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CLIFFORD H. WARD
CLERK SUPREME COURT
BY

IN THE SUPREME COURT OF THE STATE OF ARIZONA

In Banc

FARMERS INVESTMENT COMPANY, a corporation,

Appellant,

v.

ANDREW L. BETTWY, as State Land Commissioner, and the STATE LAND DEPARTMENT, a Department of the State of Arizona, and PIMA MINING COMPANY, a corporation,

Appellees.

No. 11439-2

FARMERS INVESTMENT COMPANY, a corporation,

Appellant,

v.

THE ANACONDA COMPANY, a corporation; AMAX COPPER MINES, INC., THE ANACONDA COMPANY as partners in and constituting ANAMAX MINING COMPANY, a partnership,

Appellees.

SUPPLEMENTAL MEMORANDUM IN SUPPORT OF MOTION FOR REHEARING

CITY OF TUCSON, a municipal corporation,

Appellant,

v.

ANAMAX MINING COMPANY, and DUVAL CORPORATION and DUVAL SIERRITA CORPORATION,

Appellees.

COME NOW THE ANACONDA COMPANY, AMAX COPPER MINES, INC., and

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ANAMAX MINING COMPANY, hereinafter referred to as ANAMAX, and respectfully submit their Supplemental Memorandum in Support of Motion for Rehearing.

DATED this 24th day of September, 1976.

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ANAMAX'S SUPPLEMENTAL MEMORANDUM IN SUPPORT OF MOTION FOR REHEARING

The result reached by the majority in this case, and the manner of reaching it, compel ANAMAX to urge this Honorable Court to grant a rehearing and to reconsider its decision. The decision here, like many decisions, can be interpreted in more than one way. If the majority intended to say that the lower Court erred in concluding that a temporary injunction could never be issued under any set of facts involving the movement of water from one place in a basin to another place in a basin, state-created or otherwise, then as will appear later herein, ANAMAX has no significant quarrel with the Court's decision.

If on the other hand the Court intended to restrict or to limit the movement of water to an area immediately surrounding the wellhead and to justify such a limitation on the basis of the reasonable use doctrine as previously initiated by this Court and other Courts then ANAMAX asks in the most urgent tones that this Court reconsider its prior decision.

Beyond the relief and clarification sought by ANAMAX as a single litigant, it is incumbent on the Court to deal with the problems raised by the opinion, some of which are discussed herein,* in order that other courts, attorneys, and residents of the State may know how to guide their future decisions in water-related

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*ANAMAX will not deal with how this decision would affect irrigation districts, private water companies, municipalities, manufacturing concerns, school districts and other public institutions or the disastrous effect this decision might have on residents of this State as more claims are made by the Indian tribes and the United States under the "reservation doctrine" as articulated in Winters v. United States, 207 U.S. 564 (1908), and Cappaert v. United States, _____ U.S. _____ (1976).

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matters. The present opinion raises many questions concerning the validity of long-standing principles of stare decisis, equity, and what is the just and proper basis for judicial decision making -- all above and beyond the substantive issues of groundwater law necessarily involved in the case. Furthermore, the reliance placed by the majority on an isolated portion of the unpublished Bristor complaint, beyond being unusual, is papably wrong. ANAMAX is confident that this Honorable Court will follow with both patience and tolerance its arguments for relief and clarification, which are presented as nearly as possible in the order set forth in ANAMAX'S Motion for Rehearing.

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I. THE MAJORITY OPINION DOES NOT FOLLOW THE AMERICAN RULE OF REASONABLE USE AS ENUNCIATED BY THIS COURT IN ITS PREVIOUS DECISIONS.

The issue decided by the Court related to the definition of the term "off the lands" or "away from the lands." Any judicial opinion may be read more than one way. ANAMAX might take comfort in the reasoning that when this Court held:

> Water may not be pumped from one parcel to another just because both overlie the common source of supply if the plaintiffs' lands or wells upon his lands thereby suffer injury or damage. . . . (Opinion at 14, emphasis added),

it was agreeing with what ANAMAX had contended before the trial court all along, and that is that denying the preliminary injunction sought by FICO should not be based "solely" on its Findings No. 2 of May 12, 1974.[1] ANAMAX realizes that, despite authority

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1/ It must be pointed out that ANAMAX has not had the opportunity for a hearing on the issues presented by the application for a preliminary hearing. In addition to the reasonable use issue, it was FICO'S burden to prove immediate and irreparable damage by the use of the well here involved and that monetary damages cannot compensate FICO for the injury. Admissions by all parties to this litigation that the water table of the lands involved is lowering is certainly not an admission of immediate and irreparable injury to FICO by the operation of one well. The "damage" resulting may be de minimus when compared with the overall withdrawals from the basin. See Section V, below.

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supportive of Finding No. 2 as an absolute rule, the conditions in Arizona might require a Court of equity to impose some reasonable relationship between the point of pumping of percolating water and the point of its return to the earth. For example, in a basin having an aquifer such as the Upper Santa Cruz, which is some 20 or 30 miles long and decreases in elevation from south to north, it might be unreasonable to allow a landowner on the south end to pump vast amounts of water from his land and pump it to another of his parcels a distance 30 miles at the opposite and lower end of the basin, to the damage of landowners at the higher, south end. This would particularly commend itself to equity if there were some "spillover" of groundwaters from the south end into another basin. However, the basic rule of groundwater in Arizona has been that the landowner owns the waters beneath his land, and as long as he uses these waters on his land which is over the common source of supply, his use is legal, unless it can be shown to be wasteful or otherwise unreasonable.

Despite the comfort which might be taken in such reasoning, however, ANAMAX finds other portions of the opinion not so comforting. The Court observed that the principles controlling in this case have been set forth in detail and in "unequivocal" language by the Court in many decisions. This language suggests that counsel for the parties involved here would risk whatever professional reputation they might have, together with a client's fortune, in the face of crystal clear authority that such a course of action would be condemned by the Court.

It is hoped that the Court will not assume that millions of dollars of a client's money would be put in jeopardy simply in the hope that this Court did not possess the necessary judicial courage to make a decision that would impact so heavily on the litigant. ANAMAX will try to dissuade the Court from that point of view, if in fact it exists, and attempt to demonstrate not only that the

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results here could not have been predicted with any degree of certainty but that the prior pronouncements of this Court led quite clearly to the conclusion that the term "off the lands" or "away from the lands" cannot and should not be as narrowly construed as this Court has apparently elected to do.

1. The common supply principle is amply supported by precedent and under principles of stare decisis must be applied to this case. In 1931, this Court stated that "groundwater principles should be enunciated . . . so that our citizens may know how to guide their future procedure." Maricopa County Municipal Water Conserv. Dist. No. 1 v. Southwest Cotton Co., 39 Ariz. 65, 71 4 P.2d 369, 372 (1931). That case reaffirmed the long-standing rule that in Arizona, percolating groundwaters are the private property of the landowner, and not public in nature and subject to appropriation. The rule was well entrenched in our law prior to statehood, going at least back to 1904. Howard v. Perrin, 8 Ariz. 347, 76 P.2d 460 (1904), aff'd. 200 U.S. 71 (1906). As with any rule of law, particularly with one dealing with a subject as crucial as water and property, residents of the State relied heavily upon it. See, Fourzan v. Curtis, 43 Ariz. 146, 29 P.2d 722 (1934) (reaffirming rule of private ownership and referring to American rule in dictum).

The next significant cases in this line of precedent are Bristor v. Cheatham, 73 Ariz. 228, 240 P.2d 185 (1952), on rehearing Bristor v. Cheatham, 75 Ariz. 227, 255 P.2d 173 (1954). They are analyzed at length below. Suffice it to say here, however, that they came to this Court after the trial court granted defendants' motions to dismiss, and that the end result was to affirm the long-standing rule of private ownership of percolating waters and to formally adopt the American rule of reasonable use. This rule, among other things, required that water be used for the beneficial enjoyment of the lands from which they are taken. The meaning of that phrase was not at issue in that opinion, although two justices

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had earlier commented on it in Bristor I (See Section II, below).

At this point in the history of groundwater law in Arizona, an attorney seeking to advise his client or a citizen seeking to gain knowledge on where or how he might use groundwater would have to look to the treatises and cases from other jurisdictions to find definite guidance, or perhaps to Bristor I. These authorities amply supported the common supply principle and made it a part of our law. Burr v. McClay Rancho Water Company, 154 Cal. 428, 98 P. 260 (1908); City of San Bernardino v. City of Riverside, 186 Cal. 7, 198 P. 784 (1921); Horne v. Utah Oil and Refining Company, 59 Utah 279, 202 P. 815 (1921); Glover v. Utah Oil and Refining Company, 62 Utah 174, 218 P. 955 (1923); Evans v. City of Seattle, 47 P.2d 984 (Wash. 1935); Forbell v. City of New York, 58 N.E. 644 (N.Y. App. 1900); Volkman v. City of Crosby, 120 N.W.2d 18, 22-23 (N.D. 1963); Katz v. Walkinshaw, 70 P. 663 (Cal. 1902). These cases are discussed in appellees' answering brief before this Court and all support the fundamental common supply principle. Katz v. Walkinshaw, supra, and the other California cases involve the correlative rights doctrine, which like the reasonable use doctrine has been referred to as the "American Rule." Both doctrines are identical in that they require that percolating waters must be "used on the lands from which they are taken" but the correlative rights doctrine limits the amount available to each landowner in times of shortage whereas the reasonable use doctrine contains no such limitation. The "off the land" problem, however, is identical in both doctrines since they emerge from a disagreement in the American courts with the English rule regarding unlimited withdrawals. In Montecito Valley of Water Company v. City of Santa Barbara, 144 Cal. 578, 77 P. 1113 (1904), the California court compared the case before it with Katz v. Walkinshaw, supra, a quotation which is set out at length in ANAMAX'S Answering Brief at pages 24-26. It is quite clear from these two cases that the California courts in Katz, supra,

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and in City of Montecito, supra, meant by the phrase "upon the lands from which it is obtained;" that is, that groundwater must be used on lands overlying the common supply -- the water basin. It is of particular note that Katz v. Walkinshaw, supra, has been often relied upon by this Court in prior decisions pertaining to rights to the use of groundwater: Maricopa County Municipal Water Conserv. Dist. No. 1 v. Southwest Cotton Co., 39 Ariz. 65, 83, 4 P.2d 369, 376 (1931) ("Whether percolating waters in Arizona since the adoption of the Howell Code have been governed by the old English common law in its strictest form, or by the American modification known as the Rule of Correlative Rights, as explained and defined in Katz v. Walkinshaw, . . . based on the doctrine of sic utere tuo ut alienum non laedas, we need not now decide. . . ."); Bristor v. Cheatham, supra, 73 Ariz. at 245, 252, 240 P.2d at 196, 201 (LaPrade, J. concurring & dissenting); Bristor v. Cheatham, supra, 73 Ariz. at 254, 240, P.2d at 202 (DeConcini concurring & dissenting); Jarvis I, Jarvis v. State Land Department, 104 Ariz. 527, 532, 456 P.2d 385, 390 (1969) (McFarland, J. concurring, quoting Southwest Cotton Co., supra); Jarvis II, Jarvis v. State Land Department, 106 Ariz. 506, 508, 479 P.2d 169, 171 (1970). There are, of course, many other facets to the reasonable use doctrine, but the common supply notion is far from unprecedented as this Court has held here. On the contrary, it is well established in our law.

