COMMENTS

THE 25-YEAR LEGACY OF *FRIENDS OF MAMMOTH*

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BY
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The initial program for this conference listed your speaker as Justice Stanley Mosk, author of the California Supreme Court's opinion in *Friends of Mammoth v. Board of Supervisors* (1972) 8 Cal.3d 247. You are entitled to disappointment that instead of Justice Mosk you got one of Mat Tobriner's law clerks for the years 1971 and 1972. For me, however, this assignment is laced with delicious irony. When the *Mammoth* case came to the Supreme Court from the Third District Court of Appeal in the winter of 1971-72, the Justice to whom the case was assigned, for preparation of the memorandum on which the Court would grant or deny hearing, recommended denial. Justice Tobriner, on the advice of his three law clerks, decided to write a counter-memorandum, urging the Court to take the case. As was our custom, each week the Judge's clerks divided among ourselves the tasks of preparing the conference memoranda. Less than a year out of law school, not having yet been admitted to the bar, I asked for and received the *Mammoth* box.

We all recognized the significance of the case that had come to the Court, and the expectation that if Justice Tobriner's memorandum persuaded a majority of his colleagues to grant hearing, the Judge would be assigned to prepare the Court's opinion. In anticipation of this result, my fellow clerks and I planned a research expedition to the locus of the dispute, in the height of ski season of

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course, and at State expense, which I must assure you never materialized. More seriously, all three of us labored over the Judge's counter-memorandum, hoping through Justice Tobriner to convince the Court to take the case.

It was a case like many of that momentous decade, in which the briefs of the principal parties could not fully anticipate the challenge and opportunity they presented to the Court. Counsel for the Friends of Mammoth, John McCarthy, dared to ask the Supreme Court to bypass the Court of Appeal and hear his case on the merits, thereby earning his place in our CEQA pantheon.[1] On the merits, however, the Friends' most important contribution was to include in their opening papers the Attorney General's 3 September 1971 petition to the Secretary for Resources, arguing by analogy to NEPA's young history that the interpretation of "project" now advanced by the Friends of Mammoth should prevail. This de facto *amicus curiae* brief of the Attorney General provided the determinative research and argument—that is, the brief authored by Nick Yost, whose name with those of Louise Renne, Clem Shute, Larry King, Jan Chatten-Brown, and others in the AG's environmental unit, began appearing often and decisively in the California Reports.

On Wednesday afternoons Justice Tobriner gathered his clerks to report the results of that morning's weekly Court conference. The Judge was in good spirits on 12 January 1972, the day the Court voted on *Mammoth*. "Well," he said, with measured but typically enthusiastic satisfaction, "we got five votes to grant. But . . . ," and here the Judge turned to me, "Stanley really wants this case." For a moment he said no more, I am sure sensing in my eyes the expression, "Judge, how *could* you?" But of course he had yielded to his great colleague Stanley Mosk, just as over the years his colleagues had yielded some of the great cases that became landmark Tobriner opinions. I am sure Mat Tobriner sensed, as history has now shown, that by talent, temperament, and prior service as Attorney General himself, Stanley Mosk would make of *Mammoth* an enduring decision.

So it is not entirely without justification that instead of Justice Mosk you have me to speak, within the limits of judicial propriety, as a junior employee of the California Supreme Court 25 years ago. Let me only add, before putting aside personal history, that the authorship of the Court's opinion, like the Tobriner

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[1] The Court's opinion borrowed specifically from the language of John McCarthy's petition to describe Mammoth itself, which in McCarthy's words embraced "nature's spectacular gifts of mountains, lakes, trees, streams, and wildlife." Compare 8 Cal.3d at p.253.

