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4 Attorneys for
5 FARMERS INVESTMENT COMPANY

6 IN THE SUPREME COURT OF THE STATE OF ARIZONA

7 In Banc

8 FARMERS INVESTMENT COMPANY,
a corporation,

9 Appellant,

10 v.

11 ANDREW L. BETTUY, as State Land
Commissioner, and the STATE LAND
12 DEPARTMENT, a Department of the
State of Arizona, and PIMA MINING
13 COMPANY, a corporation,

14 Appellees.

15 FARMERS INVESTMENT COMPANY, a
16 corporation,

17 Appellant,

18 v.

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

22 Appellees.

23 CITY OF TUCSON, a municipal corporation,

24 Appellant,

25 v.

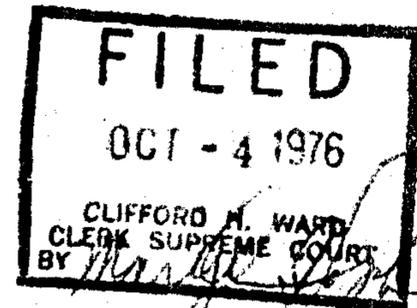
26 ANAMAX MINING COMPANY, and DUVAL
CORPORATION and DUVAL SIERRITA
27 CORPORATION,

28 Appellees.

29
30 I.

31 THE ANAMAX CRITICISM OF THE COURT'S INTERPRETATION
AND APPLICATION OF THE REASONABLE DOCTRINE

32 Anamax re-argues its forced and distorted interpretation



No. 11439-2

FICO'S MEMORANDUM
RESPONDING TO THE
ANAMAX MOTIONS FOR
REHEARING

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1 of the phrases "off the lands" and "away from the lands" but
2 with no greater force or persuasiveness than in its Appellee's
3 Brief.

4 FICO sees no need to be concerned with any cases
5 antedating the second Bristor v. Cheatham case, 75 Ariz. 227,
6 255 P.2d 173, and the two Jarvis v. State Land Department, 104
7 Ariz. 529, 456 P.2d 385 and 106 Ariz. 506, 479 P.2d 169 cases.

8 A fair and objective reading of Bristor II leads
9 only to the conclusions which this Court has restated and con-
10 firmed in this case.

11 While Anamax provides a copy of Count I of the
12 Bristor complaint as an appendix and quotes from it at length,
13 its assertions of what the plaintiffs in Bristor alleged and
14 argued are not of much legal relevance as establishing what the
15 Bristor court held. The legal impact of that decision flows
16 from how the Arizona Supreme Court interpreted and understood
17 the legal issues as framed by the pleadings which it had for
18 decision and not from what Anamax now asserts were the plaintiffs
19 claims in Bristor II. Justice Windes in Bristor II first states:

20 "The appeal is from an order of the
21 lower court in sustaining a motion to dis-
22 miss plaintiffs' complaint. For the original
23 majority and minority opinions, see 73 Ariz.
24 228, 240 P.2d 185. The substance of the
25 allegations of the complaint are set forth
26 therein." (Emphasis added)

27 It is clear that the Court in Bristor II was considering
28 and deciding the case based upon the interpretation of the plead-
29 ings as outlined by Justice Phelps in Bristor I. In 73 Ariz. 229,
30 240 P.2d 185, Justice Phelps had there stated the legal and
31 factual issues as outlined by Bristor's complaint:

32 / / / /

1 "They further allege there is a common
2 supply of underground water underlying the
3 premises of plaintiffs and defendants; that
4 since 1916 their domestic supply of water
5 has been, and is, derived exclusively from
6 this underground water supply and that they
7 have enjoyed the use of the same continuously
8 since that time; these lands are located one
9 and a half miles south and one mile east of
10 Laveen; and that defendants' lands are west
11 of plaintiffs' lands.

12 " That in the years 1948 and 1949 defend-
13 ants sank a number of large wells (eleven
14 in all) to great depths and are taking the
15 water by means of powerful pumps from this
16 common water supply and are conveying it
17 off the premises from which it is pumped to
18 other lands owned by defendants, approximately
19 three miles distant, where they are using it
20 in reclaiming from the desert other lands not
21 adjacent to the land from which water is being
22 pumped.

