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ARIZONA COURT OF  
APPEALS DIVISION TWO

In the Court of Appeals

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State of Arizona

DIVISION TWO

ELIZABETH U. FRITZ  
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No. 2 CA-CIV 1645

Pima County Superior Court No. 116542

11439-2

FILED  
SEP 23 1974  
CLERK SUPREME COURT

FARMERS INVESTMENT COMPANY, a corporation,

*Appellant*

vs.

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.*

APPELLEE'S BRIEF.

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the State of Arizona, and PIMA MINING COMPANY,  
a corporation,

*Appellees.*

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## APPELLEE'S BRIEF.

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### STATEMENT OF THE CASE.

#### I. The Nature of the Action.

In November, 1969, Appellant Farmers Investment Company (hereafter "FICO") filed suit in Pima County against Appellee Pima Mining Company (hereafter "Pima") and three other mining companies alleging in one count that the defendants were using groundwater in violation of the reasonable use doctrine. FICO sought only injunctive relief against the defendants.

As of the date FICO filed its instant motion for summary judgment, its Complaint had been amended

to include four counts.<sup>1</sup> The first count of the amended complaint sought injunctive relief against all mine defendants for violation of the reasonable use doctrine; the second count sought an injunction against the State Land Department and all the mine defendants for using State rights of way to transport water in violation of the reasonable use doctrine; the third count sought damages against all the mine defendants for having violated the reasonable use doctrine; the fourth count, the one in issue here, sought an injunction against Pima and the Land Department restraining the taking of water from Pima's Commercial Lease 906 and for a declaration that the Lease was invalid, void and a breach of the trust created by the Enabling Act.

On June 15, 1973, FICO filed a motion for summary judgment on Count IV. On August 28, 1973, Pima also moved for summary judgment on Count IV.

## 2. What the Issue Was.

FICO concedes (Brief, pp. 2-3) and Pima agrees that the sole issue raised by FICO's summary judgment motion was whether Commercial Lease 906 was in violation of the Enabling Act and thus void.

The parties disagree as to the issue raised by Pima's motion for summary judgment. Pima contends and judicially admits that it raised no issue other than that raised by FICO, namely, whether Commercial Lease 906 was in violation of the Enabling Act and thus void. As the Abstract of Record reflects, Pima argued and presented evidence below solely upon the issue of

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<sup>1</sup>Although designated by Pima as part of the record (Record, p. 173), the amended complaint was not included in the Abstract of Record.

whether the instant lease was valid under the Enabling Act. (Record, pp. 66-85 22-127; 140-147.)

FICO contends (Brief, pp. 3-5, 7, 25-40), that the affidavit submitted by Pima somehow raised a question regarding the validity of Pima's operations not raised by FICO. To the contrary, this affidavit specifically was addressed to the sub-issue raised by FICO as to whether the State Land Department was committing "waste" by having entered into this lease.

FICO expressly raised and argued this issue of waste. (Record, pp. 50-52.) Pima devoted one section of its reply memorandum to this issue of "waste" (Record, pp. 75-79), arguing on the basis of said affidavit that no waste was being committed because of the benefit to Arizona from the integrated arrangement with Pima. (Record, p. 77.) Thus, no additional or new issue was presented to the court by Pima.

FICO repeatedly advised the Court that there were only limited issues involved in Count IV, which were peculiar to Pima. (Record, pp. 120-121; 132-133.) Thus, when other mine defendants requested the right to argue at the hearing upon the summary judgment motion because of their fears that the reasonable use issue might be involved in the motion, FICO objected, saying this would only blur, obfuscate and confuse the "limited issues involved in the Pima case." (Record, pp. 121, 133.) The lower court agreed with FICO and refused to let other mine defendants argue at the hearing. (Record, p. 139.)

Moreover, FICO had requested<sup>2</sup> elaborate discovery from the defendants upon the issue of reasonable use

<sup>2</sup>None of the elaborate discovery requested by FICO, agreed to by the defendants and ordered by the Court has been commenced, except for a preliminary exchange of a *catalogue* of documents upon which the various parties rely.

because, FICO represented, in reaching its decision upon that issue,

“this Court will be forced to weigh complex and detailed testimony of numerous experts each of whose conclusions are likely to be vigorously debated.” (Record, p. 23.)

To conclude, it was apparent to Court and counsel, that the complex issues generated by the reasonable use doctrine were not to be decided in the summary judgment proceedings involving the validity under the Enabling Act of Lease 906.

**3. How the Issue Was Decided and What the Judgment Was.**

The lower court denied FICO's and granted Pima's motion for summary judgment on Count IV. (Record, pp. 163-164.) All that was involved therein was the determination that the instant lease was not void under the Enabling Act—FICO thus could not prevail under Count IV and Pima thus was entitled to a judgment declaring the validity of the lease. Judgment was entered and the matter was directed to be severed for appeal purposes. (Record, pp. 164-165.)

FICO now contends (Brief, pp. 5, 7) that the form of summary judgment generally adjudicated the issues under Count IV and somehow determined the issue of reasonable use favorably to Pima and against FICO. As a buttress to its contention, FICO points out that the allegations in its Amended Complaint regarding unreasonable use were incorporated by reference in its Count IV. (Brief, p. 5) Yet, FICO never brought to the attention of the lower court its present charge that

the Court had decided by its judgment an issue upon which the parties had not submitted evidence or argument.

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7-31-74  
On June 19, 1974, the Supreme Court adjudicated the Enabling Act issue by holding that Lease 906 is null and ~~valid~~ because it is in violation of the Enabling Act. That Court then ordered "vacated and set aside" the order of the Pima County Superior Court granting Pima's and denying FICO's motion for summary judgment.

