

WILDLIFE POLICY—WILD 410

Spring 2024, 9.30—10.50; TR; Room: Rankin Hall #204

Instructor Information

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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 35 undergraduate students and 5-10 graduate students taking the course as NRSM 595. Most sessions will include a very short background lecture followed by more in-depth class discussions on assigned readings.

WILD 410 or 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, 2019)

All additional required and recommended reading and my lecture notes are available on the course's [Moodle page](#).

*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](#).

The case law discussed in class can be most easily accessed by using [Google Scholar](#) (case law search).

Course Moodle Page & Course YouTube Channel: The course has a moodle page that will be used to organize readings and materials, post exam material, and host open forums, among other functions. The course also has a YouTube channel with associated playlists that track the units and topics covered in this class and NRSM 422 Natural Resources Policy. See moodle page for YouTube link and subscription information.

Learning Outcomes

Students successfully completing the course will:

1. Acquire a substantive understanding of U.S. wildlife policy
 - Learn how to read and interpret statutes, administrative regulations, and case law and understand the intersections between them and how they impact wildlife management and conservation on the ground.
 - 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)

Assignments & Assessment

Class Participation:

I reserve the right to consider class participation and attendance when assigning final grades—a sort of tie-breaker. I will do so especially for those students who may be on the cusp of a grade. A student, for example, earning a B+ or 89.4% in final points could possibly be bumped to an A- if he/she was a fully engaged and informed class participant that never missed a class. On the other hand, if a student rarely participated during the semester and has a shoddy attendance record, a C- score would stay a C- score. Please 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.

All students must read the reading assignments prior to class and 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. 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. 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, 200 pts total):

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 (between weeks # 7-9). The final exam is scheduled for **Tuesday, May 7 8.00—10.00 am**. I will not arrange other times for the final exam to be taken so please plan your work and travel schedules accordingly.

3 Short Written Assignments: (20 points each, 60pts total):

Students will be asked to write three 1-3 page (single-spaced) written assignments or policy position papers at different points in the semester. The papers will be graded for substance and style and they will be mostly based on our assigned and recommended readings. Students will be provided an opportunity to re-write one of these papers to possibly receive a higher score.

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” that may be shared verbally with the class and serve as the basis of class discussions. The paper assignments will closely track our class presentations and group 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).

Class Presentation/Participation/Class Contributions (15 pts. total):

The end-of-semester ESA presentation (mock Senate Hearing on the ESA) is worth 7.5 points. Another 7.5 points will be based on a student’s overall contribution to the class. This can be earned through attendance and well-informed class participation throughout the semester. This should be an easy 15 points for those students who show up, share the workload, make an informed contribution to the class, and play well with others. However, points will be deducted if a student doesn’t prepare sufficiently and adds little contribution to class discussions.

Grading Scale & Points:

The following scale will be used to translate points into grades (rounded up if the next decimal is 5 or above, down if it is four or less).

Grade Range	Description
93-100: A	Points
90-92: A-	
88-89: B+	

Grade Range	Description
83-87: B	Written exams: 100pts x 2 = 200 pts Written papers: 20pts x 3 = 60 pts Class participation: 15 pts total Total points: 275 pts
80-82: B-	
78-79: C+	
73-77: C	
70-72: C-	
68-69: D+	
63-67: D	
60-62: D-	
59- F	

Academic Support:

- [Advising Center](#) and [Tutoring Resources](#): Schedule advising or tutoring appointments, available online or by phone. Tutoring available for math, writing, public speaking, Study Jam groups, and TRiO services.
- [Office for Disability Equity](#): Ensures students receive appropriate accommodations, services, and assistance to fully access the campus programs and facilities.
- [Writing and Public Speaking Center](#): Provides help at any point with writing, presentation, and research projects. Online and in-person appointments available.
- [Office for Student Success \(OSS\)](#): Helps students to meet three goals: transition smoothly to college, remain enrolled and progress in a program of study, and graduate in a timely manner.
 - [OSS COVID-19 Website](#)
 - Download the OSS [Online Student Success Guide](#) or [condensed Student Success Checklist](#)

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](#).

Plagiarism

The following is taken directly the [UM Catalog \(2015-2016\) Academic Policies and Procedures](#):

“Plagiarism is the representing of another's work as one's own. It is a particularly intolerable offense in the academic community and is strictly forbidden. Students who plagiarize may fail the course and may be remanded to Academic Court for possible suspension or expulsion.