staff's authorship of the conference memorandum—and the Court's other great rulings of the early 1970s[2]—represented a collaboration among the Justices and their clerks. It can be judicially noted that for better or worse in our jurisprudence, the chambers of Tobriner and Mosk shared the west end of the State Building's fourth floor. Certain phrases in *Mammoth*, both in text and footnotes, have a familiar ring sharper than that attained by objective third-party reading. But the spirit, the mandate, the force of *Mammoth* belong to its author, and today most of all we honor the great Justice of that great Court still serving, Stanley Mosk.[3]

Four factors in my assessment influenced the California Supreme Court's decision in *Mammoth*. First, and indispensably, were the remarkable similarity of NEPA and CEQA; that the initial NEPA regulations required environmental impact statements for federally-licensed private activity, and that Judge Skelly Wright's forceful D.C. Circuit opinion had called for a vigorous and generous application of NEPA in *Calvert Cliffs*.[4] Second is the time, the case arising as it did at the dawn of the modern environmental age; reflected in law with federal judicial and legislative responses to our threatened environment; and the California Legislature's enactment not only in 1970 of CEQA, but also one year later of A.B. 1301 and its mandates for consistent and environmentally-sound land use planning.[5] Third was the apprehension—particularly here in California, as poorly planned subdivisions were mapped in the Tahoe Basin, with Point Reyes and the West Marin hills looming as the next loss—that premature development would irreversibly destroy our most precious and remote natural preserves. And finally, of course, this case was presented in this context in 1971 and 1972 to the most distinguished state court in the nation.[6]

Why did *Mammoth* emerge as it did, worthy of our celebration 25 years later? After all, the opinion functionally did no more than interpret a single word—"project"—in a seemingly procedural and technical statute, holding that "project" includes state or local approval of private activity affecting the environment, as well as activity directly undertaken by government itself.[7] But of course

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[2] For example, Justice Peters' *Sail'er Inn, Inc. V Kirby* (1971) 5 Cal.3d 1, Justice Sullivan's *Serrano v. Priest* (1971) 5 Cal.3d 584, Justice McComb's *Marks v. Whitney* (1971) 6 Cal.3d 251, and Chief Justice Wright's *People v. Anderson* (1972) 6 Cal.3d 628.

[3] Let us also honor the presence today and contribution of Judge Laurence Rubin, who as Justice Mosk's law clerk in the 1971-72 term, assisted Justice Mosk in crafting the Court's final opinion.

[4] *Calvert Cliffs Coordinating Comm. v U.S. Atomic Energy Comm.* (D.C. Cir. 1971) 449 F2d 1109.

[5] 1971 Cal.Stats., ch. 1446.

[6] It can be fairly argued that the sentence in text not include its limiting adjective "state."

[7] 8 Cal. 3d at p. 262.

the opinion did not stop there; its most enduring messages commanded that CEQA be interpreted "to afford the fullest possible protection to the environment within the reasonable scope of the statutory language"[8], and in footnote 8 that "[o]bviously if the adverse effects to the environment can be mitigated, or if feasible alternatives are available, the proposed activity . . . should not be approved."[9]

Mammoth, moreover, has rightly been remembered as more than an environmental case. It remains the great contemporary exemplar of statutory construction. Teaching us properly to ignore the evidentiarily useless but promotional *post hoc* declarations of legislators on both sides of an issue, Justice Mosk salvaged from the Legislature's (perhaps deliberate) use of imprecise language a mandate to bring about that which the legislators had promised to their constituents: in this case, a new model of state and local decisionmaking when the environment is at risk. Confronted with the literary precision of Justice Sullivan's dissent, Justice Mosk invoked the pantheon of Frankfurter and Hand to remind us that "[s]tatutes are not inert exercises in literary composition. They are instruments of government . . ."; the Court's task is not to enforce rules of grammar but instead one of "proliferating a purpose."[10]

In the end, *Mammoth* emerged as a great case because the Court had correctly discerned the Legislature's intent. The Court collaborated with the lawmakers to effect their inchoate will; the Legislature then had the grace to collaborate with the Court, creating an exemption for a four-month period of transition, but more importantly ratifying the Court's holding, not only of the word "project,"[11] but also of footnote 8's substantive command (albeit reposing discretion to determine feasibility and overriding considerations in the approving agency, not the courts).[12]

