IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELOUISE PEPION COBELL, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Case No. 1:96CV01285
	)	(Judge Lamberth)
GALE NORTON, Secretary of the Interior, et al.,	)	
	)	
Defendants.	)	
	)	

DEFENDANTS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO PLAINTIFFS' "CONSOLIDATED (1) MOTION FOR ORDER PURSUANT TO FED. R. CIV. P. 53(A)(2) [sic] ADOPTING SPECIAL MASTER BALARAN'S MAY 11, 1999 OPINION AND ORDER HOLDING THAT THE DELIBERATIVE PROCESS PRIVILEGE AND WORK PRODUCT DOCTRINE WILL NOT SHIELD FROM DISCLOSURE MATERIAL RELATED TO THE ADMINISTRATION OF THE IIM TRUST, (2) MOTION TO COMPEL TESTIMONY OF DEPONENTS DEFENDANTS DIRECTED NOT TO ANSWER QUESTIONS ON THE BASIS OF DELIBERATIVE PROCESS PRIVILEGE, (3) MOTION FOR SANCTIONS PURSUANT TO RULE 37(4)(A) [sic]"

The Secretary of the Interior and the Assistant Secretary - Indian Affairs ("Interior Defendants" or "Defendants"), submit the following memorandum of points and authorities in opposition to "Plaintiffs' Consolidated (1) Motion for Order Pursuant to Fed. R. Civ. P. 53(a)(2) [sic] Adopting Special Master Balaran's May 11, 1999 Opinion and Order Holding That the Deliberative Process Privilege and Work Product Doctrine Will Not Shield from Disclosure Material Related to the Administration of the IIM Trust, (2) Motion to Compel Testimony of Deponents Defendants Directed Not to Answer Questions on the Basis of Deliberative Process Privilege, (3) Motion for Sanctions Pursuant to Rule 37(4)(a) [sic]."

SUMMARY OF ARGUMENT

The Court should deny Plaintiffs' motions because:

(1) The Special Master's Opinion and Order dated May 11, 1999 ("Opinion and Order") incorrectly states the law and constitutes an advisory opinion because it fails to state how it will affect any document.

(2) Defendants properly instructed deponents not to answer certain questions on the basis of the deliberative process privilege.

(3) Defendants' objections based on the deliberative process privilege were properly asserted and substantially justified, and Plaintiffs' motion for sanctions is meritless.

ARGUMENT

I. THE SPECIAL MASTER'S OPINION AND ORDER CONSTITUTES AN ADVISORY OPINION, AND, IN ANY EVENT, INCORRECTLY STATES THE LAW ON WORK PRODUCT DOCTRINE AND DELIBERATIVE PROCESS PRIVILEGE.

A. THE SPECIAL MASTER'S OPINION IS ADVISORY AND SHOULD NOT BE ADOPTED.

The Opinion and Order is an advisory opinion which this Court should not adopt because it fails to address any specific documents. The Opinion and Order addressed the parties' general arguments of attorney-client, work product and deliberative process privilege issues in response to Plaintiffs' motion to compel responses to their second, third, fourth and fifth formal requests for production of documents. Opinion and Order at 1. However, the ruling by its own terms is advisory because it provides that "[t]hose [motions] that present questions particular to individual documents, e.g., requests for e-mail records, will be dealt with in a separate opinion." Id. The

opinion does reference privilege logs in its work-product discussion, but only prescribes guidelines for the parties to use. It nowhere states that a specific document is or is not privileged.

Plaintiffs now seek to have this opinion adopted because of its broad application, but this Court in its December 23, 2002 Memorandum and Order ("December 23 Memorandum") eschewed such rulings, despite the parties' apparent agreement on November 5, 2002, at the deposition of James Cason, that all three privileges (attorney-client, work product and deliberative process) were "teed up" for the court to decide. Cason Deposition at 56-62, cited in, Plaintiffs' Motion at 9-10. First, as the Court noted with regard to the work product privilege,

> [t]he Court cannot analyze, in a vacuum, whether communications or documents to which defendants might wish to assert a work product privilege warrant protection. . . . Lacking concrete facts any ruling that this Court might render with respect to defendants' assertion of work product privilege would necessarily be an advisory opinion without binding effect. The Court therefore declines to enter a ruling at this time regarding defendants' generalized assertion of the work product privilege.

December 23 Memorandum at 14. Second, concerning the deliberative process privilege, the Court similarly observed, "[a]s defendants correctly state in their reply brief, absent a factual record, this Court has no basis for ruling on the application of the deliberative process privilege to this phase of the instant litigation." December 23 Memorandum at 14. The Opinion and Order presents no "concrete facts" or "factual record" and therefore should not be adopted.

B. THE SPECIAL MASTER'S OPINION AND ORDER IS INCORRECT AND SHOULD NOT BE ADOPTED.

1. The Special Master's Conclusions of Law Must Be Reviewed De Novo.

The Special Master's Opinion and Order's views on work product doctrine and deliberative process privileges should not be accorded deference. D.M.W. Contracting Co. v. Stolz, 158 F.2d 405, 407 (D.C. Cir. 1946), cert. denied, 330 U.S. 839 (1947). "[A] master's conclusions of law are entitled to no special deference from the reviewing court, and will be overturned whenever they are believed to be erroneous." Oil, Chem. & Atomic Workers Int'l Union, AFL-CIO v. NLRB, 547 F.2d 575, 580 (D.C. Cir.), cert. denied, 431 U.S. 966 (1977) (citing Case v. Morrisette, 475 F.2d 1300, 1308 & n.39 (D.C. Cir. 1973)). Absent "careful review by the trial judge, judicial authority" would otherwise be "effectively delegated to an official who has not been appointed pursuant to [A]rticle III of the Constitution." Meeropol v. Meese, 790 F.2d 942, 961 (D.C. Cir. 1986). Thus, with or without objections to the Opinion and Order, its conclusions of law must be reviewed de novo and they are not binding until the Court has adopted them.

2. The Work Product Doctrine Protects Documents Prepared By Defendants' Attorneys In Anticipation Of and During the Course of this Litigation.

"The work-product privilege protects written materials lawyers prepared 'in anticipation of litigation.'" In re Sealed Case, 146 F.3d 881, 884 (D.C. Cir. 1998) (citing Fed. R. Civ. P. 26(b)(3)). "By ensuring that lawyers can prepare for litigation without fear that opponents may obtain their private notes, memoranda, correspondence, and other written materials, the privilege protects the adversary process." Id.; see also Judicial Watch, Inc. v. United States Dep't of Commerce, 196 F. Supp. 2d 1 (D.D.C. 2001). "Materials need not be prepared solely for a

litigation purpose . . . to merit protection." Strougo v. BEA Assocs., 199 F.R.D. 515, 521 (S.D.N.Y. 2001). When a document is created "because of" the prospect of litigation and analyzes the likely outcome of that litigation, it does not lose protection merely because it is also created in order to assist with a business decision. United States v. Adlman, 134 F.3d 1194, 1202 (2d Cir. 1998); accord Wessel v. City of Albuquerque, No. 00-00532, 2000 WL 1803818, at *3 (D.D.C. Nov. 30, 2000) (Kay, Magistrate J.) (quoting Adlman).

The fiduciary exception does not apply to the work product privilege. Picard Chem. Inc. Profit Sharing Plan v. Perrigo Co., 951 F. Supp. 679, 687 (W.D. Mich. 1996) (citing Cox v. Admin. U.S. Steel & Carnegie, 17 F.3d 1386, 1423 (11th Cir.), modified, 30 F.3d 1347 (11th Cir. 1994)cert. denied, 513 U.S. 1110 (1995); In re Int'l Sys. & Controls Corp. Sec. Litig., 693 F.2d 1235, 1239 (5th Cir. 1982)). Because "[t]he work product privilege is based on the existence of an adversarial relationship," International Sys. & Controls, 693 F.2d at 1239, "the mutuality of interest that is the rationale behind the fiduciary exception expires upon anticipation of litigation." Picard Chemical, 951 F. Supp. at 687 (citing International Sys. & Controls, 693 F.2d at 1239).

Rule 26(b)(3) qualifies the work product privilege by permitting limited disclosure where a party can show "substantial need of the materials in the preparation of [his] case and that [he] is unable without undue hardship to obtain the substantial equivalent of the materials by other means." Fed. R. Civ. P. 26(b)(3). Rule 26(b)(3) also provides, however, that "[i]n ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation." Id.

> The rule thus creates, as observed by the . . . D.C. Circuit, "in effect a two-tiered protection from discovery for attorney work product, in order to accommodate the liberal deposition-discovery policies of the Rules and the need to provide confidentiality for attorneys' files." In re Sealed Case, 676 F.2d 793, 809 (D.C.Cir.1982). Therefore, work product that contains only non-privileged facts must be produced if the party seeking discovery can show a "substantial need" for the factual information contained therein and an inability to collect the same factual information without undue hardship. Id.; Washington Bancorporation v. Said, 145 F.R.D. 274, 276 (D.D.C.1992). Work product that contains the opinions, judgments, and thought processes of an attorney, on the other hand, receives almost absolute protection from discovery and must be produced only if the party seeking the documents shows an "extraordinary justification" for production. Said, 145 F.R.D. at 276 (citing In re Sealed Case, 676 F.2d at 809).

See also Judicial Watch, 196 F. Supp. at 5; Upjohn Co. v. United States, 449 U.S. 383, 401-02 (1981) (discussing notes and memoranda that "reveal the attorneys' mental processes:" "As Rule 26 and Hickman make clear, such work product cannot be disclosed simply on a showing of substantial need and inability to obtain the equivalent without undue hardship."). Here, the work product privilege protects "any material obtained or prepared by a lawyer 'in the course of his legal duties, provided that the work was done with an 'eye toward litigation.'" In re Sealed Case, 29 F.3d 715, 718 (D.C. Cir. 1994) (quoting In re Sealed Case, 676 F.2d 793,809 (D.C. Cir. 1982)).

The Special Master's Opinion and Order allows some work product privilege protection. However, as this Court stated in its December 23 Memorandum (at 13): "The D.C. Circuit has never required that documents must be shown to have been prepared solely or primarily in anticipation of litigation." The Opinion and Order, therefore, concludes erroneously that "the only documents as to which work-product protection in this case will be afforded are those which

the Defendants have shown were prepared and created solely for use by counsel in anticipation of or in the course of this litigation." Opinion and Order at 13. Moreover, although the Opinion and Order limits Defendants' work-product privilege by requiring that the documents for which protection is sought be created "solely" for litigation purposes, the Special Master himself has not imposed such a strict limitation. Shortly after issuing the Opinion and Order, the Special Master ruled favorably on Defendants' motion for a protective order based on the work product doctrine to protect over 700 pages of documents related to the creation of the administrative record regarding the Strategic Plan and the High Level Implementation Plan ("HLIP"), which self-evidently relate to trust reform. The Special Master found that:

> the documents in issue fall squarely within the ambit of the work-product doctrine insofar as they reflect the "mental impressions, conclusions, opinions or legal theories of an attorney or other representative of a party conducting the litigation," Fed. R. Civ.P. 26(b)(3). Accordingly, I am recommending that defendants' Motion for a Protective Order be granted.

Recommendation and Report of the Special Master Regarding Defendants' Motion for a Protective Order at 2 (July 8, 1999) ("July 8 Report").[1] In other words, the Special Master relied on the standard work product protection analysis (which incorporates limitations designed to protect the legitimate interests of the party seeking disclosure).

3. The Special Master's Creation in His "Opinion and Order" of a Fiduciary Exception to the Deliberative Process Privilege Should Be Rejected Because It Is Legally Unsupported.

