

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF PIMA

FARMERS INVESTMENT COMPANY, a
corporation,

Plaintiff,

vs.

THE ANACONDA COMPANY, a corporation;
AMERICAN SMELTING & REFINING COMPANY,
a corporation; DUVAL CORPORATION, a
corporation; PIMA MINING COMPANY, a
corporation; BOYD LAND AND CATTLE
COMPANY, a corporation; DUVAL SIERRITA
CORPORATION, a corporation; AMAX COPPER
MINES, INC., and THE ANACONDA COMPANY
as partners in and constituting ANAMAX
MINING COMPANY, a partnership, and
anamax mining company; ANDREW L.
BETTWEY, as State land Commissioner,
and THE STATE LAND DEPARTMENT, a
department of the State of Arizona,

Defendants.

No. 116542

AMENDED COMPLAINT
COUNTS ONE, TWO, THREE
(Filed November 8, 1973)
and COUNT FOUR (Filed
per Minute Order of
March 13, 1972)

COMES NOW plaintiff and files this its Amended Complaint pursuant to Order of this Court. The Order authorizing the filing of this amendment authorized an amendment limited to reflecting the addition of AMAX COPPER MINES, INC. as a partner in ANAMAX MINING COMPANY, a partnership, and ANAMAX MINING COMPANY, a partnership consisting of THE ANACONDA COMPANY and AMAX COPPER MINES, INC. as defendants and accordingly this amendment is so limited without prejudice to FARMERS INVESTMENT COMPANY'S right to further amendments, if required by the evidence and authorized by the Court.

COUNT ONE

I

THE ANACONDA COMPANY is a corporation duly qualified and authorized to do business in Arizona; AMAX COPPER MINES, INC. is a corporation authorized to do business in Arizona;

ANAMAX MINING COMPANY is a partnership consisting of THE ANACONDA COMPANY and AMAX COPPER MINES, INC. Each of the other defendants in this Count One is a corporate entity doing business in the State of Arizona and the County of Pima.

II

That the plaintiff is the owner of approximately 7,000 acres of irrigated land in Pima County, located in the Santa Cruz Valley, south of the City of Tucson, Arizona; that said lands have been irrigated for agricultural purposes for many years, some of the plaintiff's lands have been irrigated and farmed by its predecessors in interest prior to 1915; that all of the plaintiff's lands are located within the Sahuarita-Continental critical water area so designated by the State Land Department on October 14, 1954, in pursuance of the authority invested in the Department by ARS 45-308; that the plaintiff and its predecessors in interest have for many years prior to the filing of this action irrigated their farm lands and used for domestic purposes the percolating water lying below the surface of their lands and have pumped such waters from wells on said land; 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; that the plaintiff and its predecessors in interest have expended large sums of money in the development of their lands and of these percolating waters for the beneficial and reasonable use of said lands for agricultural and domestic purposes.

III

That the supply of percolating water available to said lands is not unlimited; that in the said Sahuarita-Continental critical water area there are, in addition to the irrigated lands

of the plaintiff, other irrigated lands owned by other persons which are also irrigated by the pumping of percolating waters from beneath the lands: that the total quantity of water pumped and beneficially used as aforesaid by the plaintiff is approximately 38,500 acre-feet annually; that in addition to this usage, the other landowners within said area are and have been for several years using an additional amount of said percolating waters which the plaintiff, on information and belief, alleges to be approximately 15,000 acre-feet per year; that the annual recharge of water into this critical area is substantially less than the amounts so beneficially used for agricultural purposes, and the water table within said critical area is and has been for many years gradually lowering and the reservoir of supply has been gradually depleting.

IV

That in recent years the defendants, either directly or through agents, subsidiaries, or lessees, have acquired well sites in the said critical area and are pumping substantial amounts of water from under the lands in said critical water area and are using such waters so pumped outside the said critical water area on lands other than from which the waters are being pumped; that the present usage of all of the defendants in this regard the plaintiff alleges, on information and belief, to be approximately 25,000 acre-feet per year as of this time; further, on information and belief, the plaintiff alleges that the defendants propose and intend to continue the use of water pumped from said critical water area in the manner in which they are now doing, and to increase such pumpage in the future substantially beyond the amounts now being used.

