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APPEALS DIV. TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

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ELIZABETH U. FRITZ
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FARMERS INVESTMENT COMPANY,)
a corporation)

Appellant,)

vs.)

THE ANACONDA COMPANY, a cor-)
poration; AMAX COPPER MINES,)
INC., THE ANACONDA COMPANY,)
as partners in and consituting)
ANAMAX MINING COMPANY, a part-)
nership; ANAMAX MINING COMPANY)
a partnership,)

Appellees.)

NO. 2CA-CIV-1756

Pima County
Superior Court
No. 116542

11439-2

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APPELLEES' ANSWERING BRIEF

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Filed this 31st day of January, 1975

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State of Arizona
Division Two

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I.

PRELIMINARY MATTERS

In the interest of brevity and consistency, Appellees, THE ANACONDA COMPANY, and AMAX COPPER MINES, INC., as partners in and constituting the ANAMAX MINING COMPANY adopt the following terms as used in Appellant's Opening Brief unless the context indicates otherwise: ANAMAX, FICO, TUCSON, DUVAL, basin "subdivision," and "critical area." ANAMAX will first respond to specific portions of Appellant's brief, and thereafter will present affirmative argument regarding the reasonable use doctrine and its application to this case.

II.

NATURE OF ACTION

The present case is an offshoot of the main action filed in the Pima County Superior Court by Appellant against Appellee and several other copper mining company defendants. In the main action FICO seeks to have the defendants' uses of water declared illegal under the doctrine of reasonable use of percolating

groundwater, and asks for damages and injunctive relief. Defendants have each raised many defenses including inter alia, denials that they are in violation of the reasonable use doctrine, laches, estoppel, the "clean hands" doctrine, and have each counterclaimed against FICO seeking to have its water use declared to be in violation of the reasonable use doctrine. During the pendency of the action, ANAMAX began drilling another well on its property located within the boundaries of what has been declared a "critical area." FICO then sought a preliminary injunction against the drilling and against the planned use of waters obtained from the new well by ANAMAX on the grounds that, because the waters would be taken outside the critical area at one point, this would be illegal and entitle it to injunctive relief.

III.

REPLY TO "WHAT THE ISSUES WERE"

Appellant states a conclusion it would have the Court reach in stating the issue as

involving the legal right to use water in a way "unrelated to any beneficial use of the ground from which the groundwater was withdrawn." The crux of the legal issue is the meaning of that phrase and other statements found in the case law on the reasonable use doctrine. Furthermore, in this case, the issue involves the propriety of injunctive relief as against Appellee, before a full trial on the merits, under the doctrine of reasonable use where Appellee plans to withdraw water from its land at a site which happens to be located within the critical area, to take that water to its mills, which, although outside the critical area, overlie the water basin and the common source of supply, and to return the vast majority of that water to its tailings ponds for percolation and reintroduction into the common supply.

IV.

STATEMENT OF FACTS

ANAMAX agrees generally with the statement of facts submitted by Appellant. However,

on page 8 of its brief, Appellant states that ANAMAX makes no claim regarding the sufficiency of water in the basin underneath its millsite to meet its milling needs. Apparently this statement is derived from an admission by ANAMAX that meeting its needs from wells drilled in proximity to the mill would be "uneconomical." The admission means this, and no more.

ANAMAX also adds that it has purchased farm lands in the area between FICO's two ranches and in the critical area, and that it has retired over 1,600 acres of fields from irrigation on these farms. ANAMAX also owns over 19,000 acres of land in the basin subdivision.

V.

ANAMAX'S RESPONSE TO FICO'S
QUESTIONS PRESENTED FOR REVIEW

ANAMAX will respond to FICO's questions presented for review in the order in which they are presented in FICO's brief, and with corresponding numbers.

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1. In response to this section and paragraph of FICO's brief, ANAMAX is unsure what is meant when FICO refers to "the land area from which the groundwater is withdrawn." (Emphasis added). This question is addressed in the reasonable use section, below.

2. As to FICO's Question No. 2, ANAMAX concedes, that where certain lands are included in a critical groundwater area, further withdrawals will lower the water table in that area, depending on the extent of the overdraft to begin with and on the extent of the subsequent withdrawal. To the degree that such increases the pumping lift, it is fair to conclude that the landowners in the area are "damaged" or injured. However, whether this damage is damnum absque injuria on the one hand, or "legal damage" on the other, must be determined under the doctrine of reasonable use.

3. Regarding FICO's Question No. 3, ANAMAX fails to see how this case involves a collateral attack upon the designation of a

critical groundwater area. FICO and ANAMAX disagree as to the effect of that designation as to the Sahuarita-Continental Critical Groundwater Area. ANAMAX contends that the binding effect of same is quite clearly limited by statute to irrigation uses. Were the Court to hold otherwise and rule that water pumped from wells in a critical area may not be taken outside the boundaries of the critical area under any circumstances, then ANAMAX and the other defendants would be forced into a direct attack upon the constitutionality of the groundwater statutes as so interpreted and the procedures used in designating a critical area. This is not a collateral attack on the critical area designation, but the application of constitutional principles to the situation to ensure the proper ruling on the effect of the designation.

