

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

NO. : 2:07-CV-45-B0

DEFENDERS OF WILDLIFE,  
Plaintiff,

v.

NATIONAL PARK SERVICE, ET AL. . April 4, 2008  
Defendants . Raleigh, North Carolina

and

DARE COUNTY, ET AL.  
Intervenor/Defendants .

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

APPEARANCES:

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Proceedings recorded by stenomask, transcript produced from dictation.

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

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

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

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

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

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

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

WE HAVE WORKED VERY DILIGENTLY AND HAVE AN AGREEMENT IN PRINCIPLE ON ALL POINTS OF A SETTLEMENT AND CONSENT DECREE THAT WE ARE WORKING OUT THE VERY FINAL DETAILS ON AND DEALING WITH AN APPROVAL PROCESS THAT WE DON'T HAVE TO DEAL WITH AS PLAINTIFFS, BUT THE FEDERAL GOVERNMENT DOES HAVE TO DEAL WITH IT AS A GOVERNMENT ENTITY AND WOULD BE IN A POSITION, WE BELIEVE, TO FILE THIS CONSENT DECREE WITH THE COURT NEXT FRIDAY, WHICH IS THE SEVEN-DAY EXTENSION THAT WE'VE REQUESTED IN TERMS OF EXTENDING THE TIME FOR A HEARING ON THIS PRELIMINARY INJUNCTION MOTION.

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

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

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

MR. CARTER: YES, YOUR HONOR.

THE COURT: I'LL HEAR FROM THE GOVERNMENT.

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

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

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

AND WE DO BELIEVE THAT WE HAVE AN AGREEMENT IN PRINCIPLE THAT WOULD PROTECT ALL SPECIES AND RESOLVE ALL CLAIMS AND DISPUTES WHILE STILL PRESERVING THE APPROPRIATE AMOUNT OF RECREATIONAL ACCESS. BECAUSE AS YOUR HONOR IS AWARE, WE DO HAVE AN OBLIGATION TO PROVIDE REASONABLE ACCESS THAT WOULD NOT HARM THE ENVIRONMENT.

AND THAT IS WHAT WE BELIEVE OUR AGREEMENT IN PRINCIPLE PROVIDES, FOR PRESERVATION AND PROTECTION OF THE ENVIRONMENTAL NEST WHILE STILL ALLOWING FOR THE APPROPRIATE AMOUNT OF ACCESS.

WE ARE PREPARED TO -- I HAVE TO SEND THIS UP THE CHAIN OF COMMAND ON BOTH THE DEPARTMENT OF JUSTICE SIDE AND DEPARTMENT OF INTERIOR SIDE. SO, IT MUST ULTIMATELY BE APPROVED BY THE ASSISTANT ATTORNEY GENERAL FOR THE ENVIRONMENTAL AND NATURAL RESOURCES DIVISION AS WELL AS THE DEPUTY ASSISTANT SECRETARY OF INTERIOR. BOTH OF THOSE GENTLEMEN HAVE BEEN BRIEFED ON THE PROPOSAL AND WE HAVE BEGUN THE PROCESSES OF -- WE HAVE BEGUN THE APPROVAL PROCESS.

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

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

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

FOR INSTANCE, THERE ARE THREE SEPARATE GEOGRAPHIC AREAS. THERE'S BODIE ISLAND AND THERE IS HATTERAS ISLAND AND THERE'S OCRACOEKE ISLAND THAT COMPRISE THE SEASHORE, THE HATTERAS SEASHORE.

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

AND WE BEGIN THIS ENTIRE EXERCISE WITH THE UNDERSTANDING THAT 36 YEARS AGO IN 1972, THERE WAS A DECLARATION MADE AND THAT DECLARATION HAS COME FORWARD AS BINDING AUTHORITY AND IT WAS IMPLEMENTED AT OTHER TIMES AND OTHER PLACES

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ON SEASHORES THROUGHOUT THE ATLANTIC SEABOARD. AND WHERE THE LAND WAS IN 1972 PHYSICALLY IS MATERIALLY DIFFERENT FROM WHERE THE LAND IS TODAY. THE BRIDGE THAT WAS BUILT, YOU TELL ME, ABOUT 1964 HAS FISHING ACCOMMODATION OVER AREAS THAT WERE UNDERWATER THEN THAT ARE HUNDREDS OF YARDS IF NOT FURTHER FROM ANY WATER NOW.

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

AND VOLUME OF ACCESS TO THE FLATS AT OREGON INLET IS MUCH MORE ACUTE THAN IT IS TO THE OTHER AREAS. THE SENSATIONAL DISCUSSIONS OF A THOUSAND CARS ON A BIG HOLIDAY WEEKEND OR A SIGNIFICANTLY HIGHER NUMBER OF CARS THAN A THOUSAND, THAT OCCURS THERE. THAT'S THE MAGNET THAT DRAWS THAT IN. THAT'S THE AREA THAT IS MOST INUNDATED WITH MECHANICAL TRAFFIC.