Subsequent to the filing of this action and prior to

this amendment AMAX COPPER MINES, INC., acquired an ownership interest in the property and operations of defendants THE ANACONDA COMPANY and BOYD LAND AND CATTLE COMPANY herein complained of by FARMERS INVESTMENT COMPANY and thereafter formed a general partnership consisting of THE ANACONDA COMPANY and AMAX COPPER MINES, INC., under the name and style of ANAMAX MINING COMPANY, a partnership; upon information and belief plaintiff alleges that the said partnership is now the operating entity carrying on the mining, milling and water pumping and transportation activities which plaintiff has described and of which plaintiff made complaint in the pleadings and proceedings heretofore filed. Upon information and belief plaintiff alleges said defendants AMAX COPPER MINES, INC. and ANAMAX MINING COMPANY succeeded to an interest and ownership in the property and operations of THE ANACONDA COMPANY as aforesaid with notice of and subject to plaintiff's claims and this pending litigation and the proceedings, discovery and rulings heretofore made herein.

V

That the use by the defendants of these percolating waters is unreasonable and in violation of the rights of the plaintiff; that the plaintiff has been and will be irreparably injured and damaged by the continued withdrawal and transportation of the ground waters of the Sahuarita-Continental critical water area to be used on lands other than those from under which said waters were taken; that because of the taking of these waters by the defendants, the percolating waters under the plaintiff's lands are being depleted and, if the use by the defendants continues, will be exhausted, or lowered to the point that it is economically unfeasible to irrigate the

plaintiff's lands and the same will no longer be adaptable for agricultural use and said lands will revert to barren, desert land unless this Court by injunction permanently enjoins the defendants and each of them from the usages now being made of the said percolating waters within the Sahuarita-Continental critical water area.

VI

That, on information and belief, the defendants, and each of them, contend that they have the right to use the waters pumped from under the Sahuarita-Continental critical water area on lands other than from which they are pumped and contend that they have the right to continue and to extend such use in the future; that the plaintiff contends that such use and proposed use is in violation of the property rights of the plaintiff.

WHEREFORE, plaintiff prays as follows:

1. That this Court enter its judgment permanently enjoining the defendants, and each of them, from taking the waters from beneath lands in the critical water area within which the plaintiff's lands are situated and using said water on other lands than those from which the waters have been taken; and

2. That this Court enter its judgment enjoining the defendants, and each of them, from continuing to pump waters from the wells now owned or controlled by them in the Sahuarita-Continental critical water area other than such waters as may be reasonably used upon the lands upon which said wells are located; and

3. That this Court enter a decree declaring and adjudicating the rights of the respective parties in and to

the waters underlying the Sahuarita-Continental critical water area and underlying the respective lands of the parties; and

4. For such other and further relief as to the Court may seem just and equitable in the premises.

COUNT TWO

I

Plaintiff is an Arizona corporation, the owner and farmer of approximately 6500 acres of agricultural land located within the Sahuarita-Continental Critical Groundwater Area in what is commonly known as the Upper Santa Cruz Valley, Pima County, Arizona. The Sahuarita-Continental Critical Groundwater Area (hereinafter designated as "Critical Groundwater Area") was designated and established as a Critical Groundwater Area pursuant to Article 7, Chapter 1, State Water Code, as amended, (Sections 45-301 et seq. A.R.S.) commonly known as the Ground Water Code, by the Arizona State Land Department and the lawful Commissioner thereof, on October 14, 1954, and continues as such Critical Groundwater Area to the date hereof.

