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In Praise of Joe Sax

John D. Lesly

Joe Sax is a national treasure.

Many of my generation first encountered Sax from reading his two seminal takings pieces published in the 1960s. The last time I checked, those articles still showed up on the "greatest hits" list of most cited law review articles of all times—a remarkable feat considering that the shelf life of law review articles tends to compare to that of bread at the local bakery. He followed these pieces up with innumerable thoughtful analyses of property rights, water and land use and natural resource policy. If he had never done anything else but inform our thinking about the intersection between private property rights and government regulatory power, his impact would have been great. But that is just the surface/the beginning of the story.

Nearly forty years ago, he wrote a citizen's call to action, a book called *Defending the Environment*. Much of his work since then has been about exactly that. In addition to articles, his work has included drafting pathbreaking legislation, most notably a statute adopted by the Michigan legislature that allowed citizens to enlist the authority of the courts to protect the environment. He wrote seminal articles on the public trust doctrine which have had a particularly profound impact here in California.

While a staunch advocate of environmental protection and sustainable natural resource management, he has always approached these issues with scrupulous honesty, calling things as he sees them. Consider what he wrote 35 years ago about the National Environmental Policy Act's environmental impact assessment process, perhaps the biggest sacred cow in environmental law: "I think [its] emphasis on redemptive quality of procedural reform is about nine parts myth and one part coconut oil."

About the same time that he helped create the field of environmental law, he wrote a pathbreaking work on water law and policy. Later he co-authored a leading casebook on

water law, *Legal Control of Water Resources*, now in its fourth edition. He wrote influential pieces on the U.S. Bureau of Reclamation, the principal federal water management agency in the West. There he explained, among other things, the unhappy fate of reclamation law's famous limitation on acreage eligible for federally-subsidized water in terms that bring to mind G. K. Chesterton's assessment of the Christian ideal—not that it had "been tried and found wanting," but rather that it had "been found difficult and left untried." He wrote a book called *Mountains Without Handrails*, raising fundamental questions about why we have national parks and how we should manage them. Most recently, he published *Playing Darts with a Rembrandt*, a provocative reflection on the interplay between private and public rights in cultural objects.

Joe also took a turn as a kind of an expert detective—a virtual Poirot of water policy. Not long ago the California State Water Resources Control Board asked him to prepare a report on the history of its organic legislation, to shed light on whether the Board could regulate the extraction of groundwater connected to surface streams. I think the Board was looking for Joe's imprimatur on its desire not to get involved because if it regulated it would, as it were, make waves. That is not what they got. Joe tackled the assignment with typical zeal, tracking down long-lost materials, and carefully explaining how the legislature likely intended the Board to regulate.

Then there is Joe the policy advisor and defensive specialist, a role I got to see firsthand when he became a Counselor to Secretary of the Interior Bruce Babbitt during the Clinton Administration. Joe was persuaded to take leave from academia with the prospect of helping us implement our broad agenda of world-changing initiatives. Alas, about the time he arrived, we found ourselves thrown on the defensive when Newt Gingrich and the Republicans took over both Houses of Congress in 1995. A central thrust of their insurgency was a radical effort to dismantle decades of environmental regulation by enacting legislation mandating that the government provide compensation when its action diminished the market value of property rights. Joe spearheaded the Administration's successful efforts to head off this mischief.

Then there was Joe the speechwriter. As water policy aficionados know, the complexity and sensitivity of managing the Colorado River—whose waters are shared by

seven states, Mexico, and more than a dozen Indian Tribes, and are a vital supply to several of the fastest-growing urban areas in the country—resemble the clash of political interests in the Middle East. The Secretary of the Interior, as principal manager of the River, is smack dab in the middle of it, so Secretary Babbitt inaugurated the practice (continued by his successors) of giving a "State of the River" speech every December to the gathering of the Colorado River Water Users' Association in Las Vegas. We knew that, like speeches by senior officials on the Middle East, the Secretary's remarks would be analyzed like the entrails of a goat for clues of policy.

Joe was always tasked to craft the speech, honing and polishing the text to a high and appropriately nuanced sheen. But there was one problem. Secretary Babbitt was a gifted extemporaneous speaker who stubbornly resisted speaking from a prepared text. He understood that the delicacy of the subject matter could not tolerate that kind of high-wire act and so he adopted the following solution: Joe's speech text was made available as the Secretary took the rostrum, where he began by admonishing the audience that, regardless of what he actually said, Joe's text would be the final word. This strategy worked too well for, over the years, the audience steadily diminished in size, as more and more of the attendees would simply repair to the nearest watering hole to read Joe's text.

Finally, there is Joe as teacher. Throughout his career, he has shone a light on important questions and provided us with a view of man's relationship to nature and natural resources that has lifted us to a higher ground. From my more than three decades of firsthand observation, I have been moved to see the legions of law students he has instructed in environmental and natural resources law emerge from his tutelage bright-eyed, as if they'd been to the Oracle at Delphi. Indeed, they had been. Thousands of others know him as a groundbreaking author who was just not on the cutting edge, but ahead of it, drawing the dotted lines on the conceptual landscape where the next incision would be needed.

While his ideas about things like the meaning of the public trust or the nature of property rights have sometimes sparked intense debates—to a degree remarkable for someone who has such a gentle demeanor—he has brought to everything and everyone he touches a rare measure of grace and elegance, both intellectual and personal. And

modesty: Secretary Babbitt once mused how he always liked meetings with Joe in the room because they followed a predictable pattern: The other participants yakked on while Joe said nothing until one by one they realized they were not saying anything very helpful, quieted down, and awaited Joe at last to quietly volunteer a few simple, trenchant thoughts on the subject at hand, which more often than not became policy.

The Blue Planet Award is a most appropriate honor for such a remarkable individual.