I. Overview / Introductory Material
   a. The Tragedy of the Commons – Garrett Hardin, 1968
      i. When a resource is open to exploitation by all, individually beneficial actions
         lead to destruction of the common resource
      ii. Two possible solutions:
          1. Private ownership
          2. Government regulation of common areas
      iii. The tragedy of fragmentation
           1. When critical habitat is privately owned in small parcels no individual owner will be able to develop a viable conservation plan
           2. Bioregionalism (region defined by similar naturally occurring characteristics) may be an answer
   b. What is a natural resource?
      i. In Re Tortorelli (2003)
         1. Adopts dictionary definition of “materials supplied by nature
         2. Constitution grants States ownership of stream & lake beds
         3. Equal footing doctrine grants this ownership to newer states
         1. Lower court had adopted a definition of natural resources that required “economic value”
         2. CT Supreme Court rejected the “economic value” test, trees and wildlife are natural resources regardless of economic value
   c. Conservation
      i. Utilitarianism
         1. Focus is on using natural resources in a profitable, but sustainable manner
         2. Championed by Gifford Pinchot in the Progressive Era
         3. Focus on scientific management
         4. Current example: U.S. Forests
   d. Preservation
      i. Focus is on saving wild nature
      ii. Championed by John Muir and the Sierra Club
      iii. Current example: U.S. National Parks
   e. Public Trust Doctrine (Overview)
      i. Natural resources are held in a trust for the benefit of humankind
      ii. Trustee has a fiduciary duty to beneficiaries
      iii. Inter-generational equity: future generation have equal rights to natural resources as the current generation
      iv. Some argue that Trust metaphor is inadequate because it gives the current “trustees” too much discretion to sell or exploit natural resources in the name of economic development that will benefit future generations

II. The Public Trust Doctrine
   a. Test for Navigability
      i. Navigability for Title
         1. Did a tract of submerged land pass into state ownership at the time of statehood?
2. “Highway of Commerce” test
3. See Pollard v. Hagan

ii. Navigability for Public Access
1. Does the public have the right to float downstream?
2. Differs from state to state
   a. Some use navigability for title
   b. Some use susceptible to recreational use test
   c. Some use a historic approach, asking “Was the stream used to float logs?”

iii. Navigability for Commerce Clause purposes
1. Is a watercourse subject to federal regulation under the Commerce Clause?
2. Highway of Commerce test
3. See The Daniel Ball

iv. Navigability for Admiralty Jurisdiction
1. Does a legal dispute fall within the maritime jurisdiction of the federal courts?
   b. The Public Trust Doctrine
      i. Martin v. Waddell’s Lessee (1842)
         1. Under Colonial system, King held public waterways in trust for the people – rights to these waterways did not pass in colonial land grants
         2. U.S. Constitution divided sovereignty between Federal and State governments
         3. State governments control submerged lands and fishery rights
      ii. Illinois Central Railroad v. Illinois (1892)
          1. States may not give away public trust resources
          2. Alienation only valid when the action will:
             a. Promote the public interest, OR
             b. Will not result in any substantial impairment of the public interest in the lands and waters remaining
   c. Submerged Lands
      i. The Daniel Ball (1870)
         1. For Commerce Clause purposes, the federal government may regulate rivers that are “navigable in fact” which means they are used or are capable of being used as “highways for commerce” between states or foreign countries.
         2. Even and intra-state route on a river that runs between states is subject to federal regulation
         3. Rejects old English rule which defined navigability as influenced by the tide
      ii. Utah v. United States (1971)
          1. Whether a State owns the bed of a waterway depends on whether the waterway was navigable at the time of admission into the Union.
             a. If navigable then the State holds title under the Equal Footing Doctrine
             b. If non-navigable then ownership is determined by state law and private ownership is possible
          2. Test: Whether the lake was physically capable of being used in its ordinary condition as a highway for floating and affording passage to
water craft in the manner over which trade and travel was or might be conducted in the customary modes of travel on water at that time
a. Not a difficult test meet, does not require that any navigation actually have taken place

1. Toothpick Floating Test: any water influenced by tide that can be reached by a toothpick floating uninterrupted is “navigable” for title purposes, even if the water is not navigable in fact
2. Navigability in fact supplements the common law tidal rule, it does not supplant it

d. Authority & Duty of the States
1. State could not disclaim its rights to streambeds by using a more restrictive navigability test than the “Highway for Commerce” test
2. State has fiduciary duty to the public to maintain such lands

ii. Submerged Lands Act of 1953
1. Recognized State rights to navigable streambeds that existed in 1950
2. Reserved power of Federal government to undertake projects for flood control, power, navigation, etc.

