offices.

2. Official maps and official State documents confirm that the Act granted title to submerged lands adjacent to Crissy Field to the United States.

Historical maps of the Presidio support the United States' and California's shared interpretation of the Act's scope. Both the 1897 map filed with the Surveyor General of California and the 1913 map of the Presidio filed with the San Francisco County Recorder's Office (Attach. A, Exs. 3-4, respectively) depict the offshore boundary of the Presidio as lying 300 yards beyond the low-water mark. Moreover, the 1897 map cites the authority for this offshore boundary as the Act of March 9, 1897. California endorsed the authenticity of the 1897 map when it filed it as an exhibit to its Answer in *California I* to support its claims in that case.

Should there be any remaining doubt as to fact that the Act conveyed title to the tide and submerged lands adjacent to Crissy Field, official filings by California before the Supreme Court in *California I* lay those suspicions to rest. These filings make repeated reference to the fact that the Act conveyed California's title in seventeen submerged land areas to the United States. One of the grants specifically described in California's Supreme Court filings identified submerged lands on the ocean and bay coasts of the Presidio. *See generally*, Attach. A, Exs. 3-5.

Some thirty years later, California again provided official documentation affirming the conveyance. On March 14, 1974, the SLC – the California agency having jurisdiction over submerged lands – provided a jurisdictional summary of the Presidio and other federal installations within GGRNA's boundaries. The jurisdictional statement for the Presidio stated "[b]y act approved March 9, 1897, [California] ceded title to the tidelands adjacent and contiguous to the existing reservation and laying between the high-water mark and a line 300 yards beyond low-water mark . . . . Attach. A, Ex. 9. California would not repeatedly make definitive statements regarding the scope of the Act (particularly in official pleadings before the Supreme Court) if the Act did not actually convey title to tide and submerged land areas adjacent to on-shore military reservations such as the Presidio.

3. Defendants' Reliance on *Watkins* is misplaced.

Defendants' argument contesting the United States' ownership to these lands is based primarily on a strained reading of the verbiage of the Act itself – a reading that finds no support

in the historical record. Moreover, Defendants' reliance on *United States v. Watkins*, 22 F.2d 438 (N.D. Cal. 1927), is of no avail for *Watkins* cannot be read as holding that the Act conveyed title over submerged lands surrounding islands only. *Watkins* did not involve issues pertaining to submerged lands. The portion of the opinion that makes a passing reference to the Act is dicta. The holding of *Watkins* concerned the interpretation of a different statute, one passed on March 2, 1897 by California, which dealt with the cession of exclusive jurisdiction over all lands within California then held or later acquired for military purposes. *Watkins* is of no relevance here.

The ample historical record leaves but one conclusion: the Act conveyed title in the tide and submerged lands adjacent to Crissy Field to the United States.

B. California's 1897 Grant is not Reversed by the Submerged Lands Act.

Defendants contend that if California's March 9, 1897 legislation conveyed title or jurisdiction over specified tide and submerged lands to the United States, as it clearly did, the federal Submerged Lands Act ("SLA"), 43 U.S.C. § 1301 *et seq.*, reconveyed those interests to California in 1953. Defs.' Br. at 14. That is plainly not the case.

As Defendants correctly state, "[t]he very purpose of the [SLA] was to undo the effect of this Court's 1947 decision in *United States v. California . . . .*" *Id.*, quoting *United States v. California*, 436 U.S. 32, 37 (1978) (hereinafter "*Channel Islands*"). But Defendants ignore the fact that *California I* concerned only title to offshore submerged lands – those lying seaward of the coastline beneath the territorial or marginal sea.[14] The Supreme Court concluded that "California is not the owner of the three-mile marginal belt along its coast, and that the Federal Government rather than [California] has paramount rights in and power over that belt . . . ." *Channel Islands*, 436 U.S. at 38; *see also*, Order and Decree at 332 U.S. 804, 805 (1947).

Title to lands beneath inland navigable waters was not at issue in the 1947 case, and their status was distinguished from the offshore lands in contention. The parties and the Supreme Court acknowledged that "under the *Pollard* rule, as explained in later cases, California has a

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[14] "The complaint [in *Channel Islands*] alleges that the United States 'is the owner in fee simple of, or possessed of paramount rights in and powers over, the lands, mineral and other things of value underlying the Pacific Ocean, lying seaward of the ordinary low water mark on the coast of California and outside of the inland waters of [California] . . . .'" *California I*, at 22. The controversy is over "who owns the three-mile belt . . . ." *Id.* at 26; or "the land under the three-mile belt." *Id.* at 27. "[W]ho owns the bare legal title to the lands under the marginal sea." *Id.* at 29. *See also*, *id.* at 31, 35-36, and 38-40.

qualified ownership of lands under inland navigable waters . . . ." *Channel Islands*, at 30, referring to *Pollard's Lessee v. Hagan*, 44 U.S. (3 How.) 212 (1845); footnotes omitted.

SF Bay is inland water. *California II*, 432 U.S. at 41. It lies landward of the marginal belt at issue in the 1947 *California I* case. Except to the extent that lands beneath inland navigable waters had been transferred by California outside of state ownership, they were acknowledged to belong to California. When the Supreme Court said "[t]he very purpose of the SLA was to undo the effect of this Court's 1947 opinion . . .," it was referring to the Court's determination that lands beneath the three-mile marginal sea belonged to the United States. *Channel Islands*, 436 U.S. at 37. Congress granted those lands to the coastal states in 1953 through the SLA, but the SLA did nothing to alter title to lands beneath inland navigable waters.

But even if the SLA could be said to apply to lands beneath inland navigable waters, the SLA did not reconvey to California the submerged lands at issue here. In quoting the granting language of the SLA, Defendants excise the provisions which defeat their contention. Defs.' Br. at 15. For example, Defendants quote the language from 43 U.S.C. § 1311(a) which provides that submerged lands are hereby "confirmed, established, and vested in and assigned to the respective States . . .," but Defendants ignore the text immediately following "or the persons who were on June 5, 1950, entitled thereto under the law of the respective States in which the land is located." 43 U.S.C. § 1311(a). From § 1311(b), Defendants attempt to suggest that the United States "'releases and relinquishes' to the States 'all right, title and interest of the United States . . . .'" Defs.' Br. at 15. The passage actually reads "[t]he United States hereby releases and relinquishes unto said States and persons aforesaid, except as otherwise reserved herein, all right, title, and interest of the United States . . . ." 43 U.S.C. § 1311(b).

