Federal Water Projects, Native Americans and Environmental Justice: The Bureau of Reclamation's History of Discrimination

by Kaylee Ann Newell

"No matter what color you are, you get thirsty."
Cecil Williams, Papago Tribal Chairman, 1979[1]

Introduction

The history of the United States is littered with examples of poor treatment of indigenous populations. From the time of white settlement of this country, Native Americans have been looked upon as a savage, uncivilized people.[2] This view of Native Americans has been tempered through the centuries, but Native Americans are still the victims of racism, as are other minorities. The Constitution prohibits government sponsored racism, and the federal government has outlawed discrimination based on race in variety of settings.[3] Yet United States' institutions still discriminate on the basis of race. For example, the history of the Bureau of Reclamation reveals a continuing disregard for the rights of Native Americans.

The goal of this paper is to highlight the mistreatment of Native Americans in the development of federal water projects. This paper is divided into three sections. The first section outlines the background of settlement and water rights in the west, as well as the development of Native American water rights. The second section attempts to show the institutionalized racism against Native Americans that has persisted in the Bureau of Reclamation's projects throughout this Century. The third section describes use of Equal Protection doctrine and Title VI of the Civil Rights Act[4] as possible remedies to be used by Native American tribes ("tribes") in the event of further discrimination by the Bureau of Reclamation.

I. Background

The policies implemented by the Bureau of Reclamation ("Bureau" or "BOR") in the twentieth century have not evolved in a vacuum. To illuminate the problems facing Native Americans, it is crucial to understand the history of settlement and water development in the Western United States.

A. Settling the American West

1. Pioneers

Throughout the 1800's, the United States Government attempted to sell or give

away vast tracts of public lands located in the West. This policy was known as disposition. Easterners were encouraged to move west through a series of congressional Acts designed to give land to settlers at minimal prices. Among these acts were the Homestead Act of 1862[5], the Desert Land Act of 1877[6] and the Mining Act of 1872[7].

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Westward expansion resulted in a new theory in water law. In the East, water law was based on a system of riparianism, which came from English common law. Under riparian law, an owner of land abutting a watercourse is entitled to use of the water.[8] Riparianism works well in wet regions where many land owners are entitled to water.

Riparian water rights proved impractical in the West due to the arid conditions over most of the region.[9] Early western settlers, primarily pioneers and miners, found need for water in many dry areas.[10] Water was therefore diverted from its natural channels and transported to dryer areas. Consequently, a system of diversion developed in many areas of the West to promote maximum beneficial use of water.

Western mining resulted in a new water scheme known as prior appropriation.[11] The prior appropriation doctrine allocates water rights to the first party to put the water to beneficial use.[12] If at some point the first appropriator fails to use the water beneficially, another person may appropriate the water and gain rights to the water.[13] Additionally, a person with earlier rights to the water, called the senior appropriator, has greater rights than people who appropriate later in time, who are known as junior appropriators.[14] In a time of water shortage, seniors are entitled to take the full amount of their water right before a junior user may appropriate.[15] In contrast, under riparianism all water users share the burden in times of shortage by using less.[16]

In *United States v. Rio Grande Irrigation Co.*[17] the Supreme Court held that Congress had acknowledged and approved of the use of prior appropriation doctrine in the western states which was necessary for the doctrine's validity. As a constitutional matter, valid federal water laws are supreme: the Property, Commerce, Treaty, and Supremacy Clauses give Congress ample authority to legislate on issues relating to water.[18] All western states have adopted some form of prior appropriation.[19]

2. Native Americans

Early in the history of the United States, many decision-makers believed that Native Americans would assimilate into white society.[20] The policy of assimilation was codified in "An Act making provision for the civilization of the Indian tribes adjoining

the frontier settlements".[21] The United States Government pursued assimilation policies until the 1830s.[22]

In the 1830s, the United States adopted a policy of "civilization and preservation" to be achieved by removal and segregation of Native Americans from white society.[23] Congress adopted a formal removal policy which involved trading federal lands west of the Mississippi for Native American land in the east.[24] Decision-makers believed removal, along with a program of agricultural education on the Reservations, would lead to civilization of Native Americans. Decision-makers thought that removal and education would ultimately result in Native American assimilation into white culture.[25] Gradually, however, as white settlers took over Native American lands, the removal policy gave way to the reservation system that exists today.[26]

B. Water Policy in the Late 19th and Early 20th Centuries

1. Reclamation

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Western settlers soon realized the need for an irrigation system to successfully farm newly acquired arid lands.[27] In 1894, Congress addressed the need for irrigation in the Carey Act, ceding millions of acres of public lands to states to sell in order to fund state irrigation programs.[28] The Carey Act failed, however, to promote widespread irrigation in the western states.[29]

Congress then passed the Reclamation Act, or Newlands Act of 1902.[30] The Act created the Reclamation Service, a new federal agency within the U.S. Geological Survey.[31] The mission of the Reclamation Service was to build and maintain water projects in the western states.[32] All projects were to be financed by the Reclamation Fund, with moneys initially provided by the sale of western land.[33] It was intended the Fund would be reimbursed by the sale of water from the projects to farmers.[34] However, Congress passed a series of Acts postponing repayment by farmers who were unable to pay.[35] Deferrals of payment, along with the low interest rate and increase in inflation resulted in a huge subsidy to western farmers.[36]

