ORIGINAL
4/402

FILED
ARIZONA COURT OF
APPEALS DIV TWO

NOV 4 4 20 PM 1974

ELIZABETH D. FRITZ
CLERK
BY G.G. Martinez
DEPUTY CLERK

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

FARMERS INVESTMENT COMPANY, a corporation, Appellant, vs. THE ANACONDA COMPANY, a corporation; AMAX COPPER MINES, INC., and THE ANACONDA COMPANY, as partners in and constituting ANAMAX MINING COMPANY, a partnership; ANAMAX MINING COMPANY, a partnership, Appellees.	)No. 2CA-CIV-1756)Pima County)Superior Court)No. 116542

11439-2
FILED
MAR 17 1975
CLERK SUPREME COURT
BY [illegible]

ABSTRACT OF RECORD ON APPEAL
Volume III, pp. 256-End

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

Attorneys for Appellant

FCTL001138

TABLE OF CONTENTS

VOLUME I	PAGE
Amended Complaint Counts One, Two, Three (Filed November 8, 1973) filed November 8, 1973	1
Answer of Amax Copper Mines, Inc. The Anamax Mining Company and the Anaconda Company to Plaintiff's Amended Complaint of November 8, 1973 and Counterclaim filed November 19, 1973	30
Counterclaim	41
Motion for Summary Judgment as to Duval Corporation and Duval Sierrita Corporation filed January 15, 1974	46
Memorandum of Points and Authorities	52
Affidavit of John R. Erickson re Overlay, Plate 1, Bulletin 1112, U.S.G.S. (Exhibit A)	63
Affidavit of M. L. Breashers	66
Affidavit of Warren E. Culbertson	73
Supplemental Affidavit to Photographic Exhibit 1	77
Supplemental Affidavit to Photographic Exhibit 2	79

TABLE OF CONTENTS

VOLUME I

	PAGE
Motion for Summary Judgment as to Duval, etc. (continued):	
Supplemental Affidavit to Photographic Exhibit 3	81
Supplemental Affidavit to Photographic Exhibit 4	83
Supplemental Affidavit to Photographic Exhibit 5	85
Exhibit A, Plate 1, Bulletin 1112, U.S.G.S. with overlay	85.1
Exhibits 1 - 5, 8 x 10 colored photographs	85.1
Duval Defendants' Motion for Summary Judgment filed February 13, 1974	86
Affidavit of B. G. Messer	87
Duval Defendants' Memorandum in Support of Motion for Summary Judgment filed February 13, 1974	89
Exhibit A, Map of Sahuarita-Continental Critical Groundwater Area and Subdivision	116
Exhibit B, Official Map of the State Land Department of the Sahuarita-Continental Subdivision as established June 18, 1954, etc.	116

TABLE OF CONTENTS

	PAGE
VOLUME I	
Notice of Deposition filing date unknown; dated March 13, 1974	117
VOLUME II	
The Anamax Defendants' Motion for Partial Summary Judgment as Against the City of Tucson filed March 13, 1974	121
Memorandum	122
Affidavit of Robert E. Lundquist	151
Duval Defendants' Respone to Plaintiffs' Motion for Summary Judgment, Opposing Affidavits and Memorandum	153
Memorandum	158
Affidavit (of Mr. Messer)(Ex.A)	237
Affidavit (of Mr. Gookin)(Ex. B)	245
Map Depicting Location of Lands Owned and Leased by Duval in the Upper Santa Cruz Valley (Exhibit C)	254
Map Depicting Boundaries of Sahuarita-Continental Critical Groundwater Area, etc. (Ex. D)	

TABLE OF CONTENTS

VOLUME III

	PAGE
Response to City of Tucson to Motions for Summary Judgment of Anamax and Duval filed March 21, 1974	256
City of Tucson Water Department Map of City Well Locations (Exhibit 1)	280
Map showing groundwater basins established for administrative purposes for proposed groundwater code (Exhibit 2)	280
Map of the Sahuarita-Continental Subdivision of the Santa Cruz Basin (Exhibit 3)	280
Copy of Application for a Permit to Appropriate Public Waters of the State of Arizona (Ex. 4)	280
Notice of Location of Water Right and Reservoir Site (Ex.5)	280
Tables, pumpage figures (Ex. 6)	280
"A Regional Plan for Water, Sewerage and Solid Waste Management" (Exhibit 7)	280
"Underflow of the Santa Cruz River"	280

TABLE OF CONTENTS

VOLUME III

	PAGE
Petition for Injunctive Relief; Motion for Rule 42(b) and Rule 65(a)(2) Orders filed April 15, 1974	281
Affidavit of Mark Wilmer	290
Motion for Order Severing the Issue Presented by the Foregoing Petition and for an Order Consolidating the Hearing upon this Petition with Trial on the Merits	291
Memorandum in Support of Motions	292
Motion to Dismiss Petition for Injunctive Relief filed April 23, 1974	308
Memorandum	309
Memorandum in Opposition to Plaintiff's Motion for Rule 42(b) and Rule 65(a)(2) Orders filed April 23, 1974	313
Amended Notice of Hearing Application for Preliminary Injunction filed May 1, 1974	329
Affidavit of R. Keith Walden	330
Amended Complaint Counts 1-3	335

TABLE OF CONTENTS

VOLUME III

	PAGE
Response to Motion to Dismiss Petition for Injunctive Relief filed May 1, 1974	336
Answer and Response to Application and Amended Application for Preliminary Injunction filed May 7, 1974	344
Answer and Response to Affidavit of R. Keith Walden	357
Affidavit (of Mr. Hansen)	366
Minute Entry (Ruling) dated May 21, 1974	368
Minute Entry (Hearing) dated May 22, 1974	369
Order Denying Injunctive Relief dated May 24, 1974	370
Motion to Vacate Order Denying Injunctive Relief and to Enter an Order Denying Injunctive Relief filed June 7, 1974	373
Memorandum	374
Minute Entry (Hearing) dated July 9, 1974	[illegible]
Notice of Appeal filed July 11, 1974	378

TABLE OF CONTENTS

VOLUME III	PAGE
Bond for Cost on Appeal filed July 11, 1974	379
Designation of Contents of Record on Appeal filed July 11, 1974	381
Additional Designation of Contents of Record on Appeal	385

* * *

(TITLE OF ACTION)

RESPONSE OF CITY OF
TUCSON TO MOTIONS
FOR SUMMARY JUDGMENT OF
ANAMAX AND DUVAL

Filed: March 21, 1974

I.

FACTUAL STATEMENT

The City of Tucson is situated on and near the Santa Cruz River. From the earliest recorded times it has obtained the principal part of its municipal water supply from wells in and near that river and its tributaries. The City has no supply of water that is not pumped from underground, either from the sub-terranean flow of the Santa Cruz or from the groundwater supply of the Santa Cruz and Avra-Marana Basins. Wells from which the City has obtained its water are shown

FCTL001146

on the map attached as Exhibit 1. All of the wells shown on the map are located within the Santa Cruz Basin as that basin is defined by the State Land Department under the provisions of ARS 45-303 and shown on the map marked Exhibit 2. Some are in the Sahuarita-Continental Subdivision (see Map, Exhibit 3). (On Exhibit 2 the wells in the Tucson Subdivision are those shown to be in the Tucson Critical Groundwater Area; those in the Sahuarita-Continental Subdivision are those shown to be in the Sahuarita Critical Groundwater Area.)

The prior appropriative rights of the City in and to the waters of the Santa Cruz, both surface and underground, are in some cases "immemorial" rights deriving from the laws of Spain. In other cases those rights derive from modern law and statute and date back at least to

1880. (See, e.g., Exhibit 4.) In still other cases the appropriations date from 1907. (See, e.g. Exhibit 5.)

The City presently (1973) draws from its wells located in the Sahuarita-Continental Critical Groundwater Area a total of 11,278 acre feet annually. This is approximately 14.6% of its total municipal water requirement. (See the tables attached as Exhibit 6.) It is sufficient water to provide for the annual needs of about 65,000 people. It is less than one-third of the total annually withdrawn for agricultural use by Farmers Investment Company; it is about one-quarter of the annual withdrawal by the defendants for mining purposes. The City has, presently, a population of about 400,000; it is projected that by 1980 the number will be 500,000, by 2000 it will be 900,000; in less than 50 years it will be 1,400,000.

(See Exhibit 7, p. 1.) The total water pumped from all sources for the population of 400,000 in 1973 was a little over 72,000 acre feet (less than twice the defendants' combined use and less than the total of the annual use of Farmers Investment Company and the defendants). By the year 2000 it will be necessary for the City to pump at least 150,000 acre feet annually; by 2020, 233,333 acre feet. The City, incidentally, supplies through its water utility over 95% of the population of the eastern one-third of Pima County; the percentage is increasing.

The principal wells of the City (omitting from all of this statement reference to wells in the Avra Valley which produce about 8,000 acre feet annually) are located in the so-called South Side field, south of the airport. Over many

years wells have been abandoned for a variety of reasons and replaced by new wells located, in some cases, upstream as far as Township 16 South (about the north end of the properties owned by Farmers Investment Company and ASARCO). The construction of the City's wells now within the Sahuarita Critical Groundwater Area occurred in many cases in 1954 prior to the designation of the area either as a subdivision of the Santa Cruz Basin or as critical (the subdivision designation was June 8, 1954; the critical area designation was October 14, 1954).

Water pumped from the wells south of the City in the Sahuarita Critical Groundwater area is transported north to locations where, comingled with water from other wells, it is delivered to customers for municipal uses. All of that water is delivered and consumed within

the Santa Cruz Basin, and waste water is returned to that Basin.

For the past year the City has undertaken a program of drilling to determine whether any of the water used by the mines is returned to the underground supply. Findings to date demonstrate little or no such return, but the data is not yet conclusive on the question.

II.

ARGUMENT

The Motions filed by Duval and Anamax are essentially identical and raise the same legal issues, making it appropriate that they be answered together. Stripped of surplusage, the Motions say this: Those defendants are pumping water from within th Sahuarita Critical Area. They are taking the water up the hill to their mines and mills and using it in their operations. They are "using" it either

(a) within the critical area, or (b) outside it but within the Sahuarita Continental Subdivision of the Santa Cruz Basin. They are in any case returning it to the common supply shared by themselves, FICO and the City. The City, on the other hand, is taking water from the Critical Area and moving it outside the Subdivision. Their own use, they urge, is lawful, the City's is not. They rely on Bristor v. Cheatham and Jarvis v. City

These are Motions for Summary Judgment in an action in equity. They must be denied if there is any contested issue of fact underlying either the legality of the City's actions or the defendants' right to complain of them. For the sake of clarity it may be useful to treat with the second matter first.

Clearly, if the conduct of the defendants themselves is unlawful, they

can be granted no relief in equity. Can the Court, then, at this point in the proceedings find and hold that defendants' conduct is lawful? That, of course, is the very issue which is presented by FICO's complaint against them. Merely to glance at the accumulated files in this case is to appreciate that -- to put it in the mildest terms -- every factual assertion on which the mines rely is strongly contraverted. They assert that their "use" of water is in fact within the critical area; FICO urges that it is not, and there is evidence in the record to support FICO's view. They assert that the water which they use is "returned" after use to the common supply; FICO vehemently denies it, and there is evidence to support FICO's position.

At the heart of the Motions is the assertion that the mines are, as a matter

of law, using the water on "the land from which it is taken" (the language is that of Bristor II). They contend for the right to take water out of the Critical Area so long as its use is within the Basin, so that waste will be returned to the "common supply." Whether that proposition of law is acceptable under Bristor and Jarvis I and II is a matter on which the City has no present comment (although it is certainly to the City's advantage that the assertion be true). For one of two things is so: If the proposition is sound, the City's withdrawal and use of water from its wells in the Critical Area is lawful; if the proposition is unsound, the mines are in no position to appeal to a court of equity.

