

FILED
JUL 1 1974
CLIFFORD M. WARD
CLERK SUPREME COURT

IN THE SUPREME COURT OF THE STATE OF ARIZONA

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32

FARMERS INVESTMENT COMPANY,
a corporation,

Petitioner,

v.

PIMA MINING COMPANY, a
corporation; et al.,

Respondents.

NO. 11439

MOTION FOR REHEARING
AND/OR STAY OF MANDATE

Respondent Pima Mining Company hereby moves this Honorable Court for a Rehearing of the cause and/or an Order staying the issuance of the mandate in the manner hereinafter specified. Respondent also hereby opposes the motion of Petitioner to advance the effective date of this Court's decision of June 19, 1974.

The grounds of the motion are that an immediate cessation of Respondent's rights under Commercial Lease 906 would defeat, not advance the intent and purpose of the Enabling Act. Therefore, the Court should delay the effective date of its decision so as to allow the State Land Department an interim period of time sufficient to establish the necessary procedures for extraction of water under said lands in accordance with the Enabling Act. It is estimated by that Department that 120 days is the absolute minimum amount of time required for that purpose. Therefore, Respondent suggests that 180 days is more realistic.

Any such order granting such a delay in the effective date of said decision should be conditioned upon a requirement that the compensation Pima Mining Company pays during said interim period should reflect (retroactive to the date of this Court's decision of June 19, 1974) any increase in compensation for water extraction occasioned by such new procedures having been effected.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32

Should this Court decline to so allow such a delay, Respondent respectfully requests that this Court stay the issuance of its mandate until the final disposition of an appeal or petition for writ of certiorari to the United States Supreme Court, which stay should be conditioned upon timely filing by Respondent of such a notice of appeal or petition for certiorari.

Respectfully submitted,
VERITY & SMITH
and
MUSICK, PEELER & GARRETT

By: Bruce A. Bevan, Jr.
Bruce A. Bevan, Jr.
Attorneys for Respondent
Pima Mining Company

MEMORANDUM IN SUPPORT OF MOTION

1
2
3 1. The State Land Department's Interpretation of
4 Commercial Leases.
5

6 Respondent Pima Mining Company (hereafter, "Pima") was
7 not responsible for choosing the type of lease which this Court
8 has found to be inappropriate under the Enabling Act. As the files
9 of the State Land Department and the deposition of Louis C. Duncan,
10 taken in this matter reflect (pages 18-19, 31-33; Ex. P-1), the
11 State Land Department has been issuing commercial leases for water
12 development upon State lands since 1959. As the State Land Com-
13 missioner, Mr. Bettwy, likewise testified in his such deposition
14 (page 24), historically, it has been the procedure of the State
15 Land Department to treat the sale of water as the proper subject
16 of a commercial lease where a commercial use was to be made of
17 such water.
18

19 Thus, there are and have been other off-site commercial
20 leases for water development issued to water utility companies,
21 residential subdivisions, municipal corporations as the Cities of
22 Flagstaff and Tucson, for public water utility purposes as well as
23 to individuals and to industrial corporations for industrial pur-
24 poses. (Duncan deposition, pages 29, 31-32; Ex. P-1)
25

26 This long-standing administrative construction by the
27 State Land Department would seem to stem from the 1951 amendment
28 to the Enabling Act the purpose of which was to liberalize its
29 provisions regarding, inter alia, commercial leases (Act of June 2,
30 1951, Ch. 120, 65 Stat. 51). As House Report 429, 82nd Congress,
31 First Session (1951) stated:
32

///

1 "Another restriction that has hin-
2 dered development is the provision for 10
3 weeks of detailed advertisement in two
4 newspapers at different localities. As
5 stated by the Secretary of the Interior in
6 his favorable report on an identical bill
7 in the Eighty-first Congress, upon which
8 no action could be taken because of the
9 pressure of other business, this federally
10 imposed requirement is 'often impractical,
11 unduly cumbersome, time-consuming, and
12 expensive.'

