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First name: Bruce

Last name: Rogers

Organization:

Title:

Comments: Dr. Bruce W. Rogers

Forest Supervisor Ms. Holly Jewkes

Deschutes National Forest

63095 Deschutes Market Road

Bend OR 97701

Forest Supervisor Jewkes,

I have concerns about the currently proposed cave orders and propose the following changes in the wording of this document.

Summary of Changes

ProposedChange to:

1Eternity/Infinity ClosedApprove the proposed Oregon High Desert Grotto (OHDG) Challenge Cost Share Agreement and Management Plan or a similar agreement

2Cody Borehole Closed Year RoundChange to: Cody Borehole open year round

3Lower Quartz Mountain & Lee's Cave closed Oct 1st-April 30thLower Quartz Mountain & Lee's Cave Closed Oct 1st-May 31st

4Cave digs prohibitedProvide clarification to the OHDG Grotto on how passage restoration will be managed to allow important exploration and study.

5Wind, Bat, and Skeleton Cave Closed Year RoundWind, Bat, and Skeleton to be closed seasonally. Public access will be restored.

6Temporary anchors prohibitedBolts and piton anchors will be prohibited

7Charcoal #1 & Deg Closed Year RoundCharcoal #1 & Deg Caves to be closed seasonally as determined on scientifically qualified reasons.

850 foot bufferSite by site mitigation plans are far better and exact - With this blanket closure the USFS is creating a monster of a legal disaster for itself.

9"Certified Service Animals" allowedService Animals as defined by ADA.gov -The verbiage in this option is illegal.

Priority #1

Eternity and Infinity Caves - Closed, gated, and properly managed

The Oregon High Desert Grotto (OHDG) , National Speleological Society, located these caves. The OHDG has

managed these caves in the most restrictive and conservative manner while allowing scientific and limited recreational uses. The OHDG has sent a proposed challenge cost share agreement and management plan on these caves, and helped push their protection at every turn in a repeated manner while the US Forest Service has seemingly forgotten about their inputs as volunteer organization while espousing continual, conservation-minded usage. Reinstating and approving the OHDG-sponsored challenge-cost share agreement and management plan is long overdue. It is necessary to get these caves gated and properly managed with proper OHDG access and oversight.

Priority #2

Cody Borehole Year Round Closure

While some charcoal remains in the cave, there is no evidence that significant archaeological artifacts remain, and is apparent from observation by qualified personnel that further significant charcoal deposits are unlikely to remain in the cave. The 4000-year old points were all located in clear view on the surface of the lava rocks. Cody Borehole is the deepest cave in Oregon, and a significant recreational destination. Hundreds of cavers have visited the cave for decades. The OHDG does not believe that this closure is needed or properly supported by the resources in view of contents still present in the cave. I expect Cody Borehole to remain open to responsible visitation as it has for decades. The practice of having caves closed to us due to cavers locating sensitive resources will endanger the trust the caving community's have in the USFS, and would most likely make for future reporting of resources by cavers less likely.

Priority #3

Lower Quartz Mountain & Lee's Cave

Lee's Cave has hibernating bats into May most years. Lower Quartz Mountain probably does as well based on proximity and elevation. It is proposed that extending this closure to May 31st would not endanger the bat colony in this cave.

Priority #4

Cave digs" (i.e. excavation within caves for purposes such as opening up presently blocked passage, etc.) are a well established techniques in cave exploration around the nation and world-wide. They occur deep inside at the terminal ends of cave passages, most often far from entrances. Major examples like the Lechuguilla Cave dig in Carlsbad Caverns National Park, and the Snowy River Extension in Ft. Stanton Cave speak to the incredible proven potential for discovery and science. The passage modification in Cody Borehole may possibly someday lead to the discovery of the longest lava tube in the State of Oregon, and open up possible research avenues we can't yet envision. Cavers are pushing the edge of our scientific knowledge and exploring some of the few unknown parts of our world. While the caving community and the US Forest Service agree that oversight of digs is reasonable and legally required, the US Forest needs to reply to the OHDG's persistent requests about what such oversight might be, and what processes and criteria will the US Forest Service base their decisions on.

