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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

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| UNITED STATES OF AMERICA, | ) | No. P426479 |
| | ) | |
| Plaintiff, | ) | MOTION TO DISMISS FOR LACK OF JURISDICTION |
| | ) | |
| v. | ) | |
| | ) | |
| GRETCHEN BARLEY, | ) | |
| | ) | |
| Defendant. | ) | |
| | ) | |

## I. INTRODUCTION

On March 13, 2004, Gretchen Barley was issued a citation pursuant to 36 CFR Section 2.15, subdivision (a)(2) [the "Regulation"], for allegedly "[f]ailing to ... restrain on a leash ... a pet." 36 CFR Section 2.15(a)(2) does not apply to this case because Ms. Barley and her dog were on tidelands owned by the State of California, not on property under federal jurisdiction in the Golden Gate National Recreation Area ("GGNRA").

The regulation at issue (36 CFR Sec. 2.15(a)(2)) applies only within "[t]he boundaries of federally **owned** lands and waters administered by the National Park Service." (36 CFR 1.2, subd. (a)(1), emphasis added.) Indeed, the Regulations specifically state that they "do not apply on non-federally owned lands and waters." (36 CFR 1.2(b).) The wet portion of the beach on which Ms. Barley was standing, and the water in which her dog was swimming, are not "federally owned lands" and are not subject to Federal Jurisdiction.[1]

## II. PRIOR CASES REGARDING FEDERAL JURISDICTION OVER THE PRESIDIO AND TIDELANDS

The question of the jurisdiction of the United States over California tidelands has been litigated on numerous occasions. The question of Federal Jurisdiction over the Presidio has also been litigated. The confluence of these two lines of cases leads to the conclusion that the United States has no jurisdiction over the tidelands bordering the Presidio, but that it has exclusive jurisdiction over the Presidio itself.

### A. A BRIEF HISTORY OF TIDELAND OWNERSHIP IN CALIFORNIA

As the Supreme Court recognized in United States v. California, 436 U.S. 32 n. 3 (1978), all public lands belonging to the Mexican government became

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1. While the federal Regulation likely applies to the vast majority of the lands within the Presidio, it does not, by its own terms, under decisions of the United States Supreme Court, and under California law, apply to the wet portion of the beach (and that portion up to the mean high water mark) on which Ms. Barley was standing and the water in which her dog was swimming. Accordingly, the citation was issued in excess of federal jurisdiction.

public lands of the United States upon the signing of the Treaty of Guadalupe Hidalgo on February 2, 1848. ([Former] Article VIII, 3 West's California Constitution, pp. 727, et seq. (1954); see also, City of Los Angeles v. Venice Peninsula Properties, 31 Cal.3d 288, 294 (1982), disapproved on another ground, Summa Corp. v. California ex rel. State Land Comm., 466 U.S. 198 (1984).) In 1851, the federal government passed "An Act to Ascertain and Settle the Private Claims in the State of California." "Under the Act of 1851, all land in California, including tidelands, which had belonged to Mexico and was not patented to private parties, became the property of the United States." (9 Stat. 631, Sec. 13, p. 633; see, City of Los Angeles v. Venice Peninsula Properties, 31 Cal.3d at 294, 296). "The federal government held the interest in tidelands in trust for the future state, and when California was admitted to the Union [in 1850], it succeeded to the rights of the United States as an incident of sovereignty." (City of Los Angeles v. Venice Peninsula Properties, 31 Cal.3d at 296, citing City of Berkeley v. Superior Court, 26 Cal.3d 515, 521 (1980).) The federal government "retained an interest in the tidelands," but not in a proprietary capacity, and "this interest was acquired by California upon its admission to statehood." (City of Los Angeles v. Venice Peninsula Properties, 31 Cal.3d at 300, 302.)

In Borax Consolidated, Ltd. v. City of Los Angeles, 296 U.S. 10 (1935), the United States Supreme Court set forth the "settled principles governing the title to tidelands." "The soils under tidewaters within the original states were reserved to them respectively, and the states since admitted to the Union have the same

sovereignty and jurisdiction in relation to such lands within their borders as the original states possessed." (Citations omitted) "This doctrine applies to tidelands in California." "Upon the acquisition of the territory [of California] from Mexico, the United States acquired the title to tidelands equally with the title to upland, but held the former only in trust for the future states that might be erected out of that territory." (296 U.S. at 15, citations omitted.) Title to the tidelands held in trust by the United States, "passed to California at the time of her admission to the Union in 1850." (296 U.S. at 16; see also Knight v. United Land Assn., 142 U.S. 161, and People v. Hecker, 179 Cal.App.2d 823, 835-836 (1960).)

