IN THE SUPREME COURT OF THE STATE OF ARIZONA

FARMERS INVESTMENT COMPANY, a corporation, Petitioner, v. PIMA MINING COMPANY, a corporation; et al., Respondents.	NO. 11439

ANSWER OF PIMA MINING COMPANY

TO SPECIAL ACTION PETITION

BRIEF HISTORY OF PROCEEDINGS

MEMORANDUM IN OPPOSITION

TO SPECIAL ACTION PETITION

EXHIBIT B

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IN THE SUPREME COURT OF THE STATE OF ARIZONA

FARMERS INVESTMENT COMPANY, a corporation, Petitioner, v. PIMA MINING COMPANY, a corporation; et al., Respondents.	NO. 11439 ANSWER TO SPECIAL ACTION PETITION

Pima Mining Company hereby answers the Special Action Petition as follows:

1. Admits the allegations contained in the following paragraphs of the Complaint: I, II, III and VI - XII, inclusive.

2. Respondent denies the allegations contained in paragraph XIV of the Complaint.

3. Answering the allegations contained in paragraph IV, Respondent admits that some of the lands of the Petitioner and of the Respondent which are material to the Petition are contained within said Sahuarita-Continental Groundwater Area; except as admitted, Respondent denies the allegations thereof.

4. Respondent admits the allegations contained in the first and third sentences of paragraph V; Respondent is without knowledge or information sufficient to form a belief as to the truth of the averments contained in the allegations of the second sentence thereof.

5. Answering the allegations contained in paragraph XIII, Respondent admits that FICO's motion for partial summary

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judgment was based upon the grounds set forth in subparagraph (b) of said paragraph; except as so admitted, Respondent denies the allegations of paragraph XIII.

FIRST AFFIRMATIVE DEFENSE

In 1955, Respondent drilled and completed its Wells Nos. 1, 2 and 3 in connection with its initial mining and drilling program which processed approximately 3,000 tons of ore per day.

In 1962 and 1963, the first and third well, respectively, of Respondent were deepened and improved.

In 1963, Respondent made an expansion of its mining and milling operations and increased its capacity to approximately 7,000 tons of ore per day.

In 1965, Respondent drilled its Wells Nos. 4 and 5, and commenced pumping therefrom in 1965 and in 1967.

In 1965, Respondent commenced a further expansion of its mining and milling operations which was completed in 1966, which raised its milling capacity to approximately 18,000 tons of ore per day.

In 1966, Respondent drilled its Wells Nos. 6, 7 and 8 from which water was first pumped in 1967.

In 1966, Respondent commenced, and in 1967 completed, a further expansion of its mining and milling operations from 18,000 tons of ore per day to a projected capacity of 30,000 tons of ore per day, but which eventuated in actual capacity of 40,000 tons of ore per day.

In 1968, Respondent drilled and first pumped water from its Well No. 9. In 1969, Respondent drilled and in 1970 first pumped water from its Well No. 10, and drilled its Well No. 11. Respondent drilled its Wells 12 and 14 in 1970, after having obtained permits so to do from the State Land Department in 1969.

In 1969, Respondent announced plans for and completed by 1972 a further expansion of its mining and milling activities, which increased its capacity to mill ore to approximately 54,000 tons of ore per day.

At least as early as 1952, and thereafter, Petitioner believed that the groundwater in what was to become the Sahuarita-Continental Critical Groundwater Area was being used and depleted faster than it was being recharged.

At least as early as 1954, and thereafter, Petitioner also believed that any further withdrawal of groundwater from the Critical Groundwater Area necessarily would adversely affect the groundwater supply for all of the farming lands in the Sahuarita-Continental Area.

Petitioner knew in 1954 that water rights might be lost by estoppel and knew that in order to obtain an injunction against the unreasonable use of water, it was necessary to warn the alleged illegal withdrawer of water before the latter made large expenditures in furtherance of publicized plans to withdraw water.

Petitioner knew as early as 1957 or 1958 that mines were using water for their operations, and that Respondent pumped water up to its mine and mill area, which was about six miles away from the wells from which the water was taken.

In 1958, three years after Respondent had completed its first three wells near the Santa Cruz River, Petitioner bought its land in the Sahuarita Area, fully knowing that Respondent's wells were nearby.

Petitioner knew as early as 1961 that Respondent's concentrated pumping of water had lowered the latter's water level approximately 30 feet from 1956 to 1961. Petitioner also knew in 1965 that the pumping of water for the milling of copper ore was expected to increase.

At no time prior to 1969 did Petitioner ever complain to

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Respondent about or protest its use of water from the wells which were located nearby that is now Petitioner's Sahuarita Farm.

Through November of 1969, Respondent had made a capital investment of more than $80,000,000 in connection with the erection and maintenance and expansions of its mine and mill and related facilities. Although Petitioner knew in advance of Respondent's commencement of activities and expansions, Petitioner never objected either to Respondent's initial building of its facilities in 1955, nor to any of the expansions thereof which took place in 1964, 1965 and 1966, all of which activities were well publicized in the Tucson, Arizona and national press. Nor did Petitioner object to the pumping of water by Respondent in connection with any of Respondent's operations until Petitioner informally complained in the Spring of 1969.

Petitioner misled Respondent into believing that Respondent could so pump water for use in connection with its mining and milling operations, and allowed Respondent to expend over $80,000,000 prior to the time that Petitioner first raised any objection to the use of water by Respondent.

Petitioner therefore is guilty of laches and Respondent would be greatly prejudiced should Petitioner's now-asserted rights be recognized, and Petitioner therefore should be estopped from asserting the equitable relief it seeks herein.

SECOND AFFIRMATIVE DEFENSE

Respondent further alleges that its taking of water from its wells in said Critical Area and use of such water at its Pima Mine has been open, apparent, notorious, continuous, hostile and adverse to Petitioner and to all other persons for a period of more than ten consecutive years next preceding the filing of this action and any notice to said Respondent of the rights Petitioner

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now claims, whereby Petitioner's alleged claim is barred by the provisions of Arizona Revised Statutes (1956) Section 12-526.

THIRD AFFIRMATIVE DEFENSE

On November 25, 1969, Petitioner filed an application with the State Land Department in which it asserted that the waters from which its wells pump may be pumping water from a definite underground channel located beneath the surface of the earth in the Santa Cruz Valley and following the general course and direction of the Santa Cruz River. Also, in 1952, Petitioner, as a member of the Santa Cruz Underground Water Users' Association, contended to the Arizona Underground Water Commission that the water under the Santa Cruz River low lands in the area from Tucson south to the Mexican border was underground of the Santa Cruz River, that is, was an underground stream according to law, and therefore was subject to appropriation.

If a trier of fact finds that Petitioner be correct in its assertions of fact that the water which it pumps is an underground, channelized stream, then it may not complain herein of Respondent's use of underground water.

FOURTH AFFIRMATIVE DEFENSE

On December 21, 1948, in pursuance of the authority vested in it by A.R.S. 45-303, the State Land Department designated certain land as the "Santa Cruz Groundwater Basin." All of Respondent's pumping and use and all of its mining and milling facilities are located within the boundaries of said Santa Cruz Groundwater Basin.

Pursuant to A.R.S. 45-301(5), the "Santa Cruz Groundwater Basin" is defined to mean "Land overlying, as nearly as may be

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determined by known facts, a distinct body of groundwater . . ." As a result of the foregoing, Petitioner is not injured by and has no rights to be affected by the withdrawal of water by Respondent for use in any part of its facilities or in any portion of said land overlying the "distinct body of groundwater" referred to in A.R.S. 45-301.

FIFTH AFFIRMATIVE DEFENSE

On June 8, 1954, in pursuance of the authority vested in it by A.R.S. 45-303, the State Land Department designated certain land as the Sahuarita-Continental Subdivision of the Santa Cruz Groundwater Basin. All of Respondent's pumping and use and all of its mining and milling facilities are located within the boundaries of said Sahuarita-Continental Subdivision of the Santa Cruz Groundwater Basin.

Pursuant to A.R.S. 45-301(6), said Subdivision is defined to mean "an area of land overlying, as nearly as may be determined by known facts, a distinct body of groundwater. It may consist of any determinable part of a groundwater basin." As a result of the foregoing, Petitioner is not injured by and has no rights to be affected by the withdrawal of water by Respondent for use in any part of its facilities or in any portion of said land overlying the "distinct body of groundwater" referred to in A.R.S. 45-301.

SIXTH AFFIRMATIVE DEFENSE

Approximately 90% of the water which is pumped by Respondent from the Sahuarita-Continental Critical Groundwater Area has its ultimate use in said Critical Groundwater Area by Respondent for a legitimate and proper industrial purpose. The important and beneficial industry which Respondent operates in

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Pima County, therefore, should not be shut down merely because 10% of the total water which it pumps is used outside of said Critical Groundwater Area, as such amount, under the circumstances of this case, is de minimus.

SEVENTH AFFIRMATIVE DEFENSE

The water which constitutes the source of supply of all wells of Respondent, except its Wells numbered 2 and 5, is completely separated from the water which constitutes the source of supply for Petitioner's wells by a fault or faults or other impermeable barrier. Therefore, except for said Wells Nos. 2 and 5 of Respondent, the waters which Respondent and Petitioner pump are from different and separated water basins. As a result, Petitioner is not injured by and has no right to complain of the use by Respondent of the water which it pumps from its said wells.

EIGHTH ALTERNATIVE AND AFFIRMATIVE DEFENSE

The land on which all of Respondent's wells (except its Wells Nos. 2 and 5) and on which its mining and milling facilities are located, all overlie a common water basin which is hydraulically interconnected and completely severed from water supplying Petitioner's land. Consequently, Respondent is not taking or using water off the land to which it is subjacent, and Petitioner is not injured by and has no right to complain of the use by Respondent of the water which it pumps from its said wells.

NINTH AFFIRMATIVE DEFENSE

Respondent has purchased certain acreage of agricultural land within the Sahuarita-Continental Critical Groundwater Area

which, Respondent believes, had an annual water usage of approximately 7,000 acre feet, and will have retired same from agricultural use by the time of the trial of this action, and therefore has the equitable right to use in its mining and milling and related operations the historical water use of said land, which exceeds said operation's use outside said Critical Area.

TENTH AFFIRMATIVE DEFENSE

Respondent is making reasonable use of the water which it pumps from said Critical Area. Said water is being used in a profitable mining and milling operation in which there was invested over $80,000,000 as of November, 1969. Respondent pays substantial taxes to the County of Pima and the State of Arizona. For example, the total property taxes paid to Pima County in 1968 were over $1,373,000; the total royalties paid to the State of Arizona for the year 1968 were over $935,000; the total sales tax paid for the year 1968 was over $979,000; Respondent paid Arizona income tax of over $305,000; the total payroll of Respondent for the year 1968 was over $5,706,000.

On the other hand, Petitioner's use of water has been for an agricultural operation which could not have existed except for subsidies; in 1968, Petitioner received over $527,000 in subsidies; in 1969, Petitioner received over $658,000 in subsidies; and in 1970, Petitioner received over $848,000 in subsidies. As of year-end 1968, Petitioner had a total deficit of over $100,000.

Approximately 80% of the water which Respondent pumps for its use is returned to the lands within the Critical Area and as a result may be returned to the underground source of supply from which Respondent takes its water.

Petitioner consumptively uses over 90% of all the water which it pumps.

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The conflicting interests of Petitioner and Respondent to the water in said Critical Area require a determination that the use of water by Respondent involves a higher social use and greater utility than that of Petitioner.

ELEVENTH AFFIRMATIVE DEFENSE

On December 5, 1966, Respondent and the State Land Department entered into a contract whereby Respondent leased for ten (10) years certain land within the Critical Area from which Respondent had the right to remove the water, and which contract required that Respondent pay 1 cent per 1,000 gallons of water removed.

