

Public Land Law and Policy
NRM 204, 3 Credits
Spring Semester 2018

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Course Summary

This course examines the major federal laws and policies affecting the exploitation and conservation of resources on public lands in the United States. We will analyze the conflicting values and interests that underlie policy debates over the management of natural resources and the legal authorities that attempt to reconcile them. Anticipated topics include the history of public lands acquisition and disposition; the National Environmental Policy Act; the roles of various federal agencies in managing federal lands; the mineral, timber, and preservation resources; and the unique Alaskan context, including subsistence.

Readings

The textbook for this course is a casebook entitled *Federal Public Land and Resources Law* by George C. Coggins et al. (Foundation Press, 2014, 7th Edition). Copies should be available at the UAF Bookstore for purchase and one copy will be placed at the Rasmuson Library on Reserve for short term use. From time to time there will be mandatory outside readings, which I intend to post as PDFs on Blackboard.

You are expected to check Blackboard regularly for updates to the syllabus and for newly posted readings. I will try to post no later than the end of the day Friday prior to the week in which the assignments apply. Please note that readings and other assignments are due by the class period with which they are associated. The readings, while short, require close attention and considerable thought. From time to time I will send out follow up readings, which will explain and amplify a prior lecture.

Class Structure and Course Grade

Class will be run small section style: part lecture, part Socratic method, part discussion, part student-led teaching. Attendance is required unless otherwise excused. Students will be expected to have completed their readings and assignments prior to the class for which they are assigned, including the first class. Your course grade will be comprised of the following evaluations: attendance and participation for 10%, one presentation for 15%, three in-class quizzes for 10% each, a ten-page paper for 20%, and a cumulative in-class final for 25%. I will provide more information about each of these evaluations as the time for them nears. Late work will lose 10% of available points each day it is late.

Grades

This course is graded with a +/- letter grade corresponding to the weighted numerical average of the evaluations above.

Extra Help

If you find, at any time during the semester, that you are having trouble understanding the concepts discussed in class, please see me before you fall behind. I am happy to provide additional explanations and other help to any interested student.

Course Syllabus (Subject to Change)

1. Tuesday, January 16th – COURSE INTRODUCTION

Course Introduction: a working definition of public land; instructor and student introductions; review of syllabus. Lecture: thinking about natural resources. Assignment: a) read excerpt of *One Third of the Nation's Land: A Report to the President and to Congress by the Public Land Review Commission* (1970); b) review the fact sheet, "Land Ownership in Alaska"; c) prepare to share a photograph, personal artefact, or story relating to a particular unit of public land; and d) prepare to explain why you are taking this course.

2. Thursday, January 18th – WORKING WITH CASES

Lecture: an introduction to the American legal system; efficiency in rules of law. Assignment: a) review your notes from Class #1 and capture any questions for today; b) read the handout, *How to Brief a Case*; c) try your hand at briefing *Edwards v. Sims*, 24 S.W.2d 619 (Ky. 1929), as edited. Follow up reading: excerpt from Mersky, *Fundamentals of Legal Research* (2002, 8th edition). Extra credit follow up reading: "The Idea of Efficiency" from Farnsworth, *The Legal Analyst: A Toolkit for Thinking about the Law* (2007).

3. Tuesday, January 23rd – ACQUISITION OF THE PUBLIC DOMAIN

"Thus in the beginning all the world was *America*." John Locke, *Two Treatises of Government* (1690). Lecture: European powers in early America; interests in land and the bundle of sticks; the doctrine of discovery and aboriginal title. Assignment: a) review your notes from Class #2 and capture any questions for today; b) read excerpt from Wilson, *The Earth Shall Weep: A History of Native America* (1999); c) review *Coggins* 46-52; d) brief *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823), as edited in the Dukeminier & Krier property casebook. Follow up readings: excerpt from Case & Voluck, *Alaska Natives and American Law* (2012, 3d edition) and excerpt from Vecsey & Venables, *American Indian Environments* (1980).

4. Thursday, January 25th – DISPOSITION OF THE PUBLIC DOMAIN

"In states like Utah and Nevada, where more than half the land within state borders is managed by the federal government, the feds have become convenient scapegoat for an impossible climate, an unattainable cultural ideal, and a changing economy." Michelle Nijhuis, "What Will Become of Federal Public Lands under Trump?" *The New Yorker* (January 31, 2017). Lecture: the mechanics of

land conveyances – title and deeds; the historic disposition of federal public lands to states and private individuals; the Equal Footing doctrine and navigability; the Sagebrush Rebellion and beyond. Assignment: a) review your notes from Class #3 and capture any questions for today; b) review Nathaniel Herz, “King Cove and feds sign deal to advance proposed road through wildlife refuge,” *Alaska Dispatch News* (January 22, 2018); d) read *Coggins* 58-66; e) brief *PPL Montana, LLC v. Montana*, 132 S.Ct. 1215 (2012), excerpted in *Coggins* 66-71. Class will close with a feedback request.

