

**S268802**

**IN THE  
SUPREME COURT OF CALIFORNIA**

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**ANTELOPE VALLEY GROUNDWATER CASES**

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**PUBLIC WATER SUPPLIERS'  
ANSWER TO PETITION FOR REVIEW**

**REBECCA LEE WILLIS ET AL.,**  
*Plaintiffs and Appellants,*

v.

**LOS ANGELES COUNTY WATERWORKS DISTRICT NO. 40 ET  
AL.,**

*Defendants, Cross-complainants, and Respondents;*

**CITY OF LOS ANGELES ET AL.,**

*Defendants, Cross-defendants, and Respondents;*

**ANTELOPE VALLEY–EAST KERN WATER AGENCY,**  
*Cross-defendant, Cross-complainant, and Respondent;*

**U. S. BORAX INC. ET AL.,**

*Cross-defendants and Respondents.*

**AFTER A DECISION BY THE COURT OF APPEAL  
FIFTH APPELLATE DISTRICT, CASE NO. F082469**

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## Reasons for Denying Review

There are three reasons for this Court to deny review in this case. First, the Court of Appeal did not create new law, but applied well-established law to a unique factual situation. To condition the exercise of unexercised correlative rights is a straightforward application of *In re Waters of Long Valley Creek Stream System* (1979) 25 Cal.3d 339 (*Long Valley*) to a comprehensive adjudication of an overdrafted groundwater basin. Furthermore, determining correlative groundwater rights with equal priorities, based on equitable principles, dates to the seminal case on correlative groundwater rights, *Katz v. Walkinshaw* (1903) 141 Cal. 116 (*Katz*), and has been unchanged since then.

Second, applying those principles will not impose unreasonable burdens on the Willis Class, whose members hold unexercised overlying rights. The physical solution approved by the Court of Appeal balances the burdens on the Willis Class with the burdens on existing users.

Third, there is no urgency for this Court to act. There is no conflict among decisions to resolve. Further, after judgment was entered in this case, the Legislature enacted a new law governing comprehensive adjudications, which specifically provides for the application of the principles established in *Long Valley*. (Code Civ. Proc., §§ 830–852.) The Court of Appeal decision and the physical solution imposed by the trial court and approved by the Court of Appeal provide significant guidance to trial courts as cases apply the new legislative provisions allowing trial courts to condition the exercise of previously unexercised correlative groundwater rights.

## **Willis Class Proposed Issues for Review**

The first issue submitted by the Willis Class contains a misstatement in sub-issue (b), which reads:

May a court “subordinate” the water rights of not-yet-pumping overlying owners to permit current users to continue using all available water? (Petn. at p. 7.)

Under the judgment, current users do not “continue using all available water.” Instead, the judgment severely reduces the amount of groundwater that current users can pump from the groundwater basin to its safe yield. Holders of unexercised overlying rights can pump groundwater for reasonable and beneficial uses under article X, section 2 of the California Constitution upon satisfying certain conditions, including payment of a replacement assessment. (See Slip Opn. at p. 27.) Thus, a more accurate statement of that sub-issue would be:

May a court condition the exercise of the water rights of not-yet-pumping overlying owners in an overdrafted groundwater basin?

## **Factual and Procedural Background**

This answer is filed on behalf of Antelope Valley public water suppliers, which have appropriative and prescriptive groundwater rights in the groundwater basin that is the subject of the action. To supplement their groundwater supplies, they also purchase imported water from the California State Water Project, which is delivered by

the California Aqueduct. (Slip Opn. at p. 8.) They were the original defendants in the lawsuit, which involved a limited number of groundwater pumpers. Later, the public water suppliers filed a cross-complaint, seeking a comprehensive adjudication of the groundwater rights in the basin. (*Id.* at 10-11.) One of the cross-defendants is the United States, which is the largest landowner in the Antelope Valley and pumps a significant amount for its facilities, primarily including Edwards Air Force Base. (*Id.* at 9.) Under the McCarran Amendment (43 U.S.C. § 666), the United States will waive sovereign immunity and participate in state water rights proceedings only when those proceedings are comprehensive, i.e. only when they join all parties with claims of water rights.

In this case, there was a comprehensive adjudication of groundwater rights in the basin which included two separate class actions. The Willis Class (petitioner here) consists of property owners who had never pumped groundwater from the basin. (Slip Opn. at 10.) The Wood Class (small pumper class) consists of those pumping less than 25 acre-feet of groundwater per year. (*Id.* at 9.) These two class actions were coordinated with the adjudication lawsuit and later consolidated with it, along with other cases. (*Id.* at 12-14.) The consolidation order explicitly provided that the court would determine all *inter se* claims to water rights within the basin. (*Id.* at 78–79.)