II

Defendants THE ANACONDA COMPANY (hereinafter "ANACONDA"), AMERICAN SMELTING & REFINING COMPANY (hereinafter "ASARCO"), DUVAL CORPORATION (hereinafter "DUVAL"), PIMA MINING COMPANY (hereinafter "PIMA"), BOYD LAND AND CATTLE COMPANY (hereinafter "BOYD"), DUVAL SIERRITA CORPORATION (hereinafter "SIERRITA"), and AMAX COPPER MINES, INC. and THE ANACONDA COMPANY as members of and constituting ANAMAX MINING COMPANY, a partnership (hereinafter "ANAMAX"), are each (except as to ANAMAX which is a partnership as described in Count One) corporations doing business in the State of Arizona and the County of Pima; defendant THE STATE LAND DEPARTMENT is a Department of the State of Arizona

and is empowered under law to administer all laws relating to lands owned by and under the control of the State of Arizona; that defendant ANDREW L. BETTWY is the duly appointed, qualified and acting State Land Commissioner of the State of Arizona and as such is the executive officer of the State Land Department and empowered and required under law to exercise and perform all powers and duties vested in or imposed upon the State Land Department, or upon the State Land Commissioner, including the general control and supervision of the waters of the State, both appropriable and ground water, and the distribution thereof.

III

That for many years prior to the filing of this action plaintiff has irrigated its farm lands from percolating water pumped from wells on its said land, said percolating water underlaying the land, for the purpose of producing crops grown thereon and for domestic purposes, and has expended large sums of money in the development of the percolating waters for the beneficial and reasonable use of said land for agricultural and domestic purposes.

IV

That the supply of water available to the land is not unlimited but said supply is limited and the farm properties referred to herein lie within what is commonly known as the Sahuarita-Continental Critical Groundwater Area so established by order of the State Land Commissioner on October 14, 1964, pursuant to Article 7, Chapter 1, State Water Code, as amended (Sections 45-301 et seq. A.R.S.), commonly known as the Ground Water Code.

V

That there are approximately 16,000 acres of agricultural

crop land within the Critical Groundwater Area of which approximately 6500 acres belong to and have been farmed and are being farmed by plaintiff. The sole source of water for irrigation of said farm lands in cropping the same is the supply of ground water underlying the land in said Critical Groundwater Area. In farming the aforesaid lands the farmers thereof have withdrawn water from said groundwater supply since the Critical Groundwater Area was established as aforesaid pursuant to and in conformity with the limitations and requirements of the Ground Water Code (Sections 45-301 et seq. A.R.S.). This withdrawal of ground water for agricultural purposes has in the past exceeded and now exceeds the annual recharge thereto by a substantial amount. The supply of ground water available for beneficial consumptive use upon the lands in said critical area has been and presently is inadequate to meet such needs without withdrawing or "mining" stored water in the underground of the critical area and thereby further lowering the water table and further depleting the supply available for future requirements of the critical area.

VI

The defendants ANACONDA, ASARCO, DUVAL, SIERRITA, PIMA and ANAMAX have acquired certain well sites within the Critical Groundwater Area and are presently pumping ground water subjacent to and underlying the Critical Groundwater Area and are transporting the same for use and are using the same outside of said Critical Groundwater Area. Said defendants are presently so pumping and transporting ground water out of said critical area in an amount substantially in excess of 50,000 acre feet per year. Some of said defendants are presently drilling additional wells within said critical area for the purpose of

enlarging their withdrawal of ground water from said supply and transporting the same for use outside the boundaries of said critical area and as of said defendant, plaintiff is informed and believes and therefore alleges, contemplate and intend to continue and enlarge their present illegal withdrawals and usage from said Critical Groundwater Area.

VII

Prior hereto the State Land Department and the then State Land Commissioner granted to the following defendants the rights of way over state lands as hereinafter described for the purpose of laying thereon pipelines to enable such defendant to transport ground water withdrawn from the ground water supply underlying the land within the aforesaid Critical Groundwater Area for use outside said area, as follows:

ASARCO

Right of Way No. 1132

Township 16 South, Range 14 East:

Across the top of Section 34, 35 and 36
(South 30 feet of North 100 feet)

TPA

Right of Way No. 1197

Township 17 South, Range 13 East:

Across the top of West half of Section 2, 3, 4 and 5 (the East half of the West half of Section 2, 3, 4 and 5) (North 100 feet)

Right of Way No. 1232

Township 17 South, Range 13 East:

