

Rainbow Bridge

Administrative History



CHAPTER 5:

Issues and Conflicts I: Rainbow Bridge Religion and Navajo Legal Claims, 1863-1998 (continued)

There was and still is a long history of Native American activity at Rainbow Bridge. Between 1970 and 1971, when the waters from Lake Powell began to creep up Bridge Canyon and into the monument, some Navajos were more than a little concerned. They were certain of their own history at the bridge and gave little thought to the fact that their history was unwritten. Outside some case-specific context, Navajos did not feel any need to record in written form the practice of religious ceremonies at Rainbow Bridge. Sometimes cultures overlook the significance of recording an activity when that activity is frequent and not out of the ordinary. In any event, the steady advance of encroaching waters between 1970 and 1974 dictated that the Navajo had to do something to preserve their religious heritage.

On September 3, 1974, the Navajo Legal Aid Society (DNA) filed suit in U.S. district court to stop waters from Lake Powell from entering Bridge Canyon. [219] The plaintiffs were eight Navajo singers, including Nakai Ditloi, Lamar Badoni, Teddy Holiday, and Jimmy Goodman. Shonto, Navajo Mountain, and Inscription House chapters of the Navajo Nation were also listed as plaintiffs. The suit named some important defendants: Bureau of Reclamation Commissioner Gilbert R. Stamm; NPS Director George B. Hartzog; and Secretary of the Interior Rogers C.B. Morton. The relief sought in the suit centered around the Navajo claim that "Rainbow Bridge [was] a religious symbol and a focal point through which many prayers and religious ceremonies derive meaning and vitality by reason of its role in the emergence of the Navajo people." The suit argued two major claims for relief. In the first claim, the suit alleged that the flooding of Bridge Canyon by water from Lake Powell desecrated or destroyed numerous sites of religious significance. Additionally, the improved accessibility to Rainbow Bridge provided by Lake Powell had resulted in thousands more tourists in the monument. This directly impeded the ability of Navajo singers and others from performing religious activities at and near the bridge. The negative physical impacts on Rainbow Bridge and its environs, occasioned by increased tourist visitation, were also cited as part of this claim for relief. As a result of these harms, the plaintiffs alleged that their ability to pursue the free exercise of religion was impeded by the current operational status of Glen Canyon Dam and Lake Powell.

The first claim for relief sought a specific response. The plaintiffs demanded that the Bureau of Reclamation and the National Park Service "to take appropriate steps to operate Glen Canyon Dam . . . in such a manner that the important religious and cultural interests of [the] plaintiffs will not be harmed or degraded." This meant releasing enough water from Lake

Powell to let its waters recede from Bridge Canyon. It also meant implementing any measures necessary to curtail harmful tourist activities at the bridge. This claim expressed a concern that was new to the Park Service: Native American belief in the spiritual and cultural significance of a natural edifice and the role of that edifice in the free exercise of a Native American religion. This concept predated the American Indian Religious Freedom Act (AIRFA) by four years. The language used in the DNA suit for describing the sacrosanct status of Rainbow Bridge and its relationship to Navajo religious freedom was strikingly similar to the language eventually used in the AIRFA. But in 1974, the AIRFA did not exist. It is likely that the significance of the Navajo suit and the damages claimed at Rainbow Bridge were definite contributors to the passage of the AIRFA in its final form. After all, the decision in *Badoni v. Higginson* came less than a year before the AIRFA. Unfortunately the documentary evidence to verify such a claim is beyond the resources and scope of this administrative history. [220]

Because the AIRFA was not law by 1974, the DNA suit made use of existing legislation to underpin the demand for injunctive relief at Rainbow Bridge. The second claim for relief raised the specter of the Colorado River Storage Project (CRSP) and the historic relationship between the Department of the Interior and Native American tribes. This complaint stipulated that the improper operation of the Glen Canyon Dam violated Section 1 of the CRSP, which mandated the Secretary of the Interior to take adequate protective measures against the impairment of Rainbow Bridge NM. The suit stipulated that protecting the monument meant more than just safeguarding its physical resources. DNA attorneys argued that the plaintiffs were the intended beneficiaries of Section 1, because of their unique and verified interest in the integrity of the bridge and its environs.

