

January 31, 2007

**VIA EMAIL**

(hard copy to follow)

Kirsten Winters  
Cleveland National Forest  
10845 Rancho Bernardo Rd #200  
San Diego, CA 92127

**RE: ACCESS FUND COMMENTS ON SEASONAL RAPTOR  
CLOSURES IN CLEVELAND NATIONAL FOREST**

Dear Ms. Winters:

Thank you for taking the time to speak and meet with Dave Kennedy, President of the San Diego Alliance of Climbers and prominent guide book author, over the past year regarding climbing related issues in the Cleveland National Forest (CNF). Dave expressed to me his appreciation of your receptivity to the climbing community's concerns and the level of professionalism exhibited during the meetings. As you are aware, climbing in the San Diego area, particularly the resources in the Cleveland National Forest, is a unique and valuable experience, and we are committed to working cooperatively with the CNF to address all your concerns regarding rock climbing.

It is particularly appropriate that the Access Fund work closely with the USDA Forest Service (USFS) on any management decisions concerning rock climbing given the memorandum of understanding (MOU) that the Access Fund has with the USFS relating to any climbing management initiatives within the National Forest System.<sup>1</sup> This letter serves to provide Access Fund comments to the CNF's scoping letters dated December 11, 2006 which propose seasonal area closures at Rock Mountain, Eagle Peak<sup>2</sup>, and Corte Madera Mountain<sup>3</sup> to protect "Golden Eagles and Prairie Falcons as well as other cliff-nesting species." It is the Access Fund's understanding that the key raptor nesting areas at El Cajon Mountain are not on CNF land and that there are no proposed closures to recreational activity at El Cajon Mountain on CNF land. If this is not correct, the analysis in this letter then equally applies to any proposed closure at El Cajon Mountain.

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<sup>1</sup> See <http://accessfund.org/pdf/AF-03-MOU-USFS.pdf>

<sup>2</sup> <http://www.fs.fed.us/r5/cleveland/projects/projects/seasonal-closures/palomar.pdf>

<sup>3</sup> <http://www.fs.fed.us/r5/cleveland/projects/projects/seasonal-closures/descanso.pdf>

The Access Fund understands the CNF's obligation to balance many different interests, needs, and uses to meet the mission of the USDA Forest Service "to sustain the health, diversity, and productivity of the Nation's forests and grasslands to meet the needs of present and future generations."<sup>4</sup> We are very concerned, however, that the CNF intends to seasonally close up to one and a half mile of cliff to climbing to protect Prairie Falcons and Golden Eagles when there is no indication that other mitigation efforts such as education, perimeter control, or signage have been used and evaluated for effectiveness. In addition, the CNF makes no mention of the outstanding recreational values provided in the Rock Mountain, Eagle Peak, and Corte Madera Mountain region.

Second, the CNF does not indicate which raptor species are present in the proposed area closures, whether raptor nests are present, or if consistent monitoring of fledging success has been performed and recorded. In short, CNF has not developed or demonstrated benchmark measures of success or a consistent standard of scientific data to justify any climbing closure to protect cliff-nesting birds. Accordingly, the actual presence and protection of Prairie Falcons and Golden Eagles for which the CNF is seeking comments is unsubstantial and speculative, at best. Therefore, the Access Fund requests more detail in the legal reasoning, scientific data, and actual historical presence and location of the raptors upon which each proposed closure is based, as well as a clearly articulated monitoring plan.

Finally, the Access Fund finds it problematic that the CNF invokes the MBTA and Cleveland National Forest Management Plan as the legal authority for the closure of public lands for a raptor population that is not a federally<sup>5</sup> or California<sup>6</sup> listed as an Endangered or Threatened Species and thus has no special U.S. Forest Service protection or status.<sup>7</sup> In fact, according to the Peregrine Fund,<sup>8</sup> the Prairie Falcon is categorized as a species of "Least Concern" by BirdLife International. The proposed seasonal closures for the Prairie Falcon are particularly troublesome considering the CNF statement that the "San Diego County (Prairie Falcon) population appears to be stable (Unitt 2004)" A mandatory closure based on the MBTA would initiate an unprecedented invocation of authority to effect a closure of public lands. The Access Fund therefore cautions the CNF against mandatory closures that restrict recreational climbing to ensure the nesting of a non-threatened or endangered species with neither a tenable legal basis nor supporting scientific data.

