

**A STATUTE WITHOUT TEETH: IS A PRIVATE RIGHT OF  
ACTION IN THE NATIONAL HISTORIC PRESERVATION  
ACT NECESSARY FOR MEANINGFUL CULTURAL  
RESOURCE PROTECTION?**

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INTRODUCTION

Passed in 1946, the Administrative Procedure Act (APA)<sup>1</sup> is a catch-all statute that specifies federal agency standards for rulemaking, adjudicatory proceedings, and judicial review.<sup>2</sup> Pursuant to section 704 of the APA, only a “final agency action” is reviewable by the courts.<sup>3</sup> For an agency action that

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1. Administrative Procedure Act, 5 U.S.C. § 551 (2018).

2. *Id.* §§ 553, 554, 701, 706.

3. “Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and

is not subject to formal trial-like procedures to be set aside, the APA requires that a court determine the action was “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”<sup>4</sup> This standard is deferential to the agency.<sup>5</sup>

In *San Carlos Apache Tribe v. United States*, the Ninth Circuit split from the Third and Fifth Circuits by holding the APA was the exclusive mechanism available to the Apache Tribe to challenge the Bureau of Indian Affairs’ (BIA) failure to comply with the National Historic Preservation Act (NHPA).<sup>6</sup> The court held the NHPA did not provide a private right of action, and the San Carlos Apache Tribe could not entertain a suit purely under the NHPA.<sup>7</sup>

This Article is not directly concerned with the APA. While the APA provides private citizens an enforcement mechanism to hold federal agencies accountable, the APA is not, in and of itself, a substantive statute.<sup>8</sup> The APA is a supplemental statute that governs procedures and lacks any policy or spirit in its implementation. Conversely, the NHPA is a statute rich in legislative policy and directives regarding the importance of preserving the nation’s heritage.

This article considers the NHPA and whether, in light of *San Carlos*, the Act provides for a private right of action, and, alternatively, if it does not provide for a private right of action, whether a private right of action would allow the NHPA to better accomplish its intended purpose.

## I. HISTORICAL OVERVIEW OF THE NATIONAL HISTORIC PRESERVATION ACT

### A. Creation of the NHPA

The NHPA is the foundation of federal historic preservation.<sup>9</sup> With that honor comes scrutiny, as the NHPA attracts more litigation than all other

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provides that the action meanwhile is inoperative, for an appeal to superior agency authority.” *Id.* § 704. The APA further defines *final agency action* as a “final disposition.” *Id.* at § 551. “Final disposition” is not defined in the statute and has been interpreted by the courts on a case-by-case basis. *Id.*; Jason Fowler, *Finality: What Constitutes Final Agency Action? The Practical Implications of the D.C. Circuit’s Ruling in Reliable Automatic Sprinkler Co. v. Consumer Product Safety Commission*, 24 J. NAT’L ASS’N ADMIN. L. JUDGES 311, 315 (2004).

4. 5 U.S.C. § 706(2)(A).

5. *See id.* (defining narrow grounds for setting aside agency actions, findings, and conclusions).

6. *San Carlos Apache Tribe v. United States*, 417 F.3d 1091, 1099 (9th Cir. 2005).

7. *Id.*

8. *See* 5 U.S.C. § 552 (explaining the purpose of the APA).

9. National Historic Preservation Act of 1966, 54 U.S.C. §§ 300101–320303 (formally codified at 16 U.S.C. §§ 470–440x–6).

federal cultural property laws.<sup>10</sup> For some, the NHPA guarantees a check on federal government undertakings that affect cultural properties.<sup>11</sup> For others, it is a nuisance with the potential to stymie time-sensitive construction projects and invite public criticism.<sup>12</sup>

The NHPA was enacted in response to the building boom of the 1950s and 1960s.<sup>13</sup> In the wake of the Great Depression and World War II, the United States emerged as an economic superpower, and Congress began investing in building projects to modernize the American landscape.<sup>14</sup> While necessary, the aforementioned streamlined federal construction and urban renewal projects “resulted in the destruction of places greatly valued by local citizens.”<sup>15</sup> Historic structures and Native American archaeological sites had few legal protections, and were often unceremoniously destroyed.<sup>16</sup> A 1966 report by the Special Committee on Historic Preservation of the United States Conference of Mayors titled *With Heritage So Rich*, championed by then first-lady Lady Bird Johnson, urged Congress to address the destruction of the nation’s patrimony.<sup>17</sup> As a result, Congress passed the NHPA, and it was signed into law on October 15, 1966.<sup>18</sup>

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10. SHERRY HUTT, CAROLINE MEREDITH BLANCO & STAN N. HARRIS, *CULTURAL PROPERTY LAW: A PRACTITIONER’S GUIDE TO THE MANAGEMENT, PROTECTION, AND PRESERVATION OF HERITAGE RESOURCES* 7 (2d ed. 2017).

11. *Cf.* 54 U.S.C. § 306107 (2012) (mandating that federal agencies minimize harm to historic landmarks when undertaking projects).

12. *Cf. id.* § 306108 (explaining how the effects of federal projects must be assessed and provide opportunity for comment *prior* to the commencement of federal projects).

13. HUTT, *supra* note 10 at 7.

14. NAT’L PARK SERV., NATIONAL HISTORIC PRESERVATION ACT 50 YEAR ANNIVERSARY TOOL KIT 3 (2016). Two examples of more substantial federally-funded building statutes are the Federal-Aid Highway Act of 1956 and the Housing Act. *See* Federal-Aid Highway Act of 1956, Pub. L. No. 84-627, § 108, 70 Stat. 374, 378 (appropriating billions of dollars); Housing Act of 1961, Pub. L. No. 87-70, § 101 75 Stat. 149, 149 (awarding substantial funds for new housing programs)

15. Advisory Council on Historic Preservation, *Preserving America’s Heritage: National Historic Preservation Act 40th Anniversary*, WASH. TIMES 3 (2007), [https://www.achp.gov/sites/default/files/documents/2018-12/NIE\\_40th%20Anniversary%20Newpaper%20Insert.pdf](https://www.achp.gov/sites/default/files/documents/2018-12/NIE_40th%20Anniversary%20Newpaper%20Insert.pdf).