In 1872, California enacted Civil Code Section 670, codifying California's ownership of all tidelands within the State.[2]

California Civil Code Section 670 provides:

> The State is the owner of all land below tide water, and below ordinary high-water mark, bordering upon tide water within the State; of all land below the water of a navigable lake or stream; of all property lawfully appropriated by it to is own use; of all property dedicated to the State; and of all property of which there is no other owner.

Civil Code Section 607 was amended and given its current form by the amendment of 1873-74. (West's Annotated Civil Code Section 670, "Historical

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[2] In United States v. Bateman, 34 F. 86 (9th Cir. 1888) the Ninth Circuit concluded that jurisdiction over the Presidio had passed to California. Accordingly, the interpretation of the scope of subsequent transfers by California to the Federal government is a matter of state law. (State of California, ex rel. State Lands Commission v. United States, 457 U.S. 273, 282 (1982).)

and Statutory Notes.") "[I]n California the state is the owner of all land below tide water." (Miramar Co. v. City of Santa Barbara, 23 Cal.2d 170, 174 (1943), citing Civil Code Section 670.) The term "tidelands" is "defined as the shore of the mainland and of islands, between the line of mean high water and the line of mean lower low water . . . ." (United States v. California, 436 U.S.32, fn 7 (1978).) This includes not simply the wet portion of the beach but all of the beach up to the mean high water mark. (Lechuza Villas West v. California Coastal Commission 525 U.S. 868 (1998).)

> The State owns all tidelands below the ordinary high water mark, and holds such lands in trust for the public (Civ. Code, Sec. 670; State of Cal. Ex rel. State Lands Com. v. Superior Court 11 Cal.4th 50, 63) (1995)) while the owners of land bordering on tidelands take to the ordinary high water mark.

(Lechuza Villas West v. California Coastal Comm., 60 Cal.App.4th at 235.)

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

## 1. THE PUBLIC TRUST CHARACTER OF CALIFORNIA TIDELANDS

"The land under tide waters has a special legal character"; "submerged tidelands are held by the state in trust for the common use of the public as part of the inherent sovereignty of the people." (State of California ex rel. State Lands Comm. v. United States, 512 F.Supp. 36, 40 (1981), citing Illinois Central Railroad v. Illinois, 146 U.S. 387, 452, 455, 459 (1892).) While it is unclear (and undocumented) as to the statutory basis for the State grant of jurisdiction over the Presidio, in City of Berkeley v. Superior Court, 26 Cal.3d 515, 525, 528, (1980) the California Supreme Court discussed the "public trust" doctrine as it applied to the purported grant of tidelands and held that:

> "[S]tatutes purporting to abandon the public trust are to be strictly construed; the intent to abandon must be clearly expressed or necessarily implied; and if any interpretation of the statute is reasonably possible which would retain the public's interest in tidelands, the court must give the statute such an interpretation."

(Id., at p. 528.)[3] The narrow interpretation of grants of tideland is demonstrated by a series of cases in which California made grants to other governmental entities for the purposes of harbor development. In each of those cases, the purported grants

[3] The Supreme Court gives a long and somewhat interesting history of the soverign right to the tidelands and the necessity of a strict constriction of any grant of those tidelands in Shively v. Bowlby, 152 U.S. 1 (1894).

of tidelands were severely limited, even in the case of grant language expressly containing a grant of the tidelands portion of the property.[4]

In State of California ex rel. State Lands Com. v. County of Orange, 134 Cal.App.3d 20 (1982), the Court narrowly construed the State grant to Orange County of the "tidelands and submerged lands of the Pacific Ocean" at Dana Point in order to build a harbor. Although that grant specifically gave Orange County the ability to collect and retain rents on the harbor leases, after Orange County had spent more than 12 million dollars building the harbor and was collecting money from leases there, the State sued contending that Orange County did not have the right to spend that money on non-trust uses. The Court of Appeal agreed holding:

