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6 IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

7 IN AND FOR THE COUNTY OF PIMA

8 FARMERS INVESTMENT COMPANY,)
a corporation,)
9)
Plaintiff,)
10)

11 vs.)

NO. 116542

12 THE ANACONDA COMPANY, et al.,)
Defendants.)
13)

RESPONSE OF CITY OF
TUCSON TO MOTIONS FOR
SUMMARY JUDGMENT OF
ANAMAX AND DUVAL

14 CITY OF TUCSON, a municipal)
corporation,)
15)
Plaintiff in)
16 Intervention,)

17 vs.)

18 FARMERS INVESTMENT COMPANY,)
a corporation, et al.,)
19)
Defendants in)
20 Intervention.)

21 I.

22 FACTUAL STATEMENT

23 The City of Tucson is situated on and near the Santa Cruz River.
24 From the earliest recorded times it has obtained the principal part of its
25 municipal water supply from wells in and near that river and its tributaries.
26 The City has no supply of water that is not pumped from underground, either
27 from the subterranean flow of the Santa Cruz or from the groundwater supply
28

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1 of the Santa Cruz and Avra-Marana Basins. Wells from which the City has
2 obtained its water are shown on the map attached as Exhibit 1. All of the
3 wells shown on the map are located within the Santa Cruz Basin as that basin
4 is defined by the State Land Department under the provisions of ARS 45-303
5 and shown on the map marked Exhibit 2. Some are in the Sahuarita-Conti-
6 nental Subdivision (see Map, Exhibit 3). (On Exhibit 2 the wells in the Tucson
7 Subdivision are those shown to be in the Tucson Critical Groundwater Area;
8 those in the Sahuarita-Continental Subdivision are those shown to be in the
9 Sahuarita Critical Groundwater Area.)

10 The prior appropriative rights of the City in and to the waters of
11 the Santa Cruz, both surface and underground, are in some cases "historical"
12 "rights deriving from the laws of Spain. In other cases those rights derive
13 from modern law and statute and date back at least to 1880. (See, e.g.,
14 Exhibit 4.) In still other cases the appropriations date from 1907. (See, e.g.,
15 Exhibit 5.)

16 The City presently (1973) draws from its wells located in the
17 Sahuarita-Continental Critical Groundwater Area a total of 11,278 acre feet
18 annually. This is approximately 14.6% of its total municipal water require-
19 ment. (See the tables attached as Exhibits 6 & 7.) It is not enough water to provide
20 for the annual needs of about 65,000 people. It is less than one-third of the
21 total annually withdrawn for agricultural use by Farmers Investment Company;
22 it is about one-quarter of the annual withdrawal by the defendants for mining
23 purposes. The City has, presently, a population of about 400,000, it is
24 projected that by 1980 the number will be 500,000, by 2000 it will be 900,000,
25 in less than 50 years it will be 1,400,000. (See Exhibit 7, p. 1.) The total
26 water pumped from all sources for the population of 400,000 in 1973 was a
27 little over 72,000 acre feet (less than twice the defendants' combined use and
28 less than the total of the annual use of Farmers Investment Company and the

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1 defendants). By the year 2000 it will be necessary for the City to pump at
2 least 150,000 acre feet annually; by 2020, 233,333 acre feet. The City,
3 incidentally, supplies through its water utility over 95% of the population of
4 the eastern one-third of Pima County; the percentage is increasing.

5 The principal wells of the City (omitting from all of this state-
6 ment reference to wells in the Avra Valley which produce about 8,000 acre
7 feet annually) are located in the so-called South Side field, south of the air-
8 port. Over many years wells have been abandoned for a variety of reasons
9 and replaced by new wells located, in some cases, upstream as far as Town-
10 ship 16 South (about the north end of the properties owned by Farmers Invest-
11 ment Company and ASARCO). The construction of the City's wells now
12 within the Sahuarita Critical Groundwater Area occurred in many cases in
13 1954 prior to the designation of the area either as a subdivision of the Santa
14 Cruz Basin or as critical (the subdivision designation was June 8, 1954; the
15 critical area designation was October 14, 1954).

16 Water pumped from the wells south of the City in the Sahuarita
17 Critical Groundwater Area is transported north to locations where, some-
18 mingled with water from other wells, is delivered to customers for muni-
19 cipal uses. All of that water is delivered and consumed within the Santa Cruz
20 Basin, and waste water is returned to that Basin.