16. The American Antiquities Act of 1906 was not an effective vehicle to stop the destruction of most historic and prehistoric properties, because it only protected sites on “lands owned or controlled by the Government of the United States.” *See* American Antiquities Act of 1906, Pub. L. No. 59-209, 34 Stat. 225 (codified as 54 U.S.C. § 320301 (2014)) (noting how the Act only protects sites on government property). Many of the construction projects in the 1950s and 1960s were subsidized by the government on land not owned by the government, therefore falling outside the purview of the Antiquities Act. HUTT, *supra* note 10.

17. SPECIAL COMM. ON HISTORIC PRESERVATION, *WITH HERITAGE SO RICH* 208–10 (1966).

18. 16 U.S.C. § 470(b) (1966).

*B. Brief Overview of the NHPA*

Crafted in a bygone era when Congress still incorporated eloquent preambles in its legislation, the findings of the Act proposed that “the historical and cultural foundations of the Nation should be preserved;” “historic properties significant to the Nation’s heritage are being lost or substantially altered, often inadvertently, with increasing frequency;” “the preservation of this irreplaceable heritage is in the public interest;” “the increased knowledge of our historic resources, the establishment of better means of identifying and administering them, and the encouragement of their preservation will improve the planning and execution of federal and federally assisted projects.”<sup>19</sup> While private agencies and individuals had historically carried the nation’s burden of historic preservation and should continue to be an integral part of cultural preservation, it was “necessary and appropriate for the Federal Government to accelerate its historic preservation programs and activities” and to embolden private preservation initiatives and support state and local preservation programs.<sup>20</sup>

The NHPA creates affirmative duties for the Secretary of the Interior<sup>21</sup> and the heads of federal agencies; however, the true heavy lifting of the NHPA’s initiatives is carried out through section 106, which provides:

[P]rior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license, shall take into account the effect of the undertaking on any historic property. The head of the Federal agency shall afford the [Advisory] Council [on Historic Preservation established under Title II of this Act] a reasonable opportunity to comment with regard to the undertaking.<sup>22</sup>

Regulations promulgated by the Advisory Council on Historic Preservation (ACHP)<sup>23</sup> set forth a multi-step review and consultation process in which an agency must take into account the effects of a federal

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19. *Id.*

20. *Id.*

21. *See* 54 U.S.C. § 302101 (2017) (delegating the Secretary of the Interior the authority to expand and maintain a National Register of Historic Places).

22. *Id.* § 306108. “Historic property,” as used in this Part, is a defined term, meaning any “prehistoric or historic district, site, building, structure, or object included on, or eligible for inclusion on, the National Register, including artifacts, records, and material remains relating to the district, site, building, structure, or object.” *Id.* at § 300308.

23. *See id.* § 304108 (explaining how the NHPA delegates to the ACHP the authority necessary to promulgate regulations).

*undertaking*.<sup>24</sup> The basic review process includes: (1) the identification of historic properties and consulting parties;<sup>25</sup> (2) notice to consulting parties, including the public, of initiation of consultation;<sup>26</sup> (3) assessment as to whether the project will have an adverse effect on the historic property;<sup>27</sup> (4) notice to consulting parties of a finding of no adverse effect and opportunity for consulting parties to respond;<sup>28</sup> and, depending on whether adverse effects are established, (5) continued consultation with the public and other parties to develop and evaluate alternatives or modifications to the federal *undertaking* that could avoid or mitigate the adverse effects.<sup>29</sup>

### 1. Federal Undertakings

The concept of an *undertaking* is key to understanding the breadth of section 106 and distinguishing it from other similar legislation, such as the Antiquities Act and the National Environmental Policy Act (NEPA). Unlike the Antiquities Act, which only pertains to federal land, section 106 requires federal agencies to review the impacts of their actions on historic properties that are deemed *undertakings*.<sup>30</sup> An *undertaking* is defined by regulation as:

[A] project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including—

- (1) those carried out by or on behalf of [a] Federal agency;
- (2) those carried out with Federal financial assistance;
- (3) those requiring a Federal permit, license, or approval; and

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24. *Id.*

25. *See* Protection of Historic Properties, 36 C.F.R. § 800 (2019) (stating the responsibilities of the agency official).

26. *See id.* § 800.2(d)(2) (“The agency official must, except where appropriate to protect confidentiality concerns of affected parties, provide the public with information about an undertaking and its effects on historic properties and seek public comment and input.”).

27. *See id.* (stating the agency official must assess adverse effects).

28. *See id.* § 800.5(c) (“If the agency official proposes a finding of no adverse effect, the agency official shall notify all consulting parties of the finding and provide them with the documentation specified in § 800.11(e).”).

29. *See id.* § 800.6(a) (“The agency official shall consult with the SHPO/THPO and other consulting parties, including Indian tribes and Native Hawaiian organizations, to develop and evaluate alternatives or modifications to the undertaking that could avoid, minimize or mitigate adverse effects on historic properties.”).

30. 54 U.S.C. § 304108 (2017); *see* American Antiquities Act of 1906, Pub. L. No. 59-209, 24 Stat. 225 (noting the Act only protects sites on “lands owned or controlled by the Government of the United States.”).

(4) those subject to State or local regulation administered pursuant to a delegation or approval by a Federal agency.<sup>31</sup>

Undertakings have a much wider reach than federal land holdings.<sup>32</sup> The Department of the Interior has interpreted *undertakings* to include “new or continuing projects, activities, or programs and any of their elements not previously considered under Section 106.”<sup>33</sup> Further, the size or impact of an action by a federal agency has no bearing on whether it is considered an undertaking, nor does an undertaking need to meet the criteria for a *final agency action* under the APA.<sup>34</sup>

## 2. Attorneys’ Fees

Before 1980, the NHPA did not provide for attorneys’ fees or litigation costs for successful plaintiffs.<sup>35</sup> While some courts held that attorneys’ fees and costs were available in NHPA actions that dealt with “bad faith,” the majority of courts did not imply such an award.<sup>36</sup> Congress amended the NHPA by adding section 305 in 1980.<sup>37</sup> The section authorized attorneys’ fees and litigation costs to any “interested person” who “substantially prevails” in any civil action to enforce the NHPA “in any United States district court.”<sup>38</sup>

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31. *Id.* § 300320. The NHPA’s definition of “undertaking” prior to the 1992 amendments reads: “any action as described in § 470f of this title.” 16 U.S.C. § 470 (1988) (amended in 1992).