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<sup>4</sup> USDA Forest Service Strategic Plan for Fiscal Years 2004-08, <http://www.fs.fed.us/publications/strategic/fs-sp-fy04-08.pdf>, November 2004, pg. 3

<sup>5</sup> See [http://ecos.fws.gov/tess\\_public/SpeciesReport.do?dsource=animals](http://ecos.fws.gov/tess_public/SpeciesReport.do?dsource=animals)

<sup>6</sup> See <http://www.dfg.ca.gov/whdab/pdfs/TEAnimals.pdf> and [http://www.dfg.ca.gov/hcpb/species/t\\_e\\_spp/tebird/tebirda.shtml](http://www.dfg.ca.gov/hcpb/species/t_e_spp/tebird/tebirda.shtml)

<sup>7</sup> <http://www.fs.fed.us/r5/projects/sensitive-species/sensitive-animals.pdf>

<sup>8</sup> <http://www.globalraptors.org/grin/SpeciesResults.asp?specID=8242>

## **The Access Fund**

The Access Fund is the only national advocacy organization whose mission keeps climbing areas open and conserves the climbing environment. A 501(c)3 non-profit supporting and representing over 1.6 million climbers nationwide in all forms of climbing—rock climbing, ice climbing, mountaineering, and bouldering—the Access Fund is the largest US climbing organization with over 15,000 members and affiliates.

The Access Fund promotes the responsible use and sound management of climbing resources by working in cooperation with climbers, other recreational users, public land managers and private land owners. We encourage an ethic of personal responsibility, self-regulation, strong conservation values and minimum impact practices among climbers.

Working towards a future in which climbing and access to climbing resources are viewed as legitimate, valued, and positive uses of the land the Access Fund advocates to federal, state and local legislators concerning public lands legislation; works closely with federal and state land managers and other interest groups in planning and implementing public lands management and policy; provides funding for conservation and resource management projects; develops, produces and distributes climber education materials and programs; and assists in the acquisition and management of climbing resources. For more information about the Access Fund, visit [www.accessfund.org](http://www.accessfund.org).

## **Climbing in Cleveland National Forest**

“Dramatic cliffs with soaring multi-pitch climbs, steep, featured boulderfields . . . the best climate in the world. Where can I find such a place, you ask? San Diego” starts off the Second Edition of *San Diego County Climbing Guide* by Dave Kennedy and Chris Hubbard. As you are probably aware, climbers from around the world travel to the San Diego area to test their skills on the historic rock that defines the Southern California climbing. Due to its wide range of climbing difficulty, type of climbing (traditional, sport, and bouldering), excellence of rock, multiple aspects of rock, and proximity to San Diego, Corte Madera, Rock Mountain, and Eagle Peak are important resources for climbers throughout the year.

Corte Madera has drawn climbers for over 30 years and is home to over one hundred one to four pitch routes on its orange and white granite. While smaller crags with easy access are becoming more heavily used, Corte Madera remains a destination for the committed climber.

A tough 4-wheel drive road, a long hike, ticks, rattlesnakes, summer heat, dense brush, combine to challenge even the most enthusiastic climber. According to local climbers, from near the summit, one can look southeast 50 miles over largely uninhabited land to see the domes of Canon Tajo, and to the north, Cuyamaca and Stonewall Peaks seem just a stone's throw away. The lure of Corte Madera is a dramatic, remote, setting and a beautiful steep

cliff. Corte Madera is home to many of San Diego's finest climbs. For those who make the trek, winter is the time of year to soak up the sunshine and some of the best climbing in the region. Of particular note is the South Buttress, a 5-pitch classic first climbed by local climbing legend Rick Piggot, solo, in snow flurries. The undulating cracks create a natural route directly up the prominent nose between the east and south faces. These unique characteristics and histories are important aspects of the Corte Madera climbing experience.

Rock Mountain and Eagle Peak are less popular, but equally important climbing resources to the San Diego Community. Speaking with a local climber, Eagle Peak has seen consistent and regular climbing activity for the past four years. Though not on the "radar" of the general climbing public, from what I have heard this area is now host to many excellent routes and shares the same remoteness and beauty as is sought after by those climbers who visit Corte Madera. It is important that the CNF strive to manage for the fact that, in addition to being home to raptors, these areas provides a truly unique and important climbing experience.

