1 IN THE UNITED STATES DISTRICT COURT

2 FOR THE DISTRICT OF NEVADA

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4 The Access Fund,

5 Plaintiff,

6 -vs- NO. CV-N-03-687-HDM(RAM)
United States District Court
7 Ann M. Veneman, Secretary of 400 S. Virginia Street
Agriculture, The United Reno, Nevada 89501
8 States Department of
Agriculture, and The United January 28, 2005
9 States Forest Service,

10 Defendants.
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13 TRANSCRIPT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT (#19)

14 AND THE UNITED STATE'S MOTION FOR SUMMARY JUDGMENT (#21)

15 BEFORE THE HONORABLE HOWARD D. McKIBBEN

16 UNITED STATES DISTRICT JUDGE

17

18 A P P E A R A N C E S:

19

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1 Proceedings recorded by mechanical stenography produced by computer-aided transcript

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5 OFFICIAL COURT REPORTER: KATHRYN M. FRENCH, RPR
NEVADA LICENSE NO. 392
6 CALIFORNIA LICENSE NO. 8536

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1 legitimate activity on public land. I mean, there is nothing
2 illegal about rock climbing.
3 THE COURT: I totally agree with that.
4 MR. GUSTAFSON: It happens on public land. It
5 was a legitimate activity. It was a legitimate user use at
6 Cave Rock. And one of the things that the Bear Lodge case
7 points out is that you run afoul of the Establishment Clause
8 when you prohibit a legitimate user use in order to support
9 the religious preferences of another group. And that's
10 exactly what we believe is happening here at Cave Rock. We
11 cannot distinguish Cave Rock and Bear Lodge. We think they
12 are identical situations.
13 I have nothing further, Your Honor.
14 THE COURT: All right. Thank you very much.
15 I appreciate the arguments. The briefs, I think,
16 were comprehensive, and I've examined the administrative
17 record in this case which is, in my opinion, a fairly
18 thorough and comprehensive consideration of the issues, and
19 I'm going to enter the following findings and conclusions in
20 connection with this case.
21 I would make the observation that the Court's
22 conclusion with respect to whether or not a decision by the
23 government is the right decision or wrong decision is not
24 always necessarily consistent with the Court's opinion as
25 to what should or should not be done. Courts have to be

1 very careful about deciding cases such as this by virtue
2 of applying their own values or determinations as to how
3 there should be perhaps reasonable accommodation for everyone
4 involved. But in many instances, those decisions are left
5 to the administrative bodies, or to the executive branch, as
6 long as there's not a violation of the constitution, and as
7 long as the actions are not arbitrary and capricious, and the
8 foundation for the decision is supported in the record.
9 So having said that, I'll enter the following
10 findings and conclusions:
11 First, the standard for summary judgment, and
12 these are cross-motions for summary judgment as well set
13 forth in the Federal Rules of Civil Procedure 56, and I'm not
14 going to restate that. The parties addressed the standards
15 comprehensively in the pleadings.
16 The facts really are not tremendously in dispute.
17 It's the conclusions reached by the Forest Service that gives
18 rise to this litigation.
19 Essentially, there are two issues raised in the
20 motions and cross-motion for summary judgment. The first is
21 whether or not the action of the Forest Service, in its record
22 of decision, violated the Establishment Clause of the First
23 Amendment.
24 The second issue is whether or not under the
25 terms of the Administrative Procedure Act, the action of the

