

Outline for Access Fund Backgrounder on Cave Rock Closure

1. Summary

This document provides background on the closure of a climbing area on the shores of Lake Tahoe known as Cave Rock. It includes the details of a recent management action by the United States Forest Service (USFS) which have unexpectedly resulted in a climbing ban, as well as the Access Fund's administrative appeal, our efforts to negotiate a policy solution, and our lawsuit seeking to overturn the USFS's unlawful climbing ban. A chronological summary of actions the Access Fund took to reach a compromise and avert an all-out ban, and a discussion of implications and next steps.

In August 2003, the USFS Lake Tahoe Basin Management Unit released its Record of Decision banning climbing at Cave Rock. On September 19, 2003, The Access Fund filed an administrative appeal on constitutional and procedural grounds, in order to overturn the ban. On November 5th, 2003, the USFS issued its appeal decision to uphold the climbing ban. On December 15, 2003, the Access Fund filed suit in Nevada Federal District Court requesting the court overturn the USFS decision. On Friday January 28, 2005 a federal judge in Reno, Nevada ruled against the Access Fund's lawsuit

2. What is Cave Rock?

Cave Rock is a 300-foot high basalt plug on the shores of Lake Tahoe that has been significantly altered by human intervention over the last several decades. Cave Rock has been dynamited, bulldozed, tunneled through, and built on. Today, Cave Rock sits atop of U.S. Highway 50, with four lanes of road drilled directly through the base of the formation. For the recreation community, Cave Rock provides unique "sport climbing" opportunities for climbers from around the world. For nearly four decades climbers have considered Cave Rock an outstanding year-round climbing resource. In addition, boaters enjoy the dock at the base of Cave Rock, and hikers, picnickers and stargazers scramble on its trails. Cave Rock is also considered sacred to the local Washoe Tribe, who claim that the U.S. Forest Service (USFS) should prohibit access at Cave Rock to all people except for a few male Washoe religious practitioners.



3. The history of religious and recreational use at Cave Rock?

Romanticized in Indian lore as a sacred place, Cave Rock is the subject of many legends. Named for a cave, a remnant of which can be seen some 200 feet above the waterline, this formation was a landmark on the Lake Bigler Toll Road in the early days. Quarried granite blocks which supported the toll road can still be seen on the west face of Cave Rock, as can the remains of the old wooden trestle. The rock was first tunneled for the construction of a highway in 1931 and the second tunnel was put through in 1958.

Climbing activity at Cave Rock dates back to at least the early 1960s¹. Despite the echoing noise and danger from trucks, buses and cars, Cave Rock is recognized by the international climbing community as a unique rock-climbing resource. For over four decades climbers from around the world have come to Cave Rock. Climbers from Reno and the Carson City areas as well as climbers living in northern and eastern California frequently climb Cave Rock. Cave Rock offers the only year-round, high-level rock climbing in the Lake Tahoe region. The climbing at Cave Rock has been profiled numerous times in national climbing magazines and has been featured in several climbing videos. Access Fund members climbed at Cave Rock prior to the issuance of the Record of Decision (“ROD”).

Cave Rock is also sacred to the local Washoe Tribe. The Washoe believe Cave Rock is “significant as a place of accumulated spiritual power.” (ROD at 2, R. 001953.) As the USFS has explained: “Mythologically, Cave Rock is the location of an epic confrontation between me'tsunge or water babies (powerful dwarf-beings, common in Washoe cosmology, who traversed all waters of the land and controlled their flow) and a small weasel brother (a mythological ancestor of all Washoe) that occurred during the creation of the Tahoe landscape.” Water babies are thought to congregate at Cave Rock, which is believed to contain the entrance to a tunnel that allowed them to travel to the adjoining Carson Valley waterways.

Cave Rock is the location and source of power that influences, or is influenced by, those who visit the rock. A white sand path traveled by Washoe doctors is believed to lead underwater from Cave Rock to an undisclosed location on the northwest shore of the lake. Additionally, Ang, an enormous man-eating bird, would take its victims to its nest on a now submerged island offshore from Cave Rock to devour them, until it was outsmarted by an old Washoe man who killed it at Cave Rock. So powerful and important is Cave Rock that many Washoe continue to believe that the health and integrity of their society may be jeopardized if traditional practices are not observed there.