13 "These restrictions likewise have
14 hampered development of Arizona's State
15 lands for commercial, home site, grazing,
16 and agricultural purposes.

17 "The committee wholeheartedly con-
18 curs with the Secretary of the Interior in
19 believing that --
20 'the Legislature of the State of Arizona
21 could best determine what procedures would
22 be most fruitful in producing income from
23 and obtaining the maximum utilization of
24 the granted lands.'"

25
26 Thus, the determination to allow the instant water
27 development pursuant to a commercial rather than pursuant to a
28 natural product lease was in accordance with State Land Department
29 practice obviously thought by the State to conform to the intent
30 of the liberalizing 1951 amendment to the Enabling Act. This
31 choice of commercial versus product lease was not made in order
32 to afford Pima some devious, illegal advantage to the State's

1 detriment. Pima thus is hardly a guilty party who has been caught
2 misappropriating State products but instead now finds itself a
3 victim of a somewhat understandable bad guess by the State as to
4 the type of lease proper under the circumstances.

5
6 2. Effect of Immediate Cessation of Pumping Under
7 Lands Subject to Lease 906.

8
9 Pima has four wells on Lease 906, which supply a sub-
10 stantial percentage of the water necessary to process the approxi-
11 mately 60,000 tons of ore mined and milled by Pima each day.
12 This percentage varies from year to year depending on a variety
13 of conditions. In 1972, said four wells supplied 65% of the
14 total water pumped by Pima for mining and milling purposes. In
15 1973, the equivalent percentage was 36%. If the water from said
16 four wells were not available to Pima, some additional quantity
17 of water could be obtained by pumping more heavily other wells
18 of Pima. However, Pima could not obtain sufficient additional
19 water to avoid reducing substantially its mining and milling
20 operations.

21
22 Although the amount of the reduction cannot be calcu-
23 lated with precision, Pima estimates that there would be reduction
24 of approximately 33-40% in Pima's operations. The effect of such
25 a curtailment would be as follows.

26
27 Pima would terminate approximately 250 employees whose
28 average annual payroll cost to Pima is \$12,000. This payroll of
29 \$3,000,000 would be lost to the State and to its citizens. The
30 State would lose taxes upon that income and would increase its
31 welfare costs. The hardship upon the particular workers cannot
32 be measured solely in monetary terms.

1 Further, the State would lose income, sales and severance
2 taxes in proportion to Pima's curtailment. Regarding trust lands,
3 Pima leases land from the State for its mining and milling purposes
4 and pays the State royalties thereon which presently amount to
5 approximately \$1,000,000 per year. Curtailment of Pima's opera-
6 tions would cause loss of immediate enjoyment of royalties in pro-
7 portion to the curtailment. Further, the State would lose the
8 revenues presently being produced under Lease 906, which approxi-
9 mate \$2,250 per month.

10

11 3. Pima's Efforts to Comply With This Court's Decision.

12

13 Following receipt on Friday, June 21, 1974 of the deci-
14 sion, Pima's counsel called the Attorney General's office that day
15 to determine whether the Attorney General and the State Land
16 Department would be agreeable to establishing the procedures
17 necessary under the decision to effect legally a disposition of
18 the water under the lands subject to Lease 906. The Chief
19 Assistant Attorney General advised that Assistant Attorney-General
20 Gullato who was handling the matter was out of town but that the
21 Attorney General had no objection to Pima contacting the State
22 Land Department.

23

24 Accordingly, the following Monday, June 24, 1974, Mr.
25 Komadina, the General Manager of the Pima Mine, made an appoint-
26 ment with Commissioner Bettwy for the next day. Counsel for each
27 party were notified of the meeting.