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

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

THE COURT: AREN'T THEY UNINCORPORATED?

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

THE COURT: YEAH, THEY'RE UNINCORPORATED SUBDIVISIONS. AND SO THE GOVERNMENT OF THOSE IS DARE COUNTY. ANYWAY, SO THE EXPERIENCE ON HATTERAS ISLAND AND ACCESS AND USE IS DIFFERENT IN KIND FROM THE EXPERIENCE ON BODIE ISLAND. AND THEN YOU GET OVER TO OCRACOE AND YOU CAN'T GET THERE WITHOUT TAKING A STATE FERRY OR SWIM OR TAKE A BOAT, BUT IF YOU TOOK A BOAT, YOU CAN'T DRIVE.

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

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

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

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

ONCE YOU GET ONTO HATTERAS ISLAND THERE ARE SEVERAL RAMPS. ONCE YOU GET FURTHER DOWN TO OCRACOE THERE ARE RAMPS AGAIN, NOT TOO MANY. BUT THE ABILITY TO REGULATE THE NUMBER AND KIND AND CIRCUMSTANCES OF OFF ROAD VEHICLES IS READILY AVAILABLE THROUGH THE PORTAL THAT EXISTS NOW, IT'S JUST NOT MANNED AND IT NEVER HAS BEEN. IT'S NOT EXAMINED OR USED AS A GATEKEEPER, BUT PHYSICALLY THAT APPLIES.

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

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

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

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

THE COURT: OKAY. I MEAN, THESE ARE THINGS THAT I DON'T KNOW IF

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YOU'RE DEALING WITH THEM OR NOT. BUT IF YOU'RE NOT, COMMON SENSE WOULD RECOMMEND THAT YOU DEAL WITH THEM BECAUSE YOU DON'T HAVE TO BE A MARINE BIOLOGIST TO FIGURE OUT THAT THE IMPACT OF A HIGH WEIGHT, HIGH ENGAGEMENT VEHICLE IS GOING TO BE SIGNIFICANT COMPARED TO SOME OTHER KIND OF VEHICLE. THE IMPACT OF 1,000 OR 1,500 VEHICLES IS GOING TO BE A LOT DIFFERENT THAN THE IMPACT OF 150 OR 200 VEHICLES.

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

MS. TAYLOR: NOT CURRENTLY, YOUR HONOR.

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

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

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

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

THE COURT: DURING THE SUMMER.

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

THE COURT: RIGHT. THE BREEDING AREAS TALK ABOUT NESTING AND MATING AND I GUESS THOSE ARE THE PRINCIPLE THINGS. BUT I HAVEN'T SEEN ANYTHING IN THE DISCUSSION, AND MAYBE IT'S NON-SCIENCE OR BAD SCIENCE, ABOUT THE EDGE OF THE WATER EFFECT. BUT I'LL BE SURPRISED TO LEARN THAT A CRITICAL ENVIRONMENTAL AREA, ONE OF FRAGILE AND SIGNIFICANT IMPORTANCE, IS NOT WHERE THE WATER MEETS THE LAND BECAUSE THAT'S THE FEEDING GROUND OF THE TERRESTRIAL AND AIRBORNE ANIMALS THAT ARE GOING TO BE ON THE BEACH. IS THAT NOT THE CASE?

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

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

OR EFFECTIVE RESPONSE. BUT WE RECOGNIZE, AND WITHOUT REVEALING TOO MUCH OF THE CURRENTLY UNAUTHORIZED SETTLEMENT PROPOSAL, THE ISSUES THAT YOUR HONOR HAS -- DOES RAISE ARE -- HAVE BEEN DISCUSSED IN GREAT DETAIL AND ARE -- THERE HAS BEEN AN ATTEMPT TO ADDRESS THOSE CONCERNS.

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

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

OPERATING A MOTOR VEHICLE ON THE BEACH UNDER THE CIRCUMSTANCES AND PREDICTABILITY OF WHAT CAN HAPPEN IN THAT ENVIRONMENT. THE COURT: THERE'S NO ONE THAT SAYS YOU'RE CAPABLE SKILL-WISE OF

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

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

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

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

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

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THE COURT: WHY WOULD NOT THE APPROPRIATE SOLUTION BE FOR THE COURT TO ENTER A GENERAL PRELIMINARY INJUNCTION AUTHORIZING THE CREATION OF A RESPONSIVE PLAN CONSISTENT WITH THE LAW AND ALLOW THE PARTIES TO PRODUCE EITHER SINGULARLY OR IN COMBINATION A PROPOSAL?

