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SEP 12 1976
 CLIFFORD H. WILSON
 CLERK SUPREME COURT
 BY *M. Joseph*

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8 IN THE SUPREME COURT OF THE STATE OF ARIZONA

9 In Banc

10 FARMERS INVESTMENT COMPANY,)
 a corporation,)
 11)
 Appellant,)
 12)
 vs.)
 13)
 14 ANDREW L. BETTWY, as State Land
 Commissioner, and the STATE LAND
 DEPARTMENT, a Department of the
 15 State of Arizona, and PIMA MINING
 COMPANY, a corporation,)
 16)
 Appellees.)

NO. 11439-2
 PETITION FOR LEAVE
 TO FILE AMICUS CURIAE
 BRIEF

18 FARMERS INVESTMENT COMPANY,)
 a corporation,)
 19)
 Appellant,)
 20)
 vs.)
 21)
 22 THE ANACONDA COMPANY, a corporation;
 AMAX COPPER MINES, INC., THE ANACONDA
 COMPANY, as partners in and constituting)
 23 ANAMAX MINING COMPANY, a partnership,)
 24)
 Appellees.)

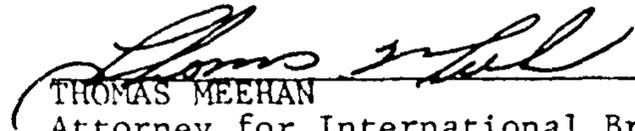
25)
 26 CITY OF TUCSON, a municipal corporation,)
 Appellant,)
 27)
 vs.)
 28)
 29 ANAMAX MINING COMPANY, and DUVAL
 CORPORATION and DUVAL SIERRITA
 CORPORATION,)
 30)
 Appellees.)
 31)

32 COMES NOW the International Brotherhood of Teamsters,

1 Chauffeurs, Warehousemen and Helpers of America, Local No. 310,
2 hereinafter designated "Teamsters", and petitions the Court for
3 leave to file its brief amicus curiae. Your petitioner has 2150
4 members who are directly interested in the successful and economi-
5 cal operations of several of the parties hereto. Furthermore,
6 other members are employed by farms, other mines, and countless
7 other businesses throughout the State of Arizona which will be
8 directly affected by this Court's decision in the present case.
9 Your petitioner believes the present opinion could have a
10 disastrous effect on the economy of the State and, therefore,
11 urges that this Court grant leave to file the attached memorandum
12 of points and authorities.

13 Respectfully submitted this 11 day of October,
14 1976.

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America, Local 310.

20 MEMORANDUM OF POINTS AND AUTHORITIES

21 INTRODUCTION

22
23 Beyond the basic chemical compound for all life as we
24 know it, water is a primary material in any civilization. Where
25 water is unavailable, industrial concerns such as the availability
26 of raw materials, capital, labor force, and transportation and
27 farming concerns as to the amount of sunshine and availability of
28 fertilizer, proper soil, labor and equipment, become meaningless.
29 It is, therefore, of vital importance to any orderly economy that
30 the law with regard to water use, both statutory and case law, be
31 as definite and consistent as is possible. This is true through-
32 out the world, but particularly so in Arizona where the growth of

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1 the State and concurrent growth in the demand for water are
2 rapidly overtaking the available supplies. In addition to the
3 uncertainties caused by the problems with water supply in Arizona,
4 this Court appears to have added a new dimension to the uncer-
5 tainty in its opinion in this case. It is your petitioner's
6 belief that this opinion will have a destabilizing effect on
7 every imaginable entity within the State: from individuals to
8 corporations; from local governments to the executive branch of
9 the State government; and from industry to agriculture. It is,
10 therefore, urged that the Court reconsider its opinion.

11 This memorandum will concern itself with the following
12 areas. First, we will trace the historical background of ground-
13 water as it existed prior to the present case. We will explore
14 the Groundwater Code of 1948, the Bristor I & II decisions, and
15 the Jarvis I & II opinions. Then we will closely examine this
16 current decision (hereafter referred to as the FICO opinion), in
17 light of the principles of Bristor II, and the rules of equity as
18 to injunctions.

