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PHOENIX, ARIZONA 85003

1 IN THE SUPREME COURT OF THE STATE OF ARIZONA

2 In Banc

3 FARMERS INVESTMENT COMPANY,)
4 a corporation,)

5 Appellant,)

6 v.)

7 ANDREW L. BETTWY, as State Land)
8 Commissioner, and the STATE LAND)
9 DEPARTMENT, a Department of the)
10 State of Arizona, and PIMA MINING)
11 COMPANY, a corporation,)

12 Appellees.)

13 FARMERS INVESTMENT COMPANY,)
14 a corporation,)

15 Appellant,)

16 v.)

17 THE ANACONDA COMPANY, a corporation;)
18 AMAX COPPER MINES, INC., THE ANACONDA)
19 COMPANY, as partners in and consti-)
20 tuting ANAMAX MINING COMPANY, a)
21 partnership,)

22 Appellees.)

23 CITY OF TUCSON, a municipal cor-)
24 poration,)

25 Appellant,)

26 v.)

27 ANAMAX MINING COMPANY, and DUVAL)
28 CORPORATION and DUVAL SIERRITA)
29 CORPORATION,)

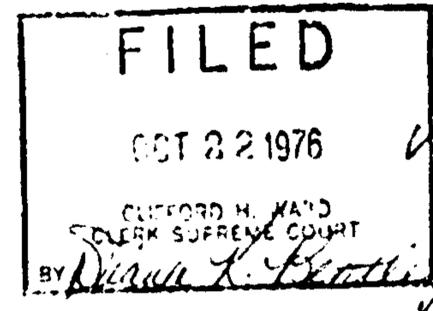
30 Appellees.)

31 DUVAL CORPORATION and DUVAL SIERRITA CORPORATION
32 (collectively "Duval") concede that, for the reasons set forth
in the Memorandum which follows, the Motion for Rehearing filed
by the City of Tucson ("Tucson") should be granted.

Duval further urges, for the reasons set forth in
the Memorandum below, that the Opinion of the Court should be

No. 11439-2

RESPONSE OF DUVAL COR-
PORATION AND DUVAL
SIERRITA CORPORATION TO
MOTION FOR REHEARING OF
CITY OF TUCSON AND
MEMORANDUM IN SUPPORT
OF MOTIONS FOR REHEARING



1 vacated and a rehearing granted on the entire case.

2 Respectfully submitted this 22d day of October, 1976.

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MEMORANDUM

1
2 PREFATORY STATEMENT.

3 Before the Court are a municipal corporation and
4 several private corporations. One private corporation, the
5 plaintiff, engages in farming. The other private corporations,
6 the defendants, engage in mining and milling copper ore. (See
7 pp. 17, et seq.)

8 There exist facts of overwhelming significance which
9 must be accepted by the Court:

10 First: ALL OF THE PRIVATE CORPORATIONS ARE ENGAGED IN
11 THE IDENTICAL ACTIVITY. EACH ONE OF THEM PUMPS GROUNDWATER FROM
12 ONE PLACE ON ITS LANDS AND TRANSPORTS IT FOR USE AT ONE OR MORE
13 OTHER PLACES ON ITS LANDS.

14 Second: ALL OF THE PLACES FROM WHICH ALL PARTIES PUMP
15 GROUNDWATER FROM THEIR LANDS AND ALL OF THE PLACES TO WHICH ALL
16 PARTIES, EXCEPT TUCSON, TRANSPORT GROUNDWATER FOR USE ON THEIR
17 LANDS OVERLIE THE SAME "COMMON SUPPLY" OR "DISTINCT BODY OF
18 GROUNDWATER".

19 The majority Opinion states that the question presented
20 is whether the law permits "percolating waters to be used off the
21 lands from which they are pumped, if thereby others whose lands
22 overlie the common supply are injured or damaged thereby. [sic]"
23 (Opinion, p. 9).

24 The majority begs the question. The answer is
25 obviously "no". This was not the issue below and is not the
26 issue before this Court. The real issue presented, as correctly
27 pointed out and discussed in the dissenting Opinion, is "the
28 meaning of 'on the land' and 'off the land' in the American
29 doctrine of reasonable use" (Opinion, p. 24, emphasis

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1 added).^{1/}

2 Stated in the context of Bristor and Jarvis, the real
3 issue before the Court is:

4 An owner of land pumps percolating water from one place
5 on his lands and transports it to another place on his lands
6 where it is beneficially used. If the place of pumping and the
7 place of use both overlie a common supply, is such water "taken
8 in connection with a beneficial enjoyment of the land from which
9 it is taken"^{2/} or is the use of such water "off the lands from
10 which" it is pumped?^{3/}

11 The holding of the Court in the Anamax appeal was:

12 ". . . Water may not be pumped from one
13 parcel and transported to another just
14 because both overlie the common source of
15 supply if the plaintiff's lands or wells upon
16 his lands thereby suffer injury or damage."
(Opinion, p. 14).

16 This holding is not responsive to either the "question
17 presented", as stated by the Opinion, or to the real question
18 presented. When groundwater is pumped and this pumping is
19 accompanied by use, the common supply is inevitably depleted. If
20 the common supply is diminishing, the lands of the pumper and of
21 all other owners of land over the common supply are surely
22 damaged. Hence the holding is unclear and its effect cannot be
23 perceived because it provides no explanation as to why ground-
24 water may not be pumped from one place but used at another place
25 on an owner's lands overlying a common supply.

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29 ^{1/} See also Opinion, p. 27: ". . . whether the mines could
30 use the water in question depends on whether their use is
'on the land' or 'off the land'."

31 ^{2/} Bristor v. Cheatham (Bristor II), 75 Ariz. 227, 237-238,
255 P.2d 173 (1953).

32 ^{3/} Jarvis v. State Land Department (Jarvis II), 106 Ariz. 506,
508, 479 P.2d 169 (1970).

1 The word "parcel" has no inherent or unique meaning and
2 is not defined by the Court. The majority explains that
3 transportation is unlawful where the pumping confers "no benefit
4 to the . . . land on which the pumping was conducted". The
5 Opinion further indicates that groundwater cannot be transported
6 to any lands "other than lands on which the pumping occurred"
7 (Opinion, p. 12). This language provides no clarification
8 whatever of the meaning of the word "parcel", and raises the
9 obvious question: What is the definition of "land on which the
10 pumping was conducted"? What does the Court mean by "lands on
11 which the pumping occurred"?

12 The only other clue to the meaning of the words
13 "parcel" or "lands" appears in the Court's suggestion that water
14 may not be pumped at a point down gradient from the pumping of
15 another owner (Opinion, p. 13).

16 Considering all of the language of the Court in
17 context, the Opinion seems to relate a "parcel" to a well site.
18 But what is a well site?

19 While it is clear that the Court has necessarily
20 concluded that Anamax' uses are "off the land", the Opinion
21 simply fails to disclose what the Court means by "parcel" or by
22 "off the land".

23 The holding of the Court in the Pima appeal was that

24 ". . . the pumping of water from the
25 Santa Cruz basin is unlawful where it
26 depletes the common source of supply of other
landowners and damages their lands,"
(Opinion, p. 17).

27 Like the Anamax holding, this holding is unclear. It
28 is acknowledged that the common source of supply of the Santa
29 Cruz Basin is diminishing. If it is assumed that any of the
30 water pumped is consumed by transpiration, evaporation or
31 otherwise, this holding expresses a universal proposition which
32 leads nowhere.

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1 The pumping and consumptive use of water from the Santa
2 Cruz Basin or any other basin always depletes the common supply;
3 and if depletion exceeds recharge, injury is always caused to the
4 lands of other pumpers in the basin. This is true whether the
5 water is transported away from the basin or whether the water is
6 consumptively used by each pumper up gradient from and even
7 within 100 feet of his well head. Though the amount of depletion
8 and the extent of damage or injury are highly variable, it is
9 only transportation and uses which are either outside the basin
10 or away from the common supply which are condemned by the
11 reasonable use doctrine.

12 The above-quoted holding as to Pima would seem to imply
13 that in this case there may occur transportation away from the
14 basin. Obviously, the Court could not have intended this impli-
15 cation because none of the defendants, even Tucson, is taking
16 water away from the Santa Cruz Groundwater Basin. It follows
17 that the Court's "parcel" holding must also have been intended to
18 apply to Pima.

19 So, when the majority Opinion condemns transportation
20 and use on "another parcel", or "away from" the point of pumping,
21 the reader is helpless to know: How big is a parcel? What
22 constitutes "another parcel"? Must a parcel be shown to have any
23 hydrological characteristics? Is the meaning or size of a parcel
24 to be determined by the language of instruments of conveyance?
25 By section, township and range? By historic uses? Are natural
26 or man-made barriers or surface objects relevant to the term
27 "parcel"? Do the terms "up gradient" and "down gradient" refer
28 to land surface elevation or water table elevation?

29 These questions are real. And they are unanswerable in
30 terms of any sort of comprehensible judicial or hydrological
31 standard which can be evenly applied to any fact situation.
32 These questions and innumerable others are bound to arise under

1 the ruling of the majority Opinion. They point up the practical
2 and judicial fallacy of the Court's "parcel supply" concept.
3 They further show that it is impossible to discern from the
4 Opinion what the Court meant by "off the land" or "another
5 parcel".

6 The vagueness of the Court's holdings, coupled with the
7 failure of the majority to state precisely the circumstances
8 under which the majority Opinion applies, are highly significant.
9 When an appellate court adopts as its own law the rules of
10 decisions from other jurisdictions, the methodology of the common
11 law, not to mention ordinary justice and fair play, require that
12 the facts or circumstance of the adopted decisions be similar or
13 at least analogous to those before the Court. Otherwise,
14 fragments or passages from the adopted decisions may be taken out
15 of context and applied to different facts to reach a result
16 bearing no relationship to the holdings of the decisions adopted
17 or relied upon.

18 This is exactly what has occurred here.

19 The majority Opinion cites two cases from Pennsylvania
20 and Oklahoma^{4/} which are said to support the "off his land", off
21 the "parcel" rule announced by the majority. But, if the actual
22

23
24 ^{4/} Rothrauff v. Sinking Spring Water Co., 339 Pa. 129, 14 A.2d
25 87 (1940), and Canada v. City of Shawnee, 179 Okla. 53, 64
26 P.2d 694 (1936). The statement quoted from Canada appeared
27 first in the case of Meeker v. City of East
28 Orange, 77 N.J.L. 623, 74 A. 379 (1909). These three
29 cases, along with the English, New Hampshire and New York
30 cases which gave rise to the American doctrine of reason-
31 able use, are discussed in some detail in the Appendix to
32 this Memorandum. The weight given to Rothrauff is
immediately apparent when it is noted that it is the
case which is quoted from or specifically relied upon by
name in every reasonable use case ever decided by this
Court. Though not cited, it is quoted from in the
dissenting opinion in Anway, infra, (87 Ariz. at 214).

Neither the facts nor the holding of Rothrauff bear any
resemblance to any of the Court's previous reasonable use
cases.

1 facts and the real holdings of these decisions are examined, they
2 lend no support whatever to the rule stated in the majority
3 Opinion. This is most apparent from the analysis in the attached
4 Appendix. Quite the contrary, these decisions and many others
5 stand for two basic propositions which are the American
6 reasonable use doctrine.

7 First, WHEN TWO OR MORE OWNERS OF LAND PUMP WATER FROM
8 THE COMMON SUPPLY WHICH IS PERCOLATING BENEATH THEIR LANDS AND
9 BENEATH THE LANDS OF OTHER ADJACENT AND NEIGHBORING OWNERS, THEY
10 MAY BENEFICIALLY OR REASONABLY USE THIS WATER ON THEIR OWN LANDS,
11 EVEN THOUGH THEY MAY DEplete NOT ONLY THEIR OWN SUPPLIES BUT ALSO
12 THE SUPPLIES OF OTHER ADJOINING OR NEIGHBORING OWNERS WHO ARE
13 PUMPING WATER FROM THE COMMON SUPPLY FOR USE ON THEIR LANDS.

