No. 17-1951

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

NARRAGANSETT INDIAN TRIBE,
Plaintiff-Appellant

v.

RHODE ISLAND DEPARTMENT OF TRANSPORTATION; FEDERAL HIGHWAY ADMINISTRATION; ADVISORY COUNCIL ON HISTORIC PRESERVATION; RHODE ISLAND HISTORICAL PRESERVATION & HERITAGE COMMISSION,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

RESPONSE BRIEF FOR THE FEDERAL APPELLEES

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STATEMENT OF JURISDICTION

The Narragansett Indian Tribe filed a complaint against two Rhode Island agencies and two federal agencies, alleging a breach of contract and seeking a declaratory judgment and injunctive relief. App'x 26, 30-31. The complaint asserts that it "arises under" the Administrative Procedure Act, 5 U.S.C. §§ 701-706, and Section 106 of the National Historic Preservation Act, 54 U.S.C. § 306108, but states no separate claim under either statute. App'x 26, 30-31. The district court correctly concluded that it lacked jurisdiction over claims against the federal defendants because the NHPA does not create an implied private right of action and because the Narragansett had failed to challenge any final agency action as required by the APA. App'x 18-20. On September 11, 2017, the district court therefore granted the federal defendants' motion to dismiss for lack of jurisdiction and entered judgment in favor of the federal defendants. App'x 10.

On September 26, 2017, the Narragansett filed a timely notice of appeal. App'x 8. Fed. R. App. P. 4(a)(1)(B)(ii). This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Whether Congress impliedly created a private right of action when it enacted the National Historic Preservation Act.

2. Whether the complaint states an adequate claim for relief against the federal defendants.

STATEMENT OF THE CASE

The Rhode Island Department of Transportation ("RIDOT") proposed to replace the I-95 Providence Viaduct. The Federal Highway Administration agreed to provide financial assistance for the project. Because the project is federally funded, it is an "undertaking" within the meaning of the National Historic Preservation Act ("NHPA"), 54 U.S.C. §§ 300101-320303. Some of the historic properties that will be affected by the project are connected to the Narragansett Tribe. Accordingly, the Federal Highway Administration, the Tribe (acting through its Tribal Historic Preservation Officer), the Rhode Island State Historic Preservation Office, and RIDOT, entered into a Programmatic Agreement to govern implementation of the project. The Tribe contends that RIDOT has not fulfilled its obligation under the Programmatic Agreement to transfer certain properties to the Tribe, and it seeks to compel RIDOT to do so.

I. Statutory Background

A. The National Historic Preservation Act

The NHPA imposes procedural obligations on federal agencies to consider the effects of projects carried out, funded by, or licensed by federal agencies on historic properties. The "fundamental purpose of the NHPA is to ensure the preservation of historical resources." *Te-Moak Tribe v. U.S. Dep't of Interior*, 608 F.3d 592, 609 (9th Cir. 2010). Section 106 of the NHPA provides that, "prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any

license, [a federal agency] shall take into account the effect of the undertaking on any historic property." 54 U.S.C. § 306108 (Section 106).

To administer Section 106 of the NHPA, Congress created the Advisory Council on Historic Preservation. *See* 54 U.S.C. §§ 304101, 304108. The Advisory Council has promulgated regulations that govern the implementation of Section 106. *See* 36 C.F.R. pt. 800. The regulations establish an orderly process to comply with Section 106, under which the relevant agency is required to consult with a number of specified parties to identify historic properties, assess the adverse effects that the proposed project would have on those properties, and "seek ways to avoid, minimize or mitigate any adverse effects." *Id.* § 800.1(a). The Section 106 regulations authorize, but do not require, the negotiation of a "programmatic agreement to govern the implementation of a particular program or the resolution of adverse effects from certain complex project situations or multiple undertakings," *Id.* § 800.14(b).[1] The implementation of a programmatic agreement "evidences the agency official's compliance with section 106 . . . and shall govern the undertaking and all of its parts." *Id.* § 800.6(c); *see also id.* § 800.14(b)(3); 54 U.S.C. § 306114. If a signatory to a