Students must always be very careful to acknowledge any kind of borrowing that is included in their work. This means not only borrowed wording but also ideas. Acknowledgment of whatever is not one's own original work is the proper and honest use of sources. Failure to acknowledge whatever is not one's own original work is plagiarism.”

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, class presentations and written assignments. If you are having trouble with one of the required readings, be sure to try one of the recommended readings for a different way of presenting material.

Strategic Reading: I will make clear what readings I want you to read in depth, so that you can come to class ready to discuss the material. Some material, however, can be read more strategically, so that you can put information together as a way to prepare for the exams and the written assignments.

Please note that there are some differences in readings based on whether you have a first or second edition of the text. I've indicated required readings for each edition.

There are several contemporary cases and developments in wildlife law and policy that will be referenced in each unit. I've placed in each moodle section several folders and subfolders that contain related documents.

Course session will begin by reviewing the available readings and how they can be used to prepare for exams and the written assignments. Please view the recommended readings as resources that can be read in their entirety, skimmed for content and a different perspective, and/or something to be used for study and preparation.

TOPICS & READINGS

1. Introduction to Wildlife Law, Policy & Politics

A. Background. The Global Biodiversity Challenge & Context

United Nations, Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services, *Global Assessment Report on Biodiversity and Ecosystem Services* (2019), available at <https://www.un.org/sustainabledevelopment/blog/2019/05/nature-decline-unprecedented-report/>

Rosenberg, K.V., et al., Decline of the North American Avifauna, *Science* 366 (2019): 120-124. See also <https://www.3billionbirds.org/>

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

Freyfogle & Goble, *Wildlife Law* 1st ed., Ch. 1; pp. 191-202; pp. 305-308 (2d ed. Ch. 1; pp. 192-202; 287-289)

Case Study: The Migratory Bird Treaty Act

For an overview of the MBTA see *The Migratory Bird Treaty Act (MBTA): Selected Legal Issues* (Washington, D.C.: Congressional Research Service, 2016).

We will work through the following documents as a class:

U.S. Fish and Wildlife Service, Regulations Governing Take of Migratory Birds, Proposed Rule, 85 Federal Register 5915 (Feb. 3, 2020).

U.S. Fish and Wildlife Service, Regulations Governing Take of Migratory Birds: Revocation of Provisions, 86 Federal Register 54 (Oct. 4, 2021)

More documents and resources pertaining to the Trump-Biden MBTA Rulemakings available at <https://www.fws.gov/regulations/mbta/resources>

2. The Public Trust in Wildlife

The public trust doctrine and applications to wildlife management; the complicated nature of state sovereign “ownership” of wildlife.

Freyfogle & Goble, *Wildlife Law* 1st ed. Ch. 2 & pp. 98-99; (2d ed. Ch. 2 & pp. 88-90)

Martin Nie, *The Public Trust Doctrine and Wildlife Management in Montana: A Primer and Citizen’s Guide* (Missoula, MT: Bolle Center for People and Forests, 2023) (a version of this paper is forthcoming in the *Public Lands and Resources Law Review*).

Recommended: Douglas Quirke, *The Public Trust Doctrine: A Primer* (A White Paper of the University of Oregon School of Law Environment and Natural Resources Law Center, 2016) (a very good and reader-friendly introduction to the public trust doctrine, though not focused on wildlife)

Recommended: Michael C. Blumm & Aurora Paulsen, “The Public Trust in Wildlife,” *Utah Law Review* 6 (2013): 1437-1504.

Recommended: Martin Nie, Nyssa Landres & Michelle Bryan, “The Public Trust in Wildlife: Closing the Implementation Gap in 13 Western States,” *Environmental Law Reporter*, 50, no. 11 (2020): 10909-10919.

The Public Trust in Wildlife: Applied to Climate Change

The “*Juliana v. U.S.*” campaign and litigation, available at <https://www.ourchildrenstrust.org/>.

Held v. Montana (2023) (the District Court decision, reviewing the Montana State Constitution (and some PTD).

Recommended: Michael C. Blumm and Mary Christina Wood, “‘No Ordinary Lawsuit’: Climate Change, Due Process, and the Public Trust Doctrine,” *American University Law Review* 67 (2017): 1-87.

Recommended: Jeremy T. Bruskotter, Sherry A. Enzler, and Adrian Treves, "Rescuing Wolves from Politics: Wildlife as a Public Trust Resource," *Science* 333 (2011): 1828-1829.

