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IN THE SUPREME COURT OF CALIFORNIA

ANTELOPE VALLEY GROUNDWATER CASES[1]

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

PETITION FOR REVIEW

[1] *Los Angeles County Waterworks District No. 40 v. Diamond Farming Co.* (Super. Ct. Los Angeles County, No. BC325201); *Los Angeles County Waterworks District No. 40 v. Diamond Farming Co.* (Super. Ct. Kern County, No. S-1500-CV254348); *Wm. Bolthouse Farms, Inc. v. City of Lancaster* (Super. Ct. Riverside County, No. RIC353840); *Diamond Farming Co. v. City of Lancaster* (Super. Ct. Riverside County, No. RIC344436); *Diamond Farming Co. v. Palmdale Water Dist.* (Super. Ct. Riverside County, No. RIC344668); *Willis v. Los Angeles County Waterworks District No. 40* (Super. Ct. Los Angeles County, No. BC364553); *Wood v. Los Angeles County Waterworks District No. 40* (Super. Ct. Los Angeles County, No. BC391869).

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Issues Presented

1. Whether a comprehensive judicial plan (physical solution) that regulates the amount of water that may be pumped from an overdrafted aquifer may permanently allocate all of the available native water to current users and allocate no native water, either now or in the future, to overlying owners who have not yet begun pumping.

a. Does such an order effectively extinguish the water rights of not-yet-pumping overlying owners?

b. May a court "subordinate" the water rights of not-yet-pumping overlying owners to permit current users to continue using all available water?

2. Before adopting a physical solution for an overdrafted aquifer that effectively extinguishes the water rights of not-yet-pumping overlying owners, must a court consider less drastic alternative solutions, such as recognizing the property rights of owners who have not yet pumped to later claim their reasonable share of the groundwater if it is needed in the future while allowing present users to use that allocation until it is claimed?

Why Review Should Be Granted

The Willis Class is composed of 18,000 owners of undeveloped land in the Antelope Valley who have not yet exercised their rights to pump water from the aquifer that lies beneath their property. The Court of Appeal affirmed a judgment that purports to "subordinate" their water rights to the rights of those who are currently pumping from the aquifer and caused it to be overdrafted. This leaves the Willis Class with no right to pump native water, either now or in the future.

This court has never considered the rights of owners of land who have not yet pumped water from an overdrafted aquifer that lies beneath their property to exercise that right in the future. The Court of Appeal's murky and inconsistent opinion raises several issues that should be decided by this court.

The Antelope Valley Groundwater Cases imposed a Physical Solution that determined the water rights of all present and future users to pump water from the aquifer that lies beneath more than a thousand square miles of high desert north of Los Angeles. For decades, the amount of water pumped from the aquifer has exceeded by "significant margins" the amount of water replenishing it, causing significant long-term damage, including subsidence of the overlying land and loss of aquifer storage capacity. After extensive litigation, the trial court adopted a Physical Solution that restricted the amount of water that may be pumped from the aquifer.

The members of the Willis Class collectively own approximately 60 percent of the land overlying the aquifer. They have not yet exercised their appurtenant rights to the reasonable and beneficial use of groundwater in the aquifer because they have yet to develop their land. Because their properties are not supplied by a water system, they have no source of water to develop their land unless they are permitted to install water wells.

The Physical Solution adopted by the trial court permanently allocated all of the aquifer's native supply of available groundwater to current users and none of it, either now or in the future, to the Willis Class. To begin pumping water, members of the Willis Class must seek permission from the Watermaster Engineer, who has the discretion to deny the request on the basis, among others, that all of the water " 'is then currently being used reasonably and beneficially.' " (Slip opn.

p. 70.) If the Watermaster grants the request, the landowner must pay a "replacement assessment" to cover the cost of obtaining replacement water from another source, unless the Watermaster chooses to waive payment because the amount would be de minimis. (*Id.* at p. 27.)

The Court of Appeal affirmed in a published decision, holding that because the current " 'reasonable and beneficial use pumping alone exceeded' " the amount of water that could safely be removed from the aquifer, " 'the Willis Class are not entitled to an allocation in the Physical Solution.' " (Slip opn. p. 68.)

The Court of Appeal's holding that property owners may be deprived of their appurtenant right to a fair share of the groundwater in their land because that water is already being used by others is unprecedented. The court below acknowledged that the members of the Willis Class have water rights that must be given " '[f]irst priority' " under California water law, observing all of the overlying landowners above the aquifer share this correlative right. (Slip opn. pp. 32-33.) But as an issue of first impression, the Court of Appeal held that because the members of the Willis Class have yet to pump groundwater onto their land, their rights could be subordinated to the rights of current users. (Slip opn. p. 44.)

