

March 25, 2003

Maribeth Gustafson
Forest Supervisor, Lake Tahoe Basin Management Unit
USDA Forest Service
870 Emerald Bay Road
South Lake Tahoe, CA 96150

Re: Access Fund Comments on the Cave Rock Management Direction and Final Environmental Impact Statement

Supervisor Gustafson:

The Access Fund welcomes the opportunity to comment on the Cave Rock Management Plan Final Environmental Impact Statement (hereafter "FEIS"). Cave Rock is a unique and significant climbing resource and a large number of the Access Fund's members climb at Cave Rock and in the Lake Tahoe area. We believe that Alternative #6 is not the best management direction for Cave Rock and respectfully request that the United States Forest Service at the Lake Tahoe Basin Management Unit (USFS) reconsider its recent change in position and renew its long-term support for Alternative #2. The Access Fund has worked successfully with the USFS involving Cave Rock issues and believes that it can work successfully in the future with the USFS to preserve climbing opportunities while conserving the climbing environment at Cave Rock. The Access Fund believes that all interests can be accommodated at Cave Rock, rather than the accommodation of some interests at the exclusion of others.

The Access Fund

The Access Fund is a 501(c) 3 non-profit conservation and advocacy organization representing the interests of American rock and mountain climbers. The Access Fund is the nation's largest climbing organization, with over 15,000 members and affiliates. We advocate on behalf of approximately one million technical rockclimbers and mountaineers nation-wide. 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.

The Access Fund encourages an ethic of personal responsibility, self-regulation, and Leave No Trace practices among climbers. In doing so the Access Fund works closely with local climbers, land managers, environmental organizations, and other interest groups to manage and preserve climbing areas throughout the United States; develops and distributes climber education materials; acquires and manages land; and provides funding for conservation and impact-mitigation projects, and for scientific research relevant to the climbing environment. A significant number of the Access Fund's members climb in Nevada generally and Cave Rock specifically.

The Access Fund endorses the appropriate management of recreational uses on public lands to balance Native American religious concerns with the constitutional and statutory mandates of the public land agencies. 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.

GENERAL REMARKS

The Access Fund opposes preferred Alternative #6 because it arbitrarily and unfairly singles out climbers for exclusion from Cave Rock. Moreover, it is our sense that Alternative #6 did not receive the benefit of the extensive public participation process that all other alternatives in the FEIS received. Significantly, the Access Fund asserts that Alternative #6 violates the First Amendment of the U.S. Constitution.

The Access Fund supports the selection of Alternative #2 in the Cave Rock FEIS because it fairly balances the interests of all affected parties as much as can reasonably be expected given the complicated circumstances. Management regimes similar to Alternative #2 have proven successful elsewhere, namely at Devils Tower National Monument (AKA Bear Lodge). Finally, Alternative #2 is the culmination of extensive public process and formal consultation and adequately accommodates the religious practices of the Washoe Tribe while preserving limited climbing access.

As you know, Cave Rock is a basalt plug which provides unique “sport climbing” opportunities for climbers from around the world. For nearly three decades climbers have considered Cave Rock an outstanding year-round climbing resource; indeed, it is possible to climb here in the middle of winter when it is not possible to climb on other cliffs in the Lake Tahoe region. Climbers from Reno and the Carson City areas would be most directly affected by a closure of Cave Rock, but the formation is also popular with climbers living in northern and eastern California. The climbing at Cave Rock is so outstanding that it has been profiled numerous times in national climbing magazines and has been featured in several climbing videos.

Cave Rock straddles US Highway 50 with four lanes of road drilled directly through the formation. It is a place where greater danger is found crossing the lanes of traffic to gain access to the rock than in climbing the expert-level routes, and where roadside parking is prohibited as too dangerous due to the high speed of traffic. Climbers must shout to each other to be heard over the roar of traffic making verbal communication virtually impossible. Cave Rock has been dynamited, bulldozed, built on, and tunneled through. Cave Rock has been used for 25 years as a climbing area; over 300 fixed safety anchors have been placed there to provide a modicum of safety while climbing. Cave Rock is also considered sacred to the local Washoe Tribe.

The Access Fund has a long history of involvement with USFS management of Cave Rock. In 1995 the Access Fund, in consultation with local climbers, worked to identify a compromise that would keep Cave Rock open for climbing on a limited basis while at the

same time accommodating the religious interests of the Washoe. We have met directly with members of the Washoe Tribe, and have repeatedly suggested solutions similar to those in effect at Devils Tower National Monument^[1] in Wyoming, where *voluntary* closures are instituted for limited time periods out of respect for Native American religious practices. The Access Fund and local climbers agreed to remove some of the climbing routes at Cave Rock, and to disallow the establishment of new routes. However, our suggestions were never acceptable to the Washoe.