¹ Along with the filing of its appeal, the Access Fund submitted a request to the USFS to reopen the administrative record to include the diary entry of Alvin McLane. Mr. McLane climbed Cave Rock in 1963 and contemporaneously recorded his climb in a written diary entry which has also been submitted to the USFS. This information is significant given the US Forest Service’s use of 1965 as a cut-off date for future permitted activities at Cave Rock.

Traditional Washoe assert that Cave Rock is to be avoided by all people, except traditional Washoe practitioners who have been called to seek power or knowledge at the rock. Many Washoe honor Cave Rock by practicing and requesting total human avoidance, or at least demonstration of a respectful attitude, there. They believe that Cave Rock as a whole should be avoided, except by a few traditional Washoe practitioners, especially the cave (considered the nucleus of the rock), the top of the rock, and the water beneath the rock, which appear to be particularly taboo. Members of the Washoe Tribe have continually emphasized the significance of Cave Rock as a religious site and, in particular, have emphasized that it is a sacred site upon which only a few male tribal members, and no women, can visit. Tribal member Elwood Wyatt has said, "It's a place of meditation." (Jeff DeLong, *Rock climbers banned from Cave Rock*, RENO GAZETTE-JOURNAL, July. 11, 2003, at 1B). Darriel Bender, a Washoe elder, in referring to the conflict between public access to Cave Rock and the Washoe Tribe's religious beliefs about the site, said, "There is no middle ground." (Stephanie Simon, *Washoe Tribe, Climbers Clash Over Rock*, LOS ANGELES TIMES, May 14, 1997, at 2).

Bill Dancing Feather, the cultural resources coordinator for the Washoe Tribe said that traditionally only the tribe's medicine men are allowed to visit Cave Rock. The Washoe believe that only a few male shaman should ever visit the site. Brian Wallace, the Washoe Tribal Chairman, says "We're required to say a prayer before we even mention [Cave Rock] No women are allowed to visit Cave Rock; in days gone by, they were forbidden even to look upon it." (David Roberts, *Whose Rock Is It Anyway?*, SMITHSONIAN MAGAZINE, Mar. 1 2003, at 2).

As the USFS explained the Washoe Tribe's religious beliefs in the FEIS:

According to Washoe traditional belief, the intimate contact between climbers and Cave Rock leads to an exchange of power between the rock and climbers that affects the materials of the TCP [Traditional Cultural Property]; the rock has power that will affect people that visit it or the rock's power will be affected by the visitors. Thus, vehicles traveling through the tunnels are transitory and do not affect the rock as much as individuals that are clinging to or hanging on the rock for a prolonged period. Washoe believe that the presence of people at the rock can have ill effects on both the visitor and the Washoe people (Dancing Feather personal communication with John Maher, June 2, 1999).

(FEIS at 2-21, R. 001109.)

The USFS also quotes the Washoe Tribe chairperson as stating that "Cave Rock is 'the most religious feature within the Washoe religion'" and says that, "During the 1998 collaboration sessions, many Washoe members repeatedly compared Cave Rock to a church." (FEIS at 3-50, R. 001163).

For these reasons, the Washoe demanded that the USFS prohibit access to Cave Rock by all people except for a few male Washoe religious practitioners "who have been called by

greater powers to seek power or knowledge at the rock [to] affect cures for the Washoe people.” (ROD at 3, R. 001954).

4. Recent land management history at Cave Rock

In 1996, the USFS determined that Cave Rock was eligible for inclusion on the National Register as a traditional cultural property under the National Historic Preservation Act despite the presence of these climbing routes. The USFS began planning for the management of Cave Rock to address both the interests of the local Washoe Tribe and a variety of recreational users. In so doing, the USFS consulted with the rock-climbing community, the Washoe Tribe, and other interested parties to reach consensus on how to protect the traditional cultural values associated with Cave Rock. As a result of this extensive consultation and collaboration, the LTBMU agreed to balance the various user-group interests and keep Cave Rock open to limited recreational climbing. In 1999, this multiple use management direction was reflected in the initial “Preferred Alternative” of the Cave Rock Draft Environmental Impact Statement (“DEIS”), despite the acknowledged traditional Washoe belief that Cave Rock should be avoided by all people except for only a few male Washoe religious practitioners who had been properly sanctioned by the Washoe Tribe.

