

The National Historic Preservation Act: An Inadequate Attempt to Protect the Cultural and Religious Sites of Native Nations

Amanda M. Marincic*

ABSTRACT: The National Historic Preservation Act (“NHPA”) of 1966 established a federal policy of preserving historic places at the federal, state, and local level. In 1992, the Act was amended to include sites of cultural and religious significance to Native Nations on the National Register of Historic Places. This Note argues how that inclusion, while a noble step in the right direction for Native Nation relations with the federal government, did not go far enough to adequately protect the cultural and religious sites of Native Nations. This Note discusses the NHPA’s effectiveness in protecting the cultural and religious sites of Native Nations, the origins and purpose of the Act, the statutory framework of the Act, and the shortcomings of the Act. The Note concludes by recommending that Congress amend the NHPA to require that a federally-approved or funded project must not have any adverse effects on a cultural or religious site in order to move forward, unless all of the involved parties agree to move forward despite the adverse effects.

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* J.D. Candidate, The University of Iowa College of Law, 2018; B.A., University of St. Thomas, 2015. I would like to thank the *Iowa Law Review* editorial boards for Volumes 102 and 103 for their help in editing this Note. I would also like to thank my family and friends for their support, especially my parents, Patricia and Andrew Marincic, and my sister, Emily.

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I. INTRODUCTION

Since Europeans first set foot in North America, conflicts between Native Nations and North American governments have been rampant. Both Native Nations and the United States' government have attempted to ease tensions, with some attempts more genuine than others. However, the United States' government has consistently disrespected Native Nations. From broken treaties, forced assimilation, brutal massacres, and mass removal of entire tribes to different parts of the country, the United States' disregard toward Native Nations' lives and cultures has been a consistent theme in Native American relations.¹

For centuries, North American governments recognized the sovereignty of Native Nations, primarily evidenced by treaty-making.² In 1871, however, the United States effectively broke with this tradition by discontinuing treaty-making, an action which effectively relegated Native Nations to a position

1. For an eloquent account of the major points of Native Nations' interactions with the early European settlers and a more detailed narrative of the western Native Nations' dealings with the growing United States, see generally DEE BROWN, *BURY MY HEART AT WOUNDED KNEE: AN INDIAN HISTORY OF THE AMERICAN WEST* (1970). For a rich discussion of Euro-Americans' changing perception of the Native peoples from desired allies to "inferior races," see generally RICHARD WHITE, *THE MIDDLE GROUND: INDIANS, EMPIRES, AND REPUBLICS IN THE GREAT LAKES REGION, 1650-1815* (2d ed. 2011).

2. See WHITE, *supra* note 1, at 435-36.

unequal to the federal government.³ The effect of this action was compounded by the passage of the Dawes Act in 1887. The Dawes Act gave the president of the United States the power to unilaterally divide reservation land to allot the land to individual Native Americans.⁴ Furthermore, the Act asserted federal law over Native Americans.⁵ The Dawes Act not only forced upon Native Americans Western views of property ownership and individualized society, but the Act also effectively extended the authority of the federal government directly over Native Americans on reservations.⁶ Since the passage of the Dawes Act, tensions between Native Nations and the federal government have not eased.

The National Historic Preservation Act (“NHPA”), as amended in 1992 to include Native cultural and religious sites on the National Historic Register, is arguably a step in the right direction for Native American relations. However, the NHPA does not account for the cultural differences that prevent understanding of Native Nations’ religions and cultures. This failure of understanding in turn prevents adequate protection of Native sites. This Note argues that, while a commendable step, the NHPA does not go far enough in protecting Native Nations’ cultural, religious, and historic sites.⁷

The NHPA’s ability to effectively protect Native Nations’ cultural sites is hampered by the difficulties the statute itself imposes, as well as the cultural barriers between Native Nations and the United States. The NHPA provides one of the few avenues for Native Nations to protect their cultural sites.⁸ Strengthening the NHPA would not only provide more effective protection of Native Nations’ cultural sites, but it would also signal to Native Nations that the United States is serious about respecting Native Nations’ culture, religion, and sovereignty.

Beginning in 2016, the Standing Rock Sioux Tribe engaged in a highly-publicized, year-long legal battle with Energy Transfer Partners regarding the construction of the Dakota Access Pipeline (“DAPL”). The Tribe initially

3. Charles Rennick, Comment, *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, 69 (2006) (citing Sharon O’Brien, *Tribal Governments*, in AMERICAN INDIANS AND U.S. POLITICS: A COMPANION READER 4, 42 (John M. Meyer ed., 2002)).

4. Dawes Severalty Act of 1887, ch. 119, 24 Stat. 388, 388 (repealed 2000).

5. *Id.*

6. *Id.*

7. The NHPA explicitly states that agencies must consult Native tribes when an undertaking will affect property that has a religious or cultural connection to those tribes. Throughout this Note, “cultural sites” includes both religious and cultural sites.

8. Another avenue is the First Amendment, which is often ineffective. See Peter J. Gardner, *The First Amendment’s Unfulfilled Promise in Protecting Native American Sacred Sites: Is the National Historic Preservation Act a Better Alternative?*, 47 S.D. L. REV. 68, 72 (2002) (“[T]he First Amendment may not ‘be asserted to deprive the public of its normal use of an area,’ and the use by . . . ‘relatively few persons of public lands for religious purposes does not release the government from its statutory responsibility to manage such lands for the benefit of the public at large.’” (footnotes omitted)).

argued that the DAPL's construction would destroy ancient burial sites and potentially poison their only source of drinking water, the Missouri River.⁹ The Tribe also argued that the agency involved in the project, the Army Corps of Engineers, did not fulfill the obligations required by the NHPA.¹⁰ For a while, the fate of the DAPL was uncertain, with permits for construction being denied and then granted.¹¹ After the Army Corps of Engineers granted the permit pursuant to President Trump's memorandum, construction on the DAPL was completed.¹² After several failed attempts by the Standing Rock Sioux to halt operation of the DAPL, a federal district judge ruled in June 2017 that the environmental impact studies done on the DAPL were inadequate.¹³ While this ruling is a small victory for the Standing Rock Sioux Tribe, the NHPA was useless in protecting its cultural sites from significant damage.

Part II of this Note introduces the NHPA and provides the historical and cultural background information necessary to understand the full implications of the NHPA. Part II.A discusses the NHPA and the cultural conflicts inherent in its construction. Next, Part II.B explains the statutory framework of the NHPA, while Part II.C discusses the role of the Administrative Procedure Act in enforcing the NHPA's requirements. Finally, Part II.D examines the circuit split on whether the NHPA confers a private right of action.

9. Robinson Meyer, *The Legal Case for Blocking the Dakota Access Pipeline: Did the U.S. Government Help Destroy a Major Sioux Archeological Site?*, ATLANTIC (Sept. 9, 2016), <http://www.theatlantic.com/technology/archive/2016/09/dapl-dakota-sitting-rock-sioux/499178>.

10. Sam Levin, *Dakota Access Pipeline: The Who, What and Why of the Standing Rock Protests*, GUARDIAN (Nov. 3, 2016, 8:00 AM), <https://www.theguardian.com/us-news/2016/nov/03/north-dakota-access-oil-pipeline-protests-explainer>.

11. President Obama blocked the construction of the DAPL in September 2016, after a federal district court denied the Tribe's request for a preliminary injunction to halt construction. Robinson Meyer, *The Obama Administration Temporarily Blocks the Dakota Access Pipeline*, ATLANTIC (Sept. 9, 2016), <https://www.theatlantic.com/science/archive/2016/09/the-obama-administration-temporarily-blocks-the-dakota-access-pipeline/499454>. However, this decision was reversed by President Trump's Presidential Memorandum Regarding Construction of the Dakota Access Pipeline. Memorandum from President Donald J. Trump, President, United States, to Ryan McCarthy, Sec'y of the Army, United States (Jan. 24, 2017), <https://assets.documentcloud.org/documents/3410448/Construction-of-the-Dakota-Access-Pipeline.pdf>. The memorandum states that the U.S. Army Corps of Engineers and other involved federal agencies should "review and *approve* in an expedited manner . . . requests for approvals to construct and operate the DAPL." *Id.* (emphasis added). The memorandum also directs the Army Corps to "review and grant . . . requests for waivers of notice periods" relating to Army Corps real estate policies. *Id.*

12. According to Energy Transfer Partners, the company that owns the DAPL, oil began to flow through the DAPL on June 1, 2017. *How much of the Dakota Access Pipeline is Complete?*, DAKOTA ACCESS: PIPELINE FACTS, https://daplpipefacts.com/dt_articles/how-much-of-the-dakota-access-pipeline-is-complete (last visited Feb. 10, 2018).

13. Associated Press, *Dakota Access Pipeline: Judge Rules Environmental Survey Was Inadequate*, GUARDIAN (June 14, 2017, 10:03 PM), <https://www.theguardian.com/us-news/2017/jun/14/dakota-access-pipeline-environmental-study-inadequate>. The judge, however, did not halt the operation of the pipeline, despite this inadequacy. *Id.*

Part III analyzes the issues and problems with the NHPA as it currently stands. These problems include the lack of effective protection under the NHPA and the ease with which parties may meet the NHPA's requirements. First, Part III.A analyzes the statutory and regulatory language of the NHPA, especially the review process necessary to meet the NHPA's requirements. Part III.B discusses the lack of adequate judicial review by analyzing the excessive deference courts give to agency decisions, the circuit split on the private right of action, and the lack of a waiver of sovereign immunity.

Finally, Part IV proposes that Congress amend the NHPA to provide stronger, more effective protection of Native Nations' cultural sites and explicitly confer a private right of action.

II. BACKGROUND

A. THE NATIONAL HISTORIC PRESERVATION ACT AND CULTURAL CONFLICTS

The NHPA and the regulations, case law, and cultural implications surrounding it are complex. To clarify these complexities, this Part discusses: (1) the NHPA and the cultural conflicts surrounding it; (2) the statutory framework of the NHPA; (3) the Administrative Procedure Act's role in NHPA claims; and (4) the circuit split on whether the NHPA confers a private right of action. This information provides a backdrop for the current issues with the NHPA.

Before the national historic preservation program accounted for Native American cultural and religious sites, the federal government actively worked to destroy the culture of Native Nations. For Native Nations west of the Mississippi River, this destruction began with the rapid influx of settlers into the Western frontier.¹⁴ In many instances, this influx resulted in horrendous violence between settlers and Native Americans.¹⁵ As the violence escalated, Congress acted in 1867 to bring peace to the West by creating the Indian Peace Commission.¹⁶ Peace would be achieved by placing Native Americans onto reservations, where they would be segregated from the white settlers and introduced to "civilization."¹⁷ By the end of the 19th century, this objective was largely achieved.¹⁸ However, settlers and local governments stole, as a matter of policy, reservation land that was usable for agriculture.¹⁹ As a result,

14. See BROWN, *supra* note 1, at 8–9 (presenting a historical overview of American westward expansion).

15. See generally *id.* (recounting innumerable instances of horrific violence between settlers and Native Nations).

16. DAVID MAYERS, *DISSENTING VOICES IN AMERICA'S RISE TO POWER* 165 (2007).

17. *Id.*

18. Chip Colwell-Chanthaphonh, *The Incorporation of the Native American Past: Cultural Extermination, Archaeological Protection, and the Antiquities Act of 1906*, 12 INT'L J. CULTURAL PROP. 375, 378 (2005).