> Rather, the issue to be decided under the rules of statutory interpretation of People v. California Fish Co., 166 Cal. 576, and City of Berkeley v. Superior Court, 26 Cal.3d 515, is whether the Legislature clearly evidenced its intent to abandon the public trust and the public interest in tidelands and their revenues. See City of Long Beach v. Morse, 31 Cal.2d at p. 298. No such intent is evident in the statute here under consideration. No findings of the necessity or advisability of cutting off the State from this source of

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

> revenue are to be found in it, or elsewhere. City of Long Beach v. Mansell 3 Cal.3d 462, 482 (1970). If we could find an intent to abandon the public trust, the constitutional prohibition against a gift of public monies or things of value remains as a barrier to the County's activities. Our duty is to strictly construe the statute to, if possible, "retain the public's interest in tidelands." City of Berkeley v. Superior Court, 26 Cal.3d 515(1980).

Similarly in Mallon v. City of Long Beach, 44 Cal.2d 199 (1955), the California Supreme Court considered an express attempt by the California Legislature to allow Long Beach to keep 50 percent of the revenues from oil and gas drilling in the Long Beach Harbor after an express legislative finding that the funds were "no longer required for navigation, commerce and fisheries, nor for such uses, trusts, conditions and restrictions as are imposed by said acts." Id. at p. 204. Although the Court concluded the Legislature had the power to make such a grant of proceeds from tidelands, as long as it retained the power to protect the public's interest in the tidelands (Id., at 207), the Supreme Court held that such a transfer of State assets would be a gift of public assets in violation of the California Constitution's gift clause (Art. 16, § 6). (Id., at 222.)

## 2. THE HISTORY OF THE PRESIDIO

In United States v. Bateman, 34 F. 86 (9th Cir. 1888), the Ninth Circuit held that, in 1888, there was not exclusive Federal Jurisdiction over the Presidio because upon the grant of Statehood to California, the Federal Government did not reserve its sovereignty over lands it was using for military purposes.

By express legislation in 1891 and 1897, however, the State of California ceded exclusive jurisdiction over the Presidio to the United States. (United States v. Watkins, 22 F.2d 437 (1927).)

That legislation, however, could not have transferred jurisdiction over the Crissy Field tidelands to the federal government, because as previously discussed, the California Constitution of 1879 expressly recognized State jurisdiction over the tidelands and forbade the State from alienating them. (Cal. Const. Art. 15, § 3; People ex inf. Webb v. California Fish Co.,166 Cal. 576 (1913). See also, United States v. Aranson, 696 F.2d 654 (1983).)

In 1891 California granted the United States government jurisdiction over land being used as military reservations. That grant of jurisdiction, however, made no mention of tidelands. That act is quoted in Watkins:

> [T]he Legislature of the state enacted, in 1891 (St. 1891, p. 262), the following statute: 'Section 1. The state of California hereby cedes to the United States of America exclusive jurisdiction over such piece or parcel of land as may have been or may be hereafter ceded or conveyed to the United States, during the time the United States shall be or remain the owner thereof, for all purposes except the administration of the criminal laws of this state and the service of civil process therein. Sec. 2. This act shall take effect immediately.'

(United States v. Watkins, 22 F.2d 437,438 (1927).) There were two additional separate Legislative Acts in March, 1897 transferring lands to the military. The first, the Act of March 2, 1897, which transferred jurisdiction over the Presidio to the government, applies to fast lands connected to the territory of California and

transferred jurisdiction over those fast lands, provided that the government filed a description of the lands it was acquiring in the appropriate county recorder's office. The Second Act, passed on March 9, 1897, gave the government jurisdiction over "islands held by the United States for military purposes or defense"… "from [the] high-water mark to 300 yards beyond low-water mark". (Stats. Cal. 1897, p. 74; United States v. Watkins, 22 F.2d 437, 438 (1927).) Because the boundaries of federal islands, i.e. Alcatraz, Angel, etc. were obvious, there was no need for a formal metes and bounds description.

