

IN THE
SUPREME COURT
STATE OF ARIZONA

FARMERS INVESTMENT)
COMPANY, a corporation,) Supreme Court
) No. 11439-2
Appellant,)
) Pima County
v.) No. 116542
)
ANDREW L. BETTWY, as)
State Land Commissioner,)
and the STATE LAND)
DEPARTMENT, a Department)
of the State of Arizona,)
and PIMA MINING COMPANY,)
a corporation,)
)
Appellees.)
)

BRIEF OF PETITIONERS
DUVAL CORPORATION AND
DUVAL SIERRITA CORPORATION

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STATEMENT OF FACTS

Since this Brief addresses only the reasonable use issues, facts which relate to the Enabling Act, to questions of state leases, and to other issues raised by FICO's Special Action for Review and by this Appeal of Judge Roylston's decisions on the motions relating to Count IV of FICO's complaint will not be recited.

As shown by the map attached as Appendix "A", the operations of the mining company defendants are located within the Sahuarita-Continental Subdivision of the Santa Cruz Groundwater Basin (the "Subdivision") so established by the State Land Department and so designated by its Order No. 14 on June 8, 1954, pursuant to A.R.S. § 45-308.¹ A.R.S.

A copy of Order No. 14 dated June 8, 1954, of Amendment to Order No. 14, dated February 15, 1956, and of official map of the State Land Department, entitled "Map of Sahuarita-Continental Subdivision of the Santa Cruz Basin," certified by Louis C. Duncan, Deputy State Land Commissioner are on file in this Court in Cause No. 10486, Farmers Investment Company v. State Land Department, et. al., as Exhibit A to Petition for Leave to Intervene of Duval Corporation and Duval Sierrita Corporation, filed May 3, 1971.

§ 45-301(6) defines "Groundwater Subdivision"

as:

. . . an area of land overlying, as nearly as may be determined by known facts, a distinct body of ground water. It may consist of any determinable part of a groundwater basin.

A portion of the Duval Sierrita pit extends beyond the Subdivision boundary, but no water is transported by Duval for use outside the Subdivision except for de minimis amounts used to control dust on the pit roads. However, in 1973 for example, the Sierrita pit produced over 480 acre feet of groundwater which was pumped into the Duval mill circuit to compensate for dust control water.

Within the Sahuarita-Continental Subdivision lies the smaller Sahuarita-Continental Critical Groundwater Area (the "Critical Area") designated by the State Land Department on October 15, 1954 as an area in which there is insufficient groundwater "to provide a reasonably safe supply for irrigation of the cultivated lands" at current rates of withdrawal. A.R.S. § 45-301(1).

FICO's operations, consisting of two farms comprising 7,000 acres (FICO's Amended Complaint, filed November 8, 1974, the "Complaint," Count I, Paragraph II), lie within the Critical Area. Approximately 5,000 acres have been planted in pecans which are flood irrigated. (FICO's Petition for Special Action, Arizona Supreme Court Cause No. 11439, filed January 2, 1974, the "Special Action Petition as to Lease 906," Paragraph V) Much of this acreage has been intercropped and double and triple cropped. (Answers of Plaintiff to Interrogatories of Duval Defendants, First Set, No. 6; See also deposition of Warren E. Culbertson, February 23, 1974, p. 87). FICO currently pumps approximately 38,500 acre feet per year. (Complaint, Count I, Paragraph III) In some instances water is transported distances of over six miles for irrigation by FICO. (Answers of Plaintiff to Interrogatories of Duval Defendants, First Set, No. 15).

The City of Tucson (the "City" or "Tucson") owns 30 well sites in the Critical

Area each approximately 2 1/2 acres. (Response of City to Motions for Summary Judgment of Anamax and Duval, filed March 21, 1974, Exhibit 1).

Tucson pumps over 11,000 acre feet per year from these sites for transportation to the City of Tucson. (Ibid., p. 2) Tucson intends to increase the rate of its pumping from the Critical Area by over 55% by 1980. (Deposition of Frank Brooks, Nov. 30, 1973, p. 34) It owns no other land in the Critical Area, except for less than two sections of desert land and has no plans to buy or retire any agricultural land. (Ibid., p. 35.)

The mining company defendants own in fee approximately 43,170 acres within the Sahuarita-Continental Subdivision. Approximately 21,785 of these acres are located within the Sahuarita-Continental Critical Area. 7,363 of the acres located within the Critical Area have a history of cultivation and are entitled to the use of groundwater for the cultivation of crops under the 1954 Groundwater Code, but have been retired from cultivation. Duval

owns 9,430 acres in fee within the Subdivision; 7,430 acres lie inside the Critical Area and 1,530 acres entitled to the use of groundwater for irrigation, have been retired. The mining companies' wells are located inside the Critical Area on large tracts of land. Duval's Esperanza well field is located on a tract of fee land located inside the Critical Area comprising approximately 562 acres, while the Sierrita well field is located on a parcel comprising approximately 5,950 acres. Petitioners' wells have been located at these points which overlie lower portions of the basin because industrial water requirements can most economically be met from these wells.

While the Duval mills both overlie the Basin Subdivision, water could not be feasibly and economically produced at the mill sites to continue operations. Duval's make-up requirements are approximately 23,000 acre feet annually. Collectively, the mining company defendants pumped 54,478 acre feet in 1973.

Water is transported from the wells to

the mill sites. There, the water is mixed with ore which has been finely ground. It is used to transport the slurry thus formed through the floatation cells where copper is removed and then to transport the tailing material which remains to tailing ponds located within the Critical Area.

While water is "used", in the broad, literal sense of the word, outside the Critical Area for the transportation of slurry within the mills, no water is legally or consumptively "used" outside the Subdivision or even the smaller Critical Area. The points of consumptive use are the tailing ponds located within the Critical Area. Of course, as much water as possible is reclaimed from the tailing ponds and recycled into the mill circuits.

Further facts are set forth in the argument in Section III of this brief.

ARGUMENT

Introduction

FICO's argument proceeds on two premises.

The first premise is that the water is not "used upon the land from which it is produced"; therefore, the doctrine of reasonable use is violated. This premise cannot be accepted unless the term, "the land from which it is produced" is defined. Petitioners submit that both Pima and Petitioners use the water upon "the land from which it is produced", as that term is defined for purposes of the doctrine of reasonable use.

FICO's second premise is that the water is used outside the Critical Area; therefore, FICO, which is situated inside the Critical Area, is damaged. This does not follow and is denied by the mining companies.

Petitioners agree that the principle of Jarvis v. State Land Department, 104 Ariz. 527, 456 P.2d 385 (1969) (Jarvis I) and 106 Ariz. 506, 479 P.2d 169 (1970) (Jarvis II), is correctly stated by FICO, but there are

two reasons why the principle as sought to be applied by FICO, does not apply to this case.