19 HISTORICAL BACKGROUND

20 It is the Teamsters' opinion that this Court should take
21 a long, hard look at the inconsistent and confusing line of cases
22 in Arizona which deal with groundwater law culminating in the FICO
23 opinion. After such a general overview, we hope that the Court
24 will return to the basic legal and equitable principles which the
25 Court established in Bristor v. Cheatham, 75 Ariz. 227, 255 P.2d
26 173 (1953), reversing on rehearing 73 Ariz. 228, 240 P.2d 185
27 (1952).

28 GROUNDWATER CODE OF 1948

29 The legislature of the State of Arizona has been
30 remarkably silent in the face of the growing crises with respect
31 to the State's water supply. The Groundwater Code of 1948, A.R.S.
32 §45-301 et seq., is the only time it has addressed the problem

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1 of "overdraft" on the State's groundwaters. This legislation,
2 passed some four years before the Bristor litigation, apparently
3 tried to deal with the overdraft by permitting the State Land
4 Department to declare certain areas "critical" with respect to
5 groundwater and limiting the further reclamation of lands from the
6 desert in such areas. The law effectively favored existing
7 irrigators over potential irrigators. The law, however, exempted
8 municipal and industrial growth from these restrictions, A.R.S.
9 §45-301(3), §45-322, indicating a legislative policy that such
10 growth was looked on at least as favorably as existing agricul-
11 tural uses. It should be remembered that with respect to
12 irrigators who sought to reclaim desert land in a critical area,
13 this law was in derogation of the common law right of ownership
14 previously declared by this Court in Maricopa County Municipal
15 Water Conserv. Dist. No. 1 v. Southwest Cotton Company, 39 Ariz.
16 65, 71, 4 P.2d 369, 372 (1931), and Howard v. Perrin, 8 Ariz. 347,
17 76 P.2d 460 (1904) aff'd 200 U.S. 71 (1906). These cases stood
18 for the proposition that the right to the use of groundwater is
19 based upon land ownership and that a landowner also owned the
20 waters percolating in and underneath his lands. Thus, prior to
21 the Groundwater Code of 1948, there was apparently no restriction
22 upon the withdrawal of groundwater, even if in so doing, a land-
23 owner withdrew water made up partially from water lying underneath
24 his neighbor's land.

25 BRISTOR I & II

26 After the adoption of the Groundwater Code of 1948,
27 there was no restraint whatsoever on the mining of percolating
28 water, with the exception of the prohibition against reclaiming
29 new lands from the desert for agriculture in critical groundwater
30 areas. With the State's groundwater law in this posture, then,
31 this Court was faced with the first of numerous cases which arose
32 out of the problem of overdraft on the groundwater supply in

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1 Birstor v. Cheatham, supra. The initial response of this Court in
2 Bristor I was to reject the common law rule of private ownership
3 of percolating water and adopt the rule of prior appropriation
4 based upon a system of public ownership of these waters. It was
5 reasoned that adopting such principles would permit the legislature
6 to enact a comprehensive system of groundwater rights and to
7 promote orderly development in the State. This Court obviously
8 recognized the problems inherent in allowing any landowner to
9 treat groundwater beneath his property as his own and to use it
10 however he choosed, under the existing conditions in Arizona and
11 with a view toward future growth.

12 This Court, however, did a turnaround in Bristor II,
13 supra, in reponse to the din raised by persons who had relied upon
14 the common law rule of private ownership of percolating water.
15 This Court recognized that the people of the State had in fact
16 relied on this long-standing rule and, thus compelled by the
17 principle of the stare decisis, this Court reversed itself. Even
18 though we believe that the rule of prior appropriation and public
19 ownership of groundwater would have served Arizona better, a
20 change-over at that point in the State's law history would have
21 been difficult, and perhaps unjust and even catastrophic. However,
22 the Bristor II court, instead of adopting the correlative rights
23 rule, adopted the rule of reasonable use of percolating ground-
24 water. These are both refinements on the common law rule of
25 private ownership, and whereas the correlative rights rule limits
26 the landowner in times of shortage to an amount equal to his pro-
27 portionate area of land over the common water supply, see, e.g.,
28 1 Waters and Water Rights, §52.2(b) at 330 (R. Clark ed. 1967),
29 the rule of reasonable use provides no limitation on overdraft so
30 long as the water is employed for the "beneficial use of the lands
31 from which it was taken." This Court adopted the latter rule, to
32 the exclusion of the more prudent correlative rights rule,