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

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

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

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

MS. TAYLOR: CORRECT.

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

MS. TAYLOR: CORRECT.

THE COURT: OKAY. ANYTHING YOU WANT TO ADD?

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

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

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

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

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

THERE ARE TREMENDOUS INTERESTS AT STAKE FROM OUR STANDPOINT. I HEAR WHAT YOUR HONOR IS SAYING. WE'RE VERY SENSITIVE TO THE CONCERNS ABOUT THE RESOURCES IN THE CAPE HATTERAS NATIONAL SEASHORE. BUT WE'RE ALSO VERY CONCERNED ABOUT THE IMPACT ON OUR INTERESTS; THE ECONOMY, THE LOCAL INTEREST, THE HISTORY AND THE LEGISLATIVE HISTORY OF THE CAPE HATTERAS NATIONAL SEASHORE. ALL THIS BALANCE THAT YOUR HONOR WAS TALKING ABOUT ARE SO CRITICAL TO US AND WE WOULD WANT TO HAVE THE OPPORTUNITY IF THEY PROCEED DOWN THIS PATH TO PRESENT A PROPOSED CONSENT ORDER TO THE COURT TO RAISE OBJECTIONS INCLUDING THE OPPORTUNITY TO PRESENT EVIDENCE, TO HAVE YOUR HONOR ADDRESS THOSE ISSUES FROM THE BALANCE THAT YOUR HONOR WAS DISCUSSING.

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

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

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

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

MR. HORNTAL: THANK YOU, YOUR HONOR. I WOULD SAY I DON'T KNOW VERY

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MUCH ABOUT THE ENVIRONMENTAL ISSUES AS THE COURT WOULD APPRECIATE AND I'LL LEAVE THAT TO MR. LIEBESMAN AND HIS COUNSEL. THEY'RE WELL ABLE TO DEAL WITH THAT. BUT I HAVE REVIEWED THE PAPERS. AND FROM REVIEWING THE PAPERS, IT WOULD BE APPARENT TO ME AND TO ANYONE ELSE THERE'S A SHARP CONTROVERSY FROM THE POINT OF VIEW OF SCIENCE AND ECONOMIC EVIDENCE BETWEEN THE POSITION THAT HAS BEEN TAKEN BY THE PLAINTIFFS AND HAS ESSENTIALLY BEEN CONCEDED BY THE GOVERNMENT AND THE POSITION OF THE INTERVENORS.

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

I, TOO, AM VERY SENSITIVE TO THE QUESTIONS ON THE NARROWNESS IN TAILORING OF RELIEF THAT YOUR HONOR HAS RAISED. FROM A PROCEDURAL POINT OF VIEW, I WOULD OBSERVE THAT THE INTERVENORS HAVE FILED A MOTION TO DISMISS THAT HAS NOT BEEN DETERMINED.

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

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

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

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

THE COURT: NO, NO, NO.

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

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

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

THE COURT: IT'LL BE DENIED.

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

THE COURT: THAT'S CORRECT.

MR. HORNTAL: AND SO IT WOULD SEEM THAT --

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

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

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

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

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

IF YOU -- AND THIS IS NO CRITICISM INTENDED, BUT IT'S SELF-EVIDENT TO EVERYBODY WHO IS IN HERE. IF THE PARK SERVICE HAD HAD A PLAN IN LATE 1972, AND THEN HAD DEALT WITH THE PROGRESSION OF DEVELOPMENT AND DEMOGRAPHIC SHIFT AND ACCESS TO THE BEACH AND ALL THAT OVER THE PAST 36 YEARS, THE PLAN MIGHT HAVE MIGRATED AND IT MIGHT HAVE DEVELOPED AND EVOLVED AND IT MIGHT BE LESS THAN NO PLAN TODAY, BUT

WILDLIFE HRG

SOMETHING THAT WAS BUILT INTO THE SET OF EXPECTATIONS OF THE PEOPLE IN THE COMMUNITY.

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

AND SO THOSE ARE ALL CONSIDERATIONS THAT MAY OR MAY NOT BE IN THE NEGOTIATIONS, BUT WILL BE APPARENT WHEN SOME CONSENT AGREEMENT COMES OUT.

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

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

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

MR. HORNTHAL: YOUR HONOR, AS PRESIDING JUDGE IN THIS AREA PROBABLY HAS A CONSIDERABLY BETTER UNDERSTANDING OF WHAT THE GEOGRAPHIC AND NATURAL FACTORS AFFECTING THE NATIONAL SEASHORE WOULD THAN JUDGES SITTING IN OTHER LOCATIONS. AND YOU HAVE RAISED FOR THE BENEFIT OF ALL THE PARTIES SOME MATTERS THAT CERTAINLY -- THAT MAY BE WORTHY OF CONSIDERATION WITH RESPECT TO THE NARROW TAILORING OF RELIEF, WHICH I'M UNDERSTANDING YOUR HONOR TO SAY THAT YOU WELL APPRECIATE IS THE RESPONSIBILITY OF THE COURT.

