MONO LAKE AT 20: PAST, PRESENT, AND FUTURE

Byron Sher Auditorium, Sacramento

**A Brief Tribute to Joe Sax**

Joe Sax left us last March as the nation's dean of natural resources professors, producing a lifetime of teaching and scholarly excellence at the Universities of Colorado, Michigan, and our own California at Berkeley. So much for the nation. In this room we honor Joe as the intellectual and spiritual godfather of the Mono Lake decision. (*National Audubon Society v. Superior Court (Dept. of Water & Power* (1983) 33 Cal.3d 419.) For a few minutes let us reaffirm Joe's parentage of *Audubon*'s past, assess Joe's lineage in *Audubon*'s present, and invoke his guidance for *Audubon*'s future.

With precision resembling the fifth chapter of Genesis, the genealogy of *National Audubon* might read like this: Sax begat Dunning and Ralph Johnson, Dunning and Johnson begat Jan Stevens, Stevens begat Palmer Madden and Bruce Dodge, and Madden and Dodge begat Justice Broussard. We could throw in a few cousins and in-laws as well. We can confirm that the most influential environmental law review article of all time, Joe's *The Public Trust Doctrine in Natural Resources Law: Effective Judicial Intervention* (1970) 68 Mich. L. Rev. 471), spawned the public trust doctrine in California water.

Let me offer personal testimony.[1] In August 1976, four months after opening my law office a bit west of here at 717 K Street (in a then-more-challenging but NBA-free environment), I received a visit from two UC grad students, a Berkeley undergrad dropout, and David Brower. The grad students had spent the summer at Mono Lake documenting its decline; the

[1] John Hart recorded this history in his Storm Over Mono: The Mono Lake Battle and the California Water Future (1996) pp. 62-65, 81-82.

undergraduate, Tim Such, brought a copy of the Michigan Law Review. Tim ultimately carried his intellectual baggage to Morrison and Foerster. As Palmer Madden wrote to me last spring, "Of all the law review articles written in America, Joe's article on the Public Trust Doctrine was the most fruitful.... One of the theories called to my attention by Tim was from a piece that Hap Dunning had authored citing Prof. Sax's article.... [B]oth Hap's support and Joe's scholarship provided a sense to us that we were on to something that might work.... Hap's work depended upon Joe's law review article. At the root, Joe's scholarly work was the fulcrum ... for the Mono Lake case ...."[2] (P. Madden to A. Rossmann, 201001 APRIL 2014.)

The public trust that Joe propounded in 1970 was that of substance and of process. In our perception as tourists in the law, "public trust" stands in the *Illinois Central* [*Railroad Co. v. Illinois* (1892) 146 U.S. 387] sense as a substantive limit on the state's power to alienate public resources, an elevation of public rights over those of private appropriation -- in the California Court's words, "surrendering that right of protection only in rare cases ...." (33 Cal.3d at p. 441.) But to Joe, the public trust also created procedural rights in the citizenry: to invoke the judicial process where necessary to promote "democratization" of trust decisions, praising courts for "manipulating the political burden ... to aid underrepresented and politically weak interests ...." (68 Mich. L. Rev. at p. 558.) As Professor Carol Rose observed, Joe's advocacy was not against majority rule, but in support of it, to prevent the capture of natural resources by a focused private stakeholder

[2] The California Supreme Court actually first took note of Joe's article in an obscure footnote to Justice McComb's opinion in *Marks v. Whitney* (1971) 6 Cal.3d 251, 257 fn. 4, pointing out that Joe criticized the court of appeal's non-final opinion in that case (68 Mich. L. Rev. at pp. 530-531), before including the surprising dictum that the California public trust extended beyond fishing, commerce, and navigation to embrace preservation of environmental and recreational values (*Id*. at pp. 259-260*). Marks* consequently ordained the *Audubon* holding. 33 Cal.3d at p. 425.

minority. (C. Rose, *Joseph Sax and the Idea of the Public Trust* (1998) 25 Ecology L. Q. 351, 353-354.)

Today some practitioners and Justices view *Audubon* in its procedural sense: not creating any substantive duties, but instead requiring consideration and reconsideration of trust values, with no weight on the scale for the public commons of nature. The trust is satisfied if it is looked at and balanced on substantial evidence against competing values. (See, e.g., *State Water Resources Control Board Cases* (2006) 136 Cal.App.4th 674; *Citizens for East Bay Parks v. State Lands Comm.* (2012) 202 Cal.App.4th 549.) In this proceduralist view, propounded by our most distinguished speaker at the conclusion of today's program, the public trust is less about the courts and more about the agencies themselves that administer it. (R. Robie, *Effective Implementation of the Public Trust Doctrine in California Water Resources Decision-Making: A View from the Bench* (2012) 45 U.C. Davis L. Rev. 1155, 1157.)

