

# Environmental Law

Professors Boyer, Meidinger, and Shannon

## **Final Examination**

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### **Instructions**

1. This is an open book examination. While taking it, you may have with you and consult the assigned course readings, and any personal written, typed, or photocopied notes or outlines. You may not use a computer while taking the exam. You may not consult any written sources other than those listed in the previous sentence, and you may not consult or discuss the exam with anyone until you have turned in your answers. Even after the exam is over, be careful in discussing it with others: some students may have gotten permission to take the exam late due to illness, schedule conflict, etc. You are on your honor and are subject to the rules of the Law School Honor Code.
2. The exam consists of 10 pages of questions numbered consecutively. Make sure no pages are missing.
3. The exam consists of 20 short-answer questions, each worth 3 to 8 points, for a total of 100. It is divided into two parts, each worth 50 points. Part One begins with a long fact pattern, and the questions in this part are based on the fact pattern. Part Two does not have a separate fact pattern; any facts you need to answer the questions will either be provided in each individual question, or available from the course readings, lectures, and discussions, or some combination of the two. When a question calls for a true-false or yes-no response, you must choose one or the other and circle it. You can then justify or qualify your choice in the explanatory part of your answer.
4. As is customary in law school exams, the questions generally track contemporary controversies, but facts may have been changed for testing purposes. Therefore, you should assume that the facts given in the questions are accurate (even if they are biologically, geographically, politically, or otherwise implausible), and frame your answers accordingly. As usual, your reasoning and analysis in reaching a conclusion in an open-ended short-answer question are more important than the conclusion itself.
5. You have 3 hours to complete the exam.
6. Good luck!

**Part One.** The questions in this part are based upon the following fact pattern, and any additional facts that may be given in individual questions.

Facts. In Western Idaho on the lower Snake River, not far above the confluence of the Snake with the Columbia River, is a mountain lake called Mallard Lake, which is the epicenter of a long-running environmental controversy. Mallard Lake sits in a high mountain valley, in the Wallowa-Whitman National Forest. The lake, which lies at an elevation of about 7,000 feet, is fed by snowmelt from the surrounding mountains to the east, which rise 1,500-2,000 feet above the lake (that is, the peaks go up to 8,500 to 9,000 feet). These mountains are within the National Forest, and above about 7,500 feet, the land is part of a Congressionally-designated wilderness area, the David Brower National Wilderness. Mallard Lake drains to the west through Mallard Creek, initially across a gently sloping valley floor for about a mile. The creek then flows down a steep slope into Lost Canyon, which drops more than five hundred feet over the next four miles through a series of riffles and pools. However, after the first mile of Mallard Creek's course down Lost Canyon, the National Forest ends and other landholdings begin--notably, a Nez Perce Indian Reservation and a miscellany of privately-owned property. As it emerges from Lost Canyon, the creek drops over a series of rapids and cascades into the Snake River, within the Hells Canyon National Recreation Area.

In the nineteenth century, Mallard Lake supported a large run of sockeye salmon, which spawned in gravel beds along Mallard Creek and then swam into the lake to mature before migrating. Unlike other salmon species, sockeyes spend the first year of their life in freshwater lakes, migrating downriver in their second spring to mature at sea and then returning to their home stream several years later to spawn. The Mallard Lake Sockeye run fared badly from development, in part because of their life cycle. Because they were larger when they migrated downstream than the smolts of other species, Mallard Lake Sockeye were more vulnerable to being sliced and diced in the generating apparatus of hydropower facilities on the river. They were also heavily fished by recreational anglers and, of course, commercial fishing interests and other predators as they moved from their feeding grounds in the ocean back into the river system to seek out their spawning grounds. There was also some siltation of their spawning beds as logging and vacation-home development ate away at the forested lands along Lost Canyon. By 1992, spawning populations had dropped low enough that the Mallard Lake Sockeye were listed as "endangered" under the Federal Endangered Species Act. Their critical habitat was designated as Mallard Lake, and the adjacent downstream four miles of Mallard Creek (that is, two miles in the National Forest, and two miles outside). The critical habitat includes the land where the Nez Perce reservation is located. The recovery plan subsequently developed called for a ban on fishing for the sockeye in Mallard Lake, Mallard Creek, and one mile of the Snake River downstream of the confluence with Mallard Creek, along with careful population counts of the salmon returning to spawn in Mallard Creek each year. In addition, logging was prohibited within a thousand feet of Mallard Lake and Creek.