The Special Master created a "fiduciary exception" to the deliberative process privilege without citation to any authority in holding that "the disclosure requirements applicable to

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[1] The Court has not ruled on the July 8 Report.

fiduciary relations in general require that pre-decisional and deliberative documents and information germane to the administration of the IIM trust must be made available to the beneficiaries of the trust." Opinion and Order at 16-17. The Special Master's "holding" is incorrect as a matter of law and this Court should not adopt it.[2]

Disclosure of inter-agency and intra-agency deliberations and advice is injurious to the federal government's decision-making functions because it tends to inhibit the frank and candid discussion necessary to effective government. See NLRB v. Sears, 421 U.S. at 150-51 (1975); EPA v. Mink, 410 U.S. 73, 87 (1973). The deliberative process privilege serves as a safeguard against this danger. See United States v. Furrow, 100 F. Supp. 2d 1170, 1174 (C.D. Cal. 2000). The privilege is an "ancient [one] . . . predicated on the recognition 'that the quality of administrative decision-making would be seriously undermined if agencies were forced to operate in a fishbowl.'" Dow Jones & Co. v. DOJ, 917 F.2d 571, 573 (D.C. Cir. 1990) (quoting Wolfe v. HHS, 839 F.2d 768, 773 (D.C. Cir. 1988) (en banc)); see also Dudman Communications Corp. v. Department of the Air Force, 815 F.2d 1565, 1567 (D.C. Cir. 1987).

Courts have recognized that the deliberative process privilege generally serves three basic purposes: (1) it protects candid discussions within a government agency; (2) it prevents public confusion from premature disclosure of agency opinions before the agency establishes its final policy; and (3) it protects the integrity of an agency's decision. See, e.g., Alexander v. FBI, 192 F.R.D. 50, 55 (D.D.C. 2000).

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[2] As established above, the legal conclusions of the Opinion and Order must be reviewed de novo by this Court, regardless of whether a party served objections to it.

The deliberative process privilege protects evidence from disclosure if the evidence satisfies the following two criteria: (1) it is pre-decisional and (2) it is deliberative in nature, containing opinions, recommendations, or advice about agency decisions. See Renegotiation Board v. Grumman Aircraft Eng'g Corp., 421 U.S. 168, 184 (1975); In re Sealed Case, 121 F.3d 729, 735-36 (D.C. Cir. 1997); Coastal States Gas Corp. v. DOE, 617 F.2d 854, 866 (D.C. Cir. 1980). Generally, a document is predecisional when it is prepared for the purpose of assisting an agency decisionmaker in arriving at her decision. See Hopkins v. HUD, 929 F.2d 81, 84 (2d Cir. 1991); National Congress for Puerto Rican Rights v. City of New York, 194 F.R.D. 88, 92 (S.D.N.Y. 2000). Here, Plaintiffs seek to compel testimony regarding predecisional oral statements and the contents of predecisional documents. See, e.g., Plaintiffs' Motion at 7 (citing Deposition of Donna Erwin). The rationale for protecting predecisional thought processes applies equally to both. Thus, the deliberative process privilege covers all "recommendations, draft documents, proposals, suggestions, and other subjective documents which reflect the personal opinions of the writer rather than the policy of the agency." Grand Cent. P'ship, Inc. v. Cuomo, 166 F.3d 473, 482 (2d Cir. 1999); National Wildlife Fed'n v. Forest Service, 861 F.2d 1114, 1118-19 (9th Cir. 1988). A communication is deliberative if it relates to the process by which the agency formulates its policies. See Hopkins, 929 F.2d at 84; National Congress, 194 F.R.D. at 92. Thus, communications such as advisory opinions, recommendations and deliberations that comprise part of a process by which a government agency formulates its decisions and policies are protected by the deliberative process privilege. See id.

The deliberative process privilege protects advice generated outside a government agency by consultants, temporary employees, contractors, and the like, so long as the agency solicited the

information as part of the deliberative process. See Dow Jones, 917 F.2d at 575; Ryan v. DOJ, 617 F.2d 781, 789-90 & n.30 (D.C. Cir. 1980) (responses from member of Congress to agency questionnaires held privileged); Soucie v. David, 448 F.2d 1067, 1078 n.44 (D.C. Cir. 1971). In addition, the District of Columbia Circuit has adopted an expansive view of the extent to which the deliberative process privilege may protect documents submitted to the government by private parties. See, e.g., Formaldehyde Inst. v. HHS, 889 F.2d 1118 (D.C. Cir. 1989) (peer review report submitted to CDC by a professional journal protected); Public Citizen, Inc. v. DOJ, 111 F.3d 168 (D.C. Cir. 1997) (communications mandated by statute between National Archives and former presidents are protected). As a result, the Fed. R. Civ. P. 30(b)(6) deposition testimony of James Pauli, employed by Interior's contractor EDS to perform various studies related to trust reform, was subject to and protected by the deliberative process privilege.

Government deliberations concerning whether to initiate litigation, or pursue a particular course of action in litigation, are protected by the deliberative process privilege. See United States v. Farley, 11 F.3d 1385, 1389 (7th Cir. 1993) (referral memorandum from FTC to DOJ was predecisional and deliberative, so it was protected by DOJ's deliberative process privilege); Furrow, 100 F. Supp. 2d at 1175 (death penalty evaluation form and prosecution memorandum submitted to Attorney General's committee considering whether to authorize pursuit of that penalty were protected by the deliberative process privilege).

Factual materials that do not reflect deliberative processes are not protected by the deliberative process privilege, see Mink, 410 U.S. at 87-89, unless they are inextricably intertwined with recommendations. See Soucie, 448 F.2d at 1077. Analysis and evaluation of facts, however, are clearly within the scope of the privilege. See Skelton v. Postal Serv., 678

F.2d 35, 38 (5th Cir. 1978). "In some circumstances, . . . the disclosure of even purely factual material may so expose the deliberative process within an agency" that it must be withheld as privileged. Mead Data Cent., Inc. v. Department of the Air Force, 566 F.2d 242, 256 (D.C. Cir. 1977) (citing Brockway v. Department of the Air Force, 518 F.2d 1184, 1194 (8th Cir. 1975)); Montrose Chem. Corp. v. Train, 491 F.2d 63 (D.C. Cir. 1974); see also Petroleum Info. Corp. v. Department of the Interior, 976 F.2d 1429, 1435 (D.C. Cir. 1992) ("To the extent that pre-decisional materials, even if 'factual' in form, reflect an agency's preliminary positions or ruminations about how to exercise discretion on some policy matter, they are protected under Exemption 5 [of FOIA]," which codifies privilege for FOIA purposes). In addition, certain scientific or cost and risk assessments, for example, may seem factual, but are actually derived from a complex set of judgments similar to opinions, and are thus protected. See Chemical Weapons Working Group v. EPA, 185 F.R.D. 1, 2-3 (D.D.C. 1999).

Internal "[d]iscussions among agency personnel about the relative merits of various positions which might be adopted in contract negotiations are as much a part of the deliberative process as the actual recommendations and advice which are agreed upon." Mead Data, 566 F.2d at 257. The identities of the authors of privileged deliberative documents are also privileged, for revelation of those identities has the potential to exert a harmful chilling effect on the deliberative process itself. See, e.g., Cofield, 913 F. Supp. at 613.

Drafts are almost always considered privileged. They are, by their nature, deliberative, and they are rarely relevant. See Grossman v. Schwarz, 125 F.R.D. 376, 385 (S.D.N.Y. 1989) (Lee, Mag.). Stated differently, drafts represent the personal opinion of the author, not yet adopted as the final position of the agency. See Judicial Watch, Inc. v. Clinton, 880 F. Supp. 1,

13, aff'd, 76 F.3d 1232 (D.C. Cir. 1996). As explained by the court of appeals in Lead Industries Ass'n, Inc. v. OSHA, 610 F.2d 70, 86 (2d Cir. 1979):

> If the [draft language] appeared in the final version, it is already on the public record and need not be disclosed. If [its] segment did not appear in the final version, its omission reveals an agency deliberative process: for some reason, the agency decided not to rely on that fact or argument after having been invited to do so. It might indeed facilitate [the requester's] attack on the [government] if it could know in just what respects the Assistant Secretary departed from the staff reports she had before her. But such disclosure of the internal workings of the agency is exactly what the law forbids.

Accord Russell v. Department of the Air Force, 682 F.2d 1045, 1048-49 (D.C. Cir. 1982).

When balancing the interests of the government against those of the litigants, courts have considered several factors: (1) the degree to which the proffered evidence is relevant; (2) the extent to which it may be cumulative; (3) the opportunity of the party seeking disclosure to prove the particular facts by other means; (3) the "seriousness" of the litigation and the issues involved; (4) the role of the government in the litigation; and (5) the possibility of future timidity by government employees who will be forced to recognize their secrets are voidable. United States v. AT&T, 524 F. Supp. 1381, 1386 n.14 (D.D.C. 1981); Franklin Nat'l Bank Sec. Litig., 478 F. Supp. 577, 583 (E.D.N.Y. 1979)); see also Schreiber v. Society for Savings Bancorp, Inc., 11 F.3d 217 (D.C. Cir. 1993) (applying factors to bank examiners privilege). A requesting party cannot, as a matter of law demonstrate "need" in the absence of relevance. See United States v. Farley, 11 F.3d 1385, 1390 (7th Cir. 1993) (internal memoranda containing unpublished views of agency staff regarding legal issues are not relevant to court's interpretation of the law).

Particularly in light of the Special Master's conclusion that this is not "an action in which the subjective motivation of agency officials is a central issue," Opinion and Order at 16, and

because intent is not part of Plaintiffs' claims, Defendants may invoke the deliberative process privilege. In re Subpoena Duces Tecum, 145 F.3d 1422, 1424 (D.C. Cir. 1998), cited in, Opinion and Order at 16. "The central purpose of the privilege is to foster government decisionmaking [sic] by protecting it from the chill of potential disclosure. See NLRB v. Sears Roebuck & Co., 421 US. 132, 150 (1975). If Congress creates a cause of action that deliberatively exposes government decisionmaking [sic] to the light, the privilege's raison d'etre evaporates." In re Subpoena Duces Tecum, 145 F.3d at 1424. In this motion, Plaintiffs do not provide evidence that Defendants' intent is at issue so as to affect the deliberative process analysis. They rely solely on the Special Master's Opinion and Order, which is fatally flawed.[3]

The Special Master's "holding" not only lacks precedent, it also acknowledges the lack of statutory disclosure obligations present in the one case, In re Subpoena Duces Tecum, 156 F.3d 1279 (D.C. Cir. 1998), it relies upon for "some guidance." Opinion and Order at 16. Though he concedes that "[c]learly, it is not the agency's deliberative-process in determining its course of conduct that is the primary issue," id., the Special Master creates a fiduciary exception founded on his conclusion that "[r]ather, it is the alleged result of [Interior's] choices in implementing its fiduciary obligations to the IIM trust that is under attack." Id. That conclusion however, even if it is correct, does not justify the Special Master's creation of a new rule requiring disclosure of pre-decisional and deliberative information. Neither "alternatives available" nor "appropriate degree of care and prudence," upon which the Special Master relies, id., and which are elements present in any number of cases where the deliberative process applies, make this a "cause of

[3] The Special Master recognized that In re Subpoena Duces Tecum is inapplicable here.

action . . . directed at the agency's subjective motivation," which was the benchmark set forth in In re Subpoena Duces Tecum, 156 F.3d at 1280. Therefore, the privilege still applies to protect appropriate documents and communications from disclosure under conventional deliberative process analysis.

In sum, the Court should deny Plaintiffs' motion to adopt the Special Master's Opinion and Order with regard to the work product doctrine and the deliberative process privilege because it constitutes an advisory opinion that is contrary to the law.

II. PLAINTIFFS' MOTION TO COMPEL SHOULD BE DENIED BECAUSE DEFENDANTS PROPERLY OBJECTED TO DEPOSITION QUESTIONS BY ASSERTING THE DELIBERATIVE PROCESS PRIVILEGE.

As shown above, Defendants were entitled and their attorneys were obligated to object to Plaintiffs' deposition questions that sought answers protected by the deliberative process privilege. Each of the objections cited in Plaintiffs' motion to compel were properly asserted as established below. Therefore, the Court should deny Plaintiffs' motion to compel answers to the questions raising the deliberative process privilege, as well as the related motion for sanctions (which motion Defendants address on its merits in section III below).

