Miccosukee v. United States: The Continuing Unwieldiness of Equal Protection in Environmental Justice

INTRODUCTION

On May 15, 2013 the Eleventh Circuit held in *Miccosukee Tribe of Indians v. United States* that the Army Corps of Engineers' alleged flooding of the plaintiff tribe's trust and lease lands was not a violation of equal protection, due process, or the relevant lease agreement and trustee deed.[1] Rather than address the substance of the tribe's claims, the court based its decision on the grounds that the tribe failed to sufficiently state a claim for the various counts in the complaint.[2] As a result, the Eleventh Circuit neglected to resolve a fundamental conflict of values that will certainly reappear. *Miccosukee* presented an opportunity for the court to balance tribal property rights against the federal government's authority to manage ecosystems. By failing to engage in an equal protection inquiry, the court missed an opportunity to establish procedural tools that could incorporate tribes into decision-making processes, ultimately leaving equal protection off the table for environmental justice plaintiffs in the Eleventh Circuit.

I. BACKGROUND: THE MICCOSUKEE TRIBE AND WATER MANAGEMENT IN SOUTHERN FLORIDA

The Miccosukee Tribe of Florida filed a complaint on October 28, 2008 consisting of four counts against the United States and the Army Corps of Engineers (Corps).[3] The first count alleged that the defendants had violated the tribe's rights under the Florida Land Claims Settlement Act.[4] The second count alleged that the defendants had deprived the tribe of life, liberty, and property without due process of law by allowing high water levels to persist on their lease and trust lands.[5] The third count called for mandamus relief, and the fourth count alleged that the defendants had violated equal protection by

1. Miccosukee Tribe of Indians v. United States (*Miccosukee III*), 716 F.3d 535, 560 (11th Cir. 2013).

2. *Id.*

3. Complaint ¶¶ 74–99, Miccosukee Tribe of Indians v. United States (*Miccosukee I*), 656 F. Supp. 2d 1375 (S.D. Fla. 2009) (No. 08–23001), 2008 WL 8102318.

4. *Id.* ¶¶ 74–80.

5. *Id.* ¶¶ 81–85.

maintaining low, non-injurious water levels in non-tribally owned agricultural, residential, and park areas at the cost of allowing high levels of water to collect on the tribe's lands.[6]

The basis of the tribe's complaint centered on the Corps' management of an intricate water control system ("C&SF Project") covering 16,000 square miles in southern Florida.[7] The C&SF Project is by no means the first government attempt to tame the Everglades, but it is certainly the most aggressive—the system controls the flow of water across a massive land area using dams, gates, pumping stations, levees, and canals. The C&SF Project is the result of a partnership between the federal government and the State of Florida, but the Corps is responsible for maintaining the system and making the management decisions that led to the conflict in *Miccosukee*.[8]

The Project's purpose is to provide water supply to three constituencies—the agricultural area south of Lake Okeechobee, the privately owned residential area east of the Everglades, and Everglades National Park[9]—by managing water flowing through sections of marsh land called Water Conservation Areas (WCA).[10] At issue in *Miccosukee* is the Corps' operation of a set of gates, the S-12 gates, which control the flow of water between a portion of the WCA and Everglades National Park.[11] The Miccosukee have a perpetual leasehold from the state that is wholly within the WCA, and trust land that is partly within the WCA,[12] so the Corps' decision to open and close the S-12 gates directly affects the water level on the tribe's lease and trust lands. The tribe stated in its complaint that tribal members use the land within the WCA for cultural and religious practices, and that these practices depend on the water level being below a certain level.[13]

The Corps determines when the S-12 gates should be opened and closed.[14] In recent years, the schedules have been adjusted such that the S-12 gates are closed for a longer portion of the year[15] as part of an effort to bolster the Cape Sable sparrow population. The Cape Sable sparrow is listed as an endangered species under the Endangered Species Act.[16] Because an important subpopulation of the species lives directly below the S-12 gates,[17] the Corps is required to manage the water flow in a manner that preserves the Cape Sable

6. *Id.* ¶¶ 86–99.
7. *Miccosukee III*, 716 F.3d at 538.
8. *Id.* at 541.
9. *Id.* at 551.
10. *Id.* at 539.
11. *Id.*
12. *Id.* at 545.
13. Complaint, *supra* note 3, ¶¶ 2–12. The tribe describes the practices as both "subsistence and recreational." *Id.* ¶ 5. Specific activities include: fishing, frogging, commercial airboating, hunting, gathering native plants, and planting corn on the tree islands (in the leased lands) for religious and other purposes. *Id.*
14. *Miccosukee III*, 716 F.3d at 541.
15. *Id.* at 544.
16. *Id.* at 541–42.
17. *Id.* at 544.

