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ORIGINAL

BEFORE THE
FEDERAL MARITIME COMMISSION

Docket No. 09-08

SSA TERMINALS, LLC
AND
SSA TERMINALS (OAKLAND), LLC

COMPLAINANTS

v.

THE CITY OF OAKLAND, ACTING BY AND THROUGH
ITS BOARD OF PORT COMMISSIONERS

RESPONDENT

COMPLAINANTS' REPLY TO RESPONDENT'S SUPPLEMENTAL APPEAL BRIEF

Complainants SSA Terminals, LLC and SSA Terminals (Oakland), LLC (collectively "SSAT") hereby reply to the Supplemental Appeal Brief of Respondent City of Oakland, acting by and through its Board of Port Commissioners ("Respondent" or the "City").

I. The City of Oakland is the Respondent in this Case, and the City is Not Entitled to Eleventh Amendment Sovereign Immunity Under Well-Settled Law.

Both the Commission in its July 21, 2011 Order, and the Respondent in its Supplemental Reply Brief (at 1), characterize the issue currently before the Commission as whether the Port of Oakland is entitled to Eleventh Amendment sovereign immunity as an arm of the State of California. Respectfully, the issue is not whether *the Port* is entitled to Eleventh Amendment immunity, but whether *the City of Oakland*, when acting through its City Port Department, is

entitled to such immunity. This is a critical distinction as the uniform and black letter law holds that the City does not have Eleventh Amendment immunity.

Decades of Supreme Court and Ninth Circuit authority have made clear that political subdivisions, like the City of Oakland, are not entitled to sovereign immunity, even when they are exercising "a slice of State power." *See, e.g., Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391, 401 (1979) ("[T]he [Supreme] Court has consistently refused to construe the [Eleventh] Amendment to afford protection to political subdivisions such as counties and municipalities, even though such entities exercise a 'slice of state power.'"); *Alden v. Maine*, 527 U.S. 706, 756 (1999) ("[sovereign] immunity does not extend to suits prosecuted against a municipal corporation or other governmental entity which is not an arm of the State."); *Mt. Healthy City Brd. of Educ. v. Doyle*, 429 U.S. 274, 280 (1977) ("The bar of the Eleventh Amendment to suit in federal courts extends to States and state officials in appropriate circumstances, but does not extend to counties and similar municipal corporations."); *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 47 (1994) ("cities and counties do not enjoy Eleventh Amendment immunity"); *Brd. of Trustees of the Univ. of Alabama v. Garrett*, 531 U.S. 356, 368 (2000) ("the Eleventh Amendment does not extend its immunity to units of local government."); *City of Long Beach v. Metcalf*, 103 F.2d 483, 485 (9th Cir. 1939) ("the state's constitutional immunity from suit does not extend to [municipal] corporations."); *Beentjes v. Placer Cty. Air Pollution Control Dist.*, 397 F.3d 775, 777-78 (9th Cir. 2005) ("The decision to extend sovereign immunity to a public entity turns on whether the entity 'is to be treated as an arm of the State partaking of the State's Eleventh Amendment immunity, or is instead to be treated as a municipal corporation or other political subdivision to which the Eleventh Amendment does not extend.'").

Though this principle is well-established and unassailable, the City nevertheless contends that it is entitled to sovereign immunity when it operates its port over tidelands. In this respect, the City's argument is identical to Chatham County's claim that even though it was a county not generally entitled to sovereign immunity, it was acting as an arm of the state of Georgia when it operated a drawbridge over tidelands pursuant to delegated state authority.[1] The Supreme Court squarely rejected Chatham County's claim, confirming once again that political subdivisions such as cities and counties are not arms of the state even when they are exercising authorities delegated by the state. *See N. Ins. Co. of New York v. Chatham Cty., Ga.*, 547 U.S. 189 (2006).

By Order of November 8, 2010, the Presiding Officer applied this authority and correctly determined that the City when operating through its Port Department is not an arm of the State of California entitled to sovereign immunity. Any other outcome would be contrary to *Chatham*, and would further be at odds with the D.C. Circuit's admonition that "an entity either is or is not an arm of the State." *Puerto Rico Ports. Auth. v. Fed'l Maritime Comm'n*, 531 F.3d 868, 873 (D.C. Cir. 2008). Indeed, it is impossible to reconcile the Respondent's position regarding the City's dual status with the D.C. Circuit's holding that:

> The status of an entity does not change from one case to the next based on the nature of the suit, the State's financial responsibility in one case as compared to another, or other variable factors.

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[1] Chatham County conceded that Eleventh Amendment immunity did not apply to counties, but contended that it was nevertheless immune from suit when it operated a drawbridge over the Wilmington River. This was so, according to Chatham County, because the State of Georgia had delegated its sovereign authority to build, maintain, and operate bridges to the counties. Chatham County argued to the Supreme Court that the bridge in question was built over tidal waters held in trust by the State of Georgia for the people of that state and argued that delegation of authority with respect to these lands involved the transfer of a "core, sovereign function of the State." *N. Ins. Co. of New York v. Chatham Cty., Ga.*, No. 04-1618, Respondent's Brief on the Merits, 2006 WL 284224, *22-26 (U.S.) (Reply to Motion to Dismiss, Ex. C).

Id. at 873.

Accordingly, the City cannot be found to be an arm of the State in connection with certain actions involving the City Port Department, but not an arm of the State with regard to other activities. *See id.* The law is clear that as a municipality it is not entitled to immunity under any circumstances.

