

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
9 LAND DEPARTMENT, a Department
of the State of Arizona, and
PIMA MINING COMPANY, a
corporation,

10 Appellees.

11 FARMERS INVESTMENT COMPANY, a
12 corporation,

13 Appellant,

14 v.

15 THE ANACONDA COMPANY, a corpora-
16 tion; AMAX COPPER MINES, INC.,
17 THE ANACONDA COMPANY as partners
in and constituting ANAMAX
MINING COMPANY, a partnership,

18 Appellees.

19 CITY OF TUCSON, a municipal
20 corporation,

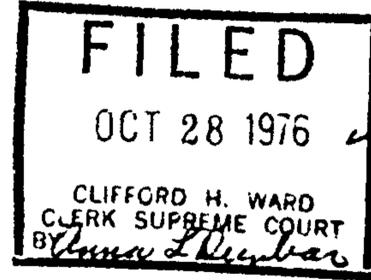
21 Appellant,

22 v.

23 ANAMAX MINING COMPANY, and
24 DUVAL CORPORATION and DUVAL
SIERRITA CORPORATION,

25 Appellees.

26
27 The City of Prescott, a municipal corporation of the
28 State of Arizona, have asked leave to file a brief as amicus
29 curiae for the purpose of asking the Honorable Court to clarify
30 and/or modify portions of the majority opinion which appear on
31 their face to be in conflict with the existing groundwater law
32 in the State of Arizona as enunciated by this Court in previous
32-A decisions.



NO. 11439-2

AMICUS CURIAE BRIEF OF THE
CITY OF PRESCOTT

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1 As stated in the Petition for Leave to File an
2 Amicus Brief, the City of Prescott is involved in substantial
3 water litigation and further is in the course of completing
4 comprehensive water studies and tests in order to satisfy
5 court judgments and to secure the future water needs of the
6 citizens of Prescott and the Little Chino Valley Water Basin.
7 All of Prescott's investments and developments of water
8 resources have been guided by what Prescott perceived to be the
9 groundwater law in Arizona as delineated by the Arizona Revised
10 Statutes and decisions of the State Supreme Court.

11 Since the City of Prescott is now involved in costly
12 water litigation, it feels it is its duty to its citizens to
13 petition this Court for a clarification or modification of its
14 decision in the FICO suit or the citizens of Prescott might have
15 to bear the cost of continuous litigation over any attempts to
16 develop water resources for Prescott. It is not the intention
17 of the City to request this Court to reform the FICO suit to the
18 individual views and interests of the City of Prescott, but only
19 that this Court enunciate a rule or rules with respect to
20 groundwater which are clear and definitive and which may be
21 applied by Arizona Courts to the particular fact situations and
22 equities arising between parties in groundwater disputes.

23 FICO PROPOSAL:

24 The City of Prescott has received and read with
25 interest a copy of the proposal made by FICO and presented to
26 the Supreme Court as included as an attachment to its Response
27 Memoranda.

28 The City of Prescott does not pretend to have some
29 special insight into the controversy in the FICO case; nor, is
30 the City of Prescott suggesting that with respect to the FICO
31 case that the interests of one party should be considered by
32 the Court as more important due to their social or economic

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1 impact upon the State of Arizona. In fact, Prescott heartily
2 agrees with FICO's proposal in the respect that Prescott also
3 believes that, if possible, all parties should join in an effort
4 to protect and conserve the water resources available to the
5 Tucson area, both groundwater and Colorado river water, since
6 once gone the resource is not replaceable. Prescott, and all
7 other municipalities, and all economic interests in this State
8 are faced with the same problem, and cooperation and conservation
9 of water resources is the only answer. Thus, if the parties in
10 FICO could reach a reasonable accommodation between the
11 conflicting claims, the public interest and the interest of all
12 economic interest would be best served.

13 However, even if such compromise and accommodation is
14 reached between the parties in the FICO case, such accommodation
15 would not resolve the problems created by the FICO decision and
16 more litigation and costly conflicts between parties in other
17 areas of the State are likely to ensue. In other words, it is
18 the City of Prescott's position, that if the parties in FICO
19 resolve their differences and reach a settlement, it would still
20 be necessary for this Court to either withdraw its FICO decision
21 since it has not been published, or to modify or clarify said
22 decision in order to bring it into conformity with previous water
23 decisions and to completely settle the groundwater law in
24 Arizona.

