

ORIGINAL

IN THE SUPREME COURT
OF THE
STATE OF ARIZONA

FILED
JUN 16 1975
CLIFFORD H. WARD
CLERK SUPREME COURT
BY *[Signature]*

CITY OF TUCSON, a municipal)
corporation,)

Appellant,)

vs.)

THE ANACONDA COMPANY and)
AMAX COPPER MINES, INC.,)
partners in the ANAMAX)
MINING COMPANY; DUVAL)
CORPORATION and DUVAL)
SIERRITA CORPORATION,)
corporations,)

Appellees.)

No. 11439-2

) Pima County
) Superior Court
) No. 116542

ABSTRACT OF RECORD ON APPEAL
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JAMES D. WEBB
City Attorney, City of Tucson

- and -

LESHER, KIMBLE, RUCKER & LINDAMOOD
3773 East Broadway
Tucson, Arizona 85716

Attorneys for Appellant

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SUPERIOR COURT OF ARIZONA

PIMA COUNTY

FARMERS INVESTMENT COMPANY,)
a corporation,)

Plaintiff,)

vs.)

THE ANACONDA COMPANY, et)
al.,)

Defendants.)

No. 116542

CITY OF TUCSON, a municipal)
corporation,)

Plaintiff in)
Intervention,)

vs.)

FARMERS INVESTMENT COMPANY,)
a corporation,)

Defendants in)
Intervention.)

* * *

(TITLE OF ACTION)

THE ANAMAX DEFENDANTS'
MOTION FOR PARTIAL
SUMMARY JUDGMENT AS
AGAINST THE CITY OF TUCSON

Filed: March 13, 1974

COMES NOW the defendants, THE ANACONDA COMPANY, AMAX COPPER MINES, INC., as partners in the ANAMAX MINING COMPANY (hereinafter "ANAMAX defendants"), pursuant to Rule 56, Arizona Rules of Civil Procedure and herewith file their Motion for Partial Summary Judgment as against the Intervenor, the City of Tucson on their counterclaim filed on or about September 13, 1973. This motion is based upon the pleadings, depositions and answers to interrogatories of (sic) file herein, the affidavits and exhibits attached hereto and upon the memorandum in support of the motion for summary judgment also attached hereto.

(Signed CHANDLER, TULLAR,
UDALL & RICHMOND by Robert
E. Lundquist, Attorneys
for named Defendants)

MEMORANDUM IN SUPPORT OF MOTION

(Prefatory note: The complaint in intervention filed by the City of Tucson in this case named, inter alia, The Anaconda Company as a defendant. The answer to the complaint and the counterclaim were also filed in the name of The Anaconda Company. Since that time, the interest in the Twin Buttes mining operation, material to both the complaint and the counterclaim, was transferred from The Anaconda Company to The Anaconda Company and Amax Copper Mines, Inc., as partners in and constituting the Anamax Mining Company. Therefore, the Anamax defendants press this motion for summary judgment as successors in interest of the counterclaim of The Anaconda Company.

Rule 25(d), Arizona Rules of Civil Procedure.)

Rule 56, Arizona Rules of Civil Procedure, states that summary judgment ". . . shall be rendered forthwith if the pleadings, deposition, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact that the moving party is entitled to judgment as a matter of law."

The facts material to the Anamax defendants' counterclaim against the Intervenor City of Tucson are undisputed, as will be shown herein. The law, at least insofar as it applies to these facts, is also clear. This motion is directed solely to the issue of whether the City's acts are in violation of the

reasonable use doctrine and not towards the issues raised in the City's answer to the counterclaim such as laches and estoppel which may require a trial.

Arizona's groundwater code, A.R.S. Secs. 45-301 et seq., requires the State Land Department to designate groundwater basin boundaries and boundaries of groundwater basin subdivisions. Id. Sec. 45-303. A "groundwater subdivision" means "land overlying as nearly as may be determined by known facts, a distinct body of groundwater. . . ." Id. Sec. 45-301(6)(emphasis added). The administrative duty imposed by these statutes led to the declaration of the Sahuarita-Continental Subdivision of the Santa Cruz Basin on June 8, 1954. Therefore, the area material to this motion has been administratively investigated and legally declared a "distinct body of groundwater." The boundaries of the

Sahuarita-Continental Subdivision are shown in an attachment.

The State Land Department is also required to designate from time to time "critical areas" which, under the statutes are supposed to be groundwater basins or subdivisions that do not have sufficient groundwater "to provide a reasonably safe supply for irrigation of the cultivated lands in the basin at the then current rates of withdrawal." Id. Sec. 45-301(1); Sec. 45-308. The statutes put controls on the use of water for new irrigation purposes, but domestic and industrial uses are exempted from control. Id. Sec. 45-301(3); Sec. 45-322. Pursuant to this statutorily imposed duty, the State Land Department declared a "critical area" within the confines of the Sahuarita-Continental Basin Subdivision in 1954. See attachment. The boundaries of a critical area appear to be required

by the statutes to be the same as the boundaries of the "distinct body of groundwater," the basin or the subdivision. Id. Secs. 45-301(1), - 301(6), - 308. In the case of the Sahuarita-Continental Critical Groundwater Area, however, one can see that such is not the case, although there are common boundaries. However, it is easy to see how the boundaries of the Critical Area, which determine the impositions of code controls on the use of water from the Subdivision supply only for irrigation purposes, might be confined roughly to those areas of the Subdivision which are suitable for irrigation and cultivation, under a different interpretation of the statute. In any event, the State Land Department has declared the supply of groundwater in the Sahuarita-Continental Subdivision to be insufficient for irrigation at the rates of withdrawal. It is obvious that

further or increased withdrawal will put a greater drain on the supply of Sub-division water.

The Anamax defendants own approximately 19,500 acres of land within the boundaries of the above Basin Subdivision at least 1,600 acres of which have been retired from irrigation. They own and operate an open pit copper mine on parts of their lands, and percolating groundwater from the supply over which these lands and the Subdivision lie forms a vital part of counterclaimant's mining and milling process. Water withdrawn from the Subdivision supply is used on lands within the Subdivision and, after use, the water is available for return to the groundwater supply.

The Intervenor City of Tucson, however, admits in its complaint that it owns well sites inside the Critical Area and pumps water withdrawn from their land north to the City proper to be sold

to its customers. In transporting the water across the north boundary of the Critical Area, it at the same time transports the water across the Subdivision boundary which is coterminous with the Critical Area boundary on that side. The City also admits in its complaint that its use is down grade from the Subdivision and it logically follows that none of the water withdrawn from the supply by the City is returned for re-use. The deposition of Assistant City Manager Frank Brooks indicates that the City has increased the volume of its withdrawals from the supply from nine million gallons per day to over eighteen million gallons per day. Deposition of Frank Brooks, pp. 52-54. This is roughly 20,000 acre-feet per year. The City admits it intends to continue and increase such practices. The designation of the Critical Area in the Subdivision indicates that even without such withdrawals the water table

would continue to decline to the damage of landowners in the Subdivision.

The doctrine of reasonable use of percolating groundwaters. The above facts are undisputed. The law to be applied to these facts dictates that the City's actions are illegal.

Water withdrawn from the ground is presumed to be percolating groundwater. Howard v. Ferrin, 3 Ariz. 347, 76 P.2d 460 (1904). Therefore, absent a clear showing that such is not the situation in the case at bar, the law regarding percolating groundwater applies.

Arizona has adopted the rule of reasonable use of percolating groundwaters. Bristor v. Cheatham, 75 Ariz. 227, 225 P.2d 153 (1953). Before discussing the doctrine and examining its applicability to the present case, however, it is helpful to review briefly the common law development of the doctrine.

