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Superintendent
New River Gorge National River
104 Main Street
P. O. Box 246
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April 30, 2002

Re: The New River Gorge National River Draft Climbing Management Plan and Proposed Peregrine Closure at the Endless Wall

Dear Cal:

Thank you for taking the time to speak with Gene Kistler, John Bliss and me on April 19 in Glen Jean regarding the Park Service's proposed peregrine closure at the Endless Wall in the New River Gorge (NRG). It was very helpful to have Gary Hartley, Ken Stephens and Clif Bobinsky in attendance. We were very impressed with the level of knowledge and professionalism among the staff there at the New River Gorge National River (NRG NR). This letter serves as a follow up to our discussions on the 19th, and is a "roadmap" for many of the issues that concern The Access Fund concerning your proposed closure of the Endless Wall.

The Access Fund

As you know, The Access Fund is a national, non-profit organization dedicated to keeping climbing areas open and to conserving the climbing environment. With over 15,000 members and affiliates from across the country, The Access Fund advocates on behalf of approximately one million technical rockclimbers and mountaineers in the United States. To accomplish our mission The Access Fund acquires and manages land, works cooperatively with public land managers on conservation projects and management planning, provides funding for conservation projects and scientific studies, develops and distributes educational materials, and represents the interests of climbers on public policy issues. The Access Fund also sponsors a nation-wide Adopt-a-Crag day where we lead trail restoration projects and clean-ups at climbing areas in the most wide ranging volunteer effort by the climbing community. The Access Fund's Adopt-a-Crag Day is the climbing community's way to give back to the environment, celebrate their local climbing area, and foster a spirit of volunteerism across the country.

The Access Fund has an exemplary record with regards to supporting natural resource protection. The Access Fund acknowledges that sometimes land managers are legally obliged to take measures to protect the nest sites of threatened or endangered raptors. On our website (www.accessfund.org) 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).

Much is still to be learned about how climbers impact raptors. In an effort to address this shortcoming, the Access Fund produced, in consultation with biologists and land managers, the handbook *Raptors & Climbers*. This publication (Access Fund, 1997) covers new ground, providing common-sense guidelines for managing climbing activity to protect raptor nest sites. Complimentary copies of the manual have been circulated to resource managers, biologists, climbing organization representatives and assistants working in the field.

The Access Fund and the climbing community can help land managers in their efforts to conserve raptor habitat. The Access Fund's grant program regularly provides funding for management initiatives that raise awareness about climber responsibilities through stewardship projects, develop or support partnerships with resource management agencies, conservation organizations, land trusts and local climbing groups, reduce climber impacts on natural and cultural resources within the climbing environment, 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.

Climbers can also 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.

I. THE NATIONAL PARK SERVICE LACKS EITHER A LEGAL OR SCIENTIFIC BASIS FOR CLOSING THE ENDLESS WALL TO RECREATIONAL ROCKCLIMBING IN ORDER TO ENCOURAGE SPECULATIVE NESTING FOR MIGRANT PEREGRINE 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 NRGNR's draft Climbing Management Plan (CMP) has neither a tenable legal basis, nor any scientific data to justify the closure of the Endless Wall to recreational climbing in order to ensure the nesting of a species that is not native to the NRG.

At our meeting, your staff indicated three possible legal authorities to base your proposed closure. These include (1) the monitoring plan required by the Endangered Species Act following the delisting of endangered species; (2) the NRGNR enabling legislation; and/or (3) the mission statement and Organic Act of the National Park Service (NPS). NRGNR staff, however, could not clearly specify under which legal authority this closure will be implemented, and admitted that the NPS has virtually no data or other documentation (besides two very brief monitoring reports) showing an ecological rationale for closing public lands to provide for speculative nesting habitat for migrant peregrine falcons. These points are explored in more detail below.

