

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

No. 02:07-CV-00045-BO

DEFENDERS OF WILDLIFE and THE NATIONAL AUDUBON SOCIETY,
Plaintiffs,
v.
NATIONAL PARK SERVICE; DIRK KEMPTHORNE, SECRETARY OF THE INTERIOR; MARY A. BOMAR, DIRECTOR OF THE NATIONAL PARK SERVICE; H. DALE HALL, DIRECTOR OF THE U.S. FISH AND WILDLIFE SERVICE; and MICHEAL B. MURRAY, SUPERINTENDENT OF THE CAPE HATTERAS NATIONAL SEASHORE, Defendants,
and
DARE COUNTY, NORTH CAROLINA; HYDE COUNTY, NORTH CAROLINA; and THE CAPE HATTERAS ACCESS PRESERVATION ALLIANCE,
Defendant- Intervenors.

Affidavit of
J. Peter Doherty

I, J. Peter Doherty, under penalty of perjury, depose and say:

- 1. I am a member of Defenders of Wildlife, the American Ornithologists' Union and the Waterbird Society.
2. I reside at 465 Staleyville Road, Sharon Springs, NY.
3. I am a graduate of Loomis School, Windsor, Connecticut (1963); Yale University (B.A. American Studies, 1967); University of Virginia School of Law (J.D., 1973). I am a member of the New York Bar and have appeared before, tried, argued and briefed cases in United States

Federal District Courts, Circuit Courts of Appeal and the Supreme Court of the United States. As a Special Assistant Attorney General for the State of Rhode Island, I served as the state environmental advocate in the mid-1970s.

4. In post-college years I have taken upper-level college courses in evolutionary biology, ornithology, ecology and field biology, soil science, agronomy and animal science at Connecticut College, University of Rhode Island and SUNY Cobleskill.

5. I was a Commissioned officer, U.S. Coast Guard. I was assigned as Group operations officer in the Eastern Long Island CG Group and later as an English and government instructor, and assistant football and sailing coach at U.S. Coast Guard Academy, New London, CT.

6. My interest in observing birds and their behavior began as a child and was fostered by my mother and several friends who were active bird banders. Birds have been of continuing interest to me since my childhood. In recent years I have been involved with various legal and policy issues dealing with the Migratory Bird Treaty Act and the Endangered Species Act. My life-long interest in birds and concern for healthy ecosystems moved me to become active in formal ornithology research. I am a North American Banding Council certified "bander" with color band endorsement. I also build custom whoosh and drop nets for use in ornithological research.

7. I have spent a considerable amount of time working as a field ornithologist studying various types of birds in locations spanning the east coast. My avian research experience includes work in the following positions:

- a. Spring 2003: field assistant studying White-breasted Nuthatch in Florida.
- b. Fall 2003 – Spring 2004: bander studying Field, Song, White-throat, White Crown and Swamp sparrows near Fort Smith, Arkansas.
- c. Spring - Summer 2004: spring migration "bander" on Cape Cod Bay.
- d. Fall 2004: bander/research assistant on Lake Ontario near Rochester, NY.
- e. Spring 2005: bander of endangered Cape Sable Seaside sparrows in Everglades National Park.

- f. August 2005: founder of fall island migration banding station in East Penobscot Bay, Maine. I manage the station each August.
- g. Fall 2005: fall migration bander at Huntsman Marine Science Centre in Ste. Andrews, New Brunswick.
- h. Spring – Summer 2006: field researcher for the University of Nebraska-Omaha on state and federal public lands in the Rainwater Basin of south-central Nebraska banding dowitchers, phalaropes, Buff-breasted Sandpipers and *calidris* sandpipers.
- i. Fall 2006: research assistant for Kansas State University in Paraguay, Argentina and Uruguay trapping, banding, bleeding and swabbing many of the same species of migrant shorebirds encountered in Nebraska.
- j. Spring – Summer 2007: spring migration bander at First Landing State Park in Virginia Beach, Virginia.
- k. Summer 2007: field biologist for BioDiversity Research Institute in Penobscot Bay, Maine.