The major group petitioning and lobbying for the designation of the Mallard Lake Sockeye in the '90s was a nonprofit environmental and sportsmen's organization called Friends of the Snake Sockeye Salmon (FOSSS). Their avowed goal is to rebuild the Mallard Lake Sockeye runs to the levels recorded in the late nineteenth and early twentieth centuries. In pursuit of this goal, they have supported measures such as the proposed breaching of the lower Snake River dams that would benefit the salmon, and have also opposed all development and logging in the watershed of Mallard Creek, with mixed results. However, despite the endangered species listing, things have not gone well for the Mallard Lake Sockeye. Populations continued to drop, until last spring only about two dozen fish were observed returning to their historic spawning grounds. In late November, responsible federal agencies--the National Marine Fisheries Service, the US Fish and Wildlife Service, and the Forest Service--met to review the biologists' findings, and promptly issued Joint Declaration of Emergency for the Mallard Lake Sockeye. Along with the declaration, the agencies issued a decision revoking the old recovery plan and promulgating a Revised Interim Recovery Plan. The Revised Interim Plan noted that "because the populations of Mallard Lake Sockeye have declined to a point where natural recovery processes are highly unlikely to prove successful, and extraordinary measures to preserve this population segment are warranted, it is necessary to rely upon captive breeding to assure the continued survival of this population. This strategy has proven successful with other endangered species such as the Black-footed ferret and the California condor. Accordingly, effective immediately, responsible agencies will seek to capture and transfer all returning Mallard Lake Sockeye to a captive breeding facility suitable to increase the populations to the point where they may be re-introduced into their historic range."

FOSSS, which had been in frequent contact with the agencies regarding the recovery plan, was taken by surprise and immediately sent a letter of protest to the agencies, asserting that the recovery plan should not be adopted without full public participation and scientific peer review. Their dismay deepened the following day when a major development project was proposed for the Lost Canyon area. The Idaho Tourism Commission announced that an upscale resort, called Lost Canyon Lodge, was to be built on private land just downstream of the National Forest, adjacent to the Nez Perce reservation. The project, which was to be undertaken by Global Reach, Inc., a multinational leader in the recreation and tourism field, would feature a 300-bed rustic lodge, along with another 250 beds in rustic cabins scattered around the 387-acre parcel purchased by Global Reach. The main lodge was projected to be located on the banks of Mallard Creek, on a point of land overlooking a picturesque series of cascades. In keeping with the resort's theme of "rustic elegance," the main lodge and the guest cabins would all be built in a "log cabin" style.

To get the logs for the cabins and lodge, Global Reach would clear as much of its own land as necessary to build the structures and infrastructure. Since that would not come close to meeting their full requirements for logs, Global Reach

purchased rights to a timber sale contract, Mallard Lake No. 5, which had been obtained from the Forest Service by Boise Cascade just before the listing of the Mallard Lake Sockeye as endangered. The Mallard Lake No. 5 timber contract involves a strip of land between Mallard Lake and the David Brower Wilderness, and includes a 200-foot buffer zone both on the lake (downhill) side, and uphill between the wilderness and the timber harvesting area. It is predominantly old-growth Ponderosa pine forest, with some lodgepole pine on the higher elevations. Slopes in the timber harvest area are fairly steep, between 25 and 45%. The sale was consistent with the Wallowa-Whitman Forest Plan, adopted in 1989, and was subjected to an environmental assessment and Finding of No Significant Impact (FONSI) when the timber sale contract was entered in 1990.

Global Reach also entered a contract with the Nez Perce Reservation (hereafter referred to as NPR). Under this contract, the company would fund NPR to build a fish hatchery and captive breeding facility. NPR would also receive exclusive rights to serve as fishing guides for guests at the resort, and would agree in turn to use a portion of their treaty fishing rights for the benefit of guests at the resort. The NPR on Mallard Creek were signatories to a treaty in the 19<sup>th</sup> century which affords them the right to take fish “on their reservations, and at their usual and accustomed fishing places in common with the citizens of the state.”

