

**Vermont Law School Public Lands Field Seminar
Missoula, Montana 2018 Summer Session
Professor Jack Tuholske, VLS**

DRAFT

Overview

Using a hands-on approach, this field seminar will explore themes of resource utilization versus preservation, the changing legal framework for public land management, current controversies over salvage logging, motorized vehicle use, conflicts between wildlife management and recreationists, ecosystem restoration, and the role of fire on public lands. Missoula, Montana provides an excellent setting for this class; its proximity to National Forest land allows us to visit forest management sites ranging from clearcuts to ecosystem restoration projects, and to view the effects of fire on public lands. In addition, Missoula is home to the headquarters of the Northern Region of the National Forest System, the Lolo National Forest, and the University of Montana School of Forestry, known for its outstanding resources in forestry, wildlife management, and wilderness studies.

The goal of this seminar is to immerse students in the realities of public land management. We won't just read endless NEPA cases about the logging debate, we will discuss forest management sitting amid a 600-acre clearcut, pondering hundreds of square miles of Forest Service lands, a visual patchwork of old harvests, vigorous newly regenerated stands, burned areas, a web-like network of roads, and vast swaths of potential new wilderness areas. Underlying these "traditional" forest management issues is the specter of GHG-driven climate change, which may pose dire consequences for the Northern Rockies. We will backpack into a designated Wilderness, explore a roadless area whose management fate is undecided, and visit restoration logging sites, among other experiential education opportunities afforded by holding class in the out-of-doors.

The goals and learning objectives of the course are:

1. To provide an in-depth look at National Forest management from a historical, legal and scientific perspective;
2. To gain a thorough understanding of NEPA, MUSY, NFMA the Wilderness Act, statutes governing recreation and Wilderness Study Acts;
3. To understand the basic principles of judicial review under the APA, principles of deference in the context of environmental law, and the role of the courts in public land management;
4. To examine the legal and philosophical basis of Wilderness in the U.S.;
5. To explore the current controversy over fire-management;
6. To appreciate the role of politics in resource management.
7. To recognize the impacts of climate change on the forest ecosystems of the Western U.S.

Reading assignments are listed below. Unless otherwise noted, the materials will be posted on TWEN. Some additional reading materials may be added; you will be notified by email if that

happens.

Note: Because web access will be limited during the course, students should download and print the materials from TWEN and the web sites in the Syllabus prior to the class, so that you have the material available to you. This should be done while you are in Vermont. For the days we are in the field, you should bring each week's materials with you. I recommend purchasing a light-weight plastic (waterproof) folder which you can buy at the University Bookstore the morning of the first class.

Internet access can be a challenge. The University has guest access, and many coffee shops downtown have free wifi. But you will be best served by downloading and/or printing the materials before you come out.

Grading

This is a three credit course. I will use a take home final examination, and perhaps a short quiz or two in the field. The class will be graded 20% for the oral presentation, and 80% for the final exam and other short assignments if they are included. The final exam will be a take home final, with page limits for the questions. It will be due on Friday August 18 at 5 p.m. as grades are due August 25. The finals are graded anonymously. You should upload your final as a word document to the TWEN site with your student number as the only ID.

In Class Presentation

Twenty percent of your grade is based on a presentation you will give in the field during the second week of class. The topic must be relevant to the course, and must be based (at least in part) on something that you have observed in the field. You can be creative (students have written songs, epic poems, created board games) but you also must be informative. We will talk more about this assignment the opening week but you can start thinking about it now. Presentations should be in the 10-15 minute range. Give yourself some time during the weekend break to be able to research your topic.

Class Participation/Preparation

You are expected to come to class prepared so that you can participate in discussions and demonstrate your understanding of the cases and concepts embodied in the materials. The Socratic Method works just fine by a babbling brook, so be forewarned! This will require some extra initiative on your part; during field days you will not have access to your computer or the internet. It is important for you to read this syllabus thoroughly and plan on how you will have the material available when you need it. I strongly encourage you to download the TWEN materials before you leave for Montana, and to print those materials we will discuss in the field. There will be reading time in the woods during our field days. In addition, the syllabus requires you to view materials on some websites. Since the web has not yet reached the wilderness areas where we camp, you will have to look at those sites before we leave Missoula.

