VERITY, SMITH, LACY, ALLEN & KEARNS, P.C.
902 Transamerica Building
Tucson, Arizona 85701
(602) 623-6961

MUSICK, PEELER & GARRETT
One Wilshire Boulevard, Suite 2000
Los Angeles, California 90017
(213) 629-3322

Attorneys for CYPRUS PIMA MINING COMPANY

IN THE SUPREME COURT OF THE STATE OF ARIZONA

FARMERS INVESTMENT COMPANY, a corporation, Appellant, v. ANDREW L. BETTWY, as State Land Commissioner, and the STATE LAND DEPARTMENT, a Department of the State of Arizona, and PIMA MINING COMPANY, a corporation, Appellees.	FILED OCT 1976 CLERK BY
FARMERS INVESTMENT COMPANY, a corporation, Appellant, v. THE ANACONDA COMPANY, a corporation; AMAX COPPER MINES, INC., THE ANACONDA COMPANY as partners in and constituting ANAMAX MINING COMPANY, a partnership, Appellees.	NO. 11439-2 MEMORANDUM IN SUPPORT OF MOTION FOR REHEARING
CITY OF TUCSON, a municipal corporation, Appellant, v. ANAMAX MINING COMPANY, and DUVAL CORPORATION and DUVAL SIERRITA CORPORATION, Appellees.	

COMES NOW THE APPELLEE, CYPRUS PIMA MINING COMPANY, and respectfully submits this Memorandum in Support of Motion for Rehearing.

DATED this 12th day of October, 1976.

VERITY, SMITH, LACY, ALLEN & KEARNS, P.C.
902 Transamerica Building
Tucson, Arizona 85701

By John C. Lacy
John C. Lacy

and

MUSICK, PEELER & GARRETT
One Wilshire Boulevard, Suite 2000
Los Angeles, California 90017

By Gerald G. Kelly
Gerald G. Kelly

Kenneth A. Holland
Kenneth A. Holland

Attorneys for Appellee
Cyprus Pima Mining Company

MUSICK, PEELER & GARRETT

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MEMORANDUM IN SUPPORT OF
MOTION FOR REHEARING

Comes now the Appellee, Cyprus Pima Mining Company (hereinafter "Cyprus Pima"), and submits this Memorandum in Support of a Motion for Rehearing to reconsider this Court's decision of August 26, 1976, wherein this Court, in entertaining consideration of three separate, but consolidated, appeals has, by its decision, abrogated the doctrine of reasonable use as heretofore adopted and construed by this Court in its prior decisions.

Since Cyprus Pima will be adversely affected by the findings of fact and conclusions of law reached by this Court in its majority opinion, and in light of this Court's directive therein that Count IV of the Amended Complaint of Plaintiff, Farmers Investment Company (hereinafter "FICO"), be remanded back to the Superior Court of Pima County, which granted Cyprus Pima's motion for summary judgment on Count IV, "for further proceedings consistent with this decision" (slip op. at 17), a rehearing is mandated.

A. THIS COURT HAS ABROGATED THE DOCTRINE OF REASONABLE USE AS HERETOFORE JUDICIALLY CONSTRUED BY ITS PRIOR DECISIONS.

In this Court's decision of August 26, 1976, the majority held that "[w]ater may not be pumped from one parcel [of land] and transported to another just because both overlie the common source of supply if the Plaintiff's land or wells upon his lands thereby suffer injury or damage" (slip op. at 14). This holding has altered the pre-existing law of this State that groundwater may be diverted for use, without incurring liability to adjoining land-owners, on any land overlying the common source of supply of

groundwater. This opinion has additionally not set forth any ascertainable standard as to what will constitute a use of groundwater "on the lands" from which the water is extracted within the meaning of the reasonable use doctrine and of equal significance the majority opinion has incorrectly presumed that FICO's water supply is being damaged by the pumping of water by the mining companies.

1. The Operative Facts Upon Which This Court Based Its Ruling.

On November 24, 1969, FICO filed its original complaint naming certain mining companies as defendants. On November 8, 1973, FICO filed its Amended Complaint naming as defendants the Anamax Copper Mining Company, the Anaconda Company, the Amax Copper Mines, Inc., the Pima Mining Company (Cyprus Pima), the Duval Corporation and the American Smelting and Refining Company. Therein, FICO alleged that the defendants were "pumping substantial amounts of water from under the lands in said critical water area (Sahuarita-Continental Critical Ground Water Area) and (were) using such waters so pumped outside the said critical water area on lands other than from which the waters (were) being pumped; . . ." (Amended Complaint of FICO. November 8, 1973).

In its answer, Appellees admitted that "water (was) pumped from its land in said critical area for its use at a site located outside of said critical water area" and further alleged that "a substantial quantity of the water so used (was) returned to said critical water area; . . ." (Answer of Amax Copper Mines, Inc., The Anamax Mining Company and The Anaconda Company to FICO's Amended Complaint, November 16, 1973).

During the pendency of the action for trial, FICO, on April 15, 1974, moved for immediate injunctive relief asserting that the Appellees were presently engaged in drilling a well to

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the proposed depth of 1,000 feet, that the well was situated within the critical water area and that a permanent injunction should issue to enjoin the Appellees from transporting the water outside the critical area "or for any use other than a beneficial use on the land from which the water is withdrawn" (Slip op. at 6).

