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LETTER

IN THE
Court of Appeals
The State of Arizona

DIVISION TWO

FARMERS INVESTMENT
COMPANY, a corporation,
Appellant,

v.

THE ANACONDA COMPANY, a
corporation; AMAX COPPER
MINES, INC., THE ANACONDA
COMPANY, as partners in
and constituting ANAMAX
MINING COMPANY, a partner-
ship; ANAMAX MINING
COMPANY, a partnership,
Appellees.

No. COA-CIV-1756

Pima County
Superior Court
No. 116542

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SNELL & WILMER
3100 VALLEY CENTER
PHOENIX, ARIZONA 85073

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Reference is made to the "Statement of Preliminary Matters" in Appellant's Opening Brief for the purpose of incorporating herein the statements there made.

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REVIEW OF RECORD BELOW
AND APPELLANT'S BRIEF

ANAMAX apparently has little stomach for the issues actually before the Court below and upon which the trial Court actually ruled. Rather than responding to these issues as outlined and argued in Appellant's Opening Brief, ANAMAX simply brushes aside the questions of law the Trial Court stated as supporting its ruling and studiously avoided facing up to the controlling issues and legal principles presented by Judge Roylston's ruling. Judge Roylston in his order plainly stated the basis for his ruling and he did so in order that the parties might secure authoritative guidance from an Appellate Court as to the legal rules controlling the controversy. Judge Roylston was plainly attempting to put the case in a posture which would permit review by this Court of the divergent views of the parties as to the legal principles applicable in this case.

The reporter's transcript of the hearing of May 22, 1974, reflects the proceedings had upon the return day of FICD's application for injunctive relief against use of the water well ANAMAX was then drilling in the Critical Area and in the land area

adjacent to FICO's orchards. Since ANAMAX has in its main argument argued issues which are not decisive of the issues ruled upon by the Court below, we believe it appropriate to set the record straight as to just what was before the Trial Court and what the issues were upon which the Trial Court ruled.

Prior to the date of hearing FICO's Petition for Injunctive Relief, the subject of this appeal, FICO had filed a Motion for Summary Judgment against the DUVAL Defendants (A.R. 46-86) which had been supported by verified photographs showing the relationship between the DUVAL wells, FICO's pecan orchard and the water use by DUVAL at its mill some seven miles distant from its wells and FICO's orchard. This Motion was also supported by a United States Geological Survey plate map showing that DUVAL's mill, where the water was used, sat on bed rock and was surrounded by impermeable, non-water bearing material. This Motion was also supported by the deposition testimony of Ben Messer, a DUVAL executive, admitting that the mill was located upon bed rock and that there was no access to groundwater of consequence in the area of the mill.

The major response by DUVAL to FICO's Motion, which was the only issue considered by Judge Royston as controlling and ruled upon by him as the controlling issue was that DUVAL's mill was within the "subdivision" and hence as a matter of law had access to the "common supply." There was no dispute but that DUVAL's mill was within the subdivision but well outside the critical area. This Motion by FICO is of record here (A.R. 46-80 accompanied by exhibits). DUVAL's Response is of record (A.R. 153-254 with exhibits).

DUVAL and ANAMAX had also filed summary judgment motions against TUCSON. The motion for Summary Judgment which DUVAL had filed against TUCSON asserted:

(a) If FICO was entitled to summary judgment against DUVAL then upon the same critical groundwater area theory and claim, DUVAL should have summary judgment against TUCSON; and

(b) DUVAL sought relief based upon FICO's position, only if the Court adopted FICO's "fallacious" arguments. DUVAL asserted that in any event it should have judgment against TUCSON because TUCSON

was admittedly taking groundwater from the Sahuarita-Continental Subdivision for use in the TUCSON Subdivision and hence since TUCSON was not within, and did not have physical access to, the groundwater of the Sahuarita-Continental Subdivision TUCSON was using the water illegally.

FICO recognizes that the foregoing oversimplifies DUVAL's arguments but a review of the DUVAL Motion (A.R. Vol. 1, pp. 86-116) including the exhibits thereto will demonstrate that this statement does fairly capsule DUVAL's position.