BUT IF YOU WOULD ALLOW ME --

THE COURT: YEAH.

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

THE COURT: NO, THAT'S FINE.

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

THE COURT: NO.

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

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

AND IF THAT HAPPENS, YOUR HONOR, WE WOULD -- THE INTERVENORS WOULD LIKE TO HAVE THE OPPORTUNITY TO BE HEARD WITH RESPECT TO THE OBJECTIONS THAT WE HAVE. WE WOULD LIKE THE OPPORTUNITY TO PRESENT EVIDENCE BASED UPON THE OBJECTIONS THAT WE HAVE, AND WE WOULD LIKE THE OPPORTUNITY TO PRESERVE THE RECORD ON WHATEVER POINTS WE MAY HAVE FOR THE PROTECTION OF OUR CLIENT IF IT GOES --

MR. LIEBESMAN: RIGHT.

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

THE COURT: ALL RIGHT. THANK YOU.

MR. HORNTHAL: I THANK YOU FOR HEARING ME.

THE COURT: THANK YOU.

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

BUT I MEAN WE'RE CONCERNED ABOUT A LOT OF THE OVERREACH. MATTER OF



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FACT WE'VE SUBMITTED WITHIN THE LAST FEW DAYS AN EXHIBIT THAT PRESENTS THE SCIENCE TO THE COURT SO YOU HAVE A VISUAL UNDERSTANDING ABOUT HABITAT AND WHAT IS NEEDED TO BE PROTECTED THAT HAS TO GO INTO THE BALANCING OF PRELIMINARY INJUNCTION FACTORS SO IT'S A SOUND NARROWLY TAILORED ONE THAT MAKES SENSE FROM A SCIENTIFIC AND BIOLOGICAL STANDPOINT.

WE'RE PREPARED TO PRESENT THAT EXHIBIT SO YOU CAN VISUALIZE IT TODAY. WE EVEN HAVE OUR EXPERT, MR. WALTON, WHO'S HERE TO TESTIFY AND EXPLAIN ABOUT THAT SO AS TO HELP EDUCATE AND ASSIST THE COURT. THAT'S ONE ISSUE.

THE OTHER ISSUE IS PROCESS. AND YOU'VE TALKED ABOUT THE YEARS IN WHICH NOTHING WAS DONE. WELL, YOU KNOW, WE HAVE THIS INTERIM PLAN THAT WAS OUT THERE THAT WENT THROUGH A PROCESS TO WHICH PLAINTIFFS PARTICIPATED, WENT THROUGH A PUBLIC PROCESS, WE THINK IT'S FUNCTIONALLY EQUIVALENT TO A SPECIAL RULE BECAUSE IN THE CHART AND IN OUR BRIEF POINTS THAT OUT, THE STEPS THAT WENT THROUGH THAT PROCESS. THAT'S NOW BEING IMPLEMENTED. IT'S BEING IMPLEMENTED AS WE SPEAK IN TERMS OF MOVING FORWARD HERE AND PROVIDING THE PROTECTIONS THAT ARE BASED UPON SOUND SCIENCE, BASED UPON DATA ON THE GROUND, THAT WE WOULD ASK WITH ALL DUE RESPECT FOR THE COURT TO REALLY CONSIDER WHEN YOU'RE LOOKING ABOUT WHETHER IT'S APPROPRIATE TO DEVIATE SUBSTANTIALLY FROM THAT INTERIM PLAN THAT'S BEING IMPLEMENTED AND PUT ON THE GROUND IN BALANCING THESE FACTORS.

THESE ARE ALL IMPORTANT CONSIDERATIONS THAT WITH ALL DUE RESPECT WE THINK IT'S REALLY CRITICAL WITH ALL THAT'S AT STAKE HERE, WITH ALL THE BUSINESSES THAT RELY UPON ACCESS, THE INDIVIDUALS WITH BUSINESSES THAT -- WE'RE NOT TALKING ABOUT LARGE LANDOWNERS NECESSARILY, BUT HOTEL OPERATORS, FOLKS THAT MIGHT HAVE TO LAY PEOPLE OFF IF THERE'S A SIGNIFICANT SHUTDOWN. THAT HAS A REAL IMPACT ON THE GROUND, THE INDIVIDUALS WHOSE LIVES HAVE DEPENDED FOR YEARS ON THIS TOURISM INDUSTRY.