Across the bottom of the Southwest quarter of Section 2 and then extending 350 feet West into Section 3 (South 100 feet)

Right of Way No. 1275

Township 17 South, Range 13 East:

Across the bottom of the Southeast quarter of Section 5 and extending 300 feet East into Section 4 (South 100 feet)

ANACONDA - ANACONDA-ANAMAX

Right of Way No. 3858

Township 17 South, Range 13 East:

Across the top of the Northeast quarter
of Section 34 (North 400 feet)

DUVAL AND SIERRITA

Right of Way No. 4517

Township 18 South, Ranges 12 and 13 East:

Range 13 East:

Section 31: Through the North half of the
Northeast quarter

Section 30: Through the Southeast quarter;
the East half of the Southwest
quarter; the Southeast quarter of
the Northwest quarter and the West
half of the Northwest quarter

Range 12 East:

Section 24: Through the East half and the
Northwest quarter

Section 25: Through the Northwest quarter
of the Northwest quarter

Section 13: Through the Southwest quarter of
the Southwest quarter

Section 14: Through the East half of the
Southeast quarter and through
the North half.

In addition the State Land Department and the said
State Land Commissioner granted to a corporation, Duval Sulphur
& Potash Company, a right of way across the south 660 feet of
Sections 8 and 9, Township 18 South, Range 13 East for a water
line which plaintiff is informed and believes and therefore
alleges is being used by defendant DUVAL for its illegal trans-
portation of ground water as hereinbefore alleged.

Each of the above designated defendants utilizes its
pipeline and right of way from the State Land Department and
the said State Land Commissioner across state land in illegally

transporting the water withdrawn by such defendant from the ground water underlying the aforesaid Critical Groundwater Area for use by said defendant outside said critical area.

VIII

Plaintiff and its lands and investments has been, is being, and will be in the future irreparably injured and damaged by the illegal withdrawals and transportation of ground water subjacent to its lands and other lands in said critical area by defendants in that defendants thereby further deplete and use up a water supply presently and heretofore inadequate for the proper and useful husbandry of its lands and which is and will be irreplaceable. The acts of defendants constitute continuing illegal diversion of the ground water supply of the area and a continuing trespass upon the property rights of plaintiff and other landowners in the Sahuarita-Continental Groundwater Critical Area in and to the available ground water supply as the same existed when the critical area was established in 1954.

IX

Plaintiff has no plain, speedy or adequate remedy at law in that plaintiff's water supply will be irrevocably and permanently damaged and its rights thereto subjected to a continuing trespass by defendants and each of them.

X

Plaintiff asserts against all defendants jointly and severally the right to relief prayed herein in respect of and arising out of the same series of transactions and occurrences and questions of fact and law common to all defendants will arise in the action.

WHEREFORE, plaintiff prays judgment against defendants

and each of them adjudging that the issuance of the rights of way hereinbefore described to defendants ANACONDA, DUVAL, PIHA, ASARCO and SIERRITA by the State Land Department and its Commissioner (and the use thereof by ANAMAX), was and is for an illegal use and enjoining further uses of their respective pipelines by the said defendants for use in transporting ground water out of said Critical Groundwater Area and enjoining the State Land Department and Andrew L. Bettwy as State Land Commissioner from permitting such use by said defendants to continue and directing that he forthwith cancel and abrogate the rights of way aforesaid and require the removal thereof by each defendant as to the pipeline installed and used by such defendant; and

For such other and further relief as may be equitably required to preserve and protect the rights of plaintiff:

COUNT THREE

I

FARMERS INVESTMENT COMPANY (hereinafter "FICO") incorporates herein by reference paragraphs I, II, III and IV of Count One herein.

II

That in recent years the defendants, either directly or through agents, subsidiaries, or lessees, have acquired well sites in the said critical area and are pumping substantial amounts of water from under the lands in said critical water area and are using such waters so pumped outside the said critical water area on lands other than from which the waters are being pumped; that the present usage of all of the defendants in this regard the plaintiff alleges, on information and belief, to be approximately 55,000 acre-feet per year as of this time; further,

on information and belief, the plaintiff alleges that the defendants propose and intend to continue the use of water pumped from said critical water area in the manner in which they are now doing, and to increase such pumpage in the future substantially beyond the amounts now being used.