Priority #5

Wind, Bat, and Skeleton Caves Year Round Closure; Arnold Cave Seasonal Closure

The US Forest changed this seasonal closure to year round closure about 10 years ago to see if the utilization by bats from vague, old reports would return. The data over the last decade has not supported that summer use is substantial or that maternity use is present. OHDG confirmed that the Forest has no data to support maintaining these closures (through FOIA request 2020-FS-R6-02685-F) which revealed any summer bat counts have not been done at any of these sites. Many summer visits to these caves by the caving community have not revealed significant bat use. Thus this closure is apparently not necessary nor backed by data. The Skeleton Cave , Bat Cave, and Wind Cave Closures have been hugely unpopular with local recreational cavers, and has driven deep resentment of the USFS. Skeleton, Bat, Arnold, and Wind Caves have been recreational sites for generations. Thus it appears that Skeleton, Bat, Arnold, and Wind Caves should be left open during the summer season for all to enjoy as it was throughout the 1990's and most of the 2000's. It would perhaps be advisable to take the removable bars out and put them in storage in May and then return them back on the gate in October as was done from 1990 to about 2009. The OHDG will continue to clean the caves and remove graffiti as needed. If further investigation shows that Arnold Cave should perhaps be closed seasonally, the USFS should gate the interior crawl and do the same seasonal gate opening and closing.

Priority #6

Temporary Anchor Restriction

Temporary climbing anchors commonly include cams, stoppers, and webbing. They are useful in exploration of caves. They are low or no impact devices allowed in the forest in general as well as our National Parks. The ban of such devices is unneeded and at odds with general USFS practices. The ban should include bolts and pitons, not temporary anchors. There is apparently no governmental interest in banning temporary anchors. If cams and webbing are fine in Zion, Yosemite, Lechuguilla Cave, as well as all over the Deschutes NF, they should be acceptable in caves. No reasonable person would think that an internationally accepted "leave no trace of one's passing technique" would be unacceptable just because one may be inside of or adjacent to the entrance of a cave.

Priority #7

Charcoal #1 and Deg

Deg Cave is a bat hibernation site and should be closed in the winter. Charcoal #1 Cave and Deg Cave do not have data to support a total summer closure for bats based on the data provided under the OHDG FOIA request. The current closures are being widely ignored and unenforced as the caves are not gated and well known to the public. The question thus remains: is there evidence that Charcoal #1 Cave has significant archeological resources that would be impacted by casual visitation? Further, why add another unenforced and poorly supported closure? Perhaps the answer may be, in view of the lack of suitable data, that closure should not be considered.

Priority #8

50 Foot Buffer Rule

One of the portions of the plan which appears to be a mistake is the new "50 foot buffer rule" on engines, stoves,

camping, mountain bikes, and more. The new version is a great improvement over the "200 foot buffer zone" proposal, but still has many issues, particularly not meeting the 14th Amendment standard established in *Kolender v. Lawson* (Void for Vagueness Doctrine) and, particularly in *United States v. True*. This blanket "50 foot buffer" will criminalize many activities people engage in with no ill intent and no knowledge they are near a cave. A great example is dispersed camp sites all over the forest which are within the 50 foot buffer by hardly identifiable caves. A reasonable person wouldn't realize many of the 8 inch wide holes in the forest are caves, nor be able to see such holes from even 10 feet away. Campers often pull into such sites with no idea a cave may be only feet away, nor have reasonable grounds to believe any cave is nearby. As cave locations are not public, nor signage present, expecting the public to obey the rule is unrealistic and contrary to established law (Void for Vagueness Doctrine). A much better way to approach this issue is site by site plans creating physical barriers and/or signage around sensitive caves. A great example is the Skelton Road gate, which mostly accomplished the distancing desired.

The proposed "50 foot buffer" around all caves is thus overly broad. It is intended to protect bats from disturbance, but most of the caves on the Forest do not have significant bat use. While it was proposed with good intentions, perhaps a better use would be to strike the buffer in entirety and then replace it with targeted relocations of roads, trails, and parking areas in specific sensitive spots as funding and time allows.

Posting Prohibitions

36 CFR 261.51 requires:

- (a) Placing a copy of the order imposing each prohibition in the offices of the Forest Supervisor and District Ranger, or equivalent officer who have jurisdiction over the lands affected by the order, and
- (b) Displaying each prohibition imposed by an order in such locations and manner as to reasonably bring the prohibition to the attention of the public.

