IN THE SUPREME COURT OF THE STATE OF ARIZONA

FARMERS INVESTMENT COMPANY, a corporation, Petitioner, vs. PIMA MINING COMPANY, a corporation; ANDREW L. BETTWY, State Land Commissioner; STATE LAND DEPARTMENT; THE HONORABLE ROBERT O. ROYLSTON, Judge of the Pima County Superior Court; and THE PIMA COUNTY SUPERIOR COURT, Respondents.	No. 11439 ANSWER OF INTERVENOR-RESPONDENTS

Intervenor-Respondents AMERICAN SMELTING AND REFINING COMPANY, DUVAL CORPORATION, DUVAL SIERRITA CORPORATION, BOYD LAND AND CATTLE COMPANY, AMAX COPPER MINES, INC. and THE ANACONDA COMPANY, as partners in and constituting ANAMAX MINING COMPANY, a partnership, and ANAMAX MINING COMPANY, answer the Special Action Petition to the extent referable to Petitioners as follows:

FIRST DEFENSE

I

As to Paragraph I, Petitioners admit that Pima Mining Company ("Pima") is an Arizona corporation engaged in the mining business in Pima County, Arizona. Petitioners admit that Farmers Investment Company ("FICO") is an Arizona corporation engaged in farming, and on information and belief allege that it is principally engaged in growing pecan trees.

II

As to Paragraph II, Petitioners admit the allegations relating to the filing of Pima County Superior Court Cause No. 116542 and as to the identities of the parties therein. Petitioners deny that Count IV of FICO's complaint in Cause No. 116542 is the only claim made by FICO in that cause material to this petition.

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III

Petitioners admit the allegations of Paragraphs III and IV relating to the Santa Cruz River and the designation of the Critical Groundwater Area.

IV

As to Paragraph V, Petitioners admit that FICO farms approximately 5,000 acres of its land in the upper Santa Cruz Basin as a pecan orchard. Petitioners deny that the pecan orchard has been appraised by a competent appraiser as having a value of $50,000,000.00 and Petitioners allege on information and belief that the orchard is worth less than half such sum.

V

As to Paragraphs VI, VII, VIII, and IX, Petitioners admit upon information and belief the allegations of fact therein relating to Pima's mining operations.

VI

As to Paragraphs X, XI, XII, and XIII, Petitioners admit the allegations relating to the proceedings in Cause No. 116542 resulting in partial summary judgment being entered against FICO, but allege that there--as here--FICO has injected issues relating to the other Counts of FICO's complaint and amendments thereto.

VII

All of Petitioners industrial consumptive uses of water, except small amounts used for dust control such as would be de minimis, occur on property which overlies the common basin ground water supply. The ultimate consumptive use occurs on property which is entirely within or immediately adjacent and closely proximate to the critical ground water area. All water not consumptively used by Petitioners is returned to points within the critical area.

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VIII

As to Paragraph XIV, Petitioners deny that FICO does not have an adequate or speedy remedy by appeal and allege that FICO's remedy by appeal is proper, plain, speedy and adequate. Petitioners assert that this Court should refuse to take jurisdiction of this matter as a Special Action for the reason that the conclusions alluded to by FICO as to CAP water and sewage effluent and the other conclusions of fact and law, all of which are controverted by Petitioners, if germaine to the issue of the litigation, as FICO alleges, could and should be presented to the Superior Court, the only appropriate forum for the resolution of these and the plethora of genuine issues already existing in FICO's pending action.

SECOND DEFENSE

I

Petitioners allege that since prior to the use by any of the mining companies of the common supply of percolating water in said ground water basin, the pumping of water from wells therein by FICO and other agricultural users has exceeded the annual recharge of water into the basin, lowering the water table and depleting the reservoir of supply by mining the water, all of which facts were well known by FICO.

II

From and after 1956, FICO has been aware of the activities of various Petitioners in connection with the development of their open pit copper mines and ore reduction facilities, and has been aware that Petitioners were making and continuing to make an enormous investment in excess of $600,000,000.00 in connection therewith. FICO nevertheless failed to make any such claim or assert any such rights against Petitioners. In reliance upon the aforesaid conduct of FICO, Petitioners continued with the development of their open pit copper mines and ore reduction

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facilities and the expenditure of hundreds of millions of dollars incident thereto. Petitioners were misled by FICO's silence and failure to assert its alleged rights. Petitioners would not have proceeded with said development and expenditure of money without a determination of their rights had FICO given Petitioners notice of the claims or "rights" it now asserts.

III

The wells from which Petitioners have been taking water are the only practical and economical sources of water available to Petitioners for use at their respective copper ore reduction facilities.

IV

By reason of FICO's conduct, which is inconsistent with the claim it is now making, and by reason of Petitioners' reliance upon such conduct and the enormous damage which will result to Petitioners if FICO is permitted to repudiate its former conduct, FICO is now estopped to assert the "rights" it now claims.

THIRD DEFENSE

FICO has been guilty of laches and unreasonable delay in bringing this Special Action in that Petitioners commenced their respective beneficial industrial uses of percolating water from its wells, as long ago as 1956, while exploring and drilling the overbodies, and have so used such water continuously and openly since that time, as FICO well knows. Subsequent to that time, Petitioners have openly and for all to see made a capital investment of more than $500,000,000.00 in removal of overburden in their open pit copper mines and in construction of and additions to their mills, copper concentrator and related facilities. The continuous use of water and the making of immense and continuing investment by Petitioners at their mines were well known to FICO, which made no assertion against Petitioners of any such rights as it now claims. FICO's silence for those many years

will have greatly prejudiced Petitioners should FICO's late-asserted rights destroy Petitioners' investments.

FOURTH DEFENSE

FICO has been guilty of laches and unreasonable delay in bringing this Special Action in that from the commencement of the respective mining operations Petitioners have openly and for all to see used state leases granted for storage of hundreds of millions of tons of waste rock and tailing. The areas under state lease used by Petitioners are now the only practical and economic waste disposal areas available to Petitioners. The use of the premises by Petitioners was well known to FICO which made no assertion against Petitioners of invalidity of such leases. Petitioners have paid as rentals sums exceeding the full fair market value of such lands, and with each lease renewal term, Petitioners continue to pay rentals equal to the full fair market value of the lands.

FIFTH DEFENSE

Petitioners have each invested millions of dollars in the purchase of agricultural lands in the Critical Groundwater Area which were then irrigated and in agricultural production, and have retired said lands from irrigation. By so doing, Petitioners have very substantially reduced the agricultural overdraft on the water supply, and have in effect added thousands of acre feet annually to the water supply from which FICO pumps.

SIXTH DEFENSE

Petitioners allege that their taking of water from its wells in said critical area and use of such water at their respective copper ore reduction facilities has been open, apparent, notorious, continuous, hostile and adverse to FICO and to all other persons for a period of more than ten consecutive years next preceding the filing of this action, whereby FICO's alleged claim is barred by the provisions of Arizona Revised Statutes

(1956) §12-526.

SEVENTH DEFENSE

FICO is not entitled to the equitable relief which it seeks, or to any relief from this Court, because FICO is guilty of laches. Petitioners specifically allege that FICO has known of the uses and proposed uses made and to be made by Petitioners for many years. FICO further knew that the water table of the Santa Cruz Basin has been lowering at all times since FICO began pumping water, and further knew that Petitioners had invested or were in the process of investing hundreds of millions of dollars for mineral exploration and for plants, mills, properties and facilities for mining purposes. Nevertheless, in spite of its knowledge of such facts and of other facts which make the assertion of its present position unconscionable and inequitable, FICO for many years has failed to take any action or steps to assert its now claimed "rights."

