

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

NATURAL ARCH AND BRIDGE SOCIETY, a Colorado non-profit corporation;
and ROBERT MOORE, DAVID BRANDT-ERICSON, HARVEY LEAKE,
EVELYN JOHNSON, and EARL DeWAAL, as individuals,

Plaintiff-Appellants,

-v-

JOSEPH F. ALSTON, Superintendent, Rainbow Bridge National Monument;
ROBERT G. STANTON, Director, National Park Service; and the
NATIONAL PARK SERVICE, an agency of the U.S. Department of the Interior,

Defendants-Appellees.

On Appeal From the U.S. District Court for the District of Utah,
Civil Action No. 2:00-CV-0191J, The Honorable Bruce S. Jenkins.

**BRIEF OF ASSOCIATION ON AMERICAN INDIAN AFFAIRS,
MEDICINE WHEEL COALITION ON SACRED SITES OF NORTH
AMERICA, AND NATIONAL TRUST FOR HISTORICAL
PRESERVATION AS AMICI CURIAE SUPPORTING APPELLEES AND
SEEKING AFFIRMANCE**

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STATEMENT OF INTEREST

The Association on American Indian Affairs is a private, nonprofit membership organization organized under the laws of New York. Its mission is to promote the welfare of American Indians and Alaska Natives by supporting efforts to sustain and perpetuate their cultures, protect their sovereignty, constitutional, legal and human rights, and natural resources and improve their health, education, and economic and community development. The Association has long been involved in efforts to protect the religious freedom and sacred lands of Native Americans, including the negotiation of agreements with the federal government. Currently, the Association is providing legal representation to the Medicine Wheel Coalition on Sacred Sites of North America in the case of Wyoming Sawmills v. United States Forest Service, Docket No. 02-8009, pending before this Court.

The Medicine Wheel Coalition on Sacred Sites of North America is a coalition of eight Plains Indian tribes located in the states of Wyoming, Montana, South Dakota, Minnesota and Oklahoma. The Board of Directors is appointed by the member tribes. Its purpose is to protect sites sacred to traditional Native American religions. It has been a party to agreements with federal agencies to accomplish same,

and it is an intervenor-appellee in the Wyoming Sawmills case.

The National Trust for Historic Preservation is a private, nonprofit organization chartered by Congress in 1949 to further the historic preservation policies of the United States and to facilitate public participation in historic preservation. 16 U.S.C. §§ 461, 468. The Chairman of the National Trust has also been designated by Congress as a member of the Advisory Council on Historic Preservation, the agency created by Congress to administer the National Historic Preservation Act (“NHPA”). See 16 U.S.C. § 470i(a)(8). This case raises important legal issues regarding the National Park Service’s responsibility for considering the effects of its actions on historic properties that have religious and cultural significance to Indian tribes. The National Trust has a long-standing interest in federal agency stewardship of cultural resources on public lands, and has frequently participated as *amicus curiae* in cases seeking to uphold the federal protection of historic properties, including sacred sites and traditional cultural properties.

STATEMENT OF THE CASE

Rainbow Bridge, located in Southern Utah, is the world’s largest natural bridge. It is of great scientific and public interest and on that basis was designated a

National Monument in 1910. It is also sacred to a number of Indian tribes, including the Navajo, Hopi and San Juan Paiute, and is utilized ceremonially by Native Americans. Historically, Rainbow Bridge, which is surrounded by the Navajo Reservation, was quite remote, and tourist visitation to the Bridge was limited. In 1955, approximately 1,000 tourists visited the Bridge. Construction of the Glen Canyon Dam in the 1960s changed this situation dramatically by providing easy boat access to the area when Lake Powell was created. As a result, visitation is now in excess of 300,000 visitors a year. This increase in visitation has caused substantial adverse impacts to the monument, including erosion, graffiti, littering, crowding, noise and pollution, which diminishes the public's enjoyment of the site and interferes with the traditional ceremonial use of the site by Native Americans. (Slip. Op. at 2-8)

As a result, the Park Service adopted a General Management Plan ("GMP") for Rainbow Bridge in 1993. The plan seeks to protect the natural resource, improve the visitor experience and acknowledge and accommodate the traditional cultural importance and ceremonial and religious use of the site. (Slip. Op. at 8-11)

Among other things, the Plan calls for a policy of requesting that visitors voluntarily refrain from walking under the Rainbow Bridge in an effort to respect the

sacred status of the site. Appellants challenge the GMP as a violation of the First Amendment Establishment Clause on the grounds, inter alia, that through its adoption and implementation of the GMP the government has “abandoned neutrality” and “endorsed” Native American religion by encouraging visitors not to walk under Rainbow Bridge.