The Willis Class entered into a settlement agreement with the public water suppliers. (*Id.* at 14.) The effect of the settlement agreement was a significant part of the Court of Appeal's opinion, but it was not included in the petition's list of issues. The public water suppliers agree with the Willis Class that the settlement agreement

is not an appropriate subject for review here, because it concerns only the parties in this lawsuit and has no applicability to other cases.

After extensive settlement discussions, nearly all the active parties entered into a settlement agreement. (*Id.* at 20.) It specified the water rights of each party and the terms of a proposed physical solution—a management plan to bring the overdrafted groundwater basin into balance. (Slip Opn. at p. 6.) The settlement stipulation provided that if the judgment was not adopted or was reversed, the stipulation would be void. (129 J.A. 126331). The Willis Class and a few others did not join the stipulation and the trial court conducted a trial on the physical solution. (Slip Opn. at 20.) Following the trial, the court adopted the proposed physical solution as its own and entered judgment. (*Id.* at 31.)

The physical solution does not allocate any specific amount of the native safe yield to the Willis Class because they are dormant users not currently using groundwater. (*Id.* at 27.) To have allocated scarce groundwater to parties with no present reasonable and beneficial use for the water would violate article X, section 2 of the California Constitution.

But the trial court judgment and its physical solution recognized that the Willis Class members have correlative overlying groundwater rights that might be exercised in the unknown future. The trial court carefully considered a process to protect the exercise of the overlying groundwater rights and to protect the groundwater basin from even further overdraft pumping. To begin exercising its overlying right, a class member is required to apply to the watermaster engineer. (*Id.* at 30–31.) The watermaster engineer

determines whether the proposed extraction and use is reasonable in the context of all other uses in the basin, “including whether all of the Native Safe Yield is then currently being used reasonably and beneficially.” (Slip Opn. at p. 70.) The class member is also required to agree to pay a replacement water assessment. (*Ibid.*) The physical solution defines the replacement water assessment as the “amount charged by the Watermaster to pay for all costs incurred by the Watermaster related to Replacement Water.” (*Id.* at 72-73.) The physical solution provides that payment of the replacement assessment may be waived in *de minimis* cases. (*Id.* at 27.)

The Court of Appeal affirmed the judgment and physical solution.

## **Argument**

- 1. The Court of Appeal applied established principles of law to the new and unique fact situation of a long-overdrafted basin in which all existing users had to cut back pumping substantially.**
- A. The Court of Appeal correctly applied the principles established by this court in *Long Valley* to a comprehensive adjudication of an overdrafted groundwater basin.**

The Willis Class asks the Court to “grant review to decide whether the water rights of overlying owners may be subordinated to

the rights of current users of equal priority based solely on whether the owners have yet to exercise their rights to pump water.” (Petn. at p. 12.) This Court has already answered that question, in the context of riparian rights. *Long Valley, supra*, concerned a comprehensive adjudication of a stream system that was being completely used but had unexercised riparian claims. This court held that “when the [State Water Resources Control] Board determines all rights to the use of the water in a stream system, an important interest of the state is the promotion of clarity and certainty in the definition of those rights; such clarity and certainty foster more beneficial and efficient uses of state waters as called for by the mandate of [California Constitution] article X, section 2. Thus, the Board is authorized to decide that an unexercised riparian claim loses its priority with respect to all rights currently being exercised.” (25 Cal.3d at pp. 358–359.) The court emphasized that its holding only applied to comprehensive adjudications. (*Id.* at pp. 347–349, 354–357.) The holding of *Long Valley* was reaffirmed in *In re Water of Hallett Creek Stream System* (1988) 44 Cal.3d 448, 470–472.

The Court of Appeal applied *Long Valley* to the comprehensive adjudication in this case. The court noted that overlying groundwater rights are legally analogous to riparian surface water rights. (Slip Opn. at 32–33.) The court distinguished *Wright v. Goleta Water District* (1985) 174 Cal.App.3d 74 (*Wright*), which declined to apply *Long Valley* to the groundwater adjudication in that case. *Wright*, however, did not involve a comprehensive adjudication. “[A]bsent a statutory scheme for *comprehensive determination* of all groundwater rights, the application of *Long Valley* to a private adjudication would allow prospective rights of

overlying landowners to be subject to the vagaries of an individual plaintiff's pleading without adequate due process protections." (174 Cal.App.3d at p. 89.)

Although this case is not a statutory adjudication, it is nonetheless comprehensive, as the lower court's statement of decision and earlier consolidation order make clear. (Slip Opn. at pp. 13–14.) It also meets the federal standards for a comprehensive adjudication under the McCarren Amendment (43 U.S.C. §666), which is required for jurisdiction over the federal government.

