Law 273.63 – Public Lands and Natural Resources Law
Spring 2023

SYLLABUS

Instructor Name: Greg Loarie

Instructor Information: I am a senior attorney at the non-profit environmental law firm Earthjustice (www.earthjustice.org), where I have had the opportunity to litigate many cases involving the statutes we will cover in this course. I look forward to providing a historical perspective as we explore issues currently at play in the courts involving federal public lands and natural resources.

Email address: gloarie@earthjustice.org

Zoom Meeting Room ID: https://berkeley.zoom.us/j/8817796019

Office Hours: Regular office hours are on Fridays immediately before and after class, but I am happy to schedule zoom or telephone meetings upon request. Please contact me in advance by email to set up a time to talk. I encourage you to talk with me about the class if you have questions or want to explore an issue in class in more detail.

Meetings: Friday, 10:00 AM – 12:40 PM in Law 10

Prerequisites or Co-requisites: None.

Units: 3

Course Description

Nearly a third of the total land in the United States, and almost half of the eleven western States, is currently owned by the federal government. Management of these vast federal public lands and their enormous natural resources impacts all of us and will profoundly affect our collective capacity to stabilize the climate, redress colonial injustice, and preserve biodiversity in the 21st century.

This course will survey the complex constitutional and statutory law governing federal public lands and natural resources. We will review the history of public land acquisition, disposition, and reservation, and we will look closely at the agencies responsible for administering federal lands today. We will cover a substantial amount of administrative law and its application to natural resources management, with a particular emphasis on the judiciary's role in public land management. Statutes covered in detail include the National Forest Management Act, the Federal Lands Policy and Management Act, the General Mining Law of 1872, the Mineral Leasing Act, the National Environmental Policy Act, the Antiquities Act, and the Wilderness Act. Students will have an opportunity to work with materials commonly used in administrative and environmental law practice, such as comments on proposed rules and environmental review documents. Guest speakers will join us periodically to discuss their experiences.

Textbook/Course Materials

The casebook for this course is Klein, Birdsong, Klass, Biber, and Owen, *Natural Resources Law: A Place-Based Book of Problems and Cases* (Fifth Ed. 2022) (ISBN:9781543838909).

Additional reading materials, noted in the schedule below, will be posted on the website and/or available through the Internet.

This syllabus is tentative and may be revised as the semester proceeds.

bCourses

Our class bCourse site is https://bcourses.berkeley.edu/courses/1520894. Students should check the site periodically for announcements, updates, and supplemental readings.

Learning Outcomes

Berkeley Law has identified a number of learning outcomes for courses at the law school. By the end of this class, I expect you will achieve the following Berkeley Law Learning Outcomes in this course:

- Knowledge and understanding of substantive and procedural law;
- Legal analysis and reasoning, legal research, problem-solving, and written and oral communication in the legal context;
- Ability to critically assess laws and legal institutions, including the ways in which they shape and are shaped by racism and other forms of systemic inequality; and
- Using the law to solve real-world problems and to create a more just society.

Course-Specific Learning Outcomes

The goals for the class are for students to be able to:

- Apply the major provisions of U.S. laws enacted to manage and protect public lands and natural resources to circumstances that are likely to be relevant for clients or to important policy scenarios.
- Read, interpret, analyze, and critique administrative and legislative materials commonly used in environmental law.
- Prepare administrative and legislative materials commonly used by practitioners in environmental law (e.g., comments on proposed rules, legislative testimony).
- Explore major policy issues in the management and protection of public lands and natural resources and to develop their own perspectives on those issues.
- Understand client goals and how to ethically advance those goals within the relevant legal framework.
- Work together as a class to accomplish all of the above goals, consistent with the law school's honor code.

Grading/Evaluation

Your grade in this class will be determined as follows: Final examination 85%. Class participation 15%.

a. Final Examination

There will be a take-home final examination during the law school final exam period. It will be 3 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. There will be a review session focused on the exam on Friday, April 28 from 10:00 to 12:40.

b. Class Participation

Students should participate in class as an active listeners and contributors. I will call on students in almost every class, primarily through a panel system (though I may call on students outside the panel system on certain occasions). The class will be divided into four panels; one panel will be "on-call" for each class, beginning after the first class. If you are not prepared or cannot answer, simply state that you would like to pass on the question. You are encouraged to volunteer answers and to ask questions. Sometimes, I will have to postpone certain questions to keep the class moving at an appropriate pace. Please bring any remaining questions to me during office hours so that we can discuss them. You should attend class if possible even if you are unprepared.

