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A Short Tribute to Joe Sax

Harrison C. Dunning*

It is a genuine pleasure to submit this short tribute to the scholarly work of Professor Joe Sax. He has been a highly creative pioneer in the fields of natural resources law and environmental law, as well as a leading figure on the difficult constitutional law problem of "taking."

I began teaching water law and property law at UC Davis in 1969-70, and I first became aware of Joe's work when I reviewed the existing water law casebooks in order to choose one for my water law course. One of them, authored by Joe, had been published a year previously.¹ That book was a great contrast to the others available then, and now I realize it was way ahead of its time.

The subtitle to Joe's book was "cases and materials", and the emphasis was on the materials. As Joe remarked in the preface to the book, "this is a case book with very few cases."² In lieu of a multitude of cases, there were legislative and academic discussions of benefit-cost analysis; contracts; problems; briefs, e.g. from the famous Storm King litigation;³ statutes; and excerpts from many articles.

Joe commented on his reasons for departing from the commonplace doctrinal, case-based model used then for law school teaching books in order to build his book around contemporary issues in water resource management. First, he said, he had found it "difficult to get students to understand the significance of legal doctrines when they are presented abstractly in the context of a series of more or less

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1. Joseph L. SAX, *WATER LAW, PLANNING & POLICY* (Bobbs-Merrill 1968).

2. *Id.* at viii.

3. *Scenic Hudson Preservation Conference v. Federal Power Commission*, 453 F. 2d 463 (2d Cir. 1971).

unrelated cases."⁴ Second, he noted his conviction that "the legal issues in water resource problems cannot be isolated from economic, technical, and political considerations."⁵

Although I agreed thoroughly with Joe's reasoning, particularly his second reason, in the end I did not select his book to begin my water law teaching career. Perhaps I was unduly influenced by the reviewer who commented that it was a wonderful book for anyone who already knew water law. I now understand, however, that Joe's first water law book was marvelously creative in providing students with the kinds of materials that are in fact the most important for them to understand.⁶

Just two years after Joe's first water law book, his pathbreaking study of the public trust doctrine appeared.⁷ I was, along I think with most teachers in our field, highly impressed by that article, and it led me to include some public trust decisions in the materials I used in my property law course.

Joe's 1970's public trust article argued that the public trust doctrine could serve as the foundation for a common law of environmental quality regarding a wide range of natural resources. His argument attracted widespread interest and, over the years, it provoked a flood of scholarly commentary. Modern environmental quality law developed, however, mostly on a statutory and regulatory foundation. Often cases have been decided by parsing intricate language from complex statutes and regulations,⁸ rather than by the sort of contextual balancing approach that a public trust analysis might have produced.

Although the public trust doctrine has not become the foundation for environmental quality law that Joe envisaged

4. SAX, *supra* note 1, at vii.

5. *Id.* at viii.

6. Joe's second water law casebook, initially coauthored with Buzz Thompson, now appears as J. SAX, B. THOMPSON, J. LESHY & R. ABRAMS, *LEGAL CONTROL OF WATER RESOURCES* (4th Edition 2006).

7. Joseph L. Sax, *The Public Trust Doctrine in Natural Resources Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970).

8. Joe once wrote that he agreed with those who find this law "numbingly complex and far from engaged with the issues at the core of our environmental dilemma." Joseph L. Sax, *Environmental Law in the Law Schools: What We Teach and How We Feel About It*, 19 ENV. L. REP. 10251, 10252 (1989).

in 1970, it has had some impact beyond its historical realm of lands beneath navigable waters. This impact has been mainly with regard to water rights, in California insofar as the exercise of water rights impacts navigable waters, in Hawaii insofar as their exercise impacts any waters. In both those states, the leading judicial decisions cited to Joe's public trust scholarship.⁹

Despite the fact that the public trust doctrine is not now and may never be the formal basis for the resolution of most natural resource and environmental controversies, the current interest in "sustainability" shows that accommodation of environmental and economic values, an accommodation characteristic of public trust cases, is of critical importance. One of my favorite scholarly works produced by Joe is a study of such accommodation on the American River in California.¹⁰ His comment there summarizes nicely what Joe's scholarship has been telling us over many years:

In short, legal and managerial institutions are going to have to start "thinking ecologically," looking broadly at ecosystems, and learning to manage them to meet both the needs of the conventional economy and those of what might be called the economy of nature—where rivers produce fish, forests provide wildlife habitat, and wetlands remain biologically productive.¹¹

9. *Nat'l Audubon Soc'y. v. Super. Ct.*, 658 P. 2d 709, 719, n. 16 (Cal. 1983); *In the Matter of the Water Use Permit Applications*, 9 P. 3d 409, 441 (Haw. 2000) (Waiahole Ditch System).

10. Joseph L. Sax, *Bringing an Ecological Perspective to Natural Resources Law: Fulfilling the Promise of the Public Trust*, in *NATURAL RESOURCES POLICY AND LAW—TRENDS AND DIRECTIONS* (L. MacDonnell & S. Bates eds., 1993).

11. *Id.* at 151.