To assist the religious practices of the Washoe, the USFS subsequently announced that it would close Cave Rock pending the establishment of a management plan. Shortly thereafter the Access Fund helped to work out an arrangement with the various parties to keep Cave Rock open to climbing during this interim period, and agreed that a joint education effort would be undertaken to encourage climbers to climb elsewhere out of respect for Washoe religious beliefs. However, in May 2002 the Access Fund met with the Forest Supervisor of the Lake Tahoe Basin Management Unit who indicated that the USFS would change its preferred alternative for the FEIS to ban climbing altogether.

A critical problem with the new preferred Alternative #6 of the FEIS is that it patently violates the Establishment Clause of the First Amendment to the U.S. Constitution. In addition, while the USFS would prohibit climbing based on religious concerns, it would continue to allow other recreational activities such as hiking and picnicking. Inexplicably, the USFS asserts that none of these other activities diminish the cultural and/or religious integrity of Cave Rock. Even if Alternative #6 were considered a permissible accommodation of religion, prohibiting only climbers is discriminatory. Absent compelling evidence that climbing is the singular activity that adversely affects the cultural integrity of Cave Rock, the Access Fund cannot support a closure that applies only to climbing.

A voluntary closure to climbing at Cave Rock is a management solution that can be supported by climbers, and is a workable balance of recreational and religious interests. Since its inception the voluntary climbing closure at Devils Tower National Monument has resulted in a 90 percent reduction in climber visitation during the ceremonial period, and there is no reason to believe that Cave Rock would not see similar results. While such a compromise may not completely satisfy all parties, a voluntary closure would serve to avoid problematic Constitutional issues yet address fairly and equally the interests of the affected stakeholders at Cave Rock. The Access Fund believes that climbers will and should support a voluntary closure at Cave Rock, and that the USFS should make a voluntary closure their preferred planning alternative. The voluntary closure approach is available to the USFS in the (formerly preferred) Alternative #2.

The USFS may accommodate the Washoe at Cave Rock for their religious practice, but this accommodation does not include excluding other legitimate users from the site. The USFS may regulate the use of Cave Rock to minimize resource destruction and conflict among users, including between rock climbers and the Washoe. Alternative #2 of the

^[1] See The Access Fund's position regarding Devils Tower National Monument at http://accessfund.org/whowere/who_about_pos_dtower.html.

FEIS provides both resource protection and accommodation to the Washoe to freely exercise their religious beliefs. Alternative #6, however, grants to the Washoe, under the guise of an adverse effect determination of the National Historic Preservation Act, a veto power over conduct they alone consider degrading to Cave Rock. The Access Fund believes this approach to be arbitrary and capricious, and a violation of the U.S. Constitution's First Amendment.

I. PREFERRED ALTERNATIVE #6 IS UNCONSTITUTIONAL

The USFS must not use the National Historical Preservation Act (NHPA), and the status of Cave Rock as a traditional cultural property, as a pretense to restrict otherwise lawful conduct because of the religious sensibilities of one particular group. The Access Fund supports, and federal courts endorse, federal agency action that informs the public of the religious significance of geographic features to certain Indian tribes. Federal courts also endorse federal agency action that requests the visiting public to voluntarily refrain from entering or climbing such geographic features. See Bear Lodge Multiple Use Association v. Babbitt, 2 F. Supp. 2d 1448 (D. Wyo. 1998), *affirmed*, 175 F.3d 814 (10th Cir. 1999). However, federal courts reject agency action that closes, restricts or regulates federal lands based upon their sacred nature to Indian tribes because such government control coerces individuals to act contrary to their own religious beliefs. Lyng v. Northwest Indian Cemetery Protective Association, 485 U.S. 439 (1988).

The Advisory Council on Historic Preservation (ACHP) acknowledged the problematic Constitutional issue at Cave Rock when they commented on the USFS's proposed Cave Rock management plan and noted that while

Cave Rock is significant, in part, for its association with the traditional cultural practices and beliefs of the Washoe Indian Tribe . . . [c]onsultation is complicated by the question of whether a Forest Service management plan that prohibits rock climbing on Cave Rock would violate the Establishment Clause of the Constitution."