1 Forest Service was arbitrary and capricious, and not supported
2 by the record.
3 Many of these cases seem to turn, at least the ones
4 that were cited by the parties, seem to turn on the issue of
5 standing. That's conceded in this case. I'm not going to
6 address it, other than indicate that even if it hadn't been
7 conceded, the Court would have concluded that the plaintiff
8 meets all of the essential elements of standing.
9 Plaintiff's I think appropriately showed that
10 they've suffered an injury in fact, that's concrete and
11 particularized, actual and imminent, and that there was
12 a causal connection existing between plaintiff's injury and
13 the defendant's conduct, and the injury could be redressed
14 by a favorable decision of the court. So, each of those
15 prongs was met. Apparently, based upon the pleadings and
16 also the statement by counsel for the government here today,
17 that the standing issue is conceded.
18 And as I indicated, some of the cases that were
19 cited, particularly the Bear case, which is Bear Lodge
20 Multiple Use Association versus Babbitt, 2 Fed.Supp 2.d 1448,
21 affirmed on appeal, 175 F.3d 814, Tenth Circuit decision,
22 1999, that decision affirmed on appeal dealt, at least on
23 appeal, strictly with the issue of standing, and I don't think
24 is particularly instructive in terms of the final conclusion
25 here; particularly, because of the singular nature of the

1 issue that was addressed on appeal, which was a standing
2 issue.
3 Addressing, first, the Establishment Clause argument
4 that's been made by the plaintiff in their motion, that the
5 conduct of the Forest Service violates the First Amendment,
6 the prong set forth in Lemon are the ones the Court has to
7 address: First, whether or not it -- the action of the Forest
8 Service had a secular purpose;
9 Second, whether or not its principal or primary
10 effect was to advance or inhibit religion; and
11 Finally, whether or not the action of the Forest
12 Service fosters excessive governmental entanglement with
13 religion.
14 I spent some time here in trying to glean from
15 each side the arguments with respect to the secular prong.
16 The secular purpose prong, as far as I can determine, means
17 that the government should be prohibited from intentionally
18 acting to promote a particular viewpoint in religious matters.
19 And that's what has been pronounced by the Supreme Court.
20 The secular purpose prong does not mean that
21 government conduct must be completely unrelated to religion,
22 as that would, as Supreme Court has indicated, exhibit a
23 callous indifference to religious groups. And that's not
24 required. And that's <u>The Corporation of Presiding Bishops for</u>
25 <u>the Church of Jesus Christ of Latter Day Saints versus Amos</u>,

1 43 U.S. 327, 335, a 1987 decision.

2 The Supreme Court has also articulated that

3 activity, in order to fail the secular purpose prong, there

4 must be no question that the government activity was motivated

5 wholly by religious considerations. And that's an important

6 factor in this case. And that was set forth in the <u>Lynch</u>

7 <u>versus Donnelly</u> case, 465 U.S. 668.

8 Finally, in <u>Wallace versus Jaffree, J-a-f-f-r-e-e,</u>

9 472 U.S. 38, the Supreme Court held that courts must determine

10 whether the government's actual purpose is to endorse or

11 disapprove of religion. When a court may discern a plausible

12 secular purpose from the face of the government conduct, the

13 court should be reluctant to find that such conduct violates

14 the secular purpose prong of the Lemon Test.

15 Now, applying that to the facts of this case,

16 as have been developed in the record, under the National

17 Register's criteria and consideration guidelines, property

18 used for religious purposes shall not be considered eligible

19 for the National Register unless the property derives primary

20 significance from historical importance. And that's set forth

21 in 36 CFR Section 60.4.