Defendants in their Motions seek to distinguish between a "basin" and a "subdivison" to justify the conclusion that

FCTL001154

their own use is lawful, the City's not. The argument they make is this: They may move water off one parcel of land and use it elsewhere so long as its use is at a point where waste or surplus will be returned to the "common supply" from which the water has been drawn; in Arizona that common supply is defined by the limits of an established basin "subdivision"; their use is within the same subdivision as their source; the City's use is outside the subdivision which contains its source; therefore, since they are returning their waste water to the "common supply," and since the City is not, their use is legal, its is not. Laying aside for the purpose of discussion the factual problems which the argument raises, it is fatally flawed as a matter of law.

The Ground Water Code (ARS 45-301, et seq.) defines two terms (ARS 45-301):

FCTL001155

> "5. 'Groundwater basin' means land overlying, as nearly as may be determined by known facts, a distinct body of ground water ..."
>
> "6. 'Groundwater subdivision' means an area of land overlying, as nearly as may be determined by known facts, distinct body of ground water. It may consist of any determinable part of a ground water basin." (emphasis ours)

The defendants read these definitions as suggesting that the "common supply" of a subdivision is not the "common supply" of the basin. The statute cannot be so construed. It is apparent enough that a common supply -- a "distinct body of ground water" -- is defined, not by a subdivision, but by a basin. The State long ago established the Santa Cruz Basin (see Exhibit 2). In so doing it established as a matter of law and fact that all ground waters within the Basin were part of the same "distinct body."

As defendants have argued, a "distinct body" is a "common supply." A subdivision is an area of land within the basin; as the very name suggests and as the statute provides, it is a part of a basin. A subdivision is clearly an administrative area, useful, for example, in the formation of critical areas. In the Santa Cruz Basin are two subdivisions (see Exhibit 3). By statute they overlie the same "distinct body of ground water, "the same "common supply." Defendants in their memoranda cite cases to the proposition that they are entitled to move water anywhere so long as it is not moved away from the common supply. It is instructive to count the number of those cases (including Bristor and Jarvis I and II) that speak in terms of "basins."

Thus, if a "common supply" is a "distinct body of ground water" -- and

defendants argue that it is -- Tucson's withdrawal, transport and use of water is as lawful as defendants' is.

But suppose, as FICO urges, that one may not, under Bristor and Jarvis, move water away from the tract from which it is drawn -- suppose the right to move it is not measured by the boundaries of the "common supply." The moving defendants meet the resulting situation with the assertion, not that the rule of reasonable use sanctions their activity, but instead that they have brought themselves within Jarvis II's exception to that rule. They say that having bought agricultural land in the Sahuarita Critical Groundwater Area and retired it from use they are entitled to move the water wherever they please, even out of the Basin. Again, defendants misread the authority on which they rely.

In Jarvis II, to be sure, the City of Tucson was permitted to buy and retire Avra Valley lands and to move to the Santa Cruz Basin an amount of water equal to that once used on those retired lands. Why was it given that privilege? The Supreme Court was clear on the point:

> "Finally, petitioners request this Court to detrmine whether Tucson by acquiring lands in cultivation in the Avra-Altar Valleys may remove the ground water used upon those lands to other areas contrary to the doctrine of reasonable use. The State Land Department joins petitioners in requesting that the first Jarvis decision be augmented by clarifying the rights of the parties in this respect. Tucson also asks the Court to pass upon a like question although in somewhat a different form. Amici Curiae, however, oppose the request of the parties that the Court expand on the legal rights in question.
>
> "We think, however, that the problem is critical to municipalities in Arizona and so justifies our consideration even though not strictly embraced within the limits of the issues of the original

lawsuit. As indicated, Jarvis' action invoked this Court's equitable jurisdiction. We issued the injunction but stated that we reserved the right to modify or dissolve upon application accompanied by a showing of circumstances as would permit the legal pumping and transportation of ground water by the City. Our decree was consistent with the almost universal rule that a court of equity when requested will determine all the equities connected with the main subject of the suit and grant all the relief necessary to a complete adjustment of the litigation:

> "'It is a principle of equity that it does justice completely and not by halves. When a bill had been brought in good faith to obtain relief within the jurisdiction of the court, the bill may be retained to do complete justice with reference to the subject matter, even though upon the facts the specific relief prayed for cannot be given, and a bill would not lie for the sole purpose of obtaining the specific relief that is given. Reynolds v. Grow, 265 Mass. 578, 580, 164 N.E. 650; Booras v. Logan, 266 Mass. 172, 175, 164 N.E. 921; Degnan v. Maryland Casualty Co., 271 Mass. 427, 430, 431, 171 N.E. 482; Peerless Unit Ventilation Co., Inc. v. D'Amore

> Construction Co., 283 Mass. 121, 125, 126, 186 N.E. 280; Geguzis v. Brockton Standard Shoe Co., 291 Mass. 368, 371, 197 N.E. 51; Somerville National Bank v. Hornblower, 293 Mass. 363, 368, 199 N.E. 918, 104 A.L.R. 1107.' Fields v. Othon, 313 Mass. 115, 46 N.E.2d 546, at 547 (1943).
>
> "It is also frequently stated as a maxim of equity that equity follows the law. By this is meant that equity obeys and conforms to the law's general rules and policies whether the common law or statute law. See, e.g., Provident Building & Loan Assn' v. Pekarek, 52 Ohio App. 492, 3 N.E.2d 983 (1936). By A.R.S. Sec. 45-147 the relative value of uses in appropriable waters has been fixed by the Legislature as first, domestic and municipal uses, and second, irrigation and stock watering. The creation of such a priority clearly evidences a legislative policy that the needs of agriculture give way to the needs of municipalities. Hence, we hold that the decree in this case will be modified if Tucson purchases or acquires the title to lands within the Avra-Altar Valleys which are now cultivated and uses the water which would have been used in cultivating such lands as a source of supply for its municipal customers. Tucson may withdraw an amount equal to the

FCTL001161

> annual historical maximum use upon the lands so acquired.

Nothing in Jarvis II can be read to suggest that these mining companies have the same equitable call on the court's power to grant such a dispensation as the City has. The unique nature of a city's requirements is pointed out clearly enough. How can this Court rule, at least in the absence of the taking of evidence, that the mining companies are entitled in equity to the same consideration? Water to carry away industrial waste is one thing. It is at least arguable that drinking water is another. Yet (1) if defendants cannot under the reasonable use rule take their water up the hill, and (2) if defendants are not entitled to assert the same exemption as was extended in Jarvis II to the City, then their withdrawal and use of water is clearly

FCTL001162

unlawful, and they are hardly parties entitled to invoke this Court's equitable jurisdiction against the City.

The memorandum to this point has considered primarily the status of the defendants. There is, however, much more to be considered. First, the defendants have in their Motions treated the City's withdrawal of waters from the wells located within the critical area as though those waters were established to be "ground waters." They are not established as anything of the kind. There is ample evidence that much or indeed all of the water which is produced by the City's wells in and near the Santa Cruz River is taken from an underground stream. (See, e.g., Exhibit 8.) It is established that the Santa Cruz is a "known independent subterranean stream." Pima Farms Co. v. Proctor, 30 Ariz. 96, 245 Pac. 369.

From its earliest history the City and its predecessor town and village have drawn the water of that stream by wells in and near its bed. That water is not "ground water," as the term is used in our statutes. It is not subject to the rule of reasonable use stated in Bristor and Jarvis. It is subject to appropriation and controlled by the rules of prior appropriation. Pima Farms Co. v. Proctor, supra. The City's appropriative rights in that subterranean flow are prior to those of any of the other parties, so far as is known, and they may include the entire flow of that stream. Having for many years drawn that water from wells located near Tucson, as those wells became unproductive or inadequate they were in many cases abandoned (see Exhibit 1). They were replaced by wells farther south, some in the Sahuarita Critical Area. In

FCTL001164

other words, the City as a prior appropriator of an underground stream moved its point of diversion upstream, an action it had the clear legal right to take. Fritsche v. Hudspeth, 76 Ariz. 202, 262 P.2d 243. The City contends, in short, that its right to take water from the wells in question here is the right of the prior appropriator of a stream. There is and will be evidence to support that contention. Nothing anywhere in the record suggests that either FICO or any defendant has any appropriative rights at all, certainly none prior to the City's.

There are still other reasons why defendants' Motions should be denied. It is instructive, in considering them, to examine the language of a Petition filed by these same moving defendants in the Supreme Court, in Cause No. 11439 in that Court, seeking to intervene in a pro-

ceeding pending there between FICO and Pima. Parts may be reproduced without change:

> In Cause No. 116542 there has been extensive discovery by way of written interrogatories and oral depositions, some lasting for days. FICO has taken depositions as recently as November 30, 1973. Additional discovery by way of drilling and sampling is currently being conducted by the City of Tucson, a party to said Cause No. 116542. Further discovery of a very substantial nature by depositions of numerous experts must be conducted by all of the parties to said cause." (Petition, Par. VI)

* * * * * * * * * * *

"THIS CASE REQUIRES TRIAL ON THE MERITS

"In essence, FICO is again seeking to raise the very same issues previously before this Court in Farmers Investment Company v. State Land Dept. et al. (No. 10486), where this Court declined to accept jurisdiction. In that case the Petitioners filed briefs urging that the issues involved were vital and possibly determinative of the rights of all defendants in the Pima County action. Petitioners urged this Court not to grant FICO's Petition without

the defendants an opportunity to try the complex hydrological and equitable issues involved in that case and which are involved here.

"Few complex water cases have reached this Court after trial on the merits. For example, Bristor v. Cheatham, 75 Ariz. 236, 255 P.2d 178 (1953) was decided on a motion to dismiss. State v. Anway, 87 Ariz. 206, 349 P.2d 774 (1960) came to this Court on appeal from summary judgment. Jarvis was an original proceeding in this Court decided on the pleadings.

"Even more than the first action brought here by FICO, this second attempt more compellingly illustrates the necessity for a trial of the facts involved. Under the guise of raising questions of state land law relating to state land leases, FICO's petition glosses over the most critical and the most basic questions. Hydrological facts and realities are completely ignored. Cases of this magnitude and complexity cannot be decided by disregarding the factual situations which the ground water statutes were designed to regulate." (Memorandum in Support of Petition, p. 20)

* * * * * * * * *

"Laches and Estoppel. FICO knew for many years and did not complain that Petitioners were continuously

engaged in the exploration, development and construction of mining operations, that Petitioners were investing several hundred million dollars therefor and that such operations would use water from wells on lands acquired by Petitioners in the Santa Cruz Valley. FICO is now barred by laches and is estopped to complain of Petitioners' uses of ground water.

"Balancing the Equities. The appropriateness of injunction against tort depends upon a comparative appraisal of all of the factors of the case including the interest to be protected, the adequacy of other remedies, plaintiff's delay in bringing the suit, plaintiff's misconduct, relative hardships, the interest of third persons in the public, and all other applicable facts and circumstances. Restatement of Law, Torts, Secs. 933-951. All of these are factors which can be shown only by a trial on the merits." (Memorandum, p. 22)

The City agrees that if ever a case required to be tried on its merits, this one does. It, too, has pleaded laches and estoppel, and there is and will be evidence to support those pleas. It is in a stronger equitable position than the mines are. As "equity follows the

law" and as domestic and municipal uses are first in relative value among all uses (Jarvis II), so, surely, no court will enjoin a City's taking of even ground water unless and until the clear illegality of its action is shown (it is not here) and, beyond even that, unless and until it is manifest (as it is not on this record) that no less harsh and oppressive remedy can be made available to those whose legitimate interests are harmed.

