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California v. Sierra Club

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INTRODUCTION

Congress enacted the Rivers and Harbors Appropriation Act of 1899[1] to protect the navigability of waterways and to enhance maritime commerce.[2] Although the Act provides for control of water pollution and obstructions in navigable waters of the United States, nothing in the legislative history suggests that the Act was intended to address other environmental problems such as conservation of natural resources.[3] In the last decade, however, sections 9[4] and 10[5] of the Act

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1. 33 U.S.C. §§ 401-467e (1976 & Supp. III 1979) [hereinafter referred to as "the Act"].

The Act superseded the Act of Sept. 19, 1890, ch. 907, 26 Stat. 454, *as amended by* Act of July 13, 1892, ch. 158, 27 Stat. 88. The 1890 legislation was Congress's response to the Supreme Court decision in Willamette Iron Bridge Co. v. Hatch, 125 U.S. 1 (1888), which stated that the federal government had no common law authority to protect navigable waters from obstructions. *Id.* at 8. For a detailed discussion of the legislative history of the Act, *see generally* Comment, *Sections 9 and 10 of the Rivers and Harbors Act of 1899: Potent Tools for Environmental Protection*, 6 ECOLOGY L.Q. 109 (1976).

2. Druly, *The Refuse Act of 1899*, ENV. REP.—Monograph No. 11, at 2 (1972). Constitutional authority for this protective legislation vested in the Commerce Clause. U.S. CONST. Art. I, § 8. *See also* Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 190 (1824); Gilman v. Philadelphia, 70 U.S. (3 Wall.) 713, 725 (1866). Congress also recognized the need to protect waterways from trespass and obstruction. H.R. REP. No. 477, 51st Cong., 1st Sess. 1 (1890).

3. The legislative history reveals that the primary concerns of Congress were to preserve navigability of waterways and to promote maritime commerce. Druly, *The Refuse Act of 1899*, ENV. REP.—Monograph No. 11, at 2 (1972). However, Sections 9 and 10 of the Act vest tremendous power in the Army Corps of Engineers to regulate development in and around navigable waters, and the courts have interpreted the broad statutory language to reach projects that do not inhibit or obstruct navigation. *See, e.g.*, Zabel v. Tabb, 430 F.2d 199 (5th Cir. 1970), *cert. denied*, 401 U.S. 910 (1971). Judge G.W. Koonce, who was with the Corps of Engineers from 1886 through 1926, and played a major role in drafting the Act, underscored the expansive scope of the law with the following remarks:

> It was intended to be, and is, an assertion of police power to protect from physical injury those highways of commerce in which the Federal Government has dominion and propriety, and within its comprehensive provisions are embraced all forms and varieties of physical obstructions. An examination and study of the law will impress anyone with the organic and far reaching character of the jurisdiction asserted, and with its evident value both as a preventive and remedial measure.

Lecture by Judge G.W. Koonce, Federal Laws Affecting River and Harbor Works, Before the Company Officer Class, the Engineer School, Ft. Humphreys, Va., Apr. 23, 1926, in *Hearings on Water Pollution Control Legislation—1971 (oversight of Existing Programs) Before the House Comm. on Public Works*, 92d Cong., 1st Sess. 288 (1971), *cited in* Comment, *supra* note 1, at 114.

4. 33 U.S.C. § 401 (1976 & Supp. III 1979).

Section 9 applies to the construction of dams, dikes, causeways, and bridges, and makes

have been used as effective environmental tools in preserving wetlands and limiting waterfront development.[6] Both Congress and the courts have encouraged use of the Act as an environmental statute. First, judicial[7] and administrative[8] definition expanded the jurisdiction of the Army Corps of Engineers to include ecologically vital coastal wetlands. Second, Congress extended the scope of the Act in 1970 through directives contained in the Fish and Wildlife Conservation Act[9] and the National Environmental Policy Act,[10] which altered the focus of the Corps of Engineers' permit program to include consideration of environmental and public-interest factors.