25 PREVIOUS GROUNDWATER LAW IN ARIZONA:

26 This Court, over the years, has ruled on the law with
27 respect to the use of groundwater. The first landmark decision
28 was Bristor v. Cheatham (Bristor No. II), 75 Ariz. 227, 255
29 P.2d 173, reversing Bristor v. Cheatham (Bristor No. I), 73
30 Ariz. 228, 240 P.2d 185 (1952).

31 In that decision, the Court stated:
32

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1 "This rule does not prevent the extraction
2 of groundwater subjacent to the soil so
3 long as it is taken in connection with
4 a beneficial enjoyment of the land from
5 which it is taken. If it is diverted for
6 the purpose of making reasonable use of
7 the land from which it is taken, there is
8 no liability occurred to an adjoining
9 owner for a resulting damage." (225 P.2d
10 at 180.)

11 The Court's decision emphasized that where the
12 groundwater was diverted for use on the land from which it is
13 taken, the adjoining land owner cannot complain of any resulting
14 damage to their water supply. The Court did not, however, define
15 at that time the term "on the land from which the groundwater is
16 taken". Subsequent cases of this Court have defined that term
17 and all economic interests, including municipalities, farming
18 interests and the mines have made substantial investments in
19 water resources based on those subsequent decisions. An
20 adoption by this Court in FICO that the term "on the land" did
21 not mean that land overlying the common supply of groundwater is
22 a complete departure from this Court's earlier pronouncements
23 and in direct conflict with practices undertaken in good faith
24 by municipalities and by numerous farming interests, such as
25 FICO, whereby a farmer has irrigation wells located on one parcel
26 of land and irrigates a noncontiguous parcel of land from such
27 wells.

28 Thus in fact, if this Court were to adopt the
29 interpretation set forth by FICO with respect to Bristor II and
30 later cases, such activities by municipalities, even within their
31 corporate limits, and by a large group of farmers would be
32 illegal.

In fact, if this Court were seeking to determine what
the then sitting Supreme Court believed the fact situation to be
in Bristor, one need only to look at Justice LaPrade's
occurring and dissenting opinion in Bristor I. Justice LaPrade

1 quoted the following passages from the Plaintiff's Opening
2 Brief:

3 "The first cause of action does not pose
4 a question as to who has the better right
5 between adjoining owners, both of whom are
6 pumping percolating water and using the
7 water to develop their respective lands.
8 Thus, however, we believe, present squarely
9 to this Court the proposition that the
10 pumper of percolating water cannot transport
11 such percolating water to some other locality
12 where there would be no opportunity for it
13 to return and replenish the common supply
14 available to the owners of both tracts of
15 land." (Emphasis supplied) (240 P.2d at
16 193-194).

17 This statement by the Court makes it clear, in the
18 absence of any other definition of "the land from which it was
19 taken" that the Court in Bristor was aware that the Plaintiff's
20 allegation was that the Defendants were unlawfully transporting
21 water they pumped away from the common source of supply which
22 fed the wells of both the Plaintiff and the Defendants. Thus,
23 this Court, by implication, in the Bristor decision accepted the
24 notion that the land overlying the common supply would be
25 accepted as that land from which the water was extracted within
26 the meaning of the doctrine of reasonable use. Such implication
27 was made clear by direct language. In Jarvis v. State Land
28 Department (Jarvis II), 106 Ariz. 506, 470 P.2d 169, (1970), this
29 Court held that Tucson could lawfully extract water from wells
30 situated within the Myrana critical groundwater area and trans-
31 port such water for use off the immediate lands on which the
32 wells were located to Ryan Field. Ryan Field's location within
the critical groundwater area was not the basis on which this
Court found the diversion lawful. The common supply or similar
water basin theory was used by the Court. This Court stated:

"Its lands (Ryan Field) overlie the
Avra-Alter Water Basin and geographically
it lies within the Marana critical ground-
water area so as to entitle it to withdraw
from the common supply for all purposes

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1 except agriculture. Tucson should not be
2 prohibited from delivering water to Ryan
3 Field for lawful purposes since the Ryan
4 Field supply is from the common basin over
5 which it lies and from which it could legally
6 withdraw water by sinking its own wells for
7 domestic purposes." (479 P.2d 173)

8 It is acknowledged by counsel for Plaintiff JARVIS
9 in the three Jarvis decisions, that:

10 "It is recognized that the American doctrine
11 of reasonable use of groundwater prohibits
12 the transportation of water outside of the
13 source of common supply to the detriment of
14 the other owners of the common supply.
15 (Amici Curiae Brief of W. W. Jarvis, et al.,
16 Pg. 10, Line 6 through 9.)