Amici submit that the GMP is a constitutional accommodation of Indian religious and cultural practices at Rainbow Bridge, adopted in furtherance of important federal policies represented by such laws as the American Indian Religious Freedom Act, 42 U.S.C. § 1996, and the National Historic Preservation Act, see 16 U.S.C. §§ 470a(d)(6), 470(f), as well the government’s general trust relationship with American Indians.

ARGUMENT

THE GENERAL MANAGEMENT PLAN DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE

The Supreme Court has “repeatedly emphasized [its] unwillingness to be confined to any single test or criterion in this sensitive [Establishment Clause] area.” Lynch v. Donnelly, 465 U.S. 668, 679 (1984). See also Bauchman v. West High

School, 132 F.3d 542, 550 (1984). The Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971) test is most frequently applied – namely, whether a government action has (1) a secular purpose, (2) does not have the principal effect of advancing or inhibiting religion, and (3) does not foster an excessive entanglement with religion. The first two prongs have been refined by Justice O’Connor’s endorsement test, namely whether the government’s conduct has the purpose or effect of endorsing religion. Bauchman v. West High School, 132 F.2d at 551.

As the District Court recognized, quoting Hobbie v. Unemployment Appeals Comm’n, 480 U.S. 136, 144 (1987), it has been "long recognized that the government may (and sometimes must) accommodate religious practices and that it may do so without violating the Establishment Clause..." (Slip. op. at 25). Permissible accommodations are by definition not an unconstitutional endorsement of religion. Indeed, the government’s ability to accommodate religious free exercise goes beyond the minimum requirements of the Free Exercise Clause itself. See, e.g., Walz v. Tax Commission, 397 U.S. 664, 673 (1970); Allegheny County v. Greater Pittsburgh A.C.L.U., 492 U.S. 573, 613 n.59 (1989); Corporation of Presiding Bishop v. Amos, 483 U.S. 327, 334 (1987). "[T]he Constitution ... affirmatively mandates

accommodation, not merely tolerance, of all religions, and forbids hostility toward any." Lynch v. Donnelly, 465 U.S. at 673.

It is explicit federal policy to accommodate the free exercise of American Indian religions. 42 U.S.C. § 1996. See also Executive Order 13007 (1996) (federal land management agencies shall "accommodate access to and ceremonial use of Indian sacred sites by Indian religious practitioners and ... avoid adversely affecting the physical integrity of such sites."); Cf. 16 U.S.C. §470a(d)(6) (National Historic Preservation Act provides that "properties of traditional religious and cultural importance to an Indian tribe" may be eligible for the National Register of Historic Places and requires that federal agencies must "consult with any Indian tribe ... that attaches religious and cultural significance to [such] properties..." prior to approving any undertakings affecting such sites).

I. Contrary to appellants' contention, the question in this case is whether the GMP is a permissible accommodation.

Appellants erroneously attempt to argue that this case is not really about accommodation. In their view, Badoni v. Higginson, 638 F.2d 172 (10th Cir. 1980), cert. denied, 452 U.S. 954 (1981), held that "accommodation" can only take place

when the government is alleviating burdens on religious exercise by taking actions that directly relate to the conduct of American Indian believers – or to put it another way, that government policies which relate to the “conduct of non-believers” cannot be considered a constitutional accommodation of the exercise of religion. (Aplt. Ap. at 35). If this is the meaning of the Badoni, then this Court should disavow it. First, the relevant observations in that 23-year-old case were dicta made in the context of a Free Exercise Clause challenge, not an Establishment Clause case, and it is unlikely that the Establishment Clause issue was fully briefed or argued in that case. Even more importantly, such an interpretation is utterly inconsistent with subsequent Supreme Court case law, specifically Lyng v. Northwest Indian Cemetery Protection Assn., 485 U.S. 439 (1988).