AND THOSE ARE ALL FACTORS THAT GO INTO THIS PROCESS OF MAKING A SOUND DECISION. THESE ARE ALL THE THINGS THAT I WANT THE COURT -- AND WE'RE PLEADING WITH YOU TO SERIOUSLY CONSIDER AS WE MOVE FORWARD IN FASHIONING THIS -- THE KIND OF RELIEF THAT YOU SAY YOU WANT TO ISSUE HERE. AND I WANT TO RESERVE OBVIOUSLY ARGUMENT TO RESPOND TO THE POINTS ON PRELIMINARY INJUNCTION TODAY. WE'RE PREPARED TO DO THAT. BUT, YOU KNOW, IF WE CAN COME TO AGREEMENT THAT BALANCES THESE FACTORS THAT MAKES SENSE THAT'S TRUE TO THE INTERIM PLAN AS MUCH AS POSSIBLE, WHICH WAS A PUBLIC PROCESS, PERHAPS WE CAN COME OUT WITH SOMETHING TO WHICH WE CAN ALL SAY WIN-WIN. BUT I DON'T SEE THAT THE WAY THAT THINGS HAVE EVOLVED IN TERMS OF THE RELIEF THE PLAINTIFFS ARE SEEKING AND NOW CUTTING US OFF FROM DISCUSSIONS. THAT'S REALLY, AT THIS POINT, ALL I HAVE TO SAY ABOUT OUR CONCERNS AND WE'RE CERTAINLY PREPARED NOW TO ARGUE THE -- TO ADDRESS THE MOTIONS THAT ARE IN FRONT OF THE COURT.

THE COURT: WELL, I SENSE A CHANGE IN DIRECTION IN YOUR ARGUMENT AWAY FROM WANTING TO WORK TOWARD A SETTLEMENT AND CONSENT DECREE RATHER THAN JUST HAVE THE COURT ENTER A PRELIMINARY INJUNCTION, WHICH I'M PREPARED TO DO, AND YOU WANT TO ARGUE THE MERITS OF NOT ENTERING A PRELIMINARY INJUNCTION WHICH WILL BE YOUR POSITION. IT SEEMS TO ME THAT THOSE POSITIONS ARE AT ODDS WITH EACH OTHER.

MR. LIEBESMAN: WELL, WITH ALL DUE RESPECT, I MEAN, FRANKLY, WHAT -- I HEAR WHAT THE COURT IS SAYING ABOUT YOU THINK THEY'RE ENTITLED TO PRELIMINARY INJUNCTIVE RELIEF. FRANKLY, YOU KNOW, WE DISAGREE WITH THAT POINT. BUT IN TERMS OF HEARING THE EVIDENCE IF YOUR HONOR, AS YOU'VE SAID, IS GOING TO ENTER A PRELIMINARY INJUNCTION, THE EVIDENCE THAT WE'RE PREPARED TO PRESENT --

THE COURT: I DON'T KNOW THAT YOU GET TO -- I MEAN, THEY'RE THE ONES THAT -- THE GOVERNMENT IS THE ONE DEFENDING AGAINST THE INJUNCTION AND THEY'RE THE ONES PROPOUNDING THE INJUNCTION AND THEY'VE MADE A COMPELLING CASE UNDER THE LEGAL STANDARD. AND SO THEY HAVE THE BURDEN AND THE COURT CAN ENTER THE INJUNCTION AND THEN YOU'RE JUST -- YOU'LL HAVE THE INJUNCTION TO DEAL WITH.

MR. LIEBESMAN: WE'RE PARTIES TO THE CASE, YOUR HONOR. WITH ALL DUE RESPECT, I THINK --

THE COURT: WELL, BUT I DON'T KNOW THAT YOU HAVE ANY STANDING TO LITIGATE THIS PART OF IT.

MR. LIEBESMAN: WITH ALL DUE RESPECT, IF I CAN ADDRESS THAT ISSUE BECAUSE YOU RAISED THAT AT THE FEBRUARY STATUS CONFERENCE. WE BELIEVE THAT WE DO HAVE STANDING. ACTUALLY, THE LAW ON INTERVENORS IS THAT WE'RE AS MUCH A PARTY AS ANY OTHER PARTY TO THE CASE. WE CAN RAISE JURISDICTIONAL ISSUES, WE CAN CONTEST MOTIONS THAT HAVE BEEN FILED. EVEN IF THE GOVERNMENT WERE TO STIPULATE AS THEY HAVE HERE THE ENTITLEMENT TO AN INJUNCTION, I MEAN WE CAN CERTAINLY FOR THE RECORD

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DISAGREE AND RAISE THOSE CONCERNS.

