

University of Montana
College of Forestry and Conservation

WILDLIFE POLICY

WILD 595, 2.00—3.30; TR. Spring 2016, Clapp #452

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Office hours: TR 3.30—5.00pm. If this is not convenient, please set up an appointment.

Course Description: This course examines wildlife law, policy and politics from multiple perspectives. Students are provided an intense introduction to the legal framework of fish and wildlife management in the United States (with coverage of U.S. and state constitutions, Indian treaties, key wildlife statutes, administrative regulations, and case law). The political context of wildlife management is provided so that students can better understand the conflicts and tensions in the field. A major part of the class focuses on the Endangered Species Act. This important law is used as a way to investigate a number of broader challenges and opportunities related to the conservation of biological diversity. While the focus of the seminar is wildlife policy, many of the issues addressed are pervasive in the field of natural resources policy, such as the significance of federalism, private property, scientific uncertainty, and various policy options in conservation. The class is organized as a discussion-oriented graduate seminar and students (individually or in teams) will lead most session reviews and discussions.

Required Reading: Eric T. Freyfogle & Dale D. Goble, *Wildlife Law: A Primer* (Washington, D.C.: Island Press, 2009)

All additional required and recommended reading is on the course's moodle page: <http://umonline.umt.edu>

*We will also discuss a number of contemporary issues in wildlife policy. An excellent way to stay up-to-date is to review stories published daily by *EE News* and *Greenwire*, online at <http://www.eenews.net/gw>.

*A number of species will be discussed in the context of the Endangered Species Act. Species Profiles—with regulatory and planning backgrounds and documents—are available at the Environmental Conservation Online System, at <http://ecos.fws.gov/ecos/home.action>.

Learning Outcomes: Students successfully completing the course will:

1. Acquire a substantive understanding of U.S. wildlife policy
 - Understand the legal and political context of U.S. wildlife policy and management
 - Understand the role played by federal, state, and tribal governments in wildlife policymaking and management
 - Understand the basis of enduring conflicts and tensions in the field
2. Be able to think critically about a number of wildlife policy problems and solutions.
 - Understand the nature of wildlife policy disputes and challenges
 - Evaluate the assumptions, strengths, and weaknesses of various reform measures and policy proposals

- Approach problems and issues in an integrated and intellectually rigorous fashion

3. Have the ability to apply acquired knowledge to their field of study or professional/personal interest(s)

Student Responsibilities & Assignments

Seminar Participation (50 pts): *Informed* participation is worth 50 pts when determining final grades. Although subjective, students can earn these points by never missing class and becoming an informed class participant on a regular basis. In short, be fully engaged or at least try to pretend and act as though this is the most exciting and enlightening class that you have ever taken and that you never want it to end.

When assigning these points, I will consider attendance obviously, but also whether a student has participated in quality fashion and on a consistent basis throughout the semester. Students will be evaluated based on their informed and consistent contributions to class discussions. This requires students to read and think about course readings before the class session. I am expecting intelligent, lively, and fully engaged classes every week.

Respect: Given the amount of discussion expected in this course, showing respect for others is paramount and is taken very seriously. We will strive towards an engaging but respectful open forum in which numerous opinions can be discussed and explored.

Reading Review, Analysis & Student-led Seminar(s) (100pts): Students (individually or in groups) will be assigned a particular week's readings and asked to lead the discussion over two or more full seminar sessions. A quick oral summary (roughly 10-15 minutes) of the readings will first be provided. Although there are a number of ways that the review and discussion can proceed, make sure to cover the following points in your review:

- (1) What are the major questions addressed in the reading?
- (2) What argument (if any), theoretical or applied, is being presented and how is it being defended by the author?
- (3) What concepts are introduced?
- (4) How is the reading related to others done this semester?
- (5) Who cares? So what? What insights and contributions does the reading make?

Students will then lead a formal class discussion by posing 5-6 analytical questions to the class based on that day's reading assignment. Students will also be graded on how well constructed and facilitated this student-led discussion proceeds; thus, students must be well prepared for the quiet and not-so-quiet seminar session. There are no make-ups.