CEQA's first quarter century has thus been distinguished because the law was interpreted early and forcefully by the highest Court in the jurisdiction, which in turn was supported by the Legislature's refinements and essential ratification. Contrast this development with that of NEPA, where the United States

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[8] *Id.* at 259.
[9] *Id.* at p. 263 fn. 8.
[10] 8 Cal.3d at p. 266, fn. 9.
[11] 1972 Cal. Stats. ch. 1154. See Seneker, *The Legislative Response to Friends of Mammoth* (1973) 48 CAL. STATE BAR J. 127; Selmi, *The Judicial Development of the California Environmental Quality Act* (1984) 18 U.C. DAVIS L. REV. 197, 210 & fn. 55.
[12] 1976 Cal. Stats. ch. 1312; see Selmi, *supra*, 18 U.C. DAVIS L. REV. at p. 261.

Supreme Court has yet to embrace the understanding that Skelly Wright elucidated in *Calvert Cliffs*, where the High Court has in fact reigned in the courts of appeals' NEPA jurisprudence in all 15 of its 15 NEPA cases, and where Congress has failed to provide a legislative correction.[13]

Let me now turn to two specific legacies of *Mammoth*, both of them like the case itself imbued with personal involvement. The first arose in the Owens Valley, not because of the holding of *Mammoth* but because the decision broadcast CEQA to the state. *Mammoth* was decided on 21 September 1972. The next day Frank Fowles, Inyo County District Attorney, woke up to learn that there was a California Environmental Quality Act and indeed it required an environmental impact report before carrying out an environmentally-threatening project. Frank began to wonder if that law might apply to Los Angeles' groundwater pumping in the Owens Valley, which had been expanding since the Second Los Angeles Aqueduct was placed in use in June 1970, and whose impact on the valley was now being discerned. Keep in mind that if CEQA applied here, it was *not* because of *Mammoth*'s holding; Los Angeles's "project" was a public one, clearly embraced within Justice Sullivan's literal definition of that word, unarguably embraced by CEQA since November 1970. No, the only difference *Mammoth* made to Frank Fowles was to make him aware of the law. And thus on 15 November 1972, nine days after *Mammoth*'s finality, Frank walked next door from his office in the Inyo County Courthouse and filed *County of Inyo v. Yorty* (later *County of Inyo v. City of Los Angeles*).[14]

Consider what *Inyo v. Los Angeles* produced between its filing 25 years ago, and the Third District Court of Appeal's two-line order of this past May 23rd: "Good cause appearing, the writ of mandate issued August 6, 1973 is discharged."[15] Six published and a few unpublished opinions—requiring Los Angeles to prepare an EIR;[16] declaring the court's power to enjoin groundwater pumping even though LA's water rights remained unchallenged;[17] requiring for the first time that the EIR prepared actually be reviewed for adequacy;[18] demanding the city

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[13] See Rossmann, *NEPA: Not So Well at Twenty* (1990) 20 E.L.R. 10174.

[14] The series of cases is described in Rossmann & Steel, *Forging the New Groundwater Law* (1983) 33 HASTINGS L.J. 903; see also J. WALTON, WESTERN TIMES AND WATER WARS (1992) pp. 248-264; W. KAHRL, WATER AND POWER (1984) pp. 416-429.

[15] *County of Inyo v City of Los Angeles* (Cal.App. May 23, 1997) 3 Civil C004068 (unpublished order).

[16] *County of Inyo v Yorty (I)* (1973) 32 Cal.App.3d 793.

[17] *County of Inyo v City of Los Angeles II* (1976) 61 Cal.App.3d 91.