The SLA did not "confirm" the states' title to all beds of navigable waters. Congress specifically provided two exceptions to the SLA's grant. The first recognized rights granted away by California, under state law, as they existed on June 5, 1950. 43 U.S.C. § 1311(a). The lands at issue here fall within that exception and would remain with the United States pursuant to § 1311(b), which is the conveyance provision of the SLA. Second, the entirety of the SLA's grant is subject to the "except as otherwise reserved" provision of § 1311(b).

Moreover, Section 5 of the SLA, 43 U.S.C. § 1313, sets out the exceptions to the grant referred to in §1311(b). It provides, in pertinent part, that the following lands are excepted from the grant:

> all tracts or parcels of land together with all accretions thereto, resources therein, or improvements thereon, title to which has been lawfully and expressly acquired by the United States from any State or from any person in whom title had vested under the law of the State or of the United States, and all lands which the United States lawfully holds under the law of the State;
>
> all lands acquired by the United States by eminent domain proceedings, purchase, cession, gift, or otherwise in a proprietary capacity; and
>
> all rights the United States has in lands presently and actually occupied by the United States under claim of right . . . .

43 U.S.C. § 1313. The Crissy Field submerged lands fall within each of these exceptions.

Defendants' SLA argument assumes, arguendo, that the March 1897 grants accomplished the California legislature's intention – title to the submerged lands at issue was transferred to the United States. Defs.' Br. at 14. That being the case, those lands are lawfully held by the United States under California law, were acquired by the United States by cession or gift, and are presently occupied by the United States under claim of right. They were specifically excluded, by Congress, from the SLA grant and thus remain in United States ownership.

Defendants claim to find support for their SLA argument in *Channel Islands*. They cannot. The submerged lands at issue in *Channel Islands* lay beneath the marginal sea. Following the Supreme Court's 1947 decision in *California I*, which established federal title to lands beneath the marginal sea, President Truman expanded the original upland boundaries of the Channel Islands National Monument to include a one-mile belt of waters and submerged lands adjacent to the islands. *Channel Islands*, 436 U.S. at 34. In 1953, Congress granted lands beneath the marginal sea to the coastal states, subject to the exceptions noted above.

In *Channel Islands*, the United States argued that the one-mile belt of submerged lands within Monument boundaries did not pass to California under the SLA because it was "presently and actually occupied by the United States under claim of right" and, therefore, excepted from the grant by 43 U.S.C. § 1313. *Id.* at 38. The federal "claim of right" arose from the Court's 1947 decision that the United States held paramount rights to all lands beneath the marginal sea.

The Court reasoned, however, that Congress must have intended a more specific basis for the federal claim of right. The legislative history of the SLA indicated a congressional understanding that "the exceptions spelled out in [Section 5] do not in any way include any claim resting solely upon the doctrine of 'paramount rights' enunciated by the Supreme Court with respect to the United States' status in the areas beyond inland waters and mean low tide." *Id.* at 41. To hold otherwise, the Court reasoned, would nullify the entire purpose of the SLA. *Id.* at 39. Thus, the Court concluded, "this [claim of right] exception applies to the submerged lands and waters in controversy here only if the United States' claim to them ultimately rests on some basis other than the 'paramount rights' doctrine of this Court's [1947] *California* decision." *Id.* The United States' claim in *Channel Islands* had no separate basis and the Court consequently held that:

> [b]ecause the United States' claim to the submerged lands and waters within one mile of Anacapa and Santa Barbara Islands derives solely from the doctrine of 'paramount rights' announced in this Court's 1947 *California I* decision, we hold that by operation of the [SLA] the Government's proprietary and administrative interests in these areas passed to [California] in 1953.

Id. at 41. The United States did not have the "claim of right" required by 43 U.S.C. § 1313(a).

Contrast the foregoing Supreme Court analysis with Defendants' characterization of the *Channel Islands* decision. According to Defendants, the Supreme Court ruled that "the [SLA] conveyed all tidelands formerly owned by the United States back to California, unless those lands were 'actually occupied' by the United States at the time of the [SLA] in 1953." Defs.' Br. at 16. Nothing in the decision supports that statement.

As a general proposition, the SLA conveyed offshore submerged lands to the adjacent states.[15] (The SLA also generally acknowledged state title to lands beneath navigable inland waters.[16]) But Section 5 of the SLA, 43 U.S.C. § 1313 provides five exceptions to the grant. In *Channel Islands*, the United States relied on only the "claim of right" exception. As discussed above, the Supreme Court ruled against the United States for failure to meet the "claim of right"

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[15] The SLA did not convey tidelands, the strip of beach between the high and low water lines, as contended by defendant. Defs.' Br. at 16. Waters above tidelands, along with rivers, ports and bays, are inland waters and the lands beneath them belong to the States under the *Pollard* doctrine, discussed above, and were never at issue.

[16] *See* authorities cited by Defs.'. Br. at 15-16. That is not to say, as Defendants would have it, that the United States does not continue to hold specific parcels of lands beneath inland navigable waters, as the Supreme Court has held in two recent decisions. *United States v. Alaska*, 521 U.S. 1, 32-62 (1997); *Idaho v. United States*, 533 U.S. 262 (2001).

requirement, not the "actually occupied" requirement as asserted by Defendants. Defs.' Br. at 16.[17]

Here, the United States' "claim of right" is based upon a grant and separate lease from California. It does not, and could not, rest – even in part – on the paramount rights doctrine from the 1947 decision in *California I*. The United States has always recognized California's original title to submerged lands beneath its inland navigable waters. The United States derived its existing title directly from California pursuant to the March 9, 1897 Act. Each of the three exceptions to the SLA grant set out above precludes a finding that the submerged lands at issue here were conveyed to California by the SLA. The SLA does not further Defendants' case.

