

ORIGINAL

IN THE SUPREME COURT OF THE STATE OF ARIZONA

FARMERS INVESTMENT COMPANY,)
a corporation,)

Appellant,)

vs.)

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

Appellees.)

NO. 11439-2

BRIEF OF AMICUS CURIAE
OF MUNICIPAL WATER
USERS ASSOCIATION

FARMERS INVESTMENT COMPANY,)
a corporation,)

Appellant,)

vs.)

THE ANACONDA COMPANY, a)
corporation; ANAX COPPER)
MINES, INC., THE ANACONDA)
COMPANY, as partners in and)
constituting ANAMAX MINING)
COMPANY, a partnership,)

Appellees.)

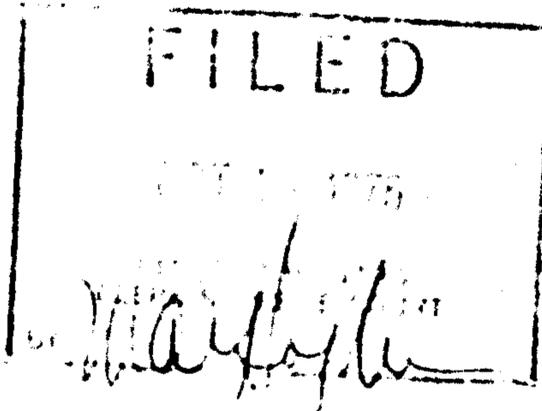
CITY OF TUCSON, a municipal)
corporation,)

Appellant,)

vs.)

ANAMAX MINING COMPANY, and)
DUVAL CORPORATION and DUVAL)
SIERRITA CORPORATION,)

Appellees.)



(734)

QUESTION PRESENTED

1. Does the opinion of the court in this matter overrule by implication previous decisions of this court defining the law which the member cities of the MUNICIPAL WATER USERS ASSOCIATION have relied on in providing domestic water service to their customers?

INTEREST OF AMICUS CURIAE

The MUNICIPAL WATER USERS ASSOCIATIONS is a voluntary organization composed of the cities of Glendale, Mesa, Phoenix, Scottsdale, and Tempe. Each of these cities owns its own domestic water system, and each has traditionally served all customers within its water service area with domestic water. A substantial portion of the domestic water served by each of the member cities to its customers is obtained by pumping underground waters lying under the service areas of the various cities. If the opinion of the court is so construed as to limit the right of the various cities to pump such waters for service to their domestic water customers, all of them and their customers will be adversely

affected. All of the cities have been increasing in population at a relatively rapid rate, with a proportionate increase in the demand for and use of domestic waters served by such cities. All of the lands within the boundaries of the service areas of the member cities of the MUNICIPAL WATER USERS ASSOCIATION are located within a critical ground water area.

USE OF UNDERGROUND WATER FOR SERVING
DOMESTIC CUSTOMERS

In the present opinion, the court makes these statements with respect to the use of underground water: (Pages 12 and 13)

"From the context of the language used in the Bristor opinion, from the cases quoted in it, and from the Bristors' position as set forth in their complaint, it is clear there is no firm basis for appellees' conclusion that the word "lands" meant other than lands on which the pumping occurred."

"The appellees' theory that the American doctrine of reasonable use only forbids the conveyance of percolating groundwaters off the lands overlying the common source of supply is not supported by the citation of any precedent. Neither is it an effective rule except possibly in those situations where there is an underground pool or basin of water. If we assume that the water withdrawn from an underground pool, which is not

consumptively used returns to replenish the common source of supply, still where groundwater percolates through the soil down gradient, the replenishment of the supply does not benefit the users of water up gradient from the point of return."

In most instances, each of the member cities of the MUNICIPAL WATER USERS ASSOCIATION acquires a well site only for the purpose of drilling a well for serving domestic water to their customers. These well sites may be as small as 50 feet by 50 feet, with reasonable access thereto. If the opinion of the court in this matter is construed to mean that the water pumped from below any such well site can be used only on the well site itself, which may be the only land the city or town owns in an area, then these cities will not be permitted to use any underground water for serving domestic customers in any instance where an adjacent land owner is adversely affected by the withdrawal of waters.

The statement of the law with respect to the right of the cities and towns to use underground waters as contained in Jarvis vs. State Land Department (1970) 106 Ariz. 506, 510, 479 P2d 169, has been considered to be a correct statement of the law, and has been relied

on by the member cities of the MUNICIPAL WATER USERS ASSOCIATION. We quote as follows from that opinion:

"Tucson questions whether on equitable principles it should be prohibited from delivering water to Ryan Field. Ryan Field is an airfield which we understand has existed at least as long as petitioners have engaged in agriculture. Its lands overlie the Avra-Altar water basin and geographically it lies within the Marana Critical Ground Water Area so as to entitle it to withdraw water from the common supply for all purposes except agriculture. Tucson should not be prohibited from delivering water to Ryan Field for lawful purposes since the Ryan Field supply is from the common basin over which it lies and from which it could legally withdraw water by sinking its own wells for domestic purposes.