A. DEFENDANTS' COUNSEL PROPERLY OBJECTED ON THE BASIS OF DELIBERATIVE PROCESS PRIVILEGE DURING THE DEPOSITIONS OF INTERIOR DEPARTMENT WITNESSES.

Defendants' objections on the basis of the deliberative process privilege were properly made. The objections were proper first because the deliberative process privilege applies in the context of this lawsuit, as demonstrated in section I above, and second because Defendants'

counsel properly asserted the privilege to prevent testimony that would reveal information protected by the privilege. Most of the cited objections were vetted by the parties and the Special Master-Monitor during the depositions and those colloquys and the surrounding questions and answers provide the factual context to demonstrate the appropriate invocation of the privilege. See Deposition Transcript Excerpts of Defendants' Objections to Questions on the Basis of Deliberative Process Privilege and Other References to Deliberative Process Privilege (Exhibit "A" attached) ("Deposition Excerpts").

Importantly and fortunately, unlike document requests, which are the focus of many of the relevant court decisions discussed above, depositions permit the questioner and witness to distinguish between disclosure of factual information – which is not privileged – and predecisional advice and recommendation information – which is privileged. That opportunity is especially applicable here, where Plaintiffs' counsel repeatedly indicated that their depositions were necessary to obtain factual information so that they could draft their plans by January 6, 2003. See Deposition Excerpts at 19-20 (Edwards Deposition at 5:24 - 6:24 (Dec. 18, 2002) (quoting Hearing Transcript at 11 (Dec. 13, 2002)). As Plaintiffs stated on December 13, 2002:

> The last thing I would like to mention is that these depositions are critical for our January 6th plan because these individuals know the facts on the ground. They, as the trustee delegate of the United States, and the people closest to these issues, they know the facts. They know what the system looks like. They know what documents they have, and it's very difficult for plaintiffs to know these things. So this is our only avenue for gaining that information. So it is absolutely critical that we be able to depose these to properly prepare for our plan so that we are not prejudiced and we were operating with the same level of information as the defendants are in preparation of these January 6th plans.

Hearing Transcript at 11 (Dec. 13, 2002). Hence, Plaintiffs' stated purpose – to gather facts, not opinions, recommendations and advice – was not hindered by Defendants' invocation of the

deliberative process privilege. The deposition transcripts reveal that Defendants' counsel permitted witnesses to answer factual questions, as well as questions seeking the witnesses' opinions (outside of the deliberative process) and whether the witness or other individuals had discussed or given advice or recommendations on specific topics. See generally Deposition Excerpts.

Also, Plaintiffs' consistent failure to show the requisite need for the information that was the subject of the objectionable questions is evident in the deposition transcripts and especially in their motion to compel. In their motion, Plaintiffs complain in general terms about Defendants' "bad faith," being "severely hampered," and suffering "irreparable harm," Plaintiffs' Motion at 4, 6, 7, but cite no evidence to support those complaints.

The area that is properly out of bounds is the content of predecisional advice or recommendations or drafts. A good example of the distinction occurred during Deputy Secretary Griles's testimony, in which Defendants objected to questions seeking what Interior officials "discuss[ed] about the relative skills and advantages and disadvantages of Mr. Cason" in deciding who would be in charge of trust reform, but not to "what was your opinion as to whether you or Mr. Cason were more qualified." Deposition Excerpts at 15. Another example of Defendants' efforts not to exceed the reasonable reach of the privilege is demonstrated by the withdrawal of an objection to a question posed to OITT Director Ross Swimmer. On that occasion, Defendants' counsel initially objected, but suggested a consultation with Mr. Swimmer, to which Plaintiffs consented, and which resulted in the question being answered "without disclosing deliberative material." Deposition Excerpts at 18, cited in, Plaintiffs' Motion at 8.

Plaintiffs wrongly assert that "defendants and their counsel have raised these objections in bad faith solely to obstruct the discovery process." Plaintiffs' Motion at 10. They compound this unfounded accusation by claiming that "defendants have obstructed Mr. Kieffer and have wholly ignored his rulings [so that] Mr. Kieffer has not been able to function effectively in that role." Id. at 10-11 n.3. As the deposition transcripts reveal, the Special Master-Monitor worked with the parties to permit the depositions to proceed and to work through most of the issues surrounding Defendants' assertions of the deliberative process privilege. For example, at the conclusion of day one of the James Pauli deposition, the Special Master-Monitor advised: "I think that you have gotten into a pattern here where you understand or at least I think the deliberative process privilege applies to Mr. Pauli's and EDS' questioning here. It seems to be running smoothly." Deposition Excerpts at 32.

B. DEFENDANTS' SPECIFIC OBJECTIONS TO QUESTIONS SEEKING INFORMATION PROTECTED BY THE DELIBERATIVE PROCESS PRIVILEGE ARE SUPPORTED BY THE RECORD AND THE LAW.

Each "Objection" addressed below is discussed or cited by Plaintiffs in their motion, Plaintiffs' Motion at 4-10, and is set forth in its full relevant context in the Exhibit Deposition Transcripts Excerpts of Defendants' Objections to Questions on the Basis of Deliberative Process Privilege and Other References to Deliberative Process Privilege ("Deposition Excerpts") attached hereto as Exhibit A.

Objection 1, cited in Plaintiffs' Motion at 4-6, Deposition of James Pauli (Dec. 19, 2002) (Day 1):

Plaintiffs asked EDS witness[4] Mr. Pauli to describe models that were being debated within Interior for organizing its trust services. This objection was the subject of a lengthy colloquy, and Defendants stand on the specific arguments made during the deposition. Deposition Excerpts at 1-3. Plaintiffs sought to learn the contents of proposed or suggested models relating to trust reform underway at Interior. As the testimony shows, the discussions were deliberative and predecisional. Plaintiffs provided no argument to show why they needed the information then or continue to need it now, and therefore failed to make "a showing of necessity sufficient to outweigh the adverse effects the production would engender." Carl Zeiss, 40 F.R.D. at 328-29. The objection should be sustained.

Objection 2, cited in Plaintiffs' Motion at 6-7, Deposition of James Pauli (Dec. 19, 2002) (Day 1):

Defendants' objected to Plaintiffs' question seeking the purpose of Defendants strategic plan. This objection was also the subject of a lengthy colloquy, and Defendants stand on their arguments made during the deposition. Deposition Excerpts at 4-6. Mr. Pauli testified that the strategic plan being debated at Interior was not in effect, making the discussion of the plan, including its purpose, predecisional. The purpose of the plan, hence, would have been in a deliberation phase, and akin to a draft, which is protected by the privilege. See Grossman v. Schwarz, 125 F.R.D. at 385. Plaintiffs have made no argument to support their asserted need for this testimony, so the objection should be sustained. Carl Zeiss, 40 F.R.D. at 328-29.

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[4] The deliberative process privilege covers an agency's contractors such as EDS. See Dow Jones, 917 F.2d at 575.

Objection 3, cited in Plaintiffs' Motion at 7
DEPOSITION OF JAMES PAULI at 194-95 (Dec. 20, 2002) (Day 2)

Defendants properly objected to Plaintiffs' question seeking "any recommendations" by EDS regarding possible changes to Interior's current approach to reform of its beneficiary services. Although the witness testified that EDS had made recommendations, those recommendations for future change are predecisional and deliberative under the case law. Grand Central Partnership, Inc. v. Cuomo, 166 F.3d at 482. Plaintiffs made no argument then and make no argument now to support their asserted need for this testimony, so the objection should be sustained. Carl Zeiss, 40 F.R.D. at 328-29.

Objection 4, cited in Plaintiffs' Motion at 7
DEPOSITION OF DONNA ERWIN at 11-13 (Dec. 20, 2002)

Defendants' objection to Plaintiffs' question seeking details about Interior's potential plans for trust reforms likewise should be sustained. The plans were being drafted at the time of the deposition and were thus deliberative and predecisional, as Plaintiffs well knew. Whether Plaintiffs were inquiring into the content of the drafts or the discussions about the drafts, such information was privileged. Plaintiffs made no argument then and make no argument now to support their asserted need for this testimony, so the objection should be sustained. Carl Zeiss, 40 F.R.D. at 328-29.

Objection 5, cited in Plaintiffs' Motion at 8
DEPOSITION OF STEVEN GRILES at 68-69 (Nov. 19, 2002)

Plaintiffs' question requesting Deputy Secretary Griles's recommendation concerning the resignation of the Special Trustee was properly objected to as predecisional and deliberative. See Hopkins v. HUD, 929 F.2d at 84. That Interior ultimately decided to retain Mr. Slonaker during the transition to the new administration does not change the nature of the information as

privileged. See, e.g., Lead Industries Ass'n, Inc., 610 F.2d at 84 (mere fact that decision-maker adopts proposed recommendation does not destroy privilege that attaches to it in its earlier form as advice). As shown by the transcript, Defendants' objection still permitted additional questioning on the subject matter. Plaintiffs made no argument then and make no argument now to support their asserted need for this testimony, so the objection should be sustained. Carl Zeiss, 40 F.R.D. at 328-29.

Objection 6, cited in Plaintiffs' Motion at 8
DEPOSITION OF STEVEN GRILES at 69-70 (Nov. 19, 2002)

The followup question to the retention of the Special Trustee (Objection "5" above) sought Mr. Griles's proposal to Secretary Norton regarding alternative candidates for the position. The analysis of the objection is essentially the same as for Objection "5." Plaintiffs were, importantly, permitted to ask Mr. Griles what his opinion – but not his advice – was about the Special Trustee. Plaintiffs made no argument then and make no argument now to support their asserted need for this testimony, so the objection should be sustained. Carl Zeiss, 40 F.R.D. at 328-29.

Objection 7, cited in Plaintiffs' Motion at 8
DEPOSITION OF STEVEN GRILES at 74-75 (Nov. 19, 2002)

Defendants objected to the question seeking the content of Mr. Griles's discussions with Secretary Norton "about fulfilling the trustee's duty" to the extent those discussions concerned "deliberative predecisional information" that constituted "advice and recommendations." See Hopkins v. HUD, 929 F.2d at 84. However, Mr. Griles proceeded to testify about his discussions with the Secretary. Plaintiffs made no argument then and make no argument now to support their

asserted need for this testimony, so the objection should be sustained. Carl Zeiss, 40 F.R.D. at 328-29.

Objection 8, cited in Plaintiffs' Motion at 8
DEPOSITION OF STEVEN GRILES at 78-80 (Nov. 19, 2002)

As with Objection "7," this objection concerned the content of Mr. Griles's discussions with Secretary Norton, this time regarding how Defendants should "carry out the dictates of the trial court." As with the previous objection, Defendants permitted testimony so long as it did not concern "deliberative predecisional information" that constituted "advice and recommendations." Plaintiffs made no argument then and make no argument now to support their asserted need for this testimony, so the objection should be sustained. Carl Zeiss, 40 F.R.D. at 328-29.

Objection 9, cited in Plaintiffs' Motion at 8
DEPOSITION OF STEVEN GRILES at 81-82 (Nov. 19, 2002)

In determining who would be primarily responsible for day-to-day oversight of trust reform at Interior, Mr. Griles consulted with Secretary Norton prior to her deciding who would best be able to accomplish that responsibility. The content of those discussions with Secretary Norton are protected by the deliberative process privilege for the reasons stated in the prior objections concerning Mr. Griles (Objections "5" through "8"). Defendants properly objected to Plaintiffs' question seeking that information. Plaintiffs made no argument then and make no argument now to support their asserted need for this testimony, so the objection should be sustained. Carl Zeiss, 40 F.R.D. at 328-29.

Objection 10, cited in Plaintiffs' Motion at 8
DEPOSITION OF STEVEN GRILES at 82-83 (Nov. 19, 2002)

The questions here reveal the disciplined use of the deliberative process privilege. Mr. Griles answered questions concerning the Secretary's final determination and his post-decisional

opinion regarding that decision. As with several of the prior objections concerning Mr. Griles, however, the question to which this objection was made sought to elicit the pre-decisional opinions and advice concerning advantages and disadvantages of persons considered for the responsibility of managing trust reform. Defendants did permit Mr. Griles to state his post-decisional opinion, but not to reveal his recommendation or advice to Secretary Norton. Plaintiffs provided no indication of a particularized need to know this information, so the objection should be sustained. Carl Zeiss, 40 F.R.D. at 328-29.