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1 probably expecting the legislature to superimpose statutes on the
2 common law doctrine of reasonable use. The legislature, however,
3 has remained silent for the past 24 years. The rule of reasonable
4 use, therefore, is a court-made rule rather than statutory. The
5 legislature has not acted. The problems of overdraft under the
6 doctrine, therefore, were bound to make their way to this Court.
7 And the major cases here are the Jarvis I & II decisions. Jarvis
8 v. State Land Department, (Jarvis I) 104 Ariz. 527, 456 P.2d 385
9 (1969); Jarvis v. State Land Department, (Jarvis II) 106 Ariz. 506,
10 479 P.2d 169 (1970). See also Jarvis v. State Land Department,
11 (Jarvis III) _____ Ariz. _____, 550 P.2d 227, No. 9488
12 (27 May 1976).

13 JARVIS I AND II

14 In Jarvis I, supra, the plaintiff, armed only with a
15 pleading and a report of the Arizona State Land Department, came
16 to this Court and obtained an injunction. It appears to this
17 amicus that this procedure wrought a significant and unwarranted
18 change in principles of equity. The following facts were accepted
19 as the evidence, based upon N. White, W. Matlock and H. Schwalen,
20 "An Appraisal of the Ground-Water Resources of Avra and Altar
21 Valleys, Pima County, Arizona" (Ariz. Land Dept. Water Resources
22 Report No. 25, Feb. 1966). The Avra Valley is a large inter-
23 mountain basin consisting of one aquifer of high permeability.
24 Although there are shallower depths of alluvium toward the
25 bordering mountains, the deepest parts range in depth down to
26 2000 feet. The above report also contained a computation that
27 groundwater available to wells above a depth of 1000 feet below
28 the surface from this aquifer to be around 16.5 million-acre feet.
29 The report also contained the statement that 1.2 million-acre feet
30 of groundwater were withdrawn from the aquifer in the 10 years
31 between 1955 to 1965. The report contained little about recharge
32 other than stating that it did not amount to much.

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1 This was an equitable proceeding where the defendants
2 were not allowed to challenge the basic facts contained in the
3 groundwater report in the traditional manner, i.e., a trial with
4 the right to offer and examine witnesses and develop and dispute
5 facts in a trial court. The petitioner was able to obtain a
6 preliminary injunction in the most unusual manner.

7 It would appear that prior to this case, a threshold
8 violation of the rule of reasonable use involved a two-pronged
9 test: (1) That waters were being pumped away from the lands from
10 which they were taken, and (2) that a neighboring landowner could
11 show damage. Beyond this, the propriety of injunctive relief as
12 opposed to money damages would further necessitate a showing of the
13 inadequacy of a remedy at law and the presence of immediate and
14 irreparable injury. This Court departed from those rules in
15 Jarvis I, supra, since the petitioner there had shown absolutely
16 no damage whatsoever. The Court presumed future damage from the
17 quantity of water which Tucson intended to take out of the basin
18 compared with the total annual withdrawals from the Avra-Altar
19 Valleys and the amount of water in storage under the ground above
20 a certain level. Tucson's contemplated transbasin diversion
21 amounted to over one-fourth of the total withdrawals then made
22 from that basin. This Court, however, assumed that the withdrawals
23 from the City's wells would damage all the landowners in the basin,
24 even those far away from the point of the City's withdrawals. This
25 amicus questions the substitution of a single report for the time-
26 tested tools of a hearing, evidence, and other procedures in equity.
27 In any event, the size of Tucson's intended diversion as compared
28 with the total withdrawals then made from the depleting water
29 supply prompted this Court to break new ground.

