NOTES

HAS *SANDOVAL* DOOMED THE PRIVATE RIGHT OF ACTION UNDER THE NATIONAL HISTORIC PRESERVATION ACT?

I. INTRODUCTION

Since its enactment in 1966, the National Historic Preservation Act, 16 U.S.C. §§ 470 *et seq.* (2000) ("NHPA"), has required federal agencies to consider the impact of their undertakings on the nation's historic resources.[1] The Third and Fifth Circuit Courts of Appeals have explicitly held that an implied right of action exists in the NHPA for private parties to sue the federal government to enforce compliance and mandate an agency to review its actions under the statutory guidelines.[2] These courts relied on the NHPA's attorneys' fees provision as indicative of Congress' intent to provide a private right of action.[3] Since those decisions, however, the United States Supreme Court markedly altered its jurisprudence on private rights of action. In *Alexander v. Sandoval*, the Court refused to establish such a right in construing § 602 of Title VI of the Civil Rights Act of 1964[4] and held that a private right of action exists only where there is explicit and unambiguous statutory intent to create one.[5] The *Sandoval* Court also held that a statutory provision of an alternative enforcement mechanism is a further indication that Congress did not intend to provide a private right of action.[6]

In August of 2005, the Ninth Circuit Court of Appeals split with the Third and Fifth Circuits by holding that the NHPA does not authorize a private right of action against the federal government to enforce compliance with its review provisions.[7]

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[1] National Historic Preservation Act § 106, 16 U.S.C. § 470f (2000).

[2] Boarhead Corp. v. Erickson, 923 F.2d 1011, 1017 (3d Cir. 1991); Vieux Carre Prop. Owners, Residents & Assoc., Inc. v. Brown, 875 F.2d 453, 458 (5th Cir. 1989).

[3] *Id.*

[4] Alexander v. Sandoval, 532 U.S. 275, 289-90 (2001).

[5] *Id.* at 286-87.

[6] *Id.* at 288-89.

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

In *San Carlos Apache Tribe v. United States*, the Ninth Circuit affirmed the lower court's dismissal of the San Carlos Apache Tribe's ("Tribe") NHPA claim against the U.S. Department of the Interior and the Bureau of Indian Affairs ("BIA").[8] These agencies own and operate the Coolidge Dam ("Dam") and its reservoir on the Tribe's reservation;[9] this reservoir has inundated the ruins of the Tribe's historic village and burying grounds.[10] The Tribe's suit alleged, among other claims, that the BIA's operation of the Coolidge Dam violated § 106 of the NHPA because it caused the level of the reservoir to fluctuate, thereby damaging the ruins.[11] The Tribe sought to enjoin the BIA and the Department of the Interior to maintain a minimum water level behind the Dam to keep the ruins inundated and prevent further exposure to looters and wave action.[12]

The Ninth Circuit affirmed the denial of the injunction and the dismissal of the Tribe's NHPA claim because it found that the attorneys' fees provision in § 305 did not explicitly and unambiguously indicate statutory intent to create a private right of action.[13] Furthermore, it held that the availability of the Administrative Procedure Act as an alternative enforcement mechanism for the Tribe to seek judicial review of the government's compliance with the NHPA weighed against finding a private right of action in the statute.[14]

This Note will demonstrate that Congress did, in fact, intend to create a private right of action for individuals to sue federal agencies to enjoin their compliance with § 106 and other provisions of the NHPA. It will further show that this intent is apparent in the text of the statute and in the context in which Congress passed the amendment that added the attorneys' fees provision to the NHPA. Section II provides the facts and procedural history of the *San Carlos Apache Tribe v. United States* case. Section III explains the Supreme Court jurisprudence on private rights of action, and Section IV discusses the circuit split regarding the existence of such a right of action in the NHPA. Finally, Section V suggests that federal courts should adopt a "moderate textualist"[15] approach to statutory construction that considers legal context to determine whether Congress intended to provide a private right of action. This Note also argues that the primacy that *Sandoval* places on statutory intent would not completely prohibit this approach. Accordingly, adhering to a moderate textualist approach, Section V demonstrates that the National Environmental Policy Act, 42 U.S.C. §§ 4321-4370 (2000) ("NEPA"), is not a perfect analog to the NHPA. Therefore, courts should not infer from NEPA's lack of a private right of action that the NHPA lacks one as well. This Note then

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[8] *Id.*

[9] San Carlos Apache Tribe v. United States, 272 F. Supp. 2d 860, 869-70 (D. Ariz. 2003).

[10] *Id.* at 868.

[11] San Carlos Apache Tribe's Opening Brief at 7-8, San Carlos Apache Tribe v. United States, 417 F.3d 1091 (9th Cir. 2005) (No. 03-16874), 2004 WL 541563.

[12] *San Carlos Apache Tribe*, 272 F. Supp. 2d at 866. *See also* San Carlos Apache Tribe's Opening Brief, *supra* note 11, at 7-8.

[13] *San Carlos Apache Tribe*, 417 F.3d at 1099.

[14] *Id.* at 1095-96.

[15] *See infra* notes 108-13 and accompanying text.

shows that the APA is not available as an alternative enforcement mechanism for the entire class of federal actions for which the NHPA mandates review. For these two reasons, this Note argues that the Ninth Circuit erred when it split with its sister circuits in holding that the NHPA does not provide a private right of action.

II. THE BACKGROUND OF THE CASE

A. The National Historic Preservation Act

Originally enacted in 1966, the NHPA includes, *inter alia*, the following Congressional findings regarding the purpose of the NHPA: that "the historical and cultural foundations of the Nation should be preserved . . ."; that "historic properties significant to the Nation's heritage are being lost or substantially altered, often inadvertently, with increasing frequency;" that "the preservation of this irreplaceable heritage is in the public interest . . .;" that "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 . . .;" and that, although recognizing that private agencies and individuals had borne the "major burdens" and initiated the "major efforts" of historic preservation and should continue to do so, it was "necessary and appropriate for the Federal Government to accelerate its historic preservation programs and activities . . ." and to encourage private preservation initiatives and assist State and local preservation programs.[16]

To effectuate these purposes, several sections of the NHPA establish affirmative duties of the Secretary of the Interior ("Secretary") and of the heads of Federal agencies, including § 106, which the Tribe sued to enforce.[17] Section 106 states:

> The head of any Federal agency having direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking in any State and the head of any Federal department or independent agency having authority to license any undertaking shall, prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license, as the case may be, take into account the effect of the undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register.[18] The head of any such 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 such undertaking.[19]

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[16] National Historic Preservation Act § 1, 16 U.S.C. § 470(b) (2000).

[17] *See id.* §§ 470f, 470a(d), 470h-2(a). *See also infra* notes 130-37 and accompanying text.

[18] Section 101 of the NHPA authorizes the Secretary to "expand and maintain a National Register of Historic Places composed of districts, sites, buildings, structures, and objects significant in American history, archaeology, engineering, and culture." *Id.* § 470a(a)(1). It also provides for National Historic Landmarks to be included on the National Register. *Id.*

[19] *Id.* § 470f.

Although not included in the Tribe's complaint for injunctive relief, other sections describe particular duties owed by Federal officers in carrying out their § 106 responsibilities; these sections include §§ 101(d)(6)[20] and 110(a)(2).[21]

Section 305 provides that a court may award attorneys' fees and other costs to the party which "substantially prevails" "[i]n any such action brought in any United States district court by any interested person to enforce the provisions of this Act . . . ."[22] In 1980, Congress amended the NHPA to include this section. In its favorable report on the amendment, the Committee on Interior and Insular Affairs stated that the intent of the section was "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."[23]

B. The San Carlos Apache Tribe and the Coolidge Dam

In 1924, the United States Congress enacted the San Carlos Project Act ("1924 Act"). This Act provided an adequate water supply for the Pima Indians to irrigate their lands on the Gila River Reservation in Arizona as compensation for the diversion of waters away from the Gila and Salt Rivers.[24] To accomplish this, the 1924 Act authorized the construction of the Coolidge Dam near the confluence of the San Carlos and Gila Rivers, about ninety miles southeast of Phoenix, Arizona.[25] The federal government purchased the land on which the Dam sits from the San Carlos Apache Tribe ("Tribe") and completed construction of the Dam in 1928.[26] The resulting inundation created the San Carlos Reservoir ("Lake")[27], and both the

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[20] § 101(d)(6) makes traditional religious and cultural properties eligible for listing in the National Register and requires Federal agencies, "[i]n carrying out [their] responsibilities under section 106," to "consult with any Indian tribe or Native Hawaiian organization that attaches religious and cultural significance" to such properties. *Id.* § 470a(d)(6)(b).