## **I. THE UNITED STATES FOREST SERVICE CURRENTLY LACKS A LEGAL AND SCIENTIFIC BASIS FOR CLOSING THE CNF TO RECREATIONAL ROCKCLIMBING IN ORDER TO PROTECT PRAIRIE FALCONS**

### **A. Public Land Closures**

The closure of public land by federal land management agencies is an extreme measure, and should only be initiated through clear legal authority and documented scientific need. The Access Fund is very concerned that the CNF's proposed closures of Rock Mountain, Eagle Peak, and Corte Madera Mountain to protect Prairie Falcons have neither a tenable legal basis, nor scientific data to justify the closure to recreational climbing. In fact, the CNF has not even identified the presence of a nest, active or otherwise, or demonstrated a pattern of use by the Prairie Falcon population in any of the proposed CNF Prairie Falcon closure areas.

In your scoping letters, the CNF indicates two possible legal authorities to base its proposed Prairie Falcon closures: (1) the Migratory Bird Treaty Act; and (2) the Cleveland National Forest Land Management Plan. However, despite citing these "authorities" the CNF provides virtually no data or other documentation (besides a very vague mention of "closing areas in vicinity of recently used and alternate nest sites") that demonstrate an ecological rationale for closing public lands to provide for speculative nesting habitat for migrant Prairie Falcons. When decisions are based on speculation and opinion—and not the best scientific data available—time and money are potentially wasted, because courses of action are followed on the basis of belief instead of science. This in turn jeopardizes the recovery of many species because it undermines public support for genuine conservation efforts. Conservation efforts should be focused on real, demonstrable threats rather than hypothetical threats or the desired

outcomes of individuals. Otherwise, land managers will consistently squander scarce financial and human resources, unfairly deny access to public lands, and fail to conserve threatened and endangered species. These points are explored in more detail below.

## **B. The Migratory Bird Treaty Act and the Prairie Falcon**

The Migratory Bird Treaty Act (MBTA) is a criminal environmental statute that concerns commerce, not recreation, and applies primarily to populations of raptors not individual bird habitat.<sup>9</sup> Signed in 1918 by Great Britain (on behalf of Canada) and the United States, the MBTA prohibited the killing of non-game migratory birds. This treaty represented decades of effort by conservationists attempting to stop the slaughter of native birds for sale in meat markets and the millinery trade. A patchwork of state laws, bolstered by the Lacey Act of 1900 and the Weeks-McLean Law of 1913, had not been entirely successful in stopping the sale of protected wildlife, especially birds, in the United States. The framers of the MBTA were determined to put an end to the commercial trade in birds and their feathers that, by the early years of the 20th century, had wreaked havoc on the populations of many native bird species.

The MBTA had historically been unclear on its applicability to federal activities.<sup>10</sup> In response to differing interpretation, the Director of the U.S. Fish and Wildlife Service issued Director's Order 131, and President Clinton signed Executive Order 13186, both which outline the responsibilities of federal agencies to protect migratory birds.<sup>11</sup> Executive Order 13186 does not change the provisions of the MBTA or the regulations issued under the MBTA as a statute can be changed only by the Congress. Executive Order 13186 merely interprets the MBTA making it clear that the Federal government must take into account the effects of its activities on migratory birds and specifies a number of affirmative actions agencies must take. For purposes of this analysis, Executive Order 13186 helps clarify the parameters to which Federal agency activity falls under the MBTA.

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<sup>9</sup> A Guide to the Laws and Treaties of the United States for Protecting Migratory Birds  
<http://www.fws.gov/migratorybirds/intrnltr/treatlaw.html>

<sup>10</sup> In 1992, the Supreme Court assumed without discussion that Section 2 of the MBTA applied to Forest Service and Bureau of Land Management logging planning decisions for lands inhabited by a bird protected by the MBTA. In 1997, however, two circuit-court decisions, both involving Forest Service timber sales, held that the MBTA does *not* apply to federal agencies. Each circuit—the Eighth Circuit in *Newton County Wildlife Ass'n v. U.S. Forest Service*, 113 F.3d 110 (8th Cir. 1997) and the Eleventh Circuit in *Sierra Club v. Martin*, 110 F.3d 1551 (11th Cir. 1997)—drew support for this conclusion from the MBTA's Section 6 criminal penalties language that mentions “any person, association, partnership, or corporation,” terms that these courts concluded did not include the United States. Considering the MBTA as a whole, they found no violation of the MBTA by the federal agencies, which apparently means they concluded that Section 2 (articulating what is unlawful behavior) also did not apply as a matter of law.

