

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
NORTHERN DIVISION

NO.: 2:07-CV-45-BO

DEFENDERS OF WILDLIFE,
Plaintiff,

v.

NATIONAL PARK SERVICE, ET AL.
Defendants

April 4, 2008
Raleigh, North Carolina

and

DARE COUNTY, ET AL.
Intervenor/Defendants

MOTION HEARING
BEFORE THE HONORABLE TERRENCE W. BOYLE
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiff:

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For the Defendants:

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For the
Intervenor/Defendants:

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dictation.

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P R O C E E D I N G S

1:58 P.M.

THE COURT: GOOD AFTERNOON. THIS IS THE CASE OF DEFENDERS OF WILDLIFE VERSUS THE NATIONAL PARK SERVICE AND OTHERS.

AND WHILE I KNOW THAT THERE WAS A MOTION FILED A DAY AGO, A DAY AND A HALF AGO, BY THE DEFENDANTS AND THE PARK SERVICE TO CONTINUE THE HEARING, I FELT LIKE IT WAS ESSENTIAL THAT WE GO FORWARD AT THIS POINT AND AT LEAST UNDERTAKE AS MUCH AS MAY BE APPROPRIATE NOW.

I THINK IT'S ALSO IMPORTANT AND CRITICAL TO A CASE AND MATTERS IN FRONT OF THE FEDERAL COURT THAT THEY BE OPEN AND PUBLIC AND TRANSPARENT. AND SO THIS IS ANOTHER REASON WHY WE'RE GOING TO PROCEED WITH THE MATTERS BEFORE THE COURT.

I KNOW FROM THE MOTION TO CONTINUE THAT THERE'S SOME REPRESENTATION THAT AT LEAST THE PLAINTIFF AND THE PARK SERVICE PARTIES HAVE BEEN ENGAGED IN SOME DISCUSSION ABOUT A RESOLUTION OF THE CASE. AND CERTAINLY PARTIES ARE THE MASTERS OF THEIR CASE, NOT THE COURT. AND I DON'T HAVE ANY INTEREST OR RIGHT TO INTERFERE WITH THAT AND SO I'LL RESPECT THAT AS IT GOES FORWARD.

THE COURT HAS CERTAIN DUTIES, TOO, AND PENDING BEFORE THE COURT TODAY HAVING BEEN SET FOR SOME TIME IS THE PRELIMINARY INJUNCTION BY THE PLAINTIFFS.

AND BY WAY OF PREFACE, I'LL SAY THAT I HAVE READ THE BRIEFS AND I HAVE FOLLOWED THE EVIDENCE THAT HAS BEEN

April 4, 2008

1 PROPOUNDED BY THE PLAINTIFFS, AND THE PLAINTIFFS HAVE A
2 COMPELLING CASE FOR PRELIMINARY INJUNCTIVE RELIEF.

3 THE COURT IS WELL AWARE, AS ARE THE LAWYERS, OF THE
4 LEGAL STANDARD THAT APPLIES FOR PRELIMINARY INJUNCTIVE RELIEF;
5 THE BALANCE OF HARMS, THE PUBLIC INTEREST, AND THE LIKELIHOOD
6 OF SUCCESS ON THE MERITS AND THE SPECIALIZED STANDARDS THAT
7 APPLY TO CASES IN WHICH THE ENDANGERED SPECIES ACT COMES TO
8 PLAY. AND SO THERE ARE TWO PARALLEL TRACKS OF EXAMINATION
9 THAT THE COURT HAS ENGAGED IN.

10 AND WHILE -- I'LL BE GLAD TO HEAR FROM THE PARTIES,
11 BUT WHILE IT APPEARS THAT YOU ARE ENTITLED TO PRELIMINARY
12 INJUNCTION, THE EXACT SCOPE AND EFFECT OF SUCH RELIEF IS
13 REALLY WHAT'S IMPORTANT. AND IT'S MY PERCEPTION WITHOUT
14 HAVING ANY SPECIAL INSIGHT FROM THE PARTIES THAT THAT'S WHAT
15 YOU'RE WORKING ON, THAT YOU'RE WORKING ON THE PRACTICAL
16 APPLICATION, STRIVING FOR A BALANCE BETWEEN THE INTEREST OF
17 NATURE AND THE INTEREST OF MAN IN THIS ARENA AND TRYING TO
18 STRIKE A POINT AT WHICH THE LAW IS FAITHFULLY OBSERVED AND THE
19 RIGHTS AND TRADITIONS OF THE PEOPLE WHO ARE ULTIMATELY THE LAW
20 ARE ALSO GIVEN RESPECT IN THIS.

21 AND SO I'LL BE GLAD TO HEAR FROM YOU. I'M PREPARED
22 TO MAKE A RULING ON THE INJUNCTION TODAY OR SHORTLY HEREAFTER.
23 CERTAINLY ANY RULING I MAKE WILL BE A WRITTEN ONE, BUT I'LL BE
24 GLAD TO HEAR FROM THE PLAINTIFFS AND WHAT THEIR POSITION IS
25 TODAY.

April 4, 2008

1 MR. CARTER: YOUR HONOR, I'M DERB CARTER
2 REPRESENTING THE PLAINTIFFS, DEFENDERS OF WILDLIFE AND
3 NATIONAL AUDUBON SOCIETY. AND I WOULD BEGIN, I THINK, BY
4 ADDRESSING OUR MOTION FOR A CONTINUANCE THAT WE FILED WITH
5 RESPECT TO THE HEARING TODAY WHICH WAS SCHEDULED TO -- TO HEAR
6 THE MOTION FOR PRELIMINARY INJUNCTION.

7 WHEN WE RECEIVED OUR RESPONSE TO THAT FROM THE
8 FEDERAL DEFENDANTS ON MARCH 14TH, THEY RESPONDED IN A SOMEWHAT
9 UNEXPECTED MANNER TO US THAT WE -- ALTHOUGH WE THOUGHT WE HAD
10 A VERY GOOD CASE THAT, IN FACT, WE ARE LIKELY TO PREVAIL ON
11 THE MERITS OF THE CASE, AND THAT THE APPROPRIATE ISSUES NOW
12 ARE THE SCOPE OF THE -- ANY INJUNCTIVE RELIEF THAT THE COURT
13 MAY GRANT.

14 THE FEDERAL DEFENDANTS INDICATED AN INTEREST IN
15 PURSUING GOOD FAITH NEGOTIATIONS WITH THE PARTIES INVOLVED TO
16 SEE IF, IN FACT, WE COULD REACH SOME RESOLUTION THAT REFLECTS,
17 IN YOUR WORDS, THE MULTIPLE INTERESTS INVOLVED WITH THE
18 INTERESTS OF NATURE AND THE WILDLIFE THAT ARE OF GREAT
19 INTEREST TO MY CLIENTS AND THE INTEREST OF THE GOVERNMENT AND
20 THE INTEREST OF THE INTERVENORS.