Another example is State ex rel. Morrison v. Anway, 87 Ariz. 206, 349 P.2d 774 (1960), where a litigant who had irrigated one parcel of land desired to let that parcel lie fallow and reclaim another parcel of land from the desert using water formerly put to use on the fallow tract over the new tract. This Court upheld his right to do so in the face of Justice Phelp's vigorous dissent that this would violate the rule of reasonable use because the water was being taken away from the land from which it was pumped.

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Although there was nothing in the opinion regarding the distance pumped, this decision clearly approved a transportation of water from one parcel to another. Anway, supra, is thus inconsistent with the Court's pronouncements in the present case. If it has been overruled, this Court should clearly so state.

If there was any doubt about the principle that under the reasonable use doctrine percolating water may be used on one's lands overlying the common supply of the water basins which are endemic to Arizona, Jarvis II, supra, removed them. There, a transbasin diversion had been earlier condemned in Jarvis I, supra, and the plaintiffs came back to this Court to complain that the City of Tucson persisted in pumping waters "off the lands" where its wells were located to Ryan Field and to residences in the "drainage area" of the Avra Valley water basin. After noting the principle that "[p]ercolating waters may not be used off the lands from which they are pumped if thereby others whose lands overlie the common supply are injured . . ." 106 Ariz. at 508, 479 P.2d at 171, this Court stated:

> "Ryan Field overlies the Avra-Altar water basin and geographically it lies within the Marana Critical Groundwater Area so as to entitle it to withdraw water from the common supply for all 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.
>
> Tucson's delivery of water to purchasers within the Avra-Altar drainage area but outside the Marana Critical Groundwater Area is, however, without equitable sanction. There is no indication in the record that these customers of Tucson overlie the water basin so as to come within the principle applicable to Ryan Field." 106 Ariz. at 510, 479 P.2d at 173 (emphasis added).

It should be pointed out that Tucson in those cases was selling water, a use which has been universally condemned by the reasonable

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use cases where the water is taken "off the lands" from which the water is pumped to the damage of neighbors. Jarvis II, supra, therefore is further support for the principle contended for by ANAMAX herein.

Furthermore, this Court in Jarvis III, Jarvis v. State Land Department, _____ Ariz. _____, 550 P.2d 227 (1976), did not consider returnflow or recharge into the common supply "illusory" when it ruled that Tucson could pump water from the Avra Valley equivalent to the historical use on agricultural lands it retired, reduced by that amount of water which would have been returned to the common supply had the lands been irrigated as they had been in the past. Therefore, this Court in another case considered recharge to be a viable concept in Arizona water law.

The final case to be discussed in this section of the supplemental memorandum is Neal v. Hunt, 112 Ariz. 307, 541 P.2d 559 (1975). There, the defendant desired to mine percolating water and sell it through the family-owned water company to several housing subdivisions in the county, and to sell it to the town of Kingman, some 30 miles away. Plaintiffs sued to enjoin this practice. Although there was not a critical groundwater area involved in the case, the trial court permanently enjoined defendants from removing percolating water to lands not overlying the common supply in an amount greater than 300 gallons per minute. This Court set forth the trial court's conclusions of law 2, 3, 4, and 5 verbatim:

> "'2. The use which defendants propose to make of water from the common supply is a beneficial use but the use will be upon and for the benefit of lands which do not overlie the common supply.
>
> 3. Withdrawal of groundwater from a common supply for a beneficial use upon lands which do not overlie the common supply is unlawful if the water supply to the well of another property owner whose lands overlie the common supply and who propose to make a beneficial use of the water upon his overlying lands is damaged or depleted.

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> 4. Withdrawal and use of groundwater for a beneficial use upon lands which do not overlie a water supply from which the water is withdrawn is not unlawful if the water supply available to the owners of lands overlying the common supply for beneficial use is not thereby damaged or depleted.
>
> 5. Lawful utilization of all available water resources of the state as required for a public or beneficial purpose and use is in the public interest.'" 112 Ariz. at 310, 541 P.2d at 562 (emphasis added).

Defendants appealed and the plaintiffs cross-appealed, claiming the defendants should not be allowed to take any water at all.

At the end of its opinion, this Court specifically affirmed the above conclusions of law: "We affirm the finings of fact, conclusions of law, and decree of the trial court." 112 Ariz. at 314, 541 P.2d at 566. A clearer enunciation of the principles relied upon by ANAMAX in the present litigation could not be written into this Court's decisions regarding groundwater.

The authorities cited above lead to the conclusion that the term "off the land" should not be as narrowly construed as this Court has apparently elected to do. The departure of the American courts via the so-called American rule from the English rule of percolating water was primarily to insure that the waters would be used on lands from which they were taken, i.e., lands overlying the common supply, so that they would be available for return to the common supply after the exercise of the landowner's property right in the water. It should be noted that for the most part, these cases dealt with agricultural, municipal, or domestic uses. Since ore and usable quantities of water are rarely found in the same cubic foot of earth, a miner looking at these decisions could only conclude that the reasonable use doctrine could not as a matter of law prohibit mining. On the contrary, there was ample support for the proposition that he could use his water on his lands for mining purposes provided his lands were over the common supply

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and water not consumptively used available for return to the common supply. The "'rule of reasonable use . . . does not prevent . . . any reasonable development of [one's] . . . land by mining or the like, although the underground water of neighboring proprietors may thus be interfered with or diverted . . .'" Bristor v. Cheatham, supra, 75 Ariz. at 238, 255 P.2d at 180 (quoting Canada v. City of Shawnee, 179 Okla. 53, 64 P.2d 694, 696).

Appellees believe a helpful statement of the rule of reasonable use is found in Canada v. City of Shawnee, supra, a case often relied upon by this Court. It was stated that the:

> ". . . virtue of the . . . rule lies not so much in its statement as in its application to concrete cases. The history of the law is replete with illustrations of how a new rule was born from the unfair and unjust use of an existing rule; it was those who sought an unfair and unconscionable advantage from the English rule who necessitated a limitation on that rule, and as we view it, the rule of reasonable use as it is actually applied is not a different rule from the English rule at all, but is merely a limitation thereon. . . . [The courts under the American rule have not denied a landowner's withdrawal of as much water as he needs] . . . so long as the use to which he puts it bears some reasonable relation to the natural use of his land, and even though such use of the land be industrial and not agricultural. But the majority of recent decisions stop short at and forbids the harmful extraction of water for sale at a distance." 64 P.2d at 697 (emphasis added).

It is apparent to anyone reading the decisions discussed above that the reasonable use doctrine is an equitable one, similar to other doctrines concerning the use of one's property. Bristor II, supra, 75 Ariz. at 227, 255 P.2d at 179. These factors, therefore, would lead a reasonable person to believe and rely on the principle that a miner might use his property-water-on his lands overlying a common supply of groundwater provided he did not waste this property.

2. FICO has implicitly recognized the common supply principle

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in its briefs. Not only did the mining company defendants and their attorneys interpret the previous decisions of this Court to support the principle that water might be moved from one part of its lands to another where both overlie a common supply, but FICO in its brief has implicitly recognized the same. The major thrust of Appellant's Opening Brief related to the designation by the State Land Department of the Upper Santa Cruz Groundwater Basin, arguing that the administrative creation of this did not necessarily mean that the area overlay a distinct body of groundwater. FICO obviously recognized the heart of the doctrine, and that if there was in fact a distinct body of groundwater, a common supply or a common basin, and that people withdrew water from this common source of supply and used it in such a way as to replenish the supply that the reasonable use doctrine was not violated. In its opening brief, FICO continually refers to the fact that Duval's mill in on bedrock. E.g., Appellant's Opening Brief at 36. This clearly indicates that it is trying to establish that the water in this mill is not being used over the source of common supply. Its principle argument was that the trial court gave conclusive effect to the designation of the basin and that this violated due process. FICO has contended all along that the critical area rather than the basin defines the limits of the common supply and that water may not be transported across the boundaries of the critical area. ANAMAX on the other hand, has argued from the very beginning to the contrary, that the reasonable use doctrine controls the use of groundwater, ant that the critical groundwater area has a limited significance, being of evidentiary value on the fact that more water is being used than is being returned into the common supply. At page 49, id., FICO is still arguing that the water-bearing area is the key to the issue and outside-the-critical-groundwater-area is still its theme.

In summary, the Arizona decisions as well as decisions from

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other jurisdictions have led counsel for the mining companies, and FICO, to proceed upon the common supply principle, and to argue whether the critical groundwater area or the water basin defines the source of common supply.

In his treatise, Professor Casner stated:

> "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." Casner, American Law of Property, Vol. 6A, p. 196 (emphasis added).