<sup>11</sup> <http://ceq.eh.doe.gov/nepa/regs/eos/eo13186.html>

Executive Order 13186 states:

Each Federal agency taking actions that have, or are likely to have, a measurable negative effect on migratory bird populations is directed to develop and implement, within 2 years, a Memorandum of Understanding (MOU) with the Fish and Wildlife Service (FWS) that shall promote the conservation of migratory bird populations.

According to the language of both MBTA and Executive Order 13186, for a Federal agency action to be covered by the MBTA it must have a “measurable negative effect on migratory bird populations.” Section 2 (16 U.S.C. §703) of the MBTA sets out the types of prohibited conduct and states: “[u]nless and except as permitted by regulations ... , it shall be unlawful at any time, by any means, or in any manner, to pursue, hunt, take, capture, kill, attempt to do these acts, [or] possess ... any migratory bird, [or] any part, nest, or eggs of any such bird ....” The MBTA’s definition of “take” does not include “harm” or “harass,” as does the Endangered Species Act (“ESA”). “Harm” as used in the ESA encompasses significant habitat destruction, therefore the application of the MBTA to habitat destruction or other indirect “take” prohibitions is unclear and thus inappropriate as authority for managing recreation on public lands. Note also that Federal courts have ruled that otherwise legal activities that result in bird deaths are not actionable under the MBTA. Specifically, habitat modification or degradation resulting from the sale of timber does not violate the MBTA.<sup>12</sup>

To this point, the MBTA also lacks the express recognition of “incidental take” that Section 10 and (by implication) Section 7 of the ESA contain, and there has been some confusion between “unintentional” takes relevant to possible convictions under Section 6 of the MBTA, and “incidental” takes, where a deliberate action taken for a particular purpose also results in a taking or killing. Section 2 of the Executive Order defines “take” as defined in 50 C.F.R. 10.12,40 and as including both “intentional” and “unintentional” take. It defines “intentional take” as a take that is the purpose of the activity in question, and “unintentional take” as take that results from, but is not the purpose of, the activity in question (arguably confusing unintentional and incidental takes). Executive Order 13186’s definition of “take” is not dispositive for purposes of determining the meaning of “take” as used in the MBTA, but it is instructive.

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<sup>12</sup> See *Seattle Audubon Society v. Evans*, 952 F.2d 297 (9th Cir. 1991) (interpreting “taking” of migratory bird to exclude habitat destruction). In rejecting this claim, the court held that previous cases only addressed *direct*, though unintended, bird deaths. They do not suggest, the Ninth Circuit said, that habitat destruction, leading *indirectly* to bird deaths, is a “taking” under the MBTA. The court bolstered this conclusion by juxtaposing the MBTA, which does not include “harm,” with the ESA, which does. In revealing contrast, noted the court, neither the MBTA nor its regulations makes any mention of habitat modification. Rather, MBTA regulations describe, in the words of the court, “physical conduct of the sort engaged in by hunters and poachers, conduct which was undoubtedly a concern at the time of the statute’s enactment in 1918.”

Under Director's Order 131, Federal agencies will have to obtain permits for the same activities for which permits are issued to researchers and others. In other words, they will need banding permits, taxidermy permits, scientific collecting permits, and depredation permits. FWS regulations do not provide for permits for any other type of activity. So, for instance, there continues to be no MBTA permit for timber sales, grazing leases, mining activities, the application of pesticides and herbicides, licensing of communications towers, channelization of rivers, draining of wetlands, or other such activities conducted by the federal government (or state governments or private individuals, for that matter).

These distinctions are important to recreational activities where such activity does not directly either kill protected birds or destroy habitat, and where such killing or destruction is not the purpose of the activity. From the above analysis, it is clear that the MBTA is not legal authority for Federal agency actions designed to protect Prairie Falcon habitat, but rather the MBTA applies to conducts or actions by the USFS or individuals that intentionally “pursue, hunt, take, capture, kill” the Prairie Falcon.