22 Of some significance in this case, although this

23 would not always obviously be dispositive on this point,

24 and it's not dispositive on the point here in the case before

25 the Court, both the Forest Service and Keeper of the National

1 Register determined that the Cave Rock is eligible for the
2 National Register. Those reasons, which I think are critical
3 reasons, not only for purposes of having the site included in
4 the National Register, but are critical for purposes of the
5 Court's determination with respect to this prong of the Lemon
6 Test, is that the reasons here included the critical position
7 that Cave Rock holds in Washoe religious and cultural
8 traditions and practices. And I emphasize the cultural
9 tradition and practices, which are separate and apart from
10 exclusively religious practices. And the courts have drawn
11 lines of demarcation between the two. The Supreme Court has
12 obviously given consideration to the difference between the
13 two, and that's what's important here;
14 Second, Cave Rock's association with historical
15 figures associated with Washoe practices, and not strictly
16 religious figures, but figures of historical significance in
17 the Washoe culture;
18 Third, that Cave Rock is the only Washoe spiritual
19 site that has been archaeologically determined to be a
20 probable location and preserved organic remains;
21 Fourth, Cave Rock's history is a well-documented
22 landmark along important transportation corridors that
23 developed in proximity of Lake Tahoe during the Nineteenth
24 and Twentieth Centuries; and
25 Finally, that Cave Rock contains ancient wood rat

1 middens which have paleoenvironmental value.
2 In fact, you are not permitted, the record seems
3 to indicate, to be included in the National Register if
4 the exclusive purpose is for religious purposes with respect
5 to the use of the site. And, here, that determination was
6 made prior to the determination of the Forest Service's final
7 conclusion with respect to Alternative Six, that it should
8 be included in the register because of the secular purposes
9 involved, but mainly because of the cultural traditions and
10 practices.
11 The Court concludes that on its face, the Forest
12 Service rock climbing prohibition does not appear to have
13 been motivated wholly by religious considerations. And that's
14 well-documented in the record.
15 The preservation of cultural resources is
16 established as the third highest priority in the Lake Tahoe
17 Basin Management Unit. The establishment of outdoor
18 recreation is listed as the seventh highest priority. It is
19 clear, and really uncontradicted anywhere in the record, or
20 even in the briefs before the Court, that the Forest Service's
21 finding is correct; that the Washoe Tribe has inhabited the
22 area surrounding Cave Rock for the past, and it's impossible
23 to date it precisely, but somewhere between 1500 and 2000 and
24 10,000 years. And, that Cave Rock is extremely important to
25 the Washoe Tribe's cultural traditions. Again, that's not

1 really disputed here.

2 The forest Service has also determined that rock
3 climbing, by its nature, alters the physical integrity of
4 Cave Rock. And, again, that's true with respect to the
5 cracks in the rock and the items that have been used in the
6 rock, it adversely affects Cave Rock, potentially adversely
7 affects Cave Rock's National Register eligibility, as I've
8 articulated earlier.

9 Therefore, the Court concludes that the record
10 does not support the plaintiff's position that the Forest
11 Service's actions were motivated wholly by consideration of
12 the Washoe Tribe's religion. It appears, instead, that the
13 evidence is substantial that the Forest Service was motivated
14 by its desire to protect the historical and cultural integrity
15 of Cave Rock.

16 And as I've indicated, preserving and protecting the
17 historically significant site has a important secular purpose,
18 and the evidence supports this conclusion. It's an important
19 site for the Washoe history. It's an important site for
20 the Washoe culture, for Euro-American history, and natural
21 history.

22 For those reasons, the Court concludes that the
23 defendant, the Forest Service, has shown that there is a
24 secular purpose, and that there has not been a violation under
25 the first prong of the Lemon's Test.

1 The second prong is the primary effect. Particular
2 attention has to be paid to whether the government's conduct
3 has the purpose or effect of endorsing religion. The
4 government, however, may accommodate religious practices
5 without violating the Establishment Clause. And I think
6 that's what's critical in this case.
7 I don't think there's any question that part of
8 the purpose of what the Forest Service is doing here, as
9 I look at the entire record, has the effect of promoting
10 religion, and may have the effect, particularly when you look
11 at the record as its been developed with the public comment,
12 the comment from the Washoes, there's no question that an
13 effect of what the Forest Service has done here promotes
14 religion. But the critical point I think is, and I'm not
15 persuaded by the plaintiff's argument to the contrary, the
16 critical point is that the government may accommodate
17 religious practices without violating the Establishment
18 Clause. The Establishment Clause does not require governments
19 to ignore the historical value of religious sites. That's the
20 case that was cited by counsel, the Cholla versus Civish,
21 C-i-v-i-s-h case, which is 382 F.3d 969 at 976, a Ninth
22 Circuit decision, 2004.
23 Many of the historical properties have significant
24 religious importance because of the central role religion
25 plays in society. And I'm paraphrasing from that decision.