(Signed JAMES D. WEBB, City Attorney and LESHER & SCRUGGS, P.C., Attorneys for Plaintiff in Intervention, City of Tucson, by Robert O. Lesher)

(Verified by FRANK BROOKS, Assistant City Manager of the City of Tucson, before a Notary Public on March 21, 1974)

(The following listed Exhibits to Response of City of Tucson are incorporated by reference thereto:

1. City of Tucson Water Department map of city well locations.

2. Map showing groundwater basins established for administrative purposes for proposed groundwater code.

3. Map of the Sahuarita-Continental Subdivision of the Santa Cruz Basin.

4. Copy of Application for a Permit to Appropriate Public Waters of the State of Arizona.

5. Notice of Location of Water Right and Reservoir Site.

6. Tables, pumpage figures.

7. "A Regional Plan for Water, Sewerage and Solid Waste Management."

8. "Underflow of the Santa Cruz River."

* * *

(TITLE OF ACTION)

PETITION FOR INJUNCTIVE RELIEF;
MOTION FOR RULE 42(b) and RULE
65(a)(2) ORDERS

Filed: April 15, 1974

FARMERS INVESTMENT COMPANY, an Arizona corporation, Plaintiff herein ("FICO"), petitions the Court for injunctive relief against Defendant ANACONDA, and respectfully shows the Court in support of this request:

I

As appears from the records and files herein, FARMERS INVESTMENT COMPANY, (FICO), is an Arizona corporation which owns approximately 7,000 acres of land in the Upper Santa Cruz Valley in Pima County. FICO farms approximately 5,000 acres of that land to pecan trees and

lesser amounts thereof to other farm crops. FICO requires large amounts of groundwater for irrigation of said crops.

II

Defendants THE ANACONDA COMPANY and AMAX COPPER MINES, INC. are corporations and as partners constitute THE ANAMAX MINING COMPANY, a partnership. The collective reference "ANAMAX" will be used herein to designate these Defendants. ANAMAX is engaged in the mining and milling of copper ore, extracting the copper bearing rock from its mine and processing said ore in its mill which are located approximately four miles westerly from the farming lands of FICO, in Pima County, Arizona.

III

On or about October 14, 1954, pursuant to the authority delegated to the State Land Commissioner and the State Land Department by ARS Sec. 45-308, et

FCTL001172

seq., the Sahuarita-Continental Critical Groundwater Area was duly and regularly designated and ever since has continued as such critical area pursuant to said designation. This critical area lies south of Tucson and includes a major part of the area generally referred to as the Upper Santa Cruz basin.

IV

FICO's Pima farm lands and orchards at all times have been located within said critical area and FICO has obtained the groundwater necessary for the irrigation of its crops in said critical area from wells located within this critical area and now obtains its required irrigation water from this area.

V

The mine and mill of ANAMAX is located approximately one mile westerly from the westerly boundary of the Sahuarita-

FCTL001173

Continental Critical Groundwater Area and entirely outside of said critical area. ANAMAX uses large quantities of water in its milling operations.

VI

The Pima farm of FICO consists of two trancts of land roughly rectangular in shape approximately one and one-half miles apart and lying generally in the valley of the Santa Cruz river bed and extending in a generally north-south direction on both sides of the dry stream-bed of the Santa Cruz River. The northerly tract is known as FICO's Sahuarita farm and the southerly tract as its Continental farm.

VII

Prior to the filing of this litigation in November, 1969 ANAMAX had constructed several large water wells in the critical area, one located a short

distance northwesterly from the northwest corner of FICO's Continental farm and equipped said wells with large pumps, powered by electric energy and connected the discharges of said pumps into its water gathering and transportation system which pumps the water withdrawn by ANAMAX water wells, including the well located at the northeast corner of FICO's Continental farm to the ANAMAX mine and mill located as aforesaid. ANAMAX has at all times since prior to the beginning of this litigation withdrawn large amounts of groundwater through use of its wells within the Critical Groundwater Area and transported the same for use in its mining and milling operations outside of the critical area. ANAMAX does not obtain any copper ore from any lands from which ANAMAX withdraws and pumps its require-ments of water for its mining and

milling activies aforesaid.

VIII

ANAMAX is presently planning an enlargement at its ore treatment facilities from a present capacity of 30,000 tons of ore per day to 40,000 tons of ore per day. Additionally, ANAMAX is presently planning upon putting into operation an oxide treatment plant to handle an additional 10,000 tons of ore per day. The projected requirement of water for the treatment of this enlarged ore treatment capacity is 6,000 acre feet of water per year.

IX

ANAMAX is presently engaged in drilling a water well to a projected depth of 1,000 feet of a 32 inch diameter at the collar reducing to a 20 inch well casing below 600 feet to 1,000 feet. This well is being drilled to supply the water

requirements of ANAMAX arising from its increased ore treatment aforesaid and to improve water management practices in its present system. This additional water supply will be connected into the existing water producing and transporting facilities in the critical area and pumped out of the critical area to the mill located outside the said critical area where the additional ore will be treated by ANAMAX. This well is being drilled at a well site acquired by ANAMAX almost equidistance from the south boundary of FICO's Sahuarita farm and the north boundary of its Continental farm and substantially in the center of the tract of land between FICO's two farms, equidistant from the east boundary and the west boundary thereof. This well is being drilled in the northeast part of Section One and an existing large ANAMAX water

well is located in the west half of Section One.

X

ANAMAX proposes to, and will unless restrained by the Court, complete the drilling of said well, install pumps and otherwise comple e the said well and connect its discharge into the wate fathering and transporting facilities of ANAMAX within the critical area and thereafter pump large amounts of groundwater from the groundwater pool subjacent to the critical area aforesaid and transport the same for use outside of the critical area aforesaid and in the mine and mill of ANAMAX located as aforesaid.

FICO has no plain speedy and adequate remedy at law and will be irreparably damaged thereby.

XI

Withdrawal of groundwater from the

underground of the aforesaid critical area and the transportation thereof for use outside of said critical area is illegal and wrongful to the property rights of FICO.

WHEREFORE, FICO prays that ANAMAX be permanently restrained from completion and use of the water well aforesaid for the purposes hereinbefore described or for any other use other than for a beneficial use of the land from which the same is withdrawn; or alternatively that ANAMAX be so restrained pending the trial of this cause and that upon such trial a permanent injunction be entered as aforesaid; and for such other relief as may be appropriate.

(Signed SNELL & WILMER by Loren W. Counce, Jr. and Mark Wilmer, Attorneys for Plaintiff)

* * *

(TITLE OF ACTION)

AFFIDAVIT OF MARK WILMER

(Attached to foregoing Petition
and made part thereof)

(Venue)

MARK WILMER, being first duly sworn, says:

Affiant is attorney for FARMERS INVESTMENT COMPANY, Petitioner to the foregoing Petition for Injunctive Relief and duly authorized and qualified to make this Affidavit; affiant makes this verification for the reason that the statements of fact made in the foregoing Petition reflect the facts of record in this litigation and hence affiant is more conversant therewith than an officer of FICO;

Affiant has read the foregoing Petition; the factual representation made

therein are true.

(Signed MARK WILMER, Attorney
for Plaintiff, before a Notary
Public on April 12, 1974)

MOTION FOR ORDER SEVERING THE ISSUE PRESENTED BY THE FOREGOING PETITION AND FOR AN ORDER CONSOLIDATING THE HEARING UPON THIS PETITION WITH TRIAL ON THE MERITS

FICO respectfully moves the Court for orders as follows:

1. Severing and separating the issue of the right of ANAMAX to drill and equip the water well it is presently drilling in Section One, Tonwship 18 South, Range 13 East, G&SRB&M, Pima County and to pump groundwater by use thereof for use outside of the Sahuarita-Continental critical area as appears from FICO's Petition for Injunctive Relief, from the issues as formulated by the pleadings, discovery and other matters of record in the principal

case, pursuant to the provisions of Rule 42 A.R.C.P.

2. Ordering that the final hearing and determination of the issue so severed be consolidated with the application of FICO for a Temporary Restraining Order and that the determination thereof be thereby expedited pursuant to the provisions of Rule 65(a)(2) A.R.C.P.

These motions are based upon the Memorandum following.

(Signed SNELL & WILMER by Loren W. Counce, Jr. and Mark Wilmer, Attorneys for Plaintiff)

MEMORANDUM IN SUPPORT OF MOTIONS

(Note: Unless otherwise indicated all emphasis will have been added.)

I. Rule 42(B) ARCP provides, in material part:

> "The Court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim, cross claim, counterclaim, or third party claim, or third party claim, or of any separate issue or of any number of claims
> * * "

It is therefore appropriate for the Court to separate the legal issue as to whether or not ANAMAX may lawfully use this well and the water produced thereby from the underground of the critical area, outside of the critical area, from the main lawsuit which is complicated by numerous assertions of facts claimed to be material by ANAMAX. A clear legal issue is presented by this ANAMAX activity for it can only be justified if the reading FICO gives the groundwater code, Bristor and Jarvis I and II is incorrect. Resolution of the contentions of FICO versus those of ANAMAX as to the applicable

principles of law governing the central controversy will certainly advance the early termination of this litigation.

II. It is also appropriate that the Court consider the disposition of a claim to injunctive relief on the merits in cases where the facts necessary to a resolution of such a claim are legally not in dispute, at least if the legal position of the petitioner for a temporary restraining order is legally sound.

Rule 65(a)(2) provides in material part:

> "(2) Consolidation of hearing with trial on merits. Before or after the commencement of the hearing of an application for a preliminary injunction, the Court may order the trial of the action on the merits to be advanced and consolidated with the hearing of the application * * "

All that is required is that the parties have notice the Court intends to

rule upon the merits, rather than as a preliminary matter. FICO recognizes that if the claims made by ANAMAX as to the meaning of "reasonable use" are legally sound, there may indeed be material facts in dispute which might cause the Court to doubt the practical wisdom of or its legal right to rule upon the merits on the hearing of FICO's application for a preliminary injunction.

However, this is true only if FICO is wrong. If this application of Rule 65(a)(2) is acted upon favorably by the Court, neither FICO nor ANAMAX will be prejudiced. If the Court finds the law to be as FICO argues, ANAMAX has a record upon which it can upset the Court's ruling, if erroneous. If the Court denies FICO's injunctive relief and FICO is right, its rights may be vindicated by appeal or special action.

While the Arizona Court of Appeals case of Reiss vs. City of Tucson (1973) 509 P.2d 651, is not particularly in point since there was no objection made to the consolidation ordered by the trial judge, it does illustrate effective use of Rule 65 (a)(2). In Reiss the Court announced during the hearing upon the application for a preliminary injunction that the Court's ruling would be on the merits. The federal rule is identical to the Arizona rule and has been frequently considered by the federal courts since the 1966 Amendment encouraged this approach to expeditious disposition of cases in an appropriate fact situation.

This issue as to the right of ANAMAX to complete and pump this new well within the critical area for uses outside of the critical area is plainly severable from the issues involved in the main case now

almost five years in process of trial discovery and preparation. In fact, none of the fact issues contested in the principal case must be resolved to dispose of this issue. Either Bristor v. Cheatham and Jarvis I and II mean what FICO asserts they teach or FICO is not entitled to an injunction; if FICO's interpretation of these cases and applicable Arizona statutes is correct, then FICO is entitled to the relief sought.

There is no dispute as to these facts:

1. The Sahurarita-Continental Critical Groundwater Area was duly designated as such a Critical Groundwater Area in October 1954 and has continued in that status to the present time.