After proceeding for three years under preferred Alternative #2, which allowed limited recreational climbing, in November 2002 a new forest supervisor, Maribeth Gustafson, abruptly reversed the previous management direction at Cave Rock by unexpectedly announcing a completely new alternative in the Final Environmental Impact Statement (FEIS), Alternative #6. Alternative #6 called for an immediate ban of all climbing at Cave Rock. This new management Alternative had not been part of the previous scoping and the DEIS phase of the Cave Rock Management Direction initiative. Unlike the alternatives presented in the DEIS, Alternative #6 now sought immediately to prohibit all recreational rock climbing at Cave Rock, and thus essentially rejected the years of hard work and consultation with the various interested parties at Cave Rock. United States Congressman Jim Gibbons (R-NV) wrote a letter to Supervisor Gustafson expressing his concern and asking for an explanation for the dramatic reversal from the previous management direction that happened to coincide with a change in personnel in the Supervisor’s office at the LTBMU.

In our administrative comments to the DEIS, The Access Fund supported the selection of the initially preferred Alternative #2. Unlike Alternative #6, this alternative resulted from years of public participation and consultation between the USFS, the Advisory Council on Historic Preservation, the Nevada State Historical Preservation Office, the Washoe Tribe, and the climbing community. Alternative #2 would fairly limit the impact that climbers might have on the religious practice of the Washoe while still accommodating the Washoe’s traditional rites. Moreover, Alternative #2 treats all users equally and does not arbitrarily single out only climbers for exclusion from public land.

5. The legal basis for the Access Fund's challenge to the USFS's unlawful closure of Cave Rock

Recognizing the Washoe Tribe's continued insistence that access to Cave Rock should be denied to all except a few male tribe members, and knowing the prominence of Cave Rock as a popular international climbing area, The Access Fund and local climbers began working with the USFS in 1995 to identify a compromise solution that would keep Cave Rock open to the public for climbing on a limited basis, while at the same time accommodating the unique religious interests of the Washoe. The leadership of the Washoe Tribe, however, refused to meet directly or formally with The Access Fund. Nevertheless, representatives from The Access Fund were able to meet with some individual Washoe members at a series of five public collaborative sessions hosted by the USFS between January and May of 1998. During these meetings, The Access Fund suggested compromise solutions that involved voluntary closures for limited periods out of respect for the Washoe's religious practices. Such compromise solutions have been extremely successful elsewhere. For example, at Devils Tower National Monument, a voluntary climbing closure during the month of June has, on average, resulted in an 80% reduction in the number of climbers during June as compared to the years before the voluntary closure was in place. The Access Fund and local climbers also proposed to remove some of the climbing routes at Cave Rock and to disallow the establishment of new routes. The Washoe, however, emphasizing that Cave Rock is a sacred religious site, rejected all proposals.

The USFS's decision to ban climbing at Cave Rock promotes the Washoe's religion in violation of The Establishment Clause. The Establishment Clause of the First Amendment states that "Congress shall make no law respecting an establishment of religion" (U.S. CONST. AMEND. I). The Establishment Clause prohibits the government from favoring or promoting religion and prohibits laws that "aid one religion, aid all religions, or prefer one religion over another." The clearest command of the Establishment Clause is that "one religious denomination cannot be officially preferred over another." The government must manage its property in a manner that does not offend the Constitution.