14 Second, AN OWNER OF LAND MAY NOT PUMP WATER FROM
15 BENEATH THAT LAND AND FROM THE COMMON SUPPLY BENEATH NEIGHBORING
16 OR ADJOINING LAND AND THEN CONVEY THAT WATER AWAY FOR SALE OR
17 DISTRIBUTION AT DISTANT PLACES; NOR MAY HE CONVEY SUCH WATER FROM
18 HIS LAND FOR USES NOT RELATED TO HIS OWNERSHIP, IF THE
19 GROUNDWATER SUPPLY OF ANY ADJACENT, NEIGHBORING OR REMOTE OWNER
20 OF LAND OVERLYING THE COMMON SUPPLY IS THEREBY DEPLETED.

21 Every reasonable use case decided by this Court until
22 the present has espoused the propositions just stated.

23 The concept of "common supply" is the heart of the
24 doctrine of reasonable use. No other approach is workable.
25 Percolating groundwater does not confine itself to property
26 lines. The courts have recognized that they must deal with
27 groundwater as it occurs in nature. Many words have been used to
28 describe the "common supply" -- for example, the "water bearing
29 strata", the "groundwater aquifer", the "groundwater basin", the
30 "alluvial plain", the "saturated sediments", the "artesian belt
31 or district", or as termed by the Arizona legislature, a
32 "distinct body of groundwater" -- but the concept is the same.

1 Rights in groundwater cannot be meaningfully defined or
2 effectively administered in any unit smaller than a determinable
3 common supply. It is as much a compulsion of nature as a rule of
4 law.

5 The impossibility of adjudging conflicting or competing
6 water rights on a scale smaller than that of the common supply is
7 the very reason for the American rule of reasonable use in the
8 first place. See, Bristor II, 75 Ariz. at 236. To apportion to
9 each overlying owner a proportionate share of the subterranean
10 percolating water is the doctrine of correlative rights, and is
11 often impossible. Bristor II, supra. To attempt to guarantee to
12 each overlying owner a property right in all of the molecules of
13 percolating groundwater within the confines of his parcel
14 boundary lines at any given time is impossible. To attempt to
15 protect the owner against withdrawal and beneficial use of those
16 molecules by another owner of hydrologically connected property
17 is also impossible if the rights of such owners are otherwise
18 equal. This is the "parcel supply" rule of the majority Opinion.

19 The parcel supply rule misconceives the nature of the
20 common law ownership of percolating water. Wholly aside from the
21 policy question of whether percolating water, like surface water,
22 should be public property with the only vested individual
23 property right being that of use, the ownership of percolating
24 water at common law is unique and usufructory only. This
25 ownership is inchoate and becomes absolute only after percolating
26 water is captured. This has to be true because water percolating
27 under land is no different from air, birds or wild game passing
28 over it. With this in mind, the Court might have had second
29 thoughts when it adopted the "parcel supply" rule. This theory
30 would readily apply to soils, rocks or minerals within property
31 lines "to the bowels of the earth", but it cannot apply to
32 percolating water.

1 The contention of the appellees, which was upheld in
2 the trial court, was that groundwater may be pumped at one place
3 but beneficially used at another place on an owner's lands so
4 long as those lands overlie the common source of supply, so that
5 all of the water not actually consumed may return to replenish
6 the common supply.

7 The Opinion first inaccurately states this contention
8 (pp. 11-12) and then observes that appellees' position "is not
9 supported by citation of any precedent" (Opinion, p. 13).
10 Although many other cases were cited in addition to this Court's
11 holdings in Bristor, Jarvis and Anway, these decisions alone are
12 compelling precedents for appellees' position.

13 On the other hand, if there has ever been one case
14 decided by any court involving a dispute among adjoining or
15 neighboring landowners which extends the reasonable use doctrine
16 to prevent a landowner from withdrawing groundwater from the
17 common supply and reasonably and beneficially using that water on
18 his own lands overlying that supply, it is not cited in the
19 majority Opinion or in any prior opinion of this Court.

20 The extension of the reasonable use doctrine by the
21 majority to apply to this dispute between adjoining and
22 neighboring owners concerning their uses of groundwater over the
23 same common supply is said to be based on this Court's opinion in
24 Bristor and upon the Bristors' Complaint which was held to have
25 stated a claim for relief. The statements in the Opinion (p. 12)
26 to the effect that the uses of groundwater complained of in
27 Bristor were on lands overlying the common supply are patently
28 erroneous. This error appears not only from the face of the
29 Complaint but also from the assignments of error, propositions of
30 law and opinions in Bristor 1.^{5/} Thus, the assumed factual
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32 ^{5/} Bristor v. Cheatham (Bristor I), 73 Ariz. 228, 240 P.2d 185
(1952).

1 situation from which the majority derived its "parcel supply"
2 rule is the complete opposite of the real factual situation set
3 forth in the Bristor I complaint. This incorrect assumption by
4 the majority was the principal underpinning of its opinion. The
5 real facts compel the opposite result!

6 Finally, the Court rejects the "common supply" concept
7 because replenishment of the common supply is "illusory". No
8 credit whatever is given, and no justification or defense arises
9 from the fact that a defendant returns to the common supply all
10 of the water he pumps which is not actually consumptively used by
11 him. The majority says this is so because "the replenishment of
12 the supply does not benefit the [plaintiff] users of water up
13 gradient from the point of return" (Opinion, p. 13).

14 The question which obviously then arises is: If down
15 gradient replenishment of the common supply does not benefit an
16 up gradient user, how can down gradient pumping injure that same
17 up gradient user?

18 The majority Opinion answers this question by saying:

19 "Inevitably, sooner or later, as the
20 supply diminishes, appellant [plaintiff] will
be irreparably injured." (Opinion, p. 14).

21 If this answer is valid, how, in the name of common
22 sense, will down gradient replenishment not benefit an up
23 gradient user if down gradient pumping is certain to cause injury
24 to the same up gradient user? The reasoning of the Court says:
25 If you take an acre-foot of water from a common supply, an up
26 gradient user will thereby ultimately be injured; but if you
27 replenish the same common supply with an acre-foot of water, the
28 up gradient user will not thereby ultimately be benefited.

29 By its holdings and the foregoing reasoning, the
30 majority Opinion applies half of the common supply concept which
31 recognizes that pumping diminishes a common supply but it rejects
32 the other half which recognizes that replenishment increases a

1 common supply.

2 SUMMARY OF THE ERRORS IN THE MAJORITY OPINION.

3 As it pertains to the issues before the Court, the
4 American doctrine of reasonable use may be succinctly summarized
5 as follows:

6 In the words of Neal:

7 "Withdrawal of groundwater from a common
8 supply for a beneficial use upon lands which
9 do not overlie the common supply is unlawful
10 if the water supply . . . of another property
11 owner whose lands overlie the common supply
12 . . . is . . . depleted."^{6/}

13 Distilling the holdings of Jarvis II and Anway:

14 Withdrawal of groundwater from a common
15 supply for a beneficial use upon other lands
16 which overlie the common supply is not
17 unlawful, even if the water supply of another
18 property owner whose lands overlie the common
19 supply is depleted.^{7/}

20 Since Bristor^{8/} and until this case, the Court
21 steadfastly upheld the reasonable use doctrine. The Court has
22 consistently applied the "common basin" or "common supply"
23 concept of the doctrine by allowing the pumping and beneficial
24 use of groundwater on land overlying the same "common supply" and
25 on land within the "same groundwater basin".

26 With equal consistency, the Court has condemned as
27 unreasonable or unlawful the pumping and transportation of
28 groundwater from one "groundwater basin" or "common supply" for
29 use in another basin or over another common supply.

30 The majority Opinion is erroneous and it abrogates the
31 unreasonable use doctrine

32 -- by discarding its common supply concept, without

33 ^{6/} Neal v. Hunt, 112 Ariz. 307, 310, 541 P.2d 559 (1975)
34 (emphasis added).

35 ^{7/} State v. Anway, 87 Ariz. 206, 349 P.2d 744 (1960); Jarvis
36 II, supra.

37 ^{8/} Bristor II, supra.

1 which the doctrine can neither function nor exist;

2 -- by attempting to determine correlative rights in a
3 dispute among adjoining and neighboring owners involving
4 beneficial uses of groundwater within the same basin and over the
5 same body of groundwater which is the common supply of all owners
6 and is subjacent to the pumps and points of use (except Tucson's)
7 of all owners;

8 -- by engrafting upon the reasonable use doctrine the
9 "first in time - first in right" rule of the law of prior
10 appropriation;

11 -- by collaterally rejecting long standing adminis-
12 trative findings and determinations made pursuant to valid
13 delegations of legislative power which established that the
14 Sahuarita-Continental Subdivision of the Santa Cruz Groundwater
15 Basin overlies a separate, indivisible and "distinct body of
16 groundwater";

17 -- by impliedly overruling this Court's decisions in
18 State v. Anway, Jarvis II and Neal v. Hunt, supra;

19 -- by attempting to distinguish the ultimate holding of
20 the Bristor cases with the assumption of a pleaded fact which
21 does not exist and which is directly contrary to the facts
22 alleged in the Bristor Complaint;

23 -- by stating that its holdings in Jarvis I and Jarvis
24 II were predicated on the pumping of water from a critical
25 groundwater area when, in reality, the existence of a critical
26 area was wholly immaterial to any issue in those cases, except
27 the issue of legal harm;

28 -- by making express and implied assumptions of fact
29 which are without support or foundation in the record before the
30 Court;

31 -- by assuming principles of hydrology which are
32 palpably unsound; and

1 -- by seizing on dicta from cases in other jurisdic-
2 tions and then applying that dicta unrealistically and
3 illogically.

4 A rehearing must be granted which reinstates the
5 reasonable use doctrine. The Court should revoke its decisions
6 and reject Fico's attempt to have the Court determine, without
7 trial, a dispute among neighboring and adjoining owners who
8 beneficially use groundwater on their own lands in the same
9 groundwater basin and over the same supply.

10 TUCSON'S APPEAL.

11 The partial judgment against Tucson should have been
12 affirmed. Unfortunately, the Opinion does not state why the
13 judgment against Tucson was affirmed. For this reason, rehearing
14 should be granted.

15 The Opinion discusses several grounds which the Court
16 may have used to affirm the judgment against Tucson, but the
17 Court does not state which of them is the basis for its decision.
18 Because some of those grounds are erroneous, clarification is
19 important. It is important to know how the Court might rule in
20 future similar cases, and it is important for Tucson to know
21 where it may justifiably turn for future water necessities.

22 For example, it appears from the Opinion that the
23 Court's decision could have been based on any one of the
24 following grounds:

25 1. That Tucson's withdrawals are down gradient from
26 Duval's.

27 The Court states:

28 ". . . Much of the water used and
29 distributed for municipal purposes by the
30 City of Tucson is obtained from wells located
31 in the valley of the Santa Cruz River and
32 within its watershed downstream from lands
owned by FICO and the mining companies and
downstream from the points at which FICO and
the mining companies can return water to the
underground water supply." (Opinion, p. 18,

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1 emphasis added).

2 This would have been an erroneous basis on which to
3 affirm judgment since the words "downstream" and "river valley"
4 relate to surface waters subject to the doctrine of prior
5 appropriation. Duval did not claim in its summary judgment
6 motion that Tucson was interfering with Duval's appropriative
7 rights. If the quoted language is an application of the "up
8 gradient-down gradient" rule announced by the court earlier in
9 the Opinion, more explanation is needed, as was pointed out by
10 the City of Tucson in its motion for rehearing.

11 2. That Tucson's wells are located in the Sahuarita-
12 Continental Critical Area.