30 In Jarvis II, supra, the Court clarified the principle
31 that when the reasonable use rule speaks of using water on lands
32 from which the water is taken that this means lands over the

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1 common supply of the water basin. The common supply rule was
2 well-established in the common law of reasonable use, but had not
3 been specifically addressed by this Court prior to this case
4 except by the dissenters in Bristor I. The rest of Jarvis II,
5 however, demands reevaluation. For example, the Court permitted
6 the City to pump water to Ryan Field because it lay within the
7 Avra Valley water basin, but inexplicably maintained an
8 injunction prohibiting the City from delivering water to some
9 residences which appeared to be outside the critical ground water
10 area, but within the Avra-Altar Valley watershed drainage area.
11 106 Ariz. at 509. It is to be reemphasized that the petitioner in
12 Jarvis had shown no existing damage to his property or water
13 supply. Whereas the quantity of water might prompt the Court to
14 grant injunctive relief with respect to the transbasin diversion
15 to Tucson (amounting to 25% of the then existing withdrawals) this
16 Court made no inquiry whatsoever into the amount of water to be
17 delivered to those residences which were in the Avra-Altar Valley,
18 nor was there any evidence as to how many residences were to be
19 affected. Thus, this Court carried its departure from traditional
20 rules regarding groundwater law and injunctions one step further
21 in that there was no damage shown to petitioner, and in this
22 amicus' opinion a step which was wholly unjustified.

23 Furthermore, in Jarvis II, this Court adopted the
24 strained approach of using a statute which applied to pending
25 applications for the diversion of appropriable water, A.R.S.
26 §45-147, in order to permit Tucson a way out of its dilemma. This
27 was done even though the water involved in that case was ground-
28 water, and as such was not subject to appropriation. After reading
29 the FICO opinion, this amicus wonders whether the Court was
30 attempting to give an indication of an impending shift to a system
31 of prior appropriation. If so, it certainly could have been more
32 direct.

THE FICO DECISION

INTRODUCTION

The opinion of the Majority in the FICO case is a further extension of the rigidity which marked Jarvis I & II, and which now leaves the State's groundwater law in disarray. It is time to return to the basic equitable principle of reasonable use that underlays Bristor II, supra. We urge that the Majority accept Chief Justice Cameron's excellent dissenting opinion as their own. The FICO opinion also suffers from the same assumptions of evidence which marred Jarvis I & II, supra. Further, the Majority opinion improperly relied upon the complaint originally filed in Bristor I, supra. Lastly, an injunction is improper due to the lack of a hearing and gathering of evidence showing damages, and due to the lack of a showing of the inadequacy of a legal remedy.

REASONABLE USE

With respect to the law of reasonable use, this amicus submits that the principle that groundwater may be used on lands which overlie the common supply and that in general this area is defined by the water basin is the law of this jurisdiction. Jarvis I & II, supra; Neal v. Hunt, 112 Ariz. 307, 310, 541 P.2d 559, 562 (1975); Bristor I, supra (LaPrade, J. dissenting); State v. Anway, 87 Ariz. 206, 349 P.2d 774 (1960). This Court's definition of "the lands from which the waters are taken" in the FICO opinion is incomprehensible. In order for the law to bear some relation to reality, the common source of supply should be reconfirmed as the water basin unless the evidence shows a smaller, more definite supply. Furthermore, the reasonable use rule was never intended to permit the finding of illegality solely on the basis of the distance water was moved from the wellhead. This Court in Bristor II, 75 Ariz. at 236, quoted from the Restatement of Torts, §860, as to the liability

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1 of one user of subterranean water (groundwater) to another user of
2 that water. A return to this source relied heavily upon by the
3 Bristor Court shows how far this Court has strayed from the
4 principles which were adopted in Bristor II, supra. Section 860
5 states:

6 "A possessor of land who, in using the
7 subterranean water therein, intentionally causes
8 substantial harm to a possessor of other land
9 through invasion of the other's interest in the
10 use of subterranean water in his land, is liable
11 to the other if but only if, the harmful use of
12 water is unreasonable in respect to the other
13 possessor."

