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## Water Law: Planning and Policy, Cases and Materials, by Joseph L. Sax

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## BOOK REVIEWS

**WATER LAW, PLANNING & POLICY, Cases and Materials, by Joseph L. Sax. Bobbs-Merrill, 1968. Pp. 508.**

"CASES and Materials" in the title to this book suggests that Professor Sax has produced another law school casebook. This would have been a noteworthy event because Sax is one of the most productive and effective legal scholars in water law. In fact, the event is more noteworthy than that: this is not another law school casebook. "Materials" in the book substantially outweigh "cases"; "planning and policy" outweigh water law. The book is designed for a law school course, but it has only the slightest resemblance to the books which have evolved from Dean Christopher Columbus Langdell's 1871 model, *Cases on Contracts*, which revolutionized law school study and teaching.<sup>1</sup>

Professor Sax planned it this way. His introduction, occupying less than three pages, he captions: "The Two Basic Legal Regimes in Water Law: Riparianism and Appropriation." That subject temporarily disposed of, he launches on chapter I: "Public Planning for Water Use: The Northwest-Southwest Diversion."<sup>2</sup> This chapter is nearly 100 pages long, but it contains only three "principal cases:"<sup>3</sup> two-page snippets from the United States Supreme Court's 1963 opinion in *Arizona v. California*, and its 1945 opinion in *Nebraska v. Wyoming*,<sup>5</sup> and three pages from the opinion of the Court of Appeals for the Second Circuit in *Scenic Hudson Preservation Conference v. Federal Power Commission*.<sup>6</sup>

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1. There has been a prevalent notion that anything lifted in whole or in part from another source is appropriate to a "casebook"; that the editor's own prose is not. No such idea can be attributed to Langdell. Cases occupy 983 pages of his two-volume second edition (1879); his Summary, which includes comment on the collected cases, fills 208 pages. Thus Sax' book, enriched with Sax' prose, is in this sense Langdellian.
  2. The four subsequent chapters are: ch. 2, *Managing Water Use*; ch. 3, *Recreation, Conservation and Aesthetics*; ch. 4, *Pollution*; ch. 5, *Ground Water and Other Special Water Sources*.
  3. They are so identified by italicized page references in the table of cases, SAX pp. XXV. Based on my count of italicized page references there are 13 other "principal cases" in the rest of the book.
  4. 373 U.S. 546 (1963). The majority opinion is 52 pages in the United States reports.
  5. 325 U.S. 589 (1945). The majority opinion is 67 pages in the United States reports.
  6. 354 F.2d 608 (2d Cir. 1965), *cert. denied*, 384 U.S. 981 (1966). The opinion is 14 pages in the Federal Reporter, Second.

Sax explains his concept in the introduction to chapter I:<sup>7</sup>

American water law is in the midst of a major transition. Traditional doctrines have been built upon a series of factual assumptions, many of which are already sadly out of date and are becoming steadily less relevant. The assumption which principally underlies the present law is that a number of private individuals and groups are competing to obtain private rights to utilize a scarce, free, and essentially fixed quantum of water.

The water lawyer of today and tomorrow needs to be less concerned with how to perfect an appropriation in Idaho or how the Massachusetts court defines a riparian tract than with understanding something of how the Corps of Engineers, the Bureau of Reclamation, and the great municipal and regional water resource agencies operate. He needs to know less of the statutory list of preferential uses in Texas, and more of the fundamentals of large-scale economic planning. He is less concerned with the difference between seepage and diffused surface water, and more involved with the role the Federal Power Commission plays in recreation and conservation planning, or the Department of the Interior in water pollution enforcement. These larger concerns provide the major focus for the materials that follow.

Professor Sax has done a good job in the task he set for himself. His book is fresh and interesting. Its best parts are expositions by Sax. Its worst parts are excerpted materials from many legal and non-legal sources most of which suffer from the excerpting—particularly in the omission of footnotes. These scissor-and-paste parts of the book most resemble the conventional law school “casebook.”

If intrinsic interest and focus on contemporaneous problems are criteria, the book is likely to be a success. Its success might well accelerate the displacement of law school books whose basic ingredients are appellate court opinions, statutes, and regulations—not only books for teaching water law but other legal subjects as well. Certainly water law is only one of many subjects where the current word is “transition.”