13 The majority repeatedly refers to the Critical Area.
14 Sometimes the references are patently erroneous as in "the
15 Sahuarita-Continental Subdivision of the Sahuarita-Continental
16 Critical Groundwater Area of the Santa Cruz groundwater basin."
17 (Opinion, p. 18). The Critical Area is, of course, part of the
18 Subdivision, instead of the other way around, as the Court
19 mistakenly states.

20 The Court makes other references to the Critical Area
21 such as pointing out that Tucson owns no cultivated lands within
22 the "Critical Area" (Opinion, p. 19). A portion of the Jarvis
23 Opinion is quoted which the court says answered "the question
24 whether Tucson could pump its water out of the Marana Critical
25 Groundwater Area . . .". (Opinion, p. 20, emphasis added).
26 Again, the Court seems to be thinking in terms of the Critical
27 Area.

28 But then the Court expressly disclaims the Critical
29 Area theory:

30 "This case, like FICO's against Anaconda
31 [presumably meaning Anamax], is not predi-
32 cated on the pumping of water from a Critical
Groundwater Area. . ."
(Opinion, p. 21, emphasis added).

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1 3. The existence of the Santa Cruz Basin.

2 The Court's opinion might be based on all parties
3 having "acknowledged . . . that the Santa Cruz basin does not
4 have sufficient water to supply existing waters." (Opinion,
5 p. 21, emphasis added). It is stated that Duval has standing to
6 enjoin the City's withdrawal because, "Duval has an interest in
7 preserving the groundwater supply in the Santa Cruz basin."
8 (Opinion, p. 22, emphasis added).

9 To sustain judgment on this basis would have been
10 erroneous because Tucson and the places where Tucson's customers
11 use groundwater lie within the Santa Cruz Groundwater Basin.

12 4. The fact that Tucson is pumping water from the
13 Sahuarita-Continental Subdivision of the Santa Cruz Groundwater
14 Basin and transporting it for use in the Tucson Groundwater
15 Subdivision of the Santa Cruz Groundwater Basin.

16 This is the correct basis for the decision.

17 The Court recites that the trial court entered
18 judgment on this basis (Opinion, p. 20), and it correctly but
19 partially summarizes this claim for relief as stated in Duval's
20 counterclaim (Opinion, p. 19).

21 But having done this, the Court never again
22 mentions the legal significance or even the existence of the
23 Subdivision until the last paragraph of the Opinion which simply
24 affirms the judgment of the trial court.

25 Of course, the Court could have intended to affirm
26 the trial court on this basis without further comment, yet the
27 case is important to the residents of Tucson who may not be able
28 to use water from the Subdivision in the future and to other
29 water-users of the State seeking guidance about where they may
30 safely rely on the availability of water. Under these circum-
31 stances, clarification is genuinely warranted. The parties and
32 all users of groundwater deserve to know which portions of the

1 subdivision ("distinct body of groundwater") approach, and what
2 parts of the Groundwater Code which gave rise to it, were
3 rejected for purposes of the action taken by the Court against
4 Anamax and Pima, but were preserved for purposes of the action
5 taken against Tucson.

6 5. The doctrine of reasonable use.

7 Finally, the Court states:

8 "This case is controlled by the American
9 doctrine of reasonable use as construed in
10 Bristor v. Cheatham, 75 Ariz. 227, and Jarvis
11 v. State Land Dept., 106 Ariz. 506."
(Opinion, p. 21).

12 Seemingly, this statement tells why the decision is
13 affirmed. But there is no specific recitation of facts to show
14 how the American doctrine of reasonable use in any way relates to
15 Tucson's situation. The facts discussed relate to theories of
16 appropriation and statutory creatures, such as "critical areas",
17 and "groundwater subdivisions", none of which have been part of
18 the American doctrine of reasonable use. The Court states the
19 case is controlled by the American doctrine of reasonable use as
20 construed by Jarvis, yet in the very same paragraph the Court
21 states that Jarvis was "predicated on the pumping of water from a
22 Critical Groundwater Area. . . ."

23 There is just nothing in the Opinion to indicate how
24 the doctrine of reasonable use or the Bristor and Jarvis cases
25 are controlling. The whole Opinion cries out for clarification
26 of the meaning of American doctrine of reasonable use, the
27 Bristor and Jarvis cases, and what, if anything, is left of them
28 in Arizona after the majority Opinion. Without this knowledge,
29 it is impossible for anyone to know what the Court means when it
30 says merely that Tucson's appeal is controlled by these
31 authorities.

32 Stated briefly, the judgment against Tucson should be
sustained on the following basis:

1 Tucson violates the doctrine of reasonable use because
2 it concentrates groundwater on small well sites located in the
3 Sahuarita-Continental Groundwater Subdivision, which, in and of
4 itself, is a distinct body and common supply of groundwater. It
5 transports that water and sells it to customers in the Tucson
6 Groundwater Subdivision, which is a separate distinct body and
7 common supply of groundwater. Tucson concedes that its pumping
8 further depletes the already overdrafted common supply of the
9 Sahuarita-Continental Subdivision and that the water transported
10 by it to the Tucson Subdivision does not return to the "common
11 supply," the Sahuarita-Continental Subdivision. Hence, Tucson
12 violates the reasonable use doctrine as adopted by the Court and
13 the legislature.

14 THE EFFECTS OF GROUNDWATER LEGISLATION ON THIS CASE.

15 The legislature has paramount power to adopt statutes
16 which, if not constitutionally or otherwise defective, are
17 binding upon every citizen and landowner in the State of Arizona
18 and upon every agency of government, including the courts.

19 If properly and constitutionally delegated, this power,
20 insofar as it relates to water and water rights, can be invested
21 in administrative agencies such as the Land Department.

22 Southwest Engineering Co. v. Ernest, 79 Ariz. 403, 291 P.2d 764
23 (1955). Determinations made by the Land Department pursuant to
24 statute are as binding as a decree of a court and may not be
25 collaterally set aside. Parker v. McIntyre, 47 Ariz. 484, 493,
26 56 P.2d 1337, 1341 (1936).

27 Duval believes the majority has failed to consider the
28 effect of specific legislative enactments on matters involved in
29 this case. The Court's present Opinion and prior decisions have
30 failed to perceive that the legislature, and not this Court,
31 first adopted the American reasonable use doctrine in Arizona.
32 Review and consideration of some of the basic principles of

1 Arizona water law, as established by the legislature, is
2 essential.

3 The legislature's first significant groundwater enact-
4 ments were against the backdrop of an unbroken line of decisions
5 which had begun with Howard v. Perrin in 1904.^{9/} Those
6 cases^{10/} had held:

7 "Percolating water, unconfined to a
8 definite channel, is not the subject of
9 appropriation, but belongs to the realty
10" (McKenzie, 20 Ariz. at p. 5).

11 Ownership of percolating water was absolute.^{11/} It was
12 not limited by beneficial use, as in the case of appropriable
13 waters. Justice Alfred Lockwood said, "[O]bviously, then, the
14 Howell Code left percolating subterranean waters as the property
15 of the owner of the land, subject to the rules of the common law"
16 (Maricopa County Municipal Water Conservation District, 39 Ariz.
17 at 78-9). At common law, the owner could deal with the water
18 under his property at will. He could transport as much as he
19 could pump as far away as he chose for any purpose. Even waste
20 was permitted.

21 Summarizing the common law rule in Bristor II, Justice
22 Windes noted that an owner of percolating water "may extract the
23 same for any purpose he chooses, with a resulting damage to an

24 ^{9/} Howard v. Perrin, 8 Ariz. 347, 76 P. 460 (1904), affd. 200
25 U.S. 71, 26 S. Ct. 195. It can be argued that the rule was
dicta in this case, but not so with later cases.

26 ^{10/} McKenzie v. Moore, 20 Ariz. 1, 176 P. 568 (1918);
27 Brewster v. Salt River Valley Water Users' Association,
28 27 Ariz. 23, 229 P. 929 (1924); Maricopa County Municipal
29 Water Conservation District v. Beardsley Land and Invest-
30 ment Company, 39 Ariz. 65, 4 P.2d 369 (1931); Fourzan v.
31 Curtis, 43 Ariz. 140, 29 P.2d 722 (1934); Campbell v.
32 Willard, 45 Ariz. 221, 42 P.2d 403 (1935); Adams v. Salt
River Valley Water Users' Association, 53 Ariz. 374, 89
P.2d 1060 (1939); and Bristor, supra.

^{11/} But the ownership became "absolute" only upon extraction
from the land. See page 7, supra.

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1 adjoining owner without liability therefor. . . ." (Bristor II,
2 75 Ariz. at 235, emphasis added). Ostensibly, he went on to
3 reject the common law rule in favor of the American doctrine of
4 reasonable use.

5 The Court did not then recognize, and has not since
6 recognized, that the rule of absolute ownership had already been
7 abrogated and the reasonable use doctrine had already been
8 adopted by the legislature five years earlier in 1948.

9 In derogation of common law, the legislature forbade
10 the waste of groundwater and declared it a crime. Later, the
11 legislature flatly prohibited new agricultural uses of
12 groundwater in prescribed areas. It thus determined that such
13 uses, like waste, were unreasonable.

14 Just as this Court was later to do, the legislature
15 embraced the common supply concept of the doctrine. But, as this
16 Court has not done, it also provided precise definitions by which
17 the limits of the common supply could be delineated. The concept
18 of common supply had long had a clear judicial meaning but, as
19 noted above, had gone under various names, such as "water bearing
20 strata", "groundwater aquifer", "groundwater basin", "alluvial
21 plain", "saturated sediments", "artesian belt or district",
22 "water basin", "common basin", as well as "common supply". In
23 each case, the words were used to describe a distinct body of
24 groundwater, and, therefore, the smallest judicially manageable
25 unit recognized by the courts.

26 With more precision than the courts could convey, by
27 the use of terms such as "common supply" and others commonly em-
28 ployed, the legislature turned to the more exact science of
29 hydrology to define the same thing. In Arizona, a "groundwater
30 basin" is:

31 ". . . land overlying, as nearly as may be
32 determined by known facts, a distinct body of
groundwater. . . ." (Laws, 1948, Sixth S.S.,
Chap. 5, § 2, A.R.S § 45-301.5).

1 The legislature's concern was to define the smallest
2 unit of groundwater to which the Groundwater Code could be
3 practically and meaningfully administered. To ensure that it did
4 so, additional and smaller determinable parts of groundwater
5 basins were separately defined as "groundwater subdivisions." A
6 groundwater subdivision is:

7 ". . . land overlying, as nearly as may be
8 determined by known facts, a distinct body of
9 groundwater. It may consist of any
10 determinable part of a groundwater basin."
11 (Laws, 1948, Sixth S.S., Chap. 5, § 2, A.R.S.
12 § 45-301.6, emphasis added).

13 Thus, the legislature gave the "common supply" concept
14 a precise legal meaning which could be established by reference
15 to observable facts. Most importantly, the legislature recog-
16 nized that groundwater could be dealt with meaningfully and
17 practically only in terms of the hydrological boundaries of the
18 groundwater supply, not in terms of property or parcel lines.

19 The Land Department or the Courts can isolate the
20 smallest bodies of groundwater which are separately identifiable,
21 but these are the smallest units to which groundwater statutory
22 or case law may be applied. The land which overlies the smallest
23 identifiable "distinct body of groundwater" must therefore
24 comprise the land "from which the water is pumped," the land on
25 which the water must be reasonably used, and the land from which
26 water "may not be taken" to the injury of others. Use in the
27 same groundwater subdivision is use "on the land".