In a case strikingly similar to the present one, the court concluded that mandatory closures of public lands for religious purposes are unconstitutional. *See Bear Lodge Multiple Use Ass'n v. Babbitt*, 2 F. Supp. 1448 (D. Wyo. 1998), *aff'd*, 175 F.3d 814 (10th Cir. 1999). In *Bear Lodge*, the government proposed a Climbing Management Plan (CMP) for Devils Tower National Monument that instituted a voluntary (not a mandatory) closure to climbing. The voluntary climbing closure was in deference to a month-long religious Sun Dance held by local Native American tribes. The District Court in *Bear Lodge* acknowledged that the United States Supreme Court has "long recognized that the government may (and sometimes must) accommodate religious practices and that it may do so without violating the Establishment Clause." However, the court recognized that appropriate accommodation is a matter of degree. "Actions step beyond the bounds of reasonable accommodation when they force people to support a given religion." The *Bear Lodge* court was careful to point out that "the

principle that the government may accommodate the free exercise of religion does not supercede the fundamental limitations imposed by the Establishment Clause." The court went on to find that "climbing at the Devils Tower National Monument is a legitimate recreational and historic use of the Park Service lands" and if the National Park Service was, in effect, "depriving individuals of their legitimate use of the monument in order to enforce the tribes' rights to worship, it has stepped beyond permissible accommodation and into the realm of promoting religion."

The court in Bear Lodge defined the main issue as "whether climbers are allowed meaningful access to the monument . . . Stated another way, is the climbing ban voluntary or is it actually an improper exercise of government coercion?" Answering that question by examining the facts, the court found that the Devils Tower climbing ban was voluntary (not coercive) and thus was a constitutionally permissible accommodation on lands considered sacred by American Indians. The court suggested, however, that "a complete elimination of climbing from the Tower in the month of June would serve as powerful evidence of actual coercion" which would have run afoul of the Establishment Clause of the Constitution. The rule clearly stated in Bear Lodge is that mandatory closures of public lands for religious purposes are unconstitutional; voluntary closures of public lands for religious purposes, however, constitute a permissible accommodation of religious activity.

The USFS ban on climbing at Cave Rock fails the US Supreme Court's test for determining whether governmental action impermissibly has the effect of establishing religion. The decision in Bear Lodge followed a line of cases that had developed three decades earlier in the Supreme Court's opinion in Lemon v. Kurtzman, 403 U.S. 602, 91 S. Ct. 2105 (1971). In Lemon, the United States Supreme Court established a three-part test for lower courts to use when determining whether governmental action has the effect of establishing religion. A governmental action does not offend the Establishment Clause if it: (1) has a secular purpose, (2) does not have the principal or primary effect of advancing or inhibiting religion, and (3) does not foster an excessive entanglement with religion.

Under the first part of the Lemon test, governmental action violates the Establishment Clause if such action has no secular purpose or, despite a secular purpose, the "actual purpose" is to endorse religion. The purpose requirement "aims at preventing the relevant governmental decisionmaker . . . from abandoning neutrality and acting with the intent of promoting a particular point of view in religious matters." At Cave Rock, during the late stages of the administrative proceedings, the USFS claimed to have selected a secular management alternative (to protect a traditional and cultural property) – and correspondingly claimed that the new rationale does not have a primary purpose of advancing religion. In other words, to protect its own decision from challenge, the USFS lately claims to be protecting traditional and cultural property, not religion. In this case, however, a climbing prohibition cannot have a secular purpose because its express objective is to benefit the practitioners of a Native American religion. Cave Rock has little or no secular significance to the Washoe. It has never been used for habitation, meeting or trading, hunting, fishing, food gathering or food processing. It is not a

battlefield or a burial ground. Cave Rock is a sacred site used solely for religious practice, and the USFS simply wants to exclude people whom the Washoe say impede these traditional religious practices. Traditional Washoe assert that Cave Rock is a place to be avoided by all people, except traditional Washoe practitioners who have been called to seek power or knowledge at the rock. The USFS's decision to ban climbing was designed to protect Washoe spiritual shaman and their exclusive quest for power and knowledge at Cave Rock's taboo locations. This "power seeking" at "taboo" locations is clearly religious activity. Accordingly, the purpose of the ban is to protect this religious activity.

