

EXHIBIT 4



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
LG-17

March 1, 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.)

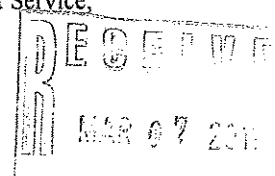
Dear Mr. Peltz:

This responds to your February 7, 2011 request to depose five employees of Big Cypress National Preserve (Preserve)¹ 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 were all either directly involved in the response to the incident or the subsequent internal investigation. The National Park Service (NPS) provided all documents in its possession related to the incident, including its investigative reports, to Howard Adelman, the father of the deceased, in response to a request under the Freedom of Information Act (FOIA), 5 U.S.C. § 552. NPS provided additional documents to you on May 11, 2010, also in response to a FOIA request.

You have stated that the employees' testimony will (1) establish the sequence of events on the date in question, including the decedent's condition and the treatment he received; (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 have stated that you are seeking the employees' "unbiased professional observations as to the facts gleaned from their investigation" of the incident. From this, we conclude that these individuals are not being asked to testify as expert witnesses, either in their official or unofficial capacities.

We first note that the United States is not a party to this litigation. It is the policy of the Department of the Interior (Department), of which NPS is an agency, to not permit its employees to testify, either in deposition or at trial, in litigation to which the United States is not a party. 43 C.F.R. § 2.81(a). In very limited circumstances, the Department will vary from this policy and

¹ One of the five individuals, Armando Pina, was actually an employee of the United States Forest Service, Department of Agriculture, on detail to the Preserve at the time of the incident.



permit such testimony if, by application of the criteria set forth in 43 C.F.R. § 2.88, we determine that such testimony would be appropriate.

We also advise you that one of the five individuals whose testimony you are seeking, Armando Pina, is currently not employed by the United States government, so NPS does not have the authority to make him available to you as a witness.

As to the remaining four employees, it is the opinion of this office, after consultation with NPS, that your request does not warrant a departure from this policy. 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.** The records that we already provided in response to numerous FOIA requests contain the same evidence that our employees would give at the deposition. They represent the Preserve's complete record of the incident and our subsequent investigations, and include detailed statements of each employee who directly participated in the response and investigation. We do not believe that anything the employees could say at deposition could add to these records. We note that as records of regularly conducted activity, these materials would be exceptions to hearsay. Fed. R. Evid. 803(6). Furthermore, if their authenticity is questioned, the Department is prepared to provide authentication in a way that would not necessitate employee testimony. See Fed. R. Evid. 902. In summary, this factor weighs against allowing the employees' testimony.
- 2. The appropriateness of this testimony under relevant Federal law.** We do not believe that this factor applies here.
- 3. The effect on NPS's ability to conduct its official business unimpeded.** We do not believe that this factor applies here.
- 4. The effect on NPS's ability to maintain impartiality in conducting its business.** We acknowledge that you are seeking only objective testimony from the Preserve employees. We also understand that the Defendants will have the opportunity to cross-examine the witnesses. However, NPS is concerned that because the employees are called by you, the perception will be that they are "your" witnesses. This perceived departure from impartiality could detrimentally affect the Preserve's relationship with at least one Defendant, the Boy Scouts of America, with which NPS has partnered in the past and hopes to continue to do so in the future. Although this result is not certain, the factor weighs 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 stated, 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. You have suggested that the employees' failure to testify could create an inference that Defendants' allegations are true. However, it is our contention that the performance of the Preserve employees in connection with the incident was beyond reproach, and that this is reflected by the record NPS has already produced and has even been acknowledged by Plaintiff. Arguably, any testimony taken out of context could weaken


the effect of the record. Accordingly, this factor weighs against allowing the employees' testimony.

6. **The effect on NPS's ability to avoid spending public employee time for private purposes.** 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 is cumulatively a significant amount of time for a "private purpose." Also, each employee will have to spend time in preparation for the deposition. Furthermore, if this case goes to trial then each employee may have to testify again—which would require a much greater time commitment. This factor 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 weighs against allowing the employees' testimony.
8. **The effect on NPS's ability to ensure that privileged or protected matters remain confidential.** We 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 do not believe that this factor applies here.

Accordingly, your request to depose the Preserve employees is denied.

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

Sincerely,


for 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