First, this rule of Jarvis establishes only the fact of damage. But the fact that other users may be damaged does not, ipso facto, establish the illegality of a use even if it were outside the Critical Area. Where, as here, the use is lawful, being for the reasonable and beneficial use of "the land from which the water is produced", i.e., on land overlying the common basin supply, others who also draw from the common supply may in fact be damaged, but there is no legal liability. As stated in Bristor v. Cheatham (Bristor II), 75 Ariz. 227, 238, 255 P.2d 173, 180 (1953), reversing, 73 Ariz. 228, 240 P.2d 185 (1952):

If it is diverted for the purpose of making reasonable use of the land from which it is taken, there is no liability incurred to an adjoining owner for a resulting damage. [Emphasis added]

Second, Duval submits that its and Pima's "use" as that term is understood for purposes of the doctrine of reasonable use is not

outside but within the Critical Area. Admittedly, water is "used" outside the Critical Area, but only in the strictly utilitarian sense for the transportation of mill tailing and not in the legal sense of consumptive use. All water which is pumped is returned to the Critical Area and the point of consumptive use is entirely within the Critical Area.

I.

THE MEANING OF
"OFF THE LAND"

This Court said in Jarvis II:

Percolating waters may not be used off the lands from which they are pumped if thereby others whose lands overlie the common supply are injured. [Emphasis added] 479 P.2d at 171.

And:

Such waters can only be used in connection with the land from which they are taken. [Emphasis added] 479 P.2d at 172.

The question then becomes: For purposes of the reasonable use doctrine what do such terms as "off the land" and "the land from which waters are taken" mean?

FICO says that the rule of Bristor II is that water is used "off the land" if it is transported more than three miles from the well head. Bristor v. Cheatham tells us no such thing. Bristor II held that water must be used in connection with the beneficial enjoyment of the land from which it is taken, and assumed, because it was decided on a

motion to dismiss, for purposes of which the allegations of the complaint must be taken as true, that the transportation was away from the land.

If transportation over three miles were the test of reasonable use, as FICO contends, then FICO would have no standing to sue since FICO itself transports water distances of over six miles. (Answers of plaintiff to Interrogatories of Duval Defendants, First Set, No. 15.) Obviously, mere distance from the well head is not the test of reasonable use.

Neither is it unreasonable per se to transport water from one parcel of land, as defined by property lines drawn on the surface of the land, to another parcel. State v. Anway, 87 Ariz. 206, 349 P.2d 774 (1960).

The answer, of course, is in the quotation from Jarvis II cited above:

Percolating waters may not be used off the lands from which they are pumped if thereby others whose lands overlie the common supply are injured. [Emphasis added] 479 P.2d 171.

Under the doctrine of reasonable use, percolating waters may not be used on lands which do not overlie the common supply if others whose lands do overlie the common supply are thereby injured. This is made clear not only by Bristor II, which enunciated the doctrine of reasonable use, but also by the Jarvis decisions and by the many cases cited by this Court in Jarvis II in support of the rule just quoted. The principle of

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While FICO correctly states that these cases constitutes an "impressive demonstration of the great weight of authority arrayed in support of the Court's pronouncement," (FICO's A.O.B., p. 19), the array does not support FICO's strained and unique interpretation of the doctrine of reasonable use. Those cases make clear that mere distance from the well head, whether it be three miles or any other arbitrary distance, is not the test of "off the land." Rather the test is whether water is being used in connection with the beneficial use of land which overlies the common supply from which the water is taken. Many of the cases have specifically upheld uses which would be prohibited under FICO's Procrustean interpretation. The cases express or imply full approval of the reasonable use which Pima and Duval are making of their groundwater. See, e.g., 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); Silver King Consolidated Mining Co. v. Sutton, 39 P.2d 682 (Utah 1934);

those cases is stated by Casner:

The reasonable use doctrine requires that the exploitation rights of the overlying proprietor be limited. It permits him to pump only such water as he can apply to reasonable beneficial uses upon his own land, and outlaws, as unreasonable, diversions to lands beyond the source basin. [Emphasis added] Casner, American Law of Property, Volume 6A, p. 196.

As adopted in Bristor II, the doctrine of reasonable use permits "the extraction of groundwater subjacent to the soil so long as it is taken in connection with the beneficial enjoyment of the land from which it is taken." [Emphasis added] 75 Ariz. at 237-38. Because Bristor was decided on a motion to dismiss, the Court had no evidence of the location of the common groundwater basin limits, and

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); Katz v. Walkinshaw, 70 Pac. 663 (Cal. 1902), on rehearing, 74 Pac. 766 (Cal. 1903); 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).

therefore the Court did not attempt to define the land entitled to the beneficial enjoyment of groundwater from the basin. But it is clear from the dissents in Bristor I that such land would be defined by the limits of the common supply. Justice LaPrade stated the issue was whether water could be transported to other lands "from whence it does not return to replenish the common supply. . . ."

[Emphasis added] 73 Ariz. at 242. Justice DeConcini stated that the prohibition under the doctrine of reasonable use was upon the transportation of water for use on other land "away from the base of the common supply. . . ." [Emphasis added] 73 Ariz. at 255.

Likewise, the Court did not define "the land" in the first Jarvis case. Such definition was unnecessary since Tucson admitted the diversion was transbasin, i.e., to land overlying a completely separate groundwater supply. Therefore, the transportation was "off the land".

The only issue then remaining was whether

the plaintiffs were damaged by the diversion. This Court correctly presumed damage from the statutory definition of critical area. Because a critical groundwater area by definition has insufficient water for agriculture, existing agricultural uses can only be impaired by the addition of other uses.

In Jarvis II where the Court was confronted with the need to define "the overlying lands", it specifically permitted the City of Tucson to deliver water from its well fields located in the Marana Critical Groundwater area to Ryan Field. This transportation of water was legal because Ryan Field overlies the common basin of groundwater from which water was taken by Tucson and delivered to Ryan Field:

Its lands overlie the Avra-Alter water basin and geographically it lies within the Marana Critical Groundwater Area so as to entitle it to withdraw from the common supply for all purposes except agriculture. Tucson should not be prohibited from delivering water to Ryan Field for lawful purposes since the Ryan Field supply is from the common basin over which it lies and from which

it could legally withdraw water by sinking its own wells for domestic purposes. [Emphasis added] 106 Ariz. at 510, 479 P.2d at 173.

Admittedly Ryan Field was situated within the Marana Critical Groundwater Area. However, the operative fact was not that Ryan Field lay within the same Critical Groundwater Area. It was the fact that Ryan Field overlay the common basin, which made the withdrawal and delivery to Ryan Field permissible.