C. The Public Trust does not Prevent the Enforcement of National Park Service Regulations Against the Defendants.

Defendants expend considerable effort attempting to convince this Court that California's conveyance of the Presidio's tide and submerged lands to the United States was a violation of the public trust, or in the alternative, that the existence of the public trust allows the Defendants to behave in whatever manner they choose at Crissy Field. Defs.' Br. at 6-8. Neither argument has merit. The public trust, if it exists at this time, is dormant and does not prohibit the application of NPS regulations.

1. The cases relied upon by Defendants are not relevant.

The cases on which Defendants rely are readily distinguishable from this case. Cases cited by Defendants involved state grants of tidelands to private parties. In *People v. Cal. Fish Co.*, 66 Cal. 576, 597 (1913), the court held that when California "has decided that portions of the tide land should be . . . sold to private use," the intent of the legislature "to authorize an abandonment of [public use of tidelands] . . . must be clearly expressed or necessarily implied." Likewise, in *City of Berkeley v. Superior Court*, 26 Cal. 3d 515, 518-19 (1980), the court ruled that "tidelands in SF Bay granted to private parties" were granted subject to public trust obligations. This case

[17] Defendants' contention that the United States' claim must also fail here because "the United States has not occupied" most of the submerged lands at issue is inconsistent with the analysis in *Channel Islands*. The lands in contention fall within the boundaries of a federal reservation. In *Channel Islands*, the parties stipulated that submerged lands within Monument boundaries were "presently and actually occupied" for purposes of 43 U.S.C. 1313. *Channel Islands*, 436 U.S. 32 at 38 n.13. The Supreme Court did not question that fact; it resolved the case on the "claim of right" requirement. Similarly, the United States "occupies" all lands within GGNRA boundaries.

does not involve conveyance of trust lands to a private party. Here, California conveyed the Presidio's submerged lands to the United States, a sovereign entity, for a public purpose – first for military use and now as a national park. Holdings from cases involving conveyances to non-sovereign entities simply have no relevance here.

Equally misplaced is Defendants' citation to California's Constitution for the proposition that California's conveyance of the tide and submerged lands to the United States was prohibited. Article XV,§ 2, of the 1897 California Constitution (now art. X, § 3), referenced by Defendants, prohibits the sale "to private persons, partnerships or corporations" of "all tidelands within two miles of any incorporated city, city and county, or town." CAL. CONST. of 1897, art. XV, § 2 (1879) (now art. X, § 3). California enacted this provision in 1879 in order to curb "the monopolizing of every frontage upon navigable waters in [California] . . . by private individuals." *City of Berkeley*, 26 Cal. 3d at 523 (quoting Debates and Proceedings, CAL. CONST. Convention 1878-79, *op. cit.* at 1481). Defendants' arguments fail to acknowledge that, in keeping with the policy underlying the public trust doctrine, courts have applied this state constitutional provision to void or restrict grants of submerged lands to private individuals. This state constitutional provision has no relevance to the United States, a sovereign entity.

Defendants next incorrectly assert that *State v. County of Orange*, 34 Cal. App. 3d 20 (4th Dist. 1982) extends article XV's constitutional bar on the conveyance of tide and submerged lands to public entities such as the United States. *County of Orange*, however, involved an entirely different provision of California's Constitution (art. XVI, § 6) than that cited by Defendants (art. XV, § X). *Id.* at 29. Article XVI, § 6, known as the "gift clause", forbids the legislature from making gifts to any individual or municipality. *See id.* at 23. Consequently, *County of Orange* has no bearing in this case.

Moreover, Defendants ignore a critical distinction in their reliance on *County of Orange* – the fundamental difference between local governments and the United States. Unlike the United States, municipal and county governments are not sovereign. They derive all their powers from California. *See Colorado River Indian Tribes v. City of Parker*, 776 F.2d 846, 848 (9th Cir. 1985) (citing *United States v. City of Pittsburg, California*, 661 F.2d 783, 786-87 (9th Cir. 1981);

and City of Rohnert Park v. Harris, 601 F.2d 1040, 1044 (9th Cir. 1979). California's constitutional provision barring the conveyance of submerged lands to private persons or municipal governments confirms that there is no meaningful distinction between a private entity and a municipal government when it comes to such conveyances. *See* CAL. CONST. of 1897, art. XV, § 2 (1879) (now art. X, § 3). The United States cannot be equated to a non-sovereign entity.

2. United States constitutional authority over federal lands supplants the public trust.

The United States is a sovereign entity. It would be inconsistent with the United States Constitution for a state's public trust authorities to actively encumber the power that the United States exercises over federal property under the Constitution. Under the Supremacy Clause, U.S. CONST. art. VI, cl.2, federal laws override conflicting state laws. *United States v. Brown*, 552 F2d. 817, 821 (8th Cir. 1977). In addition, the Property Clause of the Constitution provides that "Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." U.S. CONST., Art. IV, s. 3, cl. 2. "The power over the public land thus entrusted to Congress is without limitations. 'And it is not for the courts to say how that trust shall be administered. That is for Congress to determine'" *United States v. San Francisco*, 310 U.S. 16, 29 (1940), *quoting Light v. United States*, 220 U.S. 523, 537 (1911). Under the Property Clause, state "jurisdiction does not extend to any matter that is not consistent with full power in the United States to protect its lands, to control their use and to prescribe in what manner others may acquire rights in them." *Utah Power and Light v. United States*, 243 U.S. 389, 404 (1971) (holding that the Utah corporation could not maintain electric distribution facilities in a United States forest reservation absent full compliance with regulations designed to protect the forest reserve).

Thus, in *Kleppe v. New Mexico*, 426 U.S. 529 (1976), the Supreme Court found that even though states exercise trust responsibilities over animals within their borders, such state authority did not allow New Mexico to round up burros on United States land in contravention of the federal Wild Free-roaming Horses and Burros Act. *Id.* at 545-46. The Court stated that a state's trustee powers exist only "in so far as (their) exercise may be not incompatible with, or restrained by, the rights conveyed to the [United States] by the constitution." *Id.* at 545, quoting,

Greer v. Connecticut, 161 U.S. 519, 528 (1896). The active exercise of the public trust over the tide and submerged lands at issue here would have been incompatible with military's use of these lands during the time the military administratively controlled the Presidio. As the historical record makes clear, the military sought the conveyance and cession of these lands for coastal defense purposes. Attach. B, Ex. 1. The pursuit of fishing, navigation and recreation by the public would have been inconsistent with the military's goal of maintaining these lands for coastal defense purposes. If these lands were conveyed by California subject to the public trust, the only reasonable conclusion that comports with principles of federal sovereignty and the broad reach of the Property Clause is that the public trust was dormant during the time of the military's control over these areas.

