

# EXHIBIT 5



March 4, 2011

IRA H. LEESFIELD  
Board Certified Civil Trial Lawyer

Via Email Transmission and Mail : Mike.Stevens@sol.doi.gov

PATRICIA M. KENNEDY

Michael Stevens, Attorney-Adviser  
Office of the Regional Solicitor

THOMAS SCOLARO

Southeast Region  
Richard B. Russell Federal Building  
75 Spring Street, S.W. Suite 304  
Atlanta, Georgia 30303

ALEXANDER J. PERKINS  
Also Admitted in District of Columbia

Re: *Estate of Michael Sclawy-Adelman v. Boy Scouts of Am. et al.*  
Our File No.: 09-7337

ROBERT D. PELTZ  
Board Certified Civil Trial Lawyer

Dear Mr. Stevens:

CAROL L. FINKLEHOFF  
Also Admitted in California and Massachusetts

I am writing as a follow up to our conversation yesterday in order to supplement our previously filed "Touhy Request" to depose identified members of the National Park Service. As we had discussed, I believe that the DOI's letter of March 2, 2011 denying our initial request overlooked a number of matters and perhaps did not have the full background in support of our request. In addition, as we further discussed yesterday, there have been some new developments since the filing of our initial request. In order to focus on the factors set forth in the Department's letter, I will address them by number.

Factors 1, 5 and 6

Reply to Miami Office only:  
2350 South Dixie Highway  
Miami, Florida 33133  
305/854-4900  
800/836-6400  
Fax: 305/854-8266  
E-mail: Info@Leesfield.com  
Internet: www.Leesfield.com

Key West:  
615 1/2 Whitehead Street  
Key West, Florida 33040

South Beach:  
1111 Lincoln Road  
Miami Beach, Florida 33139

Central Florida/Orlando:  
Of Counsel  
Bounds Law Group  
222 W. Comstock Avenue  
Suite 215  
Winter Park, Florida 32789

In its letter of March 2, 2011, the Department indicated that the parties to this litigation would be able to obtain the necessary information from the Park Service Report itself and that accordingly it did "not believe that anything the employees could say at deposition could add to these records." The letter further concluded that since the case involved a dispute between private parties, it therefore did not involve the Park Service's mission or programs. This latter conclusion was further based upon the statement that "the performance of the Preserve employees in connection with the incident was beyond reproach . . ." As a further result, the Department concluded that by permitting its employees to testify at deposition would "spend public employee time for private purposes."

In response to these conclusions, I would point out that *all four Defendants* in this case have directly and *publicly* contended that the Park Service employees were *negligent and that such negligence was a proximate cause of Michael's death*. In this regard, the four

LEESFIELD  
& PARTNERS

Mr. Michael Stevens

March 4, 2011

Page 2

Defendants have recently amended their Answers to specifically raise the claim that the Park Service, by name, was negligent and that such negligence was a legal cause of Michael's death. The main basis for this claim is the contention that the Park Service employees were negligent for issuing a hiking permit on the day of the incident for the Boy Scout Troop in light of the environmental conditions existing at that time.

**There is absolutely nothing whatsoever in the Park Service report which in any way addresses this contention or the underlying facts upon which it is based.** There is no information whatsoever in the Report which discusses the issuance of the permit, the rules and policies for the issuance of such permits, the application of the Park Service guidelines to the issuance of this particular permit, whether such decisions are discretionary or not and the Park Services obligations, if any, to hikers. Accordingly, there is absolutely nothing in the Park Service Report which serves to defend the Park Service employees from these allegations raised by Defendants. As such, we believe that it is critical to both the Park Service, as well as our client, to be able to present evidence on this point. Accordingly, as to Factor 1, there is absolutely no ability to obtain testimony on this point from another source.

Although I had previously supplemented our *Touhy* request with copies of several of the Answers which had been filed by the Defendants raising this defense, it was perhaps not clear from the answers or my correspondence as to the precise nature of these claims.

As we discussed yesterday, another issue has just recently arisen, which would also fall within this particular factor. Following the incident, Park Service employees took possession of a GPS unit owned by one of the Scout Masters, Howard Crompton. The Park Service thereafter downloaded the GPS and prepared several charts using some of the data. I am enclosing copies of these particular charts for your convenience.

According to Mr. Crompton's attorney, the Park Service retained possession of the GPS unit for a considerable time, refusing to return it until fairly recently. Mr. Crompton's attorney has represented during the course of the proceedings that he and his clients have doubts as to the validity of the GPS download and the charts, which were subsequently prepared by the Park Service personnel. As a result, he sought and obtained a court order requiring that the GPS be downloaded by a forensic laboratory in Raleigh, North Carolina.

This download took place recently and we have just received the data from the forensic lab from the download. According to our GPS expert, the data is incomplete and in some ways inconsistent with that reported by the Park Service. Specifically, as you will note on the Park Service printouts, there are times associated with a number of the data points.

**LEESFIELD  
& PARTNERS**

Mr. Michael Stevens

March 4, 2011

Page 3

Normally, the GPS unit will record the date, time, longitude, latitude and altitude of the unit at periodic intervals, based upon either time or distance. Although there should be this information for each data point, in preparing the enclosed diagrams, the Park Service employees only indicated this information for a few selected points.