1. Upheld state alienation of trust land for use as a private marina
2. Two Part Test:
   a. Is the grant in aid of navigation, commerce, or other trust purposes?
   b. Does the grant substantially impair the public interest in the lands and waters remaining?
3. There is no requirement of legislative action, BUT:
   a. Administrative action will be more closely scrutinized
   b. Administrative process must be open to the public
4. Factors the court will examine:
   a. the degree of effect of the project on public trust uses, navigation, fishing, recreation and commerce
   b. the impact of the individual project on the public trust resource
   c. the impact of the individual project when examined cumulatively with existing impediments to full use of the public trust resource
   d. the impact of the project on the public trust resource when that resource is examined in light of the primary purpose for which the resource is suited
   e. the degree to which broad public uses are set aside in favor of more limited or private ones

e. Valid Trust Purposes
1. Water rights on a lake were granted to LA at a time when the state water board believed it did not have the power to protect the Lake b/c the State had declared municipal use to be the highest use of water
2. Court orders an administrative reconsideration of the decision that takes into account public trust obligations, including preservation and conservation

1. Public trust resources must be open to all state residents on equal terms
2. City could not charge non-residents a higher fee to access the high beach because that prevented the public from having equal access to the wet sand and the ocean

f. Recreational Boating
   i. People v. Emmert (1979)
      1. Land under non-navigable rivers are subject to private ownership
      2. Private owners of streambeds have the right to control access to the water above their streambeds based on common law rule that “he who owns the surface of the ground has the exclusive right to everything which is above it.”
      3. Court finds that State Constitutional provision was meant to protect prior appropriations, not public access
      1. Interprets Montana Constitution to mean that if streams are subject to use for recreation then such uses are protected by the state constitution
         a. Includes a limited right of portage around obstacles

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2. The owner may make any use of his property which is consistent with public use and not calculated to interfere with the exercise of the right of the public to enjoy the public resource

   1. Alienation of park land in NY requires governmental approval
   2. Encouraging the construction of affordable housing is sufficient legislative approval

III. Water Law
a. Riparianism
   i. Restatement of Torts
      1. Riparian Land is a tract of land that borders on a watercourse or lake
         a. Unity of Title Rule: all adjacent tracts that are within the same watershed and held in common ownership are considered riparian if the border a natural watercourse at some location
         b. Rejects alternative Source of Title Rule: noncontiguous tracts can never regain their riparian status
      2. Liability exists for unreasonable use that harm’s another riparian owner’s reasonable use
      3. Reasonableness depends on balancing several factors:
         a. The purpose of the use
         b. The suitability of the use to the watercourse or lake
         c. The economic value of the use
         d. The social value of the use
e. The extent and amount of the harm it causes
f. The practicality of avoiding the harm by adjusting the use or method of use of one proprietor or the other
g. The practicality of adjusting the quantity of water used by each proprietor
h. The protection of existing values of water uses, land investments and enterprises
   i. An incorporation of some of the principles of prior appropriation
   i. The justice of requiring the user causing the harm to bear the loss
4. Does away with the watershed rule
   a. Water cannot be used outside of the watershed
ii. Other Common Law Elements of Riparianism
   1. Natural Flow Doctrine
      a. Riparian owner may only make use of the water in a way that will not alter its quantity or quality
   2. Reasonable Use Doctrine
      a. Riparian owner can only use the water in a reasonable way that does not interfere with the ability of another riparian user to use the water
   3. Ad-hoc, fact specific determinations of water rights
iii. Gordonsville v. Zinn (1921)
   1. Applies Watershed rule to prevent homeowner from pumping water to her dwelling because it is in a different watershed
iv. How do cities acquire water rights in a Riparian system?
   1. Right of reasonable use if any city land is riparian
   2. Eminent domain over riparian land
   3. Special authority from the legislature
   4. Long standing use may ripen into a right via prescription
v. Hoover v. Crane (1960)
   1. Court upheld an order allowing riparian farmer to take water from lake when the lake was low over objection of riparian resort owner
   2. However, use was limited and monitored – reasonableness is measured at level where it does not substantially decrease the ability of the Lake to be used for recreation
vi. Problems with Riparianism
   1. In times of shortage, no rights are guaranteed
   2. Uncertainty about water rights can stall development and investment
b. Prior Appropriation
   i. Common Law
      1. First in time is first in right
      2. Three traditional requirements for a water right
         a. Demonstrating an intent to appropriate water and providing notice
         b. Making a diversion of water from a natural source
         c. Applying the water to a beneficial use without waste
      3. Water needs are satisfied in order of temporal priority during shortage
      4. No watershed rule
      5. Water rights can be lost by failing to use them
ii. *Irwin v. Phillips* (1855)
   1. There is no watershed rule in prior appropriation.