Under the common law of England, a landowner was said to own all that lay below and above his property --- from the heavens to the inferno. These ownership rights included the use of unlimited quantities of groundwater. Action v. Blundell, 152 Eng. Rep. 1223 (Ex. 1843). As long as the landowner acted without malice, he could do anything he liked with water withdrawn from his lands, and any resultant damage to neighbors was damnum absque injuria. Groundwater was treated like oil or minerals and could be conveyed away from the source for sale or use elsewhere. E.g. Clinchfield Coal Corp. v. Compton, 28 Vt. 49 (1855). This rule was initially adopted in the American colonies along with the rest of the common law.

Faced with different geologies and climates, the potential abuse inherent

in such a rule, such as the establishment of municipal well farms, inevitably led to reactions by some American courts. See Erickson v. Crookston Waterworks, Power & Light Co., 100 Minn. 481, 484, 111 N.W. 391, 392 (1907). Two new rules regarding the use of groundwater were developed: The correlative rights doctrine, see, e.g., Eckel v. Springfield Tunnel & Dev. Co., 87 Cal.App. 617, 262 p. 465 (1923), and the rule of reasonable use. E.g., Canada v. City of Shawnee, 179 Okla. 53, 64 P.2d 694 (1937). Although these two doctrines are slightly different in a particular irrelevant here (sic), both require that water withdrawn from a supply be put to a beneficial use "on the lands from which it was taken." E.g., Stillwater Water Co. v. Farmer, 89 Minn. 58, 93 N.W. 907 (1903); Meeker v. East Orange, 77 N.J. 623, 74 A. 379 (1909). Although the

English common law theory that the landowner also owns the water beneath his lands still holds, the American adaptation in the form of the reasonable use doctrine limits this ownership right to uses in connection with the lands overlying the common supply.

Arizona committed itself to the doctrine of reasonable use of percolating groundwater in 1953. Bristor v. Cheatham, supra (Bristor II). In the first Bristor case, 73 Ariz. 228, 240 P.2d 185 (1952), which was reversed by the second, Justice LaPrade dissented from the holding that groundwaters were subject to appropriation and not privately owned, stating:

". . . the only issue before the trial court was whether the owner of land overlying a supply of percolating water common adjoining land owners may pump the water from wells upon his

land and convey it to other lands for the benefit of the latter from whence it does not return to replenish the common supply, if the supply available to the adjoining land owners from pumps upon their own lands . . . is diminished to their injury."

73 Ariz. at 242 (emphasis added).

Justice DeConcini expressed a similar view, also in dissenting in the first Bristor case. 73 Ariz. at 255. Both justices joined the majority in Bristor II in adopting the reasonable use doctrine. That "lands from which the groundwater is taken" equals lands over the "common supply", in this case the Basin Subdivision, is borne out by law and logic. For example, no one could seriously contend that a rancher must water his stock at the precise

point at which the water comes from the ground, nor that a farmer cannot irrigate land away from his wellhead. Reasonable use requires essentially that, provided the water is used reasonably and beneficially on some lands, the water after it is used be available for return to the common supply.

In this respect, it is helpful to note the analogy between riparian rights to water from a surface stream or river, and rights to percolating groundwater under the doctrine of reasonable use. In Bristor II, the Supreme Court quoted the Restatement of Torts, Sec. 852, comments b & c relating to the riparian right of reasonable use of surface waters. 75 Ariz. at 237. The court then stated:

"While the foregoing notation is concerning reasonable use between riparian owners, the

same work in Section 861 states that the problem of determining reasonable use is the same whether the water is in a water course or under the surface of the earth and that the foregoing comments are applicable to groundwater."

Id.

Thus, since the principles are generally the same, we may examine the common supply notion in the context of riparian rights to a river. In Anaheim Union Water Co. v. Fuller, 150 Cal. 227, 88 P. 978 (1907), for example, the plaintiffs were riparian to the Santa Ana River. The defendants lands were above the plaintiffs', abutting the same river. The defendants, however, took water from the river and conveyed it to lands outside of its drainage area, using it on land in the drainage area of another water course which joined

the Santa Ana at a point below the plaintiffs. The Supreme Court of California affirmed the entry of an injunction against the defendants' use, reasoning as follows:

"Land which is not within the watershed of the river is not riparian thereto, and is not entitled. . . to the use or benefit of the water from the river, although it may be part of an entire tract which does extend to the river. . . .

. . . The principal reasons for the rule confirming riparian rights to that part of lands bordering on the stream which are within the watershed are that, where the water is used on such land, it will, after such use, return to the stream, so far as it is not consumed, and that,

as the rainfall on such land feeds the stream, the land is in consequences entitled, so to speak, to the use of its waters." 88 P. at 980.

(Emphasis added, cites omitted).

Thus, it is the facts of nature, the hydrological realities, that form the right to the reasonable use of water, be it on the surface or underground. The critical factor is that water must be available for return to the common supply, so far as it is not consumptively used.

Cases cited by the Bristor II Court bear out the principle that groundwater may not be conveyed to a point beyond lands overlying the common supply under the rule of reasonable use: In Burr vs. McClay Rancho Water Company, 154 Cal. 428, 98 Pac. 260 (1908) water

was being transported from one parcel of land owned by a party to a noncontiguous parcel for use on the noncontiguous parcel. This transportation was sanctioned because both the parcel from which water was being extracted and the parcel on which it was being used overlay the common source of supply, the "water bearing strata."

City of San Bernardino vs. City of Riverside, 186 Cal. 7, 198 Pac. 784 (1921) condemns a transbasin diversion but by clear implication would permit an intrabasin diversion. Anaconda concedes that the Arizona Supreme Court has not sanctioned all diversions within a drainage area.

Horne v. Utah Oil & Refining Company, 59 Utah 279, 202 P. 815 (1921) recognized the right to transport water to points within an area so long as it wasn't taken out of the area that overlay the

"artesian district."

Glover vs. Utah Oil & Refining Company, 62 Utah 174, 218 Pac. 955 (1923) defined "off the land" as being out of the artesian district.

State vs. Anway, 81 Ariz. 206, 349 P.2d 774 (1960). Anway was permitted to take water off of one parcel of land he owned and transport it to and use it on another parcel of land. This was being done in a critical groundwater area and it was sanctioned. Justice Phelps in his dissent maintained that this violated the principle of Bristor vs. Cheatham, supra. The majority of the court obviously did not agree with this conclusion and obviously did not intend to limit the use of water on a specific, precise piece of land. Since the area was a critical groundwater area, it was judicially certain that the movement was within the groundwater basin.

See also Evans v. City of Seattle,
74 P.2d 984 (Wash. 1935); Katz v.
Walkinshaw, 70 P. 663 (Cal. 1902);
Forbell v. City of New York, 58 N.E.
644 (N.Y. App. 1900) (City could not take
water beyond the boundaries of the
common supply); Volkman v. City of Crosby,
120 N.W.2d 18, 22-23 (N.D. 1963); cf.
Montecito Valley Water Co. v. City of
Santa Barbara, 144 Cal. 578, 77 P. 1113
(1904). In Montecito Valley Water Co.,
supra, the court engaged in a highly
instructive comparison of that case
with Katz v. Walkinshaw, supra:

"First, it should be noted,
as applicable to all of these
appeals, that this case is
radically different from that of
Katz v. Walkinshaw. . . . Here
no question arises as to the
use, or the right to use, or
the apportionment of seepage

or percolating waters by and between the owners of the overlying lands. Here the waters flow or are developed in a barren and mountainous country, are of no use upon the lands within the watershed where they are found, but are of great value to the neighboring towns, cities, and fertile valleys. Each one of the parties to this action is carrying the water to alien soil and no claimants, even those who are riparian proprietors, pretend to use the water upon the lands from which it is obtained.

In *Katz v. Walkinshaw* the condition presented was that of a well-defined underground catchment basin; a subterranean basin; a subterranean lake, so to speak, loosely filled with

gravels. The lands above this subterranean basin were valuable because of the waters beneath, and such of the water as was taken from this basin and used upon its superior lands found its way back to the source of supply as surely as does such water when used by a riparian proprietor of a flowing stream within its watershed. In *Katz v. Walkinshaw* the controversy arose between the owners of such superior lands upon the one hand and a defendant water company upon the other, which, tapping the subterranean basin, was draining its waters for use upon lands without the limits of the basin which use, if continued, threatened the impairment and destruction of all the overlying lands."