21 WE HAVE WORKED VERY DILIGENTLY AND HAVE AN AGREEMENT
22 IN PRINCIPLE ON ALL POINTS OF A SETTLEMENT AND CONSENT DECREE
23 THAT WE ARE WORKING OUT THE VERY FINAL DETAILS ON AND DEALING
24 WITH AN APPROVAL PROCESS THAT WE DON'T HAVE TO DEAL WITH AS
25 PLAINTIFFS, BUT THE FEDERAL GOVERNMENT DOES HAVE TO DEAL WITH

April 4, 2008

1 IT AS A GOVERNMENT ENTITY AND WOULD BE IN A POSITION, WE
 2 BELIEVE, TO FILE THIS CONSENT DECREE WITH THE COURT NEXT
 3 FRIDAY, WHICH IS THE SEVEN-DAY EXTENSION THAT WE'VE REQUESTED
 4 IN TERMS OF EXTENDING THE TIME FOR A HEARING ON THIS
 5 PRELIMINARY INJUNCTION MOTION.

6 THE COURT: WELL, I'M ASSUMING THAT ANY INTER-PARTY
 7 AGREEMENT THAT YOU ARRIVE AT WILL NOT RESULT IN A VOLUNTARY
 8 DISMISSAL AND THE TERMINATION OF THE CASE AND A HANDSHAKE
 9 BETWEEN THE PARTIES THAT THE COURT IS GOING TO BE REQUIRED TO
 10 OR REQUESTED TO ACCEPT AND CONFIRM AN AGREEMENT.

11 AND SO ONE OF THE REASONS FOR BEING HERE TODAY IS TO
 12 HOPEFULLY FLESH OUT IN SOME TERMS WHAT WOULD BE A RELEVANT
 13 CONSIDERATION IN AN AGREEMENT SO THAT YOU DON'T GO THROUGH THE
 14 PROCESS WITH FUTILITY AND COME IN WITH A PROPOSAL THAT'S
 15 INCONSISTENT WITH THE INTEREST OF JUSTICE NECESSARILY.

16 I KNOW THAT YOU'RE WORKING SINCERELY AND
 17 CONSCIENTIOUSLY ON ALL SIDES IN THE CASE, BUT PUBLIC DISCOURSE
 18 IS BETTER THAN, YOU KNOW, PRIVATE EXPECTATIONS. AND I THINK
 19 THAT'S SOMETHING THAT WE WILL GO FORWARD WITH TODAY. THANK
 20 YOU.

21 MR. CARTER: YES, YOUR HONOR.

22 THE COURT: I'LL HEAR FROM THE GOVERNMENT.

23 MS. TAYLOR: THANK YOU, YOUR HONOR. LORA TAYLOR
 24 WITH THE U.S. ATTORNEY'S OFFICE APPEARING ON BEHALF OF ALL
 25 FEDERAL DEFENDANTS.

April 4, 2008

1 WE ECHO MR. CARTER'S STATEMENTS THAT AS WE NOTED IN
2 OUR RESPONSE WE RECOGNIZE THAT WE DO NOT HAVE AN OFF ROAD
3 VEHICLE REGULATION IN PLACE SO WE ARE NOT COMPLIANT WITH 36
4 CFR 4.10, AND THE PLAINTIFFS HAVE ESTABLISHED A LIKELIHOOD OF
5 SUCCESS ON THE MERITS WITH REGARD TO THAT ELEMENT OF THEIR
6 COMPLAINT.

7 SINCE WE FILED OUR RESPONSE WE HAVE BEEN DILIGENTLY
8 ATTEMPTING TO NEGOTIATE WITH BOTH PARTIES. A RESOLUTION BEGAN
9 WITH JUST THE SCOPE OF THE INJUNCTION AND THEN WITH THE
10 PLAINTIFFS IT CONTINUED ON TO RESOLUTION POSSIBLY OF ALL
11 MATTERS IN THE CASE.

12 AND WE DO BELIEVE THAT WE HAVE AN AGREEMENT IN
13 PRINCIPLE THAT WOULD PROTECT ALL SPECIES AND RESOLVE ALL
14 CLAIMS AND DISPUTES WHILE STILL PRESERVING THE APPROPRIATE
15 AMOUNT OF RECREATIONAL ACCESS. BECAUSE AS YOUR HONOR IS
16 AWARE, WE DO HAVE AN OBLIGATION TO PROVIDE REASONABLE ACCESS
17 THAT WOULD NOT HARM THE ENVIRONMENT. AND THAT IS WHAT WE
18 BELIEVE OUR AGREEMENT IN PRINCIPLE PROVIDES, FOR PRESERVATION
19 AND PROTECTION OF THE ENVIRONMENTAL NEST WHILE STILL ALLOWING
20 FOR THE APPROPRIATE AMOUNT OF ACCESS.

21 WE ARE PREPARED TO -- I HAVE TO SEND THIS UP THE
22 CHAIN OF COMMAND ON BOTH THE DEPARTMENT OF JUSTICE SIDE AND
23 DEPARTMENT OF INTERIOR SIDE. SO, IT MUST ULTIMATELY BE
24 APPROVED BY THE ASSISTANT ATTORNEY GENERAL FOR THE
25 ENVIRONMENTAL AND NATURAL RESOURCES DIVISION AS WELL AS THE

April 4, 2008

1 DEPUTY ASSISTANT SECRETARY OF INTERIOR. BOTH OF THOSE
2 GENTLEMEN HAVE BEEN BRIEFED ON THE PROPOSAL AND WE HAVE BEGUN
3 THE PROCESSES OF -- WE HAVE BEGUN THE APPROVAL PROCESS.

4 WHAT WE ENVISION IS PRESENTING THE SETTLEMENT TO THE
5 COURT IN THE FORM OF A CONSENT DECREE. WE THINK WE WILL BE
6 PREPARED TO DO THAT BY NEXT FRIDAY AND THAT WOULD BE THE
7 PUBLIC FORUM AND THE OPPORTUNITY FOR ALL TO HEAR WHAT THE
8 SETTLEMENT IS AS WELL AS FOR THE INTERVENOR PARTIES, TO THE
9 EXTENT THAT THEY DO NOT AGREE WITH THE SETTLEMENT, TO ARGUE
10 THEIR OBJECTIONS.

11 SO, THERE WILL BE A FULL OPPORTUNITY TO BE HEARD.
12 WE BELIEVE THAT THAT IS THE APPROPRIATE RESPONSE HERE AND THAT
13 GOING ON WITH THE ARGUMENT RELATED TO THE PRELIMINARY
14 INJUNCTION IS UNNECESSARY BECAUSE WE -- IT WILL BE OBIATED BY
15 THE SETTLEMENT.