2. FICO owns and farms land within the Sahuarita-Continental Critical Groundwater Area and uses groundwater pumped

FCTL001187

from the land upon which it is used to irrigate and grow crops.

3. ANAMAX is presently drilling a water well upon land within the critical area and proposes to and will, unless restrained by the Court, pump groundwater from the groundwater supply subjacent to the ANAMAX well site lands within the critical area and transport the water so withdrawn for use outside of the critical area for a purpose wholly unrelated to the beneficial use and enjoyment of its well site lands.

While the principal issues of law here involved are also involved in the principal litigation, the fact issues which have snarled the progress of the main case are not involved in this controversy over the well now drilling and use of water produced therefrom unless FICO is wrong in its legal position as

to the legal limitation upon water use from the groundwater of a critical area.

Without attempting an inventory of the fact questions which ANAMAX has asserted must be resolved in the main case, we hurriedly point to assertions by defendants of laches and estoppel, claims that 75%-90% of the water pumped is returned to the underground, "clean hands", "relative hardship doctrine"and public benefit claims.

Manifestly, none of these claims can justify the intentional prospective violation of Arizona groundwater law by ANAMAX if the use intended by ANAMAX is unlawful.

The federal courts have recognized Rule 65(a)(2) as an appropriate judicial tool to expeditiously dispose of litigation provided that the fact situation justifies its use and all parties have

notice that the matter will be determined as a trial or hearing on the merits.

Wright and Miller, Federal Practice and Procedure, Vol. II, Sec. 2950, p. 484 et. seq., treats the matter as follows:

> "It long has been recognized that an accelerated trial on the merits often is appropriate when a preliminary injunction has been requested. If a Rule 65 (a) injunction is granted, a speedy trial minimizes the potential adverse effect of what may prove to be an unjustified restraint on defendant; if relief under Rule 65(a) is denied, a quick disposition of the merits shortens the period in which plaintiff may be threatened by irreparable harm. In either situation the urgency that is characteristic of cases involving preliminary injunction applications makes a rapid determination of the merits especially important.
>
> This policy may be most effectively served by ordering the trial to be advanced and consolidated with the preliminary injunction hearing in an appropriate case. This procedure has several advantages in addition to eliminating unnecessary delay.
> * * *

> Consolidation expressly was authorized in 1966 by the promulgation of Rule 65(a)(2), which provides that before or after the commencement of the hearing on a preliminary injunction application the court may advance the trial on the merits and consolidate it with the hearing. The addition of this provision was intended to encourage the practice."

Prior to the adoption of the amendment in 1966 a rule authorizing final disposition of a case on a hearing for a preliminary injunction obtained in the 8th Circuit as a court made rule. American Airlines vs. Transport Workers, 45 FRD 1, 3.

In Standard Oil Company vs. Lopena Gas Company, 240 F.2d 504 (C.A. 8 1957) Circuit Judge Rives speaking for that Circuit said:

> "It is settled beyond controversy that if, at the hearing on an application for preliminary injunction, the evidence shows clearly that the plaintiff has not stated a claim

upon which relief can be granted and cannot state such a claim, the court should dismiss the plaintiff's complaint. Mast, Foos & Co. v. Stover Mfg. Co., 177 U.S. 485, 495, 20 S. Ct. 708, 44 L.Ed. 856. That long established practice is akin to the more modern practice of granting a summary judgment when there is no genuine issue as to any material fact. Rule 56, F.R.C.P. When the circumstances warrant, it would seem that a similar prompt procedure should be available against the defendant as is provided against the plaintiff. Only one case has been found directly in point so holding. In Allegheny Oil Co. v. Snyder, Circuit Judge Day (later Associate Justice) speaking for the Sixth Circuit said:

'It is urged by counsel for appellant that the circuit court erred in disposing of the cases on their merits, and entering final decrees therein without taking proof in due course under the equity rules. The cases came on for hearing on the application of the oil company for a temporary injunction, the granting or refusal of which necessarily involved the continuing of the injunction granted in the state court, as well as the cross application of the oil company for an injunction. The court considered these cases together. The cases stood upon bill, answer, and affidavits. In view of the construction given the Snyder lease in the

circuit court, affirmed in this court, the holders thereof were entitled to have their rights protected, and interference therewith by holders of the second lease enjoined. The first lease being held valid, the attempted second lease must necessarily fail. There was nothing in the bill of the Allegheny Oil Company in the one case, or its answer in the other, which required further testimony before construction and effect could be given to the first lease. As was said by Judge Thompson in the circuit court, the facts were substantially undisputed. The allegation made that Fowler understood the premises were to be promptly drilled for oil and gas could not affect the agreement as reduced to writing, in the absence of allegations of fraud or mistake. There was no attempt to reform the instrument. No amendment to the bill or answer was proposed, nor has there been any suggestion of further facts material to the controversy. In such cases the courts of the United States may proceed to administer final relief without putting the parties to the expense and delay of protracted litigation. Mast, Foos & Co. v. Stover Mfg. Co., 177 U.S. 485, 20 S. Ct. 708, 44 L.Ed. 856, citing with approval, Gardt v. Brown, 113 Ill. 475; Green v. Mills, (4 Cir.) 69 F. 852, 16 C.C.A. 516, (30 L.R.A. 90) 25 U.S. App. 383; and the decision

of this court in Mayor, etc., of Knoxville v. Africa, 77 F. 501, 23 C.C.A. 252, 47 U.S. App. 74.' Allegheny Oil Co. v. Snyder, 106 F. 764, 770-771.'

See also Jackson Co. v. Gardiner Inv. Co., 1 Cir., 200 F. 113, 115, 119; Coty v. Prestonettes, Inc., 2 Cir., 285 F. 501, 516, reversed on other grounds, 264 U.S. 359, 44 S.Ct. 350, 68 L.Ed. 731; 14 Cyc. of Federal Procedure, 3rd ed., Sec. 73.77, p. 801. We find no persuasive authority to the contrary."

While Walsh vs. Local Board No.10, 305 F. Supp. 1274, 1279 (1969) did not specifically involve Rule 65(a)(2), it is in point as authority for the proposition that an application for a temporary restraining order may be treated as a summary judgment motion if as a matter of law one party should prevail on the established facts.

If FICO's application to sever the issue as to whether or not this well drilled in 1974 to be put in use

approximately five years after the lawsuit was filed is not granted, there is no way prejudice to FICO's position that this is an illegal use of groundwater can be avoided since this relatively minor issue will be inextricably intertwined with evidence as to matters and things occurring five years ago before this claim arose and before the suit was filed and wholly irrelevant to this issue.

See also:

City of Rye vs. Schuler, 355 Fed. Supp. 17; Nationwide Amusements, Inc. v. Nattin, 452 F.2d 651 (1971): Moore's Federal Practice, Vol. 7, (2nd ed) 65.04(4)

This case has been before the courts for well over four years. If in fact FICO's position as to the legal meaning and effect of the designation of the area as a Critical Groundwater Area, as

explicated by our Supreme Court in the two Jarvis cases, is correct, the case involves a continuing trespass upon FICO's rights and a continuing violation of the public policy of the State in regard to use of groundwater from such a critical area.

It has required the expediture of literally hundreds of thousands of dollars in expert witness services, discovery and legal fees which would have been largely unnecessary if the parties had been able to secure a clear cut issue as to the basic principles of controlling law as relates to withdrawal and use of groundwater from a cirtical groundwater area and a controlling ruling from the Court upon that issue.

That fact situation is now before the Court for such a ruling which does not necessarily require that the Court

also fashion the relief which is to follow, if the Court concludes that FICO's legal position is the correct reading of Bristor and Jarvis I and II (except as to the actual harnessing and use of this well which cannot be justified if in fact it flies in the face of the rules enunciated by the Supreme Court in Jarvis I and II as limiting the right to use groundwater in a critical area to the lands from which it is withdrawn.)

We respectfully urge the Court that the time has now come to give the parties firm guidance as to the legal principle which will be controlling in determining the legal right of ANAMAX to withdraw and transport water from the groundwater basin for use outside the critical area. Such a ruling in the posture of the claims of the parties as to this issue will not disturb or impair any affirmative

defenses ANAMAX may wish to urge in the principal case.

(Signed SNELL & WILMER by Loren W. Counce, Jr. and Mark Wilmer, Attorneys for Plaintiff)

* * *

(TITLE OF ACTION)

MOTION TO DISMISS PETITION FOR INJUNCTIVE RELIEF

Filed: April 23, 1974

THE ANACONDA COMPANY, a corporation, BOYD LAND AND CATTLE COMPANY, a corporation, and AMAX COPPER MINES, INC. and THE ANACONDA COMPANY as partners in and constituting ANAMAX MINING COMPANY, a partnership, and ANAMAX MINING COMPANY, pursuant to 16 A.R.S., Rules of Civil Procedure, Rule 12(b), move this Court for an order dismissing plaintiff's

Petition for Injunctive Relief for the reason that said petition fails to state a claim against any of the aforementioned defendants upon which relief can be granted.

(Signed CHANDLER, TULLAR, UDALL & RICHMOND by Thomas Chandler, Attorneys for named Defendants)

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

Rule 12(b)(6), Rules of Civil Procedure, permits a party to attack a pleading for failure to state a claim upon which relief can be granted. While a Petition for Injunctive Relief is not listed as one of the pleadings allowed by Rule 7(a), it seems quite obvious that the Petition for Injunctive Relief is in the nature of a complaint and does seek affirmative relief to which an answer or response should be filed, and the logical way to attack the sufficiency of plaintiff's petition is by a 12(b)(6) motion

if it, in fact, fails to state a claim upon which relief may be granted.

These moving defendants would like to make it plain that they intend to answer the allegations of the petition provided that this Court does not grant the relief prayed for in this motion.

The petition, on its face, indicates that the substance of petitioner's claim is that Anamax is violating the reasonable use doctrine which the Supreme Court of Arizona has held applicable to percolating or underground water. The memorandum in support of the petition so states and relies on the cases of Bristor, Jarvis I and Jarvis II.

Justice Windes, writing for the majority in Bristor v. Cheatham, 75 Ariz. 227, 255 P.2d 173, in which our Court adopted the doctrine of reasonable use relating to subterranean waters, made it quite clear that before there could be

an actionable wrong, there must be both a diversion of the water off the user's lands and damage to the complaining party. It is also quite apparent from reading the opinion in Bristor that whether or not the diversion is actionable depends upon whether the circumstances of a particular case make the diversion reasonable.

Any concession by these defendants that there is, in fact, a diversion off the land is only for the purpose of this motion, and the very nature of the motion requires the Court to take as true the allegations of the petition. It is not intended by these defendants to concede the fact of a diversion off the land except insofar as it is legally required by the nature of this motion.

The Petition for Injunctive Relief contains the general conclusion of the pleader that it is damaged and that the

damage is, in fact, irreparable. There is no fact or set of facts alleged in the petition to suggest what the damage is, or if, in fact, there is damage, the extent of that damage. That is to say that the petition does not allege that the water supply of petitioner is diminished at all or to any extent that would either justify an action for damages or injunctive relief. Bristor recognizes that any claimed harm must be substantial before an actual wrong has been committed.

It would, therefore, seem quite clear that the Petition for Injunctive Relief does not allege facts sufficient to state any claim and certainly does not allege facts sufficient to state a claim for equitable relief.

