

## Court of Appeal Finds Overlying Correlative Rights Do Not Have to Share Equally in Water Shortages

(Antelope Valley Groundwater Cases, JCCP No. 4408 (3/16/21))<sup>[1]</sup>

After twenty-two years, the protracted proceedings in the Antelope Valley groundwater adjudication resulted in a settlement and court-approved "physical solution." A physical solution equitably allocates available water under California's laws governing water rights. The physical solution in Antelope Valley limited pumping to balance the overdrafted aquifer with the available native safe yield.

Conventionally, the first priority rights to groundwater go to the landowner whose property overlies the groundwater, known as "overlying rights." Priority rights held by overlayers are correlative interests and are shared proportionately with all other overlying landowners above the aquifer. An appropriator may then take any surplus groundwater under the principle that "the one first in time is the first in right." Finally, under certain circumstances, an appropriator may gain "prescriptive rights" by five years of open and notorious use of groundwater under a claim of right adverse to existing prior rights.

In the latest Antelope Valley decision, appellant Charles Tapia—who was not a settling party and owned overlying land—asserted competing claims that he could draw 534.5 acre-feet per year from the aquifer. The trial court found that public water suppliers had established prescriptive rights to the native safe yield as to Tapia and that Tapia had not adequately shown a basis for his requested allocation of water under the physical solution. The trial court found the evidence and testimony that Tapia presented on the amount of water he pumped was not credible. The physical solution did not allocate any specific amount of the native safe yield to Tapia. Instead, it specified that the physical solution would govern any future pumping by Tapia.

On appeal, among other claims, Tapia claimed that the physical solution violates California law regarding water rights priorities. The physical solution allocates the remaining native safe yield to overlying owners who are currently pumping while denying him the correlative share to which he was entitled by virtue of owning overlying land. Tapia argued that this allocation violates the right to be treated equally with all fellow correlative rights holders,

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regardless of whether he could show that he was currently pumping for reasonable and beneficial uses.

The Court of Appeal acknowledged that overlayers have a shared or common (correlative) right among each other to extract groundwater from the aquifer for the reasonable and beneficial use of their property. However, the Court reasoned that among correlative rights holders, the division of an inadequate supply is tested by whether such allocation is *equitable*. Under this test, the Court held that protecting correlative right holders' interests when they actually use all available water for reasonable and beneficial purposes may be permitted in a physical solution. The physical solution must acknowledge overlying rights like Tapia's, but subordinate any future use by Tapia to his fellow correlative rights holders who demonstrated they presently use the available supply for reasonable and beneficial purposes.

Although the opinion is unpublished, it could change the expected dynamics in ongoing and future groundwater adjudications. Normally, lines are drawn between overlying owners and appropriators in a fight over proving prescription and the proper allocation of water rights. Now, those overlying owners who cannot definitively prove pumping and beneficial use of water may have their rights limited in favor of those who can prove beneficial historical use.

[<sup>1</sup>] The opinion can be found at <https://www.courts.ca.gov/opinions/nonpub/F082492.PDF>

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