28 The legislature did not stop with mere definitions; it
29 affirmatively required the "common supply" concept to be
30 implemented and it provided the administrative procedure for
31 doing so. The 1948 mandate stated:

32 "It shall be the duty of the Commissioner
[now the Land Department] from time to time,
as adequate factual data become available, to
designate groundwater basins and subdivisions
thereof," (Laws, 1948, Sixth S.S.,

1 Chap. 5, § 5(a), A.R.S. § 45-303).

2 Performing this duty, the Land Department designated
3 the Santa Cruz Groundwater Basin. Order No. 1, December 21,
4 1948. Later, on the basis of additional "factual data", the
5 Department designated the Tucson Subdivision and the Sahuarita-
6 Continental Subdivision of the Santa Cruz Groundwater Basin. As
7 required by law, the Sahuarita-Continental Subdivision was
8 mapped, designated and established, by Order No. 14 of the Land
9 Department, dated June 8, 1954.^{12/}

10 Not only has the majority failed to give weight to
11 these administrative orders which directly affect these appeals;
12 not only has the majority failed to give effect to the
13 legislative policies behind administrative establishment of
14 specific groundwater basins and subdivisions throughout the
15 State, but it has also failed to recognize that the Groundwater
16 Code has any effect on these appeals.

17 In the Anamax appeal, the Court does not so much as
18 acknowledge the existence of the Sahuarita-Continental
19 Subdivision. The majority seems to assume that there is a body
20 or supply of groundwater common to the much smaller Critical
21 Area, and that this common supply may be further subdivided into
22 an unlimited number of individual "parcel" or "well site"
23 supplies.

24 In Tucson's appeal, the Court refers to the "Sahuarita-
25 Continental Subdivision of the Sahuarita-Continental Critical
26

27 ^{12/} Copies of the documents, certified, are on file in a
28 related appeal, Farmers Investment Company v. Pima Mining
29 Company, et al., No. 11439 of this Court, 111 Ariz. 56, 523
30 P.2d 487 (1974). The documents are appended to Duvals'
31 Petition to Intervene or to file Brief Amici Curiae.
32 Parenthetically, it is noteworthy that Fico in that case
was unsuccessful in its attempt to have decided in an
oblique proceeding and without a trial on the merits, all
of the reasonable use issues in the original Pima County
case.

1 Groundwater Area of the Santa Cruz groundwater [sic] basin [sic]"
2 (Opinion, p. 18). Of course, there exist a Santa Cruz Valley and
3 a Santa Cruz River drainage basin and groundwater basin. They
4 lie generally between Tucson and Nogales, but the Santa Cruz
5 Groundwater Basin has a precise legal meaning in this case. This
6 Basin has the exactly defined boundaries which are set forth in a
7 formal Order and shown on a map. It was designated and
8 established from "known facts" by the Land Department in
9 cooperation with United States Geological Survey, pursuant to the
10 acts of the legislature.

11 Thereafter, the Land Department, on the basis of
12 additional and "adequate factual data", determined that the "body
13 of groundwater" underlying the Santa Cruz Groundwater Basin
14 actually consisted of at least two "distinct bodies of
15 groundwater". It thereupon established the Sahuarita-Continental
16 Subdivision and the Tucson Subdivision of this Basin. Still
17 later, the Sahuarita-Continental Critical Groundwater Area was
18 established. But this Critical Area is entirely within the
19 Subdivision, and not vice versa, as the Court mistakenly states.

20 A critical area cannot be technically equated with
21 either a "groundwater basin" or a "groundwater subdivision".
22 Establishment of a "critical groundwater area" is not a
23 determination of the existence of a distinct body of groundwater,
24 as in the case of groundwater basins and subdivisions, but is a
25 determination that, within an already existing "groundwater basin
26 . . . or any designated subdivision thereof," there is not
27 "sufficient groundwater to provide a reasonably safe supply for
28 irrigation of the cultivated lands in the basin at the then
29 current rates of withdrawal." A.R.S. § 45-301.1. It is a
30 binding determination by the State Land Department that within a
31 groundwater basin or subdivision the groundwater supply is
32 insufficient for existing uses. The court perceived and gave

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1 full effect to such a determination in Jarvis I.

2 The trial court recognized that the factual determi-
3 nations embodied in the Land Department's Orders were binding and
4 it applied the reasonable use doctrine to those facts. The
5 judgments of the trial court should be affirmed on the same
6 basis.

7 There are numerous areas of water law and rights within
8 the exclusive jurisdiction of the courts. Still others are
9 subject to governmental action by either the courts or the
10 legislative branch. For example, the courts, as well as the
11 legislature, can and should determine what is and is not a
12 reasonable use.

13 On the other hand, when the legislature empowered and
14 directed the Land Department to determine and establish
15 groundwater basins and basin subdivisions, and when, pursuant to
16 that authority, the Sahuarita-Continental Subdivision of the
17 Santa Cruz Basin was established by Order of the Land Department,
18 Duval respectfully insists that this Court cannot collaterally
19 reject that determination which was made more than 20 years ago.

20 The boundary lines of the common supply of the
21 Sahuarita-Continental subdivision ("the distinct body of water"),
22 over which all of the properties, all of the pumping and all of
23 the uses of all of the parties to this case (except Tucson) are
24 situated, were lawfully established, and this Court is not at
25 liberty to disregard them, as the majority has done by
26 substituting its own "parcel supply" concept.

27 THE EFFECT OF THE COURT'S OPINION ON PRIOR DECISIONS.

28 The majority holding violates the promise of Bristor
29 II, which, with respect to groundwater, was intended to ensure

30 " . . . that our citizens may know
31 how to guide their future procedure."
32 (75 Ariz. at 231).

32 . . .

1 While the Court has the power to depart from the
2 doctrine of stare decisis, we respectfully urge the Court that it
3 should not do so here.

4 The present decision, with its rejection of the "common
5 supply" rule of the reasonable use doctrine, overrules sub
6 silentio this Court's prior decisions in Anway, Jarvis II, and
7 Neal v. Hunt. The Court also misconstrues and misstates the
8 issues and its holding in Bristor II, and reaches a result
9 contrary to the meaning and intent of that case.

10 The holding of Bristor II must be made clear. The
11 Court said the English common law rule no longer applied in
12 Arizona; it said it was adopting the American doctrine which
13 would be applied in Arizona. But it held that Count One of the
14 Bristors' Complaint stated a claim upon which relief could be
15 granted. The nature of the allegations of the Complaint are
16 crucial to a correct understanding of the Court's ruling in
17 Bristor II.

18 The failure of the majority to recognize the nature of
19 the relief sought in the Bristor Complaint is a proximate cause
20 of its error in rejecting the American doctrine of reasonable use
21 and its common supply rule. The majority incorrectly assumes
22 that the defendants' uses in Bristor were over the common supply.
23 It then discards the common supply concept, attempting to apply
24 the reasonable use doctrine to resolve a dispute between adjacent
25 owners whose lands and whose uses overlie the same common supply.

26 The error of the majority is compounded because it has
27 now attempted to do that which this Court said was "impossible"
28 in Bristor II. After rejecting the English rule (75 Ariz.
29 235-6), and opting in favor of the American doctrine of
30 reasonable use as opposed to correlative rights, this Court
31 quoted approvingly from an Oklahoma case:

32 " * * *. This does not mean that there

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1 shall be an apportionment of subterranean
2 percolating water between adjacent
3 landowners, for such a thing is often, if not
4 always, impossible, and it was this same
5 impossibility which gave rise to the English
6 rule itself. . . ." (75 Ariz. at 236,
7 emphasis added).

8 The majority reads the Complaint in Bristor to have
9 alleged that the defendants' uses were over the same common
10 supply as the domestic uses of the plaintiffs (Opinion, p. 12).
11 The Court could not have intended the meaning conveyed by its
12 written Opinion because it is wrong.

13 It is impossible to read the Bristor complaint and come
14 to any conclusion except that there was a "common supply" of
15 groundwater underlying the property of both plaintiffs and
16 defendants. This percolating water was pumped from the common
17 supply and "transported" or "conveyed to other lands", to another
18 "locality" from whence it could not return to replenish the
19 common supply". These allegations had to be taken as true by the
20 trial court. For purposes of appeal, these allegations were
21 binding on this Court in 1953, and they are binding on this Court
22 today. The existence of the common supply and transportation
23 away from it, which was the overwhelming gravamen of Count I of
24 the Bristor plaintiffs' Complaint, was also the essence of their
25 briefs on appeal, as Justice LaPrade noted:

26 "The first cause of action does not pose a
27 question as to who has the better right
28 between adjoining owners, both of whom are
29 pumping percolating water and using the water
30 to develop their respective lands. It does,
31 however, we believe, present squarely to this
32 court the proposition that the pumper of
percolating water cannot transport such
percolating water to some other locality
where there would be no opportunity for it to
return and replenish the common supply
available to the owners of both tracts of
land." (75 Ariz. at 241, Justice LaPrade's
emphasis).

1 This identical issue appeared both in the plaintiffs' assignments
2 of error and their propositions of law. Plaintiffs' propositions
3 of law, which also were quoted by Justice LaPrade, stated:

4 "The owner of land overlying a supply of
5 percolating water common to adjoining land
6 owners may not pump the water from wells upon
7 his land and convey it to other lands for the
8 benefit of those lands, from whence it does
9 not return to replenish the common supply, if
10 the supply available to the adjoining land
11 owners from pumps upon their lands drawing
12 water from such common supply, is diminished
13 to their injury." (73 Ariz. at 242).

14 After pointing out the allegations and the issues with great
15 care, Justice LaPrade said:

16 "In my judgment, the only issue before
17 the trial court was whether the owner of land
18 overlying a supply of percolating water
19 common to adjoining land owners may pump the
20 water from wells upon his land and convey it
21 to other lands for the benefit of the latter
22 from whence it does not return to replenish
23 the common supply, if the supply available to
24 the adjoining land owners from pumps upon
25 their lands drawing water therefrom is
26 diminished to their injury. These are the
27 issues made by the parties before this
28 court." (73 Ariz. at 242, emphasis added).

29 No copper miner, pecan farmer or lawyer reading this
30 opinion, either immediately after it was handed down or today,
31 could possibly misapprehend the facts alleged. The majority in
32 Bristor I were apparently so intent on trying to apply the law of
prior appropriation to percolating water (which is no mean
undertaking) that they merely noted that defendants were taking

33 ". . . water by means of powerful pumps
34 from this common supply and are conveying it
35 off the premises from which it is pumped to
36 other lands owned by defendants, approxi-
37 mately three miles distant . . . not
38 adjacent to the land from which water is
being pumped." (73 Ariz. at 231).

39 But Justice DeConcini, who also dissented in Bristor I, perceived
40 the issue before the Court exactly as did Justice LaPrade. In
41 comparing the reasonable use doctrine and the doctrine of
42 correlative rights, he noted that under correlative rights there

1 is an apportionment of water between land owners overlying the
2 common supply. He then stated:

3 ". . . Under reasonable use there is no
4 such apportionment, but rather a prohibition
5 upon a use on other land or at a distance
6 away from the base of the common supply if
7 such alien use interferes with the use of
8 water of other property owners. (Citing
9 case)." 73 Ariz. at 255).

7 By the language just quoted, Justice DeConcini
8 distilled the principal feature of the American reasonable use
9 doctrine.

10 The doctrine was next applied by the Court in Anway,
11 supra. The majority in Anway discussed the reasonable use
12 doctrine as well as the statutory history of the Groundwater Code
13 as found in the 1956 Revised Statutes. The Court rejected the
14 Land Department's contention that groundwater could only be used
15 on the "land covered by the legal description" upon which the
16 wells are situated. The Court properly permitted water to be
17 used on other land, never previously irrigated, "thereby
18 effecting crop rotation from one parcel to another". (87 Ariz.
19 at 208). It could not be gainsaid that both parcels were not
20 over a common supply because both were located in a critical area
21 administratively established by the Land Department.

22 The action of the majority was taken over a strong
23 dissent by Justice Phelps, who contended for the parcel rule
24 which the majority Opinion has adapted. Justice Phelps quoted
25 from Bristor II and insisted that groundwater "must be applied to
26 the soil to which it is subjacent". He said that Bristor I,
27 which interpreted the applicable statutory law, forbade the
28 taking of groundwater from beneath the surface of a parcel of
29 land and the conveyance to and beneficial use of that water on
30 another parcel of land.