2. Native American Irrigation Projects

The first Native American irrigation project was started by the Bureau of Indian Affairs (BIA) on the Colorado River Indian Reservation in 1867.[37] The canal was abandoned in 1876 after several failed attempts to operate and maintain it.[38] Since 1906, most reservation projects have been constructed, operated and maintained by BIA.[39]

Unfortunately, BIA has had an extremely poor track record in regards to Native American irrigation projects.[40] In fact, of the 125 Native American irrigation projects started after 1867, BIA had not completed a single one by 1990.[41] The main reason for BIA's failure is a lack of funding.[42] In 1977, the BIA Budget Director was quoted as saying "Very candidly, a lot of the existing projects that we have were authorized and never completed. So what we do is try to keep the projects operational with what we have, and it is kind of giving enough money so that the project doesn't completely collapse."[43] Congress has simply failed to make Native American irrigation projects a priority, whereas Reclamation projects for non-Native American settlers have received generous funding.[44]

3. Native American Water Rights

Before 1908, Native American irrigation projects in the West were subject to state prior appropriation schemes.[45] In 1908, the Supreme Court handed down the seminal decision on Native American water rights, *Winters v. United States*..[46] The *Winters* case involved non-indian users appropriating water upstream of the Fort Belknap Indian Reservation.[47] The United States brought an action on behalf of the Tribes on the Reservation against non-indian defendants who claimed to be prior appropriators under Montana law.[48] The Court examined the treaty between the United States and the Tribes creating the Reservation, and found that the Reservation was established for specific purposes delineated in the treaty.[49] The Court held that the United States impliedly reserved enough water to fulfill those purposes outlined in the treaty.[50] Unlike an appropriative right, *Winters* reserved rights are not contingent on beneficial use.[51]

The differences between *Winters* rights and appropriative rights create an inherent conflict.[52] The doctrine of prior appropriation is based on present, beneficial use and codified in state law. A prior appropriator only has rights to as much water as she can beneficially use. *Winters* rights, on the other hand, are not based on present use but on future need.[53] To maintain *Winters* rights, tribes are not required to put any of the water to beneficial use. *Winters* rights are federal rights that are not dependent on state law.[54] As a result of this system, Native American users can preempt others who began using the water first, upsetting the 'first in time, first in right' scheme of prior appropriation.[55]

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The Bureau was naturally slow to recognize *Winters* rights.[56] In fact, the Bureau purposefully sought waters that were potential sources for Native American projects, in order to lay claim to those waters before BIA could begin projects.[57] Although *Winters*

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would allow BIA to preempt the Bureau and claim water for Native American users, the political climate prevented reallocation.[58] The Bureau's policies led to a significant amount of conflict between the Bureau and BIA.[59]

The interests of the Bureau and BIA remain in conflict in many situations. If a tribe chooses to assert *Winters* rights where the Bureau is currently appropriating, the Bureau and contracting users face loss of water use. The Bureau recognizes the threat to existing and future projects that tribes pose when they assert *Winters* rights. In fact, five Arizona tribes were able to use the threat of lengthy litigation based on their *Winters* rights to gain concessions for their inclusion in the Central Arizona Project.[60] It is the open-endedness of the *Winters* right which is a potential strength for tribes and could present a large problem for the Bureau if tribes are more assertive in exercising those rights.

Obviously, a combination of many forces have led to the Bureau's past and present actions. Generous congressional funding, pork barrel politics, and western settlement patterns, among other factors, all created a very powerful Bureau of Reclamation within the Department of Interior. The Bureau of Indian Affairs, also housed in Department of Interior, has suffered from lack of funding and a pervasive pattern of discrimination against Native Americans. Therefore, BIA has remained a weak force for protection of Native American rights.

II. Argument

A. The Scheme of Federal Water Projects Has Demonstrated a History of Racial Discrimination Against Native Americans

The United States Government has authorized a number of water projects, both to benefit Native American and non-Native American users. However, projects to benefit Native American users continuously go unfinished.[61] As discussed earlier, a major problem with Native American projects is funding.

Table 1[62]

Federal Investment in Irrigation (Thousands of Historical Dollars)

	Pre 1920	1920-1939	1940-1959	1960-1978
BOR	129,510	120,736	1,206,483	2,156,419
BIA	14,851	33,569	28,733	36,743

As table 1 demonstrates, Congress has repeatedly authorized considerably more funding for non-Native American projects. In fact, only two large BIA projects have been approved in the last forty years.[63] Both of these projects are combination projects with the Bureau.[64]

Under the federal Reclamation scheme, people reaping the benefits of reclamation projects often bear very little of the cost. Native Americans, on the other hand, can be forced to give up *Winters* rights to get projects that might have some benefit on the Reservation. An example of a tribe giving up *Winters* rights to irrigate a Reservation is the Navajo Indian Irrigation Project.

