Note

IN MEMORIAM:
RAINBOW BRIDGE NATIONAL MONUMENT

The Tenth Circuit in Friends of the Earth v. Armstrong has established a precedent that could jeopardize the future of the national park and monument system. The court's decision allows the waters of Lake Powell to invade Rainbow Bridge National Monument, possibly threatening the structure of the world's largest natural bridge, Rainbow Bridge, and certainly altering the area's naturally arid environment. This Note examines the various expressions of congressional intent regarding the protection of Rainbow Bridge National Monument and the creation of Lake Powell, and critically analyzes the Tenth Circuit's interpretation of these expressions of intent. The author discusses the conflict between the policies of preservation and development which appears to underlie this decision. She concludes that decisions involving the balancing of such wide-ranging policies should not be made through the application of technical legal doctrines in a court of law. Rather, such determinations are more properly made by Congress. The decision in this case leaves the door open for future judicially-sanctioned encroachments by the forces of development on the national parks and monuments.

Spanning an intermittent creek deep in the slickrock maze of southern Utah's canyon country is the graceful sandstone arch of Rainbow Bridge, the world's largest known natural bridge. So remote and inaccessible is this unique monument that rumors of its existence were not confirmed until the twentieth century. Many of the nearby Indians never saw the Bridge, even though it figured importantly in their legends as a mysterious rainbow turned to stone.

The first recorded visit by white men to Rainbow Bridge was not until 1909. Less than one year later, President William Howard Taft created Rainbow Bridge National Monument by proclamation:

1. Lake Powell has made Rainbow Bridge National Monument much more accessible. It can now be reached by a 50-mile motorboat ride from either of two marinas, instead of the difficult, dry, 24-mile slickrock trail or the strenuous boat ride down the Colorado River that used to be the only approaches.

2. For an eyewitness account of this visit, see Judd, Rainbow Trail to Nonnezoshe, 47 NAT'L PARKS & CONSERVATION MAGAZINE, Nov. 1973, at 4 (reprint of 1927 article).
Whereas, an extraordinary natural bridge, having an arch which is in form and appearance much like a rainbow, and which is three hundred and nine feet high and two hundred and seventy-eight feet span, is of great scientific interest as an example of eccentric stream erosion, . . . it appears that the public interest would be promoted by reserving this bridge as a National Monument, together with as much land as may be needed for its protection. . . .

That protection, perhaps like Rainbow Bridge itself, is in danger of erosion as result of a 1973 decision by the Tenth Circuit Court of Appeals. The decision permits the U.S. Bureau of Reclamation to operate Lake Powell, the reservoir behind Glen Canyon Dam, in such a way that water from the reservoir may be permanently within the boundaries of the Monument and up to 48 feet deep under the Bridge itself.

The Tenth Circuit decided the case on a narrow legal issue of statutory construction, using the doctrine of implied repeal to justify its interpretation of congressional action and inaction. The Supreme Court refused to grant certiorari, thereby adjudicating sub silentio crucial policy issues that appear to be the key to the Tenth Circuit's nominally "legal" holding. The most important of these issues is the conflict between policies of preservation and development.

Part I sets forth the elements of the policy conflict centering on Rainbow Bridge National Monument: the protection of Rainbow Bridge as a national monument representing preservation policy, and the Glen Canyon/Lake Powell project representing the forces of development. Also described are the actual and potential physical effects on Rainbow Bridge National Monument stemming from the presence of standing water in the Monument.

Part II presents the history of the litigation that has sought to reconcile the conflict that exists between the national monument and the reservoir. This Part includes a discussion of the legal theory upon which the Tenth Circuit primarily based its holding, the doctrine of implied repeal.

Part III analyzes in detail the Tenth Circuit's application of the doctrine of implied repeal to the Rainbow Bridge/Lake Powell situation, and raises the broader policy issues which the decision silently sub-

5. By using additional storage capacity reserved for flood control, Lake Powell could reach 3711 feet above sea level, or 59 feet deep under Rainbow Bridge. Brief for Plaintiff at 9, n.8, Friends of the Earth v. Armstrong, 485 F.2d 1, 5 ERC 1694 (10th Cir. 1973) [hereinafter cited as Brief for Plaintiff].
6. See text accompanying notes 58-64 infra.
sumes. Also discussed are the implications of this decision for possible future encroachments by development into the domain of the National Park System.

I

THE ELEMENTS OF THE CONFLICT

Rainbow Bridge spans the inner gorge of Bridge Canyon, which was carved by Bridge Creek, a tributary of the Colorado River. Glen Canyon Dam is 58 miles downriver from where Bridge Creek once joined the mainstream of the Colorado. Although the dam itself is in northern Arizona, the reservoir, known as Lake Powell, extends for most of its 186-mile length into Utah.\(^7\)

In 1956, when Congress authorized construction of a 710-foot high dam at the downstream end of what used to be Glen Canyon,\(^8\) it was clear that unless some action were taken to protect Rainbow Bridge, water from the dam's reservoir would eventually enter the preserve of the Monument.\(^9\) Prior to the Tenth Circuit decision discussed in this Note, water had already invaded the Monument on at least two occasions.\(^10\) The Supreme Court's refusal to review that decision will, in effect, allow water to remain within the boundaries of the Monument and perhaps under the Bridge itself continuously and indefinitely. Although the evidence is in conflict as to whether the presence of standing water in the inner gorge of Bridge Canyon will present a danger of physical harm to the structure of the Bridge itself, there is no doubt that the natural environment of the Monument will be drastically altered.\(^11\)

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7. This explains why Senators from Utah, especially Senator Frank Moss, have been so concerned. See text accompanying note 80 infra.


9. The dam is designed to store about 27 million acre-feet of water at levels up to 3700 feet above sea level. At 3606 feet, water reaches up Bridge Canyon to the boundary of Rainbow Bridge National Monument. Halliday, Protection of Rainbow Bridge National Monument, 133 SCIENCE 1572 (1961) [hereinafter cited as Halliday]. At 3645 feet, water stands under the Bridge itself. At the maximum capacity of 3700 feet, water is 48 feet deep under the Bridge and extends up Bridge Canyon 100 feet beyond the upstream boundary of Rainbow Bridge National Monument. Brief for Plaintiff, supra note 5, at 9, n.8.

10. On May 15, 1971, water entered the Monument and remained within it until September 15, 1972, reaching a maximum height of 3622.3 feet above sea level on July 11, 1971, still a considerable distance downstream from the Bridge itself. Brief for Plaintiff, supra note 5, at 9. The water was again within the Monument from October 20, 1972 until January 1, 1973, but on this occasion did not reach above the previous high-water mark. Id.

11. See text accompanying notes 31-41 infra.
This Part sets forth the statutory background of both Rainbow Bridge National Monument and the Glen Canyon/Lake Powell project, and outlines the possible physical and aesthetic effects of the conflict between these two federal creatures, the national monument and the reservoir.

A. Rainbow Bridge National Monument

As noted above, Rainbow Bridge National Monument was created by presidential proclamation in 1910, under authority of the Antiquities Act of 1906. In accordance with this Act, the amount of land set aside for protection of the Monument was 160 acres, presumably "the smallest area compatible with the proper care and management of the objects to be protected." The Monument has been administered by the National Park Service since 1916, when the Service was created by Congress. Like the Bureau of Reclamation, which operates Glen Canyon Dam, the National Park Service is under the aegis of the Department of the Interior, with the Secretary of the Interior being directly responsible for the operation of both agencies.

The Acts providing for the designation of national monuments and for the creation of the National Park Service reflect Congress' support of this country's strong policy in favor of preserving certain beautiful and significant areas "unimpaired for the enjoyment of future generations." This is a continuing policy that antedates by many years the current popular interest in the environment and "ecology." Congress has been faithful to this policy in its protection of the National Park System from the incursions of reclamation projects and other development-oriented uses. Amendments to the Federal Water Power Act of 1920, for example, specifically prohibit the licensing of any dam by the Federal Power Commission in any national park or monument.