Far from being inconsistent with the principle announced in such authorities, the decisions of this Court confirmed and explicitly adopted this principle, particularly Jarvis II, supra, and Neal v. Hunt, supra. The principle of state decisis recognized in Maricopa County Municipal Water Conserv. Dist. No. 1 v. Southwest Cotton Co., supra, and returned to in Bristor II, supra, that where large investments are made upon the strength of previous pronouncements by this Court regarding the State's water law, such rights must be protected, should require this Court to reconsider and clarify its definition of "on the lands from which the waters are taken."

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II. BRISTOR v. CHEATHAM

1. The majority of the Court used a small portion of the complaint filed by the plaintiffs in Bristor v. Cheatham, supra, in support of its opinion here, yet the complaint itself, on its face, shows this reliance incorrect. The FICO majority opinion states:

> "Appellee argues that while a party owning land overlying the common underground water supply could not convey pumped waters 'off the land' or 'off his land,' this only meant land overlying the common source of supply. But there is no language in Bristors' complaint which suggests the water pumped by defendant Cheatham was not used on lands overlying the common supply. The Bristors alleged in their complaint that the defendant was transporting water three miles from where it was pumped, and in paragraph XIV of their complaint:
>
> > 'That the water so pumped by defendant confers no benefit upon defendants' lands where the pumping operation is conducted; that such use by defendants is an unreasonable use as to plaintiffs * * *.'
>
> The Court's holding, therefore, that the Bristors' cause of action stated sufficient facts to warrant relief, must be interpreted in light of the allegation that the water pumped conferred no benefit to the defendants' land on which the pumping was conducted. From the context of the language used in the Bristor opinion, from the cases quoted in it, and from the Bristors' position as set forth in their complaint it is clear there is no firm basis for appellees' conclusion that the word 'lands' meant other than lands on which the pumping occurred."
> Opinion at 12 (emphasis added).

ANAMAX reads the Bristor complaint diametrically opposite of the majority. The entire complaint is reproduced verbatim in the appendix. A mere reading of the complaint demonstrates that the above statements of the majority cannot and should not stand. The pertinent portions are as follows:

> "[There were 21 named plaintiffs and their wives and some 14 defendants]

FIRST CAUSE OF ACTION

> COME, plaintiffs . . . and for their claim in first cause of action against defendants . . . allege as follows:

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. . .

VIII.

That at all times mentioned herein there was a common supply of underground water underlying said premises of plaintiffs and defendants.

IX.

That plaintiffs and/or their predecessors in interest, at various times since 1916, or thereabouts, supplied themselves and their families with domestic water . . . sank wells into the ground upon their lands to draw water from said common underground water supply. That for many years last past, before the filing of this complaint, plaintiffs and their predecessors in interest have enjoyed the use of such water for the purposes indicated above . . . .

X.

That during the year 1948 and continuing into 1949, defendants drove a series of large irrigation wells to great depths upon their lands, installed powerful pumps therein and operated same in such manner as to pump therefrom waters from the supply of underground water common to both the lands of both plaintiffs and defendants.

XI.

. . .

. . .

That defendants' pumps were and are capable of drawing a tremendous quantity of water from said common supply of underground water and up to the date of the filing of this complaint draw a tremendous supply of such water from the ground by means of pumps located on defendants' land.

. . .

XIII.

That defendants have pumped a quantity of underground water so great, from the available common supply, that the entire water level beneath plaintiffs' lands has been lowered, causing the level of water in plaintiffs' wells to drop . . . . That such pumping by defendants . . . has caused the underground water level of such common supply to drain from beneath plaintiffs' lands and into and below the surface of defendants' lands and that defendants have been and are now pumping water from their pumps, which has been abstracted from that portion of the common supply underlying plaintiffs' lands.

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XIV.

That plaintiffs are informed and believe . . . that defendants . . . are conveying the water off the premises where pumped and are using the same for the purpose of developing new and heretofore unirrigated and uncultivated lands approximately three miles from plaintiffs' lands; that the water so pumped by defendants confers no benefit upon defendants' lands where the pumping operation is conducted; that such use by defendants is an unreasonable use as to plaintiffs; that defendants, by such pumping, are using an unreasonable share of the common underground water supply available to the lands of the parties hereto in relation to the rights of plaintiffs in and to the common water supply underlying plaintiffs' lands.

XV.

That the water so pumped by defendants is taken from the supply common to the lands of all parties* and when conveyed to other lands and used to irrigate the same, as aforesaid, does not return to replenish said common supply.

. . .

XX.

That plaintiffs are informed and believe . . . that it will be impossible to secure water from their wells and pumps in the future if defendants continue such pumping, because of the geologic formation underlying plaintiffs' lands.

. . ."

It is too clear for extended argument what the thrust of the Bristor plaintiffs' complaint was in that case. The portion emphasized by the majority in the present opinion must be read in context in order to correctly interpret the theory of reasonable use asserted by plaintiffs. The majority's statement that there is "no language in Bristors' complaint which suggests the water pumped by defendant Cheatham was not used on lands overlying the common supply," Opinion at 12, is obviously incorrect. See Complaint, ¶ XV.

*The parties were 36 husbands and wives and three individuals as plaintiffs, and as defendants, 26 husbands and wives and one corporation. The number of parties indicates there were many parcels of land over the alleged source of water supply.

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2. The Bristor plaintiffs' briefs support ANAMAX'S position herein. If the complaint on its face does not conclusively establish the theory asserted by the Bristor plaintiffs, and how they viewed its proscriptions regarding "other lands" the Bristor plaintiffs' briefs further establish their belief that the American rule of reasonable use was based upon the common supply principle. In Bristor I, supra, Mr. Justice LaPrade, concurring in part and dissenting in part, quoted the plaintiffs' brief concerning the issues before the Court.

> ". . . Plaintiffs assume, in their opening brief . . . that the waters in question were percolating waters. Counsel for plaintiffs in referring to their first cause of action said: 'The first cause of action does not pose a question as to who has the better right between adjoining owners, both of whom are pumping percolating water and using the water to develop their respective lands. It does, however, we believe, present squarely to this Court the proposition that the pumper of percolating water cannot transport such percolating water to some other locality where there would be no opportunity for it to return and replenish the common supply available to the owners of both tracts of land.' (emphasis added) Counsel for plaintiffs then says: 'Since the appeal is based entirely upon the sufficiency of appellant's complaint, reference is made to the complaint itself.' It is thus seen that counsel's interpretation of his own complaint was that he had stated a cause of action predicated upon either the 'reasonable use' or 'correlative rights' doctrine." 73 Ariz. at 241, 240 .2d at 193-94 (emphasis in original).

The plaintiffs' own assignments of error read as follows:

> ". . . The first assignment assigns as error the granting of appellees' motion to dismiss the complaint, and reads as follows: 'The Court erred in granting appellees' motions to dismiss the first cause of action of the complaint . . . for the reason that the first cause of action states a valid claim for relief against appellees, since the owner of land overlying a supply of percolating water common to adjoining landowners may not pump the water from wells upon his land and convey it to other lands, for the benefit of those lands, from whence it does not return to replenish the common supply, [emphasis added], if such supply available to the adjoining landowners from pumps upon their lands drawing water from such common supply, is diminished to their injury.'

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> (Emphasis supplied.)" 73 Ariz. at 242, 240 P.2d at 194.

It is, therefore, crystal clear how the Bristor plaintiffs viewed their cause of action under the reasonable use doctrine.

3. Bristor I. The Bristor plaintiffs' complaint contained two claims for relief, the first as set out above, and the second contending that the source of water was an underground stream and claiming prior appropriative rights thereto. The trial court granted the defendants' motions to dismiss both claims for relief. In Bristor I, Bristor v. Cheatham, supra, this Court first reviewed the second claim for relief and held that it stated a cause of action under state appropriation statutes and that plaintiffs should be allowed to prove their allegations concerning the underground stream, etc. With respect to the first claim for relief, this Court noted:

> "Plaintiffs first urged that their rights . . . should be determined under the rule of 'reasonable use' or the doctrine of correlative rights, as it is sometimes called, which is closely akin to the riparian rights doctrine . . . . 73 Ariz. at 232-33, 240 P.2d at 188.

This Court, at the urging of amici curiae, overruled the principle of private ownership of percolating waters as previously set forth in Southwest Cotton Co., supra, and Fourzan v. Curtis, supra. The Bristor I opinion, then, was concerned entirely with the reasons for, and the legal principles behind, the change from a system of private ownership of groundwater to a public system of prior appropriation.

Mr. Justice LaPrade, however, concurring in part and dissenting in part, disagreed with the injection by amici curiae of the issue that percolating water was subject to appropriation--none of the parties involved in the case before the Court had raised the issue in connection with the first claim for relief. He noted that the only issue before the trial court with respect

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to this claim for relief was whether:

> ". . . the owner of land overlying a supply of percolating water common to adjoining landowners 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 . . . ." 73 Ariz. at 242, 240 P.2d at 194. (LaPrade, J. conc. & dissenting) (emphasis added).

Mr. Justice DeConcini, also concurring and dissenting in Bristor I, supra, 73 Ariz. 253-260, 240 P.2d 201-207, adopted similar language in discussing the plaintiffs' cause of action. Noting that the defendants contended that percolating water in Arizona was governed by the strict English rule of private ownership allowing percolating water to be withdrawn at will and used anywhere, that the plaintiffs insisted that the applicable principle was that of reasonable use, and, citing Katz v. Walkinshaw, 141 Cal. 116, 70 P. 663, 74 P. 766, he noted the difference between reasonable use and correlative rights, but made it clear that he understood the portion of the reasonable use rule that waters may not be taken away from the common supply if such interferes with the use or water of other property owners.

> "The doctrine of reasonable use as distinguished from correlative rights could be applied and appellants' rights protected. Under correlative rights there is an apportionment of water between overlying landowners. Under reasonable use there is no such apportionment, but rather 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. Canada v. City of Shawnee, supra." 73 Ariz. at 255, 240 P.2d at 203 (emphasis added).