Regarding the issue of reasonable use, which FICO wishes this Court to adjudicate, the Court stated:

"... We considered that the question pertaining to whether the State Land Department or the State Land Commissioner could lease lands within a critical groundwater area upon which to sink wells and pump water for use outside the area cannot be resolved at this time in the light of Pima Mining Company's affirmative defenses. We express no opinion as to whether the doctrine of reasonable use must be applied to Pima Mining Company's withdrawal of water from the lands the subject matter of Lease 906. . . ."

#### 4. Statement of Ultimate, Material Facts.

The only issue which Appellant desires this Court to review is that of reasonable use.

Since Appellee contends that there is not now and never was any issue herein regarding reasonable use, and that the parties never submitted any evidence of facts regarding that issue, it is difficult to state what facts are material to an issue of which it has been unaware.

Nevertheless, two facts which were submitted in connection with the issue of "waste" in connection with the Enabling Act question also would be pertinent if this Court attempted to rule upon the question of reasonable use.

The first fact is that Pima returns more water to State lands than is extracted from State lands. (Record, pp. 84-85.) This water is extracted from and returned to the same Critical Groundwater Area and to the same groundwater basin or compartment from which the water is pumped.

The second fact is that "one of the important uses Pima makes of the water pumped from the critical area is for transportation of tailing from its mill for deposit in its tailings ponds on the two areas of state trust land leased to Pima under these two commercial leases". (FICO Brief, p. 12.)

#### 5. Questions Presented for Review.

Following are the questions Appellee believes are presented for review:

(a) Was the issue of reasonable use ever involved in the proceedings below?

(b) If it was, has that issue now become moot?

(c) If that issue is not moot, can that issue be determined upon a review of the instant summary judgment proceedings or must the matter be referred to the lower court for trial or for further proceedings regarding the issue?

If the reasonable use issue is properly before this Court, is Pima entitled to a summary judgment upon that issue?

**ARGUMENT.**

**I. The Reasonable Use Issue Was Not Involved in the Proceedings Below and Thus Is Not Before This Court.**

FICO judicially admits (Brief, pp. 2-3), as does Pima, that FICO's summary judgment motion did not raise any issue other than the Enabling Act question. Pima disputes FICO's contention that Pima's motion raised other issues.

This action has been pending in Pima County for five years because of the complexity of the factual presentations necessary under the reasonable use doctrine. The affirmative defenses of Pima to each of the counts of FICO's Amended Complaint to which Pima made reference in the summary judgment proceedings (Record, pp. 80-81), and to which the Supreme Court referred in its opinion are set forth in Appendix A to this Brief. No one offered evidence on those defenses in the instant summary judgment proceedings because as the memoranda of the parties reflect (Record, pp. 30-64; 66-85; 94-118; 122-127; 140-147; 158-162), reasonable use was not an issue in those proceedings.

The prayer of Count IV sought only (i) a declaration that Lease 906 was void, (ii) an injunction restraining uses under said Lease, and (iii) an order that the State Land Department cancel the lease and prevent any further breach of trust by reason of utilization of Lease 906. (Record, pp. 6-7 )

Pima moved for and won only a summary judgment against FICO and in favor of Pima on that Count IV. (Record, pp. 164-165.)

Thus, the issue of reasonable use was never involved in the proceedings below.

FICO argues that an affidavit in opposition to FICO's motion, or the form of the judgment, or FICO's pleadings which incorporated matter extraneous to Count IV somehow might be said to have caused collateral estoppel or *res judicata* against FICO on the reasonable use issue. Those fears may be allayed, as Pima herein judicially admits that the issue of reasonable use was not and is not involved in the summary judgment Pima obtained. If the form of the lower court's judgment somehow embraced that issue as having been decided by the Court, Pima confesses that such was error.

## 2. The Appeal Is Moot.

This appeal is unnecessary and moot for a number of reasons

### A. This Court Cannot Grant FICO Any Relief Which It Has Not Already Won.

In its requested relief (Brief, p. 30), FICO asks this Court

"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."

The Supreme Court already has entered an order vacating the granting of Pima's and the denying of FICO's motion for summary judgment. Thus, any such identical "relief" granted by this Court would be duplicitous and unnecessary. The courts do not determine questions which have become abstract, or moot, or decide any issue unless required to do so to dispose of the appeal under consideration.

*Mesa Mail Pub. Co. v. Board of Supervisors*,  
26 Ariz. 521, 227 Pac. 572 (1924);

*Virgil v. Herman*, 102 Ariz. 31, 424 P. 2d 159 (1967).

FICO also has asked that this Court "grant FICO's Motion." Obviously, this Court has no jurisdiction to grant any motion of FICO with respect to any aspect of the Enabling Act issue, as FICO carefully has excluded same from its Notice of Appeal. (Brief, p. 8, Record, p. 168.) Yet, as FICO judicially has admitted (Brief, pp. 2-3), FICO's motion raised only the Enabling Act issue. Thus, this Court has no jurisdiction to grant FICO's motion. (It should be noted that the Supreme Court, which has sole jurisdiction over the Enabling Act issue, specifically refrained from ordering that FICO's motion be granted.)

Furthermore, it seems evident upon analysis of the status of this matter, that this Court could grant no relief to any party.

Suppose, for example, this Court ruled that Pima was making a reasonable use of the water withdrawn per Lease 906. Clearly it could not affirm Pima's summary judgment as that has been vacated upon an independent ground by the Supreme Court. It would be quite unimportant for this Court to rule that the use Pima might make of the water obtained from Lease 906 would be reasonable since the Supreme Court has ruled that no more water may be obtained under Lease 906.

Since the entire thrust of FICO's Count IV and its motion for summary judgment thereon was directed to prevent further use of water obtained per Lease 906, and since no more water will be obtained per Lease 906, the case is simply moot. The courts are not in

the business of providing advisory opinions about what might occur if water is obtained per another lease nor about whether operations under Lease 906 might have been questioned for a different reason had not the Supreme Court rendered its ruling regarding violation of the Enabling Act.