[18] *Id.*

for the first time in its history to adopt mandatory water conservation;[19] rejecting LA's EIR's not once but twice because contrived project descriptions (while not concealing environmental impacts) evaded a choice between increased groundwater pumping in Inyo and constitutionally-preferred water conservation in Los Angeles;[20] and finally authorizing the parties to experiment with joint decision-making and assessment, but not in derogation of the larger public's right to an adequate EIR that lays the foundation for meaningful mitigation.[21]

In discharging its writ five months ago, the court of appeal signaled its satisfaction with these legal requirements of CEQA, and brought into force the permanent water management plan whereby Inyo and Los Angeles jointly decide the annual allocation of the Owens Valley's water resources, and whereby Los Angeles has committed to mitigation of past impacts that will include the rewatering of the Owens River for the first time since 1913.

Was this result legally inevitable? Consider the facts of the case. Los Angeles had approved and funded the Second Aqueduct in 1963 -- seven years before CEQA became effective. L.A. began filling that aqueduct with increased groundwater in June 1970—five months before CEQA became effective. The cost of building the aqueduct and of installing the first set of pumps vastly overwhelmed the marginal cost of installing the remaining pumps on the valley floor. And *Inyo* was not even filed until two years after CEQA arguably applied to the pumping.

But the court of appeal through Justice Richardson—in what he described on his final retirement as Solicitor of the Interior, after retirement from the California Supreme Court, as his greatest work—sharply read the CEQA guidelines on ongoing projects and applied them to require an EIR on all of L.A.'s increased groundwater pumping.[22] In essence, the court held, discretion remains to spend money and discretion remains to affect the environment; while you have those choices, examine their impact and their alternatives in an EIR. What led the court to this path? The command in *Mammoth*: "We conclude . . . that the legislative intent so strongly expressed in CEQA can be met only by considering the

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[19] *County of Inyo* v. *City of Los Angeles* (Cal.App. Mar. 24, 1977) 3 Civil 13886 (unpublished preliminary memorandum quoted in Rossmann & Steel,*supra*, 33 HASTINGS L.J. at p. 919 fn. 106).

[20] *County of Inyo* v *City of Los Angeles (III)* (1977) 71 Cal.App.3d 91; *County of Inyo* v *City of Los Angeles (V)* (1981) 124 Cal.App.3d 1.

[21] *County of Inyo* v *City of Los Angeles (VI)* (1984) 160 Cal.App.3d 1178.

[22] 32 Cal.App.3d at pp. 805-806

[23] 32 Cal.App. 3d at p. 806.

expanded groundwater extraction as a "project" separate and divisible from the second aqueduct, and we so treat it."[23]

The *Inyo* series of cases, especially Justice Richardson's *Inyo I* and Justice Friedman's *Inyo III*, like *Mammoth* itself, have over the years to me read less like legal doctrine and more like passages of great scripture, revealing new insights to even the most familiar reader on each revisit. No matter how well you think you know them, I commend you to re-read them carefully each time their teachings may govern the case before you. Attempting to justify their parity with more recent entries in the California Reports, the opinions in *Mammoth* and *Inyo* recall the advice of the beloved former rector of St. Clement's, that not all scripture is created equal. The comparison remains an apt one, in that the writing of scripture and the writing of judicial decisions both attempt within the limits of human inadequacy to capture in words mandate and aspirations that transcend the moment, with these opinions succeeding.

Today at its happy conclusion we must recognize that *Inyo*, like *Mammoth*, could have gone the other way. Absent its fealty to the fresh command of *Mammoth*, the court of appeal could easily have written, for example, that " rules regulating the protection of the environment must not be subverted into an instrument for oppression and delay of social, economic, or recreational development and advancement."[24] Especially when asked to reject the second Los Angeles EIR, we can with today's hindsight easily imagine those words from a court determined to discharge its writ, giving back to the Department of Water and Power its prerogative to "develop and advance."