Mr. Justice DeConcini also relied upon Glover v. Utah Oil Refining Company, supra. He proceeded to examine the law and the policy considerations and the effect on future agriculture in the state of the adoption of a prior appropriation theory. He left no doubt what he considered to be a threshold violation of the reasonable use or correlative rights doctrine: Transportation of

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water to a point where it will not be available for return to the common supply.

4. Bristor II. The opinion on the rehearing, Bristor II, Bristor v. Cheatham, supra, must, therefore, be interpreted in light of the posture of the case. It is obvious that the primary consideration in that opinion was not to definitively describe where and under what circumstances percolating water may be used, but rather what principle of law defined the water rights involved--private ownership under the common law or public ownership and a system of prior appropriation. It is illuminating to examine the briefs of the parties involved in connection with the rehearing in Bristor II, supra. A brief filed there by an amicus curiae told this Court it had three choices concerning underground water rights in Arizona: (1) the unlimited English rule, (2) the American rule or correlative rights, and (3) prior appropriation. In attempting to persuade this Court that neither of the first two rules would work in Arizona, the amicus stated:

> "Under the correlative rights doctrine, the use of the water must be correlated with that of adjoining landowners, or landowners within the basin, and its use so restricted as not to be unreasonable. However, under this doctrine it may be taken off the land where extracted and used upon other lands so long as its use is confined to lands overlying the basin . . .
>
> . . .
>
> Under the correlative rights doctrine we assume that the so-called 'basin' would cover the entire [Salt River] Valley . . . . The owner of any tract of land within this area would have the right to now sink a well upon his land and use it to the same extent as the owner of any other land in the area, and might transport it, if practicable, to any other land so long as its use is confined within the basin. This would be true regardless of the effect it might have on existing wells and regardless of a continuing drop in the underground water level. The same would be true if we apply the common law doctrine, except that under this doctrine the landowner would not have to confine the use of the water developed to the basin.

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> The application of either of these doctrines, we submit, prohibit any regulation of use of such underground water by the State of Arizona." Bristor II, supra. Brief of Amicus Curiae, Jennings, Strauss, Salmon & Trask, at pages 6-8.

It is clear from this passage what this amicus believed the law regarding reasonable use was at that point, and what the State of Arizona was facing if the rule was to be adopted. Perhaps this is why the Bristor plaintiffs vigorously opposed a rehearing, since under a prior appropriation theory their priority and domestic use would probably have been adequate protection for them, whereas under the American rule they had to prove that the defendants' use was away from the lands overlying the common supply. Perhaps this is also why the Cheatham defendants vigorously urged a rehearing in Bristor II in an attempt to reinstate either the English rule or the American rule. See Appellees' Brief on Motion for Rehearing, Bristor v. Cheatham (Bristor II), supra.

With a multitude of arguments before it, including a crystal clear presentation of the common supply principle in the context of the American rule, this Court reversed Bristor I and adopted the American rule. One of the principal reasons for reconsidering the case was that 20 years prior to that decision, this Court in Southwest Cotton Company, supra, stated that it was its duty to declare the legal principles which in all probability would determine and govern to a great extent the course and future development within the arid regions of Arizona and that the principles should be enunciated as clearly and definitely as possible so that the residents of the state might know how to guide their future procedure. The Court rejected the doctrine of public ownership and prior appropriation, and reinstated the rule of private ownership of percolating waters. In effect, this Court reasoned that Arizona was tied to the theory that percolating groundwater rights were vested in the landowner, and referred the

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cries for conservation of the resource to the police power of the state. It expressly adopted the common law rule of reasonable use, as distinguished from the English rule and the correlative rights doctrine. It thereupon held that the trial court erred in dismissing the first claim for relief, and that the case would be remanded so that the plaintiff could be put to his proof. Since the thrust of the Bristor plaintiffs' complaint was that the defendants were taking water away from their lands to a point at which it would not be available for return to the common supply, and because the appeal was from the dismissal of the complaint and had to be read in a light most favorable to the contentions of the Bristor plaintiffs, it is simply erroneous to interpret Bristor II as this Court has presently done. On remand after Bristor II, the plaintiffs would have had to have proved that the pumping of the water three miles was in fact away from the common supply and that it was not available for return to the common supply after use, a question of fact.

It bears reemphasizing that all Bristor II decided was that the plaintiffs had stated a cause of action. The Court, however, did not attempt to define "the lands from which they were taken" although two of the justices had earlier affirmed the common supply principle in Bristor I, supra. Therefore, Bristor I and Bristor II are consistent with the position of ANAMAX herein.

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III. IF THIS COURT MEANS TO PROHIBIT ABSOLUTELY THE TRANSPORTATION OF WATER ANY DISTANCE FROM THE WELLHEAD, THEN IT WILL BE IMPOSSIBLE TO CONTINUE MANY PRESENT AGRICULTURAL, INDUSTRIAL, MUNICIPAL, AND PERHAPS EVEN SOME DOMESTIC USES.

An attorney reading the FICO opinion would be hard pressed to advise a client about where he might be able to use water. What is the meaning ascribed by this Court to the requirement that water must be put to a beneficial use on the lands from which it is pumped? Does it mean 10 feet from the well? A hundred feet? A mile? What is meant by a "parcel" of land? When the term beneficial use and enjoyment of the land is used, does not this include the principle that the owner is making a beneficial use of his water, as well as his land? If a person is using water for a domestic or stock watering purpose, is it being used "on the land" or "over the land?" One might argue that if water must be applied to the land that the only purpose for which water may be pumped is irrigation. Clearly the Court cannot intend such a restrictive meaning for these terms.

This Court also seems to imply that any place water is used, there must be under the place of use a sufficient quantity of water to meet the requirements of the existing use. Under this principle, therefore, the person who owns 40 acres of land, half of it in a river valley and the other half on the side of a bluff, may not pump water from the valley to the bluff because he cannot establish a sufficient supply underneath his home or his mill or whatever he has on the bluff sufficient to meet his needs. A farmer owning 80 acres, half of which has no water under it and the other half of which has water under it, would not be able to pump from the area that has the water to the area that does not. A well is not a well if one drills a hole where there is no water. In the present case the deepest part of the alluvium and most of the water is down along the river and virtually all of the wells

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are in that area. It would seem an absurd result to require the mines to build their mills exactly over the well site, yet this is apparently what the majority has wrought.

Or perhaps this Court is implying that there is some rule of correlative supply that governs so that a landowner can use only such water as is necessary for a particular 10-foot square or 100-foot square provided that if challenged he could establish that precisely below this tract there was no boulder that made it impossible for him to get water out of that one location. The ordinary ranch is bisected by highways, freeways, easements, state leases, federal leases, and oftentimes private ownership. Are ranchers being told that they must have a well directly over every place they water their cattle? When cattle are being watered at point A a mile away from point B where the water is pumped, such water is certainly not according to the decision of this case, being used for any beneficial use of the land "from which it is pumped."

If the prohibition relates to taking water from one parcel to another and not to whether water is obtainable under all of the land where water is used, such prohibition may be extremely unfair as is exemplified in the following hypothetical: A owns one large strip of land running north and south situated in a water basin. B owns two parcels of land each being adjacent to one side of A's parcel, but separated by lands owned by a third party so that B's two parcels are not contiguous. Water is easily obtainable from the south end of A's land and from B's south parcel. Water is not, however, productively obtainable from the earth beneath the north end of A's parcel and B's north parcel. Under the present opinion, it appears that while A may pump water across his entire parcel, B may not water his north parcel with water from the south parcel. Such a result merely gives a license to a large landowner to pump as much as he needs while denying B the right to use his water on

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his parcel. The water is pumped the same distance in each case, and the effect on surrounding landowners would be similar, yet irrigating the large contiguous parcel would be approved while condemning B's use.

ANAMAX submits that the only workable rule is the traditional common law rule that permits the landowner to exercise his property rights in water underneath his land so long as he uses it on his lands which overlie the common supply. The only workable definition of the common supply in Arizona unless there is evidence supportive of a smaller, more definite source is the hydrological water basin.

This reasoning commends itself to a sense of natural justice, also. Through the millennia, ANAMAX'S lands as well as FICO'S lands served as receptacles for rainwater, surface water runoff, and various rivers which ran through the Upper Santa Cruz Basin. Throughout this vast time, water percolating through these lands ended up contributing to the overall water supply in the Santa Cruz Basin, particularly in the area of the Upper Santa Cruz Basin. If we assume that at one time the water table was much higher, the Santa Cruz River flowed, and water was far more readily obtainable, is ANAMAX to be denied its share of the water from the common source of supply merely because the areas where it is most easily produced may have become smaller because of the overdraft in the basin caused initially by irrigation? If one end of a person's lands overlies an area of more ready accessibility to groundwater while the other end yields somewhat less groundwater, but all of the land overlies the basin, is the person to be denied the use of his water merely because he built a mill in one place rather than the other?

There is also language in the opinion which tends to indicate that where the water is pumped from a well "downgradient" to a use, even where it is confined to one "parcel," and where the

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landowners upgradient from the pumper can show damage, they may have a cause of action against the "downgradient" pumper. If this principle has been adopted by this Court, there may not be enough trial courts in the State to handle water litigation because most pumpers of groundwater are downgradient from someone.

These matters indicate that the more sensible and workable rule is the common supply principle, assuming Arizona maintains its adherence to the rule that groundwater is the private property of the landowner.

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IV. "FIRST IN TIME, FIRST IN RIGHT" HAS NO PLACE IN THE CONCEPTUAL FRAMEWORK OF THE AMERICAN REASONABLE USE DOCTRINE, AND THIS COURT'S REFERENCE TO IT IN THE OPINION, TOGETHER WITH OTHER INCONSISTENCIES, MAKE IT DIFFICULT TO EVALUATE ARIZONA LAW REGARDING THE USE OF GROUNDWATER.

First in time, first in right is a basic tenet of the prior appropriation doctrine. If there is one concept about Bristor II that is universally agreed upon, it is that Bristor v. Cheatham repudiated the prior appropriation doctrine and adopted the reasonable use doctrine, which is diametrically opposed to the principle first in time, first in right.

