

1 IN THE SUPREME COURT

2 STATE OF ARIZONA

3 FARMERS INVESTMENT COMPANY,)
4 a corporation,)
5 Appellant,)

Supreme Court
No. 11439-2

6 vs.)

7 ANDREW-L. BETTWY, as State)
8 Land Commissioner, and the)
9 STATE LAND DEPARTMENT, a)
10 Department of the State of)
11 Arizona, and PIMA MINING)
12 COMPANY, A CORPORATION,)

Appellees.)

FILED
OCT - 8 1976
CLIFFORD H. WARD
CLERK SUPREME COURT
Ward

13 MOTION FOR REHEARING BY ARIZONA STATE AFL-CIO

14 COMES NOW THE ARIZONA STATE AFL-CIO, and respectfully
15 submits to this Court the Motion for Rehearing based on the
16 grounds that the reasonable use doctrine requires an equitable
17 balancing of the hardships among all the parties as set forth
18 fully in the following Memorandum of Points and Authorities.

19 DATED the 7 day of October, 1976.

20 ELY & BETTINI

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1 MEMORANDUM OF POINTS AND AUTHORITIES

2 As will be shown, the August 26, 1976 opinion of this
3 Court in FICO vs. Bettwy will mean economic chaos and disaster
4 to the working people of Arizona. This decision although
5 supposedly based on equity failed to equitably balance the
6 hardships of the many interests involved. The decision was
7 too rigid finding one absolute winner (FICO) and two absolute
8 losers (the copper mines and the City of Tucson). Under the
9 historic doctrine of reasonable use as outlined in a line of
10 cases by this very Court the consideration of the balancing
11 of the hardships among all of the interests was a necessity in
12 order to do justice.

13 In Bristor vs. Cheatham, 73 Ariz. 228, 240 P.2d
14 185 (1952) the Supreme Court allowed a cause of action
15 concerning water rights and equitable relief. Then in Bristor
16 vs. Cheatham, 75 Ariz. 227, 255 P.2d 173 (1954) the Arizona Supreme
17 Court adopted the American rule of reasonable use. The Court
18 held:

19 "What is a reasonable use must depend to a
20 great extent upon many factors, such as the
21 persons involved, the nature of their use
22 and all the facts and circumstances pertinent
23 to the issue... a use that may be reasonable
24 under certain circumstances may be unreasonable
25 under different circumstances, and a use by A
26 that may be reasonable as to B may be unreason-
27 able as to C... the determination in a
28 particular case of the unreasonableness of
29 a particular use is not and should not be an
30 unreasoned, intuitive conclusion on the part
31 of a court or jury. It is rather an evaluating
32 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... 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." a p. 237

1 Thus, the Arizona Supreme Court mandates an application of
2 the balancing of hardships when considering equitable relief
3 in water rights within the State of Arizona.

4 In Jarvis vs. State Land Department, 106 Ariz. 506,
5 479 P.2d 169 (1970) this Court again spoke of equity and
6 equitable consideration when dealing with water rights. After
7 balancing the hardships, this Court modified an injunction
8 against the City of Tucson to allow vitally needed water to
9 be withdrawn for municipal uses. In Neal vs. Hunt, 112 Ariz.
10 307, 541 P.2d 559 (1975) this Court once again indicated that
11 hardships must be balanced. The Court held that although the
12 plaintiff wanted a complete injunction against the defendants
13 use of the water, when all of the facts were considered it was
14 proper for the trial court to allow a reasonable use of the
15 water since the defendants well "... would not injure Hunt's
16 water supply or that of his neighbors." at p. 314. Thus a
17 certain number of gallons of water per minute were allowed to
18 be pumped from the wells since the court balanced the harm
19 done to all parties involved.

20 This Court stated in its August 26 opinion that:

21 "This case is controlled by the American
22 doctrine of reasonable use as construed in
23 Bristol vs. Cheatham, 75 Ariz. 227, and
Jarvis vs. State Land Department, 106
Ariz. 506." at p. 845

24 However, this Court failed to apply the equitable balancing
25 of hardships as is required by this very doctrine. This Court
26 totally cut off all of the defendant copper mines from being
27 able to pump waters from their well sites to their milling
28 operations. This total injunction will mean the shutting down
29 of the copper mines resulting in unemployment for thousands
30 of workers. This Court did not require any reduction in use
31 by FICO but instead concentrated all of the injunction against
32 the mining companies and the City of Tucson. This is not a

1 balancing of hardships but is rather an imposition of hardships
2 upon several parties with major interests and absolutely no
3 hardships upon one party with comparably smaller economic and
4 equitable interests.

5 The copper mines operated by the defendants in the
6 Pima County area employ approximately 8,000 persons full-time
7 with an annual payroll in excess of one-hundred million dollars
8 (\$100,000,000.00). In the Tucson metropolitan area the copper
9 industry accounts directly or indirectly for one out of
10 every four jobs (The Copper Industry's Impact on Arizona
11 Economy, Arizona Economic Information Center, Marana, Arizona,
12 March 31, 1974, p.II, 30-32). FICO on the other hand employs
13 only about 90 part-time and 140 full-time employees on an
14 annual payroll of approximately \$1,000,000.00 (deposition of
15 R. Kiefe Waldon, p. 257-258). The economic impact of a
16 balancing of interests clearly shows the inequities involved
17 in shutting down the copper mines while not affecting the
18 plaintiff's use of water at all.

