

ORIGINAL

IN THE SUPREME COURT  
STATE OF ARIZONA

FILED  
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FARMERS INVESTMENT CO., )  
Appellant, )

-vs-

ANDREW L. BEITWY, etc., )  
et al. )  
Appellees. )

Supreme Court

NO. 11423-2

FARMERS INVESTMENT CO., )  
Appellant, )

-vs-

THE ANACONDA COMPANY, )  
et al. )  
Appellees. )

Pima County  
Superior Court

NO. 116542

CITY OF TUCSON, )  
Appellant, )

MINING COMPANY, )  
Appellees. )

FILED OF THE APPELLANT  
CITY OF TUCSON:

W. W. WEBB, City Attorney  
AND  
J. W. BISHOP  
Appellant City of Tucson

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POSTURE OF THE APPEAL

The appeal is from a partial summary judgment entered in favor of ANAMAX CORPORATION and DUVAL CORPORATION against the CITY OF TUCSON. Tucson was a plaintiff in Intervention in the action originally filed in the Superior Court of Pima County by FARMERS INVESTMENT COMPANY ("FICO") against ANAMAX, DUVAL, PIMA MINES, INC. and ASARCO, INC. Appellate products of that litigation have been in this Court before and others are before it now (consolidated under this same number). This appeal by Tucson is separate from those of FICO presently pending, and flows from judgments not previously the concern of this court; but it raises the same legal issue which has, among others, been raised by FICO in this

appeal (See its brief marked 2CA-CIV-1756). The partial summary judgment below (Abs. 155-162) held unlawful TUCSON'S withdrawal of water from and transportation of that water out of the Sahuarita-Continental Subdivision of the Santa Cruz Groundwater Basin, enjoining such withdrawal and transportation on the motions of ANAMAX and DUVAL.

#### FACTS ESSENTIAL TO THE APPEAL

The City of Tucson is situated on and near the Santa Cruz River. From the earliest recorded times it has obtained the principal part of its municipal water supply from wells in and near that river and its tributaries. The City has no supply of water that is not pumped from underground, either from the subterranean flow of the Santa Cruz or from the groundwater supply of the Santa Cruz and Avra-Marana Basins. All of the wells are located within the Santa Cruz Basin as that basin is defined by the

State Land Department under the provisions of ARS 45-303. Some are in the Sahuarita-Continental Sub-division.

The prior appropriative rights of the City in and to the waters of the Santa Cruz, both surface and underground, are in some cases "immemorial" rights deriving from the laws of Spain. In other cases those rights derive from modern law and statute and date back at least to 1880. In still other cases the appropriations date from 1907.

The City presently draws from its wells located in the Sahuarita-Continental Critical Ground-water Area a total of 11,278 acre feet annually. This is approximately 14.6% of its total municipal water requirement. It is sufficient water to provide for the annual needs of about 65,000 people. It is less than one-third of the total annually withdrawn for agricultural use by Farmers Investment Company; it is about one-quarter of the annual

withdrawal by the defendants for mining purposes. The City has, presently, a population of about 400,000; it is projected that by 1980 the number will be 500,000; by 2000 it will be 900,000; in less than 50 years it will be 1,400,000. The total water pumped from all sources for the population of 400,000 in 1973 was a little over 72,000 acre feet (less than twice the defendants' combined use and less than the total of the annual use of Farmers Investment Company and the defendants). By the year 2000 it will be necessary for the City to pump at least 150,000 acre feet annually; by 2020, 233,333 acre feet. The City, incidentally, supplies through its water utility over 95% of the population of the eastern one-third of Pima County; the percentage is increasing.

The principal wells of the City (omitting from all of this statement reference to wells in the Avra Valley which produce about 8,000 acre feet

annually) are located in the so-called South Side Field, south of the airport. Over many years wells have been abandoned for a variety of reasons and replaced by new wells located, in some cases, upstream as far as Township 16 South (about the north end of the properties owned by Farmers Investment Company and ASARCO). The construction of the City's wells now within the Sahuarita Critical Groundwater Area occurred in many cases in 1954 prior to the designation of the area either as a subdivision of the Santa Cruz Basin or as critical (the subdivision designation was June 8, 1954; the critical area designation was October 14, 1954).

Water pumped from the wells south of the City in the Sahuarita Critical Groundwater area is transported north to locations where, comingled with water from other wells, it is delivered to customers for municipal uses. All of that water is delivered and consumed within the Santa Cruz

Basin, and waste water is returned to that basin.

For the past year the City has undertaken a program of drilling to determine whether any of the water used by the mines is returned to the underground supply. Findings to date demonstrate little or no such return, but the data is not yet conclusive on the question.