*A.D.R. Development Co. v. Greater Ariz. S. & Loan Ass'n*, 15 Ariz. App. 266, 488 P. 2d 471 (1971);

*Baldwin v. Arizona Flame Restaurant*, 82 Ariz. 385, 373 P. 2d 759 (1957);

*Phoenix Metals Corp. v. Roth*, 79 Ariz. 106, 284 P. 2d 645 (1955).

**B. The Supreme Court Has Ruled That the Reasonable Use Issue Cannot Now Be Resolved.**

The Supreme Court, in disposing of its aspect of the review of the summary judgment proceedings, stated:

" . . . We considered that the question pertaining to whether the State Land Department or the State Land Commissioner could lease lands within a critical groundwater area upon which to sink wells and pump water for use outside the area cannot be resolved at this time in the light of Pima Mining Company's affirmative defenses. We express no opinion as to whether the doctrine of reasonable use must be applied to Pima Mining Company's withdrawal of water from the lands the subject matter of Lease 906. . . ."

Little else need be said. In plain, simple language, the Supreme Court has determined that the reasonable use issues of this civil action, at least insofar as Pima is concerned, cannot be resolved without a trial of complex facts.

It would be quite unfriendly of FICO to continue to suggest to this Court that it decide this issue in light of the Supreme Court's determination. Indeed, the Supreme Court in 1971 refused a request by FICO that it assume jurisdiction and grant an injunction against Pima. Pima objected then on the basis that its affirmative defenses required a trial. Apparently the Supreme Court agreed as it declined, on May 3, 1971, to accept jurisdiction of the matter.

**3. This Court Cannot Determine the Issue of Reasonable Use Upon the Present Record.**

As authority for the above proposition, and as the law of this case, we probably need cite only the Supreme Court's determination that the reasonable use issue cannot now be resolved in light of Pima's affirmative defenses. In addition to this determination, there are a number of factors which demonstrate why this Court may not now resolve this issue of the action pending below.

First, it would be a great surprise to Judge Royston for him to learn that he determined the numerous matters involved in a consideration of the reasonable use issue. If that issue should have been decided by Judge Royston, it only seems fair, as well as sensible, for him to be given the opportunity to hear evidence and argument upon the matter. It long has been the rule that appellate courts will not rule upon matters not clearly presented to the trial court. If trial courts are to be reversed upon matters, they should first be given the opportunity to understand that they are being asked to rule, so that they may require what evidence and argument they deem appropriate.

As stated in *Milam v. Milam*, 101 Ariz. 323, 419 P. 2d 502 (1966):

“. . . Notwithstanding, we think the rule demanding that questions be first raised in the trial court before they will be considered on appeal has application here.

\* \* \* \*

“Plainly, a party should have the opportunity to avoid a reversal and the expense and delay of a new trial by requiring that questions such as the one now raised be first submitted for decision at the trial court level.”

And, in *Aetna Casualty & Surety Co. v. Valley National Bank*, 15 Ariz. App. 13, 485 P. 2d 837 (1971).

“The trial court did not have an opportunity therefore to pass on this issue. Under our oft-stated rule that issues not raised in the trial court shall not be considered on appeal, defendant’s contention here must fail.”

And in *Payne v. Payne*, 12 Ariz. App. 434, 471 P. 2d 319 (1970):

“Turning now to the second reason, we state the general law in Arizona that a party must timely present his legal theories to the trial court so as to give the trial court an opportunity to rule properly.”

Even more fundamentally, the parties whose rights are being affected by a summary judgment determination should be aware of that fact so that they may present what evidence and raise what triable issues exist.

Here, FICO admits that its motion did not raise the reasonable use issue. Pima agrees and contends that

neither did its motion. Thus it is absurd for this Court to be asked by FICO to reverse or affirm the "ruling" upon that issue (especially since the Supreme Court has said that this cannot be done).

In order for any court to rule upon the issues inherent under the reasonable use doctrine, it would be necessary to examine the pleadings and then the proof. In Appendix "A" hereto are set forth the affirmative defenses<sup>1</sup> of Pima to each of the four counts in FICO's Complaint.

As was specifically brought to the attention of the lower court in the instant proceedings, there is evidence to support these defenses. (Record, p. 80.) As Appendix "B" hereto is set forth the affidavit of Mr. Fox referred to at page 80 of the Record. This same affidavit was presented originally to the Supreme Court in the 1971 proceeding. Additionally, Pima filed a 25-page report of Professor Richard Davis with the lower court on October 30, 1973, which report fully supports, with additional data, the opinion of Mr. Fox regarding the lack of damage to FICO by reason of the pumping by Pima.

In view of this evidence, it obviously was clear to the trial court, as it must be to this Court, that the issues raised in Pima's affirmative defenses were genuine and in good faith. As stated in *Stevens v. Anderson*, 75 Ariz. 331, 256 P. 2d 712,

"When motion for summary judgment is presented, it becomes the duty of the trial court to

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<sup>1</sup>FICO requested the lower court to strike some of but not all these defenses. The motion was heard on May 7, 1973. At that time some of FICO's motions were denied and the remainder were taken under consideration. The lower court's order under consideration the legal sufficiency of some of Pima's affirmative defenses.

examine the entire record and determine whether there is any disputed material fact which if true could have a bearing on the kind of final judgment which under the law should be rendered. If it appears that competent evidence will be submitted tending to prove or disprove such material fact, the determination of the existence thereof must depend upon the evidence submitted at the trial. The court does not try issues of fact, but only whether the same are genuine and in good faith disputed.' "

Consequently, any review of the record would have indicated to the lower court that no summary judgment could be granted against Pima. Further, FICO concedes it did not ask for any determination from the lower court other than regarding the Enabling Act. Likewise, Pima concedes it did not raise the reasonable use issue. (Brief, pp. 2-3 )

Thus, it should be apparent that the present state of the record does not provide to a reviewing court any reasonable or just basis for making a determination about an issue which neither court nor counsel considered below. It also should be clear that no judgment can be rendered against Pima on this issue without a trial which will resolve the conflicting factual claims of the parties.