The Appellees, in their response to FICO's application for injunctive relief, conceded that they were constructing the well complained of by FICO and that the water to be derived from this well would be pumped, in part, to its mine located outside the critical water area. Appellees alleged, however, that the bulk of the water would be returned to the critical water area in the tailings deposit. Appellees denied they were using the water pumped from the critical area on lands other than the lands from which the waters were being pumped, employing the term "lands" to mean lands overlying the basin subdivision and common body of water underlying such lands (Answer and Response of the Anaconda Company, Amax Copper Mines, Inc., and Anamax Mining Company to FICO's Application and Amended Application for Preliminary Injunction, May 7, 1974).

The Superior Court of Pima County denied FICO's application for a preliminary injunction on the same "basis" upon which it granted a partial summary judgment in favor of Anamax against the intervenor, the City of Tucson. The ruling of the Superior Court provided:

> "2. Water may be pumped from one parcel and transported to another parcel, if both parcels overlie a common basin or supply and if the water is put to a reasonable use" (Slip op. at 7).

This Court, in the decision under challenge here, has erroneously held that the Superior Court erred in reaching the result that groundwater may lawfully be extracted from one parcel of land

and diverted for a reasonable use on another providing both overlie a common basin of groundwater or a common supply of groundwater. In this regard this Court went on to rule that groundwater may only be diverted for use on those lands "on which the pumping occurred" (Slip op. at 12), suggesting, although not clearly, that groundwater may only be deployed and used on that land where the water wells are located.[1/] The effect of these pronouncements is apparent: the doctrine of reasonable use, as previously adopted and applied by this Court in its prior decisions, has now been overruled and no ascertainable standard remains to provide the necessary guidance to landowners in the use of the groundwater lying beneath their lands.

2. This Court Has Directly Overruled Its Prior Decisions In Neal v. Hunt, 112 Ariz. 307, 541 P.2d 559 (1975), Jarvis v. State Land Department (Jarvis II), 106 Ariz. 506, 470 P.2d 169 (1970) And Bristor v. Cheatham (Bristor II), 75 Ariz. 227, 255 P.2d 173 (1953), Which Held That Groundwater May Be Extracted And Beneficially Used On Any Land Overlying The Water Basin Or Common Source Of Supply Of Groundwater.

1/ In that portion of this Court's decision of August 26, 1976, dealing with FICO's appeal from the Superior Court's entry of a summary judgment in favor of Cyprus Pima on Count IV of FICO's amended complaint, this Court, in remanding the cause back to the Superior Court, relied primarily upon its analysis of the reasonable use doctrine set forth in the FICO v. Anamax portion of the opinion. This Court found that it was unlawful for Cyprus Pima to pump and transport groundwater from state lands lying within the upper Santa Cruz basin "away from the lands on which the water is pumped" (Slip op. at 16), where the supply of other groundwater users who overlie the common source of supply is being lowered and depleted (Ibid.).

Over the course of the past twenty-five years this Court has had the occasion, though infrequently, to rule on the rights and liabilities of those who pump and use the groundwater lying beneath their lands. One of the first and principal expressions by this Court on the permissible use of groundwater in the State of Arizona came in the landmark decision of Bristor v. Cheatham (Bristor II), 75 Ariz. 227, 255 P.2d 173, reversing, Bristor v. Cheatham (Bristor I), 73 Ariz. 228, 240 P.2d 185 (1952). There, this Court, for the first time, adopted as the law of the State the American doctrine of reasonable use. This Court was confronted in Bristor II with the question of whether the trial court properly dismissed the plaintiffs' complaint for failure to state a cause of action. The plaintiffs alleged that the defendants had constructed on their lands a number of large water wells and were extracting groundwater from under the plaintiffs' lands, thereby causing the water level to drop to the extent that the plaintiffs were deprived of this water for domestic purposes. The plaintiffs further alleged that the water pumped by the defendants was being transported approximately three miles from the location of the pumping and was therefore not used for any beneficial purpose on the lands from which the water was extracted. This Court overturned the trial court's ruling dismissing the complaint and ruled that a cause of action under the American doctrine of reasonable use was stated. This Court observed:

> "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. If it is diverted for the purpose of making reasonable use of the land from which it is taken, there is no liability incurred to an adjoining owner

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for a resulting damage" (225 P.2d at 180).

Thus, in Bristor II this Court emphasized that where groundwater is diverted for use on "the land from which it is taken" then adjoining landowners cannot complain of any resulting damage to their water supply. In Bristor II this Court did not clarify the term "on the land from which [the groundwater] is taken"; however, subsequent cases have made the term clear, and this Court's interpretation now that "on the land" did not mean that land overlying the common supply of groundwater is a complete reversal of this Court's earlier pronouncements. In reaching this result the majority unconvincingly relies upon the language of the plaintiffs' complaint in Bristor II to buttress its conclusion. This Court observed in the majority opinion:

> "Appellee nonetheless argues that Bristor only established the limited principle that groundwater may not be conveyed to a point beyond lands overlying the common supply, compelling the conclusion that if the water so transported returns at least in part to replenish the common supply, this satisfies the American doctrine of reasonable use. Appellee argues that while a party owning land overlying the common underground water supply could not convey pumped waters 'off the land' or 'off his land,' this only meant land overlying the common source of supply. But there is no language in Bristor's complaint which suggests the water pumped by defendant Cheatham was not used on lands overlying the common supply.
>
> The Bristors alleged in their complaint that defendant was transporting

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water three miles from where it was pumped, and in paragraph 14 of their complaint:

> 'that the water so pumped by defendant confers no benefit upon defendants' lands where the pumping operation is conducted; that such use by defendants is an unreasonable use as to plaintiffs . . .'