17 The City of Prescott respectfully submits to this
18 Court that such reasoning has always been the holding of Arizona
19 case law as reflected in the cases from Bristor through the
20 Jarvis decisions and State v. Anway, 87 Ariz. 206, 349 P.2d
21 774 (1960) and Neill v. Hunt, 112 Ariz. 307, 541 P.2d 559 (1975).

22 This Court stated unequivocally that in Jarvis II
23 that land overlying the common water basin is entitled to receive
24 water withdrawn from the common supply. Tucson had only to show
25 that customers outside the critical groundwater area, but within
26 drainage areas overlying the water basin would be entitled to
27 withdraw water from it. Thus, there can be no dispute that this
28 Court has accepted the principle that the water user may extract
29 water from his land and divert it for use on any land overlying
30 the common supply from which it was pumped.

31 FICO, when faced with the clear unmistakable language
32 of Jarvis II simply replies that a "weakly colorable"
argument can be made for the claim that Jarvis II may be read as
authorizing the view that "groundwater may be pumped from one
location in a groundwater basin having a common supply and used
in another location in that basin having physical access to the
common supply. Thus, with that sentence, FICO dismisses this
important aspect of Jarvis II such being the controlling law with

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1 respect to groundwater in Arizona. Then FICO completely
2 overlooking all relevant portions of the Bristor decisions,
3 including Judge LaPrade's characterization of the issue in the
4 case gleans out portions of the Plaintiff's pleadings and states
5 that an interpretation from a portion of said pleadings consti-
6 tutes the basis for a comprehensive groundwater law in Arizona
7 while at the same time it suggests that all other parties to
8 this action are only "separating out various selected quotes
9 from other cases and asserting that such asserted language
10 represents the holding of the Arizona court."

11 Further, FICO states that the distinction in all
12 the cases is obvious, and any inconsistency between the FICO
13 decision and previous Arizona decisions may be reconciled on
14 the basis of individual v. individual water disputes and area
15 v. area water disputes. Such reasoning overlooks the fact that
16 in all of these decisions the Court does not see fit to make
17 such distinction known in its decisions. Thus, the City of
18 Prescott urges this Court to reaffirm its previous position as
19 firmly set forth in Jarvis II and expressed by Chief Justice
20 Cameron in his dissenting opinion in the FICO case when he
21 stated:

22 "I believe that 'the land from which
23 the water was taken' is that land which
24 overlies the judicially determined dis-
25 tinct body of groundwater from which the
26 water was obtained. The rationale for
27 this approach, which is, I believe,
28 implicit in our previously published
29 opinions, is, essentially, that damage
30 to the available supply of groundwater
31 occurs when water is permanently
32 removed from the land overlying the
common supply, so that it is prevented
from returning through the ground to
replenish the supply. There is no
reason, according to the traditional
legal understanding of groundwater
hydrology, to prohibit the transporting
of such water from one point to another,
so long as both overlie the common supply.
This is because the water is as available

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1 to replenish the common supply at the
2 point of use as it would have been at
3 the point of pumping. The transporta-
4 tion causes little diminution of the
5 common supply, and no increase in damage
6 to other landowners overlying the common
7 supply. I believe that water used anywhere
8 on land overlying the same common supply
9 from which it was pumped is used 'on the
10 land' for the purposes of the reasonable
11 use doctrine." (Slip op. at 27-28).

12 To rule otherwise, the Court would directly overturn
13 established precedent, place in jeopardy water resource
14 developments undertaken by municipalities, farmers, and other
15 interests in reliance of previous decisions and open the door to
16 further needless litigation between various interests, including
17 numerous suits among the farming interest and finally and most
18 assuredly panicked legislation which most likely will run
19 roughshod over the rights of various interests.