8. During my research efforts, I have spent a significant amount of time at Cape Hatteras National Seashore. From November 2005-March 2006 I worked as a field ornithologist for Dr. Jim Fraser of Virginia Tech in a US Corps of Engineers-funded study of wintering endangered and threatened Piping Plover (“PIPL”) use around Oregon Inlet. During the project my field partner and I also spent time in other areas of Cape Hatteras National Seashore (“Seashore”) and the Outer Banks, including Ocracoke Island, Hatteras Inlet, Clam Shoals, Portsmouth Island and Pea Island National Wildlife Refuge (“PINWR”). My field partner and I trapped, banded, radio-tagged and relocated PIPL in the Oregon Inlet region and observed PIPL elsewhere in the Seashore. Eleven PIPL wintered in the Oregon Inlet region during 2005-2006. We captured, marked and placed transmitters aboard eight of these PIPL. A ninth bird, which we failed to capture, was previously banded in Atlantic Canada. We recaptured several of the color-banded PIPL and replaced radio transmitters which had fallen off those birds. We also observed other wintering shorebirds within the Oregon Inlet region and elsewhere on the Seashore and the Outer Banks, including Red Knots, Dunlin, Sanderlings, American Oystercatchers and Black-bellied Plovers. Oregon Inlet PIPLs were located almost daily on foot, by motor vehicle and by power

winter. During late December 2007 I again returned to the Outer Banks. During my visit I participated in the Hatteras and Pea Island Christmas Bird Counts. I was hopeful that I would see PIPL orange/black which had been sighted at Oregon Inlet in late November 2007. Instead I, along with Mr. Maddock and others, found five PIPL at Clam Shoals, one at Hatteras Inlet and nine at the Bodie Island alga flat. Together with Mr. Maddock I also viewed numbers of other species of wintering shorebirds at the Seashore and on the Outer Banks, including two banded American Oystercatchers.

14. While at Bodie Island on December 28, 2007, I was disappointed by and surprised at the changes which had occurred in the ORV corridor since my previous visit in early March 2007 and since the 2005-2006 winter. First, there were no longer any inland markers denoting the landward boundary of the ORV corridor along the narrow strip leading along the ocean beach to the broader ocean beach on the Bodie side of Oregon Inlet. Through use, the now-unmarked ORV corridor in this area has predictably migrated landward and habitat has been damaged as vehicles drive landward to avoid high water. On more than a few occasions during 2005-2006 winter, my field partner and I walked this portion of the oceanfront in order to relocate a PIPL transmitting a signal we had heard while crossing the Bonner Bridge. The walk to the alga flat took less than fifteen minutes. There were consistently larger groups of foraging shorebirds along the oceanfront on such days. Second, the ORV corridor was extended by several hundred yards along that portion of the Bodie beach inside the Inlet which runs parallel to the Bonner Bridge. PIPL foraged in the inter-tidal zone of this previously-closed area with some frequency during the 2005-2006 winter. One wintering PIPL was captured in this area when it was closed to ORV use. Third, the area open to ORV traffic on the Bodie Island alga shorebird flat was moved, widened and expanded (vicinity waypoint N 35d 47' 00.9"; W 075d 32' 17.4"). Each of

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11. During the 2005-2006 winter on the Outer Banks I made a number of new friends among local residents I met at the Seashore's public meetings I attended, at the Audubon Christmas Bird Counts at Hatteras, Pea Island and Ocracoke Island in which I participated, and among the National Park Service and US Fish and Wildlife Service employees I encountered during the PIPL project. I have remained in touch with many of these individuals by telephone and electronic mail and have kept abreast of news related to ORVs, PIPL nesting attempts and migrant PIPL arrivals and departures at the Seashore through these individuals and by internet postings at various websites. I made comments to the proposed PIPL NC Critical Habitat designation and arranged for Virginia Tech to submit data relevant to the proposal. Eight of the eleven PIPL which wintered at Oregon Inlet during 2005-2006 were fitted with a unique combination of color bands on their upper legs. I remain keenly interested in their welfare and whereabouts. A number have returned to Oregon Inlet during the two winters which have followed.