The court below claimed support for this novel rule in this court's decision in *In re Waters of Long Valley Creek Stream System* (1979) 25 Cal.3d 339 (*Long Valley*). But *Long Valley* did not address the common law rights of an overlying landowner to extract groundwater; it examined the statutory authority of the

State Water Resources Control Board to limit a landowner's riparian rights to increase the amount of water he was taking from a stream. If language in *Long Valley* is to be expanded to apply to common law rights to groundwater, it should be this court that does so.

In a footnote, the opinion below recognized that "*Long Valley* bars an adjudication which entirely extinguishes future overlying rights," but drew an untenable distinction between "extinguishing" rights and "subordinating" them, holding that *Long Valley* "does not bar an adjudication which *preserves* those rights but *subordinates* them to present and future actual reasonable beneficial uses which arose prior to the dormant rights holder's attempt to use the supply." (Slip opn. p. 45, fn. 13, original italics.)

The Physical Solution "preserves" the water rights of the Willis Class in name only. Overlying owners who have not yet pumped have no right to a fair share of the native water beneath their land either now or in the future. They may request permission from the Watermaster to pump water, which may be denied if the supply of native water " 'is then currently being used reasonably and beneficially.' " (Slip opn. p. 70.) But seeking permission to draw water and paying for replacement water is not the same as exercising an appurtenant groundwater property right.

The Court of Appeal also looked for support in *City of Barstow v. Mojave Water Agency* (2000) 23 Cal.4th 1224 but had to stretch to find it. *City of Barstow* held that a physical solution

could not disregard "preexisting legal water rights" and allocate water based solely "on the equitable apportionment doctrine." (*Id.* at pp. 1233, 1235.) It recognized that "[o]ne with overlying rights has rights superior to that of other persons who lack legal priority," but held that such landowners could be "restricted to a reasonable beneficial use. Thus, after first considering this priority, courts may limit it to present and prospective reasonable beneficial uses . . . ." (*Id.* at p. 1240.)

The opinion below discerned a rule in *City of Barstow* that is not apparent from its language, stating: "*Barstow appears* to uphold (*at least by negative implication*) the use of equitable apportionment principles when considering how to apportion water *among* correlative rights holders." (Slip opn. p. 43, first two italics added.) The Court of Appeal thus held "that, when apportioning water in an overdrafted basin among correlative rights holders, a court should employ equitable apportionment principles and eschew mechanically based calculations to the extent necessary to reach an equitable apportionment of the available water." (Slip opn. p. 42.) Despite the holding in *City of Barstow* that a court cannot disregard preexisting legal water rights, the Court of Appeal held that " ' "if an allocation . . . is to be just and equitable, strict adherence to the priority rule may not be possible." ' " (Slip opn. p. 43.) This court should grant review to decide whether this is an accurate reading of *City of Barstow*.

The Court of Appeal maintains it followed *City of Barstow* because it did not disregard the legal water rights of the Willis

Class but instead considered and then limited those rights. But *City of Barstow* held that "courts making water allocations" must not only "adequately consider" water rights, the allocations must "reflect the priority of water rights in the basin." (23 Cal.4th at p. 1248.)

The Physical Solution in this case does not reflect the priority to which members of the Willis Class are entitled as overlying owners. It creates a "first-in-time, first-in-right" regime under which members of the Willis Class have no right to pump their fair share of the native water beneath their land and can only seek discretionary permission from the Watermaster which, if granted, would result in a fee to cover the cost of obtaining replacement water, unless that fee is waived. This court should 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.

This case also raises questions about whether a physical solution that severely restricts (or extinguishes) an overlying landowner's future water rights should be made permanent and whether a court crafting a physical solution has an obligation to consider other, less drastic, alternatives. *City of Barstow* recognized that a trial court drafting a physical solution should consider the possibility of changed circumstances in the future. Speaking of the rights of appropriators to use surplus water, this court said:

> "[W]hat is a beneficial use at one time may, because of changed conditions, become a waste of water at a

> later time." [Citation.] Because the court cannot fix or absolutely ascertain the quantity of water required for future use at any given time, a trial court should declare prospective uses paramount to the appropriator's rights, so the appropriator cannot gain prescriptive rights in the use. Until the paramount right holder needs it, the appropriator may continue to take water.

(23 Cal.4th at p. 1243.)

Even Respondents recognized the far-reaching implications of the Court of Appeal's novel holding. In successfully petitioning the Court of Appeal to publish its initially unpublished opinion, several Respondents recognized that the opinion, "for the first time," applied "the equitable principles for the correlative allocation of groundwater among owners of overlying groundwater rights in an overdrafted basin." (Tejon Ranchcorp Req. for Pub. (filed 3/30/21), p. 1; see also L.A. County Waterworks Dist. No. 40 Req. for Pub. (filed 4/6/21), p. 2.) Another group of Respondents noted: "Prior to this Opinion, it was unclear what standards support a trial court's physical solution involving parties who have never exercised an overlying groundwater right." (L.A. County Waterworks Dist. No. 40 Req. for Pub., p. 3.)