4. By tendering Question No. 4, FICO is attempting to inject into its case an issue that related only to the trial court's ruling on a motion for partial summary judgment

against the City of Tucson who is not a party to this appeal. The ANAMAX mill is located on land owned by ANAMAX. This land overlies the groundwater subdivision fixed by the State Land Department and also the common, hydrological, water basin.

5. In FICO's Question No. 5, it again draws a conclusion it would have the Court reach in framing an issue when it attempts to equate "critical area" with "water basin from which the water is withdrawn." ANAMAX agrees that, under the rule of reasonable use, a landowner may not take water away from lands overlying the water basin if in so doing others owning lands overlying the common source of supply are injured.

6. As stated above, ANAMAX's admission regarding the water available from wells in the proximity of its mill was limited to economics. The mill overlies the water basin which is the source of common supply to FICO and ANAMAX. ANAMAX could get water from wells drilled near the mill, but this would be

uneconomical. Therefore the wells were drilled closer to the center of the basin. The situation is similar to a farmer with an 80 acre parcel who finds that a well drilled at one end of his land has a poor yield, so he places another well at the other end and finds a much better supply. Would FICO confine this farmer's use to the immediate acre of the wellhead? 20 acres? 40 acres? That landowners drill wells in that part of their land which will produce the greatest yields is discussed below.

VI.

ANAMAX'S "QUESTIONS PRESENTED FOR REVIEW"

1. Does the doctrine of reasonable use of percolating groundwaters require a preliminary injunction to issue before a trial on the merits enjoining Appellee from drilling a well inside the boundaries of a critical area where it intends to use some of the water pumped therefrom outside of said critical area, but in a place overlying the water basin which is the source of common supply for both FICO and ANAMAX?

2. Is the doctrine of reasonable use as applied to this case an equitable doctrine involving a myriad of facts and circumstances, requiring a full trial, or does it set down a hard and fast rule which may be applied summarily?

VII.

ARGUMENT

A. In this section of its brief, ANAMAX will respond to portions of FICO's argument as they are presented there.

FICO devotes much of its argument to an attempt to bring into this appeal the trial court's decisions regarding certain motions for summary judgment. Those decisions, of course, are not being appealed here. Therefore, ANAMAX will not respond directly to comment, argument, and factual allegations directed toward one of the other defendants below, nor to FICO's rebuttal of arguments presented by that defendant in a motion unrelated to the case being appealed. The issue here is whether the trial court properly denied the preliminary

injunction under the facts presented to it in this case.

The trial court's ruling in the other cases was, however, stated to be the basis of the ruling in the case at bar and to this extent the ruling is relevant. That ruling read:

1. Arizona had adopted the rule of reasonable use as to underground water.

2. 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. Jarvis II.

3. Water so transported must be used within the [Sahuarita-Continental] Groundwater Subdivision, with the exception of municipalities retiring lands from cultivation as provided in Jarvis II.

No one quarrels with paragraph No. 1 of the ruling. As to paragraph No. 2, FICO's quarrel is apparently with the definition of the extent of the "common basin or supply," since it admits that it pumps water over six miles in its own use of groundwater. In the third paragraph, the trial court apparently

seized upon the statutory definition of a groundwater basin subdivision as a "distinct body of groundwater" under A.R.S. §45-310 for a definition of the extent of the common basin or supply under the lands involved in this litigation. The Court took judicial notice of the subdivision and considered it along with other evidence that FICO's and ANAMAX's lands overlie a common groundwater supply. The exact boundaries of the common basin are not important in this appeal, although the administrative designation of the Basin Subdivision, it is submitted, bears heavily on the question where it is relevant.

FICO presented no evidence contrary to the proof that its and ANAMAX's lands overlay a common basin, and therefore the trial court was justified in reaching this conclusion. The significance of this finding under the facts in the case at bar is discussed below.

ANAMAX next responds to FICO's feat of turning the trial court's ruling in this case into an overruling of both Jarvis I,

Jarvis v. State Land Dept., 104 Ariz. 521, 456 P.2d 385 (1969), and Jarvis II, Jarvis v. State Land Dept., 106 Ariz. 506, 479 P.2d 169 (1970). FICO asserts that because the State Land Department designated the overall Santa Cruz Basin to include both the Marana Groundwater Area and the City of Tucson, the logical result of the trial court's holding that water may be pumped between lands overlying a common supply requires that Tucson be permitted to pump from the Marana area to the city proper, thus overruling the Jarvis cases. This avoids the obvious declaration in the statute that where distinct bodies of groundwater are determinable within a basin, a basin subdivision must be declared. A.R.S. §45-310. Pursuant to the legislative mandate the State Land Department has declared three such subdivisions or "distinct bodies of groundwater" within that portion of the Santa Cruz Basin which FICO contends is one overall body of groundwater. The argument, therefore, does not hold water.