EIGHTH DEFENSE

Petitioners have a vested property right in and to any percolating water underneath its land, and to deprive Petitioners of making reasonable and necessary use of said percolating water would deprive Petitioners of their rights to due process of law under Article 2, Section 4 of the Arizona Constitution, and would deprive Petitioners of their protection under Article 2, Section 17 of the Arizona Constitution to not have its property taken for private use, and would deny Petitioners the equal protection of the laws guaranteed them under Article 2, Section 13 of the Arizona Constitution.

NINTH DEFENSE

Petitioners have a vested propert right in and to any percolating water underneath its land, and to deprive Petitioners of making reasonable and necessary use of said percolating water would deprive Petitioners of their rights to due process of law

and equal protection of law guaranteed them under Amendment V and Amendment XIV of the Constitution of the United States.

TENTH DEFENSE

FICO is not entitled to the equitable relief which it seeks, because FICO has unclean hands. Petitioners have expended large sums of money in acquiring and developing their lands and the percolating waters, and their waters are put to a beneficial and reasonable use for mining, milling and other industrial purposes. FICO's consumption of water from the underground supply is much greater than any of Petitioners' industrial consumption, and depletes Petitioners' water supply. The use of FICO of these percolating waters is unreasonable, and is in further violation of the rights of Petitioners in that the water is being wasted by FICO. FICO has caused and continues to cause irreparable injury and damage to Petitioners by FICO's continued withdrawal and continued expropriation and waste of the ground waters.

ELEVENTH DEFENSE

FICO is not entitled to the equitable relief it seeks because, were it entitled to redress, it would have an adequate remedy at law.

WHEREFORE, Petitioners pray:

1. That FICO take nothing by its Special Action Petition.

2. That Petitioners be awarded their costs and disbursements herein.

3. That Petitioners have such other and further relief as may be just and equitable.

Respectfully submitted this 18 day of January, 1974.

CHANDLER, TULLAR, UDALL & RICHMOND

By _____
Thomas Chandler
1110 Transamerica Building
Tucson, Arizona 85701
Attorneys for petitioners,
THE ANACONDA COMPANY, BOYD LAND AND CATTLE COMPANY, and ANAMAX MINING COMPANY

EVANS, KITCHEL & JENCKES

By _____
Burton M. Apker
363 North First Avenue
Phoenix, Arizona 85003
Attorneys for petitioner,
AMERICAN SMELTING AND REFINING COMPANY

FENNEMORE, CRAIG, VON AMMON & UDALL

By _____
Calvin H. Udall

and

By _____
James W. Johnson
1700 First National Bank Plaza
100 West Washington Street
Phoenix, Arizona 85003
Attorneys for petitioner,
DUVAL CORPORATION and DUVAL SIERRITA CORPORATION

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STATE OF ARIZONA)
) ss.
County of Pima)

G. G. [illegible], being first duly sworn upon his oath, deposes and says that he is the Vice President of Duval Corporation, a corporation, and its wholly owned subsidiary, Duval Sierrita Corporation; that he is authorized to make this verification on behalf of Intervenor-Respondents, AMERICAN SMELTING AND REFINING COMPANY, DUVAL CORPORATION, DUVAL SIERRITA CORPORATION, FOYD LAND AND CATTLE COMPANY, NEW COPPER MINES, INC., THE ANACONDA COMPANY and ANCHOR MINING COMPANY; that the matters set forth in the foregoing answer are true according to the best of his knowledge, information and belief.

G. G. [illegible]

Subscribed and sworn to before me, this [illegible] notary public, this 18 day January 1974.

James W. Johnson
Notary Public

My Commission expires:
My Commission Expires June 27, 1976

MEMORANDUM OF POINTS AND AUTHORITIES

Petitioners respectfully submit the following Memorandum of Points and Authorities in support of their Petition for Leave to Intervene.

This dispute began originally as part of Civil Cause No. 116542 filed in the Superior Court of Pima County on November 24, 1969, in which FICO seeks to enjoin all water pumping in the Sahuarita-Continental Critical Groundwater Area by the mining companies.

Petitioners pump water from land located in the Sahuarita-Continental Critical Groundwater Area for industrial use on their mining properties located in said Critical Area and in the Sahuarita-Continental Subdivision of the Santa Cruz Groundwater Basin in which said Critical Area is located. Petitioners transport water from their well fields to their mining and milling sites across their own and state lands pursuant to rights of way granted by the State Land Department. Except for de minimus amounts of water used for dust control in the Duval pit, the consumptive uses of Petitioners occur on their own properties located within the Sahuarita-Continental Subdivision, and all water not consumptively used is returned to points within the Sahuarita-Continental Critical Groundwater Area. In addition, Petitioners own large tracts of agricultural land within the Critical Area which they have retired from cultivation.

As appears from this Memorandum, FICO has raised all of the issues sought to be raised by its Special Action Petition in the Pima County action below. This present action is a device by FICO to escape the proper jurisdiction of the Superior Court which jurisdiction FICO itself invoked. As

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in any case involving the reasonable use doctrine, there are many factual and legal considerations going to the issues of what is in fact a reasonable use. The proper and orderly resolution of these issues by trial on the merits should not be avoided by the contrivance of a Petition for Special Action.

Further, as a matter of law under the reasonable use doctrine and the Arizona Groundwater Code, A.R.S. §45-301 et seq., Petitioners and Pima Mining Company are entitled to their present water uses. Pima's well site lease can in no way be construed as a sale of the water produced thereon. The position urged by FICO would constitute an unlawful taking of Petitioners' property rights and denial of due process and equal protection of the laws. Finally, it will be noted that FICO has made a number of false statements relating to the availability of sewage effluent, CAP water, and other equitable issues relating to the case below.

THIS COURT SHOULD REFUSE TO TAKE JURISDICTION OF THIS MATTER AS A SPECIAL ACTION

Rule 1, Rules of Procedure for Special Actions, Supreme Court, specifically provides that the special action is not available to litigants where there is an equally plain, speedy and adequate remedy by appeal. The rules goes on to provide that the rules relating to special actions are not to be construed as enlarging the scope of the relief traditionally granted under the writs of certiorari, mandamus and prohibition.

The State Bar Committee note makes it quite clear that the special action rule was intended to combine the traditional writs into one proceeding.

It must be conceded that prior to the adoption of Rule 1, this court has been somewhat liberal in permitting the use of extraordinary writs rather than requiring litigants to take

the appeal route. See Caruso v. Superior Court, 100 Ariz. 167, 412 P.2d 463 (1966). See also Genda v. Superior Court, 103 Ariz. 240, 439 P.2d 811 (1968), and State of Arizona ex rel v. Gerbin, 100 Ariz. 236, 413 P.2d 264 (1966). There are not any clear-cut criteria that have been established by this court to guide one in determining whether a special action will lie rather than an appeal. The court has a wide latitude and exercises its discretion in determining whether or not to accept jurisdiction of a special action.

However, this court has never evidenced any intention of abandoning the appeal procedure in favor of special action, and it would seem that before the court exercises its discretion in favor of taking jurisdiction of a special action, FICO would be required to make a clear showing that there was something unique about his case that justified special and extraordinary treatment.

It goes without saying that in every case a special action route brings about a more prompt determination of a controversy than does an appeal, so this result alone never justifies a special action proceeding rather than an appeal.

In light of the principle that a litigant must make a strong showing that there is a cogent reason why he should be given preferred treatment, let us examine the reasons given in the petition for the court assuming jurisdiction of this case as a special action.

The reasons tendered by FICO can be found in paragraph XIV of the petition commencing at page 10 and continuing through a portion of page 14. The reasons given are numbered 1 through 8 and will be briefly dealt with in that order.

1. Central Arizona Project. FICO suggests that if Pima and other mining company defendants do not contract for CAP water within approximately one year, this water will not be

available. Further, FICO insinuates that enough CAP water is available to meet the approximate needs of the mines. There is at present no reasonable assurance that that is true, nor is there any assurance that the water will be of a chemical quality suitable for use in the milling processes. FICO apparently concludes that since Pima claims it would be inequitable to enjoin its use of ground water to the injury of the economy of the State, this matter needs early resolution and hence this court should assume jurisdiction of the controversy in a special action proceeding.