## III. THE ACTS OF MARCH 2, 1897 AND MARCH 9, 1987 DID NOT GIVE THE GOVERNMENT JURISDICTION OVER PRESIDIO TIDELANDS.

Unlike the Act of March 9, 1897which expressly gave the government jurisdiction over tidelands surrounding Federal islands, the California Legislative Act of March 2, 1897, makes absolutely no mention of the transfer of tidelands. Instead, the Act states:

> The State of California hereby cedes to the United States of America exclusive jurisdiction over all lands within this State now held, occupied, or reserved by the Government of the United States for military purposes or defense, or which may hereafter be ceded or conveyed to said United States for such purposes; provided, that a sufficient description by metes and bounds and a map or plat of such lands be filed in the proper office of record in the county in which the same are situated

The failure of the March 2 Act to specifically mention tidelands is consistent with the provisions of the California Constitution forbidding alienation

of the tidelands. The legislature's knowledge of its inability to alienate coastal tidelands, but its potential ability to alienate tidelands surrounding islands exclusively occupied by the United States for military purposes, was demonstrated just one week later when the California Legislature specifically mentioned the tidelands in the Act of March 9, 1897.

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

There are several other reasons why the Act of March 2, 1897 did not convey jurisdiction over the State's tidelands to the federal government. First, as indicated above, the Act of March 7 does not mention any legislative intent to convey jurisdiction over the Presidio tidelands to the government. Second, California Civil Code Section 830 provides that "[e]xcept where the grant under which the land is held indicates a different intent, the owner of the upland, when it borders on tide water, takes to ordinary high-water mark..." Giving effect to this statute, the California Supreme Court, in Abbott Kinney Co. v. City of Los Angeles, 53 Cal.2d 52, 57 (1959), stated: "Absent a showing to the contrary, the upland owner obtains title only to the high water mark." This rule is a codification of the earlier common law rule. (See, Borax Consolidated, Ltd. v. City of Los

Angeles, 296 U.S. at 22-23). As there is absolutely nothing in the Act of March 2, 1897 making any reference, even generally, to tidelands, the Act did not pass jurisdiction, or title to the State's tidelands to the United States.

Although the government has not yet supplied5 "a sufficient description by metes and bounds and a map or plat of such lands to be filed in the proper office of record in the county in which the same are situated," Watkins refers to such a description having been prepared in 1913. (United States v. Watkins, 22 F. 437, 438 (1927).) Assuming, arguendo, that such a description would purport to include a portion of the tidelands, that portion of the description purporting to transfer jurisdiction over the tidelands would be void as in excess of the legislative grant. (City of Berkeley v. Superior Court, 26 Cal.3d 515 (1980).)

As we have previously discussed, purported grants of tidelands are strictly construed.

> When the state, in the exercise of its discretion as trustee, has decided that portions of the tideland should be thus excluded from navigation, and sold to private use, its determination is conclusive upon the courts; but statutes purporting to authorize an abandonment of such public use will be carefully scanned to ascertain whether or not such was the legislative intention, and that intent must be clearly expressed or necessarily

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5 By a letter dated April 23, 2004, the government provided Steve Sayad, Esq. an explanation of its claim to have jurisdiction over the Crissy Field tidelands. Mr. Sayad, whose gracious assistance is hereby acknowledged, sent a letter to the government on April 29, 2004, explaining why the government's claim of jurisdiction to the Crissy field tidelands was unfounded. On May 5, 2004, Ms. Barley provided the court with Mr. Sayad's letter as a "declaration of my plea of not guilty" and as an explanation of why "my pet and I were not on Federally owned land when this citation was issued".

> implied. It will not be implied if any other inference is reasonably possible. And if any interpretation of the statute is reasonably possible which would not involve a destruction of the public use or an intention to terminate it in violation of the trust, the courts will give the statute such interpretation.

(People ex inf. Webb v. California Fish Co., 166 Cal. 576 (1913).)

The filing of a map by the United States in the San Francisco Recorders Office in 1913 cannot alter the terms of what the State intended to grant in 1897. The acceptance of such a survey by the Recorder's Office is purely a ministerial Act and Recorders are not authorized to determine whether a survey exceeds the grant of the Legislature.