FICO attempts to make this case turn on the validity and "binding effect" of the State Land Department's designation of the Sahuarita-Continental Subdivision boundaries. Appellee has indicated above that this is not the case; the designation is evidence of the fact that FICO's and ANAMAX's lands overlie a common supply of groundwater, and was properly considered by the trial court in this case.

cf. Jarvis I; Jarvis II.

B. The Rule of Reasonable Use of Percolating Groundwater.

The development of the American rule of reasonable use will be briefly set out. Then cases applying the rule from Arizona and other jurisdictions will be discussed. The rule will then be applied to the present case.

Our courts quickly departed from the English rule that a man may withdraw as much groundwater as he can from his land without regard to what he did with it or where he used it, and regardless of any injury to his neighbor's supply. This departure from that

rule eventually gave rise to two theories of groundwater: the reasonable use and the correlative rights rules. Both rules require that groundwater be used for the benefit of "the lands from which it is taken," E.g., Canada v. City of Shawnee, 179 Okla. 53, 64 P.2d 694 (1937)(reasonable use); Ecker v. Springfield Tunnel & Dev. Co., 87 Cal.App. 617, 262 P.425 (1927) (correlative rights), but the correlative rights rule limits the landholder in times of shortage to an amount equal to his proportionate area of land over the total underground water supply. See, 1 Waters and Water Rights §52.2(b) at 330 (R. Clark ed. 1967). The reasonable use rule has no such limitation on quantity. Both rules regard groundwater as the private property of the landowner. Both rules, however, require that groundwater be used on "the lands from which it is taken." Therefore, cases from correlative rights jurisdictions as well as reasonable use jurisdictions may be looked to for a definition of "the lands." In fact,

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early cases made no distinction between the two rules. E.g., Meeker v. East Orange, supra. Silver King Consol. Mining Co. v. Sutton, 85 Utah 297, 39 P.2d 682, 687 (1934).

A review of reasonable use and correlative rights cases demonstrates clearly that "the lands" as used in those doctrines refer to the lands overlying the source of common supply, the water basin. Where a landowner takes his groundwater and conveys it to lands beyond the area over the common supply, the water is prevented from returning to the common supply, and this illegality may be summarily redressed if injury is shown. Where the water is used on lands overlying the common supply, however, the question then becomes one of reasonableness, the equitable weighing process of all pertinent facts and circumstances spoken of in the Restatement of Torts, §852, comments b & c, 861 (1939) (cited in Bristor II, infra). The Arizona cases illustrate this rule.

This Court need not be burdened by an extensive review of Bristor. The case was decided on a motion to dismiss. For the purpose of the decision in Bristor the Supreme Court had to assume the truth of the allegations of the plaintiff's complaint. The complaint alleged, in effect, that the groundwater involved was being unreasonably used. The complaint further alleged rather specifically the damage being done to the plaintiffs. Since the water supply of plaintiffs therein was not just impaired, but had been destroyed, the damage was of sufficient magnitude to lead one to the judicial conclusion that it was irreparable.

Our Court then adopted the doctrine of "reasonable use." In adopting the rule, the Court, set two essential ingredients that must co-exist in order for a person to have a claim. The first essential ingredient was that the alleged wrongdoer must have been using the water "unreasonably." The second essential ingredient was that the alleged wrongdoer

must have "damaged" a person owning land in an area affected by his unreasonable use of the water. It was recognized in Bristol v. Cheatham, supra, that a party owning land overlying the common underground water supply could, without liability, diminish the water supply of his neighbor and actually cause his neighbor injury and damage provided that the use made of the water was "reasonable." The court said that a "reasonable use must depend to a great extent upon many factors, such as the persons involved, the nature of their use and all the facts and circumstances pertinent to the issue." 75 Ariz. at 237.

Emphasis was placed on limiting the use of the water to "purposes incident to the beneficial enjoyment of the land from which they are obtained." 75 Ariz. at 236. Dicta indicated that the modern trend in regard to reasonable use is that a "property owner may not concentrate such waters and convey them off his land if the springs or wells of another landowner are thereby damaged or impaired."

75 Ariz. at 236. However, Bristor at no time made any attempt to specifically define the term "off the land or off his land." It made no such attempt simply because the complaint had alleged transportation away from the land and there were no facts before the court that would justify any precise definition of what the term meant.

It takes no extended argument to convince a reasonable mind that the term couldn't mean away from the wellhead where the water was extracted from the ground. For example, a rancher would not have to water his cattle at the pump, and a farm would be permitted to extract the water from the land and transmit it for irrigation to places away from the situs of the well. The term had to have some meaning and since one very basic reason for the doctrine was the common right of all owners of land overlying the source of supply to make reasonable use of the source, it would seem that "off the land" would have to mean "off of any land overlying the underground basin

that provided the common source of supply."