1. Navajo Indian Irrigation Project (NIIP)

The Navajo have traditionally occupied the Four Corners area of the United States, consisting of northeastern Arizona, Northwestern New Mexico, southeastern Utah and southwestern Colorado.[65] The San Juan River runs through the Navajo Reservation and forms the Reservation's northern border.[66] Water from the San Juan was used on the Reservation for many purposes.[67]

The Reservation finally began receiving water in the late 1970s, nearly sixty years after BIA had recognized the need for irrigation at Navajo.

In 1863, the federal government retaliated against the Navajo for previous attacks on white settlements.[68] The government took over the Navajo territory and forced approximately 8,000 Navajo to relocate to Fort Sumpter in southeastern New Mexico.[69] In 1868, both parties signed a treaty that allowed the Navajo to return to their homeland.[70] As part of the treaty, the U.S. government gave the head of each Navajo family 160 acres of farmland within the Navajo territory.[71] Single adults were to receive 80 acres.[72]

In 1920, it became apparent to BIA that the farmland promised by the 1868 treaty would be useless without irrigation.[73] In 1950, BIA finally made a formal recommendation to build the Navajo Indian Irrigation Project ("NIIP"), with water to come from the San Juan River.[74] In order to gain the support of New Mexico, the government

combined the NIIP with the Bureau's San Juan-Chama project benefiting the city of Albuquerque and other non-Native American users.[75] The Bureau-BIA combination project was authorized by Congress in 1962.[76] The Navajo part of the project was funded by BIA, while the whole project was constructed by BOR.[77]

Under *Winters*, the Navajo had rights to 5 million acre-feet of water from the San Juan River which dated back to 1868, the date of the peace treaty between the US and the Navajo.[78] To receive final authorization for the NIIP, the Navajo were forced to surrender their *Winters* rights and accept a set amount of 508,000 acre feet of water from the San Juan.[79] Additionally, the Navajo had to agree to share any water shortages.[80]

The Bureau's priority for non-Native American users has been apparent in the completion of the project. The non-Native American San Juan-Chama portion of the project was completed ahead of schedule.[81] Yet the NIIP remained only 17% complete eighteen years after authorization of the project.[82] By 1975, Navajo land had still not received any water.[83] The Reservation finally began receiving water in the late 1970s, nearly sixty years after BIA had recognized the need for irrigation at Navajo.[84]

The Navajo soon lost out again. The government believed that with the installation of a sprinkler irrigation system the Navajo would need less water.[85] However, the Department of Interior recommended the use of sprinklers without researching whether this system of irrigation would be successful on the Reservation.[86] In fact, the sprinkler system imposed on the Navajo was much more appropriate for large scale agribusiness rather than for the small family farms actually existing on the Reservation.[87] As the government believed the Navajo could irrigate more efficiently with sprinklers, the Navajo entitlement to water from the project was further reduced to 333,000 acre feet. No non-Native American users, however, were ever encouraged or forced to change their method of irrigation to save water.[88] Although the Bureau's treatment of the Navajo in this situation clearly evidences discrimination, the Navajo have fared better than other tribes dealing with the Bureau.

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2. Upper Missouri River

In 1944, Congress passed the Pick-Sloan Plan, authorizing the Bureau and the Army Corps of Engineers to build 107 dams on the Upper Missouri River.[89] Five of the largest dams flooded thousands of acres of Native American land.[90] Among the Tribes hardest hit were the associated Three Tribes of the Fort Berthold Reservation.[91]

The Fort Berthold Reservation contained land that the Bureau considered to be the best grazing land in the state.[92] Yet the Pick-Sloan dams flooded that land, along with approximately one-fourth of the total acreage of the Reservation.[93] The inundated land consisted of the most valuable and productive land on the Reservation, including the areas where most of the Reservation population lived.[94] The flooding destroyed all cohesiveness of life on the Reservation from which the Tribes have never recovered.[95]

The government went to great lengths to avoid inundating any non-Native American towns along the river.[96] Several towns in both North and South Dakota were spared, including Bismarck, Pierre and Chamberlain.[97] The height of one dam was reduced to avoid any possible flooding of a small area of Williston, North Dakota. Possible flooding could have only occurred in wet years.[98]

Even more startling than the fact that the Reservation was flooded, was the compensation package the Tribes' were forced to accept. The Tribes' were forbidden to fish in the new reservoir or allow their cattle to drink from it.[99] They were forbidden to cut down the trees on the land to be flooded "except in one case, and there, according to the new terms, *they were not permitted to haul them away.*"[100] Additionally, the Tribes were forbidden to use any compensatory money received to hire attorneys.[101]

The Fort Berthold Tribes were not the only Tribes to lose land because of the Pick-Sloan Plan. Five Sioux Tribes lost approximately 202,000 acres to flooding,[102] including 90% of their timberland, 75% of wild game and their best agricultural lands.[103] None of the remaining Reservation lands received any benefits from the water projects.[104]

The above examples demonstrate that the Department of Interior, acting through the Bureau of Reclamation, has systematically discriminated against Native Americans, both in forcing tribes to bear the burden of reclamation projects and by providing few benefits of the reclamation projects to tribes. Although the historical nature of the examples described precludes any legal remedies, by learning from the past more effective strategies can be developed for dealing with future discrimination.

