SYLLABUS

MATERIALS

The casebook for this course is David D. Goble and Eric T. Freyfogle, Wildlife Law: Cases and Materials (2002) (abbreviated as G&F on the syllabus). In addition to the casebook, you should also purchase the Supplemental Reader. This syllabus is tentative, and may be revised as the semester proceeds.

There is also significant supplemental reading that will be available on the Web. This material will be available through the following sources:

(a) Lexis or Westlaw
(b) Hein on-line (available at http://www.law.berkeley.edu/library/online/databases/alpha.html)
(c) JSTOR (available at http://www.law.berkeley.edu/library/online/databases/article.html)
(d) class website (available at http://www.law.berkeley.edu/students/courses/index.html)
(e) and other miscellaneous sources.

Both Hein and JSTOR can be accessed for free from computers on the UCB campus. The syllabus indicates which supplemental reading is available from which source in bold. If you have any problems or difficulties accessing the materials please do not hesitate to let me know.

I may also hand out other supplementary material in the form of Handouts. These Handouts are numbered and dated. I suggest that you keep these with your class notes or in a separate folder so that by the end of the semester you will have all of them. I also distribute Handouts and other announcements through the web page on Boalt’s Course Management System. Please check our web page frequently.

SCHEDULE OF CLASSES

Generally we will meet on Mondays and Wednesdays in Hearst Field Annex Room D-29 at the scheduled time of 1:55-3:10 p.m. We may need to schedule up to three make-up classes during the semester – one for the Thanksgiving holiday, one for late October, and one other in case we need to miss a class during the semester for any other reason. Please tentatively reserve Friday November 6 and Friday November 13 from 2 to 3:30 PM. for our make-up class periods. We will also be scheduling a field trip during the semester, which may (depending on class preference) substitute for one of our
make-up classes. We will discuss the scheduling for the class field trip after the semester begins, although in the past it usually has been on Friday afternoons later in the semester.

OFFICE HOURS

My office is 689 Simon Hall and my telephone number is 643-5647. My e-mail is ebiber@law.berkeley.edu. I am available to talk with you after every class as needed. Regular office hours will be held on Tuesdays 2-6 PM. Appointments are not necessary, but will ensure that you do not have to wait in line to talk with me. Please contact my assistant, Teriann Asami-Oki, at 642-1729 or tasamioki@law.berkeley.edu, to schedule an appointment. If you are unable to make those office hours, please contact me and we’ll try to find another time frame to meet.

GRADING

Your grade in this class will be determined by a final examination. I will count class participation as a tie-breaker if needed.

FINAL EXAMINATION

There will be a take-home final examination during the law school final exam period. It will be 24 hours in length. The exam is open book, meaning that you may use your casebook, reader, class handouts and any other material that you have prepared. No commercial outlines or other materials are allowed. My practice is to give you a lot of practice and feedback on how to analyze exam-type questions. There will be a review session focused on the exam at the end of the semester.

CLASS PARTICIPATION

I expect everyone to participate in class. I will divide the class into groups of approximately 3-5 students. Each group will be responsible for preparing for a specific class, and each member of the group can expect to be called on during that class. I may assign specific roles or specific material for members of the group to prepare for that class. While I will focus on calling on the students in the group that is on-call for that class, I reserve the right to call on any student in class at any time. Class participation is a tie-breaker for grades. Your class participation grade will be based on your participation when your group is on-call or when I call on you at random. Student participation based on volunteering in class or questions asked in class will not affect your class participation grade. I strongly encourage volunteers and questions. There may come a time in the class when I need to move the discussion forward and not all questions can be
answered. But I encourage you then to bring those questions to my office hours where we can discuss them fully.