Joe Sax was satisfied that the California Legislature and State Water Resources Control Board have as trustee-administrators advanced the public trust. In this building the State Board renders 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[3]) grants non-proprietary claimants full standing as protestants in these proceedings (*Id.*, § 745). Decision 1631 stands as the exemplar. The California Legislature, in its 2009 Delta Reform Act, declared that "protection of the Delta's natural and scenic resources is the *paramount* concern," and that "the public trust doctrine

[3] 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."

shall be the foundation of state water management policy ...." (Cal. Water Code, §§ 85022(c)(3), 85023 (emphasis added).)[4] As Professor Richard Lazarus 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).)

But Joe expressed disappointment that the California courts have not read *Audubon* as advancing a substantive preference for public trust values. He was senior author of a letter to the California Supreme Court urging depublication of the court of appeal decision that declared public trust responsibilities satisfied by an "evaluation" under CEQA. (J. Sax, et al., Letter to Chief Justice and Associate Justices re. S. 199966, *Citizens for East Bay Parks v. State Lands Comm.* (Feb. 27, 2012).) In Joe's final years he found more encouragement from the Supreme Courts of Maine, Nevada, and particularly Hawaii, where in *Waiā hole Ditch* the Supreme Court, while expressing in its independent judgment deference to well-considered administrative decisions,[5] established burdens of proof and persuasion in favor of trust values, and emphatically rejected the notion that the trust is a mere restatement of the state's prerogative. (*In the Matter of Water Use Permit Applications, etc. for the Waiā hole Ditch* (2000) 94 Haw. 97, 9 P.3d 409.)

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[4] 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 momentarily.

[5] *California Trout, Inc. v. State Water Resources Control Board (City of Los Angeles)* (1989) 207 Cal.App.3d 585, 624-625 adopted a similar approach: deference to a legislative definition of constitutionally-required reasonable use, while reserving authority to to reject a "manifestly unreasonable" legislative authorization.

A better interpretation of *Audubon*'s duty to protect the trust "whenever feasible" (33 Cal.3d at p. 446), Joe reasoned, would not define "feasibility" of trust protection by CEQA, but instead by the more rigorous application of that term in section 4(f) of the federal Department of Transportation Act, which in light of the "paramount importance" of parkland protection, justifies taking parks for highways only on "truly unusual factors" of "extraordinary magnitudes." (J. Sax, et al., Letter to Chief Justice, *supra*, citing *Citizens to Preserve Overton Park v. Volpe* (1971) 401 U.S. 402, 411-413.) Public trust values would not always prevail, but they would not suffer by mere resort to the substantial evidence test.

These presumptions and rigorous standards flow from the need, articulated as noted above by Joe in 1970, to protect against the forensic disadvantage that advocates for nature inherently face in the legislative and administrative arenas. They also ratify the inherent truth (and California Supreme Court's recognition) that nature bats last. (*In re Bay Delta Programmatic EIR etc.* (2008) 43 Cal.4th 1143, 1168; contra, Tom Birmingham's Unnamed Colleague ("nature does not bat last in the Westlands Water District").)

Looking to *Audubon*'s future, Joe would aspire for a California Supreme Court decision that would refine the trust's substantive protections for California water that the Court did not address in 1983. And he would advocate an amendment to the California Constitution, adding a section 8 to enhance section 2 of article X, to give the public trust in California water the constitutional foundation on which the Hawaiian Court grounded *Waiā hole Ditch*. (But as he advised me, "Get the text out of committee in the middle of the night, lest they make it worse.")

Joe's clarion for "effective *judicial* intervention" in the final paragraph of his essay recognized that "the courts, in their own intuitive

way -- sometimes clumsy and cumbersome -- have shown more insight and sensitivity to many of the fundamental problems of resource management than have any of the other branches of government." (68 Mich. L. Rev. at p. 566.) In answer to whether the courts or agencies should predominate, Joe would have responded, "Neither; we need both. But we expect more from the courts."

For *Audubon*'s future, Joe would want us to get our doctrine right, but apply it with humility in the face of our too-frequent self-contradictions. Recalling his Anne Schneider Memorial Lecture with us here in Sacramento, Joe would once again invoke Voltaire and Pogo to reject perfection in place of a "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).) As our best tribute to Joe Sax, let's live up to this the last of his messages to us -- finding better but good enough ways to advance the public trust in California water.

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