The Court's holding, therefore, that the Bristor's cause of action stated sufficient facts to warrant relief, must be interpreted in light of the allegation that the water pumped conferred no benefit to the defendants' land on which the pumping was conducted.

From the context of the language used in the Bristor opinion, from the cases quoted in it, and from the Bristor's position as set forth in their complaint it is clear

> there is no firm basis for appellees' conclusion that the word 'lands' meant other than lands on which the pumping occurred.' (Slip op. at 11-12).

This Court's conclusion that the plaintiffs' position, as set forth in their complaint, was primarily that the defendants were unlawfully diverting the groundwater for use off the immediate lands on which the pumping occurred and not the broader area of land overlying the common source of supply would indeed marvel the plaintiffs in Bristor if they were informed of this today.

In Bristor I, Justice La Prade, in his concurring and dissenting opinion, emphasized that the plaintiffs' counsel interpreted his own complaint to have stated a cause of action under the reasonable use doctrine. Justice La Prade then went on to

quote the following passages from the plaintiffs' opening brief:

> "'The first cause of action does not pose a question as to who has the better right between adjoining owners, both of whom are pumping percolating water and using the water to develop their respective lands. It does, however, we believe, present squarely to this court the proposition that the pumper of percolating water cannot transport such percolating water to some other locality where there would be no opportunity for it to return and replenish the common supply available to the owners of both tracts of land.'
> [Emphasis supplied]" (240 P.2d at 193-94).

Therefore, the thrust of the plaintiffs' allegation in Bristor was that the defendants were unlawfully transporting the water they pumped away from the common source of supply which fed the wells of both the plaintiffs and the defendants. In Bristor, this Court, by implication, accepted the notion that the land overlying the common supply would be accepted as that land from which the water was extracted within the meaning of the doctrine of reasonable use.

Although it seems quite apparent from an overall analysis of the Bristor decisions that this Court defined an "on the land" use as that use of groundwater on land overlying the common supply of groundwater, this was made unmistakably clear seventeen years later in this Court's decision in Jarvis v. State Land Department (Jarvis II), 106 Ariz. 506, 470 P.2d 169 (1970). There, this Court held that the City of Tucson could lawfully extract water from its wells situated within the Marana Critical Ground Water Area and transport this water for use off the immediate lands on which the

wells were located to Ryan Field, an air base located on lands situated within the boundaries of the critical water area. The fact that Ryan Field had its locus in the Marana Critical Ground Water Area was not, however, the basis on which this Court found the diversion lawful. The critical consideration, in this Court's judgment, centered on the fact that Ryan Field was located on lands overlying the water basin. This Court concluded:

> "Its lands [Ryan Field] overlie the Avra-Altar water basin and geographically it lies within the Marana Critical Groundwater Area so as to entitle it to withdraw from the common supply for 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." [Emphasis supplied] (479 P.2d at 173).

From a common sense reading of this decision it is beyond peradventure that this Court, ONLY SIX YEARS AGO, adopted the time-honored, and indeed correct,[2/] interpretation of what land con-

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2/ The interpretation of an "on the land" use proferred by Cyprus Pima here, and which was accepted by this Court until the rendering of the opinion here challenged, that any land overlying the common supply or water basin constitutes the land from which groundwater is extracted, has been approved by several other courts. See, e.g., Horne v. Utah Oil Refining Co., 59 Utah 279, 202 Pac. 815 (1921), Glover v. Utah Oil Refining Co., 62 Utah 174, 218 Pac. 955 (1923), Orchard v. Cecil F. White Ranches, 97 Cal.App.2d 35, 217 P.2d 143 (1950), Evans v. City of Seattle, 182 Wash. 450, 47 P.2d 984 (1935), Katz v. Walkinshaw, 141 Cal. 116, 70 Pac. 663 (1902), on rehearing, 74 Pac. 766 (1903). One prominent legal scholar has correctly noted that "[t]he reasonable use doctrine requires that the exploitation rights of the overlying proprietor be limited. It permits him to pump only such water as he can apply to reasonable beneficial uses upon his own land, and outlaws, as unreasonable, diversions to lands beyond the source basin." Casner, American Law of Property, Volume 6A, p. 196.

stitutes the land from which the groundwater is derived, i.e., that land which overlies the water basin or common source of supply. In Jarvis II, this Court further ruled that Tucson could not deliver water extracted from the Marana Critical Ground Water Area to its customers who were situated outside the critical area but within the Avra-Altar Valleys' drainage areas. This Court did emphasize, however, that these customers could receive the water providing Tucson could show that they were located within the larger water basin. This Court stated:

> "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."
> [Emphasis supplied] (479 P.2d at 173).