19. See *id.* at 378–79

Native Americans living on reservations were left with land that could not sustain their population, and starvation and disease were rampant.²⁰

The physical destruction of Native Americans, whether through outright violence or more subtle means resulting in starvation and disease, was only a part of the degradation of entire Nations. During the late 19th and early 20th centuries, the federal government also aimed to culturally “assimilate” Native Americans.²¹ Families “were forced to send their children to distant boarding schools where [the children] were made to forget their indigenous languages and beliefs and replace [them] with American mores.”²² The federal government, through the Bureau of Indian Affairs, essentially became “cultural enforcers.”²³ Native Americans who practiced traditional ways of life were often arrested.²⁴ By the time Native Americans were granted the ability to gain citizenship in 1924, their traditional culture and religious beliefs had been nearly eradicated.²⁵

Congress passed its first historic preservation legislation in 1906 in response to archeologists’ efforts to protect Native American cultural artifacts and historic sites.²⁶ Ironically, the Antiquities Act was passed to protect Native American cultural artifacts, but was not passed to protect Native Americans themselves.²⁷ Proponents of the Act wished to preserve the “monuments of the prehistoric peoples of the Southwest” and lamented the looting and sale of cultural artifacts from these monuments, yet disregarded the active destruction of the Native American culture they deemed “prehistoric.”²⁸ The Antiquities Act’s primary usage, despite its supporters’ intent, has been to

20. *Id.*

21. *Id.* at 377–80 (“The aim of radical cultural assimilation was also achieved through the disruption of Native American economic activities, child-raising, religion, and individual autonomy.”).

22. *Id.* at 379.

23. *Id.*

24. *Id.* at 379–80. Some examples of offenses included polygamy, feasts, dances, and various non-Christian religious practices. *Id.* at 380.

25. MAYERS, *supra* note 16, at 186.

26. The Antiquities Act of 1906 established that the President may declare national landmarks and monuments. Antiquities Act of 1906, 54 U.S.C.A. § 320301 (West 2014); Colwell-Chanthaphonh, *supra* note 18, at 376; H. Barry Holt, Comment, *Archeological Preservation on Indian Lands: Conflicts and Dilemmas in Applying the National Historic Preservation Act*, 15 ENVTL. L. 413, 414 (1985) (discussing how the Antiquities Act of 1906 granted executive departments specific powers to preserve historic and prehistoric sites on federal property).

27. Colwell-Chanthaphonh, *supra* note 18, at 382 (“It is significant, then, that anthropologists realized the close connection between ancient ruins and living Native Americans and yet did not suggest that native peoples should actually have any rights to these places.”).

28. *See id.* (quoting J. Walter Fewkes, *Two Ruins Recently Discovered in the Red Rock Country, Arizona*, 9 AM. ANTHROPOLOGIST 263, 270 (1896)).

designate National Monuments, such as Devil's Tower in Wyoming and Mount Olympus in Washington.²⁹

Throughout the 20th Century, Congress continued to pass supplementary acts in order to protect culturally significant sites or landmarks.³⁰ For example, the Historic Sites Act of 1935 specifically states that "it is a national policy to preserve for public use historic sites, buildings, and objects of national significance for the inspiration and benefit of the people of the United States."³¹

In 1966, Congress passed the NHPA.³² Congress specifically noted that there must be a "meaningful balance . . . between preservation of these important elements of our heritage and new construction to meet the needs of our ever-growing communities and cities."³³ To achieve this balance between urban expansion and historic preservation, the NHPA "established a complex national program for historic preservation" that state and local governments and federal agencies would implement.³⁴ The original version of the NHPA did not contemplate the preservation of Native American history.

While later amendments expanded the NHPA to cover Native American cultural and historic sites,³⁵ the NHPA in its original form did not mention Native Nations or Native American land.³⁶ This congressional oversight reflects the historic state of affairs between the United States and Native Nations and illustrates the consistent tensions between European settlers and Native Americans.³⁷ Understanding that the historic and modern tensions

29. *Antiquities Act of 1906*, THEODORE ROOSEVELT CTR., <http://www.theodorerooseveltcenter.org/Learn-About/TR/TR-Encyclopedia/Conservation/The-Antiquities-Act-of-1906> (last visited Feb. 10, 2018).

30. Holt, *supra* note 26, at 415–16; Rennick, *supra* note 3, at 71–74.

31. Historic Sites Act of 1935, 54 U.S.C.A. § 320101 (West 2014).

32. National Historic Preservation Act of 1966, 54 U.S.C.A. § 300101 (West 2014).

33. H.R. REP. NO. 89-1916, at 6 (1966), *reprinted in* 1966 U.S.C.C.A.N. 3307, 3307–08 ("It is important that [properties of historical, architectural, or cultural significance] be brought to light and that attention be focused on their significance whenever proposals are made . . .").

34. Holt, *supra* note 26, at 415; *see also* 54 U.S.C.A. § 300101 (outlining the policy of the NHPA to encourage cooperation between "States, local governments, [and] Indian tribes").

35. S. REP. NO. 102-336, at 13 (1992); *see also* 54 U.S.C. § 300101(1). This provision explicitly distinguishes "Indian tribes" from "Native Hawaiian organizations." *Id.* § 300101(6). This Note focuses on how the NHPA affects "Indian tribes" and not Native Hawaiian organizations. Also, this Note refers to "Indian tribes" as "Native Nations" where appropriate.

36. Holt, *supra* note 26, at 432.

37. Beginning with the colony at Jamestown, these tensions quickly turned to violence. *See* HOWARD ZINN, A PEOPLE'S HISTORY OF THE UNITED STATES: 1492–PRESENT 12–16 (3d ed. 1999). Zinn describes multiple instances of violence and war between Native Nations and the European colonists. *Id.* At Jamestown, the European settlers, "[n]ot able to enslave the Indians, and not able to live with them . . . decided to exterminate them." *Id.* at 13. In what is now New England, the Puritans instigated a war with the local Natives, the Pequot, which contributed to the near-annihilation of the tribe. *Id.* at 13–15. In addition to brutal wars and massacres, Native peoples were

often arise from differences between cultures, especially in the value each culture places on land and privacy, is essential to understanding the impact, shortcomings, and advances of the NHPA.

To a judiciary whose values may inherently conflict with Native American values, “claims by Indians that development of public lands violates their religious beliefs would seem at once obstructionist and counterproductive.”³⁸ Western culture values property differently than Native American culture. Unlike Western religions, Native American religions are inextricably tied to the land.³⁹ The “sacred geography” inherent in Native American culture and religious practices is a key source of cultural conflict with significant impacts on the effectiveness of the NHPA.⁴⁰ Many Native Nations believe that destruction or disturbance of religious and cultural sites disrupts the harmony of nature, which is a main premise of many traditional Native American religions.⁴¹ Because of the strong religious ties Native Americans have to the land, preserving historic Native sites is essential to their beliefs.⁴² This concern goes beyond preserving a site for its aesthetic, economic, or even historic value; it ties directly into preserving Native American’s culture, history, and religion.⁴³ Preservation of these sites is especially important when one realizes

decimated by European diseases they had not encountered before. *Id.* at 16. This loss left them in a weaker position to defend themselves from attacks by the European settlers. *Id.* at 16–17.

38. Sarah B. Gordon, *Indian Religious Freedom and Governmental Development of Public Lands*, 94 YALE L.J. 1447, 1464 (1985).

39. *Id.* at 1467–68; Holt, *supra* note 26, at 418. While Native American religious beliefs and practices vary greatly from tribe to tribe, there are consistent themes throughout. In most, if not all, Native religions, the land itself is considered sacred. Brian Edward Brown, *Native American Religions, the First Amendment, and the Judicial Interpretation of Public Land*, 15 ENVTL. HIST. REV. 19, 19–21 (1991). Unlike in Christian traditions, where worship is tied to a building usually placed in an accessible location for convenience’s sake, Native traditions of worship are tied to specific geographic locations. *Id.* at 21. For example, the Navajo Nation considers the Rainbow Bridge in Utah (now a national monument) a sacred place which reflects an incarnate form of certain Navajo gods and was used by the Navajo Nation to perform religious ceremonies. *Id.* at 22–23. In the 1960s, however, the building of a dam flooded the area, effectively “drowning” the Navajo gods, preventing access to the site, and inhibiting the performance of the Navajo’s ceremonies. *Id.* at 24. The presence of the Navajo gods was located in the land itself; the completion of the dam and the subsequent formation of the lake severed the Navajo’s (and other Native Nations who consider the location sacred) ties to this sacred place. *Id.* at 22–23.

40. Gardner, *supra* note 8, at 76 (“Where Western religions build structures to designate holy sites, Indian religions hold the land itself holy.”).

41. Holt, *supra* note 26, at 418 (“Traditional American Indian religions generally are directed toward maintaining harmony with nature. In such belief systems, disruption of this harmony may have disastrous consequences for a particular group or even the entire world.”).

42. *Id.* at 418–19.

43. In the words of David Archambault, former Tribal Chairman of the Standing Rock Sioux Tribe:

History connects the dots of our identity, and our identity was all but obliterated. Our land was taken, our language was forbidden. Our stories, our history, were almost forgotten. What land, language, and identity remains is derived from our cultural and historic sites. . . . Sites of cultural and historic significance are important

the breadth of blatant cultural degradation that took place in the 19th to early 20th centuries, and the more subtle forms of cultural degradation occurring today.⁴⁴ While these cultural conflicts are all but impossible to remove from the litigation process in an NHPA claim, understanding the cultural differences may provide the judiciary with a stronger knowledge base to properly protect Native land.

Privacy is another cultural difference that makes the NHPA ineffective. To protect their cultural sites under the NHPA, Native Nations must disclose the location of those sites, which can itself put those sites in danger of disturbance.⁴⁵ Because disturbances of any kind to religious and cultural sites can be immeasurably harmful to Native Americans' religious practices, Native Nations typically do not want to make information about those sites available to third parties or the public.⁴⁶ Given that the NHPA requires federal agencies to identify and record potentially eligible historic sites,⁴⁷ there is an inherent conflict between the required disclosure of those sites and Native Nations' interest in maintaining those sites' privacy. As evidenced by the countless atrocities committed against Native Nations, the U.S. government has not historically demonstrated enough cultural sensitivity and respect towards Native Nations.⁴⁸ Native Nations understandably do not, and arguably should not, trust the United States to effectively protect their cultural sites.⁴⁹ The fact that the NHPA perpetuates this disrespect reinforces Native Nations' distrust of the federal government. The lack of cultural understanding and respect in

to us because they are a spiritual connection to our ancestors. Even if we do not have access to all such sites, their existence perpetuates the connection. When such a site is destroyed, the connection is lost.

Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs, 205 F. Supp. 3d 4, 15, 33 (D.D.C. 2016) (citing Archambault Decl., ¶¶ 6, 15).

44. See *supra* notes 14–29 and accompanying text.

45. See Holt, *supra* note 26, at 419 (describing the practice of “[p]ot hunting,” illegal looting of ruins to recover valuable artifacts, that has plagued many Native Nations, especially in the Southwest). While the Code of Federal Regulations includes a provision to restrict disclosure of sensitive information under section 800.6(a)(5), such restrictions only apply in specific situations. 36 C.F.R. § 800.6(a)(5) (2016); *id.* § 800.11(c).

46. Holt, *supra* note 26, at 419.

47. 36 C.F.R. § 800.4(b)–(c).