23 " They further allege that the withdrawal of
24 such water from the common underground water
25 supply has resulted in drying up the domestic
26 wells of plaintiffs making it necessary in
27 some cases for plaintiffs to haul their domestic
28 water supply from other places and that as a
29 result of defendants' action plaintiffs have been
30 greatly damaged. In a second count they allege
31 the waters from which their wells are supplied
32 are taken from an underground stream. They

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1 prayed for an injunction against defendants
2 enjoining them from further operation of
3 said wells and for damages which they have
4 thus far sustained." (Emphasis added)
5 Justice Windes stated the question for decision in

6 Bristor II:

7 "With reference to the dismissal of the
8 complaint, we consider the first cause of
9 action thereof. This cause alleges that the
10 plaintiffs since the year 1916 sank certain
11 wells which supplied them with water for
12 domestic purposes; that during the years
13 1948 and 1949 the defendants sank on their
14 lands a number of large wells for irrigation
15 purposes; that by the operation thereof the
16 water has been drawn from under plaintiffs'
17 lands causing the level to drop to the extent
18 that plaintiffs were deprived of such waters
19 for domestic purposes; that defendants are
20 transporting the water thus pumped from under
21 plaintiffs' land to a distance of approxi-
22 mately three miles for the development and
23 irrigation of lands not theretofore irrigated;
24 that the waters pumped by the defendants
25 are not used for any beneficial purpose upon
26 the lands from which the same is taken and
27 that the plaintiffs have been suffering and
28 will continue to suffer damages.

29 "Whether the foregoing states a cause of
30 action depends upon whether this court is going
31 to follow the English common-law rule that the
32 owner of lands overlying subterranean waters

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1 may extract the same for any purpose he
2 chooses with a resulting damage to an
3 adjoining owner without liability therefor,
4 or whether we adopt what is called the
5 American rule that one may extract such water
6 for a reasonable, beneficial use of the land
7 from which the same is taken." 75 Ariz. 227,235.
8 Jarvis I and Jarvis II clearly demonstrate that
9 Bristor II is fully viable. As between two areas, Tucson and
10 Avra Valley, the Court applied the rule as applicable to one
11 area versus another, but it did not in any sense hold or
12 indicate that the fundamental rule laid down in Bristor II was
13 in any fashion weakened.

14 Appellees' reliance upon State ex rel v. Anway
15 87 Ariz. 206, 349 P.2d 774, is misplaced. The sole question
16 there (other than of statutory construction) was whether
17 groundwater could be used upon land from which it was withdrawn
18 within a critical area solely because it had not been thereto-
19 fore irrigated. The opinion plainly does not deal with trans-
20 portation and use of water away from the area which produced it.

21 So also reliance upon Neal v. Hunt, 112 Ariz. 307,
22 541 P.2d 559 is misplaced. The Neal wells were not within a
23 critical groundwater area. The Court held that since Hunt was
24 not damaged by Neal's pumping, no injunction should issue, since
25 Hunt was not injured.

26 The point which Anamax persists in ignoring is that
27 this Court has held unequivocally that additional pumping and
28 transportation of groundwater from within a critical ground-
29 water area for use outside of that area over and above any made
30 when the area was designated as a matter of law damages the
31 adjoining landowner within the critical area.

32 It is respectfully suggested that Anamax may have

1 cast some of its arguments in slightly different form but the
2 substance (or lack of substance thereof) is unchanged.

3 II.

4 FICO HAS IMPLICITLY RECOGNIZED THE
5 COMMON SUPPLY PRINCIPLE

6 FICO is intrigued with Appellees' suggestion that
7 "large investments are (have been) made upon the strength of
8 previous pronouncements by this Court regarding the State's
9 water law" (Memo. p.13), implying that Anamax has acted in a
10 good faith reliance upon a good faith, intelligent reading
11 of Bristor II and Jarvis I and Jarvis II.

12 We assume that a similar good faith reliance caused
13 Anamax to drill the deep wells directly involved in this case
14 and to boldly program an enlargement of its mining and milling
15 program in the face of this pending lawsuit.

