

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
NORTHERN DIVISION

DEFENDERS OF WILDLIFE,)
PLAINTIFF,)
)
V.) 2:07-CV-45-BO
)
NATIONAL PARK SERVICE, ET AL,)
DEFENDANTS.)
)

STATUS CONFERENCE
FEBRUARY 22, 2008
BEFORE THE HONORABLE TERRENCE W. BOYLE
U. S. DISTRICT JUDGE

APPEARANCES:

FOR THE PLAINTIFF:

MR. DERB S. CARTER, JR., ESQ. MR. JASON RYLANDER, ESQ.
MR. GEOFF GISLER, ESQ. 1130 SEVENTEENTH ST., NW
200 W. FRANKLIN ST., SUITE 330 WASHINGTON, D.C.
CHAPEL HILL, NC

FOR THE GOVERNMENT:

FOR DEFENDANT INTERVENORS:

MS. LORA TRIPP MR. LAWRENCE R. LIEBESMAN
MR. RUDOLPH RENFER ATTORNEY AT LAW
ASST. U.S. ATTORNEY 2099 PENNSYLVANIA AVE, NW
310 NEW BERN AVE. SUITE 100
RALEIGH, NC

COURT REPORTER: DONNA J. TOMAWSKI
STENOTYPE WITH COMPUTER AIDED TRANSCRIPTION

1 FEBRUARY 22, 2008

2 **THE COURT:** GOOD AFTERNOON. MR. CARTER, YOU ARE
3 HERE FOR THE PLAINTIFFS, ALONG WITH MR. GISLER?

4 **MR. CARTER:** AND MR. RYLANDER.

5 **THE COURT:** ARE YOU ALL WITH THE SAME ENTITY OR
6 IN DIFFERENT ORGANIZATIONS?

7 **MR. CARTER:** MR. GISLER AND I ARE WITH THE
8 SOUTHERN ENVIRONMENTAL LAW CENTER REPRESENTING DEFENDERS
9 OF WILDLIFE, AND CO-COUNSEL IS MR. RYLANDER, WHO'S COUNSEL
10 WITH DEFENDERS OF WILDLIFE.

11 **THE COURT:** OKAY. AND THE GOVERNMENT IS
12 REPRESENTED BY MR. RENFER AND MS. TRIPP, CORRECT?

13 **MS. TRIPP:** THAT'S CORRECT.

14 **THE COURT:** WHO ELSE? MR. HORNTHAL IS
15 REPRESENTING ONE OF THE INTERVENORS, AND MR. LIEBESMAN?

16 **MR. LIEBESMAN:** YES, YOUR HONOR, FROM HOLLAND &
17 KNIGHT. GOOD AFTERNOON.

18 **THE COURT:** YOU REPRESENT DARE COUNTY?

19 **MR. LIEBESMAN:** DARE AND HYDE, AS WELL AS LOCAL
20 INTERESTS.

21 **THE COURT:** OKAY. WELL, THIS CASE WAS FILED, AS
22 I RECALL, IN OCTOBER MAYBE?

23 **MR. CARTER:** YES, YOUR HONOR. WE FILED A
24 COMPLAINT IN OCTOBER AND THEN AN AMENDED COMPLAINT IN
25 DECEMBER.

1 **THE COURT:** RIGHT. AND I SCHEDULED THIS HEARING
2 TO INQUIRE AS TO WHAT PROGRESS WAS GOING TO BE MADE IN
3 MOVING THE CASE ALONG. BUT SINCE I DID THAT, YOUR SIDE,
4 THE PLAINTIFF, HAS FILED A MOTION FOR PRELIMINARY
5 INJUNCTION?

6 **MR. CARTER:** THAT'S CORRECT, YOUR HONOR.

7 **THE COURT:** AND BEFORE THE DAY IS OUT, WE'LL SET
8 A DATE FOR HEARING ON THAT WITHIN THE NEXT 30 DAYS OR LESS
9 AND DISCUSS THAT, BUT WE WON'T GO INTO THE MERITS OF IT.
10 BUT TELL ME BRIEFLY WHAT YOUR PRELIMINARY INJUNCTION
11 REQUEST IS ABOUT.

12 **MR. CARTER:** YOUR HONOR, WE'RE REQUESTING -- I
13 DON'T KNOW WHERE TO BEGIN IN TERMS OF THE GENERAL
14 UNDERSTANDING OF THE CASE, BUT THIS RELATES TO BEACH
15 DRIVING ON CAPE HATTERAS NATIONAL SEASHORE.

16 **THE COURT:** I'M WELL FAMILIAR WITH THAT.

17 **MR. CARTER:** YES, YOUR HONOR. THE PLAINTIFFS IN
18 THIS CASE ARE CHALLENGING THE FAILURE OF THE PARK SERVICE
19 TO HAVE ADOPTED BY REGULATION A LONG-TERM MANAGEMENT PLAN
20 FOR ORV USE, AND IN PARTICULAR THE ADOPTION OF AN INTERIM
21 PLAN IN 2007 THAT CURRENTLY GOVERNS, NOT THROUGH
22 REGULATION BUT THROUGH MANAGEMENT POLICIES, DRIVING ON THE
23 SEASHORE AND THE INADEQUACY OF THAT PLAN, IN PLAINTIFF'S
24 VIEW, TO PROTECT BREEDING BIRDS, SEA TURTLES AND OTHER
25 NATURAL RESOURCES ON THE SEASHORE.

1 **THE COURT:** NOW YOU'VE, IN YOUR AMENDED
2 COMPLAINT, YOU RAISED ISSUES AND CLAIMS WITH RESPECT TO
3 THE ENDANGERED SPECIES ACT AND THE ENFORCEMENT OF THAT.

4 **MR. CARTER:** THAT'S CORRECT, YOUR HONOR. AT THE
5 TIME WE FILED OUR INITIAL COMPLAINT IN OCTOBER, WE ALSO
6 FILED THE REQUIRED 60-DAY NOTICE UNDER THE ENDANGERED
7 SPECIES ACT ALLEGING CERTAIN VIOLATIONS OF THE ENDANGERED
8 SPECIES ACT WITH RESPECT TO THE MANAGEMENT OF ORV'S ON THE
9 SEASHORE, AND AT THE TERMINATION OF THAT 60-DAYS WE
10 AMENDED THE COMPLAINT TO INCORPORATE THOSE CLAIMS INTO THE
11 COMPLAINT IN THIS CASE.

12 **THE COURT:** OKAY. DOES THE PROMULGATION OF A
13 PLAN, WHETHER IT'S A MANAGEMENT INTERIM PLAN OR A PLAN
14 THAT ARISES OUT OF CFR REGULATIONS, DOES THE PROMULGATION
15 OF A PLAN IN EITHER EVENT PROVOKE EITHER AN ENVIRONMENTAL
16 ASSESSMENT OR AN ENVIRONMENTAL IMPACT STATEMENT, OR ARE
17 THESE NOT GOVERNMENT ACTIONS THAT WOULD INVITE THAT KIND
18 OF SCRUTINY?

19 **MR. CARTER:** THE ADOPTION OF THE INTERIM PLAN
20 WAS ACCOMPANIED UNDER THE NATIONAL ENVIRONMENTAL POLICY
21 ACT, OR NEPA, BY AN ENVIRONMENTAL ASSESSMENT.

22 **THE COURT:** THAT'S WHAT I JUST SAID.

23 **MR. CARTER:** YES. WHICH CONCLUDED THAT THERE
24 WOULD BE NO SIGNIFICANT IMPACTS, THEREFORE A FULL
25 ENVIRONMENTAL IMPACT STATEMENT WOULD NOT BE REQUIRED.

1 **THE COURT:** WITH RESPECT TO THE MANAGEMENT PLAN.
2 THAT'S THE ADMINISTRATIVE PLAN.

3 **MR. CARTER:** THE INTERIM PLAN WITH RESPECT TO
4 THE AGENCY ACTION IN ADOPTING THE INTERIM PLAN IN 2007.

5 **THE COURT:** OKAY. AND WOULD A FORMAL PLAN
6 REQUIRE AN EA AND/OR ENVIRONMENTAL IMPACT STATEMENT?

