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IN THE SUPREME COURT
STATE OF ARIZONA

FILED
AUG 12 1975 *kek*
CLIFFORD H. WARD
CLERK SUPREME COURT
BY

FARMERS INVESTMENT CO.,)

Appellant,)

-vs-)

ANDREW L. BETTWY, etc.,)
et al,)

Appellees.)

Supreme Court

NO. 11439-2

FARMERS INVESTMENT CO.,)

Appellant,)

-vs-)

THE ANACONDA COMPANY,)
et al,)

Appellees.)

Pima County
Superior Court
NO. 116542

CITY OF TUCSON,)

Appellant,)

-vs-)

ANAMAX MINING COMPANY,)
et al,)

Appellees.)

BRIEF OF APPELLEES

THE ANACONDA COMPANY, AMAX COPPER MINES,
INC., and ANAMAX MINING COMPANY

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INTRODUCTION

The Anaconda Company, Amax Copper Mines, Inc., and Anamax Mining Company will be given the designation of Anamax. The City of Tucson will be designated the City. Farmers Investment Company will be referred to as FICO.

Anamax will not state the ultimate facts nor will it quarrel with the facts recited by the City, even though many of the facts recited by the City cannot be found in the record.

This unusual approach is justified because the issue before this Court involves a simple fact situation about which there can be no dispute. If it becomes necessary to make some specific reference to a fact that the City has omitted or to dispute the existence of a fact that the City asserts the record establishes, such reference will be made at the appropriate place.

Anamax will reply to those portions of its brief entitled "Questions Before the

Court" and "Argument." Anamax will then present its analysis of the case in a section of this brief entitled "Anamax's Argument."

REPLY TO
QUESTIONS
BEFORE THE COURT

The City accurately states the basis for the trial Court's ruling below, with the exception of one additional element, which is that the use by the City is at a place where the water does not return to the common supply of the subdivision.

On pages 10 and 11 of its brief, the City seems to imply that Anamax's use of its pumped water is all out of the critical groundwater area but within the basin subdivision. The City did not intend to leave any such impression.

The record below clearly reflects that Anamax uses water both within and without the critical groundwater area. Furthermore, the "use" of water outside the critical area is almost exclusively limited to its use as a device to transport its mill waste to its

tailing ponds which are located inside the critical area.

Since it must be concluded that Anamax owns land in both the subdivision and in the critical groundwater area, there is no basis for the City's argument that perhaps Anamax has no right to complain about the City's activity. This approach by the City suggests a defense based on "unclean hands" or "no standing." Assuming, arguendo, that some of Anamax's use of water was illegal, this would not strip Anamax of its legal right to protect itself against injury.

The City apparently takes little comfort in this suggestion because it is just "hung out" and left without argument to support it.

So it seems that the issue before the Court is simply, "Can a municipality withdraw water from land overlying a common source of supply and transport the water away from such land for sale to others with the water so transported being used at a place where it could not help replenish the common source of

supply?"

REPLY TO ARGUMENT

The City begins its argument by, in essence, adopting FICO's argument in FICO's opening brief filed in 2CA-CIV-1756. Just why the City insists on trying to row FICO's boat escapes Anamax's imagination. Throughout its brief the City gazes with rapt admiration at FICO's contentions. This me-too approach can only be explained by the old adage, "misery loves company." It would seem that the City's cause would be best served by recognizing that FICO is perfectly capable of taking care of itself and that the City should paddle its own canoe.

The City next states Anamax's position, and with the added fact that the water involved can never contribute to replenishing the common source of supply, the City accurately states Anamax's position. The conclusion that the City reaches on page 13 of its brief, however, is unwarranted:

"The trial court held that a supply

of groundwater to two non-adjacent properties was 'common' if both properties overlie 'a distinct body of groundwater' as the term is used in the Groundwater Code."

The trial Court's ruling may clearly imply this result, but as to Anamax such a holding would be purely academic.

Anamax has always taken the position that its pumping and all its usage is on one piece of property and not "off its land," albeit the use of the water is in some instances some distance from the place the water is pumped from underground.

The City continues, on pages 13 and 14, to hitch a ride on FICO. This is done by the question-begging technique of assuming that Anamax and other mining companies are using water "off the land."

