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Organization:

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Comments: Forest Supervisor Holly Jewkes

Deschutes National Forest

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William W. Christy

Forest Supervisor Jewkes,

I have concerns about the proposed cave order. I request the following:

Summary of Vital Changes

Proposed --- Please Change To:

1 Eternity/Infinity Closed. --- Approve the proposed OHDG Challenge Cost Share Agreement and Management Plan or a similar agreement

2 Cody Borehole Closed --- Year Round Cody Borehole open year round

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

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

5 Wind, Bat, and Skeleton Cave Closed Year Round --- Wind, Bat, and Skeleton closed seasonally. Public access restored.

6 Temporary anchors prohibited --- Bolts and pitons prohibited

7 Charcoal #1 & Deg Closed Year Round --- Charcoal #1 & Deg Closed seasonally

8 50 foot buffer Site by site mitigation plans --- You're creating a monster of a legal disaster for yourselves.

9 "Certified Service Animals" allowed --- Service Animals as defined by ADA.gov -The verbiage is illegal.

Priority #1

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

The Oregon High Desert Grotto found these caves. They've managed these caves in the most restrictive manner. They've sent a proposed challenge cost share agreement and management plan on these caves, and helped push their protection at every turn while the Forest has seemed to forget about them repeatedly. Approving the challenge-cost share agreement and management plan is overdue. We need to get these caves gated and properly managed with proper Grotto 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, nor are they highly likely to exist 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 Grotto does not believe that this closure is needed or properly supported by the resources still present in the cave. I expect Cody Borehole to remain open to responsible visitation as it has for decades. The prospect of having caves closed to us due to cavers locating sensitive resources endangers the trust cavers have in the USFS, and makes 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. I would propose extending this closure to May 31st.

Priority #4

Cave "Digs" AKA Passage Modification

Cave digs are well established techniques in cave exploration around the nation. 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 Cavern National Park, and the Snowy River Extension in Ft. Stanton speak to the incredible potential for discovery and science. The passage modification in Cody Borehole is likely to someday lead to the discovery of the longest lava tube in the State or 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 cavers can agree that oversight of digs is likely reasonable and legally required, the Forest needs to reply to the OHDG's long requests about what such oversight will be, and what processes and criteria you will base your decisions on.

Priority #5

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

The Forest changed this closure to year round from seasonal 10 years ago to see if the 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 does not have data to support maintaining these closures through FOIA request 2020-FS-R6-02685-F which revealed no summer counts have been done at any site. Many summer visits to these caves by cavers have not revealed significant bat use. This closure is not needed or backed by data. The Skeleton, Bat and Wind Cave Closures have been hugely unpopular with locals, and has driven deep resentment of the USFS. Skeleton, Bat, Arnold and Wind Caves were recreational sites for generations. I have a strong opinion that Skeleton, Bat, Arnold and Wind Caves should be left open during the

Summer season for all to enjoy as it was throughout the 90's and most of the 2000's. Take the removable bars to storage in May and put them back on the gate in October as was done from 1990 to about 2009. The Grotto will continue to clean the caves and remove graffiti as needed. If you want Arnold closed seasonally, you should gate the crawl and do the same seasonal gate opening and closing.

Priority #6

Temporary Anchor Restriction

Temporary 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 NO governmental interest in banning TEMPORARY anchors. If cams and webbing are fine in Zion, Yosemite, Lechuguilla Cave, and all over the Deschutes NF, they are fine in caves. No reasonable person would think that an internationally accepted leave no trace technique would be unacceptable just because you are inside or by the entrance of a cave.

Priority #7

Charcoal #1 and Deg

Deg Cave is a hibernation site, and should be closed in the winter. Charcoal #1 and Deg don't have data to support a summer closure for bats based on the data you provided under the OHDG FOIA request. Your current closures are being widely ignored and unenforced as the caves are not gated and well known to the public. Is there evidence that Charcoal #1 has archeological resources that would be impacted by casual visitation? Why add another unenforced and poorly supported closure? The answer is, you should not!

Priority #8

50 Foot Buffer Rule

One of the portions of the plan which is 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 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 is feet away, nor 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 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, you need to strike the buffer in entirety and 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.

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 blatant conflict with the 14th Amendment of the US Constitution as laid out in *US. v. Vasarajs*. How could any reasonable 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 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. 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.

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. You might just want to change the language to be "Service animals as defined by the Americans with Disabilities Act are allowed".

Conclusion

I 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. I feel that aspects of this plan will drive a further wedge between the public, cavers, and the USFS.

Alternate 2 is still highly flawed. Large portions of this plan will 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, your plan is overly broad and your governmental interest in many of the provisions is not present, poorly supported, and even contrary to the data you provided to the OHDG FOIA request. The 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. This overly broad plan covering 700+ caves and the surrounding surface area fails to meet legal standards under 36 CFR 261.50 and related court decisions.

Kind Regards,

William W Christy