Ungraded Assessments

Students will have the opportunity to receive feedback on an ungraded, issue spotting assignment midway through the semester. More information to follow.

Course Schedule

Class Date	**Topic**	**Reading and Assignments**	**Relevant Learning Outcome**
Class 1: Jan. 13	Introduction to the Course	**Supp:** Braiding Sweetgrass, Ch. 1 (Excerpt) *Drakes Bay Oyster Co. v Jewell* (Excerpts)	• Understand the basic goals of the class, expectations for learning, methods of assessment. • Place the course in the context of the broader environmental law curriculum. • Identify the policy implications that arise from a conservation versus a preservation perspective.

Class 2: Jan. 20	The Federal Public Domain	Read KBK pp. 30-43 (*Pollard v. Hagan*, *U.S. v. Gardner*); KBK pp. 53-59 (*U.S. v. Grimaud*, *Light v. U.S.*) **Supp:** Treuer, D., "Return the National Parks to the Tribes." The Atlantic, May 2021, pp. 32-45.	• Describe the importance of history in the acquisition and disposal of federal public lands. • Describe the basic components of land surveying and federal land grants. • Describe the transition to the retention era and Congressional delegation to land management agencies.
Class 3: Jan. 27	The Property Clause	Read KBK pp. 61-74 (*Camfield v U.S.*, *Kleppe v New Mexico*, *Minnesota v Block*) **Supp:** *U.S. v. Bd. of Cnty. Comm'n of Cnty. of Otero*, 843 F.3d 1208 (10th Cir. 2016)	• Describe the scope of discretionary power afforded to federal land management agencies under the Property Clause. • Predict likely outcomes for constitutional challenges to federal authority to manage federal public lands. • Develop arguments based on the appropriate level of government for natural resources decision-making, and explain their relevance for public lands law.
Class 4: Feb. 3	Non-Federal Authority on Federal Land	Read KBK pp. 186-198 (*Omaechevarria v. Idaho, Ventura County v. Gulf Oil Co., Cal. Coastal Comm'n v. Granite Rock Co.*); KBK pp. 199-209 (*SUWA v BLM*) **Supp:** *N.D. ex rel Wrigley v U.S.*, 31 F.4th 1032 (8th Cir. 2022) (excerpts)	• Describe the doctrinal structure of preemption law as applied to federal public lands management. • Predict likely outcomes for litigation based on preemption claims. • Describe R.S. 2477 and its implications for federal land management. • Identify and develop arguments about the proper level of government that should make natural resource management decisions.

Class 5: Feb. 10	The Legal Framework for Federal Management	Read KBK pp. 80-95 (*Norton v. SUWA*) KBK pp. 177-81 (*Ohio Forestry Ass'n v Sierra Club*)	• Describe the basic structure of decisionmaking for federal public land management agencies. • Describe the concept of organic acts, and how they shape federal public land management agency decisionmaking. • Identify arguments about the appropriate role of courts versus legislatures versus agencies in making decisions about natural resource management.
Class 6: Feb. 17	The National Environmental Policy Act	Read KBK pp. 96-117 (*Kleppe v. Sierra Club*, *Standing Rock Sioux Tribe v U.S.A.C.E.*)	• Describe the statutory and regulatory requirements for environmental review under NEPA. • Identify the ways in which NEPA shapes the procedures and outcomes of land management agencies. • Identify ways in which NEPA provides opportunities for outside parties to shape outcomes in public lands management. • Develop arguments about the goals of NEPA and explain the relevance of those goals to the interpretation and application of the statute and its implementing regulations.
Class 7: Feb. 24	The Endangered Species Act	Read KBK pp. 691-697; KBK pp. 717-727 (*TVA v. Hill*) **Supp.:** *Pacific Rivers Council v. Thomas*, 30 F.3d 1050 (9th Cir. 1994); *Forest Guardians v. Forsgren*, 478 F.3d 1149 (10th Cir. 2007)	• Describe the basic statutory and regulatory structure of the ESA. • Identify ways in which the ESA impacts federal land management decisionmaking. • Develop arguments about the ESA's goals and efficacy.