<http://www.achp.gov/casearchive/casessum01NV.html> (emphasis added). The USFS must clarify why it appears committed to implementing a management alternative that even the ACHP considers to have Constitutional problems.

A. The USFS's Cave Rock EIS Preferred Alternative #6 Would Violate the First Amendment to the United States Constitution

The First Amendment of the U.S. Constitution states

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof..."

U.S. CONST. Amend. I. (emphasis added).

The implementation of Alternative #6 of the FEIS would violate the Establishment Clause of the First Amendment because banning rock climbing at Cave Rock in response to concerns about disruption of Native American spiritual practices amounts to an unconstitutional establishment of religion. Implementation of Alternative #6 would violate the Establishment Clause because it fails the test set forth in the U.S. Supreme Court's seminal Establishment Clause case of Lemon v. Kurtzman, 403 U.S. 602 (1971). Under Lemon, a federal action violates the Establishment Clause if: 1) it does not have a secular purpose; 2) it has the principal or primary effect of advancing religion; and 3) it involves excessive government entanglement with religion. Id. at 612-613.

1. 1. Alternative #6 of the FEIS Fails the *Lemon* Establishment Clause Test

At Cave Rock the Lemon test requires that the USFS's selected management alternative to not have a primary purpose of advancing religion. Indeed, the USFS's selected alternative must have a secular purpose. In this case a climbing prohibition under Alternative #6 does not have a secular purpose because its express objective is to benefit the practitioners of a Native American religion. There is no secular purpose behind Alternative #6; indeed, Cave Rock has no secular significance to the Washoe—it has never been used for habitation, meeting or trading, hunting, fishing, food gathering or food processing site. It is not a battlefield or burial ground, or valuable for artifacts or rock art. Cave Rock is a sacred site used for religious practice, and the Washoe simply want to exclude climbers whom they say impede these traditional religious practices. But more than just excluding climbers,

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.

See FEIS at 3-10. The FEIS further states that climbing should be prohibited because the Washoe believe that

Cave Rock as a whole should be avoided except by a few traditional Washoe practitioners, especially the Cave . . . the top of the rock, and . . . the water beneath . . . which appear to be particularly taboo.

Id. Alternative #6 would ban climbing to protect the exclusive seeking of power and knowledge by Washoe spiritual shamen at Cave Rock's taboo locations. This "power seeking" at "taboo" locations is clearly religious activity. Accordingly, the purpose of Alternative #6 to protect this religious activity is not secular as required by Lemon and is therefore unconstitutional.

Alternative #6 would also violate the requirement that the primary effect of the USFS's Cave Rock management action be one that does not advance religion. Banning climbing

in Cave Rock clearly advances Washoe religion because it seeks to preserve the feeling and association of Cave Rock’s “taboo” locations that are crucial to the seeking of power and knowledge by traditional Washoe practitioners.^{2[2]} Washoe spiritual leaders have requested the climbing ban at Cave Rock specifically to benefit the practice of their religion. The primary effect of such a ban would be the advancement of the Washoe religion, and the USFS has openly admitted that such would be the primary effect of a closure under Alternative #6. FEIS at 2-16.

In sum, Alternative #6 violates the Establishment Clause because the USFS would ban climbing to protect the non-secular religious activity of the Washoe. Furthermore, because the stated reason for and clear effect of banning climbing is to preserve the “taboos” and “power seeking” of Washoe religion, it is clear that the USFS would seek to advance Washoe religion through the climbing ban of Alternative #6. Accordingly, Alternative #6 fails the Lemon test and would therefore be unconstitutional if selected by the USFS.

2. An Outright Climbing Ban to Protect Religious Activity is Not a Permissible Accommodation of Religion

In a case similar to the present one, Devils Tower National Monument proposed a Climbing Management Plan (CMP) that instituted a *voluntary* closure to climbing out of deference to a month-long religious Sun Dance held by local Native American tribes. The CMP also instituted a *mandatory* restriction on issuing commercial permits for guided climbing in the month of June. *See Bear Lodge Multiple Use Association v. Babbitt*, 2 F.Supp. 2d 1448 (D. Wyo. 1998), *affirmed*, 175 F.3d 814 (10th Cir. 1999).

The Tenth Circuit Court of Appeals in Bear Lodge acknowledged that while the U.S. Supreme Court has “long recognized that the government may accommodate religious practices without violating the Establishment Clause,” such action must “not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which establishes a [state] religion or religious faith, or tends to do so.” Bear Lodge, 2 F.Supp. at 1451 (*citing Lee v. Weisman*, 505 U.S. 507, 587 (1992)). In the present case, the USFS would manage Cave Rock to promote the religious interests of the Washoe Tribe, and coerce the public—through the mandatory closure of Alternative #6—to support those interests.

