**University of California, Berkeley, School of Law**

**Memorial to Joseph Lawrence Sax**

Joe Sax concluded his life as the dean of natural resources law in the United States, and probably the single most influential figure in the development of modern water law. As the most prominent exemplar, Joe's 1970 article, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 Mich. L. Rev. 471 (1970), ranks as one of the ten most influential law review publications of all time, and the single most important one in natural resources law. Joe's article revived the 1892 case of *Illinois Central R.R. v. Illinois*, 146 U.S. 387 (1892) and applied it at the dawn of the age of environmentalism, to protected the public commons (lakes, rivers, submerged lands) from alienation by the sovereign to private interests. The entire body of subsequent American (and some foreign) public trust law emanates from Sax' essay, and singularly influenced the California Supreme Court's 1983 *National Audubon* decision (*National Audubon Society v. Superior Court* (1983) 334 Cal.3d 419) that Los Angeles' 1940 water rights to divert water away from Mono Lake deserved and required reconsideration and reallocation to protect the lake's ecological qualities -- the most important 20th century water law decision from that leadership court.

I arrived too early to study Joe's article in law school; it came to me in an August 1976 visit to my fledging Sacramento law office by two UC Davis grad students, a Berkeley undergrad dropout, and, incidentally, David Brower. The grad students had spent the summer at Mono Lake documenting its decline, but the undergrad brought a copy of the Michigan Law Review. That was the winning combination. Ultimately Morrison and Foerster agreed to represent the Mono Lake Committee pro bono, and

Davis Law Professor Hap Dunning sponsored a 1980 public trust symposium at which Hap, Washington's Ralph Johnson, and Deputy AG Jan Stevens adapted Joe's public trust doctrine to the law of California's waters. The Court's opinion records this legacy.

But at that moment Joe's role was observer. None of us remembers Joe's physical presence at the *Audubon* oral argument, even though his intellectual presence pervaded the courtroom. When Joe decided three years later to leave his beloved colleagues and school in Ann Arbor, he stated a desire to be closer to his grown daughters and his mountains. (*Sax Departs for Berkeley*, 31 U. Mich. L. Quadrangle Notes 6 (Winter 1986).) But I think he came to California and to Berkeley because he also wanted to be closer to the action. Let me try in a bit to relate some of the action.

Dan Farber has recorded Joe's contributions to scholarship and Berkeley Law, just as Holly Doremus so elegantly summarized them in her memorial on Legal Planet. (*In Memoriam: Joseph L. Sax, Gentleman, Scholar, Giant of Environmental Law* (March 10. 2014).) To these we must add Joe's leadership in convincing his colleagues and the campus authorities that Boalt should award a certificate in environmental law. Today practitioners regard this certificate as the premier environmental credential of an American law school graduate. At Commencement last week Berkeley Law awarded certificates in four different disciplines: a singular Sax notion, like the public trust doctrine, whose enduring value may not have been initially foreseen.

Of course Joe's aspirations for the public trust doctrine have not been completely realized. He expressed distress (J. Sax, et al., Letter urging the California Supreme Court to depublish *Citizens for East Bay Parks v. State Lands Comm.*, 202 Cal.App.4th 549 (2012)) that in the past decade the California courts have largely abused rather than used the

public trust. And yet, *National Audubon*'s administrative legacy appears in the practice of the State Water Resources Control Board to render public trust findings as part of every decision and order (23 Code Cal. Regs, § 780), and (responsive to another of Joe's legacies, citizen access[1]) to grant non-proprietary claimants full standing as protestants in these proceedings (*Id*., § 745). So engrained is the doctrine that in its 2009 Delta Reform Act the California Legislature could not avoid declaring that " ... the public trust doctrine shall be the foundation of state water management policy ...." (Cal. Water Code, § 85023.)[2] As Professor Lazarus has recorded, "Sax claimed that environmental law's achievements would ultimately turn on its ability to revolutionize administrative lawmaking in just this manner. The past several decades have confirmed the accuracy of his prophecy." (R. Lazarus, The Making of Environmental Law 190 (2004), citing J. Sax, *New Directions in Law*, Environmental Law I-20 (1971).)

Joe's aspiration to influence California outcomes received its greatest challenge in groundwater. Late in the 1980s the pending Owens Valley truce between Inyo County and Los Angeles was threatened by an impasse over groundwater pumping from the northern end of the valley. Following one of their few early victories against Los Angeles (*Hillside Water Co. v. City of Los Angeles*, 10 Cal.2d 677 (1938)), valley residents had earned a 1940 decree against LA's groundwater pumping for export from the Bishop Cone. Even though the county and city negotiators proposed that both valley environment and export could be improved by substituting LA's

[1] Michigan Environmental Protection Act [the "Sax Act"], § 324.1701(1) (1970): "any person may maintain an action . . . against any person for the protection of the air, water, and other natural resources and the public trust in these resources from pollution, impairment, or destruction."