This Court stated unequivocally that land overlying the common water basin is entitled to receive water withdrawn from the common supply. Although Jarvis II did not involve transportation to land overlying the common basin but outside the critical groundwater area, this Court nevertheless went on in the next paragraph of its opinion to flatly state that Tucson could deliver water to customers lying outside the Critical Area if it could show that such customers were on lands overlying the common groundwater basin:

Until Tucson can establish that its customers outside the Marana

Critical Groundwater Area but within the Avra-Alter Valleys' drainage areas overlie the water basin so as to be entitled to withdraw water from it, there are no equities which will relieve it of the injunction heretofore issued. [Emphasis added] 106 Ariz. at 510, 479 P.2d at 173.

Such a showing has been made in this case. The lands of Pima and of Duval are situated within the Sahuarita-Continental Subdivision of the Santa Cruz Basin, established by the State Land Department on the basis of "known facts", pursuant to its statutory mandate to do so, to be the land overlying a distinct body of groundwater.

Anway, Bristor, Jarvis, the cases cited in Jarvis, and the quotation from Casner quoted above all call upon the same rationale, one which is based upon the hydrological fact which gave rise to this lawsuit: That water percolates beneath all lands which overlie a basin and is not subjacent to any particular, arbitrarily defined parcel. Therefore, the fundamental principle of the doctrine of reasonable use is that water shall not be moved to a point from which the water not

consumptively used cannot return to the common supply. A short hand way of saying the same thing is that groundwater shall not be used "off the land" to which it is subjacent.

II.

THE BOUNDARIES OF THE COMMON
SUPPLY ARE DEFINED BY THE
SAHUARITA-CONTINENTAL SUBDI-
VISION OF THE SANTA CRUZ BASIN
AS ESTABLISHED PURSUANT TO STAT-
UTE BY THE STATE LAND DEPARTMENT

FICO's argument is founded on the existence of the Critical Area. FICO does not once mention the existence of the Sahuarita-Continental Subdivision of the Santa Cruz Groundwater Basin so established and declared by the State Land Department on June 8, 1954. Yet it is the Subdivision which defines the lands entitled to water from the common supply.

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, 493, 56 P.2d 1337, 1341 (1936).

A critical area is legally distinguished from a groundwater subdivision in that the critical area is determined not by hydrological facts, but by agricultural 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 essence of the definition 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." Rather it is an area of land which can be cultivated 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 does not include the entire Subdivision, but it does include all irrigable lands within the Subdivision. There is good reason for this. 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, 410, 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. Where it is apparent that lands would not be suitable for agricultural purposes, there is no reason to unnecessarily expand the boundaries of the critical area to include such non-irrigable lands. 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. 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.

In reliance upon the Land Department's statutory finding and establishment of the Sahuarita-Continental Groundwater Subdivision, Duval spent over \$225,000,000 in the development of its mines, mill and related facilities. The specific statutory scheme for the establishment and declaration of such groundwater subdivisions, together with the exemption of industrial wells, could only have been to induce such reliance. The purpose of the statute is to establish and define the extent of the groundwater supply. Persons are thereby allowed and encouraged in industrial enterprises without fear of being required to

demonstrate either in lengthy and expensive trial proceedings or otherwise that their uses lie precisely over the deepest or most freely percolating part of the common supply.

Unlike the designation of a critical area, no statutory consequence attaches to the determination and establishment of a groundwater subdivision. It is therefore clear that the definition of subdivision was written with the common law doctrine of reasonable use in mind and that the consequences which attach to the establishment of the subdivision are those which attach at common law.

Once the land overlying "a distinct body of groundwater" is defined, the common law and constitutional principles of reasonable use applicable to land overlying the common supply obtain.

It is essential that there be a statutory procedure, such as that set forth in A.R.S. § 45-303 for the conclusive determination and establishment of the lands overlying the common supply and which are accordingly entitled to the beneficial and reasonable use of water

from that supply. Without it, the result would be chaotic. Persons such as Duval would otherwise be expected to proceed at their peril in the investment of hundreds of millions of dollars.

Unlike measurable determinations such as the depth in a well to groundwater or the location of the irrigable acres in a basin, the location of the body of groundwater cannot be determined from convenient reference to measurable and visible surface topographic and other features. The delineation of the boundaries of the common supply must be founded on hydrological findings and must to some extent depend on the exercise of discretion. Water levels may rise and decline, water may percolate more freely at one point than another and groundwater levels may be constantly altered by changing pumping patterns. But unless persons can rely upon the statutorily prescribed establishment of a groundwater subdivision, without fear that they will risk their entire investments in expensive, protracted court proceedings involving nice

hydrological questions and the resolution of conflicting hydrological opinions as to the precise future boundaries of a common basin or supply, orderly economic and industrial development would be completely thwarted.

III.

ACTUAL CONSIDERATION OF THE
FACTS AND EQUITIES IN THE CASE
BELOW DEMONSTRATES THAT THE
USES OF GROUNDWATER BY THE
MINING COMPANY DEFENDANTS ARE
LAWFUL AND REASONABLE

The case below is controlled by the doctrine of reasonable use. Reasonableness is a question of fact. "What is a reasonable use must depend to a great extent upon many factors, such as the persons involved, the nature of their use and all the facts and circumstances pertinent to the issue." Bristor II, 75 Ariz. at 237, 225 P.2d at 173. Cases of the magnitude and complexity of the case now pending in the Pima County Superior Court cannot be decided by disregarding long standing hydrological facts and determinations required to be made by the groundwater Code.

Reasonableness is a question which demands actual consideration of all the facts and circumstances. What is reasonable for mining purposes might not be so for agricultural or municipal purposes.

Copper deposits are found in rock, not in gravel aquifers. While the location of a farm is generally determined by the terrain, soil and location of the water supply, the location of a mine is determined by the location of the ore. Water must therefore be sometimes transported significant distances in connection with the operation of virtually every mine in Arizona. Copper has been mined in Arizona since before statehood, and has continued with the full approval and encouragement of the Legislature and the Courts. It can only be concluded that the transportation of water for mining has long been regarded as a lawful and reasonable use of groundwater in Arizona.

Even under its critical area theory, FICO could have no complaint if the mining company defendants had built their mills in the very bottom of the Santa Cruz Valley. Yet to have done so would have been impractical and would have represented the least economical, the least beneficial use of all of the lands involved and the least respect for the

environment. To now require the mines to build their mills in Green Valley, on land much better suited for agricultural, residential and commercial uses, would be foolish and would serve only to put ill-conceived form ahead of substance.

The mining company defendants in the case below differ substantially from the City of Tucson in the Jarvis case, from defendants in the cases which give rise to the American doctrine of reasonable use, and even from the City of Tucson in the case below.

Unlike those defendants, the mining companies here involved do not concentrate water on small, "postage-stamp" sized well fields but hold tracts of over 21,785 acres inside the Critical Area which are used for no other purpose than to minimize drawdown. By contrast, Tucson in the case below, as in Jarvis, owns almost no land in the Critical Area except for 30 tracts measuring 330 by 330 feet, on which it places its wells. In fact, as can be seen from the map, which is Appendix "A", Tucson's wells have been strategically placed

to systematically draw water from a much larger area than is occupied by its well sites.