7 **MR. CARTER:** THE PARK SERVICE -- THE GOVERNMENT
8 CAN ADDRESS THIS, BUT THE PARK SERVICE HAS CONCLUDED THAT
9 A FINAL PLAN WOULD REQUIRE AN ENVIRONMENTAL IMPACT
10 STATEMENT, A MORE FULL-BLOWN ANALYSIS IN AN ENVIRONMENTAL
11 IMPACT STATEMENT.

12 **THE COURT:** HAVE YOU RAISED CLAIMS INVOLVING THE
13 NEPA REQUIREMENTS IN THIS CASE?

14 **MR. CARTER:** YES, YOUR HONOR. ONE OF OUR
15 COUNTS, I BELIEVE IT'S COUNT THREE, CLAIM THAT THE INTERIM
16 PLAN, WHICH IT WAS ADDRESSING THE SAME ISSUES THAT WOULD
17 BE ADDRESSED IN A FINAL PLAN, WAS ACCOMPANIED BY AN
18 ENVIRONMENTAL ASSESSMENT AND NOT A FULL ENVIRONMENTAL
19 IMPACT STATEMENT.

20 **THE COURT:** WHAT'S THE TERM OF THE INTERIM PLAN
21 WHEN -- WHAT'S ITS DURATION?

22 **MR. CARTER:** IT DOES NOT HAVE A SPECIFIC
23 DURATION IN TERMS OF A TIME OR DATE. I THINK THE CONCEPT
24 WOULD BE THAT IF AND WHEN A FINAL PLAN WAS ADOPTED BY THE
25 PARK SERVICE, IT WOULD SUPERSEDE THE INTERIM PLAN.

1 **THE COURT:** BUT THERE'S NO FIXED TIME FOR ONE TO
2 EXPIRE AND THE OTHER TO COME ABOUT?

3 **MR. CARTER:** THERE'S NO FIXED TIME, NO, YOUR
4 HONOR.

5 **THE COURT:** OKAY. ALL RIGHT. ANYTHING YOU WANT
6 TO ADD AT THIS TIME?

7 **MR. CARTER:** THAT'S ALL FOR NOW. THANK YOU.

8 **THE COURT:** OKAY. WHO'S GOING TO SPEAK FOR THE
9 GOVERNMENT?

10 **MS. TRIPP:** I WILL, YOUR HONOR.

11 **THE COURT:** DID THE GOVERNMENT FILE ANY MOTIONS
12 OR -- I KNOW THERE'S A MOTION TO DISMISS BUT I DON'T THINK
13 THAT'S BY THE GOVERNMENT, IS IT?

14 **MS. TRIPP:** IT IS NOT, YOUR HONOR. IT'S BY THE
15 INTERVENORS. WE HAVE NOT FILED ANY MOTION, JUST OUR
16 ANSWER ON JANUARY 18, I BELIEVE.

17 **THE COURT:** OKAY. AND ARE YOU GOING TO RESPOND
18 TO THE PRELIMINARY INJUNCTION?

19 **MS. TRIPP:** YES, WE WILL, YOUR HONOR.

20 **THE COURT:** IS THERE ANYTHING THAT THE
21 GOVERNMENT WANTS TO BRING FORWARD AT THIS TIME?

22 **MS. TRIPP:** NO, YOUR HONOR.

23 **THE COURT:** ALL RIGHT. MR. LIEBESMAN?

24 **MR. LIEBESMAN:** THAT'S CORRECT, YES.

25 **THE COURT:** YOU FILED A MOTION TO DISMISS?

1 **MR. LIEBESMAN:** THAT'S CORRECT. IF I CAN JUST
2 BRING THAT TO THE COURT'S ATTENTION?

3 **THE COURT:** GIVE ME SOME IDEA.

4 **MR. LIEBESMAN:** SURE, YOUR HONOR, GLAD TO DO
5 THAT.

6 WE HAVE A NUMBER OF JURISDICTIONAL CONCERNS WITH
7 RESPECT TO THREE OF THE CLAIMS IN THE CASE, SPECIFICALLY
8 COUNTS ONE, FOUR AND SIX. HERE'S OUR CONCERN.

9 THAT THOSE COUNTS ARE AN EFFORT TO ENFORCE THIS
10 EXECUTIVE ORDER ON BEACH DRIVING WHICH WE BELIEVE, QUITE
11 FRANKLY, THERE'S NO POWER OF RIGHT OF CITIZENS TO ACTION
12 TO ENFORCE THOSE CLAIMS. THE 4TH CIRCUIT IN THE CHAO
13 CASE, WHICH IS A 4TH CIRCUIT CASE, I CAN GIVE THE COURT
14 THE CITE; 48 F.3D 1331, FOURTH CIRCUIT, 1995. THAT MADE
15 IT VERY CLEAR THAT EXECUTIVE ORDER MUST BE PURSUANT TO
16 SPECIFIC STATUTORY DELEGATION OF CONGRESS. SO WE HAVE
17 CONCERNS THIS EXECUTIVE ORDER DOESN'T MEET THAT TASK. WE
18 FEEL THERE'S NO RIGHT TO ENFORCE THAT EXECUTIVE ORDER.

19 WE HAVE ALSO FILED, ON THE BASIS OF FAILURE TO STATE
20 A CLAIM, BECAUSE ESSENTIALLY WHAT PLAINTIFFS ARE TRYING TO
21 DO WITH RESPECT TO THESE THREE CLAIMS WHICH INVOLVE THE
22 ENFORCEMENT OF THAT EXECUTIVE ORDER, EXECUTIVE ORDER IN
23 THE MIGRATORY BIRD TREATY ACT, AND TO GET YOUR HONOR TO
24 ENFORCE A PLAN.

25 THE RELIEF THEY ARE SEEKING TO COME IN AND

1 SUPERSEDING WHAT THE PARK SERVICE IS DOING IS AN EFFORT TO
2 POLICE PRAGMATIC REVIEW OF WHAT THEY ARE DOING. WE THINK
3 THERE'S A LINE OVER WHICH A COURT SHOULD NOT GET INVOLVED
4 IN THE ONGOING MANAGEMENT ACTIONS IN FRONT OF AN AGENCY
5 LIKE THE PARK SERVICE. SO WE THINK THAT THOSE CLAIMS ARE
6 NOT BEFORE THE COURT AND THE RELIEF THEY ARE SEEKING UNDER
7 THOSE CLAIMS CANNOT BE GRANTED. VERY SPECIFIC
8 JURISDICTIONAL ISSUES.

9 WE DO CITE THERE ARE IN FACT THREE OTHER CLAIMS THAT
10 ARE REVIEWABLE, SPECIFICALLY REGARDING THE INTERIM PLAN.
11 THERE WAS AN ENVIRONMENTAL ASSESSMENT DONE AND FINDING OF
12 NO SPECIFIC IMPACT. NEPA WENT THROUGH A PROCESS WHICH
13 THEY HAD OPPORTUNITY TO IN THE COMMUNITY. THAT VERY
14 ACTION IS REVIEWABLE.

15 THEN WE HAVE THE BIOLOGICAL OPINION WHICH RELATES TO
16 THE ENDANGERED SPECIES ACT. THEY SAY THAT'S REVIEWABLE AS
17 WELL AS UNDER THE ARBITRARY AND CAPRICIOUS STANDARD. AND
18 COUNT FIVE OF THE AMENDED COMPLAINT RELATES TO THE
19 DECISION UNDER NEPA TO DO AN ENVIRONMENTAL ASSESSMENT AND
20 FINDING NO SIGNIFICANT IMPACT AT THIS POINT, AS OPPOSED TO
21 DOING A FULL IC. THAT'S FINAL AGENCY ACTION.

22 WE THINK THAT'S REVIEWABLE ON THE ADMINISTRATIVE
23 RECORD BEFORE THE AGENCY. THOSE FINAL ACTIONS ARE BEFORE
24 THE COURT. THE RELIEF THEY SEEK, THE EFFORT TO GET YOUR
25 HONOR INVOLVED IN THIS PROCESS, WE THINK EXCEEDS THIS

1 COURT'S JURISDICTION ON JURISDICTIONAL ISSUES.

2 **THE COURT:** YOU ARE ONLY IN THE CASE BY LEAVE OF
3 THE COURT. YOU ARE IN IT NOW BUT THAT WAS DISCRETIONARY;
4 YOU ARE AN INTERVENOR.

5 **MR. LIEBESMAN:** THAT'S CORRECT.

