

Public Natural Resources Law (B675 & R533)

Fall 2024

Professor Rob Fischman 812-855-4565
Mondays & Wednesdays 12:40 – 2:10pm
Baier Hall (Main Maurer Bldng.) room 214

Communications:

You may email me directly at rfischma@indiana.edu, but I prefer the Canvas email function. Reserve emails for personal issues you might have with the class or non-curricular topics. Do not email me substantive questions about course materials. Instead use the Canvas discussion thread (“substantive questions and observations about course materials”) so that other students can weigh in and I can steer everyone in a productive direction. You can also pose questions during class. I monitor the discussion boards and may post comments from time to time. Forward your Canvas Inbox to your regular email so you don’t miss a message from me: go to your Profile→Notifications and click the check for “conversation message.”

You may also visit me in my office, Baier Hall rm. 276. With students scattered in two corners of campus with very different schedules, office hours do not work. However, unless I tell you otherwise, I am available immediately after class to walk back together to my office and sit down for a conversation. Canvas email me to make an appointment if you wish to meet at a time other than right after class. I welcome office visits simply to chat about common interests and career goals. I also welcome early morning coffee invitations!

Course Description:

This course is a combination of B675 for Maurer students and R533 for O'Neill graduate students. Students enrolled in both classes will read the same materials, respond to the same assignments, and engage in interdisciplinary conversations as practice for their professions. **B675 meets the Maurer J.D. graduation requirement for an upper-level course in which writing is used as a means of instruction.** Class grades will emphasize frequent, short writing assignments. There will be no final exam. Students enrolled in the law class should expect a grade curve that complies with Maurer academic regulations. Students enrolled in the SPEA class should expect to be graded on the normal graduate school scale.

This course examines the tension between public control and private interests in resources on federal lands, such as national forests. It begins with a historical overview of the development of the patterns of resource ownership, policies toward resource development, and relevant legal doctrines. Building on this historical foundation, we will discuss federalism in resource regulation, proprietary management models, planning, separation of powers, and judicial review. We will study these issues in the context of the federal laws and policies governing mineral, energy, timber, recreation, and wildlife resources. Most of these issues involve the federal lands in the American West. We will address the fundamentals, such as environmental impact analysis and the Endangered Species Act, in the context of current controversies including state claims to control federal resources, energy permitting, and justice for dispossessed native peoples.

Course Materials:

Most required reading will be from the casebook, *Federal Public Land and Resources Law* (8th ed. 2022) ISBN 978-1-68467-240-0. **Make sure you have the 8th edition** (used copies and e-editions are fine)! My recent experience with campus bookstores leads me to the regrettable recommendation that you should order this book online ASAP. The bookstores are not to be trusted with any promises of getting copies of the casebook in. Don't buy a previous edition by mistake—that will cause you all sorts of headaches. I will place any additional readings in the Files tab of Canvas.

I earn a 5.7% royalty on “net revenues” (whatever that means) of new casebook sales. Rather than rebate you individually, in the spirit of public resources I will put that money into a community fund to spend on the class as-a-whole. I'll give you more details on that in the early weeks of the semester.

You are permitted to take notes on the online materials and lectures posted for this course for your personal use. You are not permitted to re-post in another forum, distribute, or reproduce content from this course without the express written permission of the faculty member. Any violation of this course rule will be reported to the appropriate university offices and officials, including to the Dean of Students as academic misconduct.

Throughout the course, you will need to examine closely the text of statutes. While you may use Westlaw or the **official federal government's version of the U.S. Code**, I find that the **best source for quick access** is **Cornell's Legal Information Institute**. It is easy to browse by going up and down the hierarchical tables of contents. It is also easy to read by using the “prev” and “next” icons to go through a series of code sections.

Course Objectives:

We have two broad goals. The first five learning objectives deal specifically with understanding **public natural resources law**. The second five address **general legal skills**. By the end of the semester you should be able to evaluate legal issues and recommend reforms dealing with:

- 1) natural resource allocation systems (e.g., auction, capture, central planning),
- 2) the role of statutes and administrative tools (e.g., permits) in limiting and defining property rights,
- 3) the relationships between resource allocation and environmental concerns,
- 4) federalism in public resource management, and
- 5) collective interests in public resource use.