   1. RJA destroyed a marsh, resulting in more flow in the stream
   2. Court holds that a reduction in consumptive use of tributary water cannot provide a water right independent of the prior appropriation system
   3. Court wants to avoid adopting a rule that would encourage widespread destruction of natural habitat

   1. Court holds that the “diversion” prong of prior appropriation can be met by merely controlling the water within its natural course by some structure (such as a dam)
   2. Court seems to be stretching the diversion requirement to meet modern recreational & environmental priorities

c. Regulated Riparianism
   i. Model Water Code (state permitting system)
      1. Proposed use must be reasonable
      2. Proposed withdrawal, combined with other withdrawals will not exceed the safe yield of the water source
   
   ii. Florida’s Statute
      1. Use must be reasonable & beneficial
      2. Use must not interfere with any existing legal water use
      3. Use must be consistent with the public interest
         a. Fourteen administrative criteria for a permit. (p.869)
   
      1. Compensation for a “taking” of water rights is not required for a system that merely regulates riparian rights

   1. Upheld State’s regulation of Riparianism, even as to uses which predated the start of the permitting program

d. Groundwater
   i. Prior Appropriation (western states)
      1. Protects senior groundwater pumpers from harm caused by junior pumpers
   ii. Reasonable Use (eastern states)
      1. Allows pumping for any beneficial use
      2. Generally can pump as much groundwater as you please for use on the land above the groundwater and can use it reasonably on other land
   iii. Correlative Rights
      1. Groundwater rights are divided among the owners of the land above the aquifer by percentage of land each owner holds
   iv. English Rule
      1. Absolute ownership: landowners may pump whatever quantity of groundwater that can be extracted
      2. No limit on waste
   v. Restatement
      1. Landowner may withdraw groundwater for a beneficial purpose unless:
         a. The withdrawal causes unreasonable harm by lowering the water table or reducing artesian pressure
b. The groundwater forms and underground stream  
c. The withdrawal has a direct and substantial effect upon the water of a watercourse or lake

1. Court adopted Restatement position, limiting groundwater use to beneficial purposes

e. Federal Reserved Water Rights  
i. *Winters v. United States* (1908)  
1. When federal government created Indian Reservations, it implicitly reserved such water rights as the reservation might require to become a more “pastoral and civilized people.”  
2. Could have large implications as Reservations seek opportunities for economic development  
3. Some argue *Winters* is limited to agricultural use or that subsequent treaties limited Indian water rights

1. When determining what water rights Congress reserved you look to the purpose of the reservation.  
2. National Forests were created to conserve water & timber  
   a. Not to provide for recreation and wildlife  
3. Therefore, no reserved water right in a National Forest to protect recreation or wildlife

IV. **Wildlife Law**  
a. Overview  
i. Levels of Diversity  
1. Genetic Diversity (diversity within a species)  
2. Species Diversity (different species in an ecosystem)  
3. Ecosystem Diversity (diversity among ecosystems & regions)  

ii. Reed Noss  
1. Argues that ecosystem complexity is not well understood and we should err on the side of preservation  
2. Argues for a shift in the burden of proof, requiring proponents of development to prove lack of environmental harm

iii. Federal Conservation Efforts  
1. Endangered Species Act protects a very narrow group  
2. National Parks/Forests, etc. protect larger areas, but are often no broad enough to encompass an entire ecosystem

b. Constitutional Foundations of Federal Wildlife Law  
i. Wildlife & Commerce  
   a. State owns wildlife in trust for the benefit of the people  
   b. Upheld ban on transport of game birds out of state, rejecting dormant commerce clause argument  
   c. Police power rationale – the power to protect articles of food from contamination must include the power to preserve a common food supply  
   a. Formally overruled *Geer*
b. Adopted dissent view in *Geer*, State holds game in trust and may regulate it, but not in a way that offends the commerce clause

ii. The Treaty Power
   1. *Missouri v. Holland* (1920)
      a. Migratory Bird Treat Act protected certain migratory birds
      b. Court rejected MO’s argument that the 10th Amendment prevented federal regulation of wildlife
         i. State did not actually possess the wildlife
      c. Court held that treaties may be made so long as they do not contravene any prohibitory words in the Constitution

iii. The Property Clause
   1. The Property Clause – Art. IV, §3, cl. 2
      a. The Congress shall have power to dispose of and make all needful Rules and Regulations respecting the territory or other property belonging to the United States
      a. Property & Supremacy clauses allow the Federal government to override conflicting state law regarding wildlife on federal land
      b. The power over public land entrusted to Congress is without limitations
      c. The complete power that Congress has over public lands necessarily includes the power to regulate and protect wildlife living there