(Signed CHANDLER, TULLAR, UDALL & RICHMOND by Thomas Chandler, Attorneys for named Defendants)

* * *

(TITLE OF ACTION)

MEMORANDUM IN OPPOSITION TO
PLAINTIFF'S MOTION FOR RULE 42(b)
AND RULE 65(a)(2) ORDERS

Filed: April 23, 1974

THE ANACONDA COMPANY, a corporation, BOYD LAND AND CATTLE COMPANY, a corporation, and AMAX COPPER MINES, INC., and THE ANACONDA COMPANY as partners in and constituting ANAMAX MINING COMPANY, a partnership, and ANAMAX MINING COMPANY, object to the plaintiff's motions for orders pursuant to Rule 42(b) and Rule 65(a)(2), for the reasons set forth in this Memorandum.

Of all of the circuitous routes that the plaintiff has taken to isolate an issue, dress it in an intricate garment which the plaintiff describes

as simple, the motions here presented seem to be the ultimate.

The plaintiff argues that since these defendants are transporting water across a critical groundwater boundary, they are committing an illegal act and that if the Court will just isolate this contention and accept plaintiff's emphatic statement that the act is illegal, this case then can proceed with great dispatch to its inevitable conclusion, which to the plaintiff means injunctive relief against these defendants.

Plaintiff first asks the Court to invoke Rule 42(b), which empowers a Court to order separate trials of any claim, cross-claim, counterclaim, third-party claim, or of any separate issue, or any number of claims, crossclaims, counterclaims, third-party claims or issues,

reserving, of course, the right of parties to a trial by jury. Our rules of procedure that permit the joining of diverse claims in one action must provide a Court with the power to order separate trials to avoid prejudice, unreasonable delay or intolerable inconvenience to parties.

The joinder of claims permitted by Rule 18(a) and permissive counter-claims made pursuant to Rule 13(b), together with third-party practice under Rule 14, could, with the use of very little imagination, create situations where separate trials on claims or issues would be almost mandatory. Rule 42(b) was really intended to be used to dispose of such issues as jurisdiction or venue when such disposition might avoid a trial on the merits of the case; or to decide a question involving limitations, statutes of fraud, or other defenses

that might dispose of the case; or permit the trial Court to sever the defense of release and litigate the release issue that might result in the avoidance of a trial on the merits of a case.

The Rule has been and should be used in cases of multiple plaintiffs with different claims for damages but a common fact situation on liability.

Rule 42(b) is especially applicable to types of claims just mentioned. See Moore's Federal Practice, Second Edition, Volume 5, R42-42-30, et seq.

Separate trials should not be granted unless an issue is clearly severable from the other issues in the case and does not involve the same evidence. Winkler v. New York Evening Journal (E.D.N.Y. 1940), 32 F. Supp. 810.

The trial court has broad discretion in deciding whether to sever a claim

pursuant to Rule 42(b). Anderson Aviation Sales Company, Inc. v. Perez, 19 Ariz. App. 422, 508 P.2d 87; Ulan v. Richtars, 8 Ariz. App. 351, 446 P.2d 255; Purcell v. Zimbelman, 18 Ariz. App. 75, 500 P.2d 335.

It would seem that the Court should sever a claim or an issue only if the issue is clearly unrelated factually to the principal issues in the case. FICO contends that the issue of the right of Anamax to complete and pump the new well within the critical area for uses outside of the critical area is plainly severable from the issues involved in the main case. If this is correct, Anamax has completely misunderstood what the main case is about.

The gut issue which the plaintiff tenders to the Court in support of its right to any relief is the issue of whether

or not these defendants are violating the reasonable use doctrine as it applies in Arizona to underground water. This is the same issue that plaintiff tenders as a reason that the Court should grant relief as to all other defendants.

Nowhere is it contended that the drilling of the well in question violated any of the plaintiff's legal rights. The contention is that the illegal act is transporting groundwater extracted from a critical groundwater area for use outside the boundaries of the critical groundwater area. The petition for preliminary injunction alleges in paragraph X thereof that Anamax proposes to complete the well, install pumps and transport the water pumped from the well to an area outside the critical groundwater area.

FICO's entire claim for relief via injunctive or monetary damages is based

squarely on the proposition that these defendants are moving water across the critical groundwater area for use outside of the area. The wrong asserted is not the pumping of the water, it is the use of the water outside the critical groundwater area. The petition itself clearly reflects that the use complained of has been going on for some time; and while the amount of water used is to be increased, it is not just the increased use that is complained of, it is any use outside of the critical groundwater area.

The plaintiff's memorandum recognizes that these defendants have asserted affirmative defenses against plaintiff's claim and announces that the fact issues contested in the principal case need not be resolved in the disposition of the issues tendered here. Such a contention is completely without merit. If the de-

fense of laches or unclean hands would apply to part of the water, it would apply to all of the water.

It is also asserted by FICO that none of the fact issues contested in the principal case must be resolved to dispose of the issue it seeks to sever. Then it states facts which it claims are undisputed and speaks of fact issues which have snarled the progress of the main case and categorizes these fact issues as not being involved in the controversy over the well now being drilled. It does concede that there are other assertions made, such as laches, estoppel, clean hands, relative hardship doctrine and other matters, but doesn't dignify them with the description of being fact issues or issues that involved facts.

There is simply no way to litigate this case in a vacuum. If the Court

concluded that it was illegal to transport groundwater outside the critical groundwater area for use, this conclusion would not dispose of any issue in the case. The Court would then also be obliged to decide whether or not the principal use was outside the groundwatera where the water is mixed with the ore or inside the groundwater area where the water is deposited in the tailings ponds. The Court would have to also decide whether or not the amount of water used by Anamax when related to increased uses by FICO and the amount of water historically used by Anamax's predecessors on irrigated land that has since been retired was such as to give FICO any claim. If the Court answered this in the affirmative, then the Court would have to conclude whether the injury was sufficient to require equitable intervention and if

this was answered affirmatively, then consider the defenses that Anamax has asserted to FICO's claim for equitable relief. The issues in this case are such that all claims, counterclaims, and claims of the intervenors, and counterclaims against the intervenors, must be decided following a trial on all issues.

FICO does not assert that the resolution of what it suggests is an isolated issue would resolve the principal litigation. It just claims that it would put FICO in a favorable position of having the central issue decided in these collateral proceedings, but concedes that if it was not decided favorably to FICO, there would have to be a trial on all issues.

The next step in the maneuver or procedure to isolate a central issue out of the litigation for summary disposition is to suggest to the Court that after it

has separated this one issue, the Court should invoke Rule 65(a) and then consolidate the application for a preliminary injunction with the trial on the merits for a permanent injunction, thereby expediting the final disposition of the case. If the Court acceded to this request, the result would be that the Court would first decide that there was an issue that should be severed, sever the issue, then conclude that the severed issue should be reconsolidated with the principal case and a trial had on the merits of the case. Does the plaintiff propose that these defendants not be permitted to present all the defenses they have asserted in the principal case if the severed issue is consolidated? Does the plaintiff propose that the Court try the entire case on its merits as to one defendant, and then, at some later date, try the

case on its merits as to the other defendants? Does this suggested procedure appear in any way to lend itself toward the efficient and economical disposition of this litigation? The answer is obviously no.

Plaintiff speaks of the cost of the litigation as one reason why these motions should be granted. This prompts the observation that ordinarily a party does not seek $70,000,000.00 in damages or an injunction that would obviously seriously injure or destroy a substantial investment in mining development with the attendant economic loss to the community by way of jobs, tax revenues, and other economic injuries without meeting some resistance from its adversaries. The plaintiff has shown no reluctance to be litigious on all fronts. This Court may judicially notice that plaintiff, in Cause 10486,

applied for an injunction in the Supreme Court of this state against one of the litigants here. The Court also made judicial notice that a special action was commenced by plaintiff in the Supreme Court on another case. If the real problem is a more prompt resolution of the matter, then there are procedures that can be invoked for this relief. In fact, plaintiff's motion for a pretrial conference and determination of pretrial issues and a motion to set for a jury are steps taken in that direction.

Rule 65(a) was clearly designed to give the Court the power to hear an application for preliminary injunction at the same time the Court heard the principal case on its merits. The State Bar Committee note on Rule 65(a) points out that the Rule can be profitably used when a substantial part of the evidence on the

FCTL001215

preliminary injunction is relative to the merits of the case. It is contemplated that the Court could hear what it seems sufficient evidence to determine whether a preliminary injunction should issue and then continue the trial on the merits and decide whether the preliminary injunction should become permanent. Would the suggested procedure here really accomplish this result? Would a part of the case be heard without a jury on the issue of the preliminary injunction, and then the issue of the plaintiff's right to a permanent injunction be determined with the case then proceeding to a jury trial, repeating, of course, all the testimony so that the jury could ultimately advise the Court on the equity issue or decide the damage issue if this became necessary? The substance of the matter simply is that the plaintiff has substantial

litigation on its hands that is, of course, important to the plaintiff and the defendants. It just happens to be a case with no easy answer to the problem of preparing for trial and having a trial on the merits of the case. The Reiss case is cited as an example of how Rule 65(a) is used. To these defendants, it is a classic example of how the Rule should be used. It involved a simple fact issue and a determination of the merits of the application for a preliminary injunction would obviously conclude the matter, there being no defenses asserted by a defendant that needed resolution, and it would have been pointless to have, in essence, tried the case twice. One may search in vain for any valid reason why the motions here should be granted when the only result would be to put an already difficult piece of litigation in an intolerable

mess.

(Signed CHANDLER, TULLAR, UDALL
& RICHMOND by Thomas Chandler,
Attorneys for named Defendants)

---

* * *

(TITLE OF ACTION)

AMENDED NOTICE OF HEARING
APPLICATION FOR PRELIMINARY
INJUNCTION

Filed: May 1, 1974

To the ANACONDA COMPANY, AMAX COPPER MINES, INC., and ANAMAX MINING COMPANY and to CHANDLER, TULLAR, UDALL and RICHMOND, Attorneys for said Defendants:

Please take notice that FARMERS INVESTMENT COMPANY, Plaintiff, will present its application for a preliminary injunction heretofore filed in this cause upon the moving papers supporting the Petition as filed, upon the Affidavit of R. Keith Walden verifying Count One of the Amended Complaint filed on or about November 8, 1973 and further supporting the Petition, a copy of which

is hereto annexed, and upon the Response to the Motion to Dismiss, a copy of which is herewith delivered to you. A hearing upon said application for a preliminary injunction will be requested and a ruling thereon by the Court requested at 9:00 o'clock A.M. on the 6th day of May, 1974, or as soon thereafter as counsel may be heard, in the Courtroom of the Honorable Robert Roylston, the Judge to whom this matter is permanently assigned.

(Signed SNELL & WILMER by Loren W. Counce, Jr. and Mark Wilmer, Attorneys for Plaintiff)

* * *

(TITLE OF ACTION)

AFFIDAVIT OF R. KEITH WALDEN
IN SUPPORT OF PETITION FOR
TEMPORARY INJUNCTION

Filed: May 1, 1974

(Venue)

R. KEITH WALDEN, being first duly sworn, says:

1. Affiant now is and at all times during the pendency of this litigation has been President of FARMERS INVESTMENT COMPANY, an Arizona corporation, Plaintiff in this cause; that Affiant makes this Affidavit for and on behalf of said corporation, being thereunto duly authorized.

