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

Attorney for GRETCHEN BARLEY and DONALD H. KIESELHORST

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. GRETCHEN BARLEY, DONALD H. KIESELHORST, Defendants.	)	Nos. P166667 P426479 MEMORANDUM OF POINTS AND AUTHORITIES IN REPLY TO GOVERNMENT'S OPPOSITION TO MOTION TO DISMISS

INTRODUCTION

The government's Opposition to defendants' Motion to Dismiss continues the government's consistent pattern of claiming that off leash dog walking is forbidden at Crissy Field, but justifying that claim with inconsistent and contradictory theories none of which have a solid basis in law or fact.

The government's Opposition to our motion conflicts with its earlier letter to Mr. Sayad pursuant to which it attempted to describe its claim to "jurisdiction" (as opposed to ownership or lessee) over the tidelands at Crissy Field. In that letter, it expressly relied upon (and included a copy of) the decision in United States v. Watkins, 22 F.2d 438 (N.D.Cal. 1927), which it now claims "is of no relevance here." GB 11.

Instead, the government now relies heavily on documents drafted by the government itself, years prior to 1897, which purport to delineate what the government was attempting to get from the State of California but never actually obtained. In fact, the government may have tried to get what it wanted, but the Act of March 9, 1897 that was passed was substantially different than what the government wanted, and it never gave the government ownership of the tidelands at Crissy Field. The government's correspondence concerning what the government wanted bears no relevance to what California granted.

Apart from serious questions regarding its authenticity and relevance, the inclusion of government correspondence indicating what the War Department was attempting to get California to convey, demonstrates upon just how thin a reed the government's claim of jurisdiction-via-ownership is based. Even assuming, arguendo, that internal government documents describing what the government wanted are admissible, a comparison of those documents to the text of the March 9, 1897 Act, makes it clear that regardless of what the government wanted, the State's grant to the government was limited to the fast lands of

military bases lying along the water, such as the Presidio, but included tidelands, when those bases lay upon the water.

The government's arguments concerning the Pet Policy are also unfounded. That policy exists. It has not been revoked and tickets may not be issued for acts permitted under the Pet Policy.

ARGUMENT

I. THE ACT OF MARCH 9, 1987 DID NOT CONVEY TITLE TO TIDELANDS ADJACENT AND CONTIGUOUS TO ISLANDS LYING UPON TIDAL WATERS

The government argues that a plain reading of the Act conveyed title to military bases on the mainland. The government contends that the plain construction of the Act argued by defendants "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. GB 8. This argument ignores the plain text of the Grant, which applies to islands, "as lie upon tidal waters." A brief examination of other California cases concerning tideland grants and borders confirms the plain meaning of the Act's language. See e.g., Sherwood v. Wood, 38 Cal.App. 745 (1918)(the lands of the plaintiff did not lie upon or along the stream). Moreover, under the government's interpretation of the Grant, the word "island" is mere surplusage." As the government itself points out, all words must be given effect. GB 8. Despite the government's wishes, the Act of March 9, 1987 did not grant

the Federal government title to tidelands lying adjacent to fastlands such as Crissy field.

Finally, even if the grant can be claimed to be ambiguous, and it is not, in National Audubon Society v. Superior Court, 33 Cal.3d 419, 452 (1983) the California Supreme Court held that: "'Statutes purporting to authorize an abandonment of 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 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.'" National Audubon Society, 33 Cal.3d at 438, citing People v. California Fish Co., 166 Cal. 576, 597 (1913), and Illinois Central Railroad Co. v. Illinois, 146 U.S. 387 (1892). Accordingly, even if the language of the Act is ambiguous, it must be construed against containing a grant of the Crissy Tidelands.