Indeed, the cases closest to *Inyo have* gone the other way. In *Sierra Club v. Morton*[25] a single federal district judge rejected the plaintiffs' CEQA claims that an EIR should be prepared before expanding export by the State Water Project at the Tracy/Delta pumps, erroneously distinguishing *Inyo* without relying on *Mammoth*, and holding any extraction within existing design capacity exempt from CEQA. In *County of Trinity v. Andrus*[26] the very same judge, this time sitting in the Eastern rather than Northern District, followed his own precedent and declined to order an EIS on the operation of the Trinity River Division of the Cen-

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[24] *Citizens of Goleta Valley v. Board of Supervisors (II)* (1990) 52 Cal.3d 553, 576.

[25] (N.D. Cal. 1975) 400 F Supp. 610, 650, *aff'd in part and rev'd in part on other grounds*, (9th Cir. 1979) 610 F.2d 581, *rev'd on other grounds* (1981) 451 U.S. 287.

[26] (E.D. Cal. 1977) 438 F Supp. 1368, 1388-1389.

tral Valley Project. Thus again the error, so systemic in the water cases, of federal courts assuming the power to decide California law![27]

The aberrational "federal" CEQA law of *Sierra Club* and *Trinity* did become the aberrational law of California in *Nacimiento Regional Mgt. Advisory Comm. v. Monterey County Water Resources Agency* (1993) 15 Cal.App.4th 200. In that case the water agency was about to decide during our latest drought, as it did yearly, how to time and quantify its releases from the Lake Nacimiento Dam, a decision that affected and was affected by impacts on recreation in the lake, hydroelectric generation at the dam, wildlife and fisheries in the downstream Salinas River, groundwater pumping in the Salinas Valley, and irrigated agriculture there. When the water agency declined to prepare an EIR and learn how to minimize environmental impact while exercising ongoing discretion to balance these worthy and competing interests, the agency's official advisory committee brought suit. The court of appeal relied on *Sierra Club* and *Trinity* to conclude that this ongoing project was exempt from CEQA.

Perhaps the Ventura court of appeal justices could be forgiven for not relying on their Sacramento colleagues in *Inyo*, rather than a single federal judge, since their appellant advisory committee did not even cite *Inyo* in their appellate briefs. At least the Ventura court did not publish its decision on filing, causing the advisory committee to abandon the case. But then just prior to finality, third parties convinced the court of appeal to change its mind about publication, too late for others to argue otherwise, seek rehearing, or pursue review in the California Supreme Court. We've come a long way, perhaps too far, from the substance and procedure of *Mammoth*.

Fortunately the citizens of the Owens Valley fared better than those of the Salinas Valley. In the first three quarters of this century, Owens Valley came to symbolize deceit, colonialism, and exploitation. By the example of *Mammoth* as applied in *Inyo*, in the last quarter century the Owens Valley has stood for integrity and honesty in public decisions, self-determination by the people of Inyo, water conservation in Los Angeles, and ultimately joint city-county governance of the valley's water resources to reclaim their environment. Thus when asked today if CEQA and *Mammoth* matter, if they have left a legacy worth replicating, did they improve the environment, did they improve California, I respond with an old battle cry in its newer and positive incarnation: "Remember the Owens Valley."

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[27] Compare, e.g., *United States v. Gerlach Live Stock Co.* (1950) 369 U.S. 725 with *Joslin v. Marin Mun. Water Dist.* (1967) 67 Cal.2d 132 (U.S. Supreme Court misinterprets CAL. CONST., art. x, § 2).