SSAT recounts for the Commission the following relevant facts, which are undisputed. The Respondent in this case is the City of Oakland, not the Port. The City is a municipal corporation and a "body politic and corporate in name and fact." Charter of the City of Oakland ("Charter"), Art. I, § 100 (Motion to Dismiss, Ex. 1). The Port is a Department of the City, which was created by the City, and which has no existence or separate legal status apart from the City. Charter, Article VII, § 700. The Board of Port Commissioners, who control and manage the Port Department, are all appointed by the City Council upon nomination of the City's Mayor. *Id.* at § 701. Board members must be residents of the City, and only the City Council has the authority to remove a Board member. *Id.* at §§ 701, 703. All of the powers exercised by the Port are "for and on behalf of the City." *Id.* at § 706. The Port Department may only sue and be sued in the name of the City. *Id.* at § 706(1). It can only acquire property, exercise the right of eminent domain, and enter into contracts in the name of the City. *Id.* at §§ 706(15) and (19). All incomes and revenues from the operation of the Port Department are allocated to and deposited in a fund in the City Treasury (the "Port Revenue Fund"). Any surplus monies in the Port Revenue Fund are transferred to the City's General Fund. *Id.* at § 717(3).

Based on the foregoing, the Respondent is the City of Oakland, and the law is abundantly clear that such municipalities are not arms of the State entitled to Eleventh Amendment sovereign immunity. Nevertheless, the Respondent now asks the Commission to do what the

Presiding Officer would not, which is overlook well-settled law to find that the Port Department is nonetheless an arm of the State, not a department of the City, for purposes of the Eleventh Amendment. Respondent's attempts to cloak the City in the State's sovereign immunity have been and continue to be ill-fated. In its Supplemental Brief, Respondent again principally relies on the City Port Department's perceived role as either "grantee" and "trustee" of the so-called "tidelands trust," which the State of California granted to the City of Oakland in 1911 and 1931. These arguments are not new, they have already been addressed by SSAT in prior pleadings, and they were flatly rejected by the Presiding Officer. In short, Respondent's flawed line of reasoning essentially boils down to the following: the State is ultimately the "beneficial owner" of the tidelands trust, and the City Port Department is the "Trustee" of this trust, which in Respondent's view means that in its capacity as a Trustee, the Port Department's actions should be deemed as an arm of the State and entitled to Eleventh Amendment immunity. Both the facts and the law contradict this argument.

The State of California acquired title to the tidelands as "an incident of sovereignty" when it became a State. *See City of Alameda v. Todd Shipyards Corp.*, 632 F. Supp. 333, 336 (N.D. Cal. 1986). The State did not create the trust, but rather the trust was created upon California's admission to the Union. *See* PRC Section 6009(a) ("Upon admission to the United States and as incident of its sovereignty, California received title to the tidelands...."). In 1911 and 1931, the State transferred the tidelands in fee simple to the City of Oakland (granting "all of the right, title and interest of the State of California...to be forever held by said city..."). *See* Statutes 1911, Ch. 657[2] (emphasis added) and Statutes 1931, Ch. 621 (Motion to Dismiss, Ex. 2).

[2] As amended by Statutes 1919, Ch. 516; Statutes 1937, Ch. 96; Statutes 1947, Ch. 59.

To be sure, as the language of the State's grant makes quite clear, the State's transfer of the tidelands to the City of Oakland was not a delegation of government dominion or control, wherein the State retained some "dual title" in the tidelands. Rather, as the California Supreme Court has held in interpreting a tidelands grant by California identical to the one at issue here, when a state transfers ownership interest in tidelands to a city, it does so in fee simple transferring all title and interest to that city absolutely. *See City of Long Beach v. Marshall,* 11 Cal.2d 609, 615 (Cal. 1938) (rejecting the State of California's argument that following a grant of tidelands to the City of Long Beach in fee simple, the city acquired "no more than the authority and political power to establish, operate, govern, and maintain a harbor, as a subordinate governmental agency.").

Although the State's grant to the City carried with it certain conditions that the tidelands be used consistent with the public trust, the State has no reversionary interest in the tidelands. *See City of Alameda,* 632 F. Supp. at 338; *Marshall,* 11 Cal.2d at 613 (holding that even though the tidelands grant was subject to certain conditions, the State's grant to the City of "all of the right, title, and interest of the State of California" was nonetheless absolute). Further, the State had no role in creating the City Port Department, and maintains no role in directing its activities. The City, as both the grantee and trustee of the trust, does not hold the tidelands in trust for the State, but rather holds it in trust "for the people of the state," as California had done before it, which Respondent has conceded. *See City of Alameda,* 632 F. Supp. at 336 ("Each state holds title to its tidelands in trust for the people of the state...."); *See also* Respondent Supp. Br. at 4 ("California's title is a title held in trust for the people of the state...") (internal citations omitted). Following its grant of the tidelands to the City, the State's only remaining interest is

ensuring that the City complies with the conditions of the grant that all actions be on behalf of the public.