1 In particular, protecting culturally important Native American
2 sites has historic value for the nations as a whole because
3 of the unique status of Native American Societies in North
4 American history.
5 The Court concludes that the Forest Service's
6 rock climbing prohibition does not convey the government's
7 endorsement or approval of the Washoe Tribe's religion.
8 Rather, the Forest Service's rock climbing prohibition
9 conveys the government's intent to protect the physical
10 integrity and character of a culturally and historically
11 significant Native American site.
12 There is no suggestion that the Forest Service
13 endorses the Washoe Tribe religion over other religions, or
14 that the Forest Service would not protect sites of historical,
15 cultural and religious importance to other groups. Therefore,
16 the Forest Service, in the opinion of this court, has not
17 violated the primary effect prong because the primary
18 effect of its rock climbing prohibition is to protect the
19 historically important traditional and cultural property,
20 not to advance Washoe Tribe's religion. Although that is one
21 of the effects, but again, as I've indicated, that's not
22 dispositive of the issue.
23 Next, the Court has to determine whether or not
24 there is excessive entanglement. Entanglement must be
25 excessive before it runs afoul of the Establishment Clause.

1 Several levels of entanglement are tolerated; particularly,
2 where it's inevitable. A government policy benefitting
3 Native American tribes does not necessarily constitute
4 excessive entanglement with religion, because Native American
5 tribes are not solely religious in character or purpose.
6 Rather, they are ethnic and cultural in character as well.
7 Again, quoting from the Cholla case at page 977.
8 Access has alleged here that the Forest Service
9 has directly entangled itself with the Washoe Tribe religion
10 through the future management of Cave Rock. I'm not persuaded
11 by that argument. First, the majority of the Cave Rock is
12 situated on Forest Service land and the Forest Service is
13 already burdened with the responsibility of managing Cave
14 Rock.
15 Second, enforcing the FEIS prohibitions, the Forest
16 Service does not excessively entangle itself with religion.
17 Instead, the Forest Service entangles itself with protecting
18 and preserving a culturally and historically significant
19 site.
20 As I've indicated before, any entanglement with
21 the Washoe Tribe's religion appears to this court to be a
22 necessary consequence of what is occurring here, but not the
23 dominant factor. Therefore, the Court concludes that the
24 excessive standard has not been met here, and that the
25 plaintiff has failed to establish that there has been a

1 violation of the First Amendment.
2 In directing the Court's attention to the
3 Administrative Procedure Act, the plaintiff has raised a
4 point that clearly gave the Court some pause in connection
5 with an examination of the record here. It is somewhat
6 troubling to the Court that there was not public comment
7 allowed, that when the Alternative Six was proposed that
8 the Forest Service did not open this up again for public
9 comment. I'm always troubled when that doesn't occur. But,
10 again, the Court has to apply the standards for review of
11 the administrative procedures under the Administrative
12 Procedure Act.
13 In reviewing the record, it does appear to
14 the Court that Alternative Six, which was proposed, is a
15 combination of alternatives Three, Four and Five. Alternative
16 Six referred to the maximum and immediate protection of
17 heritage resources. And Alternatives Three, Four and Five
18 refer to the phase-out of sports climbing over a six-year
19 period. And Alternative Four was the exclusive Washoe use.
20 And Alternative Five was a phase-out climbing over a
21 three-year period.
22 It appears to the Court that the Forest Service
23 intended to combine those alternatives and, therefore,
24 legally, would not have been required to give any further
25 notification in reaching a conclusion that was reached