In sum, the following factors indicate that the MBTA does not serve as legal authority to close public lands by the USFS to protect Prairie Falcon nesting habitat:

- » The action the CNF is putting forth under authority of the MBTA is a mandatory closure of public lands. The MBTA provides guidance for categorical actions by a federal agency that have a measurable negative effect on populations, not authority to prohibit otherwise lawful activities that do not intentionally take individual raptors.
- » Even if the MBTA served as authority for habitat protection, the CNF has not provided any of the scientific data indicated as necessary by the FWS, such as population size and trend, geographical distribution, annual breeding effort, the condition of their breeding and wintering habitats, to make responsible management decisions under the MBTA.
- » There exists absolutely no precedent for the proposition that the MBTA-mandated habitat protection can be used as authority to close public lands in order to encourage the unsubstantiated nesting of migrant species.

Accordingly, without a demonstration that (1) the MBTA provides for the closure of public lands to protect the nesting habitat of individual raptors; (2) that CNF has documented history on the fledging success and failure, as well as the presence and use of alternative nests of the Prairie Falcon, and (3) other federal land managers have utilized the MBTA as authority to close public lands, then the MBTA is inapplicable as authority for the CNF’s proposed closure based on the presence of Prairie Falcons.

### C. Cleveland National Forest Management Plan and Prairie Falcon

In April 2006, the USDA Pacific Southwest Region issued a Record of Decision (ROD) for the Cleveland National Forest Land Management Plan. The selected Alternate 4a focuses on “active management for the maintenance of healthy forests . . . managed, sustainable recreation settings and uses; and the management of threatened and endangered species.”<sup>13</sup> The ROD goes on to further state, “[m]anaged sustainable use of the national forests is compatible with the maintenance of long-term biological diversity and ecological integrity.”<sup>14</sup> In the scoping letters, the CNF cites to the Cleveland National Forest Land Management Plan (USDA Forest Service 2005) Part 3, standard 18 as legal authority to implement the proposed Prairie Falcon closures. Standard 18 relates to the heading “Fish and Wildlife Standards,” with a subheading, “When Implementing All Activities.”<sup>15</sup> Standard 18 relates to proposed USFS activities, not existing recreational activities. Therefore, the appropriate standard to serve as legal authority is Standard 34 under “When Implementing Recreation Activities.”

Standard 34 states:

Where a threatened, endangered, proposed, candidate, or sensitive species occurs in a recreation site or area, take steps to avoid or minimize negative impacts to the threatened, endangered, proposed, candidate or sensitive species and its habitat. Use the least restrictive action that will effectively mitigate adverse impacts to the species and habitat (refer to Appendix D).<sup>16</sup>

Please note that Standard 34 applies only where a “threatened, endangered, proposed, candidate, or sensitive species” occurs in a proposed recreation area. Although the Prairie Falcon’s status designated by the state of California is a “species of special concern,”<sup>17</sup> its federal status fits none of these classifications.<sup>18</sup>

Appendix D describes when these guidelines apply to all existing and new recreation sites and uses whenever a conflict between uses or sensitive resources is detected. According to Appendix D, sensitive resources include threatened, endangered, proposed, candidate, and sensitive species and habitats. Under Appendix D, management actions are to be implemented in the order of: education; perimeter control; management presence; redirection of use, unless analysis of the conflict clearly indicates that a stronger measure is immediately necessary.

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<sup>13</sup> ROD, page 13.

<sup>14</sup> Id.

<sup>15</sup> Part 3: Design Criteria for Southern California National Forests, September 2005, page 7.

<sup>16</sup> Id. at 8.

<sup>17</sup> California Department of Fish and Game, Habitat Conservation Planning Branch, <http://www.dfg.ca.gov/hcpb/species/ssc/sscbird/sscbird.shtml>

<sup>18</sup> For a list of Forest Service Pacific Southwest Region Sensitive Animal Species (<http://www.fs.fed.us/r5/projects/sensitive-species/sensitive-animals.html>); updated ([http://www.fs.fed.us/biology/resources/pubs/tes/fs\\_ss\\_310ct05.pdf](http://www.fs.fed.us/biology/resources/pubs/tes/fs_ss_310ct05.pdf))



According to the Cleveland National Forest Land Management Plan, conservation education includes:

- » use of information networks, including public service announcements, internet sites and links, and visitor guides and newsletters to communicate information regarding sensitive resources; and
- » installation of appropriate multilingual information boards, interpretive panels and regulatory signs at developed sites and dispersed areas within sites of sensitive resources.

Perimeter control includes:

- » Modify visitor access to manage use through the installation of trails that lead away from the sensitive resource; and
- » site specific informational, interpretive and regulatory signing in conjunction with perimeter controls to engage national forest visitors with protection of sensitive resources at recreation sites and areas.