It is critical to the issues in our case to have this information for each of the data points, so that we can determine the speed of the hike, the location and duration of rest stops, the precise times of certain events occurring during the hike and similar information. Although this information (ie: the time, longitude and latitude) should exist for each data point, it was not provided by the Department in response to our FOIA request. Therefore, to the extent that this information exists, either electronically or in written form, request is made for it.

Even the provision of this additional information, however, will not resolve the existing issues regarding the GPS download. As noted above, the Defendant Howard Crompton is challenging the accuracy and validity of the manner of the GPS download and the charts which were plotted from it. Even if the report is admissible, the Court can still exclude portions of it if it finds that there is a lack of sufficient evidentiary predicate as Fed.R.Evid. 803(6) only applies to hearsay objections and not other substantive ones. There is simply insufficient information in the Park Service Report to fully defend the manner, method and technique for which these functions were performed by the Park Service employees in response to a Court challenge to exclude this portion of the report.

As we had also briefly discussed yesterday, a new issue has arisen just recently regarding the GPS download. According to our experts review of the data download, the time information is missing from two of the three tracks contained on the GPS. Obviously, the GPS recorded the time information, since the Park Service included it on the map in the identification blocks for the selected tracking points which they chose. At this point, we are not certain of the explanation for this missing information and whether it can still be retrieved from some other source.

I have just today engaged in a joint conference with the attorney for Mr. Crompton and the forensic lab (Guardian Digital Forensics in Raleigh), and the lab confirmed that there was no time date for tracks 1 and 2 in their download.

Therefore, the issue of the handling and download of the GPS by the Park Service will now be a critical one in this case, which is not sufficiently addressed in the Park Service Report, especially as to those questions which have just recently arisen.

LEESFIELD  
& PARTNERS

Mr. Michael Stevens

March 4, 2011

Page 4

Therefore, in light of the allegations of negligence asserted by the Defendants against the Park Service in connection with Michael's death and the further questions which have been raised concerning the handling of the GPS unit and the data download by Park Service employees, the mission and programs of the Park Service have been directly implicated by the Defendants claims and defenses in this matter. Moreover, the Defendants are definitely challenging the competency of Park Service employees in the performance of their functions. As noted above, the information and facts necessary to respond to these claims asserted by the Defendants are simply not contained in the Park Service report.

As a result, I believe that factors 1, 5 and 6 addressed by the Department's letter all strongly weigh in favor of permitting the requested depositions. As noted above, the claims asserted by the Defendants have directly challenged the competence of the Park Service in the performance of its official duties and accused it of negligence, which was a legal cause of Michael's death (factor 5). In addition, they have also attacked the handling and download of the GPS (factor 5), while the subsequent forensic download raises questions regarding the handling and earlier download, which also must be addressed (factor 5 again).

Since these issues are not addressed in the Park Service Report, the parties do not have any ability to obtain this information from any other source (factor 1). Moreover, the issues which have arisen concerning the download by the Park Service and its resulting charts will also likely be attacked by the Defendants, which could conceivably result in their exclusion in the absence of the necessary supporting testimony to establish the handling of the GPS, the manner of the download, the software used and the manner of the preparation of the accompanying charts as well as the existence of the specific data for each tracking point (also factor 1).

As a result, the time spent in testifying on deposition will for a large measure be related to preserving the integrity and competency of the Park Service employees and procedures, rather than simply for a private purpose in connection with litigation (factor 6). Moreover, as further reflected in our initial *Touhy* request, provisions can be made to compensate the Park Service for the employee's time on deposition.

I also believe that the Department's concern over the amount of time which will be involved in the depositions of these witnesses overlooks the fact that the purpose of these depositions is to preserve the witnesses testimony for trial. As such, it is highly unlikely that these witnesses would have to take additional time to testify at trial. It is the typical in litigation for depositions to be taken to preserve a witnesses' testimony for trial, when the witness is unavailable either due to distance, job requirements, infirmity or other reason.

Mr. Michael Stevens

March 4, 2011

Page 5

Our *Touhy* request was limited to seeking to take the depositions of these individuals and we were not asking the Department to commit to also making them available for testimony at trial.

Factor 4

The Department indicated a concern that by allowing the deposition of the employees, they would somehow be seen as "the Plaintiffs' witnesses." This is clearly not accurate.

Local state and federal employees are deposed and provide testimony in cases all the time and are not considered the witnesses of the party who may depose them. In this case alone, there are upcoming depositions of the Collier County Medical Examiner, the Head of the Miami-Dade County Toxicology Department and the investigating police officers from the Collier County Sheriff's Department. None of these governmental witnesses will be referred to at trial or on deposition as the witness of the party who has set up their deposition. Such governmental witnesses are always recognized as independent and neutral witnesses. In my 34 years of practice, I have never heard of such a governmental investigative witness as being referred to in a courtroom as a party's witness. Nevertheless, if there is some concern about this, it can obviously be remedied by making an announcement at the beginning of the deposition that the witness is appearing as a neutral governmental fact witness and not as a witness by or for any party.

As we had also briefly discussed yesterday, the Court in our case had entered an order adopting the parties joint discovery proposal, which identified numerous witnesses that all of the parties wished to take. I am enclosing a copy of the Joint Discovery Proposal for your records. In order to comply with the time period set forth by the Court, each party took the lead in setting the depositions of certain witnesses. Therefore, the fact that one party took the lead in setting the deposition of a witness in no way indicates that the witness is "that party's witness."

