

1 IN THE SUPREME COURT OF THE STATE OF ARIZONA

2 In Banc

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

6 vs.

7 ANDREW L. BETTWY, as State Land
8 Commissioner, and the STATE LAND
9 DEPARTMENT, a Department of the
10 STATE OF ARIZONA, and PIMA MINING
11 COMPANY, a corporation,

12 Appellees.

13 FARMERS INVESTMENT COMPANY,
14 a corporation,

15 Appellant,

16 vs.

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

21 Appellees.

22 CITY OF TUCSON, a municipal
23 corporation,

24 Appellant,

25 vs.

26 ANAMAX MINING COMPANY, and DUVAL
27 CORPORATION and DUVAL SIERRITA
28 CORPORATION,

29 Appellees.

30 Andrew L. Bettwy as State Land Commissioner and the State
31 Land Department, a department of the State of Arizona, pursuant
32 to Rule 9(a), Rules of the Supreme Court, respectfully move and
petition this Honorable Court for a rehearing filed in the above-
referenced case on August 26, 1976. The particular grounds for
the rehearing are more particularly set forth as follows:

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SUPREME COURT

MacHugh

SEP 10 1976

NO. 11439-2

MOTION FOR REHEARING

1 1. The decision does not determine the issues raised by the
2 Commissioner and the State Land Department in the original briefs
3 filed herein, is contrary to law and to decisions of this court and
4 the United States Supreme Court, violates Section 28 of the Arizona
5 Enabling Act and illegally allows for disposition and depletion of
6 natural products of State School Trust Lands without compensation to
7 the trust.

8 2. As administrator of the water code as it relates to surface
9 waters and to ground waters, the Commissioner and the Land Depart-
10 ment cannot reasonably administer the water code due to ambiguities
11 and conflicts with prior decisions on the following grounds:

12 A. From a reading of the decision it is not clear whether
13 the Court intended to overrule the previous decision of the Court
14 in State v. Anway, 87 Ariz. 206, 349 P.2d 774 (1960), thereby adopting
15 the dissenting opinion of Justice Phelps therein which concludes
16 groundwater may be only applied to the soil to which it is subjacent,
17 349 P.2d at 780.

18 B. From a reading of the decision it is not clear whether
19 or not the Court, by its decision intended to modify or overrule
20 the previous decisions of the Court in Jarvis v. State Land Department,
21 106 Ariz. 506, 470 P.2d 169 (1970), to the extent that the State Land
22 Department can no longer issue permits for a change in the place of
23 use of groundwater as provided in Anway and Jarvis II, or the accept-
24 ance of any Notice of Intent to Drill or issue permits for replace-
25 ment or substitute wells to the City of Tucson under the guidelines
26 established by Jarvis II.

27 C. It cannot be determined from a reading of the deci-
28 sion whether the State Land Department can permit the pumpage of
29 water from one parcel of State land and transport the same to
30 another parcel of State land within the same groundwater basin or
31 critical groundwater area when such use is for the benefit of
32

1 the trust imposed by the Enabling Act and whether or not such use
2 is limited to the legal subdivision of a section of State land
3 upon which the well is situated, or whether or not it may be used
4 on a legal subdivision of an adjoining or contiguous section of
5 State land.

6 D. From a reading of the decision it is not clear whether
7 or not the Court intended to apply use restrictions under surface
8 water appropriations to the Groundwater Code and more particularly
9 to apply the maxim "First in time, first in right" normally
10 applicable only to surface to groundwater uses as appears
11 to be stated by the Court on page 13 of the decision.

12 THE DECISION DOES NOT CONSIDER THE ISSUES
13 RAISED BY THE STATE LAND DEPARTMENT IN
14 OPENING BRIEFS, VIOLATES § 28 OF THE
15 ENABLING ACT AND IS INCONSISTENT WITH
16 PRIOR DECISION OF THIS COURT AND THE
17 UNITED STATES SUPREME COURT

18 None of the issues raised by the brief of the State Land
19 Commissioner and Land Department were considered or determined by
20 the Court in its decision. Even though ground water was determined
21 to be a "natural product" of state land in Farmers Investment Co.
22 (FICO) v. Pima Mining Co., 111 Ariz. 756, 523 P.2d 487 (1974),
23 which subjected the use and disposition of the waters subjacent
24 to state land to the provisions of § 28 of the Enabling Act,
25 the Court, in its decision herein without justification or
26 explanation applies the same restrictions on the use and disposi-
27 tion of ground waters of state trust lands as it does for any
28 privately held lands in a critical ground water area. In view
29 of the fact that the Court recognizes that critical ground water
30 areas are established and authorized for ground water basins not
31 having sufficient ground water to provide a reasonably safe supply
32 of water at current rates of withdrawal so that the addition of