In reliance upon the validity of said contract, Respondent constructed three wells on said land in 1966, and an additional well thereon in 1968, and has constructed water tanks and pipelines so as to be able to use the water from said land in Respondent's mining and milling operation. Respondent likewise has made investments of many millions of dollars subsequent to the execution of said contract, which Respondent would not have expended had it not been for Respondent's belief that the State Land Department had the power and authority to enter into a binding and subsisting contract.

Additionally, Respondent and the State Land Department entered into contracts by which Respondent received the right to use rights-of-way certain land. These rights-of-way were granted by the State Land Department in 1965 and 1967. Pursuant to said rights-of-way and in reliance thereon, Respondent expended large sums of money to construct pipelines and water systems so as to allow water from wells of Respondent to be transported in connection with Respondent's mining and milling operations.

Additionally, in further reliance upon the validity of said rights-of-way and upon Respondent's right to use said

rights-of-way, Respondent expended many millions of dollars in its expansions of its mining and milling operations, which it would not have done had it not believed that the State Land Department had the power and authority to grant valid and subsisting rights-of-way.

If said contracts by which Respondent has the right to drill for water and the right to lay pipe are declared invalid and void, Respondent will be highly prejudiced and will lose its investment of over $80,000,000 (as of November, 1969) as it will be unable to operate its mining and milling operations without the water which it pumps from within said Critical Area. Such a decision would impair contractual rights of Respondent and, therefore, Petitioner and the State Land Department should be estopped from asserting any purported invalidity of said contracts.

TWELFTH AFFIRMATIVE DEFENSE

Petitioner repeatedly has increased its irrigation use of groundwater within said Critical Groundwater Area since 1954. From 1965 through 1969 on its Sahuarita farm alone, Petitioner has doubled its production and consumptive use of groundwater. Petitioner has planted pecan trees in replacement of previous crops so as to double the requirement for, production of and consumptive use of groundwater.

Any damage which Petitioner may have suffered from any fall in the water level in its wells is due to causes other than pumping of water by Respondent.

WHEREFORE, Respondent prays that Petitioner take nothing by its Petition, for costs of suit, and for all proper relief.

VERITY & SMITH
and
MUSICK, PEELER & GARRETT

By: Bruce A. Bevan Jr.
Bruce A. Bevan, Jr.
Attorneys for Pima Mining Company
One Wilshire Boulevard, Suite 2000
Los Angeles, California 90017
(213) 629-3322

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STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

Before me, the undersigned, a Notary Public in and for said State, personally appeared David P. Evans, who, being duly sworn according to law, did depose and say that he is the Secretary of Pima Mining Company, one of the Respondents; that he is authorized to make this affidavit on behalf of Pima Mining Company and that the foregoing ANSWER TO SPECIAL ACTION PETITION is true and correct to the best of his knowledge, information and belief.

DAVID P. EVANS

Subscribed and sworn to before me this 17th day of January, 1974.

OFFICIAL SEAL
ANDREA B. BENIGAR
NOTARY PUBLIC — CALIFORNIA
PRINCIPAL OFFICE IN
LOS ANGELES COUNTY
My Comm. Expires Feb. 5, 1974

Andrea B. Benigar
Notary Public in and for said County and State.

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BRIEF HISTORY OF PROCEEDINGS

1. On November 24, 1969, FICO filed its Complaint in one count in the Pima County Superior Court which Complaint sought an injunction for an alleged violation of the reasonable use doctrine by the mine defendants.

2. On or about June 26, 1970, FICO added Count II to the Complaint, which also sought such an injunction upon the same facts and because the mines were using rights of way from the State of Arizona. The State Land Department and its Commissioner were named parties defendant.

3. On or about June 26, 1970, FICO moved for a summary judgment on Counts I and II but withdrew the motion on July 13, 1970 on the ground that FICO believed there may be an issue of fact to resolve.

4. On December 16, 1970, the Superior Court wrote counsel advising that the very minimum number of actual trial days would be twenty days, and that it could anticipate that the case would run considerably longer than twenty days. The Court also stated that:

> "It certainly now appears that this case will be quite lengthy, regardless of whether or not there is a jury; and, really, I think there may be some fact issues which the Court should have the help of a jury on."

5. On April 8, 1971, FICO dismissed Count II, the State Land Department right-of-way issue.

6. On April 19, 1971, FICO petitioned this Honorable Supreme Court for an injunction against Pima, the State Land Department and its Commissioner. This Petition raised the reasonable use issue (Count I), the right-of-way issue (Count II) and a new issue, the Commercial Lease 906 issue (later to become Count IV). In oral argument, FICO urged this court to rule whether or not the mere transportation of water from a statutorily declared critical groundwater area would, per se, violate the reasonable use doctrine. If so, FICO argued, this Court could eliminate the many complex issues below which otherwise must necessarily be tried as part of the reasonable use issue, particularly, damage to the plaintiff and laches on its part.

7. On May 4, 1971, this Honorable Court declined to accept jurisdiction of FICO's Petition for an Injunction.

8. On July 30, 1971, FICO reinstituted its previously dismissed Count II re the right-of-way issue but did not serve the State Land Department nor its Commissioner who were named defendants.

9. On September 8, 1971, FICO asked the Department to hold an administrative hearing to cancel Pima's rights-of-way and its Commercial Lease 906.

10. On December 24, 1971, Pima moved the Superior Court for an order bringing in the Department and its Commissioner as defendants on plaintiff's Count II.

11. On December 31, 1971, FICO again dismissed Count II, stating that:

". . . [A] determination of the root issues

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between the parties can be made without the necessity of an adjudication of the matters raised by Count Two . . .

"The issues raised by Count Two are collateral to the issues presented by Counts One [injunction] and Three [damages]. A determination of those claims will effectively and by necessary implication answer the legal questions presented by Count Two."

12. On January 26, 1972, Pima brought a Special Action to prohibit the administrative hearing from proceeding which had been set for hearing on March 13, 1972.

13. On January 26, 1972, FICO requested that Department to forgo the administrative hearing, reinstituted once again its Count II, filed Count IV (the Commercial Lease Issue) and procured the appearance of the Department and its Commissioner in the pending Superior Court action. As a result, the administrative hearing was vacated.

14. On June 12, 1972, FICO filed a Motion to Compel Discovery which stated:

> "The importance of ground water allocation among competing users in southern Arizona cannot be overemphasized. Each of the parties to this law suit have claimed, either formally or informally, that the continued availability of ground water in quantity is essential to its future operation.

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Consequently, the issues raised by this litigation in all probability will require a comprehensive judicial determination of ground water rights and duties in southern Arizona. In making this determination this Court will be asked to tread paths which have been but vaguely defined by precedent.

"In reaching its decision, this Court will be forced to weigh complex and detailed testimony of numerous experts, each of whose conclusions are likely to be vigorously debated. In the interest of judicial efficiency and a just, equitable result in this case, adequate preparation by all parties is mandatory.

* * *

"Because of the importance of adequate expert preparation to all parties in the development of this case, it is imperative that the parties not be limited in interrogatories in the development of their expert cases. And while it is conceivable that comprehensive, detailed interrogatory responses could provide sufficient information to permit adequate cross-examination of witnesses, it is unlikely that such responses would be available much before trial. The complexity of the case and the number of parties compel the conclusion that the compilation of

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the expert material must begin immediately." [Emphasis added.]

15. The defendants consented to an appropriate and comprehensive program for such discovery which was the subject of an Order by Chief Judge Roylston.

16. On June 15, 1973 FICO moved the Superior Court for a partial summary judgment on Count IV as to defendants Pima, and the State Land Department and its Commissioner. That Motion raised only the "Enabling Act" issue and no other issue.

17. On November 15, 1973 the lower court denied FICO's motion and granted Pima's counter-motion for summary judgment on Count IV.

18. On January 2, 1974, FICO commenced in this Honorable Court a Special Action seeking a review of Judge Roylston's partial summary judgment order.

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IN THE SUPREME COURT OF THE STATE OF ARIZONA

FARMERS INVESTMENT COMPANY, a corporation, Petitioner, v. PIMA MINING COMPANY, a corporation, Respondents.	NO. 11439 AFFIDAVIT

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

BRUCE A. BEVAN, JR., being first duly sworn, says:

Affiant is one of the attorneys for Respondent Pima Mining Company in the various actions brought by FICO since 1969. As a result, Affiant is familiar with the files and records of those proceedings and avers that the annexed Brief History of Proceedings is an accurate recitation of some of the matters which have occurred therein.

DATED: JANUARY 15, 1974.

Bruce A. Bevan Jr.
BRUCE A. BEVAN, JR.

Subscribed and sworn to before me
this 15th day of January, 1974.

Andrea K. Fenicar
Notary Public in and for said
County and State.

OFFICIAL SEAL
ANDREA K. FENICAR
NOTARY PUBLIC - CALIFORNIA
PRINCIPAL OFFICE IN
LOS ANGELES COUNTY
My Commission Expires Mar. 5, 1976

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MEMORANDUM IN OPPOSITION

TO SPECIAL ACTION PETITION

I

The Dumping of Waste Materials Issue

FICO has alleged that Judge Roylston's decision below was "arbitrary and capricious" [page 14, Petition]. One of the matters FICO requests that this Court "review" in connection with that decision concerns the dumping of tailing wastes upon state land per Commercial Lease 907 (not 906). [See Petition, page 5, lines 4-10; page 13, lines 14-29; Memorandum, page 28, line 1 through page 29, line 19.]

This Complaint of FICO was not raised below nor anywhere else previously. There is no pleading of FICO anywhere else regarding Commercial Lease 907 or this dumping issue. It thus is unseemly to accuse Chief Judge Roylston of being "arbitrary and capricious" in a sworn Petition regarding a matter never presented to him.

Consequently, Pima will not further respond concerning this matter (unless this Court accepts jurisdiction) except to say that this "dumping" issue of FICO does not concern FICO's water rights in the slightest nor any of FICO's supposed grounds of urgency asserted herein. What it does concern is the practical ability of copper mining in Arizona to exist if such contracts were abrogated.

II

THE ENABLING ACT ISSUE

A. The State Has Not Committed Waste.

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FICO accuses the State Land Department of committing waste in issuing commercial leases for the purpose of water production [Memorandum, page 21]. "Waste" is defined as an 'unlawful act. 93 C.J.S. 559. Here, the state, as landlord, has authorized water production so waste in the legal sense cannot exist.

FICO apparently then is concerned with the State selling its water too cheaply. This seems an untenable claim from a farming corporation, which, as lessee of state lands for agricultural purposes, pays no extra rent for the production of water from such lands. In any event, FICO has no standing to complain of the insufficiency of consideration in a contract to which it is not a party.

The record below [pages 35-36] shows that the State has engaged in a comprehensive mining lease arrangement with Pima. The State leases lands for open pit mining from which the State obtains millions of dollars of revenue. To do this, the State leases land to Pima for its necessary water pumping, for rights-of-way along which the water is conveyed to the mill, and from the mill to lands leased for purposes of receiving tailing deposits.

Although FICO says the millions of dollars of State revenue generated by mining royalties, property, income and other taxes is a form of waste because the water element of the arrangement is sold too cheaply, FICO's motives must be somewhat suspect. FICO says at page 4, lines 1-24 of its Memorandum that it has a right to complain of such waste because, in essence, Pima is using water which otherwise FICO could capture.

Thus, if FICO is injured by the State's allowing water production by Pima, it is because FICO otherwise would get, for free and without payment of royalty, the State's water. Obviously

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then, if the State were going to lose its water to FICO, there is no waste in selling it for some revenue especially when that water will result in much additional revenue and other benefits being generated for the State. Dabney-Johnston Oil Corp. v. Walden, 4 C. 2d 637, 655-656, 52 P. 2d 237.