By the end of the semester, you should improve your ability to:

- 6) derive law from primary source documents, such as statutes and judicial opinions,
- 7) analyze how law applies to a set of facts,
- 8) advise clients and administrators,
- 9) craft effective legal arguments, especially in applying principles of statutory interpretation (e.g., textual analysis) and administrative law (e.g., deference), and
- 10) create compromise solutions to contentious public policy problems.

Research and Study Aids:

Sometimes you may find that the casebook provides inadequate detail for your grasp of a topic. When that occurs, I suggest you supplement the required reading with the treatise **GEORGE COGGINS & ROBERT GLICKSMAN, PUBLIC NATURAL RESOURCES LAW** [continually updated, available on Westlaw]. I will provide Westlaw passcodes to all non-law students. That will allow everyone to access this treatise, Black's law dictionary, and other supplemental information. I do not expect most students will need to access Westlaw, as this class does not require legal research. You will encounter many unfamiliar acronyms in your readings for this class. A **glossary of all the important acronyms** can be found on pp. 1127-34 of the casebook.

Some students may find helpful a variety of introductions to the law and legal analysis. I suggest the following with an eye toward helping the O'Neill students in the class better understand how we move from the primary source readings to the broader discussions in class. But these introductory sources are a good review for law students as well. The key parts of the sources below are available online or posted in pdf format on the Canvas site ("Study Aids and Background" folder in Canvas "Files" tab). I particularly recommend Fischl & Paul for the early weeks of this course.

- 1) Fischl & Paul, *Getting to Maybe* (1999, 2d ed. 2023) [though focused on exam performance, this book is nonetheless useful in helping students understand how to use primary source materials to make broader arguments in class and in written assignments. **Chapter 10 pdf in Canvas introduces students to methods of making policy arguments.**],
- 2) Johns & Perschbacher, *The United States Legal System* (2002) [**Chapters 3-5 pdf in Canvas describe the structure of legal institutions and methods employed in judicial analysis**],
- 3) Schauer, *Thinking Like a Lawyer* (2009) [best single source for a non-law student to catch up with the modes of thinking practiced in law schools].
<http://ebookcentral.proquest.com/lib/iub-ebooks/detail.action?docID=3300789>
- 4) Kenneth Vandeveld, excerpts from *Thinking Like a Lawyer: An Introduction to Legal Reasoning* (2d ed. 2011). A review of case briefing and legal reasoning:
<http://site.ebrary.com/lib/iub/detail.action?docID=10435884>

For students interested in a very quick introduction to legal method, I also recommend reading some of the following materials also posted in our Canvas supplemental files folder.

- 1) Orin Kerr, "How to Read a Judicial Opinion". A popular, concise guide designed for starting law students.
- 2) Fred Cate, "Method in Our Madness". Though the essay specifically addresses communication law research, most of its points are equally applicable to natural resources law.
- 3) James Boyle, "Anatomy of a Torts Class." A 12-page categorization of common legal arguments from a longer article.

All students, but especially the O'Neill students, will regularly encounter unfamiliar legal terms in the primary materials. When that happens, look up the term's meaning. You all will have access to Westlaw, which includes the definitive **Black's Law Dictionary**.

Participation Requirements:

The students in this year's class come from a wide variety of backgrounds. You should expect to learn from your fellow students. Don't get upset if students contribute information and insights that you do not have. This course is designed to bring together students with varying levels of experience and different academic orientations. Use class discussion as a rehearsal for the interdisciplinary or collaborative work you will encounter in practice settings. Try to teach your fellow students by providing your own perspective on the required readings and discussion. What I aim for in this class is for you to sharpen your analytical ability to identify and create good arguments that will succeed in specific advocacy settings (e.g., courts, legislatures, agencies, deal-makings). What Wittgenstein said about philosophy applies to law:

Philosophy is not a body of doctrine but an activity. A philosophical work consists essentially of elucidations. Philosophy does not result in 'philosophical propositions,' but rather in the clarification of propositions. Without philosophy thoughts are, as it were, cloudy and indistinct: its task is to make them clear and give them sharp boundaries. (Tractatus Logico-Philosophicus). Our activity is to sharpen understanding through the activity of discourse. The best way to get the most out of class is to think about the discussion prompts in each class session Discussion post even if you are not submitting a written response.