But FICO cannot justify that conclusion. It would seem obvious that the broad equitable principles involved can only be properly applied after the lower court has heard all the evidence relating to the equities involved. It would also seem obvious that if Pima and other mining companies have the legal right to use their underground water, they should not be required to contract for CAP water. It would further seem obvious that the record clearly reflects that the mining activity is ongoing activity and that later possible availability of CAP water -- it could not possibly be available before 1985 -- would be no justification for ignoring equitable principles at this time, and certainly no justification for giving this aspect of this litigation special treatment.

2. Sewage Effluent. The second reason given by FICO for this court accepting jurisdiction of this special action will be referred to as the sewage effluent argument. A fair summary of this argument is that sewage effluent is available to Pima and the other mining company defendants at a price of approximately $30.00 per acre foot, but because the mining companies have not expressed any real interest in contracting for this effluent, the City of Tucson is studying other alternatives for the disposal of effluent and will make some decision as to its use in the reasonably near future. FICO then baldly asserts that therefore an early resolution of the legality of Pima's present water uses would be in the public interest as well as

FICO's. Just how Tucson's effluent problem ripens into justification for this court accepting jurisdiction of this case is beyond comprehension.

Why the effluent problem makes the early resolution of the legality of Pima's water uses a matter of public interest is left to one's imagination, unstimulated by the slightest hint or suggestion on FICO's part as to how the effluent problem relates to whether this court should exercise its discretion in favor of accepting jurisdiction of the special action.

Any further attempt to unravel this effluent mystery would be inappropriate. Suffice it to say that the affidavit of Thomas Chandler and the excerpts of the Frank Brooks deposition clearly demonstrates that FICO completely misunderstands the facts in this area. It should be noted that Frank Brooks is the source of FICO's information concerning the effluent problem.

In the first place, the effluent is not now available because the City is presently contending in the Dow litigation that Dow must take the bulk of the effluent pursuant to a contract which does not expire until early 1975. The City is in no position to contract with any person for the effluent at this time. In the second place, preliminary testing by the mines has shown that the effluent is not metallurgically acceptable in some of the milling operations, and, additionally, the effluent may be hazardous to the employees working in the mills. In the third place, Brooks has been advised by the mining company defendants that if the City makes a firm proposal to the mining company defendants relating to their use of effluent that such proposal will be given careful consideration if the material can be used safely. It would therefore appear that whatever relevance the effluent argument might have becomes academic because the facts upon which the argument is based are erroneous.

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3. Trespass. The third reason FICO asserts for the court's taking jurisdiction is the continuing trespass or continuing wrongful taking argument. This argument merely states a legal conclusion as to how FICO's rights are affected by Pima's activity. No attempt is made to demonstrate how this assumed injury or damage justifies the extraordinary relief FICO seeks. It is not alleged that any prompt resolution of the matter is required to prevent irreparable injury, and in reason 6 asserted for invoking a special action it quite clearly appears that the resolution of the issue of commercial lease 906 in no way resolves the overall problem since Pima and other mining defendants are extracting substantial amounts of water from the ground water basin in areas other than the area embraced by commercial lease 906.

4. Waste of State Land. FICO next contends that the pumping of water from the land covered by commercial lease 906 amounts to a waste of state land and a breach of trust imposed by the enabling act and is a violation of the statutes and constitution of the State of Arizona.

Here again is a legal conclusion asserted with no attempt at all to suggest why extraordinary relief is in order even if the legal conclusion were valid.

5. Tailing Ponds. FICO's argument under 5 will be referred to as the tailings argument. The most casual reference to the record contained in FICO's index to appendix will reflect that count four of FICO's amended complaint, which is the count involved in the motions for summary judgment heard below, makes no reference to any state lease other than commercial lease 906. FICO now attempts to use as a reason for this court accepting jurisdiction of this special action an issue that was not raised below and never considered by the lower court. The special action vehicle should at least be reserved for issues that were

tendered to and decided by a lower court and not expanded to include issues raised for the first time in a petition for special action.

6. Trial Preparation. What is being argued here as a reason for this court granting this unusual relief is indeed difficult to understand. A conclusion that a prompt disposition of the controversy involving commercial lease 906 would render trial preparation less difficult and more economically feasible is simply a ploy by FICO. FICO has not at any time even suggested that the resolution of this particular controversy would resolve the multitudinous issues involved in the proceeding pending in the Superior Court. What effect pumping water from the land covered by commercial lease 906 would have on the overall problem would certainly have to be determined below if it is relevant. There is no showing of any kind that the resolution of the issue of commercial lease 906 would substantially alter trial preparation for the principal case or the amount of time required to decide the principal case, nor is there any showing that the proceedings in the lower court could not proceed in an ordinary fashion while FICO exercised its right to appeal from the limited issue involving commercial lease 906.

7. Reasonable Use. FICO's argument in support of its seventh reason why the court should assume jurisdiction of the matter needs careful attention.

The issue of whether or not a lease of state land which, inter alia, permits the lessee to extract underground water from underneath the state land is a transaction which the enabling act, constitution of Arizona and the statutes permit is the central issue that was involved in FICO's and Pima's motions for summary judgment below. FICO has attempted, both below and in this court, to weave into that issue another issue that vitally affects the rights of all mining company defendants below. FICO

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argues that commercial lease 906 is void for two reasons: First, because it involves a transaction equivalent to a sale of the land or part of the land, and second that it is void because water is being withdrawn from a critical ground water area for use outside the critical ground water area.

FICO's amended complaint clearly reveals that FICO seeks an injunction against the monetary damages from all the mining company defendants based upon the claim that the movement of water from a point in the critical ground water area to a point outside the critical ground water area violates the reasonable use doctrine was enunciated by this court, so FICO has interwoven into its controversy with Pima a key issue that affects the rights of all other mining company defendants below without having joined these companies so that these parties could assert their rights as parties to these proceedings.

Without arguing the niceties of collateral estoppel, judicial estoppel or res judicata, we all know that any resolution of this particular issue by this court would have a profound effect on the lower court, and upon later proceedings here.

If FICO had limited the issues tendered here to issues only involving Pima, intervention on the part of other defendants would have been both unnecessary and inappropriate, but it clearly appears that the basic purpose of the petition is to attempt to get a key issue involved below resolved by these proceedings without permitting other affected parties to exercise their right to be heard.

It should be here noted that in 1971, in action number 10486, FICO made an attempt in a petition for original writ of injunction in this court to test the legality of transporting water out of a critical ground water area without joining as parties other parties litigating the matter in the trial court. It was never intended that extraordinary relief in the matter

of a special action be used in this fashion, and this court promptly rejected that petition.

8. Review of Trial Court's Ruling. FICO's assertions contained in paragraph 8 are simply a statement outlining why FICO claims the trial court's action was erroneous, coupled with FICO's conclusion that such action was arbitrary and capricious. Such other reasons asserted for the court accepting jurisdiction have been previously dealt with, there seems to be no reason to repeat them here.

Suffice it to say that the showing required should be made by facts and circumstances that clearly demonstrate that the vehicle of appeal is so inadequate as to require the court to give special treatment to this case. It is respectfully submitted that no such showing has been made.

II

THE DOCTRINE OF REASONABLE USE

Because issues of state land law and water law are intertwined throughout FICO's Petition, it will be difficult for this Court to rule on the merits of the Petition without also ruling on at least two issues which may be vital to and determinative of the rights of FICO and the remaining defendants in the action now pending in Pima County. These two issues are glossed over in FICO's Petition and are never precisely stated; but FICO's contentions as to these issues form the basic assumptions upon which all of the issues defined by FICO in its Petition are based.

