I cannot agree with the majority's implied suggestion that the Seventh Circuit might have decided *Stanford* in reverse had the disclosures been made to private, nongovernmental investigators. *Stanford* rests upon the actual "judicial proceeding" language now in subsection (3)(C)(i), not upon the identity of those to whom disclosure is made. Even the majority's own view of that subsection does not suggest such a government–nongovernment distinction.

Neither can I agree that the structure of Rule 6(e) implies a lack of authority for disclosure orders such as here. The majority views the grouping principle of Rule 6(e)(3) to be disclosures in aid of grand jury investigations (subsections (A) and (B)) versus disclosures in judicial proceedings that occur after discharge of the grand jury (subsection (C)). The grouping principle might just as easily be viewed as disclosures that do not require court approval versus disclosures that do. Permitting disclosures to government personnel without court approval, as Congress did in subsection (A), does not of itself imply a prohibition in subsection (C) against court–approved disclosure to nongovernment personnel.

Finally, I find nothing in the legislative history cited by the majority that suggests a per se rule against court–approved disclosure to nongovernment personnel during an ongoing grand jury investigation for the sole purpose of aiding that investigation. I would hold that Rule 6(e)(3)(C)(i) permits such disclosure within the discretion of the court.

ings, 445 F.Supp. 349 (D.R.I.), *appeal dismissed*, 580 F.2d 13 (1st Cir. 1978) (lack of appellate jurisdiction). The Southern District of Florida is quoted as saying that the application of Rule 6(e)(3)(C) "to the very grand jury from which disclosure is sought seems somewhat illogical." 478 F.Supp at 493. But the Florida court just as plainly conceded that "[c]onceivably, however, subsection C can be seen as providing the court with a discretionary means of disclosure beyond the confines of subsection A." *Id.* In the end, the court found it unnecessary to resolve the issue, for it concluded that the Government failed to show the requisite need for disclosure.

The District of Rhode Island did say subsection (C)(i) was "not designed" to permit disclosures during ongoing grand jury investigations. *See* 445 F.Supp. at 350. But the thrust of its holding was that the federal prosecutor failed to establish the requisite need for disclosure to the state detective. *See id.* It was on this discretionary basis only that the First Circuit viewed the holding. *See* 580 F.2d at 17.

In sum, I cannot find in either case the solid support found by the majority for its reading of Rule 6(e)(3)(C)(i).

Lamarr BADONI, Teddy Holiday, Betty Holiday, Jessie Yazzie Black, Jimmy Goodman, Begay Bitsinnie, Shonto Chapter of the Navajo Nation, Navajo Mountain Chapter of the Navajo Nation, and Inscription House Chapter of the Navajo Nation, Plaintiffs–Appellants,

v.

R. Keith HIGGINSON, Commissioner, Bureau of Reclamation; Ronald H. Walker, Director, National Park Service; Cecil V. Andrus, Secretary of the Interior, Defendants–Appellees,

State of Utah; Central Utah Water Conservancy District; Colorado River Conservation District; Southwestern Water Conservation District; and State of Colorado, Defendants in Intervention–Appellees.

No. 78–1517.

United States Court of Appeals,
Tenth Circuit.

Argued Jan. 24, 1980.

Decided Nov. 3, 1980.

Rehearing Denied Dec. 19, 1980.

The United States District Court for the District of Utah, Aldon J. Anderson, Chief Judge, 455 F.Supp. 141, entered order granting summary judgment to defendant federal officials so as to effectively deny

relief to Indian plaintiffs making constitutional and statutory claims against those officials, and plaintiffs appealed. The Court of Appeals, Logan, Circuit Judge, held that: (1) management by the government of the Rainbow Bridge National Monument in southern Utah and of the Glen Canyon Dam and Reservoir upon the Colorado River 58 miles below the Monument did not infringe upon the free exercise right of the Indian plaintiffs seeking declaratory and injunctive relief despite claims that, in impounding water to form Lake Powell, the government had drowned some of the plaintiffs' gods and denied the plaintiffs access to a prayer spot sacred to them and, by allowing tourists to visit the Rainbow Bridge, the government had permitted desecration of the sacred nature of the site and had denied the plaintiffs' their right to conduct religious ceremonies at the prayer spot, and (2) decision of the Bureau of Reclamation under the direction of the Secretary of the Interior to draft a comprehensive environmental impact statement considering the environmental effects of the entire Colorado River Basin project and related decisions of the Bureau to refrain from drafting a site-specific environmental impact statement on the Glen Canyon project itself were reasonable decisions notwithstanding attempt of Indian plaintiffs to require a separate environmental impact statement on the continuing operation of the Glen Canyon Dam and Reservoir.