14 "Intentional" invasion of another's interest in the use of
15 percolating water is defined in §850, (Comment A) as either when
16 the actor acts for the purpose of causing it or knows that it is
17 resulting or substantially is certain to result from what he is
18 doing. If we assume for the sake of argument that the appellees'
19 action in this case is "intentional" in that it should know or
20 knows that the water supply is limited in the area in controversy,
21 it then becomes a question of "unreasonableness". Section 861,
22 Id., defines unreasonableness by comparison between the utility of
23 the use and the gravity of the harm. Section 861 states:

24 "A possessor's use of subterranean water
25 is unreasonable, under the rule stated in §860,
26 unless the utility of the use outweighs the
27 gravity of the harm." (Emphasis added)

28 It should be noted that the Court quoted extensively from the
29 Comment of §852 which is included explicitly in the Comment to
30 §861. See 75 Ariz. at 237. Section 862 then defines the factors
31 to be considered in determining the utility of the use as follows:

32 "In determining the utility of a possessor's

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- 1 use of subterranean water causing intentional
2 harm to another possessor through invasion
3 of the other's interest in the use of such
4 water in his land, the following factors are
5 important:
- 6 (a) The social value which the law attaches
7 to the primary purposes for which the uses
8 made;
- 9 (b) The suitability of the use to the character
10 of the locality;
- 11 (c) The impracticability of preventing or
12 avoiding harm;
- 13 (d) The place where the water is used. (Emphasis
14 added.)

15 It is clear from this authority that the place of use is only
16 one factor among many to be considered in determining whether
17 there is an illegal use of water. Yet this Court in the FICO
18 opinion seems to totally ignore the other factors such as the
19 quantity of the use, the amount of recharge, the suitability of
20 the litigants' use in southern Arizona (agriculture with high
21 consumptive use versus mining with the lower consumptive use) and
22 the social values which public policy should attach to the economic
23 impact of the mining companys' ventures versus that of the plain-
24 tiff pecan farm. Section 862, (Comment B) makes it clear that the
25 place of use is only one of the factors to be considered. It is
26 conceivable that the quantity of water intended to be pumped by
27 the City in Jarvis I, supra, together with the place of use--i.e.,
28 another water basin--would be enough to find a threatened violation
29 of the reasonable use doctrine without closer scrutiny. However,
30 in Jarvis II, supra, this Court took another step and looked
31 solely to the place of use in connection with the pumping to
32 residences in the Avra Valley drainage area--"outside the water

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1 basin"--and maintained a finding of illegality without regard to
2 the quantity or the effect on the plaintiffs. Then in the present
3 FICO opinion, this Court goes one step further and, beyond ignoring
4 the quantity of water taken by one well, and ignoring the other
5 factors necessary according to the Restatement of Torts and
6 Bristor II, defines the place of use not as the water basin, but
7 as an incomprehensible "parcel". We have indeed departed from the
8 principles adopted by Bristor II.

9 Furthermore, §863 of the Restatement of Torts defines
10 the gravity of the harm stating:

11 "In determining the gravity of
12 intentional harm to a possessor of land
13 through invasion of his interest in the use
14 of subterranean water therein, the following
15 factors are important:

- 16 (a) The extent of the harm involved;
17 (b) The social value which the law
18 attaches to the particular type of use
19 of water which is interfered with;
20 (c) The suitability of such use to the
21 character of the locality;
22 (d) The burden on the possessor harmed of
23 avoiding harm.

24 In the FICO case, no court has passed on these factors: What will
25 the evidence be as to the extent of the harm to FICO's water
26 supply will be? What is the nature of the water supply? What
27 social value will the law and public policy attach to farming
28 where the consumptive use is much higher than other types of water
29 use under the conditions which obtain in Arizona? Is the present
30 manner of irrigating employed by FICO suitable to the character
31 and locality of its use? What is the burden placed on FICO, what
32

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1 is the harm, and are there ways of avoiding the harm? It is
2 submitted that a trial court must take evidence and make judgments
3 based upon this law. The FICO opinion appears to take these rules,
4 toss them out the window, and substitute a hard-and-fast rule that
5 where any amount of water is taken away from the wellhead the use
6 may be declared illegal (and subject to injunction, see below).
7 It is submitted that this is not the law in Arizona according to
8 Bristor II.