sparrow's habitat.[18] For this reason, the S-12 gates have been closed for longer periods in recent years, so water levels on the Miccosukee land in the WCA have been consistently high.[19]

In June 2008, a forest fire burned through much of the Cape Sable sparrow's habitat below the S-12 gates.[20] Under the normal schedule, the Corps would have opened the S-12 gates in mid-July, but after consulting with the National Parks Service and the Fish and Wildlife Service, the Corps postponed opening the gates so that the sparrow would have time to nest.[21] The postponement led to higher water levels than usual in the WCA. The water levels concerned the Miccosukee Tribal Chairman, so he requested that the Corps leave one of the S-12 gates open past its scheduled closing.[22] The Chairman's request was denied, and the tribe brought the suit at issue, challenging the Corps' decision to postpone opening the S-12 gates and to deny the Chairman's request to leave the gates open.[23]

II. EQUAL PROTECTION IN THE *MICCOSUKEE* RULING

The district court in *Miccosukee* dismissed three of the tribe's four claims on the basis that they failed to state a claim for relief, leaving only the equal protection claim.[24] The court subsequently granted summary judgment for defendants on the equal protection claim.[25]

In granting summary judgment for the defendants, the district court applied a standard equal protection analysis to the *Miccosukee* facts.[26] The court focused its analysis on the two particular incidents alleged in the tribe's complaint: the Corps' decision to extend the closed period of the S-12 gates, and the denial of the Tribal Chairman's request to leave the gates open past their scheduled closing.[27] The court reasoned through which level of scrutiny to apply in the analysis, and decided on rational basis rather than strict scrutiny.[28] Strict scrutiny is necessarily triggered when the law or policy in question is based on racial classifications, but if the court finds that the law or policy is "facially neutral," then strict scrutiny applies only if there is a "racial purpose or object [to the policy], or if [the policy] is unexplainable on grounds other than race."[29] In line with equal protection precedents, namely *Village of*

18. *Id.* at 541–42.
19. *Id.* at 551.
20. *Id.* at 552.
21. *Id.*
22. *Id.*
23. *See id.* at 552–55.
24. Miccosukee Tribe of Indians v. United States (*Miccosukee I*), 656 F. Supp. 2d 1375, 1381 (S.D. Fla. 2009).
25. Miccosukee Tribe of Indians v. United States (*Miccosukee II*), 722 F. Supp. 2d 1293, 1311 (S.D. Fla. 2010).
26. *Id.* at 1297.
27. *Id.*
28. *Id.* at 1305.
29. *Id.* at 1299.

Arlington Heights v. Metropolitan Housing Development Corporation, the district court outlined the types of circumstantial and direct evidence that could be considered in determining racial purpose.[30] The court recognized that there were defects in the procedure leading to the Corps' denial of the Chairman's request (a type of evidence that can be considered), but still found no evidence of racial animus.[31] Therefore, the court applied the rational basis level of scrutiny, which requires only that the Corps' actions be rationally related to a legitimate end.[32] The court found that both of the Corps' decisions under question were rationally related to maintaining the health of the endangered Cape Sable sparrow, which the court found to be a legitimate end.[33]

Rather than engage with the analysis put forth in the district court's opinion, the Eleventh Circuit essentially dismissed the tribe's equal protection claim on the grounds that the complaint did not state a claim for relief.[34] The appellate court formally affirmed the district court's grant of summary judgment to defendants, but went further by stating that the equal protection claim "[failed] to allege a case sufficient to withstand a motion to dismiss."[35] The court wholly neglected to discuss the level of scrutiny that should have been applied or the admitted procedural defects in the Corps' denial of the Tribal Chairman's request.[36]

Nevertheless, the Eleventh Circuit's opinion provides a window into the type of evidence it will require to entertain an equal protection claim in a similar situation. The court found that in order for the tribe's equal protection claim to constitute a cause of action, the court would have to assume, among other geographic details, that "the water was diverted contrary to specifications."[37] This pithy expression may seem like dicta on first blush, but upon further examination, it implies that the court will presume a non-discriminatory animus in the Corps' decisions, so long as the Corps acts within its formal directives. If this statement is to be read as a signal, it may have a chilling effect on future environmental justice plaintiffs' use of equal protection, as it sets a high bar for the evidence required to prove racial animus exists behind agency decisions.

