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FILED
ARIZONA COURT OF
APPEALS DIV. TWO

JUN 12 3 45 PM 1974

WALTER H. BEITZ
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IN THE

Court of Appeals

The State of Arizona

DIVISION TWO

11439.2

FILED
JUN 15 1974
CLERK SUPREME COURT
BY

FARMERS INVESTMENT
COMPANY, a corporation,

Appellant,

vs.

ANDREW L. BETTWY, as
State Land Commissioner
and THE STATE LAND DE-
PARTMENT, a department
of The State of Arizona,
and PIMA MINING COMPANY,
a corporation,

Appellees.

No. 2 CA-CIV / 1675

PIMA

County

Superior Court

No. 116542

SNELL & WILMER

3100 VALLEY CENTER
PHOENIX ARIZONA 85073

APPELLANT'S OPENING BRIEF

(116)

TABLE OF CONTENTS

	Page
Table of Cases and Authorities.....	(i), (ii)
The Nature of the Action.....	1
What the Issues Were.....	2
How the Issues were Decided and What Judgment or Decree was Given.....	6
Concise Statement of Ultimate Material Facts (Prefatory Explanation).....	7
Concise Statement of Facts.....	9
Questions Presented for Review.....	13
Argument.....	15
Conclusion.....	40

TABLE OF CASES AND AUTHORITIES

<u>Cases</u>	<u>Page</u>
Alaska Placer Company v. Lee (Alaska Sup. Ct.) 458 P.2d 218.....	29
Arizona Copper Co. v. Gillespie, 12 Ariz. 1950, 100 P. 465 (1909).....	27, 28
Bristor v. Cheatham, 73 Ariz. 228, 240 P.2d 185.....	18
Bristor v. Cheatham, 75 Ariz. 227, 255 P.2d 175.....	15, 17
Delano v. Smith, 92 N.E. 500 (1919).....	35, 36
Dorsey v. Speelman, Wash. App., 459 P.2d 416.....	38
Harris v. Krekler, 133 Ind. App. 190, 46 N.E.2d 267 (1943).....	29
Hastings Oil Co. v. Texas Co., 149 Tex. 416, 234 S.W.2d 389.....	29
Hervey v. Rhode Island Locomotive Co., 93 U.S. 664, 23 L.Ed. 1003.....	32, 33
Jarvis v. State Land Department, 104 Ariz. 527, 456 P.2d 385.....	15
Jarvis v. State Land Department, 106 Ariz. 506, 479 P.2d 169.....	15, 19, 20 22, 23, 34
Jordan v. United Verde Copper Co., 9 F.2d 144 (1925 aff'd, 14 F.2d 299, 304 (1926) Cert. den. (1926).....	29
Kory v. Less, 22 S.W.2d 25 at 28 (1929)....	36, 37
Rothrauf v. Sinking Spring Water Co., 339 Pa. 129, 14 A.2d 87, 90 (75 Ariz. 235, 236).....	16

(i)

Cases (Con't)

Schenk v. City of Ann Arbor, 196 Mich. 75 163 N.W. 109 at 114 (1917).....	20
Sparkman v. Hardy, 78 So.2d 584 (1955).....	38

Statutes and Authorities

42 Am. Jur. 2d, p. 907, Sec. 149, p. 803, Sec. 60.....	29
43 C.J.S., p. 525, 527, Sec. 61.....	29
62 A.L.R.2d 310, Sec. 2, 21, 22.....	29
17 Am. Jur.2d, Sec. 186, pp. 553, 554.....	31
17 C.J.S., Sec. 211, p. 1013, et seq.....	31
56 Am. Jur., Sec. 2.....	35

(ii)

THE NATURE OF THE ACTION

Farmers Investment Company, an Arizona corporation, filed suit in the Pima County Superior Court in November, 1969, against The Anaconda Company, a corporation, American Smelting and Refining Company, a corporation, Duval Corporation, a corporation, Duval Sierrita Corporation, a corporation, and Pima Mining Company, a corporation claiming that these defendants were unlawfully using ground water from the Sahuarita-Continental Critical Groundwater Area to the injury of Farmers Investment Company.

In June, 1973, Farmers Investment Company, (hereinafter "FICO") filed its Motion for Summary Judgment against Pima Mining Company (hereinafter "Pima", seeking a determination that Commercial Lease No. 906 between Pima and the State of Arizona (State Land Department) was illegal and void as contravening the Enabling Act, the Arizona Constitution and various Arizona Statutes.

Pima, in turn, filed its Motion for Summary Judgment against FICO for a summary determination that this lease was valid.

The trial judge, The Honorable Robert O. Royston, after hearing oral arguments on these two Motions and considering the briefs filed, granted Pima's Motion and denied FICO's Motion.

WHAT THE ISSUES WERE

The Motions were argued, briefed and considered by the Court together.

The FICO Motion

The Motion as filed by FICO raised only the issue as to whether a commercial lease executed and delivered by the State Land Department to a mining company of state trust land located within a duly designated critical groundwater area, which lease authorized the lessee to drill water wells in the state trust land and pump and transport large quantities of groundwater from this state trust land for

uses outside the critical area unrelated to a beneficial use of the leased state land is void as contravening the limitations imposed upon conveyancing, leasing or otherwise disposing of these state trust lands and the products thereof by the Enabling Act and the Arizona Constitution and statutes implementing the authorizations of the Enabling Act.