12. See text accompanying note 3 supra.
13. 16 U.S.C. § 431 (1970). The Act authorized the President, in his discretion, "to declare by public proclamation . . . objects of historic or scientific interest . . . to be national monuments, and [to] reserve as a part thereof parcels of land, the limits of which in all cases shall be confined to the smallest area compatible with the proper care and management of the objects to be protected." Id.
14. Id.
15. 16 U.S.C. § 1 (1970). The Act directs that the National Park Service "promote and regulate" the use of national monuments (as well as other federal areas), "by such means and measures as conform to the fundamental purpose of the said . . . monuments . . ., which purpose is to conserve the scenery and the natural and historic objects and the wild life therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations." Id.
16. Id.
17. 16 U.S.C. § 796 (1970) (prohibiting such licenses in national parks and
This policy of selective preservation was abrogated once, in 1913, when the Hetch Hetchy Valley within Yosemite National Park was dammed to provide a water supply for the city of San Francisco. However, there has been no such major departure from preservation policy since.

B. The Colorado River Storage Project Act of 1956

Recognizing that the scarcity of water could hamper development of the Southwest, Congress enacted the Colorado River Storage Project Act of 1956 [hereinafter referred to as the Storage Act], "[i]n order to initiate the comprehensive development of the water resources of the Upper Colorado River Basin. . . ." The Storage Act, which authorized construction of Glen Canyon Dam, was the culmination of a process begun in 1946, when the Bureau of Reclamation began studying possible dam and reservoir sites along the Colorado River. It was not until 1954, four years after the Bureau had issued a report on the findings of this study, that a bill authorizing Glen Canyon Dam and related works was reported out of committee. There was strong opposition to a provision in the bill for a dam at Echo Park within Dinosaur National Monument. Conservation groups and their supporters in Congress feared that the provision would set a precedent for future invasions of national parks and monuments by such projects, and they voiced their objections so strongly that passage of the bill was successfully blocked until 1956.


19. "Hetch Hetchy proved to be the last dam built within the boundaries of a National Park, although strong efforts were later made for dams in Yellowstone and in Dinosaur National Monument and for dams on the Colorado River that would affect Grand Canyon National Park." Id. at 318.

20. 43 U.S.C. § 620 (1970). The Act lists as its purposes "regulating the flow of the Colorado River, storing water for beneficial consumptive use, making it possible for the States of the Upper Basin to utilize, consistently with the provisions of the Colorado River Compact, the apportionments made to and among them in the Colorado River Compact and the Upper Colorado River Basin Compact, respectively, providing for the reclamation of arid and semiarid land, for the control of floods, and for the generation of hydroelectric power, as an incident of the foregoing purposes. . . ." Id. The Colorado River Compact of 1922 is set forth in note 73 infra.


22. Brief for Plaintiff, supra note 5, at 11.


The conservation forces were not at first concerned about Rainbow Bridge National Monument, since the Bureau of Reclamation and the Department of the Interior assured Congress that protection of the Bridge was a simple, inexpensive matter which would be undertaken as an integral part of the Glen Canyon project. When the 1955 version of the bill contained no protection for national parks and monuments, once again the conservationist coalition managed to block passage of the bill. Finally, in 1956, the bill was amended in conformity with a compromise worked out between proponents of the project and conservationists. This compromise contained three elements: (1) the elimination of the Echo Park Dam; (2) the inclusion of a passage providing "[t]hat as part of the Glen Canyon Unit the Secretary of the Interior shall take adequate protective measures to preclude impairment of the Rainbow Bridge National Monument"; and (3) the inclusion of a passage stating "[i]t is the intention of Congress that no dam or reservoir constructed under the authority of this chapter shall be within any national park or monument." Relying on these changes, the conservationists dropped their opposition to the project bill, and it was enacted into law in 1956.

25. See, e.g., Hearings on H.R. 3383 before the Subcomm. on Irrigation and Reclamation of the House Comm. on Interior and Insular Affairs, 84th Cong., 1st Sess., ser. 4, pt. 1, at 304 (1955) (assurance of Regional Director to the Bureau of Reclamation); Hearings on S. 500 before the Subcomm. on Irrigation and Reclamation of the Senate Comm. on Interior and Insular Affairs, 84th Cong., 1st Sess., at 108 (1955) (letter from Secretary McKay to David Brower).


27. Congressman Aspinall, a proponent of the project, said on the floor of the House that "[w]e have entered into an agreement with the conservationists to the effect that we would not trespass upon any national park or national monument area in the construction of projects authorized under the provisions of this bill." 102 Cong. Rec. 3504 (1956). The Conference Report of the two Houses stated: "The House approved bill ... makes clear the intention of the House that there be no invasion or impairment of the national park system by the works authorized to be constructed under this legislation. The conference committee upheld the House position and adopted the House-approved language." 102 Cong. Rec. 5768 (1956).

28. 43 U.S.C. § 620 (1970) [this provision hereinafter referred to as section 1 of the Storage Act].

29. 43 U.S.C. § 620b (1970) [this provision hereinafter referred to as section 3 of the Storage Act].

30. See Letter to the Chairman of the Irrigation and Reclamation Subcommittee from Horace M. Albright of Trustees for Conservation, Ira N. Gabrielson of Citizens' Committee on Natural Resources, and Howard Zahniser of Council of Conservationists, stating, in part, that "[i]n view of these agreements we can no longer oppose this bill. In fact, we also wish to commend the proponents of the project for the addition of these provisos, which we are glad to support as of great positive value to the cause of conservation, for they are a reaffirmation of the national park principle at a time when the
The protective policy expressed by the Congress in these provisions has never been explicitly repealed. It has, however, been eroded indirectly by subsequent acts of Congress, and eventually by the Tenth Circuit's confirmation of this implied repeal. Before turning to the legal issues involved in the Tenth Circuit's decision, however, we will examine why the conservationists thought protection of Rainbow Bridge National Monument was necessary.

C. Water Under the Bridge

There is conflicting evidence as to whether the presence of standing water in the inner gorge of Bridge Canyon under Rainbow Bridge will present a danger of physical damage to the structure of the Bridge itself. A 1959 geological report prepared by the United States Geological Survey concluded that

[There appears to be no valid reason to fear structural damage to Rainbow Bridge as a result of possible repeated incursions and withdrawals of reservoir water to and from the inner gorge of Bridge Creek beneath the bridge.]

A 1972 engineering report prepared by a private consulting firm asserted that

[a]n analysis of the bridge and foundation has shown that the structure possesses a high factor of safety against failure. It is estimated that well over one-half of the foundation rock on each leg of the arch would have to be removed before an arch failure would occur. Such a condition would not be expected to develop for many thousands of years even if all the processes evaluated in this report were increased in magnitude one-hundredfold. . . .

Other geologists and observers have noted, however, that the presence of many new rockfalls along the shores of Lake Powell indicates at least a possibility of danger to the Bridge. These recent rockfalls are particularly disturbing in light of the fact that a recent comparison of photographs from Major John Wesley Powell's expedition with photographs taken a century later showed that in the one hundred years since Powell's

national park system, in the minds of many, is in serious danger. . . ."

H.R. REP. No. 1087, pt. 2, 84th Cong., 2d Sess. at 11 (1956). Similar letters were sent by other conservation groups who had opposed the project.