B. The Environmental Justice Movement Can Provide a Litigation Strategy to Combat Future Discrimination by the Bureau of Reclamation

1. The Environmental Justice Movement

The environmental justice movement began in the 1970's,[105] drawing inspiration from the civil rights movement of the 1960's.[106] The movement gained national attention in the late 1980's after the United Church of Christ published a national study focusing on the relationship between minority communities and hazardous waste sites.[107] Much of the focus of the movement has been on the siting of potentially hazardous facilities in minority communities that have been traditionally unable to resist the facilities.[108] Commentators, however, generally view the movement as encompassing more

than siting issues, constituting a response to problems which have disproportionately burdened poor communities and the exclusion of minority communities from the national debate on environmental issues.[109]

Environmental justice commentators explore the best way to empower disenfranchised communities to help them meet the challenge of environmental threats. Grassroots organizing techniques to rally communities have been successful in some areas.[110] Legal solutions have also been advanced.[111] The following discussion examines litigation techniques used by environmental justice lawyers, in order to evaluate their potential for remedying the discrimination faced by Native Americans. The analysis focuses on claims brought under the Equal Protection Clause,[112] and Title VI of the Civil Rights Act.[113]

The main reason the Equal Protection Clause has been ineffective in environmental justice litigation is because the Supreme Court requires plaintiffs alleging an equal protection violation to show discriminatory intent on behalf of government decision-makers.

2. Equal Protection Doctrine

The Equal Protection Clause, contained in the 14th Amendment of the U.S. Constitution, mandates that all people receive equal protection of laws by state and federal government.[114] Racial discrimination was the main target of the 14th Amendment.[115] Even though the basis of environmental injustice claims are often race-related, the Equal Protection Clause has not proved to be a successful tool to combat environmental racism.[116]

The main reason the Equal Protection Clause has been ineffective in environmental justice litigation is because the Supreme Court requires plaintiffs alleging an equal protection violation to show discriminatory intent on behalf of government decision-makers.[117] In *Washington v. Davis*,[118] the plaintiffs challenged the constitutional validity of a test given to applicants for police officer positions. The plaintiffs claimed that the test had a racially discriminatory effect, but did not claim that the discrimination was purposeful. The Supreme Court held that disparate impact resulting from a governmental action is not sufficient to allege a Constitutional violation. Rather, a plaintiff has to prove discriminatory intent or purpose on behalf of government actors before a court will deem the action unconstitutional.[119]

The Supreme Court elaborated on *Washington v. Davis* in *Arlington Heights v. Metropolitan Housing Dev. Corp.*[120] In *Arlington Heights*, the Court acknowledged that a "clear pattern" of discrimination, "unexplainable on grounds other than race" which "emerges from the effect of the state action" when "the governing legislation appears neutral on its face" may be used as circumstantial evidence of the intent of official actors.[121] However, absent a stark pattern of discrimination, the Court found that dispar-

ate impact alone was not determinative as evidence of invidious intent.[122] The Court listed other evidentiary sources for proving discriminatory intent. The non-exhaustive factors listed by the Court were (1) the historical background of the decision; (2) the specific sequence of events leading up to the challenged action; (3) any departures from normal procedural sequences; (4) any departures from normal substantive sequences; and (5) the legislative or administrative history.[123] In a subsequent decision, the Court added an additional factor to the *Arlington Heights* list, namely, the foreseeability of adverse consequences to a particular group.[124]

The discriminatory intent standard articulated by the Supreme Court has proved to be extremely difficult for plaintiffs in environmental justice litigation to meet for several reasons.[125] First, environmental justice litigants face the problem of the sophisticated discriminator. This problem arises because decision-makers are not likely to reveal discriminatory motives, given the state of the law. Second, environmental justice litigants find it difficult to prove that a decision-maker is acting "because of" the adverse consequences rather than acting "in spite of" them.[126] The discriminatory intent requirement has proven a high hurdle in environmental justice litigation.[127]

However, there is another line of cases, dealing with equal services, which have been more successful for minority plaintiffs suffering discrimination.[128] The basis of these cases is the failure on the part of municipal officials to provide all sectors of a community equal services such as street paving,[129] parks and recreation,[130] water supply systems,[131] and storm drainage facilities.[132] The Eleventh Circuit has held that failure to provide equal services can constitute intentional discrimination in violation of the Equal Protection Clause and 40 U.S.C. § 1983.[133] In *Ammons v. Dade City*,[134] the Eleventh Circuit affirmed the district court's finding of intentional discrimination for providing unequal services to black residents based on the *Arlington Heights* factors.[135]

Because the Equal Protection Clause has been held to apply to the federal government as well as states,[136] Equal Protection doctrine may provide a remedy for tribes, such as the Fort Berthold Tribes or the Navajo, who experience intentional discrimination in the application of federal Reclamation laws. However, as emphasized earlier, a tribe would need to show intentional discrimination on behalf of the federal government to prove a constitutional violation. At one time it may have been easier for Native Americans to show discriminatory intent with regards to the application of Reclamation laws, but it is now more difficult to find discriminatory intent in legislation.