Pima's Motion

Pima's ground for its Motion was stated:

"The ground of this motion is that there are valid defenses to said Count as to which there are no triable issues of fact. This Motion will be based upon this Motion, the Affidavits and Memorandum annexed hereto and upon all the records and files of this action."
(A.R. 66, 67)

Pima, by the affidavit of George A. Komadina, its Vice President and General Manager, injected the issues as to whether the use made by Pima was either reasonable or beneficial by specifying the uses to be made of the water pumped from the Critical Groundwater Area and the value

to the state of Pima's operations as justifying
"Commercial Lease No. 906".

These additional issues presented by this
Affidavit were:

(a) Does the fact that Pima has
paid the state mining lease mineral
royalties between 1967 and 1972 of
\$5,373,000.00 validate the lease or
legally justify the lease?

(b) Does the fact that Pima, in
addition, pays the state income, sever-
ance (assertedly) and sales taxes
legally justify or validate the lease?

(c) Does the fact that an important
purpose and use of the water pumped from
the state land is to transport tail-
ing refuse from the mill of Pima and
dump this tailing refuse in large
quantities upon state land, Sections
9 and 10, Range 13 East, Township 17
South, which land is also under commercial
lease to Pima as a dump or tailing pond,

validate the lease or does this continuing waste to state land, in any event, invalidate the lease?

The additional issue of the legality of pumping of groundwater from land within a duly designated Critical Groundwater Area for uses away from the land producing the water and unrelated to any beneficial use of the land producing the water must also be considered an issue since the order and judgment entered by Judge Royston constituted a general adjudication upon all issues reasonably within the four corners of Count IV of the Amended Complaint. Count IV incorporates paragraphs III, IV and V of Count II of the Amended Complaint by reference. (A.R.2) These three paragraphs found in Count II, since they were before the trial court as part of the pending pleadings, are reproduced as Appendix A hereto.

In Count IV, FICO further alleged: (A.R. 3, 5)

Pima Mining Company has constructed four large irrigation type water wells

within said leased area and has pumped and is now pumping large quantities of groundwater from the groundwater supply subjacent to said state land and transporting the same for use outside of the Sahuarita-Continental Groundwater Area.

* * *

The continued pumping of groundwater from the critical groundwater area and the area adjacent to the farm lands of plaintiff constitutes a trespass upon plaintiff's property rights and a violation of the water law of the State of Arizona.

FICO, therefore, presents its claims, arguments and authorities bearing upon this issue.

HOW THE ISSUES WERE DECIDED AND
WHAT JUDGMENT OR DECREE WAS GIVEN.

Judge Royston denied FICO's Motion and granted Pima's Motion and ordered Judgment entered in favor of Pima and against FICO "on Count Four". (A.R. 165) Judge Royston, on his own motion, also ordered entry of the Judgment as a final appealable Judgment (A.R. 163,164)

7

CONCISE STATEMENT OF
ULTIMATE MATERIAL FACTS

Prefatory Explanation

Following the entry of judgment against FICO, FICO filed a Petition for a Special Action with the Arizona Supreme Court, challenging the validity of Judge Roylston's ruling. In view of the fact Judge Roylston had entered judgment against FICO generally upon "Count Four" and the fact that Pima had asserted the legality of its use of the pumped water apart from the validity of Commercial Lease No. 906, FICO considered that since all issues before Judge Roylston, which were or could have been litigated, were concluded by his broad form of judgment, FICO had no choice but to present its Petition upon the basis of Pima's Motion rather than FICO's Motion.

All other defendants sought to intervene in the Supreme Court application, based upon the assertion that the issues were broader than the validity of Commercial Lease No. 906. The

Supreme Court, in accepting jurisdiction, noted:

"...the Court, in accepting jurisdiction of the Petition for Special Action, does not propose to write on the issue of reasonable use at this time."

and, therefore, denied intervention.

FICO, therefore, was obliged to proceed with an appeal of the Judgment, insofar as the Supreme Court had not taken jurisdiction, or be faced down the road with claims of res judicata and collateral estoppel. FICO's Notice of Appeal was limited to an appeal of the issues embraced within the Count Four pleadings and the Summary Judgment pleadings and papers of Pima, except insofar as the Arizona Supreme Court had assumed and exercised jurisdiction. FICO interprets the Supreme Court order as a limitation upon the jurisdiction it has assumed to the question as to the validity or invalidity of Commercial Lease No. 906 because of the limitations contained in the Enabling Act and the Arizona Constitution and statutes upon the power of the State of Arizona to sell, lease or otherwise dispose of trust state land.

FICO's concise statement will be tailored insofar as practical to these issues as outlined, supra.

CONCISE STATEMENT OF FACTS

On October 24, 1966, the State Land Commissioner executed State Land Department "Commercial Lease" No. 906. Pima Mining Company executed this instrument as Lessee on December 5, 1966. A copy of the Lease is found following page 179, Vol. 2 of the Abstract of Record.

This Lease is for a period ending October 23, 1976, and expressly states " * * * that this Lease is issued for the purpose of: development of water farm through deep wells, booster pump and power substation, gathering tanks, pipelines, power lines, etc."