The principle is further illustrated in the first Bristor case, 73 Ariz. 228, 240 P.2d 185 (1952), which was reversed by the second. In Bristor I, Justice LaPrade dissented from the holding that groundwaters were subject to appropriation and not privately owned, stating:

. . . the only issue before the trial court was whether the owner of land overlying a supply of percolating water common adjoining land owners may pump the water from wells upon his land and convey it to other lands for the benefit of the latter from whence it does not return to replenish the common supply, if the supply available to the adjoining land owners from pumps upon their own lands . . . is diminished to their injury. 73 Ariz. at 242 (emphasis added).

Justice DeConcini expressed a similar view, also in dissenting in the first Bristor case. 73 Ariz. at 255. Both justices joined the majority in Bristor II in adopting the reasonable use doctrine. That "lands from which the groundwater is taken" equals lands

over the "common supply," is therefore found throughout the case law.

In this respect, it is helpful to note the analogy between riparian rights to water from a surface stream or river, and rights to percolating groundwater under the doctrine of reasonable use. In Bristor II, the Supreme Court quoted the Restatement of Torts, §852, comments b & c relating to the riparian right of reasonable use of surface waters. 75 Ariz. at 237. The Court then stated:

While the foregoing quotation is concerning reasonable use between riparian owners, the same work in Section 861 states that the problem of determining reasonable use is the same whether the water is in a water course or under the surface of the earth and that the foregoing comments are applicable to groundwater.
Id.

Thus, since the principles are generally the same, we may examine the common supply notion in the context of riparian rights to a river. In Anaheim Union Water Co. v. Fuller, 150 Cal. 227, 88 P.978 (1907), for example,

the plaintiffs were riparian to the Santa Ana River. The defendants lands were above the plaintiffs', abutting the same river. The defendants, however, took water from the river and conveyed it to lands outside of its drainage area, using it on land in the drainage area of another water course which joined the Santa Ana at a point below the plaintiffs. The Supreme Court of California affirmed the entry of an injunction against the defendants' use, reasoning as follows:

Land which is not within the watershed of the river is not riparian thereto, and is not entitled . . . to the use or benefit of the water from the river, although it may be part of an entire tract which does extend to the river. . . .

. . . . The principal reasons for the rule confirming riparian rights to that part of lands bordering on the stream which are within the watershed are that, where the water is used on such land, it will, after such use, return to the stream, so far as it is not consumed, and that, as the rainfall on such land feeds the stream, the land is in consequences entitled, so to

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speak, to the use of its
waters." 88 P. at 980.
(Emphasis added, cites
omitted).

Thus, it is the natural facts or the hydrological realities that form the right to the reasonable use of water, be it on the surface or underground. The critical factor is that water must be available for return to the common supply, so far as it is not consumptively used.

Cases cited by the Bristor II court bear out the principle that groundwater may not be conveyed to a point beyond lands overlying the common supply under the rule of reasonable use; In Burr vs. McClay Rancho Water Company, 154 Cal. 428, 98 Pac. 260 (1908) water was being transported from one parcel of land owned by a party to a noncontiguous parcel for use on the noncontiguous parcel. This transportation was sanctioned because both the parcel from which water was being extracted and the parcel on which it was being used overlay the common source of supply, the "water bearing strata."

City of San Bernardino vs. City of Riverside, 186 Cal. 7, 198 Pac. 784 (1921) condemns a transbasin diversion but by clear implication would permit an intrabasin diversion.

Horne v. Utah Oil & Refining Company, 59 Utah 279, 202 P. 815 (1921) recognized the right to transport water to points within an area so long as it was not taken out of the area that overlay the "artesian district."

Glover vs. Utah Oil & Refining Company, 62 Utah 174, 218 Pac. 955 (1923) defined "off the land" as being out of the artesian district.

State vs. Anway, 81 Ariz. 206, 349 P.2d 774 (1960). Anway was permitted to take water off of one parcel of land he owned and transport it to and use it on another parcel of land. This was being done in a critical groundwater area and it was sanctioned. Justice Phelps in his dissent maintained that this violated the principle of Bristor vs. Cheatham, supra. The majority of the court

obviously did not agree with this conclusion and obviously did not intend to limit the use of water on a specific, precise piece of land. Since the area was a critical groundwater area, it was judicially certain that the movement was within the groundwater basin.

See also Evans v. City of Seattle, 47 P.2d 984 (Wash. 1935); Katz v. Walkinshaw, 70 P. 663 (Cal. 1902); Forbell v. City of New York, 58 N.E. 644 (N.Y.App. 1900) (city could not take water beyond the boundaries of the common supply); Volkman v. City of Crosby, 120 N.W.2d 18, 22-23 (N.D. 1963); cf. Montecito Valley Water Co. v. City of Santa Barbara, 144 Cal. 578, 77 P. 1113 (1904). In Montecito Valley Water Co., supra, the court engaged in a highly instructive comparison of that case with Katz v. Walkinshaw, supra:

First, it should be noted, as applicable to all of these appeals, -----that this case is radically different from that of Katz v. Walkinshaw Here no question

arises as to the use, or the right to use, or the apportionment of seepage or percolating waters by and between the owners of the overlying lands. Here the waters flow or are developed in a barren and mountainous country, are of no use upon the lands within the watershed where they are found, but are of great value to the neighboring towns, cities, and fertile valleys. Each one of the parties to this action is carrying the water to alien soil and no claimants, even those who are riparian proprietors, pretend to use the water upon the lands from which it is obtained. In Katz v. Walkinshaw the condition presented was that of a well-defined underground catchment basin; a subterranean basin; a subterranean lake, so to speak, loosely filled with gravels. The lands above this subterranean basin were valuable because of the waters beneath, and such of the water as was taken from this basin and used upon its superior lands found its way back to the source of supply as surely as does such water when used by a riparian proprietor of a flowing stream within its watershed. In Katz v. Walkinshaw the controversy arose between the owners of such superior lands upon the one hand and a defendant water company upon the other, which, tapping the subterranean basin, was draining

its waters for use upon
lands without the limits
of the basin which use,
if continued, threatened
the impairment and de-
struction of all the over-
lying lands." 77 P. at
1114. (Emphasis added, cites
omitted).

Therefore, it is clear that the phrase
"lands from which the water is taken" means
lands within the groundwater basin, the com-
mon supply.

Jarvis I, supra and Jarvis II, supra,
further support the common supply principle.
In those cases, the real party in interest,
the City of Tucson, had drilled six wells in
Avra-Altar Valley and was pumping water for
use in three distinguishable places: (1) for
use on land within the Marana Critical
Groundwater Area, and therefore over the water
basin; (2) to land outside of the water basin
but in the valley "drainage area;" and
(3) out of the entire watershed into another
water basin. The petitioner brought an orig-
inal action in the Supreme Court seeking in-
junctive relief against the City's pumping

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over state land. In responding to this action, the City did not contest the fact that it was conveying "off the lands" from which it was taken, but argued, inter alia, that petitioners had not shown any demonstrable damage to their water supply on which to base any relief. Brief of Real Party in Interest, at 5-17, 19, Jarvis I, supra. The Court, however, held that cognizable injury was demonstrated by the following facts: it took judicial notice that a critical area had been declared in the valley water basin, 104 Ariz. at 530, 456 P.2d at 399. Noting the definition of a critical area in A.R.S. §45-301(3), the court held that this fact alone was enough to establish injury. 104 Ariz. at 530-31, 456 P.2d at 388-89. The Court was also apprised of the fact that the City planned to withdraw as much as 33,000 acre-feet per year and take it out of the basin, see Petitioner's Reply Brief at 6, Jarvis I, supra, and noted that the present withdrawal from the basin, not counting the City's

planned use, was 120,000 acre-feet per year. An already declining water table would necessarily be damaged by such a transbasin diversion. Therefore, the City was enjoined.

Jarvis I logically followed Bristor with the same line of reasoning but narrowed the requirement for "reasonableness" and stated definitely that a finding of unreasonable use could be based upon a determination that the water is conveyed "off the land." Thus, Jarvis I, to this point merely limited the number of factors to be considered in testing "reasonableness of use" in the case of a large transbasin diversion. However, again as in Bristor, at no time does the court in Jarvis I offer to define what is meant by "off the land."

In Jarvis II, supra, the City returned to the issue it had not contested in Jarvis I: the issue of where the water pumped from its wells in the Avra-Altar Valley could be used, i.e., the "on the lands" issue. The City contended that the rule of reasonable use

permitted pumping to points out of the water basin, but in the drainage area, as well as to Ryan Field, which was in the critical area and therefore judicially certain to be within the water basin boundaries. The Jarvis II Court, however, permitted only the latter use, since Ryan Field was situated over the common basin.

The existence of a critical area inside the basin is relevant only to the issue of damage, and not to a definition of where water may be used. It is the boundaries of the body of groundwater, the basin in Jarvis II, that are determinative. This follows from the fact that the Court stated the City could pump water to residences outside of the critical area if it could be shown that they were inside the water basin. 106 Ariz. at 510, 479 P.2d at 173.

In summary, the rule of reasonable use is a rule of property. Access to the common supply provides the natural right to withdraw groundwater. Through the millennia, rain

falling on a man's land in part ended up contributing to the total supply in the basin. If he uses his water so that it is available for return to the common supply when he is finished with it, the use is lawful, unless a neighbor can show that the use is "unreasonable," and that he is damaged thereby. Reasonableness and damage are, of course, questions of fact in such a case and generally require a trial. On the other hand, however, Jarvis I and II tell us that summary injunctive relief is available where (1) water is taken out of the water basin, and (2) damage is obvious under the facts of the case.

