

1 IN THE SUPREME COURT
2 OF THE STATE OF ARIZONA

FILED
JUL 5 1974
CLIFFORD H. WARD
CLERK SUPREME COURT
BY *[Signature]*

3
4 FARMERS INVESTMENT COMPANY, a)
corporation,)
5)
6 Petitioner,)
7)
8 -vs-)
9 PIMA MINING COMPANY, a corporation;)
ANDREW L. BETTWY, State Land Com-)
10 missioner; STATE LAND DEPARTMENT;)
THE HONORABLE ROBERT O. ROYLSTON,)
11 Judge of the Pima County Superior)
Court; and THE PIMA COUNTY SUPERIOR)
12 COURT,)
13 Respondents.)

No. 11439

MOTION FOR REHEARING

14 Respondents, ANDREW L. BETTWY, State Land Commissioner, and
15 the STATE LAND DEPARTMENT, pursuant to Rule 9, Rules of the Supreme
16 Court, move the Court for a rehearing on the grounds that the
17 decision rendered by the Court is incorrect on two counts, to-wit:
18 (1) the Court erroneously observed that there was no contention
19 that water was not a mineral, and (2) by concluding that under
20 Section 28 of the Enabling Act water should be classified as a
21 natural product of state land rather than a mineral product of
22 state land.
23

24 The State of Arizona respondents in their answer to part of
25 Count V of the Amended Complaint filed in the Superior Court below
26 admitted to the existence of Commercial Lease No. 906 but specific-
27 ally denied that the sale of water under the lease was unlawful.
28 (See Exhibit A, p. 7, lines 23-28.) These respondents therefore
29 specifically asserted that the lease was in full compliance with
30 the provisions of Section 28 of the Enabling Act.
31

32 Section 28 of the Enabling Act specifically requires that no

1 state land or natural products of state land can be disposed of
2 either by sale or lease unless notice and auction requirements are
3 met and the property yields the true appraised value. One excep-
4 tion to these requirements as contained in Section 28 provides
5 that:

6
7 Nothing herein contained shall prevent: * * *
8 (2) the leasing of any of said lands, in such
9 manner as the legislature of the State of
10 Arizona may prescribe, whether or not leased
11 for grazing and agricultural purposes, for
12 mineral purposes other than for the exploration,
13 development, and productions of oil, gas, and
14 other hydrocarbon substances; for a term of
15 twenty years or less.

16 These respondents concede that natural products of state
17 land must be disposed of by public notice and auction. However,
18 if the lease is lawful as asserted by respondents in their answer
19 below, the only way it could be lawful and consistent with the
20 provisions of Section 28 is for the lease to have been executed
21 under authority of the exception cited above, namely, a mineral
22 lease.

23 Respondents agree that the Court correctly observed that
24 "entitlement of this lease as a 'commercial' lease does not add
25 anything to the legal position of the parties. The real purpose
26 and effect of a transaction determines its true character, Hervey
27 v. Rhode Island Locomotive Works, 93 U.S. 664, 23 L.Ed. 1003 (1877),
28 and the character of a contract must be determined by its provisions
29 rather than its label, Employers Liability Assurance Corp. v. Lunt,
30 83 Ariz. 320, 313 P.2d 393 (1957)."

31 This instrument must be construed to be a minerals lease
32 whereby the mineral identified as water is being extracted. There
33 appears to be no argument that the royalty of one cent per 1,000

1 gallons of water removed is not a sufficient or proper return.
2 Indeed the return on Lease 906 is greater than any possible return
3 which would be realized from grazing, agricultural, domestic or
4 commercial uses of the land under current market values.

5
6 The only question remaining then is whether water is a
7 mineral. This question must be determined affirmatively. Water
8 is a mineral. Ridgeway Light & Heat Co. v. Elk County, 43 A. 323,
9 324, 191 Pa. 465; Gulf Production Co. v. Continental Oil Co., 132
10 553, 565, 139 Tex. 183. Waters are regarded as mineral. Goodloe
11 v. City of Richmond, 113 S.W.2d 834, 272 Ky. 100. Subterranean
12 waters are considered a "mineral" in respect to the use and enjoy-
13 ment. Hathorn v. Natural Carbonic Gas Co., 87 N.E. 504, 508, 194
14 N.Y. 326, 23 L.R.A.N.S. 436, 128 Am.St.Rep. 555, 16 Ann. Cas. 989.
15 Water, like gas and oil, is a mineral with peculiar attributes.