The stated rental is fixed at "\$10.00 per acre or 1¢ per 1,000 gallons water removed, whichever is greater, for Lots 1 and 2; S2NE. \$1.00 per acre of (sic) 1¢ per 1,000 gallons water removed, whichever is greater, for the SE."

Pima Mining Company has caused four deep water wells of approximately 5,000 gallons per minute capacity to be drilled and constructed on said state school land and has installed large pumps therein, has constructed power lines, pipe lines, storage tanks, booster pumps and other equipment and paraphernalia necessary to enable Pima Mining Company to pump many thousand acre feet of ground water annually from the ground water supply subjacent to the surface of said state land and has caused and is presentiy causing the ground water supply a part of said state land to be mined therefrom, stored and transported away from said land. This ground water pumped from the ground water which is a part of the said tract of state school land is not put to any beneficial or other use on said state land but is transported away from and put to uses unconnected with said state land.

The Sahuarita-Continental Critical Croundwater Area was designated as a critical groundwater area by the State Land Commissioner

and the State Land Department pursuant to the provisions of Article 7, Chapter 1, State Water Code, as amended (Sections 45-301 et seq. ARS) generally referred to as the Ground Water Code, on October 14, 1954, which designation remains in full force and effect to the date hereof. The area lies south of Tucson, Arizona, and in what is commonly referred to as the Upper Santa Cruz Basin.

FICO now owns and at the time said Critical Groundwater Area was designated it owned agricultural land in the aforesaid Critical Groundwater Area which it then had farmed and is presently farming to various crops, mostly as a pecan orchard. A substantial part of said acreage is contiguous to and in the general area of the state school land embraced within the terms of said Commercial Lease 906. FICO relies upon and requires the use of ground water of the area for the irrigation of its crops.

The state land the subject of said Commercial Lease at the time said Sahuarita-Continental Critical Groundwater Area was

designated and to the present time is a part of and within said Critical Groundwater Area and the uses which Pima Mining Company has made and now makes of the ground water withdrawn from said state land is in connection with its mining and milling of copper ore at its mine and mill located approximately four miles westerly from the lands the subject of Lease 906.

Pima holds commercial leases from the State of Arizona for two sections of state land, Commercial Lease No. 907-01 and 907-02 for use as tailing dumps and also holds right-of-way leases or permits for installation and maintenance of its water transportation lines and facilities over state trust land also from the State Land Department acting for the State of Arizona.

One of the important uses Pima makes of the water pumped from the critical area is for the transportation of tailing from its mill for deposit in its tailing ponds on the two areas of state trust land leased to Pima under these two commercial leases.

In 1972, 4,991,267,000 gallons of tailing effluent was dumped on this state land.

(NOTE: This statement may be erroneous in that the figures given in the Komadina Affidavit relate only to water. It may be that this figure is entirely too low since if it is a net figure reflecting only water content of the tailing dumped, the amount would be much larger. However, the actual amounts are not particularly important since the amount of tailing waste dumped on the state trust land under the commercial leases from the State Land Department is very large in any event.)

QUESTIONS PRESENTED FOR REVIEW

1. Whether pumping and transportation of groundwater from state trust lands within a critical groundwater area under a state commercial lease for use outside of said critical area and away from these leased lands, which use is unrelated to the beneficial use and enjoyment of the land from which the water

is withdrawn, thereby causing the water wells of a groundwater user in the same area as said leased lands and within the critical area to be damaged, is unlawful or lawful?

2. Whether large revenues resulting to the state from misuse of state trust lands through illegal leasing thereof, justifies the wrongful use of the state land?

3. Whether use of groundwater for the purposes of an arrangement between the State of Arizona, acting through its State Land Department, and Pima, which involves misuse of state trust lands because it is "a complete system for production of water, transportation of water to the mill area where the ore from state leases is processed and for transportation of tailings away from said mill via water to tailings pond deposit area" (when) "each aspect of this system is necessary for the mining and milling of ore" is a beneficial use? (A.R. 84, a representation made in Komadina Affidavit as to the use of critical area groundwater.)

ARGUMENT

1. Pima's groundwater use is, as a matter of law, illegal.

There is no serious contention made by Pima that the water pumped from the state lands leased to it by Commercial Lease No. 906 is used upon the land from which it is produced, beneficially or otherwise. The use is some four miles distant, outside of the critical area, and for mining and milling purposes.

Under Bristor v. Cheatham, 75 Ariz. 227, 255 P.2d 173, this use is plainly illegal if, thereby, FICO as a water user within the area influenced by the pumping of Pima's wells, is injured in FICO's water supply. Under Jarvis v. State Land Department, 104 Ariz. 527, 456 P.2d 385; Jarvis v. State Land Department, 106 Ariz. 506, 479 P.2d 169, any withdrawal of groundwater from within a critical area for use outside that area unrelated to the beneficial use of the critical area land begun after the area was designated as a critical area as a matter of law injures all lawful users of groundwater within the area.