The present appeal lies quite clearly in the former category, requiring a trial, rather than in the latter which may be summarily redressed. Here, FICO has previously attempted to get summary relief in the main case which has been denied in this Court and others. The present appeal involves an attempt to enjoin the use of water from a single well, where (1) the water will be used on lands

overlying the common supply, (2) will be available for return to the common supply after use and (3) the total withdrawal from the Sahuarita-Continental Subdivision of the Santa Cruz Basin is presently between 100,000 and 150,000 acre-feet; the water involved here amounts to much less than 1 per cent of the total withdrawals. In contrast, Jarvis I and II involved diversions of an increase of 25 per cent of the basin's withdrawals to areas wholly outside the basin and such water would be consequently unavailable for return to the common supply. The existence of a critical area inside the Jarvis basin was used as evidence by the Court in declaring that such a diversion would result in damage as a matter of law.

Here, however, FICO has failed to show how the additional well would damage it: the relatively small quantity of water involved here will be used on lands over the common supply and it is available for return to the common supply after use. Therefore, even though

a critical area has been declared inside the subject water basin, the facts here are radically different from the Jarvis cases and the trial court could not properly presume damage. In the absence of other evidence, the denial of preliminary injunctive relief was proper.

Because this case does not fall into the category where summary relief is possible, such as the Jarvis cases, it must be determined according to the equitable weighing process set out in Bristor II:

What is a reasonable use must depend to a great extent upon many factors, such as the persons involved, the nature of their use and all the facts and circumstances pertinent to the issue. The principle is well stated in Restatement of Law of Torts, Comments b and c, Section 852:

. . . As such it is a question which must be determined in each case in view of the persons involved and the particular facts and circumstances. A use that may be reasonable under certain circumstances, and a use by A that may be reasonable as to B may be unreasonable as to C.

In some localities certain uses of water may, because of fairly uniform conditions, be so continuously found to be reasonable or unreasonable that in the absence of exceptional circumstances they can be said to be so as a matter of law in that particular place. . . .

. . . The determination in a particular case of the unreasonableness of a particular use is not and should not be an unreasoned, intuitive conclusion on the part of a court or jury. It is rather an evaluating of the conflicting interests of each of the contestants before the court in accordance with the standards of society, and a weighing of those, one against the other. The law accords equal protection to the interests of all the riparian proprietors in the use of the water, and seeks to promote the greatest beneficial use by each with a minimum of harm to others. But when one riparian proprietor's use of the water harmfully invades another's interest in its use, there is an incompatibility of interest between the two parties to a greater or lesser extent depending

on the extent of the invasion, and there is immediately a question whether such a use is legally permissible. It is axiomatic in the law that individuals in society must put up with a reasonable amount of annoyance and inconvenience resulting from the otherwise lawful activities of their neighbors in the use of their land. 75 Ariz. at 237.

This process, of course, requires a trial.

Some of the facts produced in the main case to date and, consequently, to be plugged into the reasonable use weighing process, are: FICO's annual water use is about three times that of ANAMAX's, though the total of all defendants' uses exceeds FICO's; FICO's consumptive use of water is at three times a higher rate than that of ANAMAX or any of the other defendants; though ANAMAX transports water from within the critical area to without, after its use in the milling process, the vast majority of that water is returned to tailings ponds within the critical area; FICO itself transports water over six miles, although it

does not cross the critical area boundary in so doing.

ANAMAX owns over 19,000 acres in fee within the Sahuarita-Continental Basin Subdivision--over 1,600 acres purchased by ANAMAX were irrigated fields which have been voluntarily retired from irrigation, eliminating pumping and high consumptive uses by this land. There are, of course, many other factors bearing on the question. It is obvious, however, that under the quote from Briscor II, supra, it may not be resolved without considering all of them at a trial.

Lastly, ANAMAX observes that, based on its contentions, FICO would have no complaint were the mill moved from its present site to the proximity of ANAMAX's wells. This would require that the ore be mined where it is found, shipped down to the mill and processed. The water pumpage would be the same and the operation would be the least economical. Yet this is the anomalous result FICO presses for. Plainly, the present use of water by the copper

mine defendants is reasonable under the test from Bristor II set out above.

C. The Administrative Designation of a Critical Area Pursuant to Statutory Authority Has a Limited Effect on the Common Law Doctrine of Reasonable Use.

It is obvious from the Supreme Court's decisions in Jarvis I and Jarvis II that the existence of a critical area within a basin or a basin subdivision is relevant only to the issue of damage and not to the issue of where water may be used for non-agricultural purpose in a reasonable use dispute. This is also manifest on the face of the groundwater statute itself.

A.R.S. §45-301(1) defines a critical area as any basin subdivision not having a "reasonably safe supply [of ground water] for irrigation of the cultivated lands in the basin at the then current rate of withdrawal."

A.R.S. §45-308 to -311 provide procedures for declaring critical areas; the procedure may be initiated by the State Land Department or by

"twenty-five users, or one-fourth of the users of groundwater within the . . . basin or subdivision . . . whichever is the lesser number." Id. §45-308(B). "User of groundwater" is defined as any person using groundwater primarily for irrigation. Id. §45-301 (13). (ANAMAX notes here that FICO's argument that "users" as found in §45-308(B) means something other than irrigators is contrary to common sense--the statute plainly means that if one-fourth of the total number of irrigators in the basin exceeds twenty-five persons, then twenty-five will suffice to initiate the proceeding).