In a situation like the Fort Berthold inundation, a tribe might be able to show the existence of *Arlington Heights* factors such that discriminatory intent would be evident. Specific facts in the Fort Berthold experience weigh in favor of a finding of discriminatory intent, such as the fact that only Reservations were flooded, while all the white towns along the river were spared.[137] Additionally, the Tribes did not receive sufficient compensation for their losses.[138] All negotiations for compensation were halted half way through, evidencing procedural abnormalities. The disparate impact of the

reservoirs on the Tribes was obviously foreseeable. The Fort Berthold situation, while not isolated, does represent an extreme case of poor treatment. Regardless of how poorly they have been treated by the government, any tribe will carry an enormous burden to show discriminatory intent under the Equal Protection Clause.

Analogizing the Native American situation to the line of equal service cases decided in the Eleventh Circuit might prove more successful for tribes' than the traditional equal protection analysis. The services derived from Reclamation projects, such as irrigation water, flood control and electricity are benefits provided by the federal government. Although some of the benefits such as irrigation water and electricity cost the user, these services are received at highly subsidized rates.[139] Services provided by Reclamation are analogous to the municipal services which were unequally provided in *Johnson*[140] and *Ammons*.[141] Although it may be argued that the federal government is under no obligation to provide the benefits of Reclamation projects to all citizens, the fact that Reclamation consistently provides services to non-Native Americans while denying those same services to Native Americans living on Reservations nearby suggests that the Bureau has intentionally discriminated against Native Americans in violation of the Equal Protection Clause.

3. Title VI

Under the Title VI of the Civil Rights Act of 1964,[142] "No person in the United States shall, on the ground of race, color or national origin be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." Title VI prohibits discrimination that violates the Equal Protection Clause.[143] Therefore, in order for a plaintiff to be successful in an action based on Title VI, the plaintiff must show discriminatory intent within the meaning of the Equal Protection Clause.[144]

However, environmental justice litigants have found a way around the discriminatory intent requirement. Rather than rely on Title VI itself, litigants have brought actions under an agency's or department's Title VI implementing regulations.[145] In *Lau v. Nichols,*[146] the Supreme Court held that proof of disparate impact was enough to show a violation of the Department of Health, Education and Welfare's implementing regulations. The holding in *Lau* was affirmed nine years later in *Guardians Association v. Civil Service Commission of New York*[147] and reiterated in *Alexander v. Choate.*[148] The Court found that Congress had granted agencies discretion to decide whether an agency's implementing legislation contemplated a disparate impact standard or if it required a finding of discriminatory intent. The Court noted that all of the Cabinet departments (including Department of the Interior) had adopted regulations implementing Title VI that prohibited disparate impact discrimination.[149]

In order for a plaintiff to be successful in disparate impact claim, the plaintiff must first establish a prima facie case of "definite, measurable impact" to the community.[150] Once that prima facie case has been established the burden shifts to the defendant to show legitimate economic reasons for the actions which result in disparate im-

pact.[151] If the defendants reasons are legitimate, plaintiff may still be able to show that the justification is pretext for the discriminatory action. If plaintiff cannot show pretext, the discrimination claim is insufficient for recovery.[152]

The Bureau is bound by the implementing regulations for the Department of Interior. These regulations read, in pertinent part, "to effectuate ... Title VI of the Civil Rights Act of 1964 to the end that no person in the United States shall, on the grounds of race, color or national origin, be excluded from participation in, be denied benefits of, or be otherwise subjected to discrimination under any program or activity receiving Federal financial assistance from Department of Interior."[153] This language codifies the discriminatory impact standard articulated by the Supreme Court.[154]

A tribe facing circumstances similar to the Fort Berthold Tribes or the Navajo, would arguably be able to establish a prima facie case of "definite measurable disparate impact" to their community.[155] In the Fort Berthold situation, the Tribes' loss of land and the breakdown of Tribal cohesiveness is well documented.[156] The Tribes were denied the benefits of this project while bearing a disproportionate cost. Under the *NAACP v. Medical Center, Inc.*[157] standard, a tribe similarly situated to the Fort Berthold Tribes should be able to establish a prima facie case of disparate impact.

Once a tribe establishes a prima facie case of disparate impact, it then becomes the defendant's burden, in this case the Bureau, to show that its action was based on economic considerations.[158] If the Bureau is unable to a show an economic justification the Bureau would fail to meet its burden of proof, and the court can assume there was no valid reason for the disparate impact.[159] If the Bureau does meet its burden, a tribe can still prevail by showing that the Bureau's decision is pretext for a discriminatory motive and that an alternative proposal would meet the Bureau's objectives without a disparate impact on the tribe.[160] By bringing suit under the Department of Interior's Title VI implementing regulations, a tribe gains the advantage of a lower standard, namely unjustified disparate impact, rather than having to surmount the nearly impossible obstacle of Title VI's discriminatory intent standard.

The teachings of the environmental justice movement can provide valuable lesson for tribes suffering from environmental injustice and discriminatory effects of federal legislation. By using the tools of environmental justice litigation, such as the Equal Protection Clause, and Title VI and its implementing regulations, tribes may be able to effectuate positive changes on Reservations.