These issues are:

1. Whether any transportation whatever of water from a Critical Groundwater Area is an unreasonable use per se or whether water may be transferred outside a critical water area for the limited purpose of reasonable use on lands which also overlie the common supply as defined by the State Land Department

Petitioners contend that all lands overlying a common supply of ground water, as defined by the State Land Department pursuant to A.R.S. §45-308, regardless of whether such lands lie within or without a designated Critical Groundwater Area are equally entitled to the reasonable use of water from the common supply. This principle is expressed by this court's dicta in the Jarvis decisions and by the many cases relied upon by this court in those decisions. FICO places considerable reliance upon Jarvis to sustain its position because Jarvis involved the transportation by the City of Tucson of water from a Critical Groundwater Area. However, the issue involved here is different from the issues involved in Jarvis. Jarvis involved the transportation of water from a critical area to a point completely removed from the common supply. In other words, Jarvis involved a trans-basin diversion as opposed to an intrabasin diversion which is involved here. Accordingly, FICO's reliance on the magic words "Critical Groundwater Area" as an automatic solution to its case is misplaced. FICO conveniently ignores the doctrine of reasonable use and the fact that Petitioners' activities are within the Sahuarita-Continental Subdivision of the Santa Cruz Water Basin, so designated by the State Land Department, as the land overlying the common supply of groundwater from which Petitioners and FICO withdraw water.

The second issue proceeds from the first:

2. Whether a lease of a well site for the development of water to be used off the leasehold but on lands which overlie the same common supply of groundwater, as defined by the State Land Department pursuant to A.R.S. §45-308, constitutes a "sale" of such water.

Since Petitioners contend that all lands overlying a common supply of groundwater are entitled to the reasonable use of water from that supply for reasonable and beneficial purposes,

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it follows that such a lease in no way constitutes a "sale." The lease is what it says it is: a lease of a situs on which to develop water to which the lessee is already entitled. In fact, groundwater is not such an unrestricted resource that it may be the subject of unfettered private ownership and sale. Groundwater may belong to the owner of the soil, but the only ownership which the owner of the soil enjoys is the right to its reasonable use.

The Meaning of "Critical Area"

It is essential to keep in mind that Petitioners' uses of groundwater are within the Continental-Sahuarita Subdivision of the Santa Cruz Groundwater Basin so designated by the State Land Department on June 8, 1954, pursuant to A.R.S. §45-308.[1] Yet nowhere in its Petition or Memorandum does FICO mention this fact or even the existence of the Sahuarita-Continental Subdivision. A "groundwater subdivision" is defined by statute as:

> . . . an area of land overlying as nearly as may be determined by known facts, a distinct body of ground water. It may consist of any determinable part of a groundwater basin. (Emphasis added.)

A.R.S. §45-301(6). Thus, on the one hand the existence of the common supply is determined by hydrological facts. But on the other hand, the existence of a critical water area, which forms the foundation of FICO's entire argument, is determined not by hydrological facts, but by agricultural facts. A "critical groundwater area" is defined by statute as:

> . . . any groundwater basin as defined in paragraph 6 or any designated subdivision thereof, not having sufficient groundwater to provide a reasonably safe supply for irrigation of the cultivated lands in the

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[1] A copy of the Official Map of the State Land Commissioner of the Sahuarita Continental Subdivision of the Santa Cruz Basin as so designated, was previously submitted to this court by Petitioner, Duval Corporation in connection with FICO's previous action against Pima Mining Company, Farmers Investment Company vs.

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the State Land Department, et al., No. 10486, and appears as Exhibit "B" of the Petition for Leave to Intervene of Duval Corporation and Duval Sierrita Corporation therein.

> basin at the then current rates of withdrawal. (Emphasis added.)

A.R.S. §45-301(1). The essence of the definition of critical groundwater area is not the extent of the common supply, but the extent of irrigable lands. This is aptly illustrated by the case in Pima County, where the Sahuarita-Continental Critical Area is entirely within the Sahuarita-Continental Subdivision. The critical area does not include the entire subdivision, but it does include all irrigable lands within the subdivision. There is good reason for this. The purpose behind the designation of critical ground water areas and nearly all statutes and regulations relating to critical groundwater areas have to do solely with regulating development of new agriculture within the critical groundwater area. Southwest Engineering Co. v. Ernst, 79 Ariz. 403, 410, 291 P.2d 764 (1955). Industrial and other wells are expressly exempted from the statutory proscriptions relating to critical groundwater areas. A.R.S. §45-301(3) and 322. Where it is apparent that lands would not be suitable for agricultural purposes, there is no reason to unnecessarily expand the boundaries of the critical area to include such non-irrigable lands.

The Meaning of "Off the Land"

FICC's contention is simple: Pima and the other mining companies transport water out of the critical area; therefore, they are violating the reasonable use doctrine. This is a gross distortion of the reasonable use doctrine and of the decisions of this court; and it is wholely false.

This court has never condemned as illegal per se the transportation of water outside a critical area. Nor can such a

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proscription be inferred from any decision of this court.

What the doctrine of reasonable use and the decisions of this court do proscribe is the transportation of water to lands away from the common supply, to points where its return to the common supply is prevented.

The doctrine of reasonable use was adopted in Arizona in Bristor v. Cheatham, 75 Ariz. 227, 237-38, 255 P.2d 173 (1953), reversing, 73 Ariz. 228, 240 P.2d 185 (1952). Recognizing that the principal difficulty in applying the reasonable use doctrine was to determine what was a reasonable use under the circumstances and observing that "[W]hat 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 of the facts and circumstances pertinent to the issue," the court adopted the rule of reasonable use in the following language (75 Ariz. at pp. 237-38):

> This rule does not prevent the extraction of ground water subjacent to the soil so long as it is taken in connection with a beneficial enjoyment of the land from which it is taken. If it is diverted for the purpose of making reasonable use of the land from which it is taken, there is no liability incurred to an adjoining owner for a resulting damage. As stated in Canada v. City of Shawnee, supra:
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> > ' * * * the rule of reasonable use as applied to percolating waters "does not prevent the proper user by any landowner of the percolating waters subjacent to his soil in agriculture, manufacturing, irrigation, or otherwise; nor does it prevent any reasonable development of his land by mining or the like, although the underground water of neighboring proprietors may thus be interfered with or diverted; but it does prevent the withdrawal of underground waters for distribution or sale for uses not connected with any beneficial ownership or enjoyment of the land whence they are taken, if it thereby result that the owner of adjacent or neighboring land is interfered with in his right to the reasonable user of subsurface water upon his land, or if his wells, springs, or streams are thereby materially diminished in flow or his land is rendered so arid as to be less valuable

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> for agriculture, pasturage, or other legitimate uses.' (Emphasis added.)

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. However, Bristor did not specifically define the term "off the land" or "the land from which they are obtained" or similar phrases. Bristor v. Cheatham was decided on a motion to dismiss. The court had no evidence before it. Having no evidence of the physical facts as to the location and limits of the common groundwater basin, the court did not attempt to define the terms such as "off the land."

FICO reads these terms in an absurdly literal manner. Throughout its Petition and Memorandum and in the Pima County action, FICO repeatedly emphasizes that the groundwater pumped by Pima and other mining companies is not used on the well sites from which it is taken, therefore, it is used "off the land." This is absurd. "Off the land" means, and can only mean "away from the common supply."

It takes no extended argument to convince a reasonable mind that the term could not mean away from the well head where the water was extracted from the ground. Practically every drop of water pumped everywhere on earth must be transported some distance from its source in order to be put to a practical use. A rancher cannot be expected to water his cattle at the pump, and a farmer must be permitted to transmit water for irrigation to places away from the situs of its well. FICO itself transports its water over distances of several miles. In fact, the decision of this court in State ex rel. Morrison v. Anway, 87 Ariz. 206, 349 P.2d 774 (1960), decided after Bristor, clearly demonstrates that under the doctrine of reasonable use, water may be used on all land to which it is subjacent, not merely on well site tracts

alone. In Anway, this court upheld the right of a farmer to transfer groundwater from wells located on irrigated lands for use on other lands not previously irrigated. Anway makes clear that the mere distance from the pump to the point of beneficial application is not determinative of the question of lawfulness.[2]

FICO's use of the term "off the land" is clearly wrong. The doctrine of reasonable use only restricts the owner to use within the same groundwater basin.