77 P. at 1114. (emphasis added, cites omitted).

Therefore, it is clear that the phrase "lands from which the water is taken" means lands within the groundwater basin subdivision, the common supply.

Jarvis v. State Land Department, 104 Ariz. 527, 456 P.2d 385 (1969) (hereinafter "Jarvis I"), and Jarvis v. State Land Department, 106 Ariz. 506, 479 P.2d 169 (1970) (hereinafter "Jarvis II") are determinative of the case at bar and further support the common supply principle. In those cases, the real party in interest, the City of Tucson, had drilled six wells in Avra-Altar Valley and was pumping water for use in three distinguishable places: (1) for use on land within the Marana Critical Groundwater Area, and therefore over the water basin; (2) to land outside of the water basin but in the valley "drainage area;" and (3) out of

the entire watershed into another water basin. The petitioner brought an original action in the Supreme Court seeking injunctive relief against the City's pumping over state land. In responding to this action, the City did not contest the fact that it was conveying "off the lands" from which it was taken, but argued, inter alia, that the petitioners had not shown any demonstrable damage to the water supply on which to base any relief. Brief of Real Party in Interest at 5-17, 19, Jarvis I, supra. The Court, however, held that cognizable injury was demonstrated by the following fact: it took judicial notice that a critical area had been declared in the valley water basin, 104 Ariz. at 530, 456 P.2d at 399. Noting the definition of a critical area in A.R.S. Sec. 45-301 (3), the court held that this fact alone was enough to establish injury.

104 Ariz. at 530-31, 456 P.2d at 388-89. The Court was also apprised of the fact that it was possible for the City to withdraw 33,000 acre-feet per year. See Petitioner's Reply Brief at 6, Jarvis I, supra. An already declining water table would necessarily be damaged by the transbasin diversion. Therefore, the City was enjoined.

In Jarvis II, supra, the City returned to the issue it had not contested in Jarvis I: the issue of where the water pumped from its wells in the Avra-Altar Valley could be used, i.e. the "on the lands" issue. The City contended that the rule of reasonable use permitted pumping to points out of the water basin, but in the drainage area, as well as to Ryan Field, which was in the critical area and therefore judicially certain to be within the water basin boundaries. The Jarvis II Court,

however, permitted only the latter use, since Ryan Field was situated over the common basin.

It appears that the existence of a critical area inside the basin is relevant only to the issue of damage, and not to a definition of where water may be used. It is the boundaries of the body of groundwater, the basin in Jarvis II, that are determinative. This follows from the fact that the Court stated the City could pump water to residences outside of the critical area if it could be shown that they were inside the water basin. 106 Ariz. at 510, 479 P.2d at 173.

The City of Tucson is violating the reasonable use doctrine by its acts in and out of the Sahuarita-Continental Basin Subdivision, and such violation may be remedied in a summary proceeding.
The material facts in the case at bar

are clear. The State Land Department pursuant to duly delegated legislative authority has determined the Sahuarita-Continental Basin Subdivision to be a "distinct body of groundwater," or a "common supply" for those owning land over the basin. Pursuant to the same authority, the Department has also found that there is an unsafe supply of groundwater for irrigation uses in the Subdivision by declaring the Sahuarita-Continental Critical Groundwater Area in the Subdivision. The Court may take judicial notice of such facts. The City owns certain parcels of land in the Subdivision, has sunk wells into the supply, and is transporting approximately 20,000 acre-feet of water annually out of the Subdivision. The City has not shown that it has retired agricultural lands which formerly used this quantity of water within the Subdivision so as to bring it within the purview of the modification of the

Jarvis injunction. See Jarvis v. State Land Department,¹ nor could such a showing be made. The City has in effect established "well farms" over the supply of water common to the Anamax defendants

1.

In an order modifying the writ of permanent injunction issued in Jarvis II the Supreme Court of Arizona granted Tucson permission to pump 1228 acre-feet per year through its pipelines out of the water basin to its customers. Jarvis v. State Land Department, No. 9489 (Ariz. Sup. Ct., Mar. 31, 1971). Earlier, the city had purchased 307 acres of land lying within the Marana Area which had been irrigated with percolating groundwater at the rate of 4 acre-feet per year, or 1228 acre-feet per year total.

and other landowners within the Basin Subdivision, and is taking the water away from the supply to be sold so that it is not beneficially used on the lands from which it is taken and so that it is unavailable for return to the supply after use. This is precisely the abuse of rights which a great majority of the reasonable use cases dealt with. E.g., Jarvis I, supra; Jarvis II, supra; Canada v. City of Shawnee, 179 Okla. 53, 64 P.2d 694 (1937). Such illegality may be remedied in a summary proceeding -- the Jarvis cases are examples. The City's acts are putting a further, and illegal strain on the supply of groundwater in the Sahuarita-Continental Basin Subdivision which is and will be further damaging to the Anamax defendants and other landowners in the Subdivision by hastening the decline of the water table, causing economic harm, and

eventually leading to an uneconomic situation, thereby, causing these lands to fall barren.

Anamax, therefore, is entitled to partial judgment on its counterclaim against the Intervenor, the City of Tucson, that the present use made by the City of the waters of the Sahuarita-Continental Basin Subdivision is illegal under the doctrine of reasonable use, and further entitled to an order permanently enjoining the City of Tucson and its agents from increasing withdrawals from the supply above the levels at which it was pumping water out of the Subdivision as of the date of this movant's counterclaim.

(Signed CHANDLER, TULLAR, UDALL
& RICHMOND by Robert E. Lundquist,
Attorneys for named Defendants)

* * *

AFFIDAVIT OF ROBERT E.
LUNDQUIST(Attached to foregoing
and made part thereof)

(venue)

ROBERT E. LUNDQUIST, being first duly sworn upon his oath deposes and says that he is one of the attorneys for The Anaconda Company, Amax Copper Mines, Inc., as partners in the Anamax Mining Company; that he has read the foregoing Memorandum in Support of the Motion for Partial Summary Judgment against the City of Tucson dated this date, and knows the contents thereof; that the facts stated therein are true to the best of his knowledge, information and belief.

Furthermore, your affiant is informed, believes and therefore states that Exhibits "A" and "B" attached to

Duval's Motion for Summary Judgment against the City of Tucson, on the counter-claim, accurately reflects the boundaries of the Sahuarita-Continental Basin Subdivision and Critical Groundwater Area, as declared by the State Land Department; that said Exhibit "A" is part of the file of Cause No. 11439 in the Supreme Court of Arizona, and that said Exhibit "B" is part of the file in Cause No. 10486 in the Supreme Court of Arizona.

FURTHER AFFIANT SAYETH NAUGHT.

(Signed ROBERT E. LUNDQUIST
before a Notary Public on
March 13, 1974)

Exhibit A to Motion for Partial Summary Judgment: Anamax defendants incorporate by reference the map attached as Exhibit A to Duval's Motion for Summary Judgment as against the City of Tucson;

Exhibit B to Motion for Partial Summary Judgment: Anamax defendants incorporate by reference the maps and documents attached

as Exhibit B to Duval's Motion
for Summary Judgment as against
the City of Tucson.

* * *

(TITLE OF ACTION)

RESPONSE OF CITY OF
TUCSON TO MOTIONS FOR
SUMMARY JUDGMENT OF
ANAMAX AND DUVAL

Filed: March 21, 1974

I.

