

University of Montana
College of Forestry and Conservation

WILDLIFE POLICY

WILD 410, 9.40—11.00; TR. Spring 2015; LA #342.

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Office hours: TR 12.30—2.30. If this is not convenient, please set up an appointment.

Course Description: This course examines wildlife law, policy and politics from multiple perspectives. Students are provided an intense introduction to the legal framework of fish and wildlife management in the United States (with coverage of U.S. and state constitutions, key wildlife statutes, administrative regulations, and case law). The political context of wildlife management is provided so that students can better understand the conflicts and tensions in the field. A major part of the class focuses on the Endangered Species Act. This important law is used as a way to investigate a number of broader challenges and opportunities related to the conservation of biological diversity. The class is organized as a discussion-oriented large seminar with roughly thirty undergraduate and graduate students. Most sessions will include a very short background lecture followed by more in-depth class discussions on assigned readings.

WILD 410 v. NRSM 422 Natural Resources Policy: There is no prerequisite for WILD 410 but students are strongly encouraged to first take NRSM 422. The latter provides a foundational introduction to the field of natural resources law and policy, with a wider focus on federal land management, water law, and the National Environmental Policy Act (NEPA). There will inevitably be some overlap between the two courses but WILD 410 is designed to provide students a more narrow and specialized introduction to policy and politics, with a focus on wildlife conservation.

Required Reading: Eric T. Freyfogle & Dale D. Goble, *Wildlife Law: A Primer* (Washington, D.C.: Island Press, 2009)

All additional required and recommended reading is on the course's moodle page: <http://umonline.umt.edu>

*We will also discuss a number of contemporary issues in wildlife policy. An excellent way to stay up-to-date is to review stories published daily by *EE News* and *Greenwire*, online at <http://www.eenews.net/gw>.

*A number of species will be discussed in the context of the Endangered Species Act. Species Profiles—with regulatory and planning backgrounds and documents—are available at the Environmental Conservation Online System, at <http://ecos.fws.gov/ecos/home.action>.

Learning Outcomes: Students successfully completing the course will:

1. Acquire a substantive understanding of U.S. wildlife policy
 - Understand the legal and political context of U.S. wildlife policy and management
 - Understand the role played by federal, state, and tribal governments in wildlife policymaking and management
 - Understand the basis of enduring conflicts and tensions in the field

2. Be able to think critically about a number of wildlife policy problems and solutions.
 - Understand the nature of wildlife policy disputes and challenges
 - Evaluate the assumptions, strengths, and weaknesses of various reform measures and policy proposals
 - Approach problems and issues in an integrated and intellectually rigorous fashion
3. Have the ability to apply acquired knowledge to their field of study or professional/personal interest(s)

Student Responsibilities & Assignments

Seminar Participation (30pts): *informed* participation is worth 30 pts when determining final grades. Although subjective, students can earn these points by never missing class and becoming an informed class participant on a regular basis. In short, be fully engaged or at least try to pretend and act as though this is the most exciting and enlightening class that you have ever taken and that you never want it to end.

When assigning these points, I will consider attendance obviously, but also whether a student has participated in quality fashion and on a consistent basis throughout the semester. Students will be evaluated based on their informed and consistent contributions to class discussions. This requires students to read and think about course readings before the class session. I am expecting intelligent, lively, and fully engaged classes every week.

My classes are proactive and conversational in nature. Thus, *all* students must not only have read the reading assignment *prior* to class, but must be ready to discuss the readings on a regular basis. I am seeking input from the entire class, not just from a few committed students. Thus, students need to know when to speak up and when to stay quiet. If discussion is poor, unannounced pop-quizzes may be given. Therefore, it is in the collective interest of the class to participate. Any student who misses class for any reason will be held responsible for all materials covered and all announcements made during his/her absence. Do not ask me for missed handouts or about material that was covered unless you have a validated excuse. Chronic tardiness is rude and please shut off your cell phones.

Respect: Given the amount of discussion expected in this course, showing respect for others is paramount and is taken very seriously. We will strive towards an engaging but respectful open forum in which numerous opinions can be discussed and explored. Personal attacks will not be tolerated.