To succeed in this class, you need consistent engagement. If you get sick (or have some other excused absence), let me (and your school's student affairs office) know before the class session you will miss. To sustain engagement, you have two specific participation requirements, described in the numbered paragraphs below. Prepare to be busier meeting these two discussion requirements and the writing assignments through mid-November. It will be more work than most of your other classes during that time. But, after mid-November, you will have little to produce for this class. This is a good course to take in a semester when your other courses are loaded with late-semester work, such as final papers and exams.

1) You must make at least one “substantive discussion post” each week. I will start a Canvas Discussion topic with specific questions or prompts for each of our two weekly classes. You will fulfill the weekly requirement by posting a reply on one of the Discussion boards at least 60 minutes before the class in which we will discuss the question/prompt. In other words, if you want to post for a Wednesday class, you must do it before 11:40am Wednesday morning. We will spend time in each class discussing responses.

On days when writing assignments are due, there will be fewer or no opportunities to make substantive discussion posts. You will know a week ahead of time if your option for posting will be constrained. The assignment submissions are a separate requirement from the weekly "substantive discussion post" (part of participation grade). Submitting an assignment does not satisfy a week's "substantive discussion post." Plan accordingly.

Pedagogical studies show that the more you contribute to conversation, the more you will learn and remember. In other words, what you retain is not what the professor said. It is what you, yourself, expressed in your own words. The “substantive discussion post” requires that each student has something substantive to say each week. If you really want to master this material, make sure you have something substantive to say each class. You are welcome to post replies to a Discussion thread for *each* class, even though that goes beyond the participation requirement.

Asking a series of questions or summarizing/describing required reading is not a

substantive discussion post. A **substantive discussion post** will

- 1) be concisely written,
- 2) be original (not simply rephrasing what someone else wrote),
- 3) be relevant to the topic at hand, and
- 4) demonstrate that you reflected upon the assigned material (or your colleague's point of view in the case of a response).

Do not simply affirm an argument from the reading. But you can show how it might apply in surprising or counterproductive ways to a different situation. If you can't think of something substantive to add, extend, or criticize, do not post at all. Instead of stating what you find "interesting", explain **why** an aspect of a case is interesting. Consider not using the word "interesting" at all. Instead, just explain why a decision (of a court, agency, legislature, etc.) is counter-intuitive, unjust, illogical, unethical, poor policy, or supportive/contradictory of some principle we covered or in contrast to some other law/case. The key is explaining why and showing some analysis (legal or policy).

Read the replies that others posted before you. Make sure you are introducing a new interpretation, perspective, applications, or idea to the prompt. Despite your originality, you contribute nothing to the discussion if someone else posted the same idea first. Try arguing for a position you disagree with. I won't ever care if you truly subscribe to a position you argue for; I reward effective advocacy. The more difficult a position is to defend, the more I respect your taking that position--regardless of your true opinions.

If you would like individual feedback on your substantive post, please email me. If you post a discussion reply that I judge not substantive for weekly credit, you will hear from me via Canvas email.

2) You must make one current event presentation to the class during the semester. I will post a sign-up for presentation times soon. Though this requirement involves a bit of research and preparation, it is not intended to be an intensive assignment. The "research" is minimal. Simply following the news on a regular basis and thinking about how an article might relate to our course readings will yield great returns. You can receive free access to the New York Times, Wall St. J., and Wash. Post online, courtesy of IU Libraries. In addition to the links to newspapers in the "Current Events" Discussion thread, you will find good reporting on (western) resources issues in the **High Country News**.