The Tuholske/Brennan NFMA law review article also should be read before class starts. Students should read the [add page numbers] in the Coggins, Wilkinson and Leshy text book as well as *The Big Burn* by Timothy Egan , all of which are available on Reserve in the library. I have been unable to obtain copyright clearance for the text book from the publisher; otherwise I would post the chapter on TWEN.

Class 1: Public Lands: Background Primer

Location: University of Montana (location to be determined)

Time: 8:30-11:30

The class will begin with a detailed overview of public lands. The creation of public lands such as national parks and forest reserves is a nineteenth century American idea that remains vibrant today. We will address the historical development of National Forests including the philosophical debate over preservation vs. utilitarian models for public land management. The development of land use planning on National Forests, and the Supreme Court's landmark *Ohio Forestry* decision are also central to understanding how National Forests are managed. In addition to the legal foundations of forest management, the socio-political contexts that shape and are shaped by public land management decisions will be considered. This class will trace the development of forest management practices from the post-WW II emergence of timber dominance within the Forest Service, to Congressional efforts to change the agency through legislation, resulting in the Multiple Use/Sustained Yield Act, the clearcutting crisis, and finally, passage of the National Forest Management Act (NFMA).

We will break for lunch and then leave Missoula at 1:30 p.m., meeting place TBA. Please show up fully prepared to hit the road. We will begin class this afternoon in a 600-acre salvage-logging clearcut astride the Montana-Idaho border, where we will view and discuss forest management on public and private lands. The area provides a bird's-eye view into the effects of logging, road construction and fire as well as a picture of successful regeneration of lodge pole forests. We hope to have a high ranking Forest Service official with us to add his perspective that afternoon. The seemingly endless waves of forested ridges and snowy peaks - millions of acres of public land - highlight the vastness of the public domain as well as its increasing fragility and limitations. The class will conclude with a hike into a roadless area, open for logging, mining, and motorized recreation, but also nearly pristine, and part of the proposed Great Burn wilderness area. We will see a diverse, "unmanaged" forest.

Assigned Readings:

1. Tuholske and Brennan, "NFMA: Judicial Review of a Substantive Statute," *Public Land Law Review* (1994) (TWEN)
2. *Ohio Forestry* (TWEN)
3. NFMA - 16 U.S.C. 1601-1604 (TWEN)
4. Multiple Use Sustained Yield Act (TWEN)
5. *Lives Under the Canopy: Spotted Owls and Loggers in Western Forests*; pgs. 1-8 (TWEN)

Note - the reading from the Coggins textbook serves as important background for this lecture and the entire first week of the course. Make sure you have finished it before this class!

Study Questions:

1. Can you summarize the trends in the management of public lands over the 20th and 21st centuries?
2. What are the procedural and substantive aspects of NFMA?
3. Be prepared to explain the significance of *Ohio Forestry* in terms of the binding nature of Forest Plans before and after the decision. Did the authors of the NFMA law review article (i.e. your Professor) “miss the boat” in terms of not foreseeing that such a decision would arise?
4. Under which statutory mandate would the Forest Service prefer to manage National Forests, MUSY or NFMA? Why?

Class 2: Timber Management: NEPA and NFMA

Location: Great Burn Roadless Area, Lolo and Clearwater National Forests.

NEPA has been the focus of hundreds of lawsuits over the past three decades; a thorough understanding of NEPA and how it has been applied in the West is central to an informed discussion of how courts have shaped forest management. While Congress is constitutionally charged with making laws to govern public lands, in fact federal courts have had a major hand in shaping forest management. When I began practicing law 30 years ago, every forest plan in the Northern Rockies was appealed and most individual timber sales were litigated.

Two salvage logging cases in the West -- one upholding and the other overruling Forest Service decisions -- provide a paradigm into NEPA and judicial deference.