The Motion ANAMAX filed against TUCSON (A.R. Vol. 2, pp. 121-153) even more clearly relies upon the argument that designation of a "subdivision" amounts, as a matter of law, to an adjudication that in fact the subdivision land area overlies a common groundwater supply. While ANAMAX in this Motion makes many of the arguments and reviews most of the cases it repeats in its Answering Brief here (hereinafter "A.B.") it is clear that there, as here, the arguments made are largely diversionary and window dressing. It is clear that the entire substantive argument which ANAMAX made rested upon the premise

that since TUCSON is not within the Sahuarita-Continental "Subdivision" TUCSON as a matter of law does not have access to the "common supply" of that subdivision. ANAMAX incorporated the DUVAL exhibits by reference.

These were the three motions Judge Royston ruled upon on May 21, 1974. The orders entered by Judge Royston in making these rulings were distributed to all counsel prior to the opening of the May 22, 1974 hearing upon FICO's Petition for Injunctive Relief against the well ANAMAX was then drilling which is what we are concerned with here.

"THE COURT: On this Farmers Investment matter I didn't intend to just startle you giving this ruling this morning. . . .

"Have all the attorneys received a copy of the minute entries? I didn't know the ruling on this would have any effect on whether you want to go ahead on the preliminary injunction or not. Quite frankly I assumed that this ruling -- because of this ruling that about everybody would be trying to take it on up to see what direction we are heading on the case."

After some further discussion, this interchange occurred:

"MR. WILMER: And as involved in the Anamax motion against Tucson, I

assume as a matter of law we are not entitled to the injunction because as developed from the record, and from the deposition of Mr. Hansen, their position is exactly the same as Anamax and as against the City of Tucson and DuVal in that -- in the areas of using the water in the subdivision, and they are entitled to the water being in that subdivision.

"Based on your rational [sic] of the ruling in the Tucson case there is -- well, I assume no legal basis for out [sic] expecting your Honor to change your mind and grant an interlocutory injunction, but we are entitled, I think, to have a ruling from the Court that you deny it and on the basis of the ruling that you have made in the ANAMAX matter, and the DuVal case against the City of Tucson.

* * *

"THE COURT: Why do you not want a ruling right away on the application for preliminary injunction if I deny it?"

"MR. CHANDLER: I don't think it would do anything but just provide further judicial exercise, and create more expense, and I say that for this reason.

"History tells us that early on -- well, the Plaintiff went to the Supreme Court with a petition, original petition for injunction which the Court didn't take.

"Back there in the Pima case, the recent case, in trying to -- to the point of trying to get the Supreme Court to take the issue of reasonable use. That was not taken. It was just limited to the question of the enabling act in that

State rests, having knocked on the door twice, and nothing having happened it seems to me that we are about in the same posture of having the case where the only way we are ever going to get the Supreme Court to look at it, and decide on the issues, is after all the evidence is in.

* * *

"All the defenses being equitable defenses have been litigated. Any damage being done to the Plaintiff as regard to the farm lands other people have bought and retired, well, that has to be litigated. Someone has to decide in deciding use and reasonableness of our use, whether or not we are entitled to a credit for farm lands bought and retired.

"So its not offerable as the situation is, and seems there is no way to get the matter resolved except to try the case and then say this is the trial, this is what the Judge decided and give it to the Appellate Court.

"So, to put anyone in the posture of having to go to the exercise of another Special Action when, in my view, and in application for preliminary injunction, there are more things to be considered and that are involved and -- than simply this one issue.

* * *

"But I just think all we are going to do is just put everyone involved to additional expense for no reason. We have conceded that, we must start on some meaningful program to get this case discovered or discovery of pleadings, pretrial set, define the issues, get the matter tried. We are all of that frame of mind.

"Without looking to past history of trying to point a finger where it hasn't been done and we know it's a difficult case, we know there is a lot of evidence involved, a lot of problems involved, a lot of technical testimony.

* * *

"So I would prefer it be handled on this basis. I think that we all agree we can drill that well till the cows come home. That the device being complained about is if we put that water in our system, and take it outside of the critical ground water area, and that's what the complaint seems to be.