[21] § 110(a)(2) requires Federal agencies to establish "a preservation program for the identification, evaluation, and nomination to the National Register . . . and protection of historic properties." *Id.* § 470h-2(a)(2). *Inter alia*, this program must ensure that the management and maintenance of such properties occurs in a way that considers their preservation in compliance with § 106 and that the agency's procedures for compliance with § 106 provide a process for identifying and evaluating historic properties and for developing and implementing agreements among interested state, local, and tribal governments and the interested public on the means of considering adverse effects on them. *Id.*

[22] *Id.* § 470w-4.

[23] H.R. REP. NO. 96-1457, at 46 (1980), *as reprinted in* 1980 U.S.C.C.A.N. 6378, 6409.

[24] San Carlos Apache Tribe v. United States, 272 F. Supp. 2d 860, 868 (D. Ariz. 2003) (quoting the San Carlos Project Act). In the litigation that is the subject of this Note, the term "Gila River Indian Community" ("GRIC") refers to the Pima Indian recipients and the term "San Carlos Irrigation and Drainage District" ("SCIDD") refers to the other public and private recipients. Both GRIC and SCIDD are intervenors in the case. *Id.* at 866.

[25] *Id.* at 868.

[26] *Id.*

[27] *Id.*

Lake and the Dam lie within the San Carlos Apache Tribe Reservation.[28] The Lake submerged "tribal cemeteries, graves, and archaeology sites that contain and protect human remains, private homes, a grain mill, and many other historical sites, many of which have significant spiritual and cultural meaning to the . . . Tribe."[29]

In 1935, the Ninth Circuit Court of Appeals concluded litigation initiated by the federal government against upstream users of the Gila River. The court entered a consent decree determining how much Gila River water each of the users and their successors in interest could divert and utilize.[30] The decree delegated ownership of the water in the Lake and control of the Dam to the Bureau of Indian Affairs ("BIA")[31] for the exclusive benefit of the GRIC and the SCIDD.[32] Although "neither the [San Carlos] Apache Tribe, the San Carlos Apache Indian Reservation, nor any individual Apache Indians have any right to store water in the [Lake],"[33] in 1979, the BIA entered a Grant of Concession to allow the Tribe to operate a fishing and camping recreational facility ("facility") on the Lake.[34] Upon expiration of the ten-year term of the original concession, the BIA extended the concession for another ten years to October 24, 1999.[35] Although the Tribe has been operating the facility without a Grant of Concession since then, in 1992, Congress enacted the San Carlos Apache Tribe Water Rights Settlement Act of 1992 ("Water Rights Act").[36] This Act allowed the Tribe to store its allocations of water from the Central Arizona Project[37] in the Lake in exchange for the irrigation water releases to the GRIC and SCIDD in order to "maintain a permanent pool of water for fish, wildlife, recreation and other purposes."[38] The Water Rights Act recognized the financial importance of the fishing and camping concession to the Tribe, and the intent of the maintenance pool was to "avoid a fish kill and devaluation of the [L]ake as a recreational resource."[39] More importantly, the Water Rights Act,

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[28] *Id.* at 867, 868.

[29] *Id.* at 868.

[30] *Id.* at 868-69.

[31] The Bureau of Indian Affairs is a bureau of the U.S. Department of the Interior; it is responsible for the "administration and management of 55.7 million acres of land held in trust by the United States for American Indians, Indian tribes, and Alaska Natives." U.S. Dep't of the Interior, DOI Bureaus, http://www.doi.gov/bureaus.html (last visited Apr. 15, 2006).

[32] *San Carlos Apache Tribe*, 272 F. Supp. 2d at 869-70.

[33] *Id.* at 870 (quoting United States v. Gila Valley Irrigation District, 31 F.3d 1428, 1431 (9th Cir. 1994)).

[34] *Id.*

[35] *Id.*

[36] San Carlos Apache Tribe Water Rights Settlement Act of 1992, Pub. L. No. 102-575, §§ 3701-3711, 106 Stat. 4600, 4740-52 (1992).

[37] The Tribe has approximately 52,838 to 63,838 acre-feet of water available to it for storage in the Lake. *San Carlos Apache Tribe*, 272 F. Supp. 2d at 870 n.7.

[38] *Id.* at 870 (citing San Carlos Apache Tribe Water Rights Settlement Act § 3704(e), 106 Stat. at 4743-44).

[39] Brief for the Federal Appellees at 12, San Carlos Apache Tribe v. United States, 417 F.3d 1091 (9th Cir. 2005) (No. 03-16874), 2004 WL 1628320 (citing H. REP. NO. 101-918,

which became effective in 1999, established "permanent water storage rights in the [Lake] for the Apache Tribe."[40]

The water level in the Lake has fluctuated considerably since completion of the Dam in 1928, being "completely drained or drained below 1,000 acre-feet on 21 occasions between 1934 and 1995" and falling "below 75,000 acre-feet for all or part of 27 of the 41 months [since March of 1999]."[41] Having failed at negotiations to retain water in the Lake after a relentless drought in the mid-1990s, the Tribe originally brought action in the United States District Court for the District of Arizona in 1999 to enjoin the United States and the Department of the Interior to maintain a minimum pool of 75,000 acre-feet of water.[42] The Tribe alleged that the release of water below the 75,000 acre-feet level violates, *inter alia*, the NHPA.[43] Particular to the NHPA claim, the Tribe complained that the lowering of Lake levels exposes its historic, archaeological, and cultural sites to irreparable damage from looting and wave action, and that fluctuating Lake levels "hasten[] decomposition of organic cultural materials" due to alternating wet and dry conditions.[44] In a 1993 cultural resource survey by the Bureau of Reclamation[45] on a portion of the Lake, "the State Historic Preservation Office estimated that at least 165 historic sites were likely eligible for the National Register of Historic Places."[46]

C. Procedural History of San Carlos Apache Tribe v. United States

The district court, on July 8, 2003, denied a permanent injunction and granted summary judgment in favor of the federal defendants on all claims.[47] Judge Bury specifically dismissed the NHPA complaint due to lack of jurisdiction, stating that the NHPA contains no private right of action.[48] He also erroneously stated that other Ninth Circuit cases involving NHPA violations rely on the Administrative

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at 24 (1990), S. REP. NO. 102-133, at 25-26 (1991), and San Carlos Apache Tribe Water Rights Settlement Act § 3704 (e)).

[40] San Carlos Apache Tribe, 272 F. Supp. 2d at 870.

[41] *Id.* at 867.

[42] *Id.* at 866.

[43] *Id.* at 867. The Tribe's other claims included violations of the federal common law of nuisance, the Archaeological Resources Protection Act, the Native American Graves Protection and Repatriation Act, the National Environmental Policy Act, and the Fish and Wildlife Coordination Act, as well as breaches of the federal government's trust responsibilities to the Tribe. *Id.*

[44] San Carlos Apache Tribe's Opening Brief, *supra* note 11, at 7-8.

[45] The Bureau of Reclamation is a bureau of the U.S. Department of the Interior; its mission is "to manage, develop, and protect water and related resources in an environmentally and economically sound manner in the interest of the American public." U.S. Department of the Interior, DOI Bureaus, http://www.doi.gov/bureaus.html (last visited Oct. 14, 2006).

[46] San Carlos Apache Tribe's Opening Brief, *supra* note 11, at 6.

[47] *San Carlos Apache Tribe*, 272 F. Supp. 2d 860, 868 (D. Ariz. 2003).

[48] *Id.* at 885 (citing Presidio Golf Club v. Nat'l Park Serv., 155 F.3d 1153, 1158 (9th Cir. 1998)).