ANAMAX and DUVAL both withdraw water from wells within the Sahuarita-Continental Critical Groundwater Area and transport it to their operations up the hill, out of the Critical Area, but within the boundaries of the Sahuarita-Continental Subdivision.

Thus: TUCSON moves water out of the Critical Groundwater Area, out of the Subdivision, to points still within the Santa Cruz Basin. ANAMAX and DUVAL move water out of the Critical Groundwater Area to points within the Sahuarita-Continental Subdivision of the Santa Cruz Basin.

QUESTIONS BEFORE THE COURT

The trial court ruled for ANAMAX and  
DUVAL for reasons which it stated clearly:

From its Minute Order of May 21, 1974

(Abs. 153):

"3. Water so transported must  
be used within the Groundwater  
Subdivision . . ."

From its Judgment entered March 13,

1975 (Abs. 155):

"1. The State Land Department  
by its Order No. 14 dated June 8,  
1954 established the Sahuarita-  
Continental Subdivision of the  
Santa Cruz Groundwater Basin  
(the "Subdivision"). Such desig-  
nation was pursuant to statutory  
duty contained in ARS §45-303.  
Such Subdivision constitutes an  
area of land overlying a distinct  
body of groundwater.

"2. Duval Defendants own  
approximately 9,430 acres of  
land within the Subdivision which  
are used for industrial, agricul-  
tural and other beneficial purposes.  
Of such acreage, approximately

1,530 acres have a history of cultivation and are entitled to the use of water for agricultural purposes from the groundwater supply of the Subdivision.

"3. Duval Defendants pump and use within the Subdivision approximately 22,000 acre-feet of groundwater per annum for use in their milling circuits and for the transportation of tailing. De minimis amounts of water are consumptively used in the milling process, the primary consumptive use of water by Duval Defendants being for the transportation of tailing.

"4. The City of Tucson ("Tucson" or "City") lies north of the Subdivision. It owns a number of wells on small sites within the Subdivision and pumps water from such wells primarily for use and sale outside the Subdivision. Tucson owns no lands with a history of cultivation inside the Subdivision.

"5. The City's pumping from the Subdivision commenced about 20 years ago. Since the beginning of 1964 the average rate of production from the City's wells inside the Subdivision has doubled from an average daily rate of 9 million gallons to 18 million gallons.

"6. Tucson intends to continue to increase its rate of pumping and to continue to transport such water away from the Subdivision. Duval filed its answer to Tucson's Complaint in Intervention on April 12, 1972 praying for an adjudication of the relative rights of Duval Defendants and the City to the waters of the Subdivision. Duval filed its counterclaim against the City on November 7, 1973 and its Motion for Partial Summary Judgment on February 12, 1974.

"7. For many years, the water table within the Subdivision has been declining and the supply diminishing. (handwritten-- initialed ROR)

"8. Under the Arizona doctrine of reasonable use, groundwater may not be transported for use on lands which do not overlie the common groundwater supply and from which use the water does not return to the common supply, if others whose lands overlie the common supply are thereby injured.

"9. The designation and establishment of said Sahuarita-Continental Subdivision by the State Land Department constitutes a binding determination and finding that said

Subdivision overlies a distinct body of groundwater from which the Court finds that the land within it overlies a common groundwater supply.

"10. Tucson admits that it is transporting water away from the Subdivision and that none of the water transported by the City for use away from the Subdivision returns to the common supply of the Subdivision. Tucson further admits that the water supply of the Subdivision is limited, that the supply has been diminishing for many years, and that the water table of the Subdivision has been declining for many years." (emphasis added)

Clearly, therefore, the partial summary judgments from which this appeal is taken rest on but one legal conclusion drawn by the trial court: That the right of a user of groundwater to withdraw and transport that groundwater is defined and limited by a basin's division. Both TUCSON on the one hand and ANAMOK and DUVAL on the other withdraw water and transport and use it out of the Critical Area and within the Basin; only the fact

that the mines use it within the Subdivision distinguishes the uses. If the Subdivision boundary is not in law the operative boundary beyond which water cannot be transported then one of two things is true: Either the use by TUCSON is legal, requiring the summary judgments appealed from to be reversed; or the use by the mines is as illegal as Tucson's, the mines are without standing to attack the use by Tucson, and the judgments must be reversed.

There is, thus, but one question raised here: Does the boundary of a basin subdivision define the area within which the transportation of groundwater is legal and beyond which it is illegal? If that question is answered in the negative -- for whatever reason may be assigned -- the judgments appealed from cannot stand.