I DON'T SEE THAT WE'RE ANY LESS A PARTY IN TERMS OF OUR ABILITY TO MAKE THOSE ARGUMENTS ESPECIALLY WHEN YOU LOOK AT FROM A STANDING -- THIS IS AN IMPORTANT FACTOR FOR THE COURT TO CONSIDER, THE LEGISLATIVE HISTORY IN CREATING THE CAPE HATTERAS RECREATIONAL AREA TO WHICH RECOGNITION ON ACCESS AND RECREATIONAL USE WAS A FUNDAMENTAL PART OF CREATING THE SEASHORE IN THE '30S INCLUDING ACCESS BY MOTOR VEHICLES.

THOSE ARE INTERESTS THAT I REPRESENT. AND I THINK THAT CERTAINLY GIVES US STANDING, IT GIVES US A RIGHT TO PARTICIPATE AS A PARTY. THAT'S ALL I'M SAYING, YOUR HONOR, THAT I HEAR WHAT YOU'RE SAYING AND WE WANT TO BE ABLE TO PRESENT A RESPONSE TODAY. I UNDERSTAND YOUR STATEMENT, BUT I THINK WE HAVE THAT RIGHT.

THE COURT: WELL, YOU WON'T HAVE ANY RESPONSE IF I GRANT THEIR MOTION TO CONTINUE AND CARRY THE MATTER OVER AND THEY COME UP WITH A CONSENT DECREE AND THEY PRESENT IT TO THE COURT AND THE COURT SIGNS IT AND THEN THE CASE WILL BE OVER.

MR. LIEBESMAN: YEAH, WHAT WE'RE SAYING IS THAT IF THAT WERE TO PROCEED AHEAD, WE WOULD RESERVE THE RIGHT TO CHALLENGE THAT CONSENT DECREE AS NOT AN APPROPRIATE DECREE TO ENTER IN TERMS OF THE BALANCING REQUIRED ON INJUNCTIVE RELIEF. WE WOULD HAVE THAT RIGHT TO CHALLENGE IT.

THE COURT: IT WOULD BE A CONSENT DECREE. IT WOULD BE A SETTLEMENT WITH A CONSENT DECREE, IT WOULD BE A FINAL JUDGMENT.

MR. LIEBESMAN: BUT THAT DOESN'T MEAN THAT WE CAN'T CHALLENGE THAT AND HAVE A RIGHT TO TAKE AN APPEAL IF NEED BE.

THE COURT: YOU CAN TAKE AN APPEAL, BUT YOU'LL BE APPEALING FROM A CONSENT DECREE BETWEEN THE DEFENDERS OF WILDLIFE AND THE UNITED STATES DEPARTMENT OF INTERIOR.

MR. HORNTAL: MAY IT PLEASE THE COURT, BUT IT WOULD BE A CONSENT DECREE WHICH ALL THE PARTIES HAD NOT JOINED.

MR. LIEBESMAN: THAT'S CORRECT.

MR. HORNTAL: AND WE'RE PARTIES TO THIS LAWSUIT. AND WITH ALL DUE RESPECT TO THE COURT IN MEETING --

THE COURT: WELL, THEN, IT MAY NOT BE AN APPEALABLE ORDER. IF IT'S AN INTERLOCUTORY ORDER, YOU MAY GO ON FOREVER WITHOUT GETTING TO THE FOURTH CIRCUIT.

MR. HORNTAL: I WOULD --

THE COURT: I MEAN, USUALLY A FINAL ORDER IS ONE THAT RESOLVES ALL THE PARTIES AND ALL THE ISSUES IN A CASE.

MR. HORNTAL: AND THAT'S WHAT THEY'VE INDICATED THAT THEY WOULD LIKE TO BE ABLE TO PRESENT TO THE COURT. I MEAN, I WOULD -- I WOULD NOT IMAGINE THAT THE COURT WOULD ENTER AN INTERLOCUTORY ORDER SO THAT THE RIGHT OF APPEAL WOULD BE DENIED. THAT WOULD BE CONTRARY TO THE WAY THIS COURT OPERATES, I ASSUME.

BUT IF I MIGHT SAY, OUR CLIENTS OUGHT NOT TO HAVE TO CONCEDE AWAY THEIR RIGHTS IN ORDER TO PARTICIPATE IN THIS NEGOTIATION. AND I SAY THAT WITH EVERY BIT OF RESPECT I CAN OFFER TO THE COURT, BUT SPEAKING PURELY FROM THE POINT OF VIEW OF FAIRNESS AS I PERCEIVE IT.

THE COURT: MS. TAYLOR?

MS. TAYLOR: I JUST THOUGHT I'D ADD A LITTLE BIT OF CLARITY TO THAT ISSUE. WE DON'T DISAGREE THAT THE INTERVENORS WOULD HAVE THE OPPORTUNITY TO OBJECT TO ANY CONSENT DECREE THAT IS ENTERED INTO AMONGST THE GOVERNMENT AND THE PLAINTIFFS.