**4. FICO Has Not Shown a Violation of the Reasonable Use Doctrine.**

The philosophy of the "reasonable use" doctrine was set forth upon rehearing in the second *Bristol v. Cheatham*, 75 Ariz. 227, 255 P. 2d 173 (1953). As the Court there stated:



"A great majority of the states which in recent years have been presented with this problem adhere to the principle that the owner of lands overlying ground waters may freely, without liability to an adjoining user, use the same without limitation and without liability to another owner, providing his use thereof is for the purpose of reasonably putting the land from which the water is taken to a beneficial use.

\* \* \*

"The principal difficulty in the application of the reasonable use doctrine is in determining what is reasonable use. There are various uses that have been held reasonable or unreasonable depending upon the nature of the use, as reflected in the annotations found in 55 A.L.R. 1385 and 109 A.L.R. 395. What is a reasonable use must depend to a great extent upon many factors, such as the persons involved, the nature of their use and all the facts and circumstances pertinent to the issue. The principle is well stated in Restatement of Law of Torts, Comments b and c, Section 852:

\* \* \* As such it is a question which must be determined in each case in view of the persons involved and the particular facts and circumstances. A use that may be reasonable under certain circumstances may be unreasonable under different circumstances, and a use by A that may be reasonable as to B may be unreasonable as to C. In some localities certain uses of water may, because of fairly uniform conditions be so continuously found to be reasonable or unreasonable that in the absence of exceptional circumstances they

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can be said to be so as a matter of law in that particular place. \* \* \*

\* \* \* The determination in a particular case of the unreasonableness of a particular use is not and should not be an unreasoned, intuitive conclusion on the part of a court or jury. It is rather an evaluating of the conflicting interests of each of the contestants before the court in accordance with the standards of society, and a weighing of those, one against the other.

\* \* \*

"It is axiomatic in the law that individuals in society must put up with a reasonable amount of annoyance and inconvenience resulting from the otherwise lawful activities of their neighbors in the use of their land. \* \* \*"

The Supreme Court has made it clear in two subsequent decisions that the mere use of water away from the immediate land from which the water was extracted is not illegal. After all, no one can be expected to use water solely at the well site—neither people nor cattle nor farmers nor miners. Thus, in *State v. Anway*, 87 Ariz. 206, 349 P. 2d 774 (1960), the Supreme Court held it was lawful to divert well waters from one parcel of land for use upon another parcel.

In the second decision in *Jarvis v. State Land Department*, 106 Ariz. 506, 479 P. 2d 169 (1970), the Court again stated the reasonable use rule:

"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."

The court then made it clear that water could be withdrawn from one parcel of land and used in another provided the latter overlay "the common basin." As the Court put it:

"Tucson questions whether on equitable principles it should be prohibited from delivering water to Ryan Field. Ryan Field is an airfield which we understand has existed at least as long as petitioners have engaged in agriculture. Its lands overlie the Avra-Altar water basin and geographically it lies within the Marana Critical Ground Water 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 Ground Water 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. Until Tucson can establish that its customers outside the Marana Critical Ground Water Area but within the Avra-Altar Valleys' drainage areas overlie the water basin so as to be entitled to withdraw water from it, there are no equities which will relieve it of the injunction heretofore issued."

In *Jarvis*, the Court also emphasized the further requirement of the reasonable use doctrine, namely

that the plaintiff be damaged by the withdrawal and use of water. Thus, the Court held that if Tucson purchased and retired from water usage previously cultivated lands, Tucson could withdraw and use an amount equal to the annual historical use upon such purchased lands.

The foregoing general principles have the following applicability to this case.

First, FICO has offered no proof of its injury from Pima's water withdrawal. The undenied fact in even the instant summary judgment proceeding is that there is deposited on state lands in the same critical groundwater area from which Pima withdraws water more water than is withdrawn. (Record, pp. 84-85.) Pima's Tenth Affirmative Defense (App. A) and the affidavit of Mr. Fox (Record, p. 30; App. B) reflect that there would be more water recharged to the underground supply from which Lease 906 water was taken than was taken from Lease 906.

Second, FICO itself admits that Pima makes use of the instant water within even the same critical groundwater area from the water was taken. As FICO states it:

"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." (Brief, p. 12.)

Use of water for transportation purposes is specifically allowed under the Groundwater Code, 45 A.R.S. 301(3).

Third, FICO has not disproved the contention in the Seventh Affirmative Defense that the waters of Pima and FICO are severed by a vertical fault barrier so that FICO is not damaged by withdrawal of water by Pima. This Defense is the subject not only of Mr. Fox's said affidavit, but also of the aforesaid 25-page report of Professor Davis

Fourth, FICO has not disproved the contention that all of Pima's pumping and use of water is upon land overlying the common basin as set forth in Pima's Fourth, Fifth and Eighth Affirmative Defenses. As pointed out in Mr. Fox's affidavit, for example, substantial quantities of water are produced at the very pit where Pima operates, although the richer sources of water, of course, are in the area from which Pima has its industrial pumps.

Fifth, FICO has not disproved Pima's Ninth Affirmative Defense which establishes that Pima has retired agricultural land which formerly used 7,000 acre feet of water per year and that Pima thus is entitled to consumptively use that amount of water per the rule of *Jarvis*. In *Jarvis*, the Court suggested that legislative intent to favor municipal use over agricultural use would be a factor in allowing Tucson to use an amount of water equal to that retired by Tucson's purchase of lands.