31 The effect of the majority Opinion is to overrule
32 Anway and install the dissenting opinion of Justice Phelps as the

1 law of this State. If the majority has overruled Anway, we
2 respectfully suggest that it should say so.

3 Prior to the Anway decision, the Court had plainly
4 countenanced, without comment, the transportation and use of
5 water from one place to another within a critical area. Ernst v.
6 Collins, 81 Ariz. 178, 302 P.2d 941 (1956). Following Ernst, the
7 Court observed another case where large acreages of land in a
8 critical area stretching for many miles were to be irrigated from
9 a relatively few wells. State v. Harpham, 2 Ariz. App. 478, 410
10 P.2d 100 (1966, review denied).

11 The next definitive statement of the Arizona reasonable
12 use doctrine was Jarvis I. The Jarvis I opinion quoted one
13 sentence from Rothrauff,^{13/} supra, a Pennsylvania case first
14 quoted in Bristor II. This quote states:

15 " . . . While there is some difference of
16 opinion as to what should be regarded as a
17 reasonable use of subterranean waters, the modern
18 decisions are fairly harmonious in holding that a
19 property owner may not concentrate such waters and
20 convey them off his land if the springs or wells
21 of another landowner are thereby damaged or
22 impaired. . . ."

23 The majority Opinion quotes the last portion of this
24 sentence from Rothrauff via Bristor II. Surely, it cannot
25 validly be said, in the light of the facts of Jarvis I, that the
26 above quote represents the holding of Jarvis I. No more can it
27 be said that the common supply concept of the reasonable use
28 doctrine was rejected in Jarvis I. This is true because a
29 transbasin diversion was involved and because the common supply
30 concept was obviously relied upon in the majority Opinion. The

31 ^{13/} Rothrauff v. Sinking Spring Water Co., 339 Pa. 129, 14
32 A.2d 87, (1940). The quoted language is pure dicta.
Rothrauff is briefed and fully analyzed in the Appendix.
It is sufficient to here note that the quoted language
does not reflect the facts of Rothrauff and bears no
resemblance to its holding.

1 concurring opinion of Justice McFarland makes this absolutely
2 clear:

3 "The question then before this Court is
4 whether the City of Tucson, which is not in the
5 same water basin designated as a critical area as
6 the petitioners, has the right to pump water from
7 that area into another water basin." [Emphasis
8 added] 104 Ariz. at 535.

9 The opinion in Jarvis I does not contain the slightest
10 hint that the words "off the land" or away from "the lands
11 overlying the well sites" were intended to mean anything
12 different from the other phrases used by the Court, such as
13 "withdrawal and transportation of groundwaters from the Avra and
14 Altar Valleys" or transporting "the waters pumped therefrom" to
15 Tucson. The Court did not define these terms because it was
16 unnecessary to the resolution of the issues before it. It was
17 obvious that the Court was describing the undisputed fact that
18 Tucson was taking water from one body of groundwater and using it
19 over another more than 15 miles away. Anyone reading Jarvis I
20 would necessarily assume from its facts that "off the land" meant
21 "away from the common supply" or "out of the basin". The holding
22 of the Court was structured in those very terms.

23 In Jarvis II, however, the Court was confronted with
24 the necessity of defining the terms it had previously used. The
25 Court specifically permitted Tucson to deliver and sell water
26 from its wells located in the Marana Critical Groundwater Area to
27 Ryan Field. This transportation of water was allowed because
28 Ryan Field overlies the common basin and supply of groundwater.
29 The Court noted that Ryan Field overlay the same basin

30 ". . . so as to entitle it to withdraw
31 from the common supply for all purposes
32 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." 105 Ariz. at 510, 479
P.2d at 173. (emphasis added).

1 Ryan Field was situated within the Marana Critical
2 Groundwater Area, but it was the fact that Ryan Field overlay the
3 "common supply" which made Tucson's withdrawals for delivery and
4 sale at Ryan Field permissible.

5 This Court unequivocally held that land overlying a
6 common water basin is entitled to receive water withdrawn from
7 the common supply. In the next paragraph of its Opinion, the
8 Court flatly stated that Tucson could deliver and sell water to
9 customers lying outside the Critical Area, if it could show that
10 such customers were on lands overlying the groundwater basin:

11 ". . . Until Tucson can establish that
12 its customers outside the Marana Critical
13 Ground Water Area but within the Avra-Altar
14 Valleys' drainage areas overlie the water
15 basin so as to be entitled to withdraw water
16 from it, there are no equities which will
17 relieve it of the injunction heretofore
18 issued." 106 Ariz. at 510, 479 P.2d at 173.
19 (emphasis added).

20 The above language simply CANNOT BE RECONCILED with the
21 present holding of the majority. Jarvis II UNMISTAKABLY HOLDS
22 that water may be transported from one place to another for
23 beneficial use if both places overlie the common supply. EITHER
24 THE MAJORITY OPINION IS WRONG OR JARVIS II HAS BEEN OVERRULED.

25 Less than a year ago the Court decided Neal v. Hunt,
26 112 Ariz. 307, 541 P.2d 559 (1975). If there could have been the
27 slightest possible doubt that the Arizona reasonable use doctrine
28 had embraced the "common supply" concept, or that the doctrine
29 was applicable, apart from that concept, Neal removed it.

30 In Neal, the Court permitted withdrawal and use of
31 groundwater away from the common supply in quantities which did
32 not deplete the supply of other owners whose lands overlay the
common supply. This Court specifically affirmed the trial
court's conclusions of law, which were germane to the holding of
the Court; and, more importantly, embodied and described the
operable concepts of the Arizona doctrine of reasonable use:

1 "2. The use which defendants propose to make of
2 water from the common supply is a beneficial use
3 but the use will be upon and for the benefit of
4 lands which do not overlie the common supply.

5 "3. Withdrawal of groundwater from a common
6 supply for a beneficial use upon lands which do
7 not overlie the common supply is unlawful if the
8 water supply to the well of another property owner
9 whose lands overlie the common supply . . . is
10 damaged or depleted.

11 "4. Withdrawal and use of groundwater for a
12 beneficial use upon lands which do not overlie a
13 water supply from which the water is withdrawn is
14 not unlawful if the water supply available to the
15 owners of lands overlying the common supply for
16 beneficial use is not thereby damaged or
17 depleted.'" (112 Ariz. at 310, emphasis added).

18 THE MAJORITY OPINION CONFLICTS WITH PRE-BRISTOR DECISIONS.

19 The Opinion of the Court, which rejects its prior hold-
20 ings and pronouncements in Bristor, Jarvis, Anway and Neal, by
21 restricting uses over the common supply to the very "parcel"
22 immediately surrounding the wellhead, also jeopardizes rights
23 acquired in reliance on cases such as Brewster v. Salt River
24 Valley Water Users' Association, 27 Ariz. 23, 229 P. 929 (1924),
25 and Adams v. Salt River Valley Water Users' Association, 53 Ariz.
26 374, 89 P.2d 1060 (1939). In both Brewster and Adams, the Court
27 noted that percolating water belonged to the owner of the land
28 under which it was located. In both cases, the Association was
29 pumping large amounts of percolating water into its canals and
30 transporting it to the ends of the Project for irrigation uses.

31 In Adams, it appeared that between 1924 and 1935, the
32 Association had pumped and delivered almost 2,500,000 acre-feet
33 of this pumped water to "all of the landowners in the project"
34 (53 Ariz. 391-2). In Brewster, the Association was selling this
35 water to users outside the Project who were not members of the
36 Association. In each case, the plaintiffs sought to enjoin the
37 pumping and transportation of this water, claiming that the
38 Association's pumping of quantities in excess of the amount
39 necessary for drainage constituted an invasion of their property

1 rights and caused them irreparable harm.

2 The Court recognized that the plaintiffs, as
3 landowners, owned the percolating waters beneath their land, but
4 in Brewster the Court, in denying an injunction, held that the
5 plaintiff

6 "is or ought to be bound for the common good to
7 surrender ownership and dominion of such water
8 when the Association has concluded it to be to the
9 best interests of all to drain the water out of
10 the lands of the project" (27 Ariz. at 41).

11 In Adams, while recognizing plaintiffs' ownership of
12 this percolating water, the Court declined to grant relief and
13 held that the plaintiffs had, in effect, disposed of their water
14 rights by contract.

15 The significance of these cases here is that this Court
16 permitted transportation of groundwater from the point of pumping
17 throughout the main basin of the Salt River without so much as a
18 comment. See, also, Ernst v. Collins, supra, and State v.
19 Harpham, supra, which are later cases in which the Court also
20 countenanced transportation from one place to another within the
21 same basin without comment.

22 Under the majority Opinion, would not every well owner
23 up gradient from every such pump now being operated by the Salt
24 River Project have the right to enjoin that pumping? The justi-
25 fication for such pumping for drainage purposes has vanished like
26 the high water tables of a half century ago. This fact has been
27 true, as a matter of law, since at least March 18, 1953, when the
28 legislature determined there was a critical shortage of ground-
29 water in the Salt River Valley and prohibited new agricultural
30 uses. LAWS, 1953, First Regular Session, Chap. 42, § 2.

31 In his concurring opinion in Jarvis I, Justice
32 McFarland cited Adams and pointed out the need of not disturbing
groundwater rights and uses within a water basin. His comments
echoed the wisdom of the numerous cases which hold that the

1 reasonable use doctrine must not be applied to disputes between
2 users within the same water basin or subdivision thereof.
3 Justice McFarland distilled the issue before the Court, which
4 was: Can the City of Tucson, which is not in the same water
5 basin designated as a critical area, "pump water from that area
6 into another water basin"? He then stated:

7 ". . . Unquestionably it was the intent of the
8 Legislature to protect the rights of users within
9 a critical area The critical areas were
10 limited to water basins and subdivisions thereof.
11 Then, as now, there were many recognized and
12 established water rights in each water basin. For
13 example, in Adams . . . this Court recognized the
14 right of the S.R.V.W.U. to pump water to supply
15 irrigation not only for the lands from under which
16 they were pumped but from other lands So
17 Justice Struckmeyer's decision, I think, rightly
18 limits the question in the instant case to the
19 taking of water from critical areas and
20 transporting it to other areas." (104 Ariz. at
21 535, emphasis added.)

22 In the above context, the term critical area was used
23 in the same sense as the terms "water basin" and "subdivision"
24 were used in the same Opinion to indicate, as the facts clearly
25 showed, that water was transported from one body of groundwater
26 for use on land overlying another. Importantly, Justice
27 MacFarland's statement correctly points out that Jarvis I holds
28 that water may not be transported from one groundwater basin for
29 use in another groundwater basin, but this same rule does not
30 apply to transportation and use of water within the same
31 groundwater basin.

32 THE PRACTICAL IMPOSSIBILITY OF APPLYING THE
"PARCEL SUPPLY" CONCEPT OF THE MAJORITY OPINION.

33 This Court has long recognized from a legal standpoint
34 the "impossibility" of attempting to apply the reasonable use
35 doctrine as between "adjoining landowners" (Bristor I, dissent,
36 73 Ariz. at 255; Bristor II, 75 Ariz. at 236). When the
37 practical and natural problems inherent in such an attempt are
38 considered, this "impossibility" becomes absolute.

1 By its very nature and definition, a body of
2 percolating water constantly moves, both vertically and
3 horizontally. The rate and extent of this movement may be
4 greatly affected by geologic conditions and natural phenomena
5 which can vary remarkably from one place to another. A geologic
6 fault or fracture may affect an acre or a whole section of land.
7 Sedimentary deposits may change in their depths and thicknesses
8 in a very short distance. Soil conditions and particle sizes can
9 vary in a few feet.