Finally, the concern expressed in the letter that by allowing Park Service employees to testify, the relationship between the Park Service and the Boy Scouts may be damaged seems to be totally misplaced. No one is asking the Park Service employees to testify as expert witnesses. Instead, all they are being asked to do is to testify as to their factual observations and to describe the specific actions which they undertook.

Every citizen in our country has the right to a fair trial, which requires the ability to present all of the evidence in a case that is relevant and admissible under our evidentiary rules.

**LEESFIELD  
& PARTNERS**

Mr. Michael Stevens  
March 4, 2011  
Page 6

They should not be denied that right because of a relationship between one of the parties and a witness.

I hope that the foregoing information is of assistance and that the Department of Interior will reconsider our request.

Thanking you for your attention to this matter, I remain,

Sincerely,

A handwritten signature in black ink, appearing to read "R.D. Peltz", with a long horizontal flourish extending to the right.

**ROBERT D. PELTZ**

Encl.  
RDP/bl

THE UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA  
MIAMI DIVISION

CASE NO. 1:10-CV-22236-ASG  
District Ct. Judge: Alan S. Gold

Magistrate Judge: Chris M. McAliley

HOWARD ADELMAN and  
JUDITH SCLAWY, as  
Co-Personal Representatives of THE  
ESTATE OF MICHAEL SCLAWY-  
ADELMAN,

Plaintiffs

vs.

BOY SCOUTS OF AMERICA, a foreign  
corporation, THE SOUTH FLORIDA  
COUNCIL, INC., BOY SCOUTS OF  
AMERICA, PLANTATION UNITED  
METHODIST CHURCH, HOWARD K.  
CROMPTON, individually, and  
ANDREW L. SCHMIDT, individually,

Defendants

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**JOINT DISCOVERY PLAN**

Pursuant to the Magistrate's Order Following Discovery Conference [DE # 80], the Order Requiring Response [DE # 100] and the Omnibus Order [DE # 111] the parties submit the following discovery plan to the Court:

**Outstanding Discovery:**

**Depositions**

The following depositions have recently been set:

- (1) Howard Adelman and Judith Sclawy on 2-7-2011 and 2-8-2011;
- (2) Fed. R. Civ. P. 30(b)(6) designation for South Florida Council on 2-14-2011;



- (3) Jeff Hunt on 2-14-2011;
- (4) Joshua Crist on 2-18-11;
- (5) John Anthony on 2-18-11;
- (6) Joe Knight on 2-21-2011;
- (7) Fed.R. Civ.P. 30(b)(6) designation for Boy Scouts of America on 2-23-2011,  
2-24-2011 and 2-25-2011
- (8) Andrew Schmidt on 3-7-2011;
- (9) Howard Crompton on 3-8-2011;
- (10) Fed. R. Civ. P. 30(b)(6) designation for Plantation United Methodist  
Church on 3-9-11.
- (11) Rev. Timothy Smiley on 3-10-11; and

Defendant, South Florida Council has tentatively reserved 2.5 days (as requested by the Plaintiffs) on February 14, 18 and 21 to depose South Florida Council's corporate representatives: Joshua Christ, Jeff Hunt, John Anthony and Joe Knight. Defendants will confirm those dates of availability no later than January 28, 2011. The particular depositions that take place on those three dates will be determined based on the availability of those four witnesses. However, South Florida Council agrees to provide the exact order of depositions for those individuals no later than February 7, 2011.

Counsel for Defendants, Boy Scouts of America and South Florida Council, and Counsel for the Plaintiffs spoke today, January 25, 2011 to discuss objections raised to some of the areas of inquiry and document requests as listed in the various notices of deposition duces tecums propounded on Boy Scouts and South Florida Council. Counsel also discussed objections raised by South Florida Council to documents requested from Joshua Christ, Jeff Hunt, John Anthony

and Joe Knight. While both sides were able to limit some areas of dispute, no complete agreements could be reached on the objections raised to the Notices of Depositions Duces Tecums. Thus, Boy Scouts of America and South Florida Counsel will file the appropriate motions for protective orders no later than February 2, 2011. Those defendants will acknowledge the discussed limitations made by both sides, which will hopefully assist this Court in ruling on the objections.

Plantation United Methodist Church discussed some objections for the categories of documents listed in Plaintiff's Notice of Deposition Duces Tecum to the Fed. R. Civ. P. 30(b)(6) designation and Plaintiff's Notice of Deposition Duces Tecum for Timothy Smiley. These objections will be negotiated between the parties and the appropriate motions filed if necessary.

The parties agree that many or all of the following depositions shall take place

- ① Collier County Sheriff Officer Kevin O'Neill
2. Collier County Deputy J.R. Comings
3. Collier County Deputy Miller
4. Collier County Medical Examiner, Dr. Borges
- ⑤ EMT Armando Pina
6. Big Cypress Aviation Manager, Mike O'Leary
- ⑦ Chase Crompton (Boy Scout)
- ⑧ Kristopher Leon (Boy Scout)
9. Kristopher Leon's mother
- ⑩ Park Ranger Wynn Carney
- ⑪ Park Ranger Gary Sheffler
- ⑫ Park Ranger Drew Gilmour

→ 13. Park Ranger Edward Clark

14. Elisabeth Sclawy-Adelman

15. Michael Sclawy-Adelman's Pediatrician

16. Dr. Lee Hearn, Dade Toxicologist

The parties have further agreed that counsel will make themselves available for specific blocks of time between now and the April discovery cut-off.