Management presence can be fulfilled through the utilization of peer education by other climbers to ensure protection of the sensitive resources.<sup>19</sup>

Local climbers have informed the Access Fund that none of these adaptive mitigation measures have been used in any of the proposed closure areas. When climbers feel they are a part of the process and development of management policy, and they see that policies demonstrate a solid understanding of climbing activity and use patterns, they are more likely to buy-in to decisions. Because climbers believe in the inherent value of the natural environment in which we practice our sport, this has proven true even when such policies ultimately restrict climbing access.

In sum, without a legal basis demonstrating clear legal authority to close public lands to recreational access in order to encourage Prairie Falcon nesting, the CNF is initiating an unprecedented invocation of authority to effect a closure of public lands. Moreover, the CNF's scoping letters lack substantial scientific data showing an ecological need to implement the proposed area closures to recreational access.

## **II. ESTABLISHING AND MAINTAINING SEASONAL CLIMBING RESTRICTIONS FOR GOLDEN EAGLES**

The CNF also proposes widespread closures due to the presence of Golden Eagle nests; however, the CNF provides very little data to serve as the basis for determining the scope of these closures. It is the Access Fund's concern that decisions regarding the impact of

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<sup>19</sup> Appendix D- Adaptive Mitigation for Recreation Uses, page 63

human-powered recreation on the fledging success of the CNF's Golden Eagle, as the success depends on the closing of the entire climbing areas, are based on speculation and opinion—and not the best scientific data available or the establishment of baseline data and subsequent monitoring in relation to that data.

#### **A. Bald and Golden Eagle Protection Act**

The protection of habitat upon which the Golden Eagle depends is essential to its survival, but how agencies may protect its habitat can be a complicated question not currently fully addressed in the Bald and Golden Eagle Protection Act (BGEPA).<sup>20</sup> The BGEPA enacted in 1940, and amended several times since then, prohibits anyone, without a permit issued by the Secretary of the Interior, from “taking” Bald eagles, including their parts, nests, or eggs. The BGEPA defines “take” as “pursue, shoot, shoot at, poison, wound, kill, capture, trap, collect, molest or disturb.” Even though disturbing eagles has been prohibited by BGEPA since the statute's enactment, the meaning of “disturb” has never been explicitly defined by the FWS or by the courts.

In February 2006, the FWS published the National Bald Eagle Management Guidelines (the Guidelines) which will apply to Bald and Golden Eagles in the event the Bald Eagle is no longer listed as threatened under the Federal Endangered Species Act. The Guidelines inform the current proposed actions regarding the habitat needs of the CNF Golden Eagle population and provide a baseline by which to structure the discussion, monitor the population, and approach an agreed upon course of action.

As part of the delisting process, the FWS is proposing a definition of “disturb” under the BGEPA<sup>21</sup> to guide post-delisting Bald and Golden Eagle management. To define “disturb,” the FWS relies on the common meaning of the term as applied to the conservation intent of BGEPA and the working definitions of “disturb” currently used by federal and state agencies to manage eagles. The proposed definition is as follows: “To agitate or bother a Bald or Golden Eagle to the degree that interferes with or interrupts normal breeding, feeding, or sheltering habits, causing injury, death, or nest abandonment.”<sup>22</sup>

The FWS notes, however, that not all eagle pairs react to human activities in the same way. This variability may be related to a number of factors, including visibility, duration, noise levels, extent of the area affected by the activity, prior experiences with humans, and tolerance of the individual nesting pair.<sup>23</sup> By proposing an authoritative definition of “disturb”

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<sup>20</sup> 16 U.S.C. 668-668c.

<sup>21</sup> See 50 CFR Part 22 (Vol. 71, No. 32, Pg. 8265); February 16, 2006 *Protection of Bald Eagles; Definition*. Agency: Fish and Wildlife Service, Interior. Action: Proposed Rule.

<sup>22</sup> 50 CFR 22, 8266.

<sup>23</sup> Guidelines, page. 6.

the FWS seeks to advise land managers on practices that will protect and enhance eagle habitat.