The court in Bristor uses language which constitutes an unequivocal holding that any groundwater use, to be reasonable, must be "in connection with the beneficial enjoyment of the land from which it is taken". (75 Ariz. 237). In quoting from Rothrauf v. Sinking Spring Water Co., 339 Pa. 129, 14 A.2d 87, 90 (75 Ariz. 235, 236), the Arizona Supreme Court added its emphasis to the rule there enunciated by the Pennsylvania Court:

"there has been an ever increasing acceptance of the viewpoint that their use must be limited to purposes incidental to the beneficial enjoyment of the land from which they (waters) are obtained."

* * *

"While there is some difference of opinion as to what should be regarded as a reasonable use of subterranean waters, the modern decisions are fairly harmonious in holding that a property owner may not concentrate such waters and convey them off his lands if the springs or wells of another landowner are thereby damaged or impaired ..."
(Emphasis the Arizona Supreme Court's)
Again cited with approval in Jarvis v. State Land Department, 104 Ariz. 527, 456, 456 2d. 385.)

In Jarvis, the Arizona Supreme Court held that as a matter of law removal of groundwater

from within a critical groundwater area for use outside of the critical area damaged the wells of the water users within the area. This would hold true whether the injured water user within the critical area pumped water for agricultural, domestic, industrial or municipal use.

"Manifestly, a groundwater area or subdivision of a basin which does not have a reasonable safe supply for existing users can only be but further impaired by the addition of other users or uses." (456 P.2d 388)

In Bristor, the Court, after referring to the general language of Restatement of Law of Torts, Comments b and c, Section 852, which talks in general terms of factors involved in a consideration of reasonableness then immediately following the Restatement quotation held:

"This rule does not prevent the extraction of groundwater subjacent to the soil so long as it is taken in connection with a beneficial enjoyment of the land from which it is taken." (75 Ariz. 237, 238)

In Bristor, the use was clearly a "beneficial" use, since it was for the growing

of agricultural crops. The sole factor the Court there weighed was: Did the use involve conveying the water away from the land from which it was produced?

It appeared clearly that the use involved:

"...transporting the water thus pumped from under the plaintiffs' land to a distance of approximately three miles for the development and irrigation of lands not theretofore irrigated; that the waters pumped by the defendants are not used for any beneficial purpose upon the lands from which the same are taken..." (Emphasis added)

It should also be noted that the Court in Bristor II referred to Bristor I, 73 Ariz. 228, 240 P.2d 185 for a recitation of the factual background of the case. The Court there stated the factual allegations upon which the case was to be decided, in part, as follows:

"They (plaintiffs) further allege there is a common supply of underground water underlying the premises of plaintiffs and defendants; that since 1916 their domestic supply of water has been, and is, derived exclusively from this underground supply..."

"That defendants...are taking the water by means of powerful pumps from this common supply and are conveying it off the premises from which it is pumped to other lands owned by defendants, approximately three miles distant, where

they are using it in reclaiming from the desert other land not adjacent to the land from which the water is being pumped." (Emphasis added)

Bristor did not involve a critical groundwater area and, hence, must be regarded as enunciating principles of water law of general application to be understood and applied in harmony with other principles specifically applicable to groundwater within a designated critical area.

The commitment of the court to this rule is demonstrated by the fact that in support of this holding and the companion or corollary holding that:

"Such waters can only be used in connection with the land from which they are taken." (479 P.2d 172)

the Court cited a full one and one-half column of cases in the Pacific Reporter.

Immediately following this impressive demonstration of the great weight of authority arrayed in support of the court's pronouncement, the court stated:

"Tucson questions whether it may pump water from its wells and transport the water so pumped through its pipelines to lands which lie within the

watershed but outside the Marana Critical Groundwater Area. From what has been said concerning the American rule of reasonable use, the answer to Tucson's question is, of course, that it may not." (479 P.2d 172)

Following a quotation from Schenk v. City of Ann Arbor, 196 Mich. 75, 163 N.W. 109, at 114 (1917) our Supreme Court explained again why it had answered Tucson's question in the negative:

"We also pointed out in our first decision in this case that the Avra-Altar Valleys are a part of a critical water area, being included within the Marana Critical Ground Water Area. For the reason that a critical ground water area is a ground water basin or subdivision 'not having sufficient ground water to provide a reasonably safe supply for irrigation of the cultivated lands in the basin at the then current rates of withdrawal,' we held that additional users would necessarily deplete the supply of the existing users. Consequently, the conveyance of ground waters off the lands on which wells in the Avra Valley are located impairs the supply of the other land owners within the critical area." (Emphasis ours)

We must recognize that the Supreme Court's decision in Jarvis II which, in effect, allowed Tucson to pump water from any location in the critical groundwater area there involved and

into Tucson so long as Tucson has acquired agricultural land somewhere in the basin and taken it out of agricultural usage, superficially considered, raises a question as to the continued full validity of Bristor II. Since the Alter-Avra Valley extends some twenty miles in length, it seems very probable that Tucson might pump a substantial quantity of water from a well site at one location for export from the critical area, based upon the historic agricultural usage of land at another location in the critical area a substantial distance away, which land Tucson had purchased and retired from irrigated farming thereby justifying its pumping and export of the water at its well site. The result might well be to injure the water supply of the farmer owning farm land and farming it adjacent to the well site while the farmer owning land and farming it adjacent to the area purchased by Tucson and retired from cultivation would enjoy a higher water table due to the shutdown of irrigated farming in the area adjacent to his farm. This would appear to run counter to

Bristor II.