19 Because the copper industry has consistently paid
20 a higher wage scale than most other Arizona industries, its
21 significance as a source of personal income has been even
22 greater than its importance in providing jobs. Through
23 multiplier effects of income recirculation, the copper industry
24 actually provides about 17% of the State's wage and salary
25 income (The Copper Industry's Impact on the Arizona Economy,
26 supra, p. 87-88). Other manufacturing firms, other mineral
27 industries, the entire agricultural industry and tourism each
28 accounted for far less of the State's wage and salary than
29 did the copper industry. The copper industry also has a
30 significant impact through payments of pensions and other
31 benefits to former employees and through dividends to corporate
32 stock holders residing in Arizona. The combined impact of

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1 all copper industry contributions to personal income in
2 Arizona in the period 1970-1972 was more than \$852,000,000.00
3 annually to Arizona residents (The Copper Industry's Impact
4 on Arizona Economy, supra, p.88).

5 In Pima County there are over 15,000 Arizona State
6 AFL-CIO union members. In the Duval copper mines, there are
7 over 2,000 employees, 1,600 of which are Arizona State AFL-CIO.
8 In the Anamex mines there are over 1,300 employees, 955 of
9 which are Arizona State AFL-CIO. In the Pima mines there are
10 856 employees all of which are Arizona State AFL-CIO. These
11 thousands of workers have a vital economic property interest
12 to be protected in the way of jobs. The Arizona State AFL-CIO
13 is setting forth this information in order that the Supreme
14 Court of this State will appreciate the tremendous impact of
15 its August 26 decision.

16 The copper industry affects other businesses within
17 the State since it purchases more than 70% of its total goods
18 and services from within Arizona averaging over \$200,000,000.00
19 in sales each year to Arizona businesses. Wholesalers receive
20 nearly \$80,000,000.00. Construction businesses receive more
21 than \$40,000,000.00 annually, and about \$10,000,000.00 has
22 been spent in the Tucson area for construction alone. Public
23 utilities received \$37,000,000.00 from copper businesses
24 between the years 1969 through 1972, with one-half from the
25 Tucson area. Manufacturing, transportation and retail
26 businesses comprised the rest (The Copper Industry's Impact
27 on the Arizona Economy, supra, p. 88-89). Many of the workers
28 in the above businesses are union members and have the vital
29 interest in the outcome of this decision.

30 The Arizona courts have followed the principles
31 of equity throughout its history in order to do substantial
32 justice to all parties. In Sanders vs. Folsom, 104 Ariz. 283,

1 451 P.2d 617 (1969) the Supreme Court held:

2 "Equity is reluctant to permit a wrong to
3 be suffered without remedy. It seeks to do
4 justice and is not bound by strict common
5 law rules or the absence of precedence.
6 It looks to the substance rather than the
7 form, and will not sanction an unconscionable
8 result merely because it may have been
9 brought about by means which simulate
10 legality, and once rightfully possessed
11 of a case it will not relinquish it short
12 of doing complete justice." at p. 289

13 Similarly, this Court must grant this motion for rehearing
14 since it should not relinquish this case before complete
15 justice is done. It is a principle of equity that he who
16 seeks equity must do equity, Janke vs. Palomar Financial
17 Corporation, 22 Ariz. App. 369, 527 P.2d 771 (1974) and
18 Arizona Coffee Shops, Inc. vs. Phoenix Downtown Parking
19 Association, 95 Ariz. 98, 387 P.2d 801 (1963). It is also
20 a major principle of equity that the lack of diligence on
21 the part of the plaintiff and injury or prejudice to the
22 defendant due to such lack of diligence constitutes laches
23 and bars the plaintiff's claim, Meyer vs. Warner, 104 Ariz.
24 484, 48 P.2d 394 (1968). FICO has known since prior to 1954,
25 when the critical area was designated, that ground water supply
26 of the basin was limited. FICO allowed, cooperated and
27 encouraged in the development of the mining company properties
28 before 1956 and knew the mining companies were spending
29 hundreds of millions of dollars and would pump substantial
30 quantities of water. Thousands of workers came to Arizona
31 and found jobs in these copper mines. In 1955 Pima Mining
32 Company drilled and completed its first three wells. In 1965
wells four and five were completed. In 1966 and 1967 wells
six, seven and eight were completed. In 1968 well number nine.
In 1969-1970 well number ten. In 1970 wells number 11, 12
and 14 were completed. At least as early as 1957 and 1958

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1 the plaintiff FICO knew that the mines used water for milling
2 operations and carried water away from the pumping area.

3 "At no time prior to 1969 did the plaintiff
4 ever complain to the defendant about or
5 protest its use of water from the wells
6 which were located nearby what is now plaintiff's
Sahuarita Farm." at p. 3 of the appendix in
Pima Mining Company's brief in the Arizona
Court of Appeals. 2CA-CIV-1645 filed July 23, 1974

7 The other defendant mining companies made similar constructions
8 of wells and also expended their milling operations without
9 any complaints from plaintiff FICO until 1969. FICO cannot
10 equitably lay claim at this late date to the water supply
11 and cut off the mines so abruptly, throwing thousands of
12 innocent workers onto welfare.

13 The above data and case law indicates that the
14 hardships have not been balanced by this Court in its
15 August 26 decision. Equity cries out that justice must
16 contain a proper consideration of the hardships of all parties
17 and not just of the plaintiff FICO. There has not been even
18 one day of hearings as to the facts involved in this complex
19 matter. A decision as far reaching as this deserves greater
20 consideration.

21 CONCLUSION

22 The Arizona State AFL-CIO respectfully requests this
23 Honorable Court give its attention and clarification to the
24 opinion of the majority. Justice requires a close examination
25 of the equities involved. Public policy of this State should
26 uphold the equitable sharing of the valuable resource, water,
27 not the monopolization of it by an isolated group such as
28 FICO, which would result in the unemployment of thousands of
29 workers at a time when economic recovery should be a primary
30 goal of this State.

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Respectfully submitted,

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