Procedure Act, 5 U.S.C. §§ 701–706 ("APA"), for jurisdiction.[49] He noted that the Tribe failed to include a claim under the APA and that its claim would nonetheless fail to meet the jurisdictional requirements of the APA because the "ongoing day-to-day operation of the Lake . . . is not a final agency action for purposes of APA review."[50]

On appeal, the Ninth Circuit Court of Appeals considered only the Tribe's claim under § 106 of the NHPA ("§ 106").[51] Recognizing that the question of whether § 106 provides a private right of action against the United States was a question of first impression in the Ninth Circuit, the circuit court affirmed the district court's dismissal of the § 106 claim, holding that the NHPA contains no private right of action.[52] In reaching this conclusion, the Ninth Circuit analyzed § 106 in accordance with the instruction of *Alexander v. Sandoval* that "[t]he judicial task is to interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy."[53] The *Sandoval* Court held that § 602 of Title VI of the Civil Rights Act of 1964 ("§ 602")[54] did not contain a private right of action because it focused on regulatory agencies by issuing them a directive "to effectuate the provisions of [§ 601] . . . by issuing rules, regulations, or orders of general applicability"[55] and did not protect the rights of individuals.[56] *Sandoval* also rejected an implied right of action under § 602 because that section provides an explicit statutory process to enforce the regulations promulgated under it.[57] The *Sandoval* Court concluded that "the express provision of one method of enforcing substantive rule suggest that Congress intended to preclude others."[58]

The Ninth Circuit compared § 106 with § 602 and reached the same conclusion

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[49] *Id.* (citing *Presidio Golf Club*, 155 F.3d 1153, Tyler v. Cuomo, 236 F.3d 1124 (9th Cir. 2000), Morongo Band of Mission Indians v. F.A.A.., 161 F.3d 569 (9th Cir. 1998), and Tyler v. Cisneros, 136 F.3d 603 (9th Cir, 1998)). The Ninth Circuit, however, corrected Judge Bury by stating that the APA is not a jurisdictional statute. San Carlos Apache Tribe v. United States, 417 F.3d 1091, 1093 n.2 (9th Cir. 2005) (citing Gallo Cattle Co. v. U.S. Dep't of Agric., 159 F.3d 1194, 1198 (9th Cir. 1998)). It iterated further that "jurisdiction must come from a source other than the APA." *Id.* (citing Confederated Tribes of the Umatilla Indian Reservation v. Bonneville Power Admin., 342 F.3d 924, 929 (9th Cir. 2003) (quoting Pub. Util. Comm'r of Or. v. Bonneville Power Admin., 767 F.2d 622, 627 (9th Cir. 1985))).

[50] *San Carlos Apache Tribe*, 272 F. Supp. 2d at 886.

[51] *San Carlos Apache Tribe*, 417 F.3d at 1092-93. Section 106 of the NHPA is codified at 16 U.S.C. § 470f and requires federal agencies to "take into account the effect of the[ir] undertaking[s] on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register." National Historic Preservation Act § 106, 16 U.S.C. § 470f (2000).

[52] *San Carlos Apache Tribe*, 417 F.3d at 1093.

[53] *Id.* at 1094 (quoting Alexander v. Sandoval, 532 U.S. 275, 286 (2001)).

[54] Civil Rights Act of 1964 § 602, 42 U.S.C. § 2000d-1 (2000).

[55] *San Carlos Apache Tribe*, 417 F.3d at 1095 (quoting 42 U.S.C. § 2000d-1).

[56] *Id.* (citing *Sandoval*, 532 U.S. at 289).

[57] *Id.* (citing *Sandoval*, 532 U.S. at 289-90).

[58] *Id.* (quoting *Sandoval*, 532 U.S. at 290).

regarding § 106 that the *Sandoval* Court reached regarding § 602. The Ninth Circuit reasoned that Congress did not intend for a private right of action to be available under § 106 because, as the *Sandoval* Court interpreted § 602, it issues a directive to federal regulatory agencies and is not focused on individuals.[59] Furthermore, the court acknowledged that, even though the APA is "not expressly referenced in NHPA,"[60] it has been a "long-standing means to challenge agency action"[61] and is available to any "person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action."[62] The Ninth Circuit also rested its holding on the fact that the NHPA does not waive sovereign immunity to allow a suit against the federal government.[63] It also analogized the NHPA with the National Environmental Policy Act,[64] which does not allow a private right of action.[65]

In holding that the NHPA does not create a private right of action, the Ninth Circuit split with the Third and Fifth Circuits, which both held that a private right of action arises under the attorneys' fees provision, § 305 of the NHPA ("§ 305").[66] The court reasoned that simply providing for recovery of fees does not answer the question of whether a private right of action exists, does not authorize suit against federal agencies, and does not waive sovereign immunity.[67] It further posited that because the APA does not contain a fees provision, § 305 could allow a prevailing party, having sued under the APA to review an agency's compliance with the NHPA, to recover fees.[68]

III. EVOLUTION OF THE U.S. SUPREME COURT'S JURISPRUDENCE ON PRIVATE RIGHTS OF ACTION AND ITS APPLICATION BY THE CIRCUIT COURTS OF APPEALS TO THE NHPA.

A. The Supreme Court's Historic, Liberal Implication of Private Rights of Action.

The Supreme Court's reluctance to infer a private right of action is a relatively

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[59] *Id.*

[60] *Id.*

[61] *Id.*

[62] *Id.* (quoting the Administrative Procedure Act, 5 U.S.C. § 702).

[63] *Id.* at 1096.

[64] *Id.* at 1097 (citing Pres. Coalition, Inc. v. Pierce, 667 F.2d 851, 859 (9th Cir. 1982) and Morris County Trust for Historic Pres. v. Pierce, 714 F.2d 271, 278-79 (3d Cir. 1983)).

[65] *Id.* at 1097 (citing Sierra Club v. Penfold, 857 F.2d 1307, 1315 (9th Cir. 1988) and Noe v. Metro. Atlanta Rapid Transit Auth., 644 F.2d 434, 439 (5th Cir. 1981)).

[66] *Id.* at 1098 (citing Boarhead Corp. v. Erickson, 923 F.2d 1011, 1017 (3d Cir. 1991) and Vieux Carre Prop. Owners, Residents & Assoc., Inc. v. Brown, 875 F.2d 453, 458 (5th Cir. 1989)). *See infra* note 94 for other circuit courts which have reached the merits of NHPA claims without dismissing for lack of a statutorily-authorized private right of action.

[67] *San Carlos Apache Tribe*, 417 F.3d at 1098-99.

[68] *Id.* at 1099.

new phenomenon.[69] Early cases indicate that federal courts did not inquire into whether a private right of action existed because "persons suffering legal wrongs were entitled to judicial remedies."[70] Courts therefore did not even recognize the private right of action "as a separate procedural entity, independent of a right and remedy."[71] The Supreme Court first recognized the existence of a right of action as a separate statutory inquiry in *Texas & Pacific Railway Co. v. Rigsby*.[72] Following *Rigsby* and despite its identification of a right of action as a distinct jurisdictional element, however, the Court continued to provide remedies for violations of statutory rights without reference to the existence of a right of action.[73] This liberal approach culminated in *J.I. Case Co. v. Borak*, in which the Court found that the Securities and Exchange Act implied a private right of action and "made 'implied' rights of action the rule rather than the exception."[74]

In two decisions in the 1970s,[75] however, the Court began to retreat from its liberal approach to implied rights of action in *Borak* and replace it with a more *ad hoc* judgment.[76] In *Cort v. Ash*, the Court established a four-factor analysis to determine whether Congress intended for a federal statute to provide a private right of action: (1) whether the statute was enacted for the benefit of a class of persons of which the plaintiff is a member; (2) whether there is any indication of legislative intent, express or implied, to create or deny a remedy; (3) whether implying a private remedy would frustrate the underlying legislative scheme; and (4) whether implying a private federal remedy is inappropriate because the subject matter is solely a matter of state concern.[77]

Applying the *Cort* analysis, the Court in *Cannon v. University of Chicago* held that Title IX of the Civil Rights Act of 1964 implied a private right of action.[78] Particularly germane to this Note's analysis of the NHPA, the *Cannon* Court found, under the second *Cort* factor listed above, that an attorneys' fees provision in § 901

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[69] Donald H. Zeigler, *Rights, Rights of Action, and Remedies: An Integrated Approach*, 76 WASH. L. REV. 67, 69, 83 (2001).

[70] *Id.* at 71 (quoting 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)).

[71] *Id.* at 72.

[72] *Id.* at 77-78 (citing Texas & Pacific Ry. Co. v. Rigsby, 241 U.S. 33, 39 (1916)).

[73] *Id.* at 79-80.

[74] LARRY W. YACKLE, FEDERAL COURTS 224 (Carolina Academic Press, 2d ed. 2003); Zeigler, *supra* note 69, at 80-81. "[I]t is the duty of the courts to be alert to provide such remedies as are necessary to make effective the congressional purpose." J.I. Case Co. v. Borak, 377 U.S. 426, 433 (1964).

[75] Cort v. Ash, 422 U.S. 66 (1975); Cannon v. Univ. of Chicago, 441 U.S. 677 (1979).