## **B. Activity Specific Guidelines**

In determining what activities “disturb” nesting eagles, the FWS considers the historical tolerance of eagles to human activities in particular localities, the degree to which similar activities are ongoing in the vicinity of the nest, and the visibility of the activity from the nest. FWS asserts that eagles are unlikely to be disturbed by routine use where such use pre-dates the eagles’ successful nesting activity in a given area.<sup>24</sup> In most situations ongoing existing use may proceed with the same intensity with little risk of disturbing eagles. For new or intermittent activities, the FWS provided buffer recommendations based on the nature and magnitude of impacts to eagles that usually result from such activities.<sup>25</sup> At a maximum for intermittent or new non-motorized recreation and human entry that is visible or highly audible from the nest, the FWS recommends a **330-foot buffer during the nesting season**, particularly where eagles are unaccustomed to such activity.<sup>26</sup>

F. Non-motorized recreation and human entry (including hiking, camping, fishing, canoeing, and hunting). No buffer is necessary around nest sites outside the nesting season. If the activity will be visible or highly audible from the nest, maintain a 330-foot buffer during the nesting season, particularly where eagles are unaccustomed to such activity.<sup>27</sup>

Although rock climbing is not specifically identified as a form of “non-motorized recreation and human entry,” a separate clause in the Guidelines accounts for such activities: “If the activity you plan to undertake is not specifically addressed in these guidelines, follow the recommendations for the most similar activity addressed.”<sup>28</sup> These Guidelines provide an opportunity for agencies to manage both for raptor protection and climbing, by providing nesting eagles with adequate buffer zones to successfully fledge young in an undisturbed setting without having to restrict climbers’ access to an entire cliff band or rock formation.

## **C. Active vs. Alternative Nest**

It is important to note that the FWS’s analysis for buffer zones and historical uses focuses on an “active” not “alternative” nest. After 5 years of disuse for nesting, the probability of an alternate eagle nest becoming active is considered, by the FWS, remote enough that protection

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<sup>24</sup> Id., page 9.

<sup>25</sup> Id.

<sup>26</sup> Id., page 12.

<sup>27</sup> Id.

<sup>28</sup> Id., pg.10.

from disturbance is no longer necessary.<sup>29</sup> Although it is no longer necessary to avoid disturbances, the nest may not be destroyed, because it is still protected by other provisions of the BGEPA.

Aside from general comments by Dave Bittner regarding the egg-laying and hatching seasons of the Golden Eagle, the CNF has conducted no study or research that would demonstrate an ecological need or even presence of Golden Eagle nesting or use of alternative nests so to justify closures. Furthermore, to our knowledge, the CNF has not documented whether climbers have ever deterred Golden Eagle nesting in the CNF or what the proper scope of closure (size and timing) that is scientifically appropriate at the CNF. Because, CNF provides no documented nesting history of the Golden Eagle nor provides nesting locations, either active or alternative, from which to base a closure, the proposed closures are, at this time, speculative. Well before considering any closure of public lands to protect nesting, we believe that the CNF should also identify the following:

- » What has been learned from seasonal closures where implemented elsewhere in the Western geographical region?
- » Are there other climbing areas in the regional Golden Eagle distribution area?
- » What effects has climbing had on these nesting areas?
- » What is the historical success rate of Golden Eagle nesting the proposed closure areas?
- » Has climbing activity at the CNF been observed to affect the behavior and/or nesting requirements of Golden Eagles?
- » Do other recreational activities (such as hiking) in the area affect the behavior and/or nesting requirements of Golden Eagles?
- » How will a closure be evaluated for effectiveness?
- » How flexible will the restriction be? (If, for example: (1) Golden Eagles do not use the restricted site, (2) show breeding behavior but fail to nest, or (3) nesting is delayed by other environmental factors).
- » What are the arrangements for current and future monitoring of Golden Eagles at the proposed closure areas?

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<sup>29</sup> Id.

- » How often will the program be reviewed for effectiveness?
- » What is the end goal of this management initiative?

Answering these fundamental questions should precede any formalized final plans to implement any seasonal closure. To this end, the Access Fund and local climbers can be a great source of help to raptor biologists by providing volunteer help for a range of tasks. For example, climbers have helped with raptor monitoring, circulated local information on restrictions, positioned signs, and provided observations to resource managers on new raptor sightings or unusual behavior. Climbers can also assist managers in areas like banding work, where roped access or technical climbing skills are required to gain access to cliff ledges.<sup>30</sup> In addition, the Access Fund has successfully worked with many USFS districts across the country to develop and implement flexible and thoughtful guidelines to successfully allow climbing while protecting raptor habitat. A consistent monitoring program which reopens areas not chosen as nest sites as early as possible once a nesting site has been established is integral to all successful closures.