16 THE COURT: THANK YOU. LET ME ASK YOU SOME
17 QUESTIONS THAT BEAR -- SINCE YOU'RE REPRESENTING THE PARK
18 SERVICE AND YOU'RE THE NATIONAL SEASHORE AND YOU REPRESENT THE
19 SUBJECT OF THIS LAWSUIT. THERE ARE SOME PHYSICAL AND
20 GEOGRAPHIC CHARACTERISTICS THAT ARE SELF-EVIDENT IN THIS
21 PROCESS THAT MAY BE ADDRESSED AND MAY NOT BE AND THE COURT
22 WOULD CERTAINLY HAVE THOSE IN ITS MATRIX OF EXAMINATION OF THE
23 ISSUES.

24 FOR INSTANCE, THERE ARE THREE SEPARATE GEOGRAPHIC
25 AREAS. THERE'S BODIE ISLAND AND THERE IS HATTERAS ISLAND AND

April 4, 2008

1 THERE'S OCRACOKE ISLAND THAT COMPRISE THE SEASHORE, THE
2 HATTERAS SEASHORE.

3 AND EXPERIENCES AND CHARACTER AND USE AND ACCESS TO
4 BODIE ISLAND ARE PROFOUNDLY DIFFERENT FROM -- AND I'M NOT
5 SAYING THIS AS A MATTER OF LAW, I'M SAYING THIS AS A MATTER OF
6 JUDICIAL NOTICE OF THE FACTS. MUCH OF THE AREA IN CONFLICT IN
7 BODIE ISLAND -- ON BODIE ISLAND INVOLVES THE FLATS OF OREGON
8 INLET ON THE NORTH AND EAST SIDE, IF YOU WANT TO CALL IT THAT,
9 OF THE CHANNEL ITSELF.

10 AND WE BEGIN THIS ENTIRE EXERCISE WITH THE
11 UNDERSTANDING THAT 36 YEARS AGO IN 1972, THERE WAS A
12 DECLARATION MADE AND THAT DECLARATION HAS COME FORWARD AS
13 BINDING AUTHORITY AND IT WAS IMPLEMENTED AT OTHER TIMES AND
14 OTHER PLACES ON SEASHORES THROUGHOUT THE ATLANTIC SEABOARD.
15 AND WHERE THE LAND WAS IN 1972 PHYSICALLY IS MATERIALLY
16 DIFFERENT FROM WHERE THE LAND IS TODAY. THE BRIDGE THAT WAS
17 BUILT, YOU TELL ME, ABOUT 1964 HAS FISHING ACCOMMODATION OVER
18 AREAS THAT WERE UNDERWATER THEN THAT ARE HUNDREDS OF YARDS IF
19 NOT FURTHER FROM ANY WATER NOW.

20 AND SO WHAT WOULD HAVE BEEN AVAILABLE TO DEAL WITH
21 IN 1972, IS DRASTICALLY DIFFERENT FROM WHAT'S AVAILABLE TO
22 DEAL WITH NOW. WHETHER THAT MATTERS I DON'T KNOW, BUT THAT'S
23 A FACT.

24 AND VOLUME OF ACCESS TO THE FLATS AT OREGON INLET IS
25 MUCH MORE ACUTE THAN IT IS TO THE OTHER AREAS. THE

April 4, 2008

1 SENSATIONAL DISCUSSIONS OF A THOUSAND CARS ON A BIG HOLIDAY
2 WEEKEND OR A SIGNIFICANTLY HIGHER NUMBER OF CARS THAN A
3 THOUSAND, THAT OCCURS THERE. THAT'S THE MAGNET THAT DRAWS
4 THAT IN. THAT'S THE AREA THAT IS MOST INUNDATED WITH
5 MECHANICAL TRAFFIC.

6 GO OVER TO HATTERAS ISLAND, THE BEGINNING OF IT IS A
7 REFUGE ONCE YOU GET SOUTH OR WEST OF THE BRIDGE. AND THAT
8 GOES ON FOR HOWEVER MANY -- TEN MILES OR SO. AND THEN YOU
9 BEGIN TO HAVE STRETCHES OF SEASHORE INTERRUPTED BY VILLAGES.
10 AND THE VILLAGES ARE FIVE OR SIX, HOWEVER MANY THERE ARE, FROM
11 AVON, RODANTHE AND SALVO AND WAVES DOWN TO FRISCO AND
12 HATTERAS. TO MY KNOWLEDGE, AND I STAND TO BE CORRECTED, THOSE
13 ARE UNINCORPORATED POLITICAL SUBDIVISIONS. DOES THE
14 GOVERNMENT KNOW?

15 MS. TAYLOR: I'M NOT AWARE, YOUR HONOR.

16 THE COURT: AREN'T THEY UNINCORPORATED?

17 MR. LIEBESMAN: THAT'S MY UNDERSTANDING, YOUR HONOR.

18 THE COURT: YEAH, THEY'RE UNINCORPORATED
19 SUBDIVISIONS. AND SO THE GOVERNMENT OF THOSE IS DARE COUNTY.

20 ANYWAY, SO THE EXPERIENCE ON HATTERAS ISLAND AND
21 ACCESS AND USE IS DIFFERENT IN KIND FROM THE EXPERIENCE ON
22 BODIE ISLAND. AND THEN YOU GET OVER TO OCRACOKE AND YOU CAN'T
23 GET THERE WITHOUT TAKING A STATE FERRY OR SWIM OR TAKE A BOAT,
24 BUT IF YOU TOOK A BOAT, YOU CAN'T DRIVE.

25 SO, THE EXPERIENCE ON OCRACOKE IS RADICALLY

April 4, 2008

1 DIFFERENT IF FOR NO OTHER REASON THAN PHYSICALLY ORV'S CAN'T
2 GET THERE. YOU ONLY HAVE HOWEVER MANY CAN GET THERE BY TAKING
3 THE FERRY AND COMING BACK AND FORTH. AND SO THE TREATMENT
4 THERE MAY BE THE SAME, IT MAY BE DIFFERENT.

5 AND I DON'T KNOW WHAT YOUR NEGOTIATIONS ENTAIL, BUT
6 THESE ARE ALL SORT OF COMMON SENSE PUBLIC INTEREST FACTORS.

7 AND HOW YOU MAY RESPOND TO THE FLATS AT OREGON INLET
8 MAY BE RADICALLY DIFFERENT FROM HOW YOU'D RESPOND TO OCRACOKE.
9 AND I UNDERSTAND THAT THE CRITICAL FACTOR THAT'S INVOLVED HERE
10 FROM A LEGAL STANDPOINT IS THE PROTECTION OF THE WILDLIFE,
11 EITHER THE THREATENED OR ENDANGERED SPECIES OR OTHER WILDLIFE
12 WHETHER TERRESTRIAL OR AIRBORNE THAT ARE WITHIN THE MISSION
13 STATEMENT AND PUBLIC PURPOSE OF THE SEASHORE.