One principal argument made by FICO in this case is that this Court really didn't mean what it said in Jarvis v. State Land Department, 106 Ariz. 506, 479 P.2d 169 (1970) (Jarvis II), about what "away from the land" or "off the land" meant.

It is conceded that this Court never specifically said, "Be alert because we are now going to tell you what 'off the land' means in connection with that part of the reasonable use doctrine that concerns the transportation of water off the land," but this Court quite clearly decided that the prohibition was against taking water off land that overlay the common source of supply. Anamax will speak to this point at some length later herein.

The City next adopts FICO's analysis of the history and meaning of Arizona's groundwater law. It does not bother to point out that if this Court should adopt FICO's basic contention, the City's activity is clearly illegal. FICO's main theme is that water may not be transported out of a critical area. If such is the case, the City's cause is doomed because it does that.

FICO argues that when the critical groundwater areas were established, this ended any argument about any facts that formed the basis

for the establishment of a critical ground-water area, but that the same was not true in connection with the establishment of a ground-water basin or subdivision. It is argued that since no notice of a designation of a ground-water subdivision is required, no one can be bound by such designation. This conclusion is justified, FICO argues, because of how it affects the rights of landowners in the area.

This argument prompts the question, "What legal rights of a person are affected?" The answer is none. The right of a landowner to extract water from his land for use is limited by the reasonable use doctrine and no legislative enactment, except for the development of new agriculture in a critical groundwater area.

The effect of the establishment of a groundwater subdivision is to create an evidentiary fact that may or may not be used by a Court. It can be used by a Court as this Court used the establishment of the critical groundwater area in Jarvis v. State Land Department, City of Tucson, 104 Ariz. 527, 456 P.2d 385

(1969) (Jarvis I), as evidence of damage.

In this case the City never attempted to dispute the fact that it was transporting water away from land that overlay the common source of supply.

In the companion case of FICO vs. Anaconda, et al., Anamax asserted, and without contradiction, that its use of water was both in the basin established by the state and in the hydrological basin, i.e., a point overlying the common source of supply.

So the establishment of a groundwater subdivision does not take away anyone's rights. It does, however, give the prospective user of groundwater some assurance as to what he can rely upon in making substantial investments in developing his land.

The statute defines the extent of the common source of supply and tells a person where he may use water without fear of financial ruin in proceedings where the claim is made that the use is not directly over the spot where the yield from a well is the optimum.

It is significant to note that all parties to this appeal have some things in common. They all drill their wells in the valley where water is easier to pump, and they all transport water some distance from the well head for use. The heart of the controversy is where you can take this water for use.

A "groundwater subdivision" is defined by statute as:

". . . 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."
(Emphasis added) A.R.S. § 45-301(6)

A "groundwater subdivision" is distinguished from a larger "groundwater basin" in that a groundwater subdivision may consist of any "determinable part of a groundwater basin." A larger groundwater basin may consist of several "determinable parts" or "subdivisions" each of which is itself "a distinct body of groundwater." A groundwater subdivision is the smallest unit of common supply; it is the smallest unit which can be "determined by known facts" as a distinct body of groundwater.

Thus, a distinct body of groundwater is found to exist by the Land Department on the basis of known hydrological facts. The determination of the Commissioner is a quasi-judicial proceeding subject to appeal under 45 A.R.S. § 321. It is not now subject to collateral attack. Parker v. McIntyre, 47 Ariz. 484, 56 P.2d 1337 (1936).

A critical area is legally distinguished from a groundwater subdivision in that the critical area is established with the basis being agricultural facts, not hydrological facts. A "critical groundwater area" is defined by statute as:

" . . . any groundwater basin as defined in paragraph 5 or any designated subdivision thereof, not having sufficient groundwater to provide a reasonably safe supply for irrigation of the cultivated lands in the basin at the then current rates of withdrawal."
(Emphasis added) A.R.S. § 45-301(1)

The basis for the establishment of a critical groundwater area is not the extent of the common groundwater supply, but rather the extent of irrigable lands.

A critical area is not a subdivision hydrologically "determined by known facts" to overlie "a distinct body of groundwater." It is an area of land which can be farmed and which is designated as not having sufficient groundwater for irrigation. This is aptly illustrated by this case, where the Sahuarita-Continental Critical Area is entirely within, but much smaller than the Sahuarita-Continental Subdivision.