The same status persists today. If California ceded tide and submerged lands offshore from Crissy Field to the United States subject to the public trust, the trust remains dormant because these lands are presently reserved as NPS lands and, through the Constitution, the NPS possesses comprehensive management control over these lands for park purposes. In the case of national parks, Congress entrusted their proper management and care to the NPS when it enacted the NPS Organic Act ("Organic Act"). 16 U.S.C. § 1-4. The Organic Act establishes that the purposes for which national parks are to be managed are conservation and public uses which are consistent with the overriding conservation mandate.[18] To achieve these management purposes, Section 3 of the Organic Act authorizes the Secretary of the DOI to "make and publish such rules and regulations as he may deem necessary or proper for the use and management of the [lands] under the jurisdiction of the NPS." 16 U.S.C. § 3. The regulations found in Title 36 of the C.F.R., including § 2.15(a)(2), then flow from this constitutional authority. In addition to the Organic Act, each national park is administered pursuant to its own enabling legislation. GGNRA enabling legislation, 16 U.S.C. § 460bb *et seq.*, sets forth additional conservation and

[18] Section 1 of the Organic Act sets forth the purpose of the national park system. It provides that the NPS shall "promote and regulate the use of" national parks "by such means and measures as conform to the fundamental purpose of the said parks . . . which purpose is to conserve the scenery and the natural and historic objects and the wild life therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations." 16 U.S.C. § 1.

preservation purposes for which GGNRA shall be administered.[19]

Together, the Organic Act, GGNRA's enabling legislation, and the regulations promulgated thereunder provide a comprehensive approach to the proper care and administration of GGRNA lands. The regulation that prohibits off-leash dog walking furthers these conservation and preservation purposes (e.g., by preventing dogs from trampling vegetation, harassing wildlife, and disturbing or injuring other visitors). It would be inconsistent with sovereign authority exercised by the United States over GGNRA to find that the state's public trust could actively constrain the NPS's ability to manage GGNRA to achieve congressionally designated purposes.

Distilled to its simplest form, Defendants argue that the public trust allows them carte blanche to recreate at Crissy Field in whatever manner they choose.[20] However, if the public trust interest remains, it does not provide the latitude for behavior that Defendants suggest. Courts have upheld the enforcement of federal statutes and regulations in situations where state trust rights may have existed. *United States v. Holmes*, 414 F.Supp. 831 (D.Md. 1976) (refusing to dismiss criminal trespass citation where the United States owned the submerged lands adjacent to a military reservation and the defendant violated military regulations by trespassing on the submerged lands); *United States v. Brown*, 552 F.2d 817 (8th Cir. 1977) (affirming conviction of duck hunter who shot ducks within a national park unit even if the lake on which the defendant was arrested was under state ownership).

Accordingly, the Supremacy Clause of the United States Constitution leaves the NPS free to manage the offshore areas of Crissy Field in furtherance of GGNRA's designated conservation purposes. It is the view of the United States, therefore, that if the public trust burdens the federally-owned tide and submerged lands adjacent to Crissy Field, the trust is dormant for such time as the land is managed for designated federal purposes (such as a national park). This concept of a dormant public trust would fulfill both state and federal interests. It would allow the

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[19] Some of the purposes included in 16 U.S.C. § 460bb are the preservation of natural, historic, scenic, and recreational values; the provision of recreational and educational opportunities consistent with sound land use planning; the preservation of the park's natural setting; and protection of the park from uses that would destroy its beauty or natural character.

[20] The United States does not believe that off-leash dog walking falls within the purview of the public trust. Moreover, even traditional public trust uses can be regulated by the sovereign. For example, California strictly regulates fishing. *See e.g.*, CAL. FISH & GAME § 7145 (Deering 2003) (requiring every person over sixteen years of age to obtain a fishing license).

NPS to exercise its constitutionally derived authorities (as expressed through the Organic Act, the enabling legislation, and the regulations in Title 36) over GGNRA land owned by the United States. It would also allow California to exercise public trust responsibilities should the land ever revert to California pursuant to the Act's reverter clause.[21]

D. In 1987, the California State Lands Commission Granted the United States a Lease Authorizing the National Park Service to Regulate Tide and Submerged Lands within the Boundary of the Golden Gate National Recreation Area, Including Crissy Field.

Even if the Court were to conclude that the United States does not possess ownership of the tide and submerged lands at Crissy Field, the United States nevertheless has authority to regulate the Defendants' conduct because the United States holds a lease over all tide and submerged lands adjacent to or within GGNRA. The SLC granted this lease interest to the United States on September 28, 1987, for a period of forty-nine years (until July 30, 2026). *See* Attach. A, Ex. 13 (SLC Lease No. 7112.9, executed on September 28, 1987 ("SLC Lease") at 1).

In 1987, the Commission leased tide and submerged lands adjacent to or within GGRNA's authorized boundaries to the NPS to manage as part of the National Park System. *Id.* The scope of the SLC Lease to the NPS encompasses:

> A strip of tide and submerged land 1,000 feet wide in the Pacific Ocean and [SF Bay], Marin County, San Mateo County and the City and County of San Francisco, California, said strip lying between the ordinary high water mark of said Pacific Ocean and San Francisco Bay and an envelope line lying 1000 feet waterward of said ordinary high water mark and adjacent to or within the [GGNRA] as shown on [NPS] Drawing [No. 641-80046] received April 6, 1987, and filed with [SLC].

SLC Lease, Exhibit A.[22] NPS Drawing No. 641-80046 includes the Presidio, Crissy Field, and the offshore area. *See* Attach. A, Ex. 14.