Friday, January 26th – last day for student- and faculty-initiated drops with refund (no record).

5. Tuesday, January 30th – FEDERAL LAND MANAGEMENT (SCOPE OF THE PROPERTY CLAUSE)

Lecture: working with statutes; the Property Clause. Discussion: real cowboys or a conspiracy to impede federal employees? Assignment: a) review your notes from Class #4 and capture any questions for today; b) read *Coggins* 91-102; c) review the Unlawful Inclosures Act of 1885, 43 U.S.C. § 1061; d) brief *Camfield v. United States*, 167 U.S. 518 (1897), excerpted in *Coggins* 103-06; e) brief *Kleppe v. New Mexico*, 426 U.S. 529 (1976), excerpted in *Coggins* 142-48; e) read *Comment: The Sagebrush Rebellion and States’ Rights* in *Coggins* 72-74; f) watch *American Patriot: Inside the Armed Uprising Against the Federal Government* (PBS Frontline Documentary).

6. Thursday, February 1st

In Class Quiz: Definitions and Short Answers (10%) (subject matter covered: Classes #1-4) (40 mins.)

Guest Lecture: E. Barrett Ristroph – Managing Alaska’s Federal Lands in an Era of Climate Change.

Background materials: National Park Service – Alaska Region, *State of Change: Climate Change in Alaska’s National Park Areas*.

7. Tuesday, February 6th – WITHDRAWALS AND RESERVATIONS; EXECUTIVE ORDERS

Lecture: withdrawals and reservations; the power of the executive over public lands. a) review your notes from Class #5 and the guest lecture and capture any questions for today; b) read *Coggins* 108; c) brief *United States v. Gettysburg Electric Railway Co.*, 160 U.S. 668 (1896), excerpted in *Coggins* 110-12; d) read *Coggins* 382-83; e) brief *United States v. Midwest Oil Co.*, 236 U.S. 459 (1915), excerpted in *Coggins* 383-89; f) read Executive Order 13795, “Implementing an America-First Offshore Energy Strategy” (April 28, 2017); g) read Office of the White House Press Secretary,

“White House Announces Actions to Protect Natural and Cultural Resources in the Alaskan Arctic Ocean” (December 9, 2016). Follow up reading: Alex DeMarban, “Bering Sea Tribal groups slam Alaska delegation for ‘standing by’ as Trump struck order giving them voice,” *Alaska Dispatch News* (April 29, 2017).

8. Thursday, February 8th

Discussion: rubric for and scope of the ten-page research paper, which is due by the beginning of class Tuesday, March 20th. Guest Lecture: Michael Schoder – Surveying the Public Lands.

9. Tuesday, February 13th – THE DEPARTMENT OF THE INTERIOR AND ITS SUBDIVISIONS

Lecture and PowerPoint: the Department of the Interior and its subdivisions; organic legislation.

Assignment: a) review your notes from Class #7 and the guest lecture and capture any questions for today; b) watch video: (former) Secretary of the Interior Sally Jewell at the Alaska Federation of Natives Convention in Fairbanks, October 21, 2016 and read Juliet Eilperin & Darryl Fears, “Interior Department plans to move thousands of workers in its biggest reorganization ever,” *The Washington Post* (January 10, 2018) and take notes of the things you find interesting or surprising about how government policy is made; c) read *Coggins* 416-20; d) review the following specific sections from the legislative charters for agency management of federal lands: National Park Service Organic Act, 16 U.S.C. §1; the Federal Land Policy and Management Act of 1976, also known as the Bureau of Land Management Organic Act, 43 U.S.C. § 1701 et seq. – §§ 101-103, 201-203, 301-303, 402-404, 701, 702; the National Wildlife Refuge Administration Act, commonly understood as the organic act for the U.S. Fish and Wildlife Service, 16 U.S.C. §§ 668dd & ee; the Forest Service Organic Administration Act of 1897, 16 U.S.C. §§ 472-478, 479-482, 551; and e) prepare to answer the who/what/when/where/why/how for each statute.

10. Thursday, February 15th – THE ADMINISTRATIVE STATE

“First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, . . .” *Chevron v. Natural Resources Defense Council*, 467 U.S. 837, 842-43 (1984). Lecture: the barriers to judicial review; the Administrative Procedure Act and administrative rulemaking; *Chevron* deference.