The Court of Appeal applied *Long Valley* to this case, and concluded that the physical solution did not extinguish unexercised overlying rights, but rather allowed for the exercise of the overlying right subject to a reasonable condition to protect all groundwater users including the Willis Class. The trial court had lawful discretion to impose reasonable restrictions on unexercised overlying rights, including filing an application with the watermaster engineer and paying a reasonable replacement water assessment to protect the basin from further overdraft conditions.

**B. Correlative overlying rights between users of equal priority have always been determined according to equitable principles.**

The Court of Appeal's use of equitable principles to determine water rights between current overlying users and holders of unexercised overlying rights is not new. In *Katz, supra*, the case that established the principle of correlative overlying rights, the court stated that disputes between overlying owners were to be decided

using equitable principles: “Disputes between overlying landowners, concerning water for use on the land, to which they have an equal right, in cases where the supply is insufficient for all, are to be settled by giving to each a fair and just proportion.” (141 Cal. at p. 136; see *City of Pasadena v. City of Alhambra* (1949) 33 Cal.2d 908, 926 [overlying rights are held in common and each overlier “may use only his reasonable share when water is insufficient to meet the needs of all”].) That is still the rule today. The Willis Class and the public water suppliers confirmed this in their settlement agreement, which defined “correlative rights” as the “principle of California law, articulated in *Katz v. Walkinshaw* (1903) 141 Cal. 116 and subsequent cases, that Overlying Owners may make reasonable and beneficial use of the water in a Basin and that, if the supply of water is insufficient for all reasonable and beneficial needs, each Overlying Owner is entitled to a fair and just proportion of the water available to the Overlying Owners.” (Slip Opn. at 16.)

*City of Barstow v. Mojave Water Agency* (2000) 23 Cal.4th 1224 (*Barstow*), limited the use of equitable apportionment in groundwater adjudications *in situations other than competing correlative rights*: “In ordering a physical solution, therefore, a court may neither change priorities among the water rights holders nor eliminate vested rights in applying the solution without first considering them in relation to the reasonable use doctrine.” (23 Cal.4th at p. 1250.) In so doing, the *Barstow* court distinguished the case of *Rancho Santa Margarita v. Vail* (1938) 11 Cal.2d 501, 560 (which stated that a court had broad equitable powers to fashion a physical solution), saying, “But *Vail* concerned a conflict between riparian right holders, not a situation where one party's rights were

paramount to the other's." (23 Cal.4th at p. 1251 [citation omitted].) In the same vein, the court expressly acknowledged that its holding did not apply to correlative rights: "Case law simply does not support applying an equitable apportionment to water use claims *unless all claimants have correlative rights . . .*" (*Id.* at p. 1248 (emphasis added).) Nothing in *Barstow* limits the application of equitable principles to correlative rights in accordance with the traditional rule of *Katz* and its progeny.

**2. Application of those principles in the current case is fair and does not impose an unreasonable burden on unexercised rights.**

Contrary to several statements in the petition, the physical solution does not prevent a member of the Willis Class from ever pumping water. Instead, to pump water, the member must file an application containing specified information, have the application approved, and agree to pay a replacement assessment. The Court of Appeal found this to be within the trial court's discretion. (Slip Opn. at p. 76.) The court also noted the trial court's finding that a replacement assessment for one acre-foot per year (an amount sufficient for domestic use) would result in an average cost for a Willis Class member of \$26 per month, less than what most Californians are likely paying. (Slip Opn. at p. 31)

The Petition repeatedly misstates that the watermaster engineer can deny an application for new production solely on grounds that the basin is fully appropriated. (Petn. at pp. 8–9, 10, 24.) In fact, the application procedure "requires the watermaster

engineer to determine whether the applicant has ‘established the reasonableness [of its proposed extraction and use of the groundwater] in the context of all other uses of Groundwater in the Basin, at the time of the application, including whether all of the Native Safe Yield is then currently being used reasonably and beneficially.’” (Slip Opn. at p. 70) In context, whether the basin is fully used and whether those uses are reasonable and beneficial are simply factors in determining whether the applicant’s proposed extraction is reasonable and are not grounds in themselves for denial of the application. Further, the watermaster engineer’s determination of whether a proposed extraction is reasonable is subject to appeal to the watermaster board of directors, and from there to the court under its retained jurisdiction. (*Id.* at p. 72.)

Since the judgment was entered in 2015, Willis Class members have made multiple applications for new production. All the applicants agreed to pay the replacement assessment. The watermaster approved all the applications. (See request for judicial notice filed concurrently with this answer.)

