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Large Binocular Telescopes, Red Squirrel Pinatas, and Apache Sacred Mountains: Decolonizing Environmental Law in a Multicultural World

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LARGE BINOCULAR TELESCOPES, RED SQUIRREL PIÑATAS, AND APACHE SACRED MOUNTAINS: DECOLONIZING ENVIRONMENTAL LAW IN A MULTICULTURAL WORLD

ROBERT A. WILLIAMS, JR.*

I. INTRODUCTION	1134
II. MYTHOLOGIES	1136
III. A LAYER CAKE OF LIFEZONES	1139
IV. THINKING LIKE AN ENVIRONMENTALIST	1140
V. THE UNIVERSE IS EXPANDING CONSTANTLY	1142
VI. EXPANDING OUR HORIZONS	1147
VII. BAROMETER FUNCTIONS	1148
VIII. IMAGINATIVE CAPACITIES	1149
IX. THE GAANS' EMERGENCE	1150
X. A PRAYER TO MT. GRAHAM	1153
XI. "WHO PROTECTS THE LAW FROM HUMANS THEN?" THE GRANDFATHER ASKED	1155
XII. THE FOREST SERVICE'S DRAFT ENVIRONMENTAL IMPACT STATEMENT	1157
XIII. THE SAN CARLOS APACHE "COMMUNITY"	1158
XIV. INVASION OF THE LUTHERANIZERS	1160
XV. NEVER ASK THE CREATOR FOR ANYTHING	1163
XVI. CONCLUSION: RELIGIOUS, MAGICAL, FANATICAL BEHAVIOR	1164

[T]he occupier, smarting from his failures, presents in a simplified and pejorative way the system of values by means of which the colonized person resists his innumerable offensives. What is in fact the assertion of a distinct identity, concern with keeping intact a few shreds of national existence, is attributed to religious, magical, fanatical behavior.

—Frantz Fanon, *A Dying Colonialism*¹

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1. FRANTZ FANON, *A DYING COLONIALISM* 41 (1967).

I. INTRODUCTION

For two years, as Director of the Office of Indian Programs at the University of Arizona, I was involved on a near-daily basis with what has come to be known throughout the southwestern United States, and in other parts of the country and world, as *the Mt. Graham controversy*.² The controversy centers around the efforts of the University of Arizona, together with a consortium of foreign astronomers from the Vatican, the Max Planck Institute in Germany, and Arcetri astrophysical observatory of Florence, Italy, to build an astronomical observatory on the peaks of Mt. Graham in southeastern Arizona. Because of my personal involvement, I cannot claim a detached neutrality in my recitation of the facts, or for my very tentative legal-cultural analysis of the controversy. But I do believe that as a minor bit-player in this multi-layered, multicultural drama involving large binocular telescopes, red squirrel piñatas, and Apache sacred mountains, I gained some valuable first-hand knowledge of how our environmental law has been colonized by a perverse system of values which is antithetical to achieving environmental justice for American Indian peoples.

According to this system of values, the issue of protecting one of the most unique ecological and spiritual resources in North America can be decided by the vagaries and corrupting influences of the same interest-group dominated political processes which bid for marginal tax rates for millionaires and pork-barrel construction projects in our nation's capital. At the same time, this system of values guarantees a highly-select set of issues, such as those involving freedom of speech and expression or bodily integrity, from the sordid business of politics as usual in a democratic society. The perversity of this system, which privileges what it labels as "human values" over "environmental values," is its failure to recognize that both sets of values are intimately connected to who and what we are as human beings reliant on, and engaged with, the complete set of forces which give meaning and life

2. See *Mt. Graham Red Squirrel v. Madigan*, 954 F.2d 1441 (9th Cir. 1992); see also Jack Kitt, *Would You Baptize an Extraterrestrial?*, N.Y. TIMES, May 29, 1994 (magazine), at 36-39.

to our world. The core human rights of freedom of speech and expression and bodily integrity are meaningless abstractions without the sustaining context provided by the interconnected physical, social, and spiritual worlds which we inhabit and which together comprise our environment. The perverse value system which has colonized our environmental law, however, fails to recognize or acknowledge that protecting environmental values is anterior to, and a prerequisite for, protecting all our other core human rights.

One point which I want to develop in this essay is that any efforts aimed at decolonizing our environmental law must first identify and confront this perverse value system. As I attempt to illustrate, American Indian peoples possess their own unique visions of environmental justice which are capable of inaugurating this decolonization process. The values animating these American Indian visions are typically reinforced throughout tribal culture by myths and narratives which seek to invoke our imaginative capacities to see the social, physical, and spiritual worlds we inhabit as connected and interdependent. Through such stories and their interrelated themes of harmony and humility, we are taught a system of values which induces a profound attitude of respect for the forces which give life to the complex world of which we are but a small part.³

3. See, e.g., The Navajo Concept of Justice, Judicial Branch of the Navajo Nation, 1988 Annual Report 1-2, reprinted in DAVID H. GETCHES ET AL., FEDERAL INDIAN LAW: CASES AND MATERIALS 531-32 (3d ed. 1993).

The basic theme of Navajo thought, is harmony Traditionally in our society, the idea of being superior to a fellow Navajo or nature is discouraged. There is an innate knowledge in each one of us that we are to treat with respect all persons and nature with whom we share this world. As long as we behave in a humble manner to all parts of the universe we are in harmony. To behave in a humble manner is to act without thoughts of power or control, without unnecessary action against others and against nature.

Id. at 532.

Ronald L. Trosper, Director of the National Indian Policy Center at the George Washington University in his paper, *Traditional American Indian Economic Policy* (on file with author) concludes from a review of recent literature on American Indian world views that generally speaking, "American Indian cultures share an attitude of respect toward the world around us." *Id.* at 2. Trosper identifies four basic components, or assumptions, in the American Indian definition of respect:

1. *Community*: Men and women are members of a community that includes all beings . . . all beings have spirit . . . human-to-human relationships are similar to

As the Mt. Graham controversy demonstrates, however, the perverse system of values which has colonized our environmental law subjects these Indian visions of environmental justice to a political process, which presents these myths and narratives in a simplified and pejorative way. Indian resistance to the threats posed to our social, physical, and spiritual world by our environmental law are dismissed as attributable to "religious, magical, fanatical behavior."⁴ If the stories and narratives of American Indian peoples are to serve as effective and viable paths of resistance against our currently colonized environmental law, then the environmental racism which has been institutionalized at the deepest levels of our society must also be identified and confronted, for it too is part of a dying colonialism.

II. MYTHOLOGIES

In the cultural symbology of colonialism, there comes that pivotal moment when the colonizer affirms the triumph over the colonized by an unspeakable act of religious defilement; the temple is ransacked, sacred artifacts are plundered, and heathen idols are destroyed. So too, with the Mt. Graham controversy. During the first stage of the University of Arizona's decade-long battle to site its large binocular telescope project on top of Mt. Graham, the Mt. Graham Red Squirrel (*Tamiasciurus hudsonicus grahamensis*), listed by the federal government as an endangered species, came to represent the primary obstacle to the university's desires to occupy the mountain.

human-to-animal and human-to-plant relationships.

2. *Connectedness*: Everything is connected. While the idea of community provides a source of obligation and a guide to proper behavior, the idea of connectedness is a description of how the world is.