In overturning claims to tidelands based upon recorded surveys, the California Supreme Court expressly recognized:

> The surveyor-general's approval of the application and survey was necessary. But this requirement applied only to the form of the survey and application, and the qualifications of the applicant. It did not empower him to reject the application, on the ground that the land was not suitable for cultivation, or that it was needed for navigation, or that its sale to private use would interfere with or destroy the public easement to which such land is dedicated. The applicant determined what land he desired to buy, he caused it to be surveyed, if that had not already been done, he made his application, and, if he was a person qualified to buy, and his proceedings were regular in form, he thereupon became entitled to complete the purchase, and could compel the officers of the state to execute the title papers necessary to convey it to him, on payment of the fixed price of one dollar an acre.

(People ex inf. Webb v. California Fish Co.,166 Cal. 576, 591 (1913).) If the survey were proof of ownership, California would own no tidelands because:

> The tidelands embraced in these statutes, under the generally accepted meaning of that term, includes the entire sea beach from the Oregon line to Mexico and the shores of every bay, inlet, estuary, and navigable stream as far up as tide water goes.

(People ex inf. Webb v. California Fish Co., 166 Cal. 576, 592 (1913).)

## IV. ASSUMING ARGUENDO THERE WAS A GRANT TO THE GOVERNMENT, THAT GRANT WAS OVERTURNED BY THE SUBMERGED LANDS ACT

Finally, if any argument can be made that either of the Acts of 1897 conveyed title in or jurisdiction over tidelands such as those at Crissy Field, the Submerged Lands Act would have returned the Crissy Field tidelands to California.

"The very purpose of the Submerged Lands Act was to undo the effect of this Court's 1947 decision in United States v. California, 436 U.S. 32, 37 (1978). In enacting it, Congress "recognized, confirmed, established, and vested in and assigned to," § 6(a), 67 Stat. 32, 43 U.S.C. § 1314(a), the States "(1) title to and ownership of the lands beneath navigable waters within the boundaries of the respective States, and the natural resources within such lands and waters, and (2) the right and power to manage, administer, lease, develop, and use the said lands and natural resources . . . . (§ 3(a), 67 Stat. 30, 43 U.S.C. § 1311(a))." (United States v. California, 436 U.S. at 37.)

Under subdivision (b) of the Submerged Lands Act, the United States "releases and relinquishes" to the States "all right, title and interest of the United States, if any it has, in and to all said lands...." (43 U.S.C. Section 1311(b).) The term "lands beneath navigable waters" is defined in the Act to include "(2) all lands permanently or periodically covered by tidal waters up to but not above the line of mean high tide and seaward to a line three geographical miles distant from the coast line of each such State...." (43 U.S.C. Section 1301(a).) In interpreting the Submerged Lands Act's application to the Channel Islands National Monument, the Supreme Court used the common definition of tidelands. (United States v. California, 436 U.S. at n.7.)

"The effect of the [Submerged Lands] Act was ... to confirm the States' title to the beds of navigable waters within their boundaries **as against any claim of the United States Government**." (Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co., 429 U.S. 363 (1977), emphasis added.) The Act "placed title to submerged tidelands in the states from the date the state was admitted to the Union as an incidence of the state's sovereignty." (State of California ex rel. State Lands Comm. v. United States, 512 F.Supp. 36, 39-40 (1981), citing Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co., 429 U.S. 363, 374 (1977).) Thus, if the Act of March 2, 1897 could have been construed as somehow transferring title over the Crissy Field Tidelands to the Federal government, and we strongly contend such a construction is unreasonable, the Submerged Lands Act would have returned the tidelands to the State.

In United States v. California, 436 U.S. 32 (1978), the Supreme Court addressed a very similar issue. The issue in that case was whether the Federal government had the power to include submerged lands surrounding Anacapa and Santa Barbara islands in the Channel Islands National Monument. The Court answered its question with a resounding NO, ruling that the Submerged Lands Act had 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 Submerged Lands Act in 1953. This Court may take judicial notice of the fact that the United States has not occupied the tidelands of Crissy Field (with the possible exception of a small area surrounding the Coast Guard station).[6.]