6 **THE COURT:** YOUR CLIENTS ARE THE COUNTIES. THEY
7 DON'T HAVE ANYTHING TO DO WITH THE MANAGEMENT OF THE
8 NATIONAL SEASHORE; IT'S FEDERAL SOVEREIGN PROPERTY. SO
9 YOU'VE COME IN AND NOW YOU'RE COMPLAINING ABOUT THINGS
10 THAT THE UNITED STATES ISN'T COMPLAINING ABOUT. I MEAN,
11 HOW DO YOU GET -- WHERE'S YOUR STANDING TO DO THAT?

12 **MR. LIEBESMAN:** WELL, I THINK --

13 **THE COURT:** -- THIS IS NOT THE SOVEREIGN
14 SEASHORE OF DARE COUNTY, IT'S THE NATIONAL SEASHORE. IT
15 BELONGS TO THE UNITED STATES. WHAT INTEREST DO YOU HAVE
16 ANY MORE THAN ANYONE ELSE IN IT?

17 **MR. LIEBESMAN:** WELL, I THINK, AND WE WILL
18 CERTAINLY ARTICULATE THIS IN OUR RESPONSES ON THE
19 PRELIMINARY INJUNCTION. WE REPRESENT THREE LOCAL
20 GOVERNMENTS THAT HAVE A VITAL INTEREST IN THE ECONOMY OF
21 THE OUTER BANKS' CONCERN TO ACCESS THE RECREATIONAL
22 COMMUNITY. WE'RE IN THE CASE AS A PARTY AND I ALSO WANT
23 TO ADD, IT'S MY UNDERSTANDING THE GOVERNMENT IS TAKING THE
24 POSITION NOW THAT THEY ARE NOT MOVING TO DISMISS. I DON'T
25 KNOW IF THAT'S A FINAL POSITION AS TO WHETHER THEY WOULD

1 EVER JOIN IN OUR MOTION TO DISMISS OR REQUEST FOR
2 DISMISSAL. I'M NOT SURE OF THE GOVERNMENT'S DECISION AT
3 THIS POINT.

4 **THE COURT:** THEY'RE THE REAL PARTY IN INTEREST.
5 THEY'RE THE ONE WHO HAS THE LEGAL RIGHT OR OBLIGATION TO
6 DO THESE THINGS, NOT THE COUNTIES. IT JUST LOOKS A LITTLE
7 DISTRACTIVE FOR YOU TO COME IN AND BE MAKING COMPLAINTS
8 ABOUT SOMETHING THAT NO ONE IS TRYING TO DO TO YOU.

9 **MR. LIEBESMAN:** I HEAR WHAT YOU ARE SAYING, YOUR
10 HONOR. I THINK WE WOULD BE WILLING TO BRIEF THE ISSUE OF
11 STANDING, IF YOU'D LIKE US TO DO THAT.

12 **THE COURT:** THAT'S THE FIRST THING THAT CAME TO
13 MY MIND WHEN I FOUND OUT THE COUNTY WAS OBJECTING BUT THE
14 UNITED STATES WAS NOT.

15 **MR. LIEBESMAN:** WELL --

16 **THE COURT:** WHAT BUSINESS IS IT OF THE COUNTY?

17 **MR. LIEBESMAN:** I HEAR WHAT YOU ARE SAYING, YOUR
18 HONOR. I GUESS MY CONCERN RIGHT NOW IS THAT THIS GOES TO
19 THE QUESTION OF PLAINTIFF'S LIKELIHOOD TO PREVAIL ON THE
20 MERITS IN THE CASE. I UNDERSTAND YOUR CONCERNS ABOUT
21 STANDING AND I GUESS WHAT I WOULD SAY AT THIS POINT IS I'M
22 NOT SURE AGAIN WHETHER THE GOVERNMENT IS PRECLUDED FROM
23 RAISING THIS. AT SOME POINT IN THE CASE THEY MAY DO THAT.

24 I'D LIKE TO BE ABLE TO PRESENT TO THE COURT WHY I
25 THINK WE HAVE BEEN ADVERSELY AFFECTED BY THE RELIEF THEY

1 ARE SEEKING THAT GIVES US STANDING TO RAISE JURISDICTIONAL
2 CLAIMS. WE'RE A PARTY TO THE CASE. IT'S MY UNDERSTANDING
3 IF YOU MEET THE THRESHOLD FOR STANDING, WHICH I THINK WE
4 CAN MEET, WE CAN RAISE JURISDICTION AT ANY TIME, AND THIS
5 IS A JURISDICTIONAL ISSUE. SO I WOULD BE HAPPY TO ADDRESS
6 THAT IF YOU'D LIKE. WE CAN CERTAINLY ADDRESS THE STANDING
7 ISSUE.

8 **THE COURT:** WHAT ABOUT THE RIGHT OF THE
9 PLAINTIFFS AND THE STANDING OF THE PLAINTIFFS WHICH THEY
10 HAVE TO ENFORCE THE NATIONAL ENVIRONMENTAL POLICY ACT?
11 YOU SAID THAT THIS EXECUTIVE ORDER DOESN'T GIVE THEM A
12 PRIVATE RIGHT OF ACTION, BUT ARE YOU CLAIMING THAT THEY
13 DON'T HAVE A RIGHT AS AFFECTED PARTIES UNDER NEPA TO RAISE
14 ISSUES UNDER NEPA?

15 **MR. LIEBESMAN:** YES, BUT LET'S LOOK AT THE
16 ISSUES.

17 **THE COURT:** YES, YOU ARE SAYING THAT OR YES, YOU
18 ARE NOT SAYING THAT?

19 **MR. LIEBESMAN:** THEY CAN RAISE ISSUES UNDER
20 NEPA, BUT LET'S LOOK AT THE ISSUES. IT'S A CHALLENGE TO
21 THE FINAL AGENCY ACTION UNDER THE ADMINISTRATIVE PROCEDURE
22 ACT.

23 **THE COURT:** WHY CAN'T THEY CHALLENGE THE EA ON
24 THIS INTERIM PLAN?

25 **MR. LIEBESMAN:** THEY HAVE DONE THAT. WE DON'T

1 OBJECT TO THEIR ABILITY TO CHALLENGE THE ACT. WE OBJECT
2 TO THEIR ABILITY TO ENFORCE THE TREAT -- THE EXECUTIVE
3 ORDER FOR BEACH DRIVING --

4 **THE COURT:** -- IF EA IS DEFECTIVE OR DEFICIENT
5 AND THEREFORE NOT IN COMPLIANCE, AND I DON'T HAVE ANY
6 IDEA. I'M SAYING BY WAY OF SPECULATION IF THE EA IS
7 DEFICIENT, THEN THE PLAN WOULD BE -- THE ADMINISTRATIVE
8 MANAGEMENT PLAN WOULD BE UNLAWFUL BECAUSE IT WOULDN'T BE
9 IN COMPLIANCE AND IT WOULD BE VOIDED OR WOULDN'T BE
10 ENFORCED.

11 **MR. LIEBESMAN:** IF YOU WERE TO FIND THERE WAS --
12 IT WAS ARBITRARY AND CAPRICIOUS, BUT THEN WHAT'S THE
13 APPROPRIATE REMEDY? YOU WOULD SEND IT BACK FOR REVIEW BY
14 THE EXPERT AGENCY AND THE QUESTION WAS, SHOULD YOU ISSUE
15 AN INJUNCTION --

16 **THE COURT:** DO YOU SIMPLY GET TO DRIVE BECAUSE
17 THERE'S NO EFFECTIVE PLAN, HYPOTHETICALLY IF THERE'S NO
18 PLAN, AND THIS INTERIM MANAGEMENT PLAN CAME ABOUT IN THE
19 SUMMER, DIDN'T IT?

20 **MR. LIEBESMAN:** IT WAS FINALIZED, I BELIEVE, IN
21 JULY OF 2007, THAT'S CORRECT.

22 **THE COURT:** WHICH IS 35 YEARS AFTER THE
23 EXECUTIVE ORDER. SO FOR THE PRECEDING 35 YEARS, IS IT
24 YOUR POSITION THAT IT'S JUST RANDOM ACCESS BY ANYONE AT
25 ANY TIME UNDER ANY CIRCUMSTANCES?

1 **MR. LIEBESMAN:** NOT AT ALL, YOUR HONOR, AND I
2 THINK --

3 **THE COURT:** -- WHY NOT?