The presentation will be brief (approximately 5-10 minutes). You will quickly summarize the news article and explain how it relates to a required course reading. The focus of the presentation will be a conversation about the discussion question you posed. Students not presenting should read the post in Canvas prior to class; reading the news article itself is optional but encouraged. Students other than the presenter may opt to make their weekly substantive discussion post via a response to the discussion question posed in the current events thread.

The best presentations are of news articles that relate to the material we are covering the week of the presentation. But news articles relating to material we recently covered are perfectly acceptable. Do not present a current event relating to material we have not yet or are not currently covering. The day before your current event presentation, please post the following information as a reply in the Canvas discussion thread for "Current Event Presentation". Post no later than 11:59pm the day before you present. Each post should contain four elements:

- 1) Your name.
- 2) Link to the news article. Either make the headline hypertext or include a separate link.
- 3) The course reading assignment(s) and topic(s) to which the news article relates.
- 4) A 1-3 paragraph analysis as to how the news article relates to our course materials. It should conclude with the single discussion question. Try to relate the question to something we have already discussed in class.

Grading Policy:

Graded writing assignments require submission via Canvas “Assignments.” Plan to write a double-spaced page (approx. 250 words) for each 5 points available in an assignment (in other words, a 10-point assignment is about a 2-page, double-spaced assignment). Under no circumstance should your response exceed 300 words per 5pts of an assignment. I want you to edit and re-edit until you can convey key points succinctly. The first line of your submission must be your word count.

If you miss the Canvas cut-off time for the submission deadline, then Canvas and I will not accept your answer/response. You will not have an opportunity to make up the points you missed by failing to submit the assignment on time. So, please do not wait until the last minute to submit—your clock may be slightly off from the Canvas clock. You are on notice of the risk of losing credit if Canvas thinks the clock has struck noon despite your contrary indication. Every semester students suffer when a Canvas glitch rejects a submission and they did not allow enough time to troubleshoot or just wait until Canvas recovers. It may not be your fault, but I do not accept late assignments. If you are ill, please contact me and your student affairs office so that we can arrange a make-up assignment.

I often post a rubric on Canvas for students to examine before writing and submitting their assignment responses. I encourage students to meet informally to discuss their approaches to the problems and their analyses of applicable laws. But each student’s written response must be entirely their own. Keep in mind that, apart from a rubric, I award or withhold points for an answer based on (in rough order of importance) how completely and precisely it responds to the question, accuracy, identification of relevant issues, inclusion of appropriate material (and exclusion of inappropriate material), thoughtfulness, clarity, persuasiveness, and brevity. Allow yourself enough time to proofread your answer before submitting it.

When asserting principles of law, cite to a primary source (e.g., case, statute, or regulation), indicating the page where you find it in the required readings. In other words, do not worry about formal citation format. For instance, if you rely on the doctrine of discovery to assert a right of occupancy, you can cite to “*Johnson*, p. 54” (unless you specify otherwise, any pin cite is assumed to be to our casebook). If you state that Congress authorized compensation to individual Western Shoshone members for dishonorably taken lands, you can cite “118 Stat. 806, n. 5 p. 56.” Always indicate your primary source; do not merely cite a page of the casebook.

General tip for performing well on assignments: Read the week's upcoming assignment first, and jot down key issues you'll need to resolve *before* hitting the weekly reading. That will help ensure you don't miss a key issue as you are concentrate on the primary materials in the weekly readings. Written responses should be divided into sections that match rubric rows, where applicable.

If you have a question or request for clarification on a pending assignment, please post it

to the Discussion thread labeled “Questions and Requests for Clarifications on Assignments & Syllabus.” That will save me from having to cut and paste your question and my reply from a Canvas email. I want all students to share the benefit of your questions and any reply I offer.

Keep in mind that the assignments are designed to facilitate learning *through* writing. I aim to force you to struggle to apply concepts and primary sources in applications that go beyond the reading. The answers are not directly “in the book.” Measure your success by the progress you make through the semester, not by comparing yourself to other students.