> The reasonable use doctrine requires that the exploitation rights of the overlying proprietor be limited. It permits him to pump only such water as he can apply to reasonable beneficial uses upon his own land, and outlaws, as unreasonable, diversions to lands beyond the source basin. (Emphasis added.) Casner, American Law of Property, Volume 6A, p. 196.

This is the law in Arizona. It can be seen in the Anway decision and in Bristor, the Jarvis decisions, and the cases cited in the Jarvis decisions.[3]

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[2] Similarly where this court subsequently modified its injunction in Jarvis to permit the City of Tucson to retire a parcel of land from cultivation and to transport water from the Avra-Altar Valleys in amounts representing the historical use on such parcel to the City, this court specifically permitted the City to pump such water from wells located on parcels other than the parcel retired from cultivation or from

> . . . . other wells within the Avra-Altar Valleys overlying the Marana Critical Ground-water Area . . . . (Order modifying injunction, Cause 9488)

[3] The court cited many cases in Jarvis II in support of its statement of the reasonable use doctrine. Although none of these cases expressly define expressions such as "off the land," "the land from which it is taken," or similar phrases, wherever such a definition would have been relevant, the cases tacitly define such land as the land overlying the common supply and not merely the well site or other parcels of land arbitrarily defined by property lines. See, e.g., Horne v. Utah Oil & Refining Co., 59 Utah 279, 202 Pac. 815 (1921); Glover v. Utah Oil & Refining Co., 62 Utah 174, 218 Pac. 955 (1923); Silver King Consolidated Mining Co. v. Sutton, 39 P.2d 682 Utah (1934); Burr v. Maclay Rancho Water Co., 154 Cal. 428, 98 Pac. 260 (1908); City of San Bernardino v. City of Riverside, 186 Cal. 7, 198 Pac. 784 (1921); Evans v. City of Seattle, 74 P.2d 984 (Wash. 1935); Katz v.

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Walkinshaw, 70 Pac. 663 (Cal. 1902), on rehearing, 74 Pac. 766 (Cal. 1903); Schenk v. City of Ann Arbor, 163 N.W. 109 (Mich. 1971); Forbell v. City of New York, 58 N.E. 644 (N.Y. App. 1900); Rouse v. City of Kingston, 123 S.E. 482 (N.C. 1924); Volkman v. City of Crosby, 120 N.W.2d 18 (N.D. 1963).

The holding in Bristor reversed a prior decision by this court in the same case, and that holding should be read in conjunction with the dissents in the first Bristor opinion.

Justice LaPrade, who helped form the majority in the second Bristor opinion, dissented in the first opinion, and stated:

> . . . the only issue before the trial court was whether the owner of land overlying a supply of percolating water common to 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 lands drawing water therefrom is diminished to their injury. (Emphasis added.) 73 Ariz. at 242.

Similarly, Justice DeConcini, dissenting in part from the first Bristor opinion, explained the prohibition under the reasonable use doctrine:

> Under reasonable use there is . . . a prohibition upon a use on other land or at a distance away from the base of the common supply if such alien use interferes with the use or water of other property owners. (Emphasis added.) 73 Ariz. at 255.

These dissents call out a fundamental rationale supporting the doctrine of reasonable use. This rationale is simply that water shall not be moved to a point from which it cannot return to the common supply. A shorthand way of saying the same thing is that water shall not be used off the land to which it is subjacent. But this is not to say that water may not be moved within the same groundwater basin or basin subdivision to other land which overlies the common supply and which has a right to

the reasonable use of water from the common supply. It is a hydrological fact--the very one which gave rise to this lawsuit--that water is not subjacent to any particular arbitrarily defined parcel of land, but must realistically be considered subjacent to the entire basin under which it percolates. A landowner who draws water, draws it not only from his land but from all land in the basin as do other landowners when they pump. That water may be temporarily under his land is all that gives him the right and ability to mine it.

Jarvis Specifically Permits the Water Uses Made by Petitioners

FICO places great reliance on Jarvis v. State Land Department, 104 Ariz. 527, 426 P.2d 385 (1969), (Jarvis I), for the proposition that transportation out of a critical ground-water area is transportation "off the land" and therefore prohibited. FICO's entire argument rests on the quotation which appears at page 21 of its Memorandum as follows:

> . . . That these lands are within a Critical Ground Water Area is alone sufficient to grant petitioners the relief sought since a Critical Ground Water Area is a ground water basin or a subdivision thereof "not having sufficient ground water to provide a reasonably safe supply for irrigation of the cultivated lands in the basin at the then current rates of withdrawal." A.R.S. §45-301. Manifestly, a ground water area of subdivision of a basin which does not have a reasonable safe supply for the existing users can only be but further impaired by the addition of other users or uses. 104 Ariz. at 530.

FICO misreads the case. As it appears from the very quotation relied upon by FICO, the discussion in Jarvis I relating to transportation outside the critical area did not involve the issue of whether there was transportation "off the land," but only whether the plaintiff was damaged by such transportation. The fact that the transportation was "off the land" was admitted and therefore not discussed. The transportation of water made by Tucson was a transbasin diversion; the diversion was to land

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overlying a completely separate groundwater supply. What the court in Jarvis I decided is what the quotation relied upon by FICO states: since a critical ground water area by definition has insufficient water for agriculture, existing water uses can only be impaired by addition of other users. The issue of "off the land" being admitted, damages were presumed from the statutory definition of critical area.

Significantly, FICO does not refer to this court's decision in Jarvis II, 106 Ariz. 506, 479 P.2d 169 (1970). For it was in Jarvis II that this court was for the first time confronted with the need to define "the overlying lands." In Jarvis II, the City of Tucson was permitted to deliver water from its well fields located in the Marana Critical Groundwater area to Ryan Field. This transportation of water was legal because Ryan Field overlies the common basin of water from which the water delivered to it by Tucson is taken:

> Its lands overlie the Avra-Altar Water Basin and geographically it lies within the Marana Critical Groundwater Area so as to entitle it to withdraw from the common supply for purposes except agriculture. Tucson should not be prohibited from delivering water to Ryan Field for lawful purposes since the Ryan Field supply is from the common basin over which it lies and from which it could legally withdraw water by sinking its own wells for domestic purposes. 106 Ariz. at 510, 479 P.2d at 173 (Emphasis added.)

Admittedly in Jarvis II Ryan Field was situated within the Marana Critical Groundwater Area. However, it was not the fact that Ryan Field lay within the Critical Groundwater Area but the fact that Ryan Field overlay the common basin, which made the delivery permissible. This court stated unequivocably that land overlying the water basin is entitled to withdraw water from the common supply. Although Jarvis II did not involve transportation to land overlying the common supply but outside the Critical Groundwater Area, this court nevertheless went on in the next paragraph of its opinion to state that Tucson could deliver water

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to customers lying outside the critical area if it could show that such customers were on lands overlying the common supply:

> Until Tucson can establish that its customers outside the Marana Critical Groundwater Area but within the Avra-Altar Valleys' drainage areas overlie the water basin so as to be entitled to withdraw water from it, there are no equities which will relieve it of the injunction heretofore issued. 106 Ariz. at 510, 479 P.2d at 173.

Such a showing has been made in this case. The lands of the mining companies are situated within the Sahuarita-Continental Subdivision of the Santa Cruz Basin, so designated by the State Land Department as land overlying a distinct body of groundwater.

It can readily be seen why FICO does not once mention, much less discuss, either in the body of its Petition or in its Memorandum, the statutory terms or meaning of the terms "groundwater basin" or "subdivision" of a groundwater basin. It is clear why FICO chooses rather to complain only in terms of "outside the critical area" or "out of the critical groundwater area."