Objection 11, cited in Plaintiffs' Motion at 8
DEPOSITION OF STEVEN GRILES at 98 (Nov. 19, 2002)
– and –
Objection 12, cited in Plaintiffs' Motion at 8
DEPOSITION OF STEVEN GRILES at 99 (Nov. 19, 2002)

In these instances, Deputy Secretary Griles was asked to disclose the advice and views provided by Mr. Lamb regarding Mr. Griles's decision regarding Mr. Slonaker's role. Mr. Griles provided non-privileged information to Plaintiffs. Plaintiffs provided no indication of the need for this information. Plaintiffs provided no indication of a particularized need to know this information, so the objection should be sustained. Carl Zeiss, 40 F.R.D. at 328-29.

Objection 13, cited in Plaintiffs' Motion at 8
DEPOSITION OF ROSS SWIMMER at 140-41 (Nov. 20, 2002)

In this instance, after Defendants' counsel stated a precautionary warning regarding the possible application of the deliberative process privilege to advice and recommendations, Mr. Swimmer answered the question after a determination was made that the question did not seek testimony regarding pre-decisional advice and recommendations. Essentially, the objection here was mooted within moments of its preliminary and precautionary assertion.

Objection 14, cited in Plaintiffs' Motion at 8
DEPOSITION OF BERT EDWARDS at 5-7 (Dec. 18, 2002)

This "objection" is stated for the record by Defendants' counsel at the outset of Mr. Edwards's deposition. It concerns anticipated questions, and does not invoke the privilege in response to any specific question.

Objection 15, cited in Plaintiffs' Motion at 8
DEPOSITION OF BERT EDWARDS at 31-33 (Dec. 18, 2002)

In this instance, Mr. Edwards is instructed not to divulge the pre-decisional advice he received in deciding that the first historical accounting statements were complete. Plaintiffs offered no indication of why the information was necessary, so the objection should be sustained. Carl Zeiss, 40 F.R.D. at 328-29. Furthermore, Plaintiffs' counsel's response to the objection, as pointed out by the Special Master-Monitor, wrongly assumed that Defendants' counsel was objecting on the basis of attorney-client privilege.

Objection 16, not cited in Plaintiffs' Motion
DEPOSITION OF BERT EDWARDS at 134 (Dec. 18, 2002)

This objection was made to a question which clearly elicited disclosure of the pre-decisional views of a group making recommendations regarding the scope of the July 2, 2002 accounting plan. Plaintiffs again reveal no particularized need for the information, so the objection should be sustained. Carl Zeiss, 40 F.R.D. at 328-29.

Objection 17, not cited in Plaintiffs' Motion
DEPOSITION OF BERT EDWARDS at 134-36 (Dec. 18, 2002)

This instance involved an objection to a question eliciting the various accounting strategies which were considered or recommended in connection with Mr. Edwards's decision to

select one approach. As with other objections discussed above, such predecisional recommendations are privileged. In addition, Mr. Edwards confirmed unequivocally that the information sought was predecisional and deliberative. Plaintiffs provided no indication of particularized need for this information, so the objection should be sustained. Carl Zeiss, 40 F.R.D. at 328-29.

Objection 18, not cited in Plaintiffs' Motion
DEPOSITION OF BERT EDWARDS at 136-38 (Dec. 18, 2002)

This instance again demonstrates the Government's disciplined invocation of the deliberative process privilege; Mr. Edwards did not testify regarding the advice and recommendations he received in determining the scope of the accounting but did testify regarding whom the ultimate decision makers were. Moreover, Defendants objection noted that the "fact that a decision has been made, in this instance the report has been issued, does not somehow change the character of those recommendations." See, e.g., Lead Industries Ass'n, Inc., 610 F.2d at 84. Plaintiffs again provided no indication of particularized need for the privileged information, so the objection should be sustained. Carl Zeiss, 40 F.R.D. at 328-29.

Objection 19, not cited in Plaintiffs' Motion
DEPOSITION OF JAMES PAULI at 68-74 (Dec. 19, 2002) (Day 1)

Finally, this objection again demonstrates the Government's disciplined invocation of the deliberative process privilege. The witness, from Interior's consultant EDS, was permitted to testify about factual matters regarding standards which were discovered in the field during their "As-Is" investigation but not about EDS's recommendations regarding overall standards which Interior might choose to ultimately adopt. In this regard, the Special Master-Monitor approvingly

In sum, Plaintiffs have not even attempted to meet their burden of establishing a need for the testimony that was the subject of Defendants' objections during the depositions of seven witnesses in November and December 2002. The objections were proper. Accordingly, they should be sustained and the motion to compel should be denied.

III. PLAINTIFFS' MOTION FOR SANCTIONS AGAINST DEFENDANTS AND THEIR COUNSEL FOR OBJECTING TO DEPOSITION QUESTIONS ON BASIS OF DELIBERATIVE PROCESS PRIVILEGE SHOULD BE DENIED BECAUSE OBJECTIONS WERE SUBSTANTIALLY JUSTIFIED.

Even if the Court holds that Interior Defendants were incorrect in asserting the deliberative process privilege, they were substantially justified in doing so and thus are not subject to sanctions. In adjudicating discovery disputes, sanctions are not appropriate if the losing party was "substantially justified" in advancing its position. Fed. R. Civ. P. 37(a)(4)(a). A party is "substantially justified" in taking a position when no clear answer to the particular issue in dispute exists so that opposing viewpoints may be defensible.

> If there is an absence of controlling authority, and the issue presented is one not free from doubt and could engender a responsible difference of opinion among conscientious, diligent but reasonable advocates, then the opposing positions taken by them are substantially justified.

Athridge v. Aetna Cas. & Sur. Co., 184 F.R.D. 200, 205 (D.D.C. 1998)

> If the [issue] raises a genuine issue among reasonable lawyers, the losing position is found to be substantially justified. *Pierce v. Underwood,* 487 U.S. 552, 564 (1988). Speaking more practically, when there is no controlling precedent on the issue, and counsel marshals what authority there is in support of her position, the position she articulates will be found to be substantially justified even if it does not prevail.

Boca Investerings P'ship v. United States, No. 97-602PLF/JMF, 1998 WL 647214, at *1 (D.D.C. Sept. 1, 1998).

Here, no controlling precedent supports Plaintiffs' specific deliberative process privilege arguments. In section III of their Motion, Plaintiffs cite several cases which discuss generally whether an objection is substantially justified, yet cite no cases demonstrating that Interior's specific deliberative process objections were not substantially justified. Plaintiffs do not discuss the law regarding the deliberative process privilege, even in sections I and II of their Motion, which seeks adoption of the Special Master's Opinion and Order on the deliberative process privilege and to compel answers to the questions to which Defendants objected on the basis of that privilege.

For example, Plaintiffs state, "where, as here, **legal authority is clearly against** the asserted position of a party, the position is not substantially justified." Plaintiffs' Motion at 12 (emphasis added). Despite this bold statement, Plaintiffs never cite to the "legal authority" that is "clearly against" Interior's asserted deliberative process position. Plaintiffs later refer to the **"settled law in this area."** Id. at 13 (emphasis added). Once again, however, Plaintiffs cite no "settled law in this area" which would showcase the alleged folly of Interior's deliberative process position.

In contrast, Defendants in sections I and II above present at length the legal and factual arguments supporting Defendants' objections on the basis of the deliberative process privilege, relying on case law and deposition transcripts. In addition to supporting Defendants' objections, the cited law shows that deliberative process law is constantly evolving to encompass new factual situations. Plaintiffs can point to no "settled law" opposing Interior's position because there is none.

Unlike Plaintiffs, the Special Master addresses case law related to the fundamental aspects of the deliberative process privilege, Opinion and Order at 14-17, but like Plaintiffs, he cites no case in support of his "holding" that "the disclosure requirements applicable to fiduciary relations in general require that pre-decisional and deliberative documents and information germane to the administration of the IIM trust must be made available to the beneficiaries of the trust." Id. at 16-17. His references to In re Subpoena Duces Tecum, 156 F.3d 1279, 1280 (D.C. Cir. 1998), result in his distinguishing that case from this one. Opinion and Order at 16.

In short, even if the Court upholds the Special Master's legal conclusion that the deliberative process privilege is unavailable for the documents that are the subject of the Opinion and Order, the Court's ruling cannot convert the Opinion and Order to "controlling authority" or "controlling precedent." See Athridge, 184 F.R.D. at 205; Boca, 1998 WL 647214, at *1. Nor does the mere citation to cases such as In re Subpoena Duces Tecum and Schreiber in the Opinion and Order elevate those cases to decisions controlling the application of the deliberative process privilege here.

Interior's claims of deliberative process are thus not flagrant violations of controlling authority, but, rather, "a reasonable difference of opinion among conscientious, diligent but reasonable advocates." Athridge, 184 F.R.D. at 205. Counsel for Interior have articulated specific, well-reasoned objections in each deposition where they have claimed the deliberative process privilege.

This would have also been a different case if Interior Defendants had conceded the "invalidity" of its deliberative process privilege. Cobell v. Norton, 206 F.R.D. 27, 29 (D.D.C. 2002) (sanctions appropriate "in light of the overwhelming case law to the contrary and

defendants' concession that they knew of no precedent holding otherwise."); Boca, 1998 WL 647214, at *2 ("party's position is not substantially justified . . . if the party concedes the validity of his opponent's position"). In this case, Interior Defendants have not conceded the validity of the Special Master's position regarding deliberative process, much less their opponents' position.

During the December 13, 2002 deposition of Aurene Martin, the Special Master discussed the "contours" of the deliberative process privilege with the deponent in order to ensure that a deposition exhibit did not reveal information subject to the privilege. Deposition Excerpts at 33. Further, the Special Master has specifically found that Plaintiffs may not have unfettered discovery into Interior's decision-making process regarding Interior's method of accounting:

> [I]t appears that if there is any arena within which defendant agencies might be expected to exercise their discretion and expertise, it should be in the choice and implementation of an accounting method. Permitting the agencies to formulate their own methodology without subjecting every nuance of their decision-making process to inspection and challenge is ultimately in the interest of the plaintiff class, insofar as it should expedite the ultimate resolution in this case.

Opinion and Order of the Special Master at 13-14 (Sept. 28, 2001) (referring to Interior making an APA record).

The Special Master-Monitor has also articulated his belief that Interior Defendants may claim the deliberative process privilege in certain circumstances: "On the latter portion, which he just talked to, those standards are being developed and this consultant is being asked to recommend things about those standards, I would think that would be under the deliberative process privilege." Deposition Excerpts at 30 (Deposition of James Pauli at 74 (Dec. 19, 2002)). "I think that you have gotten into a pattern here where you understand or at least I think the

deliberative process applies to Mr. Pauli's and EDS' questioning here. It seems to be running smoothly." Id. at 32 (Deposition of James Pauli at 146-47 (Dec.19, 2002) (emphasis omitted).

At oral argument on Defendants' Motion for Protective Order, the Court confirmed that it has not decided the issue:

> MR. GINGOLD: Then we're dealing with the White House issues, too. That goes into the deliberative process issues which, by the way, the special master explicitly found is irrelevant in the context of a trust because there is an affirmative obligation.
> THE COURT: If I find that – how did [Defendants' counsel] put it – the sovereign trustee is treated differently than the regular trustee, then I guess that will resolve that question, too.
> MR. GINGOLD: Your Honor, there is no case that says that.
> THE COURT: I understand. There is no case. But I'm going to have to decide the question, and I have not.

