

2014 Environmental Law Conference at Yosemite

A tribute to Joseph L. Sax

In a few moments the Environmental Law Section of the State Bar of California will present its inaugural lifetime achievement award to Joseph L. Sax. As members of this bar, we are grateful that our section leadership has made this wise selection. But we are also saddened that although Joe's nomination and selection were underway while he was still with us, we cannot enjoy his presence tonight. Yet we are equally grateful for the presence this evening of his three devoted daughters, Kathy, Valerie, and Amber, to receive our award for your beloved dad.

"Beloved" is the right word. Many titles Joe earned in his lifetime -- teacher, writer, advocate, counsellor, colleague, and friend -- but more than those Joe has been to us in this room our *inspiration*. His brilliance and energy have not only guided our work; they have given worth and value to the products of our own lives.

But ahead of professional markers, we must first remember Joe Sax as a man of irreverent humor and impish wit. Consider the titles of his publications. After the State Water Resources Control Board rejected his analysis establishing the board's statutory authority over all groundwater hydrologically connected to the surface, Joe took his case against the board to the higher plane of legal scholarship, with the scolding title, "We Don't Do Groundwater." Addressing those public and private owners who would deny a trusteeship in their temporal possession of cultural treasures, Joe characterized them as "Playing Darts with a Rembrandt." In one of our visits with Joe in the hospital, a polite new orderly entered the room and asked how he preferred to be addressed. Joe's answer: "Excellency? Would that do?"

If Joe were physically present this evening, then, I think that same sense of delicious irony would be in his mind -- though he would be too polite to express it out loud. Imagine -- the California State Bar's first award of the environment presented to an individual who never in his lifetime paid a single dues bill! Or for that matter, the *California* Bar recognizing a professional of Midwestern and Eastern origins, whose landmark declarations of the public trust, citizen standing, and public regulation of private interests arose at his beloved University of Michigan Law.

But in the last third of his life, Joe surely earned membership in this assembly by his presence and his advocacy. When Joe left Michigan for our law school in Berkeley in 1986, Michigan's alumni magazine reported that he sought proximity to his mountains and his grown daughters. But I also suspect, especially after *Audubon*, that he came West to find proximity to the action.

And action he found -- or created. His advocacy for comprehensive state groundwater regulation -- Joe once remarked that California and Texas were alone in the lack of it, and in his words, "We don't expect much of Texas" -- ultimately brought a semblance of rationality to the California scheme. ACWA were his visible opponent in the State Board, but to their credit became groundwater regulation's forceful advocate in producing the landmark legislation one month ago.

Sax' defense of state power to adjust to contemporary knowledge and conditions without forced compensation to obsolete or harmful interests was tested by the U.S. Court of Claim's misguided *Tulare Lake* decision. Joe led a delegation to the Governor's Legal Affairs and Resources Secretaries to urge California's intervention to appeal. That didn't succeed, but when the Court of Appeal in *Allegretti v. Imperial* eviscerated *Tulare Lake* in an unpublished

decision, Joe wrote the letter that earned not only publication but also cert denied.

When discouraged that the California courts were turning back on *Audubon* and his own call for "effective judicial intervention," and trivializing the public trust as if a shopping center's CEQA analysis, Joe chided those decisions; but relished the Supreme Court rulings in Hawaii, Maine, and Nevada that advanced the public trust. In his final years Joe lined up with Jim Wheaton's Scott River litigation, which recruited the public trust doctrine to reaffirm the reality-based connection between water at the surface and that underground.

And though the California courts lagged in public trust jurisprudence, Joe celebrated its embrace by the Legislature and State Board as "the foundation of the State's water management policy." 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."

Not that Joe always moved forward with perfection, any more than the rest of us can do. In an essay written shortly after NEPA's enactment, with the Saxian title, "The (Unhappy) Truth About NEPA," he wrote, "I think the emphasis on the redemptive quality of procedural reform is about nine parts myth and one part coconut oil." The regressive members of our community still drag out that sentence. They forget that part of Joe's integrity embraced the modesty that keeps an open mind and receives new wisdom – for a decade later, in 1986, he admitted that he "underestimated the influence of NEPA's 'soft law' elements" and that "legitimizing public participation and demanding openness in planning and decision-making,

have been indispensable to a permanent and powerful increase in environmental protection.”

That willingness to reconsider, and recognize the human impact of a legal or policy dispute, remains in my view Joe’s most admirable trait. Despite his commitment to liberate public regulation from undue constitutional constrictions, Joe was no insensitive extremist. In one of his last lectures at Boalt Hall 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 Schneider Memorial Lecture in Sacramento last year, where he received the Mono Lake Committee’s Defender of the Trust Award, Sax 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 Boalt 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"), Joe urged competing Delta interests "to try some sort of 'good enough' solution."

Joe’s overarching example, then: be intellectually rigorous and honest in your legal analysis, but human and flexible in its application. For example, I think that even with their several shortcomings, Joe would have approved of the Legislature’s ability to reach consensus on a water bond, and even taken pride in last month’s enactment of statewide groundwater regulation – a measure that in combination with the Scott River decision should now impel counties and the State Board to govern our groundwater while recognizing that their rules underground must also account for the waters, trees, and critters at the surface.

In sum, Joe Sax' life in the law of environment emerges as the benchmark by which all future lifetime achievement awards of this section will be measured. His life exemplified what we try to do here: forcefully present the products of our own work, while respecting and endeavoring to reconcile the convictions of our colleagues. Subsequent recipients on this stage will remember what Jefferson said of Franklin as Minister to France: "Sir I succeed him; no one can replace him." In our hearts, minds, and profession, we cannot replace Joe Sax, but tonight humbly recognize the fruits of his lifetime of achievement

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