32. Dames & Moore, *Geological and Structural Evaluation of Rainbow Bridge* (1972), excerpts of which were contained in information mailed from the office of Senator Frank E. Moss, D-Utah (on file with Friends of the Earth, San Francisco, California).

historic boat trips down the Colorado River virtually no changes in the form of rockfalls had taken place in the cliff faces along Glen Canyon.\textsuperscript{34}

The new rockfalls occurred in places where the waters of Lake Powell had risen to cover and saturate the upper zone of the Kayenta sandstone, dissolving the cement that holds the sandstone particles together, thereby weakening the support of the overlying Navajo sandstone and causing it to collapse.\textsuperscript{35} It is precisely the upper Kayenta sandstone formation underlying Rainbow Bridge that will be within the zone of fluctuation when Lake Powell fills the inner gorge of Bridge Canyon.\textsuperscript{36} It is this situation that leads some observers to believe that Rainbow Bridge will be in danger of partial or total collapse when the upper Kayenta is saturated for substantial periods of time.\textsuperscript{37}

There are other possible sources of danger to the structure of the Bridge from the presence of standing water in Bridge Canyon. It has been suggested that sulfur dioxide fumes from the coal-burning power plant at nearby Page, Arizona, will combine with water in Lake Powell and rainwater to make weak solutions of sulfuric acid that will accelerate erosion of both the Bridge and its stone foundations.\textsuperscript{38} It is also possible that small-scale slippage of rock masses could occur, due to both the weight of the standing water and aqueous lubrication of faults in the rock.\textsuperscript{39}

Although the evidence is conflicting as to whether Rainbow Bridge National Monument will be in danger of structural damage, it is certain that the presence of Lake Powell within the boundaries of the Monument will drastically alter the natural environment. Tamarisk and other water-loving plants will replace the natural vegetation of the canyon. The native birds and animals will be forced to retreat to new homes elsewhere in the canyon. The erosion pattern of thousands of years will cease, as flash floods that have been responsible for carving the canyon and the Bridge lose their force in the quiet water of the lake.

Although those who advocate operating Lake Powell to its maximum capacity like to think of the arm of the reservoir as a placid ribbon

\begin{itemize}
\item \textsuperscript{34} Information on file with Friends of the Earth, San Francisco, California.
\item \textsuperscript{35} Breed, \textit{supra} note 33, at 39.
\item \textsuperscript{36} Halliday, \textit{supra} note 9, at 1574.
\item \textsuperscript{37} Hansen, \textit{supra} note 31, asserts that the Kayenta was intermittently saturated by ground water before Lake Powell entered Bridge Canyon, with no deleterious effects. Breed, \textit{supra} note 33, and Letter from Stephen Jett to Tom Turner of Friends of the Earth, June 8, 1973, (on file with Friends of the Earth, San Francisco, California) [hereinafter cited as Jett], however, distinguishes between the effects of percolating ground water and large bodies of surface water, in that surface water saturates more thoroughly.
\item \textsuperscript{38} Breed, \textit{supra} note 33, at 39-40.
\item \textsuperscript{39} Jett, \textit{supra} note 37.
\end{itemize}
of blue water which will actually enhance the scene, the experience with reservoir water in canyons elsewhere in the Southwest has led some observers to fear that the effect of the fluctuating water will be far from beneficial to the appearance of the Monument.

Bureau of Reclamation studies indicate that standing water will be beneath the Bridge 77 percent of the time, in the absence of a protective dam.\textsuperscript{40} When Lake Powell is full, the water surface will probably be marred by the debris that tends to collect in such narrow arms of static water—dead wood, detritus such as beer cans and garbage from motorboats, and an oil slick. Furthermore, the zone of fluctuation of the water level will show the effects of the reservoir even when water is not actually under the Bridge. When water is drawn down in the reservoir, there will be an unsightly sterile zone, characterized by aggraded gravel and mud, dead vegetation, the stench of stagnant water, and an obvious white "bathtub ring" where standing water has leached the color out of the reddish sandstone.\textsuperscript{41}

The presence of the reservoir within the Monument will drastically change the nature of the area and will vitiate the express purpose of a national monument—preservation for the enjoyment of future generations. On the other hand, Lake Powell is an important link in the system of southwestern water resources development.\textsuperscript{42} Rainbow Bridge National Monument, then, became the focus for a direct conflict in the courts between the forces of preservation and the forces of development.

\section*{II}

\textbf{THE CONFLICT IN THE COURTS:}

\textbf{FRIENDS OF THE EARTH V. ARMSTRONG}

\textbf{A. History of the Litigation}

\textit{Friends of the Earth v. Armstrong,\textsuperscript{43}} an action in the nature of

\begin{itemize}
\item \textsuperscript{40} Halliday, \textit{supra} note 9, at 1574.
\item \textsuperscript{41} One of the plaintiffs in \textit{Friends of the Earth v. Armstrong}, a commercial river runner on the Colorado River, has described the situation:
  \begin{quote}
  If reservoir water enters the Monument, irreparable damage will occur to this sensitively-balanced environment. Vegetation will die. Animals will scurry still further away from protective habitat. Scum and dead tree tops and branches will greet the visitor. An ugly and unsightly water line on the walls beneath the Bridge will exist during reservoir draw-down. The height of the Bridge will decrease as waters rise below it. Its natural majestic perspective will be lost.
  \end{quote}
\item \textsuperscript{42} See text accompanying notes 123-27 \textit{infra}.
\end{itemize}
mandamus under 28 U.S.C. §1361, was brought in November of 1970 in the District Court for the District of Columbia by Friends of the Earth, the Wasatch Mountain Club, Inc., and Kenneth G. Sleight (a Colorado River tour guide) against the Commissioner of the Bureau of Reclamation and the Secretary of the Interior. The complaint alleged that "[d]amage to Rainbow Bridge from fluctuating standing water will occur," but its claim for relief was not based on that allegation. Rather, the plaintiffs sought a declaration compelling defendants to perform their statutory duty under sections 1 and 3 of the Storage Act "to take adequate protective measures to preclude impairment of Rainbow Bridge National Monument and to prevent Glen Canyon Reservoir from entering the boundaries of Rainbow Bridge National Monument." Defendants' motion for transfer to the District Court for the District of Utah was granted, and the plaintiffs' subsequent challenge to the transfer, a petition for mandamus to the Court of Appeals for the District of Columbia, was denied.

The District Court for the District of Utah granted the petitions to intervene as defendants of the State of Colorado, the State of Utah, and six water conservation districts and power associations in the Upper Basin region. After cross-motions for summary judgment were

47. For a full analysis of defendants' motion for change of venue, and the District Court for the District of Columbia's action granting the transfer see Brecher, Venue in Conservation Cases: A Potential Pitfall for Environmental Lawyers, 2 ECOLOGY L.Q. 91, 98 (1972). It is Brecher's argument that the District Court for the District of Columbia, motivated by a desire to clear its congested calendar, often grants transfers under 28 U.S.C. § 1404(a) even though the moving party has not adequately proved the inconvenience of the original forum. A large number of environmental lawsuits are directed against federal defendants located in the District of Columbia. In recent years the Court of Appeals for the District of Columbia has been very sympathetic to the arguments of environmentalists. See id. at 92 for citations of pro-environmentalist decisions of the D.C. Circuit. Thus, the D.C. district court's grant of transfers to other districts, attached to less sympathetic circuit courts of appeals, may in fact influence the outcome of environmental litigation.
48. The district court allowed the intervention as defendants of: the Colorado River Water Conservation District, the Southwestern Water Conservation District, the Inter-Mountain Consumer Power Association, the Northern Division Power Association, the Central Utah Water Conservancy District, and the Colorado Ute Electric Association.

The two states which were allowed to intervene as defendants, Colorado and Utah, are those which would presumably have the most to lose if Lake Powell were not allowed to rise to the 3700 foot level. An analysis made by the Bureau of Reclamation after the decision of the district court in favor of the plaintiffs calculated that Arizona and California would respectively gain an increase of 200,000 and 500,000 acre-feet annually. The Arizona Republic, March 1, 1973, § A, at 1, col. 1.

Utah and Colorado, on the other hand, and to a lesser extent the other Upper Basin states of New Mexico and Wyoming, would be foreclosed from using their full appor-
heard, the district court granted plaintiffs' motion and on February 27, 1973, entered its Order, Judgment and Decree for plaintiffs, permanently enjoining and restraining the federal defendants “from permitting or allowing the waters of Lake Powell and the Glen Canyon Unit to enter or remain within the boundaries of Rainbow Bridge National Monument.”49 The primary defense of both the federal defendants and the defendants-in-intervention was that portions of the Storage Act on which plaintiffs relied had been repealed by implication.60 The court based its decision largely on the determination that no such implied repeal had taken place.61

Defendants' request for stay of the district court's order was granted by the Tenth Circuit Court of Appeals on May 1, 1973,62 and plaintiffs' application to the Supreme Court seeking to have the stay vacated was denied on May 14.63 The Bureau of Reclamation had begun to comply with the district court's order, and had opened the gates of the Dam to draw down the level of the reservoir so that the expected high spring runoff from the Rocky Mountains would not cause the waters of Lake Powell to invade the National Monument. The effective stay, however, entitled the Bureau of Reclamation to reclose the gates and resume impoundment of water, pending the decision of the Tenth Circuit in the defendants' expedited appeal.