10 Those portions of a groundwater aquifer possessing a
11 high rate of transmissibility are prone to extreme fluctuations
12 in their water levels when they are subjected to heavy pumping
13 and when that pumping ceases even for a short period. In such
14 areas, which usually constitute a small part of an aquifer or
15 common supply of groundwater, large cones of depression can be
16 created (e.g., near the end of the growing season in the case of
17 an agricultural well) which can vanish in a matter of weeks.
18 When a cone of depression ceases to exist, the water which has
19 percolated to replace it may then move to one or more other cones
20 of depression created by an industrial, agricultural, domestic or
21 municipal pumper or by natural phenomena. So an up gradient well
22 may become a down gradient well, or vice versa, in a matter of
23 weeks or months.

24 Obviously, surface boundaries can be drawn, but a body
25 of percolating water is too complex and subject to too many
26 variables to admit to arbitrarily imposed surface boundaries.
27 Unlike earth or rocks, it will not confine itself to a given
28 "parcel".

29 The legislature assigned to the Land Department the
30 task of determining only the exterior boundaries of whole
31 groundwater basins and groundwater subdivisions as "distinct
32 bodies" of groundwater. This task is onerous enough and

1 precision is very difficult, but such boundaries must be drawn.
2 To further judicially divide a "distinct body of groundwater"
3 along the lines of surface parcels, sub-parcels or specific
4 ownerships, is just not possible.

5 The earth in which any body or supply of percolating
6 water exists has portions from which sufficient water for indus-
7 trial or agricultural purposes cannot be feasibly obtained. It
8 should not follow from this that a use is unreasonable unless it
9 immediately overlies a part of the aquifer which has the highest
10 water productivity. Any prudent landowner will drill a well on
11 that part of his land which seems likely to possess the maximum
12 dependable and most easily obtainable water supply. The owner of
13 a section or more of land should not be compelled to drill a
14 whole grid or network of wells, use the groundwater produced only
15 around each wellhead and be enjoined from using the water at
16 every place where an unproductive well exists.

17 Any person with the painful memory of having drilled a
18 "dry hole" can attest that beneath a single parcel of land there
19 may be igneous intrusions or impervious clay lenses which make
20 the production of water from his land at that place impossible or
21 highly impracticable. Yet he may have other nearby wells that
22 are good producers. The Opinion of the majority would deny the
23 landowner the right to use the portion of his land where the dry
24 hole was drilled, if a neighbor's wells or property were
25 adversely affected. This would be true even if the parcel had
26 uniform surface appearance, value and utility.

27 The flaw in the Court's "parcel" rule can be further
28 demonstrated by facts before the Court. The Court has said that
29 Fico can enjoin Anamax' pumping and uses. Absent equitable con-
30 siderations, affirmative defenses and other matters, Fico would
31 also be able to enjoin all of the mining companies in the action
32 below, including Duval Sierrita Corporation, because their

1 pumping and uses are either identical or greatly similar to those
2 of Anamax.

3 Sierrita owns as much land as Fico immediately to the
4 south of the Fico property. Sierrita's land is "up gradient"
5 from Fico's land, both from the standpoint of surface elevation
6 and water table elevation. Sierrita owns wells situated within
7 the Sahuarita-Continental Critical Area which were devoted to
8 agricultural uses before the Critical Area was established.
9 Sierrita also owns domestic wells, stock watering wells and other
10 "exempted wells". Under the ruling of the majority, not one drop
11 of water which is pumped by Fico can possibly return (legally) to
12 replenish Sierrita's supply. So, in the words of the Court,
13 Fico's

14 "replenishment of the supply does not benefit
15 the users of water up gradient from the point
of return" (Opinion, p. 13).

16 The water level in Sierrita's wells is diminishing, but even if
17 this were not proven, their very location in the Critical Area
18 would establish this fact and the attendant presumption of injury
19 to Sierrita.

20 By inducing the majority to extend the reasonable use
21 doctrine to disputes between adjoining owners, Fico has made for
22 itself a procrustean bed. It is now subject to an injunction
23 application by Sierrita. Under the holding of the majority, if
24 the above facts were shown (and they can be) either this Court or
25 a superior court would have no choice but to grant Sierrita
26 injunctive relief.

27 Sierrita has sought an injunction and other relief
28 against Fico -- but not because its wells are up gradient from
29 Fico's and not because Fico itself transports water as far as six
30 miles (all down gradient) from its point of pumping. Sierrita
31 contends it is entitled to relief under the Arizona reasonable
32 use doctrine as it existed prior to August 26, 1976, because by

1 triple cropping, by waste, and by growing pecan trees which
2 transpire huge amounts of water, Fico uses water unreasonably.

3 One of the elements of the "parcel" concept of the
4 majority Opinion is that down gradient pumping will ultimately
5 damage the supply of an up gradient pumper, but that down
6 gradient replenishment will not ultimately benefit the up
7 gradient pumper.

8 There is a hydrological fallacy in the Court's
9 reasoning. Every gallon of water which replenishes a common
10 supply is ultimately reflected in the available supply of every
11 pumper from the common supply, up gradient or down gradient. The
12 very molecules which return to the common supply down gradient
13 may never appear in an up gradient pumper's well, but inevitably
14 the down gradient replenishment must result in maintenance of
15 higher levels in the up gradient well. By the laws of hydrology
16 and the laws of fluid mechanics, down gradient replenishment can
17 no more be disconnected from up gradient wells than can down
18 gradient withdrawals.

19 Practical application of the gradient principle can
20 have unfair and illogical effects. For example, natural recharge
21 may so affect a body of groundwater at its juncture with the
22 alluvial strata of a tributary valley that a pumper at this point
23 in the aquifer will invariably be located higher on the ground-
24 water table or gradient than all other pumpers. Under the
25 majority's pronouncement, the rights of such a pumper would
26 always be paramount. The unfairness can be shown by comparing a
27 groundwater body with a surface stream or ditch. It would be
28 ridiculous to assert that the user at the head of the ditch or at
29 the upper reaches of a stream has the paramount right, because
30 water is more readily available to him. An up gradient pumper
31 should have no better right.

32 . . .

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1 THE MAXIM, "FIRST IN TIME, FIRST IN RIGHT"
2 HAS NO PLACE IN THE REASONABLE USE DOCTRINE.

3 In applying the reasonable use doctrine to this dispute
4 between owners of adjoining and neighboring parcels, the majority
5 says that the maxim, "first in time, first in right", which is
6 part of the appropriation doctrine, applies (Opinion, p. 13).
7 This cannot be, unless the Court is reverting to Bristor I. Who
8 would have the prior right? The first of two pumpers? The first
9 of two neighboring owners to acquire his land? Is tacking
10 permitted? Are prior rights quantified? If so, when?

11 If the priority maxim applies to the reasonable use
12 doctrine and if an "up gradient" pumper has the prior right, pre-
13 sumably these rights are vested property rights and are even
14 constitutionally protected, as the Court has previously indi-
15 cated. If an owner has an absolute right to percolating water
16 subjacent to his land, how possibly can the escape of that water
17 be prevented prior to extraction? How can such an absolute owner
18 identify or determine the nature or extent of his ownership? If
19 a "down gradient" pumper has the prior right, does this right
20 prevail over the preferential right which the majority appears to
21 have granted an "up gradient" pumper?

22 Under the Court's priority concept, what are the rights
23 of Duval Corporation? It was mining and milling copper at least
24 six years before Fico began planting pecan trees and before it
25 started double and triple cropping its land. As between Duval
26 and Fico, the facts are greatly similar to those between Fico and
27 Anamax. Does Duval now have a prior right solely on the basis of
28 priority of use? Is Duval thereby entitled to enjoin the
29 subsequent uses of Fico?

30 Questions such as these were the administrative
31 "impossibilities" which were the reason for adoption of the
32 reasonable use doctrine in Bristor II.

1 The majority introduces a new dimension to "first in
2 time, first in right". It says that appellee's position:

3 ". . . contradicts this Court's holding that
4 where large investments have been made in the
5 development of groundwaters, the doctrine
6 becomes a rule of property and the rights
7 acquired under the Court's decisions and the
8 investments made are entitled to protection."
9 (Opinion, p. 14).

10 It may have been the intention of the majority to limit the
11 application of the maxim to priority of investments. If so, it
12 is fraught with the same difficulty as with its application to
13 groundwater usage.

14 Duval Corporation has spent scores of millions of
15 dollars relying on the Groundwater Code and upon the decisions of
16 this Court giving it the right to pump groundwater from its lands
17 and beneficially and reasonably use that water on its lands in
18 the Sahuarita-Continental Groundwater Subdivision and over the
19 common supply or "distinct body of groundwater" of that
20 Subdivision. Most of its investment was made years before Fico
21 began planting pecan trees. If Fico's investment was prior to
22 Anamax' and this affords grounds for injunctive relief, can Duval
23 enjoin Fico on the same grounds?

24 FICO HAS NOT BEEN HARMED.

25 The well fields owned by the mining companies in this
26 case are not unreasonably small or artificially contiguous to
27 their operating properties. Their wells are located on parcels
28 ranging from several hundred to several thousand acres. The
29 combined mining companies' well fields inside the Critical Area
30 alone comprise nearly 22,000 acres.^{14/} In addition to this fee
31 land, the mining companies lease over 10,300 additional acres in
32

^{14/} For citations to the record for the facts stated in this
section, see Petition of Duval Corporation and Duval
Sierrita Corporation for Leave to Intervene on Reasonable
Use Issues or to File Brief Amici Curiae and Brief, filed in
this proceeding on December 24, 1974, pp. 4-5, 39-41.

the Critical Area. They own or lease an additional 22,500 acres outside the Critical Area but within the Groundwater Subdivision and they own additional land outside the Subdivision but within the Santa Cruz Groundwater Basin. The number of irrigated acres retired from cultivation by the mining companies to preserve the groundwater supply inside the Critical Area alone is 7,363 -- more than FICO's entire farm. The irony is that Fico may well be better off than it would have been if the mining companies were not there.

Yet, Fico is protected still further. The portent of the majority Opinion is the shutdown of operations which in 1974 directly employed 6,300 persons full time (against 90 for Fico) with an annual payroll of \$72,000,000; operations which provide 20% of the tax base of Pima County as well as, directly or indirectly, 25% of its employment; and operations which account for nearly 20% of the nation's copper production. And this will be only the first impact of the decision. The catastrophe that will occur, as cities, industries, irrigation districts, utilities and water companies all over the state are required to shut down their wells, cannot be measured. Although it was argued that Fico had not shown it had been hurt by the mining company operations, the Court rejected those arguments:

"Even if it be assumed that damage to FICO's wells has not yet taken place, still such damage must, inevitably occur. FICO need not wait for its farms to be devastated before applying for injunctive relief against unlawful acts." (Opinion, p. 13)

* * *

"Since more water is being withdrawn than is being replaced, a court of equity is justified in interposing its protective cloak. Inevitably, sooner or later, as the supply diminishes, appellant will be irreparably injured." (Opinion, p. 14)

The Court has refused to give the mining companies any

1 credit for retiring agricultural land. The Opinion says that
2 just because the Court allowed the City of Tucson to retire
3 agricultural land in the Avra-Altar Valleys and transport water
4 to Tucson so people there could drink, this is no "precedent for
5 a doctrine that a court will prefer one economic interest over
6 another on an ad hoc basis where there are not enough of the
7 material goods of existence to go around." (Opinion, p. 15).
8 The original reasoning has been forgotten.

9 The correct reasons for allowing Tucson to retire
10 agricultural land and use its historical water duty in another
11 basin were those first discussed by Justice McFarland when he
12 made the original proposal in his special concurrence in Jarvis
13 I. Justice McFarland urged that the case required "careful con-
14 sideration of the objectives of the groundwater code". When
15 agricultural lands are retired in favor of other uses, existing
16 users suffer no damage in the exercise of their water rights.
17 They are protected against unreasonable depletion of the common
18 supply. At the same time, "the importance of the proper
19 utilization of the water of our State" is realized by encouraging
20 the most reasonable and beneficial use of water for the "general
21 economy and welfare of the State and its citizens . . ." (104
22 Ariz. at 533-34).