"Now, if we stipulate, for example that we would not make any attempt to move that water out of that area, and only pump the well for development purposes, testing and development, until, say, December 31st of this year, then it could seem to me the tag would then be much closer to trial if not that of having many of the issues decided to where we will, to where we really know where we're going, and we wouldn't have a situation where, in the special session, or in the supreme court, or the court of appeals, and we would be off on the argument as to whether or not you're entitled to a preliminary injunction without a hearing and what kind of hearing you are entitled to, a schedule in which we would have to go through a bond, how much bond, that the plaintiff would have to put up.

"To assume no preliminary injunction would be had without a bond. We are going to litigate all those issues and wind up deciding nothing. Except deciding that we had a lot of judicial time and expenses gone to and nothing actually resolved."

The court then made plain that it saw no reason why the law should not be reviewed by this Court in

order to avoid confusion and expense.

"THE COURT: Well, what was kind of turning over in my mind is if we -- if I'm starting off in the wrong direction with this ruling I'd rather somebody, one of the higher Courts, would tell us before we go through a long trial squabbling over a lot of these issues that the Supreme Court may say aren't even issues that need to be determined.

"I would think that it would be to everybody's advantage to get at least this ruling that I made yesterday before the Supreme Court. Not only as to the City but also as to the Plaintiff, the entire ruling.

MR. CHANDLER: That may well be, but back to the idea of the concept of the common law.

"THE COURT: Maybe I could get it to them easier if I granted motion for summary judgment.

MR. CHANDLER: For preliminary injunction.

"THE COURT: No, just rule the opposite what I did yesterday.

MR. CHANDLER: Perhaps it would. I don't think anyone would really argue against any procedure that would really be meaningful. As I say we have been there twice and that issue has been taken.

"After they shut the door on you twice people start wondering if they are not really telling you to go down and try this case.

"THE COURT: They have never had a specific ruling what anybody thought these cases collectively mean.

* * *

"So the Court has, apparently, had no reluctance whatsoever to take the case when the case was in such a posture that they decided something -- but with doubts about how much damage is being done, the question of retired lands, question of where is the basin, all these problems, the equitable defenses would have to be resolved. Then I would see that only as a waste of a lot of time and effort. That's why I think --

Again the Court said:

"THE COURT: What would be wrong with an Order denying the petition for preliminary injunction based on the ruling that I made yesterday?

* * *

"MR. WILMER: If the Court agrees that its the law -- fine. I do believe we are entitled to a ruling on the same basis of your ruling in the other two cases.

* * *

"THE COURT: Well, even if you convince me on any number of them, or all of them, I still think even this one alone prevents the preliminary injunction.

"As to this ruling I made yesterday.

* * *

"THE COURT: You may be right. I hope they will take it and do something with it, before getting a long trial everybody anticipates.

* * *

"MR. CHANDLER: I'm attempting to save as much judicial time and lawyers time as possible. If the Court feels the the case is any posture where there will be some definite decisions reached by the Appellate Court -- I won't continue to argue that point with the Court.

"THE COURT: Hopefully its in such posture.

"So show that the matter for Plaintiff's application for preliminary injunction having been set for this date, and it appearing to the Court that the ruling made by this Court on May 21st, 1974, prevents the Plaintiff from being entitled to a preliminary injunction, it is ordered the application is denied solely on that basis."

Thereafter FICO prepared and submitted a formal written order following the Court's minute order of May 21, 1974 which was signed by Judge Royston (A.R. 370-372). ANAMAX thereupon filed its Motion to Vacate the Order denying injunctive relief and to enter a new order denying such relief. In this Motion ANAMAX argued:

"It appears to these movants that the Court was deciding the issue of plaintiff's Motion for preliminary injunction based upon the Court's findings 1 and 2 in its minute entry order of May 21, 1974 . . . These movants did not understand that the Court intended, in connection with the motion for preliminary injunction, to make the governing factor solely the basin or subdivision boundary

as fixed by the State of Arizona. The relevance of the state groundwater subdivision was limited to the motion for partial summary judgment against the City of Tucson and should not be injected into this particular issue.