32. 54 U.S.C. § 300320.

33. AM. INDIAN LIAISON OFFICE, U.S. DEP’T OF THE INTERIOR, NATIONAL HISTORIC PRESERVATION ACT, SECTION 106: A QUICK GUIDE FOR PRESERVING NATIVE AMERICAN CULTURAL RESOURCES 1 (2012), <https://www.nps.gov/history/tribes/Documents/106.pdf>.

34. In most cases, two conditions must be satisfied for an agency action to be a final agency action: First, the action must be the “consummation” of the agency’s decision-making process, that is it must not be of a merely tentative or interlocutory nature. *See supra* note 30 and accompanying text (defining an undertaking under the NHPA); *Nat’l Parks Conservation Ass’n v. U.S. Army Corps of Eng’rs*, 446 F. Supp. 2d 1322, 1334 (S.D. Fla. 2006). “[S]econd, the action must be one by which ‘rights or obligations have been determined,’ or from which ‘legal consequences will flow.’” *Nat’l Parks Conservation Ass’n*, 446 F. Supp. 2d at 1334 (quoting *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997)).

35. *See infra* notes 36–38 and accompanying text (detailing changes in the language and interpretation of the NHPA).

36. *Comm. on Civic Rights of the Friends of the Newburyport Waterfront v. Romney*, 518 F.2d 71, 72 (1st Cir. 1975). Attorneys’ fees and costs have also been sought through other authorities in preservation cases. *See United States v. 4.18 Acres of Land*, 542 F.2d 786, 786 (9th Cir. 1976) (denying the plaintiff fees in a condemnation case involving historic preservation issues); *Black Hills All. v. Regional Forester*, 526 F. Supp. 257, 257 (D.S.D. 1981) (granting the plaintiff environmental group costs under Federal Rule of Civil Procedure 54).

37. National Historic Preservation Act, Pub. L. No. 96-515, § 501, 94 Stat. 3001, 3002 (1980).

38. 54 U.S.C. § 307105.

## II. SUPREME COURT JURISPRUDENCE ON PRIVATE RIGHTS OF ACTION

In early American jurisprudence, the federal judiciary was not in the habit of dismissing plaintiff suits for lack of a private right of action.<sup>39</sup> Rather than analyzing whether the language of the statute explicitly or implicitly afforded a private right of action, courts considered whether a legal wrong was suffered under the statute and whether the plaintiff was entitled to a remedy.<sup>40</sup> The private right of action, as we know it today, was not officially recognized as a separate statutory inquiry until the early 20th century in *Texas & Pacific Railway Co. v. Rigsby*.<sup>41</sup>

*A. Historical Overview*

In *Rigsby*, the Court held that an injured interstate railway company employee, though not himself engaged in interstate commerce, fell within the Safety Appliance Acts. The Court reasoned that an “inference of a private right of action” for the employee was enough to maintain suit under the Act.<sup>42</sup> The Court’s analysis had little to do with Congress’s intentions and was more concerned with whether the plaintiff had suffered an injury due to the government action required in the statute and what could be done to redress the injured plaintiff.<sup>43</sup>

The Court expanded its approach in the mid-20th century by finding a private right of action without explicit statutory language in *J.I. Case Co. v. Borak*.<sup>44</sup> Here, the Court considered whether the Securities Exchange Act of 1934 authorized a federal cause of action for rescission or damages to corporate stockholders in lieu of specific language granting a private right of action.<sup>45</sup> The Court looked to the Act’s “chief purposes,” which included “protection of investors,” and reasoned the language “implied the availability of judicial relief where necessary to achieve that result.”<sup>46</sup>

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39. See Donald H. Zeigler, *Rights, Rights of Action, and Remedies: An Integrated Approach*, 76 WASH. L. REV. 67, 76 (2001) (noting during the late 1800s and early 1900s courts did not grant relief if they concluded the statutory language did not create the rights and duties that the plaintiffs claimed).

40. See H. Miles Foy, III, *Some Reflections on Legislation, Adjudication, and Implied Private Actions in the State and Federal Courts*, 71 CORNELL L. REV. 501, 529 (1986) (“The essential notion, then, was that persons suffering legal wrongs were entitled to judicial remedies.”).

41. *Texas & Pac. Ry. Co. v. Rigsby*, 241 U.S. 33, 33, 39 (1916).

42. *Id.*

43. *Id.*

44. *J.I. Case Co. v. Borak*, 377 U.S. 426, 426, 431, 433 (1964).

45. *Id.* at 428.

46. *Id.* at 432; see LARRY W. YACKLE, *FEDERAL COURTS* 248 (3d ed. 2009) (stating that the *Borak* “Court made ‘implied’ rights of action the rule rather than the exception.”).