Assignment: turn into the class a single sheet with your name, the topic of your research paper,

and a brief sentence explaining either the specific question you hope to answer or the reason for your interest in the topic; b) review your notes from Class #9 and capture any questions for today; c) review the Administrative Procedure Act, 5 U.S.C. §§ 551, 701-706; d) read *Coggins* 206-09; e) brief *Lujan v. National Wildlife Federation*, 497 U.S. 871 (1990), excerpted in *Coggins* 209-11; f) read *Coggins* 215; g) brief a portion of *Ohio Forestry Association, Inc. v. Sierra Club*, 523 U.S. 726 (1998), excerpted in *Coggins* 215-17, excepting the last paragraph on 217; g) read *Coggins* 226-28; h) review *Northern California River Watch v. Wilcox*, 633 F.3d 766 (9th Cir. 2011), excerpted in *Coggins* 229-34. Follow up reading: *A Guide to the Rulemaking Process* (prepared by the Office of the Federal Register).

Tuesday, February 20th – NO CLASS

Work on your quiz re-writes (if you so choose, due in class on Thursday, February 22nd) and on refining your paper topic and starting an outline and bibliography (due Tuesday, February 27th).

11. Thursday, February 22nd – OVERARCHING LEGAL ISSUES I

“The Congress, recognizing the profound impact of man’s activity on the interrelations of all components of the natural environment, particularly the profound influences of population growth, high-density urbanization, industrial expansion, resource exploitation, and new and expanding technological advances and recognizing further the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man” National Environmental Policy Act (NEPA), 42 U.S.C. § 4331(a). Lecture: how does NEPA work, the timing and scope of NEPA analyses, the requirements under NEPA for mitigation and range of alternatives. Assignment: a) review your notes from Class #10 and capture any questions for today; b) read Lazarus, *The National Environmental Policy Act in the U.S. Supreme Court*, 100 Georgetown L.J. 1507 (2012), page 1513 through the top of page 1521; c) brief *Metcalf v. Daley*, 214 F.3d 1135 (9th Cir. 2000), excerpted in *Coggins* 242-47. Follow up reading: Salzman & Thompson, Jr., “The National Environmental Policy Act,” *Environmental Law and Policy* (2013, 4th Edition).

Tuesday, February 27th – NO CLASS

Due: outline and preliminary bibliography for the ten-page research paper. These must be typed up and stapled and have your name on the top sheet. Bring to Ms. Donaldson in O’Neill 302 by the end of the day.

12. Thursday, March 1th – SUBSISTENCE IN ALASKA

Guest Lecture: Brooke Wright – Subsistence in Alaska. Briefly review Pensley, “Existence and Persistence: Preserving Subsistence in Cordova, Alaska,” 42 *Environmental Law Review* 10368 (2012) – Introduction and Part I (excepting Section C). Follow up reading: *Survival Denied* (a publication of Tanana Chiefs Conference), which will be distributed in class.

13. Tuesday, March 6th – OVERARCHING LEGAL ISSUES II

Lecture: passage and scope of the Endangered Species Act, focus on §§ 3, 4, 7, and 9. Assignment: a) review your notes from Class #12 and capture any questions for today; b) read excerpt – “March: The Geese Return” – from Leopold, *A Sand Country Almanac and Sketches Here and There* (1949); c) read Interview with Ursula Heise, “Human Tales on Extinction and Endangered Species,” in *UCLA Review* (August 26, 2016); d) read Zaz Hollander, “U.S. Supreme Court rejects appeal of protections for Alaska’s bearded seals,” *Alaska Dispatch News* (January 22, 2017); e) read *Coggins* 263-68; e) brief *In re Polar Bear Endangered Species Act Listing and §4(d) Rule Litigation*, 709 F.3d 1(D.C. Cir. 2013), excerpted in *Coggins* 268-71; f) read *Coggins* 273-75 – comments #5-7; g) review *Greater Yellowstone Coalition v. Servheen*, 665 F.3d 1015 (9th Cir. 2011), excerpted in *Coggins* 275-80 – skipping Section B and J. Thomas’s concurrence/dissent. Class will close with a feedback request. Follow up reading: Salzman & Thompson, Jr., “The Endangered Species Act,” *Environmental Law and Policy* (2013, 4th Edition).

14. Thursday, March 8th – THE MINERAL RESOURCE I

In Class Quiz: Definitions and Short Answers (10%) (subject matter covered: Classes #5-12).
Endangered Species Act review and real life example: The Edwards Aquifer (“Who’s Suin’ Who”).