Neither do the mining companies transport water for merchandising and sale to others. Thus the two primary evils which gave rise to the doctrine of reasonable use have been averted: concentration of waters and their transportation away from the common supply for sale to others. As stated in Rothrauff v. Sinking Spring Water Co., 339 Pa. 129, 14 A.2d, 87, 90 (1940), in a passage quoted by this Court in Bristor II at 75 Ariz. at 235 and in Jarvis I at 104 Ariz. at 529:

" . . . if . . . diversion or sale [of water] to others away from the land impairs the supply of a spring or well on the property of another, such use is not for a 'lawful purpose'
[A] property owner may not concentrate such waters and convey them off his land if the springs or wells of another land owner are thereby damaged or impaired. . . ."
[emphasis added].

Most importantly, no water is transported outside the Sahuarita-Continental Groundwater

Subdivision, the area which the State Land Department determined and established to overly a distinct body of groundwater. All of the mining company uses are on their own lands which overlie the groundwater Subdivision and all amounts not consumptively used are allowed to return to the common supply of the Subdivision.

Further, even if FICO were correct in its unsupportable argument that the mining companies cannot transport water outside the Critical Area, it is a fact that their mill processes result in no net use outside the Critical Area. As stated above, water is first used in the mill process for the transportation of slurry through the floatation cells in the mills where copper concentrate is removed. The water is then used and re-used to transport tailing material to disposal ponds located within the Critical Area.

Only a de minimis amount of the mill process water is consumed by copper concentrates. At Duval in 1973 for example, only 37 acre feet of 23,300 acre feet of water

pumped as make-up water was consumed by concentrates. This water can be said to be transported away from the common supply only in the sense that water which makes up the moisture content of grain, hay, pecans or other crops is also transported away. Except for the amounts consumed by concentrates, all of the water is returned to the Critical Area.

This Court wisely pointed out in the Jarvis cases that prudent groundwater management may entail retirement of agricultural uses in favor of new ones. Though not legally bound to do so because they overlie the common supply of the Sahuarita-Continental Subdivision, the mines have voluntarily chosen to follow the suggestion of this Court in Jarvis, by retiring over 7,360 acres of farm land in the Critical Area. By taking the suggested action, the mines have helped to preserve critically short water supplies and to minimize declining water levels. This voluntary unilateral action to achieve a water balance inures equally to the benefit of all users of the common supply. It is therefore an equity which weighs heavily in their favor.

FICO argues in the case below (see e.g., FICO's Motion for Summary Judgment as to Duval Corporation and Duval Sierrita Corporation, filed January 15, 1974, pp. 7-8) that this means nothing because of an oblique reference in Jarvis II to A.R.S. § 45-147, which states that under the law of prior appropriation, municipal uses would enjoy a higher priority in conflicting claims than agricultural uses. Because the mining companies would not be required to retire irrigated land to sustain their reasonable and beneficial uses in the first place and for the reasons more fully explained in the footnote,³ A.R.S. § 45-147 is not applicable here.

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As the court in Jarvis itself stated, the priorities set forth in this section have application to appropriable waters only. They were not carried over into the groundwater code as they could have been if the legislature had intended to set values on the relative benefits to be derived from different groundwater uses. While for obvious reasons, municipalities might expect to enjoy a high priority under all circumstances, it cannot be inferred that the same priorities would hold true for other uses under all circumstances. At the time of enactment of the appropriation statutes, the traditional and most practicable source of water for agriculture was surface diversions. Southwest Engineering Co. v. Ernst, 79 Ariz.

FICO overlooks the real reason why this Court noted in Jarvis II that Tucson could retire agricultural lands in the Avra Valley in order to transport water into the Tucson basin. The reason was not A.R.S. § 45-147, which illustrated the importance of municipal uses but had nothing to do with the principles applicable in the Jarvis case. Rather the reason was the simple fact that if Tucson purchased and retired agricultural lands, releasing the amount of groundwater theretofore consumptively used for agricultural purposes, the complainants would have suffered no damage in the exercise of their water rights. This is a well recognized and long established principle of the reasonable use

403, 407, 291 P.2d 764 (1955). Similarly, the land most suitable for agriculture was generally located along surface water courses. The Legislature could logically have intended that agriculture, being the traditional user of surface water, enjoy priority in its continued use, while industry, being relative newcomers but with less dependence on proximity to water supply and with additionally greater resources be encouraged to develop and utilize the more recent technologies required to secure water from groundwater sources, as has been done.

doctrine and has nothing whatever to do with the Arizona statutes applicable to conflicting applications for appropriable waters, as distinguished from groundwater.

For example, in Glover v. Utah Oil Refining Co., 218 Pac. 955 (Utah 1923) cited in Jarvis II, 479 P.2d at 172, a similar situation was present. The defendant purchased the water rights of more than 100 lot owners overlying the common artesian district and was "conducting the waters thereof to a point beyond the boundaries of said artesian district and there use the same for commercial and manufacturing purposes." 218 Pac. at 956. The court stated that under the doctrine of reasonable use water could not be conveyed away from the boundaries of the common supply to the injury of overlying owners. The real question before the court then was:

What would constitute an injury to adjoining owners or persons owning water rights within said artesian district? 218 Pac. at 956.

The court observed that the plaintiff was not injured in its exercise of its water rights but

was contending that it was additionally entitled to those which the other owners of lands overlying the common supply would otherwise be entitled but elected to use elsewhere:

Plaintiff does not claim that defendant proposes interfering with a right which plaintiff is enjoying at the present time, but with a right which plaintiff hopes to get in the event that those who now own the right should abandon it or dispose of it to be used outside the artesian district. 218 Pac. at 957.

The court ruled that it was permissible to transport water beyond the boundaries of the common artesian district provided water rights of corresponding quantities on lands overlying the common district were retired:

We are not inclined to subscribe to the doctrine that the owner of a water right within an artesian district cannot use it, or dispose of it for use, beyond the boundaries of the district without the right thereto being forfeited to other users within the district. The contention of appellant in that regard, in the opinion of the court, is utterly incompatible with the right of private property and the established policy of the state, which permits a change of place in the use of

water as long as the rights of others are not injured thereby. In the instant case, the rights of plaintiffs . . . will not be injured by the contemplated change of the place of use, and consequently it follows that plaintiff's complaint does not state facts sufficient to constitute a cause of action. 218 Pac. at 958-59.

The essence of the doctrine of reasonable use is that water be put to a reasonable and beneficial use. The benefits produced by the use are relevant in considering its reasonableness.

In its Briefs FICO improperly casts itself as a small irrigator being oppressed by corporate monsters. In its zeal it expressly refers to Duval (FICO's A.O.B. 27) in citing inopposite trespass and nuisance cases. Of course, Petitioners' size could not make an unlawful taking lawful or an unreasonable use reasonable, but neither should their size prejudice them nor foreclose consideration of the nature of Petitioners' uses.

