IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES,

Plaintiff,

v.

GRETCHEN BARLEY; STEPHEN S. SAYAD, and DONALD KIESELHORST,

Defendants.

No. P426479 EDL; P426497 EDL; P293164 EDL; P166667 EDL

ORDER GRANTING DEFENDANTS' MOTION TO DISMISS

In these related criminal citation matters, Defendants received citations for having their dogs off leash in Crissy Field in the Presidio in San Francisco, which is part of the Golden Gate National Recreation Area ("GGNRA"). The GGNRA is part of the National Park Service ("NPS"). An NPS regulation makes it unlawful 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." See 36 C.F.R. § 2.15(a)(2).

Defendants move to dismiss on the grounds that the NPS lacked jurisdiction to issue the citations because the regulation does not govern conduct on the tidelands at Crissy Field, where each Defendant claims he or she was standing with a dog off leash. The Government assumes, without conceding, that each Defendant was on the tidelands when he or she engaged in the conduct leading to issuance of the citation. See Pl.'s Opp'n at n. 2.

On November 2, 2004, the Court held a hearing on this matter. Based on the parties' submissions and oral arguments at the hearing, the Court issues the following Order.

DISCUSSION

1. Ownership of tidelands

"'[T]idelands' are lands 'over which the tide ebbs and flows . . . land as is affected by the tide.'" Phillips Petroleum Co. v. Miss., 484 U.S. 469, 477, n. 6 (1988) (citing Black's Law Dictionary 1329 (5th ed. 1979)). Seashore tidelands are specifically 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, 35 n. 7 (1978) (citation omitted). The mean high-water mark is located at the "average elevation of all the high tides occurring over a period of 18.6 years[.]" United States v. California, 382 U.S. 448, 450 (1966). The mean lower low-water mark is located at the "average elevation of all the daily lower low tides occurring over a period of 18.6 years[.]" Id. Individual states, rather than the federal government, hold tidelands in trust for the public's benefit. See Shively v. Bowlby, 152 U.S. 1, 24 (1894). There is a strong presumption against expropriation of tidelands to either private grantees or other governmental entities. See, e.g., Shively, 152 U.S. at 13; California v. County of Orange, 134 Cal. App. 3d 20 (1982).

Under the 1848 Treaty of Guadalupe Hidalgo, Mexico ceded to the United States all of its public land in the area that is now California. See United States v. California, 436 U.S. at 35 nn. 3, 7; Borax Consol. Ltd. v. City of Los Angeles, 296 U.S. 10, 15 (1935). When California gained admission to the Union in 1850, it acquired title from the federal public domain to most of the land ceded by Mexico, including all tidelands. Id. In particular, California acquired the Presidio, a Mexican military base, although the United States continued to use the base even after California's admission as a state. See United States v. Bateman, 34 F. 86, 89 (C.C.N.D. Cal. 1888).

According to state statutes dating back to 1872 and substantively unchanged today, California, not the federal government, owns all tidelands within the state except those it has granted to others. See Cal. Civ.Code § 670 ("The State is the owner of all land below tide water, and below ordinary high-water mark, bordering upon tide water within the State[.]"); see also Cal. Civ. Code § 830 (enacted 1872) ("Except 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[.]").

In the 1890's, California granted all state land used by the United States military, including

the Presidio, to the federal government. See U.S. v. Watkins, 22 F.2d 437, 438-439 (N.D. Cal. 1927). This retrocession occurred by way of three legislative grants, one in 1891 and two in 1897. Id. The first grant stated:

> 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.

Id. at 438; 1891 Cal. Stat. 262. In the second grant, on March 2, 1897, California transferred all military-use land in California, including the Presidio, back to the federal government:

> 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....

Id. at 439; 1897 Cal. Stat. 51-52. In the third grant, on March 9, 1897, the California legislature specifically relinquished title to some tidelands:

> 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 the 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;...

Id.; 1897 Cal. Stat. 74-75.

Defendants argue that none of these statutes, much less any subsequent regulations or legislation, transferred ownership of the tidelands at Crissy Field to the United States. Defendants correctly point out that the March 2, 1897 Act was silent as to transfer of tidelands. Defendants argue further that the March 9, 1897 Act only transferred tidelands surrounding islands, not those along the shore of the Presidio, citing United States v. Watkins, 22 F.2d 437 (9th Cir. 1927). Watkins, however, did not involve submerged lands or tidelands and did not interpret the March 9, 1897 Act.