2 Exams (100 pts each): There are two written exams consisting of short answer and/or essay questions. I will provide possible exam questions two weeks in advance of each exam. The midterm will be scheduled sometime during the middle of the semester (weeks #7-9). The final exam is scheduled for **Tuesday May 12, 8.00—10.00 am**. Make-up exams will only be given for University policy-excused reasons and they will be re-scheduled at my convenience.

3 Short Written Assignments: (20 points each, 60pts total): Students will be asked to write three 2 page written assignments or policy position papers at different points of the semester. The papers will be graded for substance and style and they will be mostly based on our assigned readings, though some outside reading and research may be required. I will provide students with at least one week advance notice before papers are due. The papers will test a student's ability to think and write clearly, efficiently, and critically on contemporary topics in wildlife policy and politics. The papers will include a one paragraph "executive summary," which will be shared verbally with the class and serve as the basis of class discussions.

Papers will be graded on the basis of (1) writing and style (including clarity, level of articulation, and grammar), (2) level of critical analysis, research, specificity and detail, and (3) amount of synthesis and integration of course readings and discussions. I am also looking for formal citation (whatever style you prefer, e.g., parenthetical reference, footnote, endnote, legal, etc., just make sure you are consistent throughout, citing author, title and all publication information).

Academic Honesty: All students must practice academic honesty. Academic misconduct is subject to an academic penalty by the course instructor and/or a disciplinary sanction by the University. All students need to be familiar with the Student Conduct Code. The Code is available for review online at www.umt.edu/SA/VPSA/index.cfm?page?1321.

Grading Scale: The following scale will be used to translate points into grades.

93-100: A	<u>Points</u> Seminar participation: 30 pts Exams: 100pts x 2 = 200 pts Position papers: 20pts x 3 = 60 pts Total points: 290 pts
90-92: A-	
88-89: B+	
83-87: B	
80-82: B-	
78-79: C+	
73-77: C	
70-72: C-	
68-69: D+	
63-67: D	
60-62: D-	
59- F	

COURSE READINGS & CLASS SCHEDULE

This syllabus is very tentative and may regularly change. Bring this schedule to each class session for regular updates and additional or subtracted readings. *All readings are to be done before class.* Given time constraints, some areas may have to be sacrificed, and individual reading will have to take its place. Students must be willing to read and be responsible for material that may not be covered in class. Dates have been left open in order to increase flexibility and allow for maximum class participation and discussion. This type of open schedule, however, requires that students come to class to find out where we are and where we're going. I will inform students before upcoming sections of what readings they should pay particular attention.

About the “Recommended” Reading: Listed below, and found on the course moodle page, are several recommended readings. Everything not listed as recommended or background reading is required reading. The recommended readings provide a different perspective and/or a more in-depth treatment of a topic. They can also be used in preparing for exams and written assignments.

CLASS SCHEDULE NOTES: No classes the week of January 26th, meaning our class will begin on Tuesday, Feb. 3rd.

1. Introduction to Wildlife Law, Policy & Politics

Primer on structure and forms of wildlife law (and the relationship between U.S. and state constitutions, statutes, regulations/rules, and case law)

Freyfogle & Goble, *Wildlife Law*, Ch. 1; pp. 305-308.

2. The Constitutional Context

Introduction to the U.S. Constitution's treaty power, property clause, commerce clause, wildlife federalism, federal preemption, and the takings clause

a. The Property Clause & Federal Preemption

Freyfogle & Goble, *Wildlife Law*, Ch. 6.

Kleppe v. New Mexico (1976) (case focused on the Property Clause as it relates to wild horses and burros on federal land)

Julie Lurman & Sanford P. Rabinowitch, "Preemption of State Wildlife Law in Alaska: Where, When, and Why," *Alaska Law Review* 24 (2007): 145-171.

Letter to USFS Regional Forester, from Earthjustice, RE: Idaho Dept. of Fish and Game Wolf Killing Program in the Frank Church-River of No Return Wilderness (Oct. 14, 2014)

b. The Public Trust in Wildlife

The state ownership doctrine and public trust responsibilities

The public trust doctrine and applications to wildlife management, inland fisheries and stream access

Freyfogle & Goble, *Wildlife Law*, Ch. 2. & 5 (with focus on pp. 96-107)

Sarah K. Stauffer, "The Row on the Ruby: State Management of Public Trust Resources, the Right to Exclude, and the Future of Recreational Stream Access in Montana," *Environmental Law* 36 (2006): 1421-1443.

