

BEFORE THE REGIONAL FORESTER, PACIFIC NORTHWEST REGION,
UNITED STATES FOREST SERVICE

**In Re: Appeal of Decision Notice and Finding of No Significant Impact for Road 18
Caves Project Environmental Assessment, Deschutes National Forest, Bend-Fort
Rock Ranger District**

THE ACCESS FUND

APPEAL NO. _____

APPELLANT

2475 Broadway

Boulder, CO 80304

October 11, 2001

I. INTRODUCTION

NOTICE IS HEREBY GIVEN that The Access Fund appeals pursuant to 36 CFR part 215.7 to the Regional Forester, Pacific Northwest Region of the United States Forest Service, from the Decision Notice and Finding of No Significant Impact for Road 18 Caves Project Environmental Assessment, Deschutes National Forest, Bend-Fort Rock Ranger District, Deschutes County Oregon, signed by District Ranger Walter C. Schloer on August 30, 2001.

The Access Fund is a 501 (c) 3 non-profit advocacy group representing the interests of climbers in the United States, and is America's largest national climbing organization with over 15,000 members and affiliates. The Access Fund's mission is to keep climbing areas open, and to conserve the climbing environment. Preserving the opportunity to climb and the diversity of the climbing experience are fundamental to our mission. Working in cooperation with climbers, other recreational users, public land managers and private land owners, the Access Fund promotes the responsible use and sound management of climbing resources. We encourage an ethic of personal responsibility, self-regulation, strong conservation values and minimum impact practices among climbers.

In our previous letters to the Deschutes National Forest (DNF), dated May 24, 2000 and July 7, 2000, and during a site visit on June 19 and 20, 2000 to the caves which are the subject of this appeal, we described how the Access Fund works with public land managers to preserve climbing opportunities consistent with the maintenance of satisfactory resource conditions and the realization of specific management objectives. Through these communications we offered assistance to the DNF in the following forms: providing grant funding for studies and resource mitigation projects; consulting on policy and planning; helping to organize and educate local climbers; and assisting with outreach to the local and national climbing communities. The Access Fund also submitted comments on May 24, 2000 for the preliminary Road 18 Caves EA and strategy document drafted by the DNF, as well as follow-up comments dated July 7, 2000 and

final comments dated July 5, 2001 regarding the Road 18 Caves EA (hereafter referred to as “the Project” or the “Caves EA”).

The Access Fund claims standing to participate in the DNF’s public land decision-making process on the grounds that it has been involved in forest management issues since its founding, and the Road 18 Caves Project in particular since May, 2000. The Access Fund’s members, affiliates, staff, and board members recreate on the Deschutes National Forest, including the area included in the Road 18 Caves Project Environmental Assessment where the Decision Notice and FONSI was recently implemented by Ranger Schloer (hereafter, the “Decision”). The impacts associated with this Decision make it impossible for our members, affiliates, staff, and board members to climb at the Hidden Forest Cave. The Access Fund has participated in the comment process for the Road 18 Caves Project Environmental Assessment since the scoping phase of the Project, and has demonstrated through both its site visits and comments its significant land management concerns.

Appellant believes that the Deschutes National Forest violated the Administrative Procedures Act (APA). As such, Appellant desires and will request relief in the form of a remand of the Decision Notice and FONSI for the Road 18 Caves Project.

II. STATEMENT OF FACTS

The Road 18 Caves Project EA was designed to “analyze effects of humans on wildlife resources (including bat habitat), recreational opportunities, geologic features, native vegetation, and cultural resources in nine caves in regards to past, present and future use. The project includes . . . Hidden Forest Cave.” Caves EA, at 1. The Project is located approximately eighteen miles southeast of Bend, Oregon, in the northeastern portion of the Bend/Fort Rock Ranger District of the Deschutes National Forest.