Under both the civil and common law, groundwater belongs to the owner of the soil. Bristor v. Cheatham, supra (Bristor II), 75 Ariz. at 232, 255 P.2d at 176 (citing Kinney on Irrigation and Water Rights, 2d ed., Vol. I, Sec. 563). The principle that land ownership carries with it the right to the use of the waters beneath the land is elementary to all of the cases dealing with common law rights to groundwater, be it under the English rule, the American rule, or the correlative rights rule. Under the reasonable use rule, it is fundamental that a person buying a tract of land may pump groundwaters therefrom and use it on his land, notwithstanding the fact that this might hasten the depletion of the supply common to his neighbors. This holds true regardless of whether the neighbors had been in continuous possession of their lands for 100 years, or one year. Groundwater is part and parcel of the lands and when the lands are sold, in the absence of an express provision to the contrary, the "ownership" and the right to use the groundwaters are conveyed with the land itself. See 1 Waters and Water Rights (Clark ed.), §53 at 344-358. On the other hand, the prior appropriation system is based upon the beneficial use and priority of diversion. "First in time, first in right" is a maxim that could only be applied to an appropriation system. It

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has no place in a decision concerning common law reasonable use. Bristor II held the first claim for relief in the complaint to have stated a cause of action because it alleged, inter alia, that waters were being taken to lands not overlying the common supply and that such waters would not be available to replenish the common supply after use, and not that the plaintiffs' uses had begun prior to the defendants' pumping. This is obvious from the opinion, and the dates of the commencement of uses of the parties was relevant to the second claim for relief under an appropriation theory, but was merely a factual allegation in connection with the first claim for relief which under the well established rules of reasonable use had nothing to do with the cause of action. Likewise, this Court in the Jarvis litigation put controls on Tucson's use not because the plaintiffs' uses had commenced earlier, but rather because the large transbasin diversion contemplated by Tucson was in violation of the doctrine of reasonable use. In the interests of consistency and order, if this Court intends to affirm the rule that the landowner also owns the waters beneath his lands, this anomaly should properly be removed as a basis for the Court's decision.

Furthermore, the Court, on page 17 of its opinion, in connection with the appeal involving DuVal, has stated:

> "In light of our conclusion that the pumping of water from the Santa Cruz Basin is unlawful where it depletes the common source of supply of other landowners and damages their lands, we find it unnecessary to reach . . . [the questions presented concerning the manner of DuVal's use]."

Is the Court saying that any new pumping, regardless of the place of use, is unlawful if it depletes the common source of supply? Such language might be interpreted as imposing an absolute freeze on new pumping, regardless of the place of use, if neighboring landowners can show damages to their lands. These statements regarding "first in time, first in right" and the latter sentence

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causes ANAMAX to pause and wonder whether this Court is considering adopting a system of prior appropriation for groundwater in Arizona, a point not presented or briefed by the parties hereto. The problems inherent in a judicial imposition of appropriation theory on existing Arizona groundwater uses has been amply set forth in the briefs tendered to this Court in connection with the rehearing in Bristor II. If such a monumental change is to be made, it should be at the hands of the legislature and not by this Court.

Lastly, ANAMAX points out what must have been a typographical error on page 9 of the majority opinion where the Court states that Bristor I emphasized that Arizona "had adopted the principle of reasonable use 49 years before . . ." referring to Howard v. Perrin, supra, and Maricopa County Municipal Water Conserv. District No. 1 v. Southwest Cotton Co., supra. Those cases merely adopted the common law rule that the landowner also owns the waters percolating beneath his lands and rejected the application of appropriation doctrine to groundwater not in underground streams. It was Bristor II, supra, that adopted the rule of reasonable use, not Howard, supra, or Southwest Cotton Co., supra, and the Court may wish to correct this simple error.

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V. THIS CASE COMES TO THE COURT ON THE DENIAL OF A PRELIMINARY INJUNCTION CONCERNING THE OPERATION OF A SINGLE WELL. THE OPINION OF THE MAJORITY, IF NOT CLARIFIED, MAY HAVE WROUGHT MONUMENTAL CHANGES IN THE PRINCIPLES APPLICABLE TO SUCH PROCEEDINGS, AND IN OTHER PRINCIPLES OF EQUITY.

The principal thrust of FICO'S position below in its application for a preliminary injunction was that water was being taken outside the critical groundwater area which to FICO was equivalent to taking the water away from the land. ANAMAX'S principal position below was that it was not an ipso facto violation of the reasonable use doctrine for water to be transported outside the boundaries of groundwater area, if the water was being used over the common source of supply. ANAMAX made it quite clear below that it did not rely solely on the state-created basin concept in the FICO case.

In its briefs and oral argument in this Court counsel for FICO scolded and even vilified ANAMAX'S counsel because ANAMAX wanted to get to what it felt was the heart of the problem which was the reasonable use doctrine, and what was meant by "away from the land" or "off the land." Both below and for the most part in this Court FICO'S counsel argued the effect of the administratively created basin subdivision. It is indeed ironic that ANAMAX was chastised by its adversary for not meeting the issues by discussing the meaning of off the land and then have the case turn on the meaning of the interpretation of this concept.

There is little authority in Arizona concerning the principles to be applied by the trial court in ruling upon an application for a preliminary injunction. One thing that is clear, however, is that in accordance with the traditionally flexible practice developed by the Courts of Chancery, injunctive relief may be granted or withheld in the exercise of sound judicial discretion, and unless it is clearly shown that there was an abuse of this

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discretion, the denial of a preliminary injunction will be upheld. County of Cochise v. Board of Supervisors, 7 Ariz.App. 571, 573-74, 442 P.2d 129, 131-32 (1968). In Renck v. Superior Court of Maricopa County, 66 Ariz. 320, 187 P.2d 656 (1947), involving a test of the sufficiency of the signatures on an initiative petition, the trial court had denied a preliminary injunction to keep the petition off the ballot. This Court was presented with the issue of the validity of the denial of that preliminary injunction. The Court held that in order for the injunction to issue it was necessary to make a highly persuasive preliminary showing of the facts relied upon, and it was said that the power of the trial court should be used with great restraint and caution and only when the preliminary showing of the insufficiency of the initiative is clear and convincing. Other cases have held that where there is a showing that the maintenance of the status quo pending trial will prevent anticipated mischiefs which could not after their occurrence be adequately redressed, a preliminary injunction may issue. Remele v. Hamilton, 78 Ariz. 45, 275 P.2d 403 (1954); Farnsworth v. Hubbard, 78 Ariz. 160, 277 P.2d 252 (1954). It has also been held that an appellate court is more likely to find an abuse of discretion where a pendente lite injunction is granted than where it is denied. County of Cochise v. Board of Supervisors, supra, 7 Ariz.App. at 574.

In Peacock v. Board of Regents of Universities and State Colleges of Arizona, 380 F.Sup. 1081 (D.Ariz. 1974), aff'd 510 F.2d 1324 (9th Cir.), cert. denied 95 S.Ct. 2668, it was held that before a preliminary injunction can be granted, it is incumbent upon the court to consider the threat of irreparable harm to the plaintiff if the injunction is not granted, the injury that granting the injunction would inflict upon the opposing party, and the probability that the plaintiff will succeed on the merits at the subsequent trial, together with the larger public interest.

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Lastly, in the rehearing in Katz v. Walkinshaw, supra, the court, faced with a defendant who was taking groundwater out of the basin to distant lands for sale, stated that a prelimimary injunction should be granted in such water rights cases, " . . . if at all, only on the clearest showing that there is imminent danger of irreparable and substantial injury, and that the diversion complained of is the real cause." 74 P. at 772.

These then are the principles applicable to the denial of the preliminary injunction by the trial court in the present matter.

It is ANAMAX'S position that the preliminary injunction was properly denied, in the exercise of sound judicial discretion. The volume of evidence before the trial court in the form of depositions, answers to interrogatories, requests for admissions, and exhibits, is extraordinary. This Court has apparently held that the reason given by the trial court as the sole reason for the denial, i.e., that groundwater may be moved from one parcel to another if both parcels overlie the common water basin, is erroneous. However, on the record the trial court reached the right result.

ANAMAX even went so far as to object as to FICO'S suggested form of Order denying its preliminary injunction because ANAMAX took the position that to deny the application solely because of the findings in the Tucson case was error, and that there were many other reasons why the injunction should have been denied. It is clear that ANAMAX made efforts to avoid what has occurred in this case, and that is, an inconclusive result. See Transcript of Proceedings, May 22, 1974, and July 9, 1974. It is well established in Arizona that where the trial court reaches the right result, but for the wrong reason, the trial court will nevertheless be affirmed. State v. Martin, 102 Ariz. 142, 426 P.2d 639 (1967); State v. Fortezan, 8 Ariz.App. 468, 471, 447 P.2d 560, 563 (1968). This Court must, therefore, either find

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that on the record the trial court abused its discretion in denying the preliminary injunction, or else affirm its denial, since it is not the province of this Court to examine the record and determine whether it would have entered a preliminary injunction on the facts.

The trial court was faced with two areas of inquiry in connection with the application: (1) Whether the applicant had shown a clear right to relief under the law, i.e., was there a wrong being committed and; (2) If so, was the damage being done to the applicant, if any, such that it would produce immediate and irreparable harm to it such that monetary damages could not adequately remedy the injury.

1. Has FICO shown a clear right to relief and probability of succeeding on the merits at trial? The trial court did not make findings of fact in connection with the application for preliminary injunction. The conclusions of law applied to this case were those set down by the trial court in connection with the cases involving the City of Tucson. This Court has held the conclusions of law to be erroneous. ANAMAX strenuously argues that the Court reconsider this holding, but for the sake of argument, assuming that a parcel-to-parcel transfer of water remains an evil under this Court's interpretation of the reasonable use doctrine, there may be findings of fact concerning whether in fact ANAMAX is moving water from a "parcel" to another "parcel." ANAMAX submits that the "parcel" concept in the reasonable use context is unworkable. If a man owns five acres of land and buys another five, does this then become one "parcel" or is he precluded from using water on the newly acquired "parcel?" In the case at bar, ANAMAX owns one "parcel" of land. This "parcel" consists of fee land, leased land, and rights of way and in one context this "parcel" could be considered to be several parcels. An owner of one "parcel" who loses a strip through it for highway purposes might become the

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owner of two parcels. The entire tract lies over the alluvium of the water basin, but the high waterbearing areas are, of course, toward the east side of its lands. Therefore, the appellees' wells, mills, and tailings ponds all lie on one "parcel." It is obvious that the Court has created a new and possibly unworkable issue in the FICO opinion, and that is the definition of a "parcel."