23 Because the mining companies' uses are reasonable and
24 overlie the same common supply, their uses are lawful without
25 regard to their retirement of agricultural and other land from
26 water consumptive uses. These voluntary, unilateral acts have
27 reduced the rate of depletion of the common supply for the
28 benefit of Fico as well as for the mines. Yet because "more
29 water is being withdrawn than is being replaced" and because "the
30 supply [still] diminishes", notwithstanding that the rate of
31 depletion would be even greater but for the operations of the
32 mines, the Court says it is "justified in interposing its

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1 protective cloak". It is in effect protecting Fico from the con-
2 sequences of its own pumping.

3 CONCLUSION

4 The American doctrine of reasonable use, when correctly
5 applied, is not so strained and labored as the majority would
6 have it. The definition of "land from which the water was taken"
7 and its rationale are concisely, persuasively and correctly
8 stated in one paragraph in Chief Justice Cameron's dissent:

9 I believe that the "land from which the
10 water was taken" is that land which overlies
11 the judicially determined distinct body of
12 groundwater from which the water was
13 obtained. The rationale for this approach,
14 which is, I believe, implicit in our pre-
15 viously published opinions, is, essentially,
16 that damage to the available supply of
17 groundwater occurs when water is permanently
18 removed from the land overlying the common
19 supply, so that it is prevented from return-
20 ing through the ground to replenish the
21 supply. There is no reason, according to the
22 traditional legal understanding of ground-
23 water hydrology, to prohibit the transporting
24 of such water from one point to another, so
25 long as both overlie the common supply. This
26 is because the water is as available to
27 replenish the common supply at the point of
28 use as it would have been at the point of
29 pumping. The transportation causes little
30 diminution of the common supply, and no
31 increase in damage to other landowners
32 overlying the common supply. I believe that
water used anywhere on land overlying the
same common supply from which it was pumped
is used "on the land" for the purposes of the
reasonable use doctrine. I believe, then,
that the finding of the trial court which
reads as follows:

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

should be upheld as representing not only the
law as it existed before the majority opinion
in this case, but common sense as well.

30 . . .
31 . . .
32 . . .

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Respectfully submitted,
FENNEMORE, CRAIG, von AMMON & UDALL

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Duval Sierrita Corporation

1 upon the subject of the rights to percolating
2 waters, always treating them as a part of the
3 soil itself, and therefore holding that the
4 owner of one tract of land is permitted to
5 draw off the water found in his own land,
6 even for sale to a distant municipal
7 corporation, or that a corporation could buy
8 up the particular tract of land for the
9 express purpose of abstracting the water
10 therefrom for municipal use, and that, too,
11 although the effect is to destroy the wells
12 and springs upon the lands owned by others in
13 the neighborhood; and that, because of this
14 right, the injury to the other land owners is
15 damnum absque injuria. (Citing cases).

16 ". . . This rule of reasonable use is
17 therefore simply this, that one man must so
18 use the waters percolating through his own
19 lands in a manner reasonable to the needs and
20 necessities of his own tract of land, and
21 thereon, and also having due regard to the
22 coequal rights of his neighbors whose lands
23 overlie the same strata or saturated basins.

24 One of the first courts to adopt this rule of
25 reasonable use of percolating waters, upon
26 principle, common sense, and justice, rather
27 than English precedent, was the Supreme Court
28 of New Hampshire, in the case of Bassett v.
29 Salisbury Mfg. Co., in 1862. . . .^{2/} Kinney
30 on Irrigation and Water Rights, § 1191,
31 pp. 2158-2160 (emphasis added).

32 In defining the relative rights of landowners, the New
Hampshire Court in Bassett laid the predicate for the doctrine:

" . . . The rights of each land-owner
being similar, and his enjoyment dependent
upon the action of the other land-owners,
these rights must be valueless unless
exercised with reference to each other, and
are correlative. . . ." (43 N.H. at 577,
emphasis added).

The court went on to use the language which gave birth to the
reasonable use doctrine:

" . . . Every interference by one
land-owner with the natural drainage,
actually injurious to the land of another,
would be unreasonable, if not made by the
former in the reasonable use of his own
property. Although the plaintiff's land was
not situated upon the river, yet, if the
defendants, by means of their dam, obstructed
its natural drainage to the actual injury of

^{2/} 43 N.H. 569, 52 Am. Dec. 179. Though Bassett involved a dam
which increased rather than decreased the percolations under
the plaintiff's land, the principle announced is the same.

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the plaintiff, they are liable, unless the obstruction was caused by the reasonable use of their own land or privilege; and the reasonableness of the use would depend upon the circumstances of the case. . . ." (43 N.H. at 577-578).

It is further stated in Kinney:

"§ 1202. Percolating waters supplying surface wells-Rights thereto.--. . . But as time went on and the demand for water, or, in some cases, purer water, became greater, and it was ascertained that in certain sections of the country there were vast supplies of these percolating waters lying beneath the surface, which, owing to the invention in the meantime of mechanical devices for pumping large quantities, might be utilized for municipal, irrigation, and other purposes requiring large quantities of water. A municipal corporation or an irrigation company organized for the purpose of selling water to irrigate distant lands would therefore buy up a small tract of this heavily saturated land, sink a well, or wells, install pumps of large capacity, and thereby draw off vast quantities of water for use in distant places. . . . This condition of affairs eventually forced a change of the rule of law governing these waters from the strict English rule to the more modern doctrine of reasonable use or correlative rights. . . . Under this rule one land owner can not sell the water pumped from wells on his own land for use by a distant municipal corporation or for the purpose of irrigating distant lands. Neither can a corporation, municipal or otherwise, purchase a small tract of land, sink a well thereon, and pump the water underlying all of the lands in that neighborhood for use by the distant city or for the irrigation of distant tracts without first acquiring the right from the other land owners in some lawful manner. (Citing cases)" (pp. 2178-2180, emphasis added).

Weil outlined the origin of the American rule as follows:

"B. THE AMERICAN RULE

"§ 1041. The English Rule Modified.--There is a steady trend of decision in America away from the English rule. . . .

"The pioneer in this American departure was New Hampshire; (citing cases) but until the same departure was made in the case of Forbell v. New York, (footnote citation omitted) in New York State, it did not make much impression in the American law. After

1 the Forbell case in New York, however, the
2 English rule began to be departed from in
3 America, until now the Forbell case may be
4 said to represent the general American rule."
(Weil, supra, Vol. 2, p. 973).

4 Weil summarized the current cases:

5 "§ 1122. This is the Chief Point in the
6 New Cases.--The great body of the new cases
7 consists in applying this principle, and
8 limiting a landowner to the use of his own
9 land where he would damage the lands or
10 impair the water supply of his neighbors by
11 taking to distant lands or to lands other
12 than his own from which he takes."

9 He concluded with a quote from Miller v. Bay Cities Water
10 Company, 157 Cal. 256, 107 P. 115 (1910). Miller involved the
11 transportation of both surface and percolating waters from the
12 Santa Clara Valley to San Francisco.

13 "Such landowner has a right to restrain
14 a diversion from the stream or saturated
15 plane or other well-defined supply, by an
16 appropriator or anyone else who seeks to
17 divert such stream or other supplying waters
18 from their natural percolating flow, for use
19 elsewhere than upon lands to which, as waters
20 of the stream, they are riparian, or which,
21 as waters of an underground stratum, may
22 reasonably and usefully be applied to the
23 overlying land." (Weil, supra, § 1122,
24 p. 105, emphasis added).

20 Weil then discussed the sale of percolating water and
21 likened the right of owners overlying a water bearing stratum to
22 a riparian right.

23 "§ 1123. Sale of water.--It is thus an
24 essential point of the new rule, that sale of
25 water to alien land (such as cities and
26 towns, for example), to the detriment of
27 local land, is, as a general principle,
28 unlawful, (citing cases) just as under the
29 common law of riparian rights. (citing
30 authorities).

28 It has, indeed, been said that sale of
29 the water off of one's own land may be a
30 reasonable use where it is sold only to
31 people living over the same water-bearing
32 stratum from which the seller pumps, on the
ground that, by each pumping for himself,
they could accomplish the same result."
(p 1057, emphasis added; cf. Jarvis II).

32 It is apparent that as early as 1911, the common supply

1 concept was well ingrained into the American doctrine.

2 "§ 1133. Having found that owners of
3 alien lands not overlying the supply are
4 excluded, and that owners of lands which do
5 so overlie are confined to the use of their
6 own lands so situated, the matter now
7 remaining for consideration is the use
8 between the overlying landowners among
9 themselves, upon their own lands.

10 "§ 1134. Equality of the Overlying
11 Landowners.--Since all the overlying
12 landowners have equal opportunity of access
13 to the water, and its presence contributes to
14 the value and potential enjoyment of the land
15 of all, they have a common interest in the
16 water, and equal rights to use and share in
17 its benefits and uses to the capacity of
18 their lands. . . . Their rights are
19 correlative, and interdependent. The
20 landowner who first uses the water has not
21 greater rights than other landowners. Nor is
22 the right of one lost by nonuse.

23 "All adjacent landowners have equal
24 access to the same supply; the water is
25 'common to all'; 'the natural rights [of all
26 adjacent landowners] in this common supply of
27 water would therefore be coequal, . . ."
28 (Wiel, supra, 1061-1062; citations to
29 footnotes omitted, emphasis added).

30 Forbell

31 One of the earliest reasonable use cases was Forbell v.
32 City of New York, 164 N.Y. 522, 58 N.E. 644 (1900).

33 The City drilled wells and installed pumping stations
34 in a farming area of Kings County. The opinion of the court
35 speaks for itself:

36 "The defendant makes merchandise of the
37 large quantities of water which it draws from
38 the wells that it has sunk upon its two acres
39 of land. The plaintiff does not complain
40 that any surface stream or pond or body of
41 water upon his own land is thereby affected,
42 but does complain, and the courts below have
43 found, that the defendant exhausts his land
44 of its accustomed and natural supply of
45 underground or subsurface water,

46 ". . . As already intimated, the defendant
47 installed its pumping plant knowing that the
48 underground operation and habit of this
49 store of water in its own and neighboring
50 lands, including the plaintiff's, a total
51 area of from five to eleven square miles,
52 would enable it to capture the greater part

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of it. . . .

". . . It may be conceded that the letter of the law, as expounded in many cases in this state, denies liability. (Citing cases) The earlier cases followed the law as stated in Acton v. Blundell, 12 Mees. & W. 324, and Greenleaf v. Francis, 18 Pick. 117. (58 N.E. at 645, emphasis added).

". . . It is not unreasonable, so far as it is now apparent to us, that he should dig wells and take therefrom all the water that he needs in order to the fullest enjoyment and usefulness of his land as land. . . .

"But to fit it up with wells and pumps of such pervasive and potential reach that from their base the defendant can tap the water stored in the plaintiff's land, and in all the region thereabout, and lead it to his own land, and by merchandising it prevent its return, is, however reasonable it may appear to the defendant and its customers, unreasonable as to the plaintiff and the others whose lands are thus clandestinely sapped, and their value impaired." (58 N.E. 646, emphasis added).

The holding of Forbell affords no support for the "parcel supply" rule adopted by the majority Opinion. On the contrary, though it does not use the term "common supply", it is clear that if the use in question had been for any purpose connected with the enjoyment or use of defendant's lands, the court would have approved such use. It is interesting to note that this case, which is often credited as being the source of the American doctrine of reasonable use, plainly recognizes that the pumping and merchandising of water which is in no way connected with the use of the land from which it is taken, prevents the return of that water to the replenishment of the supply. Forbell is squarely in point as to the City of Tucson. The City's pumping of large quantities of water for sale on alien land from a two-acre well site is exactly comparable to the activities of Tucson. Tucson extracts water from "postage stamp" sized tracts in the Sahuarita-Continental Groundwater Subdivision and transports the water to the Tucson Subdivision, where "by merchandising it prevents its return".