The Court is not succumbing to the coercion of a corporate behemoth when it considers the very great economic and social benefits produced by copper mining. Copper is vital to the national welfare and it can be produced from low

grade ore only after capital investments of hundreds of millions of dollars.

Measured in terms of the need and utility of the product, gross national product, number of persons employed, indirect economic benefits, and taxes paid, copper mining produces far greater economic and social benefit than does pecan farming. Measured in these terms, FICO cannot validly claim that its lavish and unnecessary uses of groundwater to produce a non-staple crop like pecans are somehow more reasonable than conservative uses for the production of copper.

FICO seems to urge that since FICO cannot show corresponding benefits from the huge amounts of water it pumps, that it verges on corporate arrogance for the mining company defendants to point out that these things are true.

Copper is a basic metal in short supply. The United States currently depends on imports for a substantial portion of its copper consumption. Approximately 17 percent of the entire national production of copper originates from the properties involved in the suit below. In 1973,

the mining company defendants pumped approximately 54,478 acre feet of water and produced 360 million dollars worth of copper and molybdenum.⁴ FICO estimates that at full maturity its pecan orchards will yield as much as 3,000 pounds per acre (Deposition of Warren E. Culbertson, February 23, 1971, p. 89) and that its trees will require the application of 7 acre feet of water per acre. (Deposition of R. Keith Waldon, pp. 190-191; see also Deposition of Warren E. Culbertson, February 23, 1971, pp. 152-54). At today's price of 72¢/lb, the mining companies are producing \$7,616 worth of copper per acre foot of water pumped. At today's prices of 55¢/lb, if FICO's orchards were at full maturity, FICO would produce \$235 worth of pecans per acre foot of water pumped.

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The total income created in the State by the copper industry during 1970-1972, for example, was ten times the net value of the resources that it removed from the State. "The Copper Industry's Impact on the Arizona Economy," Arizona Economic Information Center, Marana, Arizona, March 31, 1974, pp. v, 85.

While FICO steadfastly urges the profitability of its operation, it continues to receive federal subsidies. Between 1967 and 1972 it accepted over \$2,385,000.00 in federal subsidies. Further, the foregoing does not consider that of the 38,500 acre feet per year pumped by FICO, over 75% is consumptively used (Affidavit of W. S. Gookin, p. 4, Exhibit C to Duval Defendants' Response to Plaintiff's Motion for Summary Judgment, filed March 15, 1974), compared to only 23,000 acre feet pumped by Duval of which all but 23% is restored to the ground within the Critical Area. (Ibid.)

The mining company defendants employ 6,312 persons full time directly in connection with the properties involved in this lawsuit. Their annual payroll exceeds \$71,555,000.00. In the Tucson metropolitan area, the copper industry accounts directly or indirectly for one out of every four jobs. ("The Copper Industry's Impact on the Arizona Economy," Arizona Economic Information Center, Marana,

Arizona, March 31, 1974, pp. ii, 30-32).

FICO employs 90 part-time and 140 full-time employees on an annual payroll of approximately \$1,000,000.00. (Deposition of R. Keith Waldon, pp. 257 and 258).

The mining properties involved in this lawsuit had a 1974 full cash value for tax purposes of \$251,100,000.00 and property taxes paid on those properties during 1974 amounted to \$11,954,408.00.

Although FICO has stated under oath in this Court in its Special Action Petition as to Lease 906, Paragraph V, that its pecan orchard alone has a value in excess of \$50,000,000.00, the 1974 cash value of all of FICO's Pima County properties for tax purposes barely exceeds a tenth of that: \$7,431,786. Property taxes paid by FICO amount to \$108,007 in 1974 and \$42,124 in 1973.

There are still further equities in this case. FICO has known since prior to 1954, when the Critical Area was designated that

groundwater supply of the basin was limited. Yet according to the sworn allegations of mining company defendants in the case below, FICO allowed, cooperated and encouraged in the development of the mining company properties since before 1956. FICO knew the mining companies were spending hundreds of millions of dollars and would pump substantial quantities of water. These facts raise serious questions as to whether FICO's claim is barred by laches and estoppel.

Other than relying on the presumption created by the designation of the Critical Area, FICO has not shown or offered any evidence that it has actually been damaged by pumping by the mining companies or that the mining companies have in any way caused any drawdown. On the contrary, according to the data published by the United States Geological Survey and others, many wells in the Critical Area have experienced substantial periods of rising water levels since the mining companies began pumping.

In an effort to maintain groundwater levels, the mining companies have purchased and retired

from regular cultivation over 7,360 acres of land in the Critical Area and have installed pump back systems to recycle, reuse and conserve to the greatest extent reasonably possible, the water used in their processes. In contrast, not only has FICO failed to show that it is in any worse position because of the mines' operations, it has engaged in extravagant and wasteful irrigation and cropping practices. FICO has been raising crops precisely as it did after the designation of the Critical Area. In addition, it has planted on the same lands 5,000 acres of pecan trees, a crop which FICO admits consumes more water than the crops grown prior to its planting of pecans (Deposition of R. Keith Waldon, pp. 190-191; see also Deposition of Warren E. Culbertson, February 23, 1971, pp. 152-54). Further, the majority of plaintiff's 5,000 acres of pecan trees are multiple and intercropped.

FICO continues to engage in flood irrigation practices in spite of the fact that its pecan trees may be much more efficiently and beneficially irrigated by a trickler irrigation

system. Trickler irrigation could reduce the application of water by approximately one-half. (Affidavit of William S. Gookin, Duval Defendants Response to Plaintiff's Motion for Summary Judgment, filed March 15, 1974). If, as FICO contends, the purpose of the groundwater code and the designation of the Critical Area is to limit "irrigation of the cultivated lands in the basin at the then current rates of withdrawal", then FICO has itself violated the doctrine of reasonable use, and fails to seek equity with "clean hands".

Moreover, urging the Court to decide the reasonable use issues on this appeal, FICO is attempting to short-circuit actual consideration of the foregoing factual, equitable and legal issues. It is seeking to obtain from this Court in the absence of the assistance which a full determination of the facts would offer, a binding precedent phrased and conceptualized in the vaguest terms. If FICO could obtain this precedent, it would then be in a position to distort it in the Pima County action as it does the Bristor and Jarvis decisions in

its briefs on this appeal.

As in any case involving the reasonable use doctrine, there are many factual and legal considerations going to the issues of what is in fact a reasonable use. The proper and orderly resolution of these issues by trial on the merits should not be avoided by FICO's contrivance of this appeal.

IV.