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

25 II.

26 ARGUMENT

27 The Motions filed by Duval and Anamax are essentially identical
28 and raise the same legal issues, making it appropriate that they be answered

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1 together. Stripped of surplusage, the Motions say this: Those defendants are
2 pumping water from within the Sahuarita Critical Area. They are taking the
3 water up the hill to their mines and mills and using it in their operations.
4 They are "using" it either (a) within the critical area, or (b) outside it but
5 within the Sahuarita Continental Subdivision of the Santa Cruz Basin. They
6 are in any case returning it to the common supply shared by themselves,
7 FICO and the City. The City, on the other hand, is taking water from the
8 Critical Area and moving it outside the Subdivision. Their own use, they
9 urge, is lawful, the City's is not. They rely on Bristor v. Cheatham and
10 Jarvis v. City.

11 These are Motions for Summary Judgment in an action in equity.
12 They must be denied if there is any contested issue of fact underlying either
13 the legality of the City's actions or the defendants' right to complain of them.
14 For the sake of clarity it may be useful to treat with the second matter first.

15 Clearly, if the conduct of the defendants themselves is unlawful,
16 they can be granted no relief in equity. Can the Court, then, at this point in
17 the proceedings find and hold that defendants' conduct is lawful? That, of
18 course, is the very issue which is presented by FICO's complaint against
19 them. Merely to glance at the accumulated files in this case is to appreciate
20 that -- to put it in the mildest terms -- every factual assertion on which the
21 mines rely is strongly contravened. They assert that their "use" of water is
22 in fact within the critical area; FICO urges that it is not, and there is evidence
23 in the record to support FICO's view. They assert that the water which they
24 use is "returned" after use to the common supply; FICO vehemently denies it,
25 and there is evidence to support FICO's position.

26 At the heart of the Motions is the assertion that the mines are,
27 as a matter of law, using the water on "the land from which it is taken" (the
28 language is that of Bristor II). They contend for the right to take water out of

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1 the Critical Area so long as its use is within the Basin, so that waste will be
2 returned to the "common supply." Whether that proposition of law is accept-
3 able under Bristor and Jarvis I and II is a matter on which the City has no
4 present comment (although it is certainly to the City's advantage that the
5 assertion be true). For one of two things is so: If the proposition is sound,
6 the City's withdrawal and use of water from its wells in the Critical Area is
7 lawful; if the proposition is unsound, the mines are in no position to appeal to
8 a court of equity.

9 Defendants in their Motions seek to distinguish between a "basin"
10 and a "subdivision" to justify the conclusion that their own use is lawful, the
11 City's not. The argument they make is this: They may move water off one
12 parcel of land and use it elsewhere so long as its use is at a point where waste
13 or surplus will be returned to the "common supply" from which the water has
14 been drawn; in Arizona that common supply is defined by the limits of an
15 established basin "subdivision"; their use is within the same subdivision as
16 their source; the City's use is outside the subdivision which contains its
17 source; therefore, since they are returning their waste water to the "common
18 supply," and since the City is not, their use is legal, its is not. Laying aside
19 for the purpose of discussion the factual problems which the argument raises,
20 it is fatally flawed as a matter of law.

21 The Ground Water Code (ARS 45-301, et seq.) defines two terms
22 (ARS 45-301):

23 "5. 'Groundwater basin' means land over-
24 lying, as nearly as may be determined by known
25 facts, a distinct body of ground water..."

26 "6. 'Groundwater subdivision' means an area
27 of land overlying, as nearly as may be determined by
28 known facts, a distinct body of ground water. It may
consist of any determinable part of a ground water
basin." (emphasis ours)

The defendants read these definitions as suggesting that the "common supply"

*NOT
"hydrologically
separate"*

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1 of a subdivision is not the "common supply" of the basin. The statute cannot
2 be so construed. It is apparent enough that a common supply -- a "distinct
3 body of ground water" -- is defined, not by a subdivision, but by a basin. The
4 State long ago established the Santa Cruz Basin (see Exhibit 2). In so doing
5 it established as a matter of law and fact that all ground waters within the
6 Basin were part of the same "distinct body." As defendants have argued, a
7 "distinct body" is a "common supply." A subdivision is an area of land within
8 the basin; as the very name suggests and as the statute provides, it is a part
9 of a basin. A subdivision is clearly an administrative area, useful, for
10 example, in the formation of critical areas. In the Santa Cruz Basin are two
11 subdivisions (see Exhibit 3). By statute they overlie the same "distinct body
12 of ground water," the same "common supply." Defendants in their memo-
13 randa cite cases to the proposition that they are entitled to move water any-
14 where so long as it is not moved away from the common supply. It is instruc-
15 tive to count the number of those cases (including Bristor and Jarvis I and II)
16 that speak in terms of "basins."