1 ultimately and incorporated in what's denominated as
2 Alternative Six.
3 What the service did do, however, was to allow
4 120 days for comment on the FEIS, and during that time it
5 received substantial comment from, in excess of a thousand
6 individuals. It appears clear to the Court that there was
7 ample opportunity for those who had an interest in what was
8 being proposed with respect to the site, to express themselves
9 and to provide appropriate comment for a final decision by the
10 Forest Service. I know there was one citing of the letter
11 here today, with the individual's interpretation of what the
12 Forest Service intended with respect to the comment period. I
13 didn't find that persuasive in connection with the fact that,
14 as suggested by the plaintiffs, that the decision had already
15 been made. I don't think there's any question that the
16 Forest Service was focusing on Alternative Six, which was
17 a combination of three other alternatives that had been
18 proposed, or they wouldn't have given additional public
19 comment.
20 Now, plaintiff has suggested that without the
21 protests that were filed, this additional comment period
22 would not have been provided. I don't think that's fatal
23 to the Forest Service's position. It would be nice if they
24 would provide that type of comment, without the necessity of
25 having protests filed and then responding but, in any event,

1 that period was given. I think there was an ample opportunity
2 to respond and, legally, probably was not req -- the Forest
3 Service is not required to provide for that additional comment
4 period, but certainly to the extent there might have been a
5 violation, it was cured by virtue of the Forest Service
6 providing that additional comment period.
7 So, I don't find that that was a violation under
8 the standards of the Administrative Procedures Act for
9 purposes of considering the alternatives, nor do I find in
10 the record any persuasive evidence that the decision had
11 already been made and predetermined. In fact, this was a long
12 laborious process that took place over a considerable period
13 of time. We're talking about over a period of years where the
14 Forest Service gave considerable consideration to the issues
15 that were presented. So this was not something that was done
16 over a very short period of time where people didn't have an
17 opportunity to comment.
18 In defining the arbitrary and capricious standard,
19 the APA provides that a person suffering legal wrong
20 because of an agency action, or are adversely affected or
21 aggrieved by agency action within the meaning of a relevant
22 statute is entitled to judicial review. Pursuant to the
23 judiciary scope of review under the APA, a reviewing court
24 shall hold unlawful, and set aside agency action, findings
25 and conclusions, which are found to be arbitrary and

1 capricious and abuse of discretion, or otherwise not in
2 accordance with law.
3 The Court clearly has to give substantial deference
4 to the Forest Service's decision. Generally, agency decisions
5 are considered arbitrary and capricious where the agency
6 relies on factors that Congress did not attend the agency to
7 consider. I don't see that in evidence anywhere in this case.
8 Or, the agency entirely fails to consider an
9 important aspect of the problem. And, here, the agency
10 considered all aspects of the problem.
11 Or, that the agency offers an explanation that
12 runs counter to the evidence.
13 Or, the agency decision is so implausible that it
14 cannot be ascribed to a difference in view or the product of
15 agency expertise.
16 And that was the Supreme Court case in <u>Motor Vehicle</u>
17 <u>Manufacturers Association versus State Farm</u>, 463 U.S. 29,
18 1983.
19 I'm not persuaded by the plaintiff's argument
20 here that the ROD is arbitrary and capricious because
21 Alternative Six was not one of the five original alternatives.
22 I've already touched on that at some length here, because
23 it does clearly appear to the Court that Alternatives Three,
24 Four and Five were ultimately incorporated into what is
25 Alternative Six. So the concept was already, I think,