This Court has also noted that ANAMAX presented "other defenses" to the application for a preliminary injunction with which it was not presently concerned. The appellees' answer and response to the application consumed 11 legal pages and denied many of FICO'S allegations concerning the reasonableness of FICO'S use, affirmative defenses concerning FICO'S entitlement to equitable relief because of its own conduct, the affirmative defense that ANAMAX was equitably entitled to the use of ground-water from the farming lands it purchased at a cost of approximately two and one-half million dollars, which lands were retired from irrigation benefiting the overall water supply, and that the lands so retired consumptively used more water on a historical basis than ANAMAX was consumptively using in its mill and other equitable defenses. In short, the allegations, denials, and evidence before the trial court are voluminous on which it should properly have denied the preliminary injunction. The Court alluded to the fact that ANAMAX had not shown that it had under-ground water in its mill sufficient to carry on its present operation. This is a rather unusual concept if it is being suggested that the defendant in a preliminary injunction suit has the burden of proof. If this fact is significant it is the plaintiff who should be required to prove it. Surely this Court does not intend to deny ANAMAX its opportunity to require FICO to show that it is clearly entitled to relief under the facts and under the law.

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Furthermore, the Court may have erroneously placed itself in the role of the finder of fact when it implies that the groundwater basin subdivision involved in this case is not a true basin or "underground lake." This is a function of the trial court.

2. Is FICO being damaged by this well, and if so, is such damage immediate and irreparable? Assuming FICO shows a wrong is being committed, the other prong of the test for the propriety of a preliminary injunction is whether FICO shows clearly that it is suffering immediate and irreparable damage from the operation of this well. It is clear from the meager facts before this Court at the present time that this is a factual question on which FICO has the burden of proof. Yet the Court seems in its opinion to change that long-standing principle of equity and to declare that as a matter of law the operation of one single well will produce "immediate and irreparable damage" such that preliminary injunctive relief is appropriate. ANAMAX is entitled to show what effect the withdrawal of water from this one well will have on FICO, or that any damage from the operation of this well, if proven, would be either de minimus or compensable in money damages. At least ANAMAX is entitled to have the trial court consider such arguments. It must be pointed out that this Court is not the finder of fact as it was in the Jarvis decisions. This Court is presently in the posture it normally occupies, that of a reviewer of proceedings in the trial court. We respectfully submit that perhaps the majority has ignored the proper role of an appellate court in this case when it states that "[e]ven if it be assumed that damage to FICO'S wells has not yet taken place, still such damage must, inevitably, occur. FICO need not wait for its farms to be devastated before applying for injunctive relief against unlawful acts." Opinion at 13. We submit that the proper showing of irreparable and immediate damage has not been made, and that this remains the test in considering an application for a preliminary injunction.

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VI. ANAMAX REQUESTS EQUITABLE RELIEF AND DIRECTION FROM THIS COURT.

The majority has apparently prohibited a transfer of water from one parcel to another parcel in an area where withdrawals exceed natural and return flow recharge. In its most restrictive sense, the opinion may be interpreted to hold that beyond this, a user may not transfer water "downgradient" from the site of his well if other wells are thereby injured. ANAMAX strenuously urges a reconsideration of these problems. If the basic principles of the opinion are affirmed, however, ANAMAX herein seeks a declaration of the equitable principles which should apply in the court below and govern the future proceeding of the lawsuit. As in Jarvis II, supra, a clarification of rights is within the purview of this Court's equity powers. Equity does justice by the whole and not by the halves. See Jarvis II, supra, 106 Ariz. at 510, 479 P.2d at 173.

Equitable principles cannot be examined or applied in a vacuum. They must relate to concrete situations. In the Jarvis litigation this Court did not deal with the City of Tucson's entire source of water. Notwithstanding this fact, this Court in the exercise of its equitable power found a way for Tucson to acquire a supply in the Avra Valley. Tucson can acquire a supply in the upper Santa Cruz in the same manner. It is probable that the City of Tucson could condemn land to acquire a source of supply so indeed while the ports left open to the City of Tucson may be shrouded in fog or rimmed with reefs and rocks, they do have some place to go. If this decision is read in the most restrictive sense, ANAMAX has no port in the storm.

FICO does not contend that its damages could not be ascertained and compensated with money. To the contrary, FICO has not only alleged that they can be compensated for in money damages but has told the court the precise amount--$50,000,000.00. See

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FICO'S Complaint, Count Three, Abstract of Record, Vol. I, at pp. 24-29. The Complaint does not indicate what its preference is unless the numbering of counts is taken as an indication of its preference.

In Jarvis II, this Court declared that Tucson would be permitted to pump water out of the Avra-Altar Valley if it purchased irrigation lands therein and retired them from cultivation. This was permissible, the Court said, because of a "legislative policy . . . that the needs of agriculture give way to the needs of municipalities." Id. at 511, 479 P.2d at 174. The Court referred to A.R.S. §45-147 concerning the relative priorities of use in considering pending applications to the State Land Department for the use of appropriable waters.

ANAMAX questions the reliance on an appropriation statute to reach a conclusion as to the legislative intent on the use of nonappropriative waters, and submits that a clearer indication of legislative intent with regard to the use of groundwaters is found in the groundwater code, A.R.S. §§45-301 et seq. Where the State Land Department declares an area critical for lack of sufficient supply of groundwater, present irrigation uses are favored by prohibiting the irrigation of new lands inside the critical area. The legislature, however, specifically exempted mining uses, and it is submitted that this is a direct indication of the legislative policy that mining uses in and around a critical area are to be recognized. Id. §45-301(3). Because of this manifestation of legislative intent, ANAMAX seeks a declaration that where it has purchased farm lands and retired them from irrigation, it is equitably entitled to the use of the amount of waters as formerly used thereon. Because the waters are not taken out of the basin as they were in the Jarvis cases, but rather are available for return to the common supply after use, there should be no reduction because of lost recharge as this Court has required in

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Jarvis III, Jarvis v. State Land Department, _____ Ariz. _____, 550 P.2d 227 (1976). Equity requires that ANAMAX be entitled to use water to the extent that its recharge is greater than or equal to the amount of recharge formerly resulting from the irrigation of the retired lands.

There is also at least one other equitable principle which should apply here. And that is the law does not require the performing of a senseless act. For example, Chandler v. Austin, 4 Ariz. 346, 42 P. 483 (1895), involved a dispute between two appropriators of surface waters out of the Salt River. The defendants were upstream from the plaintiffs and were subsequent appropriators. They took their own appropriation as well as that of the lower, prior appropriator and sought to use it for generating power. After it went through the power plant, they intended to deliver it back to the plaintiffs in the plaintiffs' ditch, above the plaintiffs' place of use, but not actually in the river. The trial court issued an injunction which required the defendants to return the water into the river so that it could then be diverted by the lower plaintiffs into the plaintiffs' ditch. The territorial supreme court held that because there was no showing that any damage had accrued or might accrue to the plaintiffs by having their water delivered to them at the ditch rather than back in the river, that it was not a case for an injunction. If any damage could be shown, it was compensable in damages. In other words, this Court stated that because of the public policy of getting the most beneficial use out of the waters of the state as possible, and because there was no showing of injury to the plaintiffs, making the defendants take the water out of plaintiffs' ditch and putting it back into the river so that the plaintiffs could then put it into their ditch by themselves would not be directed. A senseless act would not be required, even though plaintiffs may have had a technical, legal

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right to it. In the case at bar, these principles are applicable in the following ways: (1) Even under a most restrictive interpretation of the FICO opinion, ANAMAX would not be precluded from setting up its mill and tailings ponds directly over its wellsite. This would require the shipping of ore down from the pit and would be less economical and, under the facts of this case, senseless, just as senseless as the injunction sought in Chandler, supra. Unless and until FICO can show that there is any real injury caused by the situation as it exists today as opposed to setting the mill over the wellsites, equity should not deny ANAMAX'S water use. If such injury is shown, however, it would not be a case for injunction, but rather one for money damages; (2) Because ANAMAX has expended some two and one-half million dollars to acquire farm lands which surround and abut FICO'S lands, and has retired them from irrigation, a practice followed by the other mining company defendants herein, the overdraft on the supply of groundwater in the Upper Santa Cruz Basin was greatly benefited. ANAMAX could, if it desired, go into the farming business on its lands which were cultivated within five years prior to the declaration of the Sahuarita-Continental critical groundwater area. Therefore, ANAMAX should equitably be entitled to use water as it is presently doing, unless FICO can show that it is worse off under the present situation than it would have been had these lands continued to have been irrigated. Equity and common sense should not require return to irrigation of these retired lands.

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VII. WHEREAS THE REASONABLE USE DOCTRINE MAY NOT HAVE BEEN A WISE CHOICE IN BRISTOR II, IT HAS LONG BEEN THE LAW IN ARIZONA AND SHOULD BE APPLIED EVENLY AND CONSISTENT WITH THE LONG-STANDING PRINCIPLES WHICH APPLY UNDER THAT DOCTRINE.

The majority stated at page 14 of its opinion:

> "In the end, what appellees are asking this Court to do is to prefer the interest of mining over farming, irrespective of the time when rights were acquired and the then rule of law."