Recommended: The Wildlife Society, *The Public Trust Doctrine: Implications for Wildlife Management and Conservation in the United States and Canada* (Bethesda, MD: The Wildlife Society, 2010) (please skim)

Recommended: Center for Biological Diversity, Inc. v. FPL Group, Inc., California Court of Appeal, 83 Cal. Rptr. 3d 588 (2008) (wind turbine operations, raptors, and the public trust doctrine in California)

3. The Constitutional Context of U.S. Wildlife Management

Introduction to the U.S. Constitution's treaty power, property clause, commerce clause, wildlife federalism, federal preemption, the takings clause, and three foundational Supreme Court decisions focused on wildlife.

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

Recommended: *Kleppe v. New Mexico*, 426 U.S. 529 (1976) (case focused on the Property Clause as it relates to wild horses and burros on federal land)

Recommended: Wild Free-Roaming Horses and Burros Act, 16 U.S.C. §§1131-1340.

Recommended: *Hughes v. Oklahoma*, 441 U.S. 322 (1979) (case focused on state ownership of wildlife and commerce clause)

Recommended: *Missouri v. Holland*, 252 U.S. 416 (1920) (case focused on the U.S. Constitution and the Migratory Bird Treaty Act).

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)

4. Wildlife on Federal Public Lands

Cases and conflicts between federal and state governments; the National Parks and National Wildlife Refuge Systems; Wildlife on multiple use lands managed by the USFS and BLM; wildlife management in federal wilderness; savings and cooperation clauses in federal statutes.

Freyfogle & Goble, *Wildlife Law* 1st ed., Ch. 10. (2d. ed. Ch. 11)

Martin Nie, Christopher Barns, Jonathan Haber, Julie Joly, Kenneth Pitt and Sandra Zellmer, "Fish and Wildlife Management on Federal Lands: Debunking State Supremacy," *Environmental Law* 47 (2017): 797-932. (please see for agency specific statutes and regulations pertaining to wildlife)

(The Nie et al. 2017 Article above led to a response by the Association of Fish and Wildlife Agencies: Lane Kisonak, "Fish and Wildlife Management on Federal Lands: The Authorities and Responsibilities of

State Fish and Wildlife Agencies,” *Environmental Law* 50 (2020). Nie et al. were asked by the Journal to respond to the rebuttal, see Nie et al. Response to Kisonak’s Fish and Wildlife Management on Federal Lands: The Authorities and Responsibilities of State Fish and Wildlife Agencies,” *Environmental Law*, 50 (2020). All this entertainment available for free on Moodle.)

Recommended: Adam Federman, “The Hidden Battle Threatening the Future of America’s Wild Places,” *The Pacific Standard* (May 26, 2019), available at <https://psmag.com/environment/the-hidden-battle-threatening-the-future-of-americas-wild-places>

Recommended: students may find it useful to skim the following two powerpoint presentations and focus on how they so differently view federal and state powers: Kenneth P. Pitt, USDA, Office of the General Counsel, Wildlife Management Jurisdiction on National Forest System Lands (PDF powerpoint presentation, Mar. 23, 2011) and Association of Fish & Wildlife Agencies, The States: Trustees of America’s Wildlife (PDF powerpoint presentation).

A. The Special Case of Alaska

With a focus on Alaska Native Tribes and Title VIII of ANILCA (subsistence use)

Martin Nie, Christopher Barns, Jonathan Haber, Julie Joly, Kenneth Pitt and Sandra Zellmer, “Fish and Wildlife Management on Federal Lands: Debunking State Supremacy,” *Environmental Law* 47 (2017), pp. 876-880.

Alaska Federation of Natives, *The Protection of Alaska Native Subsistence Rights and Use: Overview of Alaska’s Subsistence Framework* (2022) (slide deck reviewing Title VIII and subsistence exemptions provided in other laws). Please also visit www.nativefederation.org for additional resources and video workshops on all things subsistence in Alaska.

B. The National Wildlife Refuge System

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.

Recommended: See in moodle various “compatibility determinations” made by USFWS in managing National Wildlife Refuges.

The National Wildlife Refuge System Improvement Act of 1997, Public Law No. 105-57 (1997) (the full statute is provided and to be used as a reference as needed).