17 Thus, if a "common supply" is a "distinct body of ground water"
18 -- and defendants argue that it is -- Tucson's withdrawal, transport and use
19 of water is as lawful as defendants' is.

20 But suppose, as FICO urges, that one may not, under Bristor
21 and Jarvis, move water away from the tract from which it is drawn -- suppose
22 the right to move it is not measured by the boundaries of the "common supply."
23 The moving defendants meet the resulting situation with the assertion, not that
24 the rule of reasonable use sanctions their activity, but instead that they have
25 brought themselves within Jarvis II's exception to that rule. They say that
26 having bought agricultural land in the Sahuarita Critical Groundwater Area and
27 retired it from use they are entitled to move the water wherever they please,
28 even out of the Basin. Again, defendants misread the authority on which they
rely.

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1 In Jarvis II, to be sure, the City of Tucson was permitted to buy
2 and retire Avra Valley lands and to move to the Santa Cruz Basin an amount of
3 water equal to that once used on those retired lands. Why was it given that
4 privilege? The Supreme Court was clear on the point:

5 "Finally, petitioners request this Court to
6 determine whether Tucson by acquiring lands in
7 cultivation in the Avra-Altar Valleys may remove
8 the ground water used upon those lands to other
9 areas contrary to the doctrine of reasonable use.
10 The State Land Department joins petitioners in re-
11 questing that the first Jarvis decision be augmented
12 by clarifying the rights of the parties in this respect.
13 Tucson also asks the Court to pass upon a like ques-
14 tion although in somewhat a different form. Amici
15 Curiae, however, oppose the request of the parties
16 that the Court expand on the legal rights in question.

17 "We think, however, that the problem is
18 critical to municipalities in Arizona and so justifies
19 our consideration even though not strictly embraced
20 within the limits of the issues of the original lawsuit.
21 As indicated, Jarvis' action invoked this Court's
22 equitable jurisdiction. We issued the injunction but
23 stated that we reserved the right to modify or dis-
24 solve upon application accompanied by a showing of
25 circumstances as would permit the legal pumping
26 and transportation of ground water by the City. Our
27 decree was consistent with the almost universal rule
28 that a court of equity when requested will determine
all the equities connected with the main subject of the
suit and grant all the relief necessary to a complete
adjustment of the litigation:

"It is a principle of equity that it does
justice completely and not by halves.
When a bill had been brought in good
faith to obtain relief within the jurisdic-
tion of the court, the bill may be retained
to do complete justice with reference to the
subject matter, even though upon the facts
the specific relief prayed for cannot be
given, and a bill would not lie for the sole
purpose of obtaining the specific relief that
is given. Reynolds v. Grow, 265 Mass. 578,
580, 164 N. E. 650; Booras v. Logan, 266
Mass. 172, 175, 164 N. E. 121; D... n v.
Maryland Casualty Co., 271 Mass. ..., 430,
431, 171 N. E. 482; Peerless Unit ventilation
Co., Inc., v. D'Amore Construction Co.,
283 Mass. 121, 125, 126, 186 N. E. 280;
Geguzis v. Brockton Standard Shoe Co.,

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1 291 Mass. 368, 371, 197 N.E. 51;
Somerville National Bank v. Hornblower,
2 293 Mass. 363, 368, 199 N.E. 918, 104
A.L.R. 1107. Fields v. Othon, 313 Mass.
3 115, 46 N.E.2d 546, at 547 (1943).