Christian A. Smith, "The Role of State Wildlife Professionals Under the Public Trust Doctrine," *The Journal of Wildlife Management* 75, no. 7 (2011): 1539-1543.

c. Wildlife, Private Property, and the Takings Clause

Freyfogle & Goble, *Wildlife Law*, Ch. 4 (and review pp. 117-121)

Recommended: *Andrus v. Allard*, 444 U.S. 51 (1979) (case focused on takings as it applies to the Eagle Protection and Migratory Bird Treaty Acts)

Recommended: *Kafka v. Montana Department of Fish, Wildlife, and Parks*, 201 P. 3d 8 (Mont. Supreme Court, 2008) (case focused on takings as it applies to operation of game farms)

Recommended: Robert Meltz, *The Endangered Species Act (ESA) and Claims of Property Rights "Takings"* (Washington, D.C.: Congressional Research Service, 2013) (providing a useful background on takings, the ESA, and case law review).

3. Indian Tribal Rights

Freyfogle & Goble, *Wildlife Law*, Ch. 8.

Washington v. Washington State Commercial Passenger Fishing Vessel Association, 443 U.S. 658 (1979) (focus on pp. 1-15) (U.S. Supreme Court decision focused on tribal reserved fishing rights in the Northwest)

O. Yale Lewis III, "Treaty Fishing Rights: A Habitat Right as Part of the Trinity of Rights Implied by the Fishing Clause of the Stevens Treaties," *American Indian Law Review* 27, no. 1 (2002/03): 281-311.

Ben Goldfarb, "The Great Salmon Compromise," *High Country News* (Dec. 8, 2014) (discussing tribal fishing rights in the context of the Columbia Basin Fish Accords and the politics of salmon recovery) (pdf on moodle and also available online at <http://www.hcn.org/issues/46.21/the-great-salmon-compromise>)

Recommended: Ed Goodman, "Protecting Habitat for Off-Reservation Tribal Hunting and Fishing Rights: Tribal Co-management as a Reserved Right," *Environmental Law* 30 (2000): 279-362.

Recommended: Michael C. Blumm and Jane G. Steadman, "Indian Treaty Fishing Rights and Habitat Protection: The Martinez Decision Supplies a Resounding Judicial Reaffirmation," *Natural Resources Journal* 49 (2009): 653-706.

4. State Wildlife Governance

State game laws, wildlife funding and budgets, state wildlife commissions, ballot initiatives, the North American Model of Wildlife Conservation (and criticism of model)

Freyfogle & Goble, *Wildlife Law*, Ch. 7.

Martin Nie, "State Wildlife Policy and Management: The Scope and Bias of Political Conflict," *Public Administration Review* 64, no. 2 (2004): 221-233.

J.F. Organ et al., *The North American Model of Wildlife Conservation, The Wildlife Society Technical Review 12-04* (Bethesda, MD: The Wildlife Society, 2012).

Susan G. Clark and Christina Milloy, "The North American Model of Wildlife Conservation: An Analysis of Challenges and Adaptive Options," in Susan G. Clark and Murray B. Rutherford, eds., *Large Carnivore Conservation: Integrating Science and Policy in the North American West* (Chicago: The University of Chicago Press, 2014), Ch. 9.

Angus M. Thuermer, Jr., "Study: Non-Hunters Contribute Most to Wildlife," *WyoFile* (November 18, 2014), also available at http://wyofile.com/angus_thuermer/study-non-hunters-contribute-most-to-wildlife/ (providing link to study and reader comments)

Recommended: Cynthia A. Jacobson, et al., "A Conservation Institution for the 21st Century: Implications for State Wildlife Agencies," *The Journal of Wildlife Management* 74, no. 2 (2010): 203-209.

Case Study: The Proposed Montana Wolf Conservation Stamp (proposed rule by Montana Fish, Wildlife and Parks, 2014).