IF, AS FICO SUGGESTS, THE DESIGNATION OF THE CRITICAL AREA PURSUANT TO A.R.S. §§ 45-301 ET SEQ WERE CONSTRUED AS PROHIBITING THE MINING COMPANIES' USES OF WATER, THEN AS SO APPLIED, SUCH STATUTES WOULD BE UNCONSTITUTIONAL

Wherever possible "statutes shall be construed in such a manner as to preserve their constitutionality. . . ." Selective Life Insurance Co. v. Equitable Life Assurance Co., 101 Ariz. 594, 598, 422 P.2d 710 (1967); Stillman v. Marston, 107 Ariz. 208, 209, 484 P.2d 628 (1971). However, if in accordance with FICO's contentions, it were held that designation of the Critical Area pursuant to A.R.S. §§ 45-301 et. seq., prohibits the mining companies' present uses of groundwater, then, as so construed, such statutes would be arbitrary and discriminatory and would create arbitrary and unreasonable classifications of water users and landowners. The groundwater code would be unconstitutionally vague, would deny equal protection of the laws, and would deprive the mining company defendants of their property for

a constitutionally impermissible purpose without due process and without just compensation.

A. Such Construction of the Code
Would Result in its Provisions
Being Arbitrary, Discriminatory,
and in Creating Unreasonable and
Arbitrary Classifications Among
Different Classes of Land Owners
and Water Users.

If the groundwater code were construed as prohibiting the transportation of water for use outside a critical area but on lands overlying the same groundwater basin, then the statutes would be arbitrary on their face. From the very definition of "critical groundwater area," it would then become apparent that the statutes were designed solely for the benefit and protection of agricultural water users.

By definition, a critical groundwater area is a basin or subdivision, "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." A.R.S. § 45-301(1). Under the groundwater code,

only agricultural water users are entitled to petition for the formation of a critical groundwater area. A.R.S. § 45-308(B) provides that a critical area shall be formed upon the department's initiative or upon "petition to the department signed by . . . the users of groundwater" within the basin or subdivision.

[Emphasis added]. But the definition section limits "user of groundwater" to mean "any person who is putting ground water to a beneficial use primarily for irrigation purposes.". A.R.S. § 45-301(13).

The result is that agricultural users and only agricultural users, i.e., those whose uses are "primarily for irrigation purposes", are entitled to petition the State Land Department for the formation of a critical groundwater area. If this Court were to adopt FICO's position and forsake the interpretation as stated in Jarvis II, all groundwater users other than agricultural users would clearly be denied equal protection of the law and would be unreasonably and arbitrarily discriminated against in favor of agricultural users.

This unconstitutional application of the statute urged by FICO can be shown by the designation of the very Critical Area here in issue. The Sahuarita-Continental Critical Area encompasses all of the cultivated and reasonably irrigable lands in the Sahuarita-Continental Groundwater Subdivision, but excludes more than half of the land in the Subdivision, little of which is reasonably irrigable. Agricultural interests would thus have been allowed to petition for the formation of a critical groundwater area and thereby form an enclave which would be exempt from the common law application of the doctrine of reasonable use. All industrial, municipal and other users would be effectively excluded from the benefits of that common law doctrine. Such other users are not even given the opportunity to petition to have their land included within the Critical Area. Agricultural users would thus be allowed to restrict the application of the common law doctrine of reasonable use when it appeared that there is not sufficient water available to sustain irrigation at current rates of

withdrawal, yet industrial users would not be afforded the same protection. Such users are not entitled to the designation of a critical area when it appears that there is not sufficient water available to sustain industrial uses at current levels of withdrawal. Such invidious discrimination cannot withstand constitutional scrutiny.

As claimed by FICO, the effect of the designation of a critical area would be arbitrary not only in relation to all water uses except irrigation, it would also be equally arbitrary in relation to hydrological facts. There can be no rational justification for discriminating between landowners overlying a common groundwater supply on the basis of which side of a line their properties lie, when such line has no relevance or connection whatever to the hydrologic boundaries of the supply, and consequently no relationship to the control of the declining water table in the basin. The effect would be to cut the baby in half. Mining operations do not consist of discrete parts. The mining and milling of ore is an integrated

operation with different phases of the operation being conducted on different properties according to the suitability of those properties for such purposes. Approximately 1,530 acres of Duval's operations lie within the Critical Area, but FICO contends that because some mining operations lie beyond the limits of the irrigable land in the Upper Santa Cruz Valley, the integrated use of such land is not permissible and the mines are not entitled to use such other lands for mining purposes.

FICO's interpretation of the groundwater code would create an unlawful discrimination in favor of the owners of the lower lands in the valley. In Glover v. Utah Oil Refining Co., 59 Utah 279, 218 P. 955, 958 (1923), cited in Jarvis II at 106 Ariz. at 509, the plaintiff contended that to permit water "to be conveyed to lands outside the district 'is to deprive her land of the advantage of position which nature had given it . . .'. The Court held that such a consideration should not be the controlling factor:

If the bottom of the water bearing stratum in the artesian basin is parallel with the surface of the ground, and defendant is situated at the lowest point upon the surface, defendant in the future, if necessary, could just as consistently contend that it is entitled to the advantage of its position and therefore operate its wells to the point of completely draining the upper portion of the basin. We do not here decide that such conduct on the part of defendant would be permissible, but only to illustrate the fact that "advantage in position" should not perhaps be considered as a controlling factor in cases involving the correlative use of water. 218 P. at 958.

FICO asserts that it is entitled to take advantage of its favorable location in the lowest part of the basin and prohibit all other uses in the basin on lands not so favorably situated. Yet the water FICO pumps does not come merely from its own land but is pumped from all of the land thereabout. The rain falls evenly on all land in the basin, not merely on FICO's. The amount of water pumped by FICO far exceeds the amount of recharge which occurs on its land. There is no logical or legal reason why all of the land in

in the basin should be subservient to FICO's.
All are equally entitled to the reasonable use
of water from the common supply for beneficial
5
purposes.

B. Under FICO's Construction, the
Groundwater Code Would be
Unconstitutionally Vague and
Would Deny Both Procedural and
Substantive Due Process.

If the groundwater statutes and the designation of the critical area supersede the application of the common law doctrine of reasonable use in these circumstances as contended by FICO, then the groundwater statutes are unconstitutionally vague.

No one reading the groundwater code would conclude that it prohibits transporting water pumped from industrial wells located on large

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One might not be permitted to pump unreasonably large amounts of water from small well sites to the injury of his neighbors within the basin, but such circumstances go to the reasonableness of the use and not to the question of whether land within the basin is entitled to the use of water from the common supply for reasonable purposes.

tracts within a critical area to mills located in the same groundwater basin or subdivision (over the common supply) as defined by the statutes, for the milling of copper ore. No one reading a published notice of the proposed designation of a critical area would understand that his rights to the industrial use of groundwater could be terminated by such designation. To the contrary, the statutes appear to limit only agricultural uses and to reaffirm the common law doctrine of reasonable use as to other uses.