14 ANOTHER PHYSICAL CHARACTERISTIC OF THE SEASHORE AND
15 OFF ROAD VEHICLE ACCESS IS THAT THE ONLY WAY LEGALLY YOU CAN
16 GET ONTO THE SEASHORE IS TO GO UP A RAMP. YOU CAN'T DRIVE
17 OVER THE DUNE. YOU CAN'T JUST WILLY-NILLY BE TRAVELING SOUTH
18 AND DECIDE I FEEL LIKE DRIVING ON THE BEACH. YOU HAVE TO GO
19 TO A RAMP. AND ON BODIE ISLAND I BELIEVE UNDER THE -- DURING
20 THE PERIODS OF TIME THAT ARE RELEVANT TO THIS, I COULD BE
21 WRONG, THERE'S ONLY ONE RAMP AND THAT'S NEAR THE -- NEAR
22 OREGON INLET.

23 ONCE YOU GET ONTO HATTERAS ISLAND THERE ARE SEVERAL
24 RAMPS. ONCE YOU GET FURTHER DOWN TO OCRACOKE THERE ARE RAMPS
25 AGAIN, NOT TOO MANY. BUT THE ABILITY TO REGULATE THE NUMBER

April 4, 2008

1 AND KIND AND CIRCUMSTANCES OF OFF ROAD VEHICLES IS READILY
2 AVAILABLE THROUGH THE PORTAL THAT EXISTS NOW, IT'S JUST NOT
3 MANNED AND IT NEVER HAS BEEN. IT'S NOT EXAMINED OR USED AS A
4 GATEKEEPER, BUT PHYSICALLY THAT APPLIES.

5 NOW, TO MY KNOWLEDGE, AND CORRECT ME IF I'M WRONG
6 BECAUSE IT'S YOUR PLAN, YOU HAVE AN INTERIM PLAN THAT CAME
7 INTO EFFECT LESS THAN A YEAR AGO. AND THAT PLAN DOES NOT
8 DISCRIMINATE OR LIMIT THE NUMBER OF VEHICLES, THE CHARACTER OF
9 THE DRIVER IN TERMS OF PRE-CLEARANCE, OR THE TYPE OF VEHICLE,
10 DOES IT? AS LONG AS IT'S A LICENSED MOTOR VEHICLE THAT CAN
11 OTHERWISE ENGAGE IN OFF ROAD OPERATION IT CAN GO ON THE BEACH.

12 MS. TAYLOR: THAT'S MY UNDERSTANDING, YOUR HONOR.

13 THE COURT: OKAY. SO, IF YOU TAKE A -- TAKE A
14 GUESS, 8,000 POUND HUMMER AND PUT THAT OUT THERE, THAT'S
15 ENTITLED TO THE SAME ACCESS AND DIGNITY AS A 3,000 POUND SMALL
16 JEEP?

17 MS. TAYLOR: THAT WOULD BE MY UNDERSTANDING, YOUR
18 HONOR.

19 THE COURT: OKAY. I MEAN, THESE ARE THINGS THAT I
20 DON'T KNOW IF YOU'RE DEALING WITH THEM OR NOT. BUT IF YOU'RE
21 NOT, COMMON SENSE WOULD RECOMMEND THAT YOU DEAL WITH THEM
22 BECAUSE YOU DON'T HAVE TO BE A MARINE BIOLOGIST TO FIGURE OUT
23 THAT THE IMPACT OF A HIGH WEIGHT, HIGH ENGAGEMENT VEHICLE IS
24 GOING TO BE SIGNIFICANT COMPARED TO SOME OTHER KIND OF
25 VEHICLE. THE IMPACT OF 1,000 OR 1,500 VEHICLES IS GOING TO BE

April 4, 2008

1 A LOT DIFFERENT THAN THE IMPACT OF 150 OR 200 VEHICLES.

2 CAN YOU DRIVE 24 HOURS A DAY ON THE BEACH? IS THERE
3 A NIGHTTIME RESTRICTION?

4 MS. TAYLOR: NOT CURRENTLY, YOUR HONOR.

5 THE COURT: OKAY. AND OTHER THAN CLOSURES, IS THERE
6 A TIME OF YEAR RESTRICTION ON HATTERAS ISLAND?

7 MS. TAYLOR: CURRENTLY, YOUR HONOR, I BELIEVE IN
8 FRONT OF THE VILLAGES DURING --

9 THE COURT: WELL, IN FRONT OF THE VILLAGES IS --
10 OTHER THAN THE MEAN HIGH WATER LINE DOWN THAT'S -- THE
11 VILLAGES REGULATE THAT, DON'T THEY?

12 MS. TAYLOR: AND THOSE AREAS ARE CLOSED TO OFF ROAD
13 VEHICLE USE IN FRONT OF VILLAGES.

14 THE COURT: DURING THE SUMMER.

15 MS. TAYLOR: DURING THE SUMMER. AND WE DO ACTUALLY
16 CURRENTLY UNDER OUR INTERIM STRATEGY WE HAVE PRE-NESTING
17 CLOSURES IN PLACE WHERE OFF ROAD VEHICLES ARE ALSO RESTRICTED
18 AND THOSE WERE -- THOSE ARE PUT INTO EFFECT UNDER THE INTERIM
19 STRATEGY TO PROTECT BREEDING AREAS PARTICULARLY FOR PIPING
20 PLOVER.

21 THE COURT: RIGHT. THE BREEDING AREAS TALK ABOUT
22 NESTING AND MATING AND I GUESS THOSE ARE THE PRINCIPLE THINGS.
23 BUT I HAVEN'T SEEN ANYTHING IN THE DISCUSSION, AND MAYBE IT'S
24 NON-SCIENCE OR BAD SCIENCE, ABOUT THE EDGE OF THE WATER
25 EFFECT. BUT I'LL BE SURPRISED TO LEARN THAT A CRITICAL

April 4, 2008

1 ENVIRONMENTAL AREA, ONE OF FRAGILE AND SIGNIFICANT IMPORTANCE,
2 IS NOT WHERE THE WATER MEETS THE LAND BECAUSE THAT'S THE
3 FEEDING GROUND OF THE TERRESTRIAL AND AIRBORNE ANIMALS THAT
4 ARE GOING TO BE ON THE BEACH. IS THAT NOT THE CASE?

5 MS. TAYLOR: I BELIEVE THAT WOULD BE CORRECT, YOUR
6 HONOR.

7 THE COURT: SO, IF THAT'S THE CASE, THEN CLOSURES
8 THAT SIMPLY SEPARATE AN AREA OF THE BEACH OR DUNE AND DON'T
9 DEAL WITH WATER ACCESS ARE EFFECTIVE OR INEFFECTIVE?