5. Wildlife on Federal Lands

The National Parks and National Wildlife Refuge Systems
Wildlife on multiple use lands managed by the USFS and BLM

Freyfogle & Goble, *Wildlife Law*, Ch. 10.

Robert L. Fischman, "The Significance of National Wildlife Refuges in the Development of U.S. Conservation Policy," *Journal of Land Use & Environmental Law*, 21 (2005): 1-22.

Courtney Schultz, et al., Wildlife Conservation Planning Under the United States Forest Service's 2012 Planning Rule, *The Journal of Wildlife Management* 77, no. 3 (2013): 428-444.

2012 National Forest System Planning Rule, 77 Fed. Reg. 21162 (2012) (wildlife diversity provision at section 219.9 and discussed on pp. 13-15 and pp. 51-58)

BLM Example: BLM's Sage-Grouse Conservation Strategy, at <http://www.blm.gov/wo/st/en/prog/more/sagegrouse.html>

Part II. The Endangered Species Act

6. The Endangered Species Act: Background & Overview

Including background and contrast to other key federal wildlife laws (Lacey Act, Migratory Bird Treaty Act, and Bald and Gold Eagle Protection Act)

Freyfogle & Goble, *Wildlife Law*, Ch. 9, 11 & 12.

Tennessee Valley Authority v. Hill, 437 U.S. 153 (1978)

Zygmunt J.B. Plater, "Classic Lessons from a Little Fish in a Pork Barrel—Featuring the Notorious Story of the Endangered Snail Darter and the TVA's Last Dam," *Utah Environmental Law Review* 32, no. 2 (2012): 211-244.

Case for Class Discussion: Kristina Alexander and M. Lynne Corn, *Sage Grouse and the Endangered Species Act (ESA)* (Washington, D.C.: Congressional Research Service, 2010).

Example of Citizen Petition: Center for Biological Diversity et al., *Petition to Protect the Monarch Butterfly Under the Endangered Species Act* (August, 2014)

7. Habitat Conservation Planning, Candidate Conservation Agreements & Incidental Take Permits

Patrick Duggan, "Incidental Extinction: How the Endangered Species Act's Incidental Take Permits Fail to Account for Population Loss," *Environmental Law Reporter* 41, no. 7 (2011): 10628-10640.

Background on habitat conservation planning: <http://www.fws.gov/endangered/what-we-do/hcp-overview.html>

Example: Montana Dept. of Natural Resources and Conservation, *Record of Decision: Forested State Trust Lands Final Habitat Conservation Plan and Environmental Impact Statement* (Dec. 19, 2011).

Montana DNRC Forested State Trust Lands Habitat Conservation Plan, available at <http://dnrc.mt.gov/HCP/Documents.asp>

Friends of the Wild Swan et al., v Jewell, CV 13-61-M-DWM (D. Mont. 2014) (decision focused on Montana DNRC's HCP)

Background on candidate conservation agreements: <http://www.fws.gov/endangered/what-we-do/cca.html>

Examples: Dunes Sagebrush Lizard Conservation Agreement, available at <http://www.fws.gov/southwest/es/dsl.html>

Defenders of Wildlife et al., v. Jewell, Case 1:13-cv-00919-RC (D.C. Dist. 2014) (focused on Dunes Sagebrush Lizard Conservation Agreement).

Range-Wide Oil and Gas Candidate Conservation Agreement with Assurances for the Lesser Prairie-Chicken in Colorado, Kansas, New Mexico, Oklahoma and Texas, Between the USFWS and Western Association of Fish and Wildlife Agencies/Foundation for Western Fish and Wildlife (Feb. 28, 2014).

8. Science & Political Decision Making in the Context of the ESA

M. Lynne Corn, Kristina Alexander, and Eugene H. Buck, *The Endangered Species Act and 'Sound Science'*, (Washington, D.C.: Congressional Research Service, 2013).

Holly Doremus, "Science and Controversy," in J. Michael Scott, Dale D. Goble, and Frank W. Davis, eds., *The Endangered Species Act at Thirty*, Vol. 2 (Washington, D.C.: Island Press, 2006), Ch. 9.