This liberal approach was curtailed by the Court's reasoning in *Cort v. Ash*.<sup>47</sup> The *Cort* Court created a multi-factor test to analyze whether Congress intended a federal statute to include a private right of action. The *Cort* test considers: (1) was the statute enacted to benefit a class of persons for which the plaintiff is a member; (2) is there an express or implied intention by the legislature to create or deny a remedy; (3) would an implied private right of action exasperate the underlying legislative scheme; and (4) is the subject matter solely of state concern, therefore making a private federal remedy incongruous.<sup>48</sup>

Four years later, the Court applied the *Cort* test in *Cannon v. University of Chicago* and held Title IX of the Civil Rights Act of 1964 implied a private right of action.<sup>49</sup> Relevant to the NHPA analysis for a private right of action, the *Cannon* Court held the second prong of the *Cort* test was met through section 718 of the Education Amendments' authorization of attorneys' fees in suits brought against public educational agencies to enforce Title VI and Title IX by proxy.<sup>50</sup> The Court reasoned that, since Congress amended the statute to provide attorney fees for prevailing private parties, "Congress must have assumed [a private right of action] could be implied" by the language of the statute.<sup>51</sup>

The dissent in *Cannon*, however, forecasted the Court's eventual departure from liberally construing the *Cort* test.<sup>52</sup> In a dissenting opinion, Justice Powell blasted the majority's finding of a private right of action without an express indication from Congress.<sup>53</sup> Justice Powell argued that "*Cort* allows the Judicial Branch to assume policymaking authority vested by the Constitution in the Legislative Branch" and "[the Court] should not condone the implication of any private action from a federal statute absent the most compelling evidence that Congress in fact intended such an action to exist."<sup>54</sup> Principally, Justice Powell contended that a private right of action should only be recognized if explicitly spelled out in statute, and the judiciary should resist, if at all possible, from interpreting or inferring a private right of action from legislative history.<sup>55</sup>

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47. *Cort v. Ash*, 422 U.S. 66, 78 (1975).

48. *Id.*

49. *Cannon v. Univ. of Chi.*, 441 U.S. 677, 688, 709 (1979).

50. *Id.* at 699.

51. *Id.* at 700. The Court also looked at the legislative history concerning section 718, quoting Senator Cook's floor debate regarding remedies provided under the amendment. *Id.* at 700 n. 28.

52. *Id.* at 730.

53. *Id.* at 730-31 (Powell, J., dissenting).

54. *Id.* at 743, 749 (Powell, J., dissenting).

55. *Id.*

While there are few instances of the Court liberally construing a private right of action after *Cannon*, the *Cort* test remained relatively unchanged for the next 20 years.<sup>56</sup>

*B. Alexander v. Sandoval*

In the 2001 case of *Alexander v. Sandoval*, the Court considered whether a private right of action was granted under Title VI of the Civil Rights Act of 1964 (Civil Rights Act) to sue Alabama Department of Public Safety for ordering that Alabama's driver's license test may only be given in English.<sup>57</sup> Section 601 of the Civil Rights Act prohibited discrimination based on "race, color, or national origin" by agencies or programs that received federal funding.<sup>58</sup> Section 602 of the Civil Rights Act authorized federal agencies "to effectuate the provisions of [section 601] . . . by issuing rules, regulations, or orders of general applicability."<sup>59</sup> Under section 602, the Department of Justice promulgated a regulation that prohibited agencies receiving federal funding from taking actions that had a disparate impact on persons of a certain race, color, or nationality.<sup>60</sup>

The plaintiff sued to enjoin the Alabama regulation created pursuant to section 602, arguing that it created a disparate impact based on national origin.<sup>61</sup> The state of Alabama argued the statute did not include an implied private right of action to enforce regulations under section 602.<sup>62</sup>

Under *Cort*, the Court refused to find that section 602 of the Civil Rights Act provided an implied private right of action.<sup>63</sup> Justice Scalia, writing for the majority, distinguished the private right of action found under section 601 in *Cannon*, which dealt with which individuals are protected under the Civil Rights Act, from section 602, which was directed at the regulation of agencies.<sup>64</sup>

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56. Timothy J. Famulare, *Has Sandoval Doomed the Private Right of Action Under the National Historic Preservation Act?*, 16 B.U. PUB. INT. L.J. 73, 82 (2006).

57. *Alexander v. Sandoval*, 532 U.S. 275, 279 (2001).

58. 42 U.S.C. § 2000d (2017).

59. *Id.* § 2000d-1.

60. Nondiscrimination; Equal Employment Opportunity; Policies and Procedures, 28 C.F.R. § 42 (2019).

61. *See Sandoval v. Hagan*, 197 F.3d 484, 487 (11th Cir. 1999) (describing Sandoval's claims under Title VI of the Civil Rights Act of 1964 and the Equal Protection Clause of the Fourteenth Amendment).

62. *Sandoval*, 532 U.S. at 279.

63. *Id.* at 287, 293.

64. *Id.* at 288–89. Scalia noted that "it is . . . beyond dispute—and no party disagrees—that § 601 prohibits only intentional discrimination" but does not prohibit activities with a disparate impact on certain races, colors, or nationalities. *Id.* at 280; *Cannon v. Univ. of Chi.*, 441 U.S. 677, 709 (1979).

By focusing on the language of section 602, Justice Scalia noted that certain “rights-creating” language present in section 601 relied on by the *Cannon* Court, was absent from section 602.<sup>65</sup> Justice Scalia further constructed a wall for private litigants attempting to sue agencies by announcing that “[s]tatutes that focus on the person regulated *rather* than the individuals protected create ‘no implication of an intent to confer rights on a particular class of persons.’”<sup>66</sup> Justice Scalia reasoned that section 602—by permitting agencies to defund programs that violated regulations—expressly provided for “one method of enforcing” those regulations.<sup>67</sup>

Justice Scalia determined the “express provision of one method” of enforcement “suggest[ed] that Congress intended to preclude others” from enforcement through a private right of action.<sup>68</sup> The Court ultimately held no private right of action arose under section 602 for private citizens to enforce agency regulations.<sup>69</sup>

Justice Scalia’s personal prohibition of legislating from the bench was at center stage in the *Sandoval* opinion.<sup>70</sup> Before diving into the substance of the *Sandoval* argument, he stated that congressional intent to create a private right of action must include an “intent to create not just a private right *but also* a private remedy” and that Congress’s intent is really determinative based on supplying a private remedy.<sup>71</sup>

Some scholars have argued that *Sandoval* now requires Congress to make a clear, unambiguous statement creating both a private right of action *and* a remedy of private enforcement for courts to entertain a private right of action.<sup>72</sup> This, of course, is potentially unfair treatment for statutes created prior to *Sandoval*, such as the NHPA, where Congress may not have appreciated the linguistic lengths required to ensure a private right of action.