* * *

"It appears that all that was intended by the Court was a specific ruling that without more evidence in support of a claim for injunctive relief, plaintiff was not entitled to a preliminary injunction at this time." (A.R. 373, 374, 375)

Thereafter oral argument was had on this motion and the transcript thereof discloses the following:

"THE COURT: That is it, but I was ruling, in effect, that those ground waters subdivision boundaries have to mean something. So I decided that from reading the cases, they are not -- the City is not entitled to take it from one subdivision to another with the possible exception they could retire farm lands like one of the Jarvis cases, two, I believe.

* * *

"MR. WILMER: I think the intent of the order was to try what was said in open Court, based on the minute entry, the intent of the Order.

"THE COURT: I thought it was.

"MR. CHANDLER: What's wrong with the Order simply says application for preliminary injunction and explaining that. Saying the Court is of the opinion that its prior ruling -- and based on that --

the prior minute entry and its -- as to Jarvis Two, and for that reason petition for preliminary injunction is denied.

"MR. WILMER: We will have to oppose any emasulation of that. In DuVal and Anamax with the City of Tucson that was -- this case was on the notion a subdivision was, in fact, some type of water body description. That really is the crux of the whole matter and now to change the Court's ruling previously made with relationship with the holding that you can't take water from one subdivision to another changes the whole lawsuit.

* * *

"Unless the Court is prepared to revise its previous ruling, and the Court finds, and forgetting the answer to this you can, in fact, -- and I can understand how the Court could rule that way.

"However, I disagree but I can understand it, that the subdivision is, in fact, the area which you can transport water, and that is the way we understood your ruling, in regards to Continental. You're denying only -- we could and do object to the Court going back and, in effect, giving us a different ruling with respect to the subdivision statute and with respect to the City of Tucson.

* * *

"We are contending that it doesn't rest on that. I want a record clear enough that when this goes to the Court, if it does, your Honor's position is well defined and makes no difference how it goes up as long as it goes up in a fashion that represents your Honor's representation as to what the law is.

"THE COURT: I think this written Order you drew you now think if -- if it covers what I was trying rule at the time.

"MR. WILMER: I tried as best as I could to follow your indication of the ruling and also to extipulate [sic] here in Court, in open Court, what I said, what your Honor said, that's the limit and the sole effort, and I'm perfectly willing to stipulate here the way the Orders were written and how they were read in view of your ruling the subdivision has a meaning and couldn't move water from the subdivision to another point, but the subdivision -- you could move it anywhere in that area, I think that was the intent of your ruling as I understood it.

"If I didn't do so correctly --

"THE COURT: Where this wording is on the second page, the reason the State -- the Court stated in its Order as afore-said, what does that mean?

"MR. WILMER: I'm referring to the Order you made.

"THE COURT: You do object I'm not trying to push you, do you object if I write after where it says in its Order, if I insert in there by interlineation May 21, 1973?

"MR. WILMER: That's what I was following, can't object to that.

"THE COURT: And insert preliminary?

"MR. WILMER: No objections.

"THE COURT: Then wouldn't that sufficiently cover your complaint, Mr. Chandler?

"MR. CHANDLER: Well, I don't know that we, really, have one.

* * *

"THE COURT: No. What I was trying to say was that as long as you use it within the subdivision, which by definition is supposed to be an area that overlies a common supply, that's my understanding, is that not your understand?"

The Court's Minute Order of May 21, 1974 makes it very clear that the Court related "parcels (which) overlie a common basin or supply" to parcels of land which lie anywhere "within the Groundwater Subdivision." It also makes it clear that the decision on the FICO Petition was made solely (the court's own word) because on the legal principles the Court found controlling in its May 21 rulings.

In its Finding 2 the Court decided water may be pumped from one parcel and transported to another parcel "if both parcels overlie a common basin or supply" and immediately as a part of the same ruling the Court entered Finding 3 which limits Finding 2 by requiring "water so transported must be used within the Groundwater Subdivision . . ." and concluded

"Therefore, plaintiff's Motion for Summary Judgment as to Duval is denied; Duval's and Anamax Motion for Partial Summary Judgment are granted." (A.R. 368, 369)

Certainly, it is doing no violence to the Court's ruling to paraphrase it.

"3. Water so transported may be used anywhere within the Groundwater Subdivision.