Assigned Readings:

1. *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208 (9th Cir. 1998) and *Environmental Information Protection Center v. USFS*, 451 F.3d 1005 (9th Cir. 2006) (edited, posted on TWEN as one file).
2. Selected NFMA Forest Planning Regulations - comparison of 1982 Regulations, 2005 Bush Administration Regulations and the 2012 Obama Administration Regulations (TWEN).
3. Wildlife Conservation Planning Under the United States Forest Service’s 2012 Planning Rule pgs. 1-2; 5-8; 11-15 (TWEN) (reading the entire article is not a bad idea).
4. Wentz, Draft NEPA Guidance Requires Agencies to Consider Both GHG Emissions and the Impacts of Climate Change on Proposed Actions, [http://web.law.columbia.edu/sites/default/files/microsites/climate-change/wentz_elny_article - ceq_climate_guidance.pdf](http://web.law.columbia.edu/sites/default/files/microsites/climate-change/wentz_elny_article_ceq_climate_guidance.pdf).

Study Questions

1. Can you explain the significance of the NFMA viability regulation? Do the 2012 regulations represent a major departure from the 1982 regulations?
2. Given that NEPA is purely procedural, why has it had such a major influence on forest management?

Class 3: Great Burn/The Roadless Debate

Location: Great Burn Roadless Area, Clearwater National Forest.

Roadless Rules, politics of National Forest management as viewed through the roadless rule debate. Weather permitting we will conduct class on the ridgetops and mountain tops near camp. Since we are in the midst of one of the largest and most contentious roadless areas in the National Forest System, our setting will let us see first-hand the issues that are the focus of the roadless debate. In Part II (evening lecture) of this class we will review the Endangered Species Act and discuss why this particular law has had such a major impact on public land management.

Assigned Readings:

1. Federal Wild Lands Policy in the 21st Century: What a Long Strange Trips It's Been; pgs. 1-11 (TWEN)
2. Article by Dr. Reed Noss on the ecological effects of roads at <http://www.wildlandscpr.org/ecological-effects-roads> and on TWEN.
3. Review and print the maps of the Inventoried Roadless Areas on National Forests and the Clearwater National Forest (we will discuss these in some detail).

Assigned Readings Part II

1. *Thomas v. Peterson*
2. Read Section 7 of the ESA in the statutory supplement.

Study questions:

1. Can you articulate the nature of the political debates that have underscored the roadless rule and NFMA rule litigation?
2. Can you articulate the role of NEPA in both land use planning on national forests, and its role as a litigation tool by both environmental and industry/"multiple use" advocates?
3. You must be able to explain how Section 7 of the ESA applies to Forest Service projects (One or two of you will be asked to explain this to the class!). Can you see why it has become a particularly effective road block to stop logging in places where ESA-listed species are present (i.e. every National Forest in the country)?

Class 4: Recreation on National Forests.

Location: Great Burn

Schedule: Morning lecture/discussion of recreational use of national forests, particularly conflicts between motorized and non-motorized use. Hike out around noon. Lunch and an optional soak at the Lolo Hot Springs Resort, a venerable Montana tradition, back to Missoula by 5 pm.

Recreational use of National Forests has skyrocketed in the past 30 years, as our society has become more leisurely and affluent. Recreational conflicts on public lands occur in many dimensions. For example in Missoula there are serious conflicts between hikers and mountain bikers, skiers who want to bring dogs on cross country trails and those that don't want dogs, golf players and bird watchers (yes, with litigation coming!). A large percentage of downhill ski areas (think Vail, Jackson Hole, Alta and keep going...) are on public lands; these areas constantly want to expand, pushing other uses aside. The largest category of recreational conflicts occurs between motorized users (dirt bikes, snowmobiles, ATVs, and jet skis, often lumped together as Off Road Vehicles or ORVs) and human-powered users such as hikers, skiers, and canoeists. Motorized users have a long tradition of access to National Forests, represent a large segment of the recreating public in the West, and are backed by a multi-billion dollar industry. As with every other major resource conflict on public lands, the interplay between law and politics is vital, and constantly shifting. This class will help frame some of those political debates.