1 Canada v. City of Shawnee, 64 P.2d 694 (Okla., 1937) is
2 another case relied on by the majority Opinion.

3 In this case, the City purchased 70 acres several miles
4 from the City. It drilled twelve wells and pumped water from
5 these wells to the City for sale.

6 After summarizing the English rule, correlative rights
7 and the reasonable use doctrine, the court said that:

8 ". . . few if any cases can be found
9 where American courts have denied a landowner
10 the right to draw as much percolating water
11 from under his land as he needs, even though
12 it hurts his neighbor, so long as the use to
13 which he puts it bears some reasonable
14 relationship to the natural use of his land,
15 and even though such use of the land be
16 industrial and not agricultural. But the
17 majority of recent decisions stop short at
18 and forbid the harmful extraction of
19 percolating water for sale at a distance.
20 (64 P.2d 697, emphasis added).

21 The holding of Canada is well summarized in the
22 syllabus prepared by the Court.

23 "3. The owner of land may draw from
24 beneath its surface as much of the
25 percolating waters therein as he needs, even
26 though the water of his neighbor is thereby
27 lowered, so long as the use to which he puts
28 it bears some reasonable relationship to the
29 natural use of his land in agricultural,
30 mining, or industrial and other pursuits, but
31 he may not forcibly extract and exhaust the
32 entire water supply of the community, causing
irreparable injury to his neighbors and their
lands, for the purpose of transporting and
selling said water at a distance from and off
the premises." (64 P.2d at 695, emphasis
added).

33 In the present case, Duvals' uses not only bear "some
34 reasonable relationship to the natural use" of Duvals' lands, but
35 without this water, Duvals' lands and property are useless.
36 Canada stands for nothing more than the proposition that
37 percolating water may not be taken from beneath the lands of
38 neighboring owners "for the purpose of transporting and selling
39 said water at a distance from and off the premises". Neither the
40 facts nor holding of Canada is in point and it, like Forbell and

1 Rothrauff, stands for a principle which is at odds with the
2 "parcel supply" rule of the majority Opinion.

3 Meeker v. City of East Orange, 77 N.J.L. 623, 74 A. 379
4 (1909).

5 At the top of page 11 of the Opinion, there is a
6 partial sentence which was quoted from Canada, supra. This
7 language in Canada was originally taken from Meeker.

8 Meeker may well have involved surface water, but this
9 is immaterial for present purposes. Meeker, like many of the
10 other early cases, involved the extraction of water by a city
11 from 20 wells and the transportation and sale of that water to
12 its inhabitants.

13 We respectfully suggest that the quotation from Meeker
14 referred to above does not properly reflect either the sentence
15 from which it was taken or the paragraph of Meeker in which that
16 sentence is contained. The entire paragraph of Meeker from which
17 the above quote was extracted reads as follows:

18 "Upon the whole, we are convinced, not
19 only that the authority of the English cases
20 is greatly weakened by the trend of modern
21 decisions in this country, but that the
22 reasoning upon which the doctrine of
23 'reasonable user' rests is better supported
24 upon general principles of law and more in
25 consonance with natural justice and equity.
26 We therefore adopt the latter doctrine. This
27 does not prevent the proper user by any
28 landowner of the percolating waters subjacent
29 to his soil in agriculture, manufacturing,
30 irrigation, or otherwise; nor does it prevent
31 any reasonable development of his land by
32 mining or the like, although the underground
water of neighboring proprietors may thus be
interfered with or diverted; but it does
prevent the withdrawal of underground waters
for distribution or sale for uses not
connected with any beneficial ownership or
enjoyment of the land whence they are taken,
if it thereby result that the owner of
adjacent or neighboring land is interfered
with in his right to the reasonable user of
subsurface water upon his land, or if his
wells, springs, or streams are thereby
materially diminished in flow, or his land is
rendered so arid as to be less valuable for
agriculture, pasturage, or other legitimate
uses." (74 A. at 385, emphasis added).

1 Rothrauff v. Sinking Spring Water Company, 339 Pa. 129, 14 A.2d
2 87 (1940).

3 This case is cited and quoted from in every reasonable
4 use case decided by the Court since and including Bristor II.
5 The "off his land" portion of the Arizona rule is taken directly
6 from the Rothrauff opinion (14 A.2d 90). The language so heavily
7 relied upon by the Court in the Opinion and in prior decisions is
8 dicta in Rothrauff occurring in the middle of a lengthy
9 paragraph. In Jarvis I, only a single sentence was quoted. This
10 sentence was referred to in Jarvis II. In the Opinion (p. 10),
11 only a part of that sentence is quoted. None of the Court's
12 decisions has ever mentioned the whole context of that paragraph
13 or the facts or holding of Rothrauff.

14 The facts were that the defendant corporation was
15 engaged in the business of selling water to the public. Under a
16 contract with the plaintiff, the defendant first purchased water
17 flowing from the plaintiff's spring. This was not sufficient to
18 serve the needs of its customers, so it contracted with defendant
19 to drill a well designated as No. 1. The defendant's demands
20 increased and it drilled three more wells on the plaintiff's
21 lands, all of which were unsuccessful for various reasons, as was
22 another well on defendant's own land. The defendant took options
23 on a parcel adjoining plaintiff's land and drilled three more
24 unsuccessful wells. When defendant drilled well No. 9 on the
25 optioned parcel, it "furnished an abundant supply of water, but
26 immediately upon operating it, . . . plaintiff's spring went dry"
27 and the parties agreed that it would remain dry. Plaintiff sued
28 in contract for damages.

29 We quote the paragraph of Rothrauff referred to above
30 in its entirety:

31 "This much is settled,--that when a
32 spring depends for its supply upon filtra-
tions and percolations through the land of

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an adjoining owner, and in the use of that land for lawful purposes the spring is destroyed, such owner, in the absence of malice and negligence on his part, is not liable for the damage thus occasioned. (Citing Pa. cases) The question now arises in regard to the scope of the limitation embodied in the phrase 'in the use of that land for lawful purposes.' Such purposes undoubtedly include mining, quarrying, building, draining, cultivating and irrigating the land, as well as watering live stock and domestic uses in general. Do the same rights exist in the case of an owner who treats subterranean water as merchandise for sale and distribution to persons having no connection with the land from which the water is derived? Under what is known as the English rule, (Footnote to Pa. cases) as well as most of the earlier decisions in this country, no distinction was made in this respect, the argument being that subjacent water, like minerals or oil, should belong to the owner of the land absolutely and for all purposes, and that, because of the difficulty of tracing the occult movements of underground waters, and because an attempt to administer any other legal rule would involve the subject in uncertainty, the only practical solution is to allow each owner to enjoy full rights of property in the waters under his land. But the marked tendency in American jurisdictions in later years has been away from the doctrine that the owner's right to sub-surface waters is unqualified; on the contrary there has been an ever-increasing acceptance of the viewpoint that their use must be limited to purposes incident to the beneficial enjoyment of the land from which they are obtained, and if their diversion or sale 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' within the general rule concerning percolating waters, but constitutes an actionable wrong for which damages are recoverable. While there is some difference of opinion as to what should be regarded as a reasonable use of subterranean waters, the modern decisions are fairly harmonious in holding that a property owner may not concentrate such waters and convey them off his land if the springs or wells of another landowner are thereby damaged or impaired. Among leading cases may be cited: Forbell v. City of New York, 164 N.Y. 522, 53 N.E. 644, (Citing cases). In the absence of precedent in our own State we adopt this view as the proper interpretation of the law, and therefore hold that when defendant sank well No. 9 and used the water therefrom for the purpose of sale and distribution, it committed, as against plaintiffs, a tortious

1 act for which at common law they might have
2 recovered resulting damages, or, there being
3 in existence a contract of which such illegal
4 act constituted a breach by preventing
5 performance on the part of plaintiffs, they
6 may, as already pointed out, recover damages
7 in their present action on the contract." 14
8 A.2d 90-91, emphasis added.

9 The facts of Rothrauff are dissimilar and its holding
10 bears no resemblance to the case at bar. The defendant water
11 company did not and could not possibly have suggested that its
12 uses were over the common supply or were incident to the
13 beneficial enjoyment of its own land from which the water was
14 taken. Hence, Rothrauff is a decision which lends no support for
15 the "parcel supply" rule of the majority Opinion.

16 From the foregoing, it is apparent that only parts of
17 sentences or fragments from earlier opinions are utilized in
18 support of the "parcel supply" rule of the majority Opinion.
19 Phrases like "convey them off his land", "the land whence they
20 are taken" and "the lands from which they are pumped", which are
21 used in the cases relied upon by the majority, have been given a
22 new meaning; a meaning which was never intended or contemplated
23 by the authors of those opinions. These phrases relied upon by
24 the Court do not speak for themselves and when one examines the
25 decisions from which they are quoted, it is obvious that the
26 meaning ascribed to them by the Court is, in reality, contrary to
27 the facts and holdings of these decisions.

28 If there are any decisions with holdings based on facts
29 (Tucson aside) similar to those before the Court, they are not
30 referred to in the majority Opinion. If there are any decisions
31 which have ever held that an owner of lands over a "common sup-
32 ply" of groundwater may not make legitimate, beneficial and
reasonable uses of groundwater in connection with any of his
lands overlying that supply, they have eluded research. This
Court's decisions in Jarvis II, Anway and Neal teach the opposite
and correct result. A rehearing should be granted.

END OF APPENDIX - page 11

(682)

1 STATE OF ARIZONA)
2 County of Maricopa) (ss.

3 JAMES W. JOHNSON, being first duly sworn says:

4 Affiant mailed two copies of the foregoing Response of
5 Duval Corporation and Duval Sierrita Corporation to Motion for
6 Rehearing of City of Tucson and Memorandum in Support of Motions
7 for Rehearing to:

8 Gerald G. Kelly, Esq.
9 Musick, Peeler & Garrett
10 One Wilshire Blvd.
11 Los Angeles, California 90017
12 Attorneys for Cyprus Pima Mining Co.

13 Peter C. Gullato, Esq.
14 Assistant Attorney General
15 159 Capitol Building
16 Phoenix, Arizona 85007
17 Attorneys for State Land Department

18 Mark Wilmer, Esq.
19 Snell & Wilmer
20 3100 Valley Center
21 Phoenix, Arizona 85073
22 Attorneys for Farmer Investment Company

23 Thomas Chandler, Esq.
24 Chandler, Tullar, Udall & Richmond
25 1110 Transamerica Building
26 Tucson, Arizona 85701
27 Attorneys for Anamax Mining Company

28 James Webb, Esq.
29 City Attorney of the City of Tucson
30 P. O. Box 5547
31 Tucson, Arizona 85701
32 Attorney for the City of Tucson

and one copy of the foregoing to:

33 The Honorable Bruce E. Babbitt
34 The Attorney General for the State of Arizona
35 200 State Capitol
36 Phoenix, Arizona 85007

37 Burton M. Apker, Esq.
38 Evans, Kitchell & Jenckes
39 363 North First Avenue
40 Phoenix, Arizona 85003
41 Attorneys for ASARCO

42 Bill Stephens, Esq.
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Attorney for the City of Prescott

properly addressed and postage prepaid, on October 22, 1976.

James W. Johnson
James W. Johnson

SUBSCRIBED AND SWORN TO before me this 22nd day of

October, 1976.

Betty G. Bineau
Notary Public

My commission expires:

9-30-78

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, Response of Duval Corporation and Duval Sierrita Corporation to Motion for Rehearing of City of Tucson and Memorandum in Support of Motions for Rehearing, pages 628-684 (57 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