III. ANALYSIS: USING EQUAL PROTECTION TO ACHIEVE ENVIRONMENTAL JUSTICE AIMS

The Eleventh Circuit's high evidentiary threshold for triggering strict scrutiny in *Miccosukee* is not an aberration in the body of environmental justice

30. *Id.*; *see* Village of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266 (1977).
31. *Miccosukee II*, 722 F. Supp. 2d at 1307.
32. *Id.* at 1310.
33. *Id.*
34. Miccosukee Tribe of Indians v. United States (*Miccosukee III*), 716 F.3d 535, 560 (11th Cir. 2013).
35. *Id.*
36. *Id.* at 559–60.
37. *Id.* at 560.

suits. In fact, it is notable for cementing the equal protection doctrine's historical inadequacy within the environmental justice realm. Only a very small number of environmental justice equal protection claims have gone to trial, and most have dealt with municipalities providing services in an allegedly discriminatory manner.[38] The primary barrier for plaintiffs in waging equal protection claims has been proving racial animus in order to invoke strict scrutiny, rather than a rational basis standard.[39] Because most of the allegedly discriminatory actions in environmental justice suits deal with facially neutral statutes or policies (for example, zoning laws, licensing laws, or laws regarding the distribution of municipal services),[40] proof of a racial animus behind the alleged conduct is generally required to invoke strict scrutiny.

Two equal protection cases have shaped the discriminatory intent requirement currently plaguing environmental justice plaintiffs: *Washington v. Davis* and *Village of Arlington Heights v. Metropolitan Housing Development Corporation*.[41] *Davis* established that facially neutral policies, or those not classifying based on race, must be implemented or enacted with a racially discriminatory intent in order to invoke strict scrutiny and violate equal protection.[42] *Davis* further qualified that a racially disproportionate impact by itself is not enough to violate equal protection.[43] *Arlington Heights* set out the type of evidence that can be considered in determining whether discriminatory intent exists.[44] Providing enough *Arlington Heights* evidence to get past summary judgment has proved difficult for environmental justice plaintiffs, rendering equal protection claims in this area unwieldy.[45]

Miccosukee falls in line with these precedents in that it maintains an extremely high bar for proving a racial animus, to the point of presuming that the defendants' actions do not violate equal protection as long as they fall within predetermined facially neutral specifications. The tribe's showing that the Corps failed to follow procedure was not enough to tip this balance, nor was the tribe's proffered evidence of historical discrimination against

38. *See* Ammons v. Dade City, 594 F. Supp. 1274 (M.D. Fla. 1984), *aff'd*, 783 F.2d 982 (11th Cir. 1986); Hawkins v. Town of Shaw, 437 F.2d 1286 (5th Cir. 1971).

39. *See* Nicholas C. Christiansen, *Environmental Justice: Deciphering the Maze of a Private Right of Action*, 81 MISS. L.J. 843, 852 (2012).

40. *Id.* at 851.

41. Washington v. Davis, 426 U.S. 229 (1976); Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252 (1977).

42. Christiansen, *supra* note 39, at 852.

43. *Id.*

44. *Id.*

45. *See, e.g.*, Rozar v. Mullis, 85 F.3d 556 (11th Cir. 1996) (holding that there was no discriminatory intent in a solid waste landfill siting decision because the plaintiffs did not present a factual basis for discriminatory intent); East-Bibb Twiggs Neighborhood Ass'n v. Macon Bibb Planning & Zoning Comm'n, 896 F.2d 1264 (11th Cir. 1989) (holding that the plaintiff citizens group did not demonstrate sufficient evidence that a county planning commission acted with discriminatory animus in siting a sanitary landfill); Bean v. Sw. Waste Mgmt. Corp., 482 F. Supp. 673 (S.D. Tex. 1979) (holding that plaintiffs did not produce the requisite amount of factual information to prove racial animus in the siting decision for a solid waste plant).

American Indians, and the Miccosukee Tribe in particular.[46] Therefore, the *Miccosukee* ruling is a strong indication that, excepting plaintiffs that can amass extensive *Arlington Heights* evidence or smoking gun evidence of racial animus, equal protection claims will continue to be unsuccessful for environmental justice plaintiffs.