[76] YACKLE, *supra* note 74, at 225. *See also* Alexander v. Sandoval, 532 U.S. 275, 287 (2001) (explaining that the Court has rejected the *Borak* approach since its holding in *Cort v. Ash*).

[77] *Cort*, 422 U.S. 66, 78 (1975).

[78] *Cannon*, 441 U.S. 677, 709 (1979).

was an implicit indication of Congress' intent to create a private remedy.[79] Then-Justice Rehnquist's concurrence and Justice Powell's dissent, however, foreshadowed the *Sandoval* holding that the Court should be reluctant to infer private rights of action without an express indication from Congress of its intent to provide a private right of action.[80] Justice Powell specifically complained that the *Cort* analysis violated separation of powers because three of the four *Cort* factors invited judicial law-making; the only factor with which he did not take issue is the second factor listed above, regarding whether there is any express or implied legislative intent to provide a remedy.[81]

B. The Supreme Court's Increasingly Conservative Approach to Statutory Creation of Private Rights of Action.

In the years following *Cort* and *Cannon*, however, the Court remained reluctant to infer private rights of action.[82] Nonetheless, the *Sandoval* Court gutted the *ad hoc* approach of *Cort* when it held that § 602 of Title VI of the Civil Rights Act of 1964 does not provide a private right of action to enforce regulations prohibiting disparate-impact discrimination.[83] Justice Scalia reasoned that Congress did not intend a private remedy because, unlike § 601, § 602 is directed at federal agencies and not the individuals to be protected or regulated.[84] Furthermore, § 602 provided particular statutory procedures for a federal agency to follow in the event that a person violates the anti-discriminatory regulations it promulgates, which include, but are not limited to, the withdrawal of federal funding from the violating program.[85] Justice Scalia found that this express provision of a remedy suggested that Congress intended to preclude others. *Sandoval*'s lasting influence, however, was the new approach that Justice Scalia, in writing for the majority, established for the Court to follow in interpreting a statute to determine whether it creates a private right of action:

> Like substantive federal law itself, private rights of action to enforce federal law must be created by Congress. The judicial task is to interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy. Statutory intent on this latter point is determinative. Without it, a cause of action does not exist and courts

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[79] *Id.* at 698.

[80] *Id.* at 718 (Rehnquist, J., concurring) and at 730-31 (Powell, J., dissenting).

[81] *Id.* at 740 (Powell, J., dissenting).

[82] RICHARD H. FALLON, JR., DANIEL J. MELTZER, DAVID L. SHAPIRO, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 781-82 (5th ed., Foundation Press 2003).

[83] Alexander v. Sandoval, 532 U.S. 275, 293 (2001).

[84] *Id.* at 288-89 (2001). Section 602 states, "Each Federal department and agency which is empowered to extend Federal financial assistance . . . is authorized and directed to effectuate the provisions of [§ 601] . . . by issuing rules, regulations, or orders of general applicability." Civil Rights Act of 1964 § 602, 42 U.S.C. § 2000d-1 (2000).

[85] *Sandoval*, 532 U.S. at 289-90 (citing 42 U.S.C. §§ 2000d-1 and 2000d-2).

may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute.[86]

Although Justice Scalia fell short of invoking the doctrine of clear statement, his use of the term "statutory intent" indicates that the Court must now require explicit, unambiguous statutory language to create a remedy of private enforcement.[87] Justice Scalia did not ban the Court from considering legal context, such as legislative history and congressional records; however, he did severely restrict its dispositive weight in discerning statutory intent by stating that "legal context matters only to the extent it clarifies text."[88] One interpretation of this dictum is that the Court may not consider legal context even in construing statutes that pre-date the *Sandoval* decision.[89]

IV. THE CIRCUIT SPLIT ON WHETHER § 305 PROVIDES A PRIVATE RIGHT OF ACTION

As the Ninth Circuit described in *San Carlos Apache Tribe*, two circuits have inferred a private right of action to enforce § 106 based on the attorneys' fee provision in § 305.[90] Both of those opinions preceded the U.S. Supreme Court's 2001 decision in *Alexander v. Sandoval*.[91] In *Boarhead Corp. v. Erickson*, the Third Circuit stated that "Congress has expressly given all United States district courts jurisdiction to hear claims arising under the Preservation Act and to stay a federal agency's activities until [the agency conducts a § 106 historical resource review]."[92] Its reasoning was that, in holding that a district court did not err in reaching the merits of an injunction pursuant to § 106 in *Morris County Trust for Historic Preservation v. Pierce*,[93] the district court had assumed that the case had met all jurisdictional prerequisites, including federal question jurisdiction and a private right of action.[94] More notably, however, the Third Circuit in *Boarhead* construed the language of § 305 as demonstrating Congress' intent to "establish a private right of action to interested parties, such as Boarhead, in these situations."[95]

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[86] *Id.* at 286-87 (internal citations omitted).

[87] YACKLE, *supra* note 74, at 225.

[88] *Sandoval*, 532 U.S. at 288.

[89] YACKLE, *supra* note 74, at 225 n.158.

[90] San Carlos Apache Tribe v. United States, 417 F.3d 1091, 1098 (9th Cir. 2005) (citing Boarhead Corp. v. Erickson, 923 F.2d 1011, 1017 (3d Cir. 1991) and Vieux Carre Prop. Owners, Residents & Assoc., Inc. v. Brown, 875 F.2d 453, 458 (5th Cir. 1989)). *See also* Bywater Neighborhood Ass'n v. Tricarico, 879 F.2d 165, 168 (5th Cir. 1989).

[91] *Sandoval*, 532 U.S. at 275.

[92] *Boarhead Corp.*, 923 F.2d at 1016.

[93] Morris County Trust for Historic Pres. v. Pierce, 714 F.2d 271 (3d Cir. 1983).

[94] *Boarhead Corp.*, 923 F.2d at 1017. The court also noted other circuit courts of appeals that had reached the merits of NHPA appeals without finding any jurisdictional barriers to review. *Id.* (citing Lee v. Thornburgh, 877 F.2d 1053, 1058 (D.C. Cir. 1989); *Vieux Carre*, 875 F.2d at 458; Nat'l Ctr. for Pres. Law v. Landrieu, 635 F.2d 324, 326 (4th Cir. 1980) (per curiam); WATCH v. Harris, 603 F.2d 310, 316 (2d Cir. 1979)).

[95] *Id.* (citing *Vieux Carre*, 875 F.2d at 458 and *Bywater Neighborhood Ass'n*, 879 F.2d at

The Third Circuit also held that the federal government has waived its sovereign immunity under both § 702 of the APA and § 305 of the NHPA.[96]

In *Vieux Carre Property Owners, Residents & Assoc., Inc. v. Brown*, a suit brought by plaintiff landowners against the U.S. Army Corps of Engineers, local agencies, and private developers, the Fifth Circuit held that "*[r]ather than through APA review*, a private right of action against an agency arises under 16 U.S.C. § 470w-4 [(§ 305, the attorneys' fees provision)], which provides for the NHPA to be enforced 'in any civil action brought in any U.S. District Court by any interested person.'"[97] The Fifth Circuit in *Vieux Carre* ultimately dismissed the NHPA claims against the nonfederal defendants and remanded, in part, the NHPA claim against the U.S. Army Corps of Engineers, holding that the private right of action arising from § 305 "does not extend to action against nonagency defendants" because "[b]y its terms, only a federal agency can violate [§ 106]."[98]

Although no circuit court of appeals prior to the Ninth Circuit in *San Carlos Apache Tribe* had held that the NHPA *does not* provide an implied right of action, one district court has. In *National Trust for Historic Preservation v. Blanck*, the District Court for the District of Columbia reached an opposite conclusion to those reached in *Boarhead* and *Vieux Carre* regarding whether § 305 compels an implicit private right of action in the NHPA.[99] The district court in *Blanck* held that the plaintiff did not meet the "relatively heavy" burden of persuading the court that "Congress affirmatively or specifically contemplated private enforcement . . . against the federal government under the NHPA."[100] It found specifically that "such a private right of action would [not] provide any more relief than the APA . . . does"; that "neither the language nor the legislative history of [§ 305] clearly indicates an intent on the part of Congress to create a private right of action"; that "even if there were a private right of action, nothing in the NHPA suggests that Congress intended to institute de novo review of agency . . . actions or to create an exception to [the APA's presumption of agency expertise and the corresponding deferential judicial review]"; and that the ubiquitous availability of review under the APA precludes the need for finding implied private rights of

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[96] *Id.* at 1017 n.11 (citing *Morris County Trust for Historic Pres.*, 730 F.2d 94 (3d Cir. 1983) for the § 305 waiver of sovereign immunity and Jaffee v. United States, 592 F.2d 712, 718-19 (3d Cir. 1979) (holding that § 702, as amended, waives sovereign immunity in equitable actions seeking review of agency action brought under 28 U.S.C. § 1331, but not brought under a statute that explicitly provides for review of agency action, i.e. a claim brought under NHPA, that is not also brought under APA) for the § 702 waiver).