II. THE GOVERNMENT'S ARGUMENTS REGARDING THE SUPREMACY CLAUSES AND PROPERTY CLAUSES HAVE NO BASIS

First, and without citation to any case, the government claims that because it is a sovereign, the Constitutional provision forbidding alienation of tidelands does not apply to it. Again, the failure to cite any case or authority for this proposition demonstrates its patent weakness. Moreover, even if the government was right, the strong state policies against alienation of tidelands certainly tend to

show that the State would not alienate them as an accident of draftsmanship and that if it intended to transfer jurisdiction over the tidelands, it knew how to do it. "The public trust doctrine serves the function in that integrated system of preserving the continuing sovereign power of the state of protect public trust uses, a power which precludes ANYONE from acquiring a vested right to harm the public trust, and imposes a continuing duty on the state to take such uses into account . . .." National Audubon Society 33 Cal.3d at 452 (emphasis added). The decision in National Audubon Society follows the decision City of Berkeley v. Superior Court, 26 Cal.3d 515 (1980) where the California Supreme Court recognized the courts' power to rescind apparent conveyances of tidelands not made in furtherance of the public trust.

Second, the government stretches for the Supremacy and Property Clauses to claim that somehow "[i]t 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." GB 17. This argument assumes, somehow, that the government owns the Crissy Tidelands. In point of fact, however, "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." Borax Consolidated, Ltd. v. City of Los Angeles, 296 U.S. 10, 16 (1935). See also Knight v. United Land Ass'n, 142 U.S. 161 (1891) and People v. Hecker, 179 Cal.App.2d 823, 835-836 (1960).

III. THE LEASE FROM THE STATE LANDS COMMISSION SUPPORTS OUR ARGUMENTS THAT JURISDICTION NEVER PASSED TO THE GOVERNMENT

The State Lands Commission ("SLC") lease demonstrates that the State never gave management of the Crissy Tidelands to the government, for, if the State had passed title by the Act of March 9, 1897, there would be no need for such a lease.

It is undisputed that traditional public trust easements include general recreational purposes. Marks v. Whitney, 6 Cal.3d 251, 259 (1971). As even the government recognized in the 1979 Pet Policy and the legislative history of the Golden Gate National Recreation Area (GGNRA) enabling legislation, those traditional recreational uses of Crissy Field have long included off leash dog walking. Indeed, the SLC lease itself specifically recognized that the purpose of the lease was "[t]o enhance the public safety, use and enjoyment of the lands and water of the subject lands." This stated purpose of the SLC lease is completely consistent with the State's public trust obligations and is substantially different than the National Park Service's (NPS) task of promoting and regulating national parks to conform to the fundamental purpose of conserving the scenery and the wildlife so as to leave them unimpaired for the enjoyment of future generations. 16 U.S.C. § 1; Wilderness Public Rights Fund v. Kleppe, 608 F.2d 1250 (9th Cir. 1979). In direct contrast to the general conservation mandate of the NPS, the SLC lease specifically "agrees that public access to, and use of, the existing beaches and sand will remain open and available for public use." GEx. 13 p.3.

This conflict between continued use and preservation is ongoing and is an area in which reasonable minds can differ. Some conservation absolutists would ban all activities from the parks because both man and beast can tread with a heavy foot. Other individuals and groups promote so-called wise use as a guise for the rape of the landscape and the devastation of its natural beauty. This is not such an extreme case[1]. Literally thousands of San Franciscans have walked their dogs at Crissy Field since before the turn of the century. The SLC is designed to enhance the public use and specifically requires that the existing beaches will remain open and available for public use. Indeed, when that lease was signed in 1987, the 1979 Pet Policy (as continuously recognized by one of the signers of the SLC, Superintendent Brian O'Neill) was in effect and both the Park Service and the State expected that use to be preserved.

The terms of the SLC lease are consistent with the statutory mandate of the GGNRA. The GGNRA, however, has a somewhat different statutory dedication to recreation than most national parks, which emphasize conversation. As noted in our Opening Brief, the enabling legislation[2] specifically recognized

---

[1] The government has mischaracterized defendants' position as contending: "the public trust allows them carte blanche to recreate at Crissy Field in whatever manner they choose."GB p. 19. The defendants are not seeking carte blanch to engage in any activity they contend is recreational but only to continue the type of traditional recreational activity that has been ongoing at Crissy Field for decades.