In Lyng, the Supreme Court held that Indian religious practitioners could not prevent the construction of a road through a sacred site based upon a claim that the construction would violate their rights under the Free Exercise Clause. Yet the Court also held that “[t]he Government's rights to the use of its own land ... need not and should not discourage it from accommodation of religious practices like those engaged in by the Indian respondents.” 485 U.S. at 454. The Lyng Court then

commended and accepted as constitutional a variety of government actions taken in that case to ameliorate the impact of the G-O Road upon religious practitioners. For example, "[n]o sites where specific rituals take place were to be disturbed." 485 U.S. at 454. This statement referred to a Forest Service proposal to establish around Chimney Rock, Doctor Rock, Peak 8, and a few other ceremonial sites, "protective zones which would forbid timber harvesting or the construction of logging roads within one-half miles of these locations." Northwest Indian Cemetery Protection Assn. v. Peterson, 565 F.Supp. 586, 592 (N.D.Cal. 1983), aff'd, 795 F.2d 688 (9th Cir. 1986), rev'd sub nom Lyng v. Northwest Indian Cemetery Protection Assn., 485 U.S. 439 (1988) Thus, the Supreme Court in Lyng saw no problem with the government requiring a group of "non-believers" to refrain from an otherwise permitted activity in order to prevent the activities of those individuals and the government's land use management from interfering with the Native Americans' exercise of their religion.

The record in this case indicates that the influx of tourists has created an obstacle to the ability of traditional Indian people to conduct religious ceremonies at the Rainbow Bridge. See, e.g., AR 1015-1016, 1056-1067. Thus, regulating the

actions of “non-believers” to lessen this impact falls well within the concept of accommodation as defined by the Supreme Court, appellants’ “interpretation” of Badoni notwithstanding.

Lyng is properly read as mandating that the government's ability to accommodate Native Americans’ free exercise rights be viewed expansively, including the right to regulate the activities of non-practitioners. If the Badoni court intended to preclude accommodations that impose mandatory restrictions upon non-believers, then Lyng should be viewed as implicitly overruling Badoni in this respect.

II. The GMP provisions are a permissible accommodation of religion.

The District Court found that the GMP does not violate the Establishment Clause under the traditional Lemon/endorsement test – a finding with which *amici* agree (slip. op. at 26-32). The Court properly found that there are a number of secular purposes and effects, including education to inform the public about different cultures and preserving Native American history and culture. *Amici* would further note that the specific provisions about which appellants complain are part of a larger land management plan designed to protect the natural integrity of the site for reasons having nothing to do with Native American religion. It has long been held that where

religious concerns are but part of a larger scheme which recognizes the rights of various secular interests in the same subject matter, the governmental action does not impermissibly advance or promote religion. See, e.g., Walz v. Tax Commission, 397 U.S. at 672-73.

Nonetheless, in their brief, appellants repeatedly make the claim that, because the government has asked that people voluntarily respect Native American religions it has abandoned neutrality and endorsed those religions. In essence, they equate respect with endorsement. Yet this is simply not the test. In Lee v. Weisman, 505 U.S. 577, 628-29 (1992), Justice Souter specifically addressed this distinction in his concurring opinion. He stated,

A Christian inviting an Orthodox Jew to lunch might take pains to choose a kosher restaurant; an atheist in a hurry might yield the right of way to an Amish man steering a horse-drawn carriage. In so acting, we express respect for, but not endorsement of, the fundamental values of others ... The government may act likewise ... Thus, in freeing the Native American Church from federal laws forbidding peyote use, the government conveys no endorsement of peyote rituals, the Church, or religion as such; it simply respects the centrality of peyote to the lives of certain Americans. (citation omitted)

[Id. at 628-29 (Souter, J., concurring)]

See also Larkin v. Grendel's Den, 459 U.S. 116, 123-24 & n.6 (1982) (noting that

municipal zoning ordinances prohibiting commercial liquor sales within reasonable, prescribed distance of churches would not violate the Establishment Clause, provided the ordinances did not cede government authority to the churches); *id.* at 128 (Rehnquist, J., dissenting) (same); *Avalon Cinema Corp. v. Thompson*, 658 F.2d 555 (8th Cir. 1981) (upholding municipal zoning ordinance prohibiting adult movie theaters from operating near churches).