Counsel for the Plaintiffs provides the following dates of availability in addition to those dates on which depositions have already been set as listed above: January 24-February 4; February 28-March 4; March 10-30 and April 1-8.

Counsel for Boy Scouts of America and South Florida Counsel provides the following dates of availability in addition to those dates on which depositions have already been set as listed above: March 14-22; April 4-29. If necessary, depositions on the following dates can be covered by an associate from the firm: February 7, 9, 11, 14-18, 22-25; March 1-4, 7-11, 21-25, 28-31 and April 1-3.

Counsel for Plantation United Methodist Church provides the following dates of availability in addition to those dates on which depositions have already been set as listed above: March 14-16, 21-24, 28-30 and April 4-6.

Counsel for Crompton and Schmidt provides the following dates of availability in addition to those dates on which depositions have already been set as listed above: March 16, 22; April 4-12, 14-29.

During that time, the above depositions (along with some depositions that haven't been agreed upon as of this time) can take place when the witnesses are available. The parties initially

stipulated that each side would be allotted 20 depositions. However, the parties have since agreed that the parties may stipulate to increase the number of depositions per side if necessary.

There are no further discussions of other depositions at this time. However, the parties acknowledge the potential necessity for setting further depositions as discovery progresses. None of the parties at this moment have all of the information necessary to fully know and evaluate every aspect of this case to guarantee that no further depositions or written discovery will be needed.

**Written Discovery:**

Defendants, Boy Scouts of America and South Florida Council, propounded supplemental requests for production and interrogatories on January 24, 2011 to the Plaintiffs.

The Plaintiffs propounded supplemental Interrogatories to all named defendants on January 13, 2011. Plaintiffs propounded 2<sup>nd</sup> requests for production on Boy Scouts of America, South Florida Council and Plantation United Methodist Church that same day. Plaintiffs propounded 3<sup>rd</sup> requests for production on Howard Crompton and Andrew Schmidt that same day as well.

Plaintiffs have produced copies of all the materials promised at the November 24, 2010 document inspection. Defendants, Boy Scouts of America, South Florida Council, Howard K. Crompton and Andrew L. Schmidt all moved to compel the production of the documents prior to them actually being produced. However, due to the voluminous nature, those Defendants have not had an opportunity to cross-reference the documents requested on November 24, 2010 to be produced with those actually produced. Thus, those Defendants do not believe their respective Motions are moot, but agree that they are not ripe for adjudication until the parties have had an

opportunity to review the records. Those Defendants merely reserve the right to compel production of all documents requested during the November 24, 2010 inspection should the same become necessary.

Plaintiffs sent a series of correspondence to counsel for all named Defendants requesting that the Defendants provide better answers to interrogatories and better responses to requests for production. Counsel for the Plaintiffs and for Boy Scouts of America and South Florida Council communicated on January 25, 2011 to discuss these discovery issues. Counsel for the Plaintiffs and for Boy Scouts of America and South Florida Council were able to work out many of the discovery disputes. For discovery disputes that were unresolved, counsel for the Plaintiffs will file the appropriate motion(s) with the Court no later than February 4, 2011.

Plaintiffs and defendants also intend to propound additional written discovery. Although some will likely go out shortly, other discovery will likely be necessitated in follow up to the upcoming depositions.

**Areas of Dispute:**

The parties remain in dispute pertaining to the "GPS issue," which has been briefed in part. *See* [DE #s 103, 105]. Crompton and Schmidt will file a GPS Memorandum in Response to Plaintiff's Supplemental Response. Plaintiffs reserve the right to file a Reply.

As it specifically relates to the motion for preservation of evidence filed by Boy Scouts of America and South Florida Council, the parties have come to an agreement. The parties will shortly submit an Agreed Order, which reads, "All physical evidence that any party wishes to conduct non-destructive or destructive testing on must be preserved. Notification to all parties and proposed protocol for testing must be provided at least ten days prior to testing."

While the parties are in agreement to this general Order, the parties agree that the issue surrounding preservation and testing of cell phones and personal computers is explicitly excluded from the above Order, because the Court must adjudicate the dispute. *See* [DE #s 85, 86, 103, 108].

However, the parties have made some progress with regard to emails, which were discussed during the January 24<sup>th</sup> conference call with all counsel. The discussion as to e-mails was between counsel for the Plaintiffs and counsel for Crompton and Schmidt. The Plaintiffs would agree to preserve emails related to hiking, scouting, and Eagle Scouting and from Howard Crompton and Andrew Schmidt from January 1, 2009 through the present and requests that the other parties do the same. Boy Scouts of America and South Florida Council represents that it will preserve emails sent to or received from the Plaintiffs from January 1, 2009 through the present. Boy Scouts and South Florida Council object to preserving every internal Boy Scouts of America email that may concern hiking, Eagle Scouting, scouting, etc. as overbroad and harassing. The agreement of the parties to preserve e-mails does not constitute a waiver of the right to object to their production. At this time, Plaintiffs have agreed to preserve Michael's cell phone. Plaintiffs have requested the provision of Crompton and Schmidt's cell phone numbers and requested the agreement for preservation of their phones.