However, a reading of Bristor II and the two Jarvis decisions makes it plain that the Court did not consider it was robbing Bristor II of vitality. The Court made it plain that Bristor II was decided upon the basis that injury to the plaintiffs' wells was admitted for the purposes of the Motion to Dismiss since the plaintiffs had alleged the defendant "sucked the groundwater from under plaintiffs' land, thereby destroying plaintiffs' supply for their wells." (479 P.2d 171). The Court went on to say:

"Defendant transported the water a distance of three miles where he developed agricultural lands not theretofore irrigated. We held in Bristor, which holding was repeated in our first decision here, that this was not a reasonable use of groundwater". (479 P.2d 171)

Again the Court emphasized in Jarvis II (p. 171, 479 P.2d):

"In our first decision here, we also held that the American rule of reasonable use permitted percolating water to be extracted for the beneficial use of the land from which it was drawn. We emphasized this aspect of the doctrine of reasonable use by quoting from Bristor that part of the decision

in Rothrauff v. Sinking Spring Water Co., 339 Pa. 129, 14 A.2d 87, to the effect that the modern decisions are nearly harmonious in holding that a property owner may not convey waters off the lands from which they are pumped if the wells of another are thereby damaged or impaired. This limitation on the use of ground waters has the overwhelming support of American precedent. Percolating waters may not be used off the lands from which they are pumped if thereby others whose lands overlie the common supply are injured."

In Jarvis I and Jarvis II, the Court was not considering the rights of the various farmers of the Aitar-Acra Valley vis-a-vis one another but was considering the rights of the irrigated area users versus the rights of the City of Tucson. This is shown by the Court's references to Bristor and the quotations excerpted from that case with manifest approval.

Bristor and Jarvis I and II construed as stating harmonious principles teach:
Bristor - (a) Withdrawal of groundwater from any area and transportation of this groundwater away from the land from which it is withdrawn if by reason thereof the wells and water supply of an adjoining landowner are damaged is illegal;

Jarvis I and II - (b) Withdrawal of groundwater from the lands within a critical groundwater area and transportation of this water for use outside of the boundaries of the critical groundwater area, (unless the user at the situs of use has physical access to the groundwater resource of the critical area such that such user could at the situs of use physically withdraw an amount substantially equal to that pumped from within and transported outside the boundaries of the critical area) is itself proof of damage to the critical groundwater user within the critical area and may be enjoined.

(NOTE: FICO does not concede that physical access to the critical groundwater area water resource, which is claimed to authorize pumping water from the groundwater of the critical area for use outside the critical area, does permit such use if the use at the situs of use is unrelated to the beneficial enjoyment and use of the land within the critical area from which the water is withdrawn. However, that

fact situation is not here involved. Therefore, the foregoing caveat is for the record only.)

FICO respectfully urges that the use by Pima of groundwater pumped from the underground of the Sahuarita-Continental Critical Groundwater Area and transported for use outside that area for uses unrelated to the beneficial use of the land producing the water is, as a matter of law, unlawful.

The only time the question whether a use is reasonable must be decided by the Court is when the reasonableness of the water use upon the land actually producing the water is challenged as being unreasonable. To be reasonable, the use must be a beneficial use related to the use and enjoyment of the land producing the water and any other uses, i.e., uses away from the land producing the water, are, as a matter of law, unlawful if, thereby, an adjacent property owner's groundwater source is damaged or otherwise adversely interfered with.

2. Pima's equitable argument.

FICO assumes that one purpose of the Komadina Affidavit was to invoke equitable

considerations involving public interest considerations and to invite the Court to disregard a plain wrong to a litigant because of considerations of monetary loss to the State of Arizona if the Court adhered to the law. (At least we are unable to imagine any other legal purpose in the various assertions of financial benefit to the State in the Affidavit.)

There is no reason demonstrated in the record for any conclusion or, indeed, any implication that Pima has no legal source of water available to it for its mining needs and, therefore, it must have recourse to the water in the Critical Area, but even if this were the case, it would offer no justification for refusing FICO the relief to which it is entitled.

Much the same argument was made by a mining company in territorial days, when it sought to defend against claims by irrigators that it was, in effect taking their water by

rendering it unusable due to fouling by slimes and other milling refuse.

In Arizona Copper Co. v. Gillespie, 12 Ariz. 1950, 100 P. 405 (1909) the mining company was dumping its slimes and tailings into the Gila River, thereby fouling the downstream supply of a farmer. In defense to the farmer's suit to enjoin the practice, the mining company urged almost the identical considerations of social value, investment, employment of "thousands of persons" and comparative injury here urged by DEVAL.