Turning back then to the Respondent's "trustee" argument as summarized above, the record disposes of Respondent's claims by making clear that: (1) the State is not the beneficial owner of the Trust (the people of California are), (2) the City Port Department was not created by the State (but by the City of Oakland), and (3) the City Port Department is neither the grantee nor the trustee of the tidelands trust (the City of Oakland is). Thus, all that remains of Respondent's "trustee" argument is the flawed notion that the City of Oakland, when acting in any capacity relating to the tidelands trust, is somehow entitled to sovereign immunity. The cases cited above and relied upon by the Presiding Officer in her Opinion all clearly and uniformly hold it does not and cannot, as a matter of law, have such Constitutional immunity.

In sum, because the State granted title to the tidelands to the City of Oakland in fee simple, the City when operating through its City Port Department is not operating as an arm of the state such that it is entitled to sovereign immunity. Even assuming the City is exercising "a slice of state power," the Supreme Court has consistently refused to afford municipalities Eleventh Amendment protection in these circumstances. Accordingly, the Commission should affirm the Presiding Officer's decision that the Respondent City of Oakland when acting through its City Port Department is not entitled to sovereign immunity.

Although the Commission need look no further than the foregoing analysis to affirm the Presiding Officer's decision, for the sake of completeness, SSAT responds below to a number of additional assertions in Respondent's Supplemental Brief, all of which are without merit or support.

II. The Case Law Relied Upon by the Respondent Is in Conflict with Several Supreme Court and Ninth Circuit Decisions.

To support its claim that it is entitled to state sovereign immunity, the Respondent (at 7) continues to rely on the decision by the Superior Court for the County of Los Angeles in *Hanson v. Port of Los Angeles,* Case No. BC 221839 (L.A. Super. Ct. 2001) and the decision by the U.S. District Court in *United States ex rel. Mosler v. City of Los Angeles,* No. 02-CV-02278 (C.D. Cal. 2009). To briefly summarize, the court in *Hansen* determined in an unpublished opinion that the Port of Los Angeles ("POLA") was an arm of the State of California, basing its analysis in significant part on its understanding of the status of POLA's "Harbor Reserve Fund" under California law. *Mosler*, an unpublished decision by the U.S. District Court for the Central District of California, relied almost exclusively on the holding in *Hanson* to find that tidelands trust funds are state funds.

The Respondent's continued reliance on these cases is in error for a number of reasons. At the outset, regarding the role of state court decisions in determining an entity's entitlements to Eleventh Amendment immunity, federal courts have been directed only to look to the State's highest court for instruction. *See Redondo Constr. Corp. v. Puerto Rico Highway and Transp. Auth.,* 357 F.3d 124, 127-28 (1st Cir. 2004). An Eleventh Amendment decision by the Superior Court for the County of Los Angeles is therefore not entitled to any deference by the Commission. Even if that were not the case, the *Hansen* decision is inapposite because POLA's Harbor Reserve Fund is drastically different than the City Port Department's Port Revenue Fund. The Harbor Reserve Fund was required to be created by state statute. *See An Act to amend Section 1 of, and to add Sections 2,3, 4, 5, 6, 7, 8,9, 10, 11, 12, and 13 to, Chapter 651 of the Statutes of 1929, relating to tidelands and submerged lands of the City of Los Angeles*, Statutes 1970, Chapter 1046, § 2. The State has control over how POLA spends monies in the Harbor

Reserve Fund, *Id.* at § 5, and the majority (85%) of excess revenues in POLA's fund revert to the State. *Id.* at § 6. *See also* Complainants' Reply to Respondent's Motion to Dismiss, Ex. I. None of those indicia of state ownership or control, critical to the Court's finding that POLA was an arm of the state in *Hansen*, exists with the Port Department's Port Revenue Fund.

The Port Revenue Fund is an account created by the City of Oakland (without state statutory mandate). Like the accounts of other city departments, the Port Revenue Fund is maintained in the City treasury. The funds are separately identified on the books, but they are commingled for investment purposes. The State does not contribute to the account and does not have any right to access funds in the account. Surplus funds do not revert to the State, they revert to the City. Charter, Art. VII, § 717(3). As such, the holdings in *Hanson* and *Mosler* are not applicable to this case.

In its Supplemental Brief, Respondent (at 9-10) makes much of the fact that while the City of Oakland Charter "does permit transfer to the General Fund of the City," the City's use of those funds is limited in that they must be used for purposes consistent with the trust. SSAT does not contest this. However, this does not change the fact that once the State granted the tidelands to the City in fee simple, the State retained no authority or control over these funds. The record is clear that the State's only remaining role is to potentially enforce the conditions of the use of these funds for the public's benefit and no more.

Even if the facts in the cases cited by Respondent were more similarly aligned to the facts in the present case, the reasoning in *Hanson*, which was relied upon in *Mosler*, is extremely suspect. As an initial matter, these cases are plainly inconsistent with the Supreme Court decisions cited above and the Ninth Circuit's ruling in *City of Long Beach v. Standard Oil Co. of Cal.*, 53 F.3d 337, 1995 WL 268859 (9th Cir. 1995), which held that municipalities are not

protected by the Eleventh Amendment even where the tidelands are involved. In *Standard Oil*, the Ninth Circuit flatly rejected the City of Long Beach's sovereign immunity claims and reversed the district court's finding of immunity as follows:

> The city argues that it was entitled to the protection of the Eleventh Amendment because it was acting as "trustee" of the lands as was thus "an arm of the state" for purposes of the Eleventh Amendment. The city has not pointed to any authority suggesting that this doctrine should extend to non-state agencies. We would be reluctant to engage in such a radical departure from the law in light of the Supreme Court's repeated and clear admonition that Eleventh Amendment immunity "does not extend to counties and similar municipal corporations." *Mount Healthy City School Dist. Bd. of Educ. v. Doyle,* 429 U.S. 274, 280 (1977). In any event even were we to conclude that the Supreme Court's recent decision in *Hess v. Port Authority Trans-Hudson Corp.*, 115 S. Ct. 394 (1994), should apply to the city as trustee, the city would not be entitled to immunity on the facts of this case.