Having propounded this assessment of *Mammoth*'s legacy, let me briefly add a second legacy arising from the Court's judgment of 25 years ago: that of a profession of women and men, always colleagues, sometimes adversaries but never enemies, who have labored as practitioners, teachers, citizens, and decisionmakers to make this law work for the people and environment of California. This legacy is represented on the panel before you. Andy Lawrence, the quintessential citizen, beginning her career as petitioner Friend of Mammoth, then for the last 17 years member and chair of respondent Board of Supervisors, leading her county into partnerships that saved Mono Lake and Bodie State Historic Park; fellow child of New England, fellow athlete who doesn't know when to quit (though I won't pursue that comparison any further, since no man or woman has matched Andy's consecutive gold medals in downhill Olympic skiing), we have shared quiet walks at the lake and countless reunions in Mammoth town, at first either conspiring or commiserating, but more recently focussed on the raising of children. Nick Yost, who left the AG to join Charlie Warren in the elegant Jackson Place townhouse of CEQ and use that bully pulpit to graft *Mammoth* and CEQA onto NEPA as much as two men alone could do;[28] then sensibly returning to the fellowship of this bar. Mike Remy, the Witkin of CEQA,[29] leader and rebuilder of the Planning and Conservation League, honoring me as I do him as each other's ghostbuster; the first one, when a tough question arises, you're gonna call.

The camaraderie and collegiality built by the people in this room, of which the four of us only stand as a small sample, flow from the Court's example in *Mammoth*. The past 15 years have not been good generally to the law and lawyers, in our dealings with each other and in the public's evaluation of us, as our profession became subsumed by commercialism, marketing, egotistic and aggressive tactics, the excessive politicization of the judicial process. Let us be grateful that Justice Mosk and his colleagues bequeathed us a legacy of integrity, rigor, respect, and intellectual honesty.

So let me end as I began, with the Court: the Court of Don Wright, Marshall McComb, Ray Peters, Mat Tobriner, Stanley Mosk, Ray Sullivan, and Louis Burke. They raised in *Mammoth* a great standard; but it would be naive or dishonest to

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[28] See Rossmann, *NEPA, Not So Well at Twenty, supra*, 20 E.L.R. at p. 10176.

[29] See M. REMY, T. THOMAS, J. MOOSE, W. MANLEY, GUIDE TO THE CALIFORNIA ENVIRONMENTAL QUALITY ACT (CEQA) (9th ed. 1996, and its 8 predecessors).

claim, in this age of nonpublication and depublication,[30] and of CEQA opinions that pride themselves in avoiding citation to our founding case,[31] that their example has been consistently followed.

But still that Court must guide us. As I look back on those Justices 25 years after beginning my profession in their service, I share the 60-year perspective that Learned Hand articulated of his law school teachers, in concluding his 1958 lectures on the Bill of Rights. Hand's description of "men all but one of whom are now gone," and his final peroration, sum up the *Mammoth* Court and our obligation to it:

I carried away the impress of a band of devoted scholars; patient, considerate, courteous and kindly, whom nothing could daunt and nothing could bribe. The memory of those men has been with me ever since. Again and again they have helped me when the labor seemed heavy, the task seemed trivial, and the confusion seemed indecipherable. From them I learned that it is as craftsmen that we get our satisfactions and our pay. In the universe of truth they lived by the sword; they asked no quarter of absolutes and they gave none.

Go ye and do likewise.[32]

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[30] *E.g., North Valley Coalition* v *California Water Resources Control Bd. (Browning Ferris Industries)* (Cal.App.June 26, 1996) 3 Civil C020140; *Woodland Hills Homeowners Assn.* v *City of Los Angeles (Warner Ridge Partners)* (Cal.App. Feb. 15, 1994) 2 Civil B076343; *Noth Valley Coalition* v *County of Los Angeles (Browning Ferris Industries, Inc.)* (Cal.App. Oct. 25, 1993) 2 Civil B068300; *Warner Ridge Associates* v *City of Los Angeles* (Cal.App. Dec. 31, 1991) 2 Civil B052835, depublished (Cal. Mar12, 1992) No. S0251260.

[31] *E.g., Laurel Heights Improvement Assn.* v *Regents (II)* (1993) 6 Cal.4th 1112.

[32] L. Hand, The Bill of Rights (1958), quoted inG. GUNTHER, LEARNED HAND (1994) p.654.