Several non-parties also asked for publication. The Watermaster appointed to administer the trial court's Physical Solution in this case observed the decision "represent[s] an important and significant extension of existing law," and as such is "extremely important and of ongoing interest . . . to other parties besides those involved in the instant litigation." (Antelope Valley Watermaster Req. for Pub. (filed 4/2/21), p. 3.)

Endorsing a regime in which water rights of overlying landowners who have never pumped are permanently subordinated to the rights of active pumpers risks perversely incentivizing all landowners to extract water at the earliest possible time to avoid a fate similar to that of the Willis Class. That result is difficult to square with the state's constitutional mandate that "the waste or unreasonable use . . . of water be prevented." (Cal. Const., art. X, § 2.) The Willis Class urges this court to grant review.

Background

A. Factual Background

The Antelope Valley Basin covers approximately 1,390 square miles of high desert land north of Los Angeles that lies above a single hydrologically connected aquifer. For decades, overlying farmers, ranchers, and residents – together with appropriating water districts, municipalities, commercial entities, and public agencies – pumped the Basin into severe overdraft, which caused significant long-term damage, including land subsidence. (Slip opn. pp. 7-8.)

The members of the Willis Class collectively own approximately 532,000 acres of the total 890,137 acres (60 percent) of land in the Antelope Valley and have never pumped the groundwater underlying their properties.

The United States owns approximately 265,986 acres (30 percent) of the land overlying the aquifer on which it operates Edwards Air Force Base.

A small number of overlying private corporate entities who pumped water for agricultural, industrial, and commercial uses on their properties are represented individually, including Bolthouse Properties LLC and Diamond Farming Co. Other parties include a small class of approximately 3,000 landowners known as the "Small Pumper Class" and a group of overlying public entities and agencies, including Antelope Valley-East Kern Water Agency, the City of Los Angeles, and county sanitation districts. (Slip opn. pp. 4, 9-10.)

Appropriators, primarily those who are commonly referred to as the public water suppliers, extract native groundwater from the aquifer to supply their customers' uses (primarily domestic) within their service areas. (Slip opn. p. 8.)

B. Procedural Background

When chronic overdraft conditions threatened their ability to continue pumping groundwater in large quantities, farming overlying entities and appropriating public water suppliers began litigation to resolve competing claims to the aquifer's native groundwater. (Slip opn. pp. 3-4.)

In 2009, a consolidation order was entered that tasked the trial court with entering "a judgment resolving all claims to produce groundwater and to create a physical solution as necessary." (Slip opn. p. 5.)

In 2011, the Willis Class and public water suppliers entered into a settlement agreement that decreed the Willis Class had an "Overlying Right to a correlative share of 85% of the Federally Adjusted Native Safe Yield . . . free of any Replacement

Assessment." (176 JA 157684:11-13.) The judgment required the public water suppliers to waive any claims of prescription against the Willis Class and Willis agreed to be bound by the trial court's determination of the amounts of the "native safe yield," the "total safe yield," and the "federal reserved right" allocated to the United States. (13 JA 15487:1-5.)

The trial court later found that the aquifer was in overdraft and the total safe yield from all sources was 110,000 acre-feet per year (afy). Current actual extractions ranged between 130,000 and 150,000 afy. The total annual safe yield included amounts attributable to "native" water that came into the Basin from precipitation and runoff (82,300 afy) and amounts attributable to return flows from water "imported" by various entities from outside sources. (Slip opn. pp. 8, 15.)

In 2015, the majority of the remaining parties reached a proposed settlement that included a Physical Solution. The Willis Class and several other parties did not join the proposed settlement. The class opposed the Physical Solution because it "proposed subordinating their overlying correlative rights in the native safe yield to those rights held by actively pumping overlying landowners." (Slip opn. p. 20.) The trial court denied Willis's motion "to introduce competing 'plans,' " that would "preserve segments of the native safe yield for future use by Willis" and "sustained objections to testimony from witnesses about alternative proposals." (Slip opn. pp. 21, 24.)

The trial court adopted the proposed Physical Solution, which permanently allocated the entire 82,300 afy of native

groundwater among stipulating parties and did not allocate any portion of the native groundwater to the Willis Class. It allocated 7,600 afy of the native safe yield to the United States, 3,806 afy to the Small Pumper Class, and 58,322 afy to the remaining "competing overlying landholders who were currently extracting water," including overlying private landowners, various mutual water companies, public overlying landowners, and various state agencies. Finally, the Physical Solution allocated the remaining balance of the native safe yield (12,345 afy) to the public water suppliers. The "existing producers" were "required to reduce their water extractions" to specified levels during a seven-year "rampdown" period. (Slip opn. pp. 26-27.)