The captive breeding facility envisioned by the contract would consist of a series of ponds connected to the creek, which would progress from freshwater for rearing juvenile salmon to salt-water ponds managed to replicate ocean conditions for adult fish. Under the contract with Global Reach, NPR would agree to operate the hatchery-captive breeding facility according to the terms of a memorandum of understanding executed on the same day by NPR, Global Reach, the state Department of Fish and Game, the US Fish and Wildlife Service and the National Marine Fisheries Service. The memorandum of understanding (MOU), which extends for seven years and is subject to revision or renewal by mutual agreement of the signatories (i.e., NPR, Global Reach, and the three agencies previously mentioned), provides that the NPR can capture any Mallard Lake Sockeye returning to spawn during the period that the agreement is in effect by placing nets or other structures in the creek, provided that NPR uses the fish for a captive breeding program to restore viable populations of the Mallard Lake Sockeye runs. The memorandum also states that fish raised in the captive breeding facility may be re-introduced to the wild once the participating agencies agree that the captive-bred population is sufficiently large to have a reasonable probability of establishing viable self-sustaining populations in the wild. The agencies further agree to provide advice and technical assistance in the operation of the facility. Finally, the MOU states that the NPR may use the hatchery to breed and release chinook salmon into Mallard Creek, which they may capture from a nearby stream that has a viable run of spring chinooks. Evidently the intent is to increase and diversify the fishery for the benefit of the NPR and their future clients from the resort, by establishing in Mallard Creek a run of salmon that would not

compete directly with the local sockeyes (chinooks travel downstream to the sea as smolts, rather than maturing in a lake as the sockeyes do).

The Idaho Tourism Commission press release announcing these agreements describes them as “an historic public-private partnership to safeguard the future of an important endangered species, and an outstanding example of ecologically responsible economic development.” FOSSS is considerably less enthusiastic about the agreement; they issued a press release describing it as “a secret backroom deal that is literally a death sentence for the Mallard Lake Sockeye Salmon.” Shortly thereafter, they wound up in your law firm’s office, posing a series of questions about their legal options if they decide to fight this proposal. Please answer the following questions, being careful to include a brief summary of the reasoning behind your advice.

1. What plausible arguments would FOSSS have for the proposition that an environmental impact statement under NEPA would have to be prepared before the timber sale contract purchased by Global Reach could be executed? What counter arguments could they expect from the company and/or the Forest Service? (7 points)
2. Under the old biodiversity regulations of the Forest Service, (i.e., assuming they still applied to this controversy) what obligation would the agency have to preserve the Mallard Lake Sockeye when (a) carrying out the timber sale, and (b) signing the Memorandum of Understanding? (7 points)
3. How might the new planning regulations recently issued by the Forest Service change future decisions affecting the Mallard Lake Sockeye? (7 points)
4. Under relevant Supreme Court precedents, what is the likely scope of the Nez Perce Reservation’s fishing rights on Mallard Creek and Lake? (7 points)

5. Mallard Creek currently has excellent water quality, but FOSSS is worried that several aspects of the proposed development will degrade its waters, to the detriment of the salmon. First, land clearing for the resort may allow silt to wash into the stream, and clog the spawning beds in the creek. Second, building on the edge of the stream will increase runoff, and thereby put more silt and other pollutants into the stream; the group's position is that at least a 200-foot setback or buffer zone along the creek should be required. Finally, wastewater from the lodge and cabins will be handled through a series of septic fields, and in light of what they know about the soils of the area, FOSSS is worried that in wet weather the septic fields will overflow and be carried into the stream by surface runoff. The group has heard that under the Federal Clean Water Act, the only way to deal with 'nonpoint' sources of this kind is through a process called TMDLs (total maximum daily loads), but environmentalists in other groups have told them that the process is probably not worth pursuing in a situation like Mallard Creek. Do you agree or disagree? Why? (8 points)
6. Apart from TMDLs, if the development goes forward as planned, what common-law remedies (if any) might FOSSS have if their fears of degraded water quality turn out to be well-founded? (7 points)
7. At the press conference announcing the proposed development, a reporter asked the Global Reach spokesperson whether the construction of the resort along the creek wouldn't prevent the re-establishment of the Mallard Lake Sockeye. The company official replied that "Our biologists, and the government's statistics, tell us that the primary stressor on these fish is the hydropower dams downstream that they have to traverse, and until we deal realistically with that problem, the only way they can be preserved is captive breeding. We support changing the management methods for those dams to shut down turbines when the sockeyes are migrating, and/or modifying the dams structurally to permit safer passage of the Mallard Lake Sockeye before they can be re-introduced." Some members of FOSSS tend to agree, and they see in this statement a possibility of getting powerful ally in their attempts to deal with the dams. They want to propose a deal in which Global Reach would bankroll a legal fight against the dams, in exchange for FOSSS' agreement to let the resort development go forward without challenge. Their

question to you is, “If we could make such a deal, do we have a realistic legal chance of modifying either the structure or the operation of the downstream dams to give the sockeye safe passage?” (7 points)

**Part Two:** This section includes various kinds of short answer questions. If you are asked to choose a True/False or Agree/Disagree, you **MUST** make a choice, and then support your answer drawing from the course materials and lectures.