FACTUAL STATEMENT

The City of Tucson is situated on
and near the Santa Cruz River. From the
earliest recorded times it has obtained
the principal part of its municipal
water supply from wells in and near
that river and its tributaries. The
City has no supply of water that is
not pumped from underground, either from
the subterranean flow of the Santa Cruz
or from the groundwater supply of the
Santa Cruz and Avra-Marana Basins. Wells

from which the City has obtained its water are shown on the map attached as Exhibit 1. All of the wells shown on the map are located within the Santa Cruz Basin as that basin is defined by the State Land Department under the provisions of ARS 45-303 and shown on the map marked Exhibit 2. Some are in the Sahuarita-Continental Subdivision (see Map, Exhibit 3). (On Exhibit 2 the wells in the Tucson Subdivision are those shown to be in the Tucson Critical Groundwater Area; those in the Sahuarita-Continental Subdivision are those shown to be in the Sahuarita Critical Groundwater Area.)

The prior appropriative rights of the City in and to the waters of the Santa Cruz, both surface and underground, are in some cases "immemorial" rights deriving from the laws of Spain. In other cases those rights derive from modern law and statute and date back at

least to 1880. (See, e.g., Exhibit 4.) In still other cases the appropriations date from 1907. (See, e.g., Exhibit 5).

The City presently (1973) draws from its wells located in the Sahuarita-Continental Critical Groundwater Area a total of 11,278 acre feet annually. This is approximately 14.6% of its total municipal water requirement. (See the tables attached as Exhibit 6.) It is sufficient water to provide for the annual needs of about 65,000 people. It is less than one-third of the total annually withdrawn for agricultural use by Farmers Investment Company; it is about one-quarter of the annual withdrawal by the defendants for mining purposes. The City has, presently, a population of about 400,000; it is projected that by 1980 the number will be 500,000, by 2000 it will be 900,000; in less than 50 years it will be 1,400,000.

(See Exhibit 7, p. 1.) The total water pumped from all sources for the population of 400,000 in 1973 was a little over 72,000 acre feet (less than twice the defendants' combined use and less than the total of the annual use of Farmers Investment Company and the defendants). By the year 2000 it will be necessary for the City to pump at least 150,000 acre feet annually; by 2020, 233,333 acre feet. The City, incidentally, supplies through its water utility over 95% of the population of the eastern one-third of Pima County; the percentage is increasing.

The principal wells of the City (omitting from all of this statement reference to wells in the Avra Valley which produce about 8,000 acre feet annually) are located in the so-called South Side field, south of the airport. Over many years wells have been abandoned

for a variety of reasons and replaced by new wells located, in some cases, upstream as far as Township 16 South (about the north end of the properties owned by Farmers Investment Company and ASARCO). The construction of the City's wells now within the Sahuarita Critical Groundwater Area occurred in many cases in 1954 prior to the designation of the area either as a subdivision of the Santa Cruz Basin or as critical (the subdivision designation was June 8, 1954; the critical area designation was October 14, 1954).

Water pumped from the wells south of the City in the Sahuarita Critical Groundwater area is transported north to locations where, comingled with water from other wells, it is delivered to customers for municipal uses. All of that water is delivered and consumed within the Santa Cruz Basin, and waste

water is returned to that Basin.

For the past year the City has undertaken a program of drilling to determine whether any of the water used by the mines is returned to the underground supply. Findings to date demonstrate little or no such return, but the data is not yet conclusive on the question.

II.

ARGUMENT

The Motions filed by Duval and Anamax are essentially identical and raise the same legal issues, making it appropriate that they be answered together. Stripped of surplusage, the Motions say this: Those defendants are pumping water from within the Sahuarita Critical Area. They are taking the water up the hill to their mines and mills and using it in their operations. They are "using" it either (a) within the critical area, or (b) outside it but within the Sahuarita Continental Subdivision of the Santa

Cruz Basin. They are in any case returning it to the common supply shared by themselves, FICO and the City. The City, on the other hand, is taking water from the Critical Area and moving it outside the Subdivision. Their own use, they urge, is lawful, the City's is not. They rely on Bristor v. Cheatham and Jarvis v. City (sic).

These are Motions for Summary Judgment in an action in equity. They must be denied if there is any contested issue of fact underlying either the legality of the City's actions or the defendants' right to complain of them. For the sake of clarity it may be useful to treat with the second matter first (sic).

Clearly, if the conduct of the defendants themselves is unlawful, they can be granted no relief in equity. Can the Court, then, at this point in the

proceedings find and hold that defendants' conduct is lawful? That, of course, is the very issue which is presented by FICO's complaint against them. Merely to glance at the accumulated files in this case is to appreciate that -- to put it in the mildest terms -- every factual assertion on which the mines rely is strongly contraverted. They assert that their "use" of water is in fact within the critical area; FICO urges that it is not, and there is evidence in the record to support FICO's view. They assert that the water which they use is "returned" after use to the common supply; FICO vehemently denies it, and there is evidence to support FICO's position.

At the heart of the Motions is the assertion that the mines are, as a matter of law, using the water on "the land from which it is taken" (the language is

that of Bristor II). They contend for the right to take water out of the Critical Area so long as its use is within the Basin, so that waste will be returned to the "common supply."

Whether that proposition of law is acceptable under Bristor and Jarvis I and II is a matter on which the City has no present comment (although it is certainly to the City's advantage that the assertion be true). For one of two things is so: If the proposition is sound, the City's withdrawal and use of water from its wells in the Critical Area is lawful; if the proposition is unsound, the mines are in no position to appeal to a court of equity.

Defendants in their Motions seek to distinguish between a "basin" and a "subdivision" to justify the conclusion that their own use is lawful, the City's not. The argument they make is this: They may move water off one parcel

of land and use it elsewhere so long as its use is at a point where waste or surplus will be returned to the "common supply" from which the water has been drawn; in Arizona that common supply is defined by the limits of an established basin "subdivision"; their use is within the same subdivision as their source; the City's use is outside the subdivision which contains its source; therefore, since they are returning their waste water to the "common supply," and since the City is not, their use is legal, its is not. Laying aside for the purpose of discussion the factual problems which the argument raises, it is fatally flawed as a matter of law.

The Ground Water Code (ARS 45-301, et seq.) defines two terms (ARS 45-301):

"5. 'Groundwater basin' means land overlying, as nearly as may be determined by known facts, a distinct body of ground water ..."

"6. 'Groundwater subdivision' means an area of land overlying, as nearly as may be determined by known facts, a distinct body of ground water. It may consist of any determinate part of a ground water basin." (emphasis ours)

The defendants read these definitions as suggesting that the "common supply" of a subdivision is not the "common supply" of the basin. The statute cannot be so construed. It is apparent enough that a common supply -- a "distinct body of ground water" -- is defined, not by a subdivision, but by a basin. The State long ago established the Santa Cruz Basin (see Exhibit 2). In so doing it established as a matter of law and fact that all ground waters within the Basin were part of the same "distinct body." As defendants have argued, a "distinct body" is a "common supply." A subdivision is an area of land within the basin; as the very name suggests and as the

statute provides, it is a part of a basin. A subdivision is clearly an administrative area, useful, for example, in the formation of critical areas. In the Santa Cruz Basin are two subdivisions (see Exhibit 3). By statute they overlie the same "distinct body of ground water," the same "common supply." Defendants in their memoranda cite cases to the proposition that they are entitled to move water anywhere so long as it is not moved away from the common supply. It is instructive to count the number of those cases (including Bristor and Jarvis I and II) that speak in terms of "basins."

Thus, if a "common supply" is a "distinct body of ground water" -- and defendants argue that it is -- Tucson's withdrawal, transport and use of water is as lawful as defendants' is.

But suppose, as FICO urges, that one may not, under Bristor and Jarvis, move

away from the tract from which it is drawn -- suppose the right to move it is not measured by the boundaries of the "common supply." The moving defendants meet the resulting situation with the assertion, not that the rule of reasonable use sanctions their activity, but instead that they have brought themselves within Jarvis II's exception to that rule. They say that having bought agricultural land in the Sahuarita Critical Groundwater Area and retired it from use they are entitled to move the water wherever they please, even out of the Basin. Again, defendants misread the authority on which they rely.