The Physical Solution allocated no water to the Willis Class, either then or in the future. (Slip opn. p. 27.) Rather, a member of the class who wants to commence new pumping from the aquifer must seek permission from the Watermaster Engineer who must "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.' " (*Id.* at p. 70.) If the Watermaster grants the request, the overlying owner must pay "a replacement assessment" unless the Watermaster waives payment of this assessment for domestic pumping because the Watermaster finds that the amount would be de minimis. (*Id.* at p. 27.)

The trial court explained that it allocated no water to the Willis Class because granting the class unlimited rights would defeat the Physical Solution:

> [I]f Willis were granted an unlimited ability to exercise their overlying rights, the correlative rights of existing users with long-established overlying production would be rendered meaningless since the unexercised overlying rights could eliminate all water available for long-established users.

(Slip opn. p. 28.) The trial court reasoned that the Physical Solution "required certainty through quantifying all pumping rights, . . . but Willis's overlying rights cannot be quantified, and allocating water for unexercised overlying rights would create an unacceptable measure of uncertainty . . . ." (*Ibid.*)

The trial court concluded that Willis could not have " 'unrestricted overlying rights to pump Basin groundwater.' " (Slip opn. p. 28.) It found " 'it would be unreasonable to require present users to further reduce their already severely reduced water use to reserve a supply of water for non-users' speculative future use.' " (*Id.* at p. 29.) Thus, the court found " 'that [Willis's] members have an overlying right that is to be exercised in accordance with the Physical Solution herein.' " (*Ibid.*) "Because Willis had never produced groundwater, the Physical Solution recognized this fact and did not provide for a current allocation to Willis while preserving their ability to pump groundwater in the future, subject to reasonable conditions and limitations." (*Id.* at p. 30.)

The Court of Appeal affirmed in a published decision.

Discussion

I. This Court Should Decide Whether a Physical Solution for an Overdrafted Aquifer Must Permit Overlying Landowners Who Have Not Yet Pumped to Exercise in the Future Their Rights to a Proportionate Share of the Water for Reasonable and Beneficial Uses.

A. An Overlying Owner Has Priority Water Rights Whether or Not Those Rights Have Yet Been Exercised.

Landowners have a property right to use the water that lies beneath their land. (*Wright v. Goleta Water Dist.* (1985) 174 Cal.App.3d 74, 83.) An overlying owner "does not 'own' the water . . . he 'owns' a usufructuary right – the right of reasonable use of the water . . . when he needs it." (*Rancho Santa Margarita v. Vail* (1938) 11 Cal.2d 501, 555; *City of Pasadena v. City of Alhambra* (1949) 33 Cal.2d 908, 925.) A landowner's right to the reasonable and beneficial use of water on the land is protected by the California Constitution. (Cal. Const., art. X, § 2.) This provision anticipates that this right may be exercised in the future by stating that the right attaches to "the purposes for which such lands are, *or may be made* adaptable." (*Ibid.*, italics added.)

The right to pump water from an underground aquifer is not absolute. (*Wright*, *supra*, 174 Cal.App.3d at pp. 83-84.) "[S]ince groundwater [is] a limited resource, the rule of absolute ownership would threaten all water resources of the state." (*Id.* at p. 84.) Thus, this court created the doctrine of reasonable use, which "limits the right of others to such amount of water as may be necessary for some useful purpose in connection with the land

from which it is taken." (*Katz v. Walkinshaw* (1903) 141 Cal. 116, 134 (*Katz II*); *Katz v. Walkinshaw* (1902) 141 Cal. 116, 144 (*Katz I*); *Peabody v. City of Vallejo* (1935) 2 Cal.2d 351, 383 ["the rule of reasonable use . . . applies to all water rights enjoyed or asserted in this state"].)

The rule of reasonableness is a fundamental precept of California water law that is embodied in article X, section 2 of the California Constitution, which states in part "that the water resources of the State be put to beneficial use to the fullest extent of which they are capable, and that the waste or unreasonable use or unreasonable method of use of water be prevented . . . ." This overarching consideration applies to all water users, regardless of the source from which their rights are grounded (*Peabody*, *supra*, 2 Cal.2d at p. 383), because no party has a protectable interest in the unreasonable use of water (*City of Barstow*, *supra*, 23 Cal.4th at pp. 1241-1242).

A landowner's right to subsurface water "must be exercised with reference to the equal right of others in their land." (*Katz I*, *supra*, 141 Cal. at p. 147.) An owner's right to the reasonable use of water underneath the land is shared equally by other owners of overlying land. (*Wright*, *supra*, 174 Cal.App.3d at p. 84 ["[O]verlying landowners have correlative rights in the common supply."].)

