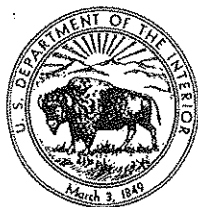


EXHIBIT 10



United States Department of the Interior



OFFICE OF THE SOLICITOR

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

IN REPLY REFER TO:

MPS
NPS.SE.0389
G-02132-2
LG-17

March 25, 2011

VIA E-MAIL peltz@leesfield.com and First-Class Mail

Robert D. Peltz, Esquire
Leesfield & Partners, P.A.
2350 South Dixie Highway
Miami, Florida 33133

SUBJECT: Estate of Michael Sclawy-Adelman v. Boy Scouts of America (S.D. Fla.)

Dear Mr. Peltz:

On February 7, 2011 you submitted a request to the Department of the Interior (Department) to depose five employees of Big Cypress National Preserve (Preserve) in the referenced litigation, which arises from the death of Michael Sclawy-Adelman on a Boy Scout hike in the Preserve in May 2009. The employees (one of whom was actually a USDA employee on detail to the Preserve) were all either directly involved in the response to the incident or the subsequent internal investigation. In your request, you stated that the employees' testimony would (1) establish the sequence of events on the date in question, including the decedent's condition and the treatment he received; and (2) help frame the last hours of the decedent's life, and help set the background for the condition of the trail, and subsequent investigations by NPS. You stated that you are seeking the employees' "unbiased professional observations as to the facts gleaned from their investigation" of the incident.

In a letter dated March 1, 2011 this office, after noting that one of the five employees was no longer employed by the Federal government so that the Department lacked authority to make him available as a witness, denied your request to depose the remaining four employees. We determined that, after applying the factors set forth in 43 C.F.R. § 2.88 (the so-called Touhy factors), a variation from the Department's policy of not permitting its employees to testify in litigation to which the United States is not a party was not appropriate. Specifically, we determined that all of the applicable factors weighed against allowing the testimony.

In a letter dated March 4, 2011, and in subsequent communications including e-mails dated March 9 and March 11, 2011, you have asked us to reconsider this determination. You suggest

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that we may have overlooked some matters and you have provided us with additional relevant information. Specifically:

- Defendants in this action have alleged that NPS was negligent in this action, by (1) issuing the permit for the hike despite unfavorable weather conditions, about which NPS failed to issue warnings; (2) responding too slowly to the emergency call; and (3) improperly investigating the incident and inaccurately writing down statements that were later attributed to Defendants. You state that none of these allegations are addressed in the records provided by NPS, so that the employee testimony is necessary; and the competence and integrity of NPS are being challenged, so that the matter is both no longer a "private purpose" and is now related to NPS's mission and programs.
- Concern has been expressed over NPS's handling of one defendant's GPS unit while it was in NPS custody. NPS downloaded the data from the unit. Defendants' expert is claiming that it cannot retrieve certain time data and that other data are incomplete. You indicate that this casts doubt on the validity of the GPS data and could suggest spoliation of evidence. You also note that data from the NPS download were never provided in response to a FOIA request for records related to the incident.
- You assert that our characterization of the Preserve employees as "plaintiff's witnesses" (or at least as being perceived that way), because the specific request for their testimony was submitted by Plaintiff, is inaccurate, because they will be testifying as neutral government fact witnesses.

We asked NPS to investigate these concerns, and have determined the following:

- The Preserve has advised that it does not actually issue permits for backcountry hikes. Rather, the Preserve uses a self-permitting system: permits are available in a drop box at the trailhead, and are to be filled out and a copy deposited in the box. A trail log is also available at the trailhead for users to sign. Information about how to complete this process, as well as about weather conditions at the Preserve, is posted at the Preserve website and on a bulletin board at the trailhead, and was similarly available at the time of the incident. We note that there is no evidence in these records that a permit was even obtained for the hike in question.
- The NPS employee who had downloaded the data from the defendant's GPS unit advised us that she did so for the purposes of NPS's law enforcement investigation and with the permission of the owner. The download, which used "DNR Garmin" software, simply copied the data onto the employee's computer and did not, and to her knowledge could not, change or delete what was in the unit. All of the data were then copied from the computer onto a compact disk which was placed into a sealed evidence container. The container has not been opened since that date, which is listed on the container. Nothing else was done with the GPS unit before it was returned to the owner.

- Also found in a sealed evidence container was a backcountry permit for the date in question, as well as the trail log that would include all those who signed in to hike the trail on that date. However, NPS has advised the permit does not correspond to the group of hikers that includes the Defendants, and the log does not show that this group of Boy Scouts signed in on the date in question.

NPS acknowledges that the GPS download, the permit, and the log were responsive to the earlier FOIA requests, but were sealed in evidence bags and overlooked in the search for responsive documents. As they are clearly relevant, we will make them all available to you as well as to Defendants. However, in light of the allegations that NPS mishandled evidence, NPS believes that the parties to this lawsuit or their representatives should be present when the evidence containers are opened and any copies of the contents made, so that there can be no further question about the handling of this material. We will also provide you with the appropriate pages from the Preserve's website as it read on May 9, 2009, to show that both information about the Preserve's permit processes and warnings about weather conditions were available to Defendants at the time of the hike.

