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Promoting the Public's Interest

*Barton H. Thompson, Jr.*¹

One cannot imagine a more deserving recipient of the Blue Planet Prize than Professor Joseph Sax, the dean of American environmental law. Through his writings, his governmental work, and his inspiration for generations of environmental lawyers, Sax has literally created our environmental law. When Sax began teaching, environmental law as we know it today did not exist. Much of what now characterizes environmental law in the United States can be traced to Sax's writings and proposals. Few legal scholars today can claim to have shaped a field to such a great degree as Sax has environmental law.

Key to Sax's influence has been his fundamental and nuanced appreciation for the public's critical role in both understanding and solving problems facing our environment. Today it may seem common place that environmental issues are public issues. Yet over the last half century Professor Sax, in both scholarship and practice, has helped legal scholars and the United States as a whole better understand the public's interest in a variety of questions once seen largely through a private lens and, even more importantly, the central role that the public can play in shaping and enforcing environmental policy.

Professor Sax's early and continued immersion in water issues may help explain his particularly sophisticated appreciation for the public's interest. Although Sax is a wide-ranging environmental expert, his first and greatest love has always been water. Sax has confessed to liking water law more than any other subject that he has taught; for at least his first several decades of teaching, it was the only

1. Robert E. Paradise Professor of Natural Resources Law, Stanford Law School; Perry L. McCarty Director, Woods Institute for the Environment, Stanford University.

course he unfailingly taught year in and year out.² Water has provided Sax with an opportunity not only to try to solve some of the knottiest environmental problems around, which often focus on the use and abuse of water resources, but also to better appreciate the importance of public commons and values.

The prior appropriation system that governs water rights in the western United States has sometimes given the impression that water is a largely private resource to be awarded, allocated, and marketed through a formalized system of "appropriative rights." For years, the appropriative system allocated water to private consumptive users with little reflection on the resulting environmental impacts.³ Courts have held that appropriative water rights are fully protected by the U.S. Constitution against governmental "takings."⁴ And water transfers have become increasingly common over the last several decades in the West.⁵

In looking at water, however, Professor Sax has noted water's special "publicness." As Sax has often said, water is not like a pocket watch, but is defined as much by its public values as by its private characteristics. Water is a "public commons," in which members of the public have traditionally enjoyed open and free access to waterways for navigation, fishing, recreation, and aesthetic enjoyment.⁶ Water, which is often critical to the development and sustainability of communities and economies, is also "common capital" and a "community's capital stock."⁷ Sax even suggested in the first issue of this journal that water is

2. See Joseph L. Sax, *Essays on Legal Education: Why I Teach Water Law*, 18 U. MICH. J. L. REV. 273 (1985). For a longer tribute to Sax's water scholarship than permitted here, see Barton H. Thompson, Jr., *Water Law as a Pragmatic Exercise: Professor Joseph Sax's Water Scholarship*, 25 ECOLOGY L.Q. 363 (1998).

3. See, e.g., *National Audubon Society v. Superior Court*, 189 Cal. Rptr. 346 (Cal. 1983) (describing the issuance of water permits to Los Angeles despite concerns over aesthetic impacts).

4. "This court holds that water rights are not 'lesser or diminished' property rights unprotected by the Fifth Amendment. Water rights, like other property rights, are entitled to the full protection of the Constitution." *Hage v. United States*, 35 Fed. Cl. 147 (1996).

5. See Joseph L. Sax et al., *Legal Control of Water Resources* 264-267 (4th ed. 2006).

6. Joseph L. Sax, *The Constitution, Property Rights, and the Future of Water Law*, 61 U. COLO. L. REV. 257, 260 (1990).

7. *Id.* at 276, 282.

a "heritage resource" to which local communities feel an attachment akin to their interest in antiquities and other cultural assets.⁸

In Sax's view, these public interests in water resources should help define how courts and legislatures treat water resources. In deciding whether private water users who must reduce their water use to meet environmental needs are entitled to compensation under the U.S. Constitution, for example, courts should recognize that water rights have always been subject to a variety of public servitudes and protections.⁹ In Sax's view, state legislatures should also ensure that water markets do not undercut a local community's interest in "their" water. Because transfers of water out of an area might harm the local economy and reduce governmental revenue, Sax has proposed that legislatures impose a "community compensation tax" or prohibit transfers that lead to fallowing of farms or other economic retrenchment.¹⁰

By emphasizing and examining the public's interest in water resources and the ways in which water law protects that interest, Sax has also provided a new window onto other property and resource issues. Consider the public trust doctrine, which Sax helped bring back from relative obscurity in a seminal 1970 article.¹¹ Under the public trust doctrine, states hold title to the beds of navigable waters in trust for the public and can alienate such lands only in limited situations that would not harm the public's interest in those lands. A state thus cannot impede public navigational rights by selling a harbor to a private company.¹² Although a legal precept born in water, the public trust doctrine would seem to speak also to other state-owned resources to which the public has free or common access. Water, in short, is a useful lens for looking at the public aspects of the environment and natural resources more generally.

8. Joseph L. Sax, *Understanding Transfers: Community Rights and the Privatization of Water*, 1 HASTINGS WEST-NORTHWEST J. OF ENVTL. L. & POL'Y 13, 14 (1994).

9. See, e.g., Joseph L. Sax, *Rights That "Inhere in the Title Itself": The Impact of the Lucas Case on Western Water Law*, 26 LOY. L.A. L. REV. 943 (1993); Sax, *supra* note 6; Joseph L. Sax, *The Limits of Private Rights in Public Water*, 19 ENVTL. L. 473 (1989).

10. Sax, *supra* note 8, at 15-16.

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

12. See, e.g., *Illinois Central Railroad Company v. Illinois*, 146 U.S. 387 (1892).

Professor Sax has not only highlighted the public interest in the environment, but also expanded the public's role in enforcing environmental rights. Indeed, this may be his most important contribution to American environmental law. The idea of citizen suits, which now pervades virtually every major federal environmental statute,¹³ began in the Michigan Environmental Protection Act, which Sax played a principal role in drafting in 1970 and is as a result sometimes popularly known as the Sax Act.¹⁴ Some previous laws (e.g., federal securities and antitrust laws) had authorized private enforcement, but the Sax Act expanded the concept of citizen enforcement in two critical ways. First, the Act broadened notions of justiciable injury and the legitimate interests of private citizens. Prior laws had allowed citizens to sue for *economic* injury. The Sax Act recognized that everyone has an interest in a clean and healthful environment, whether or not they are economically injured, and should be able to sue in court. Second, the Act broadened the accepted role of private plaintiffs. When prior laws allowed citizens to sue, the purpose was primarily to vindicate the plaintiff's injury; any benefit to public enforcement was incidental. The Sax Act, however, sought to directly enlist individual citizens and public interest groups in enforcing environmental rights.

American environmental law would be unimaginable and unimaginative without the contributions of Professor Sax. His contributions have shown us the strong interest that the public as a collective holds in our resources and environment and how the common law has long recognized and responded to many of these interests. His contributions, moreover, have shown us how the public can help both shape and enforce environmental rights. All of us, as members of the public, are better off as a result of these contributions.

13. See Barton H. Thompson, Jr., *The Continuing Innovation of Citizen Enforcement*, 2000 U. ILL. L. REV. 185, 192.

14. Mich. Comp. L. Act. §§ 691-1209 to 691-1270. The act provides in relevant part that "any person, partnership, corporation, association, organization, or other legal entity, may maintain an action in the circuit court for the protection of the air, water and other natural resources and the public trust therein from pollution, impairment, or destruction."