ANAMAX has never contended for such an approach, but rather it contends only that the reasonable use doctrine be applied evenly. In Bristor II, supra, this Court adopted the doctrine of reasonable use, rejecting the correlative rights rule and the doctrine of prior appropriation. Either of the latter two rules would have resulted in more judicial control over the quantity of groundwater pumped than is permitted by the reasonable use rule. The vigorous dissent in Bristor II predicted a "mad race to 'mine' percolating waters, which are our greatest natural resource" that would "continue unabated until . . . these waters are declared public in character and suitable regulatory measures are adopted." 75 Ariz. at 239, 255 P.2d at 179 (Phelps & Udall, J.J. dissenting). This Court adopted the reasonable use rule notwithstanding the "horror" paraded before it by amici curiae that under the traditional interpretation of the rule percolating waters could be pumped to lands so long as they lay in the water basin, see Section II, supra, turning cries for conservation of water to the police power of the state. It is submitted that this Court is trying to undo some of the damage that was done by adoption of the reasonable use doctrine, which is a laudable goal, since the doctrine probably belongs in states having more groundwater than Arizona. However, reasonable use is the law and this Court should apply it evenly. ANAMAX submits that references to "first in time, first in right" and the reasoning of the majority opinion

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is in response to the overall problem inherent in the reasonable use doctrine, that is that there is no control upon overdraft provided the water is used "reasonably" and on lands within the water basin so that the water after use is available for return to the common supply. Just as the rule of private ownership of percolating waters has become entrenched in Arizona law and precluded this Court from adopting prior appropriation in Bristor II, so has the reasonable use doctrine become entrenched in the law since Bristor II. ANAMAX simply contends for an equal, equitable, and just application of the rule. The problem of overdraft was left to the legislature in Bristor II. So should it be left to the legislature in the present litigation. Hundreds of millions of dollars have been invested in the mining company defendants' enterprises based on what would seem to be a reasonable interpretation of Arizona law.

The pressure and necessity of dealing with such a precious resource as water should not cause this Court to cloud or obscure basic tenets long held to be applicable by persons doing business in Arizona. There is not enough groundwater to go around on any long-term basis. One class of user should not be favored over another, and to now suggest that the reasonable use doctrine is covered by the principle of "first in time, first in right" is to announce a principle that has never been the law in Arizona or any other state that applies the reasonable use doctrine.

ANAMAX has urged that the present use of its water does not violate the reasonable use doctrine. It has argued alternatively that even if its use could be held to be in violation of the doctrine that injunctive relief is not the appropriate remedy.

If the Court cannot be persuaded to accept either or both of these contentions, ANAMAX urges the Court to reconsider its position that only the legislature can afford ANAMAX any relief. This Court is urged to explore with great care Justice Cameron's

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suggestion that it may be time for Arizona to consider a judicial modification of rules relating to groundwater. The narrow construction the Court has given the reasonable use doctrine certainly justifies Justice Cameron's suggestion.

This Court has shown no reluctance in the past to overrule prior holdings and chart another course when previously existing social, political, and economic conditions change to the point that sound public policy requires judicial reexamination of an existing rule. Ray v. Tucson Medical Center, 72 Ariz. 22, 230 P.2d 220 (1951); Stone v. Arizona Highway Commission, 93 Ariz. 384, 381 P.2d 107 (1963).

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VIII. CONCLUSION

ANAMAX respectfully requests this Honorable Court give its attention and clarification to the opinion of the majority. The principles set forth in Mr. Chief Justice Cameron's dissent commend themselves to reason and may be more workable than is the decision of the majority. The common supply principle of the doctrine of reasonable use is long-established and there is ample authority to support it. A proper interpretation of the Bristor litigation and the Bristor complaint supports rather than detracts from appellees' position. This Court should reassess its role as an appellate court and apply the standard suggested by ANAMAX in reviewing this denial of a preliminary injunction. Lastly, whereas the reasonable use doctrine may not be ideally suited for conditions in Arizona, it is the law of the land. This Court is aware of the difficulties of the doctrine and the "race to mine percolating waters" which is inherent in it. This problem is a legislative matter. It is submitted that a proper analysis of the situation will cause the Court to delete its references to the principle of first in time, first in right as having no place in the common law doctrine. It is also commensurate with doing whole justice to examine the equities involved, clarify them in connection with this litigation, and affirm that it is the public policy of the state to promote the wisest, best, most economic, and most equitable sharing of the primary material good of existence--water.

Respectfully submitted,

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By _____
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and

. . .

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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

TOM G. BRISTOR and MARY BRISTOR, his wife;

OSBORNE H. CAHOW and WINIFRED P. CAHOW, his wife;

D.B. CARVER and MARGARET CARVER, his wife;

MARY G. DOWD;

L.M. GRISWOLD and LUCILLE GRISWOLD, his wife;

C.K. HASH and MARGARET HASH, his wife;

L.D. HEMMAN and LOLA HEMMAN, his wife;

LESTER E. JENNINGS and MARIE JENNINGS, his wife;

CLAUDE W. MELICH and MARGARET MELICH, his wife;

LEMAY F. GRAM and RUTH GRAM, his wife;

MODELL E B. PLEMPTON, a widow;

WILLIAM E. PARKER and THELMA A. PARKER, his wife;

[illegible] A RAUCH and [illegible] H. RAUCH;

No. [illegible]
COMPLAINT

REPRODUCED FROM MICROFILM
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OF LIBRARY AND ARCHIVES

JOHN H. ROBERTS and KATHRYN A. ROBERTS, his wife;

WALTER L. ROBERTS and ETHEL T. ROBERTS, his wife;

LILLIAN ROGERS, a widow;

JOE SERIO and MARY SERIO, his wife;

GEORGE SHELTON and WILHELMINA B. SHELTON, his wife;

HARK STAHLBERG and IRENE FRANCES STAHLBERG, his wife;

WILLIAM VERMESCHER and CLEO VERMESCHER, his wife;

JOHNNY WILLIAMSON, a single man,

Plaintiffs,

vs.

A.B. CHATTAM and JANE DOE CHATTAM, his wife;

[illegible] CHATTAM and JANE DOE CHATTAM, his wife;

[illegible] CHATTAM and JANE DOE CHATTAM, his wife;

[illegible] CHATTAM and JANE DOE CHATTAM, his wife;

[illegible] CHATTAM and JANE DOE CHATTAM, his wife;

[illegible] CHATTAM and JANE DOE CHATTAM, his wife;

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STEVE H. OLIVIN and JANE DOE OLIVIN, his wife;
GERALD R. PHELPS and JANE DOE PHELPS, his wife;

HOWARD HAMLIN and JANE DOE HAMLIN, his wife;

MARSHALL D. KUCHELSKY and JANE DOE KUCHELSKY, his wife;

CHARLES D. PITRAT and JANE DOE PITRAT, his wife;

SIDNEY WILDEN and JANE DOE WILDEN, his wife;

PAUL A. WILDEN and JANE DOE WILDEN, his wife;

CHANTICLEER DAIRY, INCORPORATED, a corporation;

JOHN DOE I and MARY DOE I, his wife;

JOHN DOE II and MARY DOE II, his wife;

JOHN DOE III and MARY DOE III, his wife;

DOE CORPORATION I; and

DOE CORPORATION II,

Defendants.

FIRST CAUSE OF ACTION

COME plaintiffs by their attorney, DWIGHT L. SOLOMON, and for their claim and first cause of action against defendants, and each of them, allege as follows:

I.

That defendants reside in Maricopa County, Arizona.

II.

That CHEATHAM DAIRY, INCORPORATED, is a private corporation, organized and existing under the laws of the State of Arizona; that said corporation owns property and conducts business in Maricopa County, State of Arizona.

III.

That plaintiffs do not know the true first name of defendants, JOHN DOE CHEATHAM, JANE DOE CHEATHAM, JOHN DOE CHEATHAM, JANE DOE CHEATHAM, JOHN DOE CHEATHAM, JOHN DOE COLVIN, JOHN DOE [illegible], JOHN DOE [illegible], JANE DOE

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[illegible], JANE DOE PIERCE, JANE DOE WILDEN, JANE DOE WILDEN, or the true names of defendant JOHN DOE I and MARY DOE I, JOHN DOE II and MARY DOE II, JOHN DOE III and MARY DOE III, DOE CORPORATION I, and DOE CORPORATION II; that such first names are fictitious; that when the true first name or names of said defendants are discovered plaintiffs pray leave of the Court to amend this proceeding accordingly. That all of said defendants, with the exception of CHEERAM DAIRY, INCORPORATED, were husband and wife as set forth in the heading of this action.

IV.

That at all times mentioned herein said defendants, with the exception of said corporation were engaged in the business of the respective communities, composed of the respective defendants, as husband and wife.

V.

That for many years last past, no-

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[illegible] plaintiffs and their predecessors in interest have been the owners and in possession of certain real property in Maricopa County, Arizona, located approximately one and one-half miles south and one mile east of Laveen, Arizona, east of Lateral Seventeen (17) in said county, in Sections Fifteen (15), Sixteen (16) and Twenty-one (21), also Section Twenty-two (22), Township One South(T1S) Range Two East (R2E) of the Gila and Salt River Base and Meridian.

VI.

That plaintiffs and/or their predecessors in interest, since said time, have been in possession thereof and have expended large sums of money improving the land by erecting homes thereon in which plaintiffs reside, or lease to other persons, at the time of the filing of this complaint.

VII.

That defendants own certain lands,

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located south and west of plaintiffs' lands, in Sections Seventeen (17), Twenty (20) and Twenty-one (21), Township One South (T1S), Range Two East (R2E) of the Gila and Salt River Base and Meridian.

VIII.

That at all times mentioned herein there was a common supply of underground water underlying said premises of plaintiffs and defendants.

IX.

That plaintiffs and/or their predecessors in interest, at various times since 1910, or thereabouts, supply themselves and their families with domestic water for drinking, bathing, laundry and other such purposes, from wells into the ground upon their lands to draw water from said common underground water supply. That for many years last past, before the filing of this complaint, plaintiffs and their predecessors in interest have

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enjoyed the use of such water for the purposes indicated above; that plaintiffs enjoyed such use continuously until shortly before the filing of this complaint.

X.