Affirmed.

1. Constitutional Law ⇐84

That Indian plaintiffs lacked property rights in the Rainbow Bridge National Monument was not determinative, but only a factor to be considered in weighing plaintiffs' free exercise claim against competing interests in action for declaratory and injunctive relief against management of the Monument by federal officials. Colorado River Storage Project Act, § 1, 43 U.S.C.A. § 620; 16 U.S.C.A. §§ 1 et seq., 460dd, 460dd–3; U.S.C.A.Const. Amend. 1.

2. Constitutional Law ⇐84

The Court weighing a free exercise claim against competing interests must look to the nature of a government action and the quality of plaintiffs' possessions to determine whether they have stated a free exercise claim. U.S.C.A.Const. Amend. 1.

3. Constitutional Law ⇐84

Analysis of a free exercise claim involves a determination of whether government action creates a burden on the exercise of plaintiffs' religion and of whether practice infringed upon is based on a system of belief that is religious and sincerely held by the person asserting the infringement. U.S.C.A.Const. Amend. 1.

4. Constitutional Law ⇐84

An action which infringes upon a practice that is based on a system of belief that is religious and sincerely held by person asserting infringement is violative of free exercise clause unless government establishes an interest of sufficient magnitude to override interest claiming protection under that clause. U.S.C.A.Const. Amend. 1.

5. Constitutional Law ⇐84

Interest of the government in maintaining the capacity of Lake Powell formed behind the Glen Canyon Dam on the Colorado River in southern Utah at a level that intruded into the Rainbow Bridge National Monument outweighed the religious interest of the Indian plaintiffs seeking declaratory and injunctive relief in the case. Colorado River Storage Project Act, § 1, 43 U.S.C.A. § 620; 16 U.S.C.A. §§ 1 et seq., 460dd, 460dd–3; U.S.C.A.Const. Amend. 1.

6. Constitutional Law ⇐84

Free exercise claims generally challenge government dictates which compel citizens to violate tenets of their religion or government action which conditions a benefit or right on renunciation of a religious practice. U.S.C.A.Const. Amend. 1.

7. Constitutional Law ⇐84

Issuance of regulations to exclude tourists completely from the Rainbow Bridge National Monument in Southern Utah for the avowed purpose of aiding conduct of

religious ceremonies by the Indian plaintiffs in the case would be a clear violation of the establishment clause. Colorado River Storage Project Act, § 1, 43 U.S.C.A. § 620; 16 U.S.C.A. §§ 1 et seq., 460dd, 460dd-3; U.S.C.A.Const. Amend. 1.

8. Constitutional Law ⇐84

There was no basis in the law for ordering the government to exclude the public from public areas to insure privacy during the exercise of First Amendment rights. U.S.C.A.Const. Amend. 1.

9. Constitutional Law ⇐82(9)

Although Congress had authorized the park service to regulate the conduct of tourists in order to promote and preserve the Rainbow Bridge National Monument in Southern Utah, the Indian plaintiffs in the case seeking declaratory and injunctive relief did not have a constitutional right to have tourists visiting the bridge act in a respectful and appreciative manner. Colorado River Storage Project Act, § 1, 43 U.S.C.A. § 620; 16 U.S.C.A. §§ 1 et seq., 460dd, 460dd-3; U.S.C.A.Const. Amend. 1.

10. Constitutional Law ⇐84

Management by the government of the Rainbow Bridge National Monument in Southern Utah and of the Glen Canyon Dam and Reservoir upon the Colorado River 58 miles below the Monument did not infringe upon the free exercise right of the Indian plaintiffs seeking declaratory and injunctive relief despite claims that, in impounding water to form Lake Powell, the government had drowned some of the plaintiffs' gods and denied the plaintiffs access to a prayer spot sacred to them and, by allowing tourists to visit the Rainbow Bridge, the government had permitted desecration of the sacred nature of the site and had denied the plaintiffs' their right to conduct religious ceremonies at the prayer spot. Colorado River Storage Project Act, § 1, 43 U.S.C.A. § 620; 16 U.S.C.A. §§ 1 et seq., 460dd, 460dd-3; U.S.C.A.Const. Amend. 1.

11. Health and Environment ⇐25.10(5)

Although a comprehensive environmental impact statement is frequently undertaken after project or site-specific statements have been drafted, the need for a comprehensive statement does not automatically establish a need for a statement of a narrower scope. National Environmental Policy Act of 1969, § 101 et seq., 42 U.S.C.A. § 4331 et seq.

