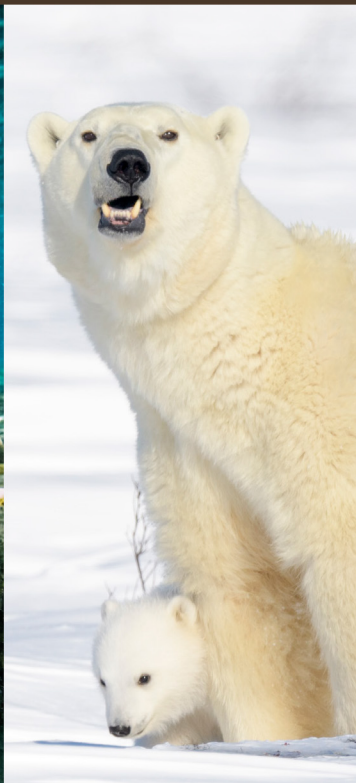




# WILDLIFE LAW COURSE GUIDE



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## **WILDLIFE LAW COURSE GUIDE**

This Wildlife Law Course Guide was prepared for the Animal Legal Defense Fund (ALDF) in December 2017 by Jessica Blome. The purpose is to provide assistance for instructors planning a course dealing with legal issues relating to wildlife. Instructors are reminded ALDF maintains a database of syllabi that are useful for course preparation as well.

**Wildlife Law Course Guide**

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## **I. Background and Structure of Course Guide**

(This section written by Rebecca Huss, adapted from the Animal Legal Defense Fund’s Companion Animal Law Course Guide.)

Putting together any course syllabus requires the instructor to make difficult choices. A limited amount of time is allocated for every course and inevitably it will be necessary to leave out material. The structure of this course guide is intended to assist instructors in making these challenging decisions.

### **A. Course Books and Other Material**

The predominant course book used by Wildlife Law instructors is:

GOBLE, FREYFOGLE, BIBER, ET AL, WILDLIFE LAW CASES AND MATERIALS (3rd Ed. 2016) (University Casebook Series) [referenced as COURSE BOOK for suggested readings].

This Course Guide relies heavily on this recently updated Course Book. ALDF also strongly recommends that instructors obtain the teacher’s manual for this book. The manual includes questions and class activities that would be useful to consider when structuring a course.

The Course Book contains many of the leading cases in the field and to avoid duplication, the supplementary material provided in this Course Guide generally does not include the cases already excerpted in the book. Instructors are encouraged to consider assigning these cases as well if putting together a course packet. The additional cases and material provided are largely of recent origin. The material was all accessed in December 2017 and was valid when this course guide was written—however instructors should always confirm the current state of the law. Given the length of some of the cases and the secondary material, instructors often will want to assign only parts of the material.

When considering topics and material for course coverage or for student papers, there are a variety of resources available online. ALDF’s website (Resources – Laws and Cases) <http://aldf.org/resources/laws-cases/> is one example. The Animal Legal and Historical Center also has a plethora of materials on wide range of topics at <http://www.animallaw.info>.

## **B. Writing Assignments**

It may be necessary to design the course to fulfill a law school's writing requirement. Students may be assigned the task of producing a research paper of a specific length. If students are spending a considerable amount of time on such a paper, it is common to allocate class time to have the students present on their individual topics during the drafting process. Although this can be time consuming, it helps hone students' oral presentation skills and exposes the class to a variety of topics. Given many students have cell phones capable of video recording, assuming no technological barriers or the inability of a law school to provide a necessary accommodation, an alternative to spending in-class time on student presentations is to have students video record a short presentation, post it on the course site and have the other students watch the recordings in advance of a class discussion on the topic. Instructors may want to schedule any such presentations close in time to any course material related to the topic.

Some schools also allow for courses with a series of shorter writing assignments to meet a writing requirement. This course guide provides some ideas if an instructor is either structuring the course for that purpose or just wants to have his or her students complete additional written assignments.

## **C. Jurisdictional Focus**

Given the legal issues relating to wildlife are often governed by state law, an instructor needs to decide whether he or she wants to focus on a single jurisdiction's law. There are certain areas of the course (such as wildlife management) where it may be especially useful to focus on the law of the state where the law school is located. However, for many law schools, because students may practice in many different states after graduation, it is more appropriate to cover issues more broadly. One way to provide an opportunity for students to learn the law they may use after graduation is to have the students choose a jurisdiction's law to apply in a series of assignments through the semester. For example, during the discussion on state game commissions, the student could report on his or her applicable state law. Ideas for these types of assignments are included in the individual topic sections. To assist in an instructor's evaluation of the assignments students could be required to provide the research they used to support their answers (cases, statutory material etc.). Rather than having the students provide hard copies of the documents, online portals (e.g., Blackboard, TWEN) can be an efficient way to handle this paperwork and track assignments.

## **D. Guest Speakers**

A good guest speaker can bring a topic to life in any course but especially in a course in an emerging area of the law it is beneficial for the students to interact with someone that is practicing in the field or otherwise is an expert on a topic. Coordinating with the law school's Student Animal Legal Defense Fund chapter on guest speakers can draw in additional students and may be a way to share any travel costs associated with a speaker. However, given the financial constraints at many law schools, finding "local talent" may be an instructor's best option. Bar association animal law sections are a good way to find folks interested or active in the field. Alumni of the school are often willing to speak to students about their experiences.

Most schools now have the capacity to "bring in" speakers using video conferencing technology. This expands the pool of possible speakers considerably because some potential speakers may be happy to present and interact with a class but do not have the time or resources to travel to the law school. In order to make a guest speaker's presentation as meaningful as possible, an instructor can ask the guest speaker whether he or she wants the students to read anything prior to the presentation (cases or relevant statutory materials). An instructor could also require students to prepare written questions in advance or require the students prepare a "reflection paper" due shortly after the guest speaker's visit.