Id. at *1.

Rather than relying on the city's status as a municipality as directed in *Standard Oil*, both the *Hanson and Mosler* courts purported to apply the five factor arm of the state test employed by the Ninth Circuit. The courts never should have reached these factors as municipalities under Supreme Court precedent are not "arms of the State." In both cases, however, the courts only discussed two of the five factors. Additionally, the courts appear to have misinterpreted *Mallon v. City of Long Beach,* 44 Cal. 2d 199 (Cal. 1955) as holding that tideland revenues have a "state character" and thus are somehow owned by the State. What *Mallon* actually held was that revenues from the tidelands were subject to the same conditions on use as the tidelands themselves and thus had to be used for the benefit of all of the people of the state rather than for purely municipal purposes. *See Mallon*, 44 Cal. 2d at 211. As discussed above, the fact that the property was granted to the City with conditions on its use does not mean that the ownership of the property was not fully transferred. This applies equally to the revenues derived from that property.

In the end, the Respondent's reliance on one poorly reasoned lower state court opinion and one district court opinion applying the same rationale is misplaced, particularly in light of the *Standard Oil* decision. Of note, Respondent does not and cannot challenge the merits of *Standard Oil* in its brief. Instead, it attacks this decision (at 8) solely on the basis that it is unpublished, which according to Respondent means it "has no precedential or even persuasive value" under the Ninth Circuit's local rules.[3] However, the Commission is not bound by the local rules of the Ninth Circuit. And even if it were, although it is unpublished, the *Standard Oil* decision is based on and consistent with long-standing and well-settled principles of law established by the Supreme Court holdings that municipalities are not entitled to state sovereign immunity, even when they are exercising a "slice of state power."

Moreover, the *Standard Oil* decision is also consistent with other decisions in the Ninth Circuit. *See City of Long Beach v. Metcalf*, 103 F.2d 483, 485 (9th Cir. 1939) ("Appellants are not the State. One of them—the City of Long Beach—is a municipal corporation and, territorially, a part of the State, but the State's constitutional immunity from suit does not extend to such corporations. The fact, if it be a fact, that appellants are grantees of the State is immaterial.") (internal citations omitted). *Standard Oil* therefore presents clear authority and sound reasoning for the Commission to apply in its analysis here.

III. The Respondent's Reliance on the SLC Letter is Misplaced.

Respondent also places considerable weight in its brief (at 3-4) on a letter of the California State Lands Commission ("SLC") issued on December 15, 2010, which it claims contradicts the Presiding Officer's decision and supports its arguments that the Port is entitled to sovereign immunity. A review of the SLC letter reveals the opposite. Aside from the SLC's

[3] This argument is particularly ironic considering Respondent itself relies so heavily on an unpublished lower state court decision and an unpublished district court decision.

legal conclusions, which are devoid of any support and which are entitled to no weight, the letter is fully consistent with and supportive of SSAT's assertions and the Presiding Officer's findings on sovereign immunity.[4]

The State relinquished all title to the tidelands and revenues derived therefrom when it granted "all of the right, title and interest" in the lands to the City of Oakland "forever." *See* Statutes 1911, Ch. 657[5] (emphasis added) and Statutes 1931, Ch. 621 (Motion to Dismiss, Ex. 2). As grantor, the State has no beneficial interest in the tidelands property. The SLC's letter confirms both of these points. The first page of the SLC letter refers to a grant of the tidelands trust to the City, not the Port ("The State of California's sovereign tide and submerged lands within the City of Oakland (City) were legislatively granted in trust to the City by the State of California...."). The SLC letter later confirms on the same page that "[t]he granting language utilized by the State Legislature has the effect of *conveying the State's legal title* to the described tide and submerged lands." (Emphasis added). The result is that the State has no legal right to the land or the revenues derived from the land.

After confirming that the City (and not the Port) "is a trustee, both as to the lands themselves and as to the revenues described therefrom," the SLC further confirms that the State is *not* the trust beneficiary, stating that "the people of the State are the beneficiaries of the trust." The Respondent erroneously cites this letter as authority for the theory that because the State is beneficial owner of the Trust, and the City (through its Port Department) is the Trustee, all

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[4] The Commission will note that the SLC letter is dated December 15, 2010, roughly one month *after* the Presiding Officer's decision in this case rejecting Respondent's claim for sovereign immunity. Accordingly, it is clear that this letter was a position paper drafted for purposes of Respondent's appeal, and is not an impartial third party legal opinion.

[5] As amended by Statutes 1919, Ch. 516; Statutes 1937, Ch. 96; Statutes 1947, Ch. 59.

money in the Port Revue Fund constitutes "state funds" for Eleventh Amendment purposes. As the SLC letter confirms, since the State has no legal or beneficial right to the land or the funds there is no basis for the Respondent to claim that the Port Revenue Fund belongs to the State of California or that payment out of the fund would equate to payment by the State, particularly as the fund is administered by the City Treasury with no state involvement.