The trial court found and the Court of Appeal upheld the findings that the conditions placed on the Willis Class’s future exercise of their overlying rights were not unreasonable in light of the burdens placed on other overlying owners to significantly reduce their current pumping and to incur expenses, in a basin in which reasonable and beneficial water uses more than exceeded the native safe yield. (Slip opn. at p. 30.)

The trial court also found that “long-range planning for and investment in measures to protect the basin would be harmed absent certainty from quantified pumping rights, and the Willis

Class’s speculative needs would frustrate those goals. Moreover, existing users were already subjected to severe reductions, and the economy of the region (premised on the existing reduced uses) would be subjected to an unreasonable measure of uncertainty if existing users’ allotments were subject to the vagaries of dormant rights claims.” (Slip opn. at pp. 69–70.)

Thus, the conclusion of the petition is wrong. The original class representative, Rebecca Lee Willis, very likely could have received the right to use the water below her property. She could have built her home and landscape nursery, and realized her retirement dreams, at the cost of a court-determined reasonable replacement assessment, or perhaps at no cost at all.

**3. This case is not appropriate for this Court’s review because of the new comprehensive groundwater adjudication law.**

In 2015, the Legislature added sections 830–852 to the Code of Civil Procedure, to establish “methods and procedures for a comprehensive adjudication.” (Code Civ. Proc., §830, subd. (a).) “Comprehensive adjudication” is defined in the new law to mean “an action filed in superior court to comprehensively determine rights to extract groundwater in a basin.” (*Id.* §832, subd. (c).) The law became effective January 1, 2016, four days after judgment was entered in this case.

The new sections are to be applied and interpreted to provide “notice and due process sufficient to enable a court in a comprehensive adjudication conducted pursuant to this chapter to

determine and establish the priority for unexercised water rights.” (Code Civ. Proc., §830, subd. (b)(7).) The statute goes on, “The court may consider applying the principles established in *In re Waters of Long Valley Creek Stream System* (1979) 25 Cal.3d 339.” (*Ibid.*)

In view of the new sections, the Court should deny review for three reasons:

1. The new additions to the Code of Civil Procedure demonstrate the California Legislature’s intent that unexercised overlying water rights may be subject to reasonable conditions in appropriate cases.
2. This Court should wait until cases are decided under the new law.
3. If this Court grants review and ultimately reverses, this case will likely be decided under the new law.

## **Conclusion**

This is a complex 16-year case involving scores of parties, the United States, two class actions, many different interests, and several kinds of water rights including the federal reserved water right. The Court of Appeal has thus far issued four opinions, with two more pending. The trial court fulfilled its obligation to consider all parties’ groundwater rights in determining a workable physical solution for the overdrafted basin. The Court of Appeal spent considerable time reviewing the trial court decision and issued a well-reasoned opinion that applies existing precedent from this

Court. The Court of Appeal examined the 162,422 pages of the joint appendix, several times referring in its opinion to matters that were in the record but not in the briefs. The Court of Appeal issued a thorough, consistent, and well-reasoned opinion that provides substantial guidance to trial courts about how to balance the interests of exercised and unexercised overlying rights. In that respect, the case is like other recent water cases, such as *City of Santa Maria v. Adam* (2012) 211 Cal.App.4th 266 (review den.) (same trial judge as this case).

The Court of Appeal applied existing law and equitable principles to the facts of this case and produced an opinion affirming a physical solution that skillfully deals with the competing interests. There is no need for review by this Court, and the petition should be denied.

DATED: June 3, 2021

Respectfully submitted,

/s/ Thomas S. Bunn, III

## CERTIFICATE OF WORD COUNT

[Cal. Rules of Court, rule 8.204(c)(1)]

I certify pursuant to Rule 8.204(c) of the California Rules of Court, the attached **PUBLIC WATER SUPPLIERS' RESPONDENTS' ANSWER TO PETITION FOR REVIEW** was produced on computer and contains 3,160 words, excluding cover pages, table of contents and authorities, and signature lines, as counted by the **Microsoft Word 2010** word processing program used to generate this brief.

/s/ Thomas S. Bunn, III

## PROOF OF SERVICE

### STATE OF CALIFORNIA COUNTY OF LOS ANGELES

At the time of Service, I was over 18 years of age and not a party to this action. I am employed in the County of Los Angeles, State of California. My business address is 155 North Lake Avenue, Pasadena, CA 91101.

On **June 3, 2021**, I served true copies of the following documents described as **PUBLIC WATER SUPPLIERS' ANSWER TO PETITION FOR REVIEW** on the interested parties in this action as follows:

### SEE ATTACHED SERVICE LIST

Additionally, I caused the above-identified document to be electronically served on all other parties and the California Supreme Court via TrueFiling, which will submit a separate proof of service.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on **June 3, 2021**, at Pasadena, California.

/s/ Diane Schmidt

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