The Caves EA states the purpose of the Project is “to preserve and protect cave resources of the eight caves within the Arnold lava tube system and Skeleton Cave. The Caves EA addresses emerging impacts of a visitor use philosophy that *promotes mostly unrestricted cave access*.” Id. (emphasis added). The Caves EA went on to note the specific purposes of the Federal Cave Resources Protection Act (FCRPA), which are “(1) to secure, protect, and preserve significant caves for the *perpetual enjoyment and benefit of all people*; and (2) to foster increased cooperation and exchange of information between governmental authorities and those who utilize caves located on Federal lands for scientific, education, or *recreational purposes*.” Id. (emphasis added). The stated need for the Project is to achieve various long-term management goals to fulfill the above-stated purpose of the Caves EA. Id. at 2.

The Caves EA analyzed three alternatives: A, B, and C. Alternative A was the No Action alternative under which the proposed action would not take place. Alternative B proposed, in part, that “the existing bolted routes in caves would not be authorized and bolts would be removed. It would also authorize a restriction on hand-drying agents.”

Under Alternative C, all action would be the same as Alternative B except, *inter alia*, the following:

Hidden Forest Cave: Completed existing bolted routes would be authorized for climbing. Incomplete routes would be removed. New climbing routes would not be authorized in this or any other cave in the project area.

Alternative C was “developed to address concerns identified during the scoping process about the lack of bolted climbing opportunities in the caves. It attempted to balance the need for reducing impacts to cave resources while maintaining a quality recreation experience.” *Id.* at 19-26.

Although Alternative C was the preferred alternative identified in the 30-day public review and comment period notice, published June 6, 2001 in The Bulletin, the Decision authorized the implementation of Alternative B with modifications for the Road 18 Caves Project EA. Ranger Schloer decided to implement a modified Alternative B “because it best responds to concerns identified by the Confederated Tribes of the Warm Springs during the comment period as well as best meeting the purpose and need identified during the scoping process. Specifically, the Tribe holds Hidden Forest Cave in high regard as a spiritual site. As such, as well as per the National Historic Preservation Act of 1966 {36 CFR 800.49(a)(4)} [sic] and Executive Order 13007 for Indian Sacred Sites, I have decided to eliminate climbing and bolted routes as described in Alternative B.” Decision, at 1.

Alternative B will implement the following: “The existing bolted routes in all caves discussed in this EA would not be authorized and bolts would be removed. Climbing without devices, or ‘bouldering’ would be allowed in areas not posted as closed. It would also authorize a restriction on the use of hand-drying agents to eliminate any adverse impacts to scenic resources and the potential effect to dependent wildlife.” *Id.* Alternative A, the No Action Alternative, was not selected because it “would not meet the purpose and need for the project.” *Id.* at 3. Ranger Schloer did not select Alternative C “because of tribal concerns and to be compliant with Executive Order 13007 for Indian Sacred Sites and the National Historic Preservation Act.” *Id.* at 4.

The Access Fund identified several procedural and substantive errors in the DNF Decision, some of which form the basis for this appeal.

III. SUMMARY OF THE ARGUMENT

The Access Fund endorses the appropriate management of recreational uses on public lands so to balance Native American religious concerns with the Constitutional and statutory mandates of the public land agencies. Indeed, the Access Fund supports Native American freedom of religion and works to educate climbers about Native American beliefs and ceremonies where the practice of these beliefs involves climbing resources or

affects climbing access. Moreover, the Access Fund actively encourages climbers to support land management programs and policies which support Native American religious beliefs and practices where these practices are reasonable and do not infringe on the constitutional rights of non-Native Americans. However, the exclusion of any group of legitimate visitors requires a clearly identified need and basis so that the reasonableness of the exclusion can be assessed against the claimed necessity. Without an adequate explanation identifying why the exclusion of a recreational use comports with maintaining Native American religious sanctity, such exclusions are arbitrary and capricious.

A critical problem with the Decision is that while the DNF prohibited climbing based on religious concerns, it said nothing about other recreational activities such as caving and hiking which remain permitted uses; inexplicably, caving and hiking do not also violate the sacred status of the Road 18 Caves. Since the Decision did not identify the nature or extent of the religious belief, it is impossible to understand why climbing in sacred caves is profane, but caving or hiking through sacred caves is not. In sum, if the DNF clearly identifies the scope and nature of the need for closure at the Road 18 Caves to protect Native American religious beliefs, any closure must apply equally to all recreational uses. Absent compelling evidence that climbing is the singular activity that adversely affects the physical integrity of the Road 18 Caves, the Access Fund cannot support a closure that applies only to climbing.