8. The federal reserved water rights claimed for the Frank Church River of No Return, Gospel-Hump, and Selway-Bitterroot Wilderness areas in the SRBA case were expressly reserved by the Wilderness Act of 1964. (3 points)  
True or False?  
Explain.
  
9. Water quality standards under the Clean Water Act must be established by the responsible federal agency. (3 points)  
True or False?  
Explain.
  
10. Although hailed by environmentalists as a potentially powerful way of promoting environmental values, the public trust doctrine as framed in the *Mono Lake* decision actually does not go beyond what NEPA requires in the case of major federal actions. (5 points)  
True or False?  
Explain.

11. The Endangered Species Act provides for the protection of species through a process of listing and concurrent designation of critical habitat. Once critical habitat is designated based upon ecological conditions, no actions that modify or remove that habitat can be undertaken by either public or private entities under any circumstances. (3 points)  
True or False?  
Explain your answer.
12. If there is an inconsistency between an agency-specific statute such as NFMA and the APA regarding procedural requirements for a specific agency action, the APA trumps the other statute (i.e., the agency must follow the APA requirements). (3 points)  
True or False?  
Explain.
13. The National Environmental Policy Act of 1970 signaled the end of the autonomous federal agency and the beginning of collaborative planning and management. (5 points)  
Agree or Disagree?  
Give specifics to support your answer.
14. It is a violation of NEPA to prepare separate Environmental Assessments (EAs) for individual timber sales and roads when they are located in the same area. (3 points)  
True or False?  
Support your answer.
15. When Forest Service Chief Jack Ward Thomas told Congress in a committee hearing that “biodiversity was *de facto* the primary objective for management of the public lands,” he meant that laws protecting biodiversity often

“trumped” (or overrode) legal responsibilities for resource production. Do the course materials support or contradict his statement? (6 points)

Support or Contradict?

Explain your answer.

16. Groups seeking to protect old growth forest ecosystems during the 1980s and 1990s were forced to develop legal strategies that were not directly based on the functions and values of old growth forest stands because the applicable legal rules and standards did not explicitly protect the integrity of these ecosystems. (5 points)

Agree or Disagree?

Explain your answer.

17. It is impermissible to consider economic and social consequences of habitat protection in the designation of critical habitat. (3 points)

True or False?

Support your answer.

18. “First in time, first in right” expresses the governing principle for riparian water rights. (3 points)

True or False?

Support your answer.

19. In the prior appropriation system of water law, water rights are specified property rights that can be bought and sold, traded, or given away at the sole discretion of the owner. (3 points)

True or False?

Explain your answer.

20. You recently moved to a small ranchette in eastern Oregon. It is located near a large cattle ranching consortium that markets organically raised Black Angus beef to Japan. Your ranchette was part of a large ranch, but the owners wanted to retire to the Oregon coast and sold their land off in 10 acre parcels a few years ago. Your lot is perfectly located on a beautiful small stream that flows year round. Your deed includes a proportional fraction of the water right appropriated by the original land owner, who used the water for irrigating crops.

One day you notice a lot of dirt in the water even though there has been no rain recently. You scout out the situation and discover that the neighbor's herd of 500 Angus cattle are congregated next to the fence with your property and are using the creek for drinking. When you speak to the owner, she explains that the cattle are in that section of pasture now as part of their rest-rotation cycle so as to maintain sustainable levels of grazing across the property. You are still not happy, since the water now has dung as well as dirt in it and is starting to smell bad. Although your home water purifier seems to be cleaning the water successfully for drinking, the odor is especially bothersome when you are out on your deck cooking dinner and trying to enjoy a fine glass of Oregon chardonnay.

You look up the nearest lawyer in the little town near you to get some advice about what to do. The lawyer says you are "up the creek." He says that because ranching is a common and preexisting use of the land, there is no nuisance claim available to you. Sitting next to the lawyer is someone you recognize from your EL1 class. Is that person nodding in agreement or disagreement with the advice the lawyer just gave you? (5 points)

Agree or Disagree?

Support your answer.

**End of Exam**

**We wish you a most enjoyable holiday break!**