4 **MR. LIEBESMAN:** HAVING WORKED WITH THESE
5 AGENCIES, THEY HAD A PRELIMINARY PLAN IN PLACE IN THE
6 1970'S. THEY HAD AREAS DESIGNATED FOR ORV ACCESS; IT IS
7 NOT RANDOM.

8 **THE COURT:** IF IT'S NOT RANDOM, IT'S ELASTIC.

9 **MR. LIEBESMAN:** I DON'T DISAGREE, IN FACT, THAT
10 THEY DON'T DO WHAT THE EXECUTIVE ORDER SAID.

11 **THE COURT:** IT'S WELL DOCUMENTED IN SOME AREAS
12 THAT DIDN'T EVEN EXIST IN 1972 ON CERTAIN TIMES OF THE
13 YEAR THERE WOULD BE BETWEEN 500 AND 2,000 VEHICLES
14 CONGESTED IN THE MOST CONSPICUOUS AND EGREGIOUS
15 CIRCUMSTANCE AND ONLY THE PHYSICAL LIMITATIONS OF SPACE
16 RETARDED THAT. AND ONLY MAN'S LACK OF IMAGINATION AVOIDED
17 THE SIZE OF THE VEHICLE. IF YOU WANTED IT TO BE 2,000
18 HUMVEES, WELL THAT'S YOUR BUSINESS. IF YOU WANTED IT TO
19 BE 2,000 TRACKED VEHICLES, MAYBE THEY WOULDN'T LET TRACKED
20 VEHICLES, BUT YOU COULD VIRTUALLY PUT ANYTHING YOU WANTED
21 OUT THERE THAT COULD NAVIGATE THAT AREA.

22 **MR. LIEBESMAN:** YOUR HONOR, LET ME JUST --

23 **THE COURT:** -- THAT'S A FACT.

24 **MR. LIEBESMAN:** LET ME RESPOND. WITH ALL DUE
25 RESPECT, CERTAINLY I READ YOUR MATEI CASE. I'VE SEEN YOUR

1 CONCERNS. I'M NOT DOWNPLAYING YOUR CONCERNS.

2 **THE COURT:** I DON'T HAVE, YOU KNOW, AN AGENDA OR
3 CONCERN. I'M JUST TRYING TO DEAL WITH THE LAW HERE.

4 **MR. LIEBESMAN:** LET ME, IF I CAN, JUST BACKTRACK
5 A SECOND.

6 THE INTERIM PLAN HAS BEEN PROMULGATED. IT'S AN
7 INTERIM PLAN THAT WENT THROUGH A PUBLIC PROCESS. WE
8 BELIEVE, QUITE FRANKLY, IT CAN BE UPHELD UNDER THE LAW.
9 THE INTERIM PLAN IS A WAY TO DEAL WITH THESE ISSUES, A
10 MANAGED SORT OF WAY TO IDENTIFY AREAS. WE THINK IT SHOULD
11 BE UPHELD AND GOING FORWARD WE THINK THE RECORD WILL SHOW
12 IT IS ADDRESSING THE CONCERNS THAT HAVE OCCURRED OVER
13 THESE NUMBER OF YEARS AND WOULD BE IN PLACE AS A RESULT OF
14 SOUND ANALYSIS, WHICH PLAINTIFFS HAVE BEEN INVOLVED IN.

15 **THE COURT:** IS THE MEASURE OF THE PLAN -- IS THE
16 BENCHMARK AGAINST WHICH YOU MEASURE 1972 OR 2007?

17 **MR. LIEBESMAN:** THAT'S A TOUGH QUESTION AT THIS
18 POINT. I MEAN, I THINK THAT THE INTERIM PLAN IS OBVIOUSLY
19 DIFFERENT THAN ANYTHING THAT HAD BEEN IN PLACE BEFORE
20 THAT. I ADMIT THERE WAS NOTHING LIKE THE INTERIM PLAN IN
21 PLACE MANY YEARS --

22 **THE COURT:** SEE, IF THERE WAS A PLAN WEEKS OR
23 MONTHS AFTER THE EXECUTIVE ORDER IN 1972, I DON'T KNOW BUT
24 I'M GUESSING YOU WOULD HAVE PEOPLE WHO HAD ACTUAL JEEP
25 VEHICLES, MAYBE A JEEP TRUCK, MAYBE A WILLIS OVERLAND,

1 MAYBE A -- I'M ABOUT TO RUN OUT OF FOUR WHEEL DRIVE
2 VEHICLES. AND SO YOU MIGHT HAVE FIVE OR TEN OR 15 OR 20
3 PEOPLE OR MAYBE, YOU KNOW, A COUPLE DOZEN IN GROSS ON THE
4 WHOLE SEASHORE ON THE BEACH WITH VEHICLES.

5 SO DO YOU GET TO NOT HAVE A PLAN, GO FORWARD 35 YEARS
6 AND THEN SAY WELL, YOU KNOW, NOW WE GOT A COUPLE HUNDRED
7 THOUSAND PEOPLE ON THE BEACH, THAT MUST BE, YOU KNOW, THE
8 STANDARD. WHO COULD SAY WHAT THE NATURAL LIFE AND HABITAT
9 WAS LIKE IN 1972 AND WOULD HAVE BEEN LIKE IF YOU HAD A
10 PLAN, AS OPPOSED TO THE DEGRADATION AND EXTERNAL
11 TERMINATION OF SPECIES AND OTHER WILDLIFE BECAUSE THE
12 ENVIRONMENT HAS BEEN ALTERED? DO YOU GET TO POISON IT AND
13 SAY NOBODY IS HERE SO IT MUST NOT BE A VERY
14 ENVIRONMENTALLY SENSITIVE AREA?

15 **MR. LIEBESMAN:** YOUR HONOR, I UNDERSTAND WHAT
16 YOU ARE SAYING. WHAT WE'RE CONCERNED ABOUT RIGHT NOW,
17 QUITE FRANKLY, IS WE HAVE A PLAN IN PLACE. THEY HAVE A
18 RIGHT TO CHALLENGE IT. WE'LL PRESENT THIS. SINCE THE
19 PLAN HAS BEEN IN PLACE, WE HAVE MR. MURRAY'S LETTER TO THE
20 COURT. WE BELIEVE IT'S BEING IMPLEMENTED IN A FAIR AND
21 EFFECTIVE WAY AND THEY WILL SHOW --

22 **THE COURT:** -- THE PLAN IS ALWAYS EFFECTIVE
23 DURING THE COLDEST MONTHS OF THE YEAR BECAUSE NOBODY IS
24 THERE.

25 **MR. LIEBESMAN:** I UNDERSTAND WHAT YOU ARE

1 SAYING, YOUR HONOR, BUT AGAIN, THE PLAN WAS PROMULGATED IF
2 THROUGH A PUBLIC PROCESS IT'S BEING IMPLEMENTED. WE THINK
3 IT'S A REASONABLE PLAN GOING FORWARD. WE HAVE THE
4 COMMITMENT FROM THE PARK SERVICE.

5 IF I CAN BOIL IT DOWN TO ITS ESSENCE. AT THIS POINT,
6 YOUR HONOR, SHOULD YOU BE IN A POSITION TO SORT OF PLAY
7 BIOLOGIST OR REFER TO THE JUDGMENT OF THE EXPERT AGENCIES,
8 THE PARK SERVICE THAT DEVELOPED THIS PLAN THROUGH PUBLIC
9 PROCESS AND ARE COMMITTED TO MOVING FORWARD WHILE THIS
10 RULE-MAKING PROCESS IS UNDERWAY, I THINK THAT'S THE KEY
11 ISSUE. I UNDERSTAND WHAT YOU ARE SAYING IN THE PAST BUT
12 LET'S LOOK FORWARD PROSPECTIVELY. THERE'S A NEGOTIATED
13 RULE-MAKING PROCESS ON THE WAY WHICH THE PLAINTIFFS ARE ON
14 THE TABLE ON.

15 **THE COURT:** CAN YOU TELL ME IF THE INTERIM PLAN
16 SHOULD BE SCREENED OR JUDGED AGAINST THE CONDITION OF THE
17 ENVIRONMENT IN 1972 OR WHETHER IT'S SCREENED AND JUDGED
18 AGAINST THE CONDITION OF THE ENVIRONMENT IN 2007?