The review & discussion will be graded using the following criteria: (1) Does the student seem knowledgeable and comfortable with the readings being discussed and reviewed—grasp of issues and important related points? (2) Did the student prepare well? Did the student recognize the primary issues addressed in the readings? Was the requisite work put into the assignment? (3) Was the presentation effective and organized? Was the summary of the readings clear and well-stated? (4) Did the student tie-in and integrate class materials and discussions (especially important as the semester progresses), e.g., course readings, discussions, etc.? (5) Did the student do a good job facilitating the class discussion? Did they help us work through difficult questions? Were they able to respond to other student's questions and concerns? (6) How well organized, constructed and analytical were the student's questions for class discussion?

*This component of the seminar will be determined by how many students enroll in the class. If the seminar is small (8-10 students), most of the review and discussion can be done individually. If the class is larger, however, we will move to groups of students (2-3) doing the review and leading the discussion.

Three Final Exam Questions (50pts each, 150 pts. total): The final exam is a take-home, comprehensive written assignment based on course readings and discussions. Three questions will be asked and are worth 50pts each. Each question will be answered in 5-7 double-spaced pages. Questions will be provided at intervals throughout the semester and students have the option of turning in answers one at a time or all at once on April 28th.

Papers will be graded on the basis of (1) writing and style (including clarity, level of articulation, and grammar), (2) level of critical analysis, research, specificity and detail, and (3) amount of synthesis and integration of course readings and discussions. I am also looking for formal citation (whatever style you prefer, e.g., parenthetical reference, footnote, endnote, legal, etc., just make sure you are consistent throughout, citing author, title and all publication information).

Academic Honesty: All students must practice academic honesty. Academic misconduct is subject to an academic penalty by the course instructor and/or a disciplinary sanction by the University. All students need to be familiar with the Student Conduct Code. The Code is available for review online at www.umt.edu/SA/VPSA/index.cfm?page?1321.

Grading Scale: The following scale will be used to translate points into grades.

93-100: A 90-92: A- 88-89: B+ 83-87: B 80-82: B- 78-79: C+ 73-77: C 70-72: C- 68-69: D+ 63-67: D 60-62: D- 59- F	<u>Points</u> Seminar participation: 50pts Student-led discussion: 100pts Final exam: 150pts Total points: 300pts
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COURSE READINGS & CLASS SCHEDULE

Bring this schedule to each class session for regular updates and additional or subtracted readings. *All readings are to be done before class.* Given time constraints, some areas may have to be sacrificed, and individual reading will have to take its place. Students must be willing to read and be responsible for material that may not be covered in class. Dates have been left open in order to increase flexibility and allow for maximum class participation and discussion. This type of open schedule, however, requires that students come to class to find out where we are and where we're going. I will inform students before upcoming sections of what readings they should pay particular attention.

About the "Recommended" Reading: Listed below, and found on the course moodle page, are several recommended readings. Everything not listed as recommended or background reading is required reading. The recommended readings provide a different perspective and/or a more in-depth treatment of a topic.

Students may wish to read or skim these pieces if they are leading a seminar on that topic or use them in answering exam questions.

1. Introduction to Wildlife Law, Policy & Politics

Primer on structure and forms of wildlife law (and the relationship between U.S. and state constitutions, statutes, regulations/rules, and case law); primer on basic approaches to law & policy; introduction to common drivers of natural resource-based conflict.

Seminar by: Nie

Freyfogle & Goble, *Wildlife Law*, Ch. 1; pp. 305-308.

James Salzman, "Teaching Policy Instrument Choice in Environmental Law: The Five P's," *Duke Environmental Law & Policy Forum*, 23 (2013): 363-376.

Martin Nie, "Drivers of Natural Resource-based Political Conflict." *Policy Sciences* 36 (2003): 307-341.

2. Constitutional & Legal Framework of U.S. Wildlife Management

The Property Clause, federal preemption, wildlife on federal lands; federal-state tensions in wildlife management, cases focused on intensive wildlife management in Alaska, wolf control in Idaho, and elk management in Jackson Hole, Wyoming.

Seminar by: Nie

Freyfogle & Goble, *Wildlife Law*, Ch. 6. & Ch. 10.

Julie Lurman & Sanford P. Rabinowitch, "Preemption of State Wildlife Law in Alaska: Where, When, and Why," *Alaska Law Review* 24 (2007): 145-171.