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it unlawful for such projects to be constructed on any navigable waters of the United States without legislative authorization and administrative approval by the Chief of Engineers an the Secretary of the Army. *Id.*

5. 33 U.S.C. § 403 (1976 & Supp. III 1979).

Section 10 applies to wharves, piers, breakwaters, dredge and fill operations, and other modifications of navigable waters; these projects require only administrative approval of the Chief of Engineers and the Secretary of the Army. *Id.*

6. *See, e.g.*, Sierra Club v. Leslie Salt Co., 412 F. Supp. 1096 (N.D. Cal. 1976) (existing wetlands are within federal protection under the Act because they are part of water bodies that were once navigable waters used in interstate commerce). *Cf.* United States v. Stoeco Homes, Inc., 498 F.2d 597 (3d Cir. 1974), *cert. denied*, 420 U.S. 927 (1975).

7. Federal jurisdiction under sections 9 and 10 is defined in terms of "navigable waters of the United States." 33 U.S.C. §§ 401, 403 (1976 & Supp. III 1979). One of the earliest tests of navigability was announced by the Supreme Court in *The Daniel Ball*, 77 U.S. (10 Wall.) 557 (1870):

> Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water.

Id. at 563. The definition of "navigable waters" has since been broadened considerably, with a three-part test currently prevailing: (1) is the waterway presently being used or suitable for use in interstate commerce; (2) has the waterway been used or was it suitable for such use in the past; or (3) could the waterway be made suitable for such use in the future by reasonable improvements. Rochester Gas & Electric Corp. v. Fed. Power Comm'n, 344 F.2d 594, 596 (2d Cir. 1965), *cert. denied*, 382 U.S. 832 (1965). *See also* United States v. Appalachian Electric Power Co., 311 U.S. 377, 409 (1940) (forms and extent of commercial activity on a waterway vary greatly and depend upon "[t]he character of the region, its products and the difficulties or dangers of the navigation"); Economy Light & Power Co. v. United States, 256 U.S. 113 (1921) (establishing the doctrine of continuing navigability which holds that waters once navigable remain subject to federal regulation even though no longer navigable); *accord*, United States v. Appalachian Electric Power Co., 311 U.S. at 408; United States v. United States Steel Corp., 482 F.2d 439, 453 (7th Cir. 1973), *cert. denied*, 414 U.S. 909 (1973); Sierra Club v. Leslie Salt Co., 412 F. Supp. 1096, 1103 (N.D. Cal. 1976); United States v. Kaiser Aetna, 408 F. Supp. 47, 49 (D. Hawaii 1976); United States v. Lewis, 355 F. Supp. 1132, 1139 (S.D. Ga. 1973).

8. The Corps of Engineer's definition of navigable waters parallels the judicial doctrine of navigability, evaluating past, present, and future commercial use:

> Navigable waters are those waters that are subject to the ebb and flow of the tide and/or are presently used, or have been used in the past, or may be susceptible for use to transport interstate or foreign commerce.

33 C.F.R. § 329.4 (1981).

9. 16 U.S.C. § 1661(b) (1976).

10. 42 U.S.C. § 4332(A)-(C) (1976 & Supp. III 1979).

The final expansion in use of the Act revolved around who could sue to enforce it. The Act expressly vests responsibility in the federal government to seek judicial enforcement,[11] and does not expressly provide a cause of action for private litigants.[12] In the 1970's, however, the trend in the lower federal courts was to recognize an implied private right of action, at least in cases involving sections 9 and 10 of the Act.[13] The recent Supreme Court decision in *California v. Sierra Club*[14] has curtailed this expansive reading of the Act. In that case, appellants were private litigants who had brought an action to enjoin construction of portions of the California water project. The Supreme Court reversed the holdings of the District Court and the Ninth Circuit Court of Appeals that the Act implied a private right of action.

I

BACKGROUND OF THE CASE

The landmark Supreme Court opinion of *Cort v. Ash*,[15] written in 1975, outlined four factors relevant to the Court's "preferred approach for determining whether a private right of action should be implied

11. 101 S. Ct. at 1781.