Finally, SSAT notes that the SLC letter baldly asserts that "the Port's public trust revenue funds, managed by the Port as trustee for the people of California, should have no less immunity under the 11th Amendment to the United States Constitution than is otherwise applicable to like funds held by the State of California." The SLC's use of the words "should have" in the above sentence appears to be more wishful thinking than a conclusion. Regardless, this statement, which cites no authority, is particularly confusing as Eleventh Amendment immunity applies to States and arms of States, not City monetary funds. The letter further says, also without offering any support, that "the Port performs valuable governmental functions on behalf of the State and as such should be considered as acting as an arm of the State." If the SLC is contending that the City of Oakland is entitled to immunity because it is performing an important function that has been delegated by the State, it is well-established that a municipality is not converted into an arm of the state simply because it is exercising a governmental function. *See N. Ins. Co. of N.Y. v. Chatham Cty., Ga.*, 547 U.S. 189 (2006); *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391 (1979); and cases cited *supra* at 2.

IV. The Addition of Section 6009 to the Public Resources Code Does Not Provide the State With Any New Rights or Authorities Over the Tidelands Trust.

Respondent again argues (at 6-7) that Cal. Sen. Bill No. 1350, which, among other things, added a new §6009 to the California Public Resources Code ("PRC"), somehow confirms its view that the Port is entitled to Eleventh Amendment sovereign immunity in its role as "Trustee"

for the State. It does not. By its express terms, the statute itself makes clear that "[t]he addition of Section 6009 to the Public Resources Code by Section 3 of this act *does not constitute a change in, but is declaratory of, existing law*." Cal. Sen. Bill No. 1350, Sec. 4 (emphasis added). As stated in California State Senator Kehoe's letter to the Secretary of the California State Senate (attached as Exhibit 1 hereto), Section 6009 "is simply declaratory of existing law," and the only purpose of this section is to "restate existing common law in the area of public trust and tidelands." Thus, Section 6009 does not provide the State with any new rights or authorities. It does not provide the State with any veto power. Nor does it establish any new reporting obligations. It simply confirms that the tidelands are granted subject to the public trust and confirms the oversight process that is already in place.

As SSAT has discussed in prior pleadings, while the SLC has "exclusive jurisdiction over all *ungranted* tidelands and submerged lands owned by the State," its jurisdiction over *granted* tidelands is limited to any "jurisdiction and authority remaining in the State." Cal. Pub. Res. Code § 6301. Indeed, once a state has granted its tidelands to another entity, courts have consistently found these grants are in fee simple subject only to the trust conditions. *See City of Long Beach v. Marshall,* 11 Cal.2d 609, 613-14 (Cal. 1938); *State Lands Comm'n v. City of Long Beach*, 200 Cal. App. 2d 609, 614 (Cal. Dist. Ct. App. 1962); *City of Alameda v. Todd Shipyards Corp.*, 632 F. Supp. 333, 338 (N.D. Cal. 1986). This difference in control is mirrored in the language of new Section 6009, which provides for the state to have absolute control over *ungranted* tidelands, but merely provides for SLC oversight over the *granted* tidelands. *See* Cal. Pub. Res. Code § 6009(b) and (c). Respondent concedes in its brief that Section 6009's provisions distinguish between the State's role with respect to ungranted lands and lands that the State has granted to another entity. However, Respondent claims (at 6-7) that with respect to

ungranted lands, the State is "both a Trustee and Beneficiary," whereas in granted lands the grantee "serves as Trustee." That is not what Section 6009 says.

Subsection 6009(b) states the "state's power and right to control, regulate, and utilize its tidelands and submerged lands when acting within the terms of the public trust is absolute." *See* Respondent Supp. Br. at Ex. B, p. 2. The statute says nothing about the State as a "beneficiary." All it says is that the State has full responsibility to regulate these lands consistent with the public trust, a point that is not in dispute. Subsection (c), however, is quite different. There, it says "Tidelands and submerged lands granted by the Legislature to local entities remain subject to the public trust, and remain subject to the oversight authority of the state by and through the State Lands Commission." *Id.* In other words, any entity upon which the State transfers the tidelands (here, the City of Oakland), remains subject to the obligation that such lands be regulated consistent with the public trust, and the State only maintains oversight authority. This oversight authority consists solely of monitoring whether the grantees are using the granted tidelands in accordance with the public trust conditions. The SLC does not directly manage the use of the lands. It cannot direct or veto the actions of the municipality. The only power the SLC has is to notify the City of any perceived violation of the trust purposes, report the alleged violations to the state legislature, or bring a legal action to halt the project. *See* Cal. Pub. Res. Code § 6301 (SLC jurisdiction over *granted* tidelands is limited to any "jurisdiction and authority remaining in the State.").

Thus, notwithstanding Respondent's attempt to put "trustee labels" on the provisions in Section 6009 relating to the State's roles with respect to granted and ungranted tidelands, there is no question that general control and management of the tidelands has been transferred to and resides with the City. The express language of the agreement between SSAT and the City of

Oakland confirms this. *See* SSAT Amended and Restated Non-Exclusive Preferential Assignment Agreement, p. 1 ("the Port is vested with the complete and exclusive power, and it is the Port's duty for and on behalf of the City with respect to the Port area to...enter into any agreement or assignment of City-owned properties in the Port Area....") (emphasis added) (attached hereto as Exhibit 2). The only way the State of California can impose its will on the City at this point is through the passage of legislation or through litigation. However, such ultimate state control over the granted lands is not the type of control considered in the arm of the state analysis:

> [U]ltimate control of every state created entity resides with the State, for the State may destroy or reshape any unit it creates. 'Political subdivisions exist solely at the whim and behest of their State,' yet cities and counties do not enjoy Eleventh Amendment immunity.