iv. The Commerce Clause
      a. Plaintiff argued that after *Lopez*, the ESA could not constitutionally be applied to protect a species of fly existing entirely in one state without present commercial value
      b. Channels of Interstate Commerce
         i. Court holds that federal government has power to prevent immoral injurious uses of the channels of interstate commerce
         ii. Preventing the “take” of any endangered species advances that goal
      c. Substantial Effect on Interstate Commerce
         i. Each time a species becomes extinct the nation loses a resource
         ii. Even non-commercial species have “option” value, reflecting the potential for future uses
      a. Upholds ESA as applied to the Red Wolf based on substantial impact upon interstate commerce
         i. e.g. Red Wolf related tourism, research, etc.
c. The Endangered Species Act (ESA) (1973)
   i. Definitions & Overview
      1. Statutory Organization
         a. §4 Listing
         b. §7 Consultation/Jeopardy
         i. Applies to federal government action
c. §9 Take Prohibition
   i. Applies to everyone

2. Endangered Species
   a. Any species which is in danger of extinction throughout all or a significant portion of its range

3. Threatened Species
   a. Species which may become endangered in the near future

4. Fish & Wildlife vs. Plants
   a. Plants receive less protection

5. Species
   a. Three levels for designation as endangered
      i. Species
      ii. Sub-species
      iii. Distinct Population Segment
          1. Three Elements: (p.772-73)
             a. Discreteness: is it different?
             b. Significance: is it important?
             c. Status: conservation status in relation to standards for listing

6. What is a Take?
   a. To harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, collect or to attempt to do any of these things

7. Critical Habitat
   a. Areas that are:
      i. Essential to the conservation of the species AND
      ii. Which may require special management considerations or protection

8. Who Carries out the ESA?
   a. Dept. of Interior – via Fish & Wildlife Service (FWS)
   b. Dept. of Commerce – via National Marine Fishery Service (NMFS)

ii. Listing (§4)
   1. Statute
      a. Directs the Secretary to use five factors in making listing decision:
         i. The present or threatened destruction, modification, or curtailment of habitat or range
         ii. Over-utilization for commercial, recreational, scientific, or educational purposes
         iii. Disease or predation
         iv. Inadequacy of existing regulatory mechanisms
         v. Other natural or manmade factors affecting its continued existence
      b. Secretary is required to use the best scientific and commercial data available
      c. Critical Habitat:
         i. Secretary shall designate critical habitat
         ii. However, Secretary may exclude any area if benefits of exclusion outweigh benefits of inclusion
1. Economic impact can be considered
   iii. Secretary must list an area as critical habitat if not doing so will result in extinction

2. Listing Petitions
   a. §553(e) of the ESA allows anyone to file a petition seeking to have a species or critical habitat listed
   b. 90 days to determine if further investigation is warranted
   c. 12 months to make a decision
      i. FWS can decide that the listing is:
         1. Not Warranted
         2. Warranted
         3. Warranted but Precluded (Agency is too busy with other priorities to take action)
   d. This is a final order that can be challenged in court under the APA’s “arbitrary and capricious” standard

3. Recovery Plan
   a. Required for each listed species
   b. Lists steps to get a species off the list, including time and cost estimates
   c. Ongoing litigation about whether the plans are binding on the FWS
   d. Species are monitored for five years after being removed

   a. Court challenge to a DPS listing
      i. Court finds the DPS Discrete
         1. A population is discrete if it is markedly separated from other population of the same taxon as a consequence of physical, physiological, ecological, or behavioral factors or it is delimited by international governmental boundaries within which differences in control of exploitation, management of habitat, conservation status or regulatory mechanism that are significant.
      ii. Court finds a difference in conservation Status
          1. Lower number of the animals in the U.S.
      iii. Court finds a lack of Significance
          1. Accepted FWS argument that a “gap” in the range can occur at the edges of the range, BUT
          2. Rejected argument of significance based on international boundary and lack of genetic difference between Mexican and Arizona owls

   a. Secretary sought to avoid listing by entering into “conservation agreements” to protect the lizard on certain private lands
   b. Court found that because 82% of the lizard’s range was still vulnerable to extinction that a “substantial portion of its range” was at risk and a listing was warranted
   iii. Consultation, Jeopardy, & Adverse Modification (§7)
      1. Scope
a. §7 applies to any activity on federal land that could affect a listed species
b. Applies when a federal agency funds, authorizes or carries out an activity