In rejecting the defense, the Arizona Territorial Supreme Court said:

"Counsel press upon us the proposition that we should consider the comparative damage that will be done by granting or withholding an injunction in this case, alleging that the effect of an injunction will be to stop the operation of extensive works, deprive thousands of persons of employment, and cause loss and distress to other thousands. It is undoubtedly true that a court should exercise great care and caution in acting where such results are to follow. It should very clearly appear that the acts of the defendant are wrongful, and that the complainant is suffering substantial and irreparable injury, for which he cannot secure

adequate compensation at law. A number of eminent courts support the contention of appellant that the comparative injury to the parties in granting or withholding relief must also be considered.* * *

It seems to us that to withhold relief where irreparable injury is, and will continue to be, suffered by persons whose financial interests are small in comparison to those who wrong them is inconsistent with the spirit of our jurisprudence. It is in effect saying to the wrongdoer, 'If your financial interests are large enough so that to stop you will cause you great loss, you are at liberty to invade the rights of your smaller and less fortunate neighbors.'* * * To the same effect are the remarks of Judge Marshall in McCleery v. Highland Boy Gold Min. Co., (C.C.), 140 Fed. 951, wherein he says: 'The substantial contention of the defendant is that it is engaged in a business of such extent, and involving such a large capital, that the value of the plaintiff's rights sought to be protected is relatively small, and that, therefore, an injunction, destroying the defendant's business, would inflict a much greater injury on it than it would confer benefit upon the plaintiff's. Under such circumstances it is asserted, courts of equity refuse to protect legal rights by injunction and remit the injured party to the partial relief to be obtained in actions at law. Stated in another way, the claim in effect is that one wrongfully invading the legal rights of his neighbor will be permitted by a court of equity to continue the wrong indefinitely on condition that he invest sufficient capital in the undertaking. I am unable to accede to this statement of the law."

The Court enjoined continued pollution of the river and the United States Supreme Court affirmed the decision. 230 U.S. 46, 33 S.Ct. 1004, 57 L.Ed. 1384 (1913)

See also: Jordan v. United Verde Copper Co., 9 F.2d 144 (1925 aff'd, 14 F.2d 299, 304 (1926 Cert. den. (1926)

Pima's continued unlawful usage of water from the critical area to the continuing injury of FICO constitutes a continuing trespass and as such, a continuing wrong. A Court of Equity may exercise discretion as to remedies for past wrongs and injuries, but it runs afoul of the "Chancellor's Conscience" to, in effect, condone and permit future injuries and illegal actions harming other persons. Alaska Placer Company v. Lee (Alaska Sup. Ct.) 458 P.2d 218; Harris v. Krekler, 113 Ind. App. 190, 46 N.E.2d 267 (1943) Hastings Oil Co. v. Texas Co., 149 Tex. 416, 234 S.W.2d 389; 42 Am. Jur.2d, p. 907, Sec. 149, p. 803, Sec. 60; 43 C.J.S., p. 525, 527, Sec. 61; 62 A.L.R.2d 310, Sec. 2, 21, 22.

3. The "arrangement" asserted by Pima in the affidavit supporting its Motion for Summary Judgment involves in material part a breach of trust and, hence, it affirmatively appears that Pima's water use is not a "beneficial use".

The provisions of Section 28 of the Enabling Act governing a resolution of Pima's claim to a "beneficial use" of the critical groundwater area are:

(a) The authorization in the Enabling Act for leasing of state lands "in such manner as a legislature...may prescribe" limited to use "...for grazing, agricultural, commercial and domestic purposes for a term of ten years, or less;..."

(b) The absolute prohibition clause found in the Enabling Act against any sale of land or other disposition amounting to a sale, except after public notice and at public auction;

(c) The provision in the Enabling Act that any disposition of state lands not made in substantial conformity with the

Enabling Act provisions is null and void;

(d) The provisions of the Enabling Act declaring the lands to be received by the State of Arizona "shall be by the said state held in trust"...and that disposition of these lands "contrary to the provisions of this Act shall be deemed a breach of trust".

It is black letter law that contracts, contrary to public policy or which involve a breach of trust are invalid. 17 Am. Jur. 2d, Sec. 136, pp. 553, 554, 17 C.J.S., Sec. 211, p. 1015, et seq.

Pima, by the Affidavit of its Vice President and General Manager, Koshalina, has represented to the Court, in support of its Motion, that it has entered into an arrangement with the State of Arizona, the purpose of which is to make a use of state land contrary to the plain purpose of the Enabling Act and, thereby, runs afoul of the provisions that any such use of state land or any authorization thereof shall be "null and void, any provision of the constitution or laws of any state to the contrary notwithstanding".

Tailing ponds have been a part of the Arizona scene for enough years the Court may judicially notice that a tailing pond substantially destroys the area occupied by it for any purpose other than for the continued storage of the tailing waste. The pond generates no activity, commercial or otherwise, and constitutes a nuisance to the surrounding area. After the ten year lease period, the tailings remain at free storage insofar as Pima is concerned for there is no way in which the tailings can practically or reasonably be removed. While structured as a lease, it is plain Pima has purchased and Arizona has sold a right to the permanent use and occupation of the tailing pond area for storage of tailing waste, at least until the winds dissipate the tailings through dust storms during the years that lie ahead.

In the early United States Supreme Court case of Hervey v. Rhode Island Locomotive Co., 95 U.S. 604, 25 L.Ed. 1005, the Supreme Court observed:

"It is true the instrument of conveyance purports to be a lease, and the sums stipulated to be paid are for rent; but this form was used to cover the real transaction * * * It was evidently not the intention of the parties that this sum should be paid as rent for the use of the engine for one year."