10 MS. TAYLOR: IT'S PROBABLY NOT JUST A YES OR -- NOT
11 AN INEFFECTIVE OR EFFECTIVE RESPONSE. BUT WE RECOGNIZE, AND
12 WITHOUT REVEALING TOO MUCH OF THE CURRENTLY UNAUTHORIZED
13 SETTLEMENT PROPOSAL, THE ISSUES THAT YOUR HONOR HAS -- DOES
14 RAISE ARE -- HAVE BEEN DISCUSSED IN GREAT DETAIL AND ARE --
15 THERE HAS BEEN AN ATTEMPT TO ADDRESS THOSE CONCERNS.

16 THE COURT: YOU CAN'T GO HUNTING IN NORTH CAROLINA
17 WITH A FIREARM WITHOUT PASSING A HUNTER'S SAFETY COURSE, DID
18 YOU KNOW THAT? YOU CAN'T EVEN GET A HUNTING LICENSE WITHOUT
19 PASSING A HUNTER'S SAFETY COURSE. BUT YOU CAN HAVE A DRIVER'S
20 LICENSE AND BUY AN ORV AND DRIVE UP AND DOWN THE SEASHORE
21 WITHOUT LIMITATION, CAN'T YOU, TODAY?

22 MS. TAYLOR: WITHOUT HAVING SOME SORT OF -- ALONG
23 THE LINES OF THE HUNTER PERMIT, NO.

24 THE COURT: THERE'S NO ONE THAT SAYS YOU'RE CAPABLE
25 SKILL-WISE OF OPERATING A MOTOR VEHICLE ON THE BEACH UNDER THE

April 4, 2008

1 CIRCUMSTANCES AND PREDICTABILITY OF WHAT CAN HAPPEN IN THAT
2 ENVIRONMENT.

3 MS. TAYLOR: THAT'S CORRECT, YOUR HONOR.

4 THE COURT: ARE YOU TAKING INTO ACCOUNT THE
5 RESOURCES AND MANPOWER OF THE PARK SERVICE AND HOW -- AND
6 WHETHER THEY WILL BE ADEQUATELY PREPARED OR SUPPORTED BY THEIR
7 AGENCY IN ORDER TO DEAL WITH THIS CHANGING SITUATION?

8 MS. TAYLOR: MOST CERTAINLY, YOUR HONOR. THAT HAS
9 BEEN AN IMPERATIVE CONCERN AND HAS BEEN DISCUSSED AT GREAT
10 LENGTHS.

11 THE COURT: THE HISTORY OF THE PAST 20 OR 30 YEARS
12 HAS BEEN THAT PARK SERVICE MANPOWER IS CONSISTENTLY REDUCED BY
13 THE DEPARTMENT OF INTERIOR AS AN EXPENDABLE RESOURCE BECAUSE
14 IT'S THE PARK SERVICE. YOU KNOW, WHERE DO WE CUT? LET'S CUT
15 THERE. AND AT THE SAME TIME THAT MANPOWER HAS BEEN
16 CONSISTENTLY REDUCED, THE NUMBER OF FULL TIME RANGERS,
17 SEASONAL RANGERS, INTERPRETATION PEOPLE, AS THAT HAS GONE ON,
18 USER ACCESS AND THE VOLUME OF ATTENDEES AT CAPE HATTERAS HAS
19 GONE IN A STRAIGHT LINE GRAPH UP. AND SO, IF YOU REACH A
20 PROPOSAL THAT AGGRAVATES THE LACK OF MANPOWER, IT'S NOT GOING
21 TO BE EFFECTIVE.

22 MS. TAYLOR: I WOULD AGREE WITH YOUR HONOR, AND THAT
23 HAS BEEN DISCUSSED AT GREAT LENGTH.

24 THE COURT: WHY WOULD NOT THE APPROPRIATE SOLUTION
25 BE FOR THE COURT TO ENTER A GENERAL PRELIMINARY INJUNCTION

April 4, 2008

1 AUTHORIZING THE CREATION OF A RESPONSIVE PLAN CONSISTENT WITH
2 THE LAW AND ALLOW THE PARTIES TO PRODUCE EITHER SINGULARLY OR
3 IN COMBINATION A PROPOSAL?

4 MS. TAYLOR: SIMPLY BECAUSE IT'S NOT NECESSARY TO DO
5 SO. WE'VE MOVED BEYOND THAT ALREADY OURSELVES AND THERE IS NO
6 NEED FOR THE COURT TO DO THAT.

7 THE COURT: OKAY. WHAT'S THE DIFFERENCE BETWEEN A
8 COURT ORDERED CONSENT DECREE, WHICH I'M ASSUMING WILL HAVE
9 ENFORCEMENT PROVISIONS IN IT, AND AN INJUNCTION? IS IT JUST A
10 SEMANTIC DIFFERENCE OR IS THERE AN ACTUAL DIFFERENCE?

11 MS. TAYLOR: I BELIEVE IT'S JUST SEMANTIC. THE
12 PLAINTIFFS HAVE REQUESTED INJUNCTIVE RELIEF IN THEIR
13 COMPLAINT. THEREFORE, ANY CONSENT DECREE THAT WE ENTER INTO
14 IS ESSENTIALLY THE INJUNCTION, IT'S JUST THAT WE HAVE AGREED
15 AMONGST OURSELVES WHAT THAT SHOULD BE.

16 THE COURT: OKAY. AND THAT WOULD FOREGO APPEAL IF
17 YOU CONSENTED TO IT. YOU CAN'T APPEAL FROM A DOCUMENT THAT
18 YOU CONSENT TO.

19 MS. TAYLOR: CORRECT.

20 THE COURT: YEAH. THE GOVERNMENT WOULD NOT BE
21 TAKING AN APPEAL.

22 MS. TAYLOR: CORRECT.

23 THE COURT: OKAY. ANYTHING YOU WANT TO ADD?

24 MS. TAYLOR: NO. THANK YOU, YOUR HONOR.

25 THE COURT: OKAY. I'LL HEAR FROM THE COUNTY.

April 4, 2008

1 MR. LIEBESMAN: YOUR HONOR, LAWRENCE LIEBESMAN ON
2 BEHALF OF LOCAL INTEREST INCLUDING DARE AND HYDE COUNTIES.
3 WITH ME IS MR. HORNTAL, LOCAL COUNSEL, AND MR. STEVE KELTON
4 FROM OUR LAW FIRM OF HOLLAND AND KNIGHT. AND I'LL LET MR.
5 HORNTAL ADDRESS A COUPLE ISSUES.