19 **MR. LIEBESMAN:** I'M NOT SURE. I THINK THAT'S AN
20 ISSUE THAT WE'LL HAVE TO RESPOND TO IN OUR PAPERS. THE
21 FINAL AGENCY ACTION IS PARTICULARLY JUDGED IN THE POINT IN
22 TIME IN WHICH THE DECISION IS MADE ON THE RECORD,
23 ADMINISTRATIVE RECORD AT THAT POINT IN TIME, AS YOUR HONOR
24 WELL KNOWS, BEFORE THE AGENCY AT THE TIME.

25 I THINK THE RECORD WILL SHOW THE 2007 PLAN WAS A

1 REASONABLE ONE TO WHICH THERE WAS SUFFICIENT PUBLIC
2 PROCESS.

3 **THE COURT:** DO YOU KNOW WHETHER OR NOT THERE
4 WERE BIRD AND OTHER ENDANGERED SPECIES PRESENT 35 YEARS
5 AGO THAT ARE NO LONGER PRESENT AT ALL?

6 **MR. LIEBESMAN:** NO, BUT I THINK -- I DON'T AGAIN
7 WANT TO COMMENT TOO MUCH ON THE MERITS, BUT LOOKING AT THE
8 PRELIMINARY INJUNCTION PAPERS, I'M NOT SURE I SUPPORT THE
9 CAUSE AND EFFECT RELATIONSHIP PRESENTED BY THEIR
10 BIOLOGIST.

11 AS A MATTER OF FACT, WE HAVE A BIOLOGIST WHO WILL BE
12 DOING A REPORT TO YOU AND I THINK THAT WILL POINT OUT THE
13 FLAWS OF THEIR ANALYSIS, EVEN GOING BACK IN TIME ON THE
14 CAUSE AND EFFECT RELATIONSHIP. THAT'S GOING TO THE
15 QUESTION RETROSPECTIVELY THAT YOU RAISED, WHETHER THERE'S
16 THIS CLEAR-CUT RELATIONSHIP BETWEEN ORV USE AND THE STATUS
17 OF NOT ONLY PIPER PLOVERS BUT OTHER --

18 **THE COURT:** -- HOW ABOUT TURTLES?

19 **MR. LIEBESMAN:** THAT AS WELL.

20 **THE COURT:** HASN'T THERE BEEN ALMOST STRAIGHT
21 LINE DECLINE IN THE PRESENCE OF LARGE TURTLES?

22 **MR. LIEBESMAN:** I CAN GO BACK AND LOOK AT ALL
23 THE DATA, BUT WE HAVE OTHER -- WE WILL BE DEVELOPING
24 INFORMATION THAT MAY RAISE INTO QUESTION WHETHER THAT
25 CAUSE AND EFFECT RELATIONSHIP HAS IN FACT BEEN

1 ESTABLISHED.

2 JUST ONE FACT. IT'S ABOUT THE PIPING PLOVERS, THE
3 ENDANGERED BIRD. THIS PAST YEAR HAD BEEN THE BEST YEAR
4 SINCE 1999, THE BEST YEAR.

5 **THE COURT:** THAT MAY BE THE PRODUCT OF
6 ENFORCEMENT.

7 **MR. LIEBESMAN:** I HAVE BEEN THROUGH THE PIPING
8 PLOVER REPORT. THEY GO THROUGH THE ANALYSIS OF HOW THAT
9 BIRD HAS DONE AND THEY RAISE QUESTIONS ABOUT WHETHER ORV'S
10 ARE RESPONSIBLE FOR DEATHS OF CHICKS, LOOKING AT PREDATION
11 AND WEATHER FACTORS.

12 ONE OF THE BIG THINGS I WANT TO LEAVE AS A REAL
13 CONCERN WITH YOUR HONOR, I THINK IT'S IMPORTANT TO THEM
14 COMING IN FOR PRELIMINARY INJUNCTION RIGHT NOW AND TRYING
15 TO EXPEDITE THIS PROCESS. SEEMS TO US THAT IT'S A
16 SITUATION WHERE THEY COULD HAVE FILED THIS MANY MONTHS AGO
17 SO YOUR HONOR CAN DEAL WITH THIS IN A CONSIDERED FASHION.
18 THERE'S COMPLEX SCIENTIFIC EVIDENCE IN THIS CASE.

19 **THE COURT:** THEY SAID THEY NEEDED TO HAVE A
20 60-DAY COOLING DOWN PERIOD ON THE ENDANGERED SPECIES ACT
21 CLAIM.

22 **MR. LIEBESMAN:** YOUR HONOR, THE LAW ALLOWS THEM
23 TO FILE THAT 60-DAY NOTICE EVEN BEFORE THEY FILED THE
24 OCTOBER COMPLAINT. THEY WOULD HAVE FILED THAT 60-DAY
25 NOTICE BACK LAST SUMMER AND FILED THE COMPLAINT.

1 THE SECOND THING THEY ARE CLAIMING IS IMMEDIATE
2 IRREPARABLE INJURY. I LOOKED AT SOME OF THE -- THEY WERE
3 SIGNED BACK IN DECEMBER. WHY WERE NOT HERE FILING FOR
4 PRELIMINARY INJUNCTION IN DECEMBER INSTEAD OF FEBRUARY
5 SAYING NOW YOU HAVE TO DECIDE THIS ON AN EXPEDITED BASIS.
6 THEY HAVE BEEN INVOLVED IN THE PROCESS. THEY HAVE BEEN
7 SITTING AT THE NEGOTIATING RULE-MAKING TABLE. THEY KNEW
8 THERE WAS A WINDOW BETWEEN THE CLOSE OF THE SUMMER SEASON
9 AND START OF THE BREEDING SEASON, TO WHICH YOUR HONOR CAN
10 ADDRESS THE ISSUE OF EXTRAORDINARY RELIEF UNDER THE PI AND
11 CONSIDERED FASHION. THEY COME IN ON THE EVE OF THE
12 BREEDING SEASON AND SAY YOU SHALL EXPEDITE IT.

13 I HAVE TO SAY WHAT I CONSIDER -- I HAVE A LOT OF
14 RESPECT FOR MR. CARTER. DON'T GET ME WRONG, WE GO BACK
15 MANY YEARS BUT I'M CONCERNED ABOUT THE ACTIONS TAKEN HERE
16 IN TRYING TO EXPEDITE THIS CASE IN FRONT OF YOUR COURT AND
17 ON THIS FAST TRACK ON THIS POINT WHEN THEY HAD THIS
18 OPPORTUNITY TO DO THIS MANY MONTHS AGO.

19 **THE COURT:** IT'S DIFFICULT TO ATTRIBUTE FAST
20 TRACK TO SOMETHING THAT TOOK 36 YEARS TO COME FORWARD.

21 **MR. LIEBESMAN:** I UNDERSTAND THAT, AND IF I CAN
22 JUST -- I'M TRYING TO SEPARATE OUT THE DECISION OF THE
23 INTERIM PLAN, WHICH WAS LAST JULY, FROM WHAT HAPPENED THE
24 YEARS BEFORE THAT. THE DECISION POINT -- THE POINT IN
25 WHICH THEY COULD HAVE GONE TO THE COURT, THE FINAL AGENCY

1 ACTION UNDER THE APA WAS JULY OF 2007.

2 **THE COURT:** YOU DON'T THINK ANYBODY COULD HAVE
3 GONE TO COURT BEFORE THERE WAS ANY AGENCY ACTION ON THE
4 FACT THERE WAS AN ABSENCE OF AGENCY ACTION AND THAT THERE
5 WAS USE OF THE BEACH AND DEROGATION OF THE LAW?

6 **MR. LIEBESMAN:** POSSIBLY. THE POINT THAT I'M
7 TRYING TO MAKE IS THAT OUR POSITION IS LET'S DEAL WITH THE
8 RECORD IN FRONT OF THE COURT. LET'S DEAL WITH THE HERE
9 AND NOW; LET'S DEAL WITH THE PROSPECTIVE. THERE MAY HAVE
10 BEEN THINGS THAT OCCURRED IN THE PAST BUT NOW WE'RE COMING
11 FORWARD.

12 **THE COURT:** YOU SAY LET'S DO THAT AND WE'RE NOT
13 DOING ANYTHING HERE THAT'S BINDING OR CONCLUSIVE. THAT'S
14 WELL UNDERSTOOD.

15 **MR. LIEBESMAN:** I UNDERSTAND THAT.