The Cave Rock climbing ban had the primary effect of advancing religion. For governmental action to be unconstitutional there must be some advancement of religion by governmental action. If the challenged action is likely to be interpreted as advancing religion, it is impermissible, regardless of whether it is actually intended to do so. The principal or primary effect of governmental policies and practices are measured according to whether a "reasonable observer, aware of the history and context of the community in which the conduct occurs, would view the practice as communicating a message of government endorsement or disapproval." Under this objective standard, governmental policies and practices, have forbidden "effects" whenever the "government itself has advanced religion through its own activities and influence." The Bear Lodge Court drew the permissible boundary short of coercion when it stated: "Actions step beyond the bounds of reasonable accommodation when they force people to support a given religion." Clearly, the mandatory ban on climbing at Cave Rock goes too far and crosses the permissible line of religious accommodation. The USFS's banning of climbing at Cave Rock clearly advances the Washoe religion because the ban seeks to preserve the feeling and association of Cave Rock's "taboo" locations that are crucial to the Washoe religious practitioner's quest for power and knowledge. Washoe spiritual leaders have requested that the government ban climbing at Cave Rock specifically to benefit the practice of their religion, and the primary effect of such a government ban is a constitutionally impermissible advancement of the Washoe religion. The USFS ban on climbing at Cave Rock is a coercive ban on climbing in deference to religion and constitutes governmental promotion of Native American Religious practices in contravention of the First Amendment of the United States Constitution.

The climbing ban at Cave Rock excessively entangles the USFS with religion. The Court must look at the "the character and purposes of the institutions that are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and religious authority." Strong evidence of excessive entanglement exists where the character and the purpose of the benefited institution is "primarily religious," or has a "substantial religious activity and purpose." The Washoe Tribe's use of Cave Rock is undisputedly religious and based on sacred rituals and beliefs. The climbing ban at Cave Rock stems from the USFS's aspirations to meet the religious concerns of the Washoe and is based directly upon the Washoe's demand for exclusive use of the site for religious purposes. The nature of the governmental aid provided here by the USFS is complete, total, and direct. At Cave Rock, the USFS has directly entangled itself in

religious matters through the day-to-day surveillance and future management of Cave Rock, all for the purpose of protecting the Washoe Tribe's religious practices.

The USFS's attempt to shift the rationale for its decision from "protection of religion" to "protection of traditional and cultural property" is a post-decision maneuver designed to side-step the limitations of the Establishment Clause. The USFS claims that its decision is neutral and non-discriminatory, and that the listing of Cave Rock on the National Register of Historic Places (NRHP) as a "traditional cultural property" serves as the basis for banning a legitimate use of federal public land. However, the USFS's reliance on the National Historic Preservation Act (NHPA) is misplaced. Listing Cave Rock as a traditional and cultural property does not change the fundamental nature of Cave Rock's use as a religious site. Moreover such a traditional cultural property designation, in and of itself, does not grant the USFS the authority to violate the United States Constitution. Simply put, the spiritual use of Cave Rock as a sacred site involves religion and the USFS cannot sidestep the restrictions of the First Amendment through the vehicle of a NHPA traditional cultural property designation.

The NHPA designation of Cave Rock does not change the religious nature of the site. In Bear Lodge, the District Court of Wyoming considered the National Park Service's Final Climbing Management Plan for Devils Tower National Monument. In the climbing plan, the National Park Service called for a voluntary ban on climbing to protect the natural and cultural resources at Devils Tower, and in "respect for the reverence many American Indians hold for Devils Tower as a sacred site, rock climbers will be asked to voluntarily refrain from climbing on Devils Tower during the culturally significant month of June." Bear Lodge, 2 F. Supp. at 1450. The Final Climbing Management Plan did not identify any other basis for the June closure. The Court noted that Devils Tower was eligible for inclusion to the National Register of Historic Places as a traditional cultural property for several American Indian peoples of the northern plains that were increasingly traveling to the Monument to perform "traditional cultural activities." Despite the government's attempt to characterize the measures at Devils Tower as pertaining solely to American Indian culture and being wholly separate from any religious practices, "[t]he Court [was] not persuaded that a legitimate distinction can be drawn in this case between religious and cultural practices of those American Indians who consider Devils Tower a sacred site." As in Bear Lodge, the USFS's attempt to avoid the religious nature of the climbing ban at Cave Rock on cultural grounds is a transparent attempt to avoid the limitations of the Establishment Clause.