Here, the Legislature clearly has indicated the priority of industrial use over agricultural use by exempting industrial wells from the scope of the critical groundwater code which applies to irrigation wells. 45 A.R.S. 301(3); 45 A.R.S. 322.

Sixth, FICO has not disproved the affirmative defenses of laches and adverse use set forth in Pima's Affirmative Defenses Nos. 1 and 2.

Seventh, FICO has not disproved Pima's Tenth Affirmative Defense which sets forth the reasons per Restatement of Torts §852 regarding why no injunction should be issued against Pima.

Pima has treated only in summary, cursory fashion the reasonable use theory and its application to this case. The reason for this is that we cannot conceive that this Court could undertake any meaningful consideration of that issue in the light of the circumstances here present.

#### Conclusion.

The issue Appellant seeks to have this Court determine is one which the parties did not present to the lower Court nor one which that Court consciously ruled upon. Even if this issue were before this Court, there is no reason for this Court to consider this appeal. FICO has obtained from the Supreme Court all the relief possible under its Count IV. Lease 906 has been declared null and void. FICO can obtain no further relief from this Court.

FICO apparently seeks to have this Court render an advisory opinion upon the reasonable use issues

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even though the Supreme Court specifically has stated that this is not possible to do in the light of Pima's affirmative defenses to the Complaint.

If FICO wants to raise the reasonable use issue against Pima, it should do so by specifically so moving before the lower Court which then would have an opportunity to determine whether triable issues existed. Proceedings of such nature should not be commenced for the first time in a Court of Appeal.

For the foregoing reasons, Pima respectfully suggests that the appeal be dismissed.

Respectfully submitted,

VERITY & SMITH,  
and  
MUSICK, PEELER & GARRETT,  
*Attorneys for Appellee,*  
*Pima Mining Company.*



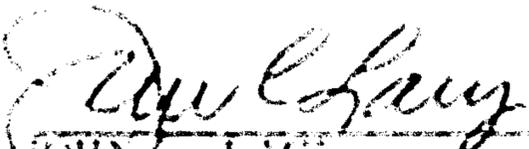
A handwritten signature in cursive script, appearing to read "Alan C. Bay", is written over a solid horizontal line.

STATE OF ARIZONA )  
 ) ss.  
COUNTY OF PIMA )

JOHN C. LACY being first duly sworn,

says:

Affiant mailed two copies of Appellee's Opening Brief to SNELL & WILMER, attorneys for Appellant, and to the Attorney General of Arizona, attorney for STATE LAND DEPARTMENT properly addressed and postage prepaid on July 23, 1974.

  
JOHN C. LACY

SUBSCRIBED and sworn to before me July 23,  
1974.

  
Robert D. Hubbard  
Notary Public

My Commission Expires  
By \_\_\_\_\_ Expires Aug. 5, 1977



## APPENDIX "A."

### First Affirmative Defense to Each Count.

In 1955, defendant drilled and completed its Wells Nos. 1, 2 and 3 in connection with its initial mining and drilling program which processed approximately 3,000 tons of ore per day.

In 1962 and 1963, the first and third well, respectively of defendant were deepened and improved.

In 1963, defendant made an expansion of its mining and milling operations and increased its capacity to approximately 7,000 tons of ore per day.

In 1965, defendant drilled its Wells Nos. 4 and 5, and commenced pumping therefrom in 1965 and in 1967.

In 1965, defendant commenced a further expansion of its mining and milling operations which was completed in 1966, which raised its milling capacity to approximately 18,000 tons of ore per day.

In 1966, defendant drilled its Wells Nos. 6, 7 and 8 from which water was first pumped in 1967.

In 1966, defendant commenced, and in 1967 completed, a further expansion of its mining and milling operations from 18,000 tons of ore per day to a projected capacity of 30,000 tons of ore per day, but which eventuated in actual capacity of 40,000 tons of ore per day.

In 1968, defendant drilled and first pumped water from its Well No. 9. In 1969, defendant drilled and in 1970 first pumped water from its Well No. 10, and drilled its Well No. 11. Defendant drilled its Wells 12 and 14 in 1970, after having obtained permits so to do from the State Land Department in 1969.

In 1969, defendant announced plans for and will complete in 1971 a further expansion of its mining and milling activities, which will increase its capacity to mill ore to approximately 54,000 tons of ore per day.

At least as early as 1952, and thereafter, plaintiff believed that the groundwater in what was to become the Sahuarita-Continental Critical Groundwater Area was being used and depleted faster than it was being recharged.

At least as early as 1954, and thereafter, plaintiff also believed that any further withdrawal of groundwater from the Critical Groundwater Area necessarily would adversely affect the groundwater supply for all of the farming lands in the Sahuarita-Continental Area.

Plaintiff knew in 1954 that water rights might be lost by estoppel and knew that in order to obtain an injunction against the unreasonable use of water, it was necessary to warn the alleged illegal withdrawer of water before the latter made large expenditures in furtherance of publicized plans to withdraw water.

Plaintiff knew as early as 1957 or 1958 that mines were using water for their operations, and that defendant pumped water up to its mine and mill area, which was about six miles away from the wells from which the water was taken.

In 1958, three years after defendant had completed its first three wells near the Santa Cruz River, plaintiff bought its land in the Sahuarita Area, fully knowing that defendant's wells were nearby.

Plaintiff knew as early as 1961 that defendant's concentrated pumping of water had lowered the latter's water level approximately 30 feet from 1956 to

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1961. Plaintiff also knew in 1965 that the pumping of water for the milling of copper ore was expected to increase.

At no time prior to 1969 did plaintiff ever complain to defendant about or protest its use of water from the wells which were located nearby what is now plaintiff's Sahuarita Farm.