4 "It is also frequently stated as a maxim of
equity that equity follows the law. By this is meant
5 that equity obeys and conforms to the law's general
rules and policies whether the common law or statute
6 law. See, e.g., Provident Building & Loan Ass'n. v.
Pekarek, 52 Ohio App. 492, 3 N.E.2d 983 (1936).
7 By A.R.S. §45-147 the relative value of uses in
appropriable waters has been fixed by the Legislature
8 as first, domestic and municipal uses, and second,
irrigation and stock watering. The creation of such
9 a priority clearly evidences a legislative policy that
the needs of agriculture give way to the needs of muni-
10 cipalities. Hence, we hold that the decree in this
case will be modified if Tucson purchases or acquires
11 the title to lands within the Avra-Altar Valleys which
are now cultivated and uses the water which would
12 have been used in cultivating such lands as a source
of supply for its municipal customers. Tucson may
13 withdraw an amount equal to the annual historical
maximum use upon the lands so acquired."

14 Nothing in Jarvis II can be read to suggest that these mining companies have
15 the same equitable call on the court's power to grant such a dispensation as
16 the City has. The unique nature of a city's requirements is pointed out clearly
17 enough. How can this Court rule, at least in the absence of the taking of evi-
18 dence, that the mining companies are entitled in equity to the same considera-
19 tion? Water to carry away industrial waste is one thing. It is at least argu-
20 able that drinking water is another. Yet (1) if defendants cannot under the
21 reasonable use rule take their water up the hill, and (2) if defendants are not
22 entitled to assert the same exemption as was extended in Jarvis II to the City,
23 then their withdrawal and use of water is clearly unlawful, and they are hardly
24 parties entitled to invoke this Court's equitable jurisdiction against the City.

25 The memorandum to this point has considered primarily the
26 status of the defendants. There is, however, much more to be considered.
27 First, the defendants have in their Motions treated the City's withdrawal of
28

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1 waters from the wells located within the critical area as though those waters
2 were established to be "ground waters." They are not established as anything
3 of the kind. There is ample evidence that much or indeed all of the water
4 which is produced by the City's wells in and near the Santa Cruz River is
5 taken from an underground stream. (See, e.g., Exhibit 8.) It is established
6 that the Santa Cruz is a "known independent subterranean stream." Pima
7 Farms Co. v. Proctor, 30 Ariz. 96, 245 Pac. 369. From its earliest history
8 the City and its predecessor town and village have drawn the water of that
9 stream by wells in and near its bed. That water is not "ground water," as
10 the term is used in our statutes. It is not subject to the rule of reasonable
11 use stated in Bristor and Jarvis. It is subject to appropriation and controlled
12 by the rules of prior appropriation. Pima Farms Co. v. Proctor, *supra*.
13 The City's appropriative rights in that subterranean flow are prior to those
14 of any of the other parties, so far as is known, and they may include the
15 entire flow of that stream. Having for many years drawn that water from
16 wells located near Tucson, as those wells became unproductive or inadequate
17 they were in many cases abandoned (see Exhibit I). They were replaced by
18 wells farther south, some in the Sahuaron Critical Area. In other words,
19 the City as a prior appropriator of an underground stream moved its point of
20 diversion upstream, an action it had the clear legal right to take. Fritsche
21 v. Hudspeth, 76 Ariz. 202, 262 P.2d 245. The City contends, in short, that
22 its right to take water from the wells in question here is the right of the prior
23 appropriator of a stream. There is and will be evidence to support that con-
24 tention. Nothing anywhere in the record suggests that either FICO or any
25 defendant has any appropriative rights at all, certainly none prior to the City's.
26 There are still other reasons why defendants' Motions should be
27 denied. It is instructive, in considering them, to examine the language of a
28 Petition filed by these same moving defendants in the Supreme Court, in

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1 Cause No. 11439 in that Court, seeking to intervene in a proceeding pending
2 there between FICO and Pima. Parts may be reproduced without change.

3 "In Cause No. 116542 there has been extensive
4 discovery by way of written interrogatories and oral
5 depositions, some lasting for days. FICO has taken
6 depositions as recently as November 30, 1973. Addi-
7 tional discovery by way of drilling and sampling is
8 currently being conducted by the City of Tucson, a
9 party to said Cause No. 116542. Further discovery
10 of a very substantial nature by depositions of numerous
11 experts must be conducted by all of the parties to said
12 cause." (Petition, Par. VI)

13 * * * * *

14 "THIS CASE REQUIRES TRIAL ON THE MERITS

15 "In essence, FICO is again seeking to raise
16 the very same issues previously before this Court in
17 Farmers Investment Company v. State Land Dept. et
18 al. (No. 10486), where this Court declined to accept
19 jurisdiction. In that case the Petitioners filed briefs
20 urging that the issues involved were vital and possibly
21 determinative of the rights of all defendants in the
22 Pima County action. Petitioners urged this Court not
23 to grant FICO's Petition without affording the defen-
24 dants an opportunity to try the complex hydrological
25 and equitable issues involved in that case and which
26 are involved here.