B. The Endangered Species Act and the American Peregrine Falcon Monitoring Plan

Section 4(g)(1) of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 et seq.) (ESA), requires that the United States Fish and Wildlife Service (USFWS) implement a system, in cooperation with the States, to effectively monitor for not less than 5 years the status of all species that have been recovered and removed from the List of Endangered and Threatened Species. Following its recovery, the American peregrine falcon was removed from the List of Endangered and Threatened Species on August 25, 1999. The final delisting rule also removes designated critical habitat for the peregrine falcon, and the designation of "endangered." In order to meet the ESA's monitoring requirement, and to facilitate the efficient collection of data, a sampling method capable of assessing the population status of the American peregrine falcon will be implemented by the USFWS through a formal monitoring plan.

The American peregrine falcon monitoring plan was developed in cooperation with State resource agencies, recovery team members, and interested scientists, and will be carried out in collaboration with Federal, State, and private cooperators. Surveys will be conducted every 3 years for a total of five surveys spanning 15 years. Monitoring will include the collection of information on the population trends and nesting success. At the end of each triennial monitoring the USFWS will review all available information to determine the state of the falcon.

The USFWS's peregrine monitoring plan advances two primary goals: (1) to detect Peregrine Falcon population trends and (2) nesting success. The plan calls for surveys to be conducted at known territories that are easily visible and accessible, and designates five geographical regions within the United States for surveys. Each territory will be visited twice, once during late courtship, egg laying, or incubation, and once late in the nesting season. The intent of the first visit is to verify the presence of a nesting pair; the second visit is to determine the presence or absence of young. Monitoring will include

the collection of information on population trends and nesting success. At the end of each monitoring period the Service will review all available information to determine if the status of the peregrine continues to improve. Should any decline be detected, the Service will work closely with the States and other involved partners to determine what measures need to be implemented to reverse the decline.

Compelling factors indicate that the peregrine monitoring plan does not serve as authority for the closure of public lands to encourage nesting habitat:

- • The plan seeks only to collect information on existing populations and their accompanying nests; nothing in the plan speaks to the establishment of new nests or expanded habitat in migratory regions.
- • Even if the monitoring plan sought to establish speculative habitat for migrant peregrines, the plan does not include West Virginia as one of its five geographical surveying regions; this absence recognizes that peregrines are (1) not native to the NRG region, and (2) that the NRG is not a suitable enough habitat for the USFWS to require the ESA-mandated monitoring plan to be implemented there.
- • There exists absolutely no precedent for the proposition that the ESA-mandated monitoring plans can be used as authority to close public lands in order to encourage the speculative nesting of migrant species.

Accordingly, without a demonstration that (1) the ESA monitoring plan for the peregrine falcon provided for the closure of public lands to encourage the speculative nesting of non-native peregrines; (2) that West Virginia—and the NRGNR in particular—is a region the USFWS intended the monitoring plan to control, and (3) other federal land managers have utilized the ESA mandated monitoring plan as authority to close public lands, then the ESA is inapplicable as authority for the NRGNR's proposed closure of the Endless Wall.

B. New River Gorge National River Legislation and the National Park Service Mission Statement

The legislation establishing the New River Gorge National River, 16 USC § 460, et seq., does not clearly define the purpose of the Park, much less provide for closures to allow for the nesting of non-native species. Section 1101 of the Act states that

[f]or the purpose of conserving and interpreting outstanding natural, scenic, and historic values and objects in and around the New River gorge and preserving as a free-flowing stream an important segment of the New River in West Virginia for the benefit and enjoyment of present and future generations, the Secretary of the Interior shall establish and administer the New River Gorge National River. . . . The Secretary shall administer, protect, and develop the national river in accordance with the provisions of the Act of August 25, 1916 . . . ; except that any other statutory authority available to the Secretary for the preservation and management of natural

resources may be utilized to the extent he finds such authority will further the purposes of this title.

Ibid. The “Organic Act” of August 25, 1916, creating the National Park Service, states that the mission of the National Park Service is

to promote and regulate the use of the . . . national parks . . . which purpose is to conserve the scenery and the natural and historic objects and the wild life therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations.