The Government disputes Defendants' contention that the March 9, 1897 Act only conveyed tidelands surrounding islands. The Government argues that correspondence, official maps and State

documents indicate that the March 9, 1897 Act applied to the tidelands adjacent to Crissy Field, not just to islands.

The language of the March 9, 1897 Act is somewhat ambiguous as to whether it applies to all tidelands or just those surrounding islands. On balance, however, the Court concludes that the Government's reading is more persuasive, because Defendants' interpretation would render certain language surplusage and does not accord with the historical record dating back to the early twentieth century. The Act uses the phrase, "for military purposes or for defense," to modify two clauses in the Act: (1) "lying adjacent and contiguous to such lands of the United States in this State as lie upon tidal waters . . . ," and (2) "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 . . . ." See 1897 Cal. Stat. 74-75. If the Act only applied to islands, there would be no reason to repeat the phrase regarding military purpose or defense to describe each clause. Rather, the Act appears to place the two clauses in the alternative, as if an "or" were inserted before the clause, "lying adjacent and contiguous to any island . . . ." This reading is more plausible in view of the California Legislature's purpose of furthering the nation's goal of military readiness. It would not have made sense for California to grant the United States only tidelands adjacent to islands when nearby coastal waters off the mainland, such as the Presidio, were at least as important for military purposes.

Subsequent historical maps and other State documents confirm that the Act granted to the United States title to tidelands at the Presidio. A 1913 map shows the metes and bounds of the Presidio as extending 300 yards from the low water mark. See Goodyear Decl. Ex. 4. An answer filed in 1945 by California in the Supreme Court case of United States v. California references an 1897 map prepared by the Engineer Office of the Army, which shows a strip of submerged land 300 yards wide extending around the Presidio. Id. Ex. 3 at 96; see also Ex. 5 (brief filed by California referencing the March 9, 1897 Act as granting 17 parcels of submerged lands 300 yards wide below low water to the United States). In 1974, the State Lands Commission provided a jurisdictional summary of the Presidio, which states that the March 9, 1897 Act ceded title to the tidelands adjacent to the Presidio extending 300 yards beyond the low water mark. Id. Ex. 9 at 3. Although these documents do not by themselves establish the legislative intent in 1897, they tend to show that long

before the present dispute, the Act has consistently been interpreted to include tidelands of the mainland, not just those surrounding islands.

Finally, Defendants argue that the California Constitution prohibits the sale of tidelands within two miles of an incorporated city. See Cal. Const. XV, § 3. This section, however, prohibits the sale of tidelands to private parties:

> All tidelands within two miles of any incorporated city or town in this State, and fronting on the waters of any harbor, estuary, bay or inlet used for the purposes of navigation, shall be withheld from grant or sale to private persons, partnerships, or corporations.

Id. Nothing in that section prohibits alienation of tidelands to the federal government. Defendants' citation to State of California ex rel. State Lands Commission v. County of Orange, 134 Cal.App.3d 20 (1982) is not well-taken. That case interpreted California Constitution Article XVI, Section 6 regarding a grant of tidelands by the state to a county as a gift, and did not construe Article XV, Section 3.

Based on a common sense interpretation of the March 9, 1897 Act as well as subsequent documents showing that the Act was interpreted to cede tidelands at the Presidio to the United States, the tidelands at Crissy Field fall within the United States' jurisdiction.

2. Submerged Lands Act

Defendants argue that even if the 1897 Acts transferred ownership of the Crissy Field tidelands to the United States, the Submerged Lands Act returned the tidelands to California. The Government argues that the Submerged Lands Act did not address the tidelands area, but granted to the States the lands seaward of the marginal sea, which is a three-mile belt.

The Submerged Lands Act ("SLA") of 1953, 43 U.S.C. §§ 1301-1315, clarifies that tidelands are state-owned, subject to certain specified exceptions. See 43 U.S.C. § 1311(a), (b). "The effect of the [Submerged Lands] Act was merely to confirm the States' title to the beds of navigable waters within their boundaries as against any claim of the United States Government." Oregon v. Corvallis Sand & Gravel Co., 429 U.S. 363, 372 n. 4 (1977). Specifically, the SLA states:

> It is determined and declared to be in the public interest that (1) title to and ownership of the lands beneath navigable waters within the boundaries of the respective States, ..., be, and they are, subject to the provisions hereof, recognized, confirmed, established and vested in and assigned to the respective States *or the persons who were on June 5, 1950, entitled thereto under the law of the respective*

> *States in which the land is located*, and the respective grantees, lessees, or successors in interest thereof.

