

Joseph Sax Speaks on National Park Protection

by Robin S. Kohn

Introduction

"Glacier [National Park] is constrained by bureaucratic prudence and timidity. It is reluctant to use the law, highly deferential to the traditional turf prerogatives of its neighbors, and hesitant to subject itself to criticism by speaking out forcefully on transboundary issues."

These were some of the conclusions reached by Professor Joseph L. Sax in his law review article, Sax, Keiter, "Glacier National Park and Its Neighbors: A Study of Federal Interagency Relation," 14 Ecology L.Q. 207 (1987). Sax spoke about these conclusions in his speech at a day long conference on "Parks and Wildlife Conference" on February 27, 1988, held by the Environmental Law Society.

Sax, an environmental and public land law professor at Boalt Hall, is well known legal scholar. He received his J.D. at the University of Chicago, and has taught at the University of Colorado and University of Michigan Law Schools as well as at Boalt. He has written the well-acclaimed book, Mountains Without Handrails (1980), a preservationist's perspective on the National Park System. He also wrote Legal Control of Water Resources (1986), a water law casebook.

The topic of Sax's speech was "Interagency Coordination of Park Protection." In particular, he discussed his recent law review article which he wrote with Professor Robert B. Keiter of the University of Wyoming Law School. The article was based on a case study of Glacier National Park in Montana. The purpose of the study was to learn about how people who work for the National Park Service resolve transboundary resource disputes.

The Problem: External Threats

According to Sax, public lands have been traditionally split up into separate enclaves, managed by separate agencies such as the Park Service, the Forest Service, the Bureau of Land Management and the military. In the past, most of the national parks, especially the large western parks, were relatively isolated because they were surrounded by relatively undeveloped forests. Thus, few boundary problems existed. Today, however, increased use of the lands surrounding national parks for energy development, timber harvesting, and urban development, the boundaries have become more significant and the parks have been affected by external threats. These

threats include air, water and noise pollution, as well as the destruction of wildlife habitats.

These external threats, said Sax, are being alleviated only to a small extent by laws such as the Clean Air Act (CAA) and the National Environmental Policy Act (NEPA). Specific park protection legislation has been largely unsuccessful due to Congressional recognition of the "turf" concerns of private entrepreneurs and landowners. Despite inadequate legal protection for the parks, however, the official National Park System position is that existing legislative authorities are sufficient, that there is no need for further coercive legislation.

The Research: Case Study of Glacier National Park

In light of these findings, Sax said he and Keiter decided to study a park in order to draw conclusions about what was being done to deal with these external threats within the park system and to help the park managers deal with problems more effectively. They recognized that, although some innovative things had been done to resolve transboundary disputes in the parks, there were also problems with dispute resolution.

Sax and Keiter chose to do a case study of Glacier National Park because it is a relatively isolated and pristine park, yet it has highly visible issues and an active and concerned constituency. The study focused primarily on disputes with the Lewis and Clark National Forest and with the Flathead National Forest. The disputes dealt with oil and gas leasing, mineral leasing, and timber harvesting in those forests. The research consisted of interviews with employees of the National Park Service and other agencies, private parties, and documentary materials collected by park officials over a long period of time.

Conclusions about the People in Glacier National Park

According to Sax, he and Keiter were able to draw some general conclusions about the people who work in Glacier National Park. Sax feels that these conclusions may explain some of the problems in other parks as well. Sax and Keiter concluded that park managers are people who easily "take charge" of problems with their park and work well within a hierarchical structure to issue orders and regulations. They also are good diplomats when dealing with local government officials and politicians. Sax and Keiter discovered, however, that there were few



park managers with the skills, experience, or feeling of comfort necessary to deal with unresolved conflict and adversarial relationships. These were people who by temperament, experience, and inclination were reluctant to "take up the sword" and take a strong stand to protect park resources from external threats.

Sax and Keiter also observed that problems with external threats were generally resolved in favor of the park when someone else, such as the Fish and Wildlife Service or an environmental group, "took up the sword." As their article states, "One of our most striking findings was the central role of private groups that used the legal system to control threatened damage to the park...how often outside organizations held the critical leverage in the resolution of conflict." (*supra*, at 261). When negotiation and conciliation did not work and there was no Fish and Wildlife Service or environmental group to step in, however, the park managers had trouble dealing with a strong industry such as the oil industry. They also had trouble dealing with forest managers who were extremely sympathetic to their commodity users.

Observations about Glacier National Park

Sax said that the people working for the park were resigned to the fact that at least some of the problems, such as the oil and gas drilling proposals at the southern end of the park, were outside their control. He also said that the park management policy was "never say never." Park managers were reluctant to take a strong stand against other agencies, even if persuaded that a particular activity would be harmful to the park. Sax observed that when writing letters to the other agencies, the strongest stand taken by the park managers was, "Gee, we hope..." rather than "No."

Sax also observed that the park managers did not try to collect factual data in anticipation of

"building a case" should a conflict arise. Instead of providing data and studies, the park managers communicated general "park values" and "overall strategies." But these values and strategies were vague, a further reflection of their reluctance to take official positions on critical issues, such as controlling the impact of timber harvests on park water quality.

Another observation, according to Sax, was that when the park finally addressed critical issues, it did so "too late in the game." For example, the park managers became concerned when oil companies applied for exploratory drilling permits in the national forests, rather than at the leasing stage. A vested right in the oil is created at the leasing stage, however, and any interference by a governmental entity after this stage creates constitutional takings issues.

Additionally, Sax observed that the park managers had a very negative view of litigation; they viewed it as a failure. This was despite the fact that virtually every issue that had been litigated--such as timber harvesting, road paving, private land development, oil and gas leasing, and stream siltation--had resulted in orders favorable to the park. They also viewed a decision by the Regional Forester or the Washington office to deal with these issues, as a measure of failure. Despite these general attitudes, however, Sax said that the park managers had not thought about what happens when two parties "agree to disagree." Although this is generally a lawyer's starting problem, these people avoided conflict at all costs.

Proposals by Sax to Cure Some of These Problems

Sax feels that there must be a Congressional mandate passed which recognizes the problem of external threats to national parks, even if it is only a

general statement. He believes this would affect the behavior of people such as the managers of Lewis and Clark Forest, who are currently more concerned about their commodity users than the interests of the national parks. The legislature should also consider the creation of joint management areas (or "buffer zones" as Sax is reluctant to call them) that are managed jointly by neighboring agencies. These neighboring agencies would then consider transboundary issues when formulating policy for the "buffer zones."

In addition, park managers must learn to "agree to disagree" through mediation and arbitration. Park managers must realize that park concerns such as protection of the grizzly bear will attract public support if park managers are more vocal. According to Sax, national parks are this country's "sacred cows," and the public wants them protected. Park managers, however, must lead the way, and not wait for other groups to become involved.

Sax said that in addition to "taking up the sword," park managers must also think about building a case, making a record, and collecting data in anticipation of litigation or mediation. They must also

become involved in issues earlier in the process -- before it is too late.

Sax said he and Keiter have discussed their findings and proposals with the Glacier Park Superintendent and the managers of the adjacent forests. The two are currently working on developing models for cooperative management, and they plan to write another law review article setting forth these models and the results of their present work with the agencies. Only time will tell, however, if these academic studies will truly provide better protection from external threats for the national parks.

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