Each overlying owner has a right to a proportionate share of the water. "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." (*Katz II*, *supra*, 141 Cal. at p. 136.) "A[s] between overlying owners, the rights . . . are correlative and are referred to as belonging to all in common; each may use only his reasonable share when water is insufficient to meet the needs of all. [Citations.]" (*City of Pasadena*, *supra*, 33 Cal.2d at p. 926.) Overlying rights are superior to rights of other persons who lack legal priority. (*City of Barstow*, *supra*, 23 Cal.4th at p. 1240.)

Overlying owners do not lose their paramount property rights simply because they have not yet pumped any water. The "correlative rights of overlying landowners . . . [do] not depend upon use and [are] not lost by disuse, in absence of prescriptive rights against them." (*Wright*, *supra*, 174 Cal.App.3d at p. 84.)

An overlying owner's property right to use the water in an aquifer has priority over the interest of an appropriator who pumps water for use on "distant land." (*Wright*, *supra*, 174 Cal.App.3d at p. 84; *Burr v. Maclay Rancho Water Co.* (1908) 154 Cal. 428, 434-435.) An appropriator is entitled only to "surplus" water: "[S]ince the landowner's right extends only to the quantity of water that is necessary for use on his land, the appropriator can take the surplus." (*Wright*, at p. 84.)

A landowner's right to pump a reasonable amount of water for use on the land is superior to the claim of an appropriator even if the landowner has not yet pumped water. (*Burr*, *supra*, 154 Cal. at p. 436 ["appropriation for distant lands is subject to the reasonable use of the water on lands overlying the supply"].) But an appropriator may take any surplus water until the

landowner begins to pump: "If the adjoining overlying owner does not use the water, the appropriator may take all the regular supply to distant land until such landowner is prepared to use it and begins to do so." (*Ibid.*; *Peabody*, *supra*, 2 Cal.2d at p. 374.)

A wrongful claim by an appropriator "may ripen into a prescriptive right where the use is actual, open and notorious, hostile and adverse to the original owner, continuous and uninterrupted for the statutory period of five years, and under claim of right." (*City of Pasadena*, *supra*, 33 Cal.2d at pp. 926-927.) Acquiring a prescriptive right in groundwater " 'elevat[es] the right of the one acquiring it above that of an appropriator to a right equivalent in priority to that of a landowner.' " (Slip opn. pp. 34-35, quoting *City of Santa Maria v. Adam* (2012) 211 Cal.App.4th 266, 297.)

A classwide settlement foreclosed any claim of prescriptive rights against the Willis Class (slip opn. pp. 15-16), but the courts below found Respondents had gained prescriptive rights against certain parties other than the Willis Class and, on that basis, were entitled to priority above that of mere appropriators. (*Id.* at pp. 21, 40, fn. 9.)

A court may regulate the use of water by overlying owners and appropriators, as long as the owner's superior rights are protected: "The court unquestionably has power to make reasonable regulations for the use of such water by the respective parties, fixing the times when each may take it and the quantity to be taken, provided they be adequate to protect the person

having the paramount right in the substantial enjoyment of that right . . . ." (*Burr*, *supra*, 154 Cal. at p. 437.)

Balancing these rights and priorities often is not easy. The authority of the courts to impose a "physical solution" was first recognized by this court in *Peabody*, *supra*, 2 Cal.2d at pp. 379-380, 383-384, but this court made clear that the regulations and limitations imposed by the court must protect the paramount water rights of overlying owners: "[I]f a physical solution be ascertainable, the court has the power to make and should make reasonable regulations for the use of the water by the respective parties, provided they be adequate to protect the one having the paramount right in the substantial enjoyment thereof and to prevent its ultimate destruction . . . ." (*Id.* at p. 383.) This court added that the trial court "should reserve unto itself the right to change and modify its orders and decree as occasion may demand . . . ." (*Id.* at pp. 383-384.)

B. The Physical Solution Effectively Eliminates the Rights of Willis Class Members to Pump the Water Beneath Their Land and Replaces Those Rights with the Possibility of Obtaining Permission to Pump Water.

The Court of Appeal concluded that the Physical Solution "recognizes (rather than entirely extinguishes) Willis's overlying future rights," quoting the trial court's finding that " '[Willis's] members have an overlying right that is to be exercised in accordance with the Physical Solution herein.' " (Slip opn. p. 46.) The Physical Solution provides that "any 'new production' from the aquifer (including by members of Willis) must comply with

the new production application procedures . . . [and] be subject to payment of a replacement assessment," which the Watermaster may waive if the Watermaster determines the new production will be de minimis. (*Id.* at p. 27.) The Watermaster has the discretion to deny the request to pump water if " 'all of the Native Safe Yield is then currently being used reasonably and beneficially.' " (*Id.* at p. 70.)

