

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF PIMA

FARMERS INVESTMENT COMPANY,
a corporation,

Plaintiffs,

vs.

THE ANACONDA COMPANY, et al.,

Defendants.

No. 116542

FICO'S RESPONSE TO DEFENDANT
PIMA'S COMMERCIAL LEASE
NO. 906 PLEADINGS

The age-old device of setting up a straw man with appropriate built-in imperfections thereby predisposing the poor fellow to an untimely end at the hands of erudite counsel as employed by PIMA in its reply to FICO's Motion for Summary Judgment on Count Four and in its countering Motion for Partial Summary Judgment is best exposed and disposed of by a summary of the facts legally established, and as Justice Alfred Lockwood loved to say "a recourse to fundamental and well established legal principles."

Bits and pieces of tender beef and succulent vegetables carefully selected may be fashioned into a delicious stew but bits and pieces of statutes, constitutional provisions and court decisions taken completely out of context can generally be fashioned into arguments persuasive only to the simple or unsophisticated legal mind. PIMA has labored mightily only to achieve this usual result.

PIMA first converts FICO's assertions that the commercial lease, if in fact not truly a lease, must constitute an ouster out for the transfer of title to a material, to wit, water, ditch, but for PIMA's activities, would remain part and parcel of a piece of state land, into a FICO primary claim that the lease is a sale of mineralized land.

By this reverse alchemy by words so to speak, PIMA thereby achieves the dross of an indefensible position for FICO and wholly avoids a confrontation with the statutes and arguments discussed by FICO in its Opening Memorandum demonstrating the invalidity of the claim that a commercial lease of state land may be used to transfer title to a natural product of such land.

PIMA wholly defaults in answering FICO's argument that a commercial lease, as that term is used in the Enabling Act, the Arizona Constitution and the Arizona statutes means a lease of the surface of the land for business or other commercial activity. The Arizona cases recognize this as the purpose of a commercial lease.

Columbia Inv. Co. v. M. M. Sundt Const. Co., 1 Ariz. App. 124, 400 P.2d 132.

These facts are established of record:

FACT I

Commercial Lease 906 purports to lease a parcel of Arizona School Land to Pima Mining Company which is located within the boundaries of a Critical Groundwater Basin, for a ten year term, beginning in 1966.

FACT II

The lease expressly stated that it was for the purpose of "development of water farm from deep wells, booster pump and power substation gathering tanks, pipelines, power lines, etc." (Exhibit I to FICO's Motion) and that "The rental so fixed by the State Land Commissioner shall be due and payable annually in advance \$10.00 per acre of 1¢ per 1000 gallons of water removed, whichever is greater * * ." (Emphasis added)

FACT III

The water produced and removed (mined) from the state leased land is and at all times has been pumped several miles

to the mill and mine of PIMA outside of the critical groundwater area where it serves the customary and usual mining and milling uses.

FACT IV

PIMA has mined and removed and is currently mining and removing from the underground of this parcel of state land literally millions of gallons of groundwater daily and transporting it for use outside the critical groundwater area and for a use unrelated to any mining, milling, agricultural, commercial or other beneficial use on the leased premises.

FACT V

FICO has large, valuable, agricultural property in the critical groundwater area adjacent to PIMA's commercial leasehold No. 906 consisting of large acreage of maturing pecan trees and other agricultural crops.

PIMA ASSERTS THESE ADDITIONAL FACTS AS UNPROVEN

FACT I

FICO has not proved damage and hence has no standing to complain.^{1/}

FACT II

PIMA has "raised against FICO the defenses of laches and estoppel."

1/ When compared to the early clamor and affidavits to this effect based upon the asserted "return flow" from the tailing ponds of defendants it is conceivable that the mines may have found themselves between the proverbial "rock" of depletion of the critical groundwater basin through pumping and transporting water outside its boundaries and the "hard place" of the charge of polluting Tucson's drinking water. The resounding silence by PIMA and other defendants as to these claims of recharge to the basin from the mill effluent amounting to claims of recharge by quantities of up to 80% of the water pumped is quite amusing and instructive.

FICO'S FAILURE TO PROVE DAMAGE

There is no assertion in the rather unusual affidavit of "expert" Fox asserting in PIMA's behalf that in effect PIMA has a private aquifer that this "private aquifer" enjoyed by PIMA is outside the boundaries of the critical groundwater basin. Neither does Mr. Fox dispute that PIMA's pumps are within the area or that the water pumped comes from within the subterranean water underlying the PIMA leasehold. Likewise Mr. Fox does not assert that there is no hydrological connection between the PIMA aquifer and the critical groundwater basin. Absent such a connection the water of the entire basin responds to the usual law of hydraulics that water seeks its own level.