12. Health and Environment ⇐25.10(5)

Decision of the Bureau of Reclamation under the direction of the Secretary of the Interior to draft a comprehensive environmental impact statement considering the environmental effects of the entire Colorado River Basin project and related decision of the Bureau to refrain from drafting a site-specific environmental impact statement on the Glen Canyon project itself were reasonable decisions notwithstanding attempt of Indian plaintiffs to require a separate environmental impact statement on the continuing operation of the Glen Canyon Dam and Reservoir. Colorado River Storage Project Act, § 1 et seq., 43 U.S.C.A. § 620 et seq.; Colorado River Basin Project Act, §§ 102, 602, 43 U.S.C.A. §§ 1501(a), 1552(a); National Environmental Policy Act of 1969, § 102, 42 U.S.C.A. § 4332.

under the circumstances of

Richard W. Hughes of Luebben, Hughes & Kelly, Albuquerque, N. M. (Eric P. Swenson, Mexican Hat, Utah, with him on brief), for plaintiffs-appellants.

Anne S. Almy, Atty., Dept. of Justice, Washington, D. C. (Anthony C. Liotta, Acting Asst. Atty. Gen., Ronald L. Rencher, U. S. Atty., Salt Lake City, Utah, and Robert L. Klarquist, Atty., Dept. of Justice, Washington, D. C., with her on brief), for defendants-appellees.

Dallin W. Jensen, Asst. Atty. Gen., State of Utah, Salt Lake City, Utah (Richard L. Dewsnup, Asst. Atty. Gen., State of Utah, and Edward W. Clyde, Salt Lake City, Utah, with him on brief, for appellees-in-intervention State of Utah and Central Utah Water Conservancy District.

Frank E. Maynes, Durango, Colo., and Andrew R. Hurley, Salt Lake City, Utah,

cept perhaps for a total ban on beer drinking.

[10] What of the request stated in the appellant's reply brief for access "on infrequent occasions" to conduct religious ceremonies in private? The government asserts that plaintiffs, in common with other members of the public, may apply for a public assembly permit to hold religious ceremonies at the Bridge.[5] No one suggests such a permit could not be used to permit access after normal visiting hours when privacy might be assured. The courts have held permit requirements unconstitutional when they have been used to restrain First Amendment rights without narrow, objective standards. *E.g., Shuttlesworth v. Birmingham,* 394 U.S. 147, 89 S.Ct. 935, 22 L.Ed.2d 162 (1969). *Cf. Chess v. Widmar,* 635 F.2d 1310 (8th Cir. No. 80-1048, Aug. 5, 1980) (use of university facilities). Our problem is that there is no allegation that any such permit was requested and denied. The pleadings, affidavits and interrogatories suggest no specific time or schedule for religious ceremonies. Indeed, plaintiffs' answers to interrogatories and the proffered affidavit of their expert Karl Luckert indicate the ceremonies are infrequent and scheduled at the request of individual Navajos when a need seems to exist.

Plaintiffs cite the Park Service's proposed guidelines for use of Grand Canyon National Park, which prohibit entry on certain sacred Indian religious sites. They also cite the American Indian Religious Freedom Act, 42 U.S.C. § 1996, which states a public policy to permit Indians access to sacred sites for worship, and perhaps to protect them from intrusion. *See* H.R.Rep.No.1308, 95th Cong., 2d Sess. (1978), *reprinted in* [1978] U.S.Code Cong. & Ad.News, pp. 1262, 1264. But we do not have before us the constitutionality of those laws or regulations or of any action taken by defendants in alleged violation of them. The pleadings, even as supplemented by the expanded requests in the brief and supported by the proffered evidence, afford no basis for relief.

II

Plaintiffs also seek an order under the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4331 *et seq.*, requiring the Department of Interior to draft an environmental impact statement (EIS) on the continuing operation of the Glen Canyon Dam and Reservoir. Alternatively, plaintiffs seek a remand to the district court for trial on this issue. The district court held that the issue was not ripe for judicial review because the agency had not taken a position of sufficient clarity and finality to allow meaningful judicial review. 455 F.Supp. at 648. It also stated that if the issue were ripe for decision an EIS would not be required because operation of the dam involves merely ministerial rather than major federal actions and because no reasonable alternatives would afford relief to plaintiffs. *Id.* at 648-49.