[2] In order to preserve for public use and enjoyment certain areas of Marin and San Francisco Counties, California, possessing outstanding natural, historic, scenic, and recreational values, and in order to provide for the maintenance of needed recreational open space necessary to urban environment and planning, the Golden Gate National Recreation Area (hereinafter "recreation area") is hereby established. In the

the urban character of the GGNRA and required management practices to maintain traditional recreational open spaces necessary to an urban environment. The legislative history specifically reflects that existing recreational functions are to continue and that those functions include flying kits, sunbathing and off leash dog walking.

IV. THE VOICE COMMAND PET POLICY ALLOWING OFF LEASH DOG WALKING AT CRISSY FIELD WAS PROPERLY ENACTED AND IS IN FORCE TODAY

As set forth in our Opening Brief, Judge Alsup has already determined that the Pet Policy may not be modified unilaterally and that any modification requires publication, and a public comment period. That decision should end this matter and these tickets should be dismissed. As we also predicted in that Brief, however, the government now contends that "[n]o authority exists to that allows GGNRA's superintendent to relax the NPS-wide regulatory restriction requiring dogs to be on leash." GB 25. The government, however, fails to cite any authority for its claim the Superintendent has no power to modify general regulations to accommodate the different circumstances and statutory mandates for individual parks. As we also demonstrated in our Opening Brief, the Park Service's own rules and regulations provide for that authority.

---

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

When the Pet Policy was established, the NPS' official policy manual provided that:

> Any restrictions on recreational use will be limited to the minimum necessary to protect park resources and values and to promote visitor safety and enjoyment.

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

The Policy Manual in effect today, NPS Management Policies 2001, specifically recognizes that Individual Park Superintendents must be able to make specific policies that comport with the mission of their particular park.

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

Ex.[3] S.

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

---

[3] All references to "Ex." refers to Exhibits to our Opening Brief. We have attached one additional Exhibit to this Brief which is specifically referred to as Exhibit A to Reply Brief.

Here there is nothing to indicate that off leash dog walking is contrary to statute, and as Judge Alsup recognized, "[i]n the management of the recreation area, the Secretary of the Interior ... shall utilize the resources in a manner which will provide for recreation and educational opportunities consistent with sound principles of land use planning and management." Fort Funston Dog Walkers, 96 F.Supp.2d 1021, 1025 (N.D.Cal 2000).

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

As the government points out, the park service has discontinued its former three pronged administrative policy distinguishing between environmental, recreational and historical parks. GB 24. The government claims, however, that this change of policy was dictated by Congress through a series of amendments to the National Park Organic Act. GB 24. In fact, there have been no amendments to the Organic Act changing the management system. As the Court recognized in National Rifle Ass'n of America v. Potter, 628 F.Supp. 903 (D.D.C. 1986) and whose findings were adopted in Bicycles Trails Council of Marin, a 1970 amendment to the Organic Act, known as the General Authorities Act, 16 U.S.C. §§ 1a-1, 1c (1982), Congress and the Redwood National Park Expansion Act, Pub.L.

No. 95-250, 92 Stat. 163, were perceived by the NPS as requiring a change in its management policies.

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

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

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

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

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

Moreover, contemporaneously with these amendments to the Organic Act, the GGNRA was established as an urban recreation area and the Presidio Trust was created in a unique management structure that specifically emphasized

recreation and cost efficiency, (16 U.S.C. 1; PL 104-333 (HR 4236) November 12, 1996, Omnibus Parks and Public Lands Management Act of 1996). in contrast to the NPS' general focus on resource preservation.

The statutory mandate of the GGNRA to provide recreational activities for citizens of the crowded Bay Area, is far different than the preserve and protect mandate of the majority of national parks.

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

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

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

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

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

At a Senate subcommittee hearing on the proposed legislation, Joseph Caverly, General Manager of the San Francisco Recreation and Park

Commission, addressed the importance of the GGNRA. Mr. Caverly stated that the GGNRA would "preserve valuable open space for citizens." Hearings on S. 2342, S. 3174, H.R. 16444 Before the Subcomm. on Parks and Recreation of the Senate Comm. on Interior and Insular Affairs, 92d Cong., 2d Sess. 117 (1972).