The legislature did not see fit to recognize the peculiar hydrological theories espoused by PIMA in legislating as to how the boundaries of a critical groundwater area should be established and by which one who claims to be improperly within a designated area may cause an amendment or alteration of the designated area to reflect such exemption. (Sections 45-308 A.R.S. et seq.). So long as the boundaries of the critical groundwater area remain intact all groundwater in the basin is subject to the conclusive presumption that it is subject to the same restrictions as all other groundwater found therein.

THE APPLICABLE LAW

Counsel for FICO relied on memory rather than a refresher reading of State Land Department v. Tucson Sand and Rock Co., 107 Ariz. 74, 481 P.2d 867 in making the statement quoted by PIMA on page 7 of its summary judgment filing. We said at page 11 of our Opening Memorandum "water is plainly not timber or other natural product of such land."

PIMA says FICO made the statement "judicially." Not so.

We made it stupidly.

In Tucson Sand and Rock, supra, our Supreme Court was dealing with the mining and removal of sand and rock under a Mineral Lease at a royalty of 5¢ per ton.

The Court first concluded that the Arizona Legislature had not historically considered sand, stone and gravel as minerals. The Court said:

"It is clear that the Arizona Legislature, almost from statehood, has construed the words of the Enabling Act, 'other products of land', as including sand, stone and gravel, and has not included sand, stone and gravel within the leasing of minerals." 107 Ariz. at 77

Our quick reading of the language of Section 28 of the Arizona Enabling Act (p. 4 FICO memo)

"* * 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"

caused us to equate "other natural product of such lands" with products similar to "timber" i.e., growing on or produced by the land. In this we were wrong. Plainly the Court construed natural product to mean "naturally occurring" or a like construction.

Certainly if sand, rock and stone is a "natural product of the land" water is equally so.

The Supreme Court then held:

"One further matter. It is to be noted that A.R.S. § 27-254, subsec. C (since amended) provides that the royalty for sand, rock and gravel shall not be more than five cents per cubic yard. Placing such a limitation upon the products of State lands is in direct contravention of the language used in § 28 of the Enabling Act, supra, and, consequently, is a breach of trust

and void. *Lassen v. Arizona ex rel. Arizona Highway Department*, 385 U.S. 458, 87 S.Ct. 584, 17 L.Ed.2d 515." 107 Ariz. at 78

There is no dispute but that the requirements of the Enabling Act were not met when this lease was awarded. There should be little dispute also that the lease is accordingly void.

FICO did not rely upon the above quoted phrase from Section 28 of the Enabling Act (and following constitutional and statutory provisions) in filing its motion and hence did not research the meaning of the phrase "or other natural products of such lands" properly.

The motion, wholly adequate under the reasoning and precedents relied upon in FICO's Opening Memorandum, now is unnecessarily (but, from FICO's viewpoint, pleasantly) buttressed.

In *Jarvis v. State Land Department*, 104 Ariz. 527, 456 P.2d 385 our Supreme Court said:

"In 1954, pursuant to the terms of the Ground Water Code, the Avra and Altar Valleys were declared critical, being included within and as a part of the Marana Critical Ground Water Area. This is an official act of a state agency, the records of which we take judicial notice. *State ex rel. Smith v. Bohannon*, 101 Ariz. 520, 421 P.2d 877. 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 use." 456 P.2d at 388

In the second *Jarvis* case, 106 Ariz. 106, 479 P.2d 169 the Supreme Court reaffirmed this holding. The Court said:

"We also pointed out in our first decision in this case that the Avra-Altar Valleys are a part of a critical water area, being included within the Marana Critical Ground Water Area. For the reason that a critical ground water area is a ground water basin or subdivision '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,' we held that additional users would necessarily deplete the supply of the existing users. Consequently, the conveyance of ground waters off the lands on which wells in the Avra Valley are located impairs the supply of the other land owners within the critical area." 479 P.2d at 172

As to the claim that PIMA "has raised the defense of laches and estoppel" we point out that (a) the conduct of PIMA constitutes a continuing trespass and wrong and hence, short of acquiring a right by adverse possession and prescription such a defense does not lie; but (b) more importantly the Supreme Court rules this defense out in Jarvis I. The Court said:

"We do not think these allegations raise an estoppel. Petitioners were sufficiently concerned to engage attorneys to meet and confer with Tucson. Thereafter, the legal rights were as apparent to Tucson as to petitioners. Silence does not operate as an estoppel where the means of knowledge is equally available to both parties. Cityco Realty Co. v. Slaysman, 160 Md. 357, 153 A. 278, 76 A.L.R. 296; Anno. 304, 310. Estoppel by silence cannot be invoked by one who knows the true character of his own title. Certainly, petitioners were under no duty to protect Tucson by advising it as to what its legal rights were. To make the silence of a party operate as an estoppel, there must have been a duty to speak. Ray v. First National Bank of Arizona, 83 Ariz. 337, 356 P.2d 691. Remaining passive and silent does not deprive a person of his legal rights. In addition there must be some act to induce or encourage another to alter his position. Grant County Deposit Bank v. Greene, 6 Cir., 200 F.2d 835." 456 P.2d at 390.