Hearing Tr. at 20:19 - 21:5 (Nov. 5, 2002). Plaintiffs seek to have the Court adopt the Opinion and Order, apparently believing that it could govern all past and future objections relating to work product and deliberative process. See Plaintiffs' Motion at 4, 10. Further, without any citation to law or the record, they baldly and erroneously argue that adoption is warranted because "defendants and their counsel in bad faith have obstructed, and will continue to obstruct, Court ordered discovery." Id. at 4.

Moreover, at the November 5, 2002, hearing, this Court recognized that its rejection of the deliberative process for specific documents during the second contempt trial does not preclude Defendants' assertion of the privilege for other purposes:

> MR. GINGOLD: One last point. You stated the deliberative process privilege disappears altogether -- and this is not in a trust context -- when there is any reason to believe the government misconduct has occurred. Your Honor, we have gone through two contempt trials. If there isn't a reason to believe that government misconduct has occurred in this case, plaintiffs suggest --

> THE COURT: Well, that misconduct I'm talking about there, that is a crime fraud exception though where there was a violation of a criminal privacy act statute isn't it?
> MR. GINGOLD: Yes, it is.
> THE COURT: I don't think that's the same question as here.
> MR. GINGOLD: It is not the same question, but it is certainly analogous because --
> THE COURT: It may be analogous, but I found that the President violated a criminal provision of the privacy act. . . . [I]t is not the same question.
> MR. GINGOLD: Well, but that goes -- you did say the deliberative process privilege, even outside the trust, is not absolute.
> THE COURT: I agree with that, too.

Hearing Tr. at 22:6 - 23:3 (Nov. 5, 2002). At the second contempt trial, Defendants raised the privilege in seeking to protect e-mail concerning the first quarterly report to the Court on trust reform. Trial Tr. 942:22 - 943:12 (Dec. 17, 2001). The Court ruled then that "[t]he allegations of fraud in the preparation of the first quarterly report are sufficient that I will not allow [deliberative process] privilege or attorney-client privilege to hide any of these documents from public viewing as to whether the defendants were committing contempt by fraudulently misleading the Court." Id. at 946:4-9. But now this case is in Phase 1.5; it is not in a contempt proceeding.

In its December 23 Memorandum, the Court again confirmed that it has not decided the issue. December 23 Memorandum at 15 n.10. Given these statements by the Court, the Special Master and Special Master-Monitor, Defendants, far from ignoring "controlling precedent," had affirmative authority to claim the deliberative process privilege in the depositions. Defendants had "substantial justification" because they could, and still can, point to specific favorable authority as well as an absence of any adverse controlling authority. See Athridge, 184 F.R.D. at

210 ("The [party's] position could be said to be substantially justified if they could point to authority in this Circuit or elsewhere [to support their position].")[5]

Even if this Court finds that Interior was incorrect in asserting the deliberative process privilege, reasonable minds can differ on this specific legal issue, which precludes an award of sanctions. "While lapidary generalizations are dangerous in area [sic] so imbued with discretionary judgments, an examination of the cases interpreting the words 'substantially justified' suggests that the standard is a forgiving one." Boca, 1998 WL 647214, at *1. Moreover, while courts may disagree with a party's position, courts should bear in mind the pressures that attorneys face in making a privilege decision. "Additionally, lawyers are understandably unwilling to surrender documents they consider privileged lest they be accused of violating the ethical requirements of preserving their client's confidences and secrets." Id. at *3. Such pressures may be said to be even more prominent during the heat of a deposition.[6]

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[5] In the context of a party's testimony rather than counsel making an objection, this Court has held that sanctions are not appropriate where the conduct is "not the product of any intent to evade or deceive." Alexander v. F.B.I., 192 F.R.D. at 31. As in Alexander, there is no evidence here of intent to evade or deceive.

[6] Plaintiffs specifically ask that any sanctions awarded against the government be paid "personally by each of defendants' counsel who directed deponents not to answer questions based on the deliberative process privilege." Plaintiffs' Motion at 13. Plaintiffs have presented no basis to invoke personal sanctions under these circumstances where government attorneys have asserted the deliberative process privilege, which circumstances are dramatically less egregious than could justify personal sanctions. See U.S. v. Shaffer Equip. Co., 158 F.R.D. 80, 86, 87, 88 (S.D.W.V. 1994) (personal sanctions under Rule 26 against government attorneys who knew of perjury by government witness but did not inform opponents of such perjury.); Chilcutt v. U.S., 4 F.3d 1313, 1322-24 (5th Cir. 1993) (personal sanctions under Rule 37 against government attorney where court had previously personally sanctioned government attorney for similar misconduct, and where government attorney "not only intentionally withheld documents that [he] knew existed, but . . . also knowingly made blatant misrepresentations to the district court about the existence of those documents") cert. denied, 513 U.S. 979 (1994)

In the absence of adverse controlling authority, and in the presence of favorable authority, Defendants were substantially justified in asserting the deliberative process privilege. As such, even if the Court finds the privilege inapplicable to Defendants, sanctions are not appropriate.

CONCLUSION

For the reasons set forth above, the Court should deny Plaintiffs' three motions in their entirety.

January 13, 2003

Respectfully submitted,

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CERTIFICATE OF SERVICE

I declare under penalty of perjury that, on January 13, 2003 I served the foregoing *Defendants' Memorandum of Points and Authorities in Opposition to Plaintiffs' Consolidated (1) Motion for Order Pursuant to Fed. R. Civ. P. 53(a)(2)[sic] Adopting Special Master Balaran's May 11, 1999 Opinion and Order Holding That the Work Product Doctrine and Deliberative Process Privilege Will Not Shield from Disclosure Material Related to the Administration of the IIM Trust, (2) Motion to Compel Testimony of Deponents Defendants Directed Not to Answer Questions on the Basis of Deliberative Process Privilege, (3) Motion for Sanctions Pursuant to Rule 37(4)(a)[sic]* by facsimile in accordance with their written request of October 31, 2001 upon:

Keith Harper, Esq.
Native American Rights Fund
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(202) 822-0068

Dennis M Gingold, Esq.
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By U.S. Mail upon:

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K P Kingston

Kevin P. Kingston

DEPOSITION TRANSCRIPT EXCERPTS OF DEFENDANTS' OBJECTIONS TO QUESTIONS ON THE BASIS OF DELIBERATIVE PROCESS PRIVILEGE AND OTHER REFERENCES TO DELIBERATIVE PROCESS PRIVILEGE

EXHIBIT "A" TO DEFENDANTS' OPPOSITION - FILED JAN. 13, 2002

Objection 1, cited in Plaintiffs' Motion at 4-6.
DEPOSITION OF JAMES PAULI at 22-27 (Dec. 19, 2002) (Day 1)

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Q Now, when you were saying they were involved in this discussion, did you mean that this occurred in one discussion?
A I believe there were multiple discussions about it. What I am centering on is a discussion where back in -- I am not exactly sure. Let's say the spring time frame. I am not sure of the exact dates -- where

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we had a meeting. I believe it was in Phoenix where we started discussing how to do the As-Is analysis.
MR. KRESSE: As-Is.
THE WITNESS: As-Is analysis and how the -- the Department was thinking about how it should do its business planning and what structure and approach it should use for that.
BY MR. HARPER:
Q And when you say spring, spring of what year?
A This year 2002.
Q Could you identify Mr. Christianson's position at the Department or what office he belongs to?
A He works under Ross Swimmer.
Q At that meeting, were there any instructions given to you regarding how to proceed in your project?
A I don't remember any instructions on how to proceed. It was a discussion that we talked about different ways of organizing and thinking about how the Department does its trusts and its major components. Various models were thrown up. And this was one of -- I believe these eight items that they selected or some permutation of those were put up at that meeting.
Q And could you describe some of these models that you mentioned?
A Essentially --

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MR. KRESSE: I am going to stop for a while here. These are subject to the deliberative process privilege. Any recommendations or suggestions that may have gone into any subsequent decisions are privileged. So to the extent that there would be models, those would be akin to drafts or preliminary recommendations. And those would be privileged.
MR. HARPER: Are you instructing him not to answer?

MR. KRESSE: Yes, I am.
SPECIAL MASTER KIEFFER: Well, I am not even sure what we are talking about here as far as where in the process EDS was brought in to do what. They have been involved a long time before July of this year or the spring of this year. And I don't believe that you can throw everything under a deliberative process privilege just because he gave a recommendation on something that may have nothing to do with making a decision on how to do the plan or how to do the historical accounting. I am not going to tell you how to do your deposition, but you may want to go back and try to put in context what he is talking about where this meeting fell into.
MR. HARPER: Yeah. I am trying to get to that, but it is kind of taking me to this point -- his

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answers. Let me ask you this. So I guess for clarification, Mr. Kieffer, I guess are you making a ruling on the objection?
SPECIAL MASTER KIEFFER: I can't make a ruling on the objection because I am not sure what he is talking about. That's the point here. He is talking, when you started this off, about what are the eight things that form a trust management. And he starts talking about this one meeting or one discussion he had this spring. I don't know what it is in the context of. Therefore, I can't know whether the objection can be sustained or not.
MR. HARPER: Okay.
MR. KRESSE: Just let him ask the question at this point. I am objecting to that, so if he has another --
SPECIAL MASTER KIEFFER: Well, what's your basis for your objection to that? He hasn't talked about any opinion or any recommendation he is giving.
MR. GELDON: As I stated, I think the danger and the reason that the deliberative process privilege applies here is that when you talk about -- clearly, any preliminary draft or any draft is objectionable.
SPECIAL MASTER KIEFFER: But you don't know if he is talking about a draft.

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MR. KRESSE: All I am saying is if you are talking about a suggestion or a recommendation or advice as to how to proceed -- and, again, it is very vague as to what is being discussed here. But I am concerned that when you say -- when he says there are multiple

models being discussed, if you start describing those models, then you are talking about something that's preliminary to a final decision about how trust management should look. So I believe that is covered. It is preliminary. It is protected by the privilege. That's my objection.

SPECIAL MASTER KIEFFER: Just a second. He hasn't started talking about it.

MR. KRESSE: And I don't want him to. He has said enough. And that's why -- if he could say something that doesn't run afoul of that objection, then fine.

SPECIAL MASTER KIEFFER: Mr. Kresse, if you think you are going to sweep everything this man has done in consulting for the Interior Department under the deliberative process privilege today, you are going to have a lot of problems, okay. Now, he hasn't started talking about models. He hasn't talked about anything but a discussion that was had about eight principles that were given to him, not what he was giving to the

Department. So I don't think your objection is a good objection if you are going to hold to that objection. But he can answer the question.

MR. KRESSE: No, he can't. He can answer the question to the extent it doesn't violate the privilege. But I just want to say that the purpose of this deposition as a 30(b)(6) deposition is to gather information about what EDS has done. And that is the purpose of the 30(b)(6) deposition. It is a factual-based deposition. And that's the primary purpose of it.

SPECIAL MASTER KIEFFER: And that's what Mr. Harper is starting to do here. Now, allow him to do that, and we will get to your objections later on.

SPECIAL MASTER KIEFFER: Start over, Mr. Harper.

Objection 2, cited in Plaintiffs' Motion at 6-7
DEPOSITION OF JAMES PAULI at 50-55 (Dec. 19, 2002) (Day 1)

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Q What project is EDS involved in?
A EDS is involved in the development of an As-Is model. EDS is involved in a project to develop a data quality -- data cleanup strategy. EDS is involved in providing advice on the Department's plan -- strategic plan.
Q What is the purpose of that strategic plan?
MR. KRESSE: I am going to object on the deliberative process, and I will explain why and

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instruct him not to answer. The strategic plan, to the extent that it is being developed, any question as to what is the purpose of the plan to the extent that the plan itself would state what its purpose is -- in other words, you have got a plan that says the purpose of the plan is X, Y, Z, okay. If the plan is not finalized, then the purpose is not finalized.
MR. HARPER: Your Honor, I don't know how much further we are going to be able to go. Each time I get to a critical part of the deposition, we have got an objection on deliberative process in what are clearly not deliberative process bases.
SPECIAL MASTER KIEFFER: The question did not ask him to say what he has recommended to anybody about anything, nor did the question define which plan he is talking about. There is a strategic plan, as I understand it, that was being developed long before the judge requested a plan. I am not sure what plan is being talked about. But in any event --
MR. KRESSE: That's part of the problem.
SPECIAL MASTER KIEFFER: May I finish?
MR. KRESSE: I'm sorry.
SPECIAL MASTER KIEFFER: He didn't ask him what he was recommending on which a decision was going to be made about a plan. So I don't believe there is

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any deliberative process privilege over that question.
MR. KRESSE: I guess my -- in an effort to try to help you get what you are looking for if, in fact, when you talk about strategic plan, if there is, in fact, a strategic plan that is already in effect, then the purpose of the plan would certainly not be subject to the deliberative process. If, in fact, the

strategic plan that we are talking about is being developed, then any purpose of the plan, as I stated, is in process and therefore is subject to the deliberative process privilege.