Therefore Plaintiff's Motion for Summary Judgment against Duval is denied"

This is the first time, insofar as memory serves accurately, both as to actual experience and recollection of reported cases, that counsel for a party has so strenuously objected to the Court entering an order or judgment in favor of that party for reasons so frivolous and for a purpose so clearly unrelated to an early resolution of a pending controversy.

ANAMAX argued it was "seriously" concerned that this Court might refuse to review the matter -- "FICO has knocked at the door twice and has been told to try the case on the merits" (R. T. May 22, 1974 hearing, supra pp. 9-11).

ANAMAX was "seriously" concerned about waste of judicial and counsel's time and the expense involved should the Court deny the relief FICO requested. (R. T. supra pp. 6-8).

The fact is, of course, that for the first time an appealable clear-cut legal issue free of the defendants' claims of laches, estoppel, return flow from the tailing ponds, etc., was being formulated and posed for appellate review and ANAMAX didn't like it one little bit.

FICO attempted in its Opening Brief to make it plain that the only reason for including the FICO Motion for Summary Judgment against Duval Defendants and the ANAMAX and Duval Motions against TUCSON was because the ruling upon these Motions constituted in fact the Court's "Findings of Fact and Conclusions of Law" upon which the Court based its denial of a temporary injunction to FICO. The Court plainly so stated by inserting the word "solely" in its order as specifying the basis for its FICO ruling.

ANAMAX simply has defaulted in facing up to and answering the major points made by FICO in its Opening Brief. These were the issues presented to the Court below by FICO's Petition for Injunctive Relief (A. R. 281, et seq), as Amended (A. R. 329, et seq) and the Answer and Response thereto by ANAMAX as supplemented and explained by the depo on

of C. J. Hansen which is before the Court here. After ANAMAX filed its Answer and Response to FICO's Application and Amended Application for Injunctive Relief (A. R. 344, et seq) FICO noticed a Rule 30(b) (6) ARCP deposition of the ANAMAX defendants and in response thereto C. J. Hansen, a Vice President and Chief Counsel, General Mining Division, the Anaconda Company, appeared and was deposed. This deposition is of record. The purpose of this deposition was to clarify in the record certain generalized fact statements made in the ANAMAX Answer and Response.

From FICO's application as amended these basic facts appeared.

1. FICO owns and farms pecan and other crops in the Sahuarita-Continental Critical Groundwater Area through use of groundwater for irrigation of these crops.

2. ANAMAX has previously drilled water wells in this Critical Area and transported this pumped water for use in its ore mill outside of the critical area.

3. ANAMAX is presently engaged in a program to enlarge its mill and its use of groundwater from

the Critical Area for milling and leaching purposes by about 6,000 acre feet of water per year and is presently drilling a large water well within the Critical Area in an area adjacent to FICO's farm in order to obtain additional groundwater for this program.

By its Answer and Response ANAMAX asserted certain facts (as further defined by Mr. Hansen in his deposition).

1. That while defendants admit to pumping in excess of 25,000 acre feet of water per year from within the critical area and that they intend to increase this use by 6,000 acre feet per year, defendants deny that they are using the water on lands other than the lands from which the water is pumped "using the term 'lands' to mean lands overlying the basin subdivision and common body of water underlying such lands." (A. R. 349)

Mr. Hansen testified (Deposition pp. 13,14):

"MR. WILMER: . . . Now, would you explain for me please, Mr. Hansen, when you say the term 'lands' from which the waters are being pumped means lands overlying the basin subdivision and common body of water underlying such lands, referring specifically to the physical

outlines of the critical area, does that include lands outside of the critical area?

"A. Yes, it would.

"Q. I think, if you'd like, C. J., just go ahead and tell me what is the intent and meaning of that statement, and we won't have to fool around with it.

"A. Well, when we speak of lands overlying the common supply, we're talking about lands that lie within the Continental-Sahuarita Subdivision of the Santa Cruz Basin. This has been established in accordance with the legislation which you are very familiar with. We also say that these lands overlie the hydrological basin from which the water is taken.

"Q. May I phrase it this way, to be sure that I understand it: the statute says that the Land Department may establish subdivisions of ground water basin as being areas which overlie a distinct body of ground water.

"A. Yes.

"Q. And you therefore say that since the entire operation of Anamax is within the Sahuarita-Continental subdivision, that therefore it is upon lands which overlie a distinct body of ground water as evidenced by the action of the State Land Department;

"A. That's right.