[1] When an undertaking may result in an adverse effect to a historic property, the federal agency must "consult … to develop and evaluate alternatives or modifications to the undertaking that could avoid, minimize or mitigate adverse effects on historic properties." 36 C.F.R. § 800.6(a). But if an agreement to resolve such effects is not reached (through a Programmatic Agreement for instance), the federal agency then discharges its Section 106 responsibilities through requesting and responding to the Advisory Council's comments. *See id.* § 800.7; 54 U.S.C. § 306114.

programmatic agreement determines that the terms of the agreement are not being carried out (or cannot be carried out) the signatories must consult and seek amendment of the agreement. If an amendment is not agreed upon, any signatory may terminate the agreement, and the agency official must either execute a memorandum of agreement with signatories pursuant to Section 800.6 (c)(1) of the regulations or request the comments of the ACHP pursuant to Section 800.7(a). *Id.* § 800.6(c)(8).

B. The Administrative Procedure Act

Because the NHPA does not provide for a private right of action, the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-706, provides for judicial review of challenges to final agency actions under the NHPA. *Brodsky v. NRC*, 704 F .3d 113, 119 (2d Cir. 2013); *Karst Envtl. Educ. & Prot., Inc. v. EPA*, 475 F.3d 1291, 1295 (D.C. Cir. 2007) ("[B]ecause NHPA, like NEPA, contains no private right of action, . . . NHPA actions must also be brought pursuant to the APA."). The APA provides that any "person . . . aggrieved by agency action within the meaning of a relevant statute" is "entitled to judicial review thereof." 5 U.S.C. § 702. Under the APA, the reviewing court shall "set aside agency action" that is found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2). Judicial review under the APA is available for review of "*final* agency action for which there is no other adequate remedy in a court.'" 5 U.S.C. § 704 (emphasis added).

II. Factual Background

As explained above, the Section 106 regulations allow a programmatic agreement to be employed in certain, specific circumstances, including cases in which "effects on historic properties cannot be fully determined prior to approval of an undertaking." 36 C.F.R. § 800.14(b)(ii). In the Programmatic Agreement in this case, the parties agreed that "in order to take into account the foreseen and unforeseen future effects of the Undertaking on historic properties," the Viaduct Project would be implemented in accordance with certain stipulations. App'x 35. In one of the amended stipulations, RIDOT agreed to acquire and transfer ownership of one property, the Salt Pond Archaeological Preserve in the Town of Narragansett, "to the State of Rhode Island jointly with the [Tribal Historic Preservation Office] for and on behalf of the . . . Tribe," App'x 41. RIDOT also agreed to acquire and transfer ownership of two other "significant Narragansett Indian Tribal cultural propert[ies]"—the "so-called 'Providence Boys Club-Camp'" and the "so called 'Chief Sachem Night Hawk property,'" both in the Town of Charlestown—to the Tribal Historic Preservation Office for and on behalf of the Tribe.

RIDOT has acquired title to each of the Tribal Historic Properties but it has not transferred ownership of the properties to the Tribe. Instead, it has informed the Tribal Historic Preservation Office that it will not do so unless the Tribe enacts a resolution waiving the Tribe's sovereign immunity by executing "covenant(s) within the deed(s) that the Tribal Historic Properties shall be subject to the civil and criminal

laws and jurisdiction of the State of Rhode Island." App'x 45. The Tribal Historic Preservation Office and the Tribe have refused to agree to this condition or to execute any deed or agreement waiving the Tribe's sovereign immunity.