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65. *Sandoval*, 532 U.S. at 289.

66. *Id.* (emphasis added) (quoting *California v. Sierra Club*, 451 U.S. 287, 294 (1981)).

67. *Id.* at 289–90.

68. *Id.* at 290 (citations omitted).

69. *Id.* at 293.

70. *See Morrison v. Olson*, 487 U.S. 654, 697–99 (1988) (Scalia, J., dissenting) (exemplifying Scalia’s fervor against the Court when he perceives the Court expanding the words of Congress). *See Sandoval*, 532 U.S. at 286 (citation omitted) (stating “private rights of action to enforce federal law must be created by Congress”).

71. *Sandoval*, 532 U.S. at 286 (emphasis added) (citation omitted). Scalia goes on to state that without a private remedy “a cause of action does not exist” and compatibility with the statute for a private right of action is irrelevant for the Court. *Id.* at 286–87.

72. *See YACKLE*, *supra* note 46, at 249 (concluding *Sandoval* requires express statutory language); Famulare, *supra* note 56, at 83 (explaining why Scalia’s use of “statutory intent” requires Congress to explicitly create a remedy of private enforcement).

## III. NHPA PRIVATE RIGHT OF ACTION LITIGATION

The litigation regarding whether a private right of action is available under the NHPA can be split into two cohorts: litigation before and prior to the *Sandoval* decision.<sup>73</sup>

*A. Private Right of Action Prior to Sandoval*

Prior to *Sandoval*, the question of whether the NHPA included a private right of action had been answered in the positive.<sup>74</sup> Courts consistently held that Congress designed the NHPA to allow private parties to enforce its provisions to “prevent properties from falling into disrepair or being destroyed without judicial oversight.”<sup>75</sup>

In *Vieux Carre Property Owners v. Brown*, the Fifth Circuit considered a property association seeking a declaratory judgment against the Army Corps of Engineers (Corps) and an injunction to prevent a proposed aquarium construction project by a local park authority proximal to the historic French Quarter in New Orleans, Louisiana.<sup>76</sup> The Corps did not initiate the section 106 process under the NHPA for the aquarium construction, because it considered deemed the project to be covered under a nationwide permit, therefore, a and therefore no new federal undertaking had commenced because a no new license was not needed.<sup>77</sup>

The Fifth Circuit adopted the Tenth Circuit’s interpretation of the NHPA, as echoed in the statutory language and the legislative history: the Act contemplates widespread agency responsibility for the protection of historic interests.<sup>78</sup> The court then differentiated the APA from the NHPA by pointing to section 305 of the NHPA, which it argued “provides for the NHPA to be enforced ‘in any civil action brought in any U.S. District Court by any interested person.’”<sup>79</sup> Without applying statutory canons, the court found the current action fit within the breadth of the NHPA and interpreted

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73. See *Sandoval*, 532 U.S. at 293 (holding no private right of action exists under the NHPA).

74. See *id.* (holding the Civil Rights Act does not provide an implied private right of action); see *infra* notes 80–84 and accompanying text (describing which courts found an implied right of action under the NHPA).

75. Charles Rennick, *The National Historic Preservation Act: San Carlos Apache Tribe v. United States and the Administrative Roadblock to Preserving Native American Culture*, 41 NEW ENG. L. REV. 67, 100–01 (2006).

76. *Vieux Carre Prop. Owners v. Brown*, 875 F.2d 453, 455 (5th Cir. 1989).

77. *Id.* at 456.

78. *Id.* at 465.

79. *Id.* at 458 (citation omitted).

the plain meaning of section 305 to imply a private right of action against federal agencies.<sup>80</sup>

The claims were ultimately dismissed as the court declined to extend the private right of action under the NHPA to “nonagency defendants,” because only federal agencies can violate section 106.<sup>81</sup>

Two years later, in *Boarhead Corp. v. Erickson*, the Third Circuit adopted this interpretation of the NHPA.<sup>82</sup> In *Boarhead*, the Third Circuit construed the language of section 305 to indicate Congress’s intent “to establish a private right of action to interested parties, such as Boarhead, in these situations.”<sup>83</sup>

The only court, prior to *Sandoval*, to hold the NHPA did not provide for a private right of action was the district court for the District of Columbia.<sup>84</sup> In *National Trust for Historic Preservation v. Blanck*, the National Trust for Historic Preservation and Save Our Seminary at Forest Glen, Maryland, sought declaratory and injunctive relief based on a demolition by neglect theory to compel the Army to preserve the National Park Seminary Historic District, which was listed in the National Register of Historic Places in 1972.<sup>85</sup> The court referred to “a relatively heavy” burden that must be met to find “Congress affirmatively or specifically contemplated private enforcement when it passed [the] relevant statute.”<sup>86</sup> The court further noted that evidence in favor of a private right of action, such as the existence of section 305, was not dispositive of the existence of a private right of action and, specifically, the court could not determine what benefit a plaintiff would have from invoking a private right of action under the NHPA when the APA seemed a suitable vehicle for bringing a claim.<sup>87</sup> The court went on to note the NHPA did not make damages available to plaintiffs, which further bolstered its analysis of the APA, and the legislative history did not “clearly indicate[]” a private right of action.<sup>88</sup> The court, instead, determined that a more reasonable understanding of section 305 was that it provided attorneys’ fees under NHPA challenges “evaluated under the standards of the APA” because the APA lacks an attorney fee provision.<sup>89</sup>

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80. *Id.*

81. *Id.*

82. *Boarhead Corp. v. Erickson*, 923 F.2d 1011, 1017 (3d Cir. 1991).

83. *Id.* (citing *Vieux Carre*, 875 F.2d at 458).

84. *Nat’l Tr. for Historic Pres. v. Blanck*, 938 F. Supp. 908, 915 (D.C. Cir. 1999).

85. *Id.* at 909–10, 918.