16 **THE COURT:** BUT, YOU KNOW, FROM AN EQUITABLE
17 STANDPOINT, THE GOVERNMENT MAY NOT BE BOUND BY EQUITY BUT
18 FROM AN EQUITABLE STANDPOINT YOU DON'T GET TO DESTROY
19 SOMETHING AND THEN SAY THERE'S NO POINT IN SPENDING ANY
20 TIME OR EFFORT ON IT BECAUSE IT'S DESTROYED.

21 **MR. LIEBESMAN:** AGAIN, YOU COME BACK TO THE
22 CAUSE AND EFFECT RELATIONSHIP, AND THAT'S A QUESTION I
23 THINK WE CAN PRESENT TO THE COURT IN REBUTTING THEIR
24 CLAIMS OF INJURY. THAT'S, YOU KNOW, RETROSPECTIVELY.

25 YOU KNOW, WITH ALL DUE RESPECT, I DON'T NECESSARILY

1 ACCEPT THE REVIEW THAT ORV DRIVING HAS HAD A CLEAR AND
2 DIRECT RELATIONSHIP BETWEEN THE STATUS OF SPECIES ON THE
3 BEACH. MAY HAVE BEEN OTHER FACTORS. SOME MAY NOT HAVE
4 BEEN CAUSED BY HUMANS.

5 **THE COURT:** YOU DON'T THINK IT ALTERS THE
6 CHARACTER OF THE BEACH?

7 **MR. LIEBESMAN:** UNDER CERTAIN CIRCUMSTANCES IT
8 MIGHT, BUT THE QUESTION THEY ARE RAISING RIGHT NOW ON
9 THESE FACTS IS PREMISED ON THIS DIRECT RELATIONSHIP. IF
10 YOU REMOVE THE ORV AND THE REMEDY THEY ARE SEEKING, WHICH
11 WOULD ESSENTIALLY SHUT DOWN 12 MILES OF THE BEACH, IS THE
12 WAY TO REMEDY THIS INJURY.

13 **THE COURT:** SHUT DOWN MORE THAN 12 MILES,
14 WOULDN'T IT?

15 **MR. LIEBESMAN:** I THINK THEY WERE ASKING FOR
16 12 MILES. MAY BE LONGER POTENTIALLY.

17 **THE COURT:** ISN'T THE ENTIRE SEASHORE COVERED BY
18 THIS JURISDICTION?

19 **MR. LIEBESMAN:** AS I UNDERSTAND IT, YOU KNOW,
20 THEIR PRELIMINARY INJUNCTION, AS I RECALL, IS SEEKING
21 12 MILES, AS I UNDERSTAND IT. BUT THE THREE MOST CRITICAL
22 AREAS FOR THE FISHING COMMUNITY ARE COVERED WITHIN THAT
23 12 MILES. AND IT'S CRITICAL TO THE COUNTY ALSO IN TERMS
24 OF TOURIST-BASED TAX INCOME. THAT'S A REAL CONCERN. THE
25 QUESTION THEN BECOMES HAVE THEY ESTABLISHED IMMEDIATE AND

1 IRREPARABLE INJURY --

2 **THE COURT:** -- THERE ARE DRAMATICALLY OR
3 CONSIDERABLE DIFFERENT USES ON BODIE ISLAND GOING SOUTH TO
4 OREGON INLET AND BEGINNING AFTER PEA ISLAND REFUGE AND
5 GOING ALL THE WAY TO THE VILLAGE OF HATTERAS AND AGAIN ON
6 OCRACOKE. ALL THREE OF THOSE REGIONS, ALTHOUGH THEY ARE
7 ALL WITHIN THE HATTERAS SEASHORE, HAVE PRONOUNCED AND
8 DIFFERENT ACTUAL USE.

9 **MR. LIEBESMAN:** THAT'S CORRECT. AND AGAIN, YOU
10 KNOW, JUST ABSORBING THE PAPERS, I'M GIVING YOU MY INITIAL
11 RESPONSE TO WHAT THEY ARE SEEKING. WE JUST GOT THEIR
12 MASSIVE AMOUNT OF PAPERS THE OTHER DAY. I DON'T WANT TO
13 BAMBOO WHAT I'M SAYING. MR. CARTER CAN CLARIFY THE RELIEF
14 HE'S SEEKING.

15 ALL I'M SAYING, YOUR HONOR, IS WE'RE PREPARED TO
16 CHALLENGE THE -- FIGHT THE PRELIMINARY INJUNCTION. WE
17 THINK THAT THE REMEDY THEY'RE SEEKING IS EXTREME. I ONLY
18 RAISE THE EQUITABLE CONCERNS BY WHERE THEY ARE TIME-WISE.
19 WE WILL DEFEND RIGOROUSLY AND STRONGLY IN MOVING FORWARD
20 FROM HERE.

21 **THE COURT:** OKAY. THANK YOU. THANK YOU FOR ALL
22 OF YOUR THOUGHTS AND COMMENTS.

23 DOES THE GOVERNMENT HAVE ANYTHING YOU WANT TO SAY AT
24 THIS TIME? I THINK WE HAVE BEEN THROUGH EVERYBODY.

25 **MS. TRIPP:** THE ONLY THING I WOULD RAISE IS THAT

1 WE, ALL COUNSEL, DISCUSSED A SCHEDULING OF THE BRIEFING ON
2 BOTH OF THE MOTIONS AND WE --

3 **THE COURT:** -- I WAS THINKING OF HAVING A
4 HEARING ON MARCH 18, WHICH IS A TUESDAY. WHAT'S THAT DO
5 TO YOUR PLANNING?

6 **MS. TRIPP:** THAT WOULD EXPEDITE IT QUITE A LOT.
7 WE HAD AGREED ALL PARTIES WOULD HAVE THE OPPORTUNITY TO
8 FILE THEIR OPPOSITIONS BY MARCH 14 AND THEN REPLY ON THE
9 28TH.

10 **MR. LIEBESMAN:** WE HAD WORKED OUT, YOUR HONOR, A
11 BRIEFING SCHEDULE YESTERDAY ALONG THE LINES OF THE LOCAL
12 RULES THAT WOULD HAVE THE BRIEFING DONE BY MARCH 26, I
13 BELIEVE FRIDAY THE 26TH, AND WOULD REQUEST A HEARING AFTER
14 THAT BRIEFING PROCESS IS COMPLETED.

15 THIS IS A VERY COMPLEX CASE, AS YOU KNOW. MARCH 18
16 WOULD PUT CERTAINLY US AS INTERVENORS UNDER TREMENDOUS
17 STRAIN TO RESPOND TO TEN DECLARATIONS WITH SIGNIFICANT
18 SCIENTIFIC EVIDENCE. WE RESPECTFULLY REQUEST YOUR HONOR
19 AGREE TO THE BRIEFING SCHEDULE WE WORKED OUT.

20 **THE COURT:** EASTER IS THE WEEK AFTER THAT.
21 ANYWAY, WHAT DO YOU SAY?

22 **MR. CARTER:** WELL, YOUR HONOR, WE DID, YOU KNOW,
23 BASED ON THE STANDARD RESPONSE TIMES, TRY TO COME UP WITH
24 A SCHEDULE THAT WE THOUGHT WOULD WORK FOR ALL OF US. THAT
25 WOULD CONCLUDE BRIEFING ON MARCH 28. THAT'S WHEN REPLIES

1 WOULD BE DUE. WE WOULD BE WILLING -- CERTAINLY WE WOULD
2 BE WILLING TO FOREGO REPLIES, WHICH MEANS OUR BRIEFING
3 WOULD BE CONCLUDED PRIOR TO THE 18TH.

4 AND PART OF, YOUR HONOR, WHAT WE'RE TRYING TO ACHIEVE
5 HERE IS, AND I NEED TO RESPOND A LITTLE BIT TO MR.
6 LIEBESMAN IN TERMS OF HIS CHARACTERIZATION OF THE
7 SITUATION, IS THE FACT THAT, AND YOU WILL SEE IT IN THE
8 PAPERS AND SUPPORTING AFFIDAVITS THAT WE HAD FILED, THAT
9 THIS LAST YEAR -- THE FIRST YEAR, THE LAST YEAR, AND THE
10 FIRST YEAR UNDER THIS INTERIM MANAGEMENT PLAN WAS THE
11 WORST YEAR EVER FOR BREEDING BIRDS OUT ON THE NATIONAL
12 SEASHORE. THE NUMBERS WERE AT AN ALL-TIME LOW. TWO
13 SPECIES ACTUALLY DISAPPEARED FROM THE SEASHORE. OUR
14 EXPERTS ARE EXTREMELY CONCERNED THAT ONE MORE -- EVEN ONE
15 MORE OF THOSE TYPE OF BREEDING SEASONS COULD DO
16 IRREPARABLE HARM TO THE NATIONAL SEASHORE IN TERMS OF THE
17 SPECIES ACTUALLY DISAPPEARING.