FICO must take the position that the designation and boundaries of a "critical groundwater area" are all important and that the designation and boundaries of a "groundwater basin" or a "subdivision thereof" are meaningless. If FICO did not assert this position, it would be forced to concede that Petitioners, owning lands both inside and outside the boundaries of the critical groundwater area have legally vested, statutorily and constitutionally protected property rights to use groundwater underlying such lands, so long as the uses are reasonable and are upon lands overlying the "common basin" or "subdivision" supply.

III

THIS CASE REQUIRES TRIAL ON THE MERITS

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

Few complex water cases have reached this 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. Davis was an original 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 involved. 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 completely ignored. Cases of this magnitude and complexity cannot be decided by disregarding the factual situations which the ground water statutes were designed to regulate.

Clearly, the question of reasonable use in every case is a question of fact. "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." Bristor, supra. A consideration

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of the factual, equitable and legal issues pending in the Pima County action demonstrates what a handy circumvention FICO has devised. For example, following are some of the factual and other issues which FICO is attempting to short-circuit:

Retirement of Agricultural Lands. Petitioners contend that they are entitled to the use of water from the common supply on their lands overlying the common supply. However, the Petitioners have acquired and retired large tracts of agricultural lands within the Sahuarita-Continental Critical Area in view of this Court's decision that Tucson could transport water away from the common supply if it acquired and retired agricultural land overlying the Marana Critical Groundwater Area. Further statements in Bristor v. Cheatham, supra, indicated that the trend in regard to reasonable use is that a "property owner may not concentrate such waters and convey them off his land . . . ." (emphasis added) 75 Ariz. at 236, quoting from Rothrauff v. Sinking Spring Water Co., 339 Pa. 129, 14 A.2d 87, 90 (1940). See also, Jarvis v. State Land Department (Jarvis I), 104 Ariz. 527, 529, 456 P.2d 385 (1969). That the doctrine of reasonable use is often stated in this alternate way further illustrates that the doctrine is not simply a verbal formula but one originating out of hydrological facts and one to be applied in the context of hydrological facts.

Recharge to Critical Area. With the exception of a de minimus amount of water used for dust control in the Duval mine area, the uses of all Petitioners are within the Sahuarita-Continental Subdivision. Since by definition these lands overlie the common supply, Petitioners are entitled to the use of such water. However, as Petitioners have alleged in the Pima County action, only a small percentage of the water pumped by Petitioners is actually consumptively used and the remainder is returned to points within the critical area.

Multiple Cropping and Intercropping by FICO. The statutes pursuant to which the Sahuarita-Continental Critical Area was designated and the designation of that critical area were designed to limit agricultural production of water at then current levels. Southwest Engineering Co. v. Ernst, supra. Given this legislative policy and the definition of critical water area, as Petitioners contend in the Pima County action, it is FICO that violates the reasonable use doctrine by engaging in agricultural practices which increase its consumption of water.

Laches and Estoppel. FICO knew for many years and did not complain that Petitioners were continuously engaged in the exploration, development and construction of mining operations, that Petitioners were investing several hundred million dollars therefor and that such operations would use water from wells on lands acquired by Petitioners in the Santa Cruz Valley. FICO is now barred by laches and is estopped to complain of Petitioners' uses of ground water.

Balancing the equities. The appropriateness of injunction against tort depends upon a comparative appraisal of all of the factors of the case including the interest to be protected, the adequacy of other remedies, plaintiff's delay in bringing the suit, plaintiff's misconduct, relative hardships, the interest of third persons or the public, and all other applicable facts and circumstances. Restatement of Law, Torts, §§933-951. All of these are factors which can be shown only by a trial on the merits.

FICO's action is an attempt to sever and bring to this Court for summary adjudication once again a part of its own action previously filed in Pima County. Because it knows that such determination would not set at it, FICO is trying to avoid the trial of its [illegible] vigorously [illegible] factual and

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equitable issues in that case, and to obtain from this Court (in the absence of the assistance which a full determination of the facts would offer) a binding precedent phrased and conceptualized in the broadest terms. If FICO could obtain this precedent, it would then be in a position to distort it in the Pima County action as it does the Bristor and Jarvis decisions in its Petition in this case.

IV.

FICO'S CLAIM THAT LEASES FOR WASTE DISPOSAL ARE INVALID IS IMPROPERLY INTERJECTED AND, IN ANY EVENT IS FALSE

FICO's purported basis for the filing of its special action petition is the summary judgment entered below. That judgment relates solely to the issue in Count IV of FICO's complaint to-wit: FICO's contention that Pima's State lease for water is invalid. But FICO now attempts to inject an entirely new issue here, the contention that the State leases held by Petitioners for waste purposes are invalid. That issue has never been raised below and has never been considered by the lower court. The special action procedure should be reserved for issues that were tendered to and decided by the trial court, and should not be expanded to include issues raised by subterfuge for the first time in a petition for special action.

In any event, FICO's contention that State leases for waste disposal purposes are not leases is simply untrue. If the law recognizes any distinction between a sale and a lease then those transactions are leases and not sales.

As appears from the affidavit of Burton M. Apker appended hereto, the leases are for terms of not more than ten years, the leases prohibit subletting and assignment; the leases require the lessee to construct waste rock dumps in benches of sufficient size to permit prospective future use for homesite purposes; the leases require the lessee to make the waste rock available for

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sale and delivery by the lessor to third persons. Although over the years the rentals required are more than the full fair market value of the land, the leases grant lessee no easements of title.

Leases of ten years or less are excluded from the advertisement ar auction sections of the Enabling Act, Arizona Enabling Act, Section 28, and of the Arizona Constitution, Arizona Constitution, Article X, Section 3, and of the Arizona Statutes, A.R.S. Section 37-281. This Court can surely take judicial notice of the fact that a mining operation is a commercial venture, and that no open pit mining operation can be conducted without waste dumps nor the milling operations conducted without tailing ponds. Thus, the State Land Department's ten-year commercial leases for waste disposal purposes not only are not prohibited but are expressly authorized by the Enabling Act, the Arizona Constitution and the Arizona Statutes.

V.

PETITIONERS CANNOT BE DENIED OF DUE PROCESS AND EQUAL PROTECTION OF THE LAW

I. PROHIBITING THE PETITIONERS' USE OF WATER THROUGH AN APPLICATION TO THE FACTS OF THIS CASE OF THE DOCTRINE OF REASONABLE USE OF PERCOLATING GROUND WATER WOULD VIOLATE PETITIONERS' RIGHT TO DUE PROCESS AS GUARANTEED BY THE 14TH AMENDMENT TO THE UNITED STATES CONSTITUTION AND BY THE ARIZONA CONSTITUTION IN THAT PETITIONERS' PROPERTY WOULD BE TAKEN FOR USE THAT IS NOT PUBLIC AND WOULD BE TAKEN WITHOUT JUST COMPENSATION.

II. IF THE GROUNDWATER CODE, A.R.S. § 45-301 et seq., IS CONSTRUED BY THIS COURT AS PROHIBITING PETITIONERS' PRESENT USES OF GROUNDWATER ON THE GROUNDS THAT THE CODE MODIFIES THE COMMON LAW DOCTRINE OF REASONABLE USE OF PERCOLATING GROUNDWATERS,

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THE GROUNDWATER CODE, AS TROSLY APPLIED, WOULD VIOLATE PETITIONERS' RIGHT TO DUE PROCESS OF LAW AS GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION, AND BY THE ARIZONA CONSTITUTION, IN THAT PETITIONERS' PROPERTY WOULD THEREBY BE TAKEN FOR A USE THAT IS NOT PUBLIC, AND WOULD BE TAKEN WITHOUT JUST COMPENSATION.