I hope the book will succeed, but that it will not be that successful. My own preference is for WATER LAW, CASES AND

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7. SAX 5-6.

COMMENTARY, 1965 preliminary edition.<sup>8</sup> This is a hard preference for me to defend because the author of that book is also Professor Joseph L. Sax. I wish he had revised the 1965 book, and that his 1968 book had been a separate volume of supplemental readings by himself and others. This would have permitted additional materials, and it would have spared omission of the footnotes.

Even if this best of all possible worlds is not yet attainable, I would still prefer Sax' 1965 edition. That preference is based on two notions: (1) Lawyers should concentrate first on those functions which lawyers alone can do, or can do better than anyone else. (2) In reconstructing yesterday's judicial and legislative battles lawyers learn best how to deal with the problems of today and tomorrow.

I find it hard, however, to be dogmatic about my preference. The number of lawyers professionally engaged in (i) perfecting appropriations in Idaho, or (ii) promoting or preventing water diversions from the Columbia to the Colorado Rivers is small. A how-to-do-it course focused on either of those skills is less than a burning need. The latter topics, perhaps, should get the preference because it is important and it has more classroom sex appeal than the former. If lawyers do not understand great public issues, who will?

My major reservation about Professor Sax' latest book relates to whether all three jobs—law, planning, and policy—can be well done in a book of this scope for a single law school course. If all three cannot be well accomplished, the emphasis should be on what the lawyer uniquely contributes to planning and policy—namely, law.

Perhaps water law's most emphasized nexus today is with economics. What is more needed than "cases and materials" on this subject is a minimum of say one or two hundred pages of connected prose by an economist. For example, in an introductory paragraph on benefit-cost ratios, Professor Sax writes in Chapter I:<sup>9</sup>

Since it is thought desirable to maximize the benefit-cost ratio, the [benefit-cost] analysis also

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8. Pruett Press, Boulder, Colo. 1965. A permanent edition has not been published.

9. SAX 29-30.

permits us to manipulate such things as the size or facilities of a project to determine the point at which benefits are maximized.

This confuses (1) maximum benefit-cost ratios, (2) maximum benefits, and (3) maximum net benefits.<sup>10</sup> An excerpt from Senate Document No. 97, 87th Congress, following the foregoing quotation makes this clear, but I doubt that most law student readers would get that important message.<sup>11</sup>

Yet the legal materials, about which the economist member of a planning team should look to a lawyer, are neglected. For example, students will read in the first chapter (still on Northwest-Southwest diversion):<sup>12</sup>

A congressional apportionment is in fact a form of compact, negotiated by the state's water officials through their congressional delegation rather than through appointed commissioners.

This is from an excerpt from Professor Charles J. Meyers' excellent articles on the Colorado River. Readers of the articles will understand it as a metaphor, and not an assertion that an interstate compact and apportionment by act of Congress have identical consequences. Law student readers

10. The point is an obvious one. The highest benefit cost ratio for a municipal water works would attach to the plant which has enough capacity only to prevent death of the residents by thirst. The benefit-cost ratio would be successively lower as capacity were successively added to permit residents to (1) bathe, (2) flush toilets, and (3) water lawns, but all three functions would be justified by a ratio of greater than unity and maximum net benefits would probably accrue if water were made available for all four purposes.

I wish this point had been obvious to me. It was brought to my attention by a colleague in the Economics Department. This, however, emphasizes my most important point: While a lawyer should be informed about economics (and ideally about everything else), if he has to wrestle professionally about benefit-cost ratios, he had better find himself at least one economist. An economist educating a lawyer can usually do better with text rather than excerpts from source documents, just as a lawyer educating an economist should not start with excerpts from appellate opinions and statutes. And if the task is to acquaint educated citizens (lawyers, economists, or League of Women Voters) with important contemporary issues, text and not "cases and materials" is the best and most efficient way to do it.