17 The decisions in ordinary cases of mineral rights,
18 etc., have never been held as unqualified precedents
19 in regard to flowing, or even to percolating waters.
20 Water and oil and still more strongly gas, may be
21 classified by themselves, if the analogy is not too
22 fanciful as minerals *ferae naturae*. In common with
23 animals and unlike other minerals, they have the
24 power and tendency to escape without the volition
25 of the owner.

23 Westmoreland & Cambria Natural
24 Gas Co. v. DeWitt, 18 A. 724,
130 Pa. 235, 5 L.R.A. 731.

25 The lease of the mineral "water" under Lease 906 is totally
26 consistent with the cited portions of Section 28 of the Enabling
27 Act. The Court's classification of "water" as "timber or other
28 natural product" under Section 28 is totally in error.

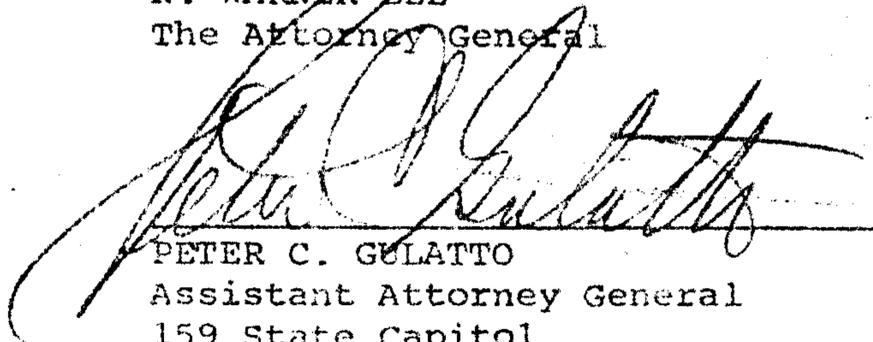
29 Therefore, respondents submit the Court should grant this
30 motion for rehearing, withdraw its opinion and declare Commercial
31

32 . . .

1 Lease 906 valid consistent with the determination of the court
2 below.

3 Respectfully submitted this 5th day of July, 1974.

4 N. WARNER LEE
5 The Attorney General



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8 PETER C. GUALATTO
9 Assistant Attorney General
10 159 State Capitol
11 Phoenix, Arizona 85007
12 Attorneys for Respondents Andrew L.
13 Bettwy and State Land Department

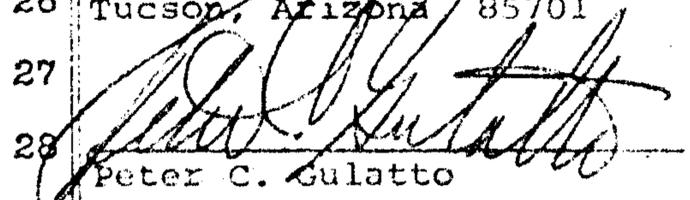
13 Copy of the foregoing mailed this
14 5th day of July, 1974, to:

15 Mark Wilmer, Esq.
16 Snell & Wilmer
17 3100 Valley Center
18 Phoenix, Arizona 85073
19 Attorneys for Petitioner

20 Bruce A. Bevan, Jr., Esq.
21 Musick, Peeler & Garrett
22 One Wilshire Boulevard
23 Los Angeles, California 90017

24 John C. Lacey, Esq.
25 Verity & Smith
26 177 North Church Street
27 Tucson, Arizona 85701
28 Attorneys for Pima Mining Co.

29 The Honorable Robert O. Royston
30 Judge of Superior Court
31 Pima County Courthouse
32 Tucson, Arizona 85701



Peter C. Gualatto