27 "Few complex water cases have reached this
28 Court after trial on the merits. For example, Bristor
v. Cheatham, 75 Ariz. 236, 255 P.2d 178 (1953) was
decided on a motion to dismiss. State v. Anway, 87
Ariz. 206, 349 P.2d 774 (1960) came to this Court on
appeal from summary judgment. Jarvis was an orig-
inal proceeding in this Court decided on the pleadings.

"Even more than the first action brought here
by FICO, this second attempt more compellingly
illustrates the necessity for a trial of the facts in-
volved. Under the guise of raising questions of state
land law relating to state land leases, FICO's petition
glosses over the most critical and the most basic
questions. Hydrological facts and realities are com-
pletely ignored. Cases of this magnitude and complex-
ity cannot be decided by disregarding the factual situa-
tions which the ground water statutes were designed to
regulate." (Memorandum in Support of Petition, p. 20)

* * * * *

Laches and Estoppel. FICO knew for many

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1 years and did not complain that Petitioners were con-
2 tinuously engaged in the exploration, development and
3 construction of mining operations, that Petitioners
4 were investing several hundred million dollars therefor
5 and that such operations would use water from wells on
6 lands acquired by Petitioners in the Santa Cruz Valley.
7 FICO is now barred by laches and is estopped to com-
8 plain of Petitioners' uses of ground water.

9 "Balancing the Equities. The appropriate-
10 ness of injunction against tort depends upon a com-
11 parative appraisal of all of the factors of the case
12 including the interest to be protected, the adequacy
13 of other remedies, plaintiff's delay in bringing the
14 suit, plaintiff's misconduct, relative hardships, the
15 interest of third persons in the public, and all other
16 applicable facts and circumstances. Restatement of
17 Law, Torts, §§933-951. All of these are factors
18 which can be shown only by a trial on the merits."
19 (Memorandum, p. 22)

20 The City agrees that if ever a case required to be tried on its merits, this
21 one does. It, too, has pleaded laches and estoppel, and there is and will be
22 evidence to support those pleas. It is in a stronger equitable position than the
23 mines are. As "equity follows the law" and as domestic and municipal uses
24 are first in relative value among all uses (Jarvis II), so, surely, no court
25 will enjoin a City's taking of even ground water unless and until the clear
26 illegality of its action is shown (it is not here) and, beyond even that, unless
27 and until it is manifest (as it is not on this record) that no less harsh and
28 oppressive remedy can be made available to those whose legitimate interests
are harmed.

Respectfully submitted,

JAMES D. WEBB,
City Attorney, City of Tucson,

-and-

LESHER & SCRUGGS, P.C.,
Attorneys for Plaintiff in Intervention, City of Tucson,

By Robert O. Leshner
Robert O. Leshner

STATE OF ARIZONA)

: ss.

COUNTY OF PIMA)

FRANK BROOKS, being duly sworn, deposes and says that he is

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1 Assistant City Manager of the City of Tucson; that he has read the Factual
2 Statement contained in the foregoing Memorandum; that its contents are to the
3 best of his knowledge, information and belief, true and correct.

4 Frank Brooks

5 SUBSCRIBED AND SWORN to before me by FRANK BROOKS this

6 21st day of March, 1974.

7 Hazel M. Gatzke
8 Notary Public

9 My commission expires:

10 5/23/75

11 Copies of the foregoing Response of City of Tucson to Motions for Summary
12 Judgment of Anamax and Duval served, as follows:

13 By personal delivery: (March 22, 1974)

14 Mr. Mark Wilmer
15 Snell & Wilmer
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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, Response of City of Tucson to Motions for Summary Judgment of Anamax and Duval, pages 233-244 (12 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 Muir
Signature, Notary Public

My commission expires 04/13/2009
Date