Thus, it is beyond dispute that this Court has accepted and iterated the principle that a water user may extract water from his land and divert it for use on any land overlying the common supply from which it was pumped.

ONLY ONE YEAR AGO, in this Court's decision in Neal v. Hunt, 112 Ariz. 307, 541 P.2d 559 (1975), Chief Justice Cameron, speaking for this Court, again reiterated the principle, by impli-

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cation, that where water is extracted and used on land overlying the common supply (water basin), then this constitutes a use of the water "on the land" from which it is withdrawn. Although in Neal v. Hunt, supra, this Court was concerned with a use of groundwater away from the area from which it was extracted, it is indisputable that the Court considered the land away from which the water was pumped to be that land which did not overlie the common supply:

> "We therefore hold that in dealing with percolating waters and not surface waters or subterranean streams, and absent a showing of damage to, or impairment of, the water supply of another landowner within the same groundwater basin, a landowner may mine and remove, to an outside area, subjacent water from his land." [Emphasis supplied] (541 P.2d at 565). 3/

Here, there is little question but that the mining companies, including Cyprus Pima, are pumping groundwater from their wells located on lands situated within the Sahuarita-Continental Critical Ground Water Area and transporting this water for use, in part, to their milling circuits located outside the critical water area. It is also undisputed that the entire extraction and use of the groundwater takes place on lands overlying the Sahuarita-Continental Subdivision of the Santa Cruz

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3/ In Neal v. Hunt, supra, this Court affirmed the findings of fact of the trial judge, which clearly showed that the defendants were diverting the water they pumped away from the lands from which it was withdrawn, i.e., the land overlying the supply of water common to the plaintiffs. The trial court found that "'[n]one of the proposed locations for delivery of the water to be removed from the Neal wells . . . overlay the supply of water common to the HUNT, BYERS, GRIGG and NEAL wells . . .; consequently, the present and contemplated withdrawal and use of the percolating groundwater by defendants is not connected with any beneficial ownership or enjoyment of the land from which it is withdrawn.'" (541 P.2d at 564).

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Groundwater Basin. The critical water area here in question is a smaller entity lying totally within the boundaries of the larger subdivision. Pursuant to legislative directive, on June 8, 1954, the Sahuarita-Continental Subdivision was designated by the State Land Department as an "area of land overlying, as nearly as may be determined by known facts, a distinct body of groundwater. . . . (Arizona Revised Statutes §45-301(6). A critical area is not a subdivision hydrologically "determined by known facts" to overlie "a distinct body of groundwater." Conversely, it is only an area of land which is primarily devoted to cultivation uses and which has been designated as not having sufficient groundwater for irrigation (Arizona Revised Statutes §45-301(1)). The legislature never intended, nor has this Court ever held prior to the instant decision, that a diversion of groundwater away from a critical area is unlawful, per se. Indeed, the mining companies are, under the traditional precepts of the reasonable use doctrine, utilizing the water they pump in a wholly lawful manner on the land from which the water has been extracted. They are using all water pumped on lands overlying the distinct body of groundwater designated by the State Land Department as the Sahuarita-Continental Subdivision of the Santa Cruz Ground Water Basin. As such FICO has no cause to complain of any resulting injury or damage to the water supply from which they irrigate their lands since the defendants are using the water they pump on lands overlying the supply common to both them and FICO.

In full accord with our position here are the views expressed by Chief Justice Cameron in his dissenting opinion:

> "I believe that 'the land from which the water was taken' is that land which overlies the judicially determined distinct body of groundwater from which the water was obtained. The rationale for

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this approach, which is, I believe, implicit in our previously published opinions, is, essentially, that damage to the available supply of groundwater occurs when water is permanently removed from the land overlying the common supply, so that it is prevented from returning through the ground to replenish the supply. There is no reason, according to the traditional legal understanding of groundwater hydrology, to prohibit the transporting of such water from one point to another, so long as both overlie the common supply. This is because the water is as available to replenish the common supply at the point of use as it would have been at the point of pumping. The transportation causes little diminution of the common supply, and no increase in damage to other landowners overlying the common supply. I believe that water used anywhere on land overlying the same common supply from which it was pumped is used 'on the land' for the purposes of the reasonable use doctrine" (Slip op. at 27-28).

The effect of this Court's majority holding that water may not be transported from one parcel of land and diverted for use on another, notwithstanding that both overlie the water basin or the common source of supply over which both parcels of land are situated, directly overrules this Court's prior holdings in Neal

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v. Hunt, supra, Jarvis v. State Land Department (Jarvis II), supra, and Bristor v. Cheatham (Bristor II), supra. As a result thereof this Court should rehear this case to conform its decision with those pronouncements previously enunciated by this Court and relied upon, not only by the mining companies, but by all water users in the State of Arizona.

3. This Court Has Failed To Provide Ground-water Users In The State Of Arizona With Any Ascertainable Standard As To What Will Constitute A Use Of Water "Off The Land" From Which It Is Taken.