He further testified (Deposition pp. 15, 16):

"MR. WILMER: . . . Then you say and use the term 'lands' to mean the

land within the subdivision of the ground water basin overlying lands that overlie the common source of supply.

"Do I understand from that, Mr. Hansen, that when you deny that they're to be used on lands other than those from which they are pumped, that you state that since the lands upon which they are being used are within the Sahuarita-Continental ground water subdivision, that hence they are used on the lands which overlie the common source of supply?"

"Yes, it's true, Mr. Wilmer."

2. ANAMAX admits that its mill lies outside of the critical area and that it uses large quantities of water in its milling operations. ANAMAX however asserts that the actual use of this water is within the critical area "intending the term 'used' to mean consumptively used." (A. R. 353, 354).

Mr. Hansen testified that the tailing from the ore after it is milled and the metals are separated out flows by an open ditch to the tailing pond where the water evaporates out of the tailing and that this evaporation is the only substantial use - i.e., consumptive (beneficial?) use made of the groundwater. (Deposition pp. 10, 11, 12, 29, 30, and 31).

3. ANAMAX denies that it does not obtain copper ore from the lands from which it withdraws this groundwater.

Mr. Hansen explains this statement by explaining that ANAMAX either owns land through which its pipe line runs to its mill or has an easement right of way for its lines or has a state commercial lease through which its water line runs and hence that ANAMAX has an ownership of some nature in land from the place of use on the mountain side to the pump in the valley some six miles away and hence there is no hiatus in its ownership title from well to mill. "This water never really goes off our lands" (Deposition pp. 16-21, 34-36).

4. The Answer also makes reference to "the basin subdivision and common body of water underlying said lands" (A. R. 349) and (A. R. 354) defines this term: "in this connection uses the term 'lands' to mean lands overlying the water basin and the common source of supply, and also affirmatively alleges that some of its water is pumped from its mine."

Mr. Hansen testified that the mine pit lies about one mile northerly from the mill and is

approximately 1,100 feet deep. It produces about 1,000 acre feet of pit water per year although the source of the water is undefined whether rain water, springs, over use of water in mining operations, etc. In addition to this information supporting the claim that the "common supply" was subjacent to the mill, the witness stated that there are wells "in the McKeeville area" (Deposition p. 23) estimated by the witness to be ten miles west of the mine and mill area (Deposition pp. 24, 25). There are also some stock watering wells, some domestic wells but the witness had no information as to production or other factual basis for the claim. Mr. Hansen conceded that ANAMAX equated the "hydrological basin" with the "subdivision".

". . . in this connection the term 'lands' again relates to the same definition used before, that is, lands within the Sahuarita Continental Sub-division or what you say to be the hydrological basin?

"MR. HANSEN: That's correct." ^{1/}

^{1/} FICO does not mean to imply that ANAMAX had presented its contentions as simply as outlined above - or that FICO did, either, for that matter. It is asserted, however, that the material issues are thereby fairly outlined. ANAMAX, of course, also dwelt upon its large investment in the mine

- continued -

While ANAMAX now claims (Ans.Br. 4) it did no more than admit it would be "uneconomical" to meet its water needs by wells in the area of its mill, the record does not support the implication that ANAMAX could, in fact, so meet its groundwater needs.

The only factual assertion of substance bearing upon the water subjacent to the ANAMAX mill, is found in Mr. Hansen's statement that the mine pit about a mile away 1,100 feet deep, which we suggest must be several thousand feet wide, produces 1,000 acre feet of water per year. If that size hole, open to a depth of 1,100 feet, will only surrender up 1,000 acre feet of water a year, it would appear that "uneconomical" could be classified as a modest understatement.

1/ -continued-

and mill and made its usual estoppel and laches claims. However, in view of the fact that ANAMAX has seen fit to boldly ignore and challenge the plain ruling of this Court in Bristol II and Jarvis I and II by drilling and proposing to pump a new well without justification other than it wants the water these defenses do not have even colorable validity. While absence may make the heart grow fonder, it also must be true that success in buying delay by burying all attempts to get a meaningful and authoritative restatement of legal principles heretofore clearly stated by this Court with a deluge of paper pleadings appears to make the litigant bolder.