12. The implied right of action theory is a judicial creation whereby courts will infer a private remedy under a statute that does not expressly provide such relief. The theory underlying the doctrine is that one who is injured by the violation of a statutorily imposed duty should be permitted to obtain civil redress for his injuries where maintenance of the action would further the statute's purposes and would not interfere with the operation of the statutory scheme. Where the statute does not expressly provide a private remedy, the Supreme Court has identified four factors that must be weighed in determining whether a private right of action is implicit in the statute. See text accompanying notes 17-20 *infra*.

13. *See, e.g.*, Sierra Club v. Andrus, 610 F.2d 581 (9th Cir. 1979); People *ex rel.* Scott v. Hoffman, 425 F. Supp. 71 (S.D. Ill. 1977); Potomac River Ass'n, Inc. v. Lundeberg Maryland Seamanship School, Inc., 402 F. Supp. 344 (D. Md. 1975) Sierra Club v. Morton, 400 F. Supp. 610 (N.D. Cal. 1975); James and Kanawha Canal Parks, Inc. v. Richmond Metropolitan Authority, 359 F. Supp. 611 (E.D. Va. 1973), *aff'd per curiam*, 481 F.2d 1280 (4th Cir. 1973); Alameda Conservation Ass'n v. California, 437 F.2d 1087 (9th Cir. 1971), *cert. denied*, 402 U.S. 908 (1972), *as interpreted by* Sierra Club v. Leslie Salt Co., 354 F. Supp. 1099 (N.D. Cal. 1972). *See also* United States v. City of Irving, 482 F. Supp. 393 (N.D. Tex. 1979) (inferring a private right of action under section 14). *Contra*, Citizens' Committee for Environmental Protection v. United States Coast Guard, 456 F. Supp. 101 (D. N.J. 1978).

The Third Circuit Court of Appeals refused to infer a private right of action under section 10 of the act as early as 1970. *See* Red Star Towing and Transportation Co. v. Department of Transportation of New Jersey, 423 F.2d 104 (3rd Cir. 1970). In cases involving section 13 of the Act, few courts have ever upheld such a private right of action. *See, e.g.*, National Sea Clammers Ass'n v. City of New York, 616 F.2d 1222, 1232 (3rd Cir. 1980), *aff'd sub nom.* Middlesex County Sewerage Authority v. Nat'l Ass'n of Sea Clammers, 449 U.S. 917 (1981); City of Evansville v. Kentucky Liquid Recycling, Inc., 604 F.2d 1008 (7th Cir. 1979), *cert. denied sub nom.* Louisville and Jefferson County Metropolitan Sewer District v. City of Evansville, 444 U.S. 1025 (1980); Romero-Barcelo v. Brown, 643 F.2d 835 (1st Cir. 1981).

14. 101 S. Ct. 1775 (1981). See Part III *infra* for a detailed discussion of the Court's decision.

15. 422 U.S. 66 (1975).

from a federal statute":[16] First it must be determined whether the plaintiff is a member of the class for whose "especial benefit" the statute was enacted.[17] Second, the court will look at the legislative history to determine whether there is any legislative intent, explicit or implicit, to create or deny a private remedy.[18] Third, the court must inquire whether it will be consistent with the underlying purposes of the legislative scheme to imply a private remedy.[19] Finally, the court must determine whether the cause of action is one traditionally relegated to state law so that it would be inappropriate to infer a cause of action based only on federal law.[20] Cases decided since *Cort* have explained that the ultimate issue in any such inquiry is whether Congress intended to create a private right of action,[21] and that the four factors specified in *Cort* are simply the "criteria through which this intent [can] be discerned."[22] In *California v. Sierra Club*, the Court applied the *Cort* test to determine that the Rivers and Harbors Act of 1899 implied no right of action for private plaintiffs who sought to enjoin construction of portions of the California Water Project.