Assigned readings:

1. "Unmanaged Motorized Recreation" (Forest Service Position Paper) (TWEN)
2. "Power Tools" by the Blue Ribbon Coalition (TWEN). Also please spend 15-20 minutes visiting the Blue Ribbon Coalition's website at <http://www.sharetrails.org/>.
3. Executive Orders 11644 and 11898 (TWEN)
4. "Effects of the Ski Industry on Public Lands" (research by former Field Seminar student Reed Sirak).
5. Ohio Valley Trail Riders case
6. Wild Earth Guardians v. Forest Service (June 2015 decision)

Study Questions:

1. What are your views about recreational use on National Forests and how it should be managed? Should "quiet recreation" have a preference?
2. For ski bums only: is it a legitimate use of NF lands to lease thousands of acres to large corporations for downhill ski resorts?
3. For the WildEarth Guardians case, you should be able to articulate why one NEPA claim succeeded and the other failed. And please, don't just quote the court's opinion. Can you define what a "hard look" entails? Also, how does this case define the status of the current Travel Management Rule?

Class 5: Timber, Wildfire and Ecosystem Management Field Tour.

Location: Missoula area. Class begins at 8:30 a.m. in the UC Classroom. Pattee Canyon is about 15 minutes from the University. The burned areas and/or logging project are also close by.

This first portion of this class is a lecture followed by a field tour and lecture by a senior forest ecologist from the Forest Service. We will visit a logging project designed to restore an old growth Ponderosa Pine ecosystem in close proximity to Missoula. We will discuss the project, one that was locally controversial, but did not end up in court. We will discuss the role of fire in Western forests and how fire suppression has changed native ecosystems. In many parts of the West, residential areas are rapidly expanding into forested areas, often bordering public lands. The Forest Service is spending hundreds of millions of dollars of taxpayer money fighting forest fires protecting the property of these often newly-arrived “settlers.” The fire conundrum increasingly dominates the management of all public lands. A century of fire suppression following the Big Burn has left forests in an unnatural highly burnable condition. Climate change stokes the fires too and that will intensify under all climate change scenarios. Fires consume one half of the agency’s entire budget some years, leaving little funding for other projects.

The second part of this class focuses on judicial review. The *McNair* case offers further insight into judicial review of timber management projects in the 21st century - and also highlights the on-going legal debate over the extent courts should defer to the agency’s expertise on scientific and technical matters. We also use this case and this class to refresh our understanding of the APA.

In the afternoon we will head to the Bitterroots and hike into Bear Creek (aptly named, on the inaugural course we literally bumped into a black bear that had been spooked by a horse), and take a first-hand look at the Urban Wildland Interface on the way in. Bear Creek, in the Bitterroot National Forest, is about 45 minutes south of Missoula. The drive to the trail head will reveal more neighborhoods rapidly expanding in the urban/wildland interface; this will be the initial focus of the discussion. Our hike will take us from an easily-accessible, popular and heavily impacted recreation spot into a wild canyon flanked by 2,000-foot granite walls. We will pass into the Selway-Bitterroot Wilderness, one of the largest federally designated Wilderness Areas in the lower 48. In addition to seeing first-hand the results of fire suppression on forest ecosystems (continuing these topics from earlier in the week), we will discuss the recreation resource on public lands. Even in the Wilderness, which by law should be “untrammeled by man,” human impacts abound. The hike in is about 4 miles, mostly on a gentle trail with a couple of streams to ford. Topics pertaining to management under the Wilderness Act of 1964, and more philosophical digressions regarding the value (or for some, the lack of value) of wild places to the human spirit will be discussed.

Assigned Readings:

1. Coburn, “The Fire Next Time: Land Use Planning in the Urban Wildlands Interface.” 8 J. Land, Resources and Environmental Law 223 (2008). (Note: You need to finish reading the entire article before Class 8. For Class 5, please read Section I, pages 2-4 and Section III A on pages 7-8).
2. Pattee-Blue Environmental Assessment & Decision Notice (selected pages, TWEN).
3. New York Times article “On Fringe of Forest, Homes and Wildfire Meet” (June 26, 2007) (to be handed out).
4. *The Lands Council v. McNair* en banc opinion (C.A.9 (Idaho) (TWEN).
5. Administrative Procedure Act - Statutory supplement – TWEN – Read sections 551

(definitions) and 701-706.