11. SAX 31: "Net benefits are maximized when the scope of development is extended to the point where the benefits added by the last increment of scale (i.e., an increment of size of a unit, an individual purpose in a multiple-purpose plan or a unit in a comprehensive plan) are equal to the costs of adding that increment of scale. . . ." Quoted from S. Doc. No. 97, 87th Cong., 2d Sess. (1962).
12. P. 85. Quotation is from Meyers, *The Colorado River*, 19 STAN. L. REV. 1, 51 (1966). A companion article is Meyers and Noble, *The Colorado River: The Treaty with Mexico*, 19 STAN. L. REV. 367 (1967). Professor Meyers served as law clerk to the Special Master in *Arizona v. California*, Hon. Simon H. Rifkind. A source book of water law materials should include reprints of reports of Special Masters in interstate cases. They are not officially published. The report of Judge Rifkind fills 433 pages.

of the book, however, would not be informed about the distinctions. Yet they remain important because there have been many interstate water compacts but only one—and, that perhaps inadvertent—congressional apportionment.<sup>13</sup>

A water lawyer—particularly a water lawyer professionally concerned with the subject of Sax' first chapter—should know about *Hinderlider v. La Plata River & Cherry Ditch Co.*<sup>14</sup> and about *West Virginia ex rel. Dyer v. Sims.*<sup>15</sup> Both were in Sax' 1965 book, but neither is in this 1968 book. If a choice must be made, this is even more important than knowing "something of how" (which is as much as anyone is likely to learn from a book) the Bureau of Reclamation operates.

Perhaps the contrast between the concept of Professor Sax' 1968 book and his 1965 book can be accounted for by his move, in the interim, from Colorado to Michigan. If so, I now have an additional reason for hoping he will move back west before making a third effort: western water law, growing out of private disputes over small creeks, does not contain answers but it offers fertile hunting ground for building answers for most of the larger and often, but not always, different problems of 1968. Law, planning, and policy are and should be inseparable—except maybe in emphasis—but a lawyer's study should start, I think, with law.

In fairness to Professor Sax, who has provided a great deal of law and large helpings of other materials—all useful for water lawyers and law students—it should be said that there is more law within his covers than immediately meets

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13. Whether Congress intended to delegate to the Secretary of the Interior power to allocate Colorado River water among Colorado River states was a major issue on which the Supreme Court sharply divided. One of the most persuasive indications supporting the Court's minority is the evidence that Congress in 1928 reasonably thought it had no power to allocate water. See *Arizona v. California*, 373 U.S. 546, 610-611 (1963) (dissenting opinion).

The continuing importance of the interstate compact, although it should now be reasonably clear that Congress can apportion even non-navigable waters, is illustrated by Section 501(c) of the Colorado River Basin Project Act, P.L. 90-537, enacted September 30, 1968, culminating another chapter in the Colorado River history. This section authorizes the Antmas-La Plata Federal reclamation project, Colorado-New Mexico, construction not to be undertaken "until and unless the States of Colorado and New Mexico shall have ratified the following compact to which the consent of Congress is hereby given: . . ."

14. 304 U.S. 92 (1938).

15. 341 U.S. 22 (1951). I would suggest, as a minimum, the addition to *Hinderlider* and *Dyer v. Sims*, of *Petty v. Tennessee-Missouri Bridge Comm'n*, 359 U.S. 275 (1959).

the eye. This is because, as he explains in his preface, he has not organized the book on doctrinal lines. "And," he writes, "I don't want to start the student thinking about a legal doctrine until it becomes relevant to one of the problems he is considering."<sup>16</sup>

My problem, however, is less the arrangement than the quantity. The 508 pages are enough bulk, I think, but a more effective use of those pages should be possible, and would better equip the lawyer to deal with water problems of our time.

*Charles E. Corker\**

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16. SAX vii.

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**DIGEST OF PUBLIC LAND LAWS—Prepared for the Public Land Law Review Commission by Shepard's Citations, Inc., 1968. Pp. 1091.**

Pursuant to its charge to study the existing public land laws of the United States, the Public Land Law Review Commission caused to be prepared a compilation of all the statutes enacted by Congress which have affected the disposition of public lands of the United States and their resources. The Digest presents a summary of these laws in chronological order by date of enactment with a topical index. For the person who needs to identify the specific law authorizing dispositions, acquisitions, authority, etc. with respect to public lands, the Digest presents a very useful tool. Copies are available from the Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402 at \$6.50 a copy.