The government now appears to concede the issue is ripe for judicial review, because the Bureau has decided to draft a comprehensive EIS for the entire Colorado River Basin Project. It has also determined that a site-specific EIS on the Glen Canyon unit is not necessary. [Appellees' Brief 24-26.] * Thus, we must determine whether the agency's decision not to draft a site-specific EIS for the dam and reservoir is reasonable.[6] *See Wyoming Outdoor Coordinating*

5. 36 C.F.R. § 2.21 provides in pertinent part:

(a) Public meetings, assemblies, gatherings, demonstrations, parades and other public expressions of views are permitted within park areas on lands which are open to the general public provided a permit therefor has been issued by the Superintendent.

"Park area" is defined in the regulations as "all federally owned or controlled areas administered by the National Park Service." 36 C.F.R. § 1.2(f).

6. The choice of standard of review here depends upon how the agency action is characterized. *Kleppe v. Sierra Club,* 427 U.S. 390, 412, 96 S.Ct. 2718, 2731, 49 L.Ed.2d 576 (1976), requires a showing the agency acted "arbitrarily" in choosing the site specific approach rather than requiring a region-wide EIS. Argu-

* thus passing the threshhold question, permitting review (ripeness)

Council v. Butz, 484 F.2d 1244, 1248–49 (10th Cir. 1973).

The Colorado River Storage Project Act of 1956, 43 U.S.C. § 620 et seq., authorized the Glen Canyon Dam and Reservoir along with other storage facilities and power plants. Construction began on October 15, 1956, and was completed on September 13, 1963. Six months later, water was first impounded in the project. In September 1968, Congress instructed the Secretary of Interior to promulgate criteria for the storage and release of the water from the Colorado River Project. 43 U.S.C. § 1552(a). The operational criteria were published on June 10, 1970, shortly after NEPA's effective date of January 1, 1970.

NEPA requires that federal agencies include an environmental impact statement "in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). The Bureau apparently agrees with plaintiffs that the continuing operation of the Colorado River Basin Project is a major federal action since it has decided to draft a comprehensive EIS on the entire project. Disagreement between plaintiffs and the Bureau arises because plaintiffs believe an additional site-specific EIS on the Glen Canyon unit is necessary.

The criteria in question apply not only to the Glen Canyon unit, but also to all the storage units of the Colorado River Project constructed and operated under three related acts.[7] The title, "Criteria for Coordinated Long-Range Operation of Colorado River Reservoirs," reflects the comprehensive scope of the criteria set by direction of Congress. *See* 43 U.S.C. § 1552(a). This Court has recognized the interrelated and comprehensive development of the water resource project. *Friends of the Earth v. Armstrong*, 485 F.2d 1 (10th Cir. 1973), *cert. denied*, 414 U.S. 1171, 94 S.Ct. 933, 39 L.Ed.2d 120 (1974).

> Lake Powell is an important element or link in the Colorado River water and power development. It cannot be considered alone as all the existing projects in the Upper Basin, and the planned ones, are interrelated and interdependent. The projects have different purposes and functions, but are dependent on Lake Powell to provide basic storage necessary to fulfill the delivery requirements to the downstream states and Mexico, especially in dry years.... This interrelation created by the comprehensive plan for development is rather delicate and can be disturbed if the capacity of by far the largest storage or regulating unit is reduced significantly.

Id. at 6. We also note that Congress expressly declared that the purpose of the Act which required criteria was the "further comprehensive development of the water resources of the Colorado River Basin." 43 U.S.C. § 1501(a).

[11, 12] Although a comprehensive EIS is frequently undertaken after project or site-specific EIS's have been drafted, need for a comprehensive EIS does not automatically establish need for environmental statements of narrower scope. *See Kleppe v. Sierra Club*, 427 U.S. 390, 410–12, 96 S.Ct. 2718, 2730–31, 49 L.Ed.2d 576 (1976). We find no proposal for criteria or any other major action under NEPA which involves the Glen Canyon project singly; rather it is for the entire Colorado River Basin Project. We therefore find the agency's decision to draft a comprehensive EIS considering the environmental effects of the entire project and its related decision not to draft a site-specific EIS on the Glen Canyon unit were reasonable. The district court correctly granted judgment against plaintiffs on this issue.

AFFIRMED.

ably, that standard should apply to the instant case, which would make plaintiffs' task more difficult. For purposes of this appeal we gave plaintiffs the benefit of the doubt and apply the "reasonableness" standard.

7. These acts are: the Colorado River Storage Project Act, 43 U.S.C. § 620 *et seq.*; the Boulder Canyon Project Act, 43 U.S.C. § 617 *et seq.*; and the Boulder Canyon Project Adjustment Act, 43 U.S.C. § 618 *et seq.*

but may

* We can now distinguish this point!

Postscript: ① BOR Never Did the Comprehensive EIS
② Court here had no articulated "proposal" Re: Glen Canyon unit