THE PRICE WE PAY TO SEE THE STARS: MT. GRAHAM RED SQUIRREL v. MADIGAN

by Randy Maddalena

Graham Mountain, rising in excess of 10,000 feet out of the desert in Southeastern Arizona, is a perfect place for two separate and quite distinct existences. One is an astrophysical complex consisting of a battery of telescopes, support facilities and access roads. The other is the Mount Graham red squirrel, with an estimated population of 250-300.[1] A conflict arises because these two entities, the squirrel and the astrophysical complex, may not be able to coexist on the same mountain.

This sort of conflict is not new to our world. Many products of progress have been placed in the ring with an animal to fight for existence. The first wants to gain existence while the later wants to maintain existence. In many instances, government agencies have the difficult job of weighing the effects of a project on the environment and deciding its fate. To guide them, Congress set forth statutes like the National Environmental Policy Act (NEPA) and the Endangered Species Act (ESA).

In 1984, an international consortium led by the University of Arizona and consisting of the Vatican Observatory, the Max Plank Institute of Radioastronomy of West Germany, the Arcetri Astrophysical Observatory of Florence, Italy, and Ohio State University, proposed the construction of thirteen telescopes on the two highest peaks of Mount Graham; Emerald Peak and High Peak. Elevation and location relative to major population centers make Emerald Peak and High Peak the best sites in the United States for astrophysical research. Consequently, members of the international consortium indicated that the astrophysical complex will be built in another country if it can not be built on Mount Graham's two highest peaks.[2]

The University of Arizona's proposal jeopardized existence of the Mt. Graham red squirrel.

The University of Arizona's proposal to build on Mount Graham started the Forest Service (the agency responsible for the area of interest) down a long decision making path which had been blazed by many years of legislative and judicial molding. The path was designed to guide the agency to a responsible and well documented decision. The ultimate purpose of the decision making process of NEPA and ESA is to insure that "man and nature can exist in productive harmony,"[3] and to generate agency decisions that are "not likely to jeopardize the continued existence" of an endangered or threatened species.[4]

Responding to the University's proposal in 1985, the Forest Service began drafting an environmental impact statement as required by NEPA.[5] The draft statement included the agency's preferred alternative of building only five of the thirteen telescopes and limiting construction to only one of the two peaks. The Forest Service then went on to produce a Biological Assessment of their preferred alternative as required by the EPA.[6]

Shortly after the Biological Assessment was completed, the Fish and Wildlife Service listed the Mount Graham red squirrel as endangered.[7] This action prompted the Forest Service to initiate "formal consultation" with the Fish and Wildlife Service in order to determine if the telescope complex should be built and under what conditions. The Forest Service indicated that it would agree to construction of an astrophysical complex on High Peak but not on Emerald Peak.[8]

At this point, the University of Arizona informed the Forest Service that building only on High Peak would not result in a "viable cost-effective research facility."[9] The Forest Service then suspended consultation until the University could propose its own minimum viable plan.

After the University completed their proposal, the Forest Service prepared a new Biological Assessment and reopened consultation with the Fish and Wildlife Service. The new

Biological Opinion, released by the Fish and Wildlife Service in 1988, clearly indicated that the University proposal would jeopardize the continued existence of the Mt. Graham red squirrel. The opinion also set forth three alternatives, two of which, surprisingly, allowed for construction on Mount Graham.[10] The next step would have been for the Forest Service to choose one of the three alternatives as a preferred proposal. Before this could be done, the University of Arizona lobbied Congress to step in and authorize construction of the astrophysical complex on Mount Graham.

Congress responded by adding Title 6 to the Arizona-Idaho Conservation Act which was quickly enacted into law. In essence, Congress took over the job of the Forest Service by choosing "Reasonable and Prudent Alternative" Three from the Biological Opinion. In Title 6, Congress divided the construction of the astrophysical complex into two phases. Congress then ordered the issuance of a special use permit and instructed the Secretary of Agriculture to "immediately approve" the first phase of the astrophysical project.[11] In legislating their decision, Congress circumvented the decision making process crafted by law and refined through judicial interpretation.