In light of this additional information, the Regional Solicitor's Office, in consultation with NPS, has reconsidered your Touhy request. Once again, it is the opinion of this office that your request does not warrant a departure from the Department's policy of not allowing employees to testify. We base this opinion on the following analysis of the factors in 43 C.F.R. § 2.88:

1. **Your ability to obtain the testimony from another source.** In our initial response we stated that the records that we already provided in response to numerous FOIA requests, contain the same evidence that our employees would give in deposition, and as business records would be exempt from the hearsay rule. You have, in turn, suggested that the original records did not adequately address Defendants' allegations of negligence on the part of NPS and concerns about spoliation of the GPS evidence.

To the extent that this might be true, we believe that the additional records described above—the standard operating procedures for permit issuance, the permit, the trailhead log, and the GPS download—contain sufficient factual information to address these allegations. Specifically, the permit issuance procedures will demonstrate that (1) it is not standard Preserve procedure to “issue” a permit to trail users nor to provide warnings to individual users; but (2) information about permit issuance procedures and weather conditions in the Preserve was available at the time of the incident. The GPS records should confirm the response timeframe reported by Preserve employees in other documentation already provided. The GPS data, along with the circumstances of its generation and production, should also refute allegations that the Preserve spoliated evidence.¹ As to answering allegations that the response of NPS employees was unreasonable, or that NPS misrepresented statements of individual defendants during the investigation of the incident, we do not see how the testimony of the individuals would be more valuable than the records themselves. Therefore, this factor still weighs against allowing the employees' testimony.

¹ Garnet Tritt, the NPS employee who performed the GPS download is not one of the four employees whose testimony is being sought here. None of these employees can testify as to the GPS concerns.

2. **The appropriateness of this testimony under relevant Federal law.** We still do not believe that this factor applies here.
3. **The effect on NPS's ability to conduct its official business unimpeded.** We still do not believe that this factor applies here.
4. **The effect on NPS's ability to maintain impartiality in conducting its business.** We acknowledge your assurances that NPS employees will be testifying solely as to what they did and observed, and are not being asked to provide expert or opinion testimony. We also acknowledge that the joint discovery proposal attached to your supplemental Touhy request indicates that all parties agree to the requested testimony. Accordingly, we are willing to agree that the testimony would not harm NPS's ability to maintain impartiality in conducting its business. At the same time, we do not see how allowing the employees to testify furthers that ability. On the whole, we conclude that this factor does not weigh either for or against allowing the employees' testimony.
5. **The effect on NPS's ability to minimize the possibility that it will become involved in issues that are not related to our mission and programs.** As you acknowledged in your initial request, this litigation is a dispute between private parties, none of which are directly related to the NPS, even though the issues could conceivably affect NPS. However, you have advised us that the Defendants have asserted as an affirmative defense in this case that NPS, even though not a party, was the cause of at least some of the injury that is the subject of this case and may have mishandled the investigation of the incident, including spoliating evidence. You have suggested that the employees' failure to testify could create an inference that Defendants' allegations are true.

Despite these suggestions, NPS is still not a party to this case, and we must consider this factor in that light. Furthermore, we continue to maintain that the conduct of the Preserve employees in connection with the incident was beyond reproach, that the allegations that have arisen since the original Touhy request are baseless, and that this is substantiated by the record, both the materials originally provided to you and those that we will provide in connection with this response. In terms of refuting the allegations against NPS to its satisfaction, we do not believe that the testimony can improve on this record. Accordingly, this factor still weighs against allowing the employees' testimony.

6. **The effect on NPS's ability to avoid spending public employee time for private purposes.** As stated in response to your original request, we appreciate your commitment to minimizing the time that Preserve employees will have to spend in depositions, to accommodating the employees' schedules, and travelling to the employees' offices to take the deposition. However, even with these accommodations, several hours per employee cumulatively represent a significant amount of time for a "private purpose," which is still how we characterize this litigation between non-Federal parties. Also, each employee would have to spend time in preparation for the deposition. Furthermore, notwithstanding your statements indicating otherwise, the possibility remains that this case could go to trial, in which case some or all of the employees would

have to testify again—which would require even more time commitment. This factor still weighs against allowing the employees' testimony.

7. **The effect on NPS's ability to avoid the negative cumulative effect of granting similar requests.** Given the issues involved in this litigation, it is reasonable to expect similar requests in the future. The cumulative effect of granting all similar requests would be significant. This factor still weighs against allowing the employees' testimony.
8. **The effect on NPS's ability to ensure that privileged or protected matters remain confidential.** We still do not believe that this factor applies here.
9. **The effect on NPS's ability to avoid an undue burden on us.** Except as already considered under the discussion of other factors, we still do not believe that this factor applies here.

Accordingly, your request to depose the Preserve employees is denied. However, please contact us at your convenience to arrange for a date and time to retrieve the above-described records from evidence. This would include providing us with the contact information for Defendants or their representative.

Should you have questions concerning this response, please feel free to contact Michael Stevens of this office at (404) 331-4447, x238.

Sincerely,



Horace G. Clark
Regional Solicitor

cc: Pedro Ramos, Superintendent, Big Cypress National Preserve
Ed Clark, Chief Ranger, Big Cypress National Preserve
Amanda Kessler, Assistant United States Attorney, Southern District of Florida