PAPER

A limited number of students may choose, in lieu of the final examination, to write a paper in the class. You must schedule an appointment with me to talk about this possibility within the first 2 weeks of class. You must have my approval to choose this option. If you do choose this option, I will require a paper topic proposal by September 28th, six weeks into the semester, a detailed outline by November 2nd, 10 weeks into the semester, and a rough draft for my initial review by Wednesday, November 24th. All papers must be submitted in final form by the end of the exam period. Papers must be 30 to 45 pages in length.

Students who successfully complete the paper for this class may choose to do further work on the paper next semester to satisfy their writing requirement.

CROSS-ENROLLMENT

I encourage graduate students from other departments (e.g., ESPM, urban planning) to cross-enroll in this class. Cross-enrollment requires the permission of the instructor – please talk to me after class during the first week of classes if you wish to cross-enroll. We will discuss your prior background and experience in order to determine whether this class is suitable.
I. INTRODUCTION

II. LEGAL BACKGROUND: WILDLIFE LAW.

A. Common law rule of capture.


   - G&F pp. 852-857, 521-526 (starting with n.4, ending with n.1).

III. SCIENCE AND PHILOSOPHY OF BIODIVERSITY

A. Definitions of biodiversity. Rationales for protecting it.
   - G&F pp. 1100-34

B. What are threats? What are primary ways to protect biodiversity?
   - G&F pp. 1135-1164

IV. ENDANGERED SPECIES ACT.

A. Background, History, Overview.
   - G&F pp. 1164-1167, 1178-1181.

   - G&F pp. 1181-84, 1187-88 (n.2), 1188-1195 (through n.5).
   - 64 Fed. Reg. 32733-32736 (candidate conservation agreements) (course website)
   - 68 Fed. Reg. 15112-15115 (same) (course website)
   - G&F 1184-87 (through n.1), 1195-1203 (up through n.2)
D. Critical habitat designation. Consideration of economic costs. Success or failure of litigation as a tool.

- Skim G&F 1218-1219 (overview of NEPA)
- G&F pp. 1205-1216, 1205 (n.7)
- Testimony of Craig Manson re litigation and critical habitat designation (litigation as tool) (course website)
- Bull trout critical habitat decision (Introduction, Supplementary Information, skip public comments and responses, Summary of Revisions and Critical Habitat discussion until “effects of critical habitat designation”) (agency avoidance of critical habitat designation) (course website)
- Unsound Economics, NWF report (agency avoidance of critical habitat designation using economic justifications) (pp. 4-15) (Supplemental Reader)

- G&F pp. 1167-1178 (excluding n.2 on pp. 1174-75 and n.2 on pp. 1175-76), 1179 (n.2)
- G&F pp. 1310-1313
- G&F pp. 1216-1234 (excluding n.2(c) on pp. 1218-19), n.2 on pp. 1174-75
- G&F 1234-1238
- National Wildlife Fed’n v. NMFS, 524 F.3d 917 (9th Cir. 2007) (jeopardy analysis) (Parts I and II.A, B & C) (Lexis/Westlaw)


- G&F pp. 1287-1289 (through n.1), 1291-1302 (skip n.4)
- Palila v. Hawaii Dep’t of Land and Natural Resources, 639 F.2d 495 (9th Cir. 1981) (for causation) (Lexis/Westlaw)
- Palila v. Hawaii Dep’t of Land and Natural Resources, 852 F.2d 1106 (9th Cir. 1988) (same) (Lexis/Westlaw)
- Marbeled Murrelet v. Babbitt, 83 F.3d 1060 (9th Cir. 1996) (Parts I, II.B, II.C.2 & 3) (for difficulty of showing causation) (Lexis/Westlaw)
- Defenders of Wildlife v. Bernal, 204 F.3d 920 (9th Cir., 2000) (Parts I, II and III) (for difficulty of showing causation) (Lexis/Westlaw)
- Strahan v. Coxe, 127 F.3d 155 (1st Cir. 1997) (for difficulty of showing causation and also potential broad spread of section 9 taking to state/local government activity) (Intro Parts I and II, Discussion Part II.A & B) (Lexis/Westlaw)
- Arizona Cattle Growers’ Ass’n v. USFWS, 273 F.3d 1229 (9th Cir. 2001) (for difficulty of showing causation under section 9 and also ITS connection with section 9) (Parts I, IV, V, VI) (Lexis/Westlaw)