B. Water Is Not a Product of The Land

The Enabling Act prohibits (i) the sale of certain trust lands and (ii) the sale of "natural products" from such lands except per advertisement and at a public auction to the highest bidder.

At page 34 of its Memorandum, FICO argues that the instant Commercial Lease apparently violates either or both such prohibitions. Accordingly, it is necessary to consider whether water is a "natural product" of the State's land.

1. Water Is Not Produced by Land

It is worthy of judicial notice that water is not "produced" by land. Water falls to the earth from the heavens where it is produced from moisture gathered primarily from the oceans. On the other hand, hydrocarbons, for example, are produced by land, ie, by its weight crushing ancient fossil matter. Similarly, minerals are part of and are formed in and of and by elements of land. The same if true of common mineral products, as rock, sand and gravel.

Thus, by nature, it is clear that water is not a natural product of the land. In the proceedings below, FICO first agreed, saying

> "Water is plainly not 'Timber or other natural product' of such land..." [App. p.30]

Later, FICO said that it had made that statement stupidly and that water was "a natural product of the land" [App. p. 42], but not a "mineral" [App. pp. 61-62]. FICO now likens water to rock and sand [Memorandum, p. 29] We believe FICO's

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first evaluation of the matter was accurate, as the statutory scheme shows.

2. Statutory Classification Does Not Include Water As a Valuable Product of the Land

Section 37-212 A.R.S. (as amended 1959) provides that the State lands shall be classified as:

> "1. Lands suitable for agricultural purposes.
>
> 2. Lands suitable for grazing purposes.
>
> 3. Lands suitable for commercial or homesite purposes
>
> 4. Lands containing timber, stone or other products which may become valuable.
>
> 5. Lands which may become agricultural lands by expenditure of a reasonable amount for the development of water thereon."

Within the meaning of this statute, water is not a "valuable product." If it were, there could be no category (5) because the existence of water on State lands would automatically turn the land into category (4), ie, lands containing "valuable products." Also, if water were a "valuable product," there would be a conflict as to whether to classify lands as agricultural or as containing a valuable product, water.

C. The Enabling Act Exempts Certain Leases From Its Scope.

As stated before, the Enabling Act prohibits (i) the sale of certain trust lands and (ii) the sale of "natural products" from such lands except per advertisement and at a public auction to the highest bidder. Also important, however, are the exemptive provisions of the Act. The Enabling Act was intended to and does exempt from its two proscriptions the depletion of the natural products of trust lands if leased for "grazing, agricultural, commercial and domestic purposes [and] for mineral purposes. . ."

What was the purpose of these exemptive provisions of

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the Enabling Act? The purpose presumably was not to state the obvious, that is to say that leases not in conflict with the prohibitory provisions of the Act were not in conflict therewith. . . instead, the obvious purpose must have been to exempt certain types of leases which otherwise would have conflicted with the prohibitory provisions of the Act.

If so, which prohibitory provisions of the Act were intended to be the subject of the lease exemptions? There are only two prohibitions. The first is against sale of the land. Obviously the lease exemptions do not authorize a sale of the land. Nor would such an "exemption" be necessary to make it clear that a lease of land was not a prohibited "sale" thereof (FICO's argument to the contrary notwithstanding).

The only other prohibition in the Enabling Act is against sale, without advertisement and auction, of the "natural products" of trust lands. Thus, if the exemptive lease provisions of the Act have any meaningful utility, it is to exempt leases for certain purposes from the restrictions against sale from trust lands of their natural products.

Only construed in this way is the Enabling Act harmonious. Thus, the Act intends and authorizes depletion of water (arguendo, a "natural product" of trust lands) for "grazing," "agricultural" and "domestic purposes." Similarly, the Act intends and authorizes depletion and sale of natural products such as minerals [ARS 27-234, 235] without such being subject to the restrictions of the Act. Absent such a construction, the sale of mineral natural products of trust lands per mineral leases [ARS 27-233, 235] would violate the Act. Absent such a construction, so would depletion of water for grazing, agricultural and domestic purposes.

Thus, if water is used for a "commercial purpose" pursuant to a lease of ten years or less, such also is exempted

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from the advertisement and auction requirements of the Act.

Therefore, the depletion of water for "commercial purposes" likewise is exempted by the specific, express provisions of the Enabling Act. Were this not true, there simply would have been no reason for this exemption.

Here, there can be no doubt that Pima is using the instant water for "commercial purposes." No purpose could be more "commercial" than the milling of ore and the transportation of resulting tailing deposits.

D. <u>There Is No Sale of Any State Land</u>

FICO contends that the extraction of water from State lands per a commercial lease is in legal effect a sale of the land itself. [Memorandum, pp. 30, 33-34]

1. The Oil and Gas Cases

First FICO cites an overruled California case holding that oil in land is part of the land [Memorandum, p. 30-31] FICO then cites the California cases which rejected that "oil-in-place" concept on the basis that oil like water is fugacious and is <u>not</u> part of the land through which it moves [Memorandum pp. 31-32].

If water and oil are fugacious, then selling the right to drill for oil or water is obviously <u>not</u> the same as selling part of the land through which it moves, as those California cases so held. Thus, in <u>Boone v. Kingsbury</u>, 206 Cal. 148, 273 Pac. 797 (1928), the California Supreme Court held that,

> "the license or privilege or leasehold by which the permittees are granted *the right to explore and mine for gas and oil does not constitute a grant or sale of tide-lands* in the sense that those terms are used in the prohibitory provisions of Article XV, Section 3, state constitution." [Emphasis added]

Finally, as pointed out by the Supreme Court in City of Long Beach v. Marshall, 11 Cal. 2d 602, 621, 82 P. 2d 362 (1938):

> "And it should be noted, finally, that the conclusion reached in the Stone case to the effect that an oil lease is an unlawful transfer of tideland is contrary to the holding by this Court in the later case of Boone v. Kingsbury, supra, at page 104."

Further, if FICO is correct in its contention that selling water, arguendo, a natural product of the land, is like selling State land, there never would have been the necessity for the Enabling Act to prohibit not only certain sales of State land but also certain sales of natural products from such lands. Instead, if there were any purpose to the Enabling Act's prohibition against certain sales of natural products from State lands, then sales of such products is different from selling the land itself. If it were not, then how could mineral leases (which allow extraction, sale and shipment from State lands of minerals more valuable than water) be valid? Cf A.R.S. 27-234, 235. Likewise, how could agricultural leases which likewise allow unlimited and free extraction of water be valid?

Further, if FICO be correct that water is part of the State's soil, how can FICO claim that it is being hurt by Pima's pumping of water from (i) State lands or from (ii) Pima lands?

FICO argues [Memorandum, p. 30] that if an owner sank a shaft and removed a yard of earth from his land, this would be equivalent to the situation here where, say, an acre foot of water is removed. Perhaps this is true. . . Yet, the law does not say that selling a yard of earth constitutes a sale of the owner's land! That is a sale of common earth -- personalty and not some proportion of one's real property. Cf A.R.S. 27-271. Similarly with water, FICO quotes no legal authorities to support

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its arguments except the California oil and gas cases which directly refute FICO's contention.

III

THERE IS NO VIOLATION OF THE ARIZONA GROUND-WATER CODE

In its usual pithy manner, FICO puts the following question to the Court:

"Said otherwise, if Tucson had obtained ten-year 'commercial leases' from the State Land Commissioner instead of purchasing well sites in Jarvis v. State Land Department, 104 Ariz. 527, 456 P. 2d 385, would the decision have been in favor of the right of Tucson to continue pumping Avra Valley water for use in Tucson? [Memorandum, p. 2; see also p. 35.]

We can answer FICO without troubling this overworked Court. "Yes," of course the answer would be the same. Obtaining water per a valid or invalid state lease has no relevancy to whether or not Tucson violated the reasonable use doctrine, which this Court held Tucson did.

This answer merely puts us back in time to April 19, 1971, when FICO made the identical complaint that, per Commercial Lease 906, Pima was transporting water off the land from whence it came and thus violating the reasonable use doctrine. Since there were then (and still are now) very complex factual issues to be resolved concerning this issue, this Court declined to accept jurisdiction.

Merely because FICO has waited three years to ask a rhetorical question is no reason to suspect that the factual issues have become less complex. If they had, FICO would have filed (and won) a summary judgment motion on the reasonable use issue.

Since the legal position and authorities of Pima are the same as they were in 1971 and because this Memorandum already

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is overly prolix, we simply incorporate by reference Pima's Brief in Opposition to Petition for Injunction, pp. 4-22. The authorities therein demonstrate why there are factual issues which, per the Jarvis v. City of Tucson cases, must be resolved by a trier of fact. We estimate that even with proper pretrial, such would require at least 30 trial days.

Leave of Court is requested to file further briefs and to present evidence in the event this Court accepts jurisdiction of this Petition for Special Action.

Respectfully submitted,

VERITY & SMITH
and
MUSICK, PEELER & GARRETT

By: Bruce A. Bevan

Bruce A. Bevan, Jr.
Attorneys for Respondent Pima Mining Co.

One Wilshire Boulevard, Suite 2000
Los Angeles, California 90017
(213) 629-3322

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PROOF OF SERVICE BY MAIL

I caused the within ANSWER OF PIMA MINING COMPANY TO SPECIAL ACTION PETITION, BRIEF HISTORY OF PROCEEDINGS and MEMORANDUM IN OPPOSITION TO SPECIAL ACTION PETITION to be served by mail on the Petitioner and Other Respondents on January 18, 1974, as follows:

Snell & Wilmer
Suite 3100 Valley Center
Phoenix, Arizona 85073

Attention: Mark Wilmer, Esq.

The Honorable Robert O. Rayston
Superior Court of the State of Arizona
Pima County Courthouse
Phoenix, Arizona

Peter C. Gullato, Esq.
Assistant Attorney General
160 State Capitol Building
Phoenix, Arizona 85007

Bruce A. Bevan Jr.
BRUCE A. BEVAN, JR.

FCTL000090

IN THE SUPREME COURT OF THE STATE OF ARIZONA

In Banc

FARMERS INVESTMENT COMPANY, a corporation, Petitioner,	)	
v.	)	No. 11439
PIMA MINING COMPANY, a corporation; ANDREW L. BETTWY, State Land Commissioner; STATE LAND DEPARTMENT; THE HONORABLE ROBERT O. ROYLSTON, Judge of the Pima County Superior Court; and THE PIMA COUNTY SUPERIOR COURT, Respondents.	)	

FILED
JUN 19 1974
CLIFFORD H. WARD
CLERK SUPREME COURT
BY

SPECIAL ACTION

Prayer for Relief Granted

Snell & Wilmer — Phoenix
by Mark Wilmer
Loren W. Counce, Jr.

Attorneys for Petitioner

Verity & Smith — Tucson
by John C. Lacy

Musick, Peeler & Garrett — Los Angeles, California
by Bruce A. Bevan, Jr.

Attorneys for Respondent
Pima Mining Company

Gary K. Nelson — Phoenix
The Attorney General
by Peter C. Gulatto
Assistant Attorney General

Attorneys for Respondents
Andrew L. Bettwy and
State Land Department

STRUCKMEYER, Justice

EXHIBIT C

FCTL000091

Petitioner, Farmers Investment Company, brought this special action to review a ruling of the Superior Court granting respondent Pima Mining Company's motion for summary judgment and denying its motion for partial summary judgment. We accepted jurisdiction pursuant to Article 6, § 5, subsec. 4, of the Constitution of Arizona to resolve the question whether a lease from the State Land Department to Pima Mining Company is void as contrary to those provisions of Arizona's Constitution and Enabling Act requiring the leasing of certain public lands at public auction.