[97] *Vieux Carre*, 875 F.2d at 458 (emphasis added).

[98] *Id.*

[99] Nat'l Trust for Historic Pres. v. Blanck, 938 F. Supp. 908, 915, *aff'd mem.*, 203 F.3d 53 (D.C. Cir. 1999). Because the D.C. Circuit Court affirmed the district court without an opinion, it lacks authority as circuit-wide precedent.

[100] *Id.* at 914 (citing Samuels v. District of Columbia, 770 F.2d 184, 194 (D.C. Cir. 1985) (citation omitted) for the burden of persuasion).

action.[101]

V. ANALYSIS: THE TEXT AND CONTEXT OF THE NHPA INDICATE CONGRESS' INTENT TO ALLOW PRIVATE RIGHTS OF ACTION.

The court in *San Carlos Apache Tribe* held that § 106 does not provide a private right of action and that § 305 (the attorneys' fees provision) does not authorize a suit for a § 106 claim.[102] The language of § 106, taken alone, clearly corroborates that holding. This Note does not dispute that holding; rather, it argues that a private right of action arises from § 305 to enforce *all* the provisions of the NHPA that compel action by a federal official. Furthermore, the specific injunctive remedy that the Tribe sought in its litigation—that the Department of the Interior, through the Bureau of Indian Affairs, maintain a minimum pool of 75,000 acre-feet of water in the Lake[103]—is not attainable under the NHPA. The NHPA mandates federal officials to consult with specified parties and consider the negative impacts of the government's undertakings on historic resources, but it does not require particular courses of action to preserve those resources as the Tribe requested.[104]

A. The Court's Analysis of the NHPA's Legal Context Was Too Limited to Support its Holding that the NHPA Does Not Provide a Private Right of Action.

The text of § 305, providing for attorneys' fees for any "interested person" who "substantially prevails" "[i]n any civil action brought in any United States district court to enforce the provisions of this Act,"[105] is sufficiently broad to *imply* a private right of action. From the text alone, one can infer that Congress intended to allow persons interested in a federal agency's compliance with the NHPA to file "*any* civil action" to enforce the provisions of this Act. The use of the word "any," together with the statute's lack of explicit reference to the APA, would seem to remove the limitation that the Ninth Circuit placed on the remedies available to NHPA claimants—that the APA is the sole means for private parties to seek judicial review.

Since *Sandoval*, however, a court cannot simply infer a private right of action from a statute's text; statutory intent to create one must be explicit and unambiguous. Although the Ninth Circuit agreed that the language of § 305 "demonstrates Congressional intent that individuals may sue to enforce NHPA," it nevertheless found § 305 to be ambiguous on the availability of a private right of action for two reasons: (1) the statute lacks explicit language conferring a private

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[101] *Id.* at 915 (citing NAACP v. Sec'y of Hous. & Urban Dev., 817 F.2d 149, 152-53 (1st Cir. 1987) for the last basis of its reasoning regarding the availability of review under the APA).

[102] San Carlos Apache Tribe v. United States, 417 F.3d 1091, 1098-99 & n.9 (9th Cir. 2005).

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

[104] *Blanck*, 938 F. Supp. at 925.

[105] National Historic Preservation Act § 305, 16 U.S.C. § 470w-4 (2000).

right of action; and 2) rather than allowing direct suits under the NHPA as a means of enforcement, Congress may have intended merely to allow prevailing parties to collect attorneys' fees in a suit for judicial review under the APA, which itself does not contain an attorneys' fees provision.[106] Another court has also found the congressional record on the NHPA to be ambiguous.[107]

Conceding this ambiguity, it is important to acknowledge that "Congress's statutory instructions often are ambiguous."[108] Professor Molot explains that the Supreme Court has embraced the post-*Borak* textualist approach to statutory interpretation and looks primarily to legislative intent rather than its own *ad hoc* determination of a statute's purpose.[109] The differences among the Justices regarding *how* to determine legislative intent has become more narrow.[110] The purpose of "aggressive textualism" is "purported[ly] . . . to cabin judicial discretion" and "*eliminate*" "statutory ambiguity"; however, Professor Molot warns that, by ignoring statutory context in favor of a strict construction of the text, the Court may fail to *resolve* ambiguity in favor of legislative intent.[111] To avoid this result, Molot advocates a move to a "moderate, modest version of textualism" ("moderate textualism" or "moderate textualist"), which would allow the Court to "canvas all contextual sources available" before reaching a final interpretation.[112] Moderate textualism would not entirely exclude analysis of the purpose of a textually ambiguous statute; on the contrary, it might actually give greater weight to "purposivist tools," such as "statutory purposes and policy consequences" in determining the outcome of the case.[113] The *Sandoval* decision does not preclude Molot's approach. It did not expressly overrule *Cort* and *Cannon*, nor did it adopt a clear statement rule. Recall Justice Scalia's own words: "legal context matters only to the extent it clarifies text."[114]

Furthermore, in *San Carlos Apache Tribe*, the Ninth Circuit's two main arguments against a private right of action in § 106 were contextual. In deciding that the NHPA did not provide a remedy for a violation of § 106[115] and that § 305 was ambiguous on the issue of a private right of action,[116] the court performed an extra-textual analysis to resolve the NHPA's ambiguity on the private right of action question. It analogized the purpose of the NHPA with that of NEPA,[117]

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[106] *San Carlos Apache Tribe*, 417 F.3d at 1099.

[107] *Blanck*, 938 F. Supp. at 915.

[108] Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 COLUM. L. REV. 1, 63 (2006).

[109] *Id.*

[110] *Id.*

[111] *Id.* at 49-51 (emphasis added).

[112] *Id.* at 65.

[113] *Id.*

[114] Alexander v. Sandoval, 532 U.S. 275, 288 (2001). *See supra* notes 87-89 and accompanying text.

[115] San Carlos Apache Tribe v. United States, 417 F.3d 1091, 1094 (9th Cir. 2005).

[116] *Id.* at 1099.

[117] *Id.* at 1097-98.

which does not authorize a private right of action,[118] and also looked to the availability of the APA to provide a private right of action when a federal agency violates the NHPA's procedural mandate.[119] Under Molot's moderate textualist approach, the ambiguity of the text and legislative history of § 305 would have warranted a more thorough consideration of the NHPA's purpose (and particularly that of § 106) by the Ninth Circuit in *San Carlos Apache Tribe* than it actually gave to resolve the issue. A more expansive study of the NHPA in the "context" of the NEPA would reveal that: (1) Congress' mandated scope of consultation and of the federal actions subject to review under the NHPA are broader and more far-reaching than those under NEPA; and (2) the APA does not provide a generally available remedy to satisfy those goals and mandates. As a prime example of the latter point, the APA would not have been available to the Tribe if it sought judicial review of the Department of the Interior's failure to consult the Tribe on the impact of its operation of the Dam on historic resources in the Lake. It follows that many parties similarly situated to the Tribe would not be able to seek review of federal agencies' non-compliance with the NHPA, which would contravene the statute's goals.

1. The NHPA and NEPA Are Not Sufficiently Analogous to Compel the Inference from NEPA's Lack of a Private Right of Action that the NHPA also Lacks One.

In *San Carlos Apache Tribe*, the Ninth Circuit stated that both the NHPA and NEPA are "chiefly procedural in nature," that is, that they both require federal agencies to gather information about the effects of their proposed actions and to consider that information in their decision-making processes.[120] As NEPA requires agencies to consider the environmental impact of "major Federal actions," the NHPA requires agencies to do the same for the effect of their actions on historic places.[121] The Ninth Circuit continued to explain that it is a "fundamental . . . principle of environmental law . . . that there is no private right of action under NEPA" and that parties must proceed under the APA to challenge alleged NEPA violations.[122] This contrasts with other environmental statutes, such as the Endangered Species Act and the Clean Water Act, which do provide an express right of action.[123] These statutes impose affirmative duties on private parties, whereas NEPA imposes a duty only on the federal government.[124] The court reasoned that because the NHPA also applies only to federal agencies and not to

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[118] *See infra* note 122 and accompanying text.