As we have emphasized in our argument above, this Court has unwittingly overruled its prior decisions which held that water users may withdraw groundwater and divert it for use, without incurring liability to adjoining landowners, to any land overlying the water basin or the common source of supply. In doing so, however, this Court has failed to provide any ascertainable standard as to what will now constitute a use of groundwater "off the land" from which it is derived within the meaning of the reasonable use doctrine. In holding that groundwater may not be pumped from one "parcel" of "land" and transported to another even though both overlie the source of supply common to all adjoining landowners and coupling this with the Court's language in the opinion that the word "lands" could only mean lands on which the pumping occurred (Slip op. at 12-14), this Court has reduced the doctrine of reasonable use to an incomprehensible rule of law in the State of Arizona. The effect of this Court's majority opinion was aptly demonstrated by Chief Justice Cameron in dissent:

> "Logically, the land from which the water may be taken can be defined so as to be quite restrictive. For example, the

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actual field or pasture upon which the well is situated could be considered the land from which the water is taken and an adjacent pasture or field could be considered 'off the land.' This appears to be the position taken by the majority when they state:

> 'The court's holding, therefore, that the Bristor's cause of action stated sufficient facts to warrant relief must be interpreted in light of the allegation that the water pumped conferred no benefit to the defendants' land on which the pumping was conducted.'

(Slip op. at 27).

If this Court has now laid down a rule of law that requires water users to utilize the groundwater at, or near, the well site tract (and this area constitutes, under this decision, the definitional standard of a "parcel" of land), then this Court has expressly overruled its prior decision in State v. Anway, 87 Ariz. 206, 349 P.2d 774 (1960), which declared lawful the pumping of groundwater away from the parcel of land where the well head is located, and has adopted the dissenting view of Justice Phelps therein that groundwater may not be diverted for use on lands away from the well site location. If, under this restrictive interpretation, groundwater may only be utilized on the lands where the pumping "occurred" then FMCO must be unlawfully diverting the groundwater it extracts to its total lands under cultivation. To expect the mining companies, or even the State's farmers, to confine their use of the groundwater to such a small area of land was clearly not the intention of this Court in

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State v. Anway, supra, nor in any of its prior decisions.

Carrying the confusion one step further it is conceivable that this Court has fashioned a rule of law that where groundwater is extracted from a critical groundwater area and exported for use outside this critical area then this constitutes a use of the water "off the land" (or off the parcel) from which it has been derived. Even if this is the intent of the Court, however, under the doctrine of reasonable use and in light of the pertinent facts here, injury or damage to FICO cannot automatically be presumed to have resulted from the extraction and exportation of the groundwater outside the critical area (See, Argument B, infra).

A critical groundwater area is legally distinguished from a groundwater subdivision of a larger groundwater basin. A critical water area is not determined by hydrological facts, but alternatively by agricultural facts. A "critical groundwater area" is defined by statute as:

> ". . . any groundwater basin as defined in paragraph 5 or any designated subdivision thereof, not having sufficient ground water to provide a reasonably safe supply for irrigation of the cultivated lands in the basin at the then current rates of withdrawal." [Emphasis supplied] (Arizona Revised Statutes §45-301(1)).

The clear import of this language is obvious. The Arizona Legislature did not intend to define a critical groundwater area in terms of the common groundwater supply, which, under the doctrine of reasonable use, constitutes that land from which the water is derived. A critical area is not a water area hydrologically "determined by known facts" to overlie "a distinct body of

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groundwater." In short, a critical area is only that area of land which has been statutorily defined as not having a sufficient supply of groundwater for irrigation.

Thus, since this Court has now abrogated the long-standing rule that a user of groundwater may divert the water to lands overlying the water basin or the common source of supply and has adopted a more restrictive standard as to what constitutes a use of the water "on the land" from which it has been derived, then this Court has the obligation, first, to rehear this case and conform this decision to those cases previously decided by this Court, or second, to rehear this decision and firmly set forth a standard as to what now constitutes a use of groundwater "on the land" from which it is taken.

4. Under This Court's Majority Opinion Of August 26, 1976, Cyprus Pima Need Only Transfer Its Existing Wet Milling Circuit, Which Lies Outside The Critical Area, To The Lands Adjacent To Its Well Sites Or, In The Alternative, To Lands Lying Within The Critical Groundwater Area.

Although we strenuously contend that Cyprus Pima is making a lawful use of the water it extracts from the critical area on lands overlying the common source of supply - the proper standard for determining whether groundwater is being used "on the land" within the meaning of the reasonable use doctrine - since this Court has rejected this standard and accepted a more restrictive one, Cyprus Pima, in conformity with the majority opinion, has two options available to it to render its use of the groundwater lawful. First, since this Court has, although erroneously, suggested that the "lands on which the pumping

occurred" (Slip op. at 12) constitutes the proper standard for defining an "on the land" use within the ambit of the reasonable use doctrine, Cyprus Pima need only relocate its wet milling circuit to the well site parcel, or to the lands immediately adjacent thereto, and therefore withdraw any amount of water from the common supply which also feeds FICO's wells. Since this would be an "on the land" use, FICO would have no cause to complain of any resulting damage to its water supply. Cyprus Pima concedes that it has several water wells situated within the Sahuarita-Continental Critical Groundwater Area. Not all of these wells are positioned on the same tract of land. If Cyprus Pima were to move its milling Circuit to one tract of land containing some, but not all of its water wells, it is unclear, from a reading of this decision, whether water extracted from some nearby tract could be utilized at the milling circuit tract.