CONGRESS AND ENVIRONMENTAL DECISION MAKING

When Congress instructed the Secretary of Agriculture to "immediately approve the construction" of the first phase of the astrophysical complex, they neglected to remove all obstacles from the path. Difficulty arose because Congress was ambiguous as to whether the first phase of the Mount Graham project was exempt from the Endangered Species Act, and if so, to what extent. Rather than expediting the process, the ambiguity of the Arizona/Idaho Conservation Act resulted in confusion and disagreement which was destined for litigation.

A similar case came under judicial review in 1990 when Congress enacted the "Northwest Timber Compromise"[12] which addressed the ongoing controversy over timber sales in northern spotted owl habitat, Seattle Audubon Society v. Robertson.[13] The "Northwest Timber Compromise" set out a timber management plan and required the Forest Service and the Bureau of Land Management to sell 5.8 billion board feet of timber from areas in Washington and Oregon. The Act went on to explicitly state that if the government complied with the management plan as set out in the act, certain statutory requirements would be deemed satisfied.[14]

The "Northwest Timber Compromise" was found by the Ninth Circuit Court of Appeals to be unconstitutional because it violated the separation of powers doctrine by directing a court's conclusion on pending litigation.[15] One critical distinction between the Northwest Timber Compromise and the Arizona-Idaho Conservation Act is timing. When Congress passed the Arizona-Idaho Conservation Act, there was no pending litigation. The disputes and barriers which Congress sought to bypass, were strictly part of the inter and intra-government agency decision making process. On the contrary, there was pending litigation concerning the spotted owl and the timber industry prior the passage of the "Northwest Timber Compromise". And, in the later case, Congress directed the court's decision on the outcome of the pending litigation without amending or repealing the underlying laws.[16]

In 1986, Congress legislated an end to a sixteen year dispute over the construction of a highway through an environmentally sensitive area in Hawaii.[17] The power of Congress to exempt state-specific projects from otherwise applicable statutes was upheld as constitutional by the 9th Circuit Court of Appeals in the 1989 case Stop H-3 Assn v. Dole.[18] In Stop H-3 Assn v. Dole, the court held that Congress has the power to legislate a project to be exempt from environmental protection statutes as long as the law, at least that which pertains to the specific project, is changed.[19]

Not long after Congress passed the Arizona-Idaho Conservation Act, the Sierra Club and a number of other environmental groups filed suit in the United States District Court for the District of Arizona, against the Secretary of Agriculture and other government agencies. The Sierra Club claimed violations of the Endangered Species Act, the National Forest Management Act and the Arizona-Idaho Conservation Act.[20]

The action developed a complicated history involving a number of District Court proceedings along with numerous trips to the Appellate Court. By the time the dispute came before the Ninth Circuit Court for the third time, the access road for the astrophysical complex had been completed and most of the land allotted in the first phase of construction by the Arizona/Idaho Conservation Act, had been cleared.[21]

SQUIRRELS OR TELESCOPES?

The University of Arizona was concerned that the time required for the Forest Service and the Fish and Wildlife Service to reach a decision could erode the support of the international coalition behind the telescope complex. If the project was not started soon, the astrophysical complex would likely be built in another country.[22] Congress responded to this concern with an Act that seemed to circumvent all of the environmental statutes which could possibly slow the project down: all but one, that is.

§602(a) of the Arizona/Idaho Conservation Act was ambiguous as to the extent to which Section 7 of the Endangered Species Act should be applied to the first phase of construction. §602(a) reads as follows: "Subject to the terms and conditions of Reasonable and Prudent Alternative Three of the Biological Opinion, the requirements of section 7 of the Endangered Species Act shall be deemed satisfied as to the issuance of a Special Use Authorization for the first three telescopes and the Secretary shall immediately approve the construction of the following items:

(1) three telescopes to be located on Emerald Peak; (2) necessary support facilities; and (3) an access road to the Site.[23]

Congress has the power to legislate a project to be exempt from environmental protection statutes.