16 U.S.C. 1, et seq. Thus, the NRGNR was established to conserve and interpret “outstanding natural, scenic, and historic values” pursuant to the NPS mission to “conserve the scenery and the natural and historic objects and the wild life” within National Parks.

Peregrine falcons cannot be considered a significant natural value of the NRGNR since “there are no recorded nesting sites in the gorge” for peregrines despite the fact that they “might occasionally be seen in the New River area.” *See* New River Gorge National River General Management Plan, at 64. In fact, over the last 13 years there have been only 12 peregrine falcon observations at the NRGNR although 30 young peregrines were released at the NRG between 1987 and 1991. *See* Trip Report, NPS Ecologist Mike Britten, May 2, 2001. There has never been a recorded peregrine nesting at the New River Gorge, thus any observed species there were almost assuredly migrant birds traveling from distant regional nesting areas.

At our April 19 meeting the NRGNR staff stated that the peregrine is documented as native to the Mid-Atlantic Ecosystem. However, there is nothing in the NRGNR enabling legislation that prescribes managing species native to areas hundreds of miles away, but rather only the conservation of “natural values . . . in and around the New River Gorge.” It should again be noted that the USFWS does not even list West Virginia in its designated geographical survey regions within the range of the American peregrine falcon which should be included under the monitoring plan required under the ESA’s delisting process. In short: the USFWS does not consider West Virginian habitat as significant enough for the peregrine that it should be included in the recovery monitoring process.

Accordingly, because the peregrine is not native—or even common—to the NRG, peregrines do not constitute a “natural value” under the NRGNR enabling legislation. Thus, the NRGNR’s enabling legislation does not provide legal authority for the NRGNR to close the Endless Wall to recreational rockclimbing to promote the speculative nesting habitat for non-native peregrines.

Likewise, the NPS mission does not provide a legal basis for closing the Endless Wall to climbing in order to encourage speculative nesting for migrant peregrine falcons.

Although the NPS is charged with conserving “the scenery and the natural and historic objects and the wildlife” within national parks, peregrine falcons have never nested in the NRG and thus nesting management initiatives are not within the purview of the NPS’s management authority. Peregrines at the NRG should not be considered the NRG “wild life” articulated by the NPS mission because they are not a native species at the NRG. Because peregrines do not constitute relevant wildlife native to the NRG, the NPS mission statement does not provide a legal basis for closing the Endless Wall to recreational rockclimbing to encourage speculative nesting for migrant peregrine falcons.

In sum, without a legal basis demonstrating clear legal authority to close public lands to recreational access in order to encourage speculative migrant falcon nesting, the NRGNR is initiating an unprecedented invocation of authority to effect a closure of public lands. Moreover, the NRGNR lacks substantial scientific data or natural history documentation showing an ecological need to close the Endless Wall to recreational access so to encourage speculative migrant falcon nesting. As such, The Access Fund cannot support either Alternatives 1 or 3 of the NRGNR draft CMP.

II. ESTABLISHING AND MAINTAINING SEASONAL CLIMBING RESTRICTIONS

Even if the NRGNR can demonstrate a legal basis and scientific need for closing the Endless Wall, there is very little data to serve as the basis for determining the scope of any closure, voluntary or mandatory. Because peregrine falcons are not native to the NRG, the “Native Animal Management” guidelines under NPS-77 are not applicable to the proposed closure of the Endless Wall. Rather, “Chapter 8: Use of Parks of the 2001 NPS Management Policies” is the relevant NPS policy guidance document controlling the present issue. Section 8.2, “Visitor Use”, states “restrictions will be based on the results of study or research.” Further, Section 8.2.2 asserts, “restrictions placed on recreational uses *that have been found to be appropriate* will be limited to the minimum necessary to protect park resources and values, and promote visitor safety and enjoyment.” The NRGNR has not produced studies or research to justify its proposed restriction, and thus the proposal to close Endless Wall has not been “found to be appropriate.”