And, furthermore, the whole purpose of this deposition is supposed to be getting at, I thought, the subject matter that is on the deposition notice. And you asked him what the projects were, and he said developing As-Is modeling, developing data quality cleanup, and providing advice to DOI on the strategic plan.

Now, if you are providing advice on a plan that's not in effect yet, then the advice that's provided is privileged. Now, again, that's --

SPECIAL MASTER KIEFFER: Well, you don't know what the plan is.

MR. KRESSE: Again, if we can identify what plan we are talking about, let's go from there. But at

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the moment, I don't know whether there is a plan that's not in effect or a plan that's being developed that he is asking about. It is too vague.

SPECIAL MASTER KIEFFER: Then you can't make an objection that he's --

MR. KRESSE: Well, I can make an objection so that he doesn't respond as to matters that are subject to the privilege. So to that extent, he can answer the question if it is a plan that's already in effect.

THE WITNESS: It is not a plan that is already in effect.

SPECIAL MASTER KIEFFER: Well, I don't think that solves the problem, but go ahead. He has answered your question, Mr. Harper. Keep going.

BY MR. HARPER:

Q Prior to developing a plan, is it your view that you would have to determine the standards by which the ultimate business process is measured by?

A I would refer you to our trust reform report, which provides us -- provides a description. May I finish?

Q Well, yeah. You don't need to stop when we are consulting.

A Provide me a courtesy. We provided a -- in our trust reform report, we provided a recommendation on

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how the Department should -- I think we call it framework on How the Department should proceed on developing a plan and moving forward in solving the

4 issues raised in that trust reform report.

Objection 3, cited in Plaintiffs' Motion at 7
DEPOSITION OF JAMES PAULI at 194-95 (Dec. 20, 2002) (Day 2)

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Q. As we talked to you about yesterday, essentially you developed these, the "As-Is" reporting, by these interviews and these meetings out in the field, right?
A. Correct.
Q. In general terms can you tell me the state of the "As-Is" system right now for beneficiary services?
A. Essentially, the Department takes a very decentralized approach to beneficiary services currently.
Q. Have you made any recommendations in that regard as to the -- whether or not that is a good approach?
MR. KRESSE: You can answer it to the extent that you have made or not made recommendations, but it's the deliberative process privilege as to what the recommendations may have been at this point.
THE WITNESS: What was the question now?
MR. GELDON: Recommendations.
THE WITNESS: Whether we have made recommendations. We are in the process of writing a report. We have developed recommendations. I don't believe that we have delivered a draft report, although we may have delivered the draft report, as it's due today. So that in draft we may have made some recommendations.
BY MR. HARPER:
Q. Has EDS identified any problems with the way in which beneficiaries' services are provided today?

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A. If you replace "problems" with "issues," I would say yes.

Objection 4, cited in Plaintiffs' Motion at 7
DEPOSITION OF DONNA ERWIN at 11-13 (Dec. 20, 2002)

11

Q How many drafts has this plan been through? First of all, which of the two plans is this? There is a plan for accounting. There is a plan to rectify the breach. Are you aware of that?

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A Yes.
Q Okay. Which draft --
A I'm sorry. Would you repeat that?
Q There is an accounting plan. I understand there is a plan to rectify breaches, two separate plans that Interior is obligated to file.
A I did not understand there were two separate plans, one for breaches.
Q What is your understanding of what the plan is to do? You understand it was ordered by the Court, correct?
A Correct.
Q What do you understand the Court ordered the Interior Department to report on?
A The standards and reform efforts.
Q Do you understand that the Court ordered the Interior Department to report with respect to the accounting at all?
A Yes.
Q What do you understand the Court ordered in that regard?
A Plans for historical account.

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Q Now, are those two plans in this one document?
MS. SPOONER: Objection. I instruct her not to answer that question on the ground of deliberative process.
BY MR. BROWN:
Q Am I confusing you if I refer to two plans?
A Yes.
Q Why is that? Because you're not aware the Court ordered two plans?
A I am aware of two plans.

Objection 5, cited in Plaintiffs' Motion at 8
DEPOSITION OF STEVEN GRILES at 68-69 (Nov. 19, 2002)

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Q. And what discussions were there about filing the Office of Special Trustee?
A. As to whether or not the Special Trustee would -- the resignation would be requested --
Q. I'm sorry?
A. Whether or not the incumbent to the position would be asked to submit his resignation.
Q. And what was your recommendation?
MS. SPOONER: Objection. I'm instructing the witness not to answer.
MR. BROWN: The ground is?
MS. SPOONER: The deliberative process.
MR. BROWN: The decision has already been made.
MS. SPOONER: The privilege doesn't go away

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after the decision has been made.
MR. BROWN: Are you instructing him on all questions regarding what was said about that?
MS. SPOONER: Not everything, no.

Objection 6, cited in Plaintiffs' Motion at 8
DEPOSITION OF STEVEN GRILES at 69-70 (Nov. 19, 2002)

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BY MR. BROWN:
Q. What was your opinion about whether he should be retained?
A. I had none.
Q. Did Secretary Norton express an opinion on that topic?
A. Secretary Norton did not express an opinion to me. She had a transition team that she was working with. She had recommendations from the transition team.
Q. Did you propose anyone else who might serve as Special Trustee?
MS. SPOONER: Objection, deliberative process. I instruct you not to answer, Mr. Griles.
BY MR. BROWN:
Q. Did you have any opinion of who else would be competent to serve as Special Trustee, whether you expressed it or not?
A. I did not.
Q. Did you have any concerns about Mr. Slonaker at that time?
A. I did not know Mr. Slonaker at that time.

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Q. So you had no concerns?
A. I did not know Mr. Slonaker at that time, so I had no concerns. I didn't know him.
Q. When was the decision made to retain a Special Trustee, if there was such a decision?
A. I would only be speculating, because the decision was made prior to my confirmation that he would be retained.

Objection 7, cited in Plaintiffs' Motion at 8
DEPOSITION OF STEVEN GRILES at 74-75 (Nov. 19, 2002)

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Q. All right. During the time you were confirmed and the time you became the COO of trust reform, what discussions did you and Ms. Norton have about the trustee delegate's duties?
MS. SPOONER: Do you mean after he was confirmed? You said during the time he was confirmed. Between the time he was confirmed?
MR. BROWN: Yes.
MS. SPOONER: I'm sorry, the question was?
BY MR. BROWN:
Q. What discussions did you have with Secretary Norton about fulfilling the trustee's duty?
MS. SPOONER: I'm going to object to that question to the extent it calls for deliberative predecisional information, and Mr. Griles, I'm instructing you not to disclose confidential communications you had, or the substance of confidential communications you had with the Secretary that was advice

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and recommendations.
MR. BROWN: Go ahead. Can you answer that question with that kind of a cloud hanging over it?
THE WITNESS: If you could repeat your question, with those caveats I will try to answer your question.
BY MR. BROWN:
Q. I would like to know what you and the Secretary discussed about trust reform, about fulfilling the trust duty during that period before you became the point person.
A. We had extensive discussions regarding the budget for trust reform. We had extensive discussions concerning some of the issues that were managerial issues that were coming up that had arisen.

Objection 8, cited in Plaintiffs' Motion at 8
DEPOSITION OF STEVEN GRILES at 78-80 (Nov. 19, 2002)

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Q. Did you and the Secretary discuss -- well, let me ask, did you discuss the common law aspect as a source of trust duties?
A. I do not recall us discussing the terms you're using, no, sir.
Q. Did you discuss how best to carry out the dictates of the trial court?
A. Yes, we did.
Q. And what was that discussion?
MS. SPOONER: Objection. I'm going to object to the extent that it calls for deliberative information, deliberative process information, information that contains advice and recommendations, and ask you, Mr. Griles, not to disclose that information.
THE WITNESS: And I would ask after this question we take a break.
Mr. Brown, would you have him repeat the question?
MR. BROWN: Sure.
THE REPORTER: "Question: And what was that discussion?"
THE WITNESS: My best recollection, Mr. Brown, is that we went through some of the particular highlights with the lawyers involved in the case and made sure we understood what we were attempting to try to

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accomplish, the historical accounting, specifically, and the trust reform effort we engaged in. Those were the kinds of issues that we were engaged in, and those are the things we discussed.
BY MR. BROWN:
Q. And did you discuss whether the account --
A. I'm sorry, I would like to take a break.
(Recess.)
BY MR. BROWN:
Q. Did you discuss whether the duty to account predated the '94 act?
A. I don't recall that being a discussion. The duty to account preceded the '94 act.
Q. That you needed to account pre-'94, for the time period pre-'94?
MS. SPOONER: Objection. Let me just ask you clarify the question. You said that you need to account pre-'94. Do you mean the duty existed prior to

'94 and that the accounting had to go back before '94?
MR. BROWN: That the accounting had to go back before '94, first of all.
THE WITNESS: Obviously, that is one of the issues that has been reviewed and discussed with our lawyers as to what the opinion of the courts are, and how does one implement an accounting, and to what extent does

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one go back to those discussions, or are ongoing.

Objection 9, cited in Plaintiffs' Motion at 8
DEPOSITION OF STEVEN GRILES at 81-82 (Nov. 19, 2002)

81

A. It is my responsibility on a day-to-day basis to assure that the activities associated with the trust reform and the accounting to be done -- and manage that, yes.
Q. Did you discuss anyone else serving that role besides you?
A. We discussed other opportunities within the Department, who could potentially be a senior executive that could accomplish that.
Q. And who were the other people that were discussed?
A. I think we discussed most of the senior management at Interior, Mr. Cason, Mr. Slonaker, Mr. McCaleb, or the logical ones we discussed.
Q. And what did you discuss about the relative skills and advantages and disadvantages of Mr. Cason serving that role?
MS. SPOONER: Objection. The question solicits information protected by the deliberative process. I instruct you not to answer, Mr. Griles.
MR. BROWN: The same instruction as to all those people, or should I walk through the list?
MS. SPOONER: Your question is going to be,

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what was your discussion, what was the substance of your discussion about the pros and cons of those people?
MR. BROWN: Yes.
MS. SPOONER: Yes, the objection is the same.

Objection 10, cited in Plaintiffs' Motion at 8
DEPOSITION OF STEVEN GRILES at 82-83 (Nov. 19, 2002)

82

BY MR. BROWN:
Q. What was your opinion as to whether you or Mr. Cason were more qualified to serve in this role?
MS. SPOONER: Objection. I'm sorry, I apologize. You may answer that question.
THE WITNESS: Personally, I think Mr. Cason is much more qualified than I am to do anything.
Mr. Cason and I are a team. Therefore, we work together very closely. The decision the Secretary made was, she thought because I was chief operating officer of the Department I was a presidentially confirmed individual, and there were other presidentially confirmed individuals involved, and I should be the point person, or chief operating officer.
BY MR. BROWN:
Q. In your opinion, why were you? Did you disagree with her?
MS. SPOONER: Objection. I'm instructing you not to answer on the ground that the essence of the information is protected by the deliberative process

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privilege.
BY MR. BROWN:
Q. Was your opinion expressed or not that you agreed with her?
A. I'm sorry.
Q. I'm not asking you for what you said to her. I'm asking if you were in disagreement with her on that conclusion.
MS. SPOONER: What was the conclusion? I'm sorry.
MR. BROWN: That it should be Mr. Griles, because he was a presidentially confirmed individual, et cetera.
MS. SPOONER: And you're asking his opinion?
MR. BROWN: Yes.
THE WITNESS: I thought that was probably the right decision the Secretary made.