The Sierra Club did not deny that the Arizona-Idaho Conservation Act authorized the issuance of a special use permit. Rather, the Sierra Club argues that following the issuance of the permit the project is again subject to the pertinent sections of the Endangered Species Act. Specifically, the Sierra Club argues that new information and circumstances have arisen which, according to Section 7 of the Endangered Species Act, warrants reinitiation of consultation between the Forest Service and the Fish and Wildlife Service.[24]

The Sierra Club based their argument on an investigation performed by the General Accounting Office. In 1990, two of the original sponsors of the Arizona-Idaho Conservation Act, Senator McCain and DeConcini, requested an investigation of the Biological Opinion from which congress chose "Reasonable and Prudent Alternative Three."[25] Questions had arisen regarding the integrity of the biological opinion written by the Fish and Wildlife Service.[26]

The investigation concluded that "Reasonable and Prudent Alternative Three was based, in part, on "nonbiological considerations" and that the status of the red squirrel had declined since the opinion was issued. Results of the investigation led to a biological update by the Fish and Wildlife Service which recommended reinitiation of consultation between the Forest Service and the Fish and Wildlife Service.[27]

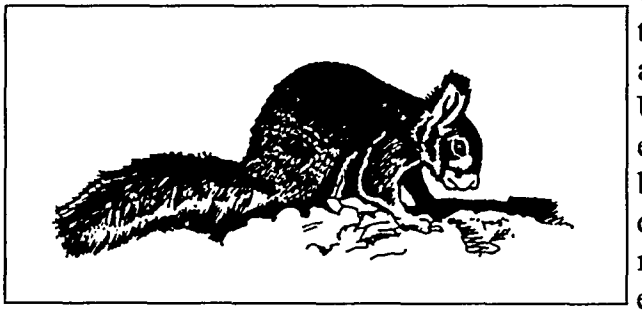
The Defendants in Mt. Graham Red Squirrel v Madigan do not dispute the fact that circumstances exist that would normally require reinitiation of consultation. Rather, the defendants argue that the Arizona-Idaho Conservation Act deems all the requirements of the

Endangered Species Act to be satisfied with regards to the entire first phase of construction. Therefore, according to the defendants, the first three telescopes, support facilities and access road can be built regardless of changes in circumstances or unforeseen effects on the existing population of Mount Graham red squirrels.[28]

The Ninth Circuit Court of Appeals was given the job of ferreting through the Congressional rubble to interpret the meaning and intent of the Arizona-Idaho Conservation Act. The outcome in this case hinges on the interpretation of one ambiguous sentence in section 602(a) of the Arizona-Idaho Conservation Act. The Court noted,"We are therefore required to make the best sense we can of the legislation as originally enacted, regardless of any questions we may have as to its wisdom."[29] The interpretation of the Arizona-Idaho Conservation Act will not alter the Endangered Species Act or any other Environmental Law. It will only affect the way the Endangered Species Act applies to construction of the first phase of the astrophysical complex on Mount Graham.

ENVIRONMENTALISTS v. ASTROPHYSICISTS: HIGH STAKES

If the Court's interpretation favors the Defendants, the University of Arizona and the United States will have the honor and prestige of locating the largest, most powerful astrophysical complex in the world. The United States will remain on the cutting edge of progress and the whole world will benefit from the knowledge which pours down from the heavens to be collected in the mirrors of the giant telescopes. This knowledge may have a cost associated with it which goes beyond the real dollar cost of construction and operation. It is the cloudy cost of risk. A risk which the Plaintiffs feel is not worth the benefits. That risk is the chance that the red squirrel, which makes its home only on Mount Graham, may cease to exist.