Conclusion

Senator Edward Kennedy summed up the plight of Native Americans when he stated "...But to the Indian people, Reclamation might just as well be the Cavalry all over again...Whenever Indian interests in land and water resources collide with other interests...the Indians lose...Almost always a single Federal agency seems to lurk behind these losses-the Bureau of Reclamation."[161] The Bureau has demonstrated consistently discriminatory behavior in its policies towards Native Americans.

In the contemporary legal climate, however, Native Americans may be able to

empower themselves to challenge the actions of the Bureau. The growing field of environmental justice provides examples of both legal and non-legal solutions that may remedy past injustice. Tribal use of litigation strategies such as claims brought pursuant to the Equal Protection Clause or Title VI of the Civil Rights Act may serve as an impetus to end the Bureau's discriminatory practices.

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Notes

1 Quoted in ARIZONA DAILY STAR February 21, 1979:20. The former Papago tribe is now known as the Tohono O'odham.

2 *See* Johnson and Graham's Lessee v. M'Intosh 21 U.S. (8 Wheat.) 543, 5 L. Ed. 541(1823). Defendants contended "The statutes of Virginia, and of all the other colonies, and of the United States, treat them [Native Americans] as an inferior race of people, without the privileges of citizens..." 5 L. Ed. at 565. Chief Justice Marshall stated in his opinion that "...the tribes of Indians inhabiting this country were fierce savages,...To leave them in possession of their country was to leave the country a wilderness..." 5 L. Ed at 586.

3 *See* 42 U.S.C. § 1981 et. seq. Also known as the Civil Rights Act of 1991.

4 42 U.S.C. § 2000d.

5 Ch.75, § 2, 12 Stat. 392 (1862), repealed by Federal Land Policy and Management Act of 1976 43 U.S.C. §§ 1701-84 (1988).

6 43 U.S.C. § 321-339 (as amended).

7 30 U.S.C. § 51 (1988)(as amended).

8 *See* DAN A. TARLOCK, JAMES N. CORBRIDGE, JR. AND DAVID GETCHES, WATER RESOURCE MANAGEMENT 67 (1993).

9 *See id.* at 150.

10 *See id.*

11 *See e.g.* Irwin v. Phillips, 5 Cal. 140 (1855).

12 *See* DANIEL MCCOOL, COMMAND OF THE WATERS: IRON TRIANGLES, FEDERAL WATER DEVELOPMENT, AND INDIAN WATER 2 (1987).

13 *See id.*

14 *See id.*

15 *See id.*

16 *See id.*

17 174 U.S. 690, 19 S. Ct. 770, 43 L. Ed 1136 (1899).

18 *See* GEORGE CAMERON COGGINS, CHARLES F. WILKINSON AND JOHN D. LESHY, FEDERAL PUBLIC LAND AND RESOURCES LAW 363 (1993).

19 *See* TARLOCK ET AL., *supra* note 8, at 151.

20 *See id.* at 761.

21 Act of March 3, 1819. Ch. 85, 3 Stat. 516.

22 *See* TARLOCK ET AL., *supra* note 8, at 761.

23 *See* FELIX S. COHEN ET AL., FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 122 (1982 Ed.)

24 Act of May 28, 1830. Ch 148, 4 Stat. 411.

25 *See* COHEN ET AL., *supra* note 21, at 123.

26 *See id.* at 124.

27 *See* TARLOCK ET AL., *supra* note 8, at 150. McCool notes that an organized political force supporting a reclamation law began soon after John Wesley Powell's study, entitled "Report on the Lands of the Arid Region of the United States, With a More Detailed Account of the Lands of Utah" was published in 1879. *See* MCCOOL, *supra* note 12, at 14.

28 *See* MCCOOL, *supra* note 12, at 15.

29 *See* MARC REISNER, CADILLAC DESERT: THE AMERICAN WEST AND ITS DISAPPEARING WATER 110 (1993).

30 *See* DORIS OSTRANDER DAWDY, CONGRESS IN ITS WISDOM: THE BUREAU OF RECLAMATION AND THE PUBLIC INTEREST 2 (1989).

31 *See id.*

32 *See* MCCOOL, *supra* note 12, at 14.

33 *See* REISNER, *supra* note 27, at 114.

34 *See id.*

35 *See* Richard W. Wahl, *Markets For Federal Water: Subsidies, Property Rights, and the Bureau of Reclamation* (1989) *in* TARLOCK ET AL., *supra* note 8, at 687.

36 *See id.* at 688.

37 *See* PETER W. SLY, RESERVED WATER RIGHTS SETTLEMENT MANUAL 13 (1988).

38 *See id.* at 14.

39 *See id.*

40 *See* Monique Shay, *Promises of a Viable Homeland, Reality of Selective Reclamation: A Study of the Relationship Between the Winters Doctrine and Federal Water Development in the Western United States* 19 ECOLOGY L.Q. 547, 557 (1992).

41 *See id.* at fn. 76.

42 *See* MCCOOL, *supra* note 12, at 125.

43 *Id.* From U.S. Congress, House Committee on Appropriations, Subcommittee on the Department of Interior and Related Agencies. "Appropriations for 1977". 94th Congress, 2nd Sess., Part 2 (1976).