48. See *supra* notes 14–29 and accompanying text.

49. See, e.g., BROWN, *supra* note 1, at 439–45 (describing the massacre at Wounded Knee, where the United States Cavalry took a band of Hunkpapas captive and, when a rifle was discharged in the course of disarming the Native Americans, “immediately the soldiers returned fire and indiscriminate killing followed” (citing U.S. BUREAU OF ETHNOLOGY, REPORT 14TH 885 (1892–1893))); DANIEL K. RICHTER, FACING EAST FROM INDIAN COUNTRY: A NATIVE HISTORY OF EARLY AMERICA 2 (2001) (“Whites and Indians had to *learn* to hate each other—had even to learn that there were such clear-cut ‘racial’ categories as ‘White’ and ‘Indian’—before ‘westward expansion’ across a steadily advancing ‘frontier’ could become the trajectory for a nation that was itself a belated result of the same learning process.”); WHITE, *supra* note 1, at 519 (“[R]emoval [is] a policy based on the premise that whites and Indians could not coexist alongside each other until Indians were ready to be assimilated fully into American society.”).

the NHPA, and the federal government's continued disregard for Native American culture, demonstrate the NHPA's ineffectiveness in protecting Native Nations' cultural and religious sites.

B. THE STATUTORY FRAMEWORK OF THE NHPA

The NHPA and its regulations designate specific parties to play a role in enforcing the NHPA. This Section outlines those parties and their roles in fulfilling the requirements of the NHPA and gives an overview of when a Native cultural site may be protected under the NHPA.

The parties involved in meeting the NHPA's requirements are varied. The NHPA applies to land on, or eligible for inclusion on, the National Register of Historic Places ("National Register").⁵⁰ The various parties outlined in the NHPA do not become involved in a project unless that project affects land tied to the National Register. These parties include the Advisory Council on Historic Preservation ("Advisory Council"), federal agency officials from involved agencies, the State and Tribal Historic Preservation Officers, representatives of local governments, applicants for federal permits/licensing, and the public.⁵¹ Congress established the Advisory Council to communicate with and "advise the President and Congress on matters relating to historic preservation."⁵² Like other executive agencies, the Advisory Council, comprised of 24 members appointed by the Executive, promulgates regulations to fulfill the purposes of the NHPA.⁵³ In addition, the Advisory Council provides guidance on and oversees the section 106 review process, which outlines the requirements federal agencies must meet to fulfill their obligations under the statute.⁵⁴

The NHPA protects land on, or eligible for inclusion on, the National Register.⁵⁵ To be eligible for inclusion on the National Register, the land must be associated with significant events, people, or architecture, or the land must have the potential to yield information relating to prehistory or history.⁵⁶ This

50. National Historic Preservation Act of 1966, 54 U.S.C.A. § 300101 (West 2014).

51. 36 C.F.R. § 800.2.

52. 54 U.S.C.A. § 304102(a)(1).

53. *Id.* § 304108.

54. 36 C.F.R. § 800.2(b).

55. 54 U.S.C.A. § 300101.

56. 36 C.F.R. § 60.4.

The quality of significance in American history, architecture, archeology, engineering, and culture is present in districts, sites, buildings, structures, and objects that possess integrity of location, design, setting, materials, workmanship, feeling, and association and

(a) that are associated with events that have made a significant contribution to the broad patterns of our history; or

(b) that are associated with the lives of persons significant in our past; or

(c) that embody the distinctive characteristics of a type, period, or method of construction, or that represent the work of a master, or that possess high

includes property that is “of traditional religious and cultural importance to” Native Nations.⁵⁷ Current listings on the National Register include the Wounded Knee Battlefield, Mount Vernon, and St. Patrick’s Cathedral in New York City.⁵⁸ The NHPA requires that a federal agency consider the adverse effects of an “undertaking” when a federal or federally assisted “undertaking” may have an effect on the historic property.⁵⁹ An undertaking is “a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency.”⁶⁰ For example, an undertaking could be a project paid for by the U.S. government, or a project which requires a permit from a federal agency, such as the Army Corps of Engineers.

The section 106 process begins when an agency official determines that a project is an “undertaking.”⁶¹ When an undertaking may have an effect on a historic property, the federal agency involved must provide the Advisory Council with an opportunity to comment on the effects of the undertaking.⁶² This consideration is commonly referred to as section 106 review, process, or consultation.⁶³ Courts often refer to this type of provision as a “stop, look, and listen” provision.⁶⁴ The goal of section 106 review “is to identify historic properties potentially affected by the undertaking, assess its effects and seek

artistic values, or that represent a significant and distinguishable entity whose components may lack individual distinction; or

(d) that have yielded, or may be likely to yield, information important in prehistory or history.

Id.

57. National Historic Preservation Act of 1966, 54 U.S.C.A. § 302706(a) (West 2014).

58. See *National Register of Historic Places Program: Research*, NAT’L PARK SERV., <https://www.nps.gov/nr/research> (last visited Feb. 10, 2018) (providing a list of databases containing the National Historic Places locations).

59. 54 U.S.C.A. § 306108.

60. *Id.* § 300320.

61. 36 C.F.R. § 800.3(a).

62. 54 U.S.C.A. § 306108.

63. See, e.g., *Pit River Tribe v. U.S. Forest Serv.*, 469 F.3d 768, 787 (9th Cir. 2006) (“[W]e hold that the agencies violated NHPA by failing to complete the necessary review [of section 106]”); *Narragansett Indian Tribe v. Warwick Sewer Auth.*, 334 F.3d 161, 167 (1st Cir. 2003) (“Each of these stages of consultation—initiating the process . . . is then spelled out in greater detail.”); *Pueblo of Sandia v. United States*, 50 F.3d 856, 862 (10th Cir. 1995) (“The district court expressed concern about the Forest Service’s commitment to the section 106 process”); *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng’rs*, 205 F. Supp. 3d 4, 8 (D.D.C. 2016) (“Once [consultation] is done, Section 106 is satisfied.”).

64. *Standing Rock Sioux Tribe*, 205 F. Supp. 3d at 8 (quoting *Narragansett Indian Tribe*, 334 F.3d at 166). Courts also often compare the NHPA’s “stop, look, and listen” provision to a similar provision in the National Environmental Policy Act (“NEPA”) for analytical purposes. *Id.* (“Section 106, like the National Environmental Policy Act, is often described as a ‘stop, look, and listen’ provision.” (quoting *Narragansett Indian Tribe*, 334 F.3d at 166)). The relevant portion of NEPA provides that federal agencies must consider connected actions, cumulative actions, similar actions, and the alternatives and impacts those actions may have. 40 C.F.R. § 1508.25 (2016).

ways to avoid, minimize or mitigate any adverse effects on historic properties.”⁶⁵

As part of the section 106 consideration, when the historic property has ties to Native Nations, “a Federal agency shall consult with any Indian tribe . . . that attaches religious and cultural significance to property described in subsection (a).”⁶⁶ “Consultation means the process of seeking, discussing, and considering the views of other participants, and, where feasible, seeking agreement with them regarding matters arising in the section 106 process.”⁶⁷ This right to consultation extends to property that is not owned by Native Nations, so long as a Native Nation has religious or cultural ties to the land.⁶⁸

Section 106 review⁶⁹ begins with a federal agency deciding whether or not the project is an undertaking within the meaning of the NHPA. If a project is not an undertaking, section 106 does not apply and the review process is complete.⁷⁰ If a project is an undertaking, the agency determines whether that undertaking could have an effect on historic property.⁷¹ If the agency determines the undertaking will not have an effect on historic property, they have no further obligation to consult under section 106.⁷²

However, when an agency determines the undertaking could have an effect on historic property, they then must identify the appropriate State Historic Preservation Officer (“SHPO”) to be involved in the consultation process.⁷³ When the project could affect Native American interests, the agency must also identify and involve the Tribal Historic Preservation Officer (“THPO”).⁷⁴ The Advisory Council may also become involved in the section 106 review process at the request of the parties or on its own volition.⁷⁵ At that point, the SHPO and the THPO assist the federal agency in identifying potential historic properties, and their historical significance, that could be

65. 36 C.F.R. § 800.1 (a) (2016).

66. National Historic Preservation Act of 1966, 54 U.S.C.A. § 302706(b) (West 2014).

67. 36 C.F.R. § 800.16(f).

68. 36 C.F.R. § 800.2(c)(2)(ii). This provision of the regulations acknowledges that Native Nations often have cultural and religious interests in sites located beyond the reservation. An excellent example of this provision being instrumental in a case brought under the NHPA is the *Standing Rock Sioux Tribe* case. *Standing Rock Sioux Tribe*, 205 F. Supp. 3d at 4. In *Standing Rock Sioux Tribe*, the DAPL pipeline would not cross the Standing Rock reservation. *Id.* at 7. However, the Standing Rock Sioux Tribe was able to bring a claim under the NHPA because, they alleged, there were sites of great historic and cultural significance in the path of the pipeline. *Id.* at 8.

69. For a visual representation of the section 106 process, see 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 2 (2012), <https://www.nps.gov/history/tribes/Documents/106.pdf>.

70. See 54 U.S.C.A. § 306108.

71. 36 C.F.R. § 800.3(a).

72. *Id.* § 800.3(a)(1).

73. See *id.* § 800.3(c).

74. *Id.*

75. *Id.* § 800.2(b)(1)–(2).

affected by the undertaking.⁷⁶ If the officers do not identify any historic properties, or if they determine that identified historic properties will not be affected, the agency publishes a public report and allows for comments.⁷⁷ Although the agency involved must consider the comments, the agency is not required to take action in response to any comments.⁷⁸ After the agency considers the public's comments, the agency's section 106 obligations are fulfilled.⁷⁹

If a federal agency determines the historic property will be affected, the agency then assesses the adverse effects on the property.⁸⁰ An adverse effect occurs when "an undertaking may alter, directly or indirectly, any of the characteristics of a historic property . . . in a manner that would diminish the integrity of the property's location, design, setting, materials, workmanship, feeling, or association."⁸¹ If the agency determines there will be adverse effects on the property, the agency consults with the SHPO/THPO to develop solutions to mitigate the adverse effects.⁸² However, if these consultations become unproductive, any party may terminate consultation and the agency may grant the undertaking, regardless of any adverse effects.⁸³

Federal agency officials in charge of reviewing the undertaking play an essential role in the section 106 review process. Ultimately, they decide whether the undertaking in question proceeds as planned, despite any adverse effects to cultural sites.⁸⁴ The agency officials initiate the section 106 consultation process with all of the involved parties and organize the process in a manner appropriate with the size and scope of the undertaking.⁸⁵ The agency officials are responsible for ensuring the parties meet the requirements of section 106.⁸⁶

The SHPO and the THPO are also integral to the consultation process. The SHPO "reflects the interests of the State and its citizens in the preservation of their cultural heritage."⁸⁷ The SHPO works with the agency

76. *Id.* § 800.4(b)–(c).

77. *Id.* § 800.4(d)(1).

78. *See id.* § 800.2(d)(1)–(2); *see also id.* § 800.4(d)(1) (indicating the steps the agency must follow to satisfy its section 106 responsibilities after making its findings public).

79. *See id.* § 800.4(d)(1)(C).

80. *Id.* § 800.5.

81. *Id.* § 800.5(a)(1).

82. *Id.* § 800.6.

83. *Id.* § 800.7(a); *see also* *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 205 F. Supp. 3d 4, 10 (D.D.C. 2016) ("The agency may, however, . . . proceed to permit the undertaking despite the [adverse] effects."); Holt, *supra* note 26, at 425 ("Despite these procedural requirements, nothing in section 106 or any other part of NHPA requires that a project be abandoned in favor of a significant historic property.")