In Bear Lodge, the court clearly drew the line between permissible accommodation and impermissibly excessive entanglement with religion. The Devils Tower CMP was found to

violate the Establishment Clause to the extent that it prohibits the issuance of commercial use licenses for guided climbing activities during the month of

^{2[2]} The FEIS refers to the Washoe shamen as “traditional Washoe practitioners.” Yet “power seeking” and respecting “taboo” areas are clearly terms of *religious* practice despite the *culture* label that the USFS would prefer to place on this activity.

June . . . such regulations require climbers to conform their conduct in furtherance of those American Indians' religious necessities. Conversely, the voluntary closure to public climbing is merely a request that climbers refrain from climbing during the month of June out of respect for American Indian religious and cultural values [which] seems to be a permissible accommodation of American Indian religious practices

Bear Lodge, 2 F.Supp. 2d at 1454.

Because Alternative #6 does not have a secular purpose, has the primary effect of advancing Washoe religion, the implementation of Alternative #6 would excessively entangle the USFS with Washoe religion and thus violate the Establishment Clause. The rule stated in Bear Lodge is clear 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's proposed ban on climbing at Cave Rock under Alternative #6 is therefore unconstitutional. Alternative #2, on the other hand, would be a permissible USFS accommodation of Washoe religion.

B. The Designation of Cave Rock on the National Register of Historic Places as a Cultural Site is Not a Basis to Ban Climbing

In 1998 Cave Rock was listed on the National Register of Historic Places. At the time of the listing, climbing had occurred at Cave Rock for over 20 years. The very fact that Cave Rock has been found eligible for the National Register, despite the presence of over 300 fixed safety anchors, demonstrates that climbing has not impaired the physical integrity of this historic formation. Indeed, all of the highway tunnels, pedestrian trails, and climbing anchors *were in place prior* to the listing of Cave Rock on the National Register. The Keeper of the Register noted when formally listing Cave Rock that

[p]hysical changes to the natural rock formation . . . while impacting the integrity of Cave Rock, have not diminished the traditional cultural significance of the place in the eyes of those that value it, nor its archeological importance or potential. Cave Rock retains the essential physical features and cultural relationships present in prehistoric and historic times that are necessary to convey its significance.

The listing of Cave Rock on the National Register indicates that physical changes to and modern activity at Cave Rock, including the 25 years of climbing, have not significantly reduced its historic or cultural significance. Therefore, allowing climbing to continue, especially supported by a public education effort, will not reduce the historic integrity and cultural significance of Cave Rock.

The USFS apparently seeks to avoid the significant Constitutional problems in Alternative #6 by cloaking the climbing ban behind an unprecedented interpretation of the National Historic Preservation Act (NHPA). By its plain meaning, an area of federal

land that is listed on the National Register because it is a sacred site to an Indian tribe is a *religious* site. Such land does not exorcise its religious character and become solely cultural simply because it is labeled cultural by the USFS. It is still a religious sacred site. The added designation of listing a sacred site as a traditional cultural property does not erase its underlying religious character and the concomitant Constitutional issues and limitations of the First Amendment.

The NHPA is a procedural statute that does not, in and of itself, create substantive rights or dictate a particular result. Indeed, nothing in the NHPA prevents the USFS from taking an action that would adversely affect a listed or eligible property. The NHPA allows the keeper of the National Register of Historic Places to list properties of “traditional religious and cultural importance to an Indian tribe.” *See* Section 101(d)(6)(A) of the NHPA. Cave Rock’s status as a “traditional cultural property” neither dictates nor requires that the USFS select Alternative #6. Rather, the NHPA mandates only that the USFS thoughtfully consider any effects that its “undertakings” (here, the FEIS) may have on Cave Rock, and to consult with outside experts on that determination *before* acting. In other words, the NHPA requires that the USFS consider any adverse effects that the Cave Rock Management Plan may have on Cave Rock, but it does not require a climbing prohibition even if climbing were found to have a physical adverse effect. In sum, the USFS cannot claim that the NHPA demands the selection of Alternative #6. To misconstrue the NHPA in that fashion would thinly disguise the USFS’s real intent—to ban climbing.

1. 1. To Equate a NHPA Cultural Property Designation as the Basis to Ban Climbing is Unprecedented and Could Have Widespread Implications Greatly Restricting Public Access to Federal Lands.