2. Affiant has read and is familiar with the factual allegations set forth in Count One of Plaintiff's Amended Complaint filed herein on or about November 8, 1973, a copy of which is hereto annexed and by reference incorporated herein; that the matters and things therein set forth are true of Affiant's own knowledge except that:

(a) The allegation therein made that Plaintiff beneficially uses

approximately 38,500 acre feet of groundwater for irrigation of its crops is inaccurate due to the fact that the declining water table has caused Plaintiff's pumps to become less efficient and the full potential requirements of Plaintiff's pecan orchard has not been reached due to the immaturity of its pecan trees. Plaintiff's use of irrigation water is substantial and will approximate the use which Plaintiff made for agricultural purposes prior to converting its crop land to growing of pecan trees and production of pecan nuts when its groves reach maturity;

(b) The amount of water now being pumped and used by all Defendants according to Affiant's best current information is in excess of

65,000 acre feet of water per year rather than 25,000 acre feet as alleged in Count One of said Complaint, all of which is pumped from and transported out of the critical groundwater area for use outside this critical area and for uses other than in connection with the beneficial enjoyment and use of the land for which it is pumped;

3. Affiant further states in support of Plaintiff's Petition for a Preliminary Injunction:

(a) Affiant has read and knows the contents of the Petition for Injunctive Relief heretofore filed herein now set for hearing May 6, 1974, in the above-entitled Court and cause; and that the matters and things therein stated are true of Affiant's own knowledge except that

Affiant is now reliably informed and therefore believes and states that the statements made by James L. Kelley upon his deposition March 25, 1974, taken as the designated agent of ANAMAX for the purposes of that deposition upon which factual representations made in the said Petition were based are inaccurate in that the ANAMAX defendants have contracted to drill and are drilling two large water wells to a depth of 2,000 feet, one of which is presently in the process of drilling instead of only such well to a depth of 1,000 feet;

(b) The Defendant ANAMAX proposes to and will, if not restrained, pump groundwater from the said wells from within the Sahuarita-Continental Critical Groundwater Area

and transport and use the same outside of said critical area for uses unrelated to any beneficial use upon the land from which such groundwater has been so pumped.

(Signed R. KEITH WALDEN before a Notary Public on April 30, 1974)

* * *

(TITLE OF ACTION)

AMENDED COMPLAINT
COUNTS ONE, TWO, THREE
(Filed November 8, 1973)

(Attached to foregoing Amended Notice of Hearing and made part thereof)

Amended Complaint Counts One, Two, Three (Filed November 8, 1973) has been previously set forth herein commencing at p. 1.

* * *

(TITLE OF ACTION)

RESPONSE TO MOTION TO
DISMISS PETITION FOR
INJUNCTIVE RELIEF

Filed: May 1, 1974

The above-captioned action as filed and as presently pending specifically seeks injunctive relief against all Defendants, including the ANACONDA COMPANY, AMAX and ANAMAX alleging wrongful pumping and transportation by Defendants of groundwater from within the Sahuarita-Continental Critical Groundwater Area, all as more fully appears from the records of this cause.

Section 12-1803 ARS provides:

"A. An injunction may be granted at the time of commencing the action upon the complaint, and at any time afterward before judgment upon

affidavits. The complaint or the affidavits shall set forth sufficient grounds therefor.

B. An injunction shall not be granted on the complaint unless it is verified by the oath of the plaintiff that he has read the complaint, or heard the complaint read, knows the contents thereof, and that it is true of his own knowledge, except the matters stated therein on information and belief, and that as to those matters, he believes the complaint to be true."

Section 12-1801 provides:

"Judges of the superior court may grant writs of injunction:

1. When it appears that the party applying for the writ is entitled to the relief demanded, and such relief or any part thereof requires the restraint of some act prejudicial to the applicant.

2. When, pending litigation, it appears that a party is doing some act respecting the subject of litigation, or threatens or is about to do some act, or is procuring or suffering some act to be done, in violation of the rights of the applicant, which would tend to render the judgment ineffectual.

3. In all other cases when applicant is entitled to an injunction under the principles of equity."

In order to obviate any claim of the insufficiency of the moving papers, Plaintiff is filing herewith and serving upon Defendants ANAMAX, et al, the Affidavit of R. KEITH WALDEN verifying Count One of the Amended Complaint filed herein November 8, 1973, and further supporting the Petition for Injunctive Relief.

That it is appropriate to move for a preliminary injunction upon a Complaint which prays only a permanent injunction is confirmed by State vs. Cohen, 15 Ariz. App. 436; 489 P.2d 283 (Div. 2, 1971). There the Court said:

> "Defendants' final contention is that the Superior Court was without jurisdiction to grant a preliminary injunction as plaintiff's complaint only contained a prayer for relief in the form of a temporary restraining order and an

injunction, i.e., it did not specifically contain a prayer for a preliminary injunction. In support of this position they cite dicta from Wall v. Superior Court, 53 Ariz. 344, 89 P.2d 624 (1939), to the effect that 'no greater relief can be given than is asked for in the pleadings.' Such a rule would ignore the intent, purpose and language of Rule 54(d), Rules of Civil Procedure, 16 A.R.S. which provides that the court 'shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings.' See England v. Valley National Bank, 94 Ariz. 267, 383 P.2d 183 (1963); Keystone Copper Mining Co. v. -----Miller, 63 Ariz. 544, 164 P2d 603 (1945). The evidence clearly shows that the State was entitled to a preliminary injunction on May 8, and furthermore, it should be pointed out that the relief granted was, in essence, that requested except that it was not permanent in nature."

In 42 Am. Jur. 2d p. 737, Sec. 11 the rule is stated:

"A court, once having obtained jurisdiction of a cause of action, has, as incidental to its general jurisdiction, inherent power to

do all things reasonably necessary to the administration of justice in the case before it. In the exercise of this power, a court may, when it is necessary in order to protect or preserve the subject matter of the litigation, to protect its jurisdiction, and to make its judgment effective, grant or issue a temporary injunction in aid of or ancillary to the principal action."

In Dennis vs. Overholtzer, 307 P.2d 1012 (Cal. App. 1957) the court said:

"The appellants maintain that a preliminary injunction could not be granted in this action because no injunctive relief is asked in the complaint. The contention is not sound. It is true that if a preliminary injunction is sought upon a complaint rather than upon affidavits the complaint must state a cause of action for such relief. Moreno Mut. Irr. Co. v. Beaumont Irr. Dist., 94 Cal. App. 2d 766, 778, 211 P.2d 928. However, upon a proper showing in any type of action a court may issue an injunction to maintain the status quo or to prevent irreparable injury during pendency of the suit. 28 Am.Jur. pp. 208-209.

'* * *The power to make such an order is specifically granted to

> the courts by the legislature and appears in subdivision 2 of section 526 of the Code of Civil Procedure providing that an injunction may be granted 'When it appears by the complaint or affidavits that the commission or continuance of some act during the litigation would produce waste, or great or irreparable injury, to a party to the action.' '
> Smith v. Smith, 49 Cal.App.2d 716, 718-719, 122 P.2d 346, 348.
>
> The issuance of a temporary injunction rests within the trial court's sound discretion and on appeal an order granting such injunction will not be reversed in the absence of a plain showing of abuse of discretion. Daniels v. Williams, 125 Cal.App.2d 310, 312-313, 270 P.2d 556."

Rule 65 ARCP provides that no preliminary injunction shall be issued without notice to the adverse party. The Petition and Notice already served on the ANAMAX Defendants is designed to give that notice; it is not structured as an independent claim but as a claim which is a part of a larger bundle of claims but which in the interests of fairness

should be separated from the other claims which have been obscured and clouded by contentions not appropriate to this claim.

If as FICO contends, our Supreme Court has enunciated the rule in Jarvis I and II that withdrawal of groundwater from a critical area for use outside that area, unrelated to the beneficial use of the land from which it is withdrawn, is unlawful then the facts are not in dispute and FICO's right to relief is plain.

In Gillispie Land and Irrigation Co. vs. Gonzalez, 93 Ariz. 152, 379 P.2d 135 (1963) our Supreme Court said:

> "***the trial court abuses its discretionary power to grant an injunction when it misapplies the law to undisputed facts. DeSoto vs. DeJaquez, 44 N.M. 564; 106 P.2d 301 (1940); Westinghouse Elec. Corp. v. United E.R.&M. Waxhers, 353 Pa. 446, 46 A.2d 163; 163 A.L.R. 656 (1946)***"

In Desoto the court said:

"***and if under the findings the plaintiff is entitled to an injunction as a matter of law, the case should be reversed. (citing cases)

In such a case there would be no room for discretion."

The Defendants in this matter have proceeded as if they enjoyed the power of eminent domain. In Jarvis the Supreme Court denied Tucson the right to do what the Defendants have done and are doing in this case. Yet Tucson as a municipality enjoyed the right of eminent domain which the ANAMAX Defendants do not have.

(Signed SNELL & WILMER by Loren W. Counce, Jr. and Mark Wilmer, Attorneys for Plaintiff)

* * *

(TITLE OF ACTION)

ANSWER AND RESPONSE TO APPLICATION AND AMENDED APPLICATION FOR PRELIMINARY INJUNCTION

Filed: May 7, 1974

Defendants THE ANACONDA COMPANY, a corporation, AMAX COPPER MINES, INC., and ANAMAX MINING COMPANY, for their response to plaintiff's Application for Preliminary Injunction and Amended Application for Preliminary Injunction, state:

FIRST DEFENSE

That said Application for Preliminary Injunction and Amended Application for Preliminary Injunction fail to state a claim or set forth grounds upon which a preliminary injunction should issue.

SECOND DEFENSE

I.

That said defendants admit paragraph I of Count One of plaintiff's Amended Complaint (filed November 8, 1973), except that Boyd Land and Cattle Company has been dissolved.

II.

That said defendants admit that plaintiff is the owner of approximately 7,000 acres of irrigated land in Pima County, Arizona, located in the Santa Cruz Valley south of the City of Tucson, Arizona, as stated in paragraph II of said Amended Complaint; that said defendants are without knowledge or information sufficient to form a belief as to the truth of the allegation that said lands (which defendants take to mean all such land) have been irrigated for agricultural purposes for many years and

FCTL001235

that some of plaintiff's lands have been irrigated and farmed by its predecessors in interest prior to 1915, as alleged in paragraph II of Count One of said Amended Complaint; that said defendants admit that all of plaintiff's lands above referred to are located within the Sahuarita-Continental Critical Groundwater Area, so designated by the State Land Department on October 14, 1954 pursuant to authority so given to the Department pursuant to ARS Section 45-308, as alleged in paragraph II of Count One of said Amended Complaint; that said defendants admit that plaintiff and its predecessors in interest have, for many years prior to the filing of this action, irrigated some of its farm lands and used for domestic purposes the percolating water lying below the surface of the lands and have pumped such water from wells on said land; that said

defendants deny that all of such waters are and have been used for the purpose of producing crops and for domestic purposes on the lands from which they have been pumped, as alleged in paragraph II of Count One of said Amended Complaint; that said defendants admit that the plaintiff and its predecessors in interest have expended large sums of money in the development of its lands and of the percolating water, but deny that this was all done for the beneficial and reasonable use of said lands for agricultural and domestic purposes, as stated in paragraph II of Count One of said Amended Complaint and, in the latter respect, affirmatively allege that the use of said water on said lands has not at all times, including the present time, been for the beneficial and reasonable use of said lands.

FCTL001237

III.

That said defendants admit that the supply of percolating water to said lands is not unlimited, as set forth in paragraph III of Count One of said Amended Complaint; said defendants further admit that there are other irrigated lands owned by persons other than the plaintiff whose lands are irrigated by pumping percolating water from beneath the lands, as set forth in paragraph III of said Amended Complaint; that said defendants are without knowledge or information sufficient to form an opinion as to the truth of the remaining allegations in paragraph III of Count One of said Amended Complaint.

IV.