The following facts are material to the determination of this action. On October 24, 1966, the State Land Department of the State of Arizona executed a 10-year lease herein designated as Lease No. 906, whereby 319 acres within the Sahuarita-Continental Critical Groundwater Area were leased to the Pima Mining Company. Farmers Investment owns and farms approximately 7,000 acres within the Critical Groundwater Area of the asserted value of fifty million dollars. A substantial part of its acreage is contiguous to or near the leased lands. It has a right in the waters percolating beneath the soil, which is common to all the overlying landowners within the groundwater area. State ex rel. Morrison v. Anway, 87 Ariz. 206, 349 P.2d 774 (1960). A critical groundwater area is a groundwater basin not having sufficient ground water to provide a reasonably safe supply at the current rates of withdrawal so that the addition of other users must necessarily deplete the supply of existing users. Jarvis v. State Land Dept. and City of Tucson, 106 Ariz. 506, 479 P.2d 169 (1970).

The lease by its terms provides that the Pima Mining Company will pay $10.00 per year "or one cent per 1,000 gallons of water removed, whichever is greater." Pima Mining Company drilled four wells on the demised lands and installed pumps and caused the water obtained thereby to be transported for use in connection with its mining and milling of copper ores. In 1972, Pima Mining Company pumped 3,163,842,000 gallons of water from beneath the land covered by Lease No. 906. The leased lands were acquired by the State of Arizona under its Enabling Act by grant from the United States Government and are approximately two miles inside the Critical Groundwater Area and seven miles from Pima Mining Company's mining and milling facilities.

Section 28 of Arizona's Enabling Act, 36 U.S. Stat. 557, 568-579, Act of June 1910, provides that the lands acquired pursuant thereto shall be held in trust by the State to be disposed of only in the manner as provided by the Act. We quote the relevant provisions of the Act:

> "Said lands shall not be sold or leased, in whole or in part, except to the highest and best bidder at a public auction * * *.
>
> * * * * * *
>
> * * * nor shall any sale or contract for the sale of any timber <u>or other natural product of such lands</u> be made, save at the place, in the manner, and after notice by publication provided for sales and leases of the lands themselves.
>
> * * * * * *
>
> All lands, leaseholds, timber and other <u>products of land</u>, before being offered shall be appraised at their true value, and no sale or other disposal thereof shall be made for a consideration less than the value so ascertained, * * *." (Emphasis added)

And:

> "Every sale, lease, conveyance, or contract of or concerning any of the lands hereby granted or confirmed, or the use thereof or the natural products thereof, not made in substantial conformity with the provisions of this Act shall be null and void, any provisions of the constitution or laws of the said State to the contrary notwithstanding. * * *." (Emphasis added)

The Arizona Constitution provides by Article 10, § 1, that all lands transferred to the State under the provisions of the Enabling Act shall be held in trust to be disposed of only in the manner as is provided in the Enabling Act and the Constitution of Arizona. It also repeats in §§ 3 and 8 of Article 10 all of the foregoing prohibitions and injunctions.

In 1915, in similar language to what is now A.R.S. § 37-481, the Legislature provided:

> "The state land department shall conserve, sell or otherwise administer the timber products, stone, gravel, and other products and property upon lands belonging to the state under rules and regulations not in conflict with the enabling act and the constitution * * *." A.R.S. § 37-481. (Emphasis added)

We first observe that there is no contention that the lease under attack is a mineral lease. Minerals are expressly excepted in § 28 and are subject to disposition as provided by the Legislature of the State. See A.R.S. § 27-231, et seq.

Pima Mining Company argues that this is a "commercial" lease which is exempt from the prohibitory provisions of the Enabling Act. This argument is predicated upon the amendment of § 28 by Congress on June 2, 1951, 65 Stat. 51. The amendment reads in its relevant part:

> "Nothing herein contained shall prevent: 1) the leasing of any of the lands referred to in this section, in such manner as the Legislature of the State of Arizona may prescribe, for grazing, agricultural, commercial and homesite purposes, for a term of ten years or less; * * *."

However, the entitlement of this lease as a "commercial" lease does not add anything to the legal position of the parties. The real purpose and effect of a transaction determines its true character, Hervey v. Rhode Island Locomotive Works, 93 U.S. 664, 23 L.Ed. 1003 (1877), and the character of a contract must be determined by its provisions rather than its label, Employers Liability Assurance Corp. v. Lunt, 82 Ariz. 320, 313 P.2d 393 (1957). The instrument, while entitled "commercial" lease, is plainly and obviously a vehicle by which the State Land Department sells for one cent per 1,000 gallons any water removed from the lands demised.

This language of Congress used in § 28 of the Enabling Act does not permit the exclusion of water from the term "product of the land":

> "Disposition of any of said lands, or of any money <u>or thing of value</u> directly or indirectly derived therefrom * * * contrary to the provisions of this Act shall be deemed a breach of trust." (Emphasis added)

Water is a thing of value directly derived from the land to be considered as a product of the land within the meaning of the Constitution and Enabling Act.

We hold that the most cursory reading of the Enabling Act and Constitution compels the conclusion that water beneath the soil is a product of the land. As such, it must be sold to the highest and best bidder at public auction in the same manner as

timber, stone and gravel. State Land Department v. Tucson Rock and Sand Co., 107 Ariz. 74, 481 P.2d 867 (1971).

Petitioner presented two questions of asserted public importance justifying the intervention of this Court. As stated, we accepted jurisdiction to resolve only the question as to whether State Land Department Lease No. 906 to Pima Mining Company was void as contrary to the provisions of the Constitution and Enabling Act. We considered that the question pertaining to whether the State Land Department or the State Land Commissioner could lease lands within a critical groundwater area upon which to sink wells and pump water for use outside the area cannot be resolved at this time in the light of Pima Mining Company's affirmative defenses. We express no opinion as to whether the doctrine of reasonable use must be applied to Pima Mining Company's withdrawal of water from the lands the subject matter of Lease 906. We also express no opinion at this time as to the validity of the State Land Department's Leases Nos. 907-01 and 907-02.

We expressly hold that the State Land Department Lease No. 906, being in violation of the Arizona Constitution and the Act of Congress as expressed in Arizona's Enabling Act is null and void. The orders of the Superior Court of Pima County granting respondent Pima Mining Company's motion for summary judgment and denying petitioner's motion for partial summary judgment

are ordered vacated and set aside.

FRED C. STRUCKMEYER, JR., Justice

CONCURRING:

JACK D. H. HAYS, Chief Justice

JAMES DUKE CAMERON, Vice Chief Justice

LORNA E. LOCKWOOD, Justice

WILLIAM A. HOLOHAN, Justice

IN THE SUPREME COURT OF THE STATE OF ARIZONA

FARMERS INVESTMENT COMPANY, a corporation, Petitioner, vs. PIMA MINING COMPANY, a corporation; ANDREW L. BETTWY, State Land Commissioner; STATE LAND DEPARTMENT; THE HONORABLE ROBERT O. ROYLSTON, Judge of the Pima County Superior Court; and THE PIMA COUNTY SUPERIOR COURT, Respondents.	No. 114339 SPECIAL ACTION PETITION

COMES NOW FARMERS INVESTMENT COMPANY, an Arizona corporation, and petitions the Supreme Court of Arizona to review the orders and judgment of the Superior Court of Pima County and the Honorable Robert O. Roylston, the presiding judge, as to Count IV of a civil action pending in that Court, entitled "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. Bettwy, as State Land Commissioner and The State Land Department, a department of the State of Arizona, Defendants", which is Cause #116542.

Two questions of public importance justifying review by the Court were ruled upon by Judge Roylston, which may be stated as follows:

Question I: Does the State Land Commissioner have authority by reason of the terms and provisions of the Arizona

EXHIBIT A

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Groundwater Code (Title 45, Article 7, Chapter 1, Arizona Water Code, as amended, Section 45-501 et seq.) to enter into a "commercial lease" of State land located within a critical groundwater area designated as such by the State Land Commissioner, for a ten-year term for the express and stated purpose of authorizing the lessee to sink wells into the water basin underlying this State land and by means thereof to pump groundwater and transport the same for use outside the critical groundwater area?

Said otherwise, if Tucson had obtained ten-year "commercial leases" from the State Land Commissioner instead of purchasing well sites in Jarvis v. State Land Department, 104 Ariz. 527, 456 P.2d 585, would the decision have been in favor of the right of Tucson to continue pumping Avra Valley water for use in Tucson?

Question II: Does the State Land Commissioner have authority under the trust obligations and limitations of Section 28 of the Enabling Act (as followed and adhered to by the relevant Arizona Constitutional and Statutory provisions) to execute "commercial" leases of State land for ten-year terms without advertising or offering the same at public auction, which

(a) amount to a conveyance of the groundwater underlying a parcel of State land and authorization to withdraw and transport the same for use away from the State land and not for the benefit of the land from which the groundwater is to be withdrawn?

(b) have for the lease purpose and authorize the dumping of tailings wastes upon the State land, thereby destroying the utility and value of said State land for any purpose after the expiration of the ten-year term except the continued storage of the tailings wastes?

Petitioner, in support of its Petition, respectfully shows the Court:

I

Petitioner, FARMERS INVESTMENT COMPANY (hereinafter for brevity "FICO") is an Arizona corporation engaged in a general farming business in the State of Arizona. Respondent PIMA MINING COMPANY (hereinafter for brevity "PIMA") is an Arizona corporation engaged in the mining business in Pima County, Arizona.

II

On November 24, 1969 FICO filed suit in the Pima County Superior Court, Cause #116542, against 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 (hereinafter for brevity "Cause #116542") asserting as to each mining defendant that said defendants were wrongfully pumping groundwater from an area theretofore lawfully designated as a Critical Groundwater Area by the State Land Commissioner, and transporting it for use in the mining and milling operations and activities of each of the defendants outside of said Critical Groundwater Area. The City of Tucson intervened in said action and thereafter Amax Copper Mines, Inc., a Nevada corporation, as a partner in the mining venture of Anamax Mining Company, said partnership consisting of The Anaconda Company and Amax Copper Mines, Inc., as successor to the property and mining operations of The Anaconda Company, were made parties by court

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order and appeared and filed their pleadings in the action.

Andrew L. Bettwy, as State Land Commissioner, and the State Land Department, were also brought in as parties defendant and the pleadings appropriately amended.

Count IV of the Complaint as amended stated a claim only against Defendants Pima Mining Company, Andrew L. Bettwy as State Land Commissioner, and the State Land Department. Count IV is the only claim made by FICO in Cause #116542 material to this Petition. A true copy of the Complaint as amended is reproduced in the Appendix hereto.

The location of FICO'S farming operations and irrigation wells and of the mills, tailings ponds and wells of all the defendants in Cause #116542 are located and shown illustratively upon Exhibit "A" hereto. The mine pit of defendant PIMA is located generally westerly from the mill of that defendant.

III

The Santa Cruz River basin south of Tucson extends generally in a north - south direction from Nogales, Arizona, to and past the Tucson, Arizona area. The bed or channel of the Santa Cruz River in this area is generally dry except during periods of heavy precipitation in its watershed area. Groundwater constitutes the water resource of the area for all purposes.

IV

A part of the Santa Cruz River basin area commonly referred to as the Upper Santa Cruz Basin which is material to this Petition lies south of Tucson and was designated as the Sahuarita-Continental Critical Groundwater Area by the State Land Commissioner and the State Land Department of the State of Arizona

1 pursuant to the provisions of Article 7, Chapter 1, Arizona
2 Surface Water Code, as amended (Section 45-301 et seq., A.R.S.)
3 generally referred to as the Groundwater Code, on October 14,
4 1954. This designation has remained in full force and effect
5 to the present time.