Letter to USFS Regional Forester, from Earthjustice, RE: Idaho Dept. of Fish and Game Wolf Killing Program in the Frank Church-River of No Return Wilderness (Oct. 14, 2014)

Robert L. Fischman and Angela M. King, "Savings Clauses and Trends in Natural Resources Federalism," *Environmental Law & Policy Review* 32, no. 1 (2007): 129-168.

Wyoming v. United States, 279 F. 3d 1214 (10th Cir. 2002) (case focused on the National Wildlife Refuge System and elk management in Jackson Hole, WY)

Please skim the following two powerpoint presentations and focus on how they view federal and state powers: Kenneth P. Pitt, USDA, Office of the General Counsel, *Wildlife Management Jurisdiction on National Forest System Lands* (PDF powerpoint presentation, Mar. 23, 2011) and Association of Fish & Wildlife Agencies, *The States: Trustees of America's Wildlife* (PDF powerpoint presentation).

Recommended: Association of Fish & Wildlife Agencies, *Wildlife Management Authority: The State Agencies' Perspective* (Washington, D.C.: Association of Fish & Wildlife Agencies, 2014).

Recommended: *Kleppe v. New Mexico* (1976) (foundational case focused on the Property Clause as it relates to wild horses and burros on federal land)

3. The Public Trust in Wildlife

The state ownership doctrine and public trust responsibilities; the public trust doctrine and applications to wildlife management, inland fisheries and stream access

Freyfogle & Goble, *Wildlife Law*, Ch. 2. & pp. 96-101.

Michael C. Blumm and Aurora Paulsen, "The Public Trust in Wildlife," *Utah Law Review* 6 (2013): 1437-1504.

The Wildlife Society, *The Public Trust Doctrine: Implications for Wildlife Management and Conservation in the United States and Canada* (Bethesda, MD: The Wildlife Society, 2010) (please skim).

Sarah K. Stauffer, "The Row on the Ruby: State Management of Public Trust Resources, the Right to Exclude, and the Future of Recreational Stream Access in Montana," *Environmental Law* 36 (2006): 1421-1443.

Recommended: Christian A. Smith, "The Role of State Wildlife Professionals Under the Public Trust Doctrine," *The Journal of Wildlife Management* 75, no. 7 (2011): 1539-1543.

Recommended: Alexandra B. Klass and Ling-Yee Huang, *Restoring the Trust: Water Resources and the Public Trust Doctrine, A Manual for Advocates* (Washington, D.C.: Center for Progressive Reform, 2009).

Seminar by: _____

4. Wildlife & Private Property

Dimensions of property and ownership; the U.S. Constitution's Takings Clause and its significance to wildlife management and conflict; policy options to biodiversity protection on private lands.

Freyfogle & Goble, *Wildlife Law*, Ch. 4 (and review pp. 117-121)

Eric T. Freyfogle, "What is Land? A Broad Look at Private Rights and Public Power," *Planning & Environmental Law* 58, no. 6 (June 2006): 3-9.

Holly Doremus, "A Policy Portfolio Approach to Biodiversity Protection on Private Lands," *Environmental Science & Policy* 6 (2003): 217-232.

Andrus v. Allard, 444 U.S. 51 (1979) (case focused on takings as it applies to the Eagle Protection and Migratory Bird Treaty Acts)

Kafka v. Montana Department of Fish, Wildlife, and Parks, 201 P. 3d 8 (Mont. Supreme Court, 2008) (case focused on takings as it applies to operation of game farms)

Recommended: Marshall Swearingen, "This Land is Their Land," *High Country News* (Feb. 2, 2015), available at <http://www.hcn.org/issues/47.2/this-land-is-their-land> (focused on private property and access to public lands)

Recommended: Robert Meltz, *The Endangered Species Act (ESA) and Claims of Property Rights "Takings"* (Washington, D.C.: Congressional Research Service, 2013) (providing a useful background on takings, the ESA, and case law review).

Seminar by: _____

5. Indian Tribal Rights

Tribal reserved rights, treaty fishing rights in Pacific Northwest and beyond, tribal co-management of fish and wildlife

Freyfogle & Goble, *Wildlife Law*, Ch. 8.