Appellants also attempt to convince the court that the government's actions are an endorsement of religion by asserting that the restrictions are really "coercive" and not "voluntary." Although the District Court disagreed with this argument, as do *amici*, some of the court's analysis seemed to accept the premise that it "could possibly" make a difference if the restriction in question were mandatory, as opposed to voluntary. *Amici* believe that whether or not any given land use restriction is voluntary or mandatory is not dispositive in terms of its constitutional validity and that the GMP is constitutionally valid regardless of how its provisions are interpreted.

A voluntary/mandatory distinction is unsupported by the case law and, if adopted more generally as a standard of law, such reasoning could limit the ability of the government to accommodate both Indian and non-Indian religious needs at other sites

which it manages.

Once again, the Lyng case is illustrative as to why the “voluntary vs coercive” dichotomy is not a meaningful one. In Lyng, the Court upheld a logging plan that proposed using government coercion to prevent logging in certain areas solely to protect those sacred sites for ceremonial use. Rather than finding this “coercive” logging plan to be unconstitutional, the Supreme Court instead commended the Forest Service for being "solicitous" and opined that such solicitude accorded with government policy expressed in the American Indian Religious Freedom Act of 1978, 42 U.S.C. § 1996. 485 U.S. at 454-55. In short, government action that required a class of individuals to involuntarily refrain from an otherwise permitted activity in order to prevent the government's system of regulation and the activities of those individuals from interfering with the free exercise of religion was not considered to constitute "forced support" for that religion. In the same vein, even if the GMP were characterized as coercive in the sense that it may create pressure for a person not to walk under Rainbow Bridge, this simply does not rise to the level of unconstitutional coercion in the sense of "forced support for Indian religion" within the meaning of Lyng and applicable Establishment Clause cases.

In general, the concept of “unconstitutional coercion” asserted by the appellants and suggested by the lower Courts dicta is simply far broader than that recognized by the Supreme Court. “Unconstitutional coercion,” as used in cases such as Lee v. Weisman, 505 U.S. 577, 587 (1992), refers to action which would force a non-believer to affirmatively provide support for or participate in a given religion. In Lee v. Weisman, for example, the Court held that a prayer at a high school graduation ceremony violated the Establishment Clause. The Court reasoned that the unwilling graduate had no meaningful choice but to attend her graduation and that standing or remaining silent during the prayer would be viewed as an “expression of participation by the graduate.” 505 U.S. at 593. The Court distinguished the “graduation prayer” in Lee v. Weisman from a prayer before a state legislature, which had been upheld in Marsh v. Chambers, 463 U.S. 783 (1983), because the “legislative prayer” was addressed to adults who were free to leave and not take part in the prayer. 505 U.S. at 596-97.

Coercion not to walk under Rainbow Bridge is fundamentally different from coercing a student to “participate in” school prayer. As stated by the District Court, contrary to the school prayer context, “visitors to Rainbow Bridge have virtually no

opportunity to observe, let alone participate in the practice of traditional Native American religions.” (slip. op. at 29) The District Court should have relied upon this finding of fact, rather than assuming that the “mandatory/voluntary” distinction might have constitutional significance.

If unconstitutional coercion were interpreted so broadly as to preclude any governmental restrictions on the public's use of government land in order to protect the ceremonial use of that land, such an interpretation of the Establishment Clause would not only be contrary to Lyng and a misinterpretation of Lee v. Weisman and similar cases, but would make it nearly impossible for the government to accommodate religion in a variety of contexts.

Indeed, the GMP is in keeping with the government's many accommodations of religious properties and ceremonies on federally owned land. The Supreme Court held long ago that public parks may constitutionally be used for religious expression and religious gatherings. Kunz v. New York, 340 U.S. 290, 293 (1951). Throughout our nation's history, the federal government has permitted private religious practices in the national parks and forests and it has accommodated those practices by temporarily or permanently restricting incompatible activities.

The survey that follows includes practices on selected federal lands. It is by no means exhaustive. Indeed, the Park Service alone “oversees thousands of square miles of land that encompass many religious sites, including historic mission churches in the southwest, small churches in the Shenandoah Valley, hundreds of sites that are sacred to Native Americans, Arlington National Cemetery, and even historic churches in cities.” E. Treene, Religion, the Public Square, and the Presidency, 24 Harv. J.L. & Pub. Pol’y 573, 588 (2001).