## E. Credit Hour Guidance

Initially the decision is made as to the number of credit hours that will be allocated to the course by the law school. Frequently law school curriculum committees and faculties (if the general faculty approves courses) will provide considerable deference to the opinion of the instructor teaching a course as to the number of credit hours needed for a course. However, given other curricular demands and scheduling issues it may be necessary to adjust credit hours up or down. In addition, at some law schools, a course may be able to be offered for a variable number of credit hours (usually a range such as two or three) at the preference of the instructor.

Law schools accredited by the ABA are subject to the ABA Standards and Rules of Procedure for Approval of Law Schools. Standard 310 Determination of Credit Hours For Coursework sets forth the requirement that law schools have written published policies and procedures for determining the number of credit hours and sets forth how to determine the amount of work that “reasonably approximates” a credit hour. In May 2016 the ABA issued a Managing Director’s Guidance Memo on Standard 310 (Guidance Memo) ([https://www.americanbar.org/content/dam/aba/administrative/legal\\_education\\_and\\_admissions\\_to\\_the\\_bar/governancedocuments/2016\\_standard\\_310\\_guidance\\_memorandum.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/governancedocuments/2016_standard_310_guidance_memorandum.authcheckdam.pdf)).

This memorandum provides general guidance on the requirements of Standard 310. For purposes of structuring a doctrinal course the general rule is for every hour spent in the classroom or under direct faculty instruction, students should be spending two hours of time preparing out of class. (Note that this is based on a fifteen-week period, including one week for a final examination and a classroom hour can be only fifty minutes versus a sixty minute hour for out of class preparation time.) The way the time is divided is left to the law school and faculty to determine and the focus is on the combination of classroom and non-classroom time.

The length of each class period is also at the discretion of each law school. Thus, a three-credit hour class may be scheduled for two seventy-five minute sessions per week or three fifty minute sessions per week. So, for each seventy-five minute class session the students would be expected to spend three hours on out of class preparation and for each fifty minute class session the students would be expected to spend two hours on out of class preparation. The Guidance Memo states a law school must demonstrate that it is adhering to its credit hour policy including by reviewing course descriptions and syllabi “to assess whether the work assigned complies with the school’s policy for the amount of work required per credit hour, including out-of-class work that is required.” Guidance Memo p. 2.

The Guidance Memo does not set forth specific requirements as to determining the amount of assigned reading and other work to support the hours of out of class student work for each credit hour. However, one approach suggested by the Guidance Memo is for law schools to set parameters or guidelines that might include a presumptive number of pages of reading per class session while allowing for adjustments for other ways students are academically engaged in the course. For example, a law school may set a parameter of assigning twenty-five to forty pages of out of class reading for every fifty minute class session for an upper level elective course. Given that law schools may set a presumptive number of pages per credit hour, this guide and the accompanying Suggested Reading Assignments List provide the number of pages for each possible reading assignment. An instructor can then add or delete individual reading assignments to ensure that the course is meeting the law school’s standards to support the allocated credit hours.

Obviously the type of material that is assigned will vary considerably in difficulty. Twenty-five pages of a dense and complex case will likely take students longer to read and comprehend compared with a secondary source written for a general legal audience. The number of pages in a reading are denoted as bracketed material and allocated as follows. For the COURSE BOOKS, and secondary materials the number of pages include all pages

containing any of the material. For cases, the number of pages will be the number of pages in a standard dual column format (reporter or Westlaw/Lexis). If a website is provided it is denoted as such and instructors can consider whether the material available through the various links might be appropriate to assign.

## **F. Student Learning Objectives**

Many law schools now require instructors to include specific student learning objectives in each course syllabus. Depending on the institution, instructors may need to ensure that the course learning objectives clearly support the learning outcomes established by the law school. (The ABA requires law schools to establish learning outcomes.)

Ideas for this type of language can be found on the sample syllabi in the ALDF database. Examples of some student learning objectives are below.

1. Demonstrate an understanding of basic issues in wildlife law (endangered species protection, international norms and treaties, state gaming commission control, poaching, federal land management).
2. Compare and contrast the variety of approaches states take in “managing” wildlife species and ecosystems.
3. Identify the remedies that may be available to a plaintiff if a wild animal has been illegally harmed or killed or if a wild animal’s habitat has been illegally injured.
4. Differentiate between the concepts of animal law, animal welfare, and animal rights.

If students will be writing a paper and doing a presentation the following could be used as student learning objectives.

1. Provide an engaging and informative oral presentation on issues relating to a discrete area of wildlife law.
2. Prepare a properly footnoted short research paper analyzing a wildlife law issue.
3. Prepare a Motion for Summary Judgment in a hypothetical matter related to a real-world case involving a wildlife law issue. Suggested real-world cases include:
  - a. *Tracey Kuehl, et al. v. Pamela Sellner, et al.*, 2016 WL 3429679 (unpublished) (N.D. Iowa June 17, 2016) (captive endangered tigers and lemurs).
  - b. *Marbled Murrelet v. Babbitt*, 83 F.3d 1060 (9th Cir. 1996), COURSE BOOK, p. 1105 (wild endangered birds).
  - c. *Animal Legal Defense Fund, Inc. v. Glickman*, 130 F.3d 464, 466 (D.C.Cir.1997) (captive chimpanzee).

## **II. Introduction**

This Course Guide presents subject matter with suggested timeline for instruction, which is categorized in the form of “weeks.” The Guide assumes the Course is being taught as a typical 16-week, 3-credit course in a law school, but instructors are free to re-arrange material in the way most convenient or intuitive to them. Additionally, even though it is always challenging to have a limited amount of time in a course and instructors want to maximize coverage, it can be helpful to allocate a class period or two for introductory material to allow students to get a sense of the coverage of the course (both what will be and what will not be covered). In addition, law schools generally have a short period at the beginning of each semester or quarter for students to add or drop courses and instructors might want to cover topics that may be easier for students who miss a few sessions to easily make up the material (either through obtaining notes from a colleague or watching any recordings of the class session).