Washington v. Washington State Commercial Passenger Fishing Vessel Association, 443 U.S. 658 (1979) (focus on pp. 1-15) (U.S. Supreme Court decision focused on tribal reserved fishing rights in the Northwest)

O. Yale Lewis III, "Treaty Fishing Rights: A Habitat Right as Part of the Trinity of Rights Implied by the Fishing Clause of the Stevens Treaties," *American Indian Law Review* 27, no. 1 (2002/03): 281-311.

Ben Goldfarb, "The Great Salmon Compromise," *High Country News* (Dec. 8, 2014) (discussing tribal fishing rights in the context of the Columbia Basin Fish Accords and the politics of salmon recovery) (pdf on moodle and also available online at <http://www.hcn.org/issues/46.21/the-great-salmon-compromise>)

Ed Goodman, "Protecting Habitat for Off-Reservation Tribal Hunting and Fishing Rights: Tribal Co-management as a Reserved Right," *Environmental Law* 30 (2000): 279-362 (please skim Part V. as it pertains to the co-management of fisheries)

Recommended: Michael C. Blumm and Jane G. Steadman, "Indian Treaty Fishing Rights and Habitat Protection: The Martinez Decision Supplies a Resounding Judicial Reaffirmation," *Natural Resources Journal* 49 (2009): 653-706 (updating the habitat right issue in Pacific Northwest)

Recommended: Brian Upton, "Returning to a Tribal Self-Governance Partnership at the National Bison Range Complex: Historical, Legal, and Global Perspectives," *Public Land & Resources Law Review* 35 (2014): 51-145.

Seminar by: _____

6. State Wildlife Governance

State game laws, wildlife funding and budgets, state wildlife commissions, ballot initiatives, the North American Model of Wildlife Conservation (and critiques)

J.F. Organ et al., *The North American Model of Wildlife Conservation*, *The Wildlife Society Technical Review* 12-04 (Bethesda, MD: The Wildlife Society, 2012).

Michael P. Nelson, et al., "An Inadequate Construct? North American Model: What's Flawed, What's Missing, What's Needed," *The Wildlife Professional* (Summer 2011): 57-60.

Martin Nie, "State Wildlife Policy and Management: The Scope and Bias of Political Conflict," *Public Administration Review* 64, no. 2 (2004): 221-233.

Case Study: The Proposed Montana Wolf Conservation Stamp (proposed rule by Montana Fish, Wildlife and Parks, 2014).

Recommended: Susan G. Clark and Christina Milloy, "The North American Model of Wildlife Conservation: An Analysis of Challenges and Adaptive Options," in Susan G. Clark and Murray B. Rutherford, eds., *Large Carnivore Conservation: Integrating Science and Policy in the North American West* (Chicago: The University of Chicago Press, 2014), Ch. 9. (see for a policy sciences approach and assessment of Model).

Recommended: Cindy McKinney, Lauren Ris, Heather Rorer, and Sara Williams, *Investing in Wildlife: State Wildlife Funding Campaigns* (School of Natural Resources and Environment, University of Michigan, 2005)

Recommended: Angus M. Thuermer, Jr., “Study: Non-Hunters Contribute Most to Wildlife,” *Wyofile* (November 18, 2014), also available at http://wyofile.com/angus_thuermer/study-non-hunters-contribute-most-to-wildlife/ (providing link to study and reader comments)

Recommended: Cynthia A. Jacobson, et al., “A Conservation Institution for the 21st Century: Implications for State Wildlife Agencies,” *The Journal of Wildlife Management* 74, no. 2 (2010): 203-209.

Recommended: Freyfogle & Goble, *Wildlife Law*, Ch. 7.

Seminar by: _____

7. The Endangered Species Act: Background & Overview

Including background and contrast to other key federal wildlife laws (Lacey Act, Migratory Bird Treaty Act, and Bald and Gold Eagle Protection Act), significance and analysis of *TVA v. Hill* (1978), review core provisions of law (with focus on §§4, 6, 7, 9, & 10); habitat conservation planning, candidate conservation agreements, incidental take permits.

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Freyfogle & Goble, *Wildlife Law*, Ch. 9, 11 & 12.

The Endangered Species Act (1973), 16 U.S.C. §1531

Tennessee Valley Authority v. Hill, 437 U.S. 153 (1978)

Zygmunt J.B. Plater, “Classic Lessons from a Little Fish in a Pork Barrel—Featuring the Notorious Story of the Endangered Snail Darter and the TVA’s Last Dam,” *Utah Environmental Law Review* 32, no. 2 (2012): 211-244.