Class 8: Mar. 3	Judicial Review	Read KBK pp. 139-142, *Lujan v Nat'l Wildlife Fed'n*); KBK pp. 161-168 (*Sierra Club v Morton*) **Supp:** *CBD v USBLM*, 2018 WL 3004594 *CBD v. USBLM*, 2019 WL 2635587	• Describe the doctrinal rules for judicial review of agency action, including the specific standards of review and reviewability. • Predict likely outcomes for lawsuits challenging agency action. • Identify ways in which judicial review shapes agency decisionmaking, and the opportunities judicial review provides to outside groups to affect agency decisionmaking. • Develop arguments about the proper role of courts in supervising agency decisionmaking, and explain the relevance of those arguments to the doctrines of judicial review.
Class 9: Mar. 10	Timber	Read KBK pp. 228-257 (*Izaak Walton League v. Butz*, *Alliance for the Wild Rockies v. U.S.F.W.S.*); KBK pp. 277-291. **Supp:** *Sierra Forest Legacy v. Sherman*, 646 F.3d 1161 (9th Cir. 2011)	• Describe the relevance of history for the development of federal forest policy. • Describe the statutory and regulatory structure of federal forest management law (MUSYA and NFMA) and the extent to which courts can enforce the statutory and regulatory standards. • Describe how the forest planning process functions under NFMA. • Describe the interaction of federal forest law with NEPA and other environmental laws.
Class 10: Mar. 17	Grazing	Read KBK pp. 300-315 (*Public Lands Council v. Babbitt*)	• Describe the relevance of history for the law of grazing on public lands. • Describe the structure of FLPMA. • Describe the statutory and regulatory structure for grazing on federal public lands. • Develop arguments about the proper role of government in grazing management and explain the relevance of those arguments to the interpretation and reform of federal grazing law.

Class 11: Mar. 24	Hardrock Mining	Read KBK pp. 348-369 (*Cole v. Ralph*, *U.S. v. Coleman*, *U.S. v. Locke*) **Supp.:** *CBD v USFWS*, 33 F.4th 1202 (9th Cir. 2022)	• Describe the basic statutory, regulatory, and judicial structures regulating hard-rock mining on federal public lands. • Describe the interaction of federal mining law with NEPA and other environmental laws. • Predict likely outcomes for litigation challenging agency decisionmaking with respect to mining on federal public lands. • Develop arguments about the proper role of government in mining, and explain the relevance of those arguments to the interpretation, application, and possible reform of federal hard-rock mining law.
Class 12: Apr. 7	Energy Leasing	Read KBK pp. 390-397; KBK pp. 398-409 (*WildEarth Guardians v. Zinke*); KBK pp. 437-458 (*Protect Our Communities Found. v. Salazar*, *Western Watersheds Proj. v. Salazar*) **Supp**.: *Los Padres Forestwatch v USBLM,* 2016 WL 5172009 (C.D. Cal. 2016)	• Describe the statutory and regulatory structure for leasing federal on-shore lands for oil and gas production. • Describe the statutory and regulatory structure for leasing federal on-shore lands for renewable energy production • Describe the interaction of federal oil and gas and renewable energy leasing law with NEPA and other environmental laws. • Develop arguments about the proper role of government in ensuring an adequate energy supply, and the relevance of those arguments for the interpretation and possible reform of federal public lands law.
Class 13: Apr. 14	National Parks and Monuments	Read KBK pp. 470-474; KBK pp. 480-488 (*Fund for Animals v. Norton*, *Int'l Snowmobile v. Norton*); KBK pp. 488-490	• Describe the statutory and regulatory structure for federal park management. • Develop arguments about the proper roles of national parks (e.g., conservation versus recreation) and explain the relevance of those arguments for the interpretation, application, and possible reform of the law of national parks.