43 U.S.C. § 1311(a) (emphasis added). "Lands beneath navigable waters" is defined in section 1311(a) as, *inter alia*: "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...." The SLA further states:

> The United States releases and relinquishes unto said States and persons aforesaid, *except as otherwise reserved herein*, all right, title, and interest of the United States, if any it has, in and to all said lands....

43 U.S.C. § 1311(b) (emphasis added).

The purpose of the SLA was to reverse the effect of United States v. California, 332 U.S. 19 (1947) ("California I"), in which the Supreme Court held that the United States possessed paramount rights in the lands underlying the Pacific Ocean lying seaward of the ordinary low-water mark on the coast of California and outside of the inland waters, extending three nautical miles. The SLA not only reversed the effect of California I for lands lying seaward of the low-water mark, but also confirmed ownership in California of the seashore tidelands, which are defined as the land between the mean high water line and the mean lower low water line, and which are included in the definition of "lands beneath navigable waters."

The tidelands at Crissy Field, however, do not fall within the SLA's grant to States of lands beneath navigable waters. First, under section 1311(a), as a result of the March 9, 1897 Act, the United States was a "person who on June 5, 1950" was entitled to the lands under state law. Therefore, the United States retained ownership in the tidelands. Second, under section 1311(b), the United States has "otherwise reserved" title to the tidelands through the March 9, 1897 Act under section 1313, which provides exceptions to the operation of section 1311 for:

> 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 ... and all lands which the United States lawfully holds under the law of the State;
>
> all lands acquired by the United States by . . . cession, gift or otherwise in a proprietary capacity;
>
> any rights the United States has in lands presently and actually occupied by the United States under claim of right.

43 U.S.C. § 1313(a). Because the March 9, 1897 Act granted title to the tidelands to the United States, the SLA did not divest the United States of that title.

3. State Lands Commission Lease

The Government argues that even if the United States does not own the tidelands at Crissy Field, the United States, through the NPS, has authority to regulate Defendants' conduct because the United States has a forty-nine-year lease (expiring in 2036) over all tide and submerged lands adjacent to or within the GGNRA. See Goodyear Decl. Ex. 13 (leasing for purposes of management "a strip of tide and submerged land 1,000 feet wide in the Pacific Ocean and San Francisco 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 1,000 feet waterward of said ordinary high water mark and adjacent to or within the GGNRA...."). The lease, which covers the entire coastline within GGNRA's authorized boundaries, requires the NPS to manage the lands for several purposes, including "to enhance public safety, use and enjoyment of the lands and water of the subject lands," "to provide for recreation and educational opportunities," and "to protect and conserve the environment." See Goodyear Decl. Ex. 13 at 2-3. The lease also requires that public access remain open. See id. at 3. Therefore, even if the March 9, 1897 Act did not convey the tidelands to the United States, the NPS has authority, by virtue of the lease, to regulate the tidelands and issue citations like those issued to Defendants. See 36 C.F.R. § 1.2(a)(2) (NPS regulations apply to all persons within the boundaries of lands and waters administered by the NPS for public-use purposes); see also 61 Fed. Reg. 35,133, 35, 135, July 5, 1996 ("the NPS would like to clarify that when NPS leases property and administers the property for public-use purposes, NPS regulations apply.").

Defendants respond that the NPS has no authority to enforce its regulations at Crissy Field because 36 C.F.R. § 1.2, which defines the scope of the NPS' authority, requires ownership, not just jurisdiction, over land to enforce 36 C.F.R. § 2.15. Section 1.2(a) states that:

> (a) 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 National Park Service;
> (2) The boundaries of lands and waters administered by the National Park Service for public-use purposes pursuant to the terms of a written instrument;

> (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 . . . and without regard to the ownership of submerged lands, tidelands, or lowlands;
> (4) Lands and waters in the environs of the District of Columbia . . .;
> (5) Other lands and waters over which the United States holds a less-then-fee interest, to the extent necessary to fulfill the purpose of the National Park Service administered interest and compatible with the nonfederal interest.