9 ASSUMPTIONS OF EVIDENCE

10 Beyond accepting a government document as the gospel
11 truth when it comes to the facts as it did in Jarvis litigation,
12 in the present case this Court seems to draw facts without any
13 foundation. For example, the Court implicitly finds that the
14 Sahuarita-Continental Subdivision of the Santa Cruz Basin as
15 declared by the State Land Department in 1954 is not a "true
16 basin" or an "underground lake". There is no evidence before this
17 Court whatsoever concerning the supply of groundwater underneath
18 the lands of the parties hereto and for this Court to presume the
19 facts concerning this supply and the geological formation subjacent
20 thereto is simply beyond the proper bounds of judicial power.
21 Another fact without substantiation was that this Court held that
22 recharge into the alleged common supply is "illusory". This
23 amicus feels that the Court cannot presume to make such statements
24 without evidence before it.

25 THE BRISTOR BRIEF

26 The FICO opinion also takes the unusual step of relying
27 on the complaint filed in Bristor v. Cheatham, supra, where that
28 complaint was not made a part of any of the opinions filed in that
29 case. Does the Court intend to suggest that in legal research
30 attorneys and litigants should search the archives in order to
31 properly interpret a case? Surely such a burdensome and absurd
32 requirement could not have been intended. Furthermore, this amicus

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1 believes that the reading given by the majority of this complaint
2 is simply wrong. There is a paragraph in the complaint which
3 specifically alleges that the groundwaters taken by the defendants
4 in the Cheatham case were not used on lands overlying the common
5 supply and that after use they did not return to replenish the
6 common supply. Therefore, the reliance on the complaint should be
7 reevaluated and if it is still to be relied upon, a proper inter-
8 pretation of the complaint should lead the Court to reexamine its
9 holding.

10 INJUNCTIVE RELIEF

11 We submit that the following principles should apply
12 to this case:

13 1. Injunctive relief is appropriate only where there is
14 a showing of damage under the evidence and it is plaintiffs'
15 burden to prove damage.

16 2. Injunctive relief is discretionary, and is to be
17 awarded only if there is no available remedy at law.

18 These principles are elementary, yet they have not been
19 followed in the FICO decision. For the Court to suggest that an
20 injunction is available against a litigant whose investments amount
21 to millions or hundreds of millions of dollars and employing
22 thousands of people where there is no proof of the amount of
23 damages in money and no proof that any damage would not be compen-
24 sable seems to fly in the face of basic equitable principles.

25 "As the principal remedy afforded by courts
26 of law for an injury is money damages, if such
27 damages will constitute an adequate compensation
28 for the injury threatened or inflicted, equity
29 will not interfere by injunction. In such case
30 plaintiff must resort to an action at law for
31 the damages sustained, and especially is this
32 doctrine applicable where the granting of an

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1 an injunction would inconvenience the public."
2 43 C.J.S. 455, Injunctions, §25.
3 An injunction is not a matter of right but is a matter
4 of the discretion of the trial court. The elementary principles
5 of equity which should be applied to the present FICO litigation
6 should be reexamined by this Court. The appropriateness of an
7 injunction against tort is determined by estimating the probable
8 consequences of this remedy if it is granted and the alternative
9 remedies if they are employed. Restatement of Torts, §934, at
10 p. 690. It is an elementary principle of equity that an injunction
11 will not issue if money damages are adequate.

12 "Section 936. Factors of Appropriateness
13 of Injunction.