3. *Seventh Generation*: . . . past generations left us a legacy, and we have a duty to our great-grandchildren and beyond, as far as to the seventh generation.

4. *Humility*: In taking action, humanity should be humble. The natural world is powerful and well able to cause trouble if not treated properly.

Id. at 23.

For an insightful and original analysis of the conflict between American Indian environmental values and European worldviews on nature during the colonial era, see CAROLYN MERCHANT, *ECOLOGICAL REVOLUTIONS: NATURE, GENDER, AND SCIENCE IN NEW ENGLAND* (1989).

4. FANON, *supra* note 1.

After a million dollar legislative lobbying effort and several years of protracted litigation, a federal court decision was finally handed down, holding that Congress had exempted the telescope project from the Endangered Species Act and other federal review processes normally required under our environmental law.⁵ Officials at the university reportedly celebrated their triumph over the forces of resistance against their occupation of Mt. Graham by destroying a Red Squirrel piñata.

This bemusing story of a group of world-class astronomers and highly-paid university administrators bashing a paper-mache rodent with a baseball bat was reported to me by a university lobbyist who, for obvious reasons, shall remain nameless. Let us dispense with the tiresome, and for my purposes, irrelevant issue of whether the story of the Red Squirrel Piñata is *true* or not, by simply calling it part of the *mythology* of the Mt. Graham controversy.

All cultures develop their own myths and narratives of epic struggle.⁶ The overly-insulated group of university scientists and administrators who had devoted the better parts of their professional lives for the past several years to the quest of conquering Mt. Graham was certainly capable of generating such a mythical narrative. Granted, the struggle for Mt. Graham was motivated in part by their strong desire to secure a nearby and accessible site to showcase and promote a new generation of honeycombed mirror telescopes being produced at the university's world-renowned Mirror Lab. Not only international prestige, but large sums of money would flow to the university by way of contracts and orders for large honeycombed mirror telescopes; just like the one on Mt. Graham. Hefty fees would also be paid by other astronomers who would travel from around the world to gaze out at the stars from the university's observatory on top of the mountain. Groups of local officials and civic leaders in Graham County, where Mt. Graham was located, had even formed a booster club to support and promote the telescope project and the economic development and tourism

5. 954 F.2d at 1441.

6. As Professor Malinowski has explained, myths provide "for cohesion for local patriotism, for a feeling of union and kinship in a community." Bronislaw Malinowski, *Myth in Primitive Psychology*, in *MAGIC, SCIENCE AND RELIGION AND OTHER ESSAYS* 94 (Robert Redfield ed., 1948).

opportunities that the university promised would follow in its wake. They saw concrete benefits flowing down from the \$200 million telescope project on top of those mountains. Money was definitely going to be made on this deal.

But the money was only part of the reason for the waging of the epic struggle for Mt. Graham. From the beginning, there were quasi-religious overtones to the university astronomers' unflagging devotion to their telescope project.⁷ As I learned from the scientists I got to know on the project, conducting pure research in astronomical physics comes as close to a religious calling as secular humanism can provide its technological and scientific adherents. The fact that the university expected to receive a significant return on its sizeable investment in the project, in terms of dollars and increased international prestige, was really beside the point. The astronomers were going to do "science" on that mountain, and that was a value in and of itself.

It was a value, as I quickly came to appreciate, so venerated by the institutional culture of a major research university that to question the wisdom of pursuing pure scientific research anywhere, even on a mountaintop sustaining several diverse ecosystems and endangered species, is regarded as near-blasphemy by the people who really matter at such places. At bottom, the scientists, at least the ones I got to know, were sincere in their belief that they were pursuing a higher calling in siting their telescopes on Mt. Graham.⁸ Those environmentalists who had so vigorously opposed their occupation of the mountain were acting as irrational fanatics in their fetishistic idolatry of an inconsequential subspecies of rodent. In the mythology generated by the Mt. Graham controversy, it would be only fitting that when the large binocular telescope crusaders finally triumphed over the tree-hugging New Age neo-luddites, the victory would be commemorated by the exquisite symbology represented by the mythical story of the destruction of a Red Squirrel piñata.

7. See, e.g., Kitt, *supra* note 2, at 39.

8. *Id.*

III. A LAYER CAKE OF LIFEZONES

Aside from its asserted advantages as a telescope site, one can easily understand why even quark-stalking astronomers would so ardently desire to possess Mt. Graham for their own purposes. As environmentalists opposed to the telescopes are quick to point out, the southernmost forest of spruce and fir in North America grows on Mt. Graham's peaks, and the ecological diversity of the mountain marks it as one of the truly unique environmental resources on the continent. It is reputed as the only mountain range to stack five of the seven major ecosystems of North America in one place, but it's in the seeing and experiencing, not the counting, that Mt. Graham's uniqueness seizes you.⁹ The hike up the mountain leads you from the dry, harsh desert that most people think of when they conjure up their cactus-laden images of Arizona, to a green, lush boreal forest at the summit that has you believing, for all intents and purposes, that you have been magically transported to some haven of respite in the Canadian Rockies.

The entire mountain is a truly unique ecological space; "a layer-cake of life zones," as the environmentalists like to call it.¹⁰ But it is at Mt. Graham's summit, where you find a boreal zone of virgin spruce-fir forest standing yet untouched by the Forest Service's devouring lessees, that it becomes clear what makes this mountain worth fighting for. Wild nature still controls the desert sky-island at the top of Mt. Graham. Mountain lions and black bears roam freely atop the

9. See "Living Land, Sacred Land (The Case Against the Mt. Graham Observatory)," published by the Mt. Graham Coalition (on file with author). This rather slickly-produced public relations packet provides a wealth of useful information on Mt. Graham's unique environmental values, including the fact that it is "the only mountain range to stack five of the seven major ecosystems of North America in one place." *Id.* The packet, of course, represents the perspective of environmental opponents to the telescope project, but at least with respect to Mt. Graham's unique environmental values, it contains some generally reliable information.

In any event, from my own perspective of legal culture critic, for anyone who has visited the mountain, it would be difficult to make the case *against* Mt. Graham's unique environmental values. The controversy over the Mt. Graham Observatory in fact is not about the mountain's environmental values; it's about the damage that might be inflicted on those values by the University of Arizona's telescope project.

10. *Id.*

mountain's peaks. The Mexican Spotted Owl and goshawk, two gravely threatened species in the southwest, are found here as well.

Mt. Graham can dispense many quiet types of blessings to the human visitor. Sit down near one of the half-dozen or so perennial streams which flow from the mountain's peaks, and you soon become totally absorbed in a world far removed in space and time from that mundane, disconnected form of existence which most of us call daily living. There is quiet here, but certainly no desperation. It is a wondrous and magical place, this mountain, as fit a site on earth as one can ever hope to find to do science, or absolutely nothing. Each in its own way after all, can be a form of worship, depending on your perspective.

IV. THINKING LIKE AN ENVIRONMENTALIST

Perspective, of course, is everything when it comes to mountains. If humans *could* learn to think like a mountain,¹¹ perhaps we could develop some truly unique perspectives on the appropriateness of doing astronomical science on Mt. Graham. We have not quite yet developed that ability as a sentient species, and so we have surrogates who presume to do the mountain's thinking for it. Our society calls these self-appointed defenders of the natural places our Creator has entrusted to us, "environmentalists."