I will score the assignments using the anonymizer feature of the Canvas grading app. Please do not put your name in the text or in the file name of the document you submit to Canvas. If you are responding in a role assigned to you, please do clearly state the role you are playing. Besides anonymizing student submissions, another nice feature of Canvas is that I can provide you with individual comments along with your grade. You can view the comments by going to the assignments page, selecting the desired assignment, and looking under the submissions tab on the righthand side of the page. You can also get everything displayed a bit nicer by clicking “Submission Details”. I tend to make more detailed comments in the rubric comment boxes than in the overall comments box at the end of the assignment. If you receive mostly full credit for a rubric criterion, then I will seldom comment. I am happy to meet with you individually to go over your score.

I intend the raw score to show you how well you did against the prompt/rubric. I intend to spread the scores out much more than a letter grading scheme would allow. As a writing course, I expect you will improve over the course of the semester. I will not adhere to any kind of numerical correspondence between percentage of points available on a rubric and letter grades. To help you see how well you performed relative to other students in the class, I will post an announcement with the mean score for each assignment.

Your final grade for the course will be based on the number of points you have accumulated. The graded assignments on Canvas will total **80 points**. I will award an additional **20 points** based on your fulfillment of participation requirements (see section above). For each of the two class sections of this class, I will adhere to the grading policies of each respective school.

Additional Matters:

As your teacher, one of my responsibilities is to create a positive learning environment for all students. To that end, I share here some important university policies and resources. The Maurer School of Law is committed to providing a positive and supportive learning environment for all students. The following guidance provides additional details and resources for students. Should you have questions, please reach out to the Leonard D. Fromm Office for Student Affairs at 812-855-4809 or at lawosa@indiana.edu.

DISABILITY ACCOMMODATIONS:

The campus Office of Disability Services for Students (DSS) assists students with physical, learning, and temporary disabilities in achieving their academic goals. DSS works with students and instructors to facilitate accommodation delivery and to link students to resources essential to success. To receive services or accommodations, please register with the office at <https://studentaffairs.indiana.edu/student-support/disability-services/get-help/index.html> . After meeting with DSS and receiving an accommodation memo, the student must present the memo

to the law school Recorder. Please note that accommodations can sometimes take time. Please contact DSS as soon as you are aware that you may need accommodations for a course, assignment, or exam. Disability Services for Students at <http://disabilityservices.indiana.edu> or 812-855-7578. At Maurer, Alexis Lanham is the contact (adlanham@indiana.edu). What follows are general resources for help.

RELIGIOUS OBSERVANCES:

Indiana University seeks to reasonably accommodate students who want to observe their religious holidays at times when academic requirements conflict with those observances. Detailed campus policies can be found at <https://vpfaa.indiana.edu/faculty-resources/teaching-resources/religious-observances-information.html>. The law school does not require students to complete an accommodation form, but students are expected to inform their professors about potential conflicts within the first two weeks of the class.

BIAS INCIDENT REPORTING:

Bias incidents (events or comments that target an individual or group based on age, color, religion, disability, race, ethnicity, national origin, sex, gender, gender identity, sexual orientation, marital status or veteran status) are not appropriate in the classroom or on campus. If you witness or experience a bias incident, you can report it by submitting a report online at https://indiana-advocate.symplicity.com/care_report/ or reporting to the Division of Student affairs at incident@indiana.edu or 812-855-8187.

COUNSELING AND PSYCHOLOGICAL SERVICES

Find services offered by CAPS: <http://healthcenter.indiana.edu/counseling/index.shtml>.

SEXUAL MISCONDUCT

Title IX and our own Sexual Misconduct policy prohibit sexual misconduct. If you have experienced sexual misconduct, or know someone who has, the University can help. To speak to someone confidentially, you can make an appointment with the IU Sexual Assault Crisis Services at 812- 855-5711, or contact a Confidential Victim Advocate at 812-856-2469 or cva@indiana.edu. University policy requires faculty and staff to share certain information brought to their attention about potential sexual misconduct, with the campus Deputy Sexual Misconduct & Title IX Coordinator or the University Sexual Misconduct & Title IX Coordinator. In that event, those individuals will work to ensure that appropriate measures are taken and resources are made available. Protecting student privacy is of utmost concern, and information will only be shared with those that need to know to ensure the University can respond and assist. Visit <https://stopsexualviolence.iu.edu> to learn more.