## Week 1: Animal Law/Welfare/Rights

It will be useful early in the term to distinguish between animal law, animal welfare, and animal rights and talk about what the focus will be in the course. Instructors may choose to delay some of the perhaps more challenging discussion on this issue to later in the course in favor of merely distinguishing the concepts at this point. For instructors who wish to go into more depth at this point, please see the section of this course guide discussing companion animal ethics. Otherwise it can be effective to, at a minimum, have a class discussion about what the students believe the terms mean and agree on a common definition for use in the course.

### *Suggested Readings*

“The Ethics of Wildlife,” COURSE BOOK, Chapter 1, Section 3, pp. 68-110, including the Discussion Problems for Cats and Birds.

David Favre, *Living Property: A New Status for Animals Within the Legal System*, 93 MARQ. L. REV. 1021 (2010) (Proposing a New Category of Property – “Living Property”) [37]

David Favre, *Equitable Self-Ownership for Animals*, 50 DUKE L.J. 473 (2000) (Proposing Dividing Living Property Into Legal and Equitable Components Allowing for a Limited Form of Self-Ownership for Animals) [22]

Steven M. Wise, *Nonhuman Rights to Personhood*, 30 PACE ENVTL. L. REV. 1278 (2013), Video available at: <http://digitalcommons.pace.edu/pelr/vol30/iss3/10>.

*Marbled Murrelet v. Babbitt*, 83 F.3d 1060 (9th Cir. 1996), COURSE BOOK, p. 1105 (affirming that the Marbled Murrelet could sue as a citizen to protect their own species’ rights under the Endangered Species Act but later overturned).

## **Week 2: Private Interests in Wildlife**

For any animal law course, it is logical to begin with the current status of animals as property, defining what is an animal, and the traditional classifications of animals. For many students at least, some of this information is likely to have been covered in their 1L Property Law course. Nevertheless, it is possible to devote an entire course on the philosophical issues surrounding the property (and lack of legal personhood) status of animals so instructors are cautioned to consider how much depth they want to delve into on this topic for the course.

### *Suggested Readings*

“What is Wildlife?” COURSE BOOK, pp. 1-20

“Acquiring Property in Wildlife,” COURSE BOOK:

“The Allocation of Rights in Wildlife,” pp. 113-126

“Limits on the Power to Capture,” pp. 127-156

“Animals Rights and the Future of Hunting,” pp. 159-165

“Wildlife and Private Property in Land,” COURSE BOOK:

“Private Land and Wildlife: The Role of the Sovereign,” pp. 204-236

“Submerged Land,” pp. 236 -274

“Western Water Law,” pp. 274-281

### Week 3: Legal Standing, Justiciability, and Other Limiting Doctrines

For wildlife advocates, one of the most significant barriers to the courtroom is standing. To litigate on behalf of an animal's interests in federal court, an advocate must first establish standing by meeting three requirements: (1) the plaintiff must have suffered an injury in fact, (2) the injury must be causally connected to the act about which the plaintiff is complaining, and (3) the court must be able to redress the injury. When it comes to non-human animals, how does an advocate demonstrate an injury to establish standing? This section of the Course Guide is the first time students are asked to think like attorneys as they contemplate the most significant barrier wildlife advocates face when invoking federal protections for wildlife in a courtroom. The suggested readings address issues related to standing in the context of the National Environmental Policy Act, Animal Welfare Act, Endangered Species Act, and Wilderness Act for native, endangered, and captive wildlife. In addition to these readings, the instructor may want to revisit *Marbled Murrelet v. Babbitt*, 83 F.3d 1060 (9th Cir. 1996), COURSE BOOK, p. 1105 from the Week 1 reading list.

#### *Suggested Readings*

DAVID N. CASSUTO, *Legal Standing for Animals and Advocates*, 13 ANIMAL LAW 61 (2006) available at <http://digitalcommons.pace.edu/lawfaculty/512/>.

FRANCISCO BENZONI, *Environmental Standing: Who Determines the Value of Other Life?* 18 DUKE ENV. LAW & POLICY FORUM 347 (2008) available at <https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1071&context=delpf>.

*Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992) (holding that when “a plaintiff’s asserted injury arises from the government’s allegedly unlawful regulation (or lack of regulation) of someone else . . . it becomes the burden of the plaintiff to adduce facts showing that [the] choices [of that third party] have been or will be made in such manner as to produce causation and permit redressability of injury”).

*Sierra Club v. Morton*, 405 U.S. 727 (1972) (holding that the Sierra Club did not have standing to block the development of a ski resort in the valley of the Sierra Nevada Mountains because the Club had not alleged a concrete injury, but dissenting Justice William O. Douglas famously argued that trees should be granted legal personhood).

*Animal Legal Defense Fund, Inc. v. Glickman*, 130 F.3d 464, 466 (D.C. Cir. 1997) (holding that an individual plaintiff was aesthetically injured by the inhumane treatment of a chimpanzee at a roadside zoo that failed to comply with minimum requirements for animal husbandry under the Animal Welfare Act).

*Hill v. Coggins*, No. 16-1457 (4th Cir. 2017) (holding that individual plaintiffs had proven aesthetic injury due to the cruel confinement of endangered Grizzly Bears at a roadside zoo in violation of the Endangered Species Act).

*WildEarth Guardians v. U.S. Dept. of Agriculture*, No. 13-16071 (9th Cir. 2015) (holding that plaintiffs had demonstrated aesthetic and informational injury sufficient to support their National Environmental Policy Act claims).

## Week 4: The Science of Biodiversity

Wildlife management goals have focused on maintaining or increasing populations of wildlife for direct human exploitation—hunting and fishing. In contrast, the science of biodiversity concerns itself with species and population protection and preservation for the benefit of all living things, both flora and fauna. The welcome shift in managing a limited number of game and fish species of wildlife to allow for sustainable human exploitation, to managing a wide range of species, populations, ecosystems, and landscapes to achieve a diverse range of goals besides direct human exploitation tracks the rise of a new scientific discipline: conservation biology. The COURSE BOOK and associated suggested reading materials consider this new discipline and its impact on how humans think about wildlife management. We then turn to the politics of wildlife management for Week 5.

### *Suggested Readings*

“Biodiversity: A Primer on Science, Values, and Policy,” COURSE BOOK, pp. 851-911.