In Jarvis II, to be sure, the City of Tucson was permitted to buy and retire Avra Valley lands and to move to the Santa Cruz Basin an amount of water equal to that once used on those retired lands. Why was it given that privilege? The

Supreme Court was clear on the point:

"Finally, petitioners request this Court to determine whether Tucson by acquiring lands in cultivation in the Avra-Altar Valleys may remove the ground water used upon those lands to other areas contrary to the doctrine of reasonable use. The State Land Department joins petitioners in requesting that the first Jarvis decision be augmented by clarifying the rights of the parties in this respect. Tucson also asks the Court to pass upon a like question although in somewhat a different form. Amici Curiae, however, oppose the request of the parties that the Court expand on the legal rights in question.

"We think, however, that the problem is critical to municipalities in Arizona and so justifies our consideration even though not strictly embraced within the limits of the issues of the original lawsuit. As indicated, Jarvis' action invoked this Court's equitable jurisdiction. We issued the injunction but stated that we reserved the right to modify or dissolve upon application accompanied by a showing of circumstances as would permit the legal pumping and transportation of ground water by the City. Our decree was consistent with the almost universal rule that a court of equity when requested will determine

all the equities connected with the main subject of the suit and grant all the relief necessary to a complete adjustment of the litigation:

"It is a principle of equity that it does justice completely and not by halves. When a bill had been brought in good faith to obtain relief within the jurisdiction of the court, the bill may be retained to do complete justice with reference to the subject matter, even though upon the facts the specific relief prayed for cannot be given, and a bill would not lie for the sole purpose of obtaining the specific relief that is given. Reynolds v. Grow, 265 Mass. 578, 580, 164 N.E. 650; Booras v. Logan, 266 Mass. 172, 175, 164 N.E. 921; Dignan v. Maryland Casualty Co., 271 Mass. 427, 430, 431, 171 N.E. 482; Peerless Unit Ventilation Co., Inc., v. D'Amore Construction Co., 283 Mass. 121, 125, 126, 136 N.E. 280; Geguzis v. Brockton Standard Shoe Co., 291 Mass. 368, 371, 137 N.E. 51; Somerville National Bank v. Hornblower, 293 Mass. 363, 368, 199 N.E. 918, 104 A.L.R. 1107. Fields v. Othon, 313 Mass. 115, 46 N.E. 2d 546, at 547 (1943).

"It is also frequently stated as a maxim of equity that equity

follows the law. By this is meant that equity obeys and conforms to the law's general rules and policies whether the common law or statute law. See, e.g., Provident Building & Loan Ass'n. v. Pekarek, 52 Ohio App. 492, 3 N.E.2d 983 (1936). By A.R.S. Sec.45-147 the relative value of uses in appropriable waters has been fixed by the Legislature as first, domestic and municipal uses, and second, irrigation and stock watering. The creation of such a priority clearly evidences a legislative policy that the needs of agriculture give way to the needs of municipalities. Hence, we hold that the decree in this case will be modified if Tucson purchases or acquires the title to lands within the Avra-Altar Valleys which are now cultivated and uses the water which would have been used in cultivating such lands as a source of supply for its municipal customers. Tucson may withdraw an amount equal to the annual historical maximum use upon the lands so acquired."

Nothing in Jarvis II can be read to suggest that these mining companies have the same equitable call on the court's power to grant such a dispensation as the City has. The unique nature of a city's requirements is pointed out clearly

enough. How can this Court rule, at least in the absence of the taking of evidence, that the mining companies are entitled in equity to the same consideration? Water to carry away industrial waste is one thing. It is at least arguable that drinking water is another. Yet (1) if defendants cannot under the reasonable use rule take their water up the hill, and (2) if defendants are not entitled to assert the same exemption as was extended in Jarvis II to the City, then their withdrawal and use of water is clearly unlawful, and they are hardly parties entitled to invoke this Court's equitable jurisdiction against the City.

The memorandum to this point has considered primarily the status of the defendants. There is, however, much more to be considered. First, the defendants have in their Motions treated the City's

withdrawal of waters from the wells located within the critical area as though those waters were established to be "ground waters." They are not established as anything of the kind. There is ample evidence that much or indeed all of the water which is produced by the City's wells in and near the Santa Cruz River is taken from an underground stream. (See, e.g., Exhibit 8.) It is established that the Santa Cruz is a "known independent subterranean stream. (See, e.g., Exhibit 8.) Pima Farms Co. v. Proctor, 33 Ariz. 96, 245 Pac. 369. From its earliest history the City and its predecessor town and village have drawn the water of that stream by wells in and near its bed. That water is not "ground water," as the term is used in our statutes. It is not subject to the rule of reasonable use stated in Bristor and Jarvis. It is subject to

appropriation and controlled by the rules of prior appropriation. Pima Farms Co. v. Proctor, supra. The City's appropriative rights in that subterranean flow are prior to those of any of the other parties, so far as is known, and they may include the entire flow of that stream. Having for many years drawn that water from wells located near Tucson, as those wells became unproductive or inadequate they were in many cases abandoned (see Exhibit 1). They were replaced by wells farther south, some in the Sahuarita Critical Area. In other words, the City as a prior appropriator of an underground stream moved its point of diversion upstream, an action it had the clear legal right to take. Fritsche v. Hudspeth, 76 Ariz. 202, 262 P.2d 243. The City contends, in short, that its right to take water from the wells in question here is the right of the prior appropriator

of a stream. There is and will be evidence to support that contention.

Nothing anywhere in the record suggests that either FICO or any defendant has any appropriative rights at all, certainly none prior to the City's.

There are still other reasons why defendants' Motions should be denied. It is instructive, in considering them, to examine the language of a Petition filed by these same moving defendants in the Supreme Court, in Cause No. 11439 in that Court, seeking to intervene in a proceeding pending there between FICO and Pima. Parts may be reproduced without change:

"In Cause No. 116542 there has been extensive discovery by way of written interrogatories and oral depositions, some lasting for days. FICO has taken depositions as recently as November 30, 1973. Additional discovery by way of drilling and sampling is currently being conducted by the City of Tucson, a party

to said Cause No. 116542. Further discovery of a very substantial nature by depositions of numerous experts must be conducted by all of the parties to said cause." (Petition, Par. VI)

* * * * *

"THIS CASE REQUIRES TRIAL ON THE MERITS

"In essence, FICO is again seeking to raise the very same issues previously before this Court in Farmers Investment Company v. State Land Dept. et al. (No. 10486), where this Court declined to accept jurisdiction. In that case the Petitioners filed briefs urging that the issues involved were vital and possibly determinative of the rights of all defendants in the Pima County action. Petitioners urged this Court not to grant FICO's Petition without affording the defendants an opportunity to try the complex hydrological and equitable issues involved in that case and which are involved here.

"Few complex water cases have reached this Court after trial on the merits. For example, Bristol v. Cheatham, 75 Ariz. 236, 255 P.2d 178 (1953) was decided on a motion to dismiss. State v. Anway, 87 Ariz. 206, 349 P.2d 774 (1960) came to this Court on appeal from summary judgment. Jarvis was an original proceeding

in this Court decided on the pleadings.

"Even more than the first action brought here by FICO, this second attempt more compellingly illustrates the necessity for a trial of the facts involved. Under the guise of raising questions of state land law relating to state land leases, FICO's petition glosses over the most critical and the most basic questions. Hydrological facts and realities are completely ignored. Cases of this magnitude and complexity cannot be decided by disregarding the factual situations which the ground water statutes were designed to regulate." (Memorandum in Support of Petition, p. 20)

* * * * *

"Laches and Estoppel. FICO knew for many years and did not complain that petitioners were continuously engaged in the exploration, development and construction of mining operations, that Petitioners were investing several hundred million dollars therefor and that such operations would use water from wells on lands acquired by Petitioners in the Santa Cruz Valley. FICO is now barred by laches and is estopped to complain of Petitioners' uses of ground water.