6 BUT JUST AS A PRELUDE TO HIS COMMENTS, WE JUST WANT
7 TO SAY THAT OUR REAL CONCERN, UNFORTUNATELY, IS THAT WE FEEL
8 THAT MOST RECENTLY WE'VE BEEN CUT OUT OF WHAT WE THINK HAVE
9 BEEN ONGOING SETTLEMENT DISCUSSIONS AND NOW HAVE BEEN ADVISED
10 WITH RESPECT TO THE LATEST FILING THAT THE GOVERNMENT AND THE
11 PLAINTIFFS ARE MOVING TOWARDS A CONSENT DECREE THAT THEY'RE
12 GOING TO PRESENT TO THE COURT A WEEK FROM NOW TO WHICH WE
13 WOULD HAVE POTENTIALLY A CHANCE TO CHALLENGE.

14 OUR CONCERN IS IN A COUPLE OF AREAS. WE'RE VERY
15 UNHAPPY THAT WE'VE BEEN CUT OUT RECENTLY BECAUSE WE HAVE BEEN
16 IN DISCUSSIONS AND THERE ARE CERTAIN THINGS THAT WE ARE IN
17 AREAS OF DISAGREEMENT ON. THERE'S CERTAIN AREAS THAT WE HAVE
18 OF AGREEMENT. BUT THE MOST RECENT COMMUNICATION IS THAT
19 THEY'RE PROCEEDING AHEAD ON THEIR OWN TO FASHION A PROPOSED
20 CONSENT DECREE AND INJUNCTION AND PRESENT TO THE COURT AND
21 WE'LL HAVE A CHANCE TO CHALLENGE.

22 THERE ARE TREMENDOUS INTERESTS AT STAKE FROM OUR
23 STANDPOINT. I HEAR WHAT YOUR HONOR IS SAYING. WE'RE VERY
24 SENSITIVE TO THE CONCERNS ABOUT THE RESOURCES IN THE CAPE
25 HATTERAS NATIONAL SEASHORE. BUT WE'RE ALSO VERY CONCERNED

April 4, 2008

1 ABOUT THE IMPACT ON OUR INTERESTS; THE ECONOMY, THE LOCAL
2 INTEREST, THE HISTORY AND THE LEGISLATIVE HISTORY OF THE CAPE
3 HATTERAS NATIONAL SEASHORE. ALL THIS BALANCE THAT YOUR HONOR
4 WAS TALKING ABOUT ARE SO CRITICAL TO US AND WE WOULD WANT TO
5 HAVE THE OPPORTUNITY IF THEY PROCEED DOWN THIS PATH TO PRESENT
6 A PROPOSED CONSENT ORDER TO THE COURT TO RAISE OBJECTIONS
7 INCLUDING THE OPPORTUNITY TO PRESENT EVIDENCE, TO HAVE YOUR
8 HONOR ADDRESS THOSE ISSUES FROM THE BALANCE THAT YOUR HONOR
9 WAS DISCUSSING.

10 WE'RE DEALING WITH SOME VERY COMPLEX ISSUES. WE'RE
11 DEALING WITH A CAREFUL BALANCING PROCESS TO COME UP WITH
12 TAILORED RELIEF, TAILORED INJUNCTIVE RELIEF, THAT BALANCES
13 THESE KINDS OF CONSIDERATIONS.

14 AND IT'S TRUE TO THE INTENT OF CONGRESS, THE CAPE
15 HATTERAS NATIONAL SEASHORE WAS CREATED AS A NATIONAL
16 RECREATION AREA IN 1937. AND SO FAR THAT PROCESS,
17 UNFORTUNATELY, HAS BEEN CUT OFF BECAUSE WE'RE FACING THE IDEA
18 OF A CONSENT DECREE AND PERHAPS A HEARING A WEEK FROM TODAY
19 AND BEING PRESENTED WITH A FAIT ACCOMPLI AND NOT HAVING THE
20 OPPORTUNITY POTENTIALLY TO CHALLENGE IT.

21 IF THAT WERE THE CASE, WE WOULD WANT TO HAVE A
22 CHANCE TO PRESENT EVIDENCE FOR SEVERAL DAYS, TO HEAR THE
23 SCIENCE, TO LOOK AT THE ECONOMICS, TO CONSIDER ALL THE FACTORS
24 IN THE COURT'S CAREFUL JUDGEMENT THAT YOU WOULD HAVE TO DO TO
25 COME UP WITH THE KIND OF RELIEF THAT IS NARROWLY TAILORED TO

April 4, 2008

1 TAKE ALL THESE FACTORS INTO ACCOUNT.

2 SO OUR BIGGEST CONCERN IS ONE OF PROCESS. AND MR.
3 HORNTHAL, IF YOU WANT TO ADD A FEW POINTS TO THAT. I'LL TURN
4 IT OVER TO MR. HORNTHAL FOR A SECOND, IF I CAN.

5 MR. HORNTHAL: THANK YOU, YOUR HONOR. I WOULD SAY I
6 DON'T KNOW VERY MUCH ABOUT THE ENVIRONMENTAL ISSUES AS THE
7 COURT WOULD APPRECIATE AND I'LL LEAVE THAT TO MR. LIEBESMAN
8 AND HIS COUNSEL. THEY'RE WELL ABLE TO DEAL WITH THAT. BUT I
9 HAVE REVIEWED THE PAPERS. AND FROM REVIEWING THE PAPERS, IT
10 WOULD BE APPARENT TO ME AND TO ANYONE ELSE THERE'S A SHARP
11 CONTROVERSY FROM THE POINT OF VIEW OF SCIENCE AND ECONOMIC
12 EVIDENCE BETWEEN THE POSITION THAT HAS BEEN TAKEN BY THE
13 PLAINTIFFS AND HAS ESSENTIALLY BEEN CONCEDED BY THE GOVERNMENT
14 AND THE POSITION OF THE INTERVENORS.

15 NOW, MY OBSERVATION TO THE COURT WOULD BE THAT I
16 BELIEVE THIS IS A CLASSIC RULE 24 INTERVENOR CASE IN WHICH THE
17 INTERESTS OF THE PUBLIC BODIES AND THE PRIVATE BODIES THAT
18 SHARE THE POSITION OF THE INTERVENORS IS NOT GOING TO BE
19 ADEQUATELY REPRESENTED IN THE POSITIONS BEING TAKEN BY THE
20 PRIMARY PARTIES TO THE LAWSUIT. AND IT SEEMS TO US THAT WE
21 OUGHT TO HAVE THE OPPORTUNITY TO MAKE PRESENTATIONS TO THE
22 COURT AND FOR THE RECORD IN THOSE REGARDS.