At Arlington National Cemetery, the government accommodates the free exercise of religion at private memorial services by providing that such services “may be closed to members of the general public.” 32 C.F.R. § 553.22(c)(3). Some forms of conduct are prohibited at all times because they are inconsistent with the sacred, spiritual purposes to which the Cemetery is devoted: these include recreational activity, commercial activity, and disruptive and disorderly conduct. Id. § 553.22(f),(g); 36 C.F.R. §§ 12.2, 12.11. Park regulations provide that “all visitors . . . shall observe proper standards of decorum and decency while within the Cemetery grounds.” 32 C.F.R. § 553.22(f). Signs at the Cemetery state that Arlington is “Our Nation's Most Sacred Shrine,” and ask visitors to “Please Conduct Yourself With

Dignity and Respect at All Times.” Treene, 24 Harv. J.L. & Pub.

Pol’y at 589.

At many national parks, monuments, and historic sites, the National Park Service owns, leases, or manages religious properties. At these properties, the Park Service “imposes restrictions on activities that would conflict with dominant faiths” and religious practices. A. Dussias, Cultural Conflicts Regarding Land Use, 1 Res Communes: Vt. J. Envt. 1, 14 (1998-1999). See also S. Lee, Government Managed Shrines, 35 Val. U. L. Rev. 265, 307 (2000).

For example, at the Martin Luther King National Historic Site in Georgia, the Park Service has a 99-year leasehold interest in Ebenezer Baptist Church. See 60 Fed. Reg. 22405 (May 5, 1995). The Park Service operates the church as part of the Historic Site, but accommodates the current congregation’s need to use the church for private religious ceremonies. Id. “The Park Service plays tapes of King’s speeches—which are filled with reference to God and faith—in the halls, and encourages the congregation to continue to hold ceremonies at the church.” Treene, 24 Harv. J.L. & Pub. Pol’y at 589. The church is “open to the public, except during special services when the sanctuary is mandatorily closed to the public.” Lee, 35 Val. U. L. Rev. at

306. Accord, Dussias, 1 Res Communes: Vt. J. Eenvt. at 14.

“Mission Churches in the Southwest under Park Service control continue to operate as churches.” Treene, 24 Harv. J.L. & Pub. Pol’y at 589. The San Antonio Missions National Historic Park in Texas contains four active Catholic missions. The Park Service’s official brochure requires visitors to “be considerate,” stating: “Parish priests and parishioners deserve your respect; please do not disrupt their services.” Lee, 35 Val. U. L. Rev. at 306. Further, “[e]ach year at the San Antonio Missions in Texas, the performance of a Christian morality play, *Los Pastores*, is sponsored by the National Park Service.” Id. At Tumacacori National Historic Park in Arizona, the Park Service owns and manages a Franciscan church built in the 1700’s. Lee, 35 Val. U. L. Rev. at 306. “A High Mass is held annually in the church in addition to weekly services. Worshippers are able to access the church and, in some cases, park fees are waived for such events.” Id. At both Tumacacori and the San Antonio Missions, “the NPS seeks to ensure a peaceful atmosphere without disruption of the services.” Dussias, 1 Res Communes: Vt. J. Eenvt. at 14.

Similarly, at the Sitka National Historic Park in Alaska, the Park Service owns and manages the Russian Bishop’s House and its Chapel of the Annunciation. The

Park Service acquired the Bishop's House in the 1970's from the Russian Orthodox Church. See P.L. 92-501 (Oct. 18, 1972). By agreement, the Park Service allows the Church's active congregation to continue to use the chapel for private religious ceremonies. Joan M. Antonson & William S. Hanable, An Administrative History of Sitka National Historic Park, ch. 5 (1987), available at <http://www.nps.gov/sitk/adhi/adhi.htm>.