For the USFS to reject Alternative #2 to preserve the religious feeling and association of a traditional cultural property will create a very troubling precedent for further restrictions on all other types of recreational access to public lands across the country.^{3[3]} There is little to distinguish Washoe objections to climbing Cave Rock to similar objections by the Washoe and many other tribes to public access at many other sacred sites throughout the nation. Very simply, even if there is an adverse impact is found with respect to a traditional or cultural property, the NHPA designation cannot and should not provide a basis for an unconstitutional act. The U.S. Supreme Court acknowledges that giving such a veto power to Native Americans for religious purposes is not legally tenable and could have widespread impact on other legitimate users.

In Lyng the Court noted that:

Nothing in the principle for which they [the Indians] contend...would distinguish this case from another lawsuit in which they [or similarly situated interests] might seek to exclude all human activity but their own from sacred areas of the public

^{3[3]} The extractive industry has already been affected by a similarly broad interpretation of the NHPA. *See Wyoming Sawmills v. U.S. Forest Service*, 179 F.Supp.2d 1279 (D. Wyo. 2001) (deciding whether managing federal lands as a sacred site bars otherwise legal multiple-use activities).

lands.... No disrespect for [Indian religious] practices is implied when one notes that such beliefs could easily require *de facto* beneficial ownership of some rather spacious tracts of public property. Even without anticipating future cases, the diminution of the Government's property rights, and the concomitant subsidy of the Indian religion, would in this case be far from trivial.

Lyng, 485 U.S. at 453 (emphasis added).

If the USFS determines that climbing at Cave Rock causes an adverse effect to a National Register property and must therefore be prohibited, there are thousands more such sacred sites on federal lands that are now listed, or may qualify for listing, as traditional cultural properties. Will climbing or other forms of recreational public access be determined, at the prompting of Indian tribes, to be adverse to such sites and thus prohibited? Will the exercise of valid existing rights be diminished or extinguished? Not every sacred site that is a traditional cultural property is physically defined as narrowly as Cave Rock. Many sacred sites cover vast areas affecting many recreation and industrial interests comprising enormous numbers of people and opportunities on public lands.

However much we might wish that it were otherwise, the government simply could not operate if it were required to satisfy every citizen's religious needs or desires The First Amendment must apply to all citizens alike, and it can give to none of them a veto over public programs that do not prohibit the free exercise of religion.

Lyng, 485 U.S. at 452. To effectively give to the Washoe a veto power over public conduct would inappropriately and unlawfully impose a religious servitude on public lands.

2. The USFS Improperly Uses a “Historic Period” as a Basis for the Climbing Ban in Alternative #6

The USFS unjustifiably uses an arbitrary “Historic Period” to single out and exclude climbers at Cave Rock. In the FEIS the USFS attempts to quantify the various environmental effects to Cave Rock and allow appropriate activity there by determining whether a given activity occurred during a specific time period. The period selected for Alternative #6 identifies acceptable activities at Cave Rock to be those that occurred prior to 1965. The use of this cut-off date is an arbitrary and capricious vehicle to single out rockclimbers and prohibit an otherwise lawful and legitimate activity because (1) the USFS fails to identify impacts caused by climbing that exceeds other recreational uses, and (2) the use of a Historic Period determination to exclude climbing is an unprecedented use of the NHPA constructed by the USFS to justify an unfair application of a management plan.

While the FEIS notes that Alternative #6 would reduce the effects of climbing on heritage values at Cave Rock to a level of no significance, this conclusion is only true if the FEIS artificially constrains the determination of adverse effects to activities that began after

1965.^{4[4]} This use of a Historic Period to justify the sole exclusion of climbers is an attempt to offer support for a predetermined decision (ban climbing) with an unprecedented interpretation of the NHPA. The Historic Period specified in Alternative #6 is an artificial academic construct, not a legal mechanism required under the NHPA. Accordingly, the USFS is acting beyond its authority when it creates a new mechanism based on the NHPA that permits management by caprice.