18 MR. LIEBESMAN MENTIONED THIS WAS THE BEST YEAR FOR
19 PIPING PLOVER ON THE SEASHORE, THAT THEY EXCEEDED THE
20 LIMIT ON THE PIPING PLOVER AND THEIR MANAGEMENT ON THE
21 SEASHORE. SO WE'RE VERY CONCERNED AND VERY INTERESTED IN
22 PUTTING IN PLACE SOME MEASURE FOR THIS COMING BREEDING
23 SEASON.

24 WHAT WE FOCUSED ON IN THIS PRELIMINARY INJUNCTION IS
25 THEIR OWN SCIENTIST'S RECOMMENDATION OF THE MOST CRITICAL

1 AREAS ON THE SEASHORE FOR BREEDING BIRDS, IF WE COULD KEEP
2 ORV'S OFF OF THIS IN THE COMING SEASON. THAT'S WHAT WE
3 ASKED FOR IN THIS PRELIMINARY INJUNCTION.

4 **THE COURT:** WERE THERE NOT LOGGERHEAD TURTLES
5 HISTORICALLY NESTING ON THE HATTERAS SEASHORE?

6 **MR. CARTER:** YES, YOUR HONOR. NOT ONLY
7 LOGGERHEAD --

8 **THE COURT:** -- AND LEATHERBACKS, TOO?

9 **MR. CARTER:** YES. LOGGERHEAD TURTLES ARE THE
10 MOST COMMON, BUT RED TURTLES AND GREEN TURTLES AND
11 LEATHERBACKS.

12 **THE COURT:** THE LEATHERBACKS DISAPPEARED
13 ENTIRELY IN RECENT YEARS?

14 **MR. CARTER:** THERE HAVE ALWAYS BEEN A FEW
15 BECAUSE WE'RE AT THE NORTHERN END OF THEIR NATURAL RANGE.

16 **THE COURT:** FOR THE TIME BEING.

17 **MR. CARTER:** BUT IN TERMS OF JUST INFORMATION
18 THAT IS AVAILABLE TO LOOK AT IS THE FISH AND WILDLIFE
19 SERVICE ALSO IMPOSED, BECAUSE THEY ARE ALSO ENDANGERED
20 UNDER THIS INTERIM PLAN, FISH AND WILDLIFE SERVICE ALSO
21 IMPOSED INCIDENTAL TAKE LIMITS ON SEA TURTLES. THE NUMBER
22 OF ABORTED NESTING ATTEMPTS OR FALSE CRAWLS CANNOT EXCEED
23 THE NUMBER OF NESTS. AND THE NATIONAL SEASHORE ALSO
24 VIOLATED THAT LAST YEAR AND EXCEEDED THEIR INCIDENTAL TAKE
25 OF ENDANGERED SEA TURTLES.

1 **MR. LIEBESMAN:** YOUR HONOR, JUST A QUICK
2 RESPONSE. THE OTHER CRITERIA THAT HAS BEEN MENTIONED, A
3 COUPLE CRITERIA THAT IS NOW BEING, AS I UNDERSTAND IT,
4 BEING REASSESSED AS PART OF THE RECONSULTATION PROCESS.
5 SO THE PROCESS IS ONGOING TO ADJUST THOSE CONCERNS THROUGH
6 THIS PRINCIPLE OF ADAPTED MANAGEMENT. SO AGAIN, THAT'S
7 PART OF THIS PROCESS THAT WE'LL PRESENT TO THE COURT IN
8 OUR RESPONSE PAPERS.

9 I WILL SAY ON THE SCHEDULE, I WOULD REALLY BESEECH
10 YOUR HONOR TO ALLOW US TO HAVE A FULL SCHEDULE THROUGH THE
11 26TH AND SCHEDULE THE HEARING AFTER THAT DATE. THIS IS A
12 COMPLEX CASE AND WE DON'T WANT TO SEE A RUSH TO JUDGMENT.
13 WE NEED PLENTY OF TIME TO RESPOND TO TEN SEPARATE EXPERT
14 AND FACT DECLARATIONS -- I'M SORRY, AFFIDAVITS, COMPLEX
15 LEGAL ARGUMENTS. WE DON'T WANT TO SEE RUSH TO JUDGMENT.

16 WE STRONGLY URGE YOUR HONOR TO ACCEPT THE SCHEDULE
17 THAT WE HAVE AGREED ON AND SCHEDULE THE CASE AFTER THE
18 26TH OF MARCH SO WE HAVE PLENTY OF TIME TO PRESENT THE
19 CASE IN FULL BLOOM TO YOUR HONOR SO YOU CAN MAKE A
20 REASONED AND CAREFUL DECISION.

21 **THE COURT:** NOW, YOUR PRELIMINARY INJUNCTION
22 MOTION ADDRESSES THE PLAN WHICH IS BROADCAST THROUGHOUT
23 THE ENTIRE SEASHORE, ISN'T IT? I MEAN, THE DRIVING PLAN,
24 IT'S A PLAN FOR THE WHOLE SEASHORE?

25 **MR. CARTER:** YES, YOUR HONOR. THE INTERIM PLAN

1 AFFECTS THE ENTIRE 64 MILES OF THE SEASHORE, CORRECT.

2 **THE COURT:** AND SOMEWHERE IN THE RESEARCH WILL
3 BE THE ORGANIC LEGISLATION IN CONGRESS THAT ESTABLISHES
4 THE PURPOSES FOR CREATING AND MAINTAINING THE SEASHORE AND
5 IT WILL HAVE LEGISLATIVE GOALS THAT ARE POLICY GOALS AND
6 THOSE ARE RELEVANT TO THIS CASE AND NEED TO BE IDENTIFIED
7 AND USED AS A MEASURE IN THIS CASE BECAUSE YOU MAY NOT
8 KNOW WHAT THEY ARE NOW. IF YOU DO, I WOULD SUSPECT SOME
9 OF THEM MAY BE RECREATION, OTHERS MAY BE MAINTAINING THE
10 BIOLOGICAL INTEGRITY OF THE SITE, AND THINGS OF THAT
11 NATURE. WHEN THE COURT LOOKS AT THE PLAN AND THE REQUEST
12 FOR INJUNCTION AND THE DRIVING ISSUE, I THINK THOSE
13 LEGISLATIVE PURPOSES COME INTO PLAY.

14 **MR. CARTER:** WE COULDN'T AGREE MORE, YOUR HONOR.
15 THERE ARE REALLY TWO KEY LAWS THAT ARE IN PLAY WITH
16 RESPECT TO THE PURPOSES FOR WHICH CONGRESS ESTABLISHED
17 CAPE HATTERAS NATIONAL SEASHORE. THE FIRST IS WHAT'S
18 REFERRED TO AS THE ORGANIC ACT, THE NATIONAL PARK ORGANIC
19 ACT. SINCE THIS IS A COMPONENT OF THE BROAD NATIONAL PARK
20 SYSTEM, JUST AS YELLOWSTONE AND YOSEMITE, I GOT A VERY
21 SPECIFIC PURPOSE STATEMENT THAT APPLIES TO ALL THOSE
22 UNITS, WHICH IS TO PRESERVE THOSE AREAS AND LEAVE THEM
23 UNIMPAIRED FOR FUTURE GENERATIONS.

24 WHILE RECREATION IS AN ALLOWABLE USE, WE CITE IN OUR
25 BRIEF CASE LAW THAT'S VERY CLEAR WHEN YOU HAVE A CONFLICT

1 BETWEEN RECREATIONAL USE AND IMPAIRMENT OF NATURAL
2 RESOURCES, THE RECREATIONAL USE HAS TO GIVE WAY TO LEAVE
3 THOSE AREAS UNIMPAIRED.