The Critical Area in this case does not include the entire Subdivision, but it does include all irrigable lands within the Subdivision. This is not without reason. The purposes behind the designation of critical groundwater areas and nearly all statutes and regulations relating to critical groundwater areas have to do solely with regulating development of new agriculture within the critical groundwater area. Southwest Engineering Co. v. Ernst, 79 Ariz. 403, 291 P.2d 764 (1955). Industrial and certain other wells are expressly exempted from the statutory proscriptions relating to

critical groundwater areas. A.R.S. §§ 45-301(3) and 322. If lands are not suitable for agricultural purposes, there is no reason to include such lands in a critical groundwater area. This is also true because all users except agricultural users are exempt from the Code whether their lands lie within or without a critical area.

The statutory "groundwater subdivision" should not be confused with the drainage area, a concept raised somewhat peripherally by Tucson in Jarvis, supra. The drainage area does not relate to groundwater hydrology but relates strictly to surface drainage. The boundary of a drainage area is the land divide along which surface waters will drain into one watershed or another. There is no statutory procedure for either determining or designating drainage areas, and the precise location of a drainage divide will to some extent be a matter of judgment. The body of groundwater which percolates beneath the surface of the ground does not necessarily have any relationship to the surface

drainage area. This is clear in the case at bar where the eastern portion of the subdivision extends well beyond the eastern boundary of the drainage area.

Thus it should be quite clear that the City has simply refused to meet its problem head-on.

Its problem is that it transports water away from the land that overlays the common source of supply for sale to others with the water never being available to replenish the common supply.

ANAMAX'S ARGUMENT

It may be of some assistance to the Court to present a very brief analysis of its position in connection with the Doctrine of Reasonable Use. It will be done by first discussing the history of the Doctrine and then looking at its application in Arizona.

HISTORY OF REASONABLE USE

It is of substantial significance that many of the earlier cases deal with situations involving water companies that were taking

water from an area to be transported some distance for sale to customers. There was no use of water on any land owned by the offenders at all. See Burr v. Maclay Rancho Water Co., 154 Cal. 428, 98 Pac. 260 (1908); City of San Bernadino v. City of Riverside, 186 Cal. 7, 198 Pac. 784 (1921); Evans v. City of Seattle, 47 P.2d 984 (Wash. 1935); Schenk v. City of Ann Arbor, 163 N.W. 109 (Mich. 1917); Forbell v. City of Kingston, 123 S.E. 482 (N.C. 1924); Volkman v. City of Crosby, 120 N.W.2d 18 (N.D. 1963); Rothrauff v. Sinking Spring Water Co., 339 Pa. 129, 14 A.2d 87 (1940); and Canada v. City of Shawnee, 179 Okl. 53, 64 P.2d 694 (1937).

It is also significant to note that no case that has come to Anamax's attention undertook any specific discussion of what was meant by the concept "off the land." However, in many cases, the boundaries of the common supply appear from the opinion to be relevant or are specifically defined or discussed by the opinion, and in all such cases the land within the boundaries of the common supply seems to be

the meaning ascribed to "the land from which the water is taken."

Although no case specifically defined "off the land," three cases which discussed the common supply did go a long way toward such a definition: Horne v. Utah Oil Refining Co., 59 Utah 279, 202 Pac. 815 (1921), Glover v. Utah Oil Refining Co., 62 Utah 174, 218 Pac. 955 (1923), and Hathorn v. Natural Carbonic Gas Co., 194 N.Y. 326, 87 N.E. 504 (1909).

In Hathorn, supra, the plaintiff complained of defendant's pumping great supplies of mineral waters from a common supply and doing so in order to extract carbonic gas and merchandising or wasting the remaining portion of the water. Defendant's pumping prevented the springs of the plaintiff and others from flowing naturally. The Court seemed clearly to consider the boundaries of the common supply to be those of "the land" and held that under the doctrine of reasonable use one could not overdraw on the common supply for purposes of merchandising the water or to waste it.