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

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

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

interesting that the government does not note any inconsistency in arguing that title to the Tidelands is conclusively determined by a brief mention filed in its brief arguing other issues (GB 10), but somehow sees its continued publication of the Pet Policy allowing off leash dog walking as irrelevant.)

It was not until the Fort Funston dog walking litigation was pending that the government tried to begin to take the position that the policy was illegal because it conflicted with a general park service regulation. Ex. N. It is noteworthy however, that while the Advisory Commission tried to take the position that the policy was illegal, that motion was rejected by a fourteen to one vote. The Advisory Commission, instead, decided to take "no action" on Bartke's motion to rescind the off leash pet policy. Ex. N. p.9. Since that date, no new regulations have been promulgated, yet the park police and rangers continue to ticket in areas where off leash dog walking is specifically allowed under the off leash pet policy. Those tickets must be dismissed.

There is nothing in the enabling legislation that evidences any intent to eliminate off leash dog walking; to the contrary, both the GGNRA enabling legislation and the Presidio Trust enabling legislation recognized the importance of recreation in the GGNRA and the continuation of existing recreational uses. (The Trust is encouraged to transfer to the administrative jurisdiction of the Secretary open space areas which have high public use potential and are contiguous to other lands administrated by the Secretary)

PL 104-333 (HR 4236) November 12, 1996, Omnibus Parks and Public Lands Management Act of 1996 § 103(b)(1).

In Fort Funston Dog Walkers, no one questioned the authority of the Superintendent to allow off leash dog walking and there are no reported cases undermining a Superintendent's authority to issue such a regulation. To the contrary, decisions such as City of Sausalito v. O'Neill, recognize that the Superintendent has great discretionary authority.

In City of Sausalito, this Court recognized that there was nothing inconsistent with the Organic Act and NPS regulations limiting commercialization of National Recreational Areas with the Park Service's decision to allow a 156 room hotel and conference center at Fort Baker. Just as in this case, there was no "special regulation" in Part 7 of Title 36 allowing the hotel to be built. Just as in this case, there was a general regulation, in that case, 36 C.F.R. 51.2,[4] which appeared to prevent the building of a commercial hotel. Nevertheless, this Court held that the planned development of the hotel was a reasoned exercise of the discretion delegated to the Secretary. .

For the long in-place Pet Policy to be illegal, this Court must find that Policy was an unreasonable exercise of discretion and was contrary to law. This Court cannot make either finding. As long as the Pet Policy was a reasonable

[4] This is also the policy of the Congress and the Secretary of the Interior that development of visitor services in park areas must be limited to those as are necessary and appropriate for public use and enjoyment of the park area in which they are located.

exercise of discretion, Judge Alsup squarely held that the attempted limitation of off leash dog walking in the GGNRA was highly controversial and that additional restrictions on off leash dog walking in the GGNRA could not be imposed without publication of a Notice of Proposed Rulemaking in the Federal Register and an opportunity for public comment as required by 36 C.F.R. 1.5(b). Fort Funston Dog Walkers, 96 F.Supp.2d at 1032. The Park Service has not published[5] such a Notice of Proposed Rulemaking and the off leash Pet Policy had not been rescinded. Accordingly, tickets issued for walking dogs in compliance with the off leash pet policy must be dismissed.

V. THE GOVERNMENT HAS A SUSPECT VIEW OF FT. FUNSTON DOG WALKERS

The government claims that 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 walkers to walk their dogs off-leash at Fort Funston" and "walking dogs off-leash in Fort Funston was expressly permitted." GB 29, quoting Ft. Funston Dog Walkers. The government quotes Judge Alsup accurately, but it does not indicate why he was in error.[6] In point of fact, the modification of Judge Alsup's decision actually strengthens our argument. In his original opinion, Judge Alsup did rely upon the

[5] The GGNRA however, has initiated a negotiated rule making progress designed to come up with a new regulation allowing off leash dog walking in the GGNRA. See section infra

Compendium to support his findings that off leash dog walking was expressly permitted. After modification, however, he still found that off leash dog walking was expressly permitted, as the documents we have submitted from that litigation conclusively demonstrate. He simply no longer relied upon the Compendium as support for that factually obvious proposition. The Park Service's own documents expressly allow dog walking off leash on the tidelands at Crissy Field.