86. *Id.* at 914 (quoting *Samuels v. District of Columbia*, 770 F.2d 184, 194 (D.C. Cir. 1985)).

87. *Id.*

88. *Id.* at 915.

89. *Id.*

## IV. SAN CARLOS APACHE TRIBE DISPUTE

Four years after the Supreme Court's ruling in *Sandoval*, the NHPA private-rights litigation came a to head in the Ninth Circuit case of *San Carlos Apache Tribe v. United States*.<sup>90</sup>

The Coolidge Dam (Dam) on the Gila River creates the San Carlos Lake Reservoir (Reservoir) approximately 100 miles southeast of Phoenix, Arizona.<sup>91</sup> The Reservoir is surrounded by the ancestral lands of the San Carlos Apache Tribe (Tribe),<sup>92</sup> which sit on the San Carlos Apache Indian Reservation.<sup>93</sup> Pursuant to the congressional language, the Bureau of Indian Affairs (BIA), which owns and operates the Dam primarily for use by the Pima Indians, constructed the Dam with the authorization to allow excess water be used for downstream irrigation of "other lands" seeing that such use does not "diminish[] the supply necessary for said Indian lands."<sup>94</sup>

Due to drought in the mid-1990s, the BIA commenced draining the Reservoir to historically low levels for downstream irrigation.<sup>95</sup> The Tribe brought suit against the Secretary of the Interior to enjoin the draws on the Reservoir due to concerns of the lower water levels on endangered species and harm to submerged sacred lands.<sup>96</sup> Further, the Tribe sought an injunction requiring the maintenance of a set water level.<sup>97</sup> These claims included violations of the Endangered Species Act (ESA), Native American Graves and Repatriation Act, common law nuisance, and the NHPA.<sup>98</sup> A biological assessment conducted by the BIA determined that any negative impact to endangered species was relatively low and declined to change its procedures concerning the Reservoir.<sup>99</sup> The BIA did not undertake the section 106 process in regard to potential effects on cultural resources due to its draws on the Reservoir.<sup>100</sup>

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90. *San Carlos Apache Tribe v. United States*, 417 F.3d 1091, 1093 (9th Cir. 2005).

91. *San Carlos Apache Tribe v. United States*, 272 F. Supp. 2d 860, 868 (D. Ariz. 2003).

92. *San Carlos Apache*, ENCYCLOPEDIA.COM, <https://www.encyclopedia.com/humanities/encyclopedias-almanacs-transcripts-and-maps/san-carlos-apache> (last updated Jan. 5, 2020) ("The people who now make up the San Carlos Apache tribe descended from the Aravaipa, Chiricahua, . . . Coyotero, Mimbreno, Mogollon, Pinaleno, and Tonto Apache peoples.").

93. *San Carlos Apache Tribe*, 272 F. Supp. 2d at 866–67.

94. *San Carlos Apache Tribe*, 417 F.3d at 1093; see San Carlos Irrigation Project Act of 1924, ch. 288, 43 Stat. 475 (providing for the construction of a dam across the Gila River).

95. *San Carlos Apache Tribe*, 417 F.3d at 1093.

96. *San Carlos Apache Tribe*, 272 F. Supp. 2d at 867, 886.

97. *Id.* at 866.

98. *San Carlos Apache Tribe*, 417 F.3d at 1093.

99. *San Carlos Apache Tribe*, 272 F. Supp. 2d at 874.

100. *C.f. id.* at 889 (explaining how the BIA failed to consider the impacts of its actions).

The district court ruled against the Tribe on all of its claims, leaving as the only issue on appeal whether the district court's dismissal of the Tribe's claim under the NHPA, on the grounds that no private right of action exists under section 106 of the NHPA, was proper.<sup>101</sup>

*A. Ninth Circuit's Treatment of the NHPA's Private Right of Action*

While there was Ninth Circuit precedent allowing a plaintiff to entertain a private right of action existed under the NHPA,<sup>102</sup> the court noted that those cases did not address whether section 106 contained a private right of action.<sup>103</sup> In its analysis, the court considered whether the NHPA provided either an express or implied private right of action.<sup>104</sup> Finding no express private right of action or remedy for a violation in the plain language of section 106, the court, with little discussion, focused its opinion on the availability of an implied right of action.<sup>105</sup>

In light of *Sandoval*, the Ninth Circuit held that section 106 did not imply a private right of action.<sup>106</sup> The court drew parallels between section 602 of the Civil Rights Act, at issue in *Sandoval*, and section 106 of the NHPA.<sup>107</sup> Since section 106 "was not directed to individuals or entities that may be harmed," but rather at "heads of federal agencies" and "federal government actors," the court surmised the "focus on regulating agencies provides little reason to infer a private right of action."<sup>108</sup>

The court further noted the availability of the APA as a frequently used mechanism of enforcement of the NHPA should preclude other, non-express, methods of imposing federal agencies to act under section 106.<sup>109</sup> This point was then bolstered by the NHPA's lack of a sovereign immunity waiver clause compared to the APA's express waiver of immunity.<sup>110</sup>

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101. *Id.* at 897; *San Carlos Apache Tribe*, 417 F.3d at 1093.

102. *See* *Tyler v. Cisneros*, 136 F.3d 603, 608 (9th Cir. 1998) (recognizing a private right of action under the NHPA).

103. *San Carlos Apache Tribe*, 417 F.3d at 1093.

104. *Id.*

105. *Id.*

106. *Id.* at 1099.

107. *Id.* at 1095.

108. *Id.*

109. *See id.* (explaining there is little need for an implied private right of action because of the APA).

110. The APA waives sovereign immunity in 5 U.S.C. § 702 (2018). This waiver has further been observed in Ninth Circuit case law. *See* 5 U.S.C. § 702 (waiving sovereign immunity); *see* *Presbyterian Church v. United States*, 870 F.2d 518, 524 (9th Cir. 1989) ("Congress was quite explicit about its goals of eliminating sovereign immunity as an obstacle in securing judicial review of the federal official conduct.").