2. Process
   a. Agency asks FWS whether any protected species is present
      i. If No, consultation ends
      ii. If Yes, step 2…
   b. Agency prepares a “biological assessment” to determine whether the species are likely to be affected
      i. If No adverse affect found then…
         1. FWS comments on the process (the Agency generally defers to FWS), If FWS agrees with no adverse affect finding then formal consultation is not required
         2. This action may be challenged as “arbitrary & capricious”
      ii. If Yes, step 3…
   c. Agency must formally consult with FWS, FWS prepares a “biological opinion” – states whether the proposed action would jeopardize the species or destroy or adversely modify critical habitat
      i. No Jeopardy Finding
         1. FWS may still require mitigation/enhancement measures
      ii. Jeopardy Finding
         1. FWS proposes reasonably prudent alternatives that avoid jeopardy (RPAs)
   d. Agency is not legally bound by the Bi-Op, but it ignores it at its own peril
   e. Once consultation begins, the agency may not make any irreversible or irretrievable commitment of resources to the project

3. The Endangered Species Committee (“The God Squad”)
   a. May allows exemptions from §7 if:
      i. There are no reasonable & prudent alternatives
      ii. The benefits of such action clearly outweigh the benefits of alternative coruses of action
      iii. The action is of regional or national significance
      iv. No irreversible or irretreivable commitment of resources has been made
      v. It establishes reasonable mitigation and enhancement measures necessary to minimize adverse effects

   a. After $100m had been invested in a dam, an endangered fish was found in the surrounding waters
   b. Court held that ESA did not allow for exceptions to §7
   c. Led to creation of the God Squad

iv. The Take Prohibition (§9)
1. §9(a)(1) Prohibits the “take” of any endangered fish or wildlife
   a. Protection extended to threatened species via administrative regulations
   b. No prohibition on destruction of critical habitat
2. §9(a)(2) Endangered Plants
   a. Prohibits commercial use, destruction of plants on federal land, destruction of a plant protected by state law, destruction of plants on the property of another if that action would constitute a criminal trespass under state law
   a. Court holds that “harm” can include habitat modification or degradation
   b. O’Connor concurs, but claims that §9 is limited by proximate causation principles
   c. Scalia dissents arguing that §9 protects individual animals, not the species as a whole
   a. Court held that before FWS can issue an ITS it must prove that the listed species actually exists on the land and that there is a reasonable likelihood of a take occurring
5. Incidental Take Statements (ITS) (§10)
   1. Allows the “take” of protected species when:
      a. Action is for scientific purposes (experimental populations)
      b. Action is incidental to an otherwise lawful activity
         i. Applicant must submit a conservation plan, stating:
             1. Impact of the take
             2. Minimization and mitigation steps
             3. Alternatives and why they were not chosen
             4. Other necessary measures
         ii. Secretary must:
             1. Allow for public comment
             2. Find that the take will be incidental
             3. Find that applicant will minimize & mitigate
             4. Find that applicant has funds to carry out the plan
             5. Find that the take ill not appreciably reduce the likelihood of the survival and recovery of the species
             6. Find that other necessary measures will be carried out
6. Penalties & Enforcement (§11) (p.808-809)
   1. Strong citizen suit provisions
   2. Civil & Criminal penalties
      a. General Intent – ESA requires only intent to engage in the underlying act, not intent to “take” an endangered species

V. Federal Lands
   a. Historical Background
      i. Sources of Federal Authority:
1. The enclave clause – Art. I, §8, cl. 17
2. The property clause – Art. IV, §3, cl. 2

ii. Withdrawal
   1. Removal of a piece of public land from the operation of general public land laws
   2. Congress may withdraw land, but often associated with executive action
   3. Federal Land Policy & Management Act of 1976 (FLPMA) limits presidential authority to withdrawing 5k acres for 20 years without Congressional approval

iii. Reservation
   1. Commitment of a particular piece of public land to a specific purpose
   2. Usually done by Congress

iv. The Federal Public Domain
      a. Submerged lands in Alabama belong to the state, not to the federal government
      b. Equal footing doctrine requires that when Alabama became a state it should have the same rights to submerged lands as the existing states
      a. Court rejected argument that Equal Footing Doctrine only allowed the U.S. only to hold land in trust for the creation of future states (condition of original land grants from colonies to U.S. government)
         i. EFD does not apply to dry land
         ii. EFD applies only to political rights & sovereignty, not to economic or physical characteristics
   3. Beginning with Ohio, each enabling act creating a state contained a disclaimer surrendering the state’s claim to federal public lands within its borders

v. Land Grants to States
   1. From 1803 forward, admission to the Union came with an endowment of public land intended to assist the state in developing its own institutions, primarily educational
      a. Court found that Congressional land grant to Colorado did create a “trust” with three conditions:
         i. Sole and exclusive beneficiary must be the “common schools”
         ii. Sole method of disposal is public sale
         iii. Funds must be exclusively and permanently dedicated to the support of common schools
      b. Court holds that reserving 10% of the land for conservation did not violate trust

vi. Grants to Private Parties
      a. Foust appealed a decision from the Interior Board of Land Appeals that refused to correct a mistake about which plot of land his home was built on
b. Court holds that a mutual mistake of fact can be corrected by exchanging the parcel actually deeded to the private party for the one the U.S. and the party intended to deed.
c. It does not matter if the exchanged land is less valuable.