12. During the summer of 2006 I learned that two of "our" banded PIPL from the Seashore had been re-sighted on Cape Cod, Massachusetts. I visited and observed one bird which attempted to nest unsuccessfully three times that season on a small island along Nantucket Sound between Wianno and Cotuit and the second which was sighted on the Cape Cod National Seashore near Provincetown. I did not re-sight that individual, but met with the biologist who had seen the bird on several occasions and visited the area in which the bird was seen.

13. In early March of 2007, before starting my seasonal field job at First Landing State Park, I joined Sidney Maddock of North Carolina Audubon and Buxton, NC for three days on the Outer Banks. During that time we visited Oregon Inlet in search of PIPL and other shorebirds. We located a number of PIPL including at least three of the birds from the previous

boat and kayak in all weather conditions. On several occasions I met and spoke with defendant, Michael B. Murray. Mr. Murray was, at that time, the newly-assigned Superintendent of the Outer Banks Group – Cape Hatteras National Seashore/Wright Brothers National Monument/Fort Raleigh National Historic Site.


9. On a daily basis from late November 2005 to late March 2006 I observed off-road vehicle (“ORV”) usage of the Seashore beaches, the impacts of their presence and use upon wintering shorebirds and occasionally, the response of the Seashore officials to constraints on ORV beach access. For example, after a small portion of the south end of Bodie Island beach was eroded by a coastal storm on or about January 8, 2006, I watched Seashore officials move the markers of the narrowed ORV corridor inland. The enlargement allowed ORV traffic to destroy a stable area of beach grass and to enter an officially closed and then-active foraging area of PIPL and other shorebirds. As I was present in the immediate area observing PIPL and setting a trap, I inquired as to the reason for the action and was told that it was necessary to retain full ORV access to Oregon Inlet.

10. On one occasion in mid-December 2005 approximately 50 yards from the Bodie Island oceanfront, I was parked in my vehicle in an ORV track facing north observing three PIPL (including the first PIPL we had captured) roosting, heads to the rear, in an ORV rut approximately 20 yards ahead of me. Another ORV traveling north on the beach approached me from behind at high speed. Without slowing this vehicle pulled out of the ruts in which it was traveling, passed me on my left and immediately pulled back into the ruts ahead of me where the PIPL were roosting. I did not see the birds flush and was fearful that one or more had been hit. A search of the area did not produce live, injured or dead PIPL. A half-hour or so later I located the radio signal of the marked PIPL along the PINWR oceanfront.

the nine PIPL seen on December 28, 2007 during the Pea Island Christmas Bird Count was observed to forage within the foraging area now open to ORV traffic. While I and other birders did not disturb the feeding PIPL and other wintering shorebirds present, we could have walked or driven among the birds. Doing so would have certainly caused the birds to flush. During periods of low water the entire lower portion of the alga flat is now available to ORVs. There is no apparent need for this important and large inter-tidal shorebird foraging zone to open to traffic, especially during the winter months.

15. I intend to return to the Seashore and to the Outer Banks with greater frequency and of longer duration to view and to study shorebirds and other avians. Specifically, I intend to continue to follow up on the birds I banded on the Seashore in the winter of 2005-2006, to locate other PIPL wintering on the Seashore and to participate in future Christmas Bird Counts there. The Seashore and the Outer Banks play a critical role in the annual cycle of many shorebirds that are of considerable interest to me and to other field biologists and ornithologists. The Atlantic, Great Lakes and prairie populations of PIPL each depend upon this area for a significant portion of their annual cycle of survival and reproduction. For migratory shorebirds each part of the annual chain of stop-over sites, wintering grounds and breeding grounds are essential. Like the PIPL, Black Skimmer, Red Knot, Gull-billed Tern, American Oystercatcher and others depend upon the resources of the Seashore for their survival and reproduction. I find these species beautiful to observe and compelling to study. Their decline in numbers and diversity on the Seashore is well documented by a variety of sources and is a matter of great personal concern to me. That such decline is occurring on public lands causes me particular personal harm and distress, as I have and will continue to work with and enjoy observing shorebirds on Seashore.

I, J. Peter Doherty, declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.



Signature

7 Feb 2008

Date