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## V. THE ARGUMENTS SUPPORTING JURISDICTION THAT THE GOVERNMENT HAS MADE IN THE PAST ARE NOT WELL TAKEN

Prior to the citation to Ms. Barley, the subject of Federal jurisdiction over the Crissy Field tidelands has been the subject of discussion between the government and Stephen Sayad. Based upon the government's correspondence with Mr. Sayad, we expect the government to argue that the government has jurisdiction over the Crissy Tidelands because (1) the State of California allegedly ceded fee title to the tidelands via the Act of March 9, 1897; (2) a 1974 letter from

the California State Lands Commission purportedly acknowledged that the Act of March 9, 1897 gave jurisdiction over the Presidio tidelands to the government; and (3) Section 1.2 of Title 36 of the Code of Federal Regulations: "apply to all persons entering, using, visiting, or otherwise within…[w]aters subject to the jurisdiction of the United States located within the boundaries of the National Park System, including navigable waters and areas within the ordinary reach (up to the mean high water line in places suvject to the ebb and flow of the tide and up to the oridnary high water mark in other places ) and without regard to the ownership of submerged lands, tidelands, or lowlands." These arguments, and the documents purporting to support them, are not sufficient to establish Federal Jurisdiction to the Crissy Tidelands.

First, and as indicated above, the California Legislative Act of March 9, 1897 did not transfer ownership of the tidelands at Crissy Field to the federal government because that Act only applies to islands which "lie upon tidal waters" and lands, "**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.... (Emphasis added.) The tidelands at Crissy Field do not "[lie] adjacent and contiguous to any island, the title to which is in the United States."

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[6] Moreover, the government has the burden of proving all elements of a case, including jurisdiction.

Second, the actual text of the State Lands Commission letter clearly refers to jurisdiction over "Alcatraz", not the Presidio, and through its statement that: "by Act approved March 9, 1897, the State of California ceded title to the tidelands adjacent and contiguous **to the island**...." (Emphasis added.) Accordingly, the State Lands Commission Letter, if it indicates anything[7] simply indicates that the State Lands Commission agrees with our argument that the Act of March 9, 1897 governs islands and has no application to the fast lands of the GGNRA such as Crissy Field.

The third argument in Ms. DiLuigi's letter of April 23, 2004 which purports to support federal jurisdiction over the tidelands is a portion of the language contained in "Section 1.2 of Title 36 of the Code of Federal Regulations." The government has argued that this regulation, 36 CFR Section 1.2, subdivision (a)(3), provides that the on-leash regulation "appl[ies] to all persons entering, using, visiting, or otherwise within . . . (3) Waters subject to the jurisdiction of the United States located within the boundaries of the National Park System, including navigable waters and areas within their ordinary reach (up to the mean high water line in places subject to the ebb and flow of the tide and up to the ordinary high water mark in other places) and without regard to the ownership of submerged lands, tidelands, or lowlands."

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[7] The letter is of dubious evidentiary value as it is without foundation, and is hearsay based upon hearsay of unknown origin,

Even assuming, arguendo, that 36 CFR Section 1.2, subdivision (a)(2), and/or subdivision (b) do not require that the federal government own the tidelands at Crissy Field in order for the on-leash regulation to apply (a point on which we have a significant difference of opinion), the government's reliance on subdivision (a)(3) is unavailing for several reasons.

First, as we have argued above, there is no transfer documentation to support the prerequisite for invocation of 36 CFR Section 1.2, subdivision (a)(3), that is, that the waters and tidelands at Crissy Field are "subject to the jurisdiction of the United States...." The only possible basis for the assertion of "jurisdiction of the United States" over the water and tidelands at Crissy Field is the California Legislative Act of March 2, 1897. As we have argued above, this Act, unlike the Act of March 9, 1897, makes absolutely no mention of the transfer of tidelands.

Second, the language of the CFR itself limits the jurisdiction of the CFR to waters "located within the boundaries of the National Park System." There can be no claim that the entire San Francisco Bay is within the boundaries of the National Park System.

## VI. CONCLUSION

The jurisdiction of the GGNRA at Crissy Field, like the property rights of David Geffen, Barbara Streisand and other rich and powerful property owners in California, ends at the high water mark. The tidelands are reserved for the people of California to enjoy as they see fit, without petty regulation from Washington. The continued harassment, ticketing, arresting, and prosecution of individuals on

non-federally owned land at Crissy Field are actions in excess of federal jurisdiction and require dismissal of the citation issued against Ms. Barley.

Respectfully submitted,

Christopher J. Cannon