Until my involvement with the Mt. Graham controversy, I had never really met an environmentalist I liked very much. That remained true, even more so, after I had wiped my hands clean of them and my own role in the controversy.

On the whole, the environmentalists I dealt with spoke passionately about the need to protect Mt. Graham, but they never connected that passion to any particular vision or ethic of how we as human

11. The reference here to "thinking like a mountain," of course, is to ALDO LEOPOLD, A SAND COUNTY ALMANAC 129-30 (1948). What Leopold said, at least from within the cultural tradition in which he wrote a generation ago, remains true today; "There is yet no ethic dealing with man's relation to land and to the animals and plants which grow upon it. The key-log which must be moved to release the evolutionary process for an ethic is simply this. Quit thinking about decent land-use as solely an economic problem." *Id.* at 224-25.

beings ought to relate to the mountain. Nor could they articulate any set of values not connected to some sterile form of economic calculus that made it clear to me why siting telescopes on Mt. Graham would be wrong.¹² From their perspective, what the university wanted to do on Mt. Graham was simply inappropriate, period. The telescopes had to be fought down from off that mountaintop.

The environmentalists' passion about Mr. Graham, as I came to understand it, was an integral part of their almost mystical devotion to trees and conspiracy theories. They had somehow managed in their minds to combine their reverence for all live-things-wooden with a perverse assimilation of extremist political rhetoric from the 1960s; that troubled era of counter-cultural rebellion which apparently mal-formed their distal movement in its infancy. Just as an earlier generation of Pentagon war-room planners, the environmentalists imagined the world as one big game of dominoes. But as opposed to geo-political regions of the world, they believed that trees, specifically old-growth trees, had been targeted by a malevolent force that had wormed its way inside the United States Forest Service's core of being.

Mt. Graham, they liked to point out, had been heavily logged of its trees, though not at its peaks; not yet anyway. But once one domino had fallen—well you know the scenario. They possessed just enough limited imaginative capacity to envision the university's intrusion onto the mountaintop as making it that much easier for the Forest Service to permit other intrusions, until the insatiable appetite of the malevolent force (defined vaguely as "the commercial logging interests"), which had long-ago captured the Forest Service, swallowed up the last of the mountain's tall old-growth trees at the top of Mt. Graham. Domino upon domino, tree upon tree; Mt. Graham would be denuded before the world's very eyes, with only the university's large binocular telescope project left standing atop its desolate summit when all was said and done.

Besides their mystical devotion to trees and conspiracy theories, the environmentalists had a peculiar and most dulling habit of also

12. *See id.*

resorting to cost/benefit analysis in defending the mountain from assault. They were never lacking for "studies" of what the appropriate use of the mountain should be. They found it particularly significant that a 1985 peer-review study of so-called "desirable" telescope sites in the United States and Northern Mexico ranked Mt. Graham thirty-seventh in terms of a place where telescopes ought to be put. In a poor marriage of the discourses of economic analysis and environmental extremism, they continually cited and relied on this and other "scientific," "objective," and "neutral" studies to attack "the efficacy and the necessity of the exploitation of Mt. Graham." Shouting a battle cry that they were certain would rally the masses to their cause, they asserted that the "ecological integrity" of the mountain had been challenged by the university.¹³

At least the astronomers could talk about seeing "larger meanings" in the universe with the aid of their large binocular telescopes, and the university administrators could tout the benefits of their \$200 million capital investment in scientific and technological advancement in defending their position in the controversy. The problem for the environmentalists was that neither their mystical devotion to protecting wild nature from malevolent forces nor the sterile abstractions of their economic discourse were equal to the task of mobilizing public opinion and sentiment against a few telescopes on a mountain that nobody else seemed to be using. The beauty of a mountain rests in the eye of the beholder, and the conspiracy theories and cost/benefit studies of the environmentalists did little to evoke the imaginative capacity of the vast majority of the public, who had never seen Mt. Graham to envision the peaks of the mountain as something worth preserving in their pristine splendor. And so the environmentalists seized upon the Mt. Graham Red Squirrel in order to save Mt. Graham.

V. THE UNIVERSE IS EXPANDING CONSTANTLY

One would think that our environmental law was invented to protect a place like Mt. Graham. At least eighteen species and subspecies of plants and animals are reputed to be found nowhere else but on Mt.

13. See "Living Land, Sacred Land," *supra* note 8.

Graham's sky-island peaks.¹⁴ Among the creatures unique to the mountain is the appropriately named Mt. Graham Red Squirrel, a genetic variant of the North American red squirrel. This small, innocuous-seeming rodent occupies a crucial niche in the connective links that determine the health of the mountain's unique set of ecosystems.¹⁵ Because habitat loss is the major cause of species extinction, and because the Mt. Graham Red Squirrel's habitat is Mt. Graham, any assault on the mountain's ecosystems, and there have been numerous ones over the course of years of Forest Service "management" of the mountain, endangers the squirrel.¹⁶

It was the Mt. Graham Red Squirrel's unfortunate fate to be thrust center stage by the environmentalists into the Mt. Graham controversy. It became the first great cultural symbol generated by the drama and came to represent the concrete manifestation of what was at stake, at least as the media portrayed the controversy to the public, in the battle to protect the mountain from the university's telescopes.

In many ways, the environmentalists would have been better off sticking with their conspiracy theories and sterile abstractions about the "ecological integrity" of the mountain in trying to save Mr. Graham. The red squirrel was a poor choice as a vehicle for stirring the imagination about the uniqueness of Mt. Graham. In actuality, however, our environmental law had left the environmentalists with little else but the squirrel in trying to stop the telescopes.

In the mid-1980s, an international consortium led by the University of Arizona had first proposed construction of 13 telescopes, support

14. *See id.*

15. *See Mt. Graham*, 954 F.2d at 1444 n.2, explaining that:

The red squirrel relies on old-growth spruce for several reasons. First, the major food source for the red squirrel is seeds from cone crops. The cones in which the red squirrel depends are primarily produced by Englemann spruce, Douglas fir, and Corkbark fir. Second, the forest canopy that old-growth creates provides a cool, moist floor that facilitates food storage. Finally, the large trees are ideal for nesting and are indispensable for travel and escape.

Id. *See also* *Seattle Audubon Society v. Evans*, 771 F. Supp. 1081 (W.D. Wash. 1991) (discussing the role of endangered species as signs of general wildlife viability within an ecosystem).