III

Defendants, and each of them, have wrongfully taken and used water from the underground storage and reservoir of the Critical Groundwater Area designated as hereinbefore alleged and have thereby become unlawfully and unjustly enriched to the injury and financial damage and loss of FICO. Defendants are obliged to account to FICO to the extent they have been and will be unjustly enriched through their past and continuing wrong and injury to FICO.

IV

The unlawful and wrongful withdrawal and utilization by defendants from the ground water reservoir and basin of the Critical Groundwater Area aforesaid has caused and will continue in the future to cause FICO loss and expense because of the depletion of the ground water supply with a consequent lowering of the ground water table thereby requiring that FICO lower its pump bowls, deepen its wells and in some instances construct replacement wells. The added pump lift of the ground water from the lowered ground water table has and will cause FICO added and additional expense in costs in power costs and labor and maintenance of its wells and installations to FICO's damage in excess of \$10,000,000.00.

V

The wrongful continued withdrawal and utilization of ground water by defendants from said critical area, as herein

complained of, has permanently depreciated the fair market value of FICO's property and lands, hereinbefore described, to FICO's damage in an amount in excess of \$50,000,000.00.

VI

The conduct of defendants, and each of them, as herein alleged and as set forth in FICO's complaint now on file, constitutes an intentional gross wrong to FICO, continuing in character, justifying the imposition of punitive damages. Said defendants and each of them are corporations of great wealth.

VII

The claims set forth in this complaint, as amended, are stated as separate claims and as alternative claims where inconsistent claims are stated. The actions and conduct of defendants resulting in the wrongs herein complained of by FICO are interrelated and the injuries and wrongs inflicted upon FICO flow from said interrelated wrongful conduct of defendants. The sums stated as admeasuring the damage and loss to FICO due to wrongful actions of defendants are approximations and estimates which FICO will amend as discovery is completed.

WHEREFORE, as to this count FICO prays judgment for:

1. An accounting from each defendant as to the profits and gains realized and achieved by each defendant from its wrongful invasion of and use of the underground water supply and resource of FICO.
2. An amount adequate to compensate FICO for the added expenses, costs and expenditures which have been or will be required because of the lowering of the water table under FICO's farm lands in excess of \$10,000,000.00;

3. The amount by which the defendants' various trespasses have or will lessen the fair market value of FICO'S property estimated at in excess of \$50,000,000.00;

4. As to each defendant a proper sum as exemplary damages estimated as to each defendant at in excess of \$10,000,000.00;

5. For such other and further relief as justice may require.

SNELL & WILMER

By _____

Mark Wilmer
Attorneys for Plaintiff
3100 Valley Center
Phoenix, AZ 85073

(NOTE: Count Four was not reproduced by FICO in the filing made November 8, 1973, which joined Amax Copper Mines, Inc. and Ana-max Mining Company, a partnership, as parties defendant, since Count Four was not affected or changed by this amendment).

COUNT FOUR

I

Plaintiff incorporates herein by reference paragraph I of Count Two of plaintiff's pending amended complaint (paragraph I of Count Two hereof).

II

Defendant PIMA MINING COMPANY is a corporation doing business in the State of Arizona and the County of Pima; defendant THE STATE LAND DEPARTMENT is a department of the State of Arizona and is empowered under law to administer all laws relating to lands owned by and under the control of the State of Arizona; that defendant ANDREW L. BETTWEY is the duly appointed, qualified and acting State Land Commissioner of the State of

Arizona and as such is the executive officer of the State Land Department and empowered and required under law to exercise and perform all powers and duties vested in or imposed upon the State Land Department, or upon the State Land Commissioner, including the general control and supervision of the waters of the state, both appropriable and ground water, and the distribution thereof.