Objection 11, cited in Plaintiffs' Motion at 8
DEPOSITION OF STEVEN GRILES at 98 (Nov. 19, 2002)

98

Q. Tell us a little bit about the risk office proposal as you recall it.

A. Well, as I recall, one of my first opportunities in dealing with Mr. Slonaker and some of the agencies in the Department, and I think it came from the risk office, on risk assessment related to some financial management issues, and the memorandum made some comments about risk management unrelated to trust, and the Office of the Chief Financial Officer did not think that that was Mr. Slonaker's role, and I had a discussion between Mr. Slonaker, and he indicated that he -- so I got them together to discuss the nature of the memorandum and to make sure Mr. Slonaker understood what his role was and what the role of the chief financial officer in terms of the financial audit and accounting of the Department was.

Q. Who was the individual you're referring to?

A. At that time, Bob Lamb was the individual who brought the issue to my attention.

Q. So did Bob Lamb think that Mr. Slonaker was overstepping his bounds?

MS. SPOONER: Objection, calls for information that is protected by the deliberative process.

Objection 12, cited in Plaintiffs' Motion at 8
DEPOSITION OF STEVEN GRILES at 99 (Nov. 19, 2002)

BY MR. BROWN:
Q. Was it your understanding at the time that Bob Lamb was complaining about Mr. Slonaker overstepping his bounds?
MS. SPOONER: Objection, for the same reason.
MR. BROWN: You're instructing him not to answer?
MS. SPOONER: Yes, I'm instructing him not to answer.
MR. BROWN: Are we going to stipulate that every time you instruct on a deliberative process objection he's not answering?
MS. SPOONER: Yes.
MR. BROWN: Okay.

Objection 13, cited in Plaintiffs' Motion at 8
DEPOSITION OF ROSS SWIMMER at 140-41 (Nov. 20, 2002)

140

Q. Did the Secretary or anyone else suggest that -- let me ask you this first. The initial proposal for BITAM, who was supposed to head BITAM? Was it an Assistant Secretary position?
A. Yes.
Q. And the Secretary or anyone else, did they discuss who would take that position?
A. Yes.
Q. And who would take that position?
MS. SPOONER: I'm going to object to the extent that you're inquiring into matters that would be protected

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by the deliberative process privilege and instruct you, Mr. Swimmer, not to disclose confidential advice and recommendations on this subject.
THE WITNESS: I will take counsel's advice.
BY MR. HARPER:
Q. So you have no answer, other than things that fall within the definition of advice, or --
MS. SPOONER: Advice and recommendations. Would you like me to consult with him and see if there's anything he can tell you?
MR. HARPER: You can consult.
MS. SPOONER: I would like to be helpful.
(Recess.)
MR. HARPER: Back on the record.
MS. SPOONER: I think he can answer your question without disclosing deliberative material. I understood the question to be, who was to head the organization.
MR. HARPER: Yes.
THE WITNESS: I was.

Objection 14, cited in Plaintiffs' Motion at 8
DEPOSITION OF BERT EDWARDS at 5-7 (Dec. 18, 2002)

5

PROCEEDINGS
MR. GINGOLD: On the record.
MR. PETRIE: I'd like to state two matters for the record. One is that we intend to assert our standing objection, as mentioned at the discovery conference held on October 18th, that we object to this deposition because we have contended, and the Court has not agreed previously about our position about discovery not being permitted pursuant to the APA.
We understand that the Court has previously looked at this differently than us, and at the discovery conference on October 18th this was discussed and we asserted at that time that that would be continue to be a standing objection that we would continue to assert.
That's the first matter. The second matter is that, for two reasons, we will object to questions that inquire of Mr. Edwards' understanding of or what would require him to divulge what the plans will consist of that Interior will submit to the Court on January 6th, to include the deliberations that go into those plans, and forcing Mr. Edwards and Ms. Erwin to be deposed before January the 6th. And the Court ultimately, as we know, last Friday December 13th

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ruled that the depositions would go forward.
Mr. Harper at that hearing on page 11 -- and I have a copy of the transcript if you'd like it. I'm just going to read a portion.
MR. GINGOLD: I trust you.
MR. PETRIE: Okay. Mr. Harper stated at lines 10 through 22 on page 11: "The last thing I would like to mention is that these depositions are critical for our January 6th plan because these individuals know the facts on the ground." The individuals here, as an aside, that he's referring to are Mr. Edwards and Ms. Erwin.
Continuing, he says: "They as the trustee delegate of the United States and the people closest to these issues, they know the facts. They know what the systems look like. They know what documents they have. And it's very difficult for Plaintiffs to know these things. So this is our only avenue for gaining

that information. So it is absolutely critical that we be able to depose these to properly prepare for our plan, so that we are not prejudiced and we are operating with the same level of information as the Defendants are in preparation of these January 6th plans."

Because these plans are still works in

progress and appear to be outside the scope of what Plaintiffs are seeking to ground information as to the status of the various components, the various things that go into Interior's requirement to provide an accounting, we will object to questions that go in that direction. For that reason, because that's outside the scope of what the Plaintiffs have sought this deposition for.

Then secondly, because, as I said earlier, these plans are works in progress, there is a good probability, depending upon the question obviously and how it's phrased, that questions that ask about these plans will necessarily seek information that's protected by the deliberative process privilege.

I just wanted to state that for the record.

Objection 15, cited in Plaintiffs' Motion at 8
DEPOSITION OF BERT EDWARDS at 31-33 (Dec. 18, 2002)

31

Q. But with regard to the decision and the preparation of this information, was that as you understand it in your capacity as a manager of the trust?

A. I'm the Executive Director of the Office of Historical Trust Accounting. I made the decision that the statements, historical statements of account, were ready for mailing. That was concurred in by the Special Trustee and by others on my staff.

Q. Did you make that in the context of a fiduciary in the administration and management of the trust?

A. I did it as a manager and sought the concurrence of the Special Trustee.

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Q. What did the Special Trustee advise you?

MR. PETRIE: Again, if the information sought requires you to divulge the recommendation or the advice of the Special Trustee for you being able to make that decision, do not disclose that. That's protected under the deliberative process privilege.

MR. GINGOLD: Mr. Kieffer, we're dealing with a matter -- Ms. Spooner has represented to the Court that the matters with regard to the management and administration of the trust and litigation have been so fully integrated that at least she was unable to distinguish them, which allowed her to make the assertion of the privilege and work product doctrine claims.

The witness today has stated that he was making these decisions in his capacity as a manager. That is, he has distinguished his role in that regard from the litigation issues that would otherwise be entitled to privilege claims.

The Court of Appeals has explicitly stated that the Secretary may not don the mantle of an administrator to be able to either withhold information or act outside the scope of a fiduciary responsibility when her primary responsibility, other than the litigation issues now, is as a fiduciary.

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So these issues are traditionally and this information is traditionally required to be disclosed

to trust beneficiaries independent of litigation, and the witness has just stated he was doing this as a manager, not as a litigator.

MR. KIEFFER: I don't think it is the attorney-client privilege that Mr. Petrie was talking about. I think he's talking about the deliberative process privilege here. But right now Mr. Edwards has not refused to answer anything. What he's cautioning him on is if, as he said, if there was a deliberative process or a recommendation or advice given to him on which he made a final decision or someone made a final decision, in Mr. Petrie's view that would fall under apparently the deliberative process privilege. But we haven't reached that point yet.

Objection 16, not cited in Plaintiffs' Motion
DEPOSITION OF BERT EDWARDS at 134 (Dec. 18, 2002)

134

Q. Was there any discussion in this group meeting where this report, this July 2nd, 2002, report, was either agreed upon or determined, to limit the scope of the accounting to funds collected by the Department of Interior?

MR. PETRIE: Objection in two respects. First, I don't think he's testified that it occurred in a single meeting. I think he's described it as a process over time.

Second, in responding please do not divulge any recommendations or advice that were provided in response to his question.

THE WITNESS: I think the report stands for itself. We were asked by Congress to give a report and that's what we did.

Objection 17, not cited in Plaintiffs' Motion
DEPOSITION OF BERT EDWARDS at 134-36 (Dec. 18, 2002)

134

BY MR. GINGOLD:
Q. That's fine. Was there any discussion about limiting the accounting during the course of this series of meetings that Mr. Petrie just

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described?
A. There were a number of adaptive strategies suggested and this is what we ended up with.
Q. Please detail what adaptive strategies you're referring to?
MR. PETRIE: Again, the caution is that if in describing what any of those strategies were, if it was in the form of a recommendation or advice about how to compile that report then it's going to be protected under the deliberative process privilege.
THE WITNESS: I think they all were. They all were under that definition.
BY MR. GINGOLD:
Q. Within --
A. The definition that Mr. Petrie just mentioned.
MR. KIEFFER: What protection are you claiming, Mr. Petrie?
MR. PETRIE: The deliberative process privilege. In other words, as I understand it -- and Mr. Edwards, please understand; listen to me very carefully -- if to tell Mr. Gingold, in response to his question, what the strategies were that were considered, the various accounting strategies, if your understanding is is that the discussion about those

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strategies was in the form of recommendations or advice about how to proceed to compile that report, then that's going to be protected under the deliberative process privilege.
Do you understand that?
THE WITNESS: I understand that and my answer is the report stands on itself and everything else is in the deliberative process.

Objection 18, not cited in Plaintiffs' Motion
DEPOSITION OF BERT EDWARDS at 136-38 (Dec. 18, 2002)

136

BY MR. GINGOLD:
Q. But the decision was made at a certain point in time in this report, correct?
A. It was made about July 1.
Q. On July 1?
MR. PETRIE: Let me make just a comment, because I think I understand where you might be headed regarding the deliberative process privilege assertion. The fact that a decision has been made, in this instance the report has been issued, does not somehow change the character of those recommendations and advice that were protected under the deliberative process privilege. They still remain protected even after the decision has been made.
MR. GINGOLD: To the extent they're advice, correct?
MR. PETRIE: That's correct.

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MR. GINGOLD: At least pending a decision by the Court.
MR. PETRIE: That's correct, too.
BY MR. GINGOLD:
Q. What about instructions? Did you receive instructions? Were instructions given during this process in any way to limit the scope of the accounting?
MR. PETRIE: Do you understand the distinction between instructions and advice versus recommendations?
THE WITNESS: Instructions from higher ups or colleagues or lower downs?
BY MR. GINGOLD:
Q. Well, I believe you indicated this was a process with a series of meetings with a group of people, and you identified, some of which have been in many of the meetings. You didn't say they were in all of them. During the course of these various meetings which resulted in the July 2nd, 2002, report, were there any instructions that were given to limit the scope of the accounting?

A. I'm still -- instructions by whom and to whom?
Q. Instructions by -- we'll go through the

list. Were there instructions by the Secretary to limit the scope of the accounting?
A. If you're going to go through the whole list --
Q. Yes, I am.
A. -- the answer is there were no specific instructions. We kicked around a lot of ideas in the deliberative process and, as I said earlier, the report stands on its own.
MR. KIEFFER: Wait a minute. You did say that a decision was made to use the worst case scenario, so someone had the instruct you to do that.
THE WITNESS: Well, the --
MR. KIEFFER: That's on the record, Mr. Petrie.
MR. PETRIE: I don't disagree, Mr. Kieffer. The point, though, is that the decision to use a worst case scenario is something that came out of that deliberative process.
MR. KIEFFER: Fine. Then what I'm saying is, was that a decision that Mr. Edwards made or was he instructed to take that course? That's the question that Mr. Gingold is asking.
THE WITNESS: I would say it was a joint conclusion of everybody who was involved.