16. *See* 954 F.2d at 1443.

facilities, and an access road on Mt. Graham's peaks. The proposal drew protests from a number of environmental groups, forcing the Forest Service in 1985 to begin the Environmental Impact Statement (EIS) process under the National Environmental Protection Act (NEPA) for the project.¹⁷

The draft Environmental Impact Statement that the agency released the following year identified a "preferred alternative" in which only five telescopes would be constructed on High Peak, one of the various peaks of Mt. Graham. Meanwhile, in 1987, the U.S. Fish and Wildlife Service listed the Mt. Graham Red Squirrel as endangered.¹⁸ This action, not wholly unexpected, required the Forest Service to initiate "formal consultation" with the Fish and Wildlife Service regarding the suitability of an astrophysical complex on Mt. Graham given the endangered status of the red squirrel. The Fish and Wildlife Service let it be known that it would likely agree to development on High Peak, but not to any development on Emerald Peak. The University of Arizona, however, notified the Forest Service that the High Peak alternative did "not provide for or allow a viable cost-effective research facility." At this point, the Forest Service suspended formal consultation with Fish and Wildlife and asked the university to present its own proposal for a "minimum viable observatory."¹⁹

In response to this invitation, the university, in late 1987, proposed the construction of three telescopes on High Peak and four telescopes on Emerald Peak, along with support facilities and access roads. Based on the university's proposal, the Forest Service prepared a new Biological Assessment. It also reinitiated formal consultation with the Fish and Wildlife Service. The Fish and Wildlife Service then issued a Biological Opinion in 1988, which found that "establishment of the seven telescope observatory on Emerald and High Peaks is *likely to jeopardize* the continued existence of the endangered red squirrel because this plan significantly increases the existing jeopardy status of this squirrel." Despite the seemingly inevitable conflict with the ESA that approval of the telescope project would appear to trigger two of

17. See National Environmental Policy Act, 42 U.S.C. §§ 4321-4370c (1988).

18. 52 Fed. Reg. 20,994 (1987).

19. 954 F.2d at 1444 (emphasis added).

the three “reasonable and prudent alternatives” contained in the opinion, the Fish and Wildlife Service allowed for the construction of an astrophysical complex on Mt. Graham. Surprisingly, one of these two alternatives, “Reasonable and Prudent Alternative Three”, provided for construction on Emerald Peak per the university’s stated desires, though clearly contrary to the Fish and Wildlife Service’s earlier conclusion that development on Emerald Peak would be environmentally unsound.²⁰

Given the language of Section 7 of the ESA, that forbids federal agencies from taking action “likely to jeopardize” or endanger species, and a federal agency’s biological opinion that the university’s telescopes would “likely jeopardize the continued existence” of the Mt. Graham Red Squirrel, the university recognized that its project could be interminably delayed by legal and political challenges from environmentalists, and perhaps even killed. But the cause of pure science was not to be so easily derailed by a furry red rodent. Like many public universities in the West, the University of Arizona possesses a delegation of United States senators and congressional representatives who see it as their privilege and responsibility to further the interests of the state’s flagship institution of higher education in the pork barrel politics of the nation’s capital. Those same high-minded public servants also stand ready to take on the challenge of navigating the university through the regulatory shoals and barrier reefs maintained by the sirens of the bureaucracy in Washington, D.C., which controls so much of the public domain in the West. In short, the university lobbied the state’s congressional delegation to lobby the rest of the Congress so that the university could get what it wanted to get; its large binocular telescopes on top of Mt. Graham.

A new strategy was developed to conquer Mt. Graham—simply exempt the entire project from NEPA and the Endangered Species Act. This stroke of brilliance was legislated into law in 1988, when Congress passed the Arizona-Idaho Conservation Act. In Section VI of the Act, Congress essentially assumed the role the Forest Service would ordinarily have played and made a selection among the three “reason-

20. *Id.* at 1445.

able and prudent” alternatives, choosing Alternative Three—the one that permitted construction on Emerald Peak, the most vital portion of the red squirrel’s habitat.²¹

In April 1989, the Secretary of Agriculture issued the university a permit for the first phase of construction of the astrophysical complex. This permit allowed construction of the first three telescopes on Emerald Peak on a total of 8.6 acres of the 1,750 acres designated in the Biological Opinion as a refugium for the red squirrel. For all intents and purposes, Congress had granted the University of Arizona an exemption from all environmental laws and regulations that might delay construction of the first of three telescopes on Emerald Peak.²² As I heard one scientist jokingly defend this fast-tracking of the Mt. Graham telescopes, “the universe is expanding constantly, and every second of delay on the telescopes means it’s getting that much further away from us all the time.”

21. The Arizona-Idaho Conservation Act, Title VI, Mount Graham International Observatory, Pub. L. No. 100-696, 102 Stat. 4571, 4597 (1988), splits the construction of the university’s astrophysical complex into two phases. It first states that:

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

Id. § 602(a). The Act further provides that

[t]he Secretary shall, subject to the requirements of the Endangered Species Act and other applicable law, authorize the construction of four additional telescopes on Emerald Peak. Consultation under section 7(a)(2) of the Endangered Species Act with respect to the four additional telescopes . . . shall consider, among other things, all biological data obtained from monitoring the impact of construction of the first three telescopes upon the Mount Graham red squirrel.

Id. § 603. The Act requires that the university, with the concurrence of the Secretary of Agriculture, develop and implement a Management Plan “consistent with the requirements of the Endangered Species Act and with the terms and conditions of Reasonable and Prudent Alternative Three of the Biological Opinion, for the Site.” *Id.* § 604(a). Finally, the Act modifies the provisions of Reasonable and Prudent Alternative Three in that it delays the closure of the summer homes and Bible Camp currently located on mount Graham. *Id.* § 605.

22. 954 F.2d at 1457.

VI. EXPANDING OUR HORIZONS

The environmentalists, of course, challenged all of this legislative legerdemain in the courts, and of course, the environmentalists lost.²³ Our environmental law allows for little in the way of mystical reverence for environmental values and dismisses out-of-hand conspiracy theories about management of the public domain as politics as usual in Washington. Under our environmental law, Congress can determine when various processes designed to protect environmental values are “deemed satisfied.” As the Court of Appeals for the Ninth Circuit itself acknowledged:

The possible extinction of an endangered species is not a threat that we take lightly. If the Mt. Graham Red Squirrel becomes extinct as a result of the astrophysical research project, then the new telescopes will not represent an unqualified step forward in our quest for greater knowledge. As we expand our horizons by building bigger and better telescopes, we would do well to remember that we also have much to learn from the plant and animal life in the world around us. By contributing to the extinction of an endangered species, we limit our horizons at least as seriously as we do my delaying or even disallowing the construction of new telescopes.

In passing the Arizona-Idaho Conservation Act, Congress has balanced the competing interests—albeit through an expedited process that may not have permitted it to consider fully concerns that it otherwise might have addressed. Moreover, the balancing may not have consisted exclusively of weighing one lofty purpose against another, i.e., the advancement of scientific knowledge against species preservation. There is another element that may have been present here as well—the prestige and pride of local institutions and other parochial interests. In that context, the lowly Red Squirrel’s chances for a fair hearing may have been considerably reduced. Whether in other circumstances the result would have been the same, and whether if Congress had considered the question more carefully or fully it would have taken a position on reconsultation that was more protective of the squirrel, we cannot say. The resolution it reached is the one that we are bound to enforce. We can only hope that Congress’s decision will prove to be a wise one.²⁴

23. *Mt. Graham*, 954 F.2d 1441.

24. *Id.* at 1463.

Unlike the mystically-revered values of free speech, religious freedom, or bodily integrity, which are protected by the courts from the majoritarian, log-rolling political processes of day-to-day democratic government, the system of values which has colonized our environmental law concedes the last word on how to protect a place like Mt. Graham to the political process. As for that political process, the Mt. Graham Red Squirrel and all it was suppose to symbolize in carrying the fight for Mt. Graham was simply not enough to overcome a million dollar lobbying campaign by the university, and make Congress "stop, look, and listen" to what the Red Squirrel might be trying to tell us about Mt. Graham and about our environmental law as well.