The Fourteenth Amendment due process clause guarantees that no state shall deprive a person of his property without just compensation, and furthermore that the taking be for a public purpose. See Chicago, B. & A. R.R. v. Chicago, 166 U.S. 266 (1897). Similar guarantees are contained in the Arizona Constitution, art. 2, §4, §17.

Respondents in this action own or lease land in the subject water basin. As part and parcel of these estates, respondents own the right to the use of water beneath said lands, Howard v. Perrin, 8 Ariz. 347, 76 P. 400 (1904); aff'd 200 U.S. 71 (1906), subject only to the common law maxim applicable to the exercise of any property right: sic utere tuo ut alien UM non laedas, which has been translated into the reasonable use doctrine. Bristor v. Cheatham, 75 Ariz. 227, 225 P.2d 173. See also State ex rel. Morrison v. Lee, 87 Ariz. 206, 349 P.2d 774 (1960). The Bristor court held that the decision in Maricopa County Municipal Water Conservation District No. 1 v. Southwest Cotton Co., 39 Ariz. 65, 4 P.2d 369, established a rule of private ownership or percolating ground-water -- a rule of property. See Dunorest v. City Bank Co., 321 U.S. 36 (1944). Respondents, therefore, subject to the doctrine of reasonable use, own the water beneath their lands; they have expended great sums of money in developing said lands and waters in reliance thereon.

A conclusion by this Court that respondents' present use of groundwater is not in the reasonable use doctrine

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would constitute "state action," see Shelley v. Kraemer, 334 U.S. 1 (1947), and furthermore would constitute a taking of respondents' property without compensation. Moreover, it would be for a private, as opposed to a public, purpose.

This taking would violate the fundamental notions of justice and fairness which is at the base of the due process clause in that FICO and respondents herein are using water from a common supply within the same water basin. The result of a decision favoring one's use over the others' would be taking the latters' property and giving it to the former. Such a constitution of the reasonable use doctrine 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 respondents' use of water in its mining operations must take place at or near their wellheads, respondents could move their milling facilities to such locations, and would be able to use the same quantities of water there. Respondents would then be forced to haul ore from their mines to such facilities, a wholly uneconomical proposition, solving none of the problems of which FICO herein complains, and making respondents' operations obviously uneconomical. Thus, such a holding would be arbitrary, and 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 respondents. See Nebbia v. New York, 291 U.S. 502 (1934) (setting out the substantive due process test).

The State Land Department designated the Sahsarita-

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Continental Subdivision as the land overlying a distinct body of groundwater, i.e., the land overlying the common supply, on June 8, 1954. In reliance on such designation and on the doctrine of reasonable use, Petitioners have spent hundreds of millions of dollars to develop their mining properties. To now hold that such designation is meaningless and that the reasonable use doctrine has been superseded would deprive the Petitioners of their property without just compensation and without due process and equal protection.

Furthermore, were the court to construe the groundwater code, A.R.S. § 45-301 et seq., as modifying the doctrine of reasonable use so as to prohibit movement of groundwater from within a critical area to without, but to a point within the same water basin, the statute or statutes would be an unconstitutional deprivation of both procedural and substantive due process.

The groundwater code was intended to control the use of groundwater for irrigation, see A.R.S. § 45-301(3) (exempting municipal and industrial wells from the controls). 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 them. 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 respondents of procedural due process: the statute in no way gives persons such as respondents any notice regarding the importance of the boundary designation. 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 respondents, 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 respondents' property rights, respondents are entitled to notice of such, before the boundaries are set, so that their lands, overlying the common supply, might be included in the area. Such is a minimal requirement of procedural due process. See Sniadach v. Wilson, 395 U.S. 337 (1969); Fuentes v. Shevin, 407 U.S. 67 (1972). This point is further emphasized by the fact that A.R.S. § 45-303 and id. § 45-301(13) provide 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 respondents' use of water in this case, due process requires that A.R.S. § 45-301(13) be rewritten to include participation by respondents, and requires that notice be given that respondents' property rights will be affected by such administrative boundary designations.

If the groundwater code, A.R.S. § 45-301 et seq. were to be construed by this court as modifying the doctrine of reasonable use, as prohibiting use of groundwater taken from within a critical area to a point outside the area but within the same water basin, the statute would also deny substantive due process. The manner in which the boundaries are designated is arbitrary in relation to all water uses except irrigation uses. The critical area as it presently exists bears no relation to hydrological realities, but rather is an administrative designation influenced mostly by irrigators desiring to be included within the area at the time of its formation. In

modifying the doctrine of reasonable use in such a manner, the legislation as interpreted by this court would be taking respondents' property without compensation, and such would benefit not the public, but only a very small group of landowners such as FICO. This is beyond the scope of a legitimate exercise of the police power. See Pennsylvania Coal Co. v. Mahon, supra. Panhandle Co. v. State Highway Commission, 294 U.S. 613 (1935). This legislation, as construed, could not be said to be reasonably calculated to deal with the evil of decreasing groundwater supplies and would arbitrarily discriminate against respondents. See Nebbia v. New York, supra.

III. PROHIBITING THE PETITIONERS' USE OF WATER THROUGH AN APPLICATION OF THE DOCTRINE OF REASONABLE USE TO THE FACTS OF THIS CASE WOULD VIOLATE PETITIONERS' RIGHT TO EQUAL PROTECTION OF THE LAWS AS GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND BY THE ARIZONA CONSTITUTION IN THAT PETITIONERS AS PRESENT USERS OF GROUND WATER FROM A COMMON SUPPLY WOULD BE ARBITRARILY AND IRRATIONALLY CLASSIFIED AND DISCRIMINATED AGAINST IN FAVOR OF OTHER USERS OF GROUND WATER FROM THE SAME SUPPLY SUCH AS THE PLAINTIFF IN THIS CASE.

IV. IF THE GROUNDWATER CODE, A.R.S. § 45-301 et seq., IS CONSTRUED BY THIS COURT AS PROHIBITING PETITIONERS' PRESENT USES OF GROUNDWATER ON THE GROUNDS THAT THE CODE MODIFIES THE COMMON LAW DOCTRINE OF REASONABLE USE OF PERCOLATING GROUNDWATERS, THE GROUNDWATER CODE, AS THUSLY APPLIED, WOULD VIOLATE PETITIONERS' RIGHT TO EQUAL PROTECTION OF THE LAWS AS GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION, AND BY THE ARIZONA CONSTITUTION, IN THAT PETITIONERS, AS PRESENT USERS OF GROUNDWATER, WOULD BE ARBITRARILY AND IRRATIONALLY CLASSIFIED AND DISCRIMINATED AGAINST, AS COMPARED WITH OTHER USERS OF GROUNDWATER SUCH AS THE PLAINTIFF IN THIS CASE.

The Fourteenth Amendment to the United States

Constitution commands that no state shall deny equal protection of the laws to persons within their jurisdiction. Section Thirteen of Article Two of the Arizona Constitution is a provision with a similar command. Schrey v. Allison Steel Mfg. Co., 75 Ariz. 282, 255 P.2d 604 (1953).

For purposes of the Fourteenth Amendment, a judicial decision is "state action." Shelley v. Kraemer, supra.

A holding that the reasonable use doctrine prohibits respondents' present water uses would be state action which unreasonably and arbitrarily discriminates against respondents in favor of FICO. 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 power of the court, or in the case of a statute, 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 artitrary, illusory, and indiviously 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).

A decision by this court that, within the same water basin, the reasonable use doctrine prevents respondents' water uses but permits FICO's (assuming this court would so hold without a trial to ascertain facts to which the doctrine should be applied) would create such an arbitrary and discriminatory classification. Without the facts, such a holding could not possibly be said to be reasonable, nor could such judicial classification have a rational basis. Such would also deny procedural due process.