1 clearly embodied within the considerations given in the
2 initial notice and hearing period.
3 After comparing the DEIS and before preparing the
4 FEIS, an agency must consider all the comments that it has
5 received. One possible response is to modify alternatives,
6 including the proposed action. And that is permissible under
7 section 1503.4(a)(1) of 4 CFR
8 A supplemental EIS is not required for every change.
9 It is not uncommon for changes to be made in an FEIS after
10 receipt of comments on the DEIS and further concurrent
11 studies. Ninth Circuit decision, Idaho -- The Kootenai Tribe
12 of Idaho versus Veneman 313 F.3d 1094 to 1118, a 2002
13 decision.
14 Plaintiff also contends the ROD is arbitrary and
15 capricious because it bans climbing while allowing activities
16 such as hiking, walking, fishing and picnicking. In reviewing
17 agency decisions, the court, as I've indicated before, may not
18 substitute its judgment for that of the agency.
19 Here, the Forest Service states that Alternative
20 Six is the alternative that would both preserve public access
21 to Cave Rock, and eliminate activities that have an adverse
22 affect on the integrity of the rock, and have an adverse
23 affect on Cave Rock's eligibility to continue in the National
24 Register. And all those are supported by the record.
25 The Forest Service explains that hiking, walking,

1 fishing and picnicking does not damage the surface of the
2 rock, as does the rock climbing. And that's supported by
3 the record. The Court cannot conclude that that decision is
4 unreasonable or arbitrary, or that it is not supported by the
5 record.
6 Finally, the Forest Service has argued that the
7 choice of the historic period -- I'm sorry, the plaintiff
8 has argued that the choice of the historic period through
9 1964 was arbitrary and capricious.
10 In that connection, the historic period was found
11 to be from time and memorial through 1965, and that was the
12 year that Henry Rupert died. Clearly, that was a significant
13 period. It was concurred in by the Nevada State Historical
14 Preservation Society and the Keeper of the National Register
15 of Historic Places. Rupert's death was chosen because he
16 was the most recent of the Washoe historical figures, whose
17 association with Cave Rock constitutes one of the bases for
18 its National Register eligibility, and because setting a
19 significant earlier date would not have been consistent
20 with Cave Rock's designation as containing a historical
21 transportation system. And that's all supported by the
22 record.
23 This court might have reached a different decision.
24 The court might have selected a different date. But, that's
25 not the issue. The issue is whether or not -- and that's not

1 the legal standard. The issue and legal standard is whether
2 or not in selecting that date, the Forest Service acted
3 arbitrarily and capriciously. And based upon this record,
4 the Court cannot conclude that that was not a significant
5 date, and that the Forest Service acted arbitrarily and
6 capriciously in selecting that date.
7 For all of those reasons, the Court concludes that
8 the decision of the Forest Service in banning rock climbing
9 was not arbitrary and capricious;
10 That the parties were given a full and fair
11 opportunity to voice their concerns about the decision-making
12 process, and express themselves with respect to what
13 alternatives should be selected. The granting of the
14 additional 120-day period for comment met the standards of
15 the Administrative Procedure Act. It did not violate due
16 process.
17 The Court therefore concludes that the arguments of
18 the plaintiff that the Administrative Procedure Act has been
19 violated by virtue of the process undertaken by the Forest
20 Service is not well-founded.
21 For the reasons that I have set forth, which will
22 constitute conclusions of law and findings of fact, to the
23 extent I've called them conclusion of law or findings of fact
24 erroneously, one will be denominated as the other, this will
25 constitute the decision of this court.

1 The defendant's motion for summary judgment on
2 behalf of the Forest Service, The United States Department of
3 Agriculture, is granted.
4 The plaintiff's motion for summary judgment on
5 behalf of the Access Fund is denied.
6 The request to intervene, motion to intervene, which
7 is document number 25, is denied without prejudice to permit
8 the Washoe Tribe, if it wishes to do so, to file an amicus
9 brief in the event leave is granted by any appellate court to
10 the Tribe to do so. It is so ordered.
11 Thank you very much counsel,
12 MR. SMITH: Thank you, Your Honor.
13 (Court adjourned.)
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16 I certify that the foregoing is a correct transcript from
17 the record of proceedings in the above-entitled matter.
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19 2.10.05
20 KATHRYN M. FRENCH, RPR, CCR DATE
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