VII. BAROMETER FUNCTIONS

Even up to this point in the story, the symbology generated by the Mt. Graham controversy is irresistible to the cultural critic. Like the Northern Spotted Owl, which has pitted environmentalists against the logging industry of the Pacific Northwest,²⁵ endangered species like the Mt. Graham Red Squirrel perform a valuable "barometer function" in alerting humans to environmental threats.²⁶ Our modern environmental law, however, as is evidenced by the Mt. Graham controversy, has generally done a poor job of explaining the basic importance to us, as human beings connected to our ecosystems, of protecting endangered species. Using an endangered species such as the Mt. Graham Red Squirrel or the Northern Spotted Owl as a symbol of the need for preserving biological diversity and respecting its importance translates poorly in the public imagination. For the administrators at the University of Arizona, for astronomical scientists committed to advancing the knowledge base of their discipline, and even to the senators and congresspersons promoting the interests of the leading university in their state, the Mt. Graham Red Squirrel simply stood as an isolated symbol of the fetishistic excesses of fanatics in the environmental

25. See ZYGMUNT J.B. PLATER ET AL., ENVIRONMENTAL LAW AND POLICY: NATURE, LAW AND SOCIETY 682-83 (1992).

26. See *supra* text accompanying note 25.

movement. In the press and even on the campus, the environmentalists involved in the Mt. Graham controversy were caricatured as groups of slightly unbalanced tree-huggers and wildly unbalanced eco-terrorists of the Earth First! variety, who preferred saving a sub-species of an otherwise ubiquitous rodent, as opposed to constructing a multi-million dollar astronomical observatory devoted to the highest causes of science. Given this symbology, the Mt. Graham Red Squirrel never had a chance of surviving unmolested in its mountain habitat. Nor could it even hope to carry the load of assisting the public and policymakers in imagining what makes preserving Mt. Graham important from our perspective as human beings. Given the terms of the debate and the symbols available in waging the war for Mt. Graham, the mountain was destined for colonization by the large binocular telescope crusaders.²⁷

VIII. IMAGINATIVE CAPACITIES

As we have seen, the Mt. Graham Red Squirrel failed as a surrogate for depicting the constellation of values connected to protecting and preserving Mt. Graham. Similarly, neither the environmentalists' passion for trees and conspiracy theories, nor their abstract terminology combining economic analysis and extremist rhetoric similarly could halt the telescope project from proceeding.

One reason for this connected series of failures, I suggest, is that we have allowed our environmental law to be colonized by a perverse system of values which unquestioningly relegates certain vital issues of public policy to the vagaries and corrupting influences of the political process. According to the assumptions of this system of values, some issues, like free speech, religious liberty, or bodily integrity, are regarded as too intimately connected to who and what we are as persons to submit them to the processes of politics as usual. But beyond this select set of highly valued core "human rights" which are declared off limits to majoritarian processes and popular prejudice, we allow various interest groups to fight it out. In other words, those things which, according to this system of values, are not regarded as fundamentally connected to who and what we are as human beings, like a mountain

27. See 954 F.2d at 1448.

and the biological diversity which it sustains, are subject to a process where all values are up for grabs. We allow large monied interests, influence peddlers, public relations campaigns, back-room deal-making, self-interest parading as high civil-mindedness, elected officials pandering to public fears and stereotypes, and bureaucrats advancing their ideological agendas under cover of the cold and sterile calculus of cost-benefit analysis to determine the importance of a place like Mt. Graham to us as humans. The perversity of this system is that it places the values of free speech and expression beyond politics as usual, but subjects environmental values, which may be every bit as intimately connected to who and what we are as human beings in the world, to the same sordid realm in which marginal tax rates for millionaires and pork barrel construction projects are determined according to the public will. It should come as no surprise, therefore, that with rare exception, when environmental statutes and regulations—the stuff of our environmental law—are debated in Washington, we rarely hear talk of the human values that are protected when we promote environmental values. That is because the political process to which we have subjected our environmental law is incapable of creating the imaginative capacity within us to see this absolutely vital connection.

IX. THE GAANS' EMERGENCE

The first stage of the Mt. Graham controversy came to a close in October of 1989, when the university was given the go-ahead by a federal district court to cut an access road to the proposed telescope site on the mountain.²⁸ Within a year, dozens of spruce and fir had been cut down to clear the site for two of the three telescopes to be built on Mt. Graham.

It was during this same period that the Mt. Graham controversy entered its second stage, with the appearance of a group called the Apache Survival Coalition. The Coalition claimed that Mt. Graham was sacred according to traditional Apache spiritual and ritual beliefs because it was the home of the Gaans. The Gaans, as members of the Coalition explained, represented the elemental forces of the Universe

28. See *supra* note 3.

according to traditional Apache belief. The Gaans had emerged from Mt. Graham many ages ago to give the original medicine to an Apache medicine person. After performing this service for the Apaches, the Gaans had then gone back into Mt. Graham to rest. The university's telescopes, it was declared, would not only destroy the ability of traditional Apaches to worship on the mountain and give thanks to the Gaans, but if the Gaans were now disturbed by the university's digging and blasting on the top of the mountain, there would be a great cosmic disturbance in the universe.

University officials, to say the least, were skeptical about the Gaans resting on Mt. Graham. It was the first they had ever heard about any Apache religious interests in the mountain. They grew even more skeptical when it was discovered that the non-profit corporation calling itself the Apache Survival Coalition had on its board of directors several of the most prominent non-Indian environmentalists who had been fighting the telescope project since its inception.

It was at this point in the Mt. Graham controversy that university officials called on the office which I directed at the time, the Office of Indian Programs (OIP), for "advice." OIP had, as a primary function, liaison relations with all of Arizona's tribes, so it was not unusual for the university to look to OIP in this situation. While I was somewhat uncomfortable with my role as cultural mediator between the university and the Apaches, I took the time to talk with Apache members of the Coalition, whom I found to be sincere and entirely convincing in stating their belief that the university telescopes should not be built on Mt. Graham. I talked with the non-Indian members of the Coalition as well, all of them self-proclaimed environmentalists. I found them as a group to be quite cynical in their passionately professed concerns for Indian religious values that would be affected by the university's telescopes atop the mountain. I asked one of them what he would do if an Apache Gaan appeared to him in a dream and told him to ritually sacrifice all of the red squirrels that could be found on the mountain. All he could say was that he would not answer "trick questions."

In the course of OIP's efforts to gather information to gain a clearer understanding of the Apache's religious claims, the anthropologist who had worked for the office for nearly two decades, Gordon

Krutz, took a walk over to the Arizona State Museum, which is a part of the university and located on the campus. The OIP had been given a lead on some old field notes collected among the Apaches at San Carlos by Grenville Goodwin, a noted University of Arizona anthropologist during the 1920s and 30s.

Anthropologists are the brunt of many jokes and much criticism in Indian country. There is an old joke one hears told among Indians in Arizona that captures the exasperated sense of exploitation Indian peoples have often felt at the hands of anthropologists—the traditional Indian family living in an Arizona reservation includes a grandmother, her daughters, their husbands, their children, and a University of Arizona anthropologist on research leave.