"Balancing the Equities. The appropriateness of injunction against tort depends upon a comparative appraisal of all of the

factors of the case including the interest to be protected, the adequacy of other remedies, plaintiff's delay in bringing the suit, plaintiff's misconduct, relative hardships, the interest of third persons in the public, and all other applicable facts and circumstances. Restatement of Law, Torts, Secs. 933-951. All of these are factors which can be shown only by a trial on the merits." (Memorandum, p. 22)

The City agrees that if ever a case required to be tried on its merits, this one does. It, too, has pleaded laches and estoppel, and there is and will be evidence to support those pleas. It is in a stronger equitable position than the mines are. As "equity follows the law" and as domestic and municipal uses are first in relative value among all uses (Jarvis II), so, surely, no court will enjoin a City's taking of even ground water unless and until the clear illegality of its action is shown (it is not here) and, beyond even that, unless and until it is manifest (as it is not on this record) that

no less harsh and oppressive remedy can be made available to those whose legitimate interests are harmed.

(Signed JAMES D. WEBB, City Attorney, City of Tucson, and LESHER & SCRUGGS, PC., by Robert O. Leshner, Attorneys for Plaintiff in Intervention)

(Verified by FRANK BROOKS, Assistant City Manager of the City of Tucson, before a Notary Public on March 21, 1974)

Exhibits referred to throughout the foregoing Response of City of Tucson do not appear attached to the Response.

* * *

(TITLE OF ACTION)

DUVAL DEFENDANTS' REPLY
TO THE CITY'S RESPONSE TO
DUVAL'S MOTION FOR SUMMARY
JUDGMENT

Filed: April 24, 1974

Standing

Duval has standing to assert its motion against the City even if the allegations in FICO's complaint against Duval were taken as true. Duval owns approximately 7,430 acres of land inside the Critical Area of which over 1,530 are entitled to the use of water for irrigation. This land represents an investment of millions of dollars and is extremely valuable not only as agricultural land but for subdivisions, planned communities and other beneficial purposes. It is a substantial interest clearly entitled to protection.

The City argues that under Jarvis II

only municipalities are allowed to retire agricultural land and transport its historical water use elsewhere. As pointed out in Duval's memorandum in response (sic) to FICO's Motion for Summary Judgment, the principle is one which is not peculiarly applicable to municipalities or one innovated by the Court in Jarvis II. As was recognized by the Supreme Court in Jarvis II, this is one of the oldest principles of the doctrine of reasonable use. The rationale is not the peculiar needs of municipalities, although that was certainly a factor in the Jarvis decision, but the fact that remaining users are not hurt by the retirement of one use and the substitution of another.

However even if the City were right in its contention, Duval is entitled to summary judgment whether or not it has retired any lands from cultivation. A

discussion of this aspect of Jarvis might be relevant if the City had retired lands within the Subdivision from cultivation, but it has not. Yet, regardless of the law which might be applicable in another context, it nevertheless remains that Duval has directly contributed a substantial water resource to the common supply of the Subdivision by the temporary retirement of agricultural lands, while the City has done nothing whatever toward conserving the common supply. Thus, on an equitable basis, Duval is all the more entitled to an injunction against the City.

Boundaries of the Common Supply.

The City urges that the boundaries of the common supply are defined not by the designation of the Sahuarita-Continental Subdivision but by the Santa Cruz Basin.

ARS Sec. 45-301(5) defines

"groundwater basin" as follows:

5. "Groundwater basin" means land overlying, as nearly as may be determined by known facts, a distinct body of ground water. . . .

Subsection (6) of ARS Sec. 45-301 defines "groundwater subdivision" as follows:

6. "Groundwater subdivision" means an area of land overlying, as nearly as may be determined by known facts, a distinct body of groundwater. It may consist of any determinable part of a groundwater basin.

Thus argues the City, if the groundwater subdivision defines the boundaries of the common supply, so too does the groundwater basin.

The critical language, of course, is that a groundwater subdivision "may consist of any determinable part of a groundwater basin."

The subdivision defines the smallest

body which is definable as a distinct body of groundwater. It is the smallest unit of common supply identifiable as such. However it is a hydrological reality that several distinctly identifiable basins may be interconnected to form a larger basin. Such larger basin is defined by the statutes as the "ground-water basin".

However, if the Court denies Duval's motion on the grounds that the Santa Cruz Basin defines the limits of the common supply then the Court must on the same grounds enter judgment in favor of Duval on FICO's complaint.

Tucson's Appropriation Theory

The City maintains that it pumps from the underflow of the Santa Cruz River, a known "underground stream", and that such water is appropriable surface water not groundwater. This assertion is completely refuted by Tucson's own exhibits:

1. To establish the underground stream from which it allegedly pumps, Tucson attached its Exhibit 8, an unidentified and unverified report by Samuel F. Turner, which is completely inadmissible as evidence. According to this report, an "inner valley" was formed in a past geologic age when the stream "cut a much deeper and wider channel than the present flood channel of the Santa Cruz River". (p. 1) Contained in this inner valley "is the very permeable material that was deposited in the old channel that now carries an underground stream under the Santa Cruz River." (p. 2) (emphasis added) The underflow of the Santa Cruz River flows entirely within the "inner valley that varies from one-half mile to a maximum of one and a half miles in width" (p. 1) along the bottom land of the present Santa Cruz Valley.

Only two of Tucson's 27 wells inside

the Critical Area are located in the "inner valley" defined by Mr. Turner. This is shown both by the City's own evidence, Exhibit 1 to its response, and by the affidavit of Mr. Ed L. Reed attached hereto. The remaining 25 wells are located on the "mesas" which Mr. Turner describes as bordering the inner valley and raising the valley elevation by ten to thirty feet and which "slope at a rapidly increasing rate upward toward the mountains on either side." (p. 1)

Thus, even if Mr. Turner's report were admissible and even if it were correct, Tucson's own evidence conclusively shows that it is not pumping appropriable waters.

2. Tucson has attached Exhibit 4, a copy of its application to appropriate waters from the Santa Cruz River. Said notice of application does not contain application for a single point of diversion on land located inside the present boundaries

of the Sahuarita Continental Critical Groundwater Area. All of the 13 points of diversion listed in the application are located north of the Subdivision and Critical Area boundaries. If a permit to appropriate was ever issued, this is not disclosed to the Court.

3. Tucson states that many of its wells inside the Critical Area were drilled prior to its designation. However according to Tucson's own Exhibit 1, all but six of the twenty-seven wells drilled by Tucson in the Critical Area were drilled after its designation in 1954. The remaining six wells were drilled in 1954 and it does not appear whether such wells were drilled before, after or concurrently with the designation of the Subdivision or whether they were drilled with knowledge of the proposed boundaries of the Subdivision and Critical Area.

4. Tucson admits that as wells

became unproductive or inadequate, they were abandoned and moved further south into the Sahuarita-Continental Critical Area. Tucson admits that its rate of pumping has increased over the years and that it intends to still further increase its withdrawals from the Critical Area. These facts are completely inconsistent with and violative of the doctrine of prior appropriation. It is well settled that the doctrine of prior appropriation does not permit an appropriator to change his place of diversion to the injury of others. Fritsche v. Hudspeth, 76 Ariz. 202, 262 P.2d 243 (1953). Further an appropriator is not entitled to expand the amount of his appropriation to the injury of later intervening appropriators. Wiel, Water Rights in the Western States (3rd ed.) Sec. 474. It is a matter of public record that the entire flow of the Santa Cruz River has been over appropriated

and regardless of the validity of past increases in pumping rates by the City, this Court should at a minimum enter its injunction prohibiting the City from increasing its pumping from its wells SC 5 and SC 13 beyond its November, 1973 rates.

Except as to wells SC 5 and SC 13, however, the contention that Tucson is pumping subflow of the Santa Cruz River pursuant to a valid appropriative right is frivolous and insufficient to overcome Duval's motion.