#### Scientific Theory 1: Trophic Cascade

- T. M. Newsome and W. J. Ripple, A continental scale trophic cascade from wolves through coyotes to foxes, *J. Anim. Ecol.*, 84(1):49–59, 2015 DOI, available at <https://doi.org/10.1111/1365-2656.12258>
- B. R. Silliman and C. Angelini, Trophic cascades across diverse plant ecosystems, *Nature Education Knowledge*, 3(10):44, 2012, available at <https://www.nature.com/scitable/knowledge/library/trophic-cascades-across-diverse-plant-ecosystems-80060347>.
- (Related Video) “How Wolves Change Rivers,” Mission Wolf, available at <http://www.missionwolf.org/page/trophic-cascade>.

#### Scientific Theory 2: Pack Disruption

ROBERT B. WIELGUS, *Effects of Wolf Mortality on Livestock Depredations*, PLOS ONE, DOI:10.1371/journal.pone.0113505 (Dec. 3, 2014).

(Related Audio) DAVID ANDERSON, “Something Wild: Why Coyotes Seem to be Everywhere,” New Hampshire Public Radio (Feb. 19, 2016), available at <http://nhpr.org/post/something-wild-why-coyotes-seem-be-everywhere-stream/0>.

#### Scientific Theory 3: Effects on Poaching

CHAPRON G, TREVES A., “Blood does not buy goodwill: allowing culling increases poaching of a large carnivore.,” *Proc. R. Soc. B* 20152939 (2016), available at <http://dx.doi.org/10.1098/rspb.2015.2939>.

## Week 5: Wildlife “Management”

States have traditionally been the primary regulators of wildlife. Historically, that primacy has focused almost exclusively on the taking of a limited number of species, those that fall into the imprecise categories of “game” and “sport fish.” Although the focus has broadened over time, as discussed during Week 4, the majority of states remain reluctant to move beyond their “hook-and-bullet” perspective. This is a matter of choice, rather than legal compulsion. States have extremely broad constitutional power to protect wildlife, but they derive the majority—if not all—of their funding from the sale of fish and game licenses and tags to hunters and fishermen. This week, we will focus on state wildlife management agencies, but we will also look at the ways in which the federal government assists state wildlife management agencies fulfill their duties to manage wildlife through the United States Department of Agriculture’s Wildlife Services Program. We will end the week by looking at some of the more controversial practices of state management agencies, such as predator killing contests.

### *Suggested Readings*

“The authority of State Wildlife Agencies,” COURSE BOOK, pp. 601-651

“State Depredation Control Laws,” COURSE BOOK, pp. 1207-1209

United States Department of Agriculture Wildlife Services Enabling Legislation, The Act of March 2, 1931, (46 Stat. 1468; 7 U.S.C. 426-426b) as amended, and The Act of December 22, 1987 (101 Stat. 1329-331, 7 U.S.C. 426c). available at

[https://www.aphis.usda.gov/aphis/ourfocus/wildlifedamage/sa\\_program\\_overview/ct\\_legislation](https://www.aphis.usda.gov/aphis/ourfocus/wildlifedamage/sa_program_overview/ct_legislation).

TOM KNUDSON, “The Killing Agency: Wildlife Services Brutal Methods Leave a Trail of Animal Death,” SACRAMENTO BEE, April 28, 2012, available at <http://www.sacbee.com/news/investigations/wildlife-investigation/article2574599.html>.

*Animal Legal Defense Fund, et al. v. Monterey County*, Case No. 16CV001670 (Super. Ct. Monterey Cnty. 2017) (holding that the County violated the California Environmental Quality Act by failing to evaluate the environmental impact of a federal wildlife damage management program on the County’s local ecosystem) available at [https://www.biologicaldiversity.org/campaigns/wildlife\\_services/pdfs/WS\\_Monterey\\_County\\_CEQA\\_decision.pdf](https://www.biologicaldiversity.org/campaigns/wildlife_services/pdfs/WS_Monterey_County_CEQA_decision.pdf).

*Center for Biological Diversity, et al. v. USDA APHIS Wildlife Services, et al.* Complaint for Declaratory and Injunctive Relief, Case No. 1:17-cv-03564 (N.D. Cal. 2017) available at <http://www.projectcoyote.org/wp-content/uploads/2017/06/California-WS-NEPA-complaint-as-filed.pdf>.

See also accompanying Newsweek exposé: KRISTIN HUGO, *Environmental Groups Sue USDA for “Barbaric” Killing of Millions of Wild Animals*, NEWSWEEK, Sept. 11, 2017, available at <http://www.newsweek.com/usda-sued-barbaric-killing-coyotes-wild-animals-663227>

“Animal Damage Control,” COURSE BOOK, pp. 847-859

*State of Wyoming ex rel. Corcoran v. Wyoming Best of the Best*, No. C-17-34-L (Wyo. Dist. Dec. 1, 2017).

BRIDGET HUBER, “These Gory New Hunting Competitions Have Taken the Country by Storm,” MOTHER JONES (Mar. 10, 2015), available at <http://www.motherjones.com/environment/2015/03/killing-coyotes-bobcats-and-foxes-fun-and-profit/>.

CHRISTOPHER KETCHUM, "Report from the Idaho Coyote and Wolf Derby," VICE (Mar. 13, 2014) available at [https://www.vice.com/en\\_us/article/qbee5d/how-to-kill-a-wolf-0000259-v21n3](https://www.vice.com/en_us/article/qbee5d/how-to-kill-a-wolf-0000259-v21n3).

## Week 6: Wildlife as a Public Trust Resource

The law has traditionally viewed animals primarily as potential property—recall the fox carcass that featured so prominently in *Pierson v. Post*. But wildlife is an uncommon sort of property. Not only is it alive, it is also dependent for its continued survival on human forbearance. As a result, English common law placed control of all wild animals in the hands of the government for the common good. This absolute power to control and regulate was later vested in colonial governments as part of common law, which passed the title to the several states and is retained by the states to this day. Under this doctrine, wildlife is considered a public resource held in trust by state governments for the benefit of all people of the states, subject only to any applicable provisions of the federal Constitution. This makes the public trust doctrine a powerful tool in the hands of a wildlife advocate. We explore the expanse and limitations of the public trust doctrine in Week 6.