23 I, TOO, AM VERY SENSITIVE TO THE QUESTIONS ON THE
24 NARROWNESS IN TAILORING OF RELIEF THAT YOUR HONOR HAS RAISED.
25 FROM A PROCEDURAL POINT OF VIEW, I WOULD OBSERVE THAT THE

April 4, 2008

1 INTERVENORS HAVE FILED A MOTION TO DISMISS THAT HAS NOT BEEN
2 DETERMINED.

3 THE COURT: WELL, I'M NOT GOING TO DISMISS THE CASE,
4 I CAN TELL YOU THAT. AND WHETHER I HAVE TO DO IT WRITING,
5 WHICH I WILL, BUT I FIND NO MERIT IN THE DISMISSAL.

6 MR. HORNTAL: WELL, I UNDERSTOOD THAT, AND YOUR
7 HONOR HAS NOW SO SAID, BUT I --

8 THE COURT: I MEAN, THE CASE IS NOT GOING TO END BY
9 THE LAWSUIT BEING DISMISSED AGAINST THE PLAINTIFFS. THAT WILL
10 NOT BE THE OUTCOME.

11 MR. HORNTAL: AND I HOPE YOUR HONOR DID NOT
12 UNDERSTAND ME TO BE OFFERING ANY DISRESPECT --

13 THE COURT: NO, NO, NO.

14 MR. HORNTAL: -- TO THAT VIEW BY THE COURT, BUT
15 JUST REMINDING --

16 THE COURT: NO, I JUST WANTED TO MOVE PASS THAT.

17 MR. HORNTAL: AND SO I WOULD UNDERSTAND FROM WHAT
18 THE COURT SAYS THAT IT WOULD BE -- THAT THAT MOTION IS GOING
19 TO BE DENIED.

20 THE COURT: IT'LL BE DENIED.

21 MR. HORNTAL: AND THE OTHER POINT FROM A PROCEDURAL
22 PERSPECTIVE, WOULD I BE CORRECT THAT YOUR HONOR DOES NOT WISH
23 TO HEAR FURTHER ARGUMENTS WITH RESPECT TO THE ENTITLEMENT OF
24 THE PLAINTIFFS TO GET A PRELIMINARY INJUNCTION IN THIS CASE,
25 THAT YOUR HONOR HAS MADE YOUR DETERMINATION THAT THEY'RE

April 4, 2008

1 ENTITLED TO THAT?

2 THE COURT: THAT'S CORRECT.

3 MR. HORNTHAL: AND SO IT WOULD SEEM THAT --

4 THE COURT: BUT I'M NOT GOING TO ORDER A PRELIMINARY
5 -- WELL, I DON'T KNOW WHETHER -- I WILL RESERVE JUDGMENT ON
6 THAT GIVEN THE POSITIONS OF THE PLAINTIFF AND DEFENDANT.

7 AND I'M HEARING WHAT YOU'RE SAYING AND I THINK THAT
8 IT RESONATES -- WHAT YOU'RE SAYING, I THINK, IS THAT YOU WOULD
9 LIKE A SEAT AT THE TABLE. IF YOU'RE GOING TO BE FACED WITH A
10 PREEMPTIVE SETTLEMENT, THEN THE PUBLIC WOULD LIKE TO HAVE
11 ACCESS TO THE NEGOTIATIONS AND TO RAISE THOSE POINTS OF
12 INTEREST THAT MAY BE NOT -- MAY NOT BE APPARENT TO THOSE WHO
13 AREN'T FOCUSING ON THOSE THINGS.

14 AND I THINK ONE OF THEM AS WE TALK ABOUT THE
15 DIFFERENCE IN GEOGRAPHY AND THE DIFFERENCES IN THE CHARACTER
16 OF THESE COMPONENTS OF THE HATTERAS SEASHORE YOU ALSO HAVE A
17 HIERARCHY OF USE. MEANING THAT THERE ARE PEOPLE WHO HAVE
18 LIVED ON THAT ISLAND FOR TWO OR 300 YEARS CHRONOLOGICALLY AND
19 WHO HAVE AN EXPECTATION OF USE THAT MAY BE MATERIALLY
20 DIFFERENT FROM THE EXPECTATION OF SOMEONE IN CLEVELAND, OHIO,
21 WHO'S GOING TO COME DOWN AND SPEND A FEW DAYS LOOKING AT THE
22 SCENERY.

23 AND SO TAKING INTO ACCOUNT THE PROXIMITY AND
24 TRADITIONS AND INTEGRATION OF THEIR LIFESTYLE WITH THE
25 SEASHORE SHOULD BE A FACTOR THAT GOES INTO PLAY.

April 4, 2008

1 I'M NOT SURE THAT ALL PERSONS SHOULD BE TREATED
2 EQUALLY. IT MAY BE THAT SOME PERSONS BECAUSE OF THEIR
3 PROXIMITY AND USE NEED TO BE TREATED DIFFERENTLY BECAUSE IT
4 ISN'T THE -- IT ISN'T THE PEOPLE, IT'S THE VOLUME THAT IS
5 CREATING THE PROBLEM.

6 IF YOU -- AND THIS IS NO CRITICISM INTENDED, BUT
7 IT'S SELF-EVIDENT TO EVERYBODY WHO IS IN HERE. IF THE PARK
8 SERVICE HAD HAD A PLAN IN LATE 1972, AND THEN HAD DEALT WITH
9 THE PROGRESSION OF DEVELOPMENT AND DEMOGRAPHIC SHIFT AND
10 ACCESS TO THE BEACH AND ALL THAT OVER THE PAST 36 YEARS, THE
11 PLAN MIGHT HAVE MIGRATED AND IT MIGHT HAVE DEVELOPED AND
12 EVOLVED AND IT MIGHT BE LESS THAN NO PLAN TODAY, BUT SOMETHING
13 THAT WAS BUILT INTO THE SET OF EXPECTATIONS OF THE PEOPLE IN
14 THE COMMUNITY.

15 THE PROBLEM IS WE CAN'T GO BACK AND CHANGE HISTORY.
16 WE CAN'T GO BACK AND MOVE THE CLOCK BACK TO 1972, WHEN IF YOU
17 SAW FIVE CARS ON THE BEACH, THAT WAS A BUSY DAY. AND WHEN YOU
18 COULDN'T GO TO EVERY CAR LOT AND BUY A FOUR-WHEEL DRIVE
19 VEHICLE. I MEAN THE OPPORTUNITY AND ACCESS THAT PEOPLE HAD TO
20 GET ON THE BEACH WAS DRASTICALLY REDUCED AND LIMITED. AND
21 WHERE GOING TO HATTERAS VILLAGE OR OCRACOCKE WAS LIKE GOING TO
22 THE END OF THE MOON. AND THAT'S NOT THE CASE ANYMORE. THE
23 CASE IS THAT PEOPLE CAN READILY GET THERE AND GET PHYSICALLY
24 ONTO THE BEACH.