The suit also observed that "the Secretary of the Interior, by virtue of his position of overseer of Indian Affairs, occupies the position of a fiduciary with respect to the plaintiffs, and thus owes them the highest level of care in actions taken by him which impinge on the rights and interests of [Navajos] and other Indian peoples." The historic relationship between the federal government and Native Americans was employed here to denote a vested Navajo interest in the effects of decisions made by the Secretary of the Interior. Navajo interests could not be separated from Rainbow Bridge interests; therefore, the Secretary of the Interior was obliged to protect Navajo interests as part of his obligation stipulated in Section 1 of the CRSP. The framers of the CRSP had obviously overlooked an important possibility in the intent of Section 1: that more than the physical elements of Rainbow Bridge required protection. Navajos were arguing that spiritual integrity was as important as physical integrity, which allowed the possibility that desecration of religious sites at Rainbow Bridge constituted impairment.

The issues in these claims clearly revolved around what constituted impairment and whether or not spiritual harm was a justifiable cause for relief. The courts had little practice establishing the veracity of Native American spiritual claims on natural features like Rainbow Bridge. In an unprecedented decision, Judge Aldon J. Anderson ordered a study be undertaken to determine the legitimacy of Navajo oral tradition regarding the religious significance of Rainbow Bridge. The court asked ethnographer Karl Luckert to complete this task. Luckert's collection of oral histories, *Navajo Mountain and Rainbow Bridge Religion*, was the result. Luckert designed a series of oral interview questions that tried to discern not

only the details of the Navajo origin story but also the process by which that story was handed down for preceding generations. As discussed previously in this chapter, Luckert's efforts established a clear and consistent tradition of the bridge's importance to western Navajos.

Federal attorneys argued that summary judgement should be granted to the defendants for one simple, yet overwhelming, reason: the plaintiffs lacked claim to protection of free exercise of religion because they had no property interests in Rainbow Bridge NM. The Navajo Nation did not own the 160 acres that comprised the monument; therefore, the government was under no obligation to protect Navajo religious freedom. Doing what the Navajo plaintiffs demanded—regulating a unit of the national park system for the benefit of non-owners to conduct private religious ceremonies—violated the Establishment Clause of the First Amendment.

The First Amendment forbids Congress from establishing a state religion; consequently, legal disputes have arisen periodically over government actions that might constitute an endorsement of a specific religion. This historical controversy became a permanent part of the legal disputes involving Rainbow Bridge. Government attorneys further argued that regulating tourist traffic at the monument in such a way that permitted Navajo access to the bridge for religious reasons while denying non-Navajo visitor access also constituted a violation of the Establishment Clause. The defendants claimed that for any violation of free exercise to occur, the plaintiffs had to establish a verifiable claim on the site where religious ceremonies took place.

Federal attorneys also filed a motion to strike the Luckert report, arguing that the subjectivity of the report's contents could not be contested by law. The court's reaction to the report was two-sided. On one side the court recognized the validity of Navajo claims to a court's decision to rule in summary judgement in favor of the defendants. As an aside, the court said it "the accepts as established and true all the facts and conclusions in the affidavit and monograph of Dr. Luckert." [221]

Unfortunately for the Navajo plaintiffs, the court's willingness to accept the existence of some religious tradition was not enough. Judge Anderson ruled against the Navajos on December 30, 1977, citing two rationales for denying Navajo claims. First, the plaintiffs did not have a free exercise claim because they had no property interest in the monument. The government, by extension, had no responsibility to uphold the free exercise of religion on land it managed as part of the federal estate. Second, even if the plaintiffs could prove a cognizable free exercise claim, the government's interests in the continued operation of Glen Canyon Dam and the larger CRSP outweighed any free exercise claims made by the Navajos. Regarding the specific claims of religious significance at Rainbow Bridge, Judge Anderson went even further. Underpinning his ruling, Anderson cited *Wisconsin v. Yoder*, a case involving the Wisconsin Board of Education and a group of Amish residents. In *Yoder*, the court ruled that Wisconsin laws regarding compulsory public education violated Amish principles and the free exercise of their religion. [222] In the final ruling on *Yoder*, the Supreme Court concluded that the Amish claim to protection under the First Amendment was valid because the traditional way of life for the Amish was not simply a matter of personal preference but "one of deep religious conviction, shared by an organized group, and intimately related to daily living."