By: \_\_\_\_\_s/Kevin D. Franz \_\_\_\_\_  
William. S. Reese Esq.  
Florida Bar No. 187183  
Kevin D. Franz, Esq.  
Florida Bar No. 015243  
[kfranz@lanereese.com](mailto:kfranz@lanereese.com)  
LANE, REESE, SUMMERS, ENNIS &  
PERDOMO, P.A.  
2600 Douglas Road  
Douglas Centre, Suite 304  
Coral Gables, FL 33134  
Phone: (305) 444-4418  
Fax: (305) 444-5504  
Attorneys for Defendants, Boy Scouts of  
America and The South Florida Council, Inc.

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that January 25, 2011 I electronically filed the foregoing with the Clerk of the Southern District Court using its CM/ECF system, which would then electronically notify the following CM/ECF participants on this case:

**Greg M. Gaebe**  
**Joseph M. Winsby**  
*GAEBE, MULLEN, ANTONELLI & DIMATTEO*  
420 South Dixie Highway, Third Floor  
Coral Gables, FL 33146  
Tel 305-667-0223  
Fax 305-284-9844  
Attorneys for Defendant PLANTATION UNITED  
METHODIST CHURCH  
E-mail [ggaebe@gaebemullen.com](mailto:ggaebe@gaebemullen.com)  
E-mail [jwinsby@gaebemullen.com](mailto:jwinsby@gaebemullen.com)

**Robert D. Peltz**  
*LEESFIELD & PARTNERS, P.A.*  
2350 South Dixie Highway  
Miami, Florida 33133-2314  
Attorneys for Plaintiffs  
Tel 305-854-4900  
Fax 305-854-8266  
E-mail [Sylvester@leesfield.com](mailto:Sylvester@leesfield.com)  
E-mail [Leesfield@leesfield.com](mailto:Leesfield@leesfield.com)

**William S. Reese**  
**Kevin David Franz**  
*LANE REESE SUMMERS & ENNIS, P A*  
2600 South Douglas Road, Ste. 304  
Coral Gables, Florida 33134-6125  
Attorneys for Boy Scouts of America and  
The South Florida Council, Inc.  
Tel 305-444-4418  
Fax 305-444-5504  
E-mail [wreese@lanereese.com](mailto:wreese@lanereese.com)  
E-mail [kfranz@lanereese.com](mailto:kfranz@lanereese.com)