Besides two brief reports conducted by Mike Britten and Craig Stihler, the NRGNR has conducted no study or research that would demonstrate an ecological need for peregrine nesting so to justify this closure. Furthermore, no one knows whether climbers have ever deterred peregrine nesting at the NRG, what the proper scope of closure (size and timing) that is appropriate at the NRG, and what level of disturbance would prove any closure useless.^[1] Well before considering any closure of public lands to encourage nesting, the NPS should also identify the following:

^[1] For example, at our April 19 meeting, we discussed the pros and cons of a voluntary v. mandatory closure. The NPS should conduct research to show what level of human disturbance might cause peregrine nesting to fail. This data would indicate whether a voluntary closure would best serve the NPS mission and NRGNR’s mandate as defined by its enabling legislation.

- What is the status of the ESA recovery plan? What has been learned from the monitoring plan where implemented elsewhere in the Eastern geographical survey region?
- What is the species distribution in the Mid-Atlantic Ecosystem? Is this distribution sufficient to sustain a regional peregrine population?
- Are there other climbing areas in the regional peregrine distribution area? What effects has climbing had on these nesting areas?
- What is the success rate of peregrine nesting in areas such as the Endless Wall? Are there other areas proximate to the NRG that might serve as a better nesting location?
- What are the ecological requirements of peregrines in terms of nesting, brooding, foraging and non-breeding habitat requirements?
- Has climbing activity at the NRG been observed to affect the behavior and/or nesting requirements of peregrines? Do other recreational activities (such as hiking) in the area affect the behavior and/or nesting requirements of peregrines?
- How will the size of any buffer zone be determined with regards to a peregrine closure?
- How will the time period of any closure be determined?
- Will a closure at the Endless Wall cause climbers to use alternative venues to recreate? Would any increased impact at these alternate venues be sustainable?
- How will a closure be evaluated for effectiveness?
- How flexible will the restriction be? (If, for example: (1) peregrines 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 peregrines at the Endless Wall?
- 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 a closure at Endless Wall.

At our April 19 meeting, your staff stressed the fact closing the Endless Wall to climbing would promote the natural, resource values that nesting peregrines would provide. Little, however, was said about the outstanding recreational values provided at the Endless Wall. Indeed, as Gene Kistler noted, the Endless Wall is the centerpiece of climbing at the New River Gorge. Furthermore, the “Significant Statement” produced by the NRGNR to distill the resource values stated in the NRGNR enabling legislation acknowledges that, in part, the purpose of the NRGNR is to “provide resource-based visitor experiences which do not impair resource values”, that the NRG is a significant destination for “world-class . . . rockclimbing”, and that a Park mission is to provide “a system of land . . . based recreational opportunities . . . that allows visitors to safely experience the resources without impairing them.”

The NRGNR should strive to manage for the fact that the Endless Wall provides a truly unique, world-class climbing experience. Likewise, the NRGNR should acknowledge that managing for a migratory peregrine population to create a non-native nesting environment is not clearly within the Park's mission or NPS authority. Without establishing a legal basis or ecological need to close Endless Wall to climbing so to provide for a speculative migratory peregrine population, the NPS appears to be managing in an arbitrary fashion: prioritizing migratory peregrines over one of the best climbing resources in the country does not present a balanced, rational management approach.

The Access Fund is committed to working with the NRGNR to resolve the issues raised in this letter. As stated, provided a legal and scientific basis for closing Endless Wall to climbing can be produced, The Access Fund will be the first to assist you in implementing the details of that initiative. As noted in our meeting, The Access Fund feels strongly that, provided a sound legal and scientific basis is demonstrated, a voluntary closure, with consistent monitoring for a two-year period (with provisions for lifting the closure if it proves fruitless), should be implemented rather than a mandatory closure for a set five-year period.

Again, The Access Fund very much appreciates your hard work at the NRGNR and your willingness to meet with us on April 19. We welcome any questions or comments you might have regarding the issues raised in this letter. I look forward to seeing you at the upcoming public meeting concerning the NRGNR draft CMP.

Sincerely,

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The Access Fund

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