6 V

7 Petitioner farms approximately 5,000 acres of its land
8 in the Upper Santa Cruz Basin and within the Critical Ground-
9 water Area above described, as a pecan orchard. These trees
10 are maturing and presently yielding annual crops of pecan nuts
11 in increasing amounts. The pecan orchard has an appraised value,
12 as determined by a qualified appraiser, of approximately $50
13 million, which sum Petitioner represents to be in fact the fair
14 approximate value of the pecan orchard. Water for the irriga-
15 tion of these pecan trees is essential to the healthy growth
16 of said trees and to the setting and ripening of the pecan nuts.

17 VI

18 On October 24, 1966 the then State Land Commissioner
19 executed "Commercial Lease No. 906" in favor of PIMA as Lessee,
20 a true copy of which is annexed hereto as Exhibit B. Said lease
21 by its terms was "for the purpose of: development of water farm
22 from deep wells, booster pump and power substation, gathering
23 tanks, pipelines, power lines, etc." The lease further pro-
24 vided: "In addition to commercial use of this land, the land
25 can also be used for grazing." (Exhibit B, "Special Conditions".)

26 VII

27 At all times material hereto, the land which is the sub-
28 ject of Lease No. 906 has been land acquired by the State of
29 Arizona subject to the provisions, conditions and trust obliga-
30 tions imposed by Section 28 of the Enabling Act and the Arizona
31 Statutes and Constitutional provisions controlling the use and
32 disposition of such lands, and at all times has been located

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within the exterior boundaries of the Sahuarita-Continental Critical Groundwater Area.

VIII

Respondent PIMA is an Arizona corporation which owns and operates a copper mine and mill located approximately seven miles westerly from the pecan orchard of Petitioner and approximately two miles westerly from the westerly boundary of said Sahuarita-Continental Critical Groundwater Area, and outside the boundary thereof.

IX

PIMA executed said Lease No. 906 on December 5, 1966 and thereafter drilled and placed in operation four large water wells in the leased area and connected the discharge from said wells to its collector, storage and transmission lines and system whereby the water discharged by said wells is pumped from the area of said wells a distance of approximately seven miles to the mine and mill of PIMA, which are located outside of and approximately two miles beyond the westerly boundary of said Critical Groundwater Area. At the mill and mine of PIMA, the water is used in the mining business of PIMA, and thereafter the wastes from the milling process are conveyed and stored in the tailing ponds of said mining company.

Each of said wells so drilled by PIMA is capable of producing approximately 5,000 gallons per minute, and during the year 1971, PIMA pumped from the wells within the boundaries of said State lease in excess of 3,163,000,000 gallons of water and transported the same out of said Critical Groundwater Area for use at its mine and mill aforesaid. PIMA continues to pump water from said water farm located on the property covered by Commercial Lease No. 906 at a rate equal to or in excess of that hereinabove described with reference to the rate of withdrawal in the year 1972.

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X

On or about June 15, 1973 FICO filed its "Motion for Partial Summary Judgment as to Commercial Lease No. 906" seeking an adjudication that said lease was invalid and void and that the withdrawal of groundwater from the area covered by said Lease No. 906 was illegal and in violation of the rights of FICO.

On or about August 20, 1973 PIMA filed its "Motion for Partial Summary Judgment re Commercial Lease No. 906". Copies of each of said motions for partial summary judgment are found in the Appendix to this Petition which is filed as a separate document from this Petition.

Thereafter, FICO filed its "Response to Defendant Pima's Commercial Lease No. 906 Pleadings". PIMA in turn filed a Reply to FICO'S Response. The State Land Department filed its Response to the motions for summary judgment on Commercial Lease No. 906, and the matter was subsequently argued before the Respondent, Robert O. Roylston, Judge of the Superior Court of Pima County, Arizona, who took the matter under advisement. Thereafter, PIMA filed its Supplemental Memorandum and FICO filed its Supplemental Memorandum as authorized by the Superior Court. Copies of each of the aforementioned Responses, Replies and Supplemental Memoranda are also found in the Appendix filed herewith.

On November 15, 1973 Judge Roylston entered a minute order as follows:

> The Court having taken under advisement plaintiff's Motion for Partial Summary Judgment as to commercial lease no. 906, and also having taken under advisement defendant Pima Mining Company's Motion for Summary Judgment on Count Four of plaintiff's Complaint,
>
> IT IS ORDERED that the plaintiff's motion is denied and defendant Pima Mining Company's motion is granted.
>
> IT IS FURTHER ORDERED that judgment in favor of defendant Pima Mining Company and against the plaintiff on Count Four be entered.

> It appearing that there is no just reason for delay of entry of final judgment as to Count Four,
>
> IT IS ORDERED that upon signing and filing of Judgment on Count Four, that the appeal time as to Count Four shall commence pursuant to Rule 54 (b).

Judge Roylston thereafter entered a formal written judgment in accordance with the minute order hereinabove set forth, which by its terms became a final judgment upon its entry by the Clerk of the Pima County Superior Court on December 6, 1973.

XI

The issues involved in the partial summary judgment proceedings above described were limited to the issues presented by Count IV of the Complaint as amended, and the only parties to said Count IV were FICO as Plaintiff; Pima Mining Company, a corporation; Andrew L. Bettwy, State Land Commissioner; and the State Land Department, as Defendants.

XII

In support of its Motion (and opposing FICO'S Motion), PIMA filed the affidavit of George Kemadino, its Vice President and General Manager, that its use was a valid use because:

(a) A portion of the PIMA mine pit from which PIMA mines its ore is leased from the State of Arizona and Arizona receives royalty payments upon the ore so mined, which royalties have annually averaged $895,000.00.

(b) Additionally, PIMA pays mine tax, income tax, severance and sales taxes to the State of Arizona.

(c) The water pumped from the wells on the leased property is used in processing ore mined from the PIMA pit, which includes the use of this water to convey the milling wastes or tailings to tailings ponds on Sections 9 and 10, also leased from the State of Arizona pursuant to Commercial Leases Nos. 907-01 and 907-02.

(d) PIMA also leases from the State of Arizona rights of way over other State land to enable PIMA to utilize the water as aforesaid and pays royalties to the State.

(e) The tailings wastes dumped upon Commercial Leases 907-01 and 907-02 contain more water than PIMA withdraws from the ground in the Critical Groundwater Area. In the year 1972, PIMA dumped tailings wastes on the State lands in Sections 9 and 10 under Commercial Leases 907-01 and 907-02 totalling 4,991,267,000 gallons of tailings water slurry, of which 1,256,934,000 gallons was reclaimed, pumped back to the mine and mill and re-used. PIMA alleged that there remained on the lands covered by Leases No. 907-01 and 907-02 3,734,333,000 gallons of water. In 1972, PIMA pumped 3,163,842,000 gallons of water from beneath the lands covered by Commercial Lease No. 906. (True copies of Commercial Lease No. 907-01 and Commercial Lease No. 907-02 are annexed hereto as Exhibits C and D).

Additionally, PIMA has contended that it withdraws most of its water from an aquifer within the Critical Groundwater Area underground but separate from the aquifer feeding FICO'S wells.

XIII

FICO, by its Motion for Partial Summary Judgment, asserted that Commercial Lease No. 906 contravened the Arizona Enabling Act, Section 28 thereof, the Arizona Constitution and Statutes enacted pursuant to the requirements of the Enabling Act, and that the withdrawal and transportation of groundwater from within the Sahuarita-Continental Critical Groundwater Area for use outside of said area was illegal and contrary to law and that FICO as a beneficial user of groundwater upon lands within said Critical Area was entitled to assert the illegality of the

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leases aforesaid (a) by reason of contravening the Arizona Ground-water Code, and (b) by reason of contravening the Enabling Act and related Arizona constitutional and statutory restrictions when disposing of State land and natural products thereof.

XIV

FICO does not have an adequate or speedy remedy by appeal, and the immediate resolution of the legal issues here involved is of sufficient importance, not only to FICO but to the economy of the Tucson area, to justify this Petition to the Arizona Supreme Court and for the Court to accept jurisdiction of this Petition for the following reasons:

1. The Central Arizona Project (hereinafter for brevity "CAP") designed to bring Colorado River water to central and south-central Arizona, is now under construction. The Tri-County Water Conservation District authorized by the Arizona Legislature, the Central Arizona Water Conservation District (hereinafter for brevity "CAWCD") has been organized and has contracted with the Secretary of the Interior for all of the Colorado River water which will be available when the CAP is completed. CAWCD is now entering into subcontract with Arizona water users for the allocation of the water to be made available by the CAP. The contract with the Secretary of the Interior gives first priority to municipal and industrial uses, and the policy adopted by the Arizona Water Commission and the CAWCD gives municipal and industrial uses first priority, recreational uses second priority, and agricultural uses third priority. These subcontracts will be completed within approximately one year, and once the water is under contract there will be no more water available for use from the CAP.

Presently, there is water available from the CAP for contract to the defendants in Cause #116542 to the full extent of their present uses, or approximately 59,000 acre feet per annum. This water is not presently available to FICO or other

FCTL000107

agricultural users in the Tucson area, and unless there remains CAP water in excess of that claimed and contracted for by municipal, industrial and recreational uses within the CAWCD, it will not be available to FICO. Unless the issue as to the legal availability of groundwater to PIMA is resolved prior to the close of the contracting period, the availability of the water to the Upper Santa Cruz Basin may be foreclosed and lost. Additionally, presently one of the defenses asserted by PIMA is that there is no source of water available to PIMA except the groundwater now being pumped by it, and hence PIMA asserts it would be inequitable to enjoin PIMA'S use of this groundwater, thereby injuring the economy of the State. The question therefore justifies early resolution.

2. The City of Tucson presently has available approximately 30,000 acre feet of effluent per annum from its municipal disposal plant which is "mild domestic sewage". This amount will increase to an estimated 90,000 acre feet by the year 2000- Tucson is prepared to make such changes in its treatment plant as may be required - if any changes are in fact required - to make this effluent useable in the mining and milling operations of PIMA, and has prepared engineering and cost studies which show that the effluent can be delivered to the PIMA collector system for approximately $30.00 per acre foot. This water is presently wasted into the bed of the Santa Cruz River. Tucson is willing to supply this water to PIMA (and the other mining defendants), but due to lack of any expression of real interest in contracting for this water, Tucson is presently studying alternative uses and will make a decision with respect to the disposition of this available water in the reasonably near future. FICO therefore asserts that an early resolution of the legality of PIMA'S present water uses would be in the public interest, as well as in the interest of FICO.

3. The use which PIMA is presently making of water from within the Critical Groundwater Area amounts to exhausting a resource which cannot be replaced and to a continuing trespass upon the property rights of FICO, and a continuing wrongful taking and use of property, a portion of which belongs to FICO.

4. Continued depletion of the water resource of the State land under the terms of Commercial Lease No. 906 amounts to a waste of State land and a breach of trust imposed by the Enabling Act limitations upon the uses which may be made of State land and to a direct violation of the Constitution of Arizona and the Arizona Statutes implementing the trust provisions of Section 28 of the Enabling Act.

5. Under the disclosures made by the affidavit of Mr. Komadino supporting the Motion for Partial Summary Judgment filed by PIMA, additional mis-use of State land is disclosed, in that two sections of State land are being used as a waste dump for PIMA'S tailings, thereby destroying said land for all future use or for future sale at its true value. No provision is made in either State Lease No. 907-01 or Lease No. 907-02 for the removal of the materials dumped upon said State land and the restoration thereof to its condition prior to the execution of these leases. In effect, the leases amount to a sale of the State land, since the lands have been effectively destroyed through the dumping of huge amounts of tailings, thereby rendering the lands unuseable for any purpose other than continued storage of such tailings, and no provision is made for the continued payment of rental for such use by PIMA after the expiration of the term of the existing leases.