If this Court did not intend to require the mining companies to use the water they extract solely on the well site parcel, and if this Court has now fashioned the rule that where groundwater is pumped from and transported for use away from the critical area, that this constitutes a use of the water "off the land" from which it has been taken, then Cyprus Pima and all other mining companies are free to move their wet milling circuits inside the Critical area and use any amount of water extracted therefrom without incurring liability to FICO.[4/]

From the foregoing analysis it is readily apparent that this Court has now overruled the previously accepted standard that groundwater may lawfully be diverted for use on any land overlying the common supply. In rejecting this standard, however, this Court has failed to clearly define what constitutes a use of

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4/ It must be emphasized that FICO's principal allegation is that the mining companies are unlawfully transporting groundwater away from the critical area to their damage.

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groundwater "on the land" from which it is derived within the meaning of the reasonable use doctrine. Clearly, the term "parcel of land" fails to provide guidance in determining whether there is an "on the land" use.

Based upon this Court's prior pronouncements in Bristor II, supra, Jarvis II, supra, and Neal v. Hunt, supra, the mining companies have justifiably assumed that they are utilizing the groundwater they extract in a wholly lawful manner. If this Court has now reversed itself and declared that the area of land overlying the common source of supply no longer defines that land from which the water is "taken" within the meaning of the reasonable use doctrine, then this Court has the obligation to rehear this case and provide to the water users in the State of Arizona a definite and ascertainable standard as to what now constitutes a use of groundwater "on the land" from which it is derived.

B. THIS COURT HAS ERRONEOUSLY ASSUMED DAMAGE TO FICO FROM THE PUMPING OF GROUNDWATER BY ANAMAX.

In this Court's decision of August 26, 1976, this Court observed:

> "The Anamax mine pit lies approximately three and one-half miles west of FICO's Sahuarita Farm. It is within the critical groundwater area, but the Anamax mill is located approximately one mile north and one and one-half miles west of the west boundary of the critical area and is, thus, outside the critical

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area." (Slip op. at 8-9).

This Court went on to state:

> ". . . The parties are in agreement that the water table within the Sahuarita-Continental Critical Groundwater area of the Santa Cruz basin is being lowered and the reservoir of supply is being depleted. It is apparent, therefore, that the additional pumping proposed by Anamax from the well complained of in FICO's petition for injunction . . ., will necessarily further deplete the source of supply of the existing users."
> (Slip op. at 13).

Drawing upon this analysis the majority has concluded that FICO would automatically be damaged by the extraction and exportation of the groundwater from the critical area to the mining company's milling circuit located outside the critical area. This Court's conclusion that FICO will be damaged, per se, by the pumping of groundwater outside the critical area is erroneous.

Under the accepted interpretation of the doctrine of reasonable use any landowner may freely extract that groundwater lying beneath his lands and divert it for a reasonable use on any land overlying the supply of water common to all adjoining landowners. If the groundwater is beneficially used on the land overlying the common source of supply no adjoining landowner may complain of any depletion or impairment to his supply. Bristor v. Cheatham (Bristor II), supra, 255 P.2d at 178. See also, Canada v. City of Shawnee, 179 Okla. 53, 64 P.2d 694 (1936). It is only in that situation where groundwater is diverted for use "off the land", i.e., that land which does not overlie the common source of

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supply, that an adjoining landowner will have standing to complain of a resultant impairment or injury to his water supply. It is axiomatic, however, that even where the water is diverted away from the common supply, any resulting damage sufficient to render the diversion unlawful must be proved, and not merely assumed.

1. This Court Has Repudiated The Principle Enunciated By This Court In Neal v. Hunt, 112 Ariz. 307, 541 P.2d 559 (1975), That Where Groundwater Is Diverted For Use Away From The Land From Which It Is Withdrawn, Damage Resulting To An Adjoining Landowner Must Be Established, And Not Assumed.

In Neal v. Hunt, supra, this Court approved the procedure of analyzing the amount of water withdrawn from each contested well to determine the extent of withdrawal that will damage an adjoining property owner's supply of water. There, the Court was presented with a situation where admittedly the defendants were extracting water from the common supply and diverting it for use on lands away from the common supply. Consequently, this diversion rendered impossible the recharge of the groundwater back to the source from which it was extracted. Although we solidly endorse the method set forth in Neal to determine the extent of damage accruing to a landowner from the extraction and transportation of the groundwater away from the common supply, Cyprus Pima is constrained to emphasize again that in the posture of the present case it is absolutely incorrect for this Court to assume that FICO has been "legally" damaged.

Indeed, under the traditional reasonable use standard, the procedure employed in Neal for determining damage need never be reached here since Anamax and Cyprus Pima are utilizing every

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drop of water they pump "on the land" overlying the common source of supply which feeds both their wells and the wells of FICO.

Assuming, however, that this Court has now rejected this standard and adopted the more restrictive one that the critical area constitutes the definitional standard of an "on the land" use, then simply because the groundwater is diverted for use, in part, to lands outside the critical area, should not give this Court the license to automatically assume that FICO has been damaged, thus rendering the mining companies' diversion unlawful.