Course Schedule:

This schedule will give you a rough sense of the scope and timing of our coverage. I reserve and will exercise my discretion to alter both the schedule to better tailor this course to student needs and to take advantage of campus and current events. For each class session, I will post a **Discussion in Canvas that lists the pages** from the casebook we will cover and the **questions/issues we will discuss** in class.

The law school and the campus graduate school operate on different schedules. We will have class meetings **only** on those days **when both schools are in session**. Read the schedule

closely to avoid coming to class on a day when we do not meet. Our 90-minute class lengths make up for the reduced number of class sessions. This means we cover more every week than you and I are accustomed to in a typical 3-credit course. Please plan accordingly.

T. Aug 20: Maurer classes start

M. Aug 26: O'Neill classes start

Our class will first meet M. Aug 26

T Sept 3: Maurer classes run on Monday schedule. We will **not meet M. & T. Sept. 2 & 3**

Oct.14: Maurer week-long class break begins. We will **not meet M & W Oct 14 & 15**

Last class meeting W Nov 20. No final exam.

Nov. 25: O'Neill week-long class break begins

T Nov 26: Maurer classes end

Before our first mandatory class meeting, please:

- 1) Review this syllabus and post any questions to the Canvas "Questions and Requests for Clarifications on Assignments & Syllabus" Discussion.
- 2) Post to the Canvas Discussion "Introductions: post before Aug. 26" your reply to the four prompts and a video.
- 3) Read the introductory materials on pp. 1-4 & 15-38 of the casebook. This is background we will not cover in class.
- 4) View the introductory video (linked from Canvas home page) that I recorded in January 2021 for a prior iteration of this class. Other than a reference to "Zoom conversations," everything I mention in the 20-minute presentation applies to this semester's class. The introductory video is designed to provide you with the "big picture" of the semester before we begin work on acquisition of federal public natural resources.
- 5) Read the materials and consider the discussion prompts from the Canvas "Aug. 26 Acquisition of the Public Domain" Discussion.

See the next page for the mandatory assignment dates nested within the description of the topics we will probably cover each week.

The following rough schedule shows you what you can expect each week. Assignments are due by noon on their indicated date, with the number of points indicated in parentheses.

Week 1: Aug. 26 & 28. Federal Resource Acquisition & Grants to States

Aug. 28 Aboriginal title assignment (Optional, practice, zero-credit assignment that would be equivalent to 5pts if required)

Week 2: Half week W. Sept 4 only. Public Trust

Sept. 4 Trust doctrines assignment (5)

Week 3: Sept. 9 & 11. Railroad Grants & Reservations. Property Clause Power.

Sept. 11 Federal power assignment (Chaco) (5)

Week 4: Sept. 16 & 18. Preemption & the Enclave Clause

Sept. 16: Prof. Lane McFadden joins us for the last hour of class to discuss preemption, Justice Dept. decision-making, appellate advocacy, and *Bohmker v. Oregon*.

Sept. 18: Preemption assignment (10)

Week 5: Sept. 23 & 25. Judicial Review, the APA, & Intro to NEPA

Week 6: Sept. 30 & Oct. 2: NEPA & the ESA

Sept. 30 NEPA assignment (10)

Week 7: Oct. 7 & 9. Access Issues

Oct. 9 ANILCA access assignment (15)

No classes Oct. 14 & 16

Week 8: Oct. 21 & 23. Hardrock Mining

Oct. 23 Hardrock mining assignment (15)

Week 9: Oct. 28 & 30. Energy Resources

Oct. 30 Renewable energy assignment (5)

Week 10: Nov. 4 & 6. National Forest Management

Week 11: Nov. 11 & 13. National forests (cont.) & Wilderness

Nov. 11. National forest planning (& split estates) assignment (15)

Week 12: Nov. 18 & 20. Wilderness & the Future of federal land conservation