VI. THE GOVERNMENT'S ESTOPPEL ARGUMENT DOES NOT PROVIDE AUTHORITY FOR AN AGENCY TO AVOID COMPLIANCE WITH THE REQUIREMENTS FOR PROPER DECISION MAKING

The government cites Pacific Shrimp Co. v. Unites States, Dept of Transp., 375 F. Supp. 1036 (W.D. Wash. 1974) repeatedly for the general concept when an agency allows conduct over a period of time, the agency is not thereby estopped from later changing its mind. GB 27. We have no argument with the general concept that the NPS may change rules and regulations and enforcement polices, the issue here, however, is what process the NPS must go through to change rules, regulations and public uses. Here, Judge Alsup has decided that the NPS must comply with the rulemaking procedure mandated by 36 C.F.R. §1.5(b).

///

[6] The government has no choice but to boldly argue Ft. Funston Dog Walkers was wrongly decided, because if Ft. Funston Dog Walkers was properly decided, and it was, defendants here must prevail.

The government's own Pacific Shrimp case illustrates the distinction. In Pacific Shrimp the agency had engaged in the public input process. The agency had issued a statement announcing a proposed policy change to take effect years later. Ultimately the policy change was considered and adopted in legislation and subsequently enforced. The affected parties who attempted to argue agency estoppel were defeated in part because of the public legislative process that had occurred prior to the enforcement of the change. See also Western Pioneer Inc. v. United States of America 709 F.2d 1331, 1337 (9th Cir. 1983). The circumstances here are very different. The NPS is improperly attempting to sidestep the specific rulemaking requirements of 36 C.F.R. § 1.5(b) before making a change.

The NPS seeks to avoid the rulemaking procedure mandated by 36 C.F.R. § 1.5(b) based on a self generated and self serving "legal" interpretation that the Pet Policy is not valid. This claim of invalidity, however, overlooks the breadth of the rulemaking requirements in 36 C.F.R.§ 1.5. Section 1.5 applies not only to changes in "official" policy but also on controversial changes to in public use patterns: "... a closure, designation, use or activity restriction ... that will result in a significant alteration in the public use pattern of the park area ... or is of a highly controversial nature ...."; and Judge Alsup has already decided and the NPS has already admitted that the restriction of off leash dog walking is highly controversial.

///

Accordingly, even if the Pet Policy was not "official," 36 C.F.R. § 1.5(b) protects against arbitrary closures of recreational park access by requiring that significant restrictions of public access can only occur after a notice and comment period. By declaring the Pet Policy invalid and seeking to give tickets to those acting as permitted under the Policy, the government is again attempting to do what Judge Alsup forbade, sidestepping the public input process to "railroad" through anti recreation closures.

The NPS attempt to do almost anything to avoid the rulemaking process was apparent to Judge Alsup. Judge Alsup specifically found that the NPS was acting with "an intent on the part of the National Park Service to railroad through the closure, to maintain secrecy, to unleash the fencing with lightening speed, and to establish a fait accompli." Ft. Funston Dog Walkers, 96 F. Supp 2d at 1037-38.

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

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

"That record shows the lengths to which the closure architects went in suppressing input." Id. at 1035. The present ticketing policy is just the latest in a long line of actions by the NPS in its attempt to restrict off leash dog walking without complying with the public comment process. Because that Policy can not be changed, except on an emergency basis, without compliance the public

input process, the Pet Policy has not been changed and defendants should be free to walk their dogs, off leash as permitted by the Pet Policy.