### *Suggested Readings*

“State Proprietary and Sovereign Powers to Protect Wildlife,” COURSE BOOK, pp. 285-296

“Federal Constitutional Limits on State Powers,” COURSE BOOK, pp. 298-316

Public Trust Concepts & Duties, COURSE BOOK, pp. 318-356

“Affirmative Federal Power over Wildlife,” COURSE BOOK, pp. 357-39.

JOSEPH L. SAX, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1969) (This seminal law review article on the public trust doctrine as a tool for affirmative litigation sparked a wave of legal and policy reforms, litigation, and environmental change that we enjoy today. Reading it in its entirety may be too ambitious for a sixteen-week law school course, but instructors should consider assigning parts of the article to students as they learn about the public trust doctrine).

RICHARD M. FRANK, *The Public Trust Doctrine: Assessing Its Recent Past & Charting Its Future*, 45 U.C. DAVIS LAW REV. 665 (2012), available at [https://lawreview.law.ucdavis.edu/issues/45/3/Topic/45-3\\_Frank.pdf](https://lawreview.law.ucdavis.edu/issues/45/3/Topic/45-3_Frank.pdf).

*Center for Biological Diversity v. FPL Group, Inc.*, 166 Cal.App.4th 1349 (2008) (dismissing a public trust enforcement action against the owners and operators of wind turbines but because the public trust doctrine could only be enforced against a state actor).

## Week 7: Wildlife Trafficking

Federal wildlife conservation laws fall into two broad categories. The first, and more common, restricts “taking” wildlife. While state fish and game laws govern seasons, bag limits, and gear restrictions on hunters and fishers, federal prohibitions against “take” tend to be broad and more protective. Taking regulation is often species-specific, and federal laws define “take” to extend beyond killing and pursuing to harming, harassing, or disturbing. We will explore how the definition of “take” applies to specially protected threatened and endangered species during Weeks 8 and 9. This week, we will look at how the federal government has restricted the illegal taking of all animals, an overall process generally referred to as poaching or trafficking.

### *Suggested Readings*

“The Lacey Act,” Course Book, pp. 665-687

“Species-Based Conservation: International Trade in Endangered Species and CITES,” Course Book, pp. 551-569

### Case Study: Ivory Trade

JOHN FREDERICK WALKER, *The Case For a Legal Ivory Trade: It Could Help Stop the Slaughter*, Yale Law e360, Oct. 13, 2014, [http://e360.yale.edu/features/point\\_the\\_case\\_for\\_a\\_legal\\_ivory\\_trade\\_it\\_could\\_help\\_stop\\_the\\_slaughter](http://e360.yale.edu/features/point_the_case_for_a_legal_ivory_trade_it_could_help_stop_the_slaughter).

MARY RICE, *The Case Against a Legal Ivory Trade: It Will Lead to More Killing of Elephants*, Yale Law e360, Oct. 13, 2014, available at [http://e360.yale.edu/features/counterpoint\\_the\\_case\\_against\\_a\\_legal\\_ivory\\_trade\\_it\\_will\\_lead\\_to\\_more\\_killing\\_of\\_elephants](http://e360.yale.edu/features/counterpoint_the_case_against_a_legal_ivory_trade_it_will_lead_to_more_killing_of_elephants).

“Trade and Wildlife: Sea Turtles and Shrimp, Dolphins and Tuna,” COURSE BOOK, pp.572-597.

CARNEY ANNE NASSER, *Welcome to the Jungle: How Loopholes in the Federal Endangered Species Act and Animal Welfare Act are Feeding a Tiger Crisis in America*, 9 Albany Gov. Law Rev. 194 (2016), available at <http://www.albanygovernmentlawreview.org/Articles/Vol09-1/5.pdf>.



## **Week 8: Federal Protection of Non-Endangered Species**

Wildlife species that are commercially valuable have customarily been managed to achieve “maximum sustainable yield.” The purported logic of this objective is appealing because it is nearly a restatement of the utilitarian objective of the greatest good for the greatest number. However, most state wildlife management agencies fail in their efforts to achieve the maximum sustainable yield when the species is commercially valuable. This week, we will discuss the two ways in which the federal government has had to preempt state management of wildlife because state managers could not or would not consider the national and international impact of their decisions when setting hunting limits locally.

“Managing Commercial Species,” COURSE BOOK, pp. 750-752

“Wild Birds,” COURSE BOOK, pp. 689-737

“Protecting Feral Horses and Burros,” COURSE BOOK, pp. 737-747

*American Wild Horse Preservation Campaign, et al. v. Ken Salazar, et al.*, Case No. 1:11-cv-02222 (D.C. Cir. 2011) (finding that the government violated the National Environmental Policy Act by failing to consider the long-term environmental impact of an experimental wild horse castration plan).

## Weeks 9, 10: Federal Protection for Endangered Terrestrial Species

The United States government responded to increasing concern for endangered wildlife in 1964 when it acknowledged that species loss was due largely to habitat loss. In that year, Congress included a provision in the Land and Water Conservation Fund Act to permit federal dollars to be used in “the acquisition of land, waters, or interests in land or waters . . . [f]or any national area which may be authorized for the preservation of species of fish or wildlife that are threatened with extinction.” 16 U.S.C. § 4601I-11. This statutory beginning for endangered wildlife protection reflected two fundamental changes. First it provided for the protection of wildlife, rather than the management of species populations. Second, that protection was accomplished through habitat preservation rather than taking restrictions.