If the Court's decision favors the environmentalists, the red squirrel will be given a slightly better chance for survival. Its fate will, at least, be decided via a decision making system that was designed to work with just this kind of issue. The decision would be made by trained foresters and wildlife professionals; not by law makers. This decision would include a thorough consideration of the facts. The quality of the decision would not be compromised in the name of expediency. Regrettably, this process takes a lot of time. The additional time increases the risk of losing the astrophysical complex to another country. If the international consortium opts to build in another part of the world, the United States and the University of Arizona would miss out on the opportunity of being at the forefront of science and progress.

After approval of construction, any new circumstances pertaining to Section 7 of the Endangered Species Act may require reinitiation of consultation.

THE 9TH CIRCUIT'S HOLDING

The Appellants in Mt. Graham Red Squirrel v. Madigan argue that Congress deemed section 7 of the Endangered Species Act to be satisfied only for the issuance of the special use authorization. After the special use permit was authorized and before the Secretary approved construction, the requirements of the Endangered Species Act would be applicable again: including reinitiation of consultation.[30]

The court rejected the Sierra Club's initial argument as making "no sense either practically or as a matter of linguistics".[31] The court instead considered a variation of the Sierra

The Arizona-Idaho Conservation Act deems all requirements of the Endangered Species Act satisfied as to the entire first phase of construction.

Club's argument, testing the argument which deemed the requirements of Section 7 satisfied through the approval of construction. Thus, after approval of construction, any new circumstances pertaining to Section 7 of the Endangered Species Act may require reinitiation of consultation.[32]

The Defendants argue that Congress intended to allow the construction of the first phase of the project to begin immediately and under no circumstances was further consultation required. The Arizona-Idaho Conservation Act was vague at best. Congress' intentions regarding the first phase of construction and immunity from the Endangered Species Act were ambiguously stated. For the Ninth Circuit to settle the dispute before them, it was imperative that they determine the true intentions of Congress. After reviewing the structure, history and purpose of the Arizona-Idaho Conservation Act, the court concluded in favor of the Defendants. The Ninth Circuit Court held that the Act considered the requirements of Section 7 to be satisfied in full for the entire first phase of construction.[33]

Although the dispute was centered only around Section 602(a), the Court found it necessary to review the entire Act in order to determine Congressional intentions. The rationale for examining the structure and history of the statute, was well settled from a number of previous cases cited by the court. Quoting from Kelly v. Robinson,[34] the court noted that "in expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy".[35]

Beginning with the structure of the Act, the Court held that Congress treated the first and second phase of the project differently. The Statute applies all applicable parts of ESA and NEPA to the second phase of construction. However, the statutory requirements of NEPA for the first phase are explicitly deemed satisfied. Moreover, approval of the second phase of the complex depends on information collected from monitoring biological impacts of the first phase of construction. The Court concluded that the structure of the statute indicated Congress wanted to bypass any delay in the project that may arise from reinitiation of consultation. However, the language of the Arizona-Idaho Conservation Act did not contain a "policy statement" expressly overriding all statutory safeguards.[36]

Therefore, the court found it necessary to go further in its interpretation by considering the legislative history of the statute. To understand the language one must first ascertain the lawmakers' intent when they wrote the law. Legislative statements and committee reports could shed valuable light on the intent of Congress thereby helping the Court ascertain the meaning of the Arizona-Idaho Conservation Act.

Regrettably, the legislative history behind the Arizona-Idaho Conservation Act was very limited. The Act, lacking any committee hearings or reports, was quickly passed in the Senate and in the House. Lacking committee reports, the supporters of the act explained the project without any opposition from the floor. All in all, the statements of only six legislators were recorded, four of which were from Arizona.[37]

Because of the limited history of the Arizona-Idaho Conservation Act, the Court found it necessary to give more weight to the statements of the legislators who spoke in favor of the act than they normally would have. The Court carefully considered statements and exchanges made in the process of creating the Arizona-Idaho Conservation Act. Afterwards, they concluded that the legislative history supported the Defendant's argument even more than the statutory structure.