The California Water Project is a massive system of water storage and transportation facilities designed to transport water from the Sacramento River Delta in Northern California to the agricultural San Joaquin Valley and the populous Los Angeles Basin in Central and Southern California. The Project has both federal and state components.[23] The federal component, the Central Valley Project, was first authorized by Congress in the Rivers and Harbors Act of 1937.[24] The Tracy Pumping Plant diverts water for this project from the Delta to

16. Transamerica Mortgage Advisors v. Lewis, 444 U.S. 11, 26 (1979) (White, J., dissenting); *see* Cannon v. Univ. of Chicago, 441 U.S. 677 (1979). Prior to the Supreme Court's decision in *Cort*, the test for determining whether a federal statute implicitly granted a private right of action paralleled that for determining whether a plaintiff had standing to sue. The relevant issues were whether the plaintiff had alleged injury in fact, whether the plaintiff's injury was of the type the relevant statute sought to prevent, and whether Congress had precluded judicial review. *See* Ass'n of Data Processing Serv. Orgs. v. Camp, 397 U.S. 150, 152-56 (1970) (test applied under Administrative Procedure Act). *Cf.* Wyandotte Transp. Co. v. United States, 389 U.S. 191, 202 (1967) (availability of criminal penalties under a statute does not preclude the statute's enforcement by private plaintiffs within the class the statute was intended to protect, where the harm to plaintiff is of the type the statute was intended to prevent).

17. *Id.* at 78.

18. *Id.*

19. *Id.*

20. *Id.*

21. *See* Univs. Research Ass'n v. Coutu, 450 U.S. 754, 770 (1981); Transamerica Mortgage Advisors v. Lewis, 444 U.S. at 23-24; Touche Ross & Co. v. Redington, 442 U.S. 560, 568 (1979).

22. Davis v. Passman, 442 U.S. 228, 241 (1979).

23. The federal Tracy Pumping Plant and the state Delta Pumping Plant both draw water from the Delta. Sierra Club v. Morton, 400 F. Supp. at 620; Sierra Club v. Andrus, 610 F.2d 581, 586 (9th Cir. 1979). *See* California Water Atlas 46-56 (1979).

24. Act of Aug. 26, 1937, Ch. 832, § 2, 50 Stat. 844, 850.

the Delta-Mendota Canal. The State Water Project, approved by referendum in 1960, supplies water to both Central and Southern California by way of the Delta Pumping Plant and the California Aqueduct.[25]

The Project diverts water that would otherwise flow through the Delta and into the San Francisco Bay. This diversion may exacerbate pollution in the Bay by reducing the flushing action of fresh water from the Sacramento River.[26] It has also degraded Delta water quality by allowing the intrusion of salt water from the Bay. Water taken from the Delta for the Project is also afflicted with this saline pollution. The state has proposed construction of the Peripheral Canal to carry the water from upstream of the Delta directly to the Tracy and Delta Pumping Plants, in order to avoid mixing this better quality water with the saline water in the Delta. The construction of the Canal as planned will greatly expand the capacity of the diversion system.[27]

Alleging damage to fisheries and farmland and restriction of recreational opportunities, the Sierra Club and two private citizens[28] sued various state and federal agencies to enjoin further operation of the federal and state components of the project[29] and the construction of the Peripheral Canal. Asserting an implied private right of action under the Act,[30] plaintiff alleged that the present and proposed diversions of water altered the navigability of the Delta and thus that section 10 of the Act required permits for the plants' further operation.[31]

Both the District Court for Northern California[32] and the Ninth Circuit Court of Appeals[33] held that the plaintiff had an implied right of private action to enforce section 10. Applying the four-part test enunciated in *Cort v. Ash*, both courts found that plaintiffs were in the class intended to be benefited by the Act, that Congress had remained silent regarding the rights of private parties, that inferring a private right of action would further the purposes of the Act, and that navigation was traditionally an area of federal concern.[34] The district court held for the plaintiffs on the merits,[35] stating that section 10 requires

25. *See* Taylor, *California Water Project: Law and Politics*, 5 ECOLOGY L.Q. 1, 28-39, 35-36 (1975).

26. Helm, *Vampiracy: The Rise of Hydraulic Society and the Destruction of Northern California*, 15 City Miner Magazine 29, 37 (1980).

