



1300 I Street
P. O. Box 944255
Sacramento, CA 94244-2550
Telephone: (916) 322-5647
Fax: (916) 322-5609
E-Mail Address: virginia.cahill@doj.ca.gov

November 16, 2007

John Kirlin, Executive Director
Delta Vision
California Resources Agency
1416 Ninth Street
Sacramento, California 95814

Re: Summary of *United States v. State Water Resources Control Board*
[and seven other cases] (1986) 182 Cal.App.3d 82 (“*Racanelli*” decision)

Dear Mr. Kirlin:

At their meeting on October 25, 2007, the Delta Vision Blue Ribbon Task Force members asked for a summary of *United States v. State Water Resources Control Board* (1986) 182 Cal.App.3d 82, commonly referred to as the “*Racanelli* Decision,” after the appellate judge who wrote the opinion. We repeat the Court’s own very short summary of the case, followed by a more detailed summary of the decision.

Court’s Own Summary:

In 1976 the [State Water Resources Control] Board convened a hearing for two declared purposes: to formulate a water quality control plan for the Delta and to determine whether the water-use permits held by the U.S. Bureau and the DWR should be amended to implement the plan. In August 1978, following an extensive evidentiary hearing over an 11-month period, the Board adopted the “Water Quality Control Plan for the Sacramento-San Joaquin Delta and Suisun Marsh” (hereafter sometimes called the Plan) and “Water Right Decision 1485” (hereafter sometimes called the Decision or D 1485).

In the Plan the Board established new water quality standards for salinity control and for protection of fish and wildlife in the Delta and Suisun Marsh. In D 1485 the Board modified the permits held by the U.S. Bureau and the DWR, compelling the operators of the projects to adhere to the water quality standards as set out in the Plan. In this

appeal we are requested to review the validity of those actions: namely, the Board's establishment of water quality objectives in the Plan and its modification of the water-use permits in the Decision.

We will conclude, *inter alia*, that the modification of the projects' permits in order to implement the water quality standards was a proper exercise of the Board's water rights authority. We will also conclude that in establishing only such water quality standards as will protect Delta water users against the effects of project activities, the Board misconceived the scope of its water quality planning function. Finally, we will determine that the Board has the power and duty to provide water quality protection to the fish and wildlife that make up the delicate ecosystem within the Delta.

(*Racanelli*, *supra*, 182 Cal.App.3d at pp. 97-98.)

Overview of Key Points

The *Racanelli* Decision is long and complex. There are literally a dozen holdings on various issues. Some of the more important ones are in the following areas. First, the Court held that the State Water Resources Control Board erred when it based the water quality standards in its water quality plan on the water quality conditions that would have been present in the Delta if the Central Valley Project (CVP) and State Water Project (SWP) had never been built ("without project" conditions) and then imposed the obligation to meet them on the CVP and SWP alone. The Board should have established the water quality standards at the level needed to protect all beneficial uses in the Delta, even if that meant that other water users would also have to contribute to meet them. Second, in response to various claims by the federal government and its contractors, the Court held that the Board's actions did not violate the CVP's water rights priorities, did not impair the federal contractors' contract rights, and were not preempted by federal law. Third, the Court held that the public trust doctrine, as enunciated in the *National Audubon Society* case, permits the Board to reconsider past water allocation decisions, and amend water rights if necessary to protect fish and wildlife.

Detailed Summary of Court's Decision

Background: As the Court notes in its summary, in 1976, the State Water Resources Control Board undertook a combined water quality/water rights proceeding for two purposes: to formulate a new water quality control plan for the Delta and to determine whether the water rights permits held by the U.S. Bureau of Reclamation for the Central Valley Project and by the California Department of Water Resources for the State Water Project should be amended to implement the plan. The Board conducted an extensive evidentiary hearing, and in August, 1978, it adopted a Water Quality Control Plan for the Sacramento-San Joaquin Delta and Suisun

Marsh and Water Right Decision 1485. The water quality plan adopted standards for salinity control and for protection of fish and wildlife based on “without project” conditions. In other words, the standards were designed to attain the level of water quality that would be present in the absence of the Projects. In Decision 1485, the Board modified the permits held by the Bureau and DWR, requiring the operators of the projects to comply with the standards set out in the Plan.