6. Journal of Forestry Article, *Forest Management Solutions for Mitigating Climate Change*, Please read the Executive Summary (pages 119-121). The entire article is posted on the Website and may be of use for a presentation or for the final.

Study Questions for McNair:

1. **What is the Forest Service's area of expertise?** The court stated that it is "to be 'most deferential' when the agency is "making predictions, within its area of special expertise." The founding father of the Forest Service, Gifford Pinchot, stated that forestry means "growing trees as crops." Do fish and wildlife viability analyses fall within this "area of special expertise?" The Forest Service is divided into two main branches: research and management. Do both of these branches have the same "area of special expertise?"

2. **What level of deference is accorded to wildlife viability analyses?** Does the court's statement that it will "defer to the Forest Service as to what evidence is, or is not, necessary to support wildlife viability analyses" conflict with its later statement that

"the Forest Service may meet wildlife viability requirements by preserving habitat, but *only where both* the Forest Service's *knowledge* of what quality and quantity of habitat is necessary to support the species and the Forest Service's *method* for measuring the existing amount of that habitat *are reasonably reliable and accurate.*" (emphasis added)(internal quotations omitted)?

3. What level of deference do you think federal land managers should receive under judicial review of their NEPA/NFMA decisions? Who is better equipped to interpret and apply these statutes, courts or the agency?

4. Does it matter if agency decisions are responsive to the political persuasions of the administration? Should the Obama Forest Service act like the Bush Forest Service?

Class 6: Wilderness Management, Recreation and the Law

Location : Bear Creek, Selway-Bitterroot Wilderness

The Forest Service has been at the center of the preservation debate, and Montana, home to 3.34 million acres of Congressionally-designated Wilderness, provides an excellent paradigm to address the matter. We begin with the philosophical conflict between preservation and utilitarian ideals within the Forest Service, and move to the Wilderness Act of 1964, another uniquely American contribution to the law and philosophy of conservation.

Assigned readings:

1. Wilderness Act of 1964. (TWEN).
2. *High Sierra Hikers v. Blackwell*, 436 F. Supp. 2d 1117 (E.D. Ca. 2006) (TWEN, edited).

3. Appel, “*Wilderness Act and the Courts*” (Note - you can skip the empirical analysis part of the article on pages 17-19 and the footnotes). (TWEN)
4. Wilderness reading material, to be handed out.

Bonus “reading” – Check out the trailer for this project by some young Montana backcountry skiers.
<https://www.kickstarter.com/projects/1129866715/land-of-no-use-montana-wilderness-ski-project>

Class 7 - Wilderness Management, WSA’s and Judicial Review

Location: Bear Creek

Morning lecture on WSAs with a focus on judicial review, and the politics of litigation. You will have time for reading and enjoying the wilds of Bear Creek. We will break camp in the early afternoon and hike out, followed by a short drive to a delightful spot on a creek on a friend’s property, where we will have the pleasure of an outdoor kitchen, refrigerator and pond for dipping. Evening lecture on wildfire policy by a person whose home was nearly engulfed by the big wildfires of 2000.

Readings for this class will address Wilderness Study Areas (WSAs), public lands that have been set aside by Congress for wilderness study, but not afforded the protection of the Wilderness Act. Congress has often used the WSA approach for Forest Service Lands. The Bureau of Land Management also has extensive WSA lands. All WSA lands are governed by a similar statutory command to maintain the suitability of the WSA for formal wilderness designation. The law does not impose the requirements of the Wilderness Act. As a result, motorized use, a popular and fast-growing activity, is still permitted in these areas. Off-road vehicle (ORV) groups have often focused their efforts on preventing wilderness designation by establishing trails and expanding ORV use in WSAs.

WSA management was at the center of one of the most important public land cases addressed in recent years by the U.S. Supreme Court, *Southern Utah Wilderness Assoc. v. Norton*. (SUWA) Professor Tuholske participated in the SUWA case and was lead counsel for a companion case, *Montana Wilderness Assoc. v. Forest Service* that was finally settled in 2007 (the case has been dropped from the readings but will be presented in class and it posted on TWEN as optional). We will also use the WSA litigation to continue our discussion of the conflicts of recreation and preservation on public lands. In both MWA and SUWA, the “real” issue was proliferation of ORVs - a fast-growing use of public lands.