Being allowed to ask for permission to pump water, which the Watermaster has discretion to deny, is not the same as exercising a right. The Physical Solution effectively extinguishes the water rights of the members of the Willis Class and replaces them with the possibility of obtaining permission to pump water and paying for the privilege.

C. This Court Should Grant Review to Decide a Question Expressly Left Open in *City of Barstow*: Whether a Trial Court May Reduce the Future Exercise of an Overlying Landowner's Water Rights.

This court's most recent discussion of the rights of overlying landowners in an overdrafted aquifer was more than 20 years ago in *City of Barstow*, *supra*, 23 Cal.4th 1224. *City of Barstow* held that a trial court may not "definitively resolve water right priorities in an overdrafted basin with a 'physical solution' that relies on the equitable apportionment doctrine but does not consider the affected owners' legal water rights in the basin." (*Id.* at p. 1233, fn. omitted.)

The dispute in *City of Barstow* centered on the Mojave River Basin, which, like the aquifer in the present case, had been

"in an overdraft condition" since the mid-1950's. (23 Cal.4th at p. 1234.) The trial court crafted a Physical Solution that "did not apportion production rights on the basis of preexisting legal water rights. The drafters of the physical solution believed such apportionment would lead to inequitable water allocation." (*Id.* at p. 1235.)

Declaring that "water right priority has long been the central principle in California water law," this court reversed, holding "that an equitable physical solution must preserve water right priorities to the extent those priorities do not lead to unreasonable use. In the case of an overdraft, riparian and overlying use is paramount, and the rights of the appropriator must yield to the rights of the riparian or overlying owner." (*City of Barstow*, *supra*, 23 Cal.4th at p. 1243.)

A trial court crafting a physical solution may alter legal priorities only to avoid an unreasonable use: "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." (*City of Barstow*, *supra*, 23 Cal.4th at p. 1250.) "[W]e have never endorsed a pure equitable apportionment that completely disregards overlying owners' existing legal rights." (*Id.* at p. 1248.)

This court recognized that overlying owners do not have the right "to extract an unlimited amount of water." (*City of Barstow*, *supra*, 23 Cal.4th at p. 1253.) "When the water is insufficient, overlying owners are limited to their 'proportionate

fair share of the total amount available based upon [their] reasonable need[s].' [Citation.]" (*Ibid.*) This court summarized its holding:

> [O]verlying owners . . . have the right to pump water from the ground underneath their respective lands for use on their lands. The overlying right is correlative and is therefore defined in relation to other overlying water right holders in the basin. In the event of water supply shortage, overlying users have priority over appropriative users.

(*Ibid.*)

A footnote in *City of Barstow* expressly left open the principal issue presented in this case. In dicta, this court speculated that a trial court could limit the water rights of overlying owners to a reasonable use. Stating "we do not address the question here," this court mused "that, in theory at least, a trial court could . . . reduce a landowner's future overlying water right use below a current but unreasonable or wasteful usage . . . ." (*City of Barstow*, *supra*, 23 Cal.4th at p. 1249, fn. 13.) But even this cloaked reference did not apply to overlying owners who had not yet pumped water. The footnote says that "courts should have some discretion to limit the future groundwater use of an overlying owner *who has exercised the water right* and to reduce to a reasonable level the amount the overlying user takes from an overdrafted basin." (*Ibid.*, italics added.)

This court never has addressed whether overlying landowners who have not pumped water retain the right to exercise that right in the future, even if other users with equal priority are already using the entire available supply. This court

should grant review to resolve the issue expressly reserved in *City of Barstow* and establish guidelines for trial courts crafting physical solutions for overdrafted aquifers.

D. This Court Should Grant Review to Decide Whether the Language in *Long Valley* Upon Which the Court Below Relied Applies to Groundwater Disputes.

The Court of Appeal held that, under appropriate circumstances, a court may "craft a physical solution which recognizes the rights held by overliers but *subordinates* any future use by those correlative rights holders to their fellow correlative rights holders who are presently using the available supply." (Slip opn. p. 44, original italics.) For support, the court relied on *Long Valley*, which it described as holding "that prospective future uses of significant unexercised correlative water rights may be conditioned and subordinated to protect existing uses and reliance interests as part of a comprehensive water rights adjudication that allocated a limited water supply among competing claimants." (Slip opn. p. 45.) This takes the holding in *Long Valley* out of context.

Long Valley did not address the rights of overlying owners to pump underground water. It considered the statutory authority of the State Water Resources Control Board (Board) "to define and otherwise limit prospective riparian rights" in surface water. (25 Cal.3d at p. 344.) A landowner in that case had long used water from a stream on this property to irrigate 89 acres of his land, but the Board denied his request to irrigate an additional 2,884 acres. (*Id.* at p. 346.)