If federal agencies give teeth to President Clinton's Environmental Justice Executive Order of 1994,[47] equal protection could become a more viable tool in some environmental justice suits. The EPA drafted guidelines pursuant to this order in 2000, which suggested protocols for the EPA and the recipients of federal funds (generally state agencies) regarding how to deduce and remedy any disparate impacts in the permitting of industrial facilities.[48] However, these guidelines are not finalized and are not mandatory.[49] From 1993 through 2003, the EPA investigated only seventeen out of 143 disparate impact complaints and only adjudicated one.[50] Because of this faulty enforcement structure, only a few states have created their own protocols for licensing.[51] Some scholars theorize that more state protocols would produce more *Arlington Heights* evidence for environmental justice plaintiffs who want to pursue equal protection claims.[52] The additive *Arlington Heights* evidence in such a case would be violations of the state disparate impact protocols.[53] Though plausible, this vision is far from the current reality, where few states have protocols, the EPA's disparate impact regulation system is nonfunctional, and the EPA is not pushing states to adopt their own protocols. Additionally, even if this counterfactual series of events led to a reawakening of equal protection in permitting cases, environmental justice claims against agencies other than the EPA (or recipients of EPA funding) would still be left with the status quo, because other agencies have shown even less enforcement of the environmental justice executive order than the EPA.[54]

In cases like *Miccosukee*, where the defendant federal agency has authority over environmental management of the land at issue, the best recourse for plaintiffs could lie outside of the equal protection doctrine, and outside of litigation altogether. Particularly, when tribal land is implicated, authority over ecosystem management could be shared with, or completely handed over to, tribal governments via agency and legislative action. The

46. Miccosukee Tribe of Indians v. United States (*Miccosukee II*), 722 F. Supp. 2d 1293, 1304 (S.D. Fla. 2010).

47. Exec. Order No. 12,898, 3 C.F.R. 859 (1995), *reprinted as amended in* 42 U.S.C. § 4321 (2006) (requiring agencies "to the greatest extent practicable" to incorporate "environmental justice [as] part of [their] mission[s]"); *see* DANIEL R. MANDELKER, NEPA LAW AND LITIGATION § 2:28 (2d ed. 2013).

48. *See* Brian Faerstein, *Resurrecting Equal Protection Challenges to Environmental Inequity: A Deliberately Indifferent Optimistic Approach*, 7 U. PA. J. CONST. L. 561, 571–72 (2004).

49. *See id.* at 572.

50. *See id.* at 573.

51. *See id.* at 575.

52. *See id.* at 584–85.

53. *See id.*

54. *See* MANDELKER, *supra* note 47, § 2:28.

recent handover in management of the Tar Creek Superfund site in Oklahoma to the Quapaw Tribe serves as a model for this type of plaintiff redress. With the help of Senator Inhofe (R-OK), the EPA, and local landowners, the Tar Creek site has become the first tribally managed Superfund site in the country.[55] Rather than retroactively fight the EPA on crucial environmental management decisions, the Quapaw will make their own management decisions subject to EPA audits and guidelines.[56] Though possibly cabined to a narrow set of facts, this model would undoubtedly work more consistently and sustainably than the currently shaky litigation model.

CONCLUSION

Concise but revealing, the Eleventh Circuit's *Miccosukee* ruling illustrates the unwillingness of courts to seriously entertain equal protection claims in environmental justice cases. This precedent is unfortunate, as the equal protection doctrine fits particularly well with the alleged discriminatory activity that is typical in environmental justice cases. Similar to the Corps in *Miccosukee*, many defendants in environmental justice cases do not explicitly violate a statute they can then be charged with—these cases generally deal with statutorily legal activity that disproportionately harms disadvantaged groups. Because this insidious discrimination is evidenced primarily by impact, equal protection could be a very useful "catchall" for such environmental justice injuries. *Miccosukee* is the latest in a series of cases that takes equal protection out of the environmental justice quiver, leaving many plaintiffs without a claim for redressing discriminatory environmental harms.

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55. Press Release, EPA, Quapaw Tribe Announces First Tribally Managed Superfund Site Cleanup in the Nation, (Dec. 19, 2013), http://www.epa.gov/region6/6sf/oklahoma/tar_creek/ok_tar_creek_quapaw-tribe-managed-site-cleanup.pdf.

56. *Id.*