25 AND SO THOSE ARE ALL CONSIDERATIONS THAT MAY OR MAY

April 4, 2008

1 NOT BE IN THE NEGOTIATIONS, BUT WILL BE APPARENT WHEN SOME
2 CONSENT AGREEMENT COMES OUT.

3 AND IF YOU'RE ASKING THE COURT TO BE NEUTRAL AND
4 DETACHED FROM THE PROCESS, DETACHED NOT INVESTED IN IT, NOT
5 FOR ONE SIDE OR THE OTHER, THEN THE COURT WOULD WANT TO LOOK
6 AT THE FAIRNESS ASPECT AND LOOK AT WHETHER THOSE WHO HAVE
7 EXPECTATIONS AND LEGITIMATE CLAIMS HAVE BEEN GIVEN -- HAVE
8 BEEN TREATED FAIRLY AND HAD THEIR VOICE HEARD.

9 MR. LIEBESMAN: YOUR HONOR, IF I CAN JUST STATE THAT
10 YOU'VE HIT A CRITICAL POINT. THAT'S WHY WE'RE SO CONCERNED
11 ABOUT BEING CUT OUT. I MEAN, FRANKLY, I'D LIKE A DIRECTION
12 THAT WE BE PUT AT THE TABLE AND BE MADE PRIVY TO THESE
13 DISCUSSIONS IF IT'S HEADING NOW TO THE --

14 THE COURT: WELL, IF YOU'RE HEARING ME, I MAY NOT
15 HAVE SAID IT IN SO MANY WORDS AND I DON'T WANT TO BE BOUND BY
16 WHAT I SAY, BUT I'M SAYING THAT A HOLISTIC SETTLEMENT, ONE
17 THAT DEALS WITH EVERYBODY'S INTEREST, IS A BETTER SETTLEMENT
18 THAN A PARTIAL SETTLEMENT. AND IF I'M GOING TO BE ASKED TO
19 GRID THAT AGAINST FAIRNESS, THEN I'M GOING TO WONDER WHY
20 LEGITIMATE ENTITLEMENTS IN INTEREST -- I MEAN, IT BELONGS TO
21 THE UNITED STATES, THE SEASHORE, BUT SOME PEOPLE ARE CLOSER TO
22 THE UNITED STATES THAN OTHERS.

23 MR. HORNTAL: YOUR HONOR, AS PRESIDING JUDGE IN
24 THIS AREA PROBABLY HAS A CONSIDERABLY BETTER UNDERSTANDING OF
25 WHAT THE GEOGRAPHIC AND NATURAL FACTORS AFFECTING THE NATIONAL

April 4, 2008

1 SEASHORE WOULD THAN JUDGES SITTING IN OTHER LOCATIONS. AND
 2 YOU HAVE RAISED FOR THE BENEFIT OF ALL THE PARTIES SOME
 3 MATTERS THAT CERTAINLY -- THAT MAY BE WORTHY OF CONSIDERATION
 4 WITH RESPECT TO THE NARROW TAILORING OF RELIEF, WHICH I'M
 5 UNDERSTANDING YOUR HONOR TO SAY THAT YOU WELL APPRECIATE IS
 6 THE RESPONSIBILITY OF THE COURT.

7 BUT IF YOU WOULD ALLOW ME --

8 THE COURT: YEAH.

9 MR. HORNTHAL: -- FROM A PROCEDURAL POINT, THEN I'LL
 10 SIT DOWN --

11 THE COURT: NO, THAT'S FINE.

12 MR. HORNTHAL: -- AND GET OUT OF EVERYBODY'S WAY.

13 THE COURT: NO.

14 MR. HORNTHAL: I FEEL THAT FOR THE RECORD I WOULD
 15 LIKE TO SAY THIS IN BEHALF OF OUR CLIENTS. WE WOULD LIKE TO
 16 BE ABLE TO COME TO THE TABLE AND WE WOULD LIKE TO BE ABLE TO
 17 PARTICIPATE IN MEANINGFUL -- IN DISCUSSIONS.

18 WE WOULD RECOGNIZE THAT THE OUTCOME OF THAT MAY BE A
 19 PLAN THAT ONLY THE PLAINTIFFS AND DEFENDANTS WILL AGREE UPON
 20 AND THE INTERVENORS CANNOT AGREE TO.

21 AND IF THAT HAPPENS, YOUR HONOR, WE WOULD -- THE
 22 INTERVENORS WOULD LIKE TO HAVE THE OPPORTUNITY TO BE HEARD
 23 WITH RESPECT TO THE OBJECTIONS THAT WE HAVE. WE WOULD LIKE
 24 THE OPPORTUNITY TO PRESENT EVIDENCE BASED UPON THE OBJECTIONS
 25 THAT WE HAVE, AND WE WOULD LIKE THE OPPORTUNITY TO PRESERVE

April 4, 2008

1 THE RECORD ON WHATEVER POINTS WE MAY HAVE FOR THE PROTECTION
2 OF OUR CLIENT IF IT GOES --

3 MR. LIEBESMAN: RIGHT.

4 MR. HORNTHAL: AND HAVING SAID THOSE THINGS, I WOULD
5 HOPE THAT WHATEVER THE COURT IS GOING TO PUT IN PLACE FOR
6 DIRECTING THE PARTIES TO DO THAT THOSE THINGS WOULD BE
7 INCORPORATED IN THE COURT'S CONSIDERATION.

8 THE COURT: ALL RIGHT. THANK YOU.

9 MR. HORNTHAL: I THANK YOU FOR HEARING ME.

10 THE COURT: THANK YOU.

11 MR. LIEBESMAN: JUST A FEW FOLLOW UP POINTS TO MR.
12 HORNTHAL. SO MUCH OF THIS WAS, I THINK, NOT ONLY ABOUT ACCESS
13 AND NUMBER OF VEHICLES THAT YOU'VE RAISED, BUT ALSO THE
14 BIOLOGY, THE SCIENCE, SOUND SCIENCE AND DOING THE REASONABLE
15 BALANCING. WE HAVE BEEN VERY CONCERNED ABOUT THE OVERREACH --
16 AND I'LL GET TO THIS IN RESPONSE CERTAINLY TO THE PRELIMINARY
17 INJUNCTION ARGUMENTS.

18 BUT I MEAN WE'RE CONCERNED ABOUT A LOT OF THE
19 OVERREACH. MATTER OF FACT WE'VE SUBMITTED WITHIN THE LAST FEW
20 DAYS AN EXHIBIT THAT PRESENTS THE SCIENCE TO THE COURT SO YOU
21 HAVE A VISUAL UNDERSTANDING ABOUT HABITAT AND WHAT IS NEEDED
22 TO BE PROTECTED THAT HAS TO GO INTO THE BALANCING OF
23 PRELIMINARY INJUNCTION FACTORS SO IT'S A SOUND NARROWLY
24 TAILORED ONE THAT MAKES SENSE FROM A SCIENTIFIC AND BIOLOGICAL
25 STANDPOINT.

April 4, 2008