This court observed that the Legislature had granted the Board "broad authority . . . to define and otherwise limit the scope of a riparian's future right." (*Long Valley*, *supra*, 25 Cal.3d at p. 348-349.) But the opinion invoked the principle that courts should presume that the Legislature intended statutes to be construed to avoid substantial constitutional issues (*ibid.*) and found it "clear that the Board's decision to extinguish [the landowner's] future riparian claim raises a serious constitutional issue." (*Id.* at p. 358.) *Long Valley* thus "interpret[ed] the Water Code as not authorizing the Board to extinguish altogether a future riparian right . . . ." (*Id.* at p. 359.)

The court below relied upon the statement in *Long Valley* that the statute authorized the Board "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.) But as the Court of Appeal observed in *Wright v. Goleta Water District*: "Even though it may appear a logical extension of *Long Valley* to allow a trial court adjudicating competing claims to groundwater to subordinate an unexercised right to a present appropriative use, we must hold such extension inappropriate." (174 Cal.App.3d at p. 87.) *Wright* explained that *Long Valley* limited its discussion "to *riparian* rights within the statutory scheme of the Water Code. Groundwater is exempted from the extensive regulations of surface water . . . ." (*Ibid.*, original italics.)

The court below attempted to distinguish *Wright* on the basis that "unlike the *Long Valley* action, the judgment *Wright*

reviewed arose from an action that was *not* a comprehensive adjudication in which all impacted owners had been given the opportunity to appear and defend their interests." (Slip opn. pp. 47-48, original italics.) While that is true, it does not lessen the force of the statements in *Wright* that the discussion in *Long Valley* applies "to *riparian* rights within the statutory scheme of the Water Code" and "[g]roundwater is exempted from the extensive regulations of surface water." (*Wright*, *supra*, 174 Cal.App.3d at p. 87.)

This court should grant review to decide whether the principles announced in *Long Valley* regarding riparian rights over surface water should apply to groundwater claims and resolve the tension between *Wright* and the court below. This is an important issue. Subordinating the rights of not-yet-pumping owners to current users creates a first-in-time, first-in-right regime that encourages and rewards the earliest, as opposed to the reasonable or beneficial, use of water in contravention of the reasonable and beneficial use doctrine.

E. This Court Should Grant Review to Decide Whether *City of Barstow* Permits the Use of Equitable Apportionment Principles to Justify Allocating None of the Water From an Overdrafted Aquifer to Overlying Owners Who Have Not Yet Pumped.

"There is and should be no endeavor to take from a water right the protection to which it is justly entitled. The preferential and paramount rights of . . . the owner of an underground and

percolating water right . . . [is] entitled to the protection of the courts . . . ." (*Peabody*, *supra*, 2 Cal.2d at p. 374.)

The opinion below ruled that the Physical Solution was consistent with California law even though it allocated water to overlying owners and others who were currently pumping and none of the native water to overlying owners who had not yet pumped. It reasoned that even though pumping owners and not-yet-pumping owners both held correlative rights of equal priority, they did not have to be treated equally; "proper division of an inadequate supply is tested by whether such division is *equitable*." (Slip opn. pp. 41-42, original italics.) Thus, the court reasoned, "a court *may* employ equitable apportionment principles to allocate the available supply among competing claimants with equivalent priorities." (Slip opn. p. 42, original italics.)

The Court of Appeal found support for this holding in *City of Barstow*, despite the fact that *City of Barstow* did not so hold. The Court of Appeal stated that *City of Barstow* "*appears* to uphold (*at least by negative implication*) the use of equitable apportionment principles when considering how to apportion water *among* correlative rights holders." (Slip opn. p. 43, first two italics added.) This thin reed does not support the weight of the Court of Appeal's novel new rule.

City of Barstow held "that an equitable physical solution must preserve water right priorities to the extent those priorities do not lead to unreasonable use." (23 Cal.4th at p. 1243.) This court also said that "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*." (*Id.* at p. 1250, italics added.) There is nothing to suggest that future exercises of water rights by members of the Willis Class would not be for a reasonable use. To the contrary, section 106 of the Water Code states "that the use of water for domestic purposes is the highest use of water." Nothing in *City of Barstow* supports the Court of Appeal's new rule that the rights of overlying owners who have not yet pumped water may be subordinated to the rights of current users based solely on whether those water rights have previously been exercised.

This court should grant review to decide whether the Court of Appeal's understanding of what it believed *City of Barstow* "*appears* to uphold (*at least by negative implication*)" is correct. (Slip opn. p, 43, italics added.) The Court of Appeal's struggle to discern what *City of Barstow* "*appears* to hold" demonstrates the need for clarity so lower courts are not left to surmise but may accurately apply this court's water rights decisions.

II. This Court Should Decide Whether a Physical Solution May Permanently Allocate All of the Water in an Aquifer and Prevent Overlying Owners Who Have Not Yet Pumped From Ever Exercising Their Water Rights.