The record is clear that for about a year FICO met with the mines in attempting to find a solution to their

Water needs. There is no indication that these meetings were fruitful for FICO first, in June, 1969, served formal protest on defendants and this being unavailing, filed this suit. More significantly, even with this litigation pending PIMA has proceeded with a further expansion and has enlarged its water draft on its "water farm" on Lease No. 906.

SPECIFIC RESPONSE TO VARIOUS PIMA CLAIMS

(a) PIMA claims: "the lease must be a lease since it provides for return of possession of the land to the State October 23, 1976."

Does it also provide for a return to the state's possession of the billions of gallons of water removed by PIMA and used up by PIMA in earning millions of dollars of profit?

Somehow the argument brings to mind a picture of a "gentleman" at the circus with three shells and a pea -- or is it two -- generally utilized by said gentleman for mulcting rubes out of dollars.

(b) PIMA says: "Arizona law plainly permits leasing of land for commercial purposes for ten years or less and of lands for mineral purposes for twenty years or less."

So PIMA says, Arizona law does permit leases, even though it prohibits sales of land and its mineral leases allow for permanent removal of non-fugacious products such as metal -- hence a lease for "commercial purposes" which allows "mining" and removal of water is allowable.

Ergo, says PIMA, leases must allow extraction and removal of fugacious materials if non-fugacious materials may be removed -- otherwise "all of the outstanding mineral

leases issued by the state are illegal and void."

Even though counsel for PIMA represent Cyprus Mines, a co-owner of PIMA, and are we assume sophisticated in mining terms, we assume a temporary spell of forgetfulness in making this representation to the Court.

The Enabling Act makes specific reference to "leasing of the lands referred to in this section, in such manner as the Legislature of the State of Arizona may prescribe * * * for mineral purposes * * * for a term of twenty years or less" as exempt from the requirements of the Enabling Act for appraisal, publication of notice of sale and sale at public auction.

A "mineral lease" in mining parlance has long been recognized as conferring a right to explore for minerals in place and, if discovered, a right to mine and remove the mineral. A "mining lease" is, in a sense, a phrase of art, conferring recognized legal rights quite different from the use and occupation rights conferred by the usual lease of the surface of land.

In Gordon v. Empire Gas & Fuel Co. - 63 F.2d 487 (C.A. 5 1933) a case often cited, the Fifth Circuit Court of Appeals said:

" * * * In Stephens County v. Mid-Kansas Oil & Gas Co., 113 Tex. at page 172, 234 S.W. 290, 29 A.R.S. 566, the Supreme Court declares it makes no difference whether the instrument by its words gives the right to mine and appropriate the minerals, or demises the land with such right, or conveys the minerals. The substantial result is the same. Agreements permitting the use of the land to explore, and then if mineral is discovered giving the right to take the mineral either for a definite term or so long as it can be produced in paying quantities upon a reserved royalty, are familiar, and in legislative and judicial as well as in common speech are called mineral leases for want of a better name. They are called leases in the very cases

which hold them to convey a base fee. In Theisen v. Robison, Commissioner, 117 Tex. at page 508, 8 S.W.(2d) 646, 651, they are referred to as well known: "in legal effect, the grants authorized by the acts are not essentially different from the grant in the ordinary oil and gas lease such as was before the court in the Stephens County Case." * * * 63 F.(2d) at 489 (Emphasis added)

See also: United States v. Atomic Fuel Coal Company, 383 F.2d 1 (1967 C.A. 4) quoting with approval from Miller v. Kellerman, 228 F.Supp. 446, 459-460,

"A mineral lease is a contract which permits the lessee to explore for minerals on the lands of the lessor in consideration of certain commitments by lessee."

54 Am.Jur.2d, 301 et seq. Sec. 120 et seq. "Mines and Minerals."

PIMA'S DISCUSSION OF FICO'S CALIFORNIA CASES

This portion of PIMA's Response to FICO's Memorandum merits the full consideration permitted by a separate division of FICO's Reply. Apparently the California practice is to fail to read the Memorandum to which a response is in process of preparation. At least this is the only theory upon which PIMA's consideration of FICO's California precedents can be reconciled.

PIMA states: "Whether or not plaintiff knows it, Stone v. City of Los Angeles 299 Pac. 838, discussed by FICO at pages 12, 13, 14 of FICO's Opening Memorandum does not have much legal validity." This case was discussed and quoted from by FICO for the sole reason that it points up and discusses fully the essential differences between an oil lease and a commercial lease.