Federal Public Lands & Wildlife Cases & Examples

30 x 30 Case Study

See in moodle Section 216 of President Biden’s Executive Order on Tackling the Climate Crisis at Home and Abroad (Jan. 27, 2021) calls for “conserving” at least 30 percent of our nation’s lands and waters by 2030. The Order is one response to declines in biodiversity and the loss of fish and wildlife habitat. Part of this unit will be focused on the 30 x 30 initiative (now referred to as “America the Beautiful”) and the role played by federal public lands, including what lands and waters should qualify for “conservation” and for measuring progress toward the 30% goal.

Restoration of American Bison on Federal Public Lands

See in moodle Secretarial Order 3410, Restoration of American Bison and the Prairie Grasslands (2023). Also available in this folder are positions taken by the State of Montana and several conservation NGOs on the restoration of bison on public lands. See also the Intertribal Buffalo Council <https://itbcbuffalonation.org/>

C. Federal Preemption Case Study

Wyoming v. United States, 279 F. 3d 1214 (10th Cir. 2002) (case focused on the National Wildlife Refuge System and elk management in Jackson Hole, WY) (we will use this case to return to federalism issues and discuss the role of savings clauses in federal land laws). Updates on this case and ongoing litigation—as it plays out regarding management of chronic wasting disease at Refuge available in Moodle).

For an update on this issue see Kylie Mohr, “Fatal Disease Looms Large Over Elk Feeding Grounds,” *Greenwire* (Jan. 27, 2021).

5. Tribal Rights to Fish and Wildlife

Introduction to principles of federal Indian law and their application to fish and wildlife, tribal treaty rights, off-reservation reserved rights, tribal co-management of fish and wildlife.

Freyfogle & Goble, *Wildlife Law* 1st ed. Ch. 8. (2nd ed. Ch. 9)

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)

U.S. v. Washington, 827 F. 3d 836 (9th Cir. 2016) (the latest decision on Tribal fishing rights in the Northwest, the so-called “culverts” decision focused on habitat). See also “13-35474 USA v. State of Washington,” on [YouTube](#) (to view state and federal arguments in the culverts case)

Recommended: Michael C. Blumm, “Indian Treaty Fishing Rights and the Environment: Affirming the Right to Habitat Protection and Restoration,” *Washington Law Review* 92 (2017): 1-38 (an excellent overview of the litigation leading up to the 9th Circuit’s culvert decision)

Recommended: 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 (this is old but a very reader-friendly introduction that students have really liked in the past)

Recommended/discussion: *Clayvin Herrera v. Wyoming*, 139 S. Ct. 1686 (2019) (tribal treaty rights and hunting on the Big Horn National Forest in Wyoming).

Cases/Examples

Joint Secretarial Order 3403 on Tribal Co-Stewardship of Public Lands, Waters, and Wildlife

See in moodle Joint Secretarial Order 3403, On Fulfilling the Trust Responsibility to Indian Tribes in the Stewardship of Federal Lands and Waters (Nov. 15, 2021). For a review, discussion and website focused on all things tribal co-management and stewardship see the “Sovereign-to-Sovereign Cooperative Agreements” website and repository, link available via moodle.

Tribal Co-Management of Marine Mammals and Migratory Birds in Alaska

See in moodle links to NOAA Fisheries overview of co-management in context of the Marine Mammal Protection Act and the Alaska Migratory Bird Management Council (created by amendment to Migratory Bird Treaty Act).

Recommended: *Tribal Nations in Montana: A Handbook for Legislators* (Montana Legislative Services & Margery Hunter Brown Indian Law Clinic, 2020) (an excellent overview of Tribal law and governance in context of Montana)

A. Tribal Reserved Rights & Tribal “Co-Management” and “Co-Stewardship” of Fish and Wildlife

Optional discussion of co-management of fish and wildlife; and the return of the National Bison Range to Confederated Salish and Kootenai Tribes.

National Bison Range Restoration excerpt from Public Law 116-260. For more background and resources on the Restoration Act see <https://bisonrange.org/>

Recommended: Monte Mills & Martin Nie, "Bridges to a New Era: A Report on the Past, Present, and Potential Future of Tribal Co-Management on Federal Public Lands," *Public Land & Resources Law Review* 44 (2021): 49-184.

Recommended: Brian Upton, “Returning to a Tribal Self-Governance Partnership at the National Bison Range Complex: Historical, Legal, and Global Perspectives,” *Public Land & Resources Law Review* 35 (2014): 51-145 (we will discuss the National Bison Range and co-management options in federal lands management, as they pertain to Interior Dept. agencies).