Objection 19, not cited in Plaintiffs' Motion
DEPOSITION OF JAMES PAULI at 68-74 (Dec. 19, 2002) (Day 1)

68

Q The Department has developed a list of standards?
A That's correct.
Q Are those published anywhere?
A No.
Q And what are those standards?
MR. KRESSE: Objection. Those are privileged. There is no final standard.
SPECIAL MASTER KIEFFER: If the Department has developed a set of standards, it does not have anything to do with the deliberative process privilege because he is not recommending anything to the Department.
MR. KRESSE: Well, as the attorney for the United States, I can tell you that to the extent that there is a list of standards that is being, as Mr. Pauli testified, that is being used in the process of developing the strategic plan, it is not a final list of

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standards and, therefore, it is subject to deliberative process privilege. To the extent that there is a final list of standards provided, it will be provided either as some kind of public document or it will be provided with the court's plan. But there is no -- other than standards that have already been identified by the Department of Interior, in other words, the manuals that are already published, as he said, the Babbitt memo, other standards that may already be out there in the public. To the extent that there are -- the Department is not -- what Mr. Pauli is not at liberty to disclose is what standards the Department is considering that may or may not be applicable to the trust responsibilities that are at issue in this case. That's what can't be disclosed.
The fact that there are standards out there that have already been used, obviously that's public information. But the list itself -- the list itself is under development, it is not a final list, and it is subject to privilege.
SPECIAL MASTER KIEFFER: What privilege?

MR. KRESSE: The deliberative process privilege.

SPECIAL MASTER KIEFFER: Between whom? Who is deliberating over those privileges?

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MR. KRESSE: The Department of Interior is deliberating over what is the list of standards or whether there is a list of standards that would be subject to publication or come to a final decision as to what those standards are.

MR. HARPER: Mr. Kieffer, may I be heard on this point?

SPECIAL MASTER KIEFFER: Yes, you may.

MR. HARPER: The deliberative process privilege, to the extent it applies at all in this case, is limited to the context of the Department deliberating predecisionally about a specific matter that they will then make a final decision on. It is not -- it is not intended to be a cloak that prevents from disclosure every document within the Department's control and everything that they are developing. The broad use of it here is essentially making it impossible for us to find out any information regarding the current status of these projects.

SPECIAL MASTER KIEFFER: Let me just ask Mr. Pauli a question so I can understand better the context in which this argument is taking place here. Mr. Pauli, has the government given you a standard on which EDS is to proceed on doing its job?

THE WITNESS: No, no. The standards -- well,

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the trust principles in the Babbitt memo are the high-level guidance for fiduciary responsibility that we had been provided. So that's at an one level. At the standards level that we are talking about here, what I perceive we are talking about, no, we have not been given, nor is it part of our duty to take a standards list and say, Did you meet those standards as part of the As-Is analysis.

I guess I should add that as part of the documentation for the As-Is, when we go to each of the regions, we are documenting what are the standards under which they believe they are operating, what the laws

are, what's the control mechanism, what's the Tribal policies. So as part of the As-Is documentation, when you -- you know, we went to each of the -- we worked with groups from all of the regions. Those regions would say, This is for appraisal; these are all the things that we are -- that are guiding us in doing our appraisal work.

SPECIAL MASTER KIEFFER: So those are standards that are set that they are using?

THE WITNESS: That's right.

SPECIAL MASTER KIEFFER: It is not something that they are developing? All right. Then, therefore, there is no deliberative process over those standards.

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THE WITNESS: To those standards. I agree with you 100 percent. But as to the standards -- there is another set of standards list. In other words, essentially, there's two sets of standards. One that we went out and documented that's part of the As-Is, that piece of work. The other piece of work we have is to advise the Department on the plan that they are building. Strategic plan, its --

SPECIAL MASTER KIEFFER: Which plan is this now? Is it the strategic plan that's long before the court spoke of a plan that they are building, or is it the court's plan or have they been joined now into one plan?

MR. KRESSE: Can I just state an objection to form, but go ahead and answer the question.

THE WITNESS: I think they have all been joined into one effort all geared towards the plan that they are going to file with the court.

SPECIAL MASTER KIEFFER: All right.

MR. KRESSE: Do you understand now what I am saying? I am saying he can talk about the standards that he has found in the field. He can talk about any standard that he is aware of. I am concerned about the list because it is a list that's under debate. And that is the deliberation that is underway. You know, how

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many standards do we have? Do we have 6,000 standards? Do we have a 100? Do we have 12 that's under debate that's being deliberated? He can talk about standards

that he is aware of. That's fine, okay.
BY MR. HARPER:
Q These standards that are being deliberated by the Department -- Mr. Kieffer, are you done?
SPECIAL MASTER KIEFFER: No. I had one more question on that because I am not sure that Mr. Kresse is talking about the list of standards that Mr. Pauli is talking about. There may be a list of standards that is being developed in answer to the Court's request for whatever those standards are.
MR. KRESSE: That's what I am talking about.
THE WITNESS: It is the same list.
SPECIAL MASTER KIEFFER: So you are aware of that list.
THE WITNESS: I am aware of that list.
SPECIAL MASTER KIEFFER: But is that airing into what you are presently doing on any of your projects?
THE WITNESS: No, not on the As-Is. Only to the extent that the Department has asked our advice in looking at their plan that we have been able to see here is a list of standards that they think that they should

meet.
SPECIAL MASTER KIEFFER: All right. On the latter portion, which he just talked to, those standards are being developed and this consultant is being asked to recommend things about those standards, I would think that would be under the deliberative process privilege. Anything to do with standards that they are working on in finding what the standards are to any part of the As-Is process are standards being used are not being developed so, therefore, they are not covered by the deliberative process.
MR. KRESSE: I agree.
MR. HARPER: No, we are not. First, I would just say that's subject to whatever ruling the Court makes on whether there is any deliberative process at all or maybe, to a limited degree, there are also times when the deliberative process even where it might be applicable gives way because of the necessity to have the information.
SPECIAL MASTER KIEFFER: I understand with those caveats, the Court has not ruled on that yet. And

you don't have a situation -- the latter situation yet before you. But continue your questioning.

BY MR. HARPER:

Q So just for clarification, let's call these

two different standards. Let's call the first one the As-Is standards -- things that do not fall within any objection to the deliberative process privilege. And let's call the other a strategic plan standards. Is that fair to clarify?

A Yes.

Q On the strategic's plan standards, are there any of those standards that you used that you utilized for purposes of recommendations regarding As-Is modeling?

A I have not compared the two lists to see what standards are on what list versus what standards are on other lists. To the extent the standards that the Department has are on the As-Is list, they may come under recommendation.

Reference 1, not cited in Plaintiffs' Motion
DEPOSITION OF JAMES PAULI at 146 (Dec. 19, 2002) (Day 1)

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MR. HARPER: We can stop there for today.
SPECIAL MASTER KIEFFER: Okay. Let me just put one thing on the record. Mr. Kresse, did you have something you wanted to say?
MR. KRESSE: No.
SPECIAL MASTER KIEFFER: Tomorrow I am going to be regulating, overseeing, or call it what you want, the Irwin deposition. **I think that you have gotten into**

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a pattern here where you understand or at least I think the deliberative process privilege applies to Mr. Pauli's and EDS' questioning here. It seems to be running smoothly [emphasis added]. If, per chance, you get into a debate over something that you want my assistance, you know where I am. And you can call me and I probably could come up or at least try to handle it on the phone tomorrow. Before any deposition is terminated because of the dispute, I would want to know about it, okay.
MR. KRESSE: Fair enough.
MR. HARPER: Just one clarification on that just for the record. Again, just that when you say the deliberative process privilege, it applies without any prejudice as to the decision before the Court on that issue.
SPECIAL MASTER KIEFFER: That's correct or any other exceptions that might come up. But at least so far, I think you understand -- you both understand what I will say about that. But obviously, if there is a chance that something else is going to come up, then I want you to know that if that does come up, I am available to try to resolve it.
(At 3:09 p.m., the deposition was adjourned.)

Reference 2, not cited in Plaintiffs' Motion
DEPOSITION OF AURENE MARTIN at 14 (Dec. 13, 2002)
(before Special Master Balaran)

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Q. Do you understand the contours of deliberative process privilege?
A. Yes.
Q. Okay. So I will ask you again, just given the fact that you have a foundation laid that you understand these privileges. In your view, did these privileges apply in any way to the conversations you may have had with the Assistant Secretary, Neal McCaleb?
A. No. I don't believe that they did apply.
Q. Okay. Do you represent or have you represented when you were counselor to the Assistant Secretary, did you represent Mr. McCaleb in any legal proceedings?
A. No, I did not.
Q. Did you give him legal advice of any sort, meaning outside of the policies here?
A. No, I did not advise him and -- in a way that could be construed as attorney-client, I don't believe.

Reference 3, not cited in Plaintiffs' Motion
DEPOSITION OF AURENE MARTIN at 33-36 (Dec. 13, 2002)
(before Special Master Balaran)

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Q. And are these notes that you took contemporaneously with the events of October 10th, 2002?
A. October 15th, 16th, and 17th I believe are the dates.

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Q. May I see those notes.
MS. KESSLER: Do they include conversations with the Solicitor's Office, Department of Justice?
THE WITNESS: I believe that some of those notes include discussions with the Solicitor's Office.
MR. BALARAN: All right. Let's go off the record.
(Discussion off the record.)
MR. BALARAN: Just to state what it is we are going to do: I believe you indicated, Ms. Martin, that some of the personal notes that you have taken may contain privileged information. What we are going to do is give you the opportunity to make a copy of those and give you the opportunity to sanitize whatever you believe may contain privileged information, and then we will distribute a copy.
I am also going to make copies of your calendars. Do you have any reason to believe that either your calendar or Mr. McCaleb's calendar that you've just turned over to me contain confidential or attorney-client privilege information?
THE WITNESS: I don't believe so, but I would like to look at the calendars to make sure.
MR. BALARAN: Okay. So why don't -- we are going to go off the record. I'm going to allow you to do

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both. And, in either event, we are going to send the Department of Justice over to make a copy.
MS. KESSLER: And to clarify, sanitizing means redacting.
MR. BALARAN: Yes, sanitizing means redacting. But you will keep a complete copy for your own records.
MR. GINGOLD: And to the extent privilege claims

or work product document claims are asserted, they would be asserted with specificity.

MR. BALARAN: Right. I mean, what we are going to do is, at least to get through the deposition, we are going to allow you the opportunity to construe this as you see fit, and we can take up whatever is necessary in-camera with the court or through any other procedure. Okay? So why don't you go ahead and do what it is you have to do.

(Recess taken.)

MR. BALARAN: Let's go back on the record.

BY MR. BALARAN:

Q. We have resolved all the issues concerning any potential conflict in your personal notes, Ms. Martin, as well as your calendar and Mr. McCaleb's calendar. And I believe counsel has all decided there is no information contained in either of these documents or the three of these documents that may implicate the attorney-client work

product or deliberative process privileges. Is that correct?

A. Yes.

(Deposition Exhibit Number 3 was marked for identification.)

Reference 4, not cited in Plaintiffs' Motion
DEPOSITION OF AURENE MARTIN at 49-50 (Dec. 13, 2002)
(before Special Master Balaran)

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Q. And we have -- counsel for Department of Justice and the Office of the Solicitor and Manatt, Phelps have had the opportunity to review this document for any privilege issues. And it is my understanding -- and counsel can chime in if I'm wrong -- that neither the attorney-client work product or deliberative process privileges are applicable. Is that your understanding?

A. Yes.

Q. Okay. Let me make a copy of that, if I may.

Before we go ahead and actually review that copy, did there come a -- I notice on the page 2 of this declaration -- well, strike that.

Did the changes that Mr. McCaleb made to this document, this affidavit which is Exhibit Number 4, did they ever become memorialized in a hard copy, in a typed copy?

A. I don't believe so.

Q. Why was that? Do you know?

A. I don't recall specifically. I think that he may have taken this matter up with his own counsel.

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Q. Can you tell me pursuant to what authority you can draft affidavits for senior members of the Department of Interior?

A. I don't know that I have specific authority to do so. I believe that I assumed, because I am a lawyer, that an affidavit should be prepared.