What goes around comes around, in a manner of speaking, and given that anthropologists collected reams and reams of information on Indians in the southwest, if any documentary evidence existed that would convince university officials of the bona fide nature of the claims of the Apache members of the coalition, it would be found among the dusty notebooks of some long dead anthropologist.

Sure enough, right there in the Goodwin field notes recorded half a century ago, we found several Apaches retelling the story of the emergence of the Gaans from Mt. Graham. There were songs and chants about Mt. Graham as well; a wonderful story about a sacred white horse that lived on the mountain and much more about age-old Apache beliefs and connections to Mt. Graham.

The Goodwin field notes confirmed, virtually verbatim, what the Apache members of the Apache Survival Coalition were claiming about Mt. Graham—that the mountain was a sacred site for the Apaches, or at least some of the Apaches who remembered the old stories about the Mountain. Obviously, that part of the oral tradition identified in the Goodwin field notes as it related to Mt. Graham had survived among those Apache families whose members belonged to the Coalition. If the telescopes were built on Mt. Graham, the Gaans would be disturbed, and this would cause tremendous strife in the world according to their Apache vision of environmental justice.

X. A PRAYER TO MT. GRAHAM

It should come as little surprise to find out that Indian values and belief systems are not reflected in or accepted by our environmental law. The point that I have learned from working and talking with many Indian people is that this is precisely what is wrong with our environmental law.

In many Indian belief systems, you will find an intimate relation between the spiritual world, the physical world, and the social world. These three dimensions of human experience are all closely integrated in most Indian belief systems, an integration which is totally alien to our environmental law. Indians have many ways to imagine and act upon this intimate relation between the spiritual, physical, and social worlds, but all of them basically boil down to a deep and abiding reverence for the land that sustains the interconnected worlds of the tribe. Without the land, in other words, there is no tribe. That is why tribal land is sacred land, because it has been given by the Creator to sustain the tribe. That is why tribal values seek to cultivate an attitude of respect for the land and the resources it yields.

Thus, in Indian visions of environmental justice, all land is sacred, but that does not mean that tribal land should never be used by the people. It is a question of attitude—an attitude of respect. Whether land should be used or developed in a certain way depends on the peoples' needs. If a hazardous waste dump on the reservation can be located in an area which is not being utilized by the tribe, then that option will be considered, along with its impact down to the seventh generation of the tribe yet to come.²⁹ If it is decided by the tribe that the land can be used in this way, this decision, if made with respect and humility, will be blessed by the Creator because the land is providing for the tribe. If it can provide jobs for people in a reservation economy that has eighty percent unemployment, then you use that land for that hazardous waste dump or at least you consider it. But if the hazardous waste dump is going to be put in a place where important spiritual, social, or physical values of the tribe are implicated, then the

29. See Trosper, *supra* note 3.

tribe doesn't even think about it. It's just not done. There is an attitude of deep and abiding respect for the land and the resources it yields.

It is difficult for environmentalists to deal with tribal governments who seriously consider siting hazardous waste dumps in their reserves and for scientists to deal with a group of Indians opposed to siting a telescope on top of a mountain because neither group is capable of understanding the Indian vision of environmental justice which underlies all land use planning decisions in a tribal community—whether or not a particular use of land will be good for the people physically, socially, and spiritually. The tribe's determination will turn on the nature of the people's connection to that land resource; a connection which Indian people can more easily visualize through sacred stories and myths like the story of the Gaans.

In the Goodwin field notes, I found an Apache song that was a prayer to Mt. Graham. It was sung before an Apache went to the mountain to hunt for deer so that the mountain's spirit and the Creator that controlled that spirit would give up its deer to the hunter. In the Apache belief system you pray to the mountain because it feeds you; or perhaps it would be more accurate to say that by your prayer to the mountain, you acknowledge your profound attitude of respect for the forces which give life to the complex world, where the human community is but a small part.

Thus, according to this Indian way of looking at Mt. Graham, you protect what a modern environmentalist might call the biodiversity of the mountain because it is that biodiversity which physically sustains you and the members of your tribe. It is a source of food and other forms of sustaining nourishment. It provides herbs and healing medicines. The Gaan story teaches that not only does Mt. Graham sustain you physically, but socially as well, because the sacred story of the Gaans connects the tribal community around a set of cohesive values which define tribal social life. The tribal society is sustained by the mountain's life-giving forces. Protecting Mt. Graham fulfills our obligations to the future generations which will constitute the tribal society. And the Gaan story also illuminates how the mountain sustains us spiritually, because those values represented by the story connect us to

a transcendent vision of our place in the world. Mt. Graham is a powerful representation of the life-sustaining forces provided by the Creator. Trouble for the people will ensue if the mountain is not treated properly with respect and humility. The spiritual, the physical, and the social worlds are all integrated under this overarching vision of the Gaans emerging from Mt. Graham to give the medicine to the Apaches and returning to rest within the mountain, to be respectfully worshiped by the Apaches.

Our environmental law is simply incapable of reflecting the types of connection that the story of the Gaans on Mt. Graham can teach us. According to this Indian vision of environmental justice, if the mountain is threatened, the people are threatened, and the Gaans will emerge to wreak havoc on the world. The Gaans help the Apaches imagine their connection to the mountain and the importance of protecting that connection because Mt. Graham is a very special place. It is sacred because it sustains the Apaches spiritually, socially, and physically.

XI. "WHO PROTECTS THE LAW FROM HUMANS THEN?" THE GRANDFATHER ASKED

I remember talking to an Indian elder once about our environmental law and how it sought to protect environmental values. I pointed to our National Wilderness Act and how it defines a wilderness "as an area where the earth and its community of life are untrammelled by man, where man himself is a visitor who does not remain." The elder laughed at this language; "Suppose there's deer there in that wilderness area?", he asked, "Can I hunt there?" I answered, "No, Grandfather, the law protects that area from humans." He then asked me, "Can that law be changed?" "Yes, Grandfather," I said. And so he asked me right back, "Who protects the law from humans then?"

In Indian visions of environmental justice the idea that "the earth and its community of life should be 'untrammelled,'" thus disconnected from humans, is seen as an odd concept. There are sacred places, which should be approached with reverence, and in some instances, only by those properly trained in the rituals of respect for such places. Humans, however, are generally not viewed as mere visitors. What I

think that elder was trying to tell me about our environmental law was that humans are connected to the land, and a law that fails to recognize that connection will not likely be respected for long by humans.³⁰ I wonder, though, whether the best way to protect them is to legislate their separateness from us into law. It is hard to respect what we do not feel connected to, whether it be a parent, our Creator, or a mountain wilderness.