In particular, paragraph 2 of the SLC Lease requires NPS to manage the tide and submerged lands "as part of the National Park system" for the following purposes:

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[21] The Act's reverter clause states: "the title to each parcel of land hereby granted, released, and ceded to the United States shall be, and remain in the United States only so long as the United States shall continue to hold and own the adjacent lands now belonging to the United States . . . ." Stats Cal. 1897, p. 75.

[22] The boundary of the park has been expanded a number of times since 1972 through acts of Congress. Section 460bb-1 of the enabling legislation currently states GGNRA "shall comprise the lands, waters, and submerged lands generally depicted on the map entitled: 'Revised Boundary Map, [GGNRA]', numbered NRA-GG-80,002-K, and dated October 1978 . . . ." 16 U.S.C. § 460bb-1. *See* Attach. A, Ex. 8 (Revised Boundary Map). This GGNRA boundary map shows a boundary line one quarter mile offshore of Crissy Field and other parts of GGNRA – clearly encompassing the tide and submerged lands off Crissy Field. *Id.*

> (a) To enhance public safety, use, and enjoyment of the lands and water of the subject lands.
>
> (b) To protect and conserve the environment and any cultural and historical resources that may be present on the subject land . . . .
>
> (c) To preserve the subject lands in their natural state and protect them from development and uses which would destroy their scenic beauty and natural character.
>
> (d) To provide for recreation and educational opportunities consistent with sound principles of land use planning and management.
>
> (e) Management of the subject lands and the administration thereof by [NPS] shall be subject to the laws of the United States governing the [GGNRA] and the rules, regulations, and policies promulgated thereunder, whether now in force or hereafter enacted or promulgated to the extent that they are not inconsistent with State law . . . .

Attach. A, Ex. 13 (SLC Lease, pp. 1-3 ¶ 2).

This lease covers GGRNA's entire ocean and bay coastline, which extends from Marin County south to San Mateo County. Some of the areas within GGNRA were never the subject of tide and submerged land conveyances from California (e.g. Stinson Beach, Muir Beach, Fort Funston, Aquatic Park). As a result, the NPS was faced with a patchwork of ownership within its boundary along the coastline, with some offshore areas being subject to submerged land grants (like the Presidio), and others remaining under state ownership. To facilitate management of the park's offshore areas, the NPS and the SLC entered into the subject lease agreement. Under this lease, the NPS is able to administer the offshore areas within and adjacent to its congressional boundary, even in areas not owned by the United States. The SLC Lease acts as an "umbrella," allowing the NPS to administer tide and submerged lands in or near the park boundary without having to determine exact ocean and bay submerged land boundaries for each incident that arises.

The citations issued to Defendants are authorized under the terms of the SLC lease, requiring administration of the tide and submerged lands in accordance with "the laws of the United States governing the [GGNRA] and the rules, regulations, and policies promulgated thereunder . . . to the extent that they are not inconsistent with State law." Attach. A, Ex. 13 (SLC Lease, ¶ 2(e) at 3). 36 C.F.R. Section 2.15 is an NPS regulation promulgated under the laws of the United States governing GGNRA. *See* 16 U.S.C. 1a-2(h) and 3 (authorizing the Secretary of DOI to promulgate and enforce regulations for the use and management of parks and, in particular,

concerning activities on or relating to waters subject to the jurisdiction of the United States).[23] Furthermore, requiring dogs to be on leash is not inconsistent with State law. Having found no California law to the contrary, the United States asserts that there is no inconsistency with the application of 36 C.F.R. Section 2.15 on the tide and submerged lands off of Crissy Field. To the contrary, this regulation is consistent with the SLC Lease mandate that NPS "enhance public safety, use, and enjoyment of the lands and water[s]." Attach. A, Ex. 13 (SLC Lease at 2).

Accordingly, while the United States unequivocally asserts ownership of the tide and submerged lands 300 yards off of Crissy Field, the SLC Lease provides additional authority to assert jurisdiction over Defendants and to enforce applicable NPS rules and regulations on such tide and submerged lands.

The NPS need not own land in fee in order to apply its regulations to visitors within the park's boundary. The SLC Lease provides a sufficient interest in land for NPS to regulate Defendants' conduct. The NPS regulations apply to all persons within the "boundaries of lands and waters administered by the NPS for public-use purposes pursuant to the terms of a written instrument." 36 C.F.R. § 1.2(a)(2). Such written instrument "could be in the form of a lease or public use easement, or a memorandum of agreement or some other written form authorizing NPS management." 61 Fed. Reg. 35,133, 35,135, July 5, 1996 (amending and clarifying 36 C.F.R. § 1.2, among other regulations). The Federal Register notice explains: "[t]he NPS would like to clarify that when NPS leases property and administers the property for public-use purposes, NPS regulations apply." *Id.* As the SLC lease clearly requires management of tide and submerged lands for public-use purposes, the NPS regulations apply to these lands. Attach. A, Ex. 13 (at 1-2, ¶¶ 2, 3, 4). The NPS regulations – including 36 C.F.R. §2.15 – apply, therefore, to the Defendants and all other persons within tide and submerged lands of Crissy Field as well as all other such areas within or adjacent to GGNRA's congressional boundary.

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[23] The NPS promulgated 36 C.F.R. § 2.15 in a 1983 rulemaking as part of a broad revision of 36 C.F.R. Parts 1-7, and 12. Attach. A, Ex. 15, 48 Fed. Reg. 30,252 (June 30, 1983). A regulation requiring all dogs in a NPS units to be on leash, however, has been in existence since at least 1966. Attach. A, Ex. 16, 36 C.F.R. § 2.8 (1966); 31 Fed. Reg 16,651 (Dec. 29, 1966) Prior to that time, the DOI had a general regulation governing all DOI lands, including NPS lands, that required all dogs to be on leash since the 1940's Attach A, Ex. 17, 36 C.F.R. § 2.13(a)(1943).