ARGUMENT

The precise legal question stated above has been addressed at length by FICO in its Opening Brief marked 2CA-CIV-1756, with which this one is now consolidated, in pages 15-51. FICO has dealt exhaustively with both the statutes and the constitutional principles believed by it to be controlling on the question. Little further development of its argument is either required or appropriate except for purposes of illustration and emphasis.

The position taken by ANAMAX and adopted by the trial court, reduced to its essentials, is this: That the law of Arizona permits the withdrawal of groundwater from land and its transportation away from the land to be used elsewhere if, but only if, the land on which the water is ultimately used overlies the "common supply"

from which it was taken; that the "common supply" is defined by the basin subdivision; and that therefore transportation and use is lawful if within the subdivision and unlawful if outside of it. The trial court held that a supply of groundwater to two non-adjacent properties was "common" if both properties overlie "a distinct body of groundwater" as the term is used in the Groundwater Code.

The City is not concerned here, in the present posture of the case, with the soundness of the Court's reasoning or conclusions to that point. The meaning of the reasonable use doctrine and the application of Bristol v. Cheatham and the Jarvis cases, all dealt with by FICO in its briefs in Appeal 1756, are not fundamental to the present judgments against the City. If FICO is correct, and the doctrine of reasonable use means simply that water must be used beneficially on the land from which it is drawn, the mines are themselves

guilty of unlawful conduct and have no standing in equity to enjoin the City's uses; if the mines are correct in their view that the doctrine is not so restrictive, and that water can be transported anywhere within the limits of the common supply, the City's use is lawful. Thus, the only issue here concerns the proper definition of the "distinct body of groundwater" which constitutes the common supply. The Code provides, in ARS 45-301, as follows:

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

"6. 'Groundwater subdivision' means an area of land overlying, as nearly as may be determined by known facts, a distinct body of groundwater. It may consist of any determinate part of a groundwater basin." (emphasis added)

FICO in its opening brief, pages 21-35, has presented a careful and thorough analysis of

this statute and its legislative history in the context of Arizona's groundwater law. The analysis compels the conclusion that FICO draws: That whatever may in our law define the "common supply", a groundwater subdivision cannot and does not. Whatever "reasonable use" may be, it cannot be defined in terms of artificial boundaries set by administrative fiat without notice to and the participation of the persons affected, whether the artificial line on a map denotes something called a "basin" or something called a "subdivision." A "common supply" is a pool of water defined and limited by scientific investigation, not administrative hunch. The City agrees with FICO's position. It merely urges that no such careful attention to legislative history is required to produce that result; that the statutes themselves, although not drawn with crystal clarity, permit no other interpretation.

On December 1, 1948, State Land Commissioner O. C. Williams, in Order No. 1, designated the Santa Cruz Groundwater Basin. Its boundaries followed, generally, those of the watershed or drainage area of the Santa Cruz River. They included all of what later were designated as various subdivisions. The Sahuarita-Continental Subdivision was designated on June 8, 1954, and its extent was redefined in an order entered February 15, 1956. (All of the maps and orders are on file in the State Land Department; the Court will take judicial notice of them. Jarvis v. State Land Department, 104 Ariz. 527, 456 P2d 385. Copies are included in the Appendix to FICO's brief in Appeal 1756.) The Tucson Subdivision and the Marana Subdivision have also been designated as subdivisions of the Santa Cruz Basin, the former adjoining the Sahuarita-Continental Subdivision on the north. When the Commissioner in

Order No. 1 designated the Santa Cruz Basin he made a finding that it overlay "a distinct body of groundwater," such a finding being a necessary statutory condition of the designation. That distinct body of groundwater underlay all of what subsequently came to be designated as the three subdivisions referred to. DUVAL and ANAMAX argued, and the court ruled in entering the partial summary judgments appealed from here, that the designation of the Sahuarita-Continental Subdivision, six (6) years later, was and is a determination, binding on all users of water there, that the subdivision now overlies a separate body of groundwater distinct from that which lies under the Tucson and Marana Subdivisions. The English language of the statute cannot be read to produce that result.

In naming the entity defined in (6) of §45-301 the legislature used the word "subdivision."

That word has a meaning, and this Court should presume that the legislature knew what it was. Words in a statute are to be given their "obvious and natural meaning," Mendelsohn v. Superior Court, 76 Ariz. 163, 261 P2d 983, such as would be understood by the ordinarily intelligent man. Southern Pacific Co. v. Maricopa County, 56 Ariz. 247, 107 P2d 212. There is no reasonable way the word "subdivision" can be understood except as referring to a part of something greater.

"Subdivide: 1. To further divide (what has already been divided); divide the part of into more parts... 2. To divide into several parts...; to divide (a tract of land into building lots ..."