I am not saying that we should not protect our wilderness. The elder's insight into the sense of disconnection with our world that our environmental law fails to remedy, and in some cases actually reinforces, has helped me to better contrast between American Indian visions of environmental justice and the vision embodied in our environmental law. I have already discussed Section 7 of the Endangered Species Act, which has played such a prominent note in the Mt. Graham controversy. Section 7 reads in pertinent part:

Each Federal agency shall . . . insure that any action authorized, funded, or carried out by such agency (hereinafter in this section referred to as an "agency action") is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined . . . to be critical³¹

Indian people have little problem with understanding why Section 7 is a good law—if the salmon aren't running, it threatens the social life of the tribe, and this is the punishment that is inflicted on the tribe for failing to act as a steward of the resource—a sacred duty. In Indian visions of environmental justice, there is a strong sense that protecting a resource which sustains the tribe physically, and around which so much of the social life of the tribe revolves, is a sacred duty. And these connections are reinforced by stories and myths which illuminate the spiritual relation between that resource and the human community. "Men and women," as seen according to Indian visions of environmental justice, "are members of a community that includes all beings . . . all beings have spirit . . . human-to-human relationships

30. *See id.*

31. 16 U.S.C. § 1536(a)(2) (1988).

are similar to human-to-animal and human-to-plant relationships.”³² But what happens when our connection to that resource and its habitat have been severed, when we are no longer reliant on the resource for our sustenance and when maintaining species habitat appears as a luxury compared to other options. Our environmental law simply designates the species as endangered, in the hopes that the designation itself will suffice as a symbol for a set of larger meanings about the importance to us, as human beings, of preserving environmental values. The Mt. Graham controversy demonstrates, however, that this is not enough. If we as humans do not feel somehow connected to the red squirrel, we can simply change our environmental law.

XII. THE FOREST SERVICE'S DRAFT ENVIRONMENTAL IMPACT STATEMENT

What I found most depressing about the Mt. Graham controversy is that the perverse system of values which has colonized our environmental law has so little difficulty in dismissing the relevance of Indian visions of environmental justice embodied in stories like the Gaans on Mt. Graham. It dismisses these visions through various mechanisms which have institutionalized environmental racism against Indian peoples at the deepest levels of our society.

In 1985, the Forest Service located what it termed three “shrines,” consisting of various Indian artifacts on two of Mt. Graham’s summits—Hawk Peak and High Peak. Because of the shrines’ potential religious significance, the University of Arizona, working with the Forest Service, contacted nineteen local tribes concerning the find, including the San Carlos Apache. Two tribes, the Ak-Chin and Hopi, responded.

Subsequently, the University of Arizona prepared a report on the shrines and sent copies to the Forest Service and a number of tribes, including the San Carlos Apache, informed of the existence of the shrines. Although the Apache did not respond, representatives of the Zuni tribe of New Mexico requested permission to visit the site. After

32. Trosper, *supra* note 3.

consultation with the Zuni, the Forest Service determined that the telescopes would have no adverse impact on the cultural sites it had identified. The Forest Service's Draft Environmental Impact Statement ("DEIS"), published in October 1986, was sent to the San Carlos Apache, and to other interest groups and tribes.

In May 1988, the Forest Service asked the San Carlos Apache and other tribes if they wished to receive a copy of the final EIS or to remain on the Forest Service's mailing list. The San Carlos Apache asked to be removed from the mailing list. The Forest Service kept the Tribe on the list anyway. The final EIS issued in the fall of 1988 stated that no further cultural resources had been discovered in the Mt. Graham area since the original discoveries. A copy of this final EIS was sent to the San Carlos Apache.

In late August 1990, some two years after the issuance of the final EIS, the San Carlos Apache Tribal Chairman informed the Forest Service of the religious importance of Mt. Graham to the Tribe. The chairman denied receipt of any prior correspondence and asked the Forest Service to halt construction immediately. The tribe failed to respond to a request by the Forest Service for information concerning specific sites that were of interest to the San Carlos Apache Tribe. Another letter was sent to the Service in June 1991, again demanding a halt to construction of the three telescopes. The tribe chose not to respond to the Service's request for a meeting to discuss their concerns. Instead, the tribe turned to the courts.

XIII. THE SAN CARLOS APACHE "COMMUNITY"

From the university's perspective, any rights—moral or legal—that the Apaches might have had to protest the telescope project on Mt. Graham had been waived by the San Carlos Apache Tribal governments' failure to *formally* respond in a timely fashion, or even at all, to the various Forest Service initiatives designed to inform the tribe about the project. The fact that the Tribal Government had not formally responded has been continually cited by university administrators to buttress their deeply-held convictions that the environmentalists had found some Indians to front for them. In reality, the process by which Indians peoples, be they Apaches or members of other tribes,

were supposed to voice their visions on their connections to Mt. Graham had been, in effect, colonized by a system of values antithetical to achieving environmental justice for Indian peoples.

The San Carlos Apache Community is not a “community” at all, at least in the way that a non-Indian would normally understand that concept. The reservation is comprised of an amalgamation of Western Apache bands—Arivaipa, Tontos, Yavapais, Coyoteros, Chiricahuas, Mimbrenos—that were placed on the San Carlos reservation by the United States Army in the nineteenth century. Some of these bands included Apaches who were among the most recalcitrant and violent resisters to the United States’ reservation policy. The Chiricahuas at San Carlos, for example, who recognized Geronimo as their leader, had been implacably hostile to invading whites. Other Apaches among these bands, however, had a long history of friendship and cooperation with the Army. Factionalism was further inbred from the start of the reservation’s creation because many of these Apache groups had never been associated with each other. Even to this day, factionalism has never been eliminated as a dominant, defining fact of “community” life on the San Carlos reservation.³³

Oftentimes, this factionalism expressed itself in a contest between various religious rivalries on the reservation. In the 1880s, at Cibecue on the reservation, an Apache shaman named Nocadelklinny led a messianic movement urging the destruction of all whites. The reservation failed to unite behind this movement, which was eventually crushed with the aid of army troops from New Mexico. In the 1920s, a split developed between the various Christian sects that had arisen on the reservation as a result of missionary activities. The “Holy Ground” movement, developed by an Apache spiritual leader named Silas John, and centered in the Bylas region of the reservation, was one by-product of this split. In the 1930s, a group of Apaches who had been members of the Lutheran church broke off and formed the Apache Independent Church. Religion, in other words, has always been a point of community factionalism, and not consensus, among the San Carlos Apaches.

33. EDWARD H. SPICER, *CYCLES OF CONQUEST* 229-61 (1962).

These same propensities for factionalism were reflected in the reservation government in the 1920s and 30s. The BIA superintendents formed the government at San Carlos by gathering about themselves Apaches and Yavapais who could speak English fairly well, and who in the words of noted historian Edward Spicer, "were disposed to cooperate with the superintendent and his plans."³⁴

The BIA's principal reason for forming the Tribal "Business Committee," as it came to be called, was so that the federal government could have some group to deal with in connection with the water rights and other issues that were arising at the time as a result of the Coolidge Dam Irrigation Project. To the BIA, it did not matter whether the Business Committee was a representative group; what mattered was that it fulfilled the legal requirements of signing agreements under the tribal name. Not surprisingly, the Committee became a focal point of opposition on the reservation and remains so to this day.

The fact is that the Apaches had never ruled themselves according to the type of "tribal government" that the BIA had provided for them, at least prior to their colonization by the United States. Apaches traditionally organize themselves at the band level, and to many Apaches, the idea that a BIA-created "tribal government" represents their interests generally, or particularly on issues of religious belief, is offensive and resisted in the extreme. The San Carlos Apache Community remains a reservation of many Apache communities, and depending upon where an individual Apache lives and what family he or she belongs to, an individual's views on tribal politics, where sovereignty resides in the tribe, and who is responsible for protecting the religious traditions of the tribe will differ dramatically.