44 *See* Michael R. Moore, *Native American Water Rights: Efficiency and Fairness* 29 NAT.RESOURCES J. 763, 773 (1985).

45 *See* MCCOOL, *supra* note 12, at 113.

46 207 U.S. 564, 28 S. Ct. 207, 52 L. Ed. 340 (1908).

47 *See id.* at 565.

48 *See id.* at 568.

49 The stated purpose of the Reservation was for the "Indians to become a pastoral and civilized people". *Id.*

50 *See Winters*, 207 U.S. at 576.

51 *See id.* at 567.

52 *See* McCool, *supra* note 12, at 2.

53 In *Arizona v. California*, 373 U.S. 546, 83 S. Ct. 1468, 10 L. Ed. 2d 542 (1963),*decree entered* 376 U.S. 340, 84 S. Ct. 755, 11 L. Ed. 2d 759 (1964), the Supreme Court authorized that Tribes should receive enough water rights to irrigate all practicably irrigable acreage (PIA) on a reservation.

54 *See* McCool, *supra* note 12, at 2.

55 *See* David H. Getches and Charles F. Wilkinson, Federal Indian Law 651 (1986).

56 *See id.* at 163.

57 *See id.* at 162.

58 *See id.*

59 *See id.*

60 *See* McCool, *supra* note 12,

61 *See* note 34 and accompanying text.

62 Moore, *supra* note 40, at 773; From US Department of Commerce, Bureau of the Census, Census of Agriculture: Census of Irrigation.

63 *See* McCool, *supra* note 12, at 140-41.

64 *See id.*

65 *See* Philip L. Fradkin, A River No More 165 (1981).

66 *See id.* at 165.

67 *See id.*

68 *See id.* at 166.

69 *See id.*

70 *See id.*

71 *See id.*

72 *See id.*

73 *See id.* at 167.

74 *See id.*

75 *See* McCool, *supra* note 12, at 140.

76 *See id.*

77 *See id.* at 173.

78 *See id.*

79 *See* Fradkin, *supra* note 61, at 169. Originally the Navajo had requested 787,000 acre feet for the NIIP.

80 *See id.*

81 *See* McCool, *supra* note 12, at 140.

82 *See id.*

83 *See id.*

84 *See id.*

85 *See id.*

86 *See* Shay, *supra* note 36, at 561.

87 *See* Philip Reno, Mother Earth, Father Sky and Economic Development: Navajo Resources and their Use 54,61 (1981).

88 *See id.*

89 *See* McCool, *supra* note 12, at 176.

90 *See id.*

91 *See* Reisner, *supra* note 27, at 186. The Associated Three Tribes are the Mandan, the Hidatsa and the Arikara. *Id.*

92 *See id.* at 187.

93 *See* McCool, *supra* note 12, at 177.

94 *See id.*

95 *See* Reisner, *supra* note 27, at 190.

96 *See id.* at 187.

97 *See id.*

98 *See id.*

99 *See id.* at 190. Reisner concludes that the reason the settlement turned out as it did was because of an incident that occurred during negotiations over compensation. Apparently, the leader of a faction of the Tribes opposed to settlement interrupted the negotiations and insulted Colonel Pick. Pick immediately ended all negotiations and proceeded to encourage allies in Congress to design the pitiful compensation package. *Id.*

100 *Id.* Emphasis in original.

101 *See id.*

102 *See* Dawdy, *supra* note 28, at 59.

103 *See* McCool, *supra* note 12, at 178.

104 *See id.*

105 *See* Luke Cole, *Environmental Justice Litigation: Another Stone In David's Sling*21 Fordham Urb. L.J. 523 (1993).

106 *See* James Colopy, *The Road Less Traveled: Pursuing Environmental Justice Through Title VI of the Civil Rights Act of 1964* 13 Stan. Envtl. L.J. 125, 140 (1994).

107 Commission for Racial Justice, United Church of Christ,*Toxic Wastes and Race in the United States* (1987).

108 *See* Vicki Been, *What's Fairness Got to Do With It? Environmental Justice and the Siting of Locally Undesirable Land Uses* 78 Cornell L. Rev. 1001, 1002 (1993).

109 *See* Colopy, *supra* note 93, at 140.

110 *See* Luke Cole, *Empowerment of the Key to Environmental Protection: The Need for Environmental Poverty Law* 19 Ecology L.Q. 619 (1992).

111 *See* Cole, *supra* note 94; Colopy, *supra* note 93.

112 U.S. Const. amend. XIV, § 1. The Equal Protection Clause is in the 14th Amendment and therefore applies to the States. There is no Equal Protection language in the 5th Amendment. However, the Supreme Court has held the Equal Protection Clause applicable to the federal government through the 5th Amendment Due Process Clause. *Bolling v. Sharpe*, 347 U.S. 497, 74 S. Ct. 693, 98 L. Ed. 884 (1954).

113 42 U.S.C. § 2000 et. seq.

114 U.S. Const. amend. XIV, § 1.

115 *See* Gerald Gunther, Constitutional Law 636 (1991).