Daniel J. Rohlf, “The Endangered Species Act at Forty: The Good, the Bad, and the Ugly,” *Animal Law Review* 20 (2013-14): 251-275.

Patrick Duggan, “Incidental Extinction: How the Endangered Species Act’s Incidental Take Permits Fail to Account for Population Loss,” *Environmental Law Reporter* 41, no. 7 (2011): 10628-10640.

Ya-Wei Li and Tim Male, *Protecting Unlisted Species: Assessing and Improving Candidate Conservation Agreements with Assurances* (Washington, D.C.: Defenders of Wildlife, 2013) (please skim)

Recommended: Jacob M. Malcom and Ya-Wei Li, “Data Contradict Common Perceptions About a Controversial Provision of the U.S. Endangered Species Act,” *PNAS* 112, no. 52 (Dec. 2015): 15844-15849.

Recommended: Alejandro E. Camacho, Elizabeth M. Taylor, and Melissa L. Kelly, *Lessons from Area-wide, Multi-agency Habitat Conservation Plans in California* (University of California, Irvine Law Center for Land, Environment, and Natural Resources, 2015).

Example of Citizen Petition: Center for Biological Diversity et al., *Petition to Protect the Monarch Butterfly Under the Endangered Species Act* (August, 2014)

Optional Background documents on HCPs and CCAAs (for students wishing to see plans and associated case law)

Background on habitat conservation planning: <http://www.fws.gov/endangered/what-we-do/hcp-overview.html>

Example: Montana Dept. of Natural Resources and Conservation, *Record of Decision: Forested State Trust Lands Final Habitat Conservation Plan and Environmental Impact Statement* (Dec. 19, 2011).

Montana DNRC Forested State Trust Lands Habitat Conservation Plan, available at <http://dnrc.mt.gov/HCP/Documents.asp>

Friends of the Wild Swan et al., v Jewell, CV 13-61-M-DWM (D. Mont. 2014) (decision focused on Montana DNRC's HCP)

Recommended: Alejandro E. Camacho, Elizabeth M. Taylor, and Melissa L. Kelly, *Lessons from Area-wide, Multi-agency Habitat Conservation Plans in California* (University of California, Irvine Law Center for Land, Environment, and Natural Resources, 2015).

Background on candidate conservation agreements: <http://www.fws.gov/endangered/what-we-do/cca.html>

Examples: Dunes Sagebrush Lizard Conservation Agreement, available at <http://www.fws.gov/southwest/es/dsl.html>

Defenders of Wildlife et al., v. Jewell, Case 1:13-cv-00919-RC (D.C. Dist. 2014) (focused on Dunes Sagebrush Lizard Conservation Agreement).

Range-Wide Oil and Gas Candidate Conservation Agreement with Assurances for the Lesser Prairie-Chicken in Colorado, Kansas, New Mexico, Oklahoma and Texas, Between the USFWS and Western Association of Fish and Wildlife Agencies/Foundation for Western Fish and Wildlife (Feb. 28, 2014).

8. Science, Uncertainty & Political Decision Making (in the Context of the ESA)

Approaches to scientific uncertainty in environmental decision making, the ESA's best available science mandate, scientific uncertainty and political judgment in ESA decision making, adaptive management as approach to scientific uncertainty, cases focused on delisting of grizzly bears and wolves.

Holly Doremus, "The Purposes, Effects, and Future of the Endangered Species Act's Best Available Science Mandate," 34 *Environmental Law* 397-450 (2004).

Greater Yellowstone Coalition v. Servheen, 665 F. 3d 1015 (9th Cir. 2011) (Ninth Circuit decision on proposed delisting of Grizzly Bear)

Open letter from scientists and scholars on wolf recovery in the Great Lakes region and beyond (2015)

An open letter from wolf experts and other wildlife management professionals supporting delisting gray wolves in Minnesota, Wisconsin and Michigan (2015).

Martin Nie and Courtney Schultz, "Decision-Making Triggers in Adaptive Management," *Conservation Biology* 26, no. 6 (2012): 1137-1144.