XIV. INVASION OF THE LUTHERANIZERS

After learning about the claims of the Apache Survival Coalition, the university did try to immediately initiate contact with the San Carlos Apache tribal government. The tribal government was headed at that time by a chairman named Buck Kitcheyan, who told the univer-

34. *Id.* at 259.

sity that the Apaches in the Coalition were a group of dissidents displeased with his administration and were allowing themselves to be manipulated by environmentalists, whom Kitcheyan called "outsiders." Chairman Kitcheyan told the university that none of the Apaches he had asked thought Mt. Graham was sacred. He said the members of the Coalition were just a group of malcontents determined to embarrass him in the upcoming tribal election by asserting that he, as tribal chairman, had failed to respond to the Forest Service inquiries about Mt. Graham, and therefore, had failed to protect Apache religious traditions.

Given the factionalized nature of the politics and religious life of the San Carlos reservation, it did not take a genius, or even much less, a cultural anthropologist, to figure that there must be another side to the story Kitcheyan was telling the university. The Apache members of the Apache Survival Coalition I spoke with, in fact, consistently spoke of the "tribal government people" as having been "Lutheranized." In other words, Lutheran missionaries had converted their families in the late nineteenth and early twentieth centuries, and those Apaches had subsequently forgotten or abandoned the Apache religious traditions. Such "Lutheranized" Apaches would not have known that Mt. Graham was sacred to some of the Apaches in a particular region of the reservation where traditional Apache beliefs had been maintained through oral tradition and stories. Trying to explain the complexities of Apache politics and the conflicting religious belief systems that intersected those politics to the scientists and to university administrations involved in Mt. Graham, of course, was not going to be an easy task. They simply wanted to build their telescopes and had no interest in political and religious factionalism on the San Carlos Apache Reservation, except to the extent that it might interfere with their plans.

Of course, our environmental law makes it so that they do not have to worry about such things. As has been seen with the process leading up to the Mt. Graham controversy, the various laws and regulatory procedures designed to incorporate Indians into the federal environmental and land use planning process need a point of access to identify tribal interests. Who do you contact if you are the University of Arizona or the United States Forest Service? Why, the tribal government, of course; but who is the tribal government, and where does

tribal sovereignty reside? These are questions that our environmental law, colonized by the same system of values which colonized Indian tribes, does not bother to even ask.

The Mt. Graham controversy illustrates perfectly how the processes of our environmental law subtly perpetuate colonialism against Indian peoples. The history of treaties between tribes and the federal government teaches us how the United States would frequently designate a tribal "chief" to sell out the territorial interests of his people, or how the BIA would form a tribal government to facilitate surrender of tribal resources. From the perspective of the white man's law, these "chiefs" and these "governments" represented the Indians. In truth, these processes had little to do with how Indians actually governed themselves.

The history of the Apaches demonstrates the incommensurability of these processes, which have now been incorporated into our environmental laws, with tribal values and social life. And the Mt. Graham controversy demonstrates how our environmental law perpetuates the legacy of European colonialism and racism against American Indian peoples.³⁵ Historically, Indians have been required to conform to the dominant society's values, without any recognition of the values that might govern Indian social life. There are no alternatives by which the great diversity within Indian communities and across Indian country can be recognized and reflected in our environmental law. Thus, our environmental law tells Indians that they must run their governments the same way that the dominant society runs its governments. This means that when the tribal government in a factionalized Indian community fails to respond to a request from the Forest Service about the tribal community's religious interests in a mountain, our environmental law can treat the tribe as having no religious interests in that mountain at all. Indians can only engage in the federal land use and environmental regulatory process through cultural and political institutions determined by the dominant society.

Of course, the irony of all this concern over the method for incorporating Indians into the environmental regulatory process is that even

35. Robert A. Williams, Jr., *Documents of Barbarism*, 31 ARIZ. L. REV. 237 (1989).

if a way could be found so that tribal religious interests are adequately represented, our environmental law is not required to respect or protect those interests. This was the basic point that university counsel kept hammering away throughout this stage of the Mt. Graham controversy. The university, under our environmental law, does not have to worry about Apache religious claims to the mountain, because under the Supreme Court's *Lyng* case,³⁶ the telescope is on public land and there is no such thing as a religious easement for Indian tribes.

XV. NEVER ASK THE CREATOR FOR ANYTHING

As was once explained to me by one of the Apaches, whenever an Apache prays to the Creator, he or she should only give thanks, because the Creator, through the Gaans, has given the Apache everything needed to live on this earth. An Apache, therefore, should never ask the Creator for anything. An Apache does have a responsibility, however, to protect the source from which these gifts flow. That is why the Apache members of the Coalition opposed construction of large binocular telescopes on Mt. Graham.

Now, you can imagine how our scientists reacted to all of this: "Why aren't the Apaches like the Zuni?" they asked. "The Zunis wanted to look out of our telescopes once they were built." Well, the Apaches aren't like the Zunis in a number of ways. In fact, the Zunis have a very cohesive governing system that operates along traditional theocratic lines. It is no coincidence that the Zunis responded to the Forest Service letter and the Apaches did not. The Zuni government and their spiritual traditions remain integrated in a way that the Apaches have not been able yet to achieve, given their factionalized history. Our scientists would then ask, "How can Mt. Graham be sacred to the Apaches if the tribal government said it wasn't sacred?" As I tried to explain, the tribal government was not necessarily representative of the Apaches on religious matters (as are few non-Indian governments for that matter when it comes to their non-Indian constituents' religious beliefs.) Perhaps, the thing I found most depressing was that none of the scientists wanted to discuss what might happen if the Gaans were

36. *Lyng v. Northwest Cemetery Protective Association*, 485 U.S. 439 (1988).

disturbed. Most just simply snickered when I explained what the Apaches believed about that mountain and dismissed Apache concerns out of hand. If these were legitimate religious claims they asked, then why didn't the tribal government take the necessary steps to assert these claims under our environmental law? All I could answer was that our environmental law was not their environmental law.

XVI. CONCLUSION: RELIGIOUS, MAGICAL, FANATICAL BEHAVIOR

Emerson once wrote that you can judge the nature and values of a society by the way it relates to its land. Under our existing laws, the relation between the spiritual world, the physical world, and the social world has been *disintegrated*. For Indians, stories and narratives like the Gaan creation myth invoke the imaginative capacity to visualize the connections between the physical environment, the social welfare of the community, and the spiritual values that create the consensus in Indian communities as to whether a particular use of the environment is beneficial or harmful to the human community. For non-Indians, there are no stories and myths which can help us imagine why preserving biodiversity is something deeply connected to who and what we are in the world—only science, economic analysis, vaguely stated appeals to aesthetic sensibility, and symbols generated by the Endangered Species Act such as the red squirrel. None of these has proven capable of generating consensus in our society about the importance of environmental values such as biodiversity to the human community.

Our technological society has lost its sense of reliance on nature for survival, and therefore, we have lost our sense of respect for the world we inhabit. We have thus lost those stories and myths which once must have helped us see our connections to our own world. And so our environmental law has been impoverished of such metaphors as the Gaans on Mt. Graham. Indian resistance to siting a telescope on Mt. Graham seems like “religious, magical, fanatical behavior.” The price we pay for maintaining our dying colonialism is to dismiss the decolonizing potential of these Indian visions of environmental justice. And until we do decolonize our environmental law, we always risk the danger of the Gaans reemerging from Mt. Graham to wreak havoc upon our world.