In national parks throughout the country, the Park Service issues permits allowing religious organizations to conduct religious services on federal lands. 36 C.F.R. §§ 2.51, 2.52, 50.19, 50.52. See O'Hair v. Andrus, 613 F.2d 931, 934 (D.C. Cir. 1979) (Park Service "issues about 100 permits annually for religious activities on national park land within the District of Columbia" alone). Through this permitting process, for example, the Park Service allows one religious organization, "A Christian Ministry in the National Parks," to conduct regularly scheduled religious services in approximately 65 national parks, including Yellowstone and Yosemite. Sandra B. Zellmer, Sustaining Geographies of Hope, 73 U. Colo. L. Rev. 413, 457-58 (2000); Raymond Cross & Elizabeth Brenneman, Devils Tower at the Crossroads, 18 Pub. Land & Res. L. Rev. 5, 26 n.95 (1997). During these religious services, the Park

Service may prohibit incompatible recreational uses of park facilities or lands. The Park Service also sponsors an “annual ‘Christmas Pageant of Peace,’ located on the Ellipse behind the White House, which includes the National Christmas Tree, a Nativity Scene, and live reindeer in a pen.” Treene, 24 Harv. J.L. & Pub. Pol’y at 590. Conflicting uses of the Ellipse may be excluded during the three-week period of the Pageant. 36 C.F.R. § 7.96(g)(4)(i)(a).

When challenged, the government’s accommodations have routinely been upheld by the courts. In O’Hair v. Andrus, 613 F.2d 931, 932-33 (D.C. Cir. 1979), the court rejected an Establishment Clause challenge to a National Park Service permit issued to the Roman Catholic Archdiocese of Washington authorizing Pope John Paul II to conduct a mass for 500,000 people on the National Mall. The Park Service erected “fences and barriers” around the Mall and spent up to \$178,450 on extra police, construction costs, water and electrical services, and garbage removal. Id. The court found that “some use of public property for a religious purpose may occur without constituting an ‘establishment’ of religion.” Id. at 937.

Similarly, in U.S. v. Means, 858 F.2d 404, 409 n.9 (8th Cir. 1988), cert. denied, 492 U.S. 910 (1989), the court discerned no Establishment Clause violation in a

government grant of a semi-permanent permit (which had been in place for 67 years) to the United Church of Christ to build and operate a twelve-acre camp with up to eighteen buildings in a national forest. See also Woodland Hills Homeowners Org. v. Los Angeles Community College Dist., 218 Cal. App. 3d 79 (Cal. App. 1990) (state college did not violate Establishment Clause by leasing surplus college property to religious organization for purpose of constructing religious temple).

No court has ruled that a religious accommodation violates the Establishment Clause simply because it designates public property for religious purposes or because it restricts public access to, or activities on, public property. Rather, in numerous contexts, courts have upheld such designations of public property. See, e.g., Good News Club v. Milford, 533 U.S. 98, 112-14 (2001) (public school facilities to be used for religious purposes); Lamb's Chapel, 508 U.S. 384, 394-95 (1993) (same); Van Zandt v. Thompson, 839 F.2d 1215, 1216 (7th Cir. 1988) (“prayer room” in state capitol building); Hawley v. City of Cleveland, 24 F.3d 814, 815, 818 (6th Cir. 1994) (Catholic Diocese chapel in Cleveland Hopkins International Airport); Brashich v. Port Authority, 791 F.2d 224, 226 (2d Cir. 1980) (chapels at John F. Kennedy International Airport in New York).

The courts have also upheld designations of public property for religious displays. See, e.g., Capitol Square Review Board v. Pinette, 515 U.S. 753, 763, 770 (1995) (upholding erection of Latin cross in plaza next to state capitol); Allegheny County v. Greater Pittsburgh A.C.L.U., 492 U.S. at 620 (upholding display of Menorah on government property); Lynch v. Donnelly, 465 U.S. at 685 (upholding city display of nativity scene).

In all of these cases, the government's designation of public property for religious uses necessarily imposed limitations on other incompatible uses. Yet, as these cases make clear, limiting some uses of government property does not in itself render a government accommodation unconstitutional.

Indeed, the fact that the government owns of a site which has been a place of worship for a particular religious group provides an adequate basis for the government to take actions to accommodate religious practice which might not be permitted in other instances. An analogous situation would be those circumstances where the government has control over individuals, such as prison inmates, and their right to worship freely is dependent upon special solicitude by the government. In such circumstances, the courts have uniformly sanctioned governmental action to

offer affirmative assistance to help those individuals to overcome government-placed obstacles to the free exercise of religion.