[2] The legislation's initial draft referred to the "constitutional" public trust doctrine. Candor compelled us to advise the committee of this error. More on that at the end.

surface water resources for modest groundwater pumping, Bishop citizens did not warm to any tinkering with the Chandler Decree. The county turned to Joe Sax for a formal opinion; his conclusion that the decree enabled the parties to put aside attention on where the molecules came from, to focus instead on the combined environmental benefits of operating the surface and ground supplies in conjunction, convinced the skeptics and salvaged the agreement that led to rewatering of the entire Owens River.

Joe's opinion presaged his assignment from the State Water Board to examine whether a hoary 19th decision that separated subsurface waters flowing in a definite channel from the remainder of the underground resource (*City of Los Angeles v. Pomeroy*, 124 Cal. 597 (1899)) survived the 1913 California Water Commission Act designed to coordinate the state's regulation. Joe's 2002 report concluded that the drafters' choice of language in the 1913 act (now Water Code § 1200) endowed the board with discretionary power to regulate all groundwater hydrologically connected to the surface streams. (J. Sax, Review of the Laws Establishing the SWRCB's Permitting Authority Over Appropriations of Groundwater Classified As Subterranean Streams and the SWRCB's Implementation of those Laws (2002).*)* He gleefully recounted discovering his proof in the only extant copy of the 1913 commission's proceedings, which were not to be found in the state archives, but in Governor Pardee's unopened personal papers at the Pardee Mansion in downtown Oakland. (See J. L. Sax, *We Don't Do Groundwater: A Morsel of California Legal History*, 6 U. Denv. Water L. Rev. 269, 290 fn. 14 (2003).)

The State Board did not act wisely. Joe had a premonition that his report would not be adopted when it was noticed for decision at Monterey where the board was meeting in conjunction with the Association of

California Water Agencies (ACWA). Neither ACWA nor the then-sitting Governor welcomed the political outcome of expanded state groundwater regulation.[3] Yet just two months ago ACWA recommended -- in light of the severe ungoverned groundwater overdraft occasioned by the current drought -- state standards "to strengthen groundwater management and accountability where it is deficient." (ACWA, Recommendations for Achieving Groundwater Sustainability (2014).) The Sacramento Bee characterized ACWA's revelation as "the game changer," (California needs overdraft protection for its dwindling groundwater supplies (April 13, 2014)), but we more modestly recognize Joe's 2002 report as another of his notions whose enduring value may not have been initially foreseen.

Joe's exploration of trust values reached new heights in application to cultural resources. Kathy and I were privileged to be present at the virtual birth of Joe's venture. Being at Stanford in 1990 and Kathy directing the National Trust's western office, we proposed that Joe and the trust's chief litigator honor NEPA's 20th anniversary with an assessment of historic preservation law's development in that period.[4] Joe came with a different idea: with his recent discovery of French Abbe Gregoire's post-Revolution resolve to preserve the artifacts of the Ancient Regime, Joe

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[3] Accord, *North Gualala Water Co. v. State Water Resources Control Bd.,* 139 Cal.App. 4th 1577, 1590 fn. 8 : "Professor Sax argues that section 1200 was intended to end the artificial legal separation of surface water and groundwater by giving the Board broad jurisdiction over all groundwater flows that have a direct and appreciable impact on a surface stream. (*We Don't Do Groundwater, supra*, 6 U. Denv. Water L.Rev. at pp. 286–306.) However, neither party to this litigation has embraced Sax's analysis, and we find no support for it in the legislative history or text of the statute."

[4] Somewhat chauvinistic, I was about to introduce Joe as a graduate of the Harvard Law School, when he advised me of my error. Thus the introduction referred to "Joe Sax' graduation from the University of Chicago Law School, where they have been trying to make up for it ever since."

proposed that elements of our patrimony -- Stongehenge, Mount Vernon, for example -- lay beyond the sole prerogatives of private proprietorship and imposed on their owners in title the Buddhist-like role of holder in trust. Reconciling the regal source of French artifacts with a call for their republican preservation, Sax vindicated Gregoire's wisdom as looking beyond the patrons and sponsors of these works to celebrate their creators and artists -- the citizens whose genius would now be protected by a free nation. (Notes, Stanford Entl L. Society & National Trust, Legal Developments in Cultural Preservation: The Last 20 Years (1990).) Joe had transformed the public's right of access to common natural resources to advocate a public right of access to a society's cultural treasures.

Nine years later Joe expanded this concept -- "the fruitful culmination of this intellectual labor," in Lee Bollinger's foreword -- into the enticing title, Playing Darts with a Rembrandt (1999). Joe discovered the irony of historic preservation (*op. cit.* at 57) in the *Penn Central* case (*Penn Central Transp. Co v. City of New York*, 438 U.S. 104 (1978)) -- not in Justice Brennan's opinion for the majority but Justice Rehnquist's dissent: "that Penn Central is prevented from further developing its property basically because *too good* a job was done in designing and building it" (*id.* at 146). Joe chided the majority for leaving Rehnquist's challenge "unacknowledged and unanswered" (*id.* at 59), and then proceeded in the rest of his essay to address it himself by redefining ownership of cultural treasures as custodianship. In time this singular Sax notion will also prove of enduring value that may not be initially foreseen.