Certainly it cannot be reasonably concluded that a "commercial use" within the meaning of the Enabling Act contemplates a use amounting in law to waste. The law is quite clear to the effect that any use of a leased premises by a tenant which prevents the return of the leased premises to the owner in substantially the same condition as when leased, constitutes waste. True, an owner can agree to such wasting use and the State Land Department specifically agreed to the use of the area as a tailing dump. The fact is, of course, that the Land Department had no authority to agree to such use and its consent, thereto, on behalf of the state was and is "null and void" unless it be found that a lease for a ten year period which permits a use of the leased premises resulting in the destruction of the area for any productive use and which

amounts to, in fact, the right to a permanent use and occupation of the area for storage of wastes can be considered a "commercial ten year lease".

In Jarvis v. State Land Department, the Supreme Court clearly held that any removal of water from a critical area, duly designated as such, as a matter of law demonstrated damage to the farmers in the critical area since the designation of the area as such established that its water resource was inadequate to supply then existing uses in the basin.

The law is clear that any use by a lessee which damages the reversion and prevents the return of the leased area to its owner in substantially its condition when leased constitutes waste. The court can judicially notice that this area overlooks the Green Valley community and was a beautiful desert area of coming premium value for urban development. It will be returned to the State of Arizona as a source of dust nuisance not only to the Green Valley area, but the Tucson area as well, for all the years which lie ahead. The use of this

is
water/not only for the principal purpose or
use of committing waste upon the state land,
but creating a nuisance as well.

56 Am. Jur. §2, "Waste", defines waste
as follows:

"As is apparent from the definitions
already given, an act to constitute
waste must be wrongful, and it is the
general rule of law that no act of a
tenant will amount to waste unless it
is or may be prejudicial to the
inheritance, or to those entitled to
the reversion or remainder. Waste
does not necessarily mean a subtraction
of something from the corporal sub-
stance of the estate. Perhaps it
may not always include change in
material condition, and it need not
consist of loss of market value; but
mere injury to the reputation of real
estate, or the supposed diminution of
its value resting on whimsical or
emotional grounds or arising from
dictates of custom or taste, does not
constitute waste. * * * Waste may be
committed of land as well as in houses
and timber, and many of the definitions
of waste include any act or omission
by a tenant which tends to destroy the
identity of the property or impair the
evidence of title.

The fact that waste may consist in any
wrongful and improper act which impairs the
value of the estate upon termination of the
tenancy is demonstrated by the early case, often
cited, from Massachusetts of Delano v. Smith,

92 N.E. 500 (1910). In that case, complaint was made that the mortgagor had been guilty of waste as to the mortgagee by leasing the mortgaged property after the mortgage had been recorded for a pest house or hospital to house persons suffering from the then dread disease of smallpox. The court considered the general principles applicable to a finding that waste has been committed by a tenant or other possessor of real property and concluded that the use of this property to house victims of smallpox in the then known state of medical inability to control the disease would result in the building itself becoming the home of possible virulent disease microbes and, hence, waste might be found.

The Court said:

"Waste is an unreasonable or improper use, abuse, mismanagement or omission of duty touching real estate by one lawfully in possession which results in substantial injury."

In the case of Kory v. Less, 22 S.W. 2d 25 at 28 (1929), the Supreme Court of Arkansas defined and described waste as follows:

or

"The general rule of law, however, in respect to waste is, that the act must be prejudicial, or work a substantial injury, to the inheritance, or to those who are entitled to the reversion or remainder, and it may be committed of houses, gardens, orchards, lands, or woods. Such injury to the inheritance may be committed by diminishing the value of the estate, although it need not consist of loss of market value, but may also be caused by increasing the burdens upon the estate, destroying its identity, or impairing the evidence of title; and if the acts committed substantially injure the inheritance they may constitute waste, although they increase the pecuniary value of the estate. The refusal or neglect of a tenant to pay current taxes, which he is under an obligation to pay, whereby the premises are sold, or are subject to sale, constitute waste. But mere injury to the reputation of real estate or the supposed diminution of its value resting on whimsical or emotional grounds or arising from dictates of custom or taste do not constitute waste; nor ordinarily will the consequences of waste attach where the injury to the inheritance is trifling or unappreciable." 10 Cyc. 591 et seq. 27 A.C.L. 1911.

"It will be seen that in order to constitute waste the life tenant must be guilty of some act or omission to the injury of the person entitled to the inheritance; a wrongful act or omission on the part of the life tenant which results in permanent injury to the inheritance. It is a violation of the obligation of the tenant to treat the premises in such manner that no harm be done to them and that the estate may revert to those having the reversionary interest without material deterioration."

In Dorsey v. Speelman, Wash. App., 459 P.2d 416, the Washington Court quoted with approval from an earlier Washington case defining waste as follows:

"The court in Graffell, at 398, 191 P.2d at 865, also defined "waste" as contemplated by the statute and discussed the distinction between "commissive" and "permissive":

"Waste", as understood in the law of real property and as variously defined by this court, is an unreasonable or improper use, abuse, mismanagement, or omission of duty touching real estate by one rightfully in possession which results in its substantial injury. It is the violation of an obligation to treat the premises in such manner that no harm be done to them, and that the estate may revert to those having an underlying interest undeteriorated by any willful or negligent act." [Citations.]