THEY CERTAINLY CANNOT OBSTRUCT OUR ABILITY TO ENTER INTO A CONSENT DECREE AND WE HAVE THE OPPORTUNITY TO ENTER INTO AN AGREEMENT AMONGST OURSELVES WITHOUT THEIR PARTICIPATION AND WITHOUT THEIR SIGNING OFF ON IT.

BUT IN ORDER FOR IT TO BE A FINAL JUDGMENT, WHICH WE WOULD ALL PREFER, WE THINK IT WOULD BE APPROPRIATE FOR THE PLAINTIFFS AND THE FEDERAL DEFENDANTS TO PRESENT WHATEVER CONSENT DECREE WE ARE ABLE TO ARRIVE AT AND TO ALLOW ARGUMENT. I WOULD TAKE ISSUE WITH EVIDENCE, BUT THEY CAN ARGUE AGAINST WHATEVER AGREEMENT WE COME UP WITH.

THE COURT: WELL, I SEE YOUR POINT. AND THE PLAINTIFFS' POSITION IS THAT YOU WANT TO DEFER FURTHER PROSECUTION OF YOUR MOTION NOW IN ORDER TO REACH A CONSENT DECREE?

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

THE COURT: AND THE DEFENDANT PARK SERVICE, FISH AND WILDLIFE,

## WILDLIFE HRG

DEPARTMENT OF INTERIOR'S POSITION IS THAT YOU WANT TO DEFER DEFENDING AGAINST IT UNTIL YOU CAN PRESENT A CONSENT DECREE?

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

THE COURT: AND SO THE INTERVENORS WOULD BE OFFERING EVIDENCE AGAINST NOTHING. YOU WOULD BE OFFERING EVIDENCE AGAINST SOMETHING THAT WAS NOT BEING PROSECUTED. SO, HOW CAN YOU DO THAT?

MR. HORNTAL: YOUR HONOR, IF --

THE COURT: TODAY.

MR. HORNTAL: IF THE COURT WAS INCLINED TO CONTINUE THE MATTER, THE ONLY -- AND WHEN THE QUESTION OF CONTINUANCE CAME UP, IT WAS OUR UNDERSTANDING THE POSITION OF THE INTERVENORS, THE INTERVENORS DID NOT OBJECT TO A CONTINUANCE. THE INTERVENORS OBJECTED TO THE ORDER THAT WAS BEING TENDERED TO THE COURT.

THE COURT: WELL, I HAVEN'T RECEIVED ANY -- AN ORDER ABOUT THE CONTINUANCE OR --

MR. HORNTAL: THEY TENDERED --

THE COURT: WELL, I DIDN'T SIGN ANY ORDER.

MR. HORNTAL: I UNDERSTAND THAT, BUT THEY WERE TENDERING AN ORDER TO THE COURT. AND WHAT I'M SAYING TO THE COURT IS IT WAS OUR OBJECTION TO THAT ORDER, WHICH DID NOT PRESERVE OUR RIGHTS TO OBJECT, IT DID NOT PRESERVE OUR RIGHTS TO BE HEARD ON THOSE OBJECTIONS, AND IT DID NOT PRESERVE OUR RIGHTS TO PRESENT EVIDENCE.

AND WE WOULD RESPECTFULLY ASK THAT IF THE COURT IS GOING TO CONTINUE IT, THAT YOU WOULD PRESERVE THOSE OPPORTUNITIES.

THE COURT: ALL RIGHT. WELL, I'LL DO THAT AND GRANT YOUR COMBINED REQUESTS TO NOT PROCEED ON THE MERITS TODAY AND TO GIVE YOU AN OPPORTUNITY TO FASHION A CONSENT AGREEMENT FOR APPROVAL BY THE COURT.

I WILL NOTE TO THE PLAINTIFFS THAT YOU HAVE MADE A CASE FOR THE URGENCY OF ACTION VIS A VIS NATURE VIS A VIS THE TIME CYCLE OF THE BIRDS AND WILDLIFE INVOLVED. AND I KNOW YOU WON'T, BUT DON'T ALLOW THE PROCESS TO IGNORE THE REALITY OF THAT. SO WHATEVER THE PARK SERVICE NEEDS TO DO FOR THIS SEASON IF THE INTERIM PLAN IS NOT RESPONDING TO THAT YOU NEED TO.