[119] *San Carlos Apache Tribe*, 417 F.3d at 1095-96.

[120] *Id.* (quoting Pres. Coalition, Inc. v. Pierce, 667 F.2d 851, 859 (9th Cir. 1982)).

[121] *Id.* at 1097 (quoting National Environmental Policy Act, 42 U.S.C. § 4332(2)(C) (2000)).

[122] *Id.* at 1097 (citing *Pres. Coalition, Inc.*, 661 F.2d at 859 and Morris County Trust for Historic Pres. v. Pierce, 714 F.2d 271, 278-79 (3d Cir. 1983)).

[123] *Id.*

[124] *Id.* at 1097-98.

private parties, it likewise should not provide a private right of action.[125]

Although the NHPA and NEPA both provide procedural directives to federal agencies, the consultation procedures that each statute mandates differ significantly. Section 102(C) of NEPA requires "the responsible Federal official . . . [to] consult with and obtain the comments of any Federal agency . . ." in preparing the requisite environmental impact statement on proposed legislation and "other major Federal actions."[126] The same section further requires federal agencies to make the environmental impact statement, as well as comments of "appropriate Federal, state, and local agencies, which are authorized to develop and enforce environmental standards . . . available to the President, the Council on Environmental Quality and to the public [in accordance with section 552 of the APA] . . . ."[127] This latter portion of § 102 requires only that a federal agency disseminate the comments it received from nonfederal parties; it does not mandate that the federal agency consult with those parties.

In sharp contrast with NEPA, which mandates consultation *only* with Federal agencies,[128] several sections of the NHPA mandate consultation with state and local agencies, tribes, preservation organizations, and other interested parties in the review processes of §§ 106 and 110.[129] Section 101(b) gives State Historic Preservation Officers the responsibility of consulting with Federal agencies in accordance with the NHPA "on Federal undertakings that may affect historic properties,"[130] and § 101(d) allows the Secretary of the Interior to permit Indian tribes to assume the functions of State Historic Preservation Officers "with respect to review of undertakings under [§ 106]."[131] The latter section also allows the Advisory Council on Historic Preservation to enter agreements with Indian tribes allowing § 106 review to proceed under tribal historic preservation guidelines in place of the Council regulations that "govern compliance with [§ 106]."[132] Moreover, § 101(d) explicitly requires federal agencies to engage in § 106 consultation with tribes and Native Hawaiian organizations regarding federal undertakings that may affect properties of "religious and cultural significance" to those tribes or organizations.[133] Section 110(a)(1) generally makes federal agencies responsible for "the preservation of historic properties which are owned or controlled by such agency,"[134] and § 110(a)(2) requires the agencies to develop a program for the identification, evaluation, nomination to the National Register, and protection of historic properties.[135] This section further orders federal agencies to

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[125] *Id.*

[126] 42 U.S.C. § 4332(C).

[127] *Id.*

[128] *See supra* note 126 and accompanying text.

[129] *See supra* notes 20-21.

[130] National Historic Preservation Act § 101, 16 U.S.C. § 470a(b)(3)(I)(i) (2000).

[131] *Id.* § 470a(d)(2)(D).

[132] *Id.* § 470a(d)(5).

[133] *Id.* § 470a(d)(6)(B).

[134] *Id.* § 470h-2(a)(1).

[135] *Id.* § 470h-2(a)(2).

consult with other "Federal, State, and local agencies, Indian tribes, Native Hawaiian organizations . . . and with the private sector" in carrying out its "preservation-related activities" under this section.[136] Most significantly, it requires that, in order to "*ensure . . . compliance with [§ 106],*" the agencies' preservation programs shall:

> provide a process for the identification and evaluation of historic properties . . . and the development and implementation of agreements, *in consultation with State Historic Preservation Officers, local governments, Indian tribes, Native Hawaiian organizations, and the interested public*, as appropriate, regarding the means by which adverse effects on such properties will be considered.[137]

Congress' mandate to the federal government in the NHPA to consult with a much broader class of "interested parties" than it mandates in NEPA indicates that it intended a greater role for the public in preserving the finite and tangible historic resources subject to § 106 review. With NEPA, Congress intended to require federal agencies not to consult with, but merely to publicize comments from, non-federal entities and persons.[138] In the context of the relatively scant consultation requirements of NEPA, the affirmative right of state, local, and tribal governmental entities under the NHPA to have federal agencies consult with them on historic preservation issues is clear. Under Molot's "moderate textualism,"[139] this should have warranted a more probing analysis of the statutory intent of the NHPA in its entirety by the Ninth Circuit in *San Carlos Apache Tribe* to determine whether a private right of action exists. A conservative interpretation of § 305 that limits the term "any civil action" to apply only to claims under the APA is inconsistent with the expansive involvement that Congress intended for state and local governments, tribes, and private citizens to have in weighing the impacts of federal undertakings on historic resources. Considering § 305 and its legislative history in the context of the broad consultation mandate that pervades the NHPA, it is clear that Congress intended to enable private parties to resort to the courts to enforce their right to have the federal government consult them through the detailed consultation measures provided by the NHPA.

2. The APA Would Not Be Available to the Tribe as an Alternative Enforcement Mechanism Under § 106.

In *San Carlos Apache Tribe*, the Ninth Circuit reasoned that, under *Alexander v. Sandoval*,[140] the availability of an alternative enforcement mechanism renders a

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[136] *Id.* § 470h-2(a)(2)(D).

[137] *Id.* § 470h-2(a)(2)(E)(ii) (emphasis added).

[138] *See supra* note 127 and accompanying text.

[139] *See supra* notes 111-13 and accompanying text.

[140] Alexander v. Sandoval, 532 U.S. 275 (2001). Section 602 of the Civil Rights Act contains a provision allowing federal agencies to terminate funding they provide to programs in the event that those recipients do not comply with rules or regulations that the federal agency has promulgated to effectuate § 601's ban on discrimination. Civil Rights Act of

private right of action unavailable.[141] Congress did not expressly refer to the APA in the NHPA as an alternative enforcement mechanism. Nevertheless, the Ninth Circuit held that the APA's general availability for challenges to agency action does not warrant the duplicative availability of a private right of action for statutes like the NHPA, which, like § 602 of the Civil Rights Act, are directed at federal government actors.[142] It explained that, with "limited exceptions,"[143] "an aggrieved party can sue under the APA to force compliance with § 106 without having a 'private right of action' under the statute."[144] Furthermore, the court quoted then-Judge Breyer:

> It is difficult to understand why a court would ever hold that Congress, in enacting a statute that creates federal obligations, has implicitly created a private right of action against the *federal* government, for there is *hardly ever* any need for Congress to do so. That is because federal action is *nearly always* reviewable for conformity with statutory obligations without any such 'private right of action.'[145]

As then-Judge Breyer noted, the APA is "*nearly always*" available;[146] however, it does not allow judicial review for *all* federal actions as the NHPA requires. The Supreme Court has held that a waiver of federal sovereign immunity "cannot be implied but must be unequivocally expressed."[147] The Ninth Circuit, which decided the appeal in *San Carlos Apache Tribe*, has interpreted the express waiver of sovereign immunity in § 702 of the APA[148] broadly to apply to *any* action seeking injunctive relief under 28 U.S.C. § 1331.[149] In *Block v. North Dakota*,[150] the United

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1964 § 602, 42 U.S.C. § 2000d-1 (2000). The *Sandoval* Court held that this express statutory enforcement method did not manifest an intent to create a private remedy. *Sandoval*, 532 U.S. at 289-90.

[141] San Carlos Apache Tribe v. United States, 417 F.3d 1091, 1095 (9th Cir. 2005).

[142] *Id.*

[143] *Id.* (quoting Glacier Park Found. v. Watt, 663 F.2d 882, 885 (9th Cir. 1981)).

[144] *Id.* at 1096.

[145] *Id.* at 1095-96 (quoting NAACP v. Sec'y of Hous. & Urban Dev., 817 F.2d 149, 152 (1st Cir. 1987) (some emphasis added).

[146] *Id.* (emphasis added).

[147] United States v. King, 395 U.S. 1, 4 (1969) (citing United States v. Sherwood, 312 U.S. 584 (1941)).

[148] Section 702 of the APA reads in part:

> An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party.

Administrative Procedure Act, 5 U.S.C. § 702 (2000).