The burden is upon ANAMAX as a user of water taken from the critical area common supply for use outside the critical area, to prove that it in fact has meaningful access to the common critical area supply. *Jarvis v. State Land Department*, 104 Ariz. 527, 456 P.2d 385. This does not mean a token supply from its mine pit a mile away from the mill and arising from unidentified sources (including summer thundershowers). It means such access as would enable ANAMAX to withdraw from the underground of the mill area groundwater in amounts comparable to the amount drawn and transported by ANAMAX from the supply of the critical groundwater area which ANAMAX has invaded, so as to offset or equalize the impact which the loss of the water transported out of the critical area has upon the supply of the critical area. Certainly this must be true if the Court's holding quoted in discussing Claim 2, post 27, 28 is based on reason and logic. ^{2/}

^{2/} FICO again states its reservations to a reading of *Jarvis II* which in effect limits or partially overrules *Bristor II*. We believe *Jarvis II* dealt with the aggregate water rights of the farmers in the Avra Altar Valley versus the City of Tucson, and not with individual water rights of one farmer in the valley versus the individual water rights of another farmer in that valley. In short, we do not believe that *Jarvis II* either limited or overruled *Bristor II*.

ANAMAX has found little in the ANAMAX Answering Brief which directly deals with the principal issues on this appeal and upon which the lower Court's ruling was based. We have therefore labored, perhaps in too great detail, to clearly establish what was decided by the Trial Court and what issues are legally at issue on this appeal. While the various red herring arguments ANAMAX has skillfully and pleasantly dragged across the trail present a tempting challenge, FICO has no intention of wrestling with these diversionary straw men ANAMAX has fabricated howsoever great the temptation.

Briefly, some claims may justify brief answers.

Claim No. 1. The critical area statute is limited to control of irrigation uses and does not restrict industrial and other non-agricultural groundwater uses. This Court has twice rejected this claim.

"Tucson argues that since by statute A.R.S. Section 45-301, et seq, only new irrigation or drainage wells in critical areas . . . are prohibited, the Legislature must have intended to permit pumping for municipal purposes without restriction. But the illegality of use

of ground water is not dependent upon whether the Legislature has not forbidden the sinking of wells as a source of supply to be used for municipalities." Jarvis v. State Land Department, 279 P.2d 169, (1972), 106 Ariz. 506, 509 (1970), again to the same effect Jarvis v. State Land Department, 456 P.2d 385, 393, 104 Ariz. 527, 535 (Sp. concurring opinion).

Claim No. 2. "ANAMAX could get water from wells drilled near the mill, but this would be uneconomical" (A. B. 7,8). No such contention was made in the Court below nor does the record support the claim.

Unless the Court accepts the novel "Subdivision Theory" the ruling in Jarvis II controls since the ANAMAX mill, while within the drainage area, is outside the critical area. The burden is therefore upon ANAMAX to establish its legal claim to use Critical Area groundwater.

"Until Tucson can establish that its customers outside the Marana Critical Groundwater Area but within the Avra-Altar Valley's drainage area overlie the water basin so as to be entitled to withdraw water from it, there are no equities which will relieve it from the injunction heretofore issued."

Claim No. 3. "The Trial Court took judicial notice of the subdivision and considered it along with other evidence that FICO's and ANAMAX's lands overlie a common groundwater supply."

The basis upon which the Trial Court reached its conclusion is set forth in detail in the actual Court Order and clarified by excerpts from the hearing transcript, supra pp. 1-15 . The statement is not supported by the record.

Claim No. 4. The explanation which ANAMAX offers to the clear inconsistency FICO demonstrated at pages 23-29 of its Opening Brief which must be found if the same reading which ANAMAX (and the Court) gave the statutory definition of "subdivision" is also given to the identical language of the statute defining a groundwater basin is not even plausible. In fact it is no explanation at all since the language in each statute is identical and hence the meaning must be the same. There is no statutory indication that a "subdivision" "must" be declared in a basin. If a "distinct body of groundwater" exists in a basin, it is water which is common to the entire basin and to each "subdivision" of that basin as established for administrative purposes. A "distinct body of groundwater" making up a basin does not become fragmented hydrologically, or separated out into different and unrelated "distinct bodies of groundwater" by the

stroke of an administrative official's pen. If the administrative finding and order designating a subdivision once entered and not appealed is beyond collateral attack, so also does such a designation of a groundwater basin become, in like manner, and for like reasons, impregnable to judicial challenge. FICO reviewed this aspect of the controversy at length in its Opening Brief, pp. 22-51, and will not reargue its unchallenged reasoning here.