Recommended: Ed Goodman, “Protecting Habitat for Off-Reservation Tribal Hunting and Fishing Rights: Tribal Co-management as a Reserved Right,” *Environmental Law* 30, no. 2 (2000): 279-362.

6. State Wildlife Governance

State game laws, wildlife funding and budgets, Pittman-Robertson & Dingell-Johnson Acts, state wildlife commissions, ballot initiatives, the North American Model of Wildlife Conservation (and critique)

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

A Critique: Kevin Bixby, “An Overview of State Wildlife Governance Today,” a talk delivered at the Wildlife for All Summit, Albuquerque, NM, 2018.

The “Wildlife for All” campaign available at <https://wildlifeforall.us/>

A. State Laws & Resources for Endangered Species Protection

Wolf Management in Montana and Idaho

Included in this unit will be an overview of recent legislation pertaining to wolf management in Idaho and Montana. An overview of these bills is available in moodle and we’ll discuss the legislation and the relationship between state legislatures, fish and wildlife commissions, and the Departments of fish and game. We will then return to the issue in the context of the ESA and a recent petition to relist wolves in the Northern Rockies.

See also in the moodle folder the Draft Montana Statewide Wolf Plan and related Environmental Impact Statement.

Discussion of Proposed Legislation: Recovering America’s Wildlife Act (RAWA)

See in moodle the Recovering America’s Wildlife Act, Senate Bill 3223 (2020) (proposed federal legislation focused on nongame funding) and the Blue Ribbon Panel on Sustaining America’s Diverse Fish & Wildlife Resources (2016), available at <https://www.fishwildlife.org/afwa-informs/resources/blue-ribbon-panel>

Alejandro E. Camacho et al., "Assessing State Laws and Resources for Endangered Species Protection," *Environmental Law Reporter* 47, no. 10 (2017)

Recommended: Robert Fischman et al., "State Imperiled Species Legislation," *Environmental Law* 48 (2018)

B. Debating the North American Model of Wildlife Conservation

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)

Michael P. Nelson, et al., "An Inadequate Construct? North American Model: What's Flawed, What's Missing, What's Needed," *The Wildlife Professional* (Summer 2011): 57-60.

J.T. Bruskotter et al., *Beyond Game Management: Toward a More Inclusive Ethic for Wildlife Conservation* (The Ohio State University, School of Environment and Natural Resources, 2022).

Recommended: Shane P. Mahoney and Valerius Geist, eds., *The North American Model of Wildlife Conservation* (Baltimore, MD: Johns Hopkins University Press, 2019)

Part II. The Past, Present and Future of the Endangered Species Act

Part II of the course provides an in depth-review of the ESA. Background lectures are supplemented with small group work that is designed to get students prepared for the mock Congressional hearing on "ESA Reform" that is held over the last two weeks of the semester.

6. ESA: 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* 1st ed., Ch. 9, 11 & 12. (2nd ed. Ch. 10, 12 & 13).

The Endangered Species Act (1973), 16 U.S.C. §1531 (the full statute is provided and to be used as a reference as needed).

The North American Model....in Court

Available in moodle are a few documents to see how the North American Model is used in a case involving the introduction of non-native mountain goats by the State of Utah that are now on federal property: (1) Proposed Brief of the Association of Fish and Wildlife Agencies as Amicus Curiae in Support of Defendants Appellees and Affirmation (2017); and (2) Declaration of Martin A. Nie, in *Utah Native Plant Society and Grand Canyon Trust v. U.S. Forest Service* (2017).

ESA Resources & Examples

Found in moodle are several ESA-related resources and documents that are referenced in lectures and discussions, including: the full amended statute, listing petitions and determinations, biological opinions, critical habitat designations, habitat conservation plans, candidate conservation agreements and more.

6-PPD-q and the "Take" of Salmon and Steelhead

See in moodle materials regarding the ESA lawsuit over the use of a chemical in making tires that kill fish.

Brett Hartl & Jessica Owley, “Rebuilding the Endangered Species Act: An Environmental Perspective,” in Don Baur & Ya-Wei Li, eds., *Endangered Species Act: Law, Policy, and Perspectives* (American Bar Association, 2021).

Recommended: Center for Conservation Innovation @ <https://home.cci-dev.org/directory/> the CCI Directory includes a rich and accessible database on most things ESA, with great tables, graphs, maps and explanatory materials—highly recommended).