In Jarvis v. State Land Department (Jarvis I), 104 Ariz. 527, 456 P.2d 385 (1969), this Court held that an injunction should issue against the State Land Department directing it to cancel rights-of-way to the City of Tucson for the transportation of groundwater outside the critical area. There, however, it was uncontested that the water diverted for use in Tucson would never return to replenish the supply of water within the critical area. Clearly, in this situation the Court could properly conclude that the adjoining landowners who extracted water from the same critical water area would be damaged since the critical area had an admittedly depleting source of supply. Thus, the permanent transportation of the water away from the critical area and the consequent inability of the water ever to be recharged back to the critical area, provided a sound basis for this Court to find that the adjoining landowners would be damaged.

Here, however, this Court has totally ignored the significance of the mining companies' profer that the great bulk of the water withdrawn by them from the critical area has its ultimate use within the critical area. In the Answer and Response of Anamax to FICO's Application and Amended Application for Preliminary Injunction (May 7, 1974), Anamax alleged that they ". . . intend to pump large amounts of groundwater from the pool subjacent to the critical groundwater area, but deny that they

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intend to transfer all the water so pumped for use outside the critical area . . . and that any use of said water outside of said critical area is de minimus, using the term 'use' to mean consumptive use . . .". With respect to Cyprus Pima, even FICO conceded in its brief to this Court that Pima makes use of the instant water within even the same critical groundwater area from which the water is taken:

> "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." (FICO Br. at 12).

Thus, in contradistinction to the situation presented in Jarvis I, the mining companies are using the great bulk of the water they extract within the critical area. Even assuming that this Court has now adopted the rule that where water is extracted from a critical area and deployed for use, in part, outside the critical area and that this "area" now constitutes the standard under the reasonable use doctrine for determining whether there has been a use of groundwater "off the land" from which it has been derived, this Court, in conformity with the principles announced in Neal v. Hunt, supra, should first require, before there can be a proper assessment of damages, an analysis of the amount of water withdrawn from each contested well, the amount of the withdrawal which is diverted for use outside the critical area, and which cannot return to recharge the supply within the critical area, and then determine whether the amount so diverted for use outside the critical area actually impairs or damages the water supply of FICO.[5/]

2. This Court Has Apparently Abrogated The Right Of The Mining Companies To Purchase Agricultural Lands Within The Critical Groundwater Area, Retire Them From Cultivation And Apply The "Annual Historical Maximum Use" To Lands Situated Outside The Critical Area.

As we have emphasized above, this Court has, without foundation, assumed that FICO is being damaged by the withdrawal of water by Anamax from the critical area for its transportation to lands lying outside the critical area. Here, the mining companies are using the great bulk of the water extracted from the critical area for use in their tailings deposits, which are

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5/ This Court has utterly failed to perceive the significance of the Superior Court's denial of FICO's application for preliminary injunctive relief against Anamax and the Superior Court's grant of injunctive relief against Tucson in favor of both Anamax and Duval. The Superior Court was consistent in both instances. With respect to the FICO v. Anamax ruling, injunctive relief was inappropriate since Anamax utilized all of the water it extracted from the critical area within the common source of supply (Sahuarita-Continental Subdivision of the Santa Cruz Groundwater Basin). In the Tucson v. Anamax and Duval controversy, the Superior Court was correct in granting injunctive relief since Tucson was transporting the water away from the common supply, thus rendering impossible any recharge of the water back to the lands from which it was taken.

This Court, in ruling on both orders, reversed the former and sustained the latter. In reversing the order denying injunctive relief against Anamax this Court apparently considered the factor of recharge to be insignificant and attached undue significance to the fact that all "the parties [agreed] that the water table within the Sahuarita-Continental Critical Groundwater Area . . . is being lowered and the reservoir of supply is being depleted" (Slip op. at 13). However, even assuming that the critical area has a constantly diminishing source of supply, since the mining companies return the great bulk of water to the critical area they should only be penalized for that amount deployed for use outside the area. To rule that the mining companies cannot divert any of the water outside the area thwarts the intent behind the reasonable use doctrine, which only declares unlawful the exportation of water away from the common supply in proportion to the damage sustained by the adjoining landowners.

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situated within the same critical area.[6/] Consequently, only that amount of water which is not recharged to the critical area should figure into the equation of whether FICO is being damaged by the withdrawal. See, Neal v. Hunt, supra, 541 P.2d at 565. However, with respect to that small amount of groundwater used by the mining companies outside the critical area, under the earlier pronouncements of this Court in Jarvis v. State Land Department (Jarvis II), supra, and Jarvis v. State Land Department (Jarvis III), _____ Ariz. _____, 550 P.2d 227 (1976), the mining companies are entitled to withdraw and use outside the critical area an amount of water equal to the "annual historical maximum use" (consumptive use) of water on those lands previously in cultivation within the critical area which have been purchased by the mining companies and retired from cultivation. As to that amount of water diverted for use outside the critical area which corresponds proportionately to the "annual historical maximum use" on the lands previously in cultivation, FICO has no cause to complain of damage resulting from the diversion since no greater amount of water will be withdrawn.

Although Cyprus Pima vigorously contends that it has never had the obligation to purchase lands within the critical area and retire them from cultivation since it extracts and uses all of the groundwater on lands situated over the common source of supply, i.e., the Sahuarita-Continental Subdivision of the Santa Cruz Groundwater Basin,[7/] Cyprus Pima has, nevertheless,

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6/ See, Affidavit of Robert C. Fox, appended to the Brief of Cyprus Pima filed in this Court in No. 11439-2.