16 Either Anamax concluded that FICO had become exhausted
17 financially and its morale destroyed and hence would not resist
18 the latest trespass, or it had persuaded itself that "law is that
19 which is boldly asserted and stoutly maintained."

20 In both areas of judgment, Anamax was wrong.

21 II.

22 BRISTOR V. EBATHAM -- ANAMAX'S VERSION

23 FICO quoted the Bristor Court's understanding of the
24 factual and legal issues which it considered it had for decision
25 in Bristor II at pages 2 - 5, supra. We doubt much enlight-
26 enment will result from pursuing the validity of counsel's view
27 as to what the Court considered, in counsel's present view of
28 the matter.

29 We also doubt that there is much to be gained from re-
30 viewing language which Justice LaPrade and DeConcini used in
31 their dissenting opinions in Bristor I several years before
32 Bristor II. We accordingly do not consider this portion of

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1 the memorandum further.

2 III.

3 FICO'S CLEAR RIGHT TO RELIEF

4 There was no dispute before the trial court as to
5 the controlling facts. Anamax had completed a large deep well
6 within the Sauwarita Continental Critical Groundwater Area
7 from which it proposed to pump groundwater and transport it
8 beyond the limits of the critical area for use in its proposed
9 enlarged mining and milling program. FICO was growing crops
10 which require groundwater for irrigation and the successful
11 growing and maturing of these crops.

12 In Jarvis I this Court held that withdrawal of
13 groundwater from within a critical area for a use outside the
14 critical area which constituted a use not made when the critical
15 area was established caused irreparable damage to the existing
16 groundwater users as a matter of law.

17 A discussion therefore of what constitutes a "parcel"
18 of land or whether the burden of proof shifts to Anamax is
19 pointless.

20 As a matter of law FICO was suffering and would suffer
21 irreparable damage.

22 CONCLUSION

23 In the main, Anamax simply restates the arguments and
24 authorities it presented in its answering brief. Anamax also
25 suggests the Court should re-examine the reasoning and rationale
26 of Bristor II and Jarvis I and II and modify these holdings for
27 the benefit of Anamax. The suggestion is made that many dollars
28 have been invested based upon the reading Anamax now gives
29 Bristor II.

30 FICO respectfully suggests that if Anamax and Anaconda
31 had made any good faith effort to ascertain the amount of water
32 which might be lawfully available to Anamax before it invested

1 these millions it would not now find itself in the predicament
2 of which it complains. Manifestly, there was no way within
3 the law by which Anaconda could obtain the water it wanted for
4 its mining and milling operations except at some considerable
5 cost. It had the choice, therefore, of taking the chance that
6 it would not be challenged (or, if challenged, that it could
7 bluster and over-awe by its large investments its way through),
8 or it could develop its mine at a much higher cost.

9 There is no reasonable interpretation to be put upon
10 Bristor II, coupled with Jarvis I and II, other than that which
11 this Court has now restated. Certainly the assurance with which
12 Anamax proceeded to drill and harness two additional large wells
13 and enlarge its milling operations in the face of a known and
14 dramatic drop in the water table does not speak too plainly of
15 its respect for the previous pronouncements of this Court which
16 had stated the controlling principles governing use of ground-
17 water--stated them so clearly that he who "drills" could also
18 read.

19 Respectfully submitted,

20 SNELL & WILMER

21
22 By Mark Wilmer

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23
24 Attorneys for FARMERS INVESTMENT
25 COMPANY

26 A copy of the foregoing
27 Memorandum Responding to
28 Anama's Motion for Rehearing
29 were mailed this 4th day of
30 October, 1976 to:

31 Honorable Bruce E. Babbitt
32 The Attorney General for the State of Arizona
200 State Capitol
Phoenix, Arizona 85007

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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, Supreme Court Instruments, Part One, FICO's Memorandum Responding to the Anamax Motions for Rehearing, pages 434-442 (9 pages)

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

Antonio Bucci
Signature

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

Etta Louise Miller
Signature, Notary Public

My commission expires 04/13/2009.
Date