27. California Water Atlas, *supra* note 23, at 46-75, 104. The capacity of the system was 3,500,000 acre-feet in 1975; by 2000, the contract specifies that this capacity shall expand to 6,000,000 acre-feet, or over 70% of the annual flow through the Delta.

28. A Delta landowner and a commercial fisherman. *Sierra Club v. Morton*, 400 F. Supp. 610, 618 (1975).

29. 400 F. Supp. 610.

30. *See* Comment, *supra* note 1, at 153-58.

31. 33 U.S.C. § 403. See note 12 *supra*.

32. *Sierra Club v. Morton*, 400 F. Supp. 610 (N.D. Cal. 1975).

33. *Sierra Club v. Andrus*, 610 F.2d 581 (9th Cir. 1974).

34. 400 F. Supp. at 622-25; 610 F.2d at 587-92.

35. 400 F. Supp. at 626-52.

Corps approval of the Tracy and Delta Pumping Plants and the Peripheral Canal. The Court of Appeals affirmed the lower court decision regarding the state component of the project, but reversed as to the federal component, holding that the congressional appropriations for the project constituted explicit authorization.[36] The United States Supreme Court granted certiorari upon petition by the water agencies and the State of California.[37]

II
SUPREME COURT DECISION

In *California v. Sierra Club*, the Supreme Court reversed the district court and Ninth Circuit inferences of a private cause of action to enforce section 10. In an opinion written by Justice White,[38] the Supreme Court held that a private right of action cannot be inferred on behalf of private litigants allegedly injured by a claimed violation of section 10, since the Act is only a general regulatory scheme and does not "unmistakably focus" on any particular class of beneficiaries whose welfare Congress intended to promote.[39] A review of the legislative history confirmed the Court's view that section 10 carries "no implication of an intent to confer rights on a particular class."[40] The Court concluded that congressional silence on the subject of private rights of action demonstrates that they were not a concern when the statute was enacted. The Court declined to use its judicial power to "engraft a remedy on a statute . . . that Congress did not intend to provide."[41] Though urged by the State of California to reach the merits of the case—whether permits are required for the state water allocation project—the Court declined to do so.[42]

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36. 610 F.2d at 601-07.

37. 49 U.S.L.W. 3245 (Oct. 6, 1980).

38. Justice White was joined in his opinion by Justices Brennan, Marshall, Blackmun, and Stevens. Justice Stevens wrote a separate concurring opinion to express his belief that the Court had properly adhered to the analytical approach adopted in *Cort v. Ash*, 422 U.S. 66 (1975), rather than adopting an approach that would attempt to follow what Congress probably assumed when it enacted the Act in 1890. 101 S. Ct. at 1781-83. Justice Rehnquist wrote a separate opinion, joined by Chief Justice Burger and Justices Stewart and Powell. While concurring in the Court's judgment, Justice Rehnquist expressed the views that (1) no implied right of action to enforce section 10 exists, and (2) the four *Cort* factors are merely guides to the central task of ascertaining legislative intent, so that courts need not mechanically trudge through all four factors when the dispositive question of legislative intent has been resolved. *Id.* at 1783-84.

39. *Id.* at 1779.

40. *Id.*

41. *Id.* at 1781.

42. *Id.* The Court stated: "Our ruling that there is no private cause of action permitting respondents to commence this action disposes of the case: we cannot consider the merits of a claim which Congress has not authorized respondents to raise." *Id.*

III
DISCUSSION

In *Sierra Club v. Morton*,[43] the district court used the *Cort* test to infer a private right of action under sections 9 and 10 of the Act, causing one student commentator to predict that "judicial implication of a private right of action has paved the way for private litigants to challenge the legality of environmentally-damaging projects" and could "help protect and restore the nation's valuable water resources."[44] The application of the *Cort* test in cases involving other sections of the Act,[45] however, resulted in a split among the circuit courts as to whether a private right of action should ever be inferred under the Act.[46] In applying the *Cort* test, the Ninth Circuit Court of Appeals in *Sierra Club v. Andrus* had noted that the impetus for the predecessor to the present Act[47] was a private suit by a party suffering special injury because of the construction of a bridge over navigable water.[48] The Court of Appeals concluded, therefore, that Congress intended section 10 "both to prevent injuries to private parties . . . and to allow the United States to regulate obstructions to . . . its navigable waterways."[49] The First Circuit Court of Appeals in *Romero-Barcelo v. Brown*,[50] on the other hand, did not seek congressional intent in the historical context of the Act or its subsequent treatment in the courts. Rather, it looked primarily at the "especial benefit"[51] factor noted in *Cort* and found that the Act was enacted for the benefit of the public at