Recommended: M. Lynne Corn, Kristina Alexander, and Eugene H. Buck, *The Endangered Species Act and 'Sound Science,'* (Washington, D.C.: Congressional Research Service, 2013).

Recommended: Andrew B. Erickson, "Grizzly Bear Recovery, Whitebark Pine, and Adequate Regulatory Mechanisms Under the Endangered Species Act," *Environmental Law* 42 (2012): 943-975.

Recommended: Courtney Schultz, "Responding to Scientific Uncertainty in U.S. Forest Policy," *Environmental Science & Policy* 11 (2008): 253-271.

Recommended: J.B. Ruhl, "Climate Change and the Endangered Species Act: Building Bridges to the No-Analog Future," *Environmental Law Reporter* 39 (2009): 10735-10745.

Recommended: Wm. Robert Irvin, "Comment on 'Climate Change and the Endangered Species Act: Building Bridges to the No-Analog Future,'" *Environmental Law Reporter* 39 (2009): 10750-10751.

Recommended: Kristina Alexander, *Does the Endangered Species Act Listing Provide More Protection of the Polar Bear?* (Washington, D.C.: Congressional Research Service, 2010) (recommended reading focused on listing of polar bears) (please skim)

Recommended: Withdrawal of Listing for the Distinct Population Segment of the North American Wolverine, 79 Fed. Reg. 47, 522 (Aug. 13, 2014) (please skim)

Seminar by: _____

9. Recovery Under the Endangered Species Act

Dale D. Goble, "The Endangered Species Act: What We Talk About When We Talk About Recovery," *Natural Resources Journal* 49 (2009): 1-44.

Jason C. Rylander, "Recovering Endangered Species in Difficult Times: Can the ESA Go Beyond Mere Salvage?" *Environmental Law Reporter* 42 (2012): 10017-10023.

J.M. Scott et al., "Recovery of Imperiled Species Under the Endangered Species Act: The Need for a New Approach," *Frontiers in Ecology and the Environment* 3, no. 7 (2005): 383-389.

Daniel J. Rohlf, Carlos Carroll, and Brett Hartl, "Reply to Goble and Colleagues," *BioScience* 64, no. 10 (2014): 859-860.

Daniel J. Rohlf, Carlos Carroll, and Brett Hartl, "Conservation-Reliant Species: Toward a Biology-Based Definition," *BioScience* 64, no. 7 (2014): 601-611.

Robert T. Lackey, "Saving Wild Salmon: A 165 Year Policy Conundrum." Dubach Workshop: Science and Scientists in the Contemporary Policy Process, Oregon State University, Portland, OR, Oct. 3-4, 2013.

Recommended: Jeremy T. Bruskotter, et al., "Removing Protections for Wolves and the Future of the U.S. Endangered Species Act (1973)," *Conservation Letters*, 7, no. 4 (2014): 401-407.

Recommended: Carol I. Bocetti, Dale D. Goble, and J. Michael Scott, “Using Conservation Management Agreements to Secure Postrecovery Perpetuation of Conservation Reliant Species: The Kirtland’s Warbler as a Case Study,” *BioScience* 62, no. 10 (2012): 874-879.

Recommended: J.M. Scott et al., “Conservation-Reliant Species and the Future of Conservation,” *Conservation Letters* 3 (2010): 91-97.

Recommended: Society for Conservation Biology, RE: Petition for Rulemaking to Define “Recovery” Under the Endangered Species Act and to Establish Recovery Planning Regulations for Threatened and Endangered Species,” Letter to Sally Jewell and Rebecca M. Blank (May 14, 2013).

10. The Future of the Endangered Species Act: Debating ESA Reform—Class Exercise

Freyfogle & Goble, *Wildlife Law*, Ch. 13.

Damien M. Schiff, “The Endangered Species Act at 40: A Tale of Radicalization, Politicization, Bureaucratization, and Senescence,” *Environs: Environmental Law and Policy Journal* 37 (2013-14): 105-132.

John Buse, “A Different Perspective on the Endangered Species Act at 40: Responding to Damien M. Schiff,” *Environs: Environmental Law and Policy Journal* 38 (2014-2015): 145-166.

Endangered Species Act Congressional Working Group, *Report, Findings and Recommendations* (Feb. 4, 2014)

[Additional readings and proposed legislation to be determined—and taken from the 114th Congress]