Procedural History: Eight petitions for writ of mandate were filed challenging the Board’s establishment of the water quality standards and/or its modification of the water rights permits. In addition to the United States, lawsuits were filed by the Central Valley East Side Project Association, the Kern County Water Agency, the San Joaquin County Flood and Water Conservation District, the South Delta Water Agency, the Contra Costa Water Agency, Fiberboard Corporation and Crown Zellerbach Corporation. The cases were coordinated in the trial court. The trial court upheld the authority of the Board to impose the water quality standards upon the projects but rejected the standards as inadequate. It issued a writ of mandate ordering the Board to set aside its plan and decision. Virtually all the parties appealed. The cases were consolidated on appeal. As described below, the Court of Appeal held that the water quality standards were not validly established, but in light of the Board’s assurance that it was commencing a new water quality proceeding, the Court did not order the Board to set aside the Plan or Decision 1485. The Court thus reversed the trial court judgment granting a writ of mandate commanding the Board to set aside the Plan and Decision.

Preliminary Discussion: The decision contains an extended discussion of the water projects, the law of water rights, available water supply, the public interest, the projects’ water rights and water quality in the Delta. (*Racanelli*, at pp. 98-111.) In the section dealing with the law of water rights, the Court notes that in its role of issuing appropriation permits, the Board has two primary duties: “1) to determine if surplus water is available and 2) to protect the public interest.” (*Id.* at p. 102.) The Board has the power to issue appropriative rights for beneficial purposes “under such terms and conditions as in its judgment will best develop, conserve, and utilize [the water] in the public interest.” (Wat. Code, § 1253.) Not only consumptive uses, but nonconsumptive or “instream uses” are beneficial uses which are to be protected in the public interest. (*Racanelli*, at p. 103.)

Under the heading Water Quality in the Delta, the Court cites Water Code section 13000, which provides that activities which may affect the quality of the waters of the state shall be regulated “to attain the highest water quality which is reasonable, considering all demands being made and to be made on those waters and the total values involved, beneficial and detrimental, economic and social, tangible and intangible.” The Board is required to “establish such water quality objectives . . . as in its judgment will ensure the reasonable protection of beneficial uses.” (*Racanelli*, at p. 110, citing Wat. Code, § 13241.)

Major Holdings: The Court addressed a number of major issues and resolved them as follows. The summary below is based entirely on the Court’s decision. We use the headings of the opinion itself for clarity.

I. Water Quality Standards for Consumptive Uses

A. Use of “Without Project” Standards for the Central and Western Delta.

In adopting water quality standards to protect consumptive uses of Delta waters, the Board employed a “without project” level of protection. The objectives were designed to maintain the levels of water quality in the Delta which would theoretically exist if the projects had never been constructed. The Board used the “without project” conditions as the measure of water flows necessary to protect the existing *water rights* in the Delta. The Court concluded that this was error. In its water quality role, the Board’s task is not to protect water rights, but *beneficial uses*. Moreover, the without project standards protected Delta waters only from degradation by the projects, while it was the Board’s responsibility to also protect against degradation by other users. The Board must consider all competing demands for water in determining what is a reasonable level of water quality protection. The procedure followed by the Board, combining the water quality and water rights functions in a single proceeding, “was unwise.” (*Racanelli* at pp. 115-123.) The Court concluded that the Board did not set the water quality objectives in the manner required by law, and the objectives were thus invalid. However, because the Board had announced its intention to conduct hearings during 1986 to establish new and revised standards, the Court did not require the Board to set the Plan aside.

B. Adequacy of Interim Standard for the Southern Delta.

For similar reasons, the Court found that the Board erred in establishing water quality standards designed to protect agricultural uses in the southern Delta. The Board believed that the SWP and the CVP projects whose permits were before it (which did not include Friant or New Melones permits) were not the cause of the water quality problems in the southern Delta, and thus believed that it could not modify the project permits before it to meet a new standard. It chose to retain an existing southern Delta agricultural water quality standard as an interim level of protection. The Court concluded that use of without project conditions and a focus on protecting southern Delta users was a flawed approach. The Board should have set water quality standards so as to provide reasonable protection to beneficial uses, considering all the demands made upon the water. (*Id.* at pp. 121-123, citing Wat. Code, §§ 13000, 13241.)

II. Enforcement of Water Quality Standards for Consumptive Uses.

A. Validity of Program Limited to Projects.

The Court observed that the Board’s power to enforce water quality standards was unclear. The Legislature has not given the Board explicit authority in the Porter-Cologne Water Quality Control Act to enforce compliance with the standards it sets. The principal enforcement mechanism available to the Board is its regulation of *water rights* to limit diversions which cause degradation to water quality. Although the Court had found that the without project standards were inadequate to establish water quality objectives, “there is no legal impediment to the Board’s use of such standards to enforce water quality objectives against the projects themselves.