That said defendants admit that in recent years defendants, either directly or through agents, subsidiaries or lessees, have acquired land or an inter-

FCTL001238

est in land in said critical area and are pumping substantial amounts of water from under the lands in said critical area and that some of the water so pumped is used upon lands outside the critical area; said defendants deny that these defendants are using such water on lands other than the lands from which the waters are being pumped, using the term "lands" to mean lands overlying the basin sub-division and common body of water underlying such lands; that said defendants admit that all defendants pump in excess of 25,000 acre feet per year at the present time and that defendants propose to continue to use water pumped from said critical area in the manner in which they are now doing, and these defendants admit that they intend to increase such pumpage in the future; that these defendants are without information or knowledge

FCTL001239

sufficient to form a belief as to the truth of the present usage of all defendants, with the term "usage" being used herein to mean consumptive use; that said defendants admit the second paragraph of paragraph IV of Count One of said Amended Complaint relating to the relationship and activity of participants in the partnership known as Anamax Mining Company.

V.

Said defendants deny all the allegations of paragraph V of Count One of said Amended Complaint, except the allegation that the percolating waters under the plaintiff's land are being depleted, and in this connection said defendants admit that there is presently some depletion but that the depletion is being jointly caused by plaintiff, the City of Tucson, defendants herein, and others.

VI.

Said defendants contend that they have the right to use the waters pumped from under the Sahuarita-Continental Critical Groundwater Area as they are now being used, and deny that they intend they may be used on lands other than from which they are being pumped, except as hereinafter set forth, and use the term "lands" to mean land within the subdivision of the groundwater basin and overlying lands that overlie the common source of supply; that said defendants admit that plaintiff contends that such use and proposed use is in violation of the property rights of the plaintiff, all of which is set forth in paragraph VI of Count One of said Amended Complaint.

VII.

That said defendants admit paragraphs I, II and III of plaintiff's Petition for Injunctive Relief.

VIII.

That in answer to paragraph IV of plaintiff's Petition for Injunctive Relief, said defendants admit the allegations thereof, except that they deny that the amount of water plaintiff obtains from the critical area is necessary for the irrigation of its crops and allege that the crops could be irrigated with less water.

IX.

That in answer to paragraph V of plaintiff's Petition for Injunctive Relief, said defendants admit that the mill of Anamax is located approximately one mile westerly from the westerly boundary of the Sahuarita-Continental Critical Groundwater Area and entirely outside said area, and that it uses large quantities of water in its milling operations, but does not admit that the actual use of

such water is outside the critical area. Said defendants deny the remaining allegations of paragraph V of said Petition for Injunctive Relief.

X.

That said defendants admit paragraph VI of plaintiff's Petition for Injunctive Relief.

XI.

In answer to paragraph VII of said Petition for Injunctive Relief, defendants admit that prior to the filing of this litigation in November of 1969, Anamax had constructed three large water wells in the critical area, and admits the allegations therein relating to the location of said wells, the manner in which they are equipped and operated,and that that the water so collected is pumped both to the mine and the milling operations; said defendants deny that a substantial part of the water is used outside the

FCTL001243

critical area, intending the term "used" to mean consumptively used; said defendants deny that they do not obtain any copper ore from any lands from which Anamax either draws and pumps its requirements of water for its mining and milling activities, and in this connection uses the term "lands" to mean lands overlying the water basin and the common source of supply, and also affirmatively alleges that some of its water used is pumped from its mine.

XII.

In answer to paragraph VIII of said Petition for Injunctive Relief, said defendants admit the allegations thereof and affirmatively allege that the tonnage figures and acre feet of water per year are approximate, although relatively accurate.

XIII.

That in answer to paragraph IX of said Petition, said defendants admit that they are presently engaged in drilling the water well described therein, but allege that at the present time it is intended that the projected depth be approximately 1,800 feet, rather than 1,000 feet; that said defendants admit that the well is being drilled to supply the water requirements of Anamax arising from its increased ore treatment set forth in said Petition and to improve water management practices in its present system; said defendants further admit that the additional water supply will be connected to the existing water-producing and transporting facilities in the critical area and pumped out of the critical area, in part, to the mill located outside the critical area, and that additional

ore will be treated at this point by Anamax, but affirmatively allege that the bulk of such water will be returned to the critical area in the tailings deposit; said defendants admit the well is being drilled at the location described in paragraph IX of said Petition.

XIV.

In answer to paragraph X of said Petition, said defendants admit that they intend to complete the drilling of the well, install pumps and otherwise complete the said well, and to connect its discharge into its water-gathering and transporting facilities within the critical groundwater area, and that they intend to pump large amounts of groundwater from the pool subjacent to the critical groundwater area, but deny that they intend to transfer all the water so pumped for use outside the critical area and

FCTL001246

allege that any use of said water outside of said critical area is de minimus, using the term "use" to mean consumptive use; said defendants deny the remaining allegations of paragraph X of said Petition.

XV.

Said defendants deny all remaining allegations of plaintiff's Petition for Injunctive Relief.

ANSWER AND RESPONSE TO
AFFIDAVIT OF R. KEITH WALDEN

I.

In answer to the allegation 2(a) of said Affidavit, found on page 2 thereof, said defendants are without knowledge or information sufficient to form a belief as to the truth of the amount of water which plaintiff claims it uses for the purposes of irrigating its crops and the reason for such diminished use; said defendants are without knowledge or

information sufficient as to form an opinion as to the truth of the allegation as to whether or not plaintiff is using approximately the same amount of water for the purpose of growing pecans as it was for the growing of other crops prior to growing pecans.

II.

Said defendants deny paragraph 2(b) of said Affidavit, found on page 2 of said Affidavit.

III.

In answer to paragraph 3(a), commencing on page 2 of said Affidavit, said defendants admit that the statements of James L. Kelley in his deposition of March 25, 1974, while accurate at the time, are no longer accurate in that the said defendants have authorized the drilling contractor to construct the one well being drilled to the depth of

approximately 1,800 feet, but deny they have contracted to drill another well at this time.

IV.

In response to (b) of 3, found on page 3 of said Affidavit, defendants deny the allegations contained therein, again using the term "land" to mean the land overlying the groundwater subdivision and overlying land under which is situated the common source of supply.

THIRD DEFENSE

The said defendants allege that prior to the filing of this action by plaintiff, said defendants acquired, at a cost to said defendants of approximately $2,500,000, farming lands all lying within the critical groundwater area referred to in plaintiff's Complaint, and subsequent to such acquisition, retired said farm land from cultivation for the purpose of having more adequate water supply with which to con-

FCTL001249

duct its mining activities; that said land so retired consumptively used more water on a historical basis than defendants are consumptively using outside the critical groundwater area; that the water historically used by defendants and their predecessors in interest on said retired agricultural lands is a property right which defendants acquired by purchase and which may be transported for use at any point away from the land.

FOURTH DEFENSE

Defendants allege that the plaintiff has been guilty of laches in bringing its claims against these defendants in that it knew of defendants' plans and activities and did not take any steps to advise or inform said defendants of plaintiff's intention to make any claim against defendants.

FIFTH DEFENSE

For some time, plaintiff has not made reasonable use of the water which it pumps from its lands in that it has wasted such water by not using reasonable procedures and techniques for the conservation of such water, or by taking reasonable steps to so conduct its irrigation practices as to use less water, knowing of other uses and needs of other landowners in the area, and it therefore is not entitled to equitable relief.

SIXTH DEFENSE

I.

These defendants have a vested property right in and to any percolating water underneath their lands and enjoining defendants' use of this water would be a violation of defendants' right to due process of law as guaranteed by the 14th Amendment to the United States Constitution

FCTL001251

and by Article 2, Section 4 of the Arizona Constitution, in that defendants' property would be taken for a use that is not public and would be taken without compensation.

A. Furthermore, a construction of ARS Section 45-301, et seq., the Arizona Groundwater Code, that it prohibits the defendants' present uses of percolating groundwater by modifying the common law doctrine of reasonable use, would, similarly, be a violation of these defendants' right to due process of law.

II.

Enjoining defendants' present uses of water while permitting plaintiff's use would violate these defendants' right to equal protection of the laws as guaranteed by the 14th Amendment to the

United States Constitution and by Article 2, Section 13 of the Arizona Constitution, in that defendants, as present users of groundwater from a common supply, would be arbitrarily and irrationally classified and discriminated against in favor of other users of groundwater from the same supply, such as the plaintiff.

A. Furthermore, should the Arizona Groundwater Code, supra, be interpreted as modifying the common law reasonable use doctrine, and as prohibiting defendants' present uses of percolating water, the statute as applied would also violate defendants' right to equal protection.

SEVENTH DEFENSE

That said defendants allege that it would be inequitable to grant plaintiff injunctive relief, either on a preliminary or permanent basis, based upon facts

stated herein and other pertinent facts of record before this Court at this time, including, but not limited to, the following: That prior to the institution of this action, The Anaconda Company had invested approximately $200,000,000 in developing the mining property referred to herein; that said investment commenced in 1964 and continued at a substantial rate thereafter; that in order to protect and attempt to retrieve the investment of approximately $200,000,000 hereinabove referred to, it was necessary for both The Anaconda Company and Amax Copper Mines, Inc. to continue to make substantial investments in said property, with the total current investment being approximately $338,000,000; that said defendants, prior to the filing of this action, employed approximately 1,200 persons in its mining operation, and at

the present time employs approximately 1,880 persons; that said defendants, in compensation to employees, taxes paid to the state, county and school district, make a substantial contribution to the economy of this state and community.

WHEREFORE, these defendants pray as follows:

1. That the Application for Preliminary Injunction be dismissed and that plaintiff take nothing by said Application.

2. That prior to the issuance of any preliminary injunction a hearing be had to ascertain whether a preliminary injunction is justified and legal and that defendants be accorded an adequate time to prepare for said hearing and to present pertinent evidence on all issues raised by said Application.

3. That prior to the issuance of any preliminary injunction, a hearing be held for the purpose of permitting the

FCTL001255

parties to present evidence and the Court to determine the appropriate amount of security which the plaintiff should give for the payment of such costs and damages as may be incurred or suffered by these defendants pursuant to Rule 65(e), Rules of Civil Procedure.

4. For such other and further relief as is just and equitable.

(Signed CHANDLER, TULLAR, UDALL & RICHMOND by Thomas Chandler, Attorneys for named Defendants)

* * *

AFFIDAVIT (of Mr. Hansen)

(Attached to foregoing Answer and Response and made part thereof)

(Venue)

C. J. HANSEN, being first duly

sworn, upon his oath deposes and says:

That he is the Vice President and Chief Counsel of the General Mining Division of The Anaconda Company; that he is authorized to execute this verification on behalf of the above-named defendants; that he has read the plaintiff's Application for Preliminary Injunction and Amended Application for Preliminary Injunction, together with Count I of plaintiff's Complaint annexed thereto and the Affidavit of R. Keith Walden; that he has read the foregoing answer and response and knows the contents thereof; that he is informed and believes, and therefore states, that the allegations made by the plaintiff which have been denied by the defendants are untrue; that the affirmative allegations of this answer and response are true.

(Signed C. J. HANSEN before a Notary Public on May 7, 1974)

* * *

(TITLE OF ACTION)

MINUTE ENTRY (Ruling)

Dated: May 21, 1974

Judge: The Honorable Robert O. Roylston

The Plaintiff's Motion for Summary Judgment as to Defendant Duval and Defendants Duval's and Anamax' Motion for Partial Summary Judgment having been taken under advisement, the Court finds as follows:

1. Arizona had adopted the reasonable use doctrine as to under-ground water.

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. Jarvis II.

3. Water so transported must be used

within the Groundwater Subdivision, with the exception of municipalities retiring lands from cultivation as provided in Jarvis II.

Therefore, Plaintiff's Motion for Summary Judgment as to Duval is denied; Duval's and Anamax' Motions for Partial Summary Judgment are granted.

Attorneys Udall and Chandler shall prepare written judgments.

* * *

(TITLE OF ACTION)

MINUTE ENTRY (Hearing)

Dated: May 22, 1974

Judge: The Honorable Robert O. Roylston

Mr. Wilmer and Mr. Chandler argue to the Court.