AND I WOULD JUST SUGGEST TO THE PARK SERVICE THAT IF YOU WERE GOING TO CURTAIL THE KIND OF UNRESTRICTED ACCESS THAT EXISTS NOW AND IF THE PUBLIC IS GOING TO BE AFFECTED AND IF THE LEGITIMATE RIGHTS OF THE PUBLIC TO ACCESS ARE GOING TO BE ALTERED THEN -- AND IF THAT'S INEVITABLE TO SOME DEGREE, MAYBE NOT TO A GREAT DEGREE, BUT TO SOME DEGREE, THEN YOU OUGHT TO BE LOOKING AT CREATIVE ALTERNATIVE WAYS OF ALLOWING THE PUBLIC TO HAVE ACCESS TO THE BEACH AND TO THE RESOURCE, THE THINGS THAT ARE UNIQUE AND NON-REOCCURRING ON EARTH LIKE CAPE POINT, WHICH IS THE MOST FRAGILE AND FURTHEREST POINT EAST IN THE LOWER STATES, AND OCRACOKE ISLAND.

SO, YOU NEED -- IF YOU'RE GOING TO CONTRACT THE DISCRETIONARY ACCESS, YOU NEED TO PROVIDE SOME THOUGHTFUL ALTERNATIVE ACCESS SO THAT PEOPLE CANNOT LOSE THEIR ABILITY TO GET TO THE BEACH. AND THAT'S ALL I WOULD SAY.

MR. HORNTAL: IF I MIGHT?

THE COURT: YEAH.

MR. HORNTAL: I SAID I WAS NOT GOING TO SAY ANYTHING FURTHER --

THE COURT: YEAH.

MR. HORNTAL: -- BUT WE WOULD LIKE VERY MUCH TO HAVE THE OPPORTUNITY TO BE AT THE TABLE DURING THOSE DISCUSSIONS SO THAT WE --

THE COURT: WELL, I THOUGHT THAT'S WHAT I WAS TRYING TO PROMOTE AND THEN YOUR PARTNER THERE TOLD ME HE WAS GOING TO FIGHT AGAINST IT NO MATTER WHAT. SO, THAT'S WHY I THOUGHT YOU WERE SENDING MIXED SIGNALS.

MR. HORNTAL: I DON'T BELIEVE --

THE COURT: MAYBE IT'S MY HEARING.

MR. HORNTAL: I DON'T THINK MR. LIEBESMAN MEANT TO SAY THAT.

THE COURT: IT MUST BE MY HEARING.

MR. HORNTAL: BUT OBVIOUSLY YOUR HONOR WOULD APPRECIATE THAT LAWYERS DON'T MAKE DECISIONS ABOUT CASES, CLIENTS MAKE DECISIONS. AND WE HAVE A NUMBER OF PEOPLE IN THE COURTROOM TODAY WHO ARE AMONG THE CONSTITUENTS THAT WE REPRESENT WHO HAVE HEARD THE OBSERVATIONS THAT THE COURT HAS AND --

THE COURT: YEAH, BUT LAWYERS HAVE A DUTY TO PROVIDE GOOD COUNSEL. JUST LIKE A DOCTOR WANTS TO MAKE YOU HEALTHY, A LAWYER OUGHT TO TRY AND MAKE YOU HEALTHY TOO.

MR. HORNTAL: AND YOUR HONOR'S NOT ASKING WHAT COUNSEL WE'VE

WILDLIFE. HRG

PROVIDED, BUT I HOPE WE'RE GOING TO PROVIDE GOOD COUNSEL.

MR. LIEBESMAN: YOUR HONOR, IF I CAN JUST CLARIFY. I'M CERTAINLY NOT TRYING TO BE AT ODDS WITH MY CO-COUNSEL HERE. IF WE CAN HAVE A CHANCE TO BE AT THE TABLE. WE'RE JUST TRYING TO PRESERVE OUR RIGHTS AS WE MOVE DOWN THE ROAD.

THE COURT: I UNDERSTAND.

MR. LIEBESMAN: AND WE UNDERSTAND CERTAINLY THAT CONTINUING UNTIL A LATER DATE IN WHICH WE WOULD HAVE THAT OPPORTUNITY WOULD BE FINE WITH US.

THE COURT: WELL, IS THAT YOUR POSITION?

(NO RESPONSE.)

THE COURT: YEAH. ALL RIGHT. WELL, WE'LL CONTINUE THIS AND GIVE YOU AN OPPORTUNITY TO COME FORWARD WITH A FURTHER OFFER OF SETTLEMENT. THANK YOU ALL VERY MUCH. COURT WILL BE IN RECESS.

(WHEREUPON, THESE PROCEEDINGS CONCLUDED AT 2:51 P.M.)

I CERTIFY THAT THE FOREGOING IS A TRUE AND ACCURATE TRANSCRIPT OF SAID PROCEEDINGS.

STACY SCHWINN, CCR, CVR

DATE