20 VESTED RIGHTS AND VARIOUS ECONOMIC INTERESTS:

21 The City of Prescott readily admits its self interests
22 in its desire to preserve vested City water resources. However,
23 as noted earlier, the City's main interest is the securing and
24 protection of the water rights and of the water supply of all
25 of the economic interests within the Little Chino Water Basin,
26 in which Prescott is located and from which, Prescott secures
27 its water supply. Prescott is a small city, but one which is
28 faced with the same water problems as large municipalities such
29 as Tucson, large corporate mining companies, and large farm
30 combines, such as FICO. Prescott is aware of legislative
31 directives and acknowledgment by this Court that the needs of
32 agriculture give way to the needs of municipalities. Prescott is
33 further aware that no such priority has ever been established
34 for mining interests. However, as noted earlier, Prescott's
35 position is not that municipalities should be granted special
36 treatment or given special rights at the expense of other
37 interests.

1 Prescott's position is clearly that this Court has the
 2 power, right and duty to set forth a groundwater law which will
 3 reconcile the FICO decision with the previous pronouncements of
 4 this Court and will recognize vested property rights, including
 5 all equitable considerations without granting special privileges
 6 to the municipalities, the mines and even the farmers.

7 This Court, in its opinion in FICO, quoted Bristor
 8 and stated:

9 "Many and large investments have been made
 10 in the development of groundwaters. Under
 11 these circumstances, the Court's announce-
 12 ment of a rule becomes a rule of property,
 13 . . . and when a decision does become a
 14 rule of property, the rights acquired
 15 thereunder are entitled to protection
 16 under the law as declared." (75 Ariz.
 17 at 231.)

18 Further, in the FICO decision on page 15, the Court
 19 stated:

20 "Rather, Court's will protect rights
 21 acquired in good faith under previous
 22 pronouncements of the law."

23 Many different economic groups or interests have acquired water
 24 rights under the previous pronouncements of this Court, some
 25 even predating Bristor. The effect of the FICO decision has
 26 been to overrule the Court's prior decisions, under which water
 27 rights were acquired in good faith relying on such previous
 28 decisions. Rather than reiterate the numerous case law and legal
 29 reasoning behind the proposition for a groundwater basin or
 30 common supply concept as meeting the criteria of the definition
 31 of "on the land," Prescott simply urges this Court that the
 32 groundwater basin or common supply concept is the only one which
 is consistent with previous court decisions, the intent of the
 State Legislature, and the only method by which continual
 needless litigation may be avoided and by which the various
 interests may work together for the conservation of existing
 water resources.

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1 The numerous Arizona cases speak of various terms, i.e.
2 groundwater aquifer, groundwater basin, groundwater subdivision,
3 water basin, common basin, and common supply. The State
4 Legislature, in adopting the common supply concept, has used
5 hydrological definitions to determine common supply. Arizona
6 Revised Statutes, Sec. 45-30(5) defines the groundwater basin as:

7 "'Groundwater basin' means land overlying,
8 as nearly as may be determined by known
9 facts, a distinct body of groundwater."

10 It is Prescott's contention that the Legislature
11 intended to define the unit of groundwater to which the State
12 Statutes could be practically and meaningfully administered. It
13 was a recognition by the State that groundwater could only be
14 dealt with through hydrological boundaries rather than property
15 lines and/or on the land, off the land designations.

16 The position, as adopted by the Court in FICO for
17 parcels of land quite conceivably would prohibit municipalities
18 from transferring water from long established wells within the
19 corporate City limits, and would prohibit farmers from trans-
20 porting water from long established wells to noncontiguous farm-
21 land by procedures that farmers have been following for years.
22 Common sense must dictate to this Court that its decision in
23 FICO, if allowed to stand, is unworkable, unequitable in almost
24 all situations, and would result in needless litigation. In fact
25 the State Statutes give the State Land Commissioner the
26 authority to, from time to time, as adequate factual data becomes
27 available, to designate groundwater basins and subdivisions
28 thereof, and as future considerations require and factual
29 data justify, alter the boundaries thereof. (A.R.S. Sec. 45-
30 30(A) Thus, the Land Department, under law, is vested with the
31 power to examine all factual data with respect to groundwater
32 and to make determinations with respect to groundwater basins
and subdivisions. Based on the previous definition of a

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1 groundwater basin, it is clear that such determinations cover the
2 common source of supply of groundwater and that such determina-
3 tions can only be made on the basis of hydrological evidence
4 rather than some delineation of parcel or section lines.