84. 36 C.F.R. § 800.2(a).

85. *Id.* § 800.2(a)(4).

86. *Id.* § 800.2(a).

87. *Id.* § 800.2(c)(1)(i).

officials to “ensure that historic properties are tak[en] into consideration at all levels of planning and development.”⁸⁸ When an undertaking affects historic properties on Native land, the THPO assumes the responsibilities of the SHPO to represent the interests of the tribe.⁸⁹ In this situation, the federal agency works with the THPO in lieu of the SHPO.⁹⁰ If, for whatever reason, a Native Nation decides not to have a THPO assume the functions of the SHPO for undertakings that affect Native land, the agency official consults with a representative of the Native Nation in addition to the SHPO.⁹¹ When an undertaking affects Native cultural properties off of Native land, the SHPO will participate in the process along with the THPO.⁹²

Local governments and applicants for federal permits/licenses are entitled, but not required, to participate in the consultation process.⁹³ The federal agency is required to inform the public about the undertaking and to seek and consider the public’s views on the undertaking.⁹⁴ The agency is required to make information about the undertaking available to the public, “except where appropriate to protect confidentiality concerns of affected parties.”⁹⁵ If a federal agency properly consults with all of the involved parties, the agency has met the requirements of the NHPA.⁹⁶

The NHPA requires only that the federal agency consider the adverse effects an undertaking may have on a historic site, rather than requiring that action is taken to remedy those effects.⁹⁷ Because of this lax standard, courts often rule in favor of the federal agency decision-maker on a claim brought under the NHPA.⁹⁸ Unless there has been a clear violation of the NHPA or

88. *Id.*

89. *Id.* § 800.2(c)(2)(i).

90. *Id.* § 800.2(c)(2)(i)(A).

91. *Id.* § 800.2(c)(2)(i)(B).

92. *Id.* § 800.2(c)(1)(ii).

93. *Id.* § 800.2(c)(3)–(4).

94. *Id.* § 800.2(d)(1).

95. *Id.* § 800.2(d)(2).

96. *See supra* notes 61–83 and accompanying text.

97. National Historic Preservation Act of 1966, 54 U.S.C.A. § 306108 (West 2014).

98. This is especially true in jurisdictions that hold that the NHPA does not confer a private right of action. In these jurisdictions, Native Nations (or any aggrieved party) must sue in conjunction with the Administrative Procedure Act to have a valid claim under the NHPA. The private right of action will be discussed in Part II.D. The Administrative Procedure Act, which governs judicial review of agency decisions made pursuant to the NHPA, states that courts should defer to agency decisions unless the decision is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” Administrative Procedure Act, 5 U.S.C. § 706(2)(A) (2012); *see also* *Pit River Tribe v. U.S. Forest Serv.*, 469 F.3d 768, 778 (9th Cir. 2006) (noting that the APA provides the standard for judicial review of agency decisions under the National Environmental Policy Act and the NHPA). The APA will be discussed further in Part II.C.

another statute, courts afford great deference to the agency's decision to permit the undertaking.⁹⁹

On the other hand, in *Muckleshoot Indian Tribe v. U.S. Forest Service*, the federal undertaking involved a land exchange between the United States Forest Service ("Forest Service") and a private company, Weyerhaeuser.¹⁰⁰ Included in the land exchange were cultural sites important to the Muckleshoot Tribe, sites which Weyerhaeuser planned to use for logging.¹⁰¹ Despite the Tribe's objections, the Forest Service exchanged the lands with Weyerhaeuser.¹⁰² Given that Weyerhaeuser intended to use the land for logging, the cultural sites of the Muckleshoot Tribe would have been destroyed.¹⁰³ In an attempt to fulfill its obligations under the NHPA, the Forest Service offered to map the cultural sites on a GPS and to "photograph significant features" in an attempt to mitigate the adverse effects that would inevitably occur.¹⁰⁴

The Ninth Circuit found that such an action did not properly consider the adverse effects of the undertaking and, thus, the Forest Service did not meet the requirements of section 106.¹⁰⁵ Here, the Muckleshoot Tribe's cultural sites were protected by the NHPA because of the Forest Service's flagrant disregard of the adverse effects of the land exchange.

However, such an outcome is rare unless, as in *Muckleshoot*, the federal agency egregiously neglected its duties under the NHPA. For example, the court in *Sisseton-Wahpeton Oyate v. U.S. Department of State* deferred to the Department of State's decision to only survey a small portion of a proposed Keystone XL pipeline for archeological artifacts.¹⁰⁶ The plaintiffs, comprised of numerous Native tribes, requested that 100% of the pipeline corridor be surveyed for traditional cultural properties.¹⁰⁷ However, the Department of State decided to survey only 25% of the pipeline corridor.¹⁰⁸ The court deferred to the Department's decision to survey only a small portion of the

99. See *Pit River Tribe*, 469 F.3d at 787-88 (finding that no section 106 review occurred whatsoever).

100. *Muckleshoot Indian Tribe v. U.S. Forest Serv.*, 177 F.3d 800, 803 (9th Cir. 1999).

101. *Id.* at 804-05.

102. *Id.* at 804.

103. See *id.* at 808.

104. *Id.*

105. *Id.*; see also *Pit River Tribe v. U.S. Forest Serv.*, 469 F.3d 768, 787 (9th Cir. 2006) ("It is undisputed that no consultation or consideration of historical sites occurred." (emphasis added)); *Pueblo of Sandia v. United States*, 50 F.3d 856, 857, 860 (10th Cir. 1995) (holding that the Forest Service did not make "a reasonable and good faith effort" to follow up with tribal concerns regarding the construction of a road that would damage Pueblo religious and cultural sites).

106. *Sisseton-Wahpeton Oyate v. U.S. Dep't of State*, 659 F. Supp. 2d 1071, 1082 (D.S.D. 2009).

107. *Id.* at 1076.

108. *Id.* at 1082.

route, noting that the regulations did not expressly provide that a certain percentage of any proposed project must be surveyed.¹⁰⁹

The parties involved in the NHPA and the section 106 review process are incredibly varied. From Native Nations to federal agencies and private companies, the interests of the parties are often conflicting. The cultural dissonance between Native Nations and the Americans involved in protecting Native cultural sites only hinders that protection.

C. THE ADMINISTRATIVE PROCEDURE ACT

The Administrative Procedure Act (“APA”) also plays a role in NHPA claims because claims brought under the NHPA always involve a federal agency decision maker.¹¹⁰ Courts have used the APA, which provides fewer protections than the NHPA, to justify not conferring a private right of action under the NHPA. The APA specifically states that “[a] person suffering legal wrong because of agency action, or adversely affected . . . by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.”¹¹¹ The APA also waives sovereign immunity, allowing individuals and private entities to sue the government.¹¹² In addition, the APA outlines the standard for judicial review of agency decisions.¹¹³ Courts overturn agency decisions when they are “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”¹¹⁴ Essentially, the APA provides an avenue for plaintiffs to sue the federal government for improper agency decisions. However, in order to have a valid claim under the APA, a party must exhaust all administrative remedies.¹¹⁵

The role of the APA in NHPA claims is especially important in the Ninth Circuit, where the Court of Appeals has found that the NHPA does not confer a private right of action.¹¹⁶ Thus, if an individual or entity wishes to bring an NHPA claim against a government agency (which is often the case), they must do so through the APA. The role of the APA, and its shortcomings, will be discussed further in Part III.B.

109. *Id.*

110. National Historic Preservation Act of 1966, 54 U.S.C.A. § 306108 (West 2014).

111. Administrative Procedure Act, 5 U.S.C. § 702 (2012).

112. *Id.*

113. *Id.* § 706.

114. *Id.* § 706(2)(A). The standard for judicial review of agency decisions will be discussed further in Part III.B.

115. 5 U.S.C. § 704; *see also* *San Carlos Apache Tribe v. United States*, 417 F.3d 1091, 1096 (9th Cir. 2005) (acknowledging that “a party generally cannot seek court review until all administrative remedies have been exhausted” (citing *Young v. Reno*, 114 F.3d 879, 881 (9th Cir. 1997))).

116. *San Carlos Apache Tribe*, 417 F.3d at 1092–93 (affirming the district court ruling that section 106 of the NHPA does not confer a private right of action to non-government entities).

D. THE CIRCUIT SPLIT ON WHETHER THE NHPA CONFERS A PRIVATE RIGHT OF ACTION

One of the disputes surrounding the NHPA is whether the statute confers a private right of action. A private right of action grants citizens the right to sue certain parties or individuals, including the federal government.¹¹⁷ *Cort v. Ash* is one of the most prominent cases in determining whether a private right of action exists. In *Cort v. Ash*, the Supreme Court held that a private right of action cannot be implied when the statute at issue is a criminal statute which specifically outlines enforcement methods.¹¹⁸ Without a private right of action, citizens are unable to enforce the laws meant to protect them. The federal circuit courts are split on whether the NHPA confers this right.¹¹⁹ The Ninth Circuit has found that the NHPA does not confer a private right of action, as have the Eighth¹²⁰ and Second¹²¹ Circuits at the district court level. Without a private right of action, anyone who pursues a claim under the NHPA must also bring a claim under the APA, which poses significant procedural hurdles.

In *San Carlos Apache Tribe v. United States*, the Ninth Circuit held that the NHPA does not grant a private right of action because the statute does not explicitly confer that right.¹²² To determine whether the NHPA implicitly granted such a right, the court analogized the NHPA to similar statutes, such as the National Environmental Policy Act, which does not confer a private right of action.¹²³ The court also noted that the NHPA does not waive sovereign immunity.¹²⁴ In addition, the court explained that since the APA does allow for a private right of action to enforce the NHPA, there is already

117. See *id.* at 1096. A statute which confers a private right of action allows individuals and organizations to bring a lawsuit directly against the opposing party rather than relying on a government agency to enforce that statute. Daniel P. Tokaji, *Public Rights and Private Rights of Action: The Enforcement of Federal Election Laws*, 44 IND. L. REV. 113, 113 n.1 (“The term[] private right of action . . . refer[s] to a non-governmental litigant’s ability to bring suit to enforce a federal statute.”).

118. See *Cort v. Ash*, 422 U.S. 66, 74–75 (1975).

119. See *San Carlos Apache Tribe*, 417 F.3d at 1092–93 (holding the NHPA does not confer a private right of action). *But see* *Boarhead Corp. v. Erickson*, 923 F.2d 1011, 1017 (3d Cir. 1991) (holding that the NHPA does confer a private right of action); *Vieux Carre Prop. Owners, Residents & Assocs., Inc. v. Brown*, 875 F.2d 453, 458 (5th Cir. 1989) (asserting that the NHPA confers a private right of action against federal agency defendants).

120. *Sisseton-Wahpeton Oyate v. U.S. Dep’t of State*, 659 F. Supp. 2d 1071, 1080 (D.S.D. 2009) (finding *San Carlos Apache Tribe* instructive and holding that the APA must be used in conjunction with the NHPA).

121. *Friends of Hamilton Grange v. Salazar*, No. 08 Civ. 5220(DLC), 2009 WL 650262, at *18 (S.D.N.Y. Mar. 12, 2009) (finding that the NHPA does not confer a private right of action).

122. *San Carlos Apache Tribe*, 417 F.3d at 1094 (“Section 106 does not expressly provide that private individuals may sue to enforce its provisions.”).

123. *Id.* at 1097.