Case Study: Grizzly Bear Delisting and Political Conflict

Seth Wilson, Gregory A. Neudecker, and James J. Jonkel, "Human-Grizzly Bear Coexistence in the Blackfoot River Watershed, Montana: Getting Ahead of the Conflict Curve," in Susan G. Clark and Murray B. Rutherford, eds., *Large Carnivore Conservation: Integrating Science and Policy in the North American West* (Chicago: The University of Chicago Press, 2014), Ch. 6.

Greater Yellowstone Coalition v. Servheen, 665 F. 3d 1015 (9th Cir. 2011)

Recommended: Andrew B. Erickson, "Grizzly Bear Recovery, Whitebark Pine, and Adequate Regulatory Mechanisms Under the Endangered Species Act," *Environmental Law* 42 (2012): 943-975.

9. Climate Change and the Endangered Species Act

J.B. Ruhl, "Climate Change and the Endangered Species Act: Building Bridges to the No-Analog Future," *Environmental Law Reporter* 39 (2009): 10735-10745.

Wm. Robert Irvin, "Comment on 'Climate Change and the Endangered Species Act: Building Bridges to the No-Analog Future,'" *Environmental Law Reporter* 39 (2009): 10750-10751.

Cases for Discussion (Polar Bear & Wolverine)

Kristina Alexander, *Does the Endangered Species Act Listing Provide More Protection of the Polar Bear?* (Washington, D.C.: Congressional Research Service, 2010) (recommended reading focused on listing of polar bears)

Withdrawal of Listing for the Distinct Population Segment of the North American Wolverine, 79 Fed. Reg. 47, 522 (Aug. 13, 2014)

10. Recovery Under the Endangered Species Act

J.M. Scott et al., "Recovery of Imperiled Species Under the Endangered Species Act: The Need for a New Approach," *Frontiers in Ecology and the Environment* 3, no. 7 (2005): 383-389.

Carol I. Bocetti, Dale D. Goble, and J. Michael Scott, "Using Conservation Management Agreements to Secure Postrecovery Perpetuation of Conservation Reliant Species: The Kirtland's Warbler as a Case Study," *BioScience* 62, no. 10 (2012): 874-879.

Dale D. Goble, "The Endangered Species Act: What We Talk About When We Talk About Recovery," *Natural Resources Journal* 49 (2009): 1-44.

Recommended: J.M. Scott et al., "Conservation-Reliant Species and the Future of Conservation," *Conservation Letters* 3 (2010): 91-97.

Recommended: Society for Conservation Biology, RE: Petition for Rulemaking to Define "Recovery" Under the Endangered Species Act and to Establish Recovery Planning Regulations for Threatened and Endangered Species," Letter to Sally Jewell and Rebecca M. Blank (May 14, 2013).

Case Study: Salmon Recovery

Robert T. Lackey, "Saving Wild Salmon: A 165 Year Policy Conundrum." Dubach Workshop: Science and Scientists in the Contemporary Policy Process, Oregon State University, Portland, OR, Oct. 3-4, 2013.

Case Study: Wolf Delisting & Recovery

Jeremy T. Bruskotter, et al., "Removing Protections for Wolves and the Future of the U.S. Endangered Species Act (1973)," *Conservation Letters*, 7, no. 4 (2014): 401-407.

Somerset Perry, "The Gray Wolf Delisting Rider and State Management Under the Endangered Species Act," *Ecology Law Quarterly* 39 (2012): 439-473.

Hal Herring, "Wolf Whiplash," *High Country News* (May 30, 2011).

Recommended: Holly Doremus, "Gray Wolf Update: Rider Upheld and Wyoming Delisting a Step Closer," *Legal Planet* (Aug. 5, 2011).

Recommended: *Alliance for the Wild Rockies v. Salazar*, 672 F. 3d 1170 (9th Cir. 2012) (Ninth Circuit decision upholding the delisting of wolves via appropriations rider)

Recommended: Martin Nie, *Beyond Wolves: The Politics of Wolf Recovery and Management* (Minneapolis: University Press of Minnesota, 2003).

11. The Future of the Endangered Species Act: Debating ESA Reform—Class Exercise

Freyfogle & Goble, *Wildlife Law*, Ch. 13.

[Readings and proposed legislation to be determined—and taken from the 114th Congress]

FINAL EXAM: Tuesday May 12, 8.00—10.00 am.