116 *See* Cole, *supra* note 101, at 538.

117 426 U.S. 229, 96 S. Ct. 2040, 48 L. Ed. 2d 597 (1976).

118 *See id.*

119 *See id.*

120 429 U.S. 252, 97 S. Ct. 555, 50 L. Ed. 2d 450 (1977).

121 *Id.* at 266. The court cited two earlier cases where facially neutral laws were struck down as constituting invidious racial discrimination; *YickWo v. Hopkins*, 118 U.S. 356, 6 S. Ct. 1064, 30 L. Ed. 220 (1886), *Gomillion v. Lightfoot*, 364 U.S. 339, 81 S. Ct. 125, 5 L. Ed.2d 110 (1960).

122 *See Arlington Heights*, 429 U.S. at 266.

123 *See id.* at 266-268.

124 *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 279 n.25, 99 S. Ct. 2282, 60 L. Ed.2d 870 (1979). However, in order to suffice as intent a plaintiff must show that the decision-maker acted "because of" the adverse consequences not "in spite of" those consequences. *Id.*

125 *See* Bean v. Southwest Management Corp., 482 F. Supp. 673 (S.D. Tex. 1979) *aff'd without opinion* 787 F.2d 1038 (5th Cir. 1986), East Bibb Twiggs Neighborhood Ass', v. Macon Bibb County Planning and Zoning Comm'n, 706 F. Supp. 880 (M.D. Ga. 1989) *aff'd* 896 F.2d 1264 (11th Cir. 1989).

126 *See* Personnel Administrator of Massachusetts v. Feeney, supra note 120.

127 *See* Cole, *supra* note 101, at 539.

128 *See* Johnson v. City of Arcadia, 450 F. Supp. 1363 (M.D. Fl. 1978), Ammons v. Dade City, 783 F.2d 982 (11th Cir. 1986), Dowdell v. City of Apopka, 698 F.2d. 1181 (11th Cir. 1983), Baker v. City of Kissimmee, 645 F. Supp. 571 (M.D. Fl. 1986), Hawkins v. Town of Shaw, 437 F.2d 1286 (5th Cir. 1971) *aff'd on reh'g*, 461 F.2d 1171 (5th Cir. 1972)(en banc).

129 *See Johnson*, 450 F. Supp. at 1367, *Ammons*, 783 F.2d at 983 fn.2.

130 *See Johnson*, 450 F. Supp. at 1367.

131 *See id.*

132 *See Ammons*, 783 F.2d 983 fn.2.

133 § 1983 authorizes a civil action for deprivation of rights. The law reads, in part, "Every person who. under color of statute, ordinance, regulation, custom or usage, of any State or Territory or the District of Colombia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the depravation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or the proper proceeding for redress." Because §1983 actions are directed only against state or local actors, §1983 does not provide a cause of action for Tribes where Reclamation laws are unequally applied.

134 783 F.2d 983 (1986).

135 *See Arlington Heights*, 429 U.S. 252,97 S. Ct. 555, 50 L. Ed. 2d 450 (1970).

136 *See Bolling v. Sharpe*, 347 U.S. 497, 74 S. Ct. 693, 98 L. Ed 884 (1954).

137 *See* REISNER, *supra* note 27, at 187.

138 *See id.*

139 *See* Wahl, *supra* note 31.

140 450 F. Supp. 1363 (M.D. Fla. 1978)(holding municipality must provide equal water supply services to black residents).

141 783 F.2d 982 (11th Cir. 1986)(holding Dade City must provide equal storm water drainage facilities).

142 42 U.S.C. § 2000d.

143 *See* Regents of the University of California v. Bakke, 438 U.S. 265, 98 S. Ct. 2735, 57 L. Ed. 2d 750 (1978).

144 *See* Cole, *supra* note 101, at 531.

145 *See* North Carolina Dep't of Trans. v. Crest St. Community Council, 479 U.S. 6, 107 S. Ct. 336, 98 L. Ed. 2d 188 (1986).

146 414 U.S. 563, 94 S. Ct. 786, 39 L. Ed. 2d 1 (1974).

147 463 U.S. 582, 103 S. Ct. 786, 39 L. Ed. 2d 866 (1983).

148 469 U.S. 287 (1985).

149 *See Guardians Ass'n*, 463 U.S. at 692, fn. 13 (1983).

150 *See* NAACP v. Medical Center, Inc., 657 F.2d 1322, 1332 (3d Cir. 1981)

151 *See id.* at 1334.

152 *See id.*

153 43 C.F.R. Subtitle A, § 17 (1995).

154 *See* Cole, *supra* note 101, at 531.

155 *See* NAACP v. Medical Center, Inc., 657 F.2d 1322, 1332 (3d Cir. 1981).

156 *See* REISNER, *supra* note 27, at 189; MCCOOL, *supra* note 12, at 177.

157 *See* note 135 and accompanying text.

158 *See* NAACP v. Medical Center, Inc., 657 F.2d at 1333.

159 *See id.*

160 *See id.* at 1334-1336.

161 U.S. Congress, Senate 1971:1598, remarks by Senator Edward Kennedy quoted in McCool, *supra* note 12, at 169.