It seemed to the Navajos and their attorneys that *Yoder* actually supported the claims on Rainbow Bridge. The Navajo chapters listed as plaintiffs were an organized group, their religion was a way of life, Navajos had no choice about their Native American birth identity. Moreover, the court had acknowledged the veracity of Navajo faith regarding Rainbow Bridge in its support of Luckert's monograph. But Judge Anderson interpreted *Yoder* differently than the plaintiffs. On the issues of religion, Rainbow Bridge, and the free exercise of Navajo beliefs, Anderson wrote "the present plaintiffs have gone to great lengths to construct a cognizable action out of their claim of First Amendment religious infringement. Again, however, even assuming that all the assertions as to the existence of plaintiffs' beliefs are true, it is apparent that these interests do not constitute 'deep religious conviction[s], shared by an organized group and intimately related to daily living.'" [223] Based on the apparent contradiction of this rationale, DNA attorneys appealed the Anderson decision to the federal Circuit Court of Appeals in Denver.

The appeals process is generally a long and winding road. This was not the case in *Badoni v. Higginson*. DNA attorneys filed their appeal August 16, 1978, five days after passage of the American Indian Religious Freedom Act. The appeal reasoned that the lower court "in determining the existence of sincere and bona fide religious beliefs on the part of the appellants. . . disregarded the record, [and] applied erroneous and unduly restrictive legal standards." [224] Much of the appeal concerned the lower court's decision regarding Navajo property interests in the monument. Attorneys for the Navajos argued that free exercise claims could be predicated solely on non-economic interests and that title to the land in question was irrelevant. The appeal contended that the Navajo possessed historic and aboriginal claims on the area surrounding Rainbow Bridge, claims denied only by the Treaty of Bosque Redondo and the illegal use of force in removing the Navajos to a reservation. The land surrounding the bridge had been added to the Navajo reservation by executive order on May 17, 1884. It remained part of the Navajo reservation until it was removed by another executive order on November 19, 1892. Given that Navajo cultural tradition maintained aboriginal claims on the bridge, and the federal government had at one time codified this claim in executive order, Navajo attorneys argued there was significant reason for the appellate court to rethink the standards for "property interest." Citing numerous legal precedents, the Navajo appellants maintained that proving actual title was not material to establishing interest in property. [225]

If the Navajo plaintiffs could claim an interest in Rainbow Bridge without establishing title, the appellate court would then weigh the interests of the government against the religious interests of the Navajos. To this end, the appeal indicted the application of *Yoder* as a standard for testing religious conviction. The appeal contended that even the Supreme Court recognized that the Amish standard was one which few other religions meet. Requiring that any religious claim made under the First Amendment must constitute deep religious conviction and be shared by an organized group and be intimately related to daily living would exclude many beliefs traditionally recognized as religions. Many religious people or groups have eclectic beliefs that are not uniformly shared; very few can make the Amish claim that their beliefs are thoroughly and intimately related to the daily lives of their adherents. In Anderson's application of *Yoder*, most religions and their adherents would not be protected by the First Amendment. [226] This was a compelling argument. The appeal further contended that the standard in *Yoder* was more a test of what constituted religious

lifestyle than it was a test for determining religious veracity. In *Yoder*, the Supreme Court never questioned the legitimacy of the Amish religion. The appellants claimed that *Yoder* was incorrectly applied in *Badoni*.