The Land and Water Conservation Fund served as the foundation for the Endangered Species Act as we know it today, with some key distinctions. For starters, with the ESA Congress recognized that taking prohibitions were still a critical component of species protection. In addition, the ESA provided established essential conservation requirements for all federal agencies:

- Section 4 establishes the procedures for listing species as threatened or endangered as well as designating critical habitat;
- Section 7 requires federal agencies to consult with the appropriate fish and wildlife agency to ensure that federal actions do not jeopardize the existence of a species;
- Section 9 prohibits any person from taking or engaging in commerce with protected species; and
- Section 11 specifies the civil and criminal penalties for violations of the ESA with a crucial citizen suit provision that paved the way for the most significant advancements under the law.

Over the next two weeks, we look at these four sections of the ESA in more detail as they apply to native, exotic, and captive wildlife.

### *Suggested Readings*

“Endangered Species Acts: The Evolution of Endangered Species Protection and an Overview of the Law,” COURSE BOOK, pp. 915-920

- [Section 4 of the Endangered Species Act](#)

“Assessing the Risk of Extinction: The Listing Decision,” COURSE BOOK, pp. 920-997

#### Case Study: Sage Grouse

“Discussion Problem: Listing the Sage Grouse,” COURSE BOOK, pp 998-100

RYAN ZINKE, *Improving the BLM’s 2015 Sage-Grouse Plans*, Memorandum dated Aug. 4, 2017, pp. 1-13, available at

[https://www.doi.gov/sites/doi.gov/files/uploads/so3353\\_memo\\_coverletter\\_report\\_080717.pdf](https://www.doi.gov/sites/doi.gov/files/uploads/so3353_memo_coverletter_report_080717.pdf).

LISA FRIEDMAN, “Interior Department to Overhaul Obama’s Sage Grouse Protection Plan, NY TIMES, Sept. 28, 2017, available at <https://www.nytimes.com/2017/09/28/climate/trump-sage-grouse.html? r=0>.

## Case Study: Grizzly Bear

Final Rule Removing the Yellowstone Ecosystem Population of Grizzly Bears from the Federal List of Threatened and Endangered Wildlife, 50 CFR Part 17, Vol. 81, No. 48 (2016) available at [http://www.biologicaldiversity.org/species/mammals/grizzly\\_bear/pdfs/DelistingProposal\\_03-11-2016.pdf](http://www.biologicaldiversity.org/species/mammals/grizzly_bear/pdfs/DelistingProposal_03-11-2016.pdf). Students should read the Summary, Background, and Recovery Sections of the Rule.

*Fact Sheet: Reasons Why the Yellowstone [Grizzly Bear] Population Needs to Remain Listed*, Center for Biological Diversity Website, Dec. 13, 2017, available at [http://www.biologicaldiversity.org/species/mammals/grizzly\\_bear/pdfs/WhyKeepYellowstoneGrizzlyBearsListed.pdf](http://www.biologicaldiversity.org/species/mammals/grizzly_bear/pdfs/WhyKeepYellowstoneGrizzlyBearsListed.pdf).

*Northern Cheyenne Tribe, et al. v. Ryan Zinke*, Case No. 9:17-cv-0119-DLC, Complaint for Declaratory & Injunctive Relief (Dist. Ct. Mon. 2017), available at [http://www.biologicaldiversity.org/species/mammals/grizzly\\_bear/pdfs/2017-08-30\\_ECF\\_No1\\_Complaint.pdf](http://www.biologicaldiversity.org/species/mammals/grizzly_bear/pdfs/2017-08-30_ECF_No1_Complaint.pdf).

Students should prepare a letter to Secretary Zinke on behalf of their favorite wildlife advocacy group arguing for or against delisting the Yellowstone Ecosystem Population of the Grizzly Bear.

“Preventing Extinction: Critical Habitat Designation,” COURSE BOOK, pp. 1000-1023

- Section 7 of the Endangered Species Act

“Consultation,” COURSE BOOK, pp. 1023-1086

*Defenders of Wildlife v. Babbitt*, 130 F. Supp. 2d 121 (D.D.C. 2001) (challenge to various federal agencies' failure to consider cumulative impacts of federal activities on Sonoran Pronghorn under section 7).

- Sections 9 & 11 of the Endangered Species Act

“Prohibitions and Penalties,” COURSE BOOK, pp. 1086-1159

## Case Study: Cricket Hollow Zoo

*Tracey Kuehl, et al. v. Pamela Sellner, et al.*, 2016 WL 3429679 (unpublished) (N.D. Iowa June 17, 2016). Students should read the Post-Trial Brief, Response, and Reply and prepare a draft opinion for the Judge to review and approve.

“Recovery Actions,” COURSE BOOK, pp. 1159-1209

“Assessing the ESA,” COURSE BOOK, pp. 1209-1218

DAMIEN M. SCHIFF, *The Endangered Species Act at 40: A Tale of Radicalization, Politicization, Bureaucratization, and Senescence*, 37:2 UC DAVIS LAW REV. 105 (2014) (For a unique perspective on the Endangered Species Act, and to understand what ESA “reformers” are talking about in Congress and at

conservation litigation groups like the Pacific Legal Foundation, a survey on the “radicalization” of the ESA may be useful).

## **Week 11: Federal Protection for Marine Mammals and Fish**

The Marine Mammal Protection Act of 1972 marked a transition in federal wildlife law. Previously, the federal government had not created comprehensive conservation programs for any wildlife other than migratory waterfowl, and even then, the program focused primarily on the regulation of hunting. The MMPA's focus on populations and ecosystems was an ambitious break with the past and set the stage for additional fisheries management inside the United States. This week, we look at the MMPA as well as the more aggressive laws that followed as scientists and government officials formed a consensus about the need to protect native freshwater wildlife and habitat.

"Marine Mammal Protection Act," Course Book, pp. 753-792

"Magnuson-Stevens Fisheries Conservation and Management Act of 1976," Course Book, pp. 793-840

"Ecosystem Management and Marine Reserves," Course Book, pp. 845-856

"The Nonindigenous Aquatic Nuisance Prevention and Control Act of 1990," Course Book, pp. 846-847

*People for the Ethical Treatment of Animals, Inc., et al. v. Miami Seaquarium, et al.* Case No. 1:15-cv-22692-UU (Dist. Ct. S. Flor. 2016) (holding that the Endangered Species Act requires a showing of grave harm to prove illegal "take" of an endangered species).