For example, in Katcoff v. Marsh, 755 F.2d 223 (2d Cir. 1985), the Court held that, given the absence of other alternatives for soldiers to practice their religions, the hiring of government chaplains for the soldiers is a permissible accommodation of their free exercise rights and does not violate the Establishment Clause. The case held that

[t]he standard to be applied in deciding whether the Army's military chaplaincy can survive attack as violative of the Establishment Clause must take into account [the War Power Clause of Art.I, sec. 8] ... and the necessity of recognizing the free exercise rights of military personnel. In our view these additional factors, which were not present in Lemon v. Kurtzman or its progeny, relied on by plaintiffs, render its test inappropriate here.

[755 F.2d at 235]

Likewise, a number of cases have recognized that providing chaplains at taxpayer expense to prisoners or patients at a county-run hospital does not violate the Establishment Clause. See, e.g., Remmers v. Brewer, 361 F. Supp. 537 (S.D. Iowa 1973), aff'd, 494 F.2d 1277 (8th Cir. 1974), cert. denied, 419 U.S. 1012 (1974) (prisoners); Horn v. People of California; 321 F. Supp. 961 (E.D. Cal. 1968), aff'd.,

436 F.2d 1375 (9th Cir. 1970), cert. denied 401 U.S. 976 (1971) (prisoners); Carter v. Broadlawns Medical Center, 857 F.2d 448 (8th Cir. 1988), cert. denied 489 U.S. 1096 (1989) (county-run hospital). The same conclusion has been reached in the case of a law providing for presumptive placement of a child in foster care with persons, or institutions run by persons, of the same religious background as the child. See Wilder v. Sugarman, 385 F. Supp. 1013 (S.D.N.Y. 1974).

In the cases cited above, the government had control over the individuals involved. Here, the government has control of the religious “facility” or place of worship itself. In each case, the impact on the religious practitioners affected by the governmental action is the same. If the government does not take special action to accommodate religious practice, governmental actions will have the effect of inhibiting or preventing religious activities from taking place. If the government is to be permitted to own any religious site, it must have the constitutional ability to take special measures to meet the legitimate Free Exercise concerns of practitioners who utilize the site.

Thus, the correct result from both a policy and constitutional standpoint is to recognize the right of the government to take reasonable and enforceable action to

accommodate both Indian and non-Indian religions with sacred places on federal land. Impermissible coercion in the Establishment Clause sense must be limited to actions that force an individual to "affirmatively participate in" or provide support to religion, not restrictions that simply prevent interference by third parties with the legitimate religious practices of individuals who ceremonially worship on public lands.

Regardless of whether the GMP is mandatory or voluntary, it does not coerce support for or participation in Native American religion any more than the prohibition of logging in Lyng. Thus, it is constitutional.

III. Because of the unique trust relationship between the federal government and Indian people, the provisions in the GMP whose purpose is to accommodate Native American religious concerns need only meet a rational basis test, a test which those provisions easily satisfy.

The basis for a special legal relationship between Indian people and the federal government is found in the Constitution, as well as judicial precedent dating back almost two centuries. U.S. Const. Art. I, § 8 (Constitution empowers Congress "[t]o regulate Commerce ... with the Indian Tribes."); Worcester v. State of Georgia, 31 U.S. (6 Pet.) 515, 559 (1832) ("Indian nations" are "distinct political communities

retaining their original natural rights..."). These constitutional and common law principles have given rise to the negotiation of numerous treaties, the development of the trust doctrine and the enactment of an entire Title of Indian-specific legislation. See generally Felix Cohen's Handbook of Federal Indian Law, 220-25 (Rennard Strickland, et al. 1982 ed.); U.S. Code, Title 25.

These principles have also given rise to a "distinctive obligation of trust incumbent upon the Government in its dealings with these dependent and sometimes exploited people...which is humane and self-imposed" and involves "moral obligations of the highest responsibility..." Seminole Nation v. United States, 316 U.S. 286, 296-97 (1942). This trust relationship applies to all Federal agencies and to federal action outside Indian reservations. See, e.g., Pyramid Lake Paiute Tribe v. U.S. Dept. of Navy, 898 F.2d 1410, 1420 (9th Cir. 1990). Because of its trust responsibility and treaty obligations, the Federal government has assumed the specific responsibility for protecting and fostering the well-being of Indian people, including the continuation of their societies, cultures and communities.¹

¹ Legislation in the area of Indian religion and culture includes the Native American Graves Protection and Repatriation Act, 25 U.S.C. §§3001 et seq., the Native American Languages Act, 25 U.S.C. §§2901 et seq., statutes addressing