Through November of 1969, defendant had made a capital investment of more than \$80,000,000 in connection with the erection and maintenance and expansions of its mine and mill and related facilities. Although plaintiff knew in advance of defendant's commencement of activities and expansions, plaintiff never objected either to defendant's initial building of its facilities in 1955, nor to any of the expansions thereof which took place in 1963, 1965 and 1966 all of which activities were well publicized in the Tucson, Arizona and national press. Nor did plaintiff object to the pumping of water by defendant in connection with any of defendant's operations until plaintiff informally complained in the Spring of 1969.

Plaintiff misled defendant into believing that defendant could so pump water for use in connection with its mining and milling operations, and allowed defendant to expend over \$80,000,000 prior to the time that plaintiff first raised any objection to the use of water by defendant.

Plaintiff therefore is guilty of laches and defendant would be greatly prejudiced should plaintiff's now-asserted rights be recognized, and plaintiff therefore should be estopped from asserting the equitable relief it seeks herein.

**Second Affirmative Defense to Each Count.**

Defendant further alleges that its taking of water from its wells in said Critical Area and use of such water at its Pima Mine has been open, apparent, notorious, continuous, hostile and adverse to plaintiff and to all other persons for a period of more than ten consecutive years next preceding the filing of this action and any notice to said defendant of the rights plaintiff now claims, whereby plaintiff's alleged claim is barred by the provisions of Arizona Revised Statutes (1956) §12-526.

**Third Affirmative Defense to Each Count.**

On November 25, 1969, plaintiff filed an application with the State Land Department in which it asserted that the waters from which its wells pump may be pumping water from a definite underground channel located beneath the surface of the earth in the Santa Cruz Valley and following the general course and direction of the Santa Cruz River. Also, in 1952, plaintiff as a member of the Santa Cruz Underground Water Users' Association, contended to the Arizona Underground Water Commission that the water under the Santa Cruz River low lands in the area from Tucson South to the Mexican border was underground of the Santa Cruz River, that is, was an underground stream according to law, and therefore was subject to appropriation.

If a trier of fact finds that plaintiff be correct in its assertions of fact that the water which it pumps is an underground, channelized stream, then it may not complain herein of defendant's use of underground water.

**Fourth Affirmative Defense to Each Count.**

On December 21, 1948, in pursuance of the authority vested in it by A.R.S. 45-303, the State Land Department designated certain land as the "Santa Cruz Groundwater Basin". All of defendant's pumping and use and all of its mining and milling facilities are located within the boundaries of said Santa Cruz Groundwater Basin.

Pursuant to A.R.S. 45-301(5), the "Santa Cruz Groundwater Basin" is defined to mean "Land overlying, as nearly as may be determined by known facts, a distinct body of groundwater . . ." As a result of the foregoing plaintiff is not injured by and has no rights to be affected by the withdrawal of water by defendant for use in any part of its facilities or in any portion of said land overlying the "distinct body of groundwater" referred to A.R.S. 45-301.

**Fifth Affirmative Defense to Each Count.**

On June 8, 1954, in pursuance of the authority vested in it by A.R.S. 45-303, the State Land Department designated certain land as the Sahuarita Continental Subdivision of the Santa Cruz Groundwater Basin. All of defendant's pumping and use and all of its mining and milling facilities are located within the boundaries of said Sahuarita Continental Subdivision of the Santa Cruz Groundwater Basin.

Pursuant to A.R.S. 45-301(6), said Subdivision is defined to mean "an area of land overlying, as nearly as may be determined by known facts, a distinct body of groundwater. It may consist of any determinable part of a groundwater basin." As a result of the foregoing, plaintiff is not injured by and has no rights to be affected by the withdrawal of water by defendant for use

in any part of its facilities or in any portion of said land overlying the "distinct body of groundwater" referred to in A.R.S. 45-301.

**Sixth Affirmative Defense to Each Count.**

Approximately 90% of the water which is pumped by defendant from the Sahuarita-Continental Critical Groundwater Area has its ultimate use in said Critical Groundwater Area by defendant for a legitimate and proper industrial purpose. The important and beneficial industry which defendant operates in Pima County, therefore, should not be shut down merely because 10% of the total water which it pumps is consumptively used outside of said Critical Groundwater Area, as such amount, under the circumstances of this case, is *de minimis*.

**Seventh Affirmative Defense to Each Count.**

The water which constitutes the source of supply of all wells of defendant, except its Wells numbered 2 and 5, is completely separated from the water which constitutes the source of supply for plaintiff's wells by a fault or faults or other impermeable barrier. Therefore, except for said Wells Nos. 2 and 5 of defendant, the waters which defendant and plaintiff pump are from different and separated water basins. As a result, plaintiff is not injured by and has no right to complain of the use by defendant of the water which it pumps from its said wells.

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**Eighth Alternative and Affirmative Defense to Each Count.**

The land on which all of defendant's wells (except its Wells Nos. 2 and 5) and on which its mining and milling facilities are located, all overlie a common water basin which is hydraulically interconnected and completely severed from water supplying plaintiff's land. Consequently, defendant is not taking or using water off the land to which it is subjacent, and plaintiff is not injured by and has no right to complain of the use by defendant of the water which it pumps from its said wells.

**Ninth Affirmative Defense to Each Count.**

Defendant has purchased certain acreage of agricultural land within the Sahuarita-Continental Critical Groundwater Area which, defendant believes, had an annual water usage of approximately 7,000 acre feet, and will have retired same from agricultural use by the time of the trial of this action, and therefore has the equitable right to use in its mining and milling and related operations the historical water use of said land, which exceed said operation's consumptive use outside said Critical Area.

**Tenth Affirmative Defense to Each Count.**

Defendant is making reasonable use of the water which it pumps from said Critical Area. Said water is being used in a profitable mining and milling operation in which there was invested over \$80,000,000 as of November, 1969. Defendant pays substantial taxes to the County of Pima and the State of Arizona. For

example, the total property taxes paid to Pima County in 1968 were over \$1,373,000; the total royalties paid to the State of Arizona for the year 1968 were over \$935,000; the total sales tax paid for the year 1968 was over \$979,000; defendant paid Arizona income tax of over \$305,000; the total payroll of defendant for the year 1968 was over \$5,796,000.