In general, climbers' compliance with new management approaches is good in areas where management priorities are well-publicized and there have been opportunities for public involvement in development of management policy. Poor compliance often arises in situations where there has been limited communication between climbers and resource managers, where management policies show poor understanding of climbing activity and use patterns, or where new restrictions have arisen without the identification of problems through field observation. It is the Access Fund's belief that consistent, reasoned, and articulated management practices, especially when they deviate from the governing agency's guidelines, facilitate stakeholder cooperation and buy-in with USFS management decisions.

## **Conclusion**

The CNF should strive to manage for the fact that the climbing at Corte Madera, Rock Mountain, and Eagle Peak provides a truly unique, climbing experience. Without establishing an ecological need to close these areas to climbing so to provide for raptor habitat, the CNF appears to be managing in an arbitrary fashion and outside the rationale of the USFS mission, "to sustain the health, diversity, and productivity of the Nation's forests and grasslands to meet the needs of present and future generations."

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<sup>30</sup> For example, consider the positive role the climbers have played at West Virginia's new River Gorge where the National Park Service has relied on the assistance of climbers in a variety of ways to support an extensive Peregrine Falcon monitoring program. See [http://accessfund.org/pubs/en/e-news68.htm#\\_The\\_New\\_River\\_1](http://accessfund.org/pubs/en/e-news68.htm#_The_New_River_1).

It is the Access Fund's experience that virtually all potential threats or actual impacts to natural and cultural resources associated with climbing can be eliminated or reduced to acceptable levels through a combination of education, cooperation with the climbing community, and site-specific prescriptions, including rerouting of trails or partial crag closures within a specific distance of the raptor's nest. The Access Fund's grant program regularly provides funding for management initiatives that raise awareness about climber responsibilities through stewardship projects and develop understanding and knowledge about natural and cultural resource sensitivities where the information is used to open climbing areas or mitigate climbing impacts.

Examples of grants awarded include:

- » Boise Climbers Alliance, Black Cliffs, ID\_Cliff nesting raptor signage & brochure.
- » Colorado Division of Wildlife, Boulder Canyon, CO\_Cliff nesting raptor signage.
- » Joshua Tree National Park, CA\_vegetation surveys, and GPS location of climbing areas in relation to Threatened & Endangered species sites.
- » North Carolina Wildlife Resources Commission, NC—Peregrine falcon monitoring and outreach.

The Access Fund and the American climbing community have an exemplary record with regards to supporting natural resource protection. On our website we include an informational page explaining to climbers the need for raptor closures, how the process works, why climbers should respect the closures related to raptor habitat, and a list of raptor closures across the country ([www.accessfund.org/access/access\\_restrictions.html](http://www.accessfund.org/access/access_restrictions.html)). In general, climbers are strong supporters of open space and conservation, have a vested interest in environment, and understand the balance between conservation and access.

Provided a legal and scientific determination for closing Corte Madera, Rock Mountain, and Eagle Peak to climbing that considers all alternatives for access and mitigation is produced by the CNF, the Access Fund will be the first to assist you in implementing the details of that initiative. The Access Fund looks forward to further discussions of various lesser restrictive measures, including educational signage and monitoring programs, and we are committed to working with the CNF to resolve any other issues raised in this letter. Again, the Access Fund very much appreciates your hard work and looks forward to assisting in the CNF efforts to explore recreation-wildlife compatible solutions.

I will contact you by February 9<sup>th</sup> to talk in more detail about our proposed alternate mitigation measures that may address your interest in conserving Golden Eagle and Prairie Falcon habitat while maintaining public access to the Cleveland National Forest. Please do not hesitate to contact me at 303.545.6772 x112 prior to that date if you have any questions or comments.

Respectfully Yours,

Deanne Buck  
Programs Director  
The Access Fund

Cc Tina Terrell, Forest Supervisor  
Graciela Terrazas, Palomar District Ranger  
Tom Gillett, Descanso District Ranger  
Mark Rey, Undersecretary of Agriculture  
The Honorable US Senator Barbara Boxer  
The Honorable US Senator Dianne Feinstein  
The Honorable US Representative Duncan Hunter  
Dr. Rob Ramey, Department of Interior Genetics Consultant  
Steve Matous, Access Fund Executive Director  
Tom Donnelly, Access Fund Regional Coordinator  
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