III

Plaintiff incorporates herein by reference paragraphs III, IV and V of Count Two of plaintiff's pending amended complaint (paragraphs III, IV and V of Count Two hereof)

IV

On December 5, 1966, the State Land Department, acting through its predecessor State Land Commissioner, upon application of Pima Mining Company, issued to said company Commercial Lease No. 906, leasing to Pima Mining Company Lots 1 and 2 and the South one-half, North one-quarter and Southeast one-quarter of Section 2, Township 17 North, Range 13 East, Pima County, constituting all of Section 2, all within the Critical Groundwater Area aforesaid. A copy of this lease is hereto attached as Exhibit I. Pima Mining Company has constructed four large irrigation-type water wells within said leased area and has pumped and is now pumping large quantities of ground water from the ground water supply subjacent to said state land and transporting the same for use outside of the Sahuarita-Continental Groundwater Area.

V

Plaintiff protested the pumping of ground water in the Critical Groundwater Area and the transportation of the water so withdrawn for use outside of the critical area by Pima Mining Company informally prior to June, 1969 and formally June,

1969 and continuing thereafter and demanded that such illegal use be terminated.

VI

The lands leased by said Commercial Lease No. 906 are adjacent to the farm lands of plaintiff herein and within the critical groundwater basin which plaintiff depends upon for its agricultural use water.

VII

While defendants STATE LAND DEPARTMENT and ANDREW L. BETTWY as State Land Commissioner have considered the protests of plaintiff with respect to the granting of the aforesaid Commercial Lease and the withdrawal of large amounts of water through the wells constructed within the boundaries of said Commercial Lease, said Andrew L. Bettwy and the State Land Department have permitted said unlawful use by Pima Mining Company to continue but have stated a willingness to cancel said leases in the event of a judicial determination that the same constitutes an unlawful and wrongful exercise of the powers of the State Land Department and of the State Land Commissioner.

VIII

The continued pumping of groundwater from the Critical Groundwater Area and the area adjacent to the farm lands of plaintiff constitutes a trespass upon plaintiff's property rights and a violation of the water law of the State of Arizona. The withdrawal of groundwater from the state land the subject of said Commercial Lease and the transportation of it away from said land constitutes waste and a breach of the provisions and requirements of the Enabling Act, particularly Section 28 thereof, and hence a breach of trust on the part of the State of Arizona.

IX

Plaintiff has no plain, speedy and adequate remedy at law.

WHEREFORE, plaintiff prays that judgment be entered herein finding and declaring that the aforesaid Commercial Lease No. 906 is an invalid and void lease and that the actions of Pima Mining Company in withdrawing water from the state lands the subject of said lease constitute waste and a wrongful and illegal act as to plaintiff herein; for an injunction restraining and enjoining further trespasses by reason of the use of said Commercial Lease 906; for an order directing the said Andrew L. Bettwy as State Land Commissioner and the State Land Department to cancel said lease and to take appropriate action to prevent further breach of trust on the part of any utilization of said Commercial Lease No. 906 and the withdrawal of ground water thereunder for purposes not beneficial to the use of the aforesaid land, and for such other and further relief as may be appropriate.

SNELL & WILMER

By s/Roger W. Perry

By s/ Mark Wilmer

Attorneys for Plaintiff
400 Security Building
Phoenix, Arizona 85004

Commercial Lease No. 906 is
Exhibit I to the Complaint.

It is not here reproduced
since it is Exhibit B to the
Petition and also an Exhibit
to FICO'S Summary Judgment
Motion.

EXHIBIT I

0 32

(131)

FCTL000019

STATE OF ARIZONA)
)
COUNTY OF MARICOPA)

ss:

I Craig Swick 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, Amended Complaint Counts One, Two, Three (Filed November 8, 1973) and Count Four (Filed per Minute Order of March 13, 1972), from Farmer's Investment Company v. Anaconda Company, et al, Superior Court of the State of Arizona in and for the County of Pima, case no. 116542. Pages 113-131.

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

Craig D. Swick
Signature

Subscribed and sworn to before me this 12/12/2005
Date

Etta Louise Muir
Signature, Notary Public

My commission expires 04/13/2009.
Date