vii. Federal Management
   1. United States v. Grimaud (1911)
      a. Upheld delegation of site specific management to administrative agencies

b. The Property Clause (Federal Authority and Ownership)
   i. Camfield v. United States (1897)
      1. Congress has a power over its own property analogous to the police power of the States
      2. Congress may order the abatement of a nuisance, even if the nuisance is occurring on adjoining private property

   ii. Leo Sheep Co. (1979)
       1. Federal government does not possess an implied easement over private land to access federal land in a checkerboard arrangement

   iii. Kleppe v. New Mexico (1976)
        1. The Property Clause power over public lands is without limitation
        2. This complete power includes the power to regulate and protect the wildlife there, even if the wildlife stray onto private land

        1. Congress has the power to ban motorboats on state waterways when it determines that their use would harm the adjoining federal land
        2. Determinations under the Property Clause are entrusted to Congress
           a. Law must protect a fundamental purpose of the federal land
           b. Restrictions must reasonably relate to that end

c. Federal Agencies
   i. The Legal Framework for Federal Land Management
      1. Organic Acts
         a. Focus on issues pertinent to the management of all lands within a particular system
         b. Usually require management decisions to be consistent with the comprehensive plan

      2. Enabling Acts
         a. Create specific areas and may impose specific standards or limits on the areas management

         a. APA claim can only proceed if the plaintiff asserts that the agency failed to take a discrete agency action that it is required to take
         b. Court holds that while the statute give a clear object (maintain the area so as not to reduce its potential for use as a wilderness) it gives wide discretion in how to reach that goal
         c. General deficiencies in compliance lack the specificity required
         d. Projections set forth in land use plans are no legally binding commitments that are enforceable under the APA

   ii. Judicial Review of Agency Action under the APA
        1. The Administrative Procedure Act (APA)
a. Rulemaking: process for formulating, amending or repealing a rule (statement of a general or particular applicability and future effect)
b. Adjudication: includes licensing, permitting
c. Formal vs. Informal: formal action required only when a statute requires that the agency act on the record after a hearing
d. Requires agencies to do rulemaking in a way that gives interested persons and opportunity to participate

2. The Right to Judicial Review
a. Judicial review of final orders if available, Except when:
   i. Statute precludes it
   ii. Decision is committed to agency discretion
b. Standing
   i. A person suffering a legal wrong or adversely affected or aggrieved by agency action
   ii. Seeking relief other than money damages
   iii. Must specify the Federal officer by name or title
c. Scope of Review
   i. The reviewing court shall:
      1. Compel agency action unlawfully withheld or unreasonably delayed
      2. Set aside actions that are:
         a. Arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law
         b. Contrary to constitutional right, power, privilege, or immunity
         c. In excess of statutory jurisdiction, authority, or limitations
         d. Without observance of procedure required by law
         e. Unsupported by substantial evidence (where a hearing is required)
         f. Unwarranted by th facts
   3. Party seeking review must show that error had a materially adverse impact
   i. Final agency action is subject to judicial review
   ii. Agency must be able to explain its decision
   iii. “Committed to agency discretion” is a narrow exception for rare instances where statutes are drawn in such broad terms that there is no law to apply

   i. Upheld closure of certain areas to snowmobiling under an APA challenge based on several specific incidents and anecdotal evidence that harassment of wolves was occurring
i. Upheld closure of certain areas based on extensive, but non-scientific surveys of park users

i. An agency rule is arbitrary and capricious
   1. If the agency has relied on factors which Congress has not intended it to consider
   2. Entirely failed to consider an important aspect of the problem
   3. Offered an explanation for its decision that runs counter to the evidence before the agency
   4. is so implausible that it could not be attributed to a difference in view or the product of agency expertise

d. “Hard Look” Review
   i. Court should take a rigorous, hard look, at how the agency arrived at its decision

4. Judicial Review of Agency Interpretation of Statutes
i. *Chevron* requires that if the statute is silent or ambiguous, the court should defer to the agency’s interpretation, if it is a permissible one
   ii. However, positions taken during litigation are not deserving of *Chevron* deference
   iii. *Skidmore* deference – entitle to respect but weighed according to the strength of its reasoning and past pronouncements (persuasive, not controlling)