VII. THE ONGOING NEGOTIATED RULEMAKING PROCESS DEMONSTRATES THAT THE GGNRA HAS THE ABILITY TO ALLOW OFF LEASH DOG WALKING

As these prosecutions, other cases, Ft. Funston Dog Walkers, and the New Situation Assessment Report, (Ex A to Reply Brief) clearly demonstrate, over the past five years NPS staff and park users seeking to walk dogs off leash, have experienced increasing conflict due to the GGNRA's changed approach to dog management. This significant change has created both confusion and animosity among those who have used GGNRA areas for off-leash dog walking for decades. As required by Judge Alsup, GGNRA has finally decided to address this conflict through rulemaking, with a goal of writing a new regulation covering dog management for the GGNRA park. On May 14th of this year, GGNRA Superintendent O'Neil sent a letter to various interested parties proposing a Negotiated Rule Making in order to address: "dog management policies, including off-leash dog walking, at Golden Gate National Recreation Area (GGNRA)." Ex A to Reply Brief p. 19. The first phase of the process was to be a "Situation Assessment" conducted under the auspices of the U.S. Institute for Environmental Conflict Resolution, to determine if it would be possible to assemble a "committee of persons who could adequately express the concerns of affected interest groups "and would be willing to negotiate in good faith to reach

a consensus on a proposed rule for GGNRA allowing off leash dog walking." Ex. A to Reply Brief.

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

That professional assessment team, chosen by the NPS and described by the NPS as "a highly qualified team of experienced mediators" has reached the conclusion that "There appears to be a broad—not unanimous—expectation that GGNRA ultimately will publish a rule allowing some off-leash dog walking," (Id.) and went on to propose a detailed schedule for the proposed rulemaking allowing all stakeholders to be heard and eventually come up with a rule all parties can live with. Id. While the assessment does not take an official position on the legality of off leash dog walking at Crissy Field, if in fact, as the government claims such off leash recreation is prohibited by statute, there would be no need for a negotiated Rulemaking. There would be no need for a process and there would be no need for an assessment.

Accordingly, neither the mediators hired by the NPS, nor the Superintendent of the GGNRA agree with the government's position in its pleading here, that there can be no exceptions to the general regulation requiring dogs to be crated or on leash in National Parks.

This conclusion demonstrates the long established Pet Policy allowing recreation with off leash dogs is well within the discretion of the Superintendent.

Ft. Funston Dog Walkers demonstrates that any change in that policy can only be made after there is a period of Notice and Comment. Since there has not been such a period, the 1979 Pet Policy still stands.

CONCLUSION

These are criminal cases. The government bears the burden of proving each element, including jurisdiction, beyond a reasonable doubt, and when interpreting statutes imposing criminal penalties, the Court must apply the rule of lenity. Here there is no dispute, that for a lengthy period of time the NPS acknowledged an official GGNRA policy allowing off leash recreation with dogs. There is no also no dispute that a controversial Park policy cannot be modified except through a process of Notice and Comment. Nevertheless the government, in an attempt to avoid the Notice and Comment requirements recognized by Judge Alsup, a process which is now ongoing, arbitrarily contends that the 1979 Pet Policy should be ignored, because it conflicts with another, general, policy. The problem with this argument is if the general policy was as absolute as the government argues here, there could not be a proposed Rulemaking regarding GGNRA dog management, because that process could only lead to one conclusion, compliance with the general policy.

As this Court recognized in City of Sausalito, the Superintendent has considerable discretion to regulate activities in the GGNRA as long as those regulations are not inconsistent with the statutory mandate. There is no statutory mandate forbidding off leash dog recreation in the GGNRA. Without such a

mandate, the government cannot prove that the general regulation takes precedence over the specific 1979 Pet Policy and the defendants here may not be convicted of walking their dogs in compliance with one acknowledged policy, even though the NPS would rather apply another policy. Accordingly, the tickets issued to Gretchen Barley, Don Kieselhorst and Stephen Sayad must be dismissed.

DATED:

Respectfully Submitted,

Christopher J. Cannon
Attorney for Gretchen Barley
and Donald Kieselhorst

DECLARATION OF SERVICE BY MESSANGER

I, the undersigned, declare:

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

On September 27, 2004, I served the within:

MEMORANDUM OF POINTS AND AUTHORITIES IN REPLY TO GOVERNMENT'S OPPOSITION TO MOTION TO DISSMISS

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

Ms. Denee A. Diluigi
Special Assistant United States Attorney
450 Golden Gate Avenue
San Francisco, CA 94102

I declare under the penalty of perjury that the foregoing is true and correct, and that this declaration was executed on September 23, 2004, at San Francisco, California.

_____
Natlaja Sust