43. 400 F. Supp. 610, 622-23 (N.D. Cal. 1975).

44. Comment, *supra* note 1, at 159.

45. *See, e.g.*, Romero-Barcelo v. Brown, 643 F.2d 835 (1st Cir. 1981); City of Evansville v. Kentucky Liquid Recycling, Inc., 604 F.2d 1008 (7th Cir. 1979), *cert. denied sub nom.* Louisville and Jefferson County Metropolitan Sewer District v. City of Evansville, 444 U.S. 1025 (1980); Nat'l Sea Clammers Ass'n v. City of New York, 616 F.2d 1222 (3rd Cir. 1980), *cert. granted sub nom.* Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n, 449 U.S. 917 (1981).

46. *See, e.g.*, Romero-Barcelo v. Brown, 643 F.2d 835 (1st Cir. 1981); City of Evansville v. Kentucky Liquid Recycling, Inc., 604 F.2d 1008 (7th Cir. 1979), *cert. denied sub nom.* Louisville and Jefferson County Metropolitan Sewer Dist. v. City of Evansville, 444 U.S. 1025 (1980); Nat'l Sea Clammers Ass'n v. City of New York, 616 F.2d 1222 (3rd Cir. 1980), *cert. granted sub nom.* Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n, 449 U.S. 917 (1981). *Cf.* Sierra Club v. Morton, 400 F. Supp. 610 (N.D. Cal. 1975), *modified*, 610 F.2d 581 (9th Cir. 1979).

47. Act of Sept. 19, 1890, ch. 907, 26 Stat. 426, 454, *as amended by* Act of July 13, 1892, ch. 158, 27 Stat. 88.

48. 610 F.2d at 587. The case that spurred enactment of the original act was Willamette Iron Bridge Co. v. Hatch, 125 U.S. 1 (1888).

49. *Id.* at 588 (citing Sierra Club v. Morton, 400 F. Supp. at 623).

50. 643 F.2d 835 (1st Cir. 1981).

51. Cort v. Ash, 422 U.S. at 78 (establishing a four-part test in which the first step is to ask whether the plaintiff is "one of the class for whose *especial* benefit the statute was enacted.") In determining whether Congress intended that section 13 be enforced by private parties, the First Circuit Court of Appeals said that that intent could best be ascertained by addressing the four factors enunciated in *Cort*, giving primary attention to whether the stat-

large, with primary enforcement responsibility vested in the federal government.[52] The court refused to infer a private right of action under the Act, because the Supreme Court had proven reluctant to infer causes of action from statutes enacted for the benefit of the general public.[53]

The Supreme Court decision in *California v. Sierra Club* has resolved the dispute by curtailing future private enforcement of the Act for such purposes as abatement of water pollution and control of waterfront development. In reversing the holding of the Court of Appeals that the private litigants in *California v. Sierra Club* were unequivocally beneficiaries under the Act, the Supreme Court apparently adopted the position of the *Romero-Barcelo* court, placing primary emphasis on the"especial benefit" factor.

Because the problems addressed by federal environmental legislation are widespread, and because the Supreme Court is reluctant to view particular parties as especial beneficiaries of a statute,[54] courts are likely to characterize the Rivers and Harbors Act and other environmental legislation as operating to benefit the general public, rather than any particular class. This interpretation will restrict the ability of public interest groups such as the Sierra Club, or other private parties to seek enforcement of federal statutes.