The appellate court was not swayed. The Navajos hoped that the national and legislative mood embodied in the AIRFA would favor their case. The AIRFA had been law for two years when the district court announced its decision. But it was not a decision or rationale the Navajos expected. To the issue of property interests in the monument, the appellate court responded that establishing an interest was not necessary as a consideration in evaluating a legitimate free exercise claim. To the issue of whether or not Navajo religion was an established enough practice to be protected under the First Amendment, the court responded favorably. Judge Logan, writing for the appellate court, said that in reviewing Judge Anderson's summary judgement, the court viewed "the facts and reasonable inferences drawn therefrom in the light most favorable to [the] plaintiffs." Logan subsequently validated most of the Navajo claims regarding their religious interests at the bridge: the existence of sacred springs, the need to pray at the bridge, generational importance of the bridge to Navajos, and the desecrating effect of tourist activity and inundation on Bridge Canyon and its holy environs as a result of allowing Lake Powell waters to enter the monument. Effectively Judge Logan was acknowledging that Navajo religious activity was a protected free exercise of religion, based on the validity of Navajo oral and cultural tradition rather than the existence of any title claim to the land in question. The most surprising part of the ruling was the court's assessment of whether or not Navajo First Amendment rights could be balanced against federal interests in Lake Powell.

One of the government claims in the lower court decision stated that regardless of the veracity of the Navajo religious claims, the government can preclude the free exercise of religion if there are interests of great enough magnitude to justify the infringement. In the case of Rainbow Bridge, the district court paid special attention to the fact that Glen Canyon Dam was one in a chain of water storage projects—which meant that its significance was married to the overall Colorado River Storage Project and could not be evaluated in the vacuum of a religious freedom claim, Judge Logan wrote:

We agree with the trial court that the government's interest in maintaining the capacity of Lake Powell at a level that intrudes into the Monument outweighs plaintiffs' religious interest [Evidence] shows that the storage capacity of the lake would be cut in half if the surface level were dropped to an elevation necessary to alleviate the complained of infringements. The required reduction would significantly reduce the water available to the Upper Basin States of Colorado, New Mexico, Utah and Wyoming from the Colorado River. Such a reduction . . . would among other things limit and reduce the development of water supplies within these States on either a permanent basis or on a limited long-term basis for irrigation purposes, for development of mineral and other natural resources, and for municipal and industrial water supplies. . . . Moreover, it is reasonable to conclude that no action other than reducing the water level would avoid the alleged infringement of plaintiffs' beliefs and practices. In these circumstances we believe the government has shown an interest of a magnitude sufficient to justify the alleged infringements. [[227](#)]

Despite the legislative mood favoring the free exercise of Native American religion, and the court's favorable opinion of Navajo religious claims, the court ruled in favor of federal managers. Judge Logan balanced the interests of the Navajos with the interests of the various states involved in the CRSP and on that playing field, religious freedom could not compare with economic prosperity. The Navajos were left with the unpalatable reality that they had proven their case but did not measure up to the interests of the state or federal government.

On specific Navajo claims that NPS policy encouraged increased and reckless visitation by tourists, and the effect of that visitation on Navajo religious practices, the appellate court was less generous. Granting Navajo demands for periodic private access to conduct religious ceremonies or ordering the Park Service to enact regulations designed to force monument visitors into solemn or deferential behavior would constitute federal endorsement of one religion over all others at the monument. This, the court ruled, would clearly violate the Establishment Clause of the First Amendment. On this claim, the issue of real property interest also worked to the disadvantage of the Navajos. Judge Logan wrote "we find 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. . . . We do not believe plaintiffs have a constitutional right to have tourists act in a respectful and appreciative manner. . . . Were it otherwise, the Monument would become a government-managed religious shrine." [228]

The key, according to the court, was that no matter what title-based claims Navajos had made in the past, Rainbow Bridge NM was a public area and all members of the public had equal right to access and use. As long as no law was being broken, federal managers were not empowered or obligated to regulate the behavior of monument visitors. Navajos were left in a quandary. While the court had validated some of the most important moral claims made by Navajos (issues of religious veracity), the ruling made it a matter of law that Native American religious interests could be violated if the opposing interests were compelling enough to justify infringing on First Amendment protections. The Navajo Nation did not find relief for its claims in the courts. The development of a policy that addressed both Navajo and Park Service needs at the monument would have to evolve from mutual cooperation, not from a judicial order. It was not long before the Park Service and the Navajo Nation started looking for the middle-ground many issues.

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