Tuesday, March 13th & Thursday, March 15th – NO CLASS (SPRING BREAK)

15. Tuesday, March 20th – THE MINERAL RESOURCE I

Lecture: the General Mining Law of 1872; locatable minerals; location; *pedis possessio* and discovery. Assignment: a) read Erica Martinson, “The Interior Department is preparing for a massive overhaul – and Alaska is its model,” *Anchorage Daily News* (March 15, 2018); b) read *Coggins* 474-76; c) read *Coggins* 478-79 comments #2 and 3; d) read *Coggins* 489; e) brief *Union Oil Co. v. Smith*, 249 U.S. 337 (1916), excerpted in *Coggins* 489-90; f) read *Coggins* 490 comment #2; g) review *Castle*

v. *Womble*, 19 L.D. 455 (1894) (Opinion of the Secretary of the Interior), excerpted in *Coggins* 495-96; h) review *United States v. Coleman*, 390 U.S. 599 (1968), excerpted in *Coggins* 496-97; i) read *Coggins* 498 comment #7, 501-02, 505-06, 510-12.

16. Thursday, March 22nd – THE MINERAL RESOURCE II

Due: ten-page research paper with possibility of a one-week extension upon written note. Lecture: Environmental regulation of hardrock mining under Forest Service and BLM regulations.

Assignment: a) review your notes from Class #15 and capture any questions for today; b) read *Coggins* 522-23; c) brief *United States v. Weiss*, 642 F.2d 296 (9th Cir. 1981), excerpted in *Coggins* 523-24; d) read *Coggins* 528-29; e) review part of *Mineral Policy Center v. Norton*, 292 F.Supp. 2d 30 (D.D.C. 2003), excerpted in *Coggins* 533-35; f) read *Coggins* 539-40. Follow up reading: *Strubel v. United States*, No. 06-112C (Fed. Cl. June 10, 2009), highlighted portions only.

17. Tuesday, March 27th – THE TIMBER RESOURCE

Discussion: Student presentations on natural resource statutes, which will be scheduled for April 17th, 19th, and 24th. Lecture: The Multiple Use and Sustainable Yield Act; the National Forest Management Act – harvesting methods, physical suitability, and the diversity mandate. Assignment: a) review your notes from Class #16 and capture any questions for today; b) read Alex DeMarban, “Army Corps plans mine comment period that Pebble calls ‘workable’ and opponents call ‘absurd,’” *Anchorage Daily News* (March 22, 2018); c) read *Coggins* 651-57, 658 comment #4, 660-61; d) briefly review *West Virginia Div. of Izaak Walton League of America, Inc. v. Butz*, 522 F.2d 945 (4th Cir. 1975), excerpted in *Coggins* 661-64; e) read *Coggins* 665-66, 669-72, 677-78; f) brief part of *Sierra Club v. Marita*, 46 F.3d 606 (7th Cir. 1995), excerpted in *Coggins* 681 (paragraph beginning “Taking its diversity analysis into consideration”) -85.

18. Thursday, March 29th

Due: ten-page research papers that were given one-week extension. Guest Lecture: Dr. Roger Kaye – The Arctic National Wildlife Refuge, Wilderness, and the Anthropocene. Please read Kaye, “What Future for the Wilderness of Wilderness in the Anthropocene?,” 13 *Alaska Park Science* 41 (2016).

Friday, March 30th – last day for student- and faculty-initiated withdrawals (W grade on transcript)

19. Tuesday, April 3rd – THE PRESERVATION RESOURCE I

“Traditional Cultural Properties aren’t marked by stelae of significance, crumbs of culture. Their significance is lodged in the brains of people, the collective consciousness of communities, and it’s those people and communities that can tell you whether a given district, site, building, structure, or object has it. They may not use archaeo-lingo or architect-speak, or recite National Register criteria, but if they value a place, they can probably tell you that they do, and then you can inquire about WHY they value it.” King, CRM+ blog post (August 13, 2016). Lecture: Why do we care about preservation? And what, exactly, do we wish to preserve? The Antiquities Act (1906), the Archaeological Resources Protection Act (1978) and the National Historic Preservation Act (1966). Assignment: a) review your notes from Class #18 and capture any questions for today; b) read *Coggins* 394-97; c) brief *Tulare County v. Bush*, 306 F. 3d 1138 (D.C. Cir. 2002), *cert denied*, 540 U.S. 813, excerpted in *Coggins* 397-99; d) review Presidential Proclamation, “Establishment of the Bears Ears National Monument” (December 28, 2016); e) review Juliet Eilperin & Darryl Fears, “Interior secretary recommends Trump alter at least 3 national monuments, including Bears Ears,” *The Washington Post* (August 24, 2017); f) review Julie Turkewitz, “Trump slashes size of Bears Ears and Grand Staircase monuments,” *The New York Times* (December 4, 2017); g) review Eric Lipton & Lisa Friedman, “Oil was central in decision to shrink Bears Ears National Monument,” *The New York Times* (March 2, 2018); h) read *Coggins* 1010-11; i) review *United States v. Shivers*, 96 F.3d 120 (5th Cir. 1996), excerpted in *Coggins* 1011-14; j) read *Coggins* 1016 comment #7; k) read *Coggins* 1033-34; l) read *Coggins* 1040 comment #4. Follow up readings: National Park Service, “Introduction,” *National Register Bulletin 38: Guidelines for Evaluating and Documenting Traditional Cultural Properties* (1998) and King, “A Traditional Cultural Place for All Citizens?,” CRM+ blog post (September 1, 2016).