On the other hand, plaintiff's use of water has been for an agricultural operation which could not have existed except for subsidies: in 1968, plaintiff received over \$527,000 in subsidies; in 1969, petitioner received over \$658,000 in subsidies; and in 1970, plaintiff received over \$848,000 in subsidies. As of year-end 1968, plaintiff had a total deficit of over \$100,000.

Approximately 80% of the water which defendant pumps for its use is recharged into the water table within the Critical Area and is returned to the underground source of supply from which defendant takes its water. Thus, defendant consumptively uses only approximately 20% of the total water which it pumps.

Plaintiff consumptively uses over 90% of all the water which it pumps, and therefore returns to its underground source of supply no more than 10% of the water it pumps.

The conflicting interests of plaintiff and defendant to the water in said Critical Area require a determination that the use of water by defendant involves a higher social use and greater utility than that of plaintiff.

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**Thirteenth Affirmative Defense to Each Count.**

Plaintiff repeatedly has increased its irrigation use of groundwater within said Critical Groundwater Area since 1954. From 1965 through 1969 on its Sahuarita farm alone, plaintiff has doubled its production and consumptive use of groundwater. Plaintiff has planted pecan trees in replacement of previous crops so as to double the requirement for production of and consumptive use of groundwater.

Any damage which plaintiff may have suffered from any fall in the water level in its wells is due to causes other than pumping of water by defendant.

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**APPENDIX "B."**

**Affidavit of Robert C. Fox.**

In the Supreme Court of the State of Arizona.

Farmers Investment Company, a corporation, Petitioner, vs. The State Land Department, a department of the State of Arizona; Andrew L. Bettwy, State Land Commissioner of the State of Arizona; and Pima Mining Company, real party in interest, Respondents. No. 10486.

State of Arizona, County of Los Angeles—ss.

**ROBERT C. FOX**, first being sworn, deposes and says:

I am an Engineering Geologist. I received my Bachelor of Arts in Geological Sciences at the University of California at Berkeley in 1951. I have an adult teaching credential which authorizes me to teach Groundwater Geology. I am a Registered Geologist and Engineering Geologist in the State of California.

I have had 20 years of extensive and varied experience involving geologic, hydrologic and water quality surveys, surface and groundwater studies; exploratory and production well drilling; the application of geology to planning, design and construction of civil engineering works; and training of personnel in the technology and application of scientific methods of water developments.

From 1951 to 1969, I was an Engineering Geologist with the California Department of Water Resources. During that period, I was in charge of geologic exploration for planning activities and was a Program Manager for Sea-Water Intrusion Studies, Water Quality Investigations, and Development of Standards for Water

Well Construction. My last title upon leaving the Department was Senior Engineering Geologist.

Among the Water Quality Investigations which have been conducted was the determination of the nature, extent and significance of water quality problems and conditions in the Colorado River Desert Area; the Mojave Desert; the Basin and Ranges Region, California; the Western Watershed of San Diego County; and the San Luis Obispo County Area. These investigations also included investigations of geothermal waters in Long Valley, Mono County, California, and the effects of geothermal development on water resources in the Salton Sea Area, California.

Additionally, I have been involved with water well standards, that is, the developing and publishing of recommended water well construction and sealing standards, and the encouragement and stimulation of the use of good water well drilling practices throughout the State of California.

- Certain of my special assignments were as follows:
- 1958-1959 Department Geologic Advisor and expert witness during Santa Margarita River litigation, United States v. Fallbrook.
  - 1965-1966 In charge of geologic studies for Crash Program pertaining to investigations of alternative sites for nuclear power plants and sea-water conversion plants.
  - 1964-1969 Department representative and member of San Luis Obispo County Sea-Water Intrusion Task Force Committee.
  - 1964-1969 Department representative to United States Atomic Energy Commission's Symposium: Engineering With Nuclear Explosives.

Since 1969, I have devoted my entire time to being a consulting Engineering Geologist servicing various governmental, industrial and private entities regarding various water problems.

Since October 1969, I have been employed as a consultant by the attorneys for Pima Mining Company ("Pima") to direct, supervise and make tests and to render advice in an action No. 116,542 in Pima County, entitled Farmers Investment Company v. The Anaconda Company, et al. As a result of such employment, I have directed, supervised and made numerous geo-hydrologic and water quality investigations of Pima and Farmers Investment Company ("Fico") wells, the groundwater supplies or sources of said wells, and the geologic conditions in the subsurface of Pima's and Fico's lands.

All of the data ordered by the Superior Court to be furnished by Fico to Pima has not yet been made available to me and, therefore, I have not been able to complete my final analysis which I will render to Pima's attorneys. However, based on the data, information, investigations and analyses to date, I have the following opinions.

*First*, Pima Wells, 1, 3, 4, 6, 7, 8, 9, 10, 11, 12 and 14 (hereafter, "said Pima's wells") are not geologically or hydraulically connected with any of Fico's wells. I have determined that said Pima's wells are physically independent from, and are in a distinct subarea or compartment from Fico's wells. Said Pima's wells do not obtain their underground water supply from the same source as do Fico's wells. In short, the hydraulic continuity between said Pima's wells and those of Fico is severed.

The reason for there being no geologic and hydraulic continuity between said Pima's wells and those of Fico is because of a fault barrier. This barrier prevents subsurface movement of groundwater, which supplies said Pima's wells, from moving over or through said barrier and co-mingling with water which supplies Fico's wells.