Section 1.2(b) states:

> The regulations contained in parts 1 through 5, part 7 and part 13 of this chapter do not apply on non-federally owned lands and waters or on Indian tribal trust lands located within National Park System boundaries, except as provided in paragraph (a) or in regulations specifically written to be applicable on such lands and waters.

Defendants argue that the part of section 1.2(b) that says "except as provided in paragraph (a)," only applies to Indian tribal lands because otherwise, section 1.2 could apply to non-federally owned lands. Yet the regulation itself contemplates application to non-federally owned lands. Section 1.2(a)(2) provides that the regulations apply to lands administered by the NPS pursuant to a written instrument with no requirement that the land be federally owned. Also, section 1.2(a)(3) provides that the regulations apply to waters subject to the jurisdiction of the United States regardless of ownership of tidelands, submerged lands or lowlands. Further, section 1.2(a)(5) provides that the regulations apply to lands over which the United States holds less than a fee interest. Therefore, the NPS's ability to enforce section 2.15 on the Crissy Field tidelands does not require ownership of the tidelands.

Finally, Defendants argue that if the Government is correct about the effect of the March 9, 1897 Act, there would be no need for a lease because the United States would already own the tidelands at Crissy Field. The Government argues persuasively, however, that the March 9, 1897 Act did not transfer ownership of all tidelands within the GGNRA, which extends considerably north and south of the Presidio, so the lease was needed to give NPS authority to manage the entire area.

Defendants also argue that the lease is subject to the public trust doctrine, which protects historic uses like off-leash dog walking, citing City of Alameda v. Todd Shipyards Corp., 635 F. Supp. 1447 (N.D. Cal. 1986). Todd Shipyards, however, stands for, *inter alia*, the proposition that the United States could not transfer to a private party title to tidelands that it obtained from the City

of Alameda, and does not further Defendants' argument regarding the public trust. Further, that case does not apply to the situation here, where the lease does not convey title to the tidelands from the State to the United States and does not involve conveyance to a private person. Moreover, the NPS is required under the lease to enhance the public safety of the area and to protect the environment, which the NPS can decide is best accomplished by enforcing the regulation. Also, the lease states that public access and use shall remain open subject to reasonable control by the NPS, which also permits enforcement of the regulation.

Accordingly, the lease gives the NPS authority to regulate off-leash pets, regardless of whether the tidelands are state-owned.

4. California Government Code § 126(f)

Defendants argue that because the Presidio is no longer a military base, it reverted to state use pursuant to California Government Code section 126(f). In that section, California ceded concurrent criminal jurisdiction to the United States within land held by the United States subject to certain limitations and conditions, including:

> (f) "Land held by the United States," as used in this section means: (1) lands acquired in fee by purchase or condemnation, (2) lands owned by the United States that are included in the military reservation by presidential proclamation or act of Congress, (3) leaseholds acquired by the United States over private lands or state-owned lands, and (4) any other lands owned by the United States, including, but not limited to, public domain lands that are held for a public purpose.

Nothing in this statute, which addresses concurrent criminal jurisdiction, supports Defendants' argument that land no longer used for military purposes ceded back to state use.

5. Rulemaking

In February 1979, the NPS issued guidelines entitled Golden Gate National Recreation Area Advisory Commission Approved Guidelines for a Pet Policy - San Francisco and Marin County ("Pet Policy"). Those guidelines permitted dogs off leash in several areas, including Crissy Field. The NPS implemented these guidelines and permitted the public to walk dogs off leash there for at least twenty years. The public took advantage of the policy. At a January 2001 meeting of the Advisory Commission of the GGNRA and the Point Reyes National Seashore, the Commission discussed possible rescission of the 1979 Pet Policy, but decided to take no action on the rescission

and to recommend further examination of the issue by the NPS and related entities. Only recently did the NPS begin to issue citations for this conduct pursuant to section 2.15.

Defendants argue that the NPS may not enforce section 2.15 over the 1979 Pet Policy without notice and a comment period pursuant to 36 C.F.R. § 1.5(b), which provides:

> Except in emergency situations, a closure, designation, use or activity restriction or condition, or the termination or relaxation of such, which is of a nature, magnitude and duration that will result in a significant alteration in the public use pattern of the park area, adversely affect the park's natural, aesthetic, scenic or cultural values, require a long-term or significant modification in the resource management objectives of the unit, or is of a highly controversial nature, shall be published as rulemaking in the Federal Register.