Moreover, should this court hold that the groundwater

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code, A.R.S. § 45-301 et seq., modifies the reasonable use doctrine so as to prohibit the use of percolating groundwater taken from within the critical area boundaries in a place outside the boundaries, but within the same water basin, the legislation, as thus interpreted, would deny equal protection of the laws to respondents. As stated above, the location of the Sahuarita-Continental critical area boundary is completely arbitrary with respect to respondents: 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 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.

The present situation is to be distinguished from that involved in Southwest Engineering Co. v. Ernst, supra. There, the groundwater code was upheld as against an equal protection challenge by a potential irrigator who claimed that he was unreasonably classified apart from present irrigators. This court, however, upheld the legislation where it prohibited him from putting his theretofore un-irrigated land to irrigation:

> "In critical areas where the supply of water is determined to be inadequate there can be no economic gain to the state by reclaiming additional desert lands since for each acre reclaimed an acre will eventually lose the water upon which it is dependent for productivity and must necessarily be withdrawn from cultivation. Capital invested in the clearing and leveling of lands and in buildings,

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> "wells and ditches on the acreage required to be withdrawn from cultivation will be destroyed to the same extent as the catastrophe of flood, fire and war; and although the economic impact may be somewhat alleviated by the fact that the loss may extend over a period of time, still it is inevitable that such loss will occur. A classification which tends to prevent such an economic loss to the community and the state cannot be said to be without rational basis and therefore we cannot say that this classification based on such consideration is either whimsical, capricious, arbitrary or unreasonable." 79 Ariz. at 411-12, 291 P.2d at 700.

In the case at bar, however, respondents are present water users with substantial capital invested in the development of their lands over the water basin. To deny their present use of water would bring about one of the very evils which the Ernst Court held the legislation was intended to prevent: economic disaster to present water users, and economic waste. To prevent Petitioners' water use while permitting FICO's would be a classification among present water users. 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. Connolly v. Union Sewer Pipe Co., 184 U.S. 540, 558-64 (1902); Truax v. Corrigan, supra; Southwest Engineering Co. v. Ernst, supra.

Respectfully submitted this 18 day of January, 1974.

CHANDLER, TULLAR, UDALL & RICHMOND

By _____
Thomas Chandler
1110 Transamerica Building
Tucson, Arizona 85701
Attorneys for petitioners,
THE ANACONDA COMPANY, BOYD LAND AND CATTLE COMPANY, and ANAMAX MINING COMPANY

EVANS, KITCHEL & JENCKES

By _____
Burton M. Apker
363 North First Avenue
Phoenix, Arizona 85003
Attorneys for petitioner,
AMERICAN SMELTING AND REFINING COMPANY

FENNEMORE, CRAIG, VON AMMON & UDALL

By _____
Calvin H. Udall

and

By James W. Johnson
James W. Johnson
1700 First National Bank Plaza
100 West Washington Street
Phoenix, Arizona 85003
Attorneys for petitioner,
DUVAL CORPORATION and DUVAL SIERRITA CORPORATION

FCTL000256

AFFIDAVIT OF BURTON M. APKER

STATE OF ARIZONA)
) ss.
County of Maricopa)

BURTON M. APKER, being first duly sworn, on oath says:

I am an attorney for American Smelting and Refining Company ("ASARCO"), one of the Petitioner-Intervenors herein. I am personally acquainted with the commercial leases which ASARCO holds on state lands in connection with its mining operations in the Upper Santa Cruz Valley, because I have for the past several years negotiated renewals of said leases with the State Land Department as the prior lease terms have expired.

Although the rentals may exceed the fair market value of the property, the leases do not grant the lessee muniments of title. The commercial leases on state lands which have been issued to ASARCO for waste disposal purposes are for ten-year terms only. The leases expressly prohibit assignment and subletting. The leases require the waste dumps to be benched in such a fashion as to permit their possible use in the future by the State Land Department for homesite purposes. The leases require the lessee to accommodate the sale and delivery by the State of materials from the waste dump to third persons for construction purposes.

I am informed and believe that the state commercial leases held by the other Petitioners are issued upon similar terms and conditions.

Burton M. Apker

SUBSCRIBED AND SWORN to before me this 18th day of January, 1974.

Notary Public

My Commission Expires:

[illegible]

STATE OF ARIZONA)
) ss.
COUNTY OF PIMA)

AFFIDAVIT OF THOMAS CHANDLER

THOMAS CHANDLER, being first duly sworn, upon his oath deposes and says:

That he personally entered into discussions with the City of Tucson relating to the possibility of the mining company defendants acquiring sewage effluent produced by the sewage disposal plant for the City of Tucson; that such discussions commenced over three years ago and were had with Frank Brooks, who, at the time, was the Director of the Department of Waters and Sewers for the City of Tucson, and who, at the present time and for approximately ten months last past, has been Assistant City Manager of the City of Tucson; that your affiant was advised by the said Frank Brooks and others, and upon information and belief states that the City of Tucson is bound by contract to deliver the bulk of the sewage effluent produced by the City's sewage treatment and disposal plant which produces approximately 33,000 acre feet per annum to the Dow Chemical Company, and that the City of Tucson is presently involved in litigation with the Dow Chemical Company in which the City has taken the position that the Dow Chemical Company is bound by a contract to receive and pay for the bulk of the effluent produced by the City sewage treatment and disposal plant; that Dow Chemical Company takes the position in said litigation that it is not so obligated; that the contract above mentioned expires by its terms in early 1975.

Affiant states that at no time during the discussions above referred to did the City of Tucson ever make any specific proposal to said mining company defendants that would have enabled the mining company defendants to contract for sewage effluent; that Frank Brooks advised your affiant that the City of Tucson studied alternate uses of sewage effluent to determine the best long term use of effluent in terms of basin wide water resources management

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and not because the defendant mining companies expressed no real interest in contracting for the effluent;

That for over three years the defendant mining companies have indicated that they would give careful consideration to any specific proposal made by the City of Tucson for the mining company defendants to acquire sewage effluent;

That Frank Brooks advised your affiant that the City of Tucson would not decide what use it intended to make of the effluent until a report known as the 701B report relating thereto was completed:

That said 701B report was completed in approximately April of 1973;

That the said Frank Brooks advised affiant in the discussions above referred to that in his opinion it would take a minimum of 18 months from the date that the City was advised that the mines were willing to contract for the effluent before the effluent could be delivered, but that he would recommend to the Mayor and Council that the agreed delivery date be a minimum of 30 months from the date an agreement was reached with the mines to take said effluent before it could be delivered; that your affiant was further advised by Frank Brooks that any study of the acre foot cost for delivery of the effluent to the mining company defendants was tentative in nature and further that capital expenditures required would, in whole or in part, be added to the cost to the mines of acquiring the effluent, including any capital expenditure required to alter the treatment process to make the effluent of a quality necessary to be useful to the mines in their metallurgical process;

That there is annexed to this exhibit portions of the

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. . .

. . .

deposition of Frank Brooks taken on November 30, 1973, and referred to in the affidavit of counsel for the petitioner.

Further affiant sayeth not.

THOMAS CHANDLER

STATE OF ARIZONA)
) ss.
COUNTY OF PIMA)

Subscribed and sworn to before me, the undersigned Notary Public, this 17 day of January, 1974, by THOMAS CHANDLER.

NOTARY PUBLIC

My commission expires:

November 14, 1977

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STATE OF ARIZONA)
) ss:
COUNTY OF MARICOPA)

I Craig Swick 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:

Microfilm of Farmer's Investment Company v. Pima Mining Company et al, Arizona Supreme Court Case No. 11439, Answer of Intervenor-Respondents, January 18, 1974. Pages 195-240.

The reproduction(s) to which this affidavit is attached is/are a true and correct copy of the document(s) on file.

Craig D. Swick
Signature

Subscribed and sworn to before me this 12/12/2005
Date

Etta Louise Muir
Signature, Notary Public

My commission expires 04/13/2009.
Date

Notary Public State of Arizona
Maricopa County
Etta Louise Muir
My Commission Expires
04/13/2009