The ensuing arguments will demonstrate that the DNF Decision violates the APA. Specifically, this appeal seeks a remedy that demonstrates the following: (1) an adequate explanation as to how/why the Road 18 Caves, and the Hidden Forest Cave in particular, was identified as holding sacred site status; and (2) an explanation as to why climbers are the only user group being singled out as violating the sacredness of these caves.

IV. THE DESCHUTES NATIONAL FOREST VIOLATED THE MANDATE OF THE ADMINISTRATIVE PROCEDURES ACT BECAUSE IT ACTED ARBITRARILY AND CAPRICIOUSLY IN REACHING ITS DECISION

A cursory review of the Decision reveals that the DNF failed to comply with the fundamental requirements of the APA. The APA requires all agency actions to conform to general standards of regularity and rationality. The courts will overturn agency decisions that are “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.” 5 U.S.C. § 706(2)(A). The arbitrary and capricious standard of review is defined as an absence of a rational connection between the facts found and the choice made. See Natural Resources. v. U.S., 966 F.2d 1292, 1297 (9th Cir. 1992). An agency action is arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law if it is not based upon consideration of relevant factors or if it was taken without observance of procedure required by law. Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 378 (1989).

A. A. The DNF's Decision Notice Was Arbitrary And Capricious Because It Failed To Adequately Explain The Basis For Its Decision

The DNF failed to apply relevant facts to controlling legal authorities to justify its Decision. The APA requires agencies to provide both legal and factual bases for their decisions. An “agency must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts and the choice made.” Motor Vehicles Manufacturers Assoc. v. State Farm Mutual Auto. Ins. Co., 463 U.S. 29, 43 (1983).

The DNF's Decision was arbitrary and capricious because it failed to adequately explain the basis for its decision. The DNF concluded that because the Road 18 Caves were sacred climbing must be prohibited, yet offered no facts in support of this conclusion. Rather, the DNF presents only an assertion in the Decision that “the Tribe holds Hidden Forest Cave in high regard as a spiritual site” and a blanket statement in the Summary of Written Comments to the Road 18 Cave Environmental Assessment that the “Confederalted [sic] Tribe of the Warm Springs Reservation holds Hidden Forest Cave in high regard as a spiritual site.” Summary of Written Comments to the Road 18 Caves EA, at 1.

Because DNF's Decision fails to offer a rational connection between the law and the facts, the Decision fails the arbitrary and capricious standard. 5 U.S.C. § 706(2)(A). Therefore, the Decision violates the APA and should be remanded to adequately explain why, under the specific law and facts, climbing should be prohibited at the Road 18 Caves.

B. B. The DNF's Decision Notice Was Arbitrary And Capricious Because It Failed To Explain Why Climbers Are The Only User Group Being Singled Out As Violating The Sacredness Of The Road 18 Caves

In its Decision the DNF also failed to adequately explain why only climbers violated the sacred status of the Hidden Forest Caves while other recreational users are permitted continued unrestricted access. As noted above, the APA requires agencies to “provide and adequate explanation for [its] action.” Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 420 (1971); 5 U.S.C. § 706(2)(A). Here, DNF states that the “Tribe holds Hidden Forest Cave in high regard as a spiritual site” and concludes therefore that “climbing and bolted routes” should be eliminated “per the National Historic Preservation Act of 1966 {36 CFR 800.49(a)(4)} [sic] and Executive Order 13007 for Indian Sacred Sites” Decision, at 1. The DNF, however, neglects to provide any provision within those legal authorities that would reveal climbing as the singular recreational activity that violates sacred or spiritual sites.

The DNF defines caving (or “spelunking”) broadly to encompass a variety of recreationists who collectively form the bulk of use at the Road 18 Caves. In the Caves EA the DNF states that caving

has been a popular recreational activity for a variety of visitors at these caves for decades. Some come to explore the cave from entry to end, curious about the geology and the cave environment. Others only venture near the entry as a retreat from the summer heat. Some are family groups, or a few friends out for an afternoon picnic, while others are avid cave enthusiasts that explore caves as part of a formalized club. Other formalized groups, such as the Boy Scouts, have nature study outings to the caves. Overall, the caves provide an opportunity for seclusion, exploration and relaxation for an array of local and non-local visitors.