Beginning in September 2013, the Tribe, its Preservation Office, and RIDOT attempted to resolve their dispute about the transfer of ownership in the properties using the Dispute Resolution provision in the Programmatic Agreement. The federal defendants have participated in these efforts in accordance with the Federal Highway Administration's consultation requirements under the Programmatic Agreement and Section 106 of the NHPA. Ultimately, however, the parties were unable to agree on the transfer of title to the Tribal Historic Properties. Accordingly, on January 19, 2017, the Federal Highway Administration terminated the agreement and referred the matter to the Advisory Council for comment as required by the Section 106 regulations and the termination provision in the Programmatic Agreement. *See* 36 C.F.R. §§ 800.6(c)(8); 800.7(a)(1), (c); App'x 38. The termination provision of the agreement states that "[i]f the PA is terminated for any reason, the FHWA shall comply with subpart B of 36 C.F.R. § 800 (800.3-800.13)." As explained above, under those regulations, when parties fail to reach an agreement on resolving adverse effects (as the parties had in this case, despite their efforts since September 2013), the federal agency then discharges its Section 106 responsibilities by requesting, considering, and responding to the ACHP's comments. *See* 36 C.F.R. § 800.7.

On May 3, 2017, the Advisory Council provided its comments to the Federal Highway Administration. The agency is required to take the comments into account and respond prior to making a final decision on the project.

III. Procedural Background

In its complaint, the Tribe alleged that the Programmatic Agreement required RIDOT to acquire and transfer the properties at issue to the Tribe, but that RIDOT has not transferred title to these properties to the Tribe. The Tribe also alleged, "upon information and belief," that RIDOT and the Federal Highway Administration "have in [their] possession or controls funds allocated to fulfill [their] agreements" under the Programmatic Agreement. App'x 30. The Tribe asked the district court to declare the Programmatic Agreement to be valid and enforceable, and that title to the properties at issue be transferred to the Tribe pursuant to the terms of the Programmatic Agreement. *Id.* The Tribe asked the court to enjoin any transfer of the properties except to the Tribe, and sought specific performance and enforcement against RIDOT as a remedy for RIDOT's alleged breach of the Programmatic Agreement. App'x 31.

As against the federal defendants, the district court dismissed the complaint for lack of jurisdiction because the Tribe has not identified any "final agency action" as required by the APA. The district court concluded that the Tribe failed to state a claim against the state defendants because the APA does not provide for review of state action and the NHPA does not create a private right of action. This appeal followed.

SUMMARY OF ARGUMENT

The Tribe's complaint in this case makes no allegation of wrongdoing by the federal defendants and includes no separate count or cause of action alleging a violation of the APA or the NHPA. The Tribe has therefore failed to state a claim against the federal defendants. The Tribe asserts on appeal that its claim is one to enforce the NHPA, but it identifies no final agency action on the part of the federal defendants as required for review under the APA. To get around that requirement for APA review, the Tribe argues that the APA's final agency action requirement does not apply because the NHPA creates an implied private right of action.

To the contrary, both courts to consider the issue following the Supreme Court's decision in *Alexander v. Sandoval* (clarifying its jurisprudence on implied rights of action) have concluded that the NHPA does not create a private right of action, and for good reason. The statutory language of the NHPA is directed towards the actions of federal agencies and does not create any individual rights; the APA provides the traditional means for review of agency action and is sufficient to protect an individual's ability to ensure federal agencies comply with the NHPA's dictates; and it is well established that the most closely analogous statute, the National Environmental Policy Act, does not create a private right of action.

The district court's judgment in favor of the federal defendants should therefore be affirmed.

STANDARD OF REVIEW

This Court reviews de novo the district court's dismissal of a claim under Federal Rule of Civil Procedure 12(b)(1) or 12(b)(6). *Chiang v. Skeirik*, 582 F.3d 238, 241 (1st Cir. 2009).

ARGUMENT

I. The National Historic Preservation Act does not create a private right of action.

Congress did not expressly include a private right of action in the NHPA. As the Ninth Circuit has explained, "Section 106 does not expressly provide that private individuals may sue to enforce its provisions. Nor does the statute specify a remedy for violation of this section." *San Carlos Apache Tribe v. United States*, 417 F.3d 1091, 1094 (9th Cir. 2005). This Court should reject the Tribe's invitation to find that, despite the failure to expressly create a private right of action, Congress implicitly created a private right of action.

The Supreme Court has explained because "private rights of action to enforce federal law must be created by Congress . . . [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." *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001). Following *Sandoval*, the courts to consider this issue have concluded that the NHPA does not create a private right of action. *San Carlos Apache Tribe*, 417 F.3d at

1094-99; *Karst Envtl. Educ. And Prot., Inc. v. EPA*, 475 F.3d 1291, 1295 (D.C. Cir. 2007). This Court should follow their lead.