One question that remains unresolved is whether the Court will allow a private litigant not expressly granted a cause of action by a federal statute to define an injury in terms of that statute in an action brought under section 10 of the Administrative Procedure Act.[55] In *Chrysler Corp. v. Brown*,[56] Chrysler was denied an implied private right of action under the Trade Secrets Act.[57] The Court applied *Cort v. Ash*[58] and found that there was nothing in the legislation to prompt an inference of a private right of action and, further, that there was no

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utory language revealed an intent to benefit a special class of which the plaintiff is a member. Romero-Barcelo v. Brown, 643 F.2d at 848-49.

52. Romero-Barcelo v. Brown, 643 F.2d at 848-49.

53. *Id.* at 849 (citing Cannon v. Univ. of Chicago, 441 U.S. 677, 691-92 n.13 (1979)).

It should be noted that California v. Sierra Club involved section 10 of the Act, while Romero-Barcelo v. Brown involved section 13 of the Act. Although sections 10 and 13 have different purposes under the Act, the *Cort* analysis applies equally to both.

54. 101 S. Ct. at 1779.

55. 5 U.S.C. § 702. Section 10(a) of the Administrative Procedure Act provides that "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action . . . is entitled to judicial review thereof."

56. 441 U.S. 281 (1979). *See also* Save the Bay, Inc. v. United States Corps of Engineers, 610 F.2d 322 (5th Cir. 1979) (plaintiffs had standing under section 10 of the Administrative Procedure Act to seek an injunction requiring the Corps to prepare an Environmental Impact Statement).

57. 441 U.S. at 316-17. The Trade Secrets Act is codified at 18 U.S.C. § 1905 (1976).

58. 422 U.S. at 79.

indication of any legislative intent to create a private right of action.[59] Although Chrysler could not avail itself of the provisions of section 1905 of the Trade Secrets Act in a separate cause of action, the Court held that violations of that act "may have a dispositive effect on the outcome of judicial review of agency action pursuant to § 10 of the APA."[60] Thus a private litigant may be able to use *Chrysler* to bring its action into court where there has been an alleged violation of a federal statute that contains no private cause of action provisions. A private litigant using this procedure, however, would be able to obtain only injunctive, rather than compensatory, relief.[61]

The Court has not yet faced the question whether it will allow a private litigant to pursue this course of action. It might be argued that to allow such an action under the APA while denying an implied fright of action under the statute that defines the injury is inconsistent. This is because the APA grants a right of judicial review only to persons "suffering a legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute."[62] To the extent that the denial of an implied right of action under a federal statute may be interpreted as a denial of any legally recognizable individual injury, such a denial would seem to preclude any recourse to judicial review under the APA.

CONCLUSION

Pre-*Cort* standards allowed the courts broad discretion to enforce federally imposed duties by recognizing implied private rights. This discretion has been significantly contracted by the adoption of the standards enunciated in *Cort v. Ash* and, more recently, by the Court's reluctance, as demonstrated in *California v. Sierra Club*, to view particular injured parties as "especial beneficiaries" of federal legislation. By adopting these changes, the Court has redefined the role of the federal courts in giving effect to congressional intent. While part of the Court's motivation in recasting these standards is undoubtedly to reduce access to the federal courts,[63] the more important long term effects are the contraction of judicial discretion and the mandate to Congress that it expressly grant private rights that it wants protected. These ef-

59. 441 U.S. at 316-17.

60. *Id.* at 317. The Court apparently reasoned that such a violation would constitute a "legal wrong," 5 U.S.C. § 702, which would trigger the applicability of the APA right of review.

61. *See* 5 U.S.C. § 706 (1976).

62. *Id.* § 702.

63. *See* Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n, 101 S. Ct. 2615 (1981) (Stevens, J., dissenting). *See also* Morrison, *Rights Without Remedies: The Burger Court Takes the Federal Courts Out of the Business of Protecting Federal Rights*, 30 RUTGERS L. REV. 841 (1977).

fects could have severe consequences for private enforcement actions under environmental legislation and will almost certainly diminish the protections once available to private parties.[64]

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64. Morrison, *supra* note 63, at 855-56.