7/ Under Jarvis II, this Court held that the City of Tucson could withdraw groundwater from the Marana Critical Groundwater Area and transport it "off the land" for municipal uses in an amount equal to the annual historical maximum use of water on lands previously in cultivation in the critical area. The critical area was clearly not the (continued)

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voluntarily purchased certain acreage of agricultural land within the Sahuarita-Continental Critical Groundwater Area, which Cyprus Pima believes had an annual water usage of approximately 7,000 acre feet of water. Thus, even assuming that this Court has adopted the more restrictive standard that a use of water away from the critical area constitutes a use of the water "off the land", this Court should clearly reaffirm its position taken in Jarvis II and Jarvis III, that the water user may extract and transport for use outside the critical area that amount of water consumptively used on the now retired parcels of agricultural land within the critical area.

Although this Court made an oblique reference to Duval's standing to enjoin Tucson's withdrawal of water from the Sahuarita-Continental Subdivision because Duval owns 1,530 acres of land formerly cultivated inside the critical area (Slip op. at 22), this language in no way affirms the principle that the mining companies have the right to export that amount of water previously used for cultivation within the critical area for use on their lands located outside the critical area.

This Court has the obligation now to clarify its position. The mining companies have invested hundreds of millions of dollars in the Santa Cruz Basin and in so doing have relied upon this Court's previous pronouncements which have clearly defined the permissible scope of groundwater use in Arizona. Based upon these previous pronouncements Cyprus Pima, and all the other mining companies, have quite properly believed that their use of

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7/ (continued)

definitional standard of that land away from which the water was diverted. Rather, this Court concluded that "away from the land" meant that land not overlying the basin or common source of supply. Thus, the customers located away from the water basin could only receive water based upon the annual historical maximum use of water on lands previously in cultivation in the critical area.

the water extracted from the Sahuarita-Continental Subdivision of the Santa Cruz Basin is entirely lawful since the use is made on lands overlying this common supply.

By its decision, this Court has erroneously jettisoned the established standards upon which all water users in the State of Arizona have relied in using the groundwater beneath their lands. Cyprus Pima agrees with this Court's statement in the majority opinion that ". . . the doctrine [of reasonable use] becomes a rule of property and the rights acquired under the Court's decisions and the investments made are entitled to protection" (Slip op. at 14). As we have pointed out above, the effect of the instant decision has been to overrule this Court's prior decisions, on which the mining companies have relied, in investing hundreds of millions of dollars in their mining operations. Without the use of the groundwater here in issue the mining companies simply cannot operate their mines.

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C. CONCLUSION

For the foregoing reasons, this Court should grant Cyprus Pima's Motion For Rehearing to reconsider this Court's decision of August 26, 1976.

Respectfully submitted,

VERITY, SMITH, LACY, ALLEN & KEARNS, P.C.
902 Transamerica Building
Tucson, Arizona 85701

By John C. Lacy

and

MUSICK, PEELER & GARRETT
One Wilshire Boulevard, Suite 2000
Los Angeles, California 90017

By Gerald G. Kelly

Kenneth A. Holland

Attorneys for Appellee
Cyprus Pima Mining Company

MUSICK, PEELER & GARRETT

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Copies of the foregoing MEMORANDUM IN SUPPORT OF MOTION FOR REHEARING delivered or mailed this 12th day of October, 1976, to:

Mark Wilmer
Snell & Wilmer
3100 Valley Bank Center
Phoenix, Arizona 85073

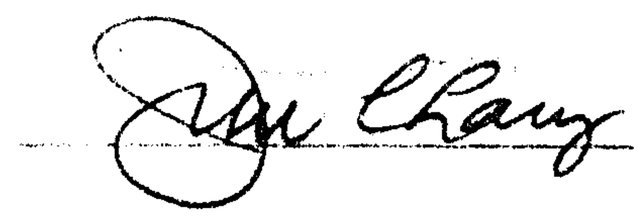
Bruce E. Babbitt
attorney General
200 State Capitol
Phoenix, Arizona 85007

Thomas S. Chandler
Chandler, Tullar, Udall & Richmond
1110 Transamerica Building
Tucson, Arizona 85701

James D. Webb
P. O. Box 5547
Tucson, Arizona 85703

Calvin H. Udall
Fennemore, Craig, Von Ammon & Udall
100 West Washington, Suite 1700
Phoenix, Arizona 85003

Burton M. Apker
Evans, Kitchel & Jenckes, P.C.
363 North First Avenue
Phoenix, Arizona 85003



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STATE OF ARIZONA)
) ss:
COUNTY OF MARICOPA)

I **Antonio Bucci** hereby certify:
Name

That I am **Reference Librarian, Law & Research Library Division** of the Arizona State
Title/Division

Library, Archives and Public Records of the State of Arizona;

That there is on file in said Agency the following:

Arizona Supreme Court, Civil Cases on microfilm, Film #36.1.764, Case #11439-2, Supreme Court Instruments, Part One, Memorandum in Support of Motion for Rehearing, pages 483-515 (33 pages)

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

Antonio Bucci
Signature

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

Etta Louise Muir
Signature, Notary Public

My commission expires 04/13/2009.
Date