6. In addition to the water withdrawals made by PIMA from the Critical Groundwater Area for use outside the area, the other mining defendants in Cause #116542 are likewise

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withdrawing groundwater from within the Critical Groundwater Area for use outside the area. The total amount so withdrawn substantially exceeds 50,000 acre feet per year and these withdrawals from the groundwater basin underlying the Critical Groundwater Area are being made jointly by all defendants in Cause #116542 (but for the separate use of each defendant) for use outside the Critical Groundwater Area. Additionally, a part of the water use made by PIMA is from wells within the area leased under Commercial Lease No. 906, and a part is from wells in the same general area within the Critical Groundwater Area but outside the boundaries of Commercial Lease No. 906. The interrelation of these uses and the uses made by the other defendants renders and will render the trial preparation and trial of Cause #116542 difficult and economically unfeasible unless and until the validity of the summary judgment entered by Judge Roylston is determined. The delay incident to the ordinary appeal processes is such that great and irreparable damage and harm would be done to FICO through further exhausting an irreplaceable resource and also permitting continuing trespass upon and waste of State lands and the property rights of FICO.

7. Determination of the validity of the summary judgment in favor of PIMA and the order denying summary judgment to FICO does not involve complicated facts.

The question may be stated thus: Does a lease granted by the State Land Commissioner and the State Land Department of State land lying within a Critical Groundwater Area for the purpose of permitting the lessee to construct large water withdrawal wells on such State land and to pump large quantities of groundwater from the land so leased for use outside said Critical Area contravene Arizona water law or the provisions of Section 28 of the Enabling Act and the

Arizona Constitutional and Statutory provisions implementing the trust obligations imposed by the Enabling Act?

8. The determination made by the Honorable Robert O. Roylston in granting the motion of PIMA for summary judgment as to the validity of Lease No. 906 and the use of water from the wells constructed under the provisions of said lease, and the denial by said Judge of the motion of FICO for a determination that said use was illegal and wrongful, was arbitrary and capricious in that, totally as a matter of law, the lease contract relied upon by PIMA was void and in contravention of the Enabling Act, the Arizona Constitution and Statutes and the use of the groundwater pursuant to the terms and provisions of said Commercial Lease No. 906 was unlaw and contrary to law. Accordingly, denial of FICO'S motion was for the same reason arbitrary and capricious.

WHEREFORE, Petitioner prays that a hearing be held on this Petition at a time and place to be fixed by the Court; that upon such hearing, the Court shall assume jurisdiction of the matters and things set forth in this Petition; and for such other and further relief, order and proceeding as the Court in its discretion may determine that the interests of justice require.

SNELL & WILMER

By _____
Mark Wilmer

By _____
Loren W. Counce, Jr.
Attorneys for Petitioner
3100 Valley Center
Phoenix, AZ 85073

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STATE OF ARIZONA)
) ss: AFFIDAVIT
COUNTY OF MARICOPA)

MARK WILMER, being first duly sworn, says:

Affiant is attorney for Farmers Investment Company, a corporation, the Petitioner herein, and makes this Affidavit for and on behalf of said Petitioner for the reasons (a) that Petitioner is a corporation and accordingly, this verification must be made by an agent; (b) that affiant is and has been personally familiar with the proceedings from the time this litigation was instituted, and is personally familiar with the scope of the proceedings herein, including the answers to interrogatories, depositions and similar matters, and since the factual assertions made in the foregoing Petition are based upon matters of record in this cause, including depositions, discovery, interrogatories and similar matters, he is better informed as to the matters and things set forth in said Petition than any other agent or representative of the corporation Petitioner.

Affiant has read the foregoing Petition and knows the contents thereof; the matters and things therein set forth are true and correct based upon the matters and things disclosed in the record in this cause; that the assertions with respect to the availability of the CAP water and related statements are based upon the deposition of Wesley Elwood Steiner, Jr., Executive Director of the Arizona Water Commission and also State Water Engineer, taken on September 24, 1973 in this cause, and the statements related to the available water effluent from the City of Tucson are based upon the deposition of Tucson Assistant City Manager Frank Brooks, whose responsibility is related to water and sewage matters

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of the City of Tucson; the reliability and accuracy of the matters depicted upon Exhibit A are supported by the affidavit of John R. Erickson, Civil Engineer and Hydrologist, and by the records on file in this action.

Further affiant saith not.

_____
Mark Wilmer

SWORN TO and SUBSCRIBED before me this _____ day of _____, 197___.

_____
Notary Public

My Commission Expires:

_____

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MEMORANDUM IN SUPPORT OF PETITION

ARGUMENT

Part One

We believe the material facts necessary to a decision of this matter are few. We state them as follows:

1. FICO is a farming enterprise landowner requiring groundwater for the successful growing and maturing of its crops, chiefly pecan nuts.

2. In 1954, the Sahuraita-Continental Critical Groundwater Area was duly designated by the State Land Commissioner and the State Land Department pursuant to the Arizona Groundwater Code, Section 45-301 et seq., A.R.S. This designation has continued in effect to the present time. FICO'S farms are located within this Critical Groundwater Area.

3. Subsequently, PIMA built an ore mill and developed an open pit mining operation approximately seven miles westerly from the westerly boundary of FICO'S farm and approximately two miles to the west of and outside the boundary of the Sahuarita-Continental Critical Groundwater Area, milling the open pit ore at its mill located as described.

4. On October 24, 1966, the then State Land Commissioner, as lessor, executed Commercial Lease No. 906 to PIMA as lessee, and PIMA executed the lease on December 5, 1966. PIMA thereafter entered into possession of the leased land and drilled and equipped four large water wells capable of producing 5,000 gallons per minute, and connected these wells into PIMA'S water gathering, storage and transportation system and has continuously pumped said wells and transported the water from the Critical Groundwater Area aforesaid some seven miles for use in its mining business. In 1972, PIMA pumped and transported over 3,100,000,000 gallons of water from within

the Critical Groundwater Area leased to PIMA by Commercial Lease No. 906 to its mill and mine.

On the first day of July, 1967 and the second day of December, 1968, respectively, Commercial Leases No. 907-01 and 907-02 were executed by the State Land Commissioner and PIMA, copies of which leases are annexed hereto as Exhibits C and D, for use by PIMA as tailings waste dumps. PIMA is now dumping very large quantities of tailings wastes in these areas leased to PIMA by Leases No. 907-01 and 907-02.

5. The lands which are the subject of Commercial Leases No. 906, No. 907-01 and No. 907-02 are lands which were acquired by the State of Arizona from the United States subject to the trust obligations and related provisions of Section 2s of the Enabling Act and the applicable Arizona Constitutional and Statutory provisions hereinafter set forth.

We believe the legal principles necessary to a decision are few and well-established in this jurisdiction. We state them as follows:

1. In Murphy v. State, 65 Ariz. 338, 181 P.2d 330 (1947) Justice La Prade set forth the policy and obligations assumed by Arizona when it accepted statehood and the Enabling Act as stated by Senator Beveridge in his report as Chairman of the Committee on Territories (65 Ariz. 351) here quoted in part:

> "The fourth important difference between the House and Senate bills is that the former bill has no restriction regarding the disposal of the lands granted the proposed new states, whereas the latter bill places on these lands careful and rigid, though entirely reasonable and practicable, restrictions.
>
> "The Senate bill (secs. 10 and 28) expressly declares that the lands granted and confirmed to the new states shall be held in trust, to be disposed of only as therein provided and for the several objects specified. The same trust feature is extended to the proceeds of the granted lands. Mortgages are entirely forbidden, and the

sales and leases are required to be made to the highest bidder at a public auction, after notice by advertisement, except that these formalities are dispensed with in the case of any lease for a period of five years or less.

"Appraisal is required before sale or lease, and sales or other disposition for a price less than the value so fixed or the minimum prices mentioned in the bill are forbidden, as well as transactions upon credit, unless accompanied by security."

* * *

"Transactions in contravention of the act are declared to be void, and it is made the duty of the Attorney-General to take such proceedings at law and in equity as may be necessary or appropriate to enforce the provisions relative to the application and disposition of the lands and the proceeds or funds derived therefrom."

Justice La Prade then commented upon the "ingenuity of politically ambitious men" and the many cases arising from efforts to circumvent the provisions of the New Mexico Enabling Act and concluded that in summary, these cases demonstrated "that every act of the Legislature that in any manner circumvents the plain provisions of the Enabling Act is struck down as unconstitutional and void". (Emphasis the court's).

The Court proceeded to apply the same policy and rule to Arizona's dealings with State land

The Court in Murphy was speaking of Legislative acts -- here we deal merely with administrative acts of a State official in disposing of State lands. See also: Lassen v State ex rel. Ariz. Highway Dept., 385 U.S. 458, 87 S.Ct. 584, 17 L.Ed2d 515; State Land Dept. v. Tucson Rock and Sand Co., 107 Ariz. 74, 481 P.2d 867 (1971).

2. Even though an instrument purports to be a lease and the sums stipulated to be paid be called "rent", the real

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form and effect of the transaction will be determined to be a sale if in fact this is its purpose and effect. Hervey v. Rhode Island Locomotive Co., 93 U.S. 664, 23 L.Ed. 1003 (1877).

17 Am. Jur. 2d, Sec. 269 "Contracts", states the applicable principle succinctly and clearly:

> "What a contract is styled or labeled by the parties does not determine its character or their legal relationship, nor is the name given a contract determinative in its construction. While in certain cases captions or names of contracts must be considered in order to ascertain the meaning and nature of the contract, the greater weight must be given to the operative contractual clauses of the agreement. Calling a contract a lease or a sale, for instance, will not make it a lease or a sale. It may be said, therefore, that the proper construction of a contract is not dependent upon any name given it by the parties, but upon the entire body of the contract and its legal effect as a whole."

3. Withdrawal of groundwater from a critical groundwater area and transportation of water so withdrawn for use outside the critical groundwater area contravenes the public policy of the State of Arizona as established and declared by the Arizona Groundwater Code,(Title 45, Article 7, Section 45-301, et seq., A.R.S.)

Accordingly, a lease of State land located within a critical groundwater area, designated as such pursuant to the provisions of the Arizona Groundwater Code (Title 45, Article 7, Section 45-301, et seq., A.R.S.) which in fact constitutes a sale of the groundwater of the State land so leased for removal from and use away from the State land and the critical groundwater area is void as contrary to public policy and beyond the power of the State Land Commissioner.

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4. Drilling of water wells in an area subsequent to its designation as a critical groundwater area, and withdrawal and transportation of groundwater outside of the critical area for use outside the critical area as a matter of law causes a farm owner within said area prior to the designation of the area and lawfully using groundwater for growing crops a justiciable claim against the one so transporting water for use outside the area.

As stated in Jarvis v. State Land Department, 104 Ariz. 527, 456 P.2d 385 (hereinafter for convenience Jarvis I):

> ". . . That these lands are within a Critical Ground Water Area is alone sufficient to grant petitioners the relief sought since a Critical Ground Water Area is a ground water basin or a subdivision thereof 'not having sufficient ground water to provide a reasonably safe supply for irrigation of the cultivated lands in the basin at the then current rates of withdrawal.' A.R.S. §45-301. Manifestly, a ground water area or subdivision of a basin which does not have a reasonable safe supply for the existing users can only be but further impaired by the addition of other users or uses." 104 Ariz. 530 (Emphasis added)

The Court in State ex rel. Morrison v. Anway, 87 Ariz. 206, 349 P.2d 774 stated that the doctrine of reasonable use as protected by the Groundwater Code "is a rule of property" protected by the Arizona Constitution. (Repeated in Jarvis I at 104 Ariz. 531).