			• Describe the statutory structure for the creation and management of national monuments.
Class 14: Apr. 21	Wilderness and Roadless Areas	Read KBK pp. 501-515 (*The Wilderness Soc'y v. USFWS*); KBK 515-524, *Wyoming v. USDA*)	• Describe and explain the statutory structure for the creation and management of wilderness areas. • Predict likely outcomes for administrative decisions implementing the Wilderness Act. • Describe the regulatory structure created by the Roadless Rule. • Develop arguments about the proper role of the judiciary, executive and legislature in making decisions about how to manage public lands and natural resources.

School-wide Policies and Resources

1) A "credit hour" at Berkeley Law is an amount of work that reasonably approximates three to four hours of work per week for 15 weeks, including a) classroom time, b) time spent preparing for class, c) time spent in review sessions and studying and taking, final exams, d) time spent researching, writing, and revising papers and other written work, and e) time spent preparing for and completing any other final project, presentation, or performance. For the purposes of these calculations, 50 minutes of classroom instruction counts as one hour, and the 15 weeks includes the exam period. You can expect to spend this amount of time per unit per week on in-class and out-of-class, course-related work as described above. (Note that this total workload will be distributed differently in classes that only meet for part of the semester.)

2) Students who need accommodations for disability or pregnancy or want to discuss the implementation of their accommodations, including accommodated exams, should contact Chelsea Yuan, Director for Student Services, Accessible Education.

Student Services schedules all exams, including accommodated exams, as the law school is committed to anonymous grading. PROFESSORS DO NOT HAVE THE AUTHORITY TO RESCHEDULE EXAMS.

3) The Academic Honor Code governs the conduct of all students during examinations and in all other academic and pre-professional activities at Berkeley Law. We expect students to adhere to this code scrupulously. If you have any questions about whether your conduct may violate the code, please contact your professor or the Dean of Students before you act. You may face severe

consequences, including a failing grade in this class or removal from the program, and the Bar will receive notification of your conduct.

4) Berkeley Law Academic Skills Program. Every student admitted to Berkeley Law has the ability to succeed in law school and we are committed to fostering an academic environment in which all students can achieve their full potential. To schedule an individual appointment and for handouts on core law school skills and study strategies, free online study aids, information about practice exams and hypos, and much more, please visit and bookmark the Academic Skills Program website.

5) Student Technology Help As a Berkeley Law student, you are entitled to general software support for your computer from the law school, and certain free software downloads from UC Berkeley, while enrolled. If you have issues with internet access or computer equipment required to participate in classes remotely, contact studentcomputing@law.berkeley.edu. Information, links, and instructions for many common computer/technical questions can be found in the law library's online computing guide. For bCourses, Zoom, and technical support questions, please email studentcomputing@law.berkeley.edu or you can use the Student Computing chat. In both cases, someone will respond to you during our regular business hours.

If you have research-related questions, please contact the reference librarians by filling out the reference request form. You can also reach reference librarians during business hours by using the law library's chat service.

6) If you are in need of economic, food, or housing support, you can find basic needs information here You may be eligible for money to buy groceries via CalFresh or our Food Assistance Program. If you need food immediately, please visit our UC Berkeley Food Pantry.

7) The University of California is committed to creating and maintaining a community dedicated to the advancement, application, and transmission of knowledge and creative endeavors through academic excellence, where all individuals who participate in University programs and activities can work and learn together in an atmosphere free of harassment, exploitation, or intimidation. Every member of the community should be aware that the University prohibits sexual violence and sexual harassment, retaliation, and other prohibited behavior ("Prohibited Conduct") that violates the law and/or University policy. The University will respond promptly and effectively to reports of Prohibited Conduct and will take appropriate action to prevent, correct, and when necessary, to discipline behavior that violates this policy. For the complete UC Policy, definitions, compliance, and procedures, please access the Sexual Violence and Sexual Harassment Policy.

Resources: If you have further questions or concerns about reporting behavior related to sexual harassment, sexual violence, and/or protected category discrimination, please contact the Office for the Prevention of Harassment and Discrimination (OPHD) by phone 510-643-7985 or email ask_ophd@berkeley.edu.

Path to Care Center Confidential Advocates provide affirming, empowering, and confidential support for those that have experienced gendered violence, including sexual harassment,

emotional abuse, dating, and intimate partner violence, sexual assault, stalking, and sexual exploitation. Advocates bring a non-judgmental, caring approach to exploring all options, rights, and resources. They can be reached by phone at (510) 642-1988.