FICO follows its quotation from Stone with the citation to Callahan v. Martin, 45 F.2d 788 which PIMA quotes as robbing Stone of "legal vitality" as rejecting the "oil in place"

theory. FICO follows its citation to Callahan with a quotation from another California Supreme Court case, Dabney-Johnson Oil Corp. v. Walden, 52 P.2d 237 (1935):

" * * Plaintiff contends that by reason of the fact that we have rejected the oil and gas in place theory as applied to oil rights * * * "

The case then discusses the profit a prendre theory and states unequivocally that the right to remove oil and gas as a profit a prendre "is an estate in real property." (p. 15 FICO Opening Brief)

FICO's Opening Brief also discusses and quotes extensively from Wall v. Shell Oil Company, 25 Cal.Rptr. 908 (1963) which again repeats the holdings in Callahan and Dabney-Johnson that an oil and gas lease as a profit a prendre is an estate in real property -- an ownership of a part of the land.

So PIMA smugly concludes:

"Therefore, although plaintiff does not seem to be aware of it, its only authority for contending that an oil and gas lease constitutes a sale of land decisively has been overruled and the law is exactly to the contrary."
(p. 6, PIMA memo)

The balance of PIMA's argument wherein it preens its copper colored tresses and fingers the gold in its pocket derived from its rape of Arizona's resources and the desecration of a once beautiful valley while it speaks of the revenue the state derives from its illegal activities, the jobs provided and the taxes paid, is devoted to the thesis that FICO is simply seeking to continue its "theft" (PIMA so kindly describes the normal agricultural activities of FICO) of the critical groundwater area water. PIMA forgets that the restraint accepted by the farmers of the Upper Santa Cruz Valley by agreeing to the designation of the area as a

critical groundwater basin is one of the reasons there is water available at its present levels and that the purpose of the legislative Act was to protect the agricultural resources of the state from activities such as PIMA and the other mines are now pursuing.

So when PIMA speaks (Komadina affidavit) of the royalties paid the State of Arizona let PIMA also speak of the billions of gallons of bargain price water removed from the state lease land and the millions of pounds of copper produced and sold at sky high prices realized thereby.

Let PIMA also speak of the desecration of the landscape by the ugly scars on the skyline and the ugly piles of rubble obscuring some of these scars and the price paid by the residents of Green Valley in lost enjoyment of their retirement homes.

And when PIMA through Mr. Komadina tells us that 3,734,333,000 gallons of water were poured back upon another state lease, No. 907, let PIMA also speak of the pollution thereby caused to the entire water basin -- unless the statement that "there thus remained on the lands covered by Commercial Lease 907 3,734,333,000 gallons of water" means that PIMA, at least, has finally acknowledged that the earlier affidavit claims from the mines that 80% or thereabouts of the water taken from the valley was recharged to the basin from the tailings ponds were unjustified in fact.

Finally, PIMA wholly ignores the fact that there is another source of water the use of which would go far to conserve the dwindling groundwater resource of Pima County but which is not presently otherwise usable by others due to its high nitrate content. That resource is the Tucson city sewage plant effluent.

Despite the ready availability of this water PIMA rejects it -- even though the price of copper has escalated to double the price when the PIMA mining operation was begun -- solely because it costs more than the illegally pumped groundwater.

CONCLUSION

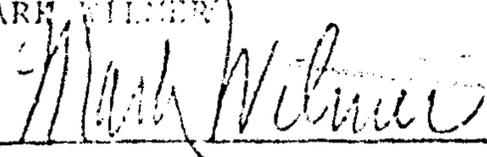
PIMA asserts need for the groundwater and emphasizes the financial benefits which will flow from its continued use by PIMA as if in the belief every man has his price.

If in fact, as FICO believes, this use of the groundwater from the critical groundwater basin is illegal, PIMA has no more right to continue taking this water than it would have to mine its ore from beneath the critical groundwater basin and from under FICO's lands and transport it up the hill to its mill if the situation was reversed and the water was on the hill and the ore in the valley. Each is equally critical to PIMA's operation -- PIMA cannot mine and mill without both ore and water.

Would the Court countenance removal of ore from beneath FICO's lands and carting it up the hill just because PIMA needs it to operate successfully?

Respectfully submitted,

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ss:

I Craig Swick hereby certify:
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That I am Reference Librarian, Law & Research Library Division of the Arizona State
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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, FICOs' Response to Defendant Pima's Commercial Lease No. 906 Pleadings from Farmer's Investment Company v. Anaconda Company, et al, Superior Court of the State of Arizona in and for the County of Pima, case no. 116542, September 4, 1973. pages 87-100.

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

Craig D. Swick
Signature

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

Etta Louise Muir
Signature, Notary Public

My commission expires 04/13/2009.
Date