5. If in fact the Lease No. 906 be considered a true lease, then the withdrawal and conveyance away from the leased premises constitutes waste, since a tenant's "right of estovers" (49 Am.Jur.2d, Sec. 259, p.274) extended only to use of products of the land, on the land and for its benefit. Any additional use constituted "waste". 93 C.J.S. 559 et seq. "Waste". (Additional legal principles may be stated in the following argument as peripherally applicable).

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Part Two

For convenience, FICO will first set out the Enabling Act, Constitutional and Statutory provisions believed applicable.

Section 28 of the Arizona Enabling Act provides, in part, as follows:

> "Sec. 28. That it is hereby declared that all lands hereby granted, including those which, having been heretofore granted to said Territory, are hereby expressly transferred and confirmed to the said State, shall be by the said State held in trust, to be disposed of in whole or in part only in manner as herein provided and for the several objects specified in the respective granting and confirmatory provisions, and that the natural products and money proceeds of any of said lands shall be subject to the same trusts as the lands producing the same.
>
> * * * * * *
>
> "No mortgage or other encumbrance of said lands, or any part thereof, shall be valid in favor of any person or for any purpose or under any circumstances whatsoever. Said lands shall not be sold or leased, in whole or in part, except to the highest bidder at a public auction to be held at the county seat of the county wherein the land to be affected, or the major portion thereof, shall lie, notice of which public auction shall first have been duly given by advertisement, which shall set forth the nature, time, and place of transaction to be had, with a full description of the lands to be offered, and be published once each week for not less than ten successive weeks in a newspaper of general circulation published regularly at the state capital, and in that newspaper of like circulation which shall then be regularly published nearest to the location of the lands so offered; nor shall any sale or contract for the sale of any timber or other natural product of such lands be made, save at the place, in the manner, and after notice by publication provided for sales and leases of the lands themselves. Nothing herein contained shall prevent: (1) the leasing of the lands referred to in this section, in such manner as the Legislature of the State of Arizona may prescribe, for grazing, agricultural, commercial, and domestic purposes, for a term of ten years or less; (2) the leasing of any of said lands, in such manner as the Legislature of the State of Arizona may prescribe, whether or not also leased for grazing and agricultural purposes, for mineral purposes, other than for the exploration, development, and production of oil, gas, and other hydrocarbon substances, for a term of twenty years or less;
>
> * * * * * *

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"All lands, leaseholds, timber and other products of land, before being offered, shall be appraised at their true value, and no sale or other disposal thereof shall be made for a consideration less than the value so ascertained, nor upon credit unless accompanied by ample security, and the legal title shall not be deemed to have passed until the consideration shall have been paid." As amended June 5, 1936, c. 517, 49 Stat. 1477.

"Every sale, lease, conveyance, or contract of or concerning any of the lands hereby granted or confirmed, or the use thereof or the natural products thereof, not made in substantial conformity with the provisions of this Act shall be null and void, any provisions of the constitution or laws of the said State to the contrary notwithstanding. ***"

Article X, Section 1 of the Arizona Constitution provides as follows:

"§ 1. Acceptance and holding of lands by state in trust

Section 1. All lands expressly transferred and confirmed to the State by the provisions of the Enabling Act approved June 20, 1910, including all lands granted to the State and all lands heretofore granted to the Territory of Arizona, and all lands otherwise acquired by the State, shall be by the State accepted and held in trust to be disposed of in whole or in part, only in manner as in the said Enabling Act and in this Constitution provided, and for the several objects specified in the respective granting and confirmatory provisions. The natural products and money proceeds of any of said lands shall be subject to the same trusts as the lands producing the same."

Article X, Section 3 provides as follows:

"§ 3. Mortgage or other encumbrance; sale or lease at public auction

Section 3. No mortgage or other encumbrance of the said lands, or any part thereof, shall be valid in favor of any person or for any purpose or under any circumstances whatsoever. Said lands shall not be sold or leased, in whole or in part, except to the highest and best bidder at a public auction to be held at the county seat of the county wherein the lands to be affected, or the major portion thereof, shall lie, notice of which public auction shall first have been duly given by advertisement, which shall set forth the nature, time and place of the transaction to be had, with a full description of the lands to be offered, and be published once each week for not less than ten successive weeks in a newspaper of general circulation

"published regularly at the state capital, and in that newspaper of like circulation which shall then be regularly published nearest to the location of the lands so offered; nor shall any sale or contract for the sale of any timber or other natural product of such lands be made, save at the place, in the manner, and after the notice by publication provided for sales and leases of the lands themselves. Nothing herein, or elsewhere in article X contained, shall prevent:

1. The leasing of any of the lands referred to in this article in such manner as the Legislature may prescribe, for grazing, agricultural, commercial and homesite purposes, for a term of ten years or less, without advertisement;

2. The leasing of any of said lands, in such manner as the Legislature may prescribe, whether or not also leased for grazing and agricultural purposes, for mineral purposes, other than for the exploration, development, and production of oil, gas and other hydrocarbon substances, for a term of twenty years or less, without advertisement; or

3. The leasing of any of said lands, whether or not also leased for other purposes, for the exploration, development, and production of oil, gas and other hydrocarbon substances on, in or under said lands for an initial term of twenty (20) years or less and as long thereafter as oil, gas or other hydrocarbon substance may be produced therefrom in paying quantities, the leases to be made in any manner, with or without advertisement, bidding, or appraisement, and under such terms and provisions, as the Legislature may prescribe, the terms and provisions to include a reservation of a royalty to the state of not less than twelve and one-half per cent of production." As amended, election Nov. 5, 1940, eff. Nov. 27, 1940; election Sept. 12, 1950, eff. Oct. 2, 1950.

Article X, Section 4 provides as follows:

"§ 4. Sale or other disposal; appraisal; minimum price; credit; passing of title

Section 4. All lands, lease-holds, timber, and other products of land, before being offered, shall be appraised at their true value, and no sale or other disposal thereof shall be made for a consideration less than the value so ascertained, nor in any case less than the minimum price hereinafter fixed, nor upon credit unless accompanied by ample security, and the legal title shall not be deemed to have passed until the consideration shall have been paid."

Article X, Section 8 provides as follows:

"S 8. Conformity of contracts with enabling act

Section 8. Every sale, lease, conveyance, or contract of or concerning any of the lands granted or confirmed, or the use thereof or the natural products thereof made to this State by the said Enabling Act, not made in substantial conformity with the provisions thereof, shall be null and void."

Section 37-101 A.R.S., Title 37 (Definitions), subparagraph 5, provides as follows:

"5. 'Commercial lands' means lands which can be used principally for business, institutional, religious, charitable, governmental or recreational purposes, or any general purpose other then agricultural, grazing, mining, oil, homesite or rights-of way."[1]

Section 37-212 A.R.S., (as amended 1959) provides in part as follows:

"B. In classifying state lands, the state land commissioner shall maintain in the offices of the land department plats, maps, or books containing the description of lands and disclosing:

1. Lands suitable for agricultural purposes.

2. Lands suitable for grazing purposes.

3. Lands suitable for commercial or homesite purposes.

4. Lands containing timber, stone, or other products which may become valuable.

5. Lands which may become agricultural lands by expenditure of a reasonable amount for the development of water thereon."

Section 37-281, A.R.S., Title 37 (pocket part) provides as follows:

---

[1]The attempted broadening by the Legislature of the term "commercial use" as found in the Enabling Act by the addition of the phrase "or any general purpose" is plainly beyond the power of the Legislature, since it deprives the narrow limitation language "commercial use" found in the Enabling Act of any real meaning.

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"S 37-281. Lease of state lands for certain purposes without advertising; term; application; prohibition of subleasing without permission

A. All state lands are subject to lease as provided in this article for a term of not more than ten years for agricultural, grazing, commercial and homesite purposes, without advertising. The leases shall be granted according to the constitution, the law, and the rules and regulations of the state land department."

Section 37-281.02, A.R.S., Title 37 (p.29 of the supplement), provides as follows:

"S 37-281.02. Lease of state lands for commercial purposes for term in excess of ten years; term; application; publication; rental

A. All state lands are subject to lease as provided in this article for a term in excess of ten years, but not more than fifty years, for commercial purposes to the highest and best bidder at public auction, which shall be conducted at the place, in the manner, and after the notice by publication provided for sales of such lands. Such leases shall only be granted within the boundaries of an incorporated city or town, or within three miles outside the boundaries of incorporated cities and towns having a population of ten thousand or less, or within five miles outside the boundaries of incorporated cities and towns having a population in excess of ten thousand. The leases shall be granted in accordance with the constitution of Arizona, state laws, and the rules and regulations of the state land department.

B. If the department determines that leasing of the land is in the best interest of the state, the tract or tracts shall be offered for lease to the highest and best bidder on the basis of a cash bonus.

C. Each offer for lease shall reserve the right in the department to reject any and all bids and to again offer the tract or tracts for lease if the bids received are not acceptable to the department.

D. Upon announcement of the successful bidder, the first year's annual rental shall be paid in cash or cashier's check. The full amount of the bonus bid must be paid within thirty days from the date of the bid. The successful bidder shall also pay the cost of the publication and reasonable expenses of the sale, and such funds shall be subject to the provisions of S 37-107.

E. Before acceptance of any bid for a lease under this section, the department shall establish to its satisfaction the responsibility of the bidder.

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F. Each lease shall be for a term in excess of ten years, but not more than fifty years, as determined by the department, and shall provide for an annual rental of not less than the appraised rental value of the land. The rental provided for in such leases shall be subject to adjustment each five-year period of the lease. The rental for the first five-year period shall be established by the department prior to call for bids.

G. All provisions of title 37 applicable to state lands and the lease thereof, not in conflict with the provisions of this section, shall apply to leasing and leases issued under this section." Added Laws 1963, Ch. 30, § 1.

A review of the foregoing statutory enactments demonstrates that the Legislature understood the term "commercial" to mean use of the surface area of the land leased for business purposes.

Such was the holding of the Court of Appeals in Columbia Investment Co. v. M.M. Sundt Const. Co., 1 Ariz. App. 124, 400 P.2d 132.

That Commercial Lease No. 906 was entered into without any advertisement or call for bids was not disputed. PIMA filed its application for the lease, it was reviewed by Louis C. Duncan, Deputy State Land Commissioner, the State Land Commissioner, and the State Land Department, and then executed as a Commercial Lease. (Deposition of Louis C. Duncan, May 31, 1973, page 5).

The affidavit filed by PIMA with its Motion for Partial Summary Judgment as to Commercial Lease No. 906 and opposing FICO'S Motion for Partial Summary Judgment adjudicating this lease to be invalid, have been summarized in Paragraph VII of the Petition and will not be reviewed in detail here. The affidavit is reproduced in the Appendix. However, paragraphs 5 and 7 of this affidavit are of importance sufficient to justify reproduction in haec verba here. Paragraph 5 reads:

"5. The water pumped from Pima wells numbers 6, 7, 8 and 9 which are on the lands leased from the State of Arizona pursuant to commercial lease number 906 is necessarily used for the processing of the ore mined from the Pima pit. This processing includes the requirement that water be used to convey tailings away from the mill. Said tailings are thus transported to Sections 9 and 10, Range 13 East, Township 17 South. These Sections are also leased from the State of Arizona pursuant to commercial lease number 907-01 and 907-02."

Paragraph 7 reads:

"7. There is more water deposited on the lands used by Pima for deposit of its tailings (commercial lease 907) than there is water taken from the lands subject to commercial lease 906. For example, in 1972, on said sections 9 and 10, there was deposited 4,991,267,000 gallons of water; there was reclaimed therefrom for further use in the processing of ore 1,256,934,000 gallons of water; there thus remained on the lands covered by commercial lease 907, 3,734,333,000 gallons of water. For 1972, the gallonage of water pumped from commercial lease 906 was 3,163,842,000."