E. Dogs Must be on Leash at all Times While on Lands Owned or Administered by the National Park Service, including the Golden Gate National Recreation Area

The regulation governing pets in National Park areas applies to all lands owned or administered by the NPS, including GGNRA. Defendants arguments to the contrary fail. First, Defendants ask this court to overlook the most fundamental principle of administrative law – that an agency cannot act outside the scope of its authority. *See generally Industrial Union Department v. American Petroleum Institute*, 448 U.S. 361 (1989). While it its true that for a number of years GGNRA informally allowed off-leash dog activities within the park, it is not within the scope of GGNRA's authority to invalidate 36 C.F.R. § 2.15(a)(2), an NPS-wide regulation duly promulgated by the NPS. Second, to the extent that GGNRA exercised its prosecutorial discretion by not enforcing this regulation, Defendants have no standing to challenge such enforcement decisions. Case law clearly establishes that "an agency's decision not to take enforcement action should be presumed immune from judicial review . . . ." *Heckler v. Chaney*, 470 U.S. 821, 833 (1985). Finally, defendants rely in error on stricken portions of Judge Alsup's decision in *Ft. Funston Dog Walkers v. Babbitt*, 96 F. Supp.2d 1021 (N.D. Cal. 2000). Attach. A, Ex. 18 (Amendment to Findings of Fact dated April 23, 2000 (May 26, 2000)).

1. 36 C.F.R. § 2.15(a)(2) applies in all areas of the Golden Gate National Recreation Area, including Crissy Field, and cannot be overridden by a recommended "policy" adopted by a now-defunct federal advisory committee.

NPS promulgated Section 2.15 of Title 36 of the C.F.R. in a 1983 rulemaking as part of broad revision to Parts 1-7, and 12 of Title 36. Attach. A, Ex. 15 (48 Fed. Reg. 30,252 (June 30, 1983)). The DOI had a general regulation governing all DOI lands, including NPS lands that required all dogs to be on leash since the 1940's. *See* Attach. A, Ex. 17. Section 1.2 of Title 36 explains the applicability of the regulations found in Parts 1 through 7, including Section 2.15:

> The regulations contained in this chapter apply to all persons entering, using, visiting, or otherwise within:
>
> (1) The boundaries of federally owned lands and waters administered by the [NPS];
>
> (2) The boundaries of lands and waters administered by the [NPS] for public-use purposes pursuant to the terms of a written agreement; . . . .

36 C.F.R. § 1.2(a)(1) and (2).

As established in Sections II.B. and III.A., *supra*, Crissy Field and its adjacent tide and submerged lands is within GGRNA's boundaries, a unit of the NPS. The offshore lands are owned by the United States extending from high water out to 300 yards beyond low water. Moreover, the NPS holds a lease from California giving it "written agreement" under which it administers these areas for public-use purposes. Accordingly, Section 2.15 applies to all persons at Crissy Field and its adjacent tide and submerged lands.

Contrary to Defendants' claims, there exists no other law, regulation or policy that exempts GGNRA from Section 2.15. Some NPS units have "special regulations" contained in Part 7 of Title 36 prescribed for specific park areas. Pursuant to 36 C.F.R. § 1.2(c), "[t]hose regulations [in Part 7] may amend, modify, relax or make more stringent the regulations contained in parts 1 through 5 and part 12 of this chapter." *Id.* At present, there are no Part 7 regulations that alter the applicability of Section 2.15(a)(2) to GGNRA or any of the other 387 National Park units nationwide. *See generally* 36 C.F.R. Part 7. The only special regulations for GGNRA are found in Section 7.97 of Title 36 of the C.F.R. That section contains three sub-parts, providing special regulations for boat landings at Alcatraz, powerless flight, and bicycle routes. 36 C.F.R. § 7.97. As with all Part 7 regulations, DOI established Section 7.97 through notice and comment rulemaking procedures in accordance with the Administrative Procedures Act ("APA"), 5 U.S.C. § 553. *See generally*, 38 Fed. Reg. 32,931 (Nov. 29, 1973), 49 Fed. Reg. 18,452 (Apr. 30, 1984), 57 Fed. Reg. 58,716 (Dec. 11, 1992). No special regulation exists that alters the application of 2.15(a)(2) to GGNRA or any other NPS area.[24]

Defendants' assertion that GGNRA could exempt itself from a NPS-wide regulation by

[24] Equally unavailing is Defendants' allegation that GGNRA enabling statute provides a basis for overriding the dog leash. Congress established GGNRA to preserve for public use and enjoyment areas of outstanding natural, historic, scenic and recreational values to be preserved, as far as possible, in its natural setting, and protected from development and uses which would destroy the scenic beauty and natural character of the area. 16 U.S.C. § 460bb, Public Law 92-589. While the park is designated a Recreation Area, by a series of amendments to the Organic Act, 16 U.S.C § 1 et seq., Congress directed that all units of the NPS, regardless of their designation, are to be treated consistently with resource protection the primary goal. *Bicycle Trails Council of Marin v. Babbitt*, 82 F.3d 1445, 1449-1450, n 2 (9th Cir. 1996) (and cases cited therein). The purpose of these amendments was to bring recreational units into the fold and require that they be consistently with the rest of the system. *Bicycle Trails*, at 1453. Nothing in this enabling legislation calls for dogs to run off-leash in GGNRA in contravention of the generally applicable regulation.

including an off-leash policy in the park's compendium is equally unavailing.[25] GGNRA lacks the authority to take actions under 36 C.F.R. Section 1.5 (Closures & Use Limits) contrary to NPS-wide regulatory standards, such as Section 2.15. The preamble to Section 1.5 explains this restriction:

> The designation process specified in this section gives the superintendent limited discretion in allowing activities within park areas provided they are *not* contrary to Federal statutory law or in derogation of park values. Designations that allow a relaxation from Servicewide regulatory restrictions are *specifically* provided for in the individual regulations in this chapter. The superintendent is *not* authorized to use § 1.5(a) to relax Servicewide regulatory standards except where the authority is directly and specifically provided in a regulation. Superintendents may use the authority of § 1.5(a)(3) only to relax restrictions imposed at the park level under the authority of § 1.5 or another section providing authority to the superintendent. Section 1.5(a) may *never* be used to contravene Federal statutory law or the general regulations in this chapter, unless specifically provided for in a particular section. (emphasis in original).