"Subdivision: An instance or example of subdividing; something produced by subdividing; a part made by subdividing..."

"Divide: 1. To separate into two or more parts..."

Webster's Third New International Dictionary, G. & C. Merriam & Co. (1966).

If the trial court here was right the concepts of basin and subdivision are mutually exclusive; where there is the one, there cannot be the other. If the basin overlies a "distinct body of groundwater," and if the subdivision also overlies a "distinct body of groundwater" (as the statute says it must), one of three things is true:

1. The subdivision must overlie a different "distinct body" than the basin, and thus cannot be a subdivision (a "determinable part") of the basin.

2. The subdivision must overlie the same body as and be co-extensive with the basin, in which event it is not a "determinable part", but is the whole of the basin, and meaningless for any purpose.

3. The subdivision must overlie a part of the same "distinct body" that defines the basin of which it is a part, and thus exist to serve some purpose unrelated to defining and limiting the body of groundwater.

The City submits that only the third possibility makes any sense at all in the context of the

groundwater Code. A subdivision is clearly an area designated for administrative purposes (e.g., the creation of critical groundwater areas. See ARS §45-308(B); FICO opening brief in Appeal 1756, p. 72) and appropriate for the sort of gross, straight-line demarcations illustrated by the north boundary of the Sahuarita-Continental Subdivision. A common supply of groundwater (the "distinct body" referred to in the Code) has all but invariably been thought of and referred to in terms of a "basin"; indeed, most of the cases cited to the trial court by ANAMAX and FICO speak of a basin as defining a common supply, Bristor and Jarvis I and II among them.

A basin defines a common supply; a subdivision is but one part of that basin all parts of which overlie that common supply. To read the statutes otherwise is to rule that the legislature did not know the meaning of the words it used.

"No legal legerdemain should be used to change the meaning of simple English words in statute so that the resulting interpretation of the statute conforms the statute to the sociological and economic views of judges or lawyers . . . Words in a statute are to be given their usual and commonly understood meaning unless it is plain or clear that a different meaning was intended. . . If the sense of a word is not to be taken in its usually and commonly understood meaning except under circumstances where a different meaning is clearly intended, it becomes impossible for men to mean what is said or say what they mean, and purposeful communication is unattainable." Kilpatrick v. Superior Court, 105 Ariz. 413, 466 P2d 18.

The right to draw and transport water from land is limited in Arizona either by the groundwater basin defining the common supply under ARS 45-301 or by the rules announced by this Court in Bristor and Jarvis I and II, however those rules may be read and understood. The right cannot be and is not limited by any such artificial and arbitrary area as a subdivision.

Since only if the subdivision limits the right can the partial summary judgments entered below stand, those judgments must be reversed.

Respectfully submitted,

JAMES D. WEBB  
City Attorney, City of Tucson  
-and-  
LESHER, KIMBLE, RUCKER  
& LINDAMOOD, P.C.  
3773 East Broadway  
Tucson, Arizona 85716

By Robert O. Leshler  
Robert O. Leshler  
Attorneys for Appellant  
CITY OF TUCSON

COPIES hereof served by mail this 30th day of  
June, 1975 upon:

Fennemore, Craig, von Ammon & Udall  
100 W. Washington, Suite 1700  
Phoenix, Arizona 85003

-and-

Elmer C. Coker  
132 South Central, Suite J  
Phoenix, Arizona 85004

Attorneys for Duval Corporation and Duval  
Sierrita Corporation

Thomas Chandler  
Chandler, Tullar, Udall & Richmond  
1110 Transamerica Building  
Tucson, Arizona 85701  
Attorneys for Anamax Mining Company

Musick, Peeler & Garrett  
One Wilshire Boulevard, Suite 2000  
Los Angeles, California 90017  
Attn: Bruce A. Bevan, Jr.  
Attorneys for Pima Mining Co.

Mark Wilmer and  
Loren Counce Jr.  
Snell & Wilmer  
3100 Valley Center  
Phoenix, Arizona 85073  
Attorneys for Farmers Investment Co.

Verity & Smith  
902 Transamerica Building  
Tucson, Arizona 85701  
Attorneys for Pima Mining Co.

Evans, Kitchel & Jenckes  
363 N. First Avenue  
Phoenix, Arizona 85003  
Attn: Burton M. Apker  
Attorneys for ASARCO

Peter C. Gulatto, Esq.  
Assistant Attorney General  
159 Capitol Building  
Phoenix, Arizona 85007  
Attorneys for State Land Department

STATE OF ARIZONA )  
 )  
COUNTY OF MARICOPA )

ss:

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Name

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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

Ella Louise Muir  
Signature, Notary Public

My commission expires 04/13/2009  
Date