The grounds of and the facts upon which this opinion is based are as follows:

(1) Modern geologic investigations of the subsurface now include as a device the determination of whether there may be observed on the surface of the earth any "linears" or lines. Such linears have been found to be indicative of faulting or other significant geologic conditions. In my investigations, I became aware of the presence of various linears in the vicinity of Pima's and Fico's wells. These linears were observable from certain National Aeronautics and Space Administration photography, from infrared imagery specifically flown for the investigations in said action, as well as from conventional color and black and white aerial photographs. One such linear trends generally in a north-south direction between Pima and Fico lands. This linear indicated to me the advisability of conducting surface and subsurface investigations to ascertain whether the linear reflected a fault, and if so, whether the fault had hydrologic significance.

(2) One of the series of tests conducted pertained to the chemistry of the groundwater supplies of the Pima and Fico wells. Groundwater samples were obtained from the Pima wells and from the Fico wells. Time and space limitations prevent a setting forth of all the data involved, of the chemistry as well as of the other tests.

but the conclusion I reached from examining said chemical tests was that the test results showed that (i) the said Pima wells on the one hand, and (ii) the Fico wells and Pima Wells 2 and 5 on the other, had significantly different mineral character and chemical quality.

(3) Another series of tests was a sophisticated groundwater temperature survey. This survey included all Pima wells and all Fico wells (where physically possible) in an approximate five and one-half square mile area nearby Pima's wells, i.e., of those Fico wells which first could be affected by pumping from Pima's wells. This temperature survey was conducted by means of a highly sensitive thermistor which, in effect, measured the temperature of the groundwater stored in the formation adjacent to wells being tested. Readings generally were taken at 10-foot depth increments. These thermistor surveys showed that there was a large, significant difference between the temperature of the groundwater adjacent to (i) said Pima's wells on the one hand, and (ii) the Fico wells and Pima Wells 2 and 5 on the other.

(4) Another series of tests involved a seismic investigation by a geophysical team which confirmed that there were a series of faults and zones of faulting in Pima's land which increased in number and complexity as the Pima-Fico boundary line was reached. More specifically, several of the precise points of faulting, located through the refraction and reflection instruments used in the seismic investigation coincided with the north-south linear mentioned above.

(5) My analysis of the well driller's logs of pertinent Pima and Fico wells indicated that faulting was preva-

ent in the investigational area. Several faults coincided with those located by geophysical means and observed on infrared and aerial photographs.

(6) I also analyzed the water level data over a number of years of the Pima and Fico wells and concluded therefrom that (i) there were significant differences in water level fluctuation in said Pima wells and Fico wells; and that (ii) such indicated the existence of a barrier between said wells.

(7) The most recent series of tests which I have conducted are well interference tests which were conducted to ascertain whether extended pumping by Pima wells would have any effect on the water levels in adjacent Fico Wells. I concluded that Pima Wells 2 and 5 are hydraulically connected with Fico's wells but that the remaining said wells of Pima are not.

Based upon the present status of my investigations, the foregoing is a brief summary of the facts known to me and the conclusions I have reached regarding my opinion that there is no hydraulic continuity between said Pima wells and Fico wells, and that the Pima wells obtain their groundwater supply from a source that is distinct from that which supplies the Fico wells.

*Second*, it is my opinion that the land in which said Pima wells, its tailings ponds, and Pima's mine and mill are located, all overlie a common source of groundwater. The underlying groundwater in said lands is hydraulically connected so as to form a distinct groundwater area. The grounds of and the facts upon which I base this opinion are as follows:

The bottom of the massive, open mine pit from which Pima extracts its low grade copper ore presently is at a level of about 2,630 feet above mean sea level

or about 600 feet below the earth's surface at the pit. Groundwater is present in said pit and is being pumped at the rate in excess of 400 g.p.m.

Well No. 11 of Pima, located approximately 1,000 feet east of Pima's tailings ponds in Section 10, Township 17 South, Range 13 East, contains groundwater.

Groundwater also is being pumped from the Palo Verde Shaft, located in Section 36, Township 16 South, Range 12 East.

The groundwater temperature of said Pima's wells, including No. 11, and the water in said Pima's pit is consistent with one another.

*Third.* based upon preliminary calculations, I have concluded that of the water pumped by the Pima wells, as much as 80% is returned to the aquifer system from which it was pumped. The ground of and the facts upon which this opinion is based are as follows:

Statistics kept by Pima reflect that of the total water pumped, approximately 90% thereof is delivered from the tailings thickeners towards the tailings ponds. The only losses of water at the tailings ponds are evaporation and a minor amount retained in the solid portion of the tailings, both of which amount to somewhat less than 10% of the water delivered to the tailings ponds.

*Fourth.* based upon chemical analyses of water from the tailings ponds, and the previous chemical samplings referred to above, there is nothing in the chemical makeup of the tailings ponds' water, with the exception of total dissolved solids concentration and sulphate ion concentration, that does not meet U.S. Public

Health Service drinking water standards. However, when recharged water reaches and co-mingles with groundwater stored in the reservoir from which it was originally pumped, it will be diluted to such an extent that it will meet the limits set by the U.S. Public Health Service. Samples of water obtained from the Fico wells reflect that the nitrate ion concentration of groundwater pumped from the Fico wells exceeds the U.S. Public Health Service limits in some cases as much as 17%. It should be pointed out that high total dissolved solids and high sulphate ion concentration do not "contaminate" the water supply but rather indicate a salt content that is higher than desirable.

Further Affiant sayeth not.

Dated: April 23, 1971.

/s/ Robert C. Fox  
ROBERT C. FOX

Subscribed and sworn to before me, this 23rd day of April, 1971.

/s/ Essie McCormick  
Notary Public in and for said County and State

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, Appellee's Brief in Farmers Investment Company v. Bettwy, filed September 23, 1974. Court of Appeals Instruments (Part Two) Page 117 with 42 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 D. 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