The Court then considered post-enactment legislative comments and agency interpretations. The comments of some of the legislators, following enactment of the Arizona-Idaho Conservation Act, indicated that they did not intend to circumvent the Endangered Species Act. Five Arizona Representatives and Senator McCain issued a joint press release after the General Accounting Office's investigation and the Forest Service's issuance of the biological update.

The Congressmen stated that they interpreted the Arizona-Idaho Conservation Act to permit reinitiation of consultation regarding the first phase of construction.[38] This statement contradicts Senator McCain's original argument when he sponsored the Arizona-Idaho Conservation Act stating: "Three telescopes will be built immediately. They can no longer be stalled by process, by litigation, or by whim."[39]

The court did not give any weight to post legislation remarks because of their contradictory nature and the fact that they did not represent congressional intent at the time the Act was passed. The consideration of agency interpretations were also found to be inconclusive, and therefore, did not influence the court's interpretation.

The Ninth Circuit Court, after lengthy consideration, held that the Arizona-Idaho Conservation Act does in fact deem the requirements of Section 7 to be satisfied for the first phase of construction. This reaffirmed the District Court's previous decision. The Circuit Court's opinion made irrelevant the Sierra Club's claim that circumstances arouse which required reinitiation of consultation under section 7 of the Endangered Species Act.[40]

LICENSES TO KILL?

On the surface, the Ninth Circuit Court's decision has the potential to deprive this world of an existence that, no matter how insignificant, can never be replaced. Upon deeper consideration, Mt. Graham Red Squirrel v. Madigan and the Arizona-Idaho Conservation Act may illuminate future changes to the Endangered Species Act. A trend has developed in Congress which may result in the weakening of statutes designed to protect our environment. The enactment of statutes that slice through environmental safeguards such as section 7 of the ESA, weaken the environmental protection network just as the loss of a specie weakens the viability of our planet.

The Sierra Club claims that if the red squirrel were to go extinct, it would be the first mammal to be lost since the enactment of the Endangered Species Act in 1973.[41] If this is true, one may surmise that the environmental statutes are effectively protecting our environment. On the other hand, if you were a farmer in need of water or a logger in need of trees or even a university looking to grow, you may conclude that the environmental statutes have become more of an obstacle to progress than a protector of the lowly animal. The perfect balance between progress and preservation has always been, and always will be illusive.

A trend has developed in Congress which may weaken statutes designed to protect our environment.

Recently, Congress has taken it upon itself to find this balance by enacting a number of statutes overriding or modifying existing environmental safeguards.[42] It seems that the priorities of our nations law makers are shifting away from the attitude which prevailed when NEPA and ESA were enacted. One can be certain that this trend in Congress is being closely monitored by all of the players in the game of progress and preservation.

The Endangered Species Act will be up for review in 1993. If the current trend in congress continues, the ESA will likely be stripped of much of its protective power. Without the protective power of the ESA, many more threatened and endangered species will end up in a plight like that of the Mount Graham red squirrel.

ENDNOTES

[1]--- F.2d --- 1992 WL 10080 (9th CIR. (ARIZ.)) at 2
[2]Id. at 2
[3]42 U.S.C. §4331(a).
[4]16 U.S.C. 1536(a)(2)

Randy Maddalena is a senior at U.C. Davis majoring in environmental toxicology. He will join the UCD Graduate Group in Agriculture and Environmental Chemistry next year.

[5]42 U.S.C. §4321-4370(c).

[6]16 U.S.C. §1536.