The Horne and Glover cases, supra, decided under the Utah doctrine of correlative rights, arose out of the same dispute. The plaintiffs were residents overlying "a well-defined artesian basin, located in a well-defined underground pervious stratum...." The defendant was an oil company which originally had acquired a small well site overlying the stratum and had driven six wells of great capacity for the purpose of transporting the water away from the artesian belt to its refining plant. It is abundantly clear from the opinion that the Court considers the boundaries of the artesian district, or the common supply, to be the boundaries of "the land" from which the water may not be taken to the injury of other adjoining owners. In Horne, supra, the Court enjoined the defendants from transporting water away from the artesian district, holding that all owners overlying an artesian district are entitled to water in proportion to their surface area but that such owners are not entitled even to their proportionate share to

the injury of others similarly situated unless the water is reasonably devoted to beneficial purposes. Thereafter, the refining company purchased the water rights of various surface owners overlying the artesian belt and proposed to pump the proportionate share of such surface owners to its refining plant away from the common supply. Glover, supra, was an action brought by a surface owner seeking to enjoin the intended transportation by the refining company in which the plaintiff contended that the surface owners must use their water on their land or not at all. If the water was not put to beneficial use on the surface owners' lands, then, contended the plaintiff, the right was forfeited to the owners within the belt who could make beneficial use of it. The Court permitted the refining company's proposed use holding that percolating waters may be conveyed away for use on alien lands if it could be done without injury to the adjoining owners. Since the intended transportation did not reduce the

supply of water to which the adjoining owners were entitled according to their surface area, there was no injury. The Court also considered that there was a public policy in favor of permitting a change in the place of use of water as long as rights of others are not injured thereby. The Court also appeared to say specifically that when land overlying a common supply is entitled to water from that supply, the well may be located anywhere over the common supply though not necessarily on the land to which it is beneficially applied. The Court recognized that it is easier to mine water from low lands overlying a basin than from the higher lands, and that the only practical way to get water to the higher lands may be to mine it from the lower lands, particularly as the water supply dwindles and the water drains from the higher lands to the lower.

Cases in which the meaning ascribed to "off the land" could be construed as "away from the common supply" are: Katz v. Walkinshaw, 70 Pac. 663 (Cal. 1902), on rehearing, 74 Pac.

766 (Cal. 1903); Burr v. Maclay Rancho Water Co., supra; City of San Bernadino v. City of Riverside, supra; Schenk v. City of Ann Arbor, supra; Volkman v. City of Crosby, supra; Canada v. City of Shawnee, supra; Silver King Consolidated Mining Co. v. Sutton, 39 P.2d 682 (Utah 1934); Evans v. City of Seattle, 47 P.2d 984 (Wash. 1935); Koch v. Wick, 87 So.2d 47 (Fla. 1956); Erickson v. Crookston Waterworks, Power & Light Co., 100 Minn. 481, 111 N.W. 391 (1907); Forbell v. City of New York, 58 N.E. 644 (1900); and Rouse v. City of Kinston, 188 N.C. 1, 123 S.E. 482 (1924).

So it seems that one must reach the inescapable conclusion that one basic element of the Reasonable Use Doctrine is that the owner of land may draw water from the common source of supply, but it must be used on land that overlies that common source of supply.

The soundness of a rule can usually be tested by an application of reason and fairness to the rule. The test seems to be met by

permitting a person to withdraw water from his land for use on land if the point of use overlies the common source of supply. Where he puts his straw in the tub as compared to where he uses the water is not significant if he uses it at a point where his use will contribute to replenishing the common supply.

The importance of using water at a point where it will cause the common supply to be replenished is well established. See Montecito Valley Water Co. v. City of Santa Barbara, 144 Cal. 578, 77 P. 1113 (1904).

In Bristor v. Cheatham, 73 Ariz. 228, 240 P.2d 185 (1952) (Bristor I), Justice LaPrade and Justice DeConcini, who were in the majority in the Bristor II case, Bristor v. Cheatham, 75 Ariz. 227, 255 P.2d 173 (1953), held similar views about this concept.

Justice LaPrade in his dissent had this to say in Bristor I, supra:

" . . . the only issue before the trial court was whether the owner of land overlying a supply of percolating water common to 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 lands . . . is diminished to their injury." (Emphasis added) 73 Ariz. at 242.

The rule just couldn't be otherwise and meet the test of reason and fairness.