The appeal was heard by the Court of Appeals for the Tenth Cir-

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49. Friends of the Earth v. Armstrong, Order, Judgment and Decree, Feb. 27, 1973 [hereinafter cited as District Court Order].
50. See text accompanying notes 58-64 infra.
51. Chief Judge Willis W. Ritter found that the plaintiffs had standing to bring the action; that the doctrine of sovereign immunity did not bar the action; that there were no indispensable parties who had not been joined; that the matter stood ready for final adjudication on the merits; that section 3 of the Colorado River Storage Project Act of 1956, by its clear expression of congressional intent, and as a matter of law, was applicable to Rainbow Bridge National Monument and to Glen Canyon Dam; that section 3 of the Colorado River Storage Project Act of 1956 had not been repealed by implication; and that section 3 of the Colorado River Storage Project Act of 1956 was still in full force and effect and forbade the intrusion of waters from Lake Powell and the Glen Canyon unit into the Rainbow Bridge National Monument. District Court Order, supra note 49. A lengthy opinion in support of the February 27 Order was released on April 21, 1973. 360 F. Supp. 165, 5 ERC 1481 (D. Utah 1973).
52. Defendants had previously applied to the district court for a stay of judgment pending appeal, but the application was denied on April 21, 1973, the same day the district court's opinion was released.
cuit, sitting en banc. In a 5-2 decision on August 2, 1973, the Tenth Circuit reversed the order of the district court. The court based its opinion on the belief that the pertinent parts of sections 1 and 3 of the Storage Act had been repealed by implication, due to certain actions of Congress subsequent to the enactment of the Storage Act in 1956. Thus as a consequence of these actions the Secretary of the Interior and the Commissioner of Reclamation had no further duty to act in conformance with these provisions. The opinion emphasized the importance of the Glen Canyon project in the integrated plan for development of the Colorado River as a regional water source.

Plaintiffs' petition for certiorari to the United States Supreme Court, filed on October 27, 1973, was denied on January 21, 1974, without comment. The Tenth Circuit's decision stands and the Bureau of Reclamation is free to allow Lake Powell to reach 3700 feet above sea level, flooding the inner gorge of Bridge Canyon for its entire length within Rainbow Bridge National Monument.

B. The Doctrine of Implied Repeal

The primary defense of all defendants, rejected by the district court and endorsed by the Tenth Circuit, was that certain provisions of the Colorado River Storage Project Act of 1956 upon which plaintiffs relied, had been repealed by implication. The decision of the Tenth Circuit rested on their determination that "[t]he action taken by Congress after passage of the Storage Act demonstrates a repeal of sections 1 and 3 thereof." Although the opinion asserts that "[t]his is thus not really a situation of repeal by implication . . . but
more a reversal of a previous position. . . ,"61 it appears from an analysis of the reasoning of the court that this is a distinction without a difference. Whatever the majority's politic phrasing, the repeal found by the Tenth Circuit was based on judicial interpretation of congressional actions and not on congressional language directly repealing the sections of the Act—thus an implied, and not a direct, repeal.

The Supreme Court has declared that

[i]he cardinal rule is that repeals by implication are not favored. Where there are two acts upon the same subject, effect should be given to both if possible. There are two well-settled categories of repeals by implication—(1) where provisions in the two acts are in irreconcilable conflict, the later act to the extent of the conflict constitutes an implied repeal of the earlier one; and (2) if the later act covers the whole subject of the earlier one and is clearly intended as a substitute, it will operate similarly as a repeal of the earlier act. But, in either case, the intention of the legislature to repeal must be clear and manifest; otherwise, at least as a general thing, the later act is to be construed as a continuation of, and not a substitute for, the first act. . . .62

As will be discussed in Part III below, the intention of Congress to repeal was far from "clear and manifest" with regard to the sections of the Storage Act upon which plaintiffs relied. The doctrine of implied repeal was improperly applied by the Tenth Circuit to this situation. The Tenth Circuit's use of the case of United States v. Dickerson63 to bolster their conclusion that the repeal had taken place was not convincing. In Dickerson, a series of congressional actions quite similar to those at issue in Friends of the Earth v. Armstrong were held to have given rise to a yearly suspension of the effect of a statute, not its repeal.64

III

THE RESOLUTION OF THE CONFLICT AND ITS IMPLICATIONS

Through its refusal to review the Tenth Circuit's decision in Friends of the Earth v. Armstrong, the Supreme Court was, in effect,

61. *Id.* at 9, 5 ERC at 1699.
63. 310 U.S. 554 (1940).
64. In *Dickerson*, a provision of a 1922 Act providing for a re-enlistment bonus had been in effect for 11 years. In 1933, a provision of the Economy Act of March 3, 1933, suspended the operation of this allowance with express language. *Id.* at 556. Identical provisions were inserted in various appropriations acts for fiscal years 1935, 1936, and 1937. For fiscal years 1938 and 1939 the language used was slightly different, but debate showed that the provisions were intended to have exactly the same effect as in previous years, i.e. a suspension of the 1922 authorization of a re-enlistment bonus. *Id.* That is, the effect of the repeated suspensions was not construed in *Dickerson* to be the equivalent of a repeal.
allowing the Tenth Circuit to adjudicate the enormously complex issues and interests lying behind the actual dispute,\(^6\) while permitting the decision to stand on the narrow legal ground of statutory construction represented by the implied repeal.

It is generally left to Congress to weigh and balance the types of interests involved in a situation such as this, where preservation policy comes into head-on conflict with the forces of progress. But where Congress has left some ambiguity in its pronouncements as to how competing policies are to balanced and implemented, as in this case, the courts are often asked to determine, in the form of an adversary proceeding, what Congress really meant.

*Friends of the Earth v. Armstrong* is an illustration of the limitations of this type of review process. Because of the kinds of interests traditionally allowed to be asserted in court, the Tenth Circuit was restricted to basing its holding on a technical and rather strained issue of statutory interpretation, thus setting a major precedent for invasion of protected areas while touching only in passing on the major policy issues that must have informed their judgment.

### A. The Legal Issues

The Tenth Circuit rested its decision on the determination that "[t]he action taken by Congress after passage of the Storage Act demonstrates a repeal of sections 1 and 3 thereof."\(^6\) Such a repeal, whereby the court interpreted congressional action without explicit expression of congressional policy, is unusual.\(^7\) The Tenth Circuit found, however, that congressional action in the form of twelve years of appropriations acts, together with the provisions of the Colorado River Basin Project Act of 1968\(^6\) was explicit and compelling enough to justify an implication of intent to repeal sections 1 and 3 of the Storage Act. This interpretation of congressional action, as discussed below, was an extremely arguable one.

#### 1. Appropriations Acts

In 1960, during congressional hearings on the 1961 Public Works

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66. 482 F.2d at 7, 5 ERC at 1698. For history and text of sections 1 and 3, see text accompanying notes 26-30 supra.

67. It is noted in the dissent to *Friends of the Earth v. Armstrong* that "[t]he Supreme Court has consistently stated that judicial interpretation is disfavored as a means of establishing a repeal of legislation." 485 F.2d at 16, 5 ERC at 1704, citing 17 Supreme Court cases in which implied repeal was rejected, and only one, *Mathews v. United States*, 123 U.S. 182 (1887), in which it was upheld. For a discussion of the doctrine of implied repeal, see text accompanying notes 58-64 supra.

Appropriations Bill, the Bureau of Reclamation requested an appropriation of $3.5 million to initiate construction of protective works for Rainbow Bridge National Monument.\(^6\) Construction of Glen Canyon Dam was well along, and the time had come to begin implementing the directive in section 1 of the Storage Act that "[t]he Secretary of the Interior shall take adequate protective measures to preclude impairment of the Rainbow Bridge National Monument."\(^7\) After hearings on the budget request, however, both the House and the Senate Appropriations Subcommittees recommended deletion of the $3.5 million, asserting their belief that the water impounded in Lake Powell would not cause structural damage to Rainbow Bridge itself. In doing so they omitted mention of other impairments to the Bridge attributable to water standing beneath it.\(^8\) The subcommittee expressed concern over the estimated high cost for the proposed protective works ($20-25 million).\(^9\) The bill was enacted by Congress without the $3.5 million for protective works.