[7]52 Fed.Reg. 20,994 (1987)

[8]--- F.2d --- 1992 WL 10080 (9th CIR. (ARIZ.)) at 2

[9]Id. at 2

[10]The Responsible Agency prepares a Biological Assessment to "identify[] any endangered species or threatened species which is likely to be affected by [an agency] action." 16 U.S.C. s 1536(c)(1). Formal consultation is initiated between the responsible agency and the Fish and Wildlife Service to "insure that any [federal] action ... is not likely to jeopardize the continued existence of any endangered species or threatened species...."U.S.C. s 1536(a)(2). The formal consultation results in a Biological Opinion stating whether the proposed action is expected to "jeopardize the continued existence of listed species or result in destruction ... of critical habitat." 50 C.F.R. s 402.16. "Reasonable and prudent alternatives" are alternative actions proposed in the Biological Opinion that are "consistent with the intended purpose of the action ... [and are] economically and technologically feasible, and that the Director believes would avoid the likelihood of jeopardizing the continued existence of listed species ...." 50 C.F.R. s 402.02.

[11]--- F.2d --- 1992 WL 10080 (9th CIR. (ARIZ.)) at 3

[12]Section 318 of the Department of the Interior and Related Agencies Appropriations Act for Fiscal Year 1990 went into effect October 23, 1989. The appropriation required the Forest Service and the Bureau of Land Management to sell 7.7 billion board feet in fiscal year 1990 of which 5.8 billion board feet would come from Washington and Oregon. s 318(a)(1).

[13] 914 F.2nd 1311 (9th cir. 1990).

[14]Seattle Audubon Soc. v. Robertson, 914 F.2d 1311 (9th Dir. 1990) at 1313.

[15] Id. at 1312.

[16]Id. at 1312.

[17]Section 114 of the Continuing Appropriations Bill for Fiscal Year 1987. 100 Stat. 3341-349.

[18] 870 F.2d 1419 (9th cir. 1989).

[19] *Id.* at 1420.

[20]--- F.2d --- 1992 WL 10080 (9th CIR. (ARIZ.)) at 4

[21]Id.

[22]Id. at 11

[23]Pub.L. 100-696, Nov. 18, 1988, 102 Stat. 4571

[24]--- F.2d --- 1992 WL 10080 (9th CIR. (ARIZ.)) at 4-5

[25]Id. at 5.

[26]For a discussion about the Fish and Wildlife biologist who testified before Congress that, under pressure form a superior she had written a flawed biological opinion; see Lisa Drew, "Rough Ride on the Road To Recovery," National Wildlife April. 1992: 35.

[27]--- F.2d --- 1992 WL 10080 (9th CIR. (ARIZ.)) at 6

[28]Id. at 8.

[29]Id. at 5.

[30]--- F.2d --- 1992 WL 10080 (9th CIR. (ARIZ.)) at 8.

[31]Id.

[32]Id.

[33]Id. at 15.

[34] 479 U.S. 36, 43 (1986).

[35] --- F.2d --- 1992 WL 10080 (9th CIR. (ARIZ)) at 9.

[36]Id.

[37]Id. at 11-12.

[38]Id. at 13.

[39]Id. at 14. Also, 134 Cong. Rec. s 15,741.

[40]--- F.2d --- 1992 WL 10080 (9th CIR. (ARIZ.)) at 16-17

[41]--- F.2d --- 1992 WL 10080 (9th CIR. (ARIZ.)) at 2.

[42]The "Northwest Timber Compromise" Department of the Interior and Related Agencies Appropriations Act, 1990, §318, 103 Stat. 701. *See also* Seattle Audubon Society v. Robertson, 914 F.2nd 1311 (9th cir. 1990); Continuing Appropriations Bill for Fiscal Year 1987, §114, 100 Stat. 3341-349; Stop H-3 Assn v. Dole, 870 F.2d 1419 (9th cir. 1989); Mount Graham red squirrel v. Madigan, --- F.2d --- 1992 WL 10080 (9th CIR. (ARIZ.)); Proposed Federal Lands and Families Protection Act (mandates minimum logging levels in the Northwest, *see* Scott Sonner, "Timber bill perils wildlife in all U.S. forests, critics say," Sacramento Bee 12 Mar 1992, at A6).