Laches and Estoppel

Without discussion, the City asserts that it "has pleaded laches and estoppel, and there is and there will be evidence to support these pleas". It is impossible on the basis of such a statement to determine what facts, if any, would support the claims of laches or estoppel or the extent to which such defenses are being

asserted. The defenses must therefore be disregarded. However, even if the City were successful in asserting its defenses and even if this Court were to try the issue of the extent to which Tucson's present pumping is protected by the doctrines of laches and estoppel, it remains that such defenses are completely ineffective to justify future increases in pumping levels. Therefore, regardless of Tucson's evidence on these issues, Duval would be entitled to an injunction prohibiting Tucson from increasing its rate of pumping above its November, 1973 levels.

Duval's Motion for Summary Judgment against the City should be granted.

(Signed FENNEMORE, CRAIG, von AMMON & UDALL by Calvin H. Udall and James W. Johnson, Attorneys for Duval Defendants)

* * *

AFFIDAVIT

(Attached to foregoing
Reply and filed therewith)

(Venue)

ED L. REED, being first duly sworn
upon his oath deposes and says:

He is by profession a registered
Engineer and Hydrologist. He graduated
from Texas Technological University with
a Bachelor of Science degree in Geological
Engineering in 1939 and did graduate
studies at the same University in Geology
in 1949 and 1950. He has been continuously
engaged in the field of Geological En-
gineering and Hydrology since 1939.

He is currently a partner in the
firm of Ed L. Reed and Associates of
Midland, Texas. He is a registered
Geologist and a registered Geological
Engineer in the State of Arizona.

From 1939 to 1952, he has engaged in

various engineering, geological and administrative assignments in the oil industry. He has practiced as a Consulting Hydrologist since 1952.

In his consulting activities as a Hydrologist, he has had experience in ground water and surface water problems throughout the State of Texas and in parts of New Mexico, Arizona, Utah and Nevada. His work has been in the field of exploration for and the development of ground water resources, evaluations of water supply projects, and water quality studies of surface and ground waters. For example, detailed studies have been conducted of water supply availability in the Amargosa Desert in southwestern Nevada, in the Yuma Mesa area of southwestern Arizona, and for many of the municipalities and water districts in the western part of Texas. He has served as Consultant for the High Plains Water Conservation

District No. 1 and the Red Bluff Water Power and Control District, both situated in the western part of Texas.

He is, or has been a Fellow or member of the

Geological Society of America
American Society of Civil Engineers
National Society of Professional
Engineers
American Association of Geological
Engineers
American Water Works Association

He has performed studies and investigations of the water resources in the Upper Santa Cruz Valley of Pima County, Arizona prior to his employment in connection with the action now pending in Pima County Superior Court in which Farmers Investment Company has sued The Anaconda Company and others.

In about December, 1969, he was employed by the Duval Corporations as a consultant in connection with this litigation to study the geology and hydrology of the Santa Cruz Basin and to make

a study and investigation of the water supply and ground water uses in the basin and the Critical Ground Water Area situated in said Basin. He has studied and investigated (sic) and is in the process of studying and investigating the foregoing matters.

In connection with his investigation, he has reviewed published data and literature, including among other things, the records of the College of Agriculture of the University of Arizona relating to static water levels and elevations in an extensive network of observation wells in the Santa Cruz Basin. He has also studied numerous other published reports by various agencies including the U.S. Geological Survey, University of Arizona, U.S. Bureau of Mines and others.

He has read the report by Samuel F. Turner entitled "Underflow of the Santa Cruz River" attached as Exhibit 8 to the

City's Response to Duval's Motion for Summary Judgment. He has personally located the "inner valley" by field work performed by him personally, by stereoscopic aerial photographs and by other geologic techniques. In addition he has personally made a field examination of the location of Tucson's wells within Sahuarita-Continental Critical Area.

Of the 27 wells described in Tucson's Exhibit 1 to its Response to Duval's Motion for Summary Judgment only wells SC 5 and SC 13 are located in the "inner valley." The remainder of Tucson's wells are located on the "mesas" that rise from the banks of the inner valley.

(Signed ED L. REED before a Notary Public on April 23, 1974)

* * *

(TITLE OF ACTION)

MINUTE ENTRY (Ruling)

Dated: May 21, 1974

Judge: The Honorable Robert O. Roylston

UNDER ADVISEMENT:

The Plaintiff's Motion for Summary Judgment as to Defendant Duval and Defendants Duval's and Anamax' Motions for Partial Summary Judgment having been taken under advisement, the Court finds as follows:

1. Arizona has adopted the reasonable use doctrine as to underground water.

2. Water may be pumped from one parcel and transported to another parcel if both parcels overlie a common basin or supply and if the water is put to a reasonable use. Jarvis II.

3. Water so transported must be used within the Groundwater Subdivision,

with the exception of municipalities retiring lands from cultivation as provided in Jarvis II.

Therefore, Plaintiff's Motion for Summary Judgment as to Duval is denied; Duval's and Anamex' (sic) Motions for Partial Summary Judgment are granted.

Attorneys Udall and Chandler shall prepare written judgments.

* * *

(TITLE OF ACTION)

MINUTE ENTRY (Ruling)

Dated: March 13, 1978

Judge: The Honorable Robert O. Royston

UNDER ADVISEMENT:

Defendant Duval's objections to the form of Judgment proposed by Intervenor City of Tucson having been taken under advisement,

IT IS ORDERED that the objections

are sustained and the Court signs the proposed Judgment and Decree of Injunction offered by Defendant.

IT IS FURTHER ORDERED that form of Judgment proposed by the Intervenor be filed herein without signature.

It further appearing to the Court that the attorneys intend to appeal this Partial Summary Judgment,

IT IS ORDERED that the Judgment is stayed until further Order of the Court.

(TITLE OF ACTION)

JUDGMENT AND DECREE OF
INJUNCTION

Filed: March 13, 1976

The defendants, DUVAL CORPORATION and DUVAL SIERRITA CORPORATION, having moved the Court for partial summary judgment and decree of injunction against the intervenor, CITY OF TUCSON, upon the

counterclaim of those defendants against the intervenor; and the Court, having considered the admissible facts before it and the memoranda of law filed by the parties, and having heard the oral argument of counsel on the issues and being otherwise fully advised in the premises; the Court finds and concludes:

1. The State Land Department by its Order No. 1, dated June 8, 1954 established the Suwannee-Continental Subdivision of the Santa Cruz Groundwater Basin (the "Subdivision"). Such designation was pursuant to statutory duty contained in A.F.S. Sec. 45-303. Such Subdivision constitutes an area of land overlying a distinct body of groundwater.

2. Duval Defendants own approximately 9,430 acres of land within the Subdivision which are used for industrial, agricultural and other beneficial purposes. Of such acreage, approximately 1,530 acres

have a history of cultivation and are entitled to the use of water for agricultural purposes from the groundwater supply of the Subdivision.

3. Duval Defendants pump and use within the Subdivision approximately 22,000 acre-feet of groundwater per annum for use in their milling circuits and for the transportation of tailing. De minimis amounts of water are consumptively used in the milling process, the primary consumptive use of water by Duval Defendants being for the transportation of tailing.

4. The City of Tucson ("Tucson" or "City") lies north of the Subdivision. It owns a number of wells on small sites within the Subdivision and pumps water from such wells primarily for use and sale outside the Subdivision. Tucson owns no lands with a history of cultivation inside the Subdivision.

5. The City's pumping from the Sub-division commenced about 20 years ago. Since the beginning of 1964 the average rate of production from the City's wells inside the Subdivision has doubled from an average daily rate of 9 million gallons to 18 million gallons.

6. Tucson intends to continue to increase its rate of pumping and to continue to transport such water away from the Subdivision. Duval filed its answer to Tucson's Complaint in Intervention on April 12, 1973 praying for an adjudication of the relative rights of Duval Defendants and the City to the waters of the Subdivision. Duval filed its counter-claim against the City on November 7, 1973 and its Motion for Partial Summary Judgment on February 12, 1974.