As was said in Southwest Engineering Co. v. Ernst, 79 Ariz. 403, 411, 291 P.2d 764 (1955), the classification of the Act is based "on the distinctions and differences between present agricultural users and potential agricultural users of groundwater in critical areas." [Emphasis added]. No class of users other than agricultural is discussed by Ernst. The definition of "critical area" relates exclusively to the availability of water for agricultural purposes. A.R.S. § 45-301(1). Only agricultural users may petition for the

designation of a critical groundwater area.

A.R.S. § 45-301(13) and A.R.S. § 45-308.

Industrial wells are specifically exempted from the Act. A.R.S. § 45-301(3).

The Code contains the further provision directing that groundwater basins and subdivisions shall be established and that such basin subdivisions shall comprise "an area of land overlying, as nearly as may be determined by known facts, a distinct body of groundwater." A.R.S. § 45-301(5)(6) and 303. Such definitions would have meaning only if the doctrine of reasonable use on the land overlying the common supply were being reaffirmed. Such definitions would be pointless if "known" hydrological and geological facts were ignored and if the limits of the available irrigable acreage were construed as the boundaries of the common groundwater supply.

If the Code makes the boundaries of the critical area crucial to the exercise of property rights, then the mining companies are entitled to be apprised of such fact by a reasonable reading of the Code. Such is a

minimal requirement of due process.

The Arizona reasonable use doctrine holds that the right to pump and reasonably use water from a groundwater basin or supply on lands within that basin or overlying that supply is a constitutionally protected property right. No one reading the Code could possibly understand that his constitutional rights could be terminated by the mere designation of a critical groundwater area as claimed by FICO. So construed, the Code is fatally defective. The only classification of users denied the right to groundwater are agricultural users. Even then the statutory prohibition extends only to potential or future users and applies only after a critical area is designated.

Thus, the State has affirmatively led industrial users including the mining companies to believe that the doctrine of reasonable use was reaffirmed by the groundwater Code. Not only do the groundwater statutes provide for the designation of the boundaries of the common supply, the boundaries of the common supply were so defined by the State Land Department

by Order No. 14 establishing the Sahuarita-Continental Groundwater Subdivision. Such order has not been changed, altered or amended in any way.

Moreover, the State Land Department, the very agency charged with the determination and establishment of the boundaries of the common supply and with enforcement of the groundwater Code, has entered into a series of leases and grants of rights-of-way intended to allow the mining companies to transport water outside the Critical Area for beneficial use on lands overlying the common supply, some of them state lands. The State has encouraged the development of mining activities with full knowledge of the facts and has encouraged the mines to spend hundreds of millions of dollars in capital investment alone. By such affirmative actions, the State has represented to the mining companies that their activities are lawful and not in violation of the groundwater Code or the reasonable use doctrine. For this Court, as an instrumentality of the State, to now rule that such uses by the mines violate

the Code and thereby work a forfeiture of their water rights and investments would constitute a denial both of due process and equal protection.

C. Such Construction Would Take
The Mining Companies' Property
For a Private Purpose Without
Due Process and Without Just
Compensation.

This Court stated in Jarvis I, 104 Ariz.
at 531:

. . . The doctrine of reasonable
use is a rule of property.

Thus, the right of the mining companies to the beneficial use of water on their lands overlying the common supply is a property right. This right cannot be confiscated by the mere designation of a critical groundwater area. The Fourteenth Amendment of the United States Constitution requires that no state shall deprive any person of property without due process of law. Article II, § 17 of the Constitution of Arizona, provides:

"No private property shall be taken or damaged for public or

private use without just compensation having first been made, or paid into court for the owner . . ."

Unless the mining companies are compensated for the loss of their property rights under the doctrine of reasonable use, i.e., the right to the beneficial use of water for industrial (mining) purposes on lands overlying the common basin supply, the groundwater Code operates so as to unconstitutionally take their property. Further, it is a taking for a private purpose, which is prohibited in any event under Article II, § 17 of the Arizona Constitution (with certain exceptions not applicable here). The designation of the Critical Groundwater Area, if FICO's construction were correct, would confiscate the companies' rights to water for industrial purposes and unconstitutionally confer on FICO the right to the use of the entire basin supply.

In addition, Article II, § 4 of the Arizona Constitution and the Fourteenth Amendment of the United States Constitution, provide that no person shall be deprived of property

without due process of law. Yet, if the designation of a critical groundwater area is completely determinative of where one may and may not use water within the same groundwater basin, then the procedures for designating such critical areas fall far short of the minimum requirements of procedural due process. For example, due process of law requires that property not be taken without notice and opportunity to make defense. McManus v. Industrial Commission, 53 Ariz. 22, 85 P.2d 54 (1938). Under the groundwater Code, the mining companies' rights under the reasonable use doctrine, the beneficial enjoyment of their lands, and their capital investment of over \$630,000,000.00, can all be confiscated with no more notice than publication of the proposed critical groundwater area once each week for four successive weeks in a newspaper of general circulation in the county. A.R.S. § 45-309. Such notice completely falls far short of the constitutional requirements. This is particularly true since the notice itself and statutes which authorize it purport to affect only future agricultural users.

CONCLUSION

It is easy to see why FICO does not once mention, much less discuss, anywhere in any of its three Briefs the meaning of the statutory terms "groundwater basin" or "subdivision" of a groundwater basin. Rather, by choosing to complain only in terms of "outside the critical area," FICO is attempting to avoid proving the factual allegations of its case and to foreclose consideration of the facts and equities which clearly entitle the mining companies to their present water uses and which might limit FICO's own extravagant uses.

FICO takes the position that the designation and boundaries of a "critical groundwater area" are all important but that the establishment and boundaries of a "groundwater basin" or a "subdivision thereof" are meaningless. If FICO did not assert this position, it would be forced to concede that Duval and the other mining companies, owning lands entirely within the Sahuarita-Continental Subdivision of the Santa Cruz Groundwater Basin and both inside

and outside the boundaries of the Critical Area have legally vested, statutorily and constitutionally protected property rights to use groundwater underlying the Subdivision, so long as the uses are reasonable and are upon lands lying within the Subdivision and hence over the common supply, as a matter of law.

The terms "groundwater basin" and "subdivision thereof" have precise meanings under the groundwater statutes and at common law, and these meanings reflect hydrological realities. They do not reflect arbitrary surface features such as irrigable acreage. Well recognized and defined consequences arise, both at common law and under the groundwater Code, from the identification and finding of the boundaries of the common supply, the "distinct body of groundwater", the "subdivision". One such consequence and the very purpose for establishing and declaring the existence of a groundwater subdivision is to identify the lands whose owners may justifiably rely upon being entitled to the use of water for reasonable and beneficial purposes within such

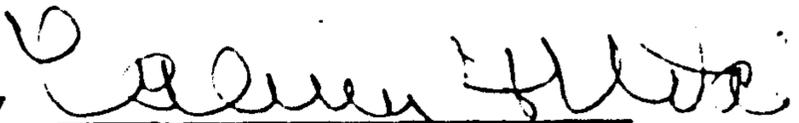
basin subdivision.