[149] Cabrera v. Martin, 973 F.2d 735, 741 (9th Cir. 1992) (citing The Presbyterian Church (U.S.A.) v. United States, 870 F.2d 518, 524-25 (9th Cir. 1989) and Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation v. Mont. Bd. of Oil & Gas Conservation, 792 F.2d 782, 793 (9th Cir. 1986)). *See also* FALLON, *supra* note 82, at 968-69 ("Though

States Supreme Court dismissed the applicability of the § 702 waiver to a claim under the Quiet Title Act by the State of North Dakota against the Secretary of Agriculture, the Secretary of the Interior, and other federal officials because the Quiet Title Act forbade relief.[151] In so doing, however, it did not limit the waiver to suits against federal officers brought under the APA.[152] This general waiver of immunity is available contingent on three conditions: (1) the claim cannot be for money damages, (2) an adequate remedy cannot be available elsewhere, and (3) another statute cannot expressly or implicitly forbid relief.[153] The terms of § 704 of the APA satisfy the second condition by extending judicial review only to "[a]gency action made reviewable by statute and final agency action."[154] Section 704 precludes direct review of "[a] preliminary, procedural, or intermediate agency action or ruling not directly reviewable," making it "subject to review on the review of the final agency action."[155]

The Ninth Circuit in *San Carlos Apache Tribe* found that the NHPA contained no such express waiver of sovereign immunity; rather, it contended that the waiver was available through the APA.[156] This analysis seems contrary to previous Ninth Circuit holdings and the common understanding regarding the general application of the APA's waiver in § 702 to all equitable actions for which there is, in no other statute, an express or implied denial of relief.[157] If, as this Note argues, § 305 of the NHPA provides a private right of action, then § 702 of the APA would provide a waiver of sovereign immunity for any private claims brought under the APA as they would be actions "made reviewable by statute."[158] Accepting *arguendo*, however, that the NHPA does not contain a private right of action, the APA would still not provide an opportunity for judicial review (and thus also a waiver of sovereign immunity) to the Tribe and other similarly situated parties unless the federal action that is the subject of the complaint is a final agency action.[159] In the decision by the U.S. District Court for the District of Arizona, Judge Bury held that the day-to-day operation of the Dam was not a "final agency action" for the purposes of the Tribe's common law nuisance claim against the Federal

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codified in the APA, the waiver applies to any suit, whether under the APA, § 1331, § 1361, or any other statute.").

[150] Block v. North Dakota, 461 U.S. 273 (1983).

[151] *Id.* at 286 n.22.

[152] *Id.*

[153] Tucson Airport Auth. v. General Dynamics Corp., 136 F.3d 641, 645 (9th Cir. 1998).

[154] Administrative Procedure Act, 5 U.S.C. § 704 (2000).

[155] *Id.*

[156] San Carlos Apache Tribe v. United States, 417 F.3d 1091, 1096 (9th Cir. 2005).

[157] *See supra* notes 149-53 and accompanying text. *See also* FALLON, *supra* note 82, at 960, 968-69 (Foundation Press, 5th ed. 2003); YACKLE, *supra* note 74, at 362 & n.44; Kathryn E. Kovacs, *Revealing Redundancy: The Tension Between Federal Sovereign Immunity and Nonstatutory Review*, 54 DRAKE L. REV. 77, 81-82 & n.23 (2005).

[158] 5 U.S.C. § 704.

[159] *Id.*

government.[160] The Supreme Court has held that, for an agency action to be "final" such that it satisfies § 704's requirement for judicial review, it must satisfy two conditions: "First, the action must mark the 'consummation' of the agency's decisionmaking process . . .—it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which 'rights or obligations have been determined,' or from which 'legal consequences will flow.'"[161] If the NHPA does not provide a right of action and the operation of a dam is not a final agency action, then the APA would not be available to the Tribe to review the Department of the Interior's non-compliance with the NHPA.

B. THE "MODERATE TEXTUALIST"[162] APPROACH TO DETERMINING WHETHER THE NHPA PROVIDES A PRIVATE RIGHT OF ACTION.

Having shown that the Ninth Circuit in *San Carlos Apache Tribe* erroneously inferred that the NHPA does not provide a private right of action and, likewise, wrongfully assumed that the APA was available to the Tribe to enforce the NHPA against the BIA, this Note will now demonstrate that, under a "moderate textualist" approach,[163] an analysis of the NHPA's purpose can resolve the ambiguity of the mention of "any civil action" in § 305, the attorneys' fees provision,[164] in favor of a private right of action. As discussed earlier, the NHPA establishes in interested government entities, associations, and individuals a right to have a federal agency consult with them before it pursues an undertaking that may threaten historic resources.[165] This affirmative obligation is meaningless unless a legal remedy is available to those parties to force a non-compliant federal agency head to adhere to the NHPA's detailed provisions. As this Note further demonstrated, the U.S. District Court for the District of Arizona foreclosed the normal avenue of judicial review for administrative actions, the APA, when it held that the operation of the Coolidge Dam was not a final agency action and thus foreclosed APA review under § 704.[166]

However, a more probing examination of the text of § 106 and other provisions of the NHPA indicates that the APA would not be available to interested parties as a judicial remedy for review of certain agency actions which would otherwise require § 106 consultation. Section 106 of the NHPA requires:

> The head of any Federal agency having direct or indirect jurisdiction over a proposed Federal or federally assisted *undertaking* in any State and the head of any Federal department or independent agency having authority to license any *undertaking* . . . [to] take into account the effect of the *undertaking* on any district, site, building, structure, or object that is included in or eligible for

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[160] San Carlos Apache Tribe v. United States, 272 F. Supp. 2d 860, 884 (D. Ariz. 2003).

[161] Bennett v. Spear, 520 U.S. 154, 177-78 (1997) (internal citations omitted).

[162] *See supra* note 112 and accompanying text.

[163] *See supra* notes 112-13 and accompanying text.

[164] National Historic Preservation Act § 305, 16 U.S.C. § 470w-4 (2000).

[165] *See supra* Section V.A.2.

[166] *See supra* notes 159-60 and accompanying text.

inclusion in the National Register.[167]

Section 301 of the NHPA defines "undertaking" as "a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including—(A) those carried out by or on behalf of the agency; (B) those carried out with Federal financial assistance; (C) those requiring a Federal permit, license, or approval . . . ."[168] By the terms of the definition of "undertaking" provided in § 301, the day-to-day operation of a dam, although not a "final agency action" for purposes of the APA as the district court held, it is clearly "an activity . . . funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including—(A) those carried out by or on behalf of the agency . . . ."[169]

Another contrast with NEPA is necessary here. NEPA requires review through an environmental impact statement for "every recommendation or report on proposals for legislation and other *major Federal actions* significantly affecting the quality of the human environment . . . ."[170] The "expanded definition"[171] in § 301 of the word "undertaking" used in § 106 of the NHPA contains no such limiting word as "major"[172] to qualify the "project[s], activit[ies], or program[s]" included in it.[173] This indicates that Congress intended § 106's mandate to federal agencies for consultation on impacts to historic resources to extend to a broader class of federal actions than it intended in NEPA.[174]

Recall that § 704 of the APA limits judicial review only to "[a]gency action made reviewable by statute and final agency action"[175] and that the Supreme Court defined "final agency action" to include those that "mark the 'consummation' of the agency's decisionmaking process . . ." and by which 'rights or obligations have been determined,' or from which 'legal consequences will flow.'"[176] If Congress

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[167] 16 U.S.C. § 470f (emphasis added).

[168] *Id.* § 470w(7).

[169] *Id.*

[170] National Environmental Policy Act, 42 U.S.C. § 4332(2)(C) (2000) (emphasis added).

[171] Nat'l Mining Ass'n v. Fowler, 324 F.3d 752, 754 (D.C. Cir. 2003).

[172] 42 U.S.C. § 4332(2)(C).

[173] 16 U.S.C. § 470w(7).

[174] *But see* Ringsred v. City of Duluth, 828 F.2d 1305, 1306-08 (8th Cir. 1987) (dismissing an NHPA claim because "[t]he parties treat[ed] NHPA's 'undertaking' requirement as essentially coterminous with NEPA's 'major Federal actions' requirement" and the court had first held that earlier in the opinion that the project in question was not a "major Federal action" under NEPA). This case does not serve as precedent that NHPA "undertakings" are coextensive with NEPA's "federal agency action" because, by stipulation, that issue was not before the Eighth Circuit. Furthermore, the court cites *United States v. 162.20 Acres of Land* as an example for support on this point. *Id.* The Fifth Circuit in *162.20 Acres of Land*, however, held only that the federal government's noncompliance neither with NEPA nor with NHPA is a valid defense to condemnation proceedings. United States v. 162.20 Acres of Land, 639 F.2d 299, 304 n.5 (5th Cir. 1981).