28

29 On June 25, 1974 Mr. Komadina and Paul Allen, Pima's
30 president, met at 4:00 p.m. in the Land Department's offices with
31 Commissioner Bettwy, Mr. Duncan, and others of the Department, as
32 well as with Assistant Attorney General Mousel. Pima's officials

1 asked the Department what was necessary to effect a disposition
2 of the water beneath the instant State lands and how much time
3 would the appropriate procedures take.
4

5 Commissioner Bettwy stated that there was required a
6 period of ten weeks for advertising for any sale or lease of the
7 lands or its waters, plus four weeks preparation for the adver-
8 tising, plus one week for appraisal, for a total of fifteen weeks.
9 Mr. Bettwy then estimated that the absolute minimum time required
10 under the Enabling Act procedures would be sixteen (16) weeks.
11 The procedure advocated by Petitioner would involve more delay
12 as is apparent from the last paragraphs of the attached letters of
13 June 25, 1974 from Petitioner's counsel, Mark Wilmer. Therefore,
14 Pima conservatively estimates that in addition to the four months
15 minimum period of time required by the Enabling Act procedures,
16 the novelty and complexity of the matter will not allow the State
17 to accomplish the necessary within the minimum period of time.
18 Thus Pima requests a stay of the decision of June 19, 1974 for a
19 period of 180 days.
20

21 At the June 25, 1974 meeting, Commissioner Bettwy
22 suggested that it would be appropriate for Pima to file various
23 types of applications which Pima considered necessary under the
24 circumstances. On June 26, 1974, Pima made three applications
25 to the State Land Department: (1) an application to purchase
26 the instant lands; (2) an application for a product lease for
27 the waters under said lands; and (3) an application for a commer-
28 cial lease regarding the present surface, commercial facilities
29 of Pima upon said lands, as, booster pump, electric power sub-
30 stations, gathering tanks, pipelines, power lines, and other
31 surface facilities necessary to operate a water farm. Thus, Pima
32 has not delayed doing the necessary on its part to attempt to

1 comply with this Court's decision of June 19, 1974.

2

3 Finally, Pima is willing to have the 180 day stay herein
4 requested be conditioned upon Pima paying the rate of compensation
5 during said period which will be determined upon completion of the
6 required auction procedures. Consequently, the trust fund would
7 be completely protected from loss by such a condition. Thus,
8 there would be "substantial conformity" with the provisions of
9 the Enabling Act per the rule in State v. Boyd, 60 Ariz. 388,
10 138 P. 2d 284 (1943).

11

12 Therefore, Respondent Pima Mining Company urges this
13 Court to grant a Rehearing of the cause so as to order a 180 day,
14 conditional stay of the effective date of the Court's decision
15 of June 19, 1974 so that the necessary procedures under the
16 Enabling Act may be implemented by the State to effect a proper
17 disposition of the instant water.

18

19

Respectfully submitted,

20

VERITY & SMITH

and

21

MUSICK, PEELER & GARRETT

22

23

By:



24

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

25

26

27

28

29

30

31

32

LAW OFFICES

SNELL & WILMER

FRANK L. SNELL
 JOSEPH T. MCELZER, JR.
 NICHOLAS H. POWELL
 DON CORBITT
 MAYNARD R. GOODY
 FREDERICK K. STEINER, JR.
 JOHN J. BOUNA
 POLAND R. HUBB
 ARTHUR R. GREENFIELD
 H. WILLIAM FOR
 ROBERT C. HAYES
 LOREN W. DUNNELL, JR.
 THOMAS J. NEILLY
 TOM ROOP
 MICHAEL L. GALLAGHER
 GUY O. GELBRON
 JAY B. WILEY
 CHANE McLENNEN
 LAWRENCE W. WILSON
 TED J. THAYER
 PETER J. RATHWELL
 CHARLES H. BERRY

MARK WILMER
 EDWARD JACOBSON
 THOMAS E. SUNDEN
 ROGER W. PENNY (BRIW 1973)
 RICHARD SNELL
 RUPP SUITER
 STEPHEN W. CRAIG
 JOHN P. PHILLIPS
 ARTHUR C. GIBB
 RICHARD HALLERY
 JARON B. NORBERG
 JON S. COHEN
 WARREN E. PLATT
 JAMES A. HONER
 BRUCE NORTON
 R. NEIL IRWIN
 WILLIAM A. WILKS, JR.
 LAWRENCE WRIGHT
 KENT E. TURLEY
 GEORGE H. LYONS
 DANIEL J. MAULIFFE