A question is: Is your office ready to post these regulations at all 700 caves and around the 50 foot buffers on the district? How could you expect the public to reasonably know all of these dozens of provisions which are different site by site unless you post them at reasonable locations? Many members of the public don't know which cave is which because the cave locations are secret by law creating a conflict with the 14th Amendment of the US Constitution as laid out in *US. v. Vasarajs*. How would any reasonable, well-meaning, and conservation-oriented person be expected to follow all these provisions when they are not posted properly as required by 36 CFR 261.51, and refer to cave names and locations that not available to the public? The 9th Circuit ruled in *United States v True* that a person in knowing and purposeful violation of such closures was not guilty as the closure order did not meet the standard of providing reasonable certainty to the public about what areas were closed and what activities were illegal.

Case Law Making the Proposed Order Generally Unenforceable

Kolender v. Lawson, 461 U.S. 352 (1983) explains:

As generally stated, the void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.

United States v. Glisson, 1996 US App Lexis 33684

Here, both prongs of the vagueness doctrine are satisfied. First, the CBTS Order clearly states that "being in or entering on lands described as the Cripps Bend Timber Sale" is prohibited. The CBTS Map incorporated by the Order identifies the closed area with sufficient definiteness that "reasonable persons would know that their conduct is at risk." Maynard, 486 [*10] U.S. at 361. Second, arbitrary or discriminatory enforcement was not encouraged because, again, the CBTS Order and Map were sufficiently definite to limit forest service officials' enforcement authority. Therefore, the CBTS Order defined the prohibited conduct clearly enough that forest service officials were not free to enforce the order in an arbitrary or discriminatory manner.

United States v. True 946 F.2d 682 (1991)

We are unable to interpret section 261.50(c) as requiring anything less than a description of the closed area and a specification of the times of closure that would permit a reader of the order to determine with reasonable certainty the boundaries of the area actually closed and the particular times during which it will be closed.

We are unable to interpret section 261.50(c) as requiring anything less than a description of the closed area and a specification of the times of closure that would permit a reader of the order to determine with reasonable certainty the boundaries of the area actually closed and the particular times during which it will be closed. Interpreting it to require only an indeterminate description of potential areas and times of closure would not only affront the plain language and self-evident intent of the regulations, but would also pose serious constitutional problems. See *Kolender v. Lawson*, 461 U.S. 352, 357, 75 L. Ed. 2d 903, 103 S. Ct. 1855 (1982) ("the void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement").

United States v. Vasarajs 908 F.2d 443 (9th Cir. 1990)

In short, due process does not require that citizens be provided actual notice of all criminal rules and their meanings. The Constitution is satisfied if the necessary information is reasonably obtainable by the public.

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Priority #9 -"Certified Service Animals"

This "Certification" requirement is illegal. See ADA.gov for details. The definition of a service animal is fluid in the courts. Perhaps a change in the wording the language: "Service animals as defined by the Americans with Disabilities Act are allowed".

Conclusion

The OHDG and general caving community wish to thank your office for reviewing the outdated closure orders and working on a comprehensive plan to manage caves. We believe the Forest has good intentions and good people trying to do the right thing. Cavers throughout the nation are HIGHLY disturbed that more of our input wasn't put into the Alternate 2 after the initial scoping. We feel that aspects of this plan as proposed will drive a further wedge between the public, cavers, and the USFS.

Alternate 2 is still highly flawed. Large portions of this plan will most probably not stand the inevitable legal challenges. A blatant example is the "certified service animal" provision which is contrary to Federal Law and case law (https://www.ada.gov/regs2010/service_animal_qa.html). While the Forest has authority to implement administrative procedures based on federal law, the current US Forest Service plan is overly broad and the governmental interest in many of the provisions is not present, poorly supported where stated, and contrary to the data you provided to the OHDG FOIA request. The US Forest must conduct further review, limit the scope of the order to those narrow and defined governmental interests, and come up with a reasonable plan to manage caves. Thus this overly broad plan covering 700+ caves and the surrounding surface areas fails to meet legal standards under 36 CFR 261.50 and related court decisions.

Yours,

Bruce W. Rogers

USGS (ret.)