THE REASONABLE USE ARGUMENT

FICO reviewed the reasonable use doctrine in reasonable detail in its Opening Brief. Again we see no justification for repeating or enlarging upon it here.

It is only by reading parts of Bristor II and Jarvis I and Jarvis II out of context that ANAMAX makes out what appears to be a plausible argument.

It is only by divorcing the reasonable or beneficial use requirement from the other requirement for legal use that the water be used on the land from which it is withdrawn that ANAMAX achieves plausibility.

There is in our opinion only one reading which may reasonably be given to Bristor II and Jarvis I and II. It is:

If use of groundwater by a landowner causes injury to the groundwater supply of an adjoining landowner it may be held to be *damnum absque injuria* only if the use (a) is upon the land from which the groundwater has been withdrawn and (b) the use is a reasonable use, i.e., a beneficial use.

It was only when the Court discussed the question of how "reasonable use" should be determined apart from the holding that the use must be on the land producing the water, that the language quoted by ANAMAX was used. The Court did not, by its reasoning setting forth the factors to be considered in determining if a use should be found "reasonable" or "beneficial" intend to or in fact reason that so long as the use was "reasonable" it was also legal. Nor does a fair reading of the opinions involved justify the bifurcation of the reasonable use doctrine into two independent constituents

1. Reasonable or beneficial use, and
 2. Use upon the land producing the water;
- which may be considered one apart from the other as defendants have so repeatedly asserted. The use must be "beneficial" and in exploring uses which might pass muster as "beneficial" the Court said that the use must be "reasonable" to be considered beneficial.

The Court then discussed uses which might be found reasonable. It is this discussion which defendants have seized upon, lifted bodily out of context, and quoted as if a use which met the test suggested by the Court as a "reasonable" use in and of itself thereby became a lawful legal use even though the other required test - use on the land producing the groundwater - was not met.

The old song about the inseparability of "love and marriage" comes to mind. One cannot exist without the other. So also with respect to the legal use of groundwater which results in injury to an adjoining landowner's groundwater supply - It must be on the land producing the groundwater and it must be a beneficial or reasonable use to be a legal use.

To further argue the matter may indicate doubt as the Court's ability to read and understand its own clear explication of the governing principles applicable to use of groundwater or, perhaps, that we are impressed with the possible validity of the ANAMAX arguments. Since neither of these conditions prevails, we will conclude our Reply with apologies for its unnecessary length and detail.

CONCLUSION

The Order denying FICO injunctive relief should be vacated with appropriate directions to the Trial Court.

Respectfully submitted,



Mark Wilmer
3100 Valley Center
Phoenix, Arizona 85073
Attorneys for Farmers
Investment Company

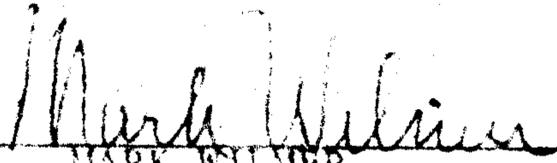
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STATE OF ARIZONA)
County of Pima) ss:

MARK WILMER, being first duly sworn, says:

Affiant mailed two (2) copies of Appellant's
REPLY BRIEF to Robert E. Lundquist, Esq., CHANDLER,
TULLAR, UDALL & RICHMOND, 1110 Transamerica Building,
Tucson, Arizona 85701, attorneys for Appellees,
properly addressed and postage prepaid this 25th
day of February, 1975.


MARK WILMER

SUBSCRIBED and SWORN to
before me this 25th day
of February, 1975.


Notary Public *nee Meador*

My Commission Expires:

February 15, 1977

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, Appellant's Reply Brief (37 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 2/12/05
Date

Etta Louise Muir
Signature, Notary Public

My commission expires 04/13/2009
Date