In *San Carlos Apache Tribe*, the Ninth Circuit exhaustively and persuasively considered whether Congress created a private right of action in the NHPA and concluded for several reasons that it did not. First, the focus of the language of the NHPA is on establishing requirements for federal agencies, not on establishing individual rights. 417 F.3d at 1095. Section 106 of the NHPA, the section on which the Tribe relies, provides that: "The head of any Federal agency . . . prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license, shall take into account the effect of the undertaking on any historic property." 54 U.S.C. § 306108. Thus, the language of the NHPA, just as the language of the statute at issue in *Sandoval*, "is not directed to individuals or entities that may be harmed through violation of NHPA's dictates, but . . . to the persons regulated—the heads of federal agencies." 417 F.3d at 1095. This Court should not conclude that Congress implicitly created a right of action in favor of individuals in a provision directed at the conduct of federal agencies.

Second, *San Carlos Apache Tribe* rejected the Tribe's argument that Congress implied a private right of action when it added the attorneys' fees provision to the NHPA. Before the Supreme Court decided *Sandoval*, the Third and Fifth Circuits had held that there is an implied private right of action under the NHPA based on the language of the NHPA's attorneys' fee provision. *See Boarhead Corp. v. Erickson*, 923

F.2d 1011, 1017 (3d Cir. 1991); *Vieux Carre Prop. Owners, Residents & Assocs. v. Brown*, 875 F.2d 453, 458 (5th Cir. 1989). But no court has concluded that the NHPA creates a private right of action since the Supreme Court's decision in *Sandoval*, and the Fifth Circuit has more recently called into question its holding in *Vieux Carre*. *See Friends of St. Francis Xavier Cabrini Church v. FEMA*, 658 F.3d 460, 466 n.2 (5th Cir. 2011) (noting that "the Supreme Court's recent jurisprudence casts serious doubt on the continued viability of the private right of action under the NHPA" (citations omitted)).

The Ninth Circuit has correctly explained why, in light of *Sandoval*, the attorney's fees provision does not create a private right of action. That provision states that "[i]n any civil action brought in any United States district court by any interested person to enforce this division, if the person substantially prevails in the action, the court may award attorneys' fees, expert witness fees, and other costs of participating in the civil action, as the court considers reasonable." 54 U.S.C. § 307105. The attorneys' fees provision simply permits the award of fees and costs in civil actions otherwise authorized to be brought in the district courts, such as those brought under the APA, and does nothing to create a private right of action. Indeed, nothing in the legislative history of the 1980 amendments, which added the provision, reveals an intent by Congress to create a new private right of action against the federal government under the NHPA or to supplement or supplant the remedies which the APA makes available to those challenging federal administrative action as unlawful.

H.R. Rep. 96 1457, 1980 U.S.C.C.A.N. 6378; *see also Morris County Trust for Historic Pres. v. Pierce*, 730 F.2d 94, 94-96 (3d Cir. 1983) (noting the lack of "meaningful legislative history" regarding the section).

Thus, as the Ninth Circuit explained, the provision "demonstrates Congressional intent that individuals may sue to enforce NHPA," and it "evinces congressional intent to cover the costs of those who prevail in a suit under the statute. But it does not follow that Congress intended these individuals to file suit against the United States under NHPA itself, rather than under the well-established procedures set out under the APA." *San Carlos Apache Tribe*, 417 F.3d at 1099.

Third, it would make little sense for Congress to have created a private right of action when the APA provides a well-established and traditional avenue for relief against a federal agency. Indeed, as then-Judge Breyer explained:

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

NAACP v. Sec'y of HUD, 817 F.2d 149, 152 (1st Cir.1987). The APA, of course, is the mechanism by which the Tribe may seek to ensure that the Federal Highway Administration acts in conformity with its statutory obligations. The existence of that means of review counsels against concluding that Congress implicitly created a private right of action in the NHPA.