The matter for Plaintiff's Application

for Preliminary Injucntion having been set for this date and it appearing to the Court that the ruling made by this Court on May 21, 1974 prevents the Plaintiff from being entitled to Preliminary Injunction,

IT IS ORDERED that the Application is denied solely on that basis.

FILED IN COURT: Deposition of C. J. Hansen.

Plaintiff's Exhibit 1, being a copy of a map, is admitted. This Exhibit is to the Deposition of C. J. Hansen.

* * *

(TITLE OF ACTION)

ORDER DENYING INJUNCTIVE RELIEF

Filed: May 24, 1974

The issues joined by the Application

and Amended Application of FARMERS INVESTMENT COMPANY, Plaintiff, for injunctive relief against THE ANACONDA COMPANY, AMAX COPPER MINES, INC. and ANAMAX MINING COMPANY, Defendants, and the verified Answer and Response of said Defendants came on regularly for hearing May 22, 1974, before the Hon. Robert O. Roylston, Judge Presiding.

FARMERS INVESTMENT COMPANY, Plaintiff, appeared by its counsel, Mark Wilmer; and THE ANACONDA COMPANY, AMAX COPPER MINES, INC. and ANAMAX MINING COMPANY appeared by their counsel, Thomas Chandleer. The respective positions of the said parties were stated to the Court, and the Court heard argument in support of the respective positions of said parties.

The Court is of the opinion that its rulings heretofore made granting the Motions of the DUVAL Defendants and of

THE ANACONDA COMPANY, AMAX COPPER MINES, INC. and ANAMAX MINING COMPANY for Summary Judgment against Intervenor, CITY OF TUCSON, and the reasons stated by the Court in its Order for the Orders/ as entered on May 21, 1974 ROR made as aforesaid require that the Court deny on the merits the said Application and Amended Application of FARMERS INVESTMENT COMPANY for/ preliminary Injunctive Relief. ROR

Accordingly, it is ordered denying the Application and Amended Application of FARMERS INVESTMENT COMPANY for/ preliminary Injunctive Relief. ROR

DONE at Tucson, Arizona, this 24 day of May, 1974.

(Signed ROBERT O. ROYLSTON, Judge of the Superior Court)

* * *

(TITLE OF ACTION)

MOTION TO VACATE ORDER
DENYING INJUNCTIVE RELIEF
AND TO ENTER AN ORDER
DENYING INJUNCTIVE RELIEF

Filed: June 7, 1974

Defendants THE ANACONDA COMPANY, a corporation, AMAX COPPER MINES, INC., and THE ANACONDA COMPANY as partners in and constituting ANAMAX MINING COMPANY, a partnership, and ANAMAX MINING COMPANY move this honorable Court for an order vacating the order denying injunctive relief previously entered and for an order denying injunctive relief.

(Signed CHANDLER, TULLAR, UDALL
& RICHMOND by Thomas Chandler,
Attorneys for named Defendants)

MEMORANDUM IN SUPPORT OF MOTION

It appears to these movants that the Court was deciding the issue of plaintiff's motion for preliminary injunction based upon the Court's findings 1 and 2 in its minute entry order of May 21, 1974. It also occurs to these movants that the Court found that Arizona had adopted the reasonable use doctrine as to underground water and that the owner of land could pump water from one location and transport it to another location on land he owned, provided that the land from which it was pumped and the land to which it was transported overlay a common basin or source of supply, and provided, further, that the water was put to a reasonable use. These movants did not understand that the Court intended, in connection with the motion for preliminary injunction, to make the governing factor solely the basin or

subdivision boundary as fixed by the State of Arizona. The relevance of the state groundwater subdivision was limited to the motion for partial summary judgment against the City of Tucson and should not be injected into this particular issue.

In addition to the foregoing, it appears that the order denying the application for injunctive relief needs clarification. In the first place, the application was for a preliminary injunction and should not be construed as holding that under no circumstances in the case would injunctive relief be improper. It appears that all that was intended by the Court was a specific ruling that without more evidence in support of a claim for injunctive relief, plaintiff was not entitled to a preliminary injunction at this time.

The position of counsel taken during

the course of these proceedings quite clearly indicates that appellate review is desired, and it is in the interest of the courts, as well as the parties, that the precise issue raised by the Court's order be made quite clear to the end that judicial time and litigants' time and expense is kept at a minimum.

(Signed CHANDLER, TULLAR, UDALL & RICHMOND by Thomas Chandler, Attorneys for named Defendants)

* * *

(TITLE OF ACTION)

MINUTE ENTRY(Hearing)

Dated: July 9, 1974

Judge: The Honorable Robert O. Roylston

Counsel argue to the Court.

IT IS ORDERED that the Motion to Set Aside the Order Denying Injunctive Relief is denied with the exception that the Court, by interlineation inserts on page 2 the following. After the words Orders the Court inserts "as entered on May 21, 1974" and before the work (sic) Injunctive in the same paragraph, the Court inserts "Preliminary" and in the last paragraph, before the word Injunctive, the Court inserts "Preliminary".

* * *

(TITLE OF ACTION)

NOTICE OF APPEAL

Filed: July 11, 1974

FARMERS INVESTMENT COMPANY hereby gives Notice of Appeal to the Court of Appeals, Division Two, of the State of Arizona, from the Order of the above Court entered as a minute order on May 22, 1974, denying the application of FARMERS INVESTMENT COMPANY for preliminary injunctive relief and from the formal written Order of said Court dated May 22, 1974, as amended by interlineation by the Court on July 9, 1974, also denying the Application and Amended Application of Plaintiff and Appellant for a Preliminary Injunction and from each of said Orders.

(Signed SNELL & WILMER by Loren W. Counce, Jr. and Mark Wilmer, Attorneys for Plaintiff and Appellant)

* * *

(TITLE OF ACTION)

BOND FOR COST ON APPEAL

Filed: July 11, 1974

KNOW ALL MEN BY THESE PRESENTS:

That we, FARMERS INVESTMENT COMPANY, a corporation, as Principal, and FIDELITY AND DEPOSIT COMPANY OF MARYLAND, as Surety, do hereby acknowledge ourselves jointly and severally bound to THE ANACONDA COMPANY, a corporation; AMAX COPPER MINES, INC., a corporation; ANAMAX MINING COMPANY, a partnership, Defendants, for all costs in the above entitled suit, not to exceed, however, the sum of TWO HUNDRED FIFTY

and no/100 Dollars ($250.00).

CONDITIONED, HOWEVER, that the said principal will pay all costs if the appeal is dismissed or the judgment affirmed, or of such costs as the Appellate Court may award if the judgment is modified against the said Principal in said appeal during its pendency or at the final determination thereof, and judgment for said costs may be entered against us, and each of us, up to the full penalty of this bond, in the final judgment of this appeal.

(Signed FARMERS INVESTMENT COMPANY by Mark Wilmer, its attorney; FIDELITY AND DEPOSIT COMPANY OF MARYLAND by A. Grant Kasson, Jr., Attorney-in-Fact and Countersigning Agent)

* * *

(TITLE OF ACTION)

DESIGNATION OF CONTENTS
OF RECORD ON APPEAL

Filed: July 11, 1974

FARMERS INVESTMENT COMPANY, plaintiff and appellant herein, hereby designates the following as the record on appeal in this matter:

1. Plaintiff's Amended Complaint;

2. Answer to Plaintiff's Amended Complaint by the Anaconda Company, Amax Copper Mines, Inc. and Anamax Mining Company;

3. Plaintiff's Petition for Injunctive Relief; Motion for Rule 42(b) and Rule 65(a)(2) Orders, dated April 12, 1974.

4. Notice of Hearing and Motion

to Dismiss Petition for Injunctive Relief of Anaconda, Amax and Anamax, dated April 23, 1974;

5. Plaintiff's Amended Notice of Hearing Application for Preliminary Injunction, dated April 30, 1974, and Affidavit of R. Keith Walden;

6. Plaintiff's Response to Motion to Dismiss Petition for Injunctive Relief dated April 30, 1974;

7. Response of Anaconda, Amax and Anamax to Plaintiff's Application for Injunctive Relief (May 7, 1974);

8. Depositions of Bernard Weber and C. J. Hansen;

9. Duval Defendants' Motion for Summary Judgment against City of Tucson, dated February 12, 1974;

10. The Anamax Defendants' Motion for Partial Summary Judgment against City of Tucson, dated March 13, 1974;

11. Response of City of Tucson to Duval and Anamax Motions for Summary Judgment (3/21/74).

12. Notice of Deposition of The Anaconda Company, Amax Copper Mines and Anamax Mining Co., dated March 13, 1974, and deposition of James L. Kelly taken pursuant thereto.

13. Plaintiff's Motion for Summary Judgment against Duval Defendants dated 1/15/74;

14. Duval's Response (3/15/74) to Plaintiff's Motion for Summary Judgment;

15. Minute Orders of Division 3, Pima County Superior Court in this matter for the days May 21 and May 22, 1974;

16. Formal Order Denying Injunctive Relief entered pursuant to Minute Order of May 22, 1974, as amended by Court Interlineation (7/9/74);

17. Motion of Anamax, et al, to vacate Order Denying Injunctive Relief, dated June 7, 1974, and Notice of Hearing Motion to Vacate;

18. Court Reporter's Transcript of Proceedings of May 21 and May 22, 1974, and July 9, 1974;

19. Plaintiff's Notice of Appeal to the Court of Appeals, Division Two;

20. Plaintiff's Bond for Costs on Appeal;

21. This Designation of Contents of Record on Appeal, dated July 10, 1974.

(Signed SNELL & WILMER by Loren W. Counce, Jr. and Mark Wilmer, Attorneys for Plaintiff and Appellant)

* * *

(TITLE OF ACTION)

ADDITIONAL DESIGNATION
OF CONTENTS OF RECORD ON
APPEAL

Filed: July 19, 1974

THE ANACONDA COMPANY, AMAX COPPER MINES, INC., and ANAMAX MINING COMPANY, defendants and appellees herein, hereby designate the following matters to be included as part of the record in the appeal on this case:

1. The Counterclaim of these defendants against the plaintiff.

2. These defendants' Memorandum in Opposition to Plaintiff's Motion for Rule 42(b) and Rule 65(a)(2) Orders.

3. This supplemental designation of record.

(Signed CHANDLER, TULLAR, UDALL
& RICHMOND by Thomas Chandler,
Attorneys for named Defendants)

CERTIFICATE OF SERVICE

I hereby certify that on the 4th MAILED day of November, 1974, I ~~delivered~~ two copies of the within Abstract of Record on Appeal to counsel for Appellees:

THOMAS CHANDLER, ESQ.
1110 Transamerica Building
Tucson, Arizona 85701.

Dated: November 4, 1974.

ARIZONA ABSTRACTS
Post Office Drawer 17150
Tucson, Arizona 85710

By _____
Betty B. Lozier

FCTL001277

STATE OF ARIZONA)
) ss:
COUNTY OF MARICOPA)

I Sheri Trego hereby certify:
Name

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

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

That there is on file in said Agency the following:

Microfilm of Farmer's Investment Company v. Pima Mining Company et al, Arizona Supreme Court Case No. 11439-2, Abstract of Record on Appeal Volume III, pages 256-End, in Farmers Investment Company v. Anaconda Company, et al., filed March 17, 1975. Court of Appeals Instruments (Part Two) Page 123 with the Table of Contents (pages i through vii) and Abstract (pages 256 through 387) following.

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

Sheri Trego
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

Notary Public State of Arizona
Maricopa County
Etta Louise Muir
My Commission Expires
04/13/2009