5 Percolating groundwater is affected by geological
6 conditions and natural phenomena which can vary remarkably, in
7 different areas of the State. To attempt to make the American
8 law of reasonable use with respect to groundwater be dependent
9 upon parcels of land is seemingly impossible. Groundwater cannot
10 be confined within arbitrarily imposed surface designations.

11 In the American Society of Civil Engineers' Manual
12 No. 4, update on Groundwater Management, 1972, Chapter 8 on
13 Aquifer Boundary Conditions, it is stated:

14 "In planning any groundwater basin management
15 plan, the boundary conditions must be carefully
16 evaluated. The methods and management philosophy
17 used in adjacent basins may have a marked impact
18 on the plan under a development. The boundaries
19 that separate groundwater basins from one
20 another or, in some cases, divide them into
21 subbasins, may be any number of different types
22 of lateral or vertical boundaries. The
23 boundaries can be physical, such as bedrock
24 contacts, aquifer contacts, or crests or
25 anticlines. They can be hydraulic boundaries,
26 such as limited pressure areas, shoreline of
27 a lake or ocean, or groundwater divide; or
28 they can be political boundaries, either
29 state, county, federal, or those of irrigation
30 districts." (At Page 49.)

31 "It is quite apparent that political boundaries,
32 such as state, local, or water district, may
33 have little or no physical significance to
34 the groundwater system. Consequently, inter-
35 ference effects can result from the operation
36 of one politically bounded basin as related
37 to its neighbor." (At Page 52.)

38 It is clear from the following quotation that bound-
39 aries designating groundwater districts or basins based solely
40 on political lines such as county or irrigation district lines
41 and/or "parcel lines" have little or no physical significance to
42 the groundwater system. To develop a rule of law under such a
43 system defies logic.

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1 It is a practicable and workable solution that a
2 basin surrounded on all sides by essentially impermeable bedrock
3 be the basis for the determination of a common water supply.
4 This is not inconsistent with the concept of critical ground-
5 water areas because it is not only possible, but logical to
6 create within a groundwater basin various critical groundwater
7 areas and in fact the practice of the State Land Commissioner
8 has been, in certain instances, to create subbasins and within
9 the subbasins critical groundwater areas which are admittedly
10 within the same general groundwater basin.

11 It is urged that this Court should reaffirm, as a
12 rule of groundwater law, the following:

13 "The right of an owner of land to the
14 reasonable use of groundwater pumped
15 therefrom on any other land owned or
16 controlled by said landowner and situated
17 in the same groundwater basin or common
18 supply to said groundwater basin is
19 hereby confirmed."

20 This position is in conformity with Chief Justice Cameron's
21 view, as expressed in the FICO decision.

22 CONCLUSION:

23 Prescott respectfully urges this Court to reconsider
24 the disastrous effects the present FICO decision could have on
25 the groundwater law in Arizona. Further, Prescott urges this
26 Court to reaffirm its previous pronouncements regarding the
27 groundwater basin or common supply concept as voiced in Justice
28 Cameron's dissent. This concept should be, in the opinion of
29 Prescott, further fortified by Justice Cameron's expression
30 that any use on the land within the common supply should be a
31 "beneficial and reasonable use" so that the various interests
32 dependent upon groundwater would be required to work in
cooperation for the protection and conservation of groundwater

1 resources to the benefit of all the citizens of Arizona.

2 RESPECTFULLY SUBMITTED this 27 day of October,
3 1976.

4 CITY OF PRESCOTT

5
6 By: Chester R. Lockwood, Jr.
7 CHESTER R. LOCKWOOD, JR.
8 City Attorney

9 COPY of the above and foregoing
10 Amicus Curiae Brief of the City
11 of Prescott mailed, postage
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Brief of the City of Prescott, pages 685-698 (14 pages)**

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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