124. *Id.* at 1096.

existing judicial recourse to enforce the statute.¹²⁵ The lack of a waiver of sovereign immunity, the similarity between the NHPA and statutes that also do not confer a private right of action, and the existence of the APA to pursue judicial review led the court to find that the NHPA does not implicitly confer a private right of action.¹²⁶

The Ninth Circuit's decision in *San Carlos Apache Tribe* departed from decisions made by its sister courts. In *Boarhead Corporation v. Erickson*, the Third Circuit held that "there is little question that Boarhead would have a right of action under the NHPA."¹²⁷ The Third Circuit found that the NHPA implicitly conferred a private right of action because the statute contains a provision to award attorney's fees.¹²⁸ In *Vieux Carre Property Owners v. Brown*, the Fifth Circuit also held that the NHPA confers a private right of action.¹²⁹

The circuit split poses two problems for those who pursue claims under the NHPA. First, undecided circuits may choose to adopt the Ninth Circuit's interpretation, making it more difficult, costly, and time consuming to bring a claim in a time-sensitive matter. Second, the circuit split produces uncertainty for those pursuing an NHPA claim. This uncertainty arises from the possibility that other circuits may adopt the Ninth Circuit's interpretation, or even that the Supreme Court may adopt the Ninth Circuit's interpretation.

The horrendous history of the federal government's relations with Native Nations, the complexity of the NHPA, the impact of the APA on the enforcement of the NHPA, and the circuit split on whether the NHPA confers a private right of action pose unique challenges and threats to the NHPA's ability to effectively protect Native Nations' cultural sites.

III. PROBLEMS AND ANALYSIS

The NHPA does not adequately protect Native American cultural sites. In this regard, the NHPA is particularly troublesome for two reasons: (1) the statutory and regulatory language provides no actual protection for cultural sites, and (2) judicial review is inadequate. This Part discusses these issues and analyzes the impact each has on the NHPA's ability to effectively protect Native Nations' cultural sites. This Part also illustrates how the weak statutory and regulatory language and the inadequate judicial review render the NHPA ineffective.

125. *Id.* at 1095; *see also* 5 U.S.C. § 702 (2012) (outlining that people may seek judicial review under the APA and waiving sovereign immunity of the United States).

126. *San Carlos Apache Tribe*, 417 F.3d at 1099.

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

128. *Id.*

129. *Vieux Carre Prop. Owners, Residents & Assoc., Inc. v. Brown*, 875 F.2d 453, 458 (5th Cir. 1989) (holding that the NHPA confers a private right of action against federal agencies but not non-agency defendants).

A. THE STATUTORY AND REGULATORY LANGUAGE OF THE NHPA

The language of the NHPA requires agencies to do very little to protect historic sites. The NHPA requires that a federal agency only “take into account the effect of the undertaking on any historic property,” and nothing more.¹³⁰ The regulations promulgated by the Advisory Council require little more.¹³¹ Courts have found that even a bare minimum effort meets the section 106 consultation requirements.¹³² This Section focuses on the shortcomings of the section 106 review process.

Section 106 review has several fundamental shortcomings. First, the statute and regulations provide little actual protection to Native interests.¹³³ Second, the consultation required by section 106 is a bar that is too easily met by federal agencies and those involved in the undertaking.¹³⁴ Third, the statute and regulations inherently disrespect the sovereign immunity of Native Nations.¹³⁵

1. The Statute and Regulations Provide Little Actual Protection to Native Interests

If the parties are unable to reach an agreement, the federal agency may approve the undertaking regardless of any adverse effects.¹³⁶ In such situations, where the parties admittedly do everything or almost everything right under the statute and regulations, the Native interests may still be ignored by the deciding agency.¹³⁷ In *Navajo Nation v. U.S. Forest Service*, the three-judge panel noted that both the Navajo Nation and the Forest Service diligently pursued their duties under section 106 of the NHPA but could not reach an agreement.¹³⁸ Despite the Navajo Nation’s belief that the proposed undertaking¹³⁹ would desecrate the sacred mountain, which was central to

130. National Historic Preservation Act of 1966, 54 U.S.C.A. § 306108 (West 2014).

131. See *supra* Part II.B.

132. See *supra* notes 97–109 and accompanying text.

133. See *infra* Part III.A.1.

134. See *infra* Part III.A.2.

135. See *infra* Part III.A.3.

136. See 36 C.F.R. § 800.7(a) (2016).

137. See *Narragansett Indian Tribe v. Warwick Sewer Auth.*, 334 F.3d 161, 168 (1st Cir. 2003) (“[T]he choice whether to approve the undertaking ultimately remains with the agency.” (quoting *Save Our Heritage Inc., v. Fed. Aviation Admin.*, 269 F.3d 49, 62 (1st Cir. 2001))); *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng’rs*, 205 F. Supp. 3d 4, 8 (D.D.C. 2016) (stating that section 106 “does not mandate that the permitting agency take any particular preservation measures to protect” cultural or religious sites); Holt, *supra* note 26, at 425 (noting the inability of the procedural requirements of section 106 to encourage favoring a historic property over an undertaking).

138. *Navajo Nation v. U.S. Forest Serv.*, 479 F.3d 1024, 1059–60 (9th Cir. 2007).

139. *Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058, 1063 (9th Cir. 2008) (en banc). The undertaking in the case was the proposed use of recycled wastewater to create artificial snow for a ski resort located on a mountain sacred to the Navajo. *Id.* The Navajo believed that the use of

their religious ceremonies, the Forest Service approved the undertaking.¹⁴⁰ Because the Forest Service met the NHPA's requirements, the en banc Ninth Circuit affirmed the district court's grant of summary judgment in favor of the Forest Service,¹⁴¹ and the Navajo's sacred religious sites went unprotected.¹⁴² By not requiring that an undertaking be either abandoned or significantly altered if it would have adverse effects, the NHPA and its regulations essentially fail their purported mission to protect the cultural and religious sites of Native Nations. Such failure delegitimizes the interests of Native Nations.

2. Section 106 Consultation is Too Easily Met

Section 106 review is a standard that can be easily met by most, if not all, of the involved parties. That in and of itself is not fundamentally wrong. However, the Native interests in retaining their cultural or religious sites intact and relatively undisturbed is arguably greater than the federal interest in making the consultation process as efficient as possible.¹⁴³ To fulfill their

the artificial snow would "spiritually contaminate the entire mountain and devalue their religious exercises." *Id.*

140. *Id.* at 1066.

141. *Id.* at 1080.

142. The Navajo Nation, along with other tribes, sued under the NHPA, the National Environmental Policy Act, and the Religious Freedom Restoration Act ("RFRA"). *Id.* at 1066. The en banc Ninth Circuit found for the Forest Service on all of these claims. *Id.* at 1080. The Navajo Nation appealed this decision as it related to their RFRA claim, which the Supreme Court denied. *Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058 (9th Cir. 2008), *cert. denied*, 556 U.S. 1281 (2009). Native American tribes continue to protest the use of the treated wastewater on their sacred mountains. See Krista Allen, *Snowbowl Opening Draws Crowds, Protests*, NAVAJO TIMES (Nov. 25, 2015), <http://navajotimes.com/reznews/snowbowl-opening-draws-crowds-protests>.

143. The importance of these interests is demonstrated by the many instances of Native Nations confronting the federal government when their cultural interests were at stake. For example, the Standing Rock Sioux protests surrounding the DAPL construction have garnered international attention and drawn thousands of protestors to the construction site. Levin, *supra* note 10. It is also important to note that, for many Native Americans, the protection of these cultural sites is the continuation of a centuries-long struggle.

It is crucial that people recognize that Standing Rock is part of an ongoing struggle against colonial violence. The Dakota Access pipeline (#NoDAPL) is a front of struggle in a long-erased war against Native peoples—a war that has been active since first contact, and waged without interruption. Our efforts to survive the conditions of this anti-Native society have gone largely unnoticed because white supremacy is the law of the land, and because we, as Native people, have been pushed beyond the limits of public consciousness.

Kelly Hayes, *How to Talk About #NoDAPL: A Native Perspective*, TRUTHOUT (Oct. 28, 2016), <http://www.truth-out.org/opinion/item/38165-how-to-talk-about-nodapl-a-native-perspective>. In 2014 and 2015, Native Nations across the country united in an effort to block the Keystone XL Pipeline from being built. "Goldtooth [of the Indigenous Environmental Network] feels the native people's lack of inclusion in the Keystone discussion belies a lack of respect." Robert Boos, *Native American Tribes Unite to Fight the Keystone Pipeline and Government Disrespect*, PUB. RADIO INT'L (Feb. 19, 2015, 8:45 AM), <http://www.pri.org/stories/2015-02-19/native-american-tribes-unite-fight-keystone-pipeline-and-government-disrespect>.

obligations under section 106, the agency decision maker and the third party (usually a private company) must inform the Native Nation of the undertaking to begin the consultation process.¹⁴⁴ Throughout the process, the agency must inform the THPO of any decisions or findings.¹⁴⁵ If at any point the THPO fails to respond within 30 days to a notice of agency determination, the agency may proceed in the process *without* the THPO.¹⁴⁶ The THPO may re-enter the process, but the agency is not required to return to its previous findings that were made without consulting the THPO.¹⁴⁷ For Native Nations with few remaining symbols of their culture or heritage, tying a cultural or religious interest to such a finite timeline disrespects the Native interest in preserving what remains of their culture and heritage.

3. The Statute and Regulations Inherently Disrespect Sovereign Immunity¹⁴⁸

The regulations explicitly provide that “[c]onsultation with Indian tribes should be conducted in a sensitive manner respectful of tribal sovereignty”¹⁴⁹ and “must recognize the government-to-government relationship between the Federal Government and Indian tribes.”¹⁵⁰ However, the NHPA, the regulations, the agency decision makers, the private organizations, and the courts do not actually treat Native Nations as sovereigns. In laying out the policy considerations behind the statute, Congress specifically provided in the NHPA that “[i]t is the policy of the Federal Government, in cooperation with *other nations* and in partnership with States, local governments, [and] *Indian tribes*” to foster activities that preserve national historic sites, including Native cultural sites.¹⁵¹

Statutory interpretation can provide insight into how Congress intended Native Nations to be treated under the NHPA. Congress seems to list the entities in order of their degree of sovereignty.¹⁵² It begins with “other nations” and then mentions States, local governments, and Indian tribes.¹⁵³

144. 36 C.F.R. § 800.3 (2016).

145. *Id.*

146. *Id.* § 800.3(c)(4).

147. *Id.*

148. The sovereign immunity (or lack thereof) of Native Nations is a complicated topic with a long and complex history which cannot be adequately discussed in this Note. For further discussion on the sovereign immunity of Native Nations, see Andrea M. Seielstad, *The Recognition and Evolution of Tribal Sovereign Immunity Under Federal Law: Legal, Historical, and Normative Reflections on a Fundamental Aspect of American Indian Sovereignty*, 37 TULSA L. REV. 661 (2002), and William Wood, *It Wasn't an Accident: The Tribal Sovereign Immunity Story*, 62 AM. U. L. REV. 1587 (2013).

149. 36 C.F.R. § 800.2(c)(2)(ii)(B).

150. *Id.* § 800.2(c)(2)(ii)(C).