REASONABLE USE
DOCTRINE
IN ARIZONA

This doctrine was embraced in Bristor II, supra. This case was decided on a motion to dismiss and for the purposes of this brief will not be reanalyzed here. It has been extensively discussed in other briefs already a part of the record.

Jarvis I, supra, logically followed Bristor with the same line of reasoning but narrowed the requirement for "reasonableness" and stated definitely that a finding of unreasonable use could be based upon a determination that the water is conveyed "off the land." Thus, Jarvis I, to this point merely

limited the number of factors to be considered in testing "reasonableness of use" in the case of a large transbasin diversion. However, again as in Bristor, at no time does the Court in Jarvis I offer to define what is meant by "off the land."

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.

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.

In summary, the rule of reasonable use is a rule of property. Access to the common supply provides the natural right to withdraw groundwater. A fundamental requirement of the rule is that an exercise of the right to withdraw such groundwater must be coupled with the use of the water on the lands from which it is taken so that it is available for return to the common supply after use.

From the foregoing, it would appear that the principal use that has been made of the Reasonable Use Doctrine is to prohibit water companies from selling water to users away from the land where it was pumped if landowners overlying the common source of supply are injured.

In Arizona this Court has made it clear that it has the same concept of the Reasonable Use Doctrine that is implicit in most other judicial decisions, i.e., the prohibition is against transporting water for use on land that does not overlie the common source of supply.

CONCLUSION

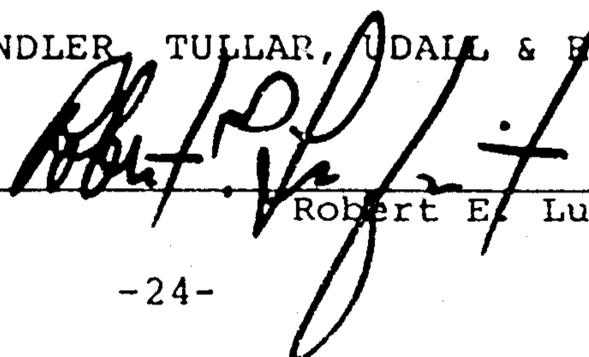
The record here clearly demonstrates that the City of Tucson has violated the Reasonable Use Doctrine by transporting water away from the common source of supply for sale to others; that use of this water by its customers is such that there can be no replenishment of the common supply. Reference to the groundwater subdivision is one method of determining the common source of supply.

The judgment of the lower Court should be affirmed.

Respectfully submitted,

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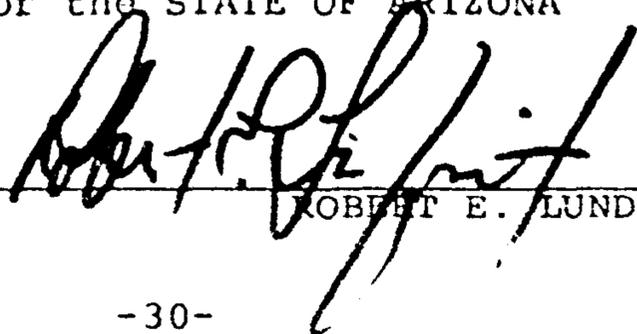
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ROBERT E. LUNDQUIST

SUBSCRIBED AND SWORN to before me, the undersigned Notary Public, this 11th day of August, 1975, by ROBERT E. LUNDQUIST.

Raymond J. ...
Notary Public

My commission expires:

October 15, 1978

STATE OF ARIZONA)
)
COUNTY OF MARICOPA)

SS:

I Antonio Bucci hereby certify:
Name

That I am Reference Librarian, Law & Research Library Division of the Arizona State
Title/Division

Library, Archives and Public Records of the State of Arizona;

That there is on file in said Agency the following:

**Arizona Supreme Court, Civil Cases on microfilm, Film #36.1.764, Case #11439-2, Brief of Appellees
The Anaconda Company, Amax Copper Mines, Inc., and Anamax Mining Company, page 732 and
attachment (33 pages)**

The reproduction(s) to which this affidavit is attached is/are a true and correct copy of the document(s)
on file.

Antonio Bucci
Signature

Subscribed and sworn to before me this 12/15/05
Date

Etta Louise Muir
Signature, Notary Public

My commission expires 04/13/2009.
Date

