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WHY I TEACH WATER LAW

Joseph L. Sax*

I began my first law school job in 1962 and water law is the only subject I have taught every year since then. Though I am enthusiastic about all the courses I teach, I confess that water law remains my favorite. I have often asked myself why, because few subjects are considered more peripheral to the central mission of the law schools. In the East and Midwest the course is rarely taught, and in the West—where it has long been a staple—it is pretty much treated as a “nuts-and-bolts” offering for students who will practice in appropriation doctrine states.

I offer four reasons for teaching, and studying, water law.

I. WATER LAW INCORPORATES A DISTINCTIVE REGIME OF PROPERTY LAW, QUITE DIFFERENT IN CONCEPT FROM ANY OF THE PROPERTY LAW TO WHICH WE ARE ACCUSTOMED

The central question of water law is why, and how, water is different. In one respect, water is ordinary property. One can obtain a vested right in it, buy and sell it, lease and transfer it, use and profit from it. At the same time, it is very different from everything else we commonly think of as private property. If I own a wristwatch, a bag of potatoes, or a house, I can use them or leave them unused. I can crush my watch under my heel, or live alone in a ten bedroom mansion while others yearn for a place to sleep.

Water is different. I can own it, but not without using it. If I don't put it to a beneficial use (and the law defines beneficiality), I lose my right and the water returns to the public. I am not allowed to waste it. I cannot sell it to the detriment of others who have relied upon my uses, but must protect them in any transfer. I cannot speculate in the water, holding it out of production with the hope that the price will rise. I cannot obtain private rights in it that intrude on public claims for public uses, navigation, fishing, recreational boating, and ecosystem protec-

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tion. I usually cannot even build over my own land, if it is submerged by navigable waters.

Why is water different? Is it because water has some physically unique quality that makes it unsuitable for ordinary private ownership? Or has some special social value been attached to water—some publicness—that induces us to view it as different? And is that special public quality unique to water, or is water law at the cutting edge of a new view of private/public relations that will come more and more to the forefront of American law?

Surely there are some distinctive things about water. It is, more than anything else that we treat as private property, a shared resource. It is used and reused. A gallon of water flowing down the Colorado River will serve a kyacker in Colorado, sustain a National Wildlife Refuge, irrigate crops for a farmer in Arizona, produce energy for a Las Vegas casino, and then either grow lettuce in the Imperial Valley, wash cars in Los Angeles, or flow down to Mexico in fulfillment of national treaty obligations. No wristwatch has quite this sort of potential.

At the same time, water could be treated more like ordinary property. We did not have to decide (as one famous old case did) that use of water to maintain a scenic waterfall at a resort was a non-beneficial, and thus unacceptable, use, simply because the water was needed for hydropower production. We don't have to make users in the San Francisco Bay Area reclaim and re-use their water as a precondition to taking new water, on the theory, as one recent case suggests, that there cannot be a right to waste water. We don't have to prohibit speculation, and we don't have to let rafters float by and over private land just because the water is "navigable."

II. WATER LAW IS INTIMATELY RELATED TO WESTERN HISTORY, AND DEEPENS ONE'S UNDERSTANDING OF IT

The appropriation doctrine evolved in the West. It is a great example of the law of necessity becoming the law of the land, and the old water law classics, such as *Yunker v. Nichols*¹ and *Coffin v. The Left Hand Ditch Co.*,² are splendid models of the judiciary thinking through and explaining why a wholly new legal regime needed to be invented and applied. At the same time,

1. 1 Colo. 551 (1872).

2. 6 Colo. 443 (1882).

students must understand how the federal government, beginning with the first mining law in 1866, determined to let the West develop, and how state and federal law came together to encourage settlement, mining, and agriculture. The Reclamation Law of 1902 shows federal subsidy policy in one of its most dramatic forms, and its original residency and acreage limitations illustrate the difficulty of creating and maintaining a society of small, independent proprietors. The great, early navigation cases offer a view into the development of the lumber industry in the upper Great Lakes Basin. The navigation servitude provides a case study in the evolution of judicial thinking about those things "incapable" of private ownership. The tension between appropriation and riparian doctrine in California is a case study in the efforts of the early land barons to preempt vast riverine ranches. The pueblo rights doctrine offers a rare glimpse into the mores and values of the Spanish settlement of the Southwest. And there is more, much more.

III. WATER LAW IS A HIGHLY TECHNICAL FIELD, FULL OF DOCTRINE

This may not seem an obvious way to lavish praise on a course, but I have discovered that law students love to learn doctrine, the more abstruse the better. In part, this is just the fun of the game. (How many of your friends know what the "thalweg" of the Mississippi River is?³) But there is more to students' enjoyment of doctrine than a game. The doctrines provide a useful point of entry for attending to important issues and putting them in a context that promotes fruitful discussion. When we ask who owns, and who can sell, the water in the Great Lakes, we pose profound questions about the limits of private ownership, and the meaning of the public trust. The abandonment and forfeiture doctrines help students understand the distinctive posture of western water law in opposition to speculation, an aspect of American anti-monopoly policy that otherwise gets little attention in the law schools. There are dozens of such examples.

3. Unless they have studied German.

IV. WATER LAW AND POLICY HAVE CONSEQUENCES THAT DESERVE FAR MORE ATTENTION THAN THEY USUALLY GET

If the oil shale in western Colorado becomes marketable, that area will demand (at last) its full share of the waters allocated to it out of the Colorado River. But if Colorado takes more of its share, the adverse impact will be enormous on the Central Arizona Project, which is now being built to take Colorado River water to Phoenix and its environs at a cost of many billions of dollars. Indeed, the Central Arizona Project itself, when completed, will require reductions in use by Californians in the Los Angeles area, who now carry that water in an aqueduct all the way from the Colorado River to southern California. Los Angeles could solve its problems if it could get irrigators in the Imperial Valley (in southernmost California) to waste less water, and sell the savings to it. If that can be done, it will reduce the pressure to dam up wilderness rivers in northern California, which is the traditional source of supply. The fate of northern California's rivers determines the fate of the Central Valley, the nation's most productive agricultural growing region and source of fresh produce for much of the nation. And what happens in the Central Valley affects the quality of water in San Francisco Bay. This is just one example of how water law illuminates the links between energy policy in the mountains of Colorado, lawn watering in Los Angeles, and the price of fruit in a New York supermarket.

Water is different. Water is interesting. Water law is as good a course as the law school curriculum has to offer.