Next, the court compared the NHPA to the NEPA, which disallows a private rights of action.<sup>111</sup> Like the NHPA, the NEPA is concerned with government actors, not private parties.<sup>112</sup> Further, both statutes require the government to partake in procedures to ensure it has considered the impacts of its actions.<sup>113</sup> The court then explained how other environmental statutes, such as the Clean Water Act (CWA)<sup>114</sup> and the ESA,<sup>115</sup> logically create private rights of action because they concern the actions of private actors, while the NHPA was a “look and listen” statute.<sup>116</sup>

Finally, the court declined to follow the Third and Fifth Circuits’ interpretations of the NHPA’s attorney’s fees section, which provided a private right of action.<sup>117</sup> In two paragraphs, similar to the D.C. Circuit’s holding in *Blanck*, the court read the NHPA attorney fee provision as (1) not waiving sovereign immunity and (2) only allowing attorneys’ fees in suits initiated under section 702 of the APA.<sup>118</sup>

However, the court did acknowledge how the attorney fee provision could render the statute ambiguous on the question of a cause of action.<sup>119</sup> The court did not think this type of ambiguity could “be converted into an implied right of action.”<sup>120</sup>

## V. ANALYSIS

### *A. Legislative History of Section 305*

The *San Carlos* court relied on Justice Scalia’s analysis of the Civil Rights Act of 1964 in *Sandoval* to conclude Congress did not intend for the NHPA to have an express or implied right of action.<sup>121</sup> Yet, the court’s analysis failed to consider the contemporaneous legislative record developed pursuant to the creation of the NHPA or subsequent amendments.<sup>122</sup>

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111. See *Sierra Club v. Penfold*, 857 F.2d 1307, 1315 (9th Cir. 1988) (citation omitted) (“[The] NEPA itself authorizes no private right of action.”).

112. *Id.* at 1312.

113. *San Carlos Apache Tribe*, 417 F.3d at 1097.

114. See 33 U.S.C. § 1365(a) (2017) (authorizing citizen lawsuits).

115. 16 U.S.C. § 1540(g) (2018). See also *Bennett v. Spear*, 520 U.S. 154, 173–75 (1997) (interpreting 16 U.S.C. § 1540(g)(1)(C), where the Supreme Court recognized a private right of action against the Secretary in the ESA, where the statute expressly authorized suits “against the Secretary.”).

116. *San Carlos Apache Tribe*, 417 F.3d at 1098.

117. *Id.*

118. *Id.* at 1099.

119. *Id.*

120. *Id.*

121. *Id.* at 1094.

122. See *id.* at 1093–99 (omitting any mention of legislative history or the NHPA amendments from the analysis).

In 1980, Congress amended the NHPA to include section 305, which allows attorneys' fees for any "interested person" that "substantially prevails" "[i]n any civil action brought in any United States district court . . . to enforce" the provisions of the NHPA.<sup>123</sup> As the split in the circuits confirm, reasonable minds can come to different conclusions on Congress's intent regarding the meaning of section 305.<sup>124</sup>

While Justice Scalia's reasoning in *Sandoval*—there is no implication for a private right of action when a statute regulates an agency action rather than a person—is arguably sound legislative policy, courts should be wary of reinterpreting statutes because they do not meet a strict judicial standard first enunciated in 2001.<sup>125</sup> Justice Scalia's hypertextual approach for ruling out implied rights of actions, if religiously followed, substitutes the intent of Congress pursuant to judicial rules.<sup>126</sup> The judiciary is tasked with interpreting the law as written by the legislature that enacted it, not developing standards on how laws should be written.<sup>127</sup> The 1980 Congress passed section 305.<sup>128</sup> The legislative history regarding the 1980 Congress, which passed the amendment, should be consulted if there is ambiguity as to the amendment's effect, as the judiciary does when determining the Framers' intentions of constitutional provisions.<sup>129</sup>

At the outset, it should be noted the APA is not mentioned explicitly in either the language of the NHPA or any legislative history regarding the NHPA.<sup>130</sup> While the APA may present an extratextual solution to the perceived ambiguity of section 305, the mere availability of an enforcement method should not foreclose enforcement by other reasonable means.

In order to determine Congress's intent, the Third and Fifth Circuits took a hard look at the legislative history surrounding the amendment.<sup>131</sup> The House of Representatives Report on section 305 explicitly addresses the intent behind the amendment as follows:

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123. 54 U.S.C. § 307105 (2017).

124. See *San Carlos Apache Tribe*, 417 F.3d at 1098 (interpreting section 305 as *only* permitting fees in an action to enforce the NHPA); *Vieux Carre Prop. Owners v. Brown*, 875 F.2d 453, 458 (5th Cir. 1989) (holding section 305 provides a private right of action); *Boarhead Corp. v. Erickson*, 923 F.2d 1011, 1017 (3d Cir. 1991) (holding section 305 allows for a private right of action).

125. *Alexander v. Sandoval*, 532 U.S. 275, 289 (2001).

126. See *id.* at 293 (finding no private right of action under Title VI of the Civil Rights Act).

127. See U.S. CONST. art. III (describing the powers of the judicial branch).

128. 54 U.S.C. § 307105.

129. *Id.*

130. *E.g., id.* at §§ 300101–320303 (failing to mention the APA); H.R. REP. NO. 96-1457 (1980) as reprinted in 1980 U.S.C.C.A.N. 6378, 6409 (failing to mention the APA).

131. *Vieux Carre Prop. Owners v. Brown*, 875 F.2d 453, 460 (5th Cir. 1989).

Section 305 provides that, in civil actions brought in U.S. District Courts by any interested person to enforce the provisions of this Act, the court may award reasonable attorneys' fees, expert witness fees and other related costs to the person if he or she substantially prevails. The *intent* is to ensure that property owners, non-profit organizations and interested individuals who may otherwise lack the means for court action be awarded reasonable costs *for actions taken under this Act*. The intent is not to award costs for frivolous suits against Federal agencies.<sup>132</sup>

This Report, which is the cumulative report released by the House of Representatives before voting on the bill, demonstrates how section 305 is intended for affected parties, who may bring suit “under this Act.”<sup>133</sup> It is reasonable to read “actions taken under this Act” to mean “legal action taken under the NHPA.”<sup>134</sup> If Congress intended enforcement of the NHPA solely via the APA, its legislative history was cryptic in that message.