Hess v. Port Auth. Trans-Hudson Corp., 513 U.S. 30, 47 (1994) (internal citations and brackets omitted). Thus, even if the State's ability to alter the terms of the tidelands trust through legislation may be deemed ultimate control, under the precepts of *Hess*, such control does not translate to arm of the state status.

Respondent's remaining arguments (at 7) concerning Subsections 6009 (d) and (e) are equally without merit. Subsection (d) simply provides that the municipal grantees are required to manage tidelands in a manner consistent with the public trust. As noted above, this fact is not in dispute. Additionally, this subsection again confirms that it is the grantees that manage the lands, not the State. Likewise, Subsection (e) provides that the "purposes and uses of tidelands and submerged lands is a statewide concern." Again, the purpose of the public trust is to use the tidelands in a manner that benefits all of the people of the state. That is not in dispute. With that said, however, the State of California determined that it was in the interest of all of the people of the State of California for the City of Oakland to build and operate a commercial port on the

tidelands, and so placed such a condition on the grant of the tidelands. So long as the City utilizes the lands and the revenues derived from the lands in furtherance of the local port it is satisfying its trust obligations.

Accordingly, the Respondent's continued reliance on Section 6009 to support its claim for Eleventh Amendment sovereign immunity is in all respects without merit.

V. Respondent's Remaining Contentions that the Port Department is Either an "Agent" or "Trustee" of the State Are No Different than its Other Arguments.

Finally, Respondent offers a number of theories (at 11-15) relating to its purported status as either an "agent" or "trustee" of the State to support its claim for sovereign immunity. These arguments add nothing new. The Respondent cites general California probate law, claiming that the Port Department's alleged status as trustee of the tidelands trust somehow equates to it being an arm of the State when acting in a "representative capacity" for the trust. However, this is merely a reformulation of Respondent's previous arguments that the City of Oakland's Port Revenue Fund belongs in some fashion to the state. In any event, the Commission need not even address these arguments because the California Probate Code does not apply to tidelands trusts to the extent that it they are in any way inconsistent with the legislative grant in trust to a political subdivision. *See City of Coronado v. San Diego Unified Port District,* 227 Cal. App.2d 455, 473 (1964) ("private trust principles cannot be called upon to nullify an act of the Legislature or modify its duty.")

However, even if that were not true, the simple fact remains that SSAT did not enter into its agreement with the City of Oakland in its "representative capacity" for the State. Indeed, nowhere in the parties' agreement was there any effort by the City to set forth or otherwise indicate that it was entering this agreement as a "trustee" for the State. To the contrary, the

agreement clearly indicates that it was between SSAT and the City. *See* Exhibit 2, SSAT Agreement, Preamble (agreement executed by SSA Terminals, LLC and "the City of Oakland, a municipal corporation, acting by and through its Board of Port Commissioners.").[6] Moreover, if the City had intended to enter this agreement as a trustee for the State, one is left to wonder why the State of California was not listed as a Third-Party Beneficiary under the terms of the contract. *See id.* at § 39 ("Nothing herein is intended to nor shall be construed to create any rights of any kind whatsoever in third persons or entities not parties to this Agreement.").

Finally, lest there be any further doubt, the monies in the Port Revenue Fund belong to the City, not the State. As SSAT has previously made clear, all incomes and revenues from the operation of the City Port Department are allocated to and deposited in the City's Treasury. The State did not retain any ownership interest in the tidelands after its grant to the City. All surplus funds are transferred to the City's general fund, not to the state. Any judgment against the City and its Port Department would not be enforceable against the State because the City and the Port Department are financially self sufficient and the debts and obligations of the Port Department are liabilities of the City of Oakland and not the State of California. *See, e.g., San Diego Unified Port District v. Gianturco*, 651 F.2d 1306, 1318, n. 33 (9th Cir. 1981) ("Nothing in the materials cited by CalTrans or amici indicates that the State of California, as settler and representative of the beneficiaries of the trust, bears fiscal liability for misuse of the Port District's land."). In

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[6] If the City wanted to hold itself out as a trustee for the state under the Probate Code (which is not applicable herein), it needed to do so in clear and express terms. *See* Cal. Probate Code, Section 18000(a) ("a trustee is not personally liable on a contract properly entered into in the trustee's fiduciary capacity in the course of administration of the trust *unless the trustee fails to reveal the trustee's representative capacity or identify the trust in the contract.*" (emphasis added). Not only did the City not identify itself as acting in any representative capacity for the State, but there is no reference in the agreement to a trust. Rather, there is merely a recitation of the various legislative grants of the tidelands from the State to the City of Oakland in 1911 and 1931 concerning the use of the premises. *See* Exhibit 2, SSAT Agreement at § 1.5.

fact, the tidelands grant specifically provided for the City to develop the port "at no expense to the state." *See* Motion to Dismiss, Ex. 2. California law requires local public entities to be responsible for their own judgments and the statutes specifically require entities to budget for judgments and permits entities to use bonds to raise money to pay judgments if necessary. Cal. Gov't Code, 970.2, 970.8, 975.2.