The matter was again considered during hearings on the Appropriations Bill for 1962. The requested funds were again disallowed, for the same reasons, and in addition, a proviso was inserted in the Act: "Provided, That no part of the funds herein appropriated shall be available for construction or operation of facilities to prevent waters of Lake Powell from entering any National Monument."\(^10\) A similar proviso has been inserted in each year's Appropriations Act through 1972.\(^11\)

After 1963, the Department of the Interior and the Bureau of Reclamation stopped seeking funds from Congress for the purpose of constructing facilities for the protection of Rainbow Bridge National Monument. That year, when the issue of protective works was again raised in committee hearings, Congress advised the Secretary that such works would not be considered, referring to "changes" in the law which reflected this change in policy.\(^12\) These "changes" were described in a March 18, 1963 opinion of the Solicitor of the Interior Department,

\(^{69}\) Friends of the Earth v. Armstrong, 485 F.2d at 7, 5 ERC at 1698.
\(^{71}\) 485 F.2d at 7, 5 ERC at 1698. Note that the directive in section 1 was to protect Rainbow Bridge National Monument, not just the Bridge itself. See text accompanying notes 26-30 supra.
\(^{72}\) Id.
\(^{75}\) 485 F.2d at 7, 5 ERC at 1698.
stating his conclusion that the failure of Congress to appropriate funds (in response to requests) for the years 1960, 1961, and 1962 meant that "Congress intended to suspend the operation of the provisions of Sections 1 and 3 of the Colorado River Storage Project Act insofar as Rainbow Bridge National Monument is concerned." 78

The Solicitor had issued a memorandum to the Secretary of the Interior two months earlier, to the effect that section 1 of the Storage Act, relating specifically to protection of Rainbow Bridge National Monument, had been suspended by Congress' failure to provide funds for protective works. 77 No mention was made in this earlier memorandum of the provision in section 3 of the Storage Act expressing the intent of Congress that no reservoir or dam shall be within any park or monument. By March, however, the Solicitor had decided that the appropriations provisos acted to suspend this expression of congressional intent as well. 78

It is difficult to justify the Solicitor's opinion and the Tenth Circuit's decision in that they both cite congressional actions relating to appropriations as negating a specific expression of congressional intent which was in no way dependent upon the appropriation of funds. As

76. Opinion of the Solicitor, Department of the Interior, Closure at Glen Canyon Dam, 70 I.D. 200 (Mar. 18, 1963). Solicitor Frank M. Barry added in a footnote: "I incline to the conclusion that permanent repeal has been effected." *Id.* at n.4. It should be noted that the memorandum was prepared not in response to the question of whether or not funds should be requested for the construction of protective works, but rather in response to the demand by conservationists that filling of Lake Powell not be allowed to begin until some action was taken to protect Rainbow Bridge National Monument. *See* National Parks Association v. Udall, Civ. No. 3904-62 (D.D.C. 1963) (dismissed on other grounds) (seeking to enjoin the closure of the diversion tunnels around Glen Canyon Dam).

77. "[T]he provisions originally included in the Colorado River Storage Project Act calling for protective measures at Rainbow Bridge National Monument have been suspended by the Congress and are no longer operative. . . . [I]t is the intention of the Congress that construction and filling of the Reservoir should proceed on schedule without awaiting the construction of barrier dams at Rainbow Bridge." Memorandum to Secretary of the Interior Udall from Solicitor of the Department of Interior, *Closure at Glen Canyon Dam* (Jan. 18, 1963). The subject of the memorandum was whether the Secretary of the Interior was under a duty to order closure of the tunnels that had been diverting Colorado River water around Glen Canyon Dam while it was under construction.

78. The Solicitor's change in position from January to March appears to have been precipitated by a statement of the District Court for the District of Columbia that "[t]he provisions of the Colorado River Storage Act remain in force. Their execution lies within the discretion of the Secretary." National Parks Association v. Udall, Civ. No. 3904-62 (D.D.C. 1963) (dismissed on other grounds). The Solicitor concluded that since the district court had denied standing to the National Parks Association, the court's statement as to the effectiveness of the provisions of the Storage Act were not binding. Opinion of the Solicitor, Department of the Interior, 70 I.D. 200 (Mar. 18, 1973). It would seem, however, that the pronouncement of a district court would have at least persuasive authority, and perhaps it was this that the Solicitor wished to counter.
the dissent in *Friends of the Earth v. Armstrong* points out, "Section 3 is self-sustaining and needs no supplement by appropriations or otherwise for its continued vitality." Furthermore, an examination of the legislative history of both the Storage Act and the Appropriations Acts reveals little further justification for the Solicitor's and the Court's conclusion that the restrictive provisos affected the provisions of section 3.

The Tenth Circuit remarked that "it is of interest" that water was actually within the boundaries of the National Monument while the Appropriations Act for 1972 was being considered by Congress. The court then asserted that "[t]he record thus demonstrates affirmatively" that Congress had intended that the provisos would override the expression of intent in section 3 of the Storage Act as to Rainbow Bridge. Such a strong assertion seems unjustified, especially in light of the fact that between 1960 and 1973, no fewer than eight bills were introduced in Congress by the Utah delegation, seeking to repeal by specific language the pertinent provision in section 3. None of these bills was even reported out of committee, seeming to indicate no intent to repeal, and perhaps indicating an affirmative expression of congressional intent to continue to protect national parks and monuments from incursions of reservoir water. Thus, if the Appropriations Act provisos had any repealing effect, it could only have been with respect to section 1 of the Storage Act—the section that specifically provided for protection of Rainbow Bridge National Monument and required appropriation of funds for its implementation.

Congressional action is far from conclusive, however, even as to the repeal of section 1. It is an acceptable interpretation of the restrictive provisos that the intent of Congress to require the Secretary to build protective works for Rainbow Bridge National Monument had changed, although it is a conclusion by no means compelled on the face of the proviso. The words "herein appropriated" which appeared in each restrictive proviso, and the very fact that the proviso appeared so often, could well be interpreted to mean that Congress merely intended to suspend from year to year the operation of section 1, without repealing it completely. This seems a more reasonable interpretation of Congress' action, for if they had wanted to repeal section 1, they could easily have done so with express language.

79. 485 F.2d at 16, 5 ERC at 1704.
81. For a discussion of the doctrine of implied repeal, see text accompanying notes 58-64 *supra*.
The fact that the proviso appeared in twelve successive appropriations acts could indicate that Congress decided that the building of costly and unsightly dams, pumps, and tunnels was not the best way to protect Rainbow Bridge National Monument. There is no indication, however, that they had thereby decided not to protect Rainbow Bridge National Monument at all, which is the meaning given to their actions by both the March 18 Solicitor's opinion and the opinion of the Tenth Circuit. In fact, there are indications to the contrary. For example, there are other “adequate protective measures” that the Secretary could take to comply with the statutory requirement that he preclude impairment of the National Monument—such as keeping the level of Lake Powell at 3606 feet above sea level. The Storage Act does not specify that the only method of protection shall be dams and tunnels.

Thus, the actions of Congress with respect to the Appropriations Acts for 1961-72 are ambiguous at best, and certainly do not fully support the notion that section 1 has been repealed, even less that section 3 is of no further effect as to Rainbow Bridge National Monument. Still to be considered is the possible repealing effect of the provisions of the Colorado River Basin Project Act of 1968, cited by the Tenth Circuit opinion as a factor in the implied repeal of the protective sections of the Storage Act.