Recommended: Noah Greenwald, et al., “Extinction and the U.S. Endangered Species Act,” *PeerJ* 7:e6803 (2019).
Recommended: M. Lynn Corn & Andrea M. Wyatt, *The Endangered Species Act: A Primer* (Congressional Research Service, 2016).

A. Case Study: TVA v. Hill (1978)

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.

Recommended: Jacob M. Malcom and Ya-Wei Li, “Data Contradict Common Perceptions About a Controversial Provision of the U.S. Endangered Species Act,” *Proceedings of the National Academy of Sciences*, 112, no. 52 (Dec. 2015): 15844-15849. (see for empirical review of section 7 consultation process).

7. Recovery & Delisting Under the Endangered Species Act

Justin R. Pidot, “Contingent Delisting,” *University of Colorado Law Review* 91 (2020): 649-676.

Clayton T. Lamb et al., “Braiding Indigenous Rights and Endangered Species Law,” *Science* 380, issue 6466 (2023)

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

ESA Resources & Examples

The ESA and State Wolf Management in Montana

See in moodle the “Emergency Petition to Relist Gray Wolves in the Northern Rocky Mountains as an Endangered or Threatened Distinct Population Segment Under the ESA (May 26, 2021).

The ESA and delisting of Grizzly Bears

See in moodle the State of Montana’s petition to delist grizzly bears in the Northern Continental Divide (2021); the USFWS’s Rule to delist Yellowstone Grizzly Bears; and *Crow Indian Tribe et al., v. U.S.* (U.S. District Court of Montana, 2018). I’ve also placed in the moodle folder the associated briefs and petitions for the case, including the Tribal petition (and other related documents).

See also Letter from USFWS Director Martha Williams to MFWP Director Hank Worsch, RE: delisting grizzly bears in the context of “inadequate regulatory mechanisms.” (Feb. 2, 2023).

“Take” of Grizzly Bears by Trains in Montana

See in moodle materials regarding the lawsuit over the take of Grizzly Bears by the BNSF Railway Company in northern Montana.

The ESA in Indian Country

See in moodle articles, updates and the Joint Secretarial Order (3206) on the implementation of the ESA in Indian Country

Recommended: 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.

Recommended: Daniel J. Rohlf, Carlos Carroll, and Brett Hartl, “Reply to Goble and Colleagues,” *BioScience* 64, no. 10 (2014): 859-860.

8. The Future of the Endangered Species Act: Debating ESA (and Wildlife Law & Policy) Reform (Including class group work and presentations in the form of a mock congressional hearing on ESA reform)

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

I’ll assign additional and most up-to-date readings and legislation from 117th Congress.

Jonathan Wood, Pacific Legal Foundation, Testimony on H.R. 6355 and H.R. 6356, U.S. House of Representatives, (2018).

Damien M. Schiff, “The Endangered Species Act at 40: A Tale of Radicalization, Politicization, Bureaucratization, and Senescence,” *Environs: Environmental Law and Policy Journal* 37 (2013-14): 105-132.

John Buse, “A Different Perspective on the Endangered Species Act at 40: Responding to Damien M. Schiff,” *Environs: Environmental Law and Policy Journal* 38 (2014-2015): 145-166.

The National Endangered Species Act Reform Coalition @ <http://nesarc.org/>

Endangered Species Act Congressional Working Group, *Report, Findings and Recommendations* (Feb. 4, 2014)

The [Center for Biological Diversity’s](#) take on the ESA and ESA Reform.

The U.S. Fish & Wildlife Service’s Environmental Conservation Online System at <https://ecos.fws.gov/ecp/> (use for all T&E species and their administrative documents).

Center for Conservation Innovation @ <https://home.cci-dev.org/directory/> the CCI Directory includes a rich and accessible database on most things ESA, with great tables, graphs, maps and explanatory materials—highly recommended).

Greenwire (news service) @ <https://www.eenews.net/gw> (be sure to access via Mansfield, the best and most detailed environmental news service, with great coverage of ESA cases).

The Fish & Wildlife Service and NOAA Fisheries have jointly proposed revisions to regulations that implement portions of the ESA. Background on these rulemakings (including powerpoints and videos) and the proposed rules are available @ https://www.fws.gov/endangered/improving_ESA/regulation-revisions.html.

Final Exam: Tuesday, May 7th 8.00—10.00 am.