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IN THE SUPERIOR COURT OF ARIZONA

PIMA COUNTY

FARMERS INVESTMENT COMPANY, a corporation, Plaintiff, vs. THE ANACONDA COMPANY, et al., Defendants.	NO. 116542 THE ANAMAX DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT AS AGAINST THE CITY OF TUCSON (ORAL ARGUMENT REQUESTED) AND NOTICE OF HEARING
CITY OF TUCSON, a municipal corporation, Plaintiff in Intervention, vs. FARMERS INVESTMENT COMPANY, a corporation, et al., Defendants in Intervention.	

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 file herein, the affidavits and exhibits attached hereto and upon the memorandum in support of the motion for summary judgment also attached hereto.

FCTL001441

DATED this 12th day of March, 1974.

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1110 Transamerica Building
Tucson, Arizona 85701

By ROBERT E. LUNDQUIST
Robert E. Lundquist
Attorneys for The Anaconda Company, Amax Copper Mines, Inc., and the Anamax Mining Company

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 the 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' counterclai

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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. §§45-301 et seq., requires the State Land Department to designate groundwater basin boundaries and boundaries of groundwater basin subdivisions. Id. §45-303. A "groundwater subdivision" means "land overlying as nearly as may be determined by known facts, a distinct body of groundwater . . . ." Id. §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. §45-301(1); §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. §45-301(3); §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

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"distinct body of groundwater," the basin or the subdivision. Id. §§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 Subdivision 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

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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. Perrin, 8 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. Acton 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

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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, 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 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

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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, §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 quotation 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

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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

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(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 Bernadino 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

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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

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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 distinquishable 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 their 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. §45-301(3), the court held that this fact alone was enough to establish injury. 104 Ariz.

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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

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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 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

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[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. 9488 (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.

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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.

Respectfully submitted this 13th day of March, 1974.

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By _____
Robert E. Lundquist,
Attorneys for The Anaconda Co.,
Amax Copper Mines, Inc., and the
Anamax Mining Company

NOTICE OF HEARING

Please take notice that the foregoing motion will be brought on for hearing on the 25th of March, 1974, at 9:00 a.m. or as soon thereafter as counsel may be heard.

. . .

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AFFIDAVIT OF ROBERT E. LUNDQUIST

STATE OF ARIZONA)
) SS:
COUNTY OF PIMA)

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 counterclaim, 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.

ROBERT E. LUNDQUIST

SUBSCRIBED AND SWORN to
before me this 13th day of
March, 1974

NOTARY PUBLIC

My Commission Expires: 1/17/78

CERTIFICATE OF MAILING

I certify that I caused copies of the foregoing Notice of Hearing, the Anamax Defendants' Motion for Partial Summary Judgment as Against the City of Tucson, and Memorandum in Support of Motion to be delivered to:

ROBERT O. LESHER. ESQ.
Lesher & Scruggs, P.C.
3773 East Broadway
Tucson, Arizona 85716
Attorney for the City of Tucson

and to be mailed to:

MARK WILMER, ESQ.
Snell & Wilmer
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Phoenix, Arizona 85073
Attorney for Farmers Investment Company

CALVIN H. UDALL, ESQ.
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Attorney for Pima Mining Company

BURTON M. APKER, ESQ.
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363 North First Avenue
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Attorney for American Smelting and Refining Co.

PETER GULATTO, ESQ.
Assistant Attorney General
Attorney for the State Land Department

this 13th day of March, 1974.

ROBERT E. LUNDQUIST

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E X H I B I T "A"

[The Anamax defendants incorporate by reference the map attached as Exhibit "A" to Duval's Motion for Summary Judgment as against the City of Tucson, being a map of the Sahuarita-Continental Critical Groundwater Area and Basin Subdivision identical to that filed in Cause No. 11439 in the Supreme Court.]

E X H I B I T "B"

[The Anamax defendants incorporate by reference the maps and documents attached as Exhibit "B" to Duval's Motion for Summary Judgment against the City of Tucson, being an official State Land Department Map of the Sahuarita-Continental Subdivision of the Santa Cruz Basin as established by Order No. 14, June 8, 1954, a copy of which map was filed in Cause No. 10486 in the Supreme Court.]

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STATE OF ARIZONA)
) ss:
COUNTY OF MARICOPA)

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, Supreme Court Instruments, Part One, The Anamax Defendants' Motion for Partial Summary Judgment as Against the City of Tucson (Oral Argument Requested) and Notice of Hearing, pages 177-193 (17 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 12/12/05
Date

Etta Louise Muir
Signature, Notary Public

My commission expires 04/13/2009
Date

Notary Public State of Arizona
Maricopa County
Etta Louise Muir
My Commission Expires
04/13/2009