2. The Colorado River Basin Project Act of 1968

The stated object of the Colorado River Basin Project Act of 1968 [hereinafter referred to as the 1968 Act] was “to provide a program for the further comprehensive development of the water resources of the Colorado River Basin and for the provision of additional and adequate water supplies for use in the upper as well as in the lower Colorado River Basin.” The Tenth Circuit focused on two provisions of the 1968 Act as indications of congressional intent to repeal sections 1 and 3 of the earlier Storage Act, noting that “[the 1968 Act] is significant here because it was considered after Glen Canyon Dam was completed.” The two provisions are section 1521(a), setting up the Central Arizona Project; and section 1552(a)(3), requiring formulation of operating criteria for reservoirs built pursuant to the 1956 Storage Act, and setting priorities for releases of water from Lake Powell. These provisions, according to the Tenth Circuit, are “based on the op-

83. § 1501.
84. 485 F.2d at 5, 5 ERC at 1696.
85. Id. at 5, 5 ERC at 1696.
eration of Lake Powell to maximum capacity," and thereby indicate a reversal of Congress' protective stance toward Rainbow Bridge National Monument, since at full capacity the waters of Lake Powell will necessarily stand 48 feet deep under the Bridge.

This reasoning is strained at best, and is suspect on two grounds. First, the 1968 Act specifically asserts that "[n]othing in this Act shall be construed to alter, amend, repeal, modify, or be in conflict with the provisions of. . ., except as otherwise provided herein, . . . the Colorado River Storage Project Act." The 1968 Act did in fact expressly modify parts of the Storage Act, with word-for-word additions or substitutions of language, indicating that when Congress intended to modify the Storage Act by the 1968 Act, it did so only with express language, and not indirectly. Second, an analysis of the language and historical background of the provisos themselves shows that they are not susceptible of the interpretation given them by the Tenth Circuit.

a. Historical Background

The importance of the Colorado River as a primary water source for much of the Southwest has caused a great deal of interstate squabbling over the allocation of its waters, and the significance of the 1968 Act provisions at issue is more evident when seen in this historical perspective. In the early part of the twentieth century, a conflict over water arose between the sparsely settled and relatively undeveloped Upper Basin states (Colorado, New Mexico, Utah, and Wyoming) and the rapidly developing Lower Basin states (Arizona, California, and Nevada—especially the former two).

The Colorado River Compact, an interstate agreement negotiated in 1922 and approved by Congress in 1928, satisfied the Upper

86. Id. at 6, 5 ERC at 1696-97.
88. Section 501 of the 1968 Act amended section 1 and section 2 of the Storage Act by word-for-word substitutions and deletions. Section 502 of the 1968 Act detailed repayment provisions between the Upper Colorado River Basin Fund, established by section 5 of the Storage Act, and the development fund authorized by section 2 of the Boulder Canyon Project Adjustment Act.
89. Act of August 19, 1921, 42 Stat. 171, set out at 70 Cong. Rec. 324 (1928). The key provisions of the Compact are:
   (1) the division of the Colorado River Basin into two parts, the Lower Basin and the Upper Basin, with the dividing point at Lees Ferry (just downriver from Glen Canyon Dam);
   (2) the apportionment of 7.5 million acre-feet of water annually to each Basin, with recognition of a portion to be released to Mexico; and
   (3) the requirement that the Upper Basin not cause the flow of the river at Lees Ferry to drop below 75 million acre-feet in any ten-year period.

The assumption clearly was that the annual flow of the Colorado River would be around 15 million acre-feet, but in fact streamflow since the signing of the Compact has averaged considerably below the assumed amount.
Basin states that enough water had been reserved for their development by the division of the Colorado River Basin into two parts and the equal apportionment of the River's estimated annual flow between the two parts. Prior to the authorization of Glen Canyon Dam in the 1956 Storage Act, the Lower Basin states were virtually assured of more than their allocated water under the Compact, since the Upper Basin states were relatively undeveloped and did not exhaust their annual allocation under the Compact. Thus, since they had no facility for storage of excess water, any water they were unable to use would perforce flow into Lake Mead, behind Boulder (later Hoover) Dam, in the Lower Basin. The rapidly developing states of Arizona and California could put the water to use, in accordance with their respective allocations of surplus water under the Boulder Canyon Project Act of 1928.\textsuperscript{90} More important, in a dry year when the Colorado's flow was less than the 15 million acre-feet assumed by the Compact, the Lower Basin would be more likely to get its full share, since the Upper Basin would not be able to use its allotment of 7.5 million acre-feet.

The dams and other works authorized by the 1956 Storage Act were intended to provide storage facilities that would enable the Upper Basin states fully to utilize their allocation of water under the Compact and to store their part of any surplus in wet years, to insure their ability to satisfy their downriver obligations in dry years. Under the terms of the Compact, the Upper Basin would not be able to store any water for which the Lower Basin had a present consumptive (domestic or agricultural) use,\textsuperscript{91} but if there should be water in excess of the present consumptive needs of both basins within the Upper Basin's allocation, then such excess could be stored in Lake Powell.

The building of Glen Canyon Dam as a facility available to the Upper Basin, threw a new variable into the situation which the State of Arizona found particularly disturbing. Arizona's concern was due in part to its lesser allocation of water under the Boulder Canyon Project Act of 1928,\textsuperscript{92} which authorized construction of Boulder Dam and

\begin{footnotes}
\item[90] 43 U.S.C. § 617 et seq. (1970); see note 92 infra.
\item[91] "The States of the upper division shall not withhold water, and the States of the lower division shall not require the delivery of water which cannot reasonably be applied to domestic and agricultural uses." Act of August 19, 1921, 42 Stat. 171, 70 CONG. REC. 324 (1928).
\item[92] 43 U.S.C. § 617 et seq. (1970). Under the Boulder Canyon Project Act, Arizona was to receive 2.8 million acre-feet per year as opposed to 4.4 million acre-feet for California; Nevada was apparently content with its 300,000 acre-feet. The apportionment under the Boulder Canyon Project Act represented a legislative compromise due to Arizona's repeated efforts to defeat congressional authorization of Boulder (later Hoover) Dam. Although Arizona was still not satisfied with its apportionment under the Boulder Canyon Project Act, its later attempts to obtain relief in the courts failed. Arizona v. California, 283 U.S. 423 (1931); Arizona v. California, 373 U.S. 546 (1963).
\end{footnotes}
Lake Mead. With its burgeoning growth, especially in the Phoenix area, Arizona wanted to be assured of a dependable and adequate water supply for the development of new consumptive uses, and the Central Arizona Project, authorized by the 1968 Act, was to be its insurance.

b. Section 1521(a)

The Central Arizona Project authorized construction of the Granite Reef Aqueduct and related works to carry Colorado River water, in excess of that needed for consumptive uses in both the Upper and Lower Basins, to the Phoenix area and western New Mexico. Section 1521 of the 1968 Act provided that the Granite Reef Aqueduct system may have a capacity of 3,000 cubic feet per second or whatever lesser capacity is found to be feasible: Provided, That any capacity in the Granite Reef Aqueduct in excess of 2,500 cubic feet per second shall be utilized for the conveyance of Colorado River water only when Lake Powell is full or releases of water are made from Lake Powell to prevent the reservoir from exceeding 3,700 feet above mean sea level or when releases are made pursuant to the proviso in section 1552(a)(3) of this title.

The Tenth Circuit interpreted this language to mean that the 1968 Act “provided that the full capacity of the aqueduct supplying water to this project could not be used unless Lake Powell was full or releases are made from Lake Powell to prevent the reservoir from exceeding the elevation of 3,700 feet or when water is released pursuant to other provisions of the Act.” The court’s conclusion that “the limitation on capacity of the aqueduct . . . [is] based on the operation of Lake Powell to maximum capacity” reads too much into the words of the authorizing statute. A more reasonable interpretation of the language would be that Congress wanted to provide operating criteria for the Aqueduct in any contingency—whether Lake Powell was full or not.

93. The Colorado River water would augment the water supply developed by related projects on the Salt and Gila Rivers in Arizona.


95. 485 F.2d at 5, 5 ERC at 1696 (emphasis added).