151. National Historic Preservation Act of 1966, 54 U.S.C.A. § 300101 (West 2014) (emphasis added).

152. *Id.*

153. *Id.*

Rather than grouping Native Nations with “other nations,” Congress grouped Native Nations with the States and local governments, implying that Native Nations are more similar to the States and local governments than they are to “other nations” with respect to sovereign immunity. One of the rules of statutory interpretation is that “[w]ords are to be interpreted according to the proper grammatical effect of their arrangement within the statute[,] unless strict adheren[ce] to the rules of grammar would defeat the purpose of the statute.”¹⁵⁴ While the NHPA and regulations explicitly recognize the sovereignty of Native Nations elsewhere,¹⁵⁵ the discrepancies within the statute of recognizing sovereignty in one provision of the statute, and seemingly ignoring it in another create ambiguity. However, this ambiguity is consistent with the federal government’s past and current treatment of “sovereign” Native Nations.¹⁵⁶

The irony of “Native Nation sovereignty” in the NHPA is apparent when one looks at the history of tribal sovereignty. Before the United States gained independence from England, European powers recognized Native Nations as sovereign.¹⁵⁷ The United States government recognized the sovereignty of Native Nations in the Commerce Clause of the Constitution.¹⁵⁸ The government continued to recognize tribal sovereignty throughout the 18th and 19th centuries, as evidenced by numerous treaties between the government and Native Nations.¹⁵⁹ However, since the mid-19th century, the federal government has actively abrogated tribal sovereign immunity. This

154. KATHARINE CLARK & MATTHEW CONNOLLY, A GUIDE TO READING, INTERPRETING AND APPLYING STATUTES, WRITING CTR. AT GULC 10 (2006), <https://www.law.georgetown.edu/academics/academic-programs/legal-writing-scholarship/writing-center/upload/A-Guide-to-Reading-Interpreting-and-Appling-Statutes.pdf>.

155. 36 C.F.R. § 800.2(c)(2)(ii)(B)–(C).

156. In 1871, Congress decided to cease treaty-making with Native Nations, “which effectively converted Indian Tribes from ‘self sufficient nations into wards’ of the government.” Rennick, *supra* note 3, at 69 (quoting O’Brien, *supra* note 3, at 42). Now, Native Nations are “domestic dependent nations” and have “the inherent sovereignty of self-rule.” *Id.* at 70 (quoting O’Brien, *supra* note 3, at 43).

157. Steven Paul McSloy, *American Indians and the Constitution: An Argument for Nationhood*, 14 AM. INDIAN L. REV. 139, 139 (1989).

158. U.S. CONST. art. I, § 8 (“Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes”); *see also* Worcester v. Georgia, 31 U.S. 515, 559 (1832) (recognizing that the Constitution, “by declaring treaties already made, as well as those to be made, to be the supreme law of the land, ha[d] adopted and sanctioned the previous treaties with the Indian nations, and consequently admit[ted] their rank among those powers who are capable of making treaties”).

159. *See Worcester*, 31 U.S. at 538 (“[B]y which treaties, the United States of America æcknowledge [sic] the said Cherokee nation to be a sovereign nation, authorised [sic] to govern themselves, and all persons who have settled within their territory, free from any right of legislative interference by the several states”); Rennick, *supra* note 3, at 69 (explaining how the cessation of treaty-making between Native Nations and the federal government affected the sovereignty of Native Nations).

abrogation has ranged from ending treaty-making with Native Nations¹⁶⁰ to granting United States citizenship to Native Americans.¹⁶¹

Ironically, the fact that the provisions that purport to protect Native Nations' cultural sites exist at all indicates the federal government's lack of respect for tribal sovereign immunity. For example, the NHPA does not permit the destruction of the cultural sites of other sovereign nations, such as Canada or Mexico; yet the NHPA does allow for the destruction of Native Nations' cultural sites, despite the Nations' statutorily recognized "sovereignty." To illustrate, assume the NHPA allowed for the protection of Canadian historic sites when an international undertaking, such as a bridge crossing the U.S.-Canadian border, affected those sites. Assume also that the Canadian government objected to the project because the project would adversely impact a Canadian historic site. If the United States government approved the project despite the Canadian government's concerns, the move would definitively violate general principles of sovereignty.¹⁶² It is difficult to imagine the United States approving such a project when the other sovereign is Canada, yet such projects are often approved when the other sovereign is a Native Nation. If Native Nations were truly treated as sovereign nations and section 106 review was "conducted in a sensitive manner respectful of tribal sovereignty"¹⁶³ that recognized the "government-to-government relationship,"¹⁶⁴ federal agencies would approach Native Nations as sovereigns with whom to be negotiated, not as a citizen group to be consulted.¹⁶⁵

B. THE LACK OF ADEQUATE JUDICIAL REVIEW

The flaws in the statutory and regulatory language are compounded by the lack of adequate judicial review of NHPA claims. First, courts give a great

160. See Rennick, *supra* note 3, at 69 ("In fact, the United States Congress ceased all treaty making with Indian Tribes in 1871 . . .").

161. One of the tools the federal government used to abrogate tribal sovereign immunity was citizenship. "The federal government and reformers have used citizenship first as a panacea for Indians' perceived degenerate status and later as a rationalization for eradicating tribal sovereignty." Alexandra Witkin, *To Silence a Drum: The Imposition of United States Citizenship on Native Peoples*, 21 HIST. REFLECTIONS 353, 383 (1995). This process, also known as "repressive emancipation" was seen by many as an "attempt to liberate a people from conditions they themselves do not consider oppressive." *Id.* at 355. By, in many instances, forcing citizenship on Native Nations, the federal government effectively destroyed those Nations' culture. *Id.* at 362.

162. See *Lake Lanoux Arbitration* (Fr. v. Spain), 12 R.I.A.A. 281, 316 ¶ 24 (1957) (articulating that the principle of territorial sovereignty must bend only before international obligations and that "France alone is the judge of works of public utility which are to be executed on her own territory").

163. 36 C.F.R. § 800.2(c)(2)(ii)(B) (2016).

164. *Id.* § 800.2(c)(2)(ii)(C).

165. See Witkin, *supra* note 161 and accompanying text; see also *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 205 F. Supp. 3d 4, 19 (D.D.C. 2016) (stating that in one letter to the Army Corps of Engineers, the Standing Rock THPO declined to participate in further communications "until *government-to-government* consultation has occurred for this project per Section 106 requirements as requested by the Standing Rock Sioux Tribe") (emphasis added).

amount of deference to agency decisions.¹⁶⁶ Second, the circuit split on whether the NHPA confers a private right of action could potentially preclude any non-government person or entity from bringing suit under the NHPA.¹⁶⁷ Third, the NHPA does not explicitly waive sovereign immunity, and courts are split on whether the statute implies a waiver.¹⁶⁸

1. Standard of Review of Agency Decisions

The APA explicitly outlines the standard of review for agency decisions.¹⁶⁹ The most relevant portion of this provision provides that courts shall only overrule agency actions when they are “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”¹⁷⁰ This great deference prevents significant judicial interference in agency decisions, even if those decisions harm the involved parties. In considering the implications of this high level of deference, it is important to note the unique position of Native Nations in respect to the federal government, as evidenced by the “trust responsibility” doctrine.

The trust responsibility doctrine asserts that the United States government has a responsibility to Native Nations to protect the Native American assets the federal government holds.¹⁷¹ The trust responsibility doctrine stems from the fact that most Native land is held in trust by the federal government; the individual Native Nations and tribes are the

166. See *infra* Part III.B.1.

167. See *infra* Part III.B.2.

168. See *infra* Part III.B.3.

169. Section 706 provides that:

The reviewing court shall—

- (1) compel agency action unlawfully withheld or unreasonably delayed; and
- (2) hold unlawful and set aside agency action, findings, and conclusions found to be—
 - (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
 - (B) contrary to constitutional right, power, privilege, or immunity;
 - (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
 - (D) without observance of procedure required by law;
 - (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
 - (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

Administrative Procedure Act, 5 U.S.C. § 706 (2012).

170. *Id.* § 706(2)(A); see also *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984) (holding that courts will defer to regulations promulgated by agencies unless the regulations “are arbitrary, capricious, or manifestly contrary to the statute”).

171. Derek C. Haskew, *Federal Consultation with Indian Tribes: The Foundation of Enlightened Policy Decisions, or Another Badge of Shame?*, 24 AM. INDIAN L. REV. 21, 62 (2000).

beneficiaries of each trust.¹⁷² Due to the complex history between Native Nations and the federal government, as well as Native Nations' status as "domestic dependent nations,"¹⁷³ the federal government has "a heightened responsibility to Indian nations with respect to federal decisions that affect Indian trust assets."¹⁷⁴ In situations where Native Nations' property rights are concerned, "[f]ull adherence to the trust responsibility [doctrine] is vitally important . . . as a tribe's way of life can be wholly destroyed by agency actions that impair the full use and enjoyment of tribal property or treaty rights."¹⁷⁵

The APA is also a costly and cumbersome statute under which to bring suit. The high level of deference courts give to agency decisions essentially requires plaintiffs to achieve a higher burden of proof to determine if an agency action was against the best interests of the plaintiff.¹⁷⁶ The APA also requires that a plaintiff exhaust all administrative remedies before bringing suit.¹⁷⁷ When a Native Nation must pursue all administrative remedies before bringing suit under the APA and the NHPA, the costs of its litigation rise as it must spend valuable time and resources pursuing each possible remedy first.¹⁷⁸ It also becomes more difficult to show the agency action was inappropriate, and it may prevent protection of a cultural site before that site is destroyed. In light of the duty the government owes to Native Nations, and the disastrous consequences that can result when that duty is violated, the high standard of judicial review commanded by the APA is inappropriate in situations involving NHPA claims brought by Native Nations.¹⁷⁹

172. *Id.* at 30–31; *Frequently Asked Questions*, U.S. DEP'T INTERIOR INDIAN AFF., <https://www.bia.gov/frequently-asked-questions> (last visited Feb. 10, 2018).

173. Haskew, *supra* note 171, at 30 (quoting *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831)).

174. *Id.* at 62.

175. *Id.* at 62–63 (quoting Mary Christina Wood, *Fulfilling the Executive's Trust Responsibility Toward the Native Nations on Environmental Issues: A Partial Critique of the Clinton Administration's Promises and Performance*, 25 ENVTL. L. 733, 744 (1995)).

176. Rennick, *supra* note 3, at 70.

177. While the APA requires plaintiffs to exhaust all administrative remedies before bringing suit, the NHPA does not. *See Yankton Sioux Tribe v. U.S. Army Corps of Eng'rs*, 194 F. Supp. 2d 977, 992 (D.S.D. 2002) (noting that, since exhaustion of administrative remedies is not required under the NHPA, "it is within the Court's discretion whether this action should be dismissed for failure to exhaust administrative remedies" (citing *Missouri v. Bowen*, 813 F.2d 864, 871 (8th Cir. 1987))). The court also noted that the purpose of exhausting administrative remedies is to prevent the "premature interruption of the administrative process." *Id.* at 993 (quoting *Bowen*, 813 F.2d at 871). Thus, despite the fact that the NHPA did not require the exhaustion of all administrative remedies, the court dismissed the Tribe's case on the basis that they had not exhausted their administrative remedies under the APA. *Id.*

178. The court in *San Carlos Apache Tribe* noted that requiring Native Nations to sue the procedural requirements of the APA "is not without consequence." *San Carlos Apache Tribe v. United States*, 417 F.3d 1091, 1096 (9th Cir. 2005). The APA's requirement that all administrative remedies be exhausted before suit is brought effectively increases the costs of a party's appeal against an agency decision. *Id.*; *see also* Rennick, *supra* note 3, at 89–90 (discussing the shortfalls of the APA as a remedy for historic preservation).

179. *See* Haskew, *supra* note 171, at 64.