The implementation program was flawed by reason of the Board's failure, in its water quality role, to take suitable enforcement action against other users as well." (*Id.* at p. 126.)

B. Authority of Board to Modify Permits to Enforce Water Quality Control Standards.

The Bureau of Reclamation and federal contractors had argued that the Board had no authority to modify the appropriative rights held by the United States for the operation of the CVP. The Court ruled to the contrary, because the Board has reserved jurisdiction to do so. Various Board decisions had reserved jurisdiction to "coordinate" the terms of the CVP permits with the SWP and other units of the CVP, and Water Code section 1394 expressly granted the Board the authority to reserve jurisdiction in order to impose new terms and conditions when necessary. The Court concluded that imposition of a term that would compel the projects to provide salinity control in the Delta by maintaining the water quality standards of the plan was within the Board's authority to amend or modify permit terms. (*Id.* at pp. 127-129.)

In addition, the Board was also authorized to modify permit terms under its power to prevent waste or unreasonable use or unreasonable methods of diversion of water, under California Constitution, Article X, section 2. The Board had determined that changed circumstances revealed new information about the adverse effects of the projects and that such information necessitated revisions to water quality standards. It made an implicit finding that the projects' methods of use had become unreasonable because of their deleterious effects upon water quality. This was essentially a policy judgment that the Board was qualified to make in view of its special knowledge and expertise. (*Id.* at pp. 129-30.)

C. Joint Responsibility to Maintain and Monitor Water Quality.

In the Water Quality Control Plan, the Board determined that project operations should be coordinated, and in Decision 1485, it made the projects equally responsible for maintaining water quality and performing monitoring in the Delta. The United States challenged this imposition of joint responsibility, alleging impairment of its prior vested water rights. (CVP rights are mostly senior to SWP rights.) The Court held that the Board's reserved power to modify the permits included the authority to impose responsibility to maintain water quality upon the projects equally. Indeed, the Court noted that the Board's power to set permit terms includes the power to consider the "relative benefit" to be derived. (Wat. Code, § 1257.) It opined that, "logically [the Board] should also be authorized to alter the historic rule of 'first in time, first in right' by imposing permit conditions which give a higher priority to a more preferred beneficial use even though later in time." (*Racanelli*, at p. 132, citing *Hutchins*, *The California Law of Water Rights*.)

D. Interference with Congressional Purposes.

The Bureau of Reclamation had argued that the Board lacked authority to regulate a federal facility. The Court disagreed. The CVP had been made expressly subject to the federal

Reclamation Act of 1902, and section 8 of that Act prohibits interference with state water law. In *California v. United States* (1978) 438 U.S. 645, the United States Supreme Court held that under section 8, state-imposed conditions on federal projects were valid as long as such conditions were not “inconsistent with congressional directives.” (*Id.* at p. 679.) River regulation was one of the purposes for which the CVP was authorized, and the *Racanelli* Court was persuaded that salinity control was encompassed in river regulation. Moreover, section 313 of the Federal Water Pollution Control Act requires federal facilities to comply with state water quality controls. (33 U.S.C. § 1323.)

E. *Contra Costa Canal Standards.*

The Water Quality Control Plan had included salinity control standards for the protection of municipal and industrial uses of water taken from the Contra Costa Canal. The Contra Costa Water District held neither riparian nor appropriative rights of its own, but operated the canal under a water purchase contract with the Bureau of Reclamation, which provided no guarantee for the quality of the water to be delivered. The Court considered whether the Watershed Protection Act (Wat. Code, §§ 11460-11463) or the Delta Protection Act (Wat. Code, §§ 12200—12220) required the projects to leave enough water in the Delta for purposes of salinity control. As a water rights matter, the Board had concluded that the projects were responsible only for maintaining the salinity levels that would exist had they never been built. However, with respect to drinking water, the Board set a higher standard in its water quality plan in order to ensure public health and the Court concluded that it was authorized to do so.