One month after that Stanford session, Joe invited me to lunch at the Hayes Street Grill, and inquired if in light of a faculty member's prospective maternity leave, I would be interested in coming to Boalt to teach one semester of land use law. Twenty-four years on, it seems this too

proved a singular Sax notion whose enduring value, at least to me, was not initially foreseen.

A final subject that Joe placed on his California action agenda is the takings clause. His early scholarship addressed the reality that our common and constitutional law traditions long honored the power of the state to adjust to contemporary knowledge and conditions without forced compensation for the economic implications of disfavoring obsolete or harmful activities. (J. L. Sax, *Takings, Private Property and Public Rights*, 81 Yale L. J. 149 (1971); J. L. Sax, *Takings and the Police Power*, 74 Yale L. J. 36 (1964).) In the early 1990s environmental limitations restricted federal and state water deliveries to project contractors -- exactly as the project contracts anticipated -- without compensation. The first of the resulting takings cases proved to be *Tulare Lake Water District v. US*, where the court of claims held that reduced contract deliveries amounted to a physical invasion of the district's water rights. (*Tulare Lake Basin Water Storage Dist. v. United States*, 49 Fed. Cl. 313 (2001).)

Joe Sax led a delegation to visit the California Resources Secretary and the Governor's legal affairs secretary, urging California to intervene in and appeal this disturbing decision. Notwithstanding the concurrence of all around the table, the Governor (same one, regrettably) ultimately proved more concerned with political fallout in the Central Valley than with protecting the state's public authority. Casebooks generally include only the worst and best of decisions, and Joe had no trouble inserting this one into the 2006 fourth edition of Legal Control of Water Resources.

On March 28 of that year, however, the San Diego-based California Court of Appeal filed its *Allegretti* opinion soundly rejecting an Imperial Valley landowner's takings claim against county groundwater regulation, and along the way taking apart the non-binding *Tulare Lake* decision. I

sent the opinion to Joe, who called to say it was the best explication he had read of why the physical invasion test makes no sense in these water cases. My response, "Would you write that to the court of appeal?, because they did not publish their decision." Joe did so, and the risk of our joint venture was ultimately rewarded with both publication and cert. denied. (*Allegretti & Co. v. County of Imperial*, 138 Cal.App.4th 1261 (2006), cert. denied, 127 S.Ct. 960 (2007).) When the order of publication was filed, Joe noted that he was about to send off the final page proofs and had one space left. Immediately below the *Tulare Lake* opinion, at page 660 of the fourth edition, appears a one-line entry, "Contra, Allegretti & Co. v. County of Imperial ..." -- a blend of Joe's scholarship and activism to keep the flame of rationality alive until this vexing issue finally rests.

And yet, despite his commitment to liberate public regulation from undue constitutional constrictions, Joe was no insensitive extremist. In one of his last lectures in Booth Auditorium he spoke of the moral and political need for society to account for economic dislocations through non-constitutional regulatory and market mechanisms. In his Anne J. Schneider Memorial Lecture in Sacramento last year, Joe called for our own "transformational change" in addressing the "transformational change" of societal respect for the environment -- reconciling the paradox that we invoke "reasonable and beneficial use" to challenge "uses that have been thought entirely reasonable and beneficial for well over a century." Again as in his Booth lecture, but this time invoking both Voltaire ("the quest for the perfect as the enemy of the good") and Pogo ("we have met the enemy and he is us"), he urged competing Delta interests "to try some sort of 'good enough' solution." (J. Sax, *Learning from Failure: California's 30 Years' War in the Delta*, 23 Cal. Water L. & Policy Rptr. 323, 24 Cal.Water L. & Policy Rptr. 3 (2013).)

Let me now conclude and return to the public trust, a different public trust, as Joe's legacy. We did not succeed in his lifetime to write the words "public trust" into article X (water) of the California Constitution. But if we turn back one page, to article IX, the words do appear as they have since 1879: "*The University of California* shall constitute a public trust …." (Cal.Const., art. IX, § 9 (emphasis added).) When Joe decided to come west, he had the choice of every law school beyond the hundredth meridian. He subsequently made no secret of choosing ours because Boalt stood out as a *public* law school -- one that would attract and sustain the diversity of students willing and able to learn from him and carry on his work when he was gone.[5] In recent years Joe questioned the efficacy of California's commitment to maintain that article IX trust. Our best memorial to Joe Sax renews our dedication to the aspiration that brought him to us.

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[5] In late February Hap Dunning, Kathy, and I visited Joe for the last time, and took with us the written program from the Berkeley Exchange of environmental scholarship produced by former Boalt students. Joe could not speak but expressed that irresistible smile as we read from that program the names of his former students. Know that he left us with knowledge of that celebration.