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Sax: Water Law, Planning and Policy: Cases and Materials

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WATER LAW, PLANNING AND POLICY: CASES AND MATERIALS. By Joseph L. Sax. Indianapolis: Bobbs-Merrill. 1968. Pp. xxxii, 520. \$13.50.

This volume is more than a casebook; it is a systematic presentation of the major public policy issues regarding the use of water in the United States today. It is true that a large number of cases are briefed, excerpted, or discussed throughout the book, but they are set in a matrix of explanatory text, articles, reports, maps, drawings, diagrams, and even cartoons which provides a comprehensive coverage of the environment and circumstances in which water use becomes a subject of the legal system. In preparing this book, Professor Sax has been guided by the conviction "that the legal issues in water resource problems cannot be isolated from economic, technical and political considerations" (p. viii). This approach is especially welcome at a time when the cry for "relevance" is being raised in colleges and universities across the land.

Water Law, Planning and Policy is a positive contribution to

several significant current developments. First, it is a part of what this reviewer, at least, hopes is a trend in contemporary legal education: emphasis on policy issues rather than on legal doctrine. The guiding doctrines of water law have not been slighted by Professor Sax, but they have been placed in perspective. Doctrines are introduced in relation to the issues in which they naturally arise rather than as abstract principles. This method also provides an opportunity to bring in many collateral points of law and doctrine that probably would not be touched upon if the materials were organized around such traditional principles of water law as appropriation, riparian rights, transfer of water rights, and intergovernmental jurisdiction.

In our time, political and legal controversies over water have broadened to include concepts and emergent principles not formerly recognized in legislation or legal education. Many of these controversies have arisen because of growing public concern with the quality of the physical environment. This concern is often expressed in individual and group efforts to protect lakes and streams and their environs for recreational and aesthetic satisfaction, to maintain the life-sustaining properties of water for fisheries and other aquatic ecosystems, and to assure the availability of water in amounts and quality sufficient for new technologies and industrial processes. The public is gradually beginning to realize that it is no longer realistic to treat water as a discrete natural resource except for certain narrowly defined technical purposes; thus, the Sax volume properly relates water law, planning, and policy to its environmental context.

Second, this volume is a significant contribution to the coherent, comprehensive body of factual literature on public policy and action in the management of the human environment. The explosive growth of population and of technology has brought the human species abruptly to the end of open frontiers as man has historically perceived them. The frontier of outer space is hardly comparable to the so-called empty spaces on terrestrial maps, colonized and developed by masses of men; twentieth-century man is perforce entering the closed political economy of Spaceship Earth. The human situation has changed in a way that has no historical precedent, and it is inevitable that human institutions growing out of historical experience will be strained in adjustment to the new conditions. Law is pre-eminently one of these institutions. When legal precedent is no longer a reliable guide to justice or to political acceptability, a problem-solving and policy-oriented approach to law is needed. The Sax book joins two other volumes published by Bobbs-Merrill as part of the Contemporary Legal Education Series in seeking to

provide a conceptual foundation for the jurisprudence of Space-ship Earth. There are Lefcoe's *Land Development Law, Cases and Materials* (1966) and Mandelker's *Managing Our Urban Environment, Cases, Text and Problems* (1966).

A third contribution of the Sax book consists of its presentation of the legal principles governing water utilization. However, the volume is less distinctive in this respect because there are other fine casebooks dealing specifically with water law. Among these is the two-volume work *Water Resources Allocation*, prepared by Sho Sato at the University of California at Berkeley in 1962. More recent and more readily available are J. H. Beuscher's *Water Rights* and Frank J. Trelease's *Cases and Materials on Water Law*,¹ both published in 1967. Professor Beuscher's casebook focuses on water law east of the Mississippi and, like the Sax volume, contains a substantial amount of background and illustrative material that is of great value in placing the legal arguments in context.

The addition of the Sax volume to these sources broadens the range of approaches to the study of water law issues and increases practical alternatives in organizing courses in natural resources law and policy for schools of law, natural resources, and public administration, and for departments of political science, geography, conservation, and planning. The recent *Water Law Bibliography*, edited by J. Myron Jacobstein and Roy M. Mersky, provides a guide to the various topics into which this complex and widely published literature is conventionally divided. What is especially welcome at this time is an "organizing" volume such as Professor Sax's to help the nonspecialist—and particularly the nonlawyer—make sense out of the complexities of water law. Two other publications during 1968 are also useful for organizing the study of public law and policy for water utilization: *The Nation's Water Resources: The First National Assessment of the Water Resources Council*, and the brief but comprehensive report on *The Federal Water Pollution Control Program* issued by the Office of the Assistant Secretary for Water Quality and Research, United States Department of the Interior. This latter report is particularly notable for its summary of all phases of the federal program and for its tabulation of the forty-four federal water pollution enforcement actions initiated prior to November 1968.

Thus, at the beginning of 1969 we have available for the first time a coherent, policy-oriented, and comprehensive coverage of water law, and we have a good beginning on the integration of this law into the broader and more fundamental context of environ-

1. The Trelease volume is a separate printing of the water law portion of the larger work, *Cases and Materials on Natural Resources*, by Trelease, Bloomenthal and Geraud (1965).

mental policy. The emergence of this body of literature on water law and policy has come at a time when tests of new concepts of water use and environmental quality will take place under a new national administration which has made no explicit commitment to the assumptions or philosophy underlying the new legislation on water use and water quality. The political squall that developed over the Senate confirmation of Secretary of the Interior Walter Hickel may be the forerunner of a stormy four years in which old and new concepts of priorities in natural resources law and policy will be vigorously argued in the courts, Congress, and the Executive branch of the federal government. Within the law schools of the 1970's, such developments might stimulate interest in natural resources law and policy comparable to that generated by the conflicts over labor law and employment security during the 1930's. One consequence would be a boom in courses and casebooks in natural resources law and policy.

To give the Sax casebook high marks, as the reviewer has done, should not suggest that no improvements could be made in it, or that its contents might not have included more or different data. There are many ways to prepare a first-rate book on water law and policy, and Joseph Sax has certainly found one of those ways.

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