In Spartan v. Hardy, 78 So.2d 584 (1955) the Supreme Court of Mississippi laid down these rules as determining when waste has been committed:

"In Moss Point Lumber Co. v. Harrison County, 59 Miss. 418, 42 So. 290, 300, 375, this Court said that: 'Waste is defined to be any substantial injury done to the inheritance, by one having a limited estate, during the continuance of his estate.' It was also there said that: '* * * it is a universal rule

in this country that, unless exempted by the terms of the lease from responsibility for waste, a tenant is responsible for voluntary waste, whenever committed.'

"Undoubtedly material changes in a building, even though they may enhance the value, amount to waste. A good statement of the rule is given in Section 1615, Vol. 4, Thompson on Real Property, p. 118, as follows: 'A tenant, whether rightfully in possession or not, cannot, without the consent of the landlord, make material changes or alterations in a building to suit his taste or convenience, and, if he does, it is waste. The law is undoubtedly so settled. Any material change in the nature or character of the buildings made by the tenant is waste, although the value of the property should be enhanced by the alteration.'"

The foregoing is adequate to demonstrate that waste is the material injury to the reversionary estate resulting in the property being surrendered back to the holder of the reversionary estate in a damaged condition.

It should be noted that the foregoing argument is directed to the point that the use Pima asserted it had and would make of the water withdrawn from the critical area was not and could not be a "beneficial use" and, hence, the trial court was wrong upon this additional ground.

It is not intended to reargue the validity of Commercial Lease No. 906, but rather to argue that the use which Pima makes of the water withdrawn from the critical area is, as a matter of law, not a beneficial use.

CONCLUSION

The judgment of the trial court should be reversed, with directions to deny the Pima Summary Judgment Motion and to vacate the order denying the Summary Judgment Motion made by FICO and to grant FICO's Motion.

Respectfully submitted,

SNELL & WILMER

By Mark A. Gilbert
Mark A. Gilbert

By Loren W. Souders, Jr.
Loren W. Souders, Jr.

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Phoenix, Arizona 85073
Attorneys for Farmers
Investment Company

STATE OF ARIZONA)
) ss:
County of Maricopa)

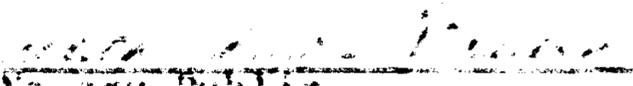
MARK WILMER, being first duly sworn,
says:

Affiant mailed two copies of Appellant's
Opening Brief to MUSICK, PEELER & GARRETT, attor-
neys for Appellee, PIMA MINING COMPANY, and to
the Attorney General of Arizona, attorney for
STATE LAND DEPARTMENT, properly addressed and
postage prepaid on June 11, 1974.



Mark Wilmer

SUBSCRIBED and sworn to before me June 11,
1974.



Notary Public

My Commission Expires:

My Commission Expires Dec 15, 1977

APPENDIX A

PARAGRAPHS III, IV AND V OF
COUNT TWO OF AMENDED COMPLAINT

III

That for many years prior to the filing of this action plaintiff has irrigated its farm lands from percolating water pumped from wells on its said land, said percolating water underlaying the land, for the purpose of producing crops grown thereon and for domestic purposes, and has expended large sums of money in the development of the percolating waters for the beneficial and reasonable use of said land for agricultural and domestic purposes.

IV

That the supply of water available to the land is not unlimited but said supply is limited and the farm properties referred to herein lie within what is commonly known as the Sahuarita Continental Critical Groundwater Area so established by order of the State Land Commissioner on October 14, 1964, pursuant to Article 7, Chapter 1, State Water Code, as amended (Sections 45-301 et seq. A.R.S.), commonly known as the Ground Water Code.

That there are approximately 16,000 acres of agricultural crop land within the Critical Groundwater Area of which approximately 6,500 acres belong to and have been farmed and are being farmed by plaintiff. The sole source of water for irrigation of said farm lands in cropping the same is the supply of ground water underlying the land in said Critical Groundwater Area. In farming the aforesaid lands the farmers thereof have withdrawn water from said groundwater supply since the Critical Groundwater Area was established as aforesaid pursuant to and in conformity with the limitations and requirements of the Ground Water Code (Sections 15-301 et seq. A.R.S.). This withdrawal of ground water for agricultural purposes has in the past exceeded and now exceeds the annual recharge thereto by a substantial amount. The supply of ground water available for beneficial consumptive use upon the lands in said critical area has been and presently is inadequate to meet such needs without withdrawing or "mining" stored water in the underground of

the critical area and thereby further lowering
the water table and further depleting the
supply available for future requirements of
the critical area.

STATE OF ARIZONA)
)
COUNTY OF MARICOPA)

ss:

I Craig Swick hereby certify:
Name

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

That there is on file in said Agency the following:

Microfilm of Farmer's Investment Company v. Pima Mining Company et al, Arizona Supreme Court Case No. 11439-2, Appellant's Opening Brief in Farmers Investment Company v. Bettwy, filed September 23, 1974. Court of Appeals Instruments (Part Two) Page 116 with 45 Pages of the Brief following.

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

Craig B. Swick
Signature

Subscribed and sworn to before me this

12/14/2005
Date

Etta Louise Muir
Signature, Notary Public

My commission expires

04/13/2009
Date