4 THE OTHER RELEVANT STATUTE THAT COMES INTO PLAY IS
5 CALLED CAPE HATTERAS NATIONAL SEASHORE ENABLING ACT PASSED
6 IN 1937 TO SET UP CAPE HATTERAS NATIONAL SEASHORE AND ADD
7 IT AS A COMPONENT TO THE NATIONAL PARK SYSTEM. THAT ACT
8 ALSO HAS SPECIFIC LANGUAGE THAT THE FIRST FEW SENTENCES IS
9 THAT IT COULD BE SET UP AS A PRIMITIVE WILDERNESS AREA TO
10 BE MAINTAINED TO PRESERVE ITS NATURAL RESOURCES.

11 THE OTHER USE IS COMPATIBLE WITH THAT THAT CAN OCCUR,
12 SUCH AS FISHING, SWIMMING, GENERALLY KIND OF WATER-BASED
13 ACTIVITIES. AND INTERESTINGLY, IT DOES NOT MENTION
14 ANYTHING ABOUT ORV DRIVING ON THE BEACH.

15 **MR. LIEBESMAN:** JUST BRIEFLY TO RESPOND TO THAT,
16 AND THIS IS AN IMPORTANT POINT. WE RESEARCHED THE
17 LEGISLATIVE HISTORY. WE CAN PRESENT THAT THAT WILL BE
18 PART OF OUR BRIEFS. WE GOT COMMENTS ON THAT. I THINK
19 THAT WHEN YOU LOOK AT '37 LEGISLATIVE HISTORY, TO FAST
20 FORWARD TO '52 WHEN THE LAND WAS ACQUIRED AND COMMENTS TO
21 THE PARK SERVICE AT THAT POINT THAT WE WILL PRESENT IN OUR
22 BRIEFS THAT PRESENT A LITTLE DIFFERENT PICTURE OF WHAT
23 CONGRESS HAD INTENDED AND HOW IT IS TO BE APPLIED TO THE
24 GROUND, IN TERMS OF MAINTAINING ACCESS.

25 THIS IS ALL PART OF THE WHOLE LEGISLATIVE HISTORY

1 PICTURE AS TO WHAT CONGRESS INTENDED OVER THIS PERIOD OF
2 TIME. THIS IS HIGHLY RELEVANT AND I THINK THIS WILL BE
3 PART OF OUR BRIEFS.

4 WE ACTUALLY HAVE THE REPORTS AND INFORMATION THAT WE
5 DUG UP ON THIS LEGISLATIVE HISTORY THAT WE WILL PRESENT TO
6 YOUR HONOR THAT I THINK CAN ADDRESS SOME OF THE POINTS
7 THAT MR. CARTER JUST RAISED.

8 **THE COURT:** ENVELOPED IN THIS SITE IS OTHER
9 DEPARTMENT OF INTERIOR PROPERTY, NAMELY PEA ISLAND, AT A
10 MINIMUM, WHICH HAS DEFINED AND IN MORE ACUTE USES IT
11 DOESN'T PERMIT, TO MY KNOWLEDGE, BEACH DRIVING AT ALL.
12 AND SO YOU'VE GOT MIXED USE AND PREDOMINANT USE ACTIVITIES
13 IN THAT AREA.

14 **MR. LIEBESMAN:** YOUR HONOR, PEA ISLAND, AS I
15 UNDERSTAND, IS PART OF THE NATIONAL WILDLIFE REFUGE
16 SYSTEM.

17 **THE COURT:** I KNOW THAT. I SAID DEPARTMENT OF
18 INTERIOR PARTICULARLY. I SAID THAT KNOWINGLY.

19 **MR. LIEBESMAN:** I'M SORRY, YOUR HONOR.

20 **THE COURT:** IT'S NOT UNDER THE PARK SERVICE
21 BECAUSE IT'S NOT A PARK.

22 **MR. LIEBESMAN:** IT'S UNDER THE FISH AND WILDLIFE
23 SERVICE.

24 **THE COURT:** IT'S A REFUGE BUT THEY ARE ALL UNDER
25 THE DEPARTMENT OF INTERIOR.

1 **MR. LIEBESMAN:** THAT'S CORRECT, YOUR HONOR.

2 **THE COURT:** THANK YOU VERY MUCH. I'LL
3 TENTATIVELY SET THE MATTER FOR 2 O'CLOCK ON MARCH 18,
4 SUBJECT TO YOUR REQUEST FOR AN EXTENSION OF TIME.

5 **MR. LIEBESMAN:** IF I CAN RAISE SOMETHING, YOUR
6 HONOR? I UNDERSTAND THE SCHEDULING. I'M SUPPOSED TO TAKE
7 VACATION THAT WEEK OF MARCH 18, A LONG-PLANNED VACATION.
8 I WOULD REQUEST IF WE COULD MOVE IT BEYOND THAT DATE SO I
9 DON'T HAVE TO CHANGE MY VACATION PLANS.

10 **THE COURT:** WELL, OKAY. THAT'S A LITTLE BIT,
11 AND WITH ALL DUE RESPECT, I DON'T MEAN TO SOUND THE LEAST
12 BIT UNSYMPATHETIC, BUT IN A CASE LIKE THIS, THAT'S
13 PROBABLY NOT A FACTOR.

14 **MR. LIEBESMAN:** SO YOU ARE TELLING ME -- OKAY, I
15 HAVE NO CHOICE.

16 **THE COURT:** NO, YOU CAN KEEP YOUR PLANS. WE'LL
17 PROBABLY CHANGE THE DATE BUT I JUST THINK THAT ASKING -- I
18 JUST THINK THE CASE IS A CASE OF OBVIOUS IMPORTANCE. I
19 MEAN, WE HAD THE OLF CASE. I CAN'T IMAGINE A LAWYER SAY
20 I'M NOT GOING TO BE HERE.

21 **MR. LIEBESMAN:** YOUR HONOR, I'M SIMPLY
22 PRESENTING --

23 **THE COURT:** -- DO YOU MIND MOVING THE CASE BACK
24 A FEW DAYS, YOU KNOW, OR SUPPOSE IT WAS BUSH VERSUS GORE,
25 THE ELECTION, AND YOU ARE IN FLORIDA AND YOU SAY WELL, YOU

1 KNOW, I'M SCHEDULED TO BE OUT OF TOWN, I CAN'T GO.

2 MR. LIEBESMAN: YOUR HONOR, I'LL CANCEL MY
3 PLANS.

4 THE COURT: DON'T CANCEL THEM BECAUSE IT WILL
5 PROBABLY BE CHANGED AND YOU WOULD HAVE MADE TWO MISTAKES.
6 YOU WOULD HAVE CHANGED YOUR PLANS AND YOU WON'T BE HERE.
7 SO KEEP YOUR PLANS BUT THAT'S -- I'M NOT TRYING TO BE
8 UNSENSITIVE, IT'S JUST NOT SOMETHING THAT I WOULD LOOK ON
9 AS BEING APPROPRIATE.

10 MR. LIEBESMAN: I UNDERSTAND. MY QUESTION IS,
11 FOR THE DATE, I DON'T KNOW WHEN YOUR HONOR WILL CHANGE THE
12 DATE.

13 THE COURT: I WON'T CHANGE IT EARLIER; I'LL
14 CHANGE IT LATER. I PROBABLY WILL BUT IT'S NOT THE KIND OF
15 REQUEST THAT I THINK IS ONE I WOULD MAKE.

16 MR. LIEBESMAN: YOUR HONOR, APOLOGIZE. I'M VERY
17 SENSITIVE TO YOUR HONOR'S CONCERNS. I JUST SIMPLY AM
18 RAISING THAT AS A LAWYER THAT WORKS HARD AND HAS A
19 VACATION PLANNED.

20 THE COURT: THAT'S FINE. ALL RIGHT. THANK YOU.
21 THANK, YOU ALL.

22

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END OF TRANSCRIPT

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CERTIFICATE

THIS IS TO CERTIFY THAT THE FOREGOING TRANSCRIPT OF PROCEEDINGS TAKEN AT THE CIVIL SESSION OF UNITED STATES DISTRICT COURT IS A TRUE AND ACCURATE TRANSCRIPTION OF THE PROCEEDINGS TAKEN BY ME, TO THE BEST OF MY ABILITY, IN MACHINE SHORTHAND AND TRANSCRIBED BY COMPUTER UNDER MY SUPERVISION.

THIS THE 26 DAY OF February 2008.

Donna J. Tomawski

DONNA J. TOMAWSKI
OFFICIAL COURT REPORTER