96. Id. at 5, 5 ERC at 1696-97.

97. This discussion assumes that the word “full” in the § 1521 proviso was intended to mean “at 3700 feet above mean sea level”—which it very likely was. Conceivably, however, “full” could be interpreted to mean the maximum level legally allowable, rather than the maximum level physically feasible—in other words, 3606 feet above mean sea level, in the absence of protection for Rainbow Bridge National Monument.
The language of the Act speaks not of "full capacity" of the Aqueduct, but rather of the full authorized capacity of 3000 cubic feet per second, "or whatever lesser capacity is found to be feasible."\(^9\) There is no indication that it is only engineering feasibility which is at stake. Presumably if a capacity of 3000 cubic feet per second were to be found legally infeasible, the Aqueduct could be built to a capacity of 2500 cubic feet per second, at which point the level of Lake Powell would be irrelevant to the Aqueduct's operation.

The legislative history of section 1521 also reinforces this interpretation. The Central Arizona Project was designed to use water which had been allocated to the Upper Basin by the Compact, but for which the Upper Basin had not yet developed a consumptive use and for which the Lower Basin did not have a present consumptive use. The prior commitments left as a water supply for the Granite Reef Aqueduct only that part of each year's runoff which could not be put to use in either basin, or stored in the Upper Basin.\(^9\) Since it was established at hearings on the 1968 Act that by about 1990 all of the available water in the Colorado River will be used consumptively in the Upper and Lower Basins,\(^{100}\) Arizona wanted the Granite Reef Aqueduct to be large enough to capture as much surplus water as possible to store in its reservoirs near Pheonix during the relatively short life expectancy of surplus water in the River.\(^{101}\) The 1968 Act therefore authorized a capacity of 3000 cubic feet per second but protected the interests of the other basin states by limiting the conditions under which the Aqueduct could be used to its full authorized capacity. This was to prevent the Aqueduct from capturing water that could reasonably be put to use or stored elsewhere in the Colorado River Basin. Thus, the proviso does not direct that water shall be available to provide the preconditions for use of the maximum authorized capacity of the Aqueduct, and therefore that Lake Powell must reach 3700 feet above sea level. Rather, it merely provides that the Aqueduct may not carry more than 2500 cubic feet per second unless these preconditions exist.

c. Section 1552(a)(3)

The section 1552(a)(3) proviso, referred to in section 1521 above, was also cited by the Tenth Circuit as evidence that the 1968 Act requires the operation of Lake Powell at its maximum engineering

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99. For an explanation of when water is required to be stored in the Upper Basin, see text accompanying notes 105-6 infra.
101. Id. at 288.
capacity. Section 1552 directs the Secretary of the Interior to develop by July 1, 1970 "criteria for the coordinated long-range operation of the reservoirs constructed and operated under the authority of the Colorado River Storage Project Act [primarily Lake Powell], the Boulder Canyon Project Act [Lake Mead], and the Boulder Canyon Project Adjustment Act."102 In part, these criteria were to "make provision for the storage of water in storage units of the Colorado River storage project and releases of water from Lake Powell..."103 in a given order of priority. Certain releases pursuant to obligations under the treaty with Mexico104 (promising 1.5 million acre-feet per year of flow into Mexico) and to obligations under the Compact would be given first priority,105 after which storage of water in the Upper Basin would be required by subparagraph 3 of the section to ensure that first-priority releases could be made in other years, according to certain specified limitations:

Provided, That water not so required to be stored shall be released from Lake Powell: (i) to the extent it can be reasonably applied in the States of the Lower Division to [domestic and agricultural uses], but no such releases shall be made when the active storage in Lake Powell is less than the active storage in Lake Mead, (ii) to maintain, as nearly as practicable, active storage in Lake Mead equal to the active storage in Lake Powell, and (iii) to avoid anticipated spills from Lake Powell.106

The Tenth Circuit elevated subclause (ii) of the foregoing proviso to mean that "[t]he Act... directs that the projects be operated to maintain as nearly as practicable active storage in Lake Mead equal to active storage in Lake Powell."107 But this constitutes a misreading of the thrust of the section as a whole. Section 1552 lists priorities to be considered by the Secretary in the development of operating criteria for the reservoirs of the Colorado River Basin. Subclause (ii) of subparagraph (3) is merely one of the priorities the Secretary was to consider in his role as a referee of the competing water interests of the Upper and Lower Basins. It is clear from the language that section 1552(a)(3)(ii) does not express a mandate, as the Tenth Circuit appeared to believe. Congress' use of the qualifying language "as nearly as practicable" indicates that it was aware that other priorities might make this goal impossible to achieve.

106. 43 U.S.C. § 1552(a)(3) (1970). "Spill," as defined in the Secretary's operating criteria published at 35 Fed. Reg. 8951 (1970), means "water released from Lake Powell which cannot be utilized for project purposes, including, but not limited to, the generation of power and energy." Id. at 8952.
107. 485 F.2d at 5, 5 ERC at 1696.
The history of section 1552 reinforces the conclusion that the language which speaks of equalizing the storage in Lakes Mead and Powell does not express a mandate to operate Lake Powell at maximum capacity, to the detriment of Rainbow Bridge National Monument. First, on two occasions during hearings on the bill that later became the 1968 Act, then-Commissioner of the Bureau of Reclamation Floyd Dominy assured Congress that the section was fully consistent with the Storage Act. Second, as the Commissioner explained at the hearing, the section 1552(a)(3) proviso was intended to operate only under very unusual climatic conditions:

[O]nly on rare occasions would there be available excess waters to which the criteria of the latter part of (3) would apply. Therefore, both conditions and the period under which these criteria would have practical application would be much less than might appear on the surface.

It would appear, then, that the interpretation of the proviso as “directing” the Secretary to maintain equal active storage in Lakes Mead and Powell attributes an importance to the proviso which was never intended.

3. Physical Effects as a Basis for Relief

As discussed above, it appears that there is sufficient doubt about the safety of Rainbow Bridge to make this an issue of considerable moment in deciding whether the integrity of the National Monument is being violated by the intrusion of Lake Powell. The Tenth Circuit, however, dismissed the issue, so central to the real concern of the plaintiffs, in one sentence:

The plaintiffs did not assert a claim based upon the possibility of physical damage to the Rainbow Bridge itself, but relied upon the statutory provisions in the Colorado River Storage Project Act.

This statement ignores the realities of the case. The statutory provisions on which plaintiffs relied were predicated on the assumption

110. As a geologist remarked as early as 1961:
Any possible error in efforts to resolve these conflicting opinions [about whether or not the Bridge will actually suffer damage] must be in the direction of greater safety of the bridge. If those who fear that the bridge will collapse are mistaken and yet prevail, the error will be of little significance. If those who hold the reverse view prevail, and are mistaken, and the reservoir causes the collapse of Rainbow Bridge, the error will be grave beyond words. Halliday, supra note 9, at 1574.
111. 485 F.2d at 3, 5 ERC at 1695.
that Rainbow Bridge was to be protected from the possibility of physical damage; section 1 of the Colorado River Storage Project Act states explicitly: "... the Secretary of the Interior shall take adequate protective measures to preclude impairment of the Rainbow Bridge National Monument."112 Furthermore, plaintiffs set out in their brief the language of 16 U.S.C. § 1 that embodies the purpose of the national parks and monuments:113 "... to conserve the scenery and the natural and historic objects and the wild life therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations."114 Thus, to rely on the provisions of the Storage Act and 16 U.S.C. § 1 was implicitly to assert an interest in protecting the Monument, and the Bridge itself, from damage.