14 (1) The appropriateness of injunction against
15 tort depends upon a comparative appraisal of
16 all of the factors in the case, including the
17 following primary factors:

18 (a) The character of the interest to be
19 protected (§937),

20 (b) The relative adequacy to the plaintiff
21 of injunction and of the remedies listed in
22 §§994-951 (§938),

23 (c) Plaintiff's delay in bringing suit
24 (§939),

25 (d) Plaintiff's misconduct (§940),

26 (e) The relative hardship likely to result
27 to the defendant if injunction is granted and
28 to plaintiff if it is denied (§941),

29 (f) The interests of third persons and of the
30 public (§942),

31 (g) The practicability of framing and enforcing
32 the order of judgment (§943) . . ." (Emphasis added.)

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1 Section 941, Id., (Comment a) states that:

2 "When a plaintiff proves that a tort has
3 been committed or is threatened and shows that
4 other remedies will not make him whole, an
5 injunction is not to be issued as a matter
6 of course. Elementary justice requires
7 consideration of the hardship the defendant
8 would be caused by an injunction as compared
9 with the hardship the plaintiff would suffer
10 if injunction should be refused."

11 This Court has ignored this principle if it implies in the FICO
12 opinion that an injunction is available against the defendants in
13 this case and under the facts and circumstances which are pertinent
14 to the issues. The degree of economic contribution by the mining
15 company defendants to the State of Arizona and the nation as a
16 whole has simply been passed over. If the plaintiffs prove a
17 cause of action, there is still the remedy of money damages. The
18 hardship to the defendants if an injunction were granted would be
19 entirely out of proportion to the inconvenience possible suffered
20 by FICO in lifting water from a greater depth or adopting water
21 conservation measures.

22 With respect to the interests of third persons and of
23 the public, Id., §942, (Comments A, B, and C) further elaborate
24 principles which have been ignored by the Court in the present
25 case. The Teamsters consider themselves an interested third
26 person. Comment B, Id., states, "Likewise, employees of an
27 industrial plant face destruction of jobs and conditions of work,
28 if changed processes or cessation of operations is required in
29 order to abate a nuisance." Although this sentence talks about
30 the injunction of a nuisance, it is obvious that cutting off the
31 mine's water would have the same effect. Thus, the interests of
32 many third persons militate against an injunction. Other factors

(557)

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1 considered important by the Restatement of Torts, §942, include
2 the public interests of the community such as the loss of taxes
3 and of the loss of purchasing power of the workers to the local
4 economy. None of these factors have been considered in connection
5 with the Court's indication that injunctive relief is available in
6 the present case. Our rules of equity simply demand a more
7 thorough evaluation than the Court has given the present case, and
8 the trial court is the proper place for such to occur.

9 These principles are exemplified in Higday v. Nickolaus,
10 469 S.W.2d 859 (Mo.App. 1971). There, the City of Columbia bought
11 17 acres worth of well sites in an area known as the McBaine
12 Bottom. The plaintiffs were owners of some 6,000 acres of farm
13 land overlying the alluvial water basin in the McBaine Bottom.
14 The city intended to take some 11.5 million gallons per day out of
15 its wells and transport the water some 12 miles away to serve the
16 city proper. From the facts of the case and a map presented, it
17 was clear that the city was taking this large quantity of water out
18 of the basin. The trial court had dismissed the action on the
19 basis that the English rule respecting percolating water applied
20 in Missouri. The appeals court reversed, however, holding that
21 the reasonable use rule applied and cited, inter ali, Bristor II,
22 supra, and Jarvis I. The court, therefore, held that the complaint
23 stated a cause of action. With respect to the prayer for injunc-
24 tion, however, the court stated:

25 "This is not to suggest that should proof
26 follow upon the pleadings, perforce injunction
27 will issue. Injunctive relief is a matter of
28 grace, not of right. 'The writ of injunction is
29 an extraordinary remedy. It is not issue as a
30 matter of course, but somewhat at the discretion
31 of the chancellor. It is his duty to consider
32 its effect upon all parties in interest, and to