7. For many years, the water table (handwritten--initialed ROR) within the Subdivision has been declining and the supply diminishing.

8. Under the Arizona doctrine of reasonable use, groundwater may not be transported for use on lands which do not overlie the common groundwater supply and from which use the water does not return to the common supply, if others whose lands overlie the common supply are thereby injured.

9. The designation and establishment of said Sahuarita-Continental Subdivision by the State Land Department constitutes a binding determination and finding that said Subdivision overlies a distinct body of groundwater from which the Court finds that the land within it overlies a common groundwater supply.

10. Tucson admits that it is transporting water away from the Subdivision and that none of the water transported by the City for use away from the Subdivision returns to the common supply of the Subdivision. Tucson further admits

that the water supply of the Subdivision is limited, that the supply has been diminishing for many years, and that the water table of the Subdivision has been declining for many years.

11. All of Tucson's wells located in the Subdivision except for Tucson's wells No. SC5 and SC 13, pump groundwater. As to wells SC5 and SC 13, there is a material issue of fact as to whether such wells pump surface water.

12. Material issues of fact exist as to Tucson's affirmative defenses under which Tucson claims the right to continue pumping groundwater from the Subdivision from wells installed prior to the filing of Duval's counterclaim. However, any such rights, if established, would not permit pumping of groundwater at rates in excess of those pumping rates established by April 12, 1972.

13. Except as noted above, there are

no genuine issues as to any material facts and defendants Duval Corporation and Duval Sierrita Corporation are, as a matter of law, entitled to judgment against the City of Tucson on their Motion for Partial Summary Judgment dated February 12, 1974.

THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED

That the City of Tucson, its officers, agents, servants, employees, attorneys, and all persons in active concert or participation with them, be and they are hereby forever enjoined from:

1. Pumping and transporting groundwater for use away from the Sahuarita-Continental Subdivision of the Santa Cruz Groundwater Basin, except from wells SC5 and SC 13, in amounts exceeding the rates at which Tucson pumped water for transportation and use outside of the Subdivision on April 12, 1972;

2. Using any wells or pumps installed in the Sahuarita-Continental Subdivision after April 12, 1972, for the pumping of groundwater for use outside the Subdivision.

It is further determined and adjudged that there is no just reason for delay in the entry of the foregoing partial judgment as a final judgment and the Court directs that it be forthwith entered as provided by Rule 54(b) of the Rules of Civil Procedure.

DONE IN OPEN COURT this 13 day of
March ROR
February, 1975.

(Signed ROBERT C. ROYLSTON,
Judge of the Superior Court)

* * *

(TITLE OF ACTION)

JUDGMENT

Filed: March 13, 1975

The defendants, THE ANACONDA COMPANY and AMAX COPPER MINES, INC., as partners in the ANAMAX MINING COMPANY, and the DUVAL CORPORATION and the DUVAL SIERRITA CORPORATION, having moved the Court for partial summary judgment against the intervenor, CITY OF TUCSON, upon the counter-claims of those defendants against the intervenor; the Court having considered the memoranda of law filed by all parties to the motions and having heard the oral argument of counsel on the issues, and being otherwise and fully advised in the premises;

NOW, THEREFORE, it is ORDERED, ADJUDGED and DECREED that judgment be, and it is hereby, entered in favor of

THE ANACONDA COMPANY and AMAX COPPER MINES, INC., as partners in the ANAMAX MINING COMPANY, and the DUVAL CORPORATION and the DUVAL SIERRITA CORPORATION, and against the CITY OF TUCSON that the present withdrawal by the CITY OF TUCSON of groundwater from wells located within the boundaries of the Sahuarita-Continental Subdivision of the Santa Cruz Basin and the transport of that water outside those boundaries is unlawful.

DONE IN OPEN COURT this ___ day of _____, 1974.

ROBERT O. ROYESTON,
Judge of the Superior Court

* * *

(TITLE OF ACTION)

NOTICE OF APPEAL

Filed: March 26, 1975

The Intervenor, City of Tucson,
appears and appeals to the Arizona Court of
Appeals from a judgment entered herein on
the 13th day of March, 1975, in favor of
the defendants Anamax and Duval Corpor-
ation.

(Signed JAMES D WEBB, City
Attorney, City of Tucson,
and LESHER, KIMBLE, RUCKER &
LINDAMOOD, P.C., by Robert O.
Leshner, Attorneys for Plaintiff
in Intervention)

* * *

(TITLE OF ACTION)

DESIGNATION OF CONTENTS
OF RECORD ON APPEAL

Filed: March 26, 1975

Pursuant to Rule 75(a), the Intervenor,

City of Tucson, hereby designates as the record on appeal the following:

1. The Complaint in Intervention filed by the City of Tucson;
2. Answers to the Complaint in Intervention filed by Defendants Anamax and Duval;
3. Counterclaims or cross-claims against the City of Tucson filed by the Defendants Anamax and Duval;
4. Defendant Anamax' Motion for Summary Judgment and the City of Tucson's response thereto;
5. Defendant Duval's Motion for Summary Judgment, and response of the City of Tucson thereto;
6. The Judgments entered herein in favor of Anamax and Duval against the City of Tucson;
7. Minute Entry of Judge Robert O. Royston, dated May 21, 1974.

(Signed JAMES D. WEBB, City Attorney, City of Tucson, and LESHER, KIMBLE, RUCKER & LINDA-MOOD, P.C., by Robert O. Leshner, Attorneys for Plaintiff in Intervention)

* * *

(TITLE OF ACTION)

DESIGNATION OF ADDITIONAL
CONTENTS OF RECORD ON
APPEAL

Filed: April 8, 1975

Pursuant to Rule 75(a), Duval Corporation hereby designates as additional contents of the record on appeal the following.

1. Duval Defendants' Memorandum in Support of Motion for Summary Judgment and Exhibits thereto, filed February 12, 1974.

2. Deposition of Frank Brooks, November 30, 1973.

3. Duval Defendants' Reply to the City's Response to Duval's Motion for

Summary Judgment and Exhibits thereto,
filed April 24, 1974.

(Signed FENNEMORE, CRAIG, von
AMMON & UDALL by James W.
Johnson, Attorneys for Duval
Defendants)

CERTIFICATE OF SERVICE

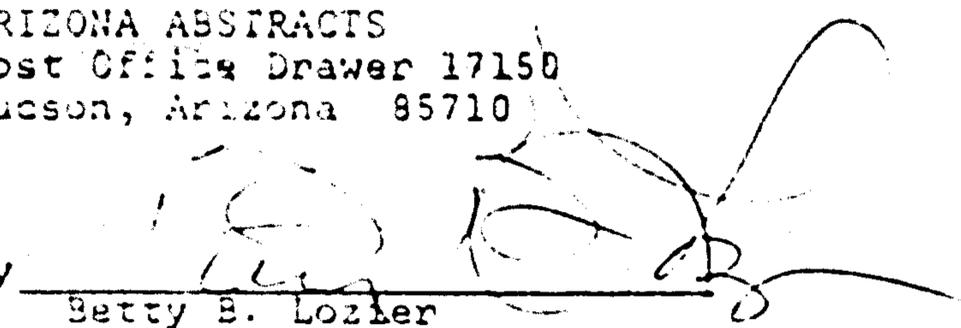
I hereby certify that on the 13
day of June, 1975, I mailed two copies
of the within Abstract of Record on
Appeal to counsel for Appellees The
Anaconda Company, et al., and two copies
to counsel for Appellees Duval Defendants
as follows:

CHANDLER, TULLAR, UDALL & RICHMOND
1110 Transamerica Building
Tucson, Arizona 85701
Attorneys for The Anaconda Company,
et al.

FENNEMORE, CRAIG, von AMMON & UDALL
100 West Washington Street
Phoenix, Arizona 85003
Attorneys for Duval Defendants.

Dated: June 13, 1975.

ARIZONA ABSTRACTS
Post Office Drawer 17150
Tucson, Arizona 85710

By 
Betty B. Lozler