The Tenth Circuit decision, then, would appear to be in contravention of the congressional policy articulated in 16 U.S.C. § 1: that the national parks and monuments were to be left "unimpaired for the enjoyment of future generations."115 This policy has never been specifically abrogated as to Rainbow Bridge National Monument. In fact, it was reiterated in section 1 of the Storage Act with express language indicating Congress' intention to "preclude impairment of the Rainbow Bridge National Monument,"116 and in section 3 of the same Act declaring that "no dam or reservoir ... shall be within any national park or monument."117 The court's decision, however, not only approved the impairment of the aesthetic enjoyment of the Monument, but also changed the very essence of the area that was to be preserved.118

In spite of the fact that the Tenth Circuit did not deal with the issue of damage to the Bridge in its opinion, this issue must have concerned them, for although they denied the relief plaintiffs sought, they directed the district court to retain jurisdiction over the action for ten years, "[i]n view of the remote possibility that the surveys may not be entirely accurate or for any other reason the depth of the water might there significantly exceed [48 feet], or in the event that some unexpected indication of structural damage to the Arch might become evident. ..."119 Thus, although the court purported to base its decision on the purely "legal" issue of implied repeal, which presumably would

113. Brief for Plaintiff, supra note 5, at 7, n.5.
115. Id. See text accompanying notes 12-19 supra for discussion of congressional preservation policy.
118. See text accompanying note 31-41 supra.
119. 485 F.2d at 12, 5 ERC at 1701.
not depend for its validity on the depth of water under the Bridge, or on the possibility of damage to the Bridge, the court left open the possibility that an allegation of actual structural damage to the Bridge itself would be entitled to relief. Since the court did not allude to the possibility of aesthetic impairment, or impairment of the area's natural qualities, an allegation based on this type of damage would probably not be entitled to relief under the court's ruling. Thus, as discussed above, the court's decision defeats the purpose for which the national monument was set aside as worthy of protection.

B. The Policy Issues

The fact that the Tenth Circuit directed the district court to retain jurisdiction over the matter demonstrates that it was at least somewhat concerned with issues other than the narrow legal basis upon which the decision was rendered. It is the contention of this Note that the real basis for the Tenth Circuit's opinion lay in a balancing of value judgments about this nation's conflicting policies of preservation, embodied in our national park system, and development, reflected in our reclamation laws—a balancing that lay outside the court's competence. The dissenting opinion of Chief Judge Lewis recognized this problem:

[T]he subject matter of the case involves whether the national welfare is best served by maximum conservation and industrial utility of the waters of the Colorado River or whether the national interest requires a modified use so as to protect the natural environment of the area designated as the Rainbow Bridge National Monument. So stated, the issue is a classic one for congressional consideration and not for judicial determination.

Chief Judge Lewis disagreed with the argument of the majority that Congress' intention as to Rainbow Bridge National Monument was clear, and for this reason he believed the majority's action to be "a deep trespass upon the prerogatives of Congress and a clear and dangerous violation of the doctrine of separation of powers." The majority opinion is replete with indications that it was primarily a concern with Lake Powell's importance in the scheme of Southwestern water development that led to their decision allowing maximum use of Glen Canyon Dam's design capacity. For example, before

120. The concurring opinion of Judge Doyle appears to indicate just that: "[T]he water . . . interferes with full aesthetic enjoyment of the Monument area. That fact does not, of course, empower us to grant the relief. We must follow the law." 485 F.2d at 12-13, 5 ERC at 1702. Judge Doyle clearly gives the ambiguous actions of Congress subsequent to the Storage Act more effect as "law" than the longstanding and clear expression of policy embodied in 16 U.S.C. § 1 (1970).

121. 485 F.2d at 13, 5 ERC at 1702.
122. Id.
mentioning any of the legal aspects of the case, the court alludes to three effects of a lowered Lake Powell that have nothing to do with whether or not any section of the Storage Act had been repealed. First, they mention the capacity of the power plant intakes and additional intakes (40,000 cubic feet per second) which would be the only ways of passing water through the Dam if the maximum surface level were at 3606 feet above sea level. The meaning of this observation is that since the spillway intakes are at 3648 feet above sea level, the Dam would be unable to pass a major flood without exceeding 3606 feet, unless the reservoir were considerably drawn down to anticipate it. The court adds: "[t]his is a factor which is significant. . . ." Secondly, the court sets out the difference in the storage capacity of Lake Powell at 3700 feet and at 3606 feet—27,000,000 acre-feet as opposed to 12,751,000 acre-feet. Third, the court remarks that "[t]he planned quantity of electricity which was to be generated and the revenues therefrom were predicated upon the Dam being utilized to its maximum design capacity. . . ." Elsewhere in the opinion, the court made statements such as: "it is apparent that Lake Powell is an important element or link in the Colorado River water and power development," and "[t]his 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."

It is not the intention of this Note to quarrel with the truth of any of the observations of the court as to the effects of a lowered Lake Powell. Rather, it is simply to point out that an analysis of Congress' actions since the passage of the Storage Act does not clearly indicate an express change of policy with respect to the integrity of Rainbow Bridge National Monument. This policy of preservation, made clear by the protective provisos in the Storage Act, should be presumed to stand until specifically abrogated by Congress. The Tenth Circuit, however, because of its preference for the policy of development, found a strained interpretation of congressional intent to lend support to its own evaluation of Lake Powell's importance in the overall plan for the Colorado River Basin's development.

C. The Court's Alternatives

The Tenth Circuit was asked to make a legislative-type decision in the setting of an adversary proceeding. In ruling as it did, on the
basis of "implied repeal," the court subsumed critical economic, social, and political issues relating to interstate use of water resources, and the relationship of development utilization of these resources to the natural environment, under the strictly legal heading of statutory construction.

It is admittedly very difficult to know what Congress intended in this situation, aside from its original explicit expression of intent in sections 1 and 3 of the Storage Act. Congressional action subsequent to passage of that Act was, as discussed earlier in this Note, open to varying interpretations. The Tenth Circuit's response to this difficult situation was ill-considered, however, for two reasons. Not only was the court's action an encroachment on the legislative function, but such an encroachment was unnecessary, as the court had better alternatives available.

For example, the court, finding itself outside the realm of its competence, could defer to the status quo, although there are problems with this approach in terms of determining what the status quo is. The developers, of course, would argue that since dams are always filled to the top, the eventual flooding of Rainbow Bridge is the status quo. The conservationists would contend that thousands of years should be enough time to establish the status quo, and that the Bridge should be preserved as it has always been, arching over a waterless sandstone canyon. Besides, the conservationists would say, status quo at the time of the action means Lake Powell at a level below which it would begin to invade the Monument. If Congress chose to act then, the problem would be back in the legislative hands, where it belongs.

But Congress might choose not to act, and such a course would leave little resolved, with the court functioning more as a sounding board than a decisionmaker. Perhaps a better method of forcing Congress to make itself perfectly clear would be for the court to face up to the issue of physical damage, in spite of the fact that it was not specifically alleged by the plaintiffs as a basis for relief. Collapse of the Bridge, and damage to its surroundings, would be an inestimable loss; the harm created could never be undone. On this basis, the court should have enjoined the filling of Lake Powell to capacity. Thus the Bridge would remain protected as Congress originally intended, or the Bureau of Reclamation would force Congress expressly to revoke its promise made to conservationists in 1956.  

CONCLUSION

The effects of the Tenth Circuit's decision are wide-ranging. Most direct, of course, are the effects on Rainbow Bridge National

128. See text accompanying notes 26-30 supra.
Monument itself, which are irreversible. If the presence of standing water under the Bridge does pose a danger of structural damage, the effects are serious indeed. In any case, the natural environment of the Monument will be destroyed.

Of more moment to the field of environmental law, perhaps, is the precedent that has been created for the future invasion, by judicial fiat, of other areas that have been preserved "for the enjoyment of future generations," in order to serve the interests of industry and development. It has been Congress' consistent policy to set aside certain outstanding areas of scenic, scientific, and historic significance for preservation, while leaving all other areas free for development. As the Council on Environmental Quality said in 1972, "[c]ntrachments on the parks and what the Nation does about them are a test of its resolve to improve the quality of all sectors of our environment." If this 160-acre sanctuary is not to be protected from the demands of "progress," what will happen to the vast timber, mineral, water, and hydro-electrical resources now preserved in our national parks and monuments when a claim is made that their use is vital to the nation's development? In 1913 the Hetch Hetchy Reservoir within Yosemite National Park was authorized, flooding forever a valley as spectacular as the Yosemite Valley itself. The Tenth Circuit's ruling in this case has paved the way for the repetition of this mistake.

The Supreme Court should have granted the plaintiffs' application for certiorari in *Friends of the Earth v. Armstrong*. Had they concluded, as has this Note, that the Tenth Circuit in fact substituted its judgement for that of Congress, they would have affirmed the district court's order and left it for Congress itself to declare explicitly whether or not it intended to flood Rainbow Bridge National Monument.

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130. See text accompanying notes 18-19 *supra*. 