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issue it only in case it is necessary to
protect a substantial right, and even then
not against great public interest. . . .
[Emphasis in Higday, citations omitted.]
It requires the application of the principles
of equity under all the circumstances. 'The
relative convenience and inconvenience and
the comparative injuries to the parties and to
the public should be considered in granting or
refusing an injunction.' [Emphasis added,
citations omitted] . . . The rule of compara-
tive injury suggests that under the facts pleaded
in concessions of counsel may be more equitable
to deny injunctive relief than to grant it. The
evidence may prompt the trial chancellor to the
same conclusion, but that must await the deter-
mination of existing circumstances . . . Should
the trial court adjudge that plaintiffs are
entitled to the declarations they seek, the rule
of reasonable use will apply and the defendant
city will be answerable to plaintiffs for any
damage from its unreasonable use of groundwater
" 469 S.W.2d at 871.

Accord, Koseris v. J.R. Simplot Co., 82 Idaho 263, 352 P.2d 235
(1960).

CONCLUSION

The FICO opinion, then, has built upon errors made by
the Court in previous cases, and compounds them further. This
Court should reconsider this case and it is submitted that the
Court should correct the inequitable situation resulting from its
Jarvis and FICO opinions and start over again. This amicus dis-
agrees that this is a legislative problem as the majority states,

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1 for this is a judicially created problem beginning with Howard v.
2 Perrin, supra, in 1906 and continuing through Bristor I and II
3 and FICO.

4 It is, therefore, incumbent upon this Court to confirm
5 that these equitable principles apply to this case. To begin
6 with, the rule of reasonable use is not a hard-and-fast rule
7 determined solely by the place of use, except possibly in circum-
8 stances such as in Jarvis I, supra, and where supported by
9 competent evidence, that a large transbasin diversion (which would
10 preclude any recharge from the used water) is taken out of a
11 basin which had a declining water table. But that case involved
12 an extreme not only as to quantity, but as to distance in that
13 there is no opportunity for recharge after the water is used.
14 Furthermore, beyond the place of use and the quantity of the use,
15 considerations of recharge, consumptive use, the economic impact
16 of the water uses and the litigants on the society, the degree of
17 the harm and even the fact that the plaintiff stood by while the
18 mining companies invested large sums of money and began with-
19 drawing water for some years prior to any action or complaint by
20 it, are all factors to determine whether there is a tort--i.e.,
21 whether or not the use of percolating water involved in this case
22 is "unreasonable". Bristor II, supra, 75 Ariz. at 237, 255 P.2d
23 at 179. Restatement of Torts, supra, §§854-863. These are
24 matters to be determined by the trial court. Beyond this,
25 however, assuming the trial court were to find an illegality--
26 "unreasonable use"--it is still the function of the trial court
27 to evaluate the facts and circumstances pertinent to the case in
28 order to determine the remedy involved. The facts involved in
29 this case, to be considered by the trial court, include the place
30 of use by the mining company defendants, the effect of their
31 pumping on FICO, the place of consumptive use by the defendants in
32 the tailings ponds which are much closer to the wellhead than the

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1 mills, the fact that lands have been retired from cultivation,
2 the problems inherent in flood irrigation by the plaintiffs in a
3 desert such as southern Arizona, and other facts and circumstances,
4 which will all be involved in determining the legality of the
5 defendants' uses will also determine the availability of injunc-
6 tive relief or money damages.

7 In closing, this case is not one for summary treatment.
8 It demands a trial and the application of established and sound
9 legal and equitable principles. The facts of Higday, supra,
10 were aggravated compared to the water use involved in the present
11 case, yet that court indicated it would be very reluctant to
12 sanction injunctive relief. That case was based upon sound
13 reasoning and similar reasoning should apply here. Bristor II,
14 supra, adopted the Restatement approach to subterranean water and
15 we should adhere to it.

16 Therefore, it is urged by this amicus curiae that the
17 Court reconsider its opinion in this case and that it should apply
18 the principles set forth above.

19 DATED this 11 day of October, 1976.

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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
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Antonio Bucci
Signature

Subscribed and sworn to before me this 12/15/05
Date

Etta Louise Muir
Signature, Notary Public

My commission expires 04/13/2009.
Date