(5) Tucson's delivery of water to purchasers within the Avra-Altar drainage area but outside the Marana Critical Ground Water Area is, however, without equitable sanction. There is no indication in the record that these customers of Tucson overlie the water basin so as to come within the principle applicable to Ryan Field. Until Tucson can establish that its customers outside the Marana Critical Ground Water Area but within the Avra-Altar Valley's drainage areas overlie the water basin so as to be entitled to withdraw water from it, there are no equities which will relieve it of the injunction heretofore issued."

In the present opinion (page 14), the court says:

"Water may not be pumped from one parcel and transported to another just because both overlie

the common source of supply, if the plaintiff's lands or wells upon his land thereby suffer injury or damage.."

This very broad statement, together with the other statements previously quoted from the opinion, appear by implication at least to be in conflict with that portion of Jarvis vs. State Land Department, Supra, above quoted, and this causes concern to the member cities of the MUNICIPAL WATER USERS ASSOCIATION, who have always thought the law to be as stated in Jarvis vs. State of Arizona, Supra, that such cities may pump waters from a common basin and serve domestic water to any customer owning and occupying land which lies over such common basin.

Such cities and towns are also concerned with the effect of the following statement: (Page 13)

"If we assume that the water withdrawn from an underground pool which is not consumptively used returns to replenish the common source of supply, still where groundwater percolates through the soil down gradient, the replenishment of the supply does not benefit the users of water up gradient from the point of return."

In the Salt River Valley Area, the slope of the land lies to the Southwest and it is a matter of common

knowledge that the flow of underground water is in the same direction. The up gradient lands then would lie to the North and East, and it is feared that this statement could be so interpreted as to prevent the pumping of waters to the South and West of any affected landowner because in no instance would the water not consumptively used which is returned to the common supply benefit the users of the water up gradient from the point of return.

It is also a matter of common knowledge that much of the domestic waters are not returned to the land, but are pumped to a sewage disposal plant. The member cities of the MUNICIPAL WATER USERS ASSOCIATION are also the joint owners of the disposal plant at 91st Avenue, where much of the waters are transported, which is many miles distant from some of the land from which it is pumped. It is not desirable in a heavily populated area to have sewage returned to the common basin because it pollutes the underground water.

Does this present opinion imply that these cities are not to be permitted to use underground waters because it is intended that the portion that

becomes sewage is to be transported many miles distant and will not be available to replenish the comm. source of supply? If so, these cities are in serious trouble.

CONCLUSION

The court's opinion in this matter appears overly restrictive. As indicated, the member cities of the MUNICIPAL WATERS USERS ASSOCIATION have established their domestic water systems in reliance on the law being as set forth in Jarvis vs. State Land Department, Supra, which in effect held that with respect to the domestic water service system of a city, 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 a reasonable use. It appears to us that this should be the only test, and that the opinion of the court should be modified at least to this extent.

Respectfully submitted this 12th day of
October, 1976.

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TWO COPIES of Petitioner's Brief of Amicus Curiae mailed this 12th day of October, 1976, to FARMERS INVESTMENT COMPANY, Appellant, c/o Mark Wilmer, Snell and Wilmer, 3100 Valley Center, Phoenix, Arizona, Attorneys for Appellant.

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TWO COPIES of Petitioner's Brief of Amicus Curiae mailed this 12th day of October, 1976, to ANDREW L. BETTWY, Appellee, and STATE LAND DEPARTMENT, c/o Peter C. Gulatto, Assistant Attorney General, 159 Capitol Building, Phoenix, Arizona, attorneys for Appellees.

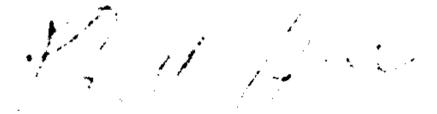
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TWO COPIES of Petitioner's Brief of Amicus Curiae mailed this 12th day of October, 1976, to ANAMAX MINING COMPANY, Appellee, c/o Thomas Chandler, 1110 Transamerica Building, Tucson, Arizona, Attorney for Appellee.

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TWO COPIES of Petitioner's Brief of Amicus Curiae Mailed this 12th day of October, 1976, to DUVAL CORPORATION and DUVAL SIERRITA CORPORATION, Appellees, c/o Mr. Calvin H. Udall, 100 West Washington, Suite 1700, Phoenix, Arizona, Attorney for Appellees.

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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, Brief of Amicus Curiae of Municipal Water Users Association, page 734 and attachment (13 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