20. Thursday, April 5th – THE PRESERVATION RESOURCE II

Fun facts: Eight Alaskan Park Service wilderness areas comprise more than 80% of the total park system wilderness acreage; 21 of the Fish & Wildlife Service’s 71 designated wilderness areas are in Alaska, containing over 90% of the total acreage in the refuge system. Lecture: where the wild things are/once were/may be in the future – the Wilderness Act of 1964; wilderness management; the Roadless Rule. Assignment: a) review your notes from Class #19 and capture any questions for today; b) read Louis Sahagun, “Feral cattle terrorize hikers and devour native plants in a California national monument,” *Los Angeles Times* (March 2, 2018); c) read Michael Ruane, “For years, families

have left cremated remains at the Vietnam Wall,” *The Washington Post* (undated); d) review excerpt – “Wilderness” – from Leopold, *A Sand Country Almanac and Sketches Here and There* (1949); d) read *Coggins* 926-30; 939-40; e) brief *Wilderness Watch v. Mainella*, 375 F.3d 1085 (11th Cir. 2004), excerpted in *Coggins* 940-43; f) read *Coggins* 931-32 – omitting the last paragraph of the section; g) read the Roadless Rule, 66 Fed. Reg. 3244-47 (“Introduction” through and including “Need for Action”) and 3272-73 (“Subpart B – Protection of Inventoried Roadless Areas”); h) briefly review *amicus brief* of the City of Craig, Alaska in *State of Alaska v. Organized Village of Kake, Alaska* (November 12, 2015). Follow up reading: Marris, “The Yellowstone Model” in *Rambunctious Garden: Saving Nature in a Post-Wild World* (2011).

21. Tuesday, April 10th – MOVIE

Movie: *Wrenched* (2014).

22. Thursday, April 12th

In Class Quiz: Definitions and Short Answers (10%) (subject matter covered: Classes #13-20).

Discussion of the film.

23. Tuesday, April 17th – STUDENT PRESENTATIONS I

24. Thursday, April 19th – STUDENT PRESENTATIONS II

25. Tuesday, April 24th – STUDENT PRESENTATIONS III

26. Thursday, April 26th – ANCSA AND ANILCA

“What I am trying to say and emphasize is I am one in modern day attempting to live a double life – and from that, my life is filled with confusion. I have a wanting deep within myself to live the life of my ancestors, but the modernized world I was raised in is restricting me from doing so.” Polly Koutchak, quoted by Berger, *Village Journey: The Report of the Alaska Native Review Commission* (1985). Lecture: the passage and scope of the Alaska Native Claims Settlement Act (“ANCSA”) and the Alaska National Interest Lands Conservation Act (“ANILCA”); subsistence and connection to public lands law; brief review of the 1998 *Venetie* decision and current issues in land into trust (fee to trust). Assignment: a) read Erica Martinson, “Trump administration launches process to lease

ANWR for drilling,” *Anchorage Daily News* (April 19, 2018); b) read *Getches, Wilkinson & Williams, Jr.* 906-11; c) brief *North Slope Borough v. Andrus*, 642 F.2d 589 (D.C. 1980), excerpted in *Getches, Wilkinson & Williams, Jr.* 916-21; d) read *Getches, Wilkinson & Williams, Jr.* 924-28; e) brief *Alaska v. Babbitt*, 72 F.3d 698 (9th Cir. 1998), *cert. denied* 1187 U.S. 517 (1996), excerpted in *Getches, Wilkinson & Williams, Jr.* 928-33.

Tuesday, May 1st, 8-9:30 a.m. – In-Class Final Exam: Open Book, Open Note