Moreover, using an artificial time period to determine whether there are environmental effects on heritage resources environmental effects avoids the question of what the members of the Washoe Tribe consider as impacts. According to the FEIS, the Washoe believe that the presence of others at Cave Rock endanger the lives of all people. Accordingly, the tribe indicated that the feeling and association of this sacred place is diminished by the presence of *all persons* except a few select Washoe shamen. The presence of women is considered a particular desecration. Further, the Washoe consider no part of Cave Rock as more or less special, but that all its parts are equally important, and that hiking, fishing, scenic viewing, stargazing and other low impact activities “disturb the traditional users of the property . . . and affect the property’s pre-European encroachment feel and association.” FEIS at 3-20. This all begs the question: is the Historic Period used by the USFS an academic construct used to justify excluding only climbing? Or do the Washoe also subscribe to this artificial cut-off date as the best way to preserve the feeling and association of Cave Rock? The Washoe believe that all low-impact users disturb the feeling and association of Cave Rock and that not only the cave area, but also the top and “water beneath” are considered taboo locations. Should not all these areas (and associated users) be treated the same? Clearly, climbers are being singled out by use of the USFS’s artificial Historic Period construct, a concept that has no basis in the NHPA or other land use laws.

The USFS should reconsider its unprecedented use of the NHPA to ban climbing at Cave Rock. Not only would such a manipulation of that statute create far-ranging problems with regard to managing federally located Native American sacred sites, but such an interpretation has no basis in law whatsoever. Finally, the USFS’s use of the NHPA to ban climbing at Cave Rock is a transparent effort to avoid well-established Constitutional limitations on governmental action.

II. II. ALTERNATIVE #2 REPRESENTS A MORE BALANCED AND LEGALLY APPROPRIATE TO MANAGING CAVE ROCK

The Access Fund supports the selection of Alternative #2 in the FEIS. This previously preferred alternative resulted from a significant amount of consultation between the USFS, the Advisory Council on Historic Preservation, the Nevada State Historical Preservation Office, the Washoe Tribe, and the climbing community. Clearly, this

^{4[4]} Consider also the construction of the historic road across the cliff face above the lake in the early 19th century that involved construction workers hanging in harnesses while they drilled bolts into the face by hand to build the cantilevered highway. This activity occurred before 1965, thus implying such climbing activity ought to be grandfathered into the FEIS under the USFS’s artificial and unprecedented environmental effect determination.

compromise was not ideal to the Washoe and they stated as such to the ACHP. Nevertheless, under our current legal system religious preferences have no place in public lands management. For Alternative #6 to be a tenable management initiative, the federal government must change the laws that govern agency action.

Unlike Alternative #6, Alternative #2 resulted from years of public participation and consultation with the various interested parties. Alternative #2 would fairly limit the impact that climbers might have on the religious practice of the Washoe while still accommodating their traditional rites. Importantly, Alternative #2 treats all users equally and does not arbitrarily single out only climbers for exclusion. Under Alternative #2 the climbing community could educate itself regarding the Washoe religious activity and voluntarily agree to respect this conduct by avoiding the area during predetermined times. Climbers could also camouflage all fixed anchors and generally leave the area so that its feeling and association is reasonably acceptable to Washoe standards.

Also unlike Alternative #6 of the FEIS, Alternative #2 would have the benefit of accommodating Washoe religious practice at Cave Rock without violating the First Amendment. While the Washoe Tribe enjoys the right to the exercise of its First Amendment religious freedoms, such freedoms may not be asserted to deprive the public of its normal use of an area. Shuttlesworth v. Birmingham, 394 U.S. 147 (1969). Therefore, like the Bear Lodge case noted above, a voluntary ban at Cave Rock instead of a coercive mandatory ban would provide the most appropriate mechanism to preserve traditional Washoe practice. The climbing community welcomes the opportunity to prove that it will respect Washoe religious concerns.

CONCLUSION

The Access Fund strongly urges you to select Alternative#2 because it represents the only balanced and fair approach of all the management alternatives in the Cave Rock FEIS. Alternative #2 seeks to accommodate the religious activities of the Washoe, yet provides for limited climbing activity. Importantly, it is fair, reasonable, and the result of an extensive public participation process that earned it preferred alternative status in the first place.

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The Access Fund sincerely hopes that these comments are informative and assist the USFS in selecting their management alternative for the Cave Rock FEIS. We look forward to working with you to identify progressive management alternatives within the Lake Tahoe Basin Management Unit that effectively adhere to your Forest Plan's hierarchy of values while at the same time are fair to all interested parties.

Sincerely,

Jason Keith
Policy Director
The Access Fund

Cc: The Honorable John Ensign, United States Senate
The Honorable James Gibbons, United States House of Representatives
Steve Matous, Access Fund Executive Director
Access Fund Policy Committee
Paul Minault, Access Fund Northern California Regional Coordinator
John Maher, Heritage Resource Program Manager, Lake Tahoe Basin
Management Unit, USDA Forest Service