*NRDC v. Winter*, 518 F.3d 658 (9th Cir. 2008) (finding that the Navy violated the National Environmental Policy Act and Marine Mammal Protection Act by failing to adequately consider the impact to sonar-using marine mammals during Navy sonar testing) and *Winter v. NRDC, Inc.*, 555 U.S. 7 (2008) (reversing that decision).

## **Weeks 12, 13: Habitat and Landscape Conservation**

Habitat degradation or destruction is one of the central threats to biodiversity. Protection of functioning ecosystems is essential to the protection of the species that are part of those ecosystems. Much of the implementation of the Endangered Species Act depends on the protection of habitat, however, the ESA focuses on species protection and recovery. Given the centrality of habitat protection to biodiversity, it might be more effective and efficient to focus our efforts on protecting habitats and/or ecosystems directly. Over the next two weeks, we look at federal land management laws and how those laws have been used to protect wildlife habitat. We also examine the National Environmental Policy Act's impact on federal land management decisions. We end this section of the course considering whether CERCLA's Natural Resource Damage Assessment and Restoration requirements have something to say about wildlife rehabilitation and recovery.

### *Suggested Readings*

"The Goals and Challenges of Habitat and Landscape Conservation, Course Book, pp. 1223-1233

"Protection of Habitat on Federal Lands," COURSE BOOK, pp. 1233-1294

U.S. Fish & Wildlife Services, *National Environmental Policy Act, General Information*, last visited Dec. 8, 2017, available at <https://www.fws.gov/habitatconservation/nepa.pdf>.

*Public Employees for Environmental Responsibility v. Tommy P. Beaudreau, et al.*, Case No. 1:10-cv-01067-RBW (Dist. Ct. D.C. 2014) (challenge to DOI's, BOEMRE'S, and FWS's environmental reviews of the Cape Wind off-shore wind project under NEPA, ESA, and MBTA) available at [https://www.gpo.gov/fdsys/pkg/USCOURTS-dcd-1\\_10-cv-01067/pdf/USCOURTS-dcd-1\\_10-cv-01067-0.pdf](https://www.gpo.gov/fdsys/pkg/USCOURTS-dcd-1_10-cv-01067/pdf/USCOURTS-dcd-1_10-cv-01067-0.pdf).

*Center for Biological Diversity v. John F. Kelly*, Case No. 4:17-cv-00163-CKJ, (Dist. Ct. Arizona) (2017), Complaint for Declaratory & Injunctive Relief, available at [https://www.biologicaldiversity.org/programs/international/borderlands\\_and\\_boundary\\_waters/pdfs/Center\\_and\\_Grijalva\\_v\\_Kelly\\_complaint\\_2017\\_04\\_12.pdf](https://www.biologicaldiversity.org/programs/international/borderlands_and_boundary_waters/pdfs/Center_and_Grijalva_v_Kelly_complaint_2017_04_12.pdf) (arguing that the federal government violated NEPA, among other laws, by executing plans to build a border wall between Mexico and the United States without completing an environmental impact statement, predominantly because the border area serves as critical habitat corridor for several wildlife species).

"Federal Regulatory Protection of Habitat," Course Book, pp. 1295-1408

*Animal Protection Institute v. Stanton*, Civ. No. 97-2563 (D.D.C.) (challenge to the National Park Service's decision to kill white-tailed deer in Cuyahoga National Park).

*Wilderness Watch, et al. v. Tom Vilsack*, Case No. 4:16-cv-00012-BLW (Dist. Ct. Idaho 2017) available at <https://earthjustice.org/sites/default/files/files/frank-church-Doc-52-ORDER.pdf> (successful challenge to state and federal authorities unlawful use of helicopters in the Frank Church River of No Return Wilderness Area).

"The Challenges of Landscape Planning," Course Book 1409-1437

## Case Study: Deepwater Horizon

U.S. Fish & Wildlife Service Fact Sheet, *The Natural Resource Damage Assessment and Restoration Program* (2010), available at <https://www.fws.gov/ecological-services/es-library/pdfs/NRDAR.pdf>.

(Podcast) NOAA Office of Response & Restoration Podcast, *Natural Resource Restoration*, Episode 31, March 24, 2011, available at <https://oceanservice.noaa.gov/podcast/mar11/dd032411.mp3>.

NOAA Fact Sheet, Deepwater Horizon Oil Spill Natural Resource Damage Assessment: Sea Turtle Early Restoration (2015), available at [http://www.gulfspillrestoration.noaa.gov/sites/default/files/wp-content/uploads/150454\\_dwh\\_factsheet\\_seaturtle.pdf](http://www.gulfspillrestoration.noaa.gov/sites/default/files/wp-content/uploads/150454_dwh_factsheet_seaturtle.pdf).

Deepwater Horizon Natural Resource Damage Assessment Trustees *Deepwater Horizon Oil Spill: Final Programmatic Damage Assessment and Restoration Plan and Final Programmatic Environmental Impact Statement*, (2016) available at [http://www.gulfspillrestoration.noaa.gov/sites/default/files/wp-content/uploads/Front-Matter-and-Chapter-1\\_Introduction-and-Executive-Summary\\_508.pdf](http://www.gulfspillrestoration.noaa.gov/sites/default/files/wp-content/uploads/Front-Matter-and-Chapter-1_Introduction-and-Executive-Summary_508.pdf).

(Podcast) NOAA Office of Response & Restoration Podcast, *Deepwater Horizon: One Year Later*, Episode 73, April 21, 2017, available at <https://oceanservice.noaa.gov/podcast/apr11/mw042111.mp3>.

CERCLA, 42 U.S.C. § 6972 (citizen suit provision).

Students should prepare a Memorandum of Law proposing the ideal plaintiff for a citizen suit against the federal government for failing to properly assess damages against a responsible party for loss of wildlife. The Memorandum must include legal argument and authority establishing the legality of using CERCLA's citizens suit provision to enforce the natural resource damage assessment and restoration requirements of CERCLA.