Attach. A, Ex. 15 (48 Fed. Reg. 30,252 (June 30, 1983)). No authority exists to that allows GGNRA's superintendent to relax the NPS-wide regulatory restriction requiring dogs to be on leash. Such authority must be "directly and specifically provided in a regulation." *Id.* A simple reading of Section 1.5 and Section 2.15 shows an absence of any authority to relax the generally applicable restriction of leashing dogs while in the park. *Cf. e.g.*, 36 C.F.R. §§ 2.10(a), 2.13(a), 2.18(c), 2.19(a), and 2.20 (specifically allowing the superintendent to authorize otherwise prohibited activities).

Defendants also would have this Court rely upon a document adopted decades ago by a now-disbanded federal advisory committee as the basis to overrule a federal regulation. This argument is contrary to law and common sense. The GGNRA Advisory Commission ("Advisory Commission") was established in 1972 to meet and consult with the Secretary of DOI at least once per year on "general policies" and "planning, administration, and development" affecting GGNRA and other local units of the NPS. 16 U.S.C. § 460bb-4. "The function of advisory

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[25] A park compendium stems from the assertion of a Superintendent's discretionary authority set forth in Section 1.5 of Title 36 of the C.F.R.. This regulation provides broad discretion to park superintendents to limit park uses and close park areas. Under Section 1.5(a), the Superintendent of a park unit may impose a public use limit or close all or a portion of a park area to all public use based upon a determination that such action is necessary for any of the following reasons: (1) the maintenance of public health and safety; (2) protection of environmental or scenic values; (3) protection of natural or cultural resources; (4) aid to scientific research; (5) implementation of management responsibilities; (6) equitable allocation of use of facilities; or (7) the avoidance of conflict among visitor use activities. 36 C.F.R. §§ 1.5(a). If any one or more of the above conditions is met, the superintendent is allowed the discretion to close areas of the park, as necessary. To effect such closures, the park superintendent provides public notice, pursuant to 36 C.F.R. § 1.7, including a compilation of , such designations updated annually (commonly known as "the compendium").

committees is advisory only, unless specifically provided by statute or Presidential directive." 41 C.F.R. § 102-3.30(c). Here, neither Congress nor the President provided substantive authority to the Advisory Commission. Rather, GGNRA enabling legislation specifically limited its function to "meet and consult." *See* 16 U.S.C. § 460bb-4.

Accordingly, the Advisory Commission never had the authority in 1979 or any other time to adopt an off-leash "pet policy" that would be applicable to GGNRA. Any such policy could only be construed as advice to those authorized to adopt and implement policies on federal park lands. As discussed above, the park superintendent lacked any authority to adopt and implement the Advisory Commission's 1979 off-leash pet policy.

To the extent that Defendants' argue that the 1979 off-leash pet policy stands until the Advisory Commission properly rescinds it, that argument too must fail. In fact, all disputes over the validity of a policy adopted by the Advisory Commission in 1979 are moot because, in 2002, in accordance with 16 U.S.C. § 460bb-4(g), the Advisory Commission ceased to exist. Thus, any attempt to rely upon the advice of this disbanded commission is misplaced.

The 1979 pet policy did not – and could not – override the NPS-wide regulation prohibiting off-leash pets inside the NPS. The leash regulation always applied to GGNRA and, as discussed *infra*, any failure to apply the regulation consistently at GGNRA does not in any way limit its applicability to Defendants.

2. Golden Gate National Recreation Area's exercise of prosecutorial discretion regarding 36 C.F.R. § 2.15 enforcement does not estop the United States from issuing such citations.

Having been allowed to use the park lands in a manner prohibited by the NPS's regulations, the Defendants now assert that they are above the law. This flawed argument is tantamount to claiming the right to exceed the speed limit after years of avoiding a speeding ticket. The case law on this issue is clear: "the United States is neither bound by nor estopped by acts of its officers or agents in entering into an arrangement or agreement to do . . . what the law does not sanction or permit." *Utah Power & Light Co. v. United States*, 243 U.S. 389, 409 (1917).[26]

[26] To the extent Defendants argue they have acquired any prescriptive right to use the lands within GGNRA to run dogs off-leash, such notions must be dismissed. Although Defendants "may have enjoyed for a number of years the privilege of [acting against the law] on national park grounds, they may not acquire a liberty or property interest allowing them to do what the law specifically forbids." *Washington*

GGNRA lacks the authority to alter the application of the leash law in the park, absent the existence of a special regulation. (*See generally*, Section III.E.1, *supra*).[27] Consequently, Defendants cannot claim to be exempt from the application of Section 2.15 even in the face of nonenforcement of the leash law for two decades. *Pacific Shrimp Co. v. United States, Dep't of Transp.*, 375 F. Supp. 1036, 1041-42 (W.D. Wash. 1974) (holding that despite a long standing Coast Guard policy (thirty-seven years) to exempt certain vessels from a statutory inspection program, the agency was not estopped from re-interpreting the statute to apply to the previously-exempt vessels).

Courts addressing the actions or omissions of the NPS and other federal agencies have consistently held that the United States cannot be estopped from enforcing the law, even following an extended period of no enforcement or underenforcement. *See Washington Tour Guides*, 808 F. Supp. at 882 (the United States is not estopped from applying a permit regulation despite prior failure to enforce those regulations) *and Pacific Shrimp*, 375 F. Supp. at 1036.

The *Washington Tour Guides* case arose out of the NPS's efforts to enforce a regulation that proscribes engaging in or soliciting business on national park grounds without a permit. 808 F. Supp. at 878. Each of the plaintiffs conducted and solicited business on park grounds, for at least fifteen years, without a permit and the NPS informed plaintiffs they would not interfere with plaintiffs' businesses. *Id.* Relying on *Pacific Shrimp*, the *Washington Tour Guides* court held:

> The Plaintiffs may well have been allowed by the [NPS] to operate their business on national park grounds for many years, but given the substantial, and undisputed, public interest in preserving national parks, the government cannot be estopped from fulfilling its duty to protect the public interest in accordance with specific regulations despite prior failure to enforce those regulations.