Paragraph 7 is less than candid in its implications, and unless read in connection with paragraph 5, is misleading. These two paragraphs read together assert that PIMA has also leased two other sections of State land for ten-year terms under "commercial leases" for use as a tailings dump and that in 1972 tailings containing 4,991,267,000 gallons of water were dumped (PIMA prefers the word "deposited", but in fact the area is a tailings dump, neither more nor less) and that of this amount 1,256,934,000 gallons was reclaimed and pumped back for re-use by PIMA in its mining business. Commercial Leases 907-01 and 907-02 (Exhibits "C" and "D" hereto), each for a ten-year term, make no provision for restoration of the premises to their condition at the beginning of the term, and no provision for continued responsibility in the lessee for blowing dust and tailings or other maintenance of the dump area. In effect, the tailings dump then becomes the responsibility of the State of Arizona.

It requires a considerable amount of self-assurance to seriously assert that use of an area as a dump grounds amounts to a commercial use of the property. It may facilitate other commercial enterprises of the one dumping wastes, but it certainly does not amount to carrying on a commercial enterprise at the dump. Such use and the lease authorizing it in effect constitutes a sale of State land at a price of $400.00 per acre (without complying with the Enabling Act requirements) with two important exceptions: the land is not subject to taxation to PIMA and PIMA is freed from responsibility for maintenance and other care of the tailings dump after the lease expires. It is plain that the land will be substantially destroyed for any beneficial use and that control of dust and blowing fines from the tailings dump must then become the responsibility of the State of Arizona. It seems clear that PIMA will effectively continue to use and occupy the land into the foreseeable future, since the literally tons of tailings wastes dumped upon the property cannot be moved, but without payment of either rent or taxes.

It is also noteworthy that since Tucson has intervened claiming pollution of its groundwater supply, PIMA makes no representation that this waste water, which it states is deposited on the land, is available for use in the basin.

While we believe the reasoning expressed and conclusions reached in State Land Department v. Tucson Rock and Sand Co., 107 Ariz. 74, 481 P.2d 867 are equally applicable to this case, we recognize that we are here dealing with a fugacious substance rather than with rock and sand which has a fixed situs. In reason, however, this difference does not seem of legal consequence. In Jarvis v. State Land Department, 104 Ariz. 527, 456 P.2d 385 (hereinafter Jarvis I), this Court said:

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> "The rule that the owner of the land owns the water beneath the soil has been the continuous holding of this court for seventy five years. Howard v. Perrin, 8 Ariz. 347, 76 P. 468; McKenzie v. Moore, 20 Ariz. 1, 176 P. 568; Maricopa County Municipal Water Dist. et al. v. Southwest Cotton, supra; State ex rel Morrison v. Anway, 87 Ariz. 206, 349 P.2d 774." 104 Ariz. at 529

Certainly if the owner of land sinks a shaft and physically removes by use of a hoist a yard of earth from below the surface and sells it for any purpose, the water which is contained therein, be it saturated or relatively dry, is part of the earth sold and title passes to the purchaser with the rest of the earth. Should the rule be different if instead of sinking a shaft and using a hoist the owner drills a hole into the underground and inserts a device called a pump down the hole to the underground to drive the water as it drains into the hole from the surrounding material to the surface by use of impellers and then sells the the water?

Courts have considered the legal effect of a lease entered into for the purpose of authorizing the lessee to drill a hole into the underground and by means of a pump bring to the surface a different fugacious material, petroleum or crude oil.

In Stone v. City of Los Angeles, 299 P.838, the California Appellate Court adhered to the "oil in place" theory and said:

> "The natural and necessary effect of an oil lease coupled with the discovery of oil is the alienation of a part of the freehold. As we have observed, the oil in place is part of the realty. When it is brought to the surface it becomes personalty and a part of it is property of the lessee. Thus a sale of a part of the freehold is effected by devious and indirect means, but it is just as much a sale as though the city should

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> convey the oil in place to the oil operator who proposes to lease the premises. Such a sale is expressly prohibited by the Act granting the property to the City of Venice." 299 P. 843

This "oil in place" theory was not shared by all California Appellate Courts, and in Callahan v. Martin, 43 P.2d 788 (1935), the California Supreme Court ruled:

> ". . . But, as a development of a logical theory appropriate to the facts, the oil and gas in place doctrine, which in terms describes a grant of an interest in oil rights which is unlimited as to duration as a present transfer of a defeasible fee in definite corporeal real property, seems not to take into account the circumstance that the oil actually brought to the surface, and to which the assignee's rights attach, may be, not only the oil and gas in place beneath the surface of the assignor's land at the time of the assignment, but also oil drawn off from beneath the surface of other lands. There is a further difficulty in applying the oil and gas in place theory, which implies a present transfer of definite corporeal real property, when the operating oil lease is not of unlimited duration, or for so long as oil shall be produced in paying quantities, but for a fixed period of years which may not exhaust the oil, or when the assignment of landowner's royalty is to extend only to oil produced during a fixed period of years.
>
> "By reason of these anomalies, as the law relating to oil and gas has developed during recent years, and the relationships arising from dealings in this type of property have been analyzed more closely by the courts, the oil in place doctrine has been rejected by a large number of jurisdictions, and other theories developed, which give due recognition to the fugacious, vagrant nature of oil and other hydrocarbon substances, yet in their logical application protect oil interests as estates in real property."

* * *

"Giving full weight to this statement of the nature of the landowner's rights in oil and gas, we are of the view that an operating lessee under a lease for a term of years, or for a term of years and so long as oil shall be produced in paying quantities, has an interest or estate in real property in the nature of a profit a prendre, which is an incorporeal hereditament, and that the assignee of a royalty interest in oil rights under an assignment by the landowner also has an interest or estate in real property in the nature of an incorporeal hereditament." 43 P. 2d 791, 792

In Dabney-Johnston Oil Corporation v. Walden, 52 P.2d 237, 243 the California Supreme Court again said:

"The owner of land has the exclusive right on his land to drill for and produce oil. This right inhering in the owner by virtue of his title to the land is a valuable right which he may transfer. The right when granted is a profit a prendre, a right to remove a part of the substance of the land. A profit a prendre is an interest in real property in the nature of an incorporeal hereditament. Callahan v. Martin (Cal.Sup.) 43 P.2d 788.

"The profit a prendre, whether it is unlimited as to duration or limited to a term of years, is an estate in real property. If it is for a term of years, it is a chattel real, which is nevertheless an estate in real property, although not real property, or real estate. Callahan v. Martin, supra, 43 P.2d 788, 793. Where it is unlimited in duration, it is a freehold interest, an estate in fee, and real property or real estate. Thus, although the oil and gas in place doctrine is rejected, interests in oil rights which are estates in real property may be granted separate and apart from a grant of surface title. The grantee of the profit has a right to such possession of the surface as is necessary and convenient for the exercise of the profit, but he has no general estate in the surface."

In Wall v. Shell Oil Company, 25 Cal.Rptr. 908 (1962), the District Court of Appeal ruled (per Justice Herndon):

"It is settled law in California that the owner in fee of real property may transfer the oil and mineral rights in his property apart from his remaining general estate in the land. (Standard Oil Co., etc. v J.P. Mills Organization, 3 Cal.2d 128, 132, 43 P.2d 797; Carlson v. Lindauer, 119 Cal.App.

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> 2d 292, 302, et seq., 250 P.2d 925). The grantee or lessee of such interest acquires a profit a prendre in gross, a right to remove a part of the substance of the land. This profit a prendre vests in the transferee a present estate, an interest in land. (Callahan v. Martin, 3 Cal.2d 112, 122, 43 P.2d 788, 101 A.L.R. 371). 25 Cal.Rptr. 911 (Emphasis added)

Arizona is firmly committed to the holding that percolating groundwater is part of the soil in which it occurs. The subsidence of the earth in areas of over-pumping of groundwater reported from time to time in the public press tells us that some part of the underground is removed when groundwater is pumped to the surface and not replaced. Common sense buttresses this conclusion.

Unless we are to reject that which reason and logic requires, we must conclude that Commercial Lease No. 906 authorizes the removal and passing of title to a part of the tract of land "leased" for a price and on credit.

If we reach this conclusion, we need only recall the rigid restrictions of the Enabling Act to conclude that Judge Roylston was indeed wrong and that the lease violates the plain policy and intent of the Enabling Act.

> "Said lands shall not be sold or leased, in whole or in part, except to the highest bidder at public auction . . . "
>
> " . . . nor shall any sale or contract for the sale of any timber or other natural product of such land be made save at the place, in the manner and after notice by publication provided for sales and leases of lands themselves . . . "
>
> "Every sale, lease, conveyance, or contract of or concerning any of the lands hereby granted or confirmed, or the use thereof or the natural products thereof, not made in substantial conformity with the provisions of this Act shall be null and void, any provisions of the constitution or laws of the said State to the contrary notwithstanding . . ."

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PIMA, in the trial court, of course attempted to bring this lease within the exception contained in the Enabling Act permitting "the leasing of the lands referred to in this section, in such manner as the Legislature of the State of Arizona may prescribe, for grazing, agricultural, commercial, and domestic purposes for a term of ten years or less . . .".

This contention cannot withstand careful scrutiny.

1. The lease is not a lease; it operates as a conveyance of an interest in land. PIMA asserted in the trial court that it must be a lease since it requires the surrender of possession and the return of possession to the lessor at the end of the term. PIMA did not discuss in connection with that contention the fact that many billions of gallons of water, taken from the earth under the leased premises, would not be returned.

2. The purpose of the conveyance is not for a commercial purpose unless we are to give the term "commercial" a reading wholly foreign to the intent of the Enabling Act. It cuts athwart the prohibition against the sale of natural products of the land for if the reading PIMA would give the work "commercial" is a fair reading, then the Land Department is at liberty to "lease" timber land, land containing sand, rock and gravel, and any other natural product for the harvest and full use and disposition thereof, free of Enabling Act limitations so long as it calls the lease a "commercial" lease and limits the term thereof to "ten years or less."

If the State Land Department had described the lease in Tucson Rock and Sand as a "commercial lease" rather than a "mineral lease", would this Court have ruled in favor of Tucson Rock and Sand?

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FICO has not discussed at length the patent lack of authority of the State Land Commissioner to execute and deliver Commercial Lease No. 906 under the rationale of the Jarvis decisions for the reason we can add little to the impact of the question and the answer which must be given, unless established groundwater law and property rights resting thereon is to be upset.

If the City of Tucson, instead of purchasing privately owned land in Avra Valley for well sites for withdrawal and transportation to Tucson of groundwater from that critical groundwater area, had obtained "commercial leases" from the State Land Commissioner within which to sink its wells and from which to pump groundwater for use outside the Marana Critical Groundwater Area, would this Court have sanctioned such groundwater use by Tucson?

CONCLUSION

FICO respectfully prays:

(a) That this Court accept jurisdiction of its Petition and review the proceedings here brought forward;

(b) That upon such review it vacate the orders and judgment of Judge Boyleston and direct the entry of appropriate orders and judgment by the Court below by directing that PIMA'S Motion be denied and that FICO'S Motion be granted, with the entry of an appropriate judgment finalizing such order; and

(c) For such other and further relief as the Court may deem appropriate.

SNELL & WILMER

By _____
Mark Wilmer

By _____
Loren W. Counce, Jr.

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STATE OF ARIZONA)
) ss:
COUNTY OF MARICOPA)

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, Answer of Pima Mining Company to Special Action Petition, Brief History of Proceedings, and Memorandum in Opposition to Special Action Petition, not dated. Court of Appeals Instruments (Part One) Pages 5-77.

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

Craig B. Swick
Signature

Subscribed and sworn to before me this 12/14/2005
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