SAC _____
 DADR _____
 Insp'g _____
 Case Ex _____
 Doc. Prep _____
 P. & R. _____
 Appr'l _____
 S. & Ex _____

Res. Mgt _____
 Forsty _____
 Movers _____
 Pcs. & H _____
 Water _____
 NRCO _____
 Prof _____
 Adm. Ser. _____

PHOENIX, ARIZONA 85001
 502-257-1200

June 25, 1974

Andrew L. Bettwy, Esq.
 State Land Department
 State Capitol Building
 Phoenix, Arizona 85001

Dear Mr. Bettwy:

Mr. Gerald Kelly of Musick, Peeler & Garrett, attorneys representing Pima Mining Company, has advised me that Mr. Paul Allen and Mr. Komadino, on behalf of Pima Mining Company, are to see you this afternoon at 4:00 in connection with the request for the adoption of a rule providing the procedure for the sale of water from State land. I assume the application will be made to you for an "emergency" rule.

As you know, we represent Farmers Investment Company which has farming interests in the immediate area of the State Lease No. 906 recently held void by the Arizona Supreme Court.

We would first bring to your attention that the Supreme Court did not hold that it was lawful for the State Land Commissioner to offer water from State land for sale. The Court specifically refused to rule on that question at this time. It merely held that to attempt utilization of a "commercial" lease which had the effect of selling water withdrawn from State land was unlawful.

The legality of a sale of water withdrawn from State land collected within a critical groundwater area for use outside of that area is, in our opinion, highly

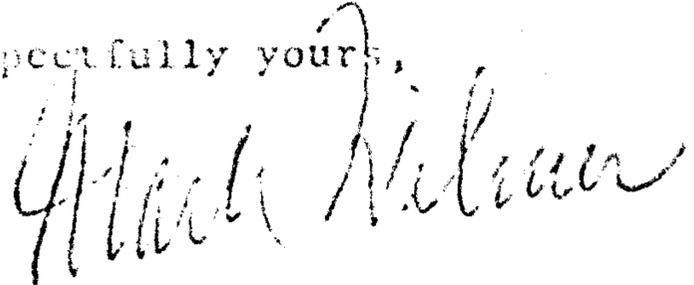
Andrew L. Bettwy, Esq.
June 25, 1974
Page Two

questionable. Certainly, rules and regulations governing as complex a subject as withdrawal and sale of water from State lands should not be resolved other than after a public hearing and certainly not on a "closed door" basis.

The court concluded that the illegality of the lease which Pima had obtained from the State Land Department prior to your succeeding to that office was apparent upon even a " cursory reading " of the Enabling Act and our Constitution. Any "emergency", therefore, can only arise from the patent illegality of the present and continuing activities of Pima Mining Company in withdrawing water from State land under the illegal State lease.

We, of course, have no objection to the adoption of appropriate rules and regulations to be available in the event a legal sale of water from state land is determined to be in the public interest by the State Land Department. We urge, however, that this should not be the result of any hurried or private discussion, but rather, should be the result of a public hearing to which all interested parties, including those interested in securing the highest return from State lands, should have an opportunity to be heard.

Respectfully yours,



MW:js
cc: Gerald Kelly, Esq.

STATE OF ARIZONA)
)
COUNTY OF MARICOPA)

ss:

I Craig Swick hereby certify:
Name

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

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

That there is on file in said Agency the following:

Microfilm of Farmer's Investment Company v. Pima Mining Company et al, Arizona Supreme Court Case No. 11439, Motion for Rehearing and/or Stay of Mandate, July 1, 1974. Pages 291-303.

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 12/12/2005
Date

Etta Louise Muir
Signature, Notary Public

My commission expires 04/13/2009
Date