In response to the political deadlock regarding management of public lands, Congress has increasingly promoted collaboration as a potential way to avoid litigation and move forward. The second part of the class will begin the discussion of collaboration as a tool for achieving consensus on national forests, and discuss the pros and cons of the approach.

Assigned readings:

1. *Norton v. Southern Utah Wilderness Association* (TWEN) (edited).
2. Federal Wild Lands Policy in the 21st Century: What a Long Strange Trips It's Been; pgs. 12-22. (TWEN).
3. Backcountry Recreation Designation article – a short piece advocating for a new land management designation that allows motorized use but is more protective than general multiple use (TWEN).
4. C. A. Schultz *et. al.*, “The Collaborative Forest Landscape Restoration Program: A History and Overview of the First Projects”
5. Review Collaborative Planning website: <http://www.fs.fed.us/restoration/CFLRP/>

Study Questions:

1. Once again the Courts are asked to resolve legal questions that are simply foils for public policy debates over public lands that have been going strong for 100+ years. How would you propose to resolve the seemingly endless conflicts over the management of public lands?
2. The Montana Wilderness Study Act is now 35+ years old. At the time it was passed its sponsors thought it would be on the books for only a couple of years - to provide some breathing room to resolve the wilderness issue. Seven of the nine WSAs remain subject to the Act - and the wilderness is still unresolved. Why do you think that is the case?
3. Can you explain the difference between the authority of a court to address a challenge to an administrative agency under Section 706 (1) and 706 (2) of the APA?
4. You should be able to explain how the collaborative process operates. Do you think it will provide an effective framework for resolving disputes before they end up in court?

Class 8: Forest Management in the context of climate change and political deadlock

Location: Blodgett Creek camp.

Schedule: In the morning we will hike to a prime viewing spot overlooking Blodgett Canyon, passing through some recently burned areas. Wildfire remains one of the most vexing issues in public land management. We are part of the cause of the current fire “problem” - Smokey the Bear is one of the most successful ad campaigns ever undertaken. As a result, we suppressed fire on public lands with zeal for 60 years, leaving an unnatural forest that inevitably burns with greater intensity than natural wildfire. Humans can't stop wildfire any more than they can stop a hurricane. Yet now, millions of new homes have been built adjacent to public lands, and those folks want the threat of wildfire eliminated. In 2000 and 2002, millions of acres burned despite hundreds of

millions of tax-payer dollars aimed at suppression. Local loggers wanted the dead trees for their mills; conservationists wanted the forests left alone to heal. These controversies always end up in court - Congress can't, or won't, act decisively. In June 2016, as I edit this syllabus, huge wildfires are already burning in the SW and California, as record heat waves appear to be the new normal.

The fire "problem" will be more vexing in light of climate change impacts in the American West that constitute the final readings for this course. The West has already experienced significant warming and drying, and predictions are for it to get worse, especially during the summer months. Climate change poses management challenges for public lands that dwarf the "utilization vs. preservation" debate of the past. Funding these management activities will become increasingly difficult with more than half of the Forest Service's budget going to fire-fighting efforts in recent years.

We will have a lecture, discussion and lunch at a stunning overlook, a short afternoon wrap up session, class evaluations and return to Missoula by mid-afternoon.

Assigned Readings:

1. Biscuit Salvage Sale newspaper articles.
2. Betscha et al, "Post fire Management of Forested Public Lands in the Western United States" (TWEN, note copyright prevents further distribution).
3. Catching Fire, The Nature Conservancy, (TWEN or online).
4. Nie and Metcalf, "The Contested Use of Collaboration & Litigation in National Forest Management"

Study Questions:

1. Can you articulate the different perspectives of affected parties regarding the wildfire issue? What are the interests of the homeowner, local government, the Forest Service, conservationists, and the timber industry in wildfire policy and salvage logging? Are these positions irreconcilable?
2. It is undeniable that human interference (wildfire suppression) has dramatically altered the natural ecosystems of the Northern Rockies. What will the next round of human interference - climate change - bring to the natural ecosystems? Should we be legislating adaptive management with climate change in mind?