Caves EA, at 4. Climbing and bouldering opportunities are also documented in the Caves EA, yet only climbing is prohibited to protect the sacred status of the caves. Meanwhile, “caving” (as broadly defined by the DNF) remains a permitted activity in the sacred Road 18 Caves. Because the DNF failed to adequately explain this obvious distinction, the Decision is arbitrary and capricious and thus violates the APA. Accordingly, the Decision should be remanded because it discriminates against climbers.

C. The Controlling Legal Authorities Regarding Indian Sacred Sites Do Not Require The Closure Of The Road 18 Caves To Climbing

The DNF cites the National Historic Preservation Act (NHPA) as authority for its elimination of climbing and bolted routes in the Hidden Forest Cave. Under Section 106 of the NHPA, agencies must take into account the effects of their actions on properties that are eligible for listing or are listed on the National Register of Historic Places. Indian sacred sites can be eligible for listing on the Register as Traditional Cultural Properties (TCP). 16 U.S.C. § 470a(d)(6)(A). Mere listing on the Register, however, does not mean that recreational uses, such as climbing, are therefore prohibited. Indeed, the agency has discretion in allowing usage of the site, even usage that could adversely affect the site, so long as the agency follows proper procedures and gives proper consideration to Native American views. 36 CFR part 800. Thus, bolted climbing is not necessarily prohibited by application of the NHPA and its implementing regulations.

Moreover, the DNF permits other usages of the Road 18 Caves that are similar in nature and impact as bolted climbing. The DNF prohibits bolted climbing at the Hidden Forest Cave while allowing bolting for recreational and wildlife purposes at other Caves within the Road 18 Project area. The DNF fails to explain, however, why usages with similar impacts are treated differently. The DNF cites Executive Order No. 13007 as authority for prohibiting bolting at the Hidden Forest Cave, which Order states that in

managing Federal lands, each executive branch agency with statutory or administrative responsibility for the management of Federal lands shall, *to the extent practicable, permitted by law, and not clearly inconsistent with essential agency functions*, (1) accommodate access to and ceremonial use of Indian sacred sites by Indian religious practitioners and (2) *avoid adversely affecting the physical integrity of such sacred sites*.

Executive Order No. 13007, § 1(a) (emphasis added).

Executive Order No. 13007 fails to provide any standards for what constitutes an “adverse affect to the physical integrity” of a sacred site. However, by virtue of DNF’s own actions, it has established that bolting does not adversely affect the physical integrity of the Road 18 Caves. The DNF allows for metal stairs and handrails to remain bolted to the Skeleton Cave, and a bat gate to be permanently installed in Lower Charlie Cave. See Caves EA, at 32-33. Because the DNF permits bolting in the Road 18 Caves for recreational and wildlife purposes, it is reasonable to conclude that these activities do not “adversely affect the physical integrity” of the sacred Caves. Likewise, it is reasonable to conclude that bolting for climbing purposes does not “adversely affect the physical integrity” of the Caves. If the law permits bolting at the Caves for hikers, cavers and wildlife preservation, it permits bolting for climbing. Thus, controlling legal authorities regarding the management of sacred sites allow for management actions permitting bolted climbing, and the DNF’s own standards recognize that bolting is a permitted and proper action in the Road 18 Caves.

In sum, the deficiencies outlined above make it impossible for the DNF to offer a reasonable justification for this Decision. The DNF has consistently failed to examine factors that Congress intended for it to consider pursuant to the APA and cannot reasonably support the claims and conclusions reached within the Decision FONSI for Road 18 Caves Project Environmental Assessment. Because the Decision is arbitrary and capricious in violation of the APA the following request for relief should be granted.

V. REQUEST FOR RELIEF

The Appellant requests a remand of the Decision Notice and FONSI for the Road 18 Caves Project EA for arbitrarily and capriciously (1) failing to support its findings on sacred sites, and (2) discriminating against climbers.

RESPECTFULLY SUBMITTED this _____ day of October, 2001 on behalf of Appellant
The Access Fund

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