Id. at 882.[28]

Tour Guides Ass'n v. National Park Service, 808 F. Supp. 877, 881 (D.D.C. 1992).

[27] In early 2002, the NPS published an advanced notice of proposed rulemaking regarding pet management within GGNRA to solicit public comment on a range of potential options for pet management within the park, including a special regulation that would permit off-leash pets within portions of GGNRA. 67 Fed. Reg. 1424, 1425 (January 11, 2002)("[T]he park, in error, implemented the voice control policy in contradiction to Service-wide regulations. . . . This [leash] regulation has always applied to GGNRA and failure to apply it consistently at GGNRA does not in any way limit is applicability today.") Unless and until a special regulation for off-leash dogs is in effect, the servicewide regulation in Section 2.15 applies to GGNRA.

[28] As stated in *Pacific Shrimp*, "[a]n administrative agency charged with protecting the public interest, is not precluded from taking appropriate action nor can the principles of equitable estoppel be applied to deprive the public of a statute's protection because of mistaken action or lack of action on the part of public officials. Laws unenforced for a long period of time do not necessarily become inoperative . . ." 375

The regulations contained in Parts 1 through 7, and Part 12 of 36 C.F.R. are the basic mechanism used by the NPS to protect the natural and cultural resources of the parks and to protect visitors and property within the parks. Attach. A, Ex. 15 (48 Fed.Reg. 30,252 (June 30, 1983)). There can be no dispute as to the public protection provided by the leash regulation. Therefore, despite its failure to enforce such a regulation for a long period of time, GGNRA is not estopped from applying Section 2.15 to Defendants.

Furthermore, agency decisions about law enforcement are not suitable for judicial review. *Sierra Club v. Whitman*, 268 F.3d 898 (9th Cir. 2001), citing *Heckler v. Chaney*, 470 U.S. 821 (1985) (FDA refusal to take enforcement action is a discretionary decision and not subject to judicial review). In *Heckler*, the Supreme Court explained:

> [a]n agency decision not to enforce often involves a complicated balancing of a number of factors which are peculiarly within its expertise. Thus, the agency must not only assess whether a violation has occurred, but whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency's overall policies, and, indeed, whether the agency has enough resources to undertake the action at all. An agency generally cannot act against each technical violation of the statute it is charged with enforcing. The agency is far better equipped than the courts to deal with the many variables involved in the proper ordering of its priorities.

Id. at 831-32. In *Sierra Club*, the Ninth Circuit held that an Environmental Protection Agency decision not to investigate and enforce the Clean Water Act is discretionary and unreviewable under the APA. 268 F.3d at 907-908. Here, managing the various visitor uses of the national parks is particularly within the expertise of the NPS. The Park Service is best equipped to make the determination to enforce or not enforce any particular regulation governing visitor uses within the park. Accordingly, the decision to not enforce (as well as the decision to enforce) Section 2.15 of Title 36 is discretionary and not subject to judicial review.

3. Defendants' reliance on *Ft. Funston Dog Walkers v. Babbitt* is misplaced as Defendants allegations directly contradict the Amendment to Findings of Fact ordered by Judge Alsup on May 16, 2000 and existing decisions by this District.

Defendants rely in error on stricken portions of Judge Alsup's decision in *Ft. Funston Dog Walkers v. Babbitt*, 96 F. Supp.2d 1021 (N.D. Cal. 2000). This case challenged the validity of a park area closure effected by GGNRA under the authority of 36 C.F.R. § 1.5, not § 2.15. *Ft.*

F. Supp. at 1042 (footnotes omitted).

Funston Dog simply did not involve a challenge to the applicability of the leash regulation at GGNRA. Nowhere in the final findings of the Court is the applicability of 36 C.F.R. § 2.15(a)(2) to GGNRA put at issue or otherwise adjudicated.

Moreover, the portion of the court's opinion cited by Defendants was stricken by Judge Alsup's subsequent order. Attach. A, Ex. 16 (*Ft. Funston Dog Walkers v. Babbitt*, No. C 00-00877 WHA, Amendment to Findings of Fact dated April 23, 2000 (May 26, 2000) ("Amended Findings")). The Court in *Ft. Funston Dog Walkers*, as Defendants here, relied in error on an outdated and superceded GGNRA Compendium Amendment from 1996. Attach. A, Ex. 18 (Amended Findings at 2). Specifically, Judge Alsup's April, 2000, decision erroneously stated that "although the [NPS] generally requires that pets be on-leash in national parks, the Park Service allows dog owners to walk their dogs off-leash at Fort Funston" and "walking dogs off-leash in Fort Funston was expressly permitted." *Ft. Funston Dog Walkers*, 96 F. Supp.2d at 1023 and 1038.

Upon review of the United States' and Intervenor's subsequent briefs in that case, Judge Alsup issued an Amendment to Findings of Fact Dated April 23, 2000, wherein the court amended its "findings to strike all references to the 1996 Compendium and all analysis that depended on it." Attach. A, Ex. 16, at 2. "[T]he Compendium upon which the Court relied was superceded by a compendium that did not designate Fort Funston as a voice control area." *Id.* In fact, before 1996 and each year thereafter, there has been no mention of "voice control" in the park's compendium. *See* Attach. A, Ex. 19 (GGNRA's Compendium for 1995, 1997, 2003, and supporting documentation). Accordingly, *Ft. Funston Dog* provides no support for Defendants' claim that they are exempt from federal regulation.

Finally, Defendants' argument that they are exempt from Section 2.15 runs afoul of recent decisions issued by this Court. This District's convictions in *United States v. Tanaka*, No. P120707 MEJ, decided January 23, 2002 and *United States v. Allen*, No. P121645 MEJ and P121649 MEJ, decided on February 27, 2002, for violations of Section 2.15 within GGNRA unequivocally demonstrates that this nation-wide regulation does, in fact, apply to all persons within GGNRA, including Defendants. Attach. A, Exs. 20-21.

IV. CONCLUSION

In light of the above arguments, the United States may lawfully enforce NPS regulations on tide and submerged lands adjacent and contiguous to Crissy Field.

Accordingly, the United States respectfully requests that the Court deny Defendants' motion.

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Respectfully Submitted,

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