The Court decided that “the Board’s authority in setting water quality standards is *not* limited to the protection of water rights but extends to the protection of *all beneficial uses* from degradation of water quality, even if the resulting level of water quality exceeds that provided by water rights.” (*Racanelli*, at p. 141, emphasis in original.) The Board was authorized to impose on the projects such terms and conditions as would, in its judgment, best serve “the public interest.” (*Id.* citing Wat. Code, §§ 1253, 1257, 1258 and cases.) However, the Board had not made any findings reflecting its balancing between domestic uses of water from the Delta and the domestic uses of export recipients. The Board did not resolve the issue of “[w]hether the projects should be required to bear the costs of releasing additional water for outflow to ensure salinity control, or whether the release requirements should be conditional upon the execution of a repayment contract between the recipient district and one of the projects.” The Court advised that in the future hearings, the Board should make specific findings as to whether it is reasonable and in the public interest for the projects to provide water for water quality control for the Contra Costa Canal without a repayment obligation. (*Racanelli*, at pp. 141-143.)

The Court also held that the Board properly eliminated a standard at Antioch for the benefit of riparian corporations, because meeting that standard would require a wasteful release of 25 acre-feet of water for each acre-foot diverted. The Board’s obligation is to provide “reasonable” protection for beneficial uses. (*Id.* at pp. 143-44.)

F. *Impairment of Suppliers' Contract Rights.*

The federal contractors argued that the Board's actions in imposing increased water quality standards on the projects impaired the contractors' contract rights. The Court decided that no substantial impairment of contractual rights was demonstrated. The Court reached this conclusion on two grounds. First, because the CVP's appropriations are, by definition, conditional, subject to continuing jurisdiction, the provisions of Article X, section 2, and the priorities of senior rights holders, the contractors could not have had any reasonable expectation that the contractual amounts of water would always be delivered. Moreover, the federal contracts expressly provided for governmental immunity in case of a failure to furnish the specified amounts in times of shortage. Second, the Board's action was justified as a valid exercise of the police power. (*Racanelli*, at pp. 145-48.)

III. **Enforcement of Water Quality Standards for Nonconsumptive, Instream Uses.**

The Water Quality Control Plan included standards to protect fish and wildlife. The standards were based on modified without project conditions, using striped bass as the benchmark. The Board recognized that higher standards would be required to protect other species but concluded that those levels would result in the "virtual shutting down of the project export pumps," and was thus against the public interest.

The Bureau argued that the Board did not identify the source of its authority to impose conditions on existing appropriative permits to protect fish and wildlife. *National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419 had been issued after the trial court judgment in this case. In *National Audubon*, the California Supreme Court had clarified the applicability of the public trust doctrine to California water rights. The public trust protects nonconsumptive, instream uses such as navigation, fishing, recreation, ecology and aesthetics. The state, as trustee, retains supervisory control over the state's waters and has the power to reconsider its past allocation decisions in light of current knowledge. "No party has a vested right to appropriate water in a manner harmful to the interests protected by the public trust." (*Id.* at p. 445.) The *Racanelli* Court concluded: "In the new light of *National Audubon*, the Board unquestionably possessed legal authority under the public trust doctrine to exercise supervision over appropriators in order to protect fish and wildlife. That important role . . . exists as a matter of law itself." (*Racanelli, supra*, 182 Ca.App.3d, at p. 150, emphasis in original.)

Environmental groups, as friends of the court, had argued that the Board should have provided even greater protection to fish and wildlife in the Delta. The court stated that whether the standards are in fact reasonable was a factual question that would have required an examination of the evidentiary record. However, the Court assumed that in its new hearings, the Board would be guided by the lessons of *National Audubon* and would consider whether a higher standard for the protection of fish and wildlife is reasonable and in the public interest. (*Id.* at pp. 151-52.)

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Conclusion

Although the Board had informed the Court that it would commence proceedings to establish new water quality standards in 1986, it was not until 1995 that the Board adopted under its water quality authority a new Water Quality Control Plan for the Delta that replaced the 1978 Plan. Revised Decision 1641, adopted in March 2000 under the Board's water rights authority, assigned the responsibility for meeting the water quality standards to water rights holders, primarily the projects, replacing the provisions in D-1485.

The *Racanelli* Decision remains relevant, however, for its insistence that water quality standards be set to protect all beneficial uses, for its holdings confirming the State Board's authority to condition and amend the water rights permits of the CVP and SWP, and for its clear statement that the public trust doctrine applies in water rights proceedings and permits the Board to impose conditions on existing appropriate permits for the protection of fish and wildlife.

Sincerely,

VIRGINIA A. CAHILL
Deputy Attorney General

For EDMUND G. BROWN JR.
Attorney General

cc: Matt Rodriguez