As a matter of law, both under the Arizona groundwater Code and under the Arizona doctrine of reasonable use, Duval and the other mining companies are entitled to their present groundwater uses.

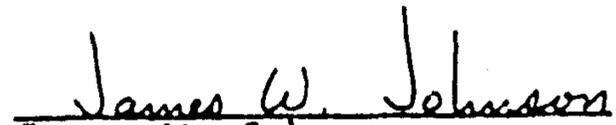
Respectfully submitted,

FENNEMORE, CRAIG, von AMMON
& UDALL

By


Calvin H. Udall

By


James W. Johnson

ELMER C. COKER



Attorneys for Duval Corpora-
tion and Duval Sierrita
Corporation

NOTE:

Because this case has not been tried, some of the economic and physical facts stated in this Brief do not appear of record below. Where facts are of record below appropriate references to the record have been made. As to other facts, a diligent effort has been made to secure the most reliable information available, and this verification is submitted in support of the latter facts.

STATE OF ARIZONA)
) ss.
County of Maricopa)

B. G. Messer, being first duly sworn upon his oath deposes and says that he is a Vice President of Duval Corporation and Duval Sierrita Corporation and is duly authorized to make this verification on their behalf.

He has read the foregoing Motion and Brief and is familiar with the contents thereof. He knows or has personally investigated the facts stated therein relating to wells and land holdings of the parties, cropped acreages and retired acreages, water production, water consumption, copper production, employment, and taxes, and states that such facts are true to the best of his information and belief.

B. G. Messer
B. G. Messer

Subscribed and sworn to before me, the undersigned notary public, this 23rd day of December, 1974.

Debra M. Latta
Notary Public

My Commission Expires:

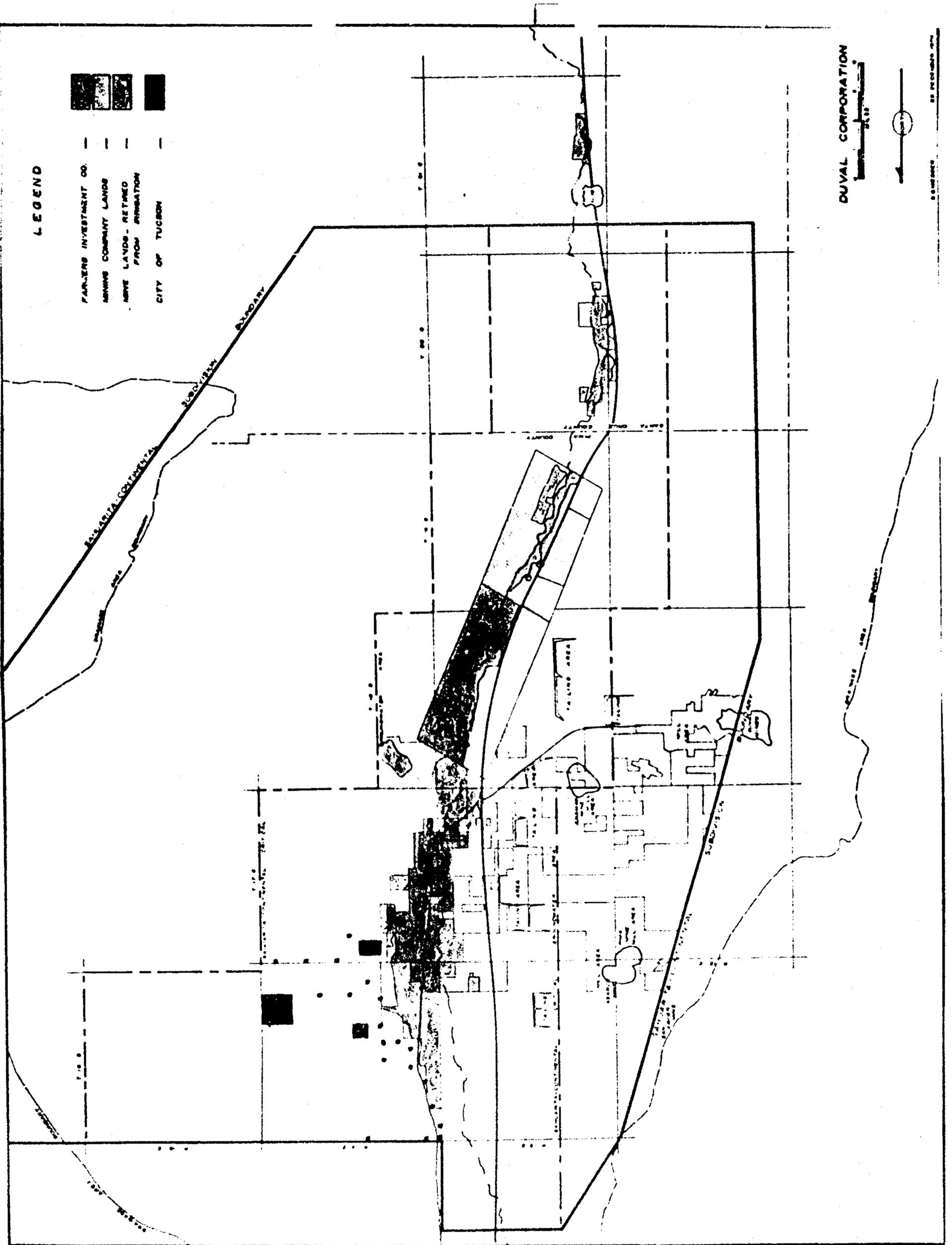
6-3-1977

Appendix A - Map of the

Sahuarita-Continental
Subdivision of the
Santa Cruz Groundwater
Basin and the
Properties of the Parties

LEGEND

- FARMERS INVESTMENT CO.
- MINING COMPANY LANDS
- ARMY LANDS - RETIRED FROM ARMBATTN
- CITY OF TUCSON



DUVAL CORPORATION



AS PREPARED BY

STATE OF ARIZONA)
) ss.
County of Maricopa)

JAMES W. JOHNSON, being first duly sworn
says:

Affiant mailed two copies of Duval's
Petition and Brief to Musick, Peeler & Garrett,
attorneys for Appellee Pima Mining Company,
properly addressed and postage prepaid, and
hand delivered two copies to Snell & Wilmer,
attorneys for Appellant, and to the Attorney
General of Arizona, attorney for State Land
Department, on December 24, 1974.

James W. Johnson
JAMES W. JOHNSON

SUBSCRIBED and sworn to before me this 24th
day of December, 1974.

Louis E. Corum
Notary Public

My Commission Expires:

My Commission Expires Jan. 17, 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 Petitioners
Duval Corporation and Duval Sierrita Corporation (74 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

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