**Frederick E. Hasty, III**  
*WICKER SMITH O'HARA, et al*



2800 SW 28<sup>th</sup> Street, 5<sup>th</sup> Floor  
Miami, FL 33133

Attorneys for Howard K. Crompton and Andrew L. Schmidt

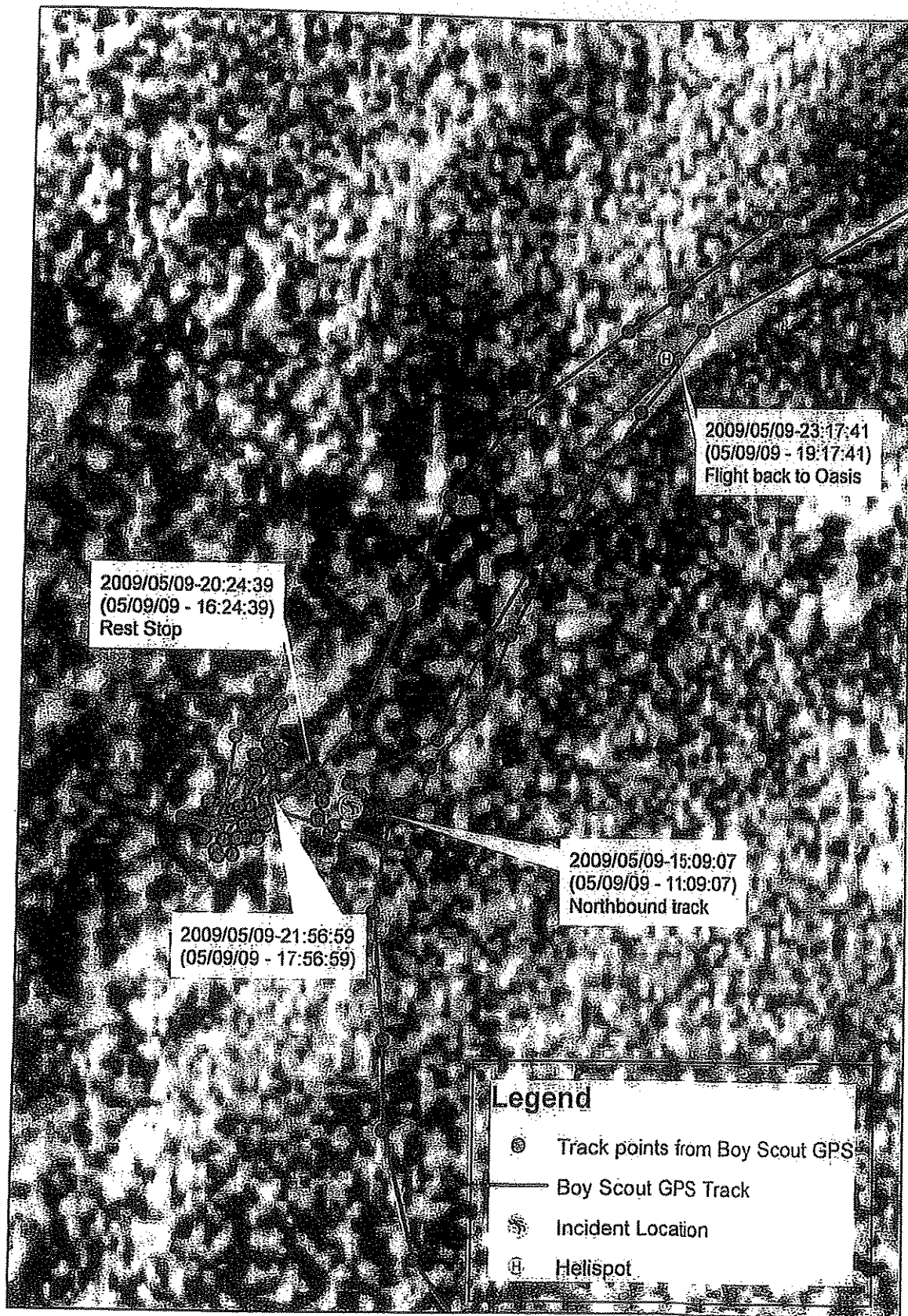
Tel 305-448-4441

Fax 305-448-3939

E-mail [fhasty@wickersmith.com](mailto:fhasty@wickersmith.com)

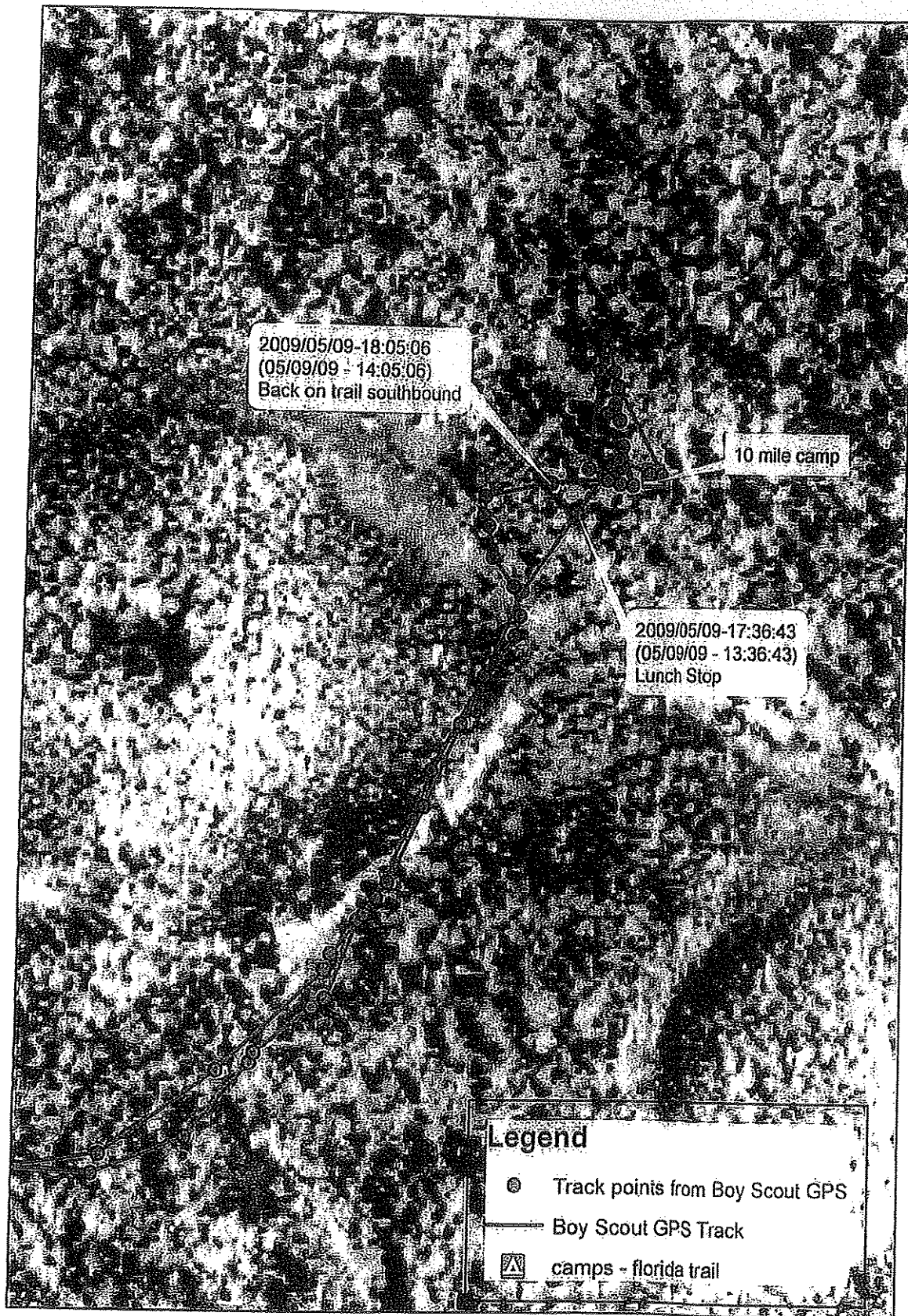
Dated: Coral Gables, Florida  
January 25, 2011