#### *B. NHPA Consultation vs. NEPA*

The *San Carlos* court also compared the NHPA with the NEPA in order to support its conclusion that the NHPA did not include an implied private right of action.<sup>135</sup> However, the scope and mandates of the two statutes are dissimilar.<sup>136</sup>

The NHPA is often overshadowed by the NEPA due to the latter's expansive scope. Yet, the NEPA only mandates that agencies consult with other federal agencies,<sup>137</sup> while the NHPA requires consultation with the public, local agencies, tribes, preservation organizations, State Historic Preservation Officers (SHPO), Tribal Historic Preservation Officer (THPO), and any interested parties.<sup>138</sup> Some scholars have argued that this “indicates . . . a greater role for the public in preserving the finite and tangible historic resources subject to § 106.”<sup>139</sup> Compared with the NEPA's

132. H.R. REP. NO. 96-1457, at 46 (1980) (emphasis added).

133. *Id.*

134. *Id.*

135. *San Carlos Apache Tribe v. United States*, 417 F.3d 1091, 1097–98 (9th Cir. 2005).

136. *Compare* National Environmental Policy Act of 1969 § 102, 42 U.S.C. § 4332 (2017) (requiring consultation *only* with other federal agencies), *with* National Historic Preservation Act 54 U.S.C. § 302706–320303 (2017) (requiring consultation with a wide variety of interest groups).

137. 42 U.S.C. § 4332(C)(v) (“[T]he responsible Federal official shall consult with and obtain the comments of any Federal agency.”).

138. *See* 54 U.S.C. §§ 300101–320303 (laying out in various sections the requirement for consultation with different groups).

139. Famulare, *supra* note 56, at 89.

requirement to publicize comments in its evaluation process,<sup>140</sup> it seems likely that Congress intended the public be more involved and have more oversight of the NHPA than with the NEPA.

Further, because the NHPA mandates the government that also interact with the public and other governments, enforcement beyond the APA's arbitrary and capricious standard is likely warranted.<sup>141</sup> It seems counterintuitive that the only remedy available for an interested party—who a government agency excludes from section 106 consultation—is to sue that agency under the APA, which affords that very agency extreme deference in its decisions regarding section 106.<sup>142</sup> Perhaps this would be reasonable if the NHPA did not include its sweeping mandates, regarding the importance of historic preservation through consultation.<sup>143</sup>

#### CONCLUSION

There is little doubt that the Ninth Circuit's reliance on *Sandoval* will curtail NHPA litigation in the western states.<sup>144</sup> This is a favorable outcome for federal agencies, which can continue their cultural resource programs under the NHPA without the worry of NHPA litigation cutting into limited resources.<sup>145</sup> Recognition of a private right of action under the NHPA could also embolden litigants, who ultimately would not meet standing requirements.<sup>146</sup> While these suits would not be unsuccessful, they would still be costly and time consuming to defend.<sup>147</sup>

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140. 42 U.S.C. § 4332.

141. See e.g., 54 U.S.C. § 302703 (requiring that the government consult with the public and Native American Tribes); *Id.* § 302301 (requiring the Secretary to allow for adequate public participation in State Historic Preservation programs).

142. The Supreme Court has continuously “recognized that considerable weight should be accorded to an executive department’s construction of a statutory scheme it is entrusted to administer, and the principle of deference to administrative interpretations.” *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984) (footnote omitted).

143. See, e.g., 54 U.S.C. § 302103 (establishing that the Secretary must consult with other groups to create rules to designate national register sites, national historic landmarks, and world heritage sites).

144. By landmass, the Ninth Circuit is by far the largest federal circuit. It also oversees more federal land than any other circuit. Lori Irish Bauman, *Split over Splitting Impasse Persists on Proposal to Split the 9th Circuit Court of Appeals*, 64 OR. ST. B. BULL. 15 (2004).

145. See *San Carlos Apache Tribe v. United States*, 417 F.3d 1091, 1099 (9th Cir. 2005) (holding the NHPA does not provide a private right of action).

146. See, e.g., Amanda M. Marincic, *The National Historic Preservation Act: An Adequate Attempt to Protect the Cultural and Religious Sites of Native Nations*, 103 IOWA L. REV. 1777, 1808–09 (2018) (discussing how a private right of action would enable Native Nations to bring suit against government agencies under the NHPA).

147. See David A. Lewis, *Identifying and Avoiding Conflicts Between Historic Preservation and the Development of Renewable Energy*, 22 N.Y.U. ENVTL. L.J. 274, 281 (2015) (discussing how compliance with the NHPA is often time consuming and costly for project developers).

Conversely, a private right of action would give the NHPA the teeth it often lacks. Viewed as a procedural preservation statute, the NHPA is often overlooked in light of its more prominent neighbors—the NEPA, the CWA, and the ESA.<sup>148</sup> Allowing private citizens to force an agency into compliance, outside of the APA, would likely raise the NHPA’s value as a historic preservation mechanism.

Yet, whether or not the NHPA *should* have a private right of action is not a justiciable question the courts can answer in future NHPA suits.<sup>149</sup> Unfortunately, the 1980 Congress is now pitted against a statute-drafting standard it could not have foreseen.<sup>150</sup> Does the NHPA allow for a private right of action? Since the courts cannot seem to figure it out, perhaps a future Congress can set the record straight.

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148. *See supra* notes 21–29 and accompanying text (highlighting the procedural safeguards established by the NHPA).

149. *See supra* Part III (describing how courts have examined whether the NHPA *does* allow for a private right of action).

150. *See* *Alexander v. Sandoval*, 532 U.S. 275, 293 (2001) (holding the Civil Rights Act does not provide an implied private right of action).