4. National Forests
   i. Forest Service Organic Act of 1897
      1. Allowed President to establish National Forests
         a. Purposes
            i. Protect the water supply
            ii. Protect the timber supply
            iii. Furnish a continuous supply of timber for the nation
      ii. The Pinchot Letter (1905)
         1. Written when forests were transferred from interior to agriculture
         2. Greatest good of the greatest number in the long run
         3. All forest resources are for use, under such restrictions only as will insure the permanence of these resources
         4. Used for the benefit of the home builder first of all
         5. Local questions will be decided upon local grounds, the dominant industry will be considered first
      iii. The Multiple Use-Sustained Yield Act (MUSYA) of 1960
         1. Officially included Forest Service’s responsibilities to include outdoor recreation, range, fish, and wildlife
         2. These purposes are supplemental to, and not in derogation of the Organic Act purposes
         3. Referenced the Pinchot Letter, said the bill would continue that policy
         4. Sustained-Yield
a. Achievement and maintenance in perpetuity of a high-level annual or regular periodic output of the various renewable resources of the national forests without impairment of the productivity of the land

   1. Held that Organic Act prohibited clearcutting
   2. Statute requires that each tree must be marked before it can be cut

v. National Forest Management Act (NFMA) of 1976 (p. 335)
   1. Required long-range planning and use of outside scientific expertise
   2. Limited timber harvests to lands where:
      a. Soil, slope, or other watershed conditions will not be irreversibly damaged
      b. There is assurance that such lands can be adequately restocked within five years after harvest
      c. Protection is provided for streams, streambanks, shorelines, lakes, & wetlands
   3. Allowed clearcutting only where:
      a. It is the optimum method
      b. Appropriate to meet the land management plan
      c. Biological, environmental, esthetic, economic impacts have been assessed

vi. The Planning Idea
   1. Overview
      a. NFMA requires the development of “land and resource management plans” (LRMPs or Forest Plans)
      b. Two-tiered decision making process
         i. Broad Forest Plan
         ii. Application of the Forest Plan to individual projects
      a. Specific mandates in an act creating an area trump the broader NFMA mandate
      b. Thus, action that would have increased overall diversity but harmed a specifically protected group of wildlife was impermissible
      a. Court rejected logging interests challenge to a Forest Plan on the grounds that they had failed to quantify the increase in wildfire probability
      b. Allowed selection of plan that provided 70% habitat for threatened species over plan that provided 69% (but with more logging)
      a. NFMA requires the Forest Service to provide for and maintain diversity
      b. This does not require the Service to use “conservation biology”, the Service is entitled to use its own methodology, unless it is irrational
a. Local interests came together to develop a forest plan that was acceptable to all the local interests (economic & environmental)
b. Criticized for not allowing national interest groups a major role

vii. The Standards Idea
1. NFMA contains some specific standards
   a. Especially regarding timber harvests and clearcutting
   a. Held that NFMA only allowed clearcutting in exceptional circumstances
   a. Held that clearcutting was not available only in exceptional circumstances, there are just certain substantive restrictions
   b. Decision to use clearcutting as part of an overall management plan is subject to narrow arbitrary and capricious standard of review
   a. When clearcutting NFMA requires conservation of soil and water resources
   b. Forest service failed to meet this obligation because it was not even collecting the data it would need to know if soil and water were being protected
   a. Although NFMA allows the Service to take actions anywhere along the continuum between preservation of the status quo on one end and eradication of species on the other, this discretion is not unbridled
   b. NFMA contains substantive requirements that a court may enforce via an injunction
   a. Held that “programmatic” challenges are not justiciable
   b. Plaintiffs must identify a final agency action that marks the consummation of the agency’s decision-making process, not simply demand a general judicial review of the Service’s day-to-day operations

e. National Parks
   i. The National Park Service Mandate
      1. The National Parks Organic Act of 1916 has two often conflicting mandates
         a. Conserve the scenery and the natural and historic objects and the wild life therein (Preservation)
         b. Provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations (Public Use)
            i. Unimpaired language in Public Use mandate means preservation ultimately trumps public use
      1. Secretary has a fiduciary duty to protect park resources, failure to spend $2.8m allocated for protecting the Park was a judicially recognizable abuse of discretion
a. This type of injunction would be difficult to sustain under Scalia’s Norton opinion