2. The Circuit Split on the Private Right of Action

As discussed above in Part II.D, the Ninth Circuit held in *San Carlos Apache Tribe v. United States* that the NHPA does not confer a private right of action to non-government entities.¹⁸⁰ In the twelve years since the Ninth Circuit decided the case in opposition to its sister circuits,¹⁸¹ the Supreme Court has not addressed this issue.¹⁸² This could prove problematic for Native Nations across the country if other circuits decide to follow the Ninth Circuit's decision or if the Supreme Court decides to take an NHPA case and finds there is no right of action under the NHPA.

In addition to departing from its sister courts, the decision in *San Carlos Apache Tribe* overlooked key aspects of the NHPA in reaching its conclusion. In footnote 9 of the opinion, the court acknowledges that it only decided whether section 106 of the NHPA conferred a private right of action, not whether there would be a private right of action under any of the other numerous sections of the NHPA.¹⁸³ The court recognized that its sister courts principally relied on the provision of the NHPA that awards attorneys' fees to a prevailing party as implicitly conferring a private right of action.¹⁸⁴ The court explicitly stated: "We agree [the attorneys' fees provision] demonstrates Congressional intent that individuals may sue to enforce NHPA."¹⁸⁵ However, the court refused to acknowledge that such an intent implicitly conferred a private right of action, and instead reasoned that "it does not follow that Congress intended these individuals to file suit against the United States under the NHPA itself, rather than under the well-established procedures set out under the APA."¹⁸⁶

The court in *San Carlos Apache Tribe* noted that the APA provides a means to challenge an agency action, allowing private individuals and entities to enforce the NHPA through the APA.¹⁸⁷ The idea that the APA is a Native Nation's only path to judicial recourse poses a multitude of issues that are nearly impossible to overcome.¹⁸⁸ Perhaps most importantly, a party cannot

180. *San Carlos Apache Tribe*, 417 F.3d at 1092–93.

181. See *Boarhead Corp. v. Erickson*, 923 F.2d 1011, 1017 (3d Cir. 1991) (holding the NHPA does confer a private right of action); *Vieux Carre Prop. Owners, Residents & Assocs., Inc. v. Brown*, 875 F.2d 453, 458–59 (5th Cir. 1989) (holding the NHPA confers a private right of action against agency defendants).

182. The Supreme Court denied certiorari in *Vieux Carre*, which held that the NHPA does confer a private right of action. *Vieux Carre Prop. Owners, Residents & Assocs., Inc. v. Brown*, 875 F.2d 453 (5th Cir. 1989), *cert. denied*, 493 U.S. 1020 (1990).

183. *San Carlos Apache Tribe*, 417 F.3d at 1099 n.9.

184. *Id.* at 1098.

185. *Id.* at 1099.

186. *Id.*

187. *Id.* at 1095.

188. See *supra* Part III.B.1 (discussing the challenges of the APA).

sue under the APA until all administrative remedies have been exhausted.¹⁸⁹ This is particularly troubling in NHPA claims because of the nature of the property at issue. Since claims are usually to bring an injunction to prevent damage to cultural sites, by the time a Native Nation pursues the administrative remedies under the APA it may be too late to prevent damage to cultural sites. Ultimately, the Ninth Circuit's view that the NHPA does not confer a private right of action means that the NHPA does not effectively protect Native Nations, or anyone else attempting to bring a claim under the NHPA. Such a holding limits one of the few legal tools Native Nations have in protecting their cultural sites and disrespects Native Nations' right to protect those sites. While the APA can protect Native interests, it is a costly and cumbersome statute under which to bring suit compared to the NHPA.¹⁹⁰

Somewhat surprisingly, the decision in *San Carlos Apache Tribe* is not entirely consistent with the Ninth Circuit's earlier cases. Indeed, the *San Carlos Apache Tribe* court itself references a case in which the court "assumed without deciding that NHPA contains a private right of action" to enforce federal law.¹⁹¹ In *Tyler v. Cisneros*, the Ninth Circuit stated that "construing Section 106 to bar all NHPA actions after the release of federal funds would run counter to the implied private right of action to file claims under the NHPA."¹⁹² The reasoning behind the Ninth Circuit's decision in *San Carlos Apache Tribe* was based on the Supreme Court's decision in *Alexander v. Sandoval*, which explicitly affirmed that "private rights of action to enforce federal law must be created by Congress."¹⁹³ It seems that, in the Second,¹⁹⁴ Eighth,¹⁹⁵ and Ninth Circuits, if a party sues under the NHPA and the APA, they have a private right of action pursuant to the APA, but the NHPA alone does not confer such a right.¹⁹⁶ Since the Supreme Court has not yet addressed the issue of whether the NHPA confers a private right of action, the

189. Administrative Procedure Act, 5 U.S.C. § 704 (2012); *San Carlos Apache Tribe*, 417 F.3d at 1096 (citing *Young v. Reno*, 114 F.3d 879, 881 (9th Cir. 1997)).

190. Rennick, *supra* note 3, at 70.

191. *San Carlos Apache Tribe*, 417 F.3d at 1094 (citing *Tyler v. Cisneros*, 136 F.3d 603, 608 (9th Cir. 1998)).

192. *Tyler*, 136 F.3d at 608 (explicitly adopting the Third Circuit's opinion in *Boarhead Corp.*).

193. *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001) (holding 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" and that, without the private remedy, there is no private cause of action).

194. *Friends of Hamilton Grange v. Salazar*, No. 08 Civ. 5220 (DLC), 2009 WL 650262, at *18 (S.D.N.Y. Mar. 12, 2009) (finding that the NHPA does not confer a private right of action).

195. *Sisseton-Wahpeton Oyate v. U.S. Dep't. of State*, 659 F. Supp. 2d 1071, 1080 (D.S.D. 2009).

196. See *San Carlos Apache Tribe*, 417 F.3d at 1095 ("Although not expressly referenced in NHPA, invocation of the APA is a longstanding means to challenge agency action."); *Sisseton-Wahpeton Oyate*, 659 F. Supp. 2d at 1080 ("[N]o private right of action was created by the NHPA, and therefore, this court can consider a violation of NHPA, like NEPA, only within the confines of the APA."); *Salazar*, 2009 WL 650262, at *18 (holding that the NHPA does not confer a private right of action).

circuit split will continue to cause confusion and uncertainty among parties bringing suit under the NHPA.

3. Waiver of Sovereign Immunity

The NHPA does not explicitly waive the federal government's sovereign immunity.¹⁹⁷ "Absent a waiver, sovereign immunity shields the Federal Government and its agencies from suit."¹⁹⁸ Absent any explicit text, courts will not read a waiver of sovereign immunity into a statute,¹⁹⁹ and such waiver must not be implied.²⁰⁰ While a private right of action grants an individual the right to sue another, rather than going through a government entity, a waiver of sovereign immunity permits individuals and organizations the ability to sue the government directly.

The Ninth Circuit found in *San Carlos Apache Tribe* that the "NHPA offers no basis to infer a waiver of sovereign immunity."²⁰¹ The court found that if parties were able to sue under the NHPA, "they would be able to sidestep the traditional requirements of administrative review under the APA without express Congressional authorization."²⁰² This strict reading of the statutory language hampers the ability of Native Nations to protect their rights under the NHPA by limiting the claims which Native Nations can bring. However, other circuits have either explicitly found that the NHPA waives sovereign immunity²⁰³ or implicitly found a waiver of sovereign immunity by deciding the NHPA issue without discussing the waiver.²⁰⁴ Without an explicit waiver of sovereign immunity, Native Nations' claims under the NHPA crippled.

Taken together, the weak statutory and regulatory language and the lack of adequate judicial review make it practically impossible for a Native Nation to successfully pursue a claim under the NHPA. When an agency makes a final decision that will proceed regardless of any adverse impacts,²⁰⁵ the purpose of the NHPA, to *preserve* properties of historic, cultural, and religious value, is left unfulfilled.²⁰⁶ The weak statutory and regulatory language does little to effectively protect Native cultural sites, a problem which is evidenced by the

197. See *San Carlos Apache Tribe*, 417 F.3d at 1096.

198. *Fed. Deposit Ins. Corp. v. Meyer*, 510 U.S. 471, 475 (1994); see also *Loeffler v. Frank*, 486 U.S. 549, 554 (1988) ("Absent a waiver of sovereign immunity, the Federal Government is immune from suit." (citing *United States v. Sherwood*, 312 U.S. 584, 586 (1941))).

199. *Lane v. Pena*, 518 U.S. 187, 192 (1996) ("A waiver of the Federal Government's sovereign immunity must be unequivocally expressed in statutory text . . .").

200. *United States v. King*, 395 U.S. 1, 4 (1969) (stating "that such a waiver cannot be implied" (citing *United States v. Sherwood*, 312 U.S. 584 (1941))).

201. *San Carlos Apache Tribe*, 417 F.3d at 1096.

202. *Id.*

203. *Morris Cty. Tr. for Historic Preservation v. Pierce*, 730 F.2d 94, 95-96 (3d Cir. 1983).

204. See *Boarhead Corp. v. Erickson*, 923 F.2d 1011, 1017-18 n.11 (3d Cir. 1991); *Yankton Sioux Tribe v. U.S. Army Corps of Eng'rs.*, 194 F. Supp. 2d 977, 990 (D.S.D. 2002).

205. Rennick, *supra* note 3, at 79.

206. H.R. REP. 89-1916, at 1 (1966), as reprinted in 1966 U.S.C.C.A.N. 3307, 3307-08.

fact that the NHPA's requirements are so easily met. The problems with the statutory language are compounded by the lack of adequate judicial review. The great amount of deference courts give to agency decisions, the circuit split on whether the NHPA confers a private right of action, and the lack of an explicit statutory waiver of sovereign immunity create a confluence of obstacles that are practically insurmountable.

The consequences of these agency decisions are potentially disastrous.²⁰⁷ Once a Native cultural site has been altered or destroyed by an undertaking, it cannot be fixed, and its value to Native peoples cannot be restored. The statute and regulations do not adequately protect lands from undertakings because they do not require that an undertaking be abandoned if it adversely affects historic property.²⁰⁸ Unless a court grants a preliminary injunction, the standard of judicial review does little to protect Native Nations' cultural sites. Without a preliminary injunction, an undertaking may proceed.²⁰⁹ By the time a Native Nation and the agency resolve an NHPA claim in court, which is unlikely given the high standard of deference, any remedy the court provides could be too little, too late.²¹⁰

207. See *Pueblo of Sandia v. United States*, 50 F.3d 856, 858 (10th Cir. 1995). In *Pueblo of Sandia*, the Forest Service found that the Las Huertas Canyon "did not constitute a traditional cultural property" despite evidence that the Pueblo of Sandia peoples used the canyon in cultural ceremonies and that the "canyon contain[ed] many shrines and ceremonial paths of religious and cultural significance to the Pueblo." *Id.* at 857. Based in part on this determination, the Forest Service approved an undertaking that would have attracted additional tourists and visitors to the area. *Id.* at 858. The increase in tourism would have had an adverse impact on the Pueblo's "cultural properties and practices in the canyon," as their religious and cultural ceremonies are highly secretive. *Id.* The Tenth Circuit court found that the Forest Service had not fulfilled its obligations under the NHPA because it failed to consider these adverse effects. *Id.* at 857. Had the Tenth Circuit Court of Appeals not ruled in favor of the Pueblo of Sandia, their ability to practice their faith would have been hindered and many of the sacred shrines in the canyon would have been significantly altered. *Id.* at 858.

208. 36 C.F.R. § 800.7(a) (2016).