In Morton v. Mancari, 417 U.S. 535 (1974), the Supreme Court recognized the unique legal status of Indian tribes in federal law and the power of the federal government to act on behalf of Indian people. It held that where legislation singles out Indians for special treatment and that "special treatment can be tied rationally to the fulfillment of Congress' unique obligations toward the Indians, such legislative judgments will not be disturbed." Id. at 554-55. This test applies to both governmental actions affecting tribes & individual Indian people, because "such regulation is rooted in the unique status of Indians as 'a separate people' with their own political institutions..." United States v. Antelope, 430 U.S. 641, 646 (1977). This special relationship between Indian tribes and the United States, and the concomitant responsibility this relationship places upon the United States, mandates different treatment and a different legal analysis than would be the case for non-Native religions. Thus, the Fifth Circuit in Peyote Way Church of God, Inc. v.

ownership or access to sacred sites, 25 U.S.C. §§640d-19, 16 U.S.C. §228i(c), 16 U.S.C. §410ii-4, 16 U.S.C. §543f, 16 U.S.C. §460uu-47, 16 U.S.C. §410pp-6, P.L. No. 98-408, Pub. L. No. 95-498, Pub. L. No. 95-499, statutes addressing the religious and cultural use of animals, 16 U.S.C. §668a and 16 U.S.C. §1371(b), No. 98-408-Pub. L. No. 95-499, statutes addressing the religious and cultural use of animals, 16 U.S.C. §668a and 16 U.S.C. §1371(b), and a statute protecting Native American religious use of peyote, 42 U.S.C. §1996a.

Thornburgh, 922 F.2d 1210, 1217 (5th Cir. 1991), in a case involving a regulatory exemption for religious peyote use by Native American Church members, held that:

The unique guardian-ward relationship between the federal government and Native American tribes precludes the degree of separation of church and state ordinarily required by the First Amendment. The federal government cannot at once fulfill its constitutional role as protector of tribal Native Americans and apply conventional separatist understandings of the establishment clause to that same relationship.

The First Circuit in Rupert v. Director, U.S. Fish & Wildlife Service, 957 F.2d 32, 34-35 (1st Cir. 1992), similarly applied a less stringent Establishment Clause standard in evaluating the constitutionality of a Bald Eagle Protection Act provision permitting Indians to possess eagles for religious purposes. 16 U.S.C. §668a. In that case, the Court (including now-Justice Stephen Breyer) held that because of the unique history and legal status of Native Americans, the Indian religious exemption in the Bald Eagle Protection Act is an exception to the general rule that a religious classification is a suspect classification. Since the law bears a rational relationship to a legitimate governmental objective, it is constitutional. Id.

In summary, both Rupert and Peyote Way found that the usual Establishment Clause test must be modified in the context of Indian religions. In essence, although

the analytical means by which they reached their conclusion was different, both courts ultimately applied a test that was virtually identical to the Morton v. Mancari test.

Thus, in evaluating the accommodation in this case, the Lemon v. Kurtzman test need not be applied. Rather, a rational basis test is sufficient.

As stated by Justice Brennan in his dissent in Lyng v. Northwest Indian Cemetery Protection Assn., 485 U.S. 439, 460-61 (1988):

...Native American faith is inextricably bound to the use of land. The site-specific nature of Indian religious practice derives from the Native American perception that land is itself a sacred, living being. Rituals are performed in proscribed locations not merely as a matter of traditional orthodoxy, but because land, like all other living things, is unique, and specific sites possess different spiritual properties and experience. (citations omitted)

Clearly, the Rainbow Bridge is a sacred site with such characteristics. It is also clear that government-permitted and regulated activities such as tourism interfere with the ceremonial use of the site. The GMP provisions seek to minimize this interference in a measured and balanced way. Accordingly, the GMP clearly satisfies the rational basis standard.

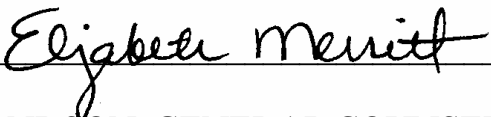
CONCLUSION

For all of these reasons, the GMP is constitutional.

DATED this 23rd day of January, 2003.

Respectfully submitted,

**ASSOCIATION ON AMERICAN INDIAN AFFAIRS
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