"Water is constantly shifting, and the supply changes to some extent every day." (*Peabody*, *supra*, 2 Cal.2d at p. 368.) Referring to riparian rights, this court announced in *Tulare* that the doctrine of reasonable use "not only protects the actual

reasonable beneficial uses of the riparian but also the *prospective* reasonable beneficial uses of the riparian." (*Tulare Irr. Dist. v. Lindsay-Strathmore Irr. Dist.* (1935) 3 Cal.2d 489, 525, italics added.) A permanent allocation of water is not appropriate because the court cannot predict what will constitute a future reasonable use: "As to such future or prospective reasonable beneficial uses, it is quite obvious that the quantity of water so required for such uses cannot be fixed in amount until the need for such use arises." (*Ibid.*)

The trial court appeared to consider only two options: allocate no water to members of the Willis Class or grant them an unlimited amount. The Physical Solution did not allocate any portion of the native supply to Willis because the trial court reasoned that "if Willis were granted an unlimited ability to exercise their overlying rights, the correlative rights of existing users with long-established overlying production would be rendered meaningless since the unexercised overlying rights could eliminate all water available for long-established users." (Slip opn. p. 28.) The Court of Appeal agreed, stating that

> absent limits on Willis's future pumping (the amount of which was speculative and if unrestrained could deprive long-established overlying production rights of any available native safe yield and render the present allocations legally meaningless), permitting unexercised rights to be exercised without limitation would "create an unacceptable measure of uncertainty and risk of harm to the public" . . . .

(*Id.* at pp. 56-57.)

Many possible alternatives lie between the two extremes of allocating no water to the Willis Class and giving the class

unlimited rights, and neither the trial court nor the Court of Appeal considered any of them. This court has declared that in a case like the present one in which the amount of water available for use is "far insufficient to meet all the needs therefor, the court should not grant an injunction until every reasonable physical solution . . . has been thoroughly investigated." (*Rancho Santa Margarita v. Vail*, *supra*, 11 Cal.2d 501, 556.) "[I]t is the duty of the trial court to ascertain whether there is a physical solution of the problem that will avoid waste and which will not unreasonably or adversely affect the rights of the parties." (*Id.* at pp. 558-559.) "[I]t is not only within the power, but it is the duty of the trial court, to work out, if possible, a physical solution, and if none is suggested by the parties to work out one independently of the parties." (*Id.* at p. 559.)

Crafting a physical solution that protects the aquifer while also respecting established water rights is often a challenge. Applying the "rule of correlative rights" may be "extremely difficult, but . . . the difficulty in its application in extreme cases is not a sufficient reason for rejecting it and leaving property without any protection from the law." (*Katz II*, *supra*, 141 Cal. at pp. 136-137.) One alternative that was proposed and left unconsidered by the trial court would have allocated a portion of the native supply to Willis class members while allowing other pumping parties to utilize that allocation until it is needed by members of the class. (See *Tulare*, *supra*, 3 Cal.2d at p. 525 ["until the riparian needs the water, the appropriator may use it,

thus, at all times, putting all of the available water to beneficial uses"].)

Conclusion

The original class representative, Rebecca Lee Willis, owned ten acres in the Antelope Valley on which she intended to build a home and landscape nursery once she retired, but the land was not within the service area of any water district. (2 JA 1963:10-17.) "Without the right to use the water below her property, her land is virtually worthless and her dreams of building a home and nursery cannot be accomplished." (2 JA 1963:17-20.)

Ms. Willis's situation mirrored that of her fellow 18,000 class members, and many similar cases involving many additional landowners are sure to follow. Given the state's drought-induced water shortages and the current overdraft conditions in many of the state's groundwater basins, the rights of overlying owners who have yet to exercise their water rights are likely to recur with increasing regularity.

The opinion in this case demonstrates that trial courts need guidance on how to respect the rights of overlying landowners to pump their fair share of the native water beneath their property for reasonable and beneficial uses while regulating the insufficient resources of an overdrafted aquifer.

The Willis Class urges this court to grant review.

Respectfully Submitted,

May 14, 2021

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Certificate of Word Count

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Dated: May 14, 2021

/s/ Greg Wolff
Greg Wolff

Proof of Service

I, Kathryn Parker declare as follows:

I am employed in the County of San Francisco, State of California, am over the age of eighteen years, and am not a party to this action. My business address is 96 Jessie Street, San Francisco, CA 94105. On May 14, 2021, I mailed the following document:

Petition for Review

I enclosed a copy of the document identified above in an envelope and deposited the sealed envelopes with the U.S. Postal Service, with the postage fully prepaid. The envelopes were addressed as follows:

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Additionally, on May 14, 2021, 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 May 14, 2021.

/s/ Kathryn Parker
Kathryn Parker