1 other users must necessarily deplete the supply of existing users.
2 (FICO v. Pima Mining Co., supra) the current decision which con-
3 cludes that the waters subjacent to state trust lands are part of
4 a common pool which can be reserved for another user in a critical
5 ground water area is totally inconsistent with the provisions of
6 § 28 of the Enabling Act which requires that the state trust be
7 compensated for the true appraised value of the natural products
8 prior to disposition. The decision of the Court is totally in-
9 consistent with the Farmers Investment Co. v. Pima Mining Co.,
10 supra, case and the case of Lassen v. Arizona, 385 U.S. 458, 87
11 S.Ct. 584, 17 L.Ed.2d 515 (1967), which strictly impose the pro-
12 visions of § 28 of the Enabling Act to the disposition of lands
13 and natural products of the State School Trust. In reading FICO
14 v. Pima Mining Co., supra, with the decision rendered herein it
15 appears that the Court is imposing restrictions on the use of
16 State School Trust lands which will best serve the interest of
17 adjacent land owners, by restricting the use and disposition of
18 underground water by the trust and permitting its depletion by
19 other adjacent landowners, without compensation to the trust.

20 The position advocated by the Land Commissioner and Land
21 Department in the brief and here is perhaps more easily referenced
22 as extending what is referred to as the "reservation doctrine" to
23 trust lands. Winters v. United States, 207 U.S. 564. It cannot
24 inferred that the United States created the School Land Trust
25 without the intention to reserve sufficient waters to the trust
26 as are proportionately available to other lands, adjacent or
27 otherwise, which may rely on a common supply and that such waters
28 are reserved for the use and disposition which will be to the best
29 interest and enhancement of the trust. The decision in this case
30 not only deprives the trust of the right to use or dispose of the

1 natural product but also allows for depletion of the resource with-
 2 out compensation. The trust is thereby substantially restricted
 3 from using the product for the trust's best interest and enhance-
 4 ment but also is restricted in future use and development of
 5 the trust lands.

6 While the State Land Commissioner and Land Department recog-
 7 nize that reargument of its initial position on appeal is not
 8 grounds for rehearing, Climate Control, Inc. v. Hill, 87 Ariz. 201
 9 349 P.2d 771 (1960), and therefore do not restate the full argument
 10 made in this brief, the positions taken therein are incorporated
 11 herein and reasserted for the purpose supporting their argument
 12 that the issues raised should be addressed, which was not done
 13 in the decision rendered by the Court.

14 THE DECISION RENDERED BY THE COURT IS
 15 AMBIGUOUS AND INCONSISTENT WITH PRIOR
 16 DECISIONS AND THEREFORE DOES NOT GIVE
 17 THE STATE LAND COMMISSIONER CLEAR GUID-
 18 ANCE FOR THE ADMINISTRATION OF THE
 19 GROUNDWATER CODE

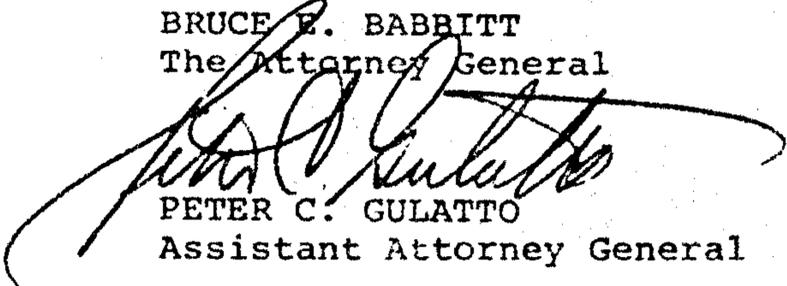
18 Throughout this litigation the Land Commissioner and the
 19 Land Department have not advocated a position regarding the
 20 issues except as they apply to the use and disposition of lands
 21 and natural products of the State School Trust. The issues have
 22 heretofore been fully presented by counsel for the appellants
 23 and other appellees, In raising what appear to the State ap-
 24 pellees to be ambiguities in the decision it is only our intention
 25 to seek clarification of the issues which will permit orderly
 26 administration of the surface and groundwater codes. Neither
 27 the State Land Commissioner nor the Land Department advocate a

28 - - -
 29 - - -
 30 - - -

1 position on the merit of the issues raised regarding the pumping
2 and transportation of ground waters to and from private lands.

3 Respectfully submitted this 10th day of September, 1976.

4 BRUCE E. BABBITT
5 The Attorney General

6 
7 PETER C. GULATTO
Assistant Attorney General

8 Copy of the foregoing mailed
9 this 10th day of September,
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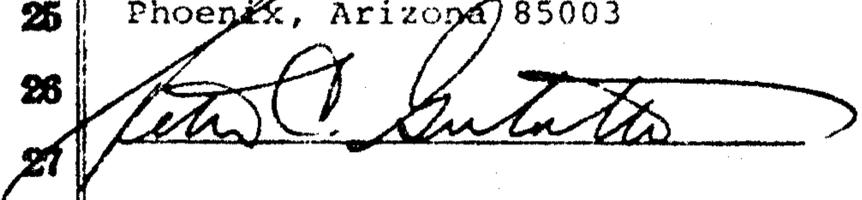
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STATE OF ARIZONA)
)
COUNTY OF MARICOPA)

SS:

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, Motion for Rehearing, pages 338-343 (6 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