- G&F pp. 1263-64, 1238-39, 1264-1287
- GAO Recovery report, pp. 1-5 (for prioritization of agency resources) (course website)
- 48 Fed. Reg. 43103-43105 (for prioritization of agency resources) (course website)
- Clubshell and Northern Riffleshell recovery plan, executive summary, skim pp. 29-41 (for overview of what recovery plan looks like) (course website)
- Decade of the Wolf, pp. 7-11, 19-33, 117-131, 169-175 (41 reader pages) (for reintroduction efforts) (Supplemental Reader)


- GAO report on conservation on private lands, pp. 1-6 (course website)
- FWS materials on safe harbours and conservation banking (course website)
- Michael J. Bean, Overcoming Unintended Consequences of Endangered Species Regulation, 38 Idaho L. Rev. 409 (2001) (for incentives) (Hein)
V. Habitat Protection.

   • G&F skim pp. 981-84, 997-1003, read pp. 1012-1016, 1023-1043
   • Alien Invasion, pp. 17-19, 41-50 (for pigs v. native species debate) (Supplemental Reader)
   • G&F pp. 43-44, 56-63 (overview of animal rights positions)
   • Optional Reading: G&F pp. 52-56, 63-67 (more on animal rights)

   • 33 USC §§ 1344, 1362 (for statutory scheme) (course website)
   • United States v. Riverside Bayview Homes, 474 U.S. 121 (1985) (for scope of wetlands regulation) (all but Part II) (Lexis/Westlaw)
   • US Army Corps of Engineers Wetlands Delineation Brochure (for application of wetlands regulation) (Supplemental Reader)
   • Avoyelles Sportsmen’s League v. Marsh, 715 F.2d 897 (5th Cir. 1983) (for types of activities regulated) (Parts I, III.A & B& C) (Lexis/Westlaw)
   • National Mining Ass’n v. U.S. Army Corps of Engineers, 145 F.3d 1399 (D.C. Cir. 1998) (for types of activities regulated) (through page 1406) (Lexis/Westlaw)
   • NWF v. Whistler, 27 F.3d 1341 (8th Cir. 1994) (for Corps’ analysis of permits) (Lexis/Westlaw).

VI. Constitutional limits on the protection of biodiversity.

A. Federalism and the Commerce Clause. The problem of intrastate species and wetlands habitat.
   • G&F 536-560.

• Penn Central Transportation Co. v. City of New York, 438 U.S. 104 (1978) (overview of balancing test) (Part II.A) (Lexis/Westlaw)
• Lucas v. South Carolina Coastal Commission, 505 US 1003 (1992) (wipe-out test) (Parts I, III of majority opinion; Parts I and II (after fn.5 on pg. 1043) and IV A & B of Blackmun dissent; Part II of Stevens dissent) (Lexis/Westlaw)
• Conti v. United States, 291 F.3d 1334 (Fed. Cir. 2002) (regulation of personal property) (Lexis/Westlaw)

VII. Into the Oceans: Marine Conservation.

   • G&F pp. 894-906, 914-923.

   • G&F pp. 924-947, 951-970.
   • Materials on Hawaiian Islands Monument (course website)

VIII. International Law

   • Optional Reading: G&F pp. 675-683 (introduction to international law)

IX. Emerging Issues

A. Invasive Species. The problem of nonindigenous species. Legal protections (or lack thereof). Potential solutions.
   • Skim G&F 831-834.
   • G&F 970-971.
B. Climate change and biodiversity. Case study: Polar bears.


- FWS decision listing polar bears as a threatened species (edited version) (course website)