209. See generally *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 205 F. Supp. 3d 4 (D.D.C. 2016) (denying the Standing Rock Tribe's motion for a preliminary injunction). The District Court found that the Army Corps of Engineers "likely complied with the NHPA." *Id.* at 7. Since then, Energy Transfers Partners, the company that primarily owns the DAPL, has completed construction on the DAPL. *How Much of the Dakota Access Pipeline is Complete?*, *supra* note 12. However, due in large part to the efforts of Native American protesters and the nationwide conversation they have sparked, the Obama Administration hinted at halting construction on the pipeline until further considerations could be made. Derek Hawkins & Juliet Eilperin, *On Dakota Access, Obama Says Army Corps is Weighing Whether to 'Reroute' Pipeline*, WASH. POST (Nov. 2, 2016), <https://www.washingtonpost.com/news/morning-mix/wp/2016/11/02/dakota-access-obama-says-army-corps-is-weighing-whether-to-reroute-pipeline>. This victory for the Standing Rock Sioux Tribe was short-lived however, as the Trump Administration granted the permit, and oil is now flowing through the pipeline. See *supra* note 11.

210. To provide another cultural example, the Standing Rock Sioux Tribe submitted documents to the court that the DAPL route would disturb ancestral burial and sacred sites that Dakota Access initially overlooked. Meyer, *supra* note 11. Before the court even denied the Tribe's request for a preliminary injunction against the pipeline, these sites were destroyed. *Id.*

IV. RECOMMENDATIONS

There are a number of potential solutions to the inadequate protection the NHPA provides to Native Nations' cultural sites. The clearest and simplest of those solutions are to (1) amend the NHPA to require that an undertaking cannot move forward if it adversely affects a historic site,²¹¹ and (2) recognize that the NHPA does confer a private right of action.²¹² This Part outlines those solutions and discusses the potential issues surrounding them.

A. *THE NHPA SHOULD BE AMENDED TO PROVIDE THAT AN UNDERTAKING CANNOT ADVERSELY AFFECT A HISTORIC SITE*

Perhaps the best solution to the problems the NHPA currently poses is to amend the statute itself. This Note proposes that Congress should amend the NHPA to include a provision that states:

If adverse effects will, or are likely to, occur as the result of an undertaking, the adverse effects must be avoided, minimized, or mitigated to the complete satisfaction of all the consulting parties outlined in 36 C.F.R. § 800.2(c), or, if such agreement cannot be reached, the undertaking must be moved to a different site where adverse effects will not occur, or the federal agency shall not approve the undertaking.

This proposed amendment would leave the section 106 consultation process in place, providing consistency to parties familiar with the process, while providing firm protection when an undertaking would adversely affect a historic site. Another option would be to have the Advisory Council amend the regulations to include the same or a similar provision. As the executive agency responsible for promulgating the regulations under the NHPA, the Advisory Council has the authority to amend those regulations. However, this would not be as effective as a statutory amendment, since the NHPA itself would still lack language that affirmatively protects Native cultural sites if an adverse effect is found.²¹³

This statutory amendment would fulfill the purposes of the NHPA. The NHPA explicitly states that it is the government's policy "to foster conditions under which our modern society and our historic property can exist in productive harmony."²¹⁴ The regulations on the section 106 review process state that "[t]he goal of consultation is to . . . seek ways to avoid, minimize or

211. *See infra* Part IV.A.

212. *See infra* Part IV.B.

213. Section 106 provides that "[t]he head of any Federal agency . . . shall take into account the effect of the undertaking on any historic property." National Historic Preservation Act of 1966, 54 U.S.C.A. § 306108 (West 2014). A regulatory amendment would lack the weight of a statutory amendment and would only slightly strengthen this provision in favor of Native Nations.

214. *Id.* § 300101.

mitigate any adverse effects on historic properties.”²¹⁵ In essence, the NHPA was passed in 1966 to improve existing historic preservation programs and expand sites that were eligible for protection.²¹⁶ These sites were expanded to include sites sacred to Native Nations in 1992.²¹⁷ By including a provision that an undertaking that causes adverse effects must be resolved or it shall not be approved by the federal agency, Congress would better fulfill the purpose of the NHPA, which is to protect historic resources.²¹⁸

Such an amendment would also truly recognize the sovereign nature of Native Nations that the regulations of the NHPA purport to respect.²¹⁹ The current statute, by allowing an undertaking to continue despite any adverse effects on Native cultural sites, disrespects the sovereignty of Native Nations by essentially “writing off” the concerns of Native Nations in protecting their land and heritage. For example, the United States would never allow Canada (or a private energy company) to build a pipeline through Arlington National Cemetery or St. Patrick’s Cathedral in New York City, nor would the United States pass legislation that allows U.S. citizens to destroy Canadian cultural sites. The current statute also does not account for the long history of distrust between the federal government and Native Nations.²²⁰ The NHPA also does not acknowledge the inherent differences between Western and Native culture that make it difficult for Western judges, legislators, and agency decision makers to understand the full implications adverse effects can have on Native Nations.²²¹ Given the history of governmental abuse and the cultural differences between Western and Native culture, stronger protections of Native Nations’ cultural sites are necessary.

Supporters of the NHPA in its current form could argue that the statute does an adequate job of protecting cultural sites. Federal agencies and private entities involved in the section 106 review process often go above and beyond what the NHPA and its regulations require.²²² While these efforts are noble, the statute still does little to protect Native Nations’ interests when an adverse effect does occur or when negotiations disintegrate.²²³

215. 36 C.F.R. § 800.1 (a) (2016).

216. See H.R. REP. NO. 89-1916, at 5 (1966), as reprinted in 1966 U.S.C.C.A.N. 3307, 3307-08.

217. See S. REP. NO. 102-336, at 13 (1992).

218. 54 U.S.C.A. § 300101.

219. 36 C.F.R. § 800.2 (c) (2) (ii) (B)-(C).

220. See *supra* note 49 and accompanying text.

221. For a discussion of these cultural differences, see *supra* Part II.A.

222. See *Narragansett Indian Tribe v. Warwick Sewer Auth.*, 334 F.3d 161, 168 (1st Cir. 2003) (finding that the private entities and federal agency involved took definitive steps to eliminate adverse effects of the undertaking); see also *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng’rs*, 205 F. Supp. 3d 4, 17-24 (D.D.C. 2016) (noting the numerous instances the Army Corps of Engineers communicated with the Tribe, despite the Tribe’s lack of responses to those efforts).

223. See *supra* Part III.B (discussing the inadequacy of judicial review of the NHPA).

Another argument against amending the NHPA is that there are other statutes Native Nations can use to protect their rights.²²⁴ In many cases involving the NHPA, Native Nations also bring claims under such statutes.²²⁵ For example, in *Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers*, the undertaking is an oil pipeline that allegedly passes through ancient tribal burial sites and crosses under the Missouri River, the tribe's main source of water.²²⁶

This undertaking involves a claim under the NHPA and a claim under NEPA. But, the existence of one form of judicial recourse does not negate the importance of another. The NHPA works in ways that NEPA cannot, and vice versa. For example, NEPA might provide protection for the Standing Rock Sioux Tribe's water source, but it could not protect the Tribe's cultural sites that surround that water source.²²⁷ It is important that Native Nations, or any plaintiff, can use all of the statutory provisions Congress has given them to protect their rights.

B. CONGRESS SHOULD AMEND THE NHPA TO EXPLICITLY CONFER A PRIVATE RIGHT OF ACTION

Unfortunately, the proposed statutory amendment outlined above would have little effect if the Ninth Circuit's decision that the NHPA does not confer a private right of action stands.²²⁸ The simplest solution to this problem would be for Congress to amend the statute to explicitly confer such a right. A

224. These statutes include the APA, NEPA, the Native American Grave Protection and Repatriation Act, the Clean Water Act, the American Indian Religious Freedom Act, the Religious Freedom and Restoration Act, and the Archeological Resource Protection Act.

225. In *Muckleshoot Indian Tribe*, the Muckleshoot Tribe brought claims under NEPA and the NHPA. *Muckleshoot Indian Tribe v. U.S. Forest Serv.*, 177 F.3d 800, 803 (9th Cir. 1999). In *Winnemem Wintu Tribe v. United States Department of the Interior*, the Winnemem Wintu Tribe sued pursuant to ARPA, AIRFA, and RFRA, in addition to the NHPA. *Winnemem Wintu Tribe v. U.S. Dep't of the Interior*, 725 F. Supp. 2d 1119, 1128 (E.D. Cal. 2010). The Yankton Sioux Tribe utilized both the NHPA and NAGPRA in a suit against the Army Corps of Engineers. *Yankton Sioux Tribe v. U.S. Army Corps of Eng'rs*, 194 F. Supp. 2d 977, 980 (D.S.D. 2002). Most recently, the Standing Rock Sioux Tribe sued the Army Corps of Engineers for violating NEPA, the Clean Water Act, and the Rivers and Harbors Act, in addition to their claims under the NHPA. *Standing Rock Sioux Tribe*, 205 F. Supp. 3d at 7.

226. See *Standing Rock Sioux Tribe*, 205 F. Supp. 3d at 12–13; Levin, *supra* note 10; Meyer, *supra* note 11.

227. Compare National Environmental Policy Act of 1969, 42 U.S.C. § 4321 (2012) ("The purposes of this chapter are: To declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality."), with National Historic Preservation Act of 1966, 54 U.S.C.A. § 300101 (West 2014) ("It is the policy of the Federal Government . . . to foster conditions under which our modern society and our historic property can exist in productive harmony . . .").

228. See *supra* notes 117–26 and accompanying text (discussing the Ninth Circuit's holding that the NHPA does not provide a private right of action).

provision that explicitly confers a private right of action, in addition to the proposed statutory amendment, would give the NHPA its full protective effect. Congress already has grounds for doing this, as many federal circuits have ruled the statute does confer a private right of action²²⁹ based on the current language of the statute itself.²³⁰

V. CONCLUSION

As it currently stands, the National Historic Preservation Act does little to effectively protect Native Nations' cultural sites. The weak statutory language, the lack of adequate judicial review of agency decisions, and the Ninth Circuit Court of Appeals' holding in *San Carlos Apache Tribe* combine to effectively prevent judicial review of agency decisions. Congress should amend the NHPA in two ways: (1) the NHPA should include a provision that any adverse effects caused by an undertaking to a historic or cultural site must be either resolved by the parties or the deciding federal agency shall not permit the undertaking, and (2) the NHPA should explicitly confer a private right of action to individuals. In total, these provisions would permit Native Nations to bring suit under the NHPA against government agencies and ensure that, after centuries of broken promises on behalf of the federal government, their cultural sites are actually protected under the National Historic Preservation Act.

229. See *supra* Part II.D.

230. The court in *Boarhead Corp. v. Erickson* based its reasoning that the NHPA did confer a private right of action in part on the provision of the NHPA that awards attorneys' fees if a party bringing an NHPA claim prevails. *Boarhead Corp. v. Erickson*, 923 F.2d 1011, 1017 (3rd Cir. 1991). In *Vieux Carre Property Owners, Residents & Associates, Inc. v. Brown*, the Fifth Circuit found that the NHPA explicitly conferred a private right of action. 875 F.2d 453, 458 (5th Cir. 1989); see also National Historic Preservation Act of 1966, 54 U.S.C.A. § 307105 (West 2014) ("In any civil action brought . . . by any interested person to enforce this division, if the person substantially prevails in the action, the court may award attorney's fees, expert witness fees, and other costs of participating in the civil action . . .").