# Track Log Time Line (5)



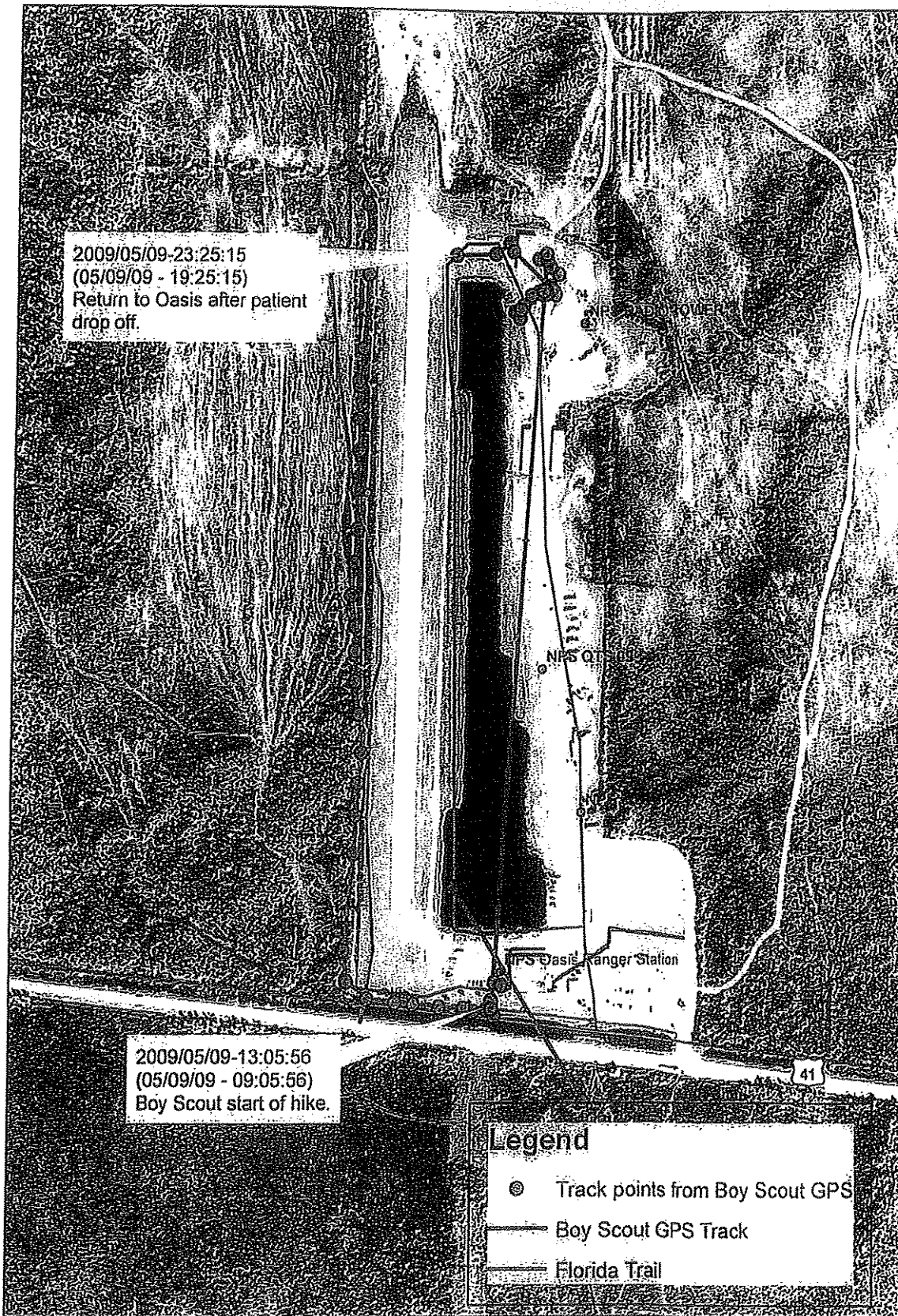
0 50 100 200 Feet

# Track Log Time Line (2)



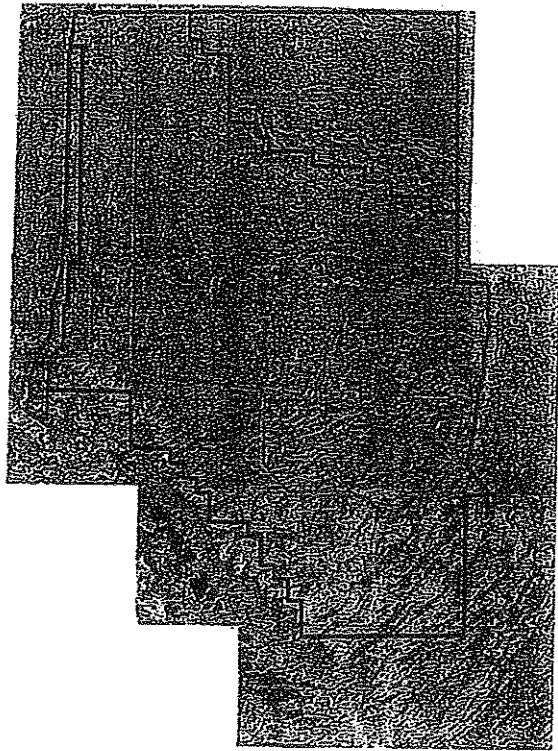
0 70 140 280 Feet

# Track Log Time Line (1,



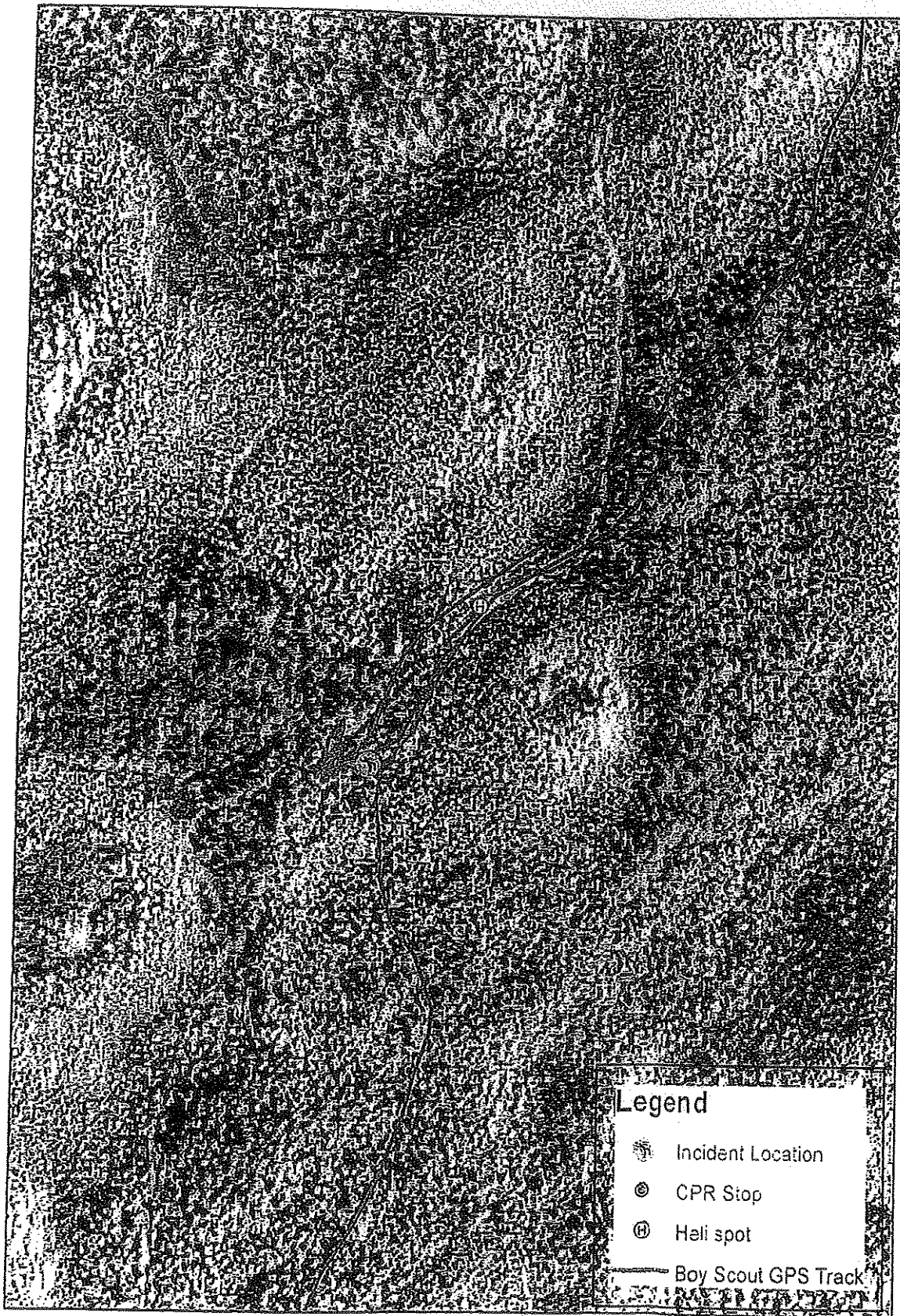
0 250 500 1,000 Feet

# Crompton's GPS Current Track





# ncident Scene



**Barbie Leon**

---

**From:** Barbie Leon  
**Sent:** Friday, March 04, 2011 2:24 PM  
**To:** 'Mike.Stevens@sol.doi.gov'  
**Subject:** Adelman - Correspondence  
**Attachments:** Stevens re conversations depo of park service personnel.pdf

Dear Mr. Stevens:

Please see attached correspondence and attachment from Robert Peltz.

Regards,

**Barbie Leon**

*Legal Assistant to Robert Peltz*  
Leesfield & Partners, P.A.  
2350 South Dixie Highway  
Miami, FL 33133  
Phone: (305) 854-4900  
Fax: (305) 854-8266  
E-mail: [leon@leesfield.com](mailto:leon@leesfield.com)

**Trial Lawyers with offices in Miami, Key West and South Beach - Of Counsel Bounds & Gonzalez in Winter Park, Florida.**

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