Defendants contend that rescission of the 1979 Pet Policy in favor of enforcement of an NPS regulation is highly controversial and would substantially alter the public use of the GGNRA, like the park closure in Fort Funston Dog Walkers v. Babbitt, 96 F. Supp. 2d 1021 (N.D. Cal. 2000). In Fort Funston, the district court addressed the issue of whether the NPS violated the requirement of notice and comment before closing certain park lands in Fort Funston. In granting Plaintiffs' motion for a preliminary injunction, the district court found that the closure of part of Fort Funston was highly controversial, primarily because of the reaction of the dog walking groups, and that there were serious questions regarding whether the closure would create a significant alteration of public use. But see Mausolf v. Babbitt, 125 F.3d 661, 669, n. 10 (8th Cir. 1997) (noting that rulemaking was not required under section 1.5(b) because snowmobiling in Voyageurs National Park was generally prohibited absent special regulations and even though the NPS failed to enforce the regulation prohibiting snowmobiling, the subsequent order closing an area to snowmobiling did not amount to a significant alternation in what was previously an unlawful public use of the park); Spiegel v. Babbitt, 855 F. Supp. 402, 404 (D. D.C. 1994) (holding that enforcement of an NPS regulation imposing dock restrictions was not a significant alteration of park use because the regulation affected a very small number of people and the dock limitation was necessary for maintenance of public health and safety and to protect environmental and scenic values). Like Fort Funston, the change in NPS policy is highly controversial, as evidenced, *inter alia*, by the packed courtroom at the hearing on this motion.

The Government responds that the Advisory Commission had no authority to issue a binding

regulation and, in the absence of a special regulation issued by NPS permitting off-leash dogs in this area, the GGNRA cannot suspend section 2.15. As the NPS has authority to issue special regulations that deviate from section 2.15, notice and comment would not be a meaningless exercise. Moreover, the Government is currently re-examining the off-leash dog policy in the GGNRA and might enact such a special regulation. See Defs.' Reply Ex. A (Situation Assessment Report: Proposed Negotiated Rulemaking on Dog Management in the Golden Gate National Recreation Area).

The 1979 Pet Policy was not adopted as a formal regulation, but it was the de facto policy in effect for many years. The Government attempts to explain away its long period of honoring the Pet Policy as a mere exercise of prosecutorial discretion not to enforce section 2.15, which it is free to alter at any time in favor of enforcement without any prior notice to the public or opportunity for comment. However, the NPS did not simply exercise prosecutorial discretion about whether and against whom to enforce section 2.15 in light of administrative concerns within its knowledge regarding specific violations of the regulation. See Heckler v. Chaney, 470 U.S. 821, 831 (1985) (explaining that agency decisions are generally unsuitable for judicial review because they involve a balancing of administrative factors peculiarly within the agency's expertise, including whether a violation has occurred, whether agency resources are best spent on the violation, whether the agency is likely to succeed, whether the enforcement action best fits the agency's policies and whether the agency has enough resources to undertake the action at all); see also Wayte v. United States, 470 U.S. 598, 607 (1985) (explaining that a prosecutor's discretion "rests largely on the recognition that the decision to prosecute is particularly ill-suited to judicial review" due to such factors as the strength of the case, the prosecution's general deterrence value and the case's relationship to the overall enforcement plan). Rather, the GGNRA implemented the 1979 Pet Policy for many years as if it were binding, and there is no evidence that officers exercised discretion on a case-by-case basis. Repeal of the Pet Policy effected by switching to a policy of enforcing section 2.15 is a fundamental change that is quite controversial and changes patterns of public use. This is the very type of change to which section 1.5(b) applies. The Government's formalistic argument to the contrary does not accord with the fundamental policies underlying the notice and comment requirement, which include informed decision-making and meaningful public participation in the rulemaking process. See, e.g.,

Idaho Farm Bureau Def'n v. Babbitt, 58 F.3d 1392, 1404 (9th Cir. 1995); Riverbend Farms, Inc. v. Madigan, 958 F.2d 1479, 1486 (9th Cir. 1992).

CONCLUSION

Therefore, Defendants' Motion to Dismiss is granted on the basis that the NPS must comply with section 1.5(b).

IT IS SO ORDERED.

Dated: December 1, 2004

ELIZABETH D. LAPORTE
United States Magistrate Judge

United States District Court
For the Northern District of California