After designation of a critical area, wells may not be drilled to irrigate lands not irrigated in the five years prior to designation. It is evident that in the groundwater code, the legislature adopted the policy that existing agricultural uses were to be favored and protected as against potential agricultural uses. Southwest Engineering Co. v. Ernst, 79 Ariz. 403, 291 P.2d 764 (1955).

Farmers such as FICO were benefited by the restriction. However, the legislative policy regarding non-agricultural uses in a critical area is basically a "hands-off" one--domestic, industrial, and other uses were expressly exempted from any such controls under the statute. A.R.S. §§45-301(3); -322.

Therefore, the only impact which the critical area statutes have on the reasonable use rule is to allow the designation of a critical area in the area of a water dispute to be considered by the court as evidence in the damage aspect of the case.

D. The Ruling of the Superior Court Should Be Upheld and the Record Viewed in a Light Most Favorable to ANAMAX.

The Jarvis cases were original proceedings in the Supreme Court. In those cases the high Court was the finder of fact. The case at bar, however, is an appeal from the Superior Court, and its ruling should be upheld unless the conceded facts indicate that an injunction should issue as a matter of law to stop movement of

water from one side of an imaginary line to the other, without regard to other facts yet to be found.

E. If the Groundwater Code Were Construed as Prohibiting the Transportation of Water for Use Outside a Critical Area But on Lands Overlying the Same Groundwater Basin, as FICO Contends, Then the Statutes as so Construed Cannot Withstand Constitutional Scrutiny.

1. Due process. That water under a person's property is his private property is clearly a long-standing rule of property in Arizona. Jarvis I and II, supra; Howard v. Perrin, supra; Bristor II, supra. Bristor II redeclared this private ownership, subject to the common law maxim that a man must not use his property unreasonably so as to injure that of his neighbor. ANAMAX owns over 19,000 acres of land within the Basin Subdivision, and over the hydrological water basin. Some of this land lies within the boundaries of the critical area, and some outside it. To construe

the critical area statutes as permitting use on one side of the hydrologically arbitrary boundary, yet prohibiting it on the other is a taking of property without compensation for a private use and is a denial of procedural and substantive due process in violation of the United States and Arizona Constitutions.

As discussed above, the groundwater code was intended to control only the use of groundwater for irrigation. When critical areas are designated by the State Land Department at the behest of local irrigators, A.R.S. §45-303, any person who was not then irrigating, or who did not intend to irrigate, would have no indication on the face of the statute that the placement of the boundaries of the critical areas would in any way affect him. A holding now that the boundaries of the critical area determines where water withdrawn from the area may or may not be used would deprive ANAMAX of procedural due process: the statute in no way gives persons such as ANAMAX any notice regarding the importance of the

boundary designation. Reasonable men would conclude that the designation would not affect their non-agricultural property. It is clear from the procedure required by the statute that irrigators contributed to the administrative decision as to what lands would be included in the Sahuarita-Continental critical area. There is no showing that this designation is anything but arbitrary in relation to ANAMAX, since the statute implies that only irrigated lands will be included in such areas. If this Court were to hold that the code makes the boundaries of the critical area crucial to the exercise of ANAMAX's property rights, ANAMAX is entitled to notice of such, before the boundaries are set, so that its lands, overlying the common supply, might be included in the area. Such is a fundamental requirement of procedural due process. This point is emphasized by the fact that only those landowners who are putting water to a beneficial use "primarily for irrigation" are entitled to petition the State Land Department for designation or alteration

of the critical area boundaries. If the code is construed to affect ANAMAX's use of water in this case, due process requires that A.R.S. §45-301(13) be rewritten to include participation by ANAMAX, and requires that notice be given that ANAMAX's property rights will be affected by such administrative boundary designations.

Beyond procedure, the statutes so construed would violate fundamental notions of justice and fairness which are at the base of the due process clause. The result of a decision favoring FICO's use over the ANAMAX's would be taking the latter's property and giving it to the former. This would go beyond the purview of state law and would violate fundamental substantive rights guaranteed by the federal constitution. See Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922) (Statute prohibiting mining in certain manner as to make it commercially impractical held to exceed police power). Were this Court to hold that ANAMAX's use of water in its mining

operations must take place at or near its wellheads, it could move its milling facilities to such locations, and would be able to use the same quantities of water there. ANAMAX would then be forced to haul ore from its mines to such facilities, a wholly uneconomical proposition, solving none of the problems of which FICO herein complains, and making the mining operations obviously uneconomical. Thus, such a holding would be arbitrary, would serve no purpose, and therefore, would violate principles of substantive due process. A decision such as this could not be reasonably calculated to deal with the evil of a decreasing groundwater supply and would unreasonably discriminate against ANAMAX.

See Nebbia v. New York, 291 U.S. 502 (1934).