For all of these reasons, the Commission should dismiss the Respondent's effort to repackage its same arguments under California probate law.

VI. Conclusion

The City of Oakland, operating through the Board of Port Commissioners, is a municipal corporation, which, under well established Supreme Court and Circuit Court precedent, is not entitled to share in a state's sovereign immunity. This is true even if it is accepted that the City's management of the Port of Oakland constitutes a "slice of state power."

Moreover, the Port Department manages the Port of Oakland for the City of Oakland and not as an agent, trustee, or arm of the State of California. The port facilities that are the subject of SSAT's complaint were conveyed to the City by the State in fee simple. Since the State held the lands subject to a "public trust" and could only convey as much as it owned, the lands were conveyed with certain use restrictions attached. The State did not, however, retain any ownership interest in the land; and the State does not retain any authority or control over the land or revenues generated thereby. While the State may act on behalf of the people of California to enforce the terms of the public trust, it may only do so through legislative action or litigation. It has no independent power to direct or control the actions of the City or the Port Department. As such, there is no basis to hold that the Port Department is immune as an arm of the State of California.

For all of these reasons, SSAT respectfully requests that the decision below be affirmed and the appeal be denied.

Respectfully submitted,

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Dated: August 17, 2011

EXHIBIT 1

MOTION TO PRINT IN JOURNAL

Senator Kehoe moved that the following letter be printed in the Journal.

Motion carried.

August 27, 2010

Greg Schmidt, Secretary
California State Senate

Dear Mr. Schmidt:

I respectfully submit this Letter to the Journal to clarify the legislative intent of my Senate

Bill 1350, now in enrollment, concerning the proposed addition of Public Resources Code Section 6009 which is simply declaratory of existing law. This letter is necessary to clarify the intent, purpose and scope of this new language.

The new Public Resources Code Section 6009 would add findings declaratory of existing law which state, in part, that "tidelands, submerged lands, and beds of navigable lakes and rivers . . . be held subject to the public trust for statewide public purposes," that state authority over these lands "when acting within the terms of the public trust is absolute," and that "the purposes and uses of tidelands and submerged lands is a statewide concern."

The purpose of adding Section 6009 to the Public Resources Code is to codify and restate existing common law in the area of public trust and tidelands. The intent of this codification is to clarify that the management and administration of these lands by the State and its grantees, which exercise management authority over state lands, is an issue of statewide concern and, specifically, that this authority cannot be circumvented by, nor can any management structure for such lands be altered through, the local ballot-initiative process.

Since these findings and declarations are reflective only of current law, this new section is not intended to enlarge any rights or authorities of any state entity, or to otherwise alter existing trust obligations or the responsibilities of grantees. It merely codifies doctrine already being promulgated regarding the public trust. SB 1350 does not—and was never intended to—create new authority, requirements, or responsibilities for any state agency.

Thank you for the opportunity to clarify this matter.

Sincerely,

CHRISTINE KEHOE
State Senator, 39th District

DC:aaa 12/23/08

BERTHS 57-59 AMENDED AND RESTATED NON-EXCLUSIVE PREFERENTIAL ASSIGNMENT AGREEMENT

THIS BERTHS 57-59 AMENDED AND RESTATED NON-EXCLUSIVE PREFERENTIAL ASSIGNMENT AGREEMENT ("Agreement"), dated for reference purposes as of October ___, 2008, by and between the **CITY OF OAKLAND**, a municipal corporation ("the City"), acting by and through its Board of Port Commissioners ("the Port"), and **SSA TERMINALS, LLC**, a limited liability company formed under the laws of the State of Delaware ("Assignee"),

W I T N E S S E T H:

WHEREAS, the Port is the owner in fee of that certain real property located in the Port Area of the City of Oakland comprised of maritime terminals and related inland properties; and

WHEREAS, under the Charter of the City of Oakland (the "Charter"), the Port is vested with the complete and exclusive power, and it is the Port's duty for and on behalf of the City with respect to the Port Area (as defined in the Charter), to make provisions for the needs of commerce, shipping and navigation of the port, to promote and develop the port, and in the exercise of such power and fulfillment of such duty, to enter into any agreement or assignment of City-owned properties in the Port Area upon such terms and conditions as the Board of Port Commissioners shall prescribe, which terms and conditions shall include control over the rates, charges and practices of the other party or assignee to the extent permitted by law; and

WHEREAS, the Port and Assignee entered into that certain Non-Exclusive Preferential Assignment Agreement dated June 20, 2000, Federal Maritime Commission Agreement No. 201113 (the "Initial Agreement") for Assignee's preferential use and assignment of a maritime terminal and approximately 150 acres of improved land and water area referred to herein as "Berths 57-59" or the "Berths 57-59 Terminal." The Port and Assignee amended, restated or otherwise modified the Initial Agreement by entering into the following: (1) That certain First Amended and Restated Non-Exclusive Preferential Assignment Agreement dated April 2, 2002, Federal Maritime Commission Agreement No. 201113-001, ("First Amended and Restated Agreement"); (2) That certain Second Amendment, consisting of a letter agreement between the Port and Assignee dated October 17, 2002, Federal Maritime Commission Agreement No. 201113-002 ("Second Amendment"); (3) That certain Second Amended and Restated Non-Exclusive Preferential Assignment Agreement dated February 18, 2003,

be temporary, and all work on the Premises shall proceed expeditiously. Assignee shall be given reasonable notice before commencement of any work on the Premises. In the event the installation or maintenance of such future utility lines in such easements causes any damage to the Premises, or any portion thereof, including but not limited to pavement, the same shall be repaired by the Port at its expense, if not so repaired by the party installing and maintaining the line. Any such required repair by the Port shall be completed within 30 days after it is notified of such damage, or, if said repair reasonably cannot be completed within said 30-day period, repair shall be completed as promptly as is practicable thereafter.