## **Week 14: The Third Sovereign: Native American Treaty Rights**

In many regions of the United States, particularly the Great Lakes, the northern Great Plains, the Southwest, and the Pacific Northwest, it is impossible to understand wildlife law without understanding the importance of a third sovereign: Native American tribes and their unique relationship with the state and federal government. United States “Indian Law” provides Native American tribes the right to hunt and fish and tribal rights to manage wildlife and regulate hunting and fishing on and off tribal lands. For a better understanding of these rights, we turn to the comprehensive analysis presented in the COURSE BOOK.

### *Suggested Readings*

“Construing Treaties: General Principles,” COURSE BOOK, pp. 392-394

“The Nature of the Treaty Right, COURSE BOOK,” COURSE BOOK, pp. 394-402

“Treaty Rights as Limitations of Private Rights,” COURSE BOOK, pp. 403-413

“Treaty Rights as Limitations on State Powers, COURSE BOOK, pp. 415-446

“Federal Power to Limit Treaty Rights,” COURSE BOOK, pp. 468-474

“Tribes as Wildlife Managers,” COURSE BOOK, pp. 476-493



## Week 15: Climate Change

Our planet is currently suffering a staggering rate of dramatic environmental change. Around the world, ecosystems are increasingly subjected to the negative effects of human population growth and its expanding ecological footprint. Be it in the form of habitat loss or alteration, the introduction of invasive species, pathogen spill-over, accumulation of persistent pollutants, climate change or stratospheric ozone depletion, global environmental change has altered physical and biological systems and is becoming of increasing concern for the well-being and survival of many species. Predicting the consequences of global environmental change on biodiversity is a complex task, but environment and wildlife advocates across the globe have been deploying creative legal and policy solutions to protect existing wildlife and its habitat.

### *Suggested Readings*

KARINA ACEVEDO-WHITEHOUSE, ET AL., *Effects of Environmental Change on Wildlife Health*, PHIL. TRANS. R. SOC. B (2009) 364, 3429-3438, doi:10.1098/rstb.2009.0128.

UNITED NATIONS ENVIRONMENT PROGRAMME, *The Status of Climate Change Litigation—A Global Review*, ISBN No. 978-92-807-3656-4 (2017), available at <http://columbiaclimatelaw.com/files/2017/05/Burger-Gundlach-2017-05-UN-Envt-CC-Litigation.pdf>.

*In re: Polar Bear Endangered Species Act Listing and Section 4(d) Rule Litigation*, 720 F.3d 354 (D.C. Cir. 2013) (upholding the Fish & Wildlife Service's listing decision, in part, due to habitat loss from rising global temperatures).

CHRISTINA GOLDFUSS, CEQ Final Guidance for Federal Departments and Agencies on Consideration of Greenhouse Gas Emissions and the Effect of Climate Change in National Environmental Policy Act Reviews, Memorandum dated Aug. 1, 2016, pp. 1-9.

(Related Video) Ohio State University Climate Change Webinar Series, *Climate Change Impacts on Wildlife*, available at <https://www.youtube.com/watch?v=MtNOHiCoCOs>.

(Related Video) Erin Eastwood, *Can Wildlife Adapt to Climate Change?* TEDEd, available at [https://www.youtube.com/watch?v=ZCKRjP\\_DMII](https://www.youtube.com/watch?v=ZCKRjP_DMII).

*Kelsey Cascadia Rose Juliana, et al. v. United States of America, et al.* Case No. 6:15-cv-01517-TC, Order Denying Motion to Dismiss (D.C. OR 2016) (finding that children had demonstrated injury in fact sufficient to proceed with lawsuit against federal government for failing to protect the atmosphere as a public trust resource) available at <https://static1.squarespace.com/static/571d109b04426270152febe0/t/5824e85e6a49638292ddd1c9/1478813795912/Order+MTD.Aiken.pdf>.

(Related Video) 9th Circuit Oral Argument on the government's writ of mandamus to stop the trial court from hearing evidence in the Juliana case: <https://www.ourchildrenstrust.org/us/federal-lawsuit/>.

## Week 16: International Wildlife Law

In the final weeks of the semester, this course will introduce the concepts of international law as they relate to wildlife. Much of this international law comes from treaties and can be implemented into U.S. law by statute. As we saw in *Missouri v. Holland*, 252 U.S. 416 (1920), the Supreme Court has held that a treaty entered into with Great Britain pursuant to the Treaty Clause of the Constitution gave Congress the power to regulate the killing of migratory birds. Similarly, the Endangered Species Act incorporates aspects of the Convention on International Trade in Endangered Species, or CITES, at 16 U.S.C. §§ 1537a, 1538. Over the next two weeks, we will explore these concepts and consider new calls to action as the global community confronts continuing species conservation and ocean habitat deterioration.

GREGORY MAGGIO & OWEN J. LYNCH, *Human Rights, Environment, and Economic Development*, COURSE BOOK, Chapter VI, pp. 499-503.

“Sources and Principles of International Wildlife Law,” COURSE BOOK, Chapter VI, pp. 499-529

### Case Study: Whales

“Species-Based Conservation: Whales,” COURSE BOOK, Chapter VI, pp. 530-548

(Related Video) NOAA Fisheries, Recovering the Southern Resident Killer Whale with Research and Conservation, available at [https://www.youtube.com/watch?v= MFQljQvbkw](https://www.youtube.com/watch?v=MFQljQvbkw).

United Nations Convention on the Law of the Sea, Part XII: Prevention and Preservation of the Marine Environment, available at [http://www.un.org/depts/los/convention\\_agreements/texts/unclos/unclos\\_e.pdf](http://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf).

“Habitat-Based Preservation: Wetlands,” COURSE BOOK, Chapter VI, p. 569.

JESSICA F. GREEN, “Do We Really Need a New U.N. Oceans Treaty? Yes, and Here’s Why,” WASH. POST (April 25, 2016).

DAVID S. FAVRE, *An International Treaty for Animal Welfare*, 18 Animal L. 237 (2012) available at <http://digitalcommons.law.msu.edu/facpubs>.