To hold otherwise would vitiate the APA's final agency action requirement and allow immediate review of intermediate, procedural steps like NHPA compliance that are normally "not directly reviewable" but are "subject to review on the review of the final agency action." 5 U.S.C. § 704. Tellingly, in *Bennett v. Spear*, 520 U.S. 154 (1997), the Supreme Court declined to find that the Endangered Species Act's citizen suit provision authorized suits against the Department of the Interior on precisely this ground. The Court concluded that the "any person" language used in that provision does not authorize such a suit, reasoning that to conclude otherwise would "effect a wholesale abrogation of the APA's 'final agency action' requirement," and that "[w]e are loathe to produce such an extraordinary regime without the clearest of statutory direction, which is hardly present here." *Id.* at 174. Nor should this Court effect a wholesale abrogation of the APA based on an implied right of action under the NHPA—hardly "the clearest of statutory direction." *Id.*

Finally, the NHPA is closely analogous to the National Environmental Policy Act, and it is well-established that NEPA does not create a private right of action and suits to enforce NEPA must proceed under the APA. *San Carlos Apache Tribe*, 417 F.3d at 1097-98. The Tribe notes some differences between the statutes, Br. 15-17, but both create intermediate, procedural obligations on federal agencies meant to inform the agency's decisionmaking process preceding a substantive final agency action that is made reviewable by the APA. Indeed, "both Acts create obligations that are chiefly procedural in nature; both have the goal of generating information about

the impact of federal actions on the environment; and both require that the relevant federal agency carefully consider the information produced. That is, both are designed to insure that the agency 'stop, look, and listen' before moving ahead." *Pres. Coalition, Inc. v. Pierce*, 667 F.2d 851, 859 (9th Cir.1982). There is no reason Congress would have impliedly adopted different review regimes for such similar statutes. This Court has held that NEPA does not create a private right of action, *Town of Portsmouth v. Lewis*, 813 F.3d 54, 62 (1st Cir. 2016) ("NEPA provides no right of action at all."), and it should hold the same for the NHPA.

II. Alternatively, the Tribe does not challenge either of the district court's grounds for dismissal, and the complaint contains no discernable claim against the federal defendants.

The district court concluded that the Tribe's "complaint is devoid of any assertion that the Federal Defendants' final agency action caused [the Tribe] harm," and it therefore granted the federal defendants' motion to dismiss. App'x 20. The Tribe does not challenge that conclusion on appeal. The district court also noted that the Tribe had failed to plead any claim under the APA in a separate count or as a cause of action. App'x 20. The Tribe does not challenge that conclusion on appeal either. Likewise, the complaint contains no count or cause of action predicated on the NHPA.

Indeed, the federal defendants are mentioned in the complaint only in passing in a paragraph alleging that the Federal Highway Administration possesses funds "allocated to fulfill" its part of the Programmatic Agreement. App'x 30. The only

claims in the case are against the state defendants, as the Tribe alleges RIDOT has breached the Programmatic Agreement. App'x 30-31. Even on appeal, the Tribe contends that the NHPA provides a private right of action against the federal defendants, but it still does not explain what it is the federal defendants have done to violate the NHPA or what relief it seeks against the federal defendants. Thus, the complaint simply does not contain an adequate "statement of the claim showing that the pleader is entitled to relief," Fed. R. Civ. P. 8(a)(2); *see also Ashcroft v. Iqbal*, 556 U.S. 662, 669 (2009); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). The district court may be affirmed on that ground alone.

CONCLUSION

The district court's judgment in favor of the federal defendants should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH
FEDERAL RULE OF APPELLATE PROCEDURE 32(A)

I hereby certify that this brief complies with the requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in 14-point Garamond, a proportionally spaced font.

I further certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains **3,721 words**, excluding the parts of the brief exempted under Rule 32(a)(7)(B)(iii), according to the count of Microsoft Word.

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CERTIFICATE OF SERVICE

I hereby certify that on February 12, 2018, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the First Circuit by using the appellate CM/ECF system and thereby served the following counsel of record.

The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

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