The Port reserves to itself and the right to grant others the right to enter upon the Premises, as may reasonably be necessary in order to remediate, clean up, provide security features or otherwise repair, alter or maintain the Premises in accordance with Laws and Regulations, or in order for the Port or others to remediate, clean up or provide security features at adjacent Port property. In the event the Port or the Port's licensee's or permittee's entry results in any damages to the Premises or Assignee's property, the same shall be repaired within 30 days after the Port is notified of such damages, provided that if the damages reasonably cannot be completed within the 30-day period, repair shall be completed as promptly as is practicable thereafter.

The Port also reserves to itself and the right to grant to others in the future easements over outside portions of the Premises, in locations that will not unreasonably interfere with Assignee's use of the Premises, for purposes of access to adjacent Port property (including, without limitation, access to improvements owned by others such as buildings owned by Port tenants on Port land and access for purposes such as maintenance, installation or repair of utilities, use of restrooms, and construction, maintenance, repair, replacement or reconstruction of improvements or facilities located on such Port property).

1.5. **Tidelands**: This Agreement and the Premises hereby assigned shall at all times during the term of this Agreement be subject to the applicable limitations, conditions, restrictions and reservations contained in and prescribed by: (a) The Act of the Legislature of the State of California, entitled "An Act Granting Certain Tidelands and Submerged Lands of the State of California to the City of Oakland and Regulating the Management, Use and Control Thereof," approved May 1, 1911 (Statutes 1911, Chapter 657), as amended (the "1911 Act"); and (b) The Act of the Legislature of the State of California entitled "An Act Granting Certain Lands and Salt Marsh and Tidelands of the State of California to the City of Oakland, including the Management, Use and Control Thereof," approved June 5, 1931 (Statutes 1931, Chapter 621), as amended (the "1931 Act"); and (c) The Charter of the City. The approximate areas of the Premises included in the grants respectively made by the 1911 Act and the 1931 Act are generally shown on the map attached hereto as Exhibit "B".

contracts nor holds itself out as being able to obtain any Port contract or contracts through improper influence.

"Contingent fee," as used in this Section, means any commission, percentage, brokerage, or other fee that is contingent upon the success that a person or concern has in securing a Port contract.

"Improper influence," as used in this Section, means any influence that induces or tends to induce a Port Commissioner, employee or officer to give consideration or to act regarding a Port contract on any basis other than the merits of the matter.

39. Third Party Rights: Nothing herein is intended to nor shall be construed to create any rights of any kind whatsoever in third persons or entities not parties to this Agreement.

40. Definitions: The following terms, when used in this Agreement, including the attached Exhibits with the initial letter(s) capitalized, whether in the singular or plural, shall have the following meaning:

"-50' Project": shall have the meaning provided in Section 9.2.

"1911 Act": shall have the meaning provided in Section 1.5.

"1931 Act": shall have the meaning provided in Section 1.5.

"1966 Lease Agreement": shall have the meaning provided in Section 1.8.

"Additional Costs": shall have the meaning provided in Section 6.4.

"Agreement": This Berths 57-59 Amended And Restated Non-Exclusive Preferential Assignment Agreement.

"Amendment Agreements": shall have the meaning provided in the third WHEREAS of this Agreement.

"As is": shall have the meaning provided in Section 5.

"as-built plans": shall have the meaning provided in Section 6.1.

"Assignee": SSA TERMINALS, LLC, a limited liability company formed under the laws of the State of Delaware

"Base Agreement": shall have the meaning provided in the third WHEREAS of this Agreement.

"Base Premises": shall have the meaning provided in the fourth WHEREAS of this Agreement.

DC:aaa 12/23/08

corporation, acting by and through its Board of Port Commissioners

Dated: January 27, 2009

By _____
Executive Director

ASSIGNEE

SSA TERMINALS, LLC, a limited liability, a company formed under the laws of the State of Delaware

Date: January 21, 09

By _____

By Jon F. Hemingway, President
(Print Name and Title)
(If Corporate: Chairman, President or Vice-President)

Date: January 21, 2009

By _____

By Kyle B. Lukrias, Secretary
(Print Name and Title)
(If Corporate: Secretary, Assistant Secretary, Chief Financial Officer, or Assistant Treasurer)

THIS AGREEMENT SHALL NOT BE VALID OR EFFECTIVE FOR ANY PURPOSE UNLESS AND UNTIL IT IS SIGNED BY THE PORT ATTORNEY.

Approved as to form and legality this 27th day of January 2009.

Deputy Port Attorney

Port Ordinance No. 4040
RA # 09-46

Certificate of Service

I hereby certify that a true and correct copy of Complainants' Reply to the Respondent's Supplemental Appeal Brief was sent by courier and email this 17th day of August 2011 to the following counsel of record in this proceeding:

Paul M. Heylman
Saul Ewing LLP
2600 Virginia Avenue, NW
Suite 1000
The Watergate
Washington, DC 20037

Robert K. Magovern