2. Equal Protection. If the groundwater code were construed to prohibit ANAMAX's transportation of water from within the critical area to its mill which, although it lies outside the critical area, lies over the common water basin, yet permit such uses as FICO's,

the statute so construed is an arbitrary and capricious discrimination and violates equal protection as guaranteed by the United States and Arizona Constitutions.

Whereas discrimination per se is not illegal, there must be some rational basis upon which the discrimination is based that is designed to deal with an evil which is within the legitimate exercise of the police power. If the person discriminated against can demonstrate that there are no fair and substantial differences between the two classes, but that the distinctions between them are arbitrary, illusory, and invidiously discriminatory, he has been denied equal protection. Reed v. Reed, 404 U.S. 71, 75-76 (1971); Truax v. Corrigan, 257 U.S. 312, 331-41 (1921); Southwest Engineering Co. v. Ernst, 79 Ariz. 403, 410-12, 291 P.2d 764, 769-71 (1955).

As shown above, the location of the Sahuarita-Continental critical area boundary is completely arbitrary with respect to ANAMAX: the location bears no relationship

to the hydrological realities of the water basin, but rather the boundaries were set by irrigators and the State Land Department. The purpose of the statute is to generally deal with the problem of diminishing groundwater supplies in Arizona due to increased reliance on groundwater for irrigation and to collect data relative thereto. See Southwest Engineering Co. v. Ernst, 79 Ariz. 403, 421-24, 291 P.2d 764, 776-79 (1955) (Phelps, J. dissenting). It cannot reasonably be argued that persons whose partial use of water from a common supply is on one side of an arbitrary boundary may be constitutionally classified apart from persons using water from the same supply whose use is on the other side of the boundary. That the respective uses are on one side or the other of the critical area boundary in no way can be said to bear any rational relationship to the control of the declining water table in the basin. The classification is, therefore, arbitrary and irrational and the legislation, were it to be construed this

way, would deny Petitioners equal protection of the laws.

VIII.

CONCLUSION

The gut issue here is whether an injunction must issue if water is pumped from land within a critical groundwater area and transported across the boundary of that area for some use on the transporter's land that overlies the common source of supply.

It is respectfully submitted that an affirmative answer to this question has no support in the reported cases of this Court or any other court.

Respectfully submitted,

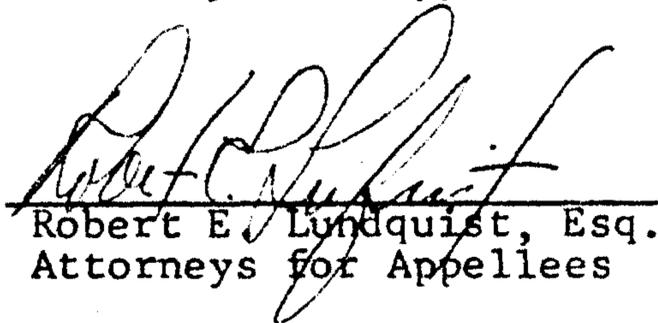
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NOTE

In view of the fact that this matter was decided on a motion for preliminary injunction with the facts stated herein found at various places in the voluminous record, and that no easy reference is possible as in more ordinary cases, no reference is made in support of the facts stated in this brief. ANAMAX is, however, confident that there will be no question about these facts. FICO has obviously recognized this problem and has taken the same approach in its brief.

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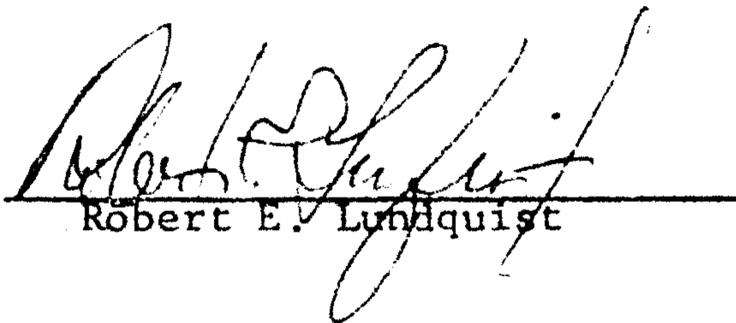
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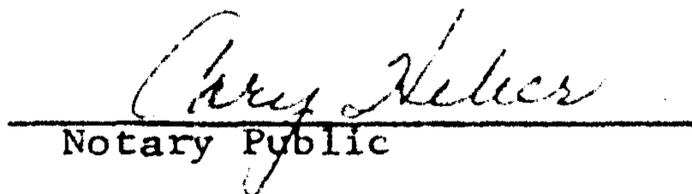
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Robert E. Lundquist

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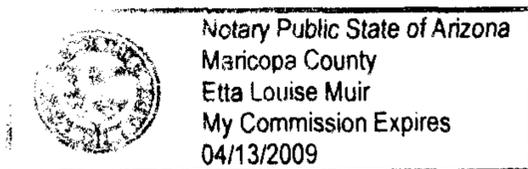
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