[175] *See supra* note 154 and accompanying text.

[176] *See supra* note 161 and accompanying text.

did not intend to provide a private right of action in the NHPA, then parties could only seek to enforce agency compliance with the NHPA when a "final agency action"[177] had occurred. Nothing in the expansive definition of "undertaking"[178] in § 301 indicates that NHPA shall apply only to "final agency action."[179]

However, this is where use of the "purposivist tools" which Molot's "moderate textualism" approach allows can best resolve the ambiguity of the remedy intended for statutory violations of the NHPA.[180] A look to the statute's purpose in § 1 of the NHPA indicates Congress' concern for the "increasing frequency" with which "historic properties . . . are being lost or substantially altered . . ." and describes this heritage as "irreplaceable."[181] Where NEPA seeks to prevent damage to the natural environment which is, in many cases, neither immediate nor immitigable, the NHPA seeks to protect the destruction of irreplaceable and unique historic properties and resources. A construction of the term "any civil action"[182] in § 305 to apply only to suits for judicial review under the APA and not to provide a private right of action directly under the APA would mean that parties could not sue to enjoin NHPA consultation by a federal agency for "undertakings" that may be "activit[ies] . . . carried out by or on behalf of the agency,"[183] but are not "final agency action[s]"[184] that "mark the 'consummation' of the agency's decisionmaking process . . ." and by which 'rights or obligations have been determined,' or from which 'legal consequences will flow,'"[185] such as the daily operation of a dam.

With the APA unavailable to interested parties to enforce the NHPA for "undertakings,"[186] that are not "final agency action[s],"[187] a private right of action remains the only completely adequate remedy available for them to enforce the provisions of the NHPA. This is particularly true for § 106, which most effectively accomplishes the NHPA's purpose of preserving the Nation's "irreplaceable"[188] historic resources by "encourag[ing] the public and private preservation and utilization of all usable elements of the Nation's historic[ally] built environment."[189] Courts should therefore resolve the ambiguity in the NHPA's attorneys' fees provision (§ 305) to prevent the contravention of the statute's purpose.

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[177] Administrative Procedure Act, 5 U.S.C. § 704 (2000).
[178] 16 U.S.C. § 470w(7).
[179] 5 U.S.C. § 704.
[180] *See supra* notes 112-13 and accompanying text.
[181] 16 U.S.C. § 470(b)(3)-(4).
[182] *Id.* § 470w-4.
[183] *Id.* § 470w(7).
[184] 5 U.S.C. § 704.
[185] *See supra* note 161 and accompanying text.
[186] 16 U.S.C. § 470w(7).
[187] 5 U.S.C. § 704.
[188] *See supra* note 181 and accompanying text.
[189] 16 U.S.C. § 470-1(5).

CONCLUSION

In its 2001 landmark decision in *Alexander v. Sandoval*, the Supreme Court disavowed the authority of federal courts to infer a private right of action in a statute that lacks clear statutory intent to provide one.[190] Prior to that decision, federal courts had allowed interested parties to sue federal agencies to enforce the consultation provisions in § 106 of the National Historic Preservation Act.[191] Two circuit courts of appeals had inferred such a right in the NHPA from the statute's attorneys' fees provision,[192] which provides that a court may award attorneys' fees and other costs to the party which "substantially prevails" "[i]n any civil action brought in any United States district court by any interested person to enforce the provisions of this Act . . . ."[193] The Ninth Circuit was the first circuit court of appeals to consider the existence of a private right of action under the NHPA following *Sandoval*. In *San Carlos Apache Tribe v. United States*, an Apache tribe in Arizona sued the Department of the Interior to enjoin the release of water below a certain level from a reservoir behind a dam on the tribe's reservation because the constant fluctuations in the water level damage several sites of historic and cultural significance to the Tribe in the reservoir's basin.[194]

Citing *Sandoval*,[195] the Ninth Circuit held that the NHPA does not provide a private right of action because the text of the statute does not indicate that Congress intended to make suits against the United States available under the statute itself.[196] The court relied primarily on the fact that the NHPA is merely a directive to federal government actors and not focused on those harmed by agency action.[197] The court also held that the availability of the APA for judicial review of agency action suggests that Congress would not intend a private right of action to enforce the NHPA without express authorization to circumvent the APA process.[198] Finally, the court noted the NHPA's lack of a waiver of sovereign immunity[199] and analogized the NHPA with NEPA,[200] a statute with a similar purpose, but relative to impacts of federal actions on environmental, not historic, resources. Because NEPA does not provide a private right of action, the court inferred that the NHPA would not have one either.[201]

Professor Molot has argued that a strict textualist approach may actually lead to a

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[190] Alexander v. Sandoval, 532 U.S. 275, 286-87 (2001).

[191] 16 U.S.C. § 470f. *See* cases cited *supra* notes 90 and 94.

[192] Boarhead Corp. v. Erickson, 923 F.2d 1011, 1017 (3d Cir. 1991); Vieux Carre Prop. Owners, Residents & Assoc., Inc. v. Brown, 875 F.2d 453, 458 (5th Cir. 1989).

[193] 16 U.S.C. § 470w-4.

[194] San Carlos Apache Tribe v. Untied States, 417 F.3d 1091, 1092-93 (9th Cir. 2005).

[195] *Sandoval*, 532 U.S. at 286.

[196] *San Carlos Apache Tribe*, 417 F.3d at 1099.

[197] *Id.* at 1095.

[198] *Id.* at 1096-97.

[199] *Id.* at 1096.

[200] *Id.* at 1097.

[201] *Id.* at 1098.

statutory interpretation that contravenes legislative intent.[202] He suggests that courts look to contextual clues and the purpose of the statute when purely textualist tools fail to resolve ambiguity in a statute.[203] In *San Carlos Apache Tribe*, although the Ninth Circuit looked to the legal context of the NHPA with its reference to the APA and NEPA, a more thorough analysis would have resolved the ambiguity of the attorneys' fees provision in favor of a private right of action. Contrasted with NEPA, the NHPA creates an affirmative obligation on federal agencies to consult with state and local governments, Indian tribes, and other interested members of the public, a mandate which NEPA lacks. This right to be consulted by a federal agency when it considers the impact of its actions, along with the attorneys' fees provision, suggests that Congress envisioned that private parties could sue a federal agency to ensure compliance with the NHPA.

Furthermore, the APA's general waiver of sovereign immunity in § 702 for actions seeking injunctive relief against the federal government would apply to actions under the NHPA; however, absent a private right of action, the APA would offer a judicial review remedy for NHPA violations only for "final agency action[s]."[204] The U.S. District Court in *San Carlos Apache Tribe v. United States* held that the operation of the Coolidge Dam was not a final agency action for the purpose of judicial review.[205]

Finally, in further applying the "moderate textualist" approach and surveying other provisions of the NHPA, it is clear that Congress envisioned that the scope of federal consultation on impacts to historic resources would attach to a broad range of federal actions. Congress intended the NHPA to apply to all federal "undertakings"[206] that would impact historic resources, and the statutory definition of that term is expansive.[207] If interested parties were limited to the APA to enforce compliance with the NHPA, they could seek review solely for "final agency actions,"[208] a limitation that is not apparent in the NHPA. Failing to find a private right of action in the NHPA prevents interested parties from petitioning the federal courts to order compliance for certain federal undertakings. This restraint on enforcement undermines Congress' intent in enacting the NHPA. Not only does it frustrate the critical role of local preservation advocates, but it also enables the federal government to disregard its own responsibility in preserving our "irreplaceable heritage" and the "vital legacy" of the nation's historic resources.[209]

Timothy J. Famulare

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[202] Molot, *supra* note 108, at 50.

[203] *Id.* at 65.

[204] Administrative Procedure Act, 5 U.S.C. § 704 (2000).

[205] San Carlos Apache Tribe v. United States, 272 F. Supp. 2d 860, 884 (D. Ariz. 2003).

[206] National Historic Preservation Act, 16 U.S.C. § 470w(7) (2000).

[207] Nat'l Mining Ass'n v. Fowler, 324 F.3d 752, 754 (D.C. Cir. 2003).

[208] 5 U.S.C. § 704.

[209] 16 U.S.C. § 470(b)(4).