1. When there is a conflict between conservation and public enjoyment, conservation is to be predominant
2. When the Agency makes a 180 degree reversal at the time of a change in administration it is subject to a higher degree of scrutiny

f. National Monuments
   i. The Antiquities Act of 1906
      1. Congress granted the president the power to carve out of general public lands “the smallest area compatible with the proper care and management” of historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest.
      2. Language in House Reports and Floor Statements that it was intended to reserve “small” areas
   ii. State of Wyoming v. Franke (1945)
      1. State challenged presidential creation of Jackson Hole National Monument (221k acres)
      2. Scope of review of Presidential discretion is limited:
         a. If there be evidence in the case of a substantial character upon which the President may have acted in declaring that there were objects of historic or scientific interest included within the area, it is sufficient upon which he may have based a decision.
         b. Arbitrary and capricious review
      3. Congress can always take bake power if it feels it is being abused
      1. Challenge to designation of Grand Staircase-Escalante National Monument (1.7m acres)
      2. The broad grant of discretion to the President generally precludes judicial review
         a. Court may only ask whether the President in fact exercised the authority that was delegated to him
         b. Rejects inquiry into motives of President (ostensibly to prevent mining operations)

 g. Wilderness Areas
   i. The Wilderness Act of 1964 (p. 553)
      1. Only Congress may designate a “wilderness” area
      2. Statutory Definition of Wilderness
         a. Undeveloped federal land
         b. Appears to have been affected primarily by the forces of nature, with the imprint of man’s work substantially unnoticeable
         c. Has outstanding opportunities for solitude or a primitive and unconfined type of recreation
         d. Has at least 5k acres
         e. May also contain other significant features
      3. No commercial enterprises or permanent roads are allowed
   ii. Parker v. United States (1971)
      1. The Secretary’s duty to study & recommend suitable areas for wilderness designation is mandatory
2. No impairment of the status quo can occur to areas contiguous to existing wilderness areas until a decision has been made at the Presidential level


1. Non-profit association could not stock a lake in a wilderness area because it was a commercial enterprise

2. Whether an activity is commercial turns on an assessment of the “purpose and effect” of the activity
   a. Here the purpose and effect were to aid commercial fishermen on rivers connected to the lake

VI. **Conservation on Private Lands**

a. Land Trusts
   i. Conservation organizations that focus on engaging in direct land transactions with private owners with the goal of protecting land permanently

ii. Tax Deductions
   1. Requirements for Tax Deduction
      a. A qualified real property interest
         i. The property in fee
         ii. A remainder interest
         iii. A restriction on use of the property
      b. To a qualified organization
         i. See #2 below
      c. Exclusively for conservation purposes
         i. Preservation of land for outdoor recreation or education
            1. Public must have regular access
         ii. Protection of natural habitats for fish and wildlife
            1. Habitat must be significant
         iii. Preservation of open pace
            1. Pursuant to federal, state, or local program
            2. Scenic enjoyment
               a. Development would impair scenic character of the local landscape
         iv. Preservation of historic land or structures
            1. On the national register of historic places
   d. In perpetuity

2. Requirements for Land Trusts to maintain tax exempt status
   a. Avoid any action which inures to the benefit of any private shareholder or individual
   b. Avoid political campaign activity
   c. Not engage in substantial lobbying
   d. Meet the public support test (requires that a substantial part of the organization’s support comes from the general public)

   a. A conservation easement is not tax deductible if the grantor retains a right to surface mining
   b. Removing large amounts of sand and gravel for construction was “surface mining” within the meaning of the statute

b. Conservation Easements
i. Legal agreement between a landowner and a land trust that protects – usually in perpetuity – the land’s important conservation values but leaves the property in private ownership and use
   1. Usually requires some sort of state authorizing statute to eliminate common law impediments to placing restrictions on the use of real property

ii. Uniform Conservation Easement Act
   1. Nonpossessory interest
   2. Of a holder
      a. Must be a qualified government body or charitable organization
   3. In real property
   4. Imposing limitations or affirmative obligations
   5. The purpose of which include:
      a. retaining or protecting natural, scenic, or open-space values of real property,
      b. assuring its availability for agricultural, forest, recreational, or open-space use,
      c. protecting natural resources,
      d. maintaining or enhancing air or water quality, OR
      e. preserving the historical, architectural archaeological, or cultural aspects of the property

   1. Current owner claimed that when a prior owner gifted the land and an easement at the same time to a conservation group the easement was eliminated by the doctrine of merger
   2. Court avoids a technical analysis and instead focuses on the intent of the grantor, finding that the conservation easement is valid

   1. Court upheld Tax Board decision denying tax break based on clause in easement did not specify exactly how much land could be used for the family residence nor whether it could be relocated

   1. Court reversed its decision in Parkinson I, allowing the tax deduction