That during the year 1948 and continuing into 1949, defendants drove a series of large irrigation wells to great depths upon their lands, installed powerful pumps therein and operated same in such manner as to pump therefrom waters from the supply of underground water common to the lands of both plaintiffs and defendants.

XI.

[illegible]

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That defendants' pumps were and are capable of drawing a tremendous quantity of water from said common supply of underground water and up to the date of the filing of this complaint draw a tremendous supply of such water from the ground by means of pumps located on defendants' lands.

XII.

That during the summer of 1948 the level of water in plaintiffs' wells began to drop and to the date of the filing of this complaint, has dropped further.

XIII.

That defendants have pumped a quantity of underground water so great, from the available common supply, that the entire water level in South plaintiffs' lands has been lowered, causing the level of water in plaintiffs' wells to drop, as set forth hereinabove; that the lowering of the water level in plaintiffs' wells, as aforesaid, has been

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caused by defendants pumping a great quantity of water from defendants' lands. That such pumping by defendants, on their lands, has caused the underground water level of such common supply to drain from beneath plaintiffs' lands and into and below the surface of defendants' lands and that defendants have been and now are pumping water from their pumps, which has been abstracted from that portion of the common supply underlying plaintiffs' lands.

XIV.

That plaintiffs are informed and believe, and therefore allege, that defendants, have conveyed, and are conveying the water off the premises where pumped and are using the same for the purpose of developing new and heretofore un-irrigated and uncultivated lands approximately 7 miles from plaintiffs' lands; that the water so pumped by defendants confers no benefit upon intervening lands

-1.-

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[illegible] pumping operation is conducted;

that such use by defendants is an unreasonable use as to plaintiffs; that defendants, by such pumping, are using an unreasonable share of the common underground water supply available to the lands of the parties hereto in relation to the rights of plaintiffs in and to the common water supply underlying plaintiff's lands.

XV.

That the water so pumped by defendants is taken from the supply common to the lands of all parties and when conveyed to other lands and used to irrigate the same, is otherwise, does not return to replenish said common supply.

XVI.

That due to defendants' pumping operations, as aforesaid, it has been necessary for some of the plaintiffs to transport water from other places to

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to supply themselves with water for drinking, bathing, laundry and other domestic uses, and to incur great expenses in connection therewith, all as set forth in detail below.

XVII.

That due to defendants' pumping operations, as aforesaid, it has been necessary for plaintiffs to drive their domestic wells to greater depths into the ground upon their respective lands, to install well supplies and more powerful pumps therein, and to incur great expenses in connection therewith, all as set forth in detail below.

XVIII.

That the following plaintiffs, to supply themselves with domestic water, have been called to incur expenses for the purposes enumerated:

(420)

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	Expense of Carrying Water	Deepening Well and Pump Equip.	Total
TOM G. BRIEGER and MARY BRIEGER, his wife,	$50.00	$1,399.62	$1,449.62
CARLENE H. CARLOW and WINIFRED P. CARLOW, his wife	50.00	305.28	355.28
D.B. CARVER and MARGARET CARVER, his wife,	50.00	342.94	392.94
MARY G. FORD;	50.00	400.00	450.00
L.H. GRISWOLD and LUCILLE GRISWOLD, his wife	50.00	859.40	909.40
C.K. HASH and MARGARET HASH, his wife;	50.00	563.83	613.83
LESLIE F. JENNINGS and MARIE JENNINGS, his wife	50.00	1,667.00	1,717.00
CLAUDE W. MELICK and MARGARET MELICK, his wife	50.00	500.00	550.00

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[illegible]			
MADELINE H. PLYMPTON, a widow,	$50.00	$1,207.06	$1,257.06
[illegible] and THORA A. [illegible], [illegible] wife,	50.00	1,375.71	1,425.71
[illegible] A. [illegible] and [illegible] H. [illegible];	50.00	48.33	98.33
JOHN H. [illegible] and [illegible], his wife;	50.00	184.00	234.00
[illegible] and [illegible], his wife;	[illegible]	119.64	169.64
LILLIAN [illegible], a widow;	50.00	500.00	550.00
GEORGE [illegible] and [illegible] WILHELMINA [illegible], his wife;	50.00	499.57	549.57
MARK STAHLBERG and [illegible]			[illegible]

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cont'd.

[illegible] and [illegible], his wife;	[illegible]	$1,097.25	$1,147.25
[illegible], a single man;	50.00	229.57	279.57

XIX.

That due to such pumping, as aforesaid, the market value of the various tracts of land owned by plaintiffs and overlying the common water supply have been impaired and diminished. That the reasonable market value before the pumping and at the time of the filing of this complaint, of each of such tracts owned by plaintiffs, and the respective diminutions are as follows:

	Value before pumping	Value at Date of filing Complaint	Diminution of Values
TOM G. BRISTOR and MARY BRISTOR, his wife	$20,000.00	$10,000.00	$10,000.00

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cont'd

OSBORNE H. CA[illegible] and WINIFRED P. CA[illegible], his wife;	$ 5,000.00	$2,000.00	$ 3,000.00
D.B. CARVER and MARGARET CARVER, his wife;	8,000.00	4,000.00	4,000.00
MARY [illegible]	37,000.00	16,000.00	21,000.00
L.M. GRISWOLD and LUCILLE GRISWOLD, his wife;	25,000.00	10,000.00	15,000.00
C.E. HASH and MARGARET HASH, his wife	30,000.00	20,000.00	10,000.00
L.D. HEMMAN and LOLA HEMMAN, his wife;	51,000.00	30,000.00	21,000.00
LESTER K. JENNINGS and MARIE JENNINGS, his wife	30,000.00	13,000.00	17,000.00
[illegible] P. CRAM and [illegible] CRAM, his wife	15,500.00	10,000.00	5,500.00
MADELINE B. PLYMPTON, a widow;	[illegible],000.00	12,000.00	13,000.00

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[illegible]			
[illegible] and [illegible], his wife;	12,000.00	6,000.00	6,000.00
OLIVE A. RAUCH and CELESTE H. RAUCH	65,000.00	45,000.00	20,000.00
JOHN H. ROBERTS and KATHRYN A. ROBERTS, his wife,	15,000.00	10,000.00	5,000.00
LILLIAN ROGERS, a widow	50,000.00	10,000.00	40,000.00
JOE SERIO and MARY SERIO, his wife;	5,500.00	4,000.00	1,500.00
GEORGE SHELTON and WILHELMINA B. SHELTON, his wife;	16,000.00	8,000.00	8,000.00
MARK STAHLBERG and IONE FRANCES STAHLBERG, his wife;	19,400.00	14,550.00	4,850.00

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cont'd

WILLIAM VEJROSTEK and CELO VEJROSTEK, his wife;	$12,500.00	9,000.00	3,500.00
JOSEPH ZITZELBERGER, a single man	5,000.00	3,500.00	1,500.00

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XX.

That plaintiffs are informed and believe, and therefore allege, that it will be impossible to secure water from their wells and pumps in the future if defendants continue such pumping, because of the geologic formation underlying plaintiffs' lands.

XXI.

That plaintiffs are informed and believe and therefore allege that defendants, and each of them, intend to continue such pumping permanently; that if such pumping be continued plaintiffs' lands will be adversely affected as to marketability or mortgability and plaintiffs, and/or their successors in interest, and their real property will suffer great and irreparable injury.

XXII.

That plaintiffs have no plain, speedy or adequate remedy at law.

WHEREFORE, plaintiffs pray judgment

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of the Court against defendants, and each of them:

1. For damages to the real property of each plaintiff as the total of the damages set forth in Paragraphs XVIII and XIX, as follows:

TOM G. BRISTOR and MARY BRISTOR, his wife;	$11,449.62
OSBORNE H. [illegible] and WINIFRED P. [illegible], his wife,	3,355.28
D.B. CARVER and MARGARET CARVER, his wife	4,332.94
MARY [illegible] DOWD	21,450.00
L.M. GRISWOLD and [illegible] GRISWOLD, his wife	15,900.40
C.A. HASH and MARGARET HASH, his wife,	13,513.83
[illegible] and [illegible], his wife,	21,[illegible]
[illegible] and [illegible], his wife,	14,717.[illegible]
[illegible] and [illegible], his wife	550.[illegible]
[illegible], a widow	14,257.[illegible]
[illegible] and [illegible], his wife,	[illegible],4[illegible].71

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OLIVER A. RUSCH and CELESTE M. RUSCH	$20,098.33
JOHN R. ROBERTS and KATHRYN A. ROBERTS, his wife and WALTER L. ROBERTS and ETHEL T. ROBERTS, his wife,	5,403.64
LILLIAN ROGERS, a widow	40,550.00
GEORGE SHELTON and WILHELMINA B. SHELTON, his wife	8,549.57
HANK STAHLBERG and IONE FRANCES STAHLBERG, his wife	5,900.00
WILLIAM VLCHOSTEK and CLEO VLCHOSTEK, his wife	4,647.25
JOSEPH ZIMMERMAN, a single man,	1,779.57
all in the total sum of Two Hundred Fourteen Thousand Three Hundred Thirty-two and 20/100	$214,332.20

2. That a writ of injunction issue from this court that defendants, and each of them, and any and all persons, firms, corporations, acting for or under them, be perpetually enjoined from abstracting, diverting or using any of the waters which plaintiffs, or any of them, were pumping from wells on their respective tracts of real property,

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STATE OF ARIZONA)
) ss:
COUNTY OF MARICOPA)

I **Antonio Bucci** hereby certify:
Name

That I am **Reference Librarian, Law & Research Library Division** of the Arizona State
Title/Division
Library, Archives and Public Records of the State of Arizona;

That there is on file in said Agency the following:

Arizona Supreme Court, Civil Cases on microfilm, Film #36.1.764, Case #11439-2, Supreme Court Instruments, Part One, Supplemental Memorandum in Support of Motion for Rehearing, pages 360-429 (70 pages)

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

Antonio Bucci
Signature

Subscribed and sworn to before me this 12/12/05
Date

Etta Louise Muir
Signature, Notary Public

My commission expires 04/13/2009.
Date