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1 MUSICK, PEELER & GARRETT
2 ATTORNEYS AT LAW
3 ONE WILSHIRE BOULEVARD
4 LOS ANGELES, CALIFORNIA 90017
5 TELEPHONE (213) 629-5322

6 Bruce A. Bevan, Jr.

7 Attorneys for Defendant
8 Pima Mining Company

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

11 FARMERS INVESTMENT COMPANY,
12 a corporation,

13 Plaintiff,

14 v.

15 THE ANACONDA COMPANY, a
16 corporation; et al.,

17 Defendants and
18 Cross-Defendants.

19 ANDREW L. BETTMY, as
20 State Land Commissioner
21 and THE STATE LAND
22 DEPARTMENT, a department
23 of the State of Arizona,

24 Defendants and
25 Cross-Claimants.

NO. 116542

SUPPLEMENTAL MEMORANDUM
OF PIMA MINING COMPANY

26 Pursuant to leave of Court granted September 10, 1973
27 Pima Mining Company ("Pima") hereby supplements its previous
28 memoranda and oral argument.

29 1. The Enabling Act.

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

1 Our first contention is that water is not a natural
2 product of the trust lands nor of any other lands. The last we
3 heard, water falls from the heavens. In contrast to minerals,
4 rock and hydrocarbons, water is not produced as a product
5 of land but simply percolates through land after its descent.
6

7 If our first contention be incorrect, we next contend
8 that the Enabling Act was intended to and does exempt from its
9 proscription the depletion of the natural products of trust
10 lands if used for "grazing, agricultural, commercial and domestic
11 purposes [and] for mineral purposes . . ."
12

13 What was the purpose of these exemptive provisions of
14 the Enabling Act? The purpose presumably was not to state the
15 obvious, that is to say that leases not in conflict with the
16 prohibitory provisions of the Act were not in conflict therewith.
17 Instead, the obvious purpose must have been to *exempt* certain types
18 of leases which *otherwise* would have conflicted with the prohibi-
19 tory provisions of the Act.
20

21 If so, which prohibitory provisions of the Act were
22 intended to be the subject of the lease exemptions? There are
23 only two prohibitions. The first is against sale of the land.
24 Obviously the lease exemptions do not authorize a sale of the land.
25 Nor would such an "exemption" be necessary to make it clear that
26 a lease of land was not a prohibited "sale" thereof (FICO's argu-
27 ment to the contrary notwithstanding).
28

29 The only other prohibition in the Enabling Act is against
30 sale, without advertisement and auction, of the "natural products"
31 of trust lands. Thus, if the exemptive lease provisions of the
32 Act have any meaningful utility, it is to exempt leases for cer-

1 tain purposes from the restrictions against sale from trust lands
2 of their natural products.

3

4 Only construed in this way is the Enabling Act harmoni-
5 ous. Thus, the Act intends and authorizes depletion of water
6 (arguendo, a "natural product" of trust lands) for "grazing,"
7 "agricultural" and "domestic purposes." Similarly, the Act
8 intends and authorizes depletion and sale of natural products
9 such as minerals [ARS 27-234, 235] without such being subject
10 to the restrictions of the Act.

11

12 Similarly, if water is used for a "commercial purpose"
13 pursuant to a lease of ten years or less, such also is exempted
14 from the advertisement and auction requirements of the Act.

15

16 Only by construing the exemptive lease provisions as
17 authorizing depletion of "natural products" of trust lands can
18 absurdity in the construction of the Enabling Act be avoided.
19 Absent such a construction, the sale of mineral natural products
20 of trust lands per mineral leases [ARS 27-234, 235] would violate
21 the Act. Absent such a construction, so would depletion of water
22 for grazing, agricultural and domestic purposes.

23

24 Therefore, the depletion of water for "commercial pur-
25 poses" likewise is exempted by the specific, express provisions
26 of the Enabling Act. Were this not true, there simply would have
27 been no reason for this exemption.

28

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

1 Consequently, the exemptive provisions of the Enabling
2 Act apply and its prohibitory provisions do not.

3
4 2. The Transportation Off the Land Issue.

5
6 FICO repeatedly mentions that Pima transports (albeit
7 temporarily) water away from lands within the Critical Ground-
8 water Area. Such does not violate the Enabling Act. Sale of
9 minerals and their shipment away from trust lands is expressly
10 authorized per ARS 27-234, 235. Similarly, there is nothing in
11 the Enabling Act which requires water of trust land leased per
12 Commercial Leases to be put to commercial use on that land itself.
13 Otherwise, rather interesting questions would arise concerning
14 water put to use for grazing cattle, for aspirating agriculture
15 and for thirsty domestics.

16
17 However, FICO also contends that its requirements for
18 proving damage have been met, per Jarvis v. City of Tucson, by the
19 removal from Lease 906 lands, within a Critical Groundwater Area,
20 of water for temporary use outside the Area. Even if such a
21 fleeting removal constituted a showing of damage to FICO, it is
22 only a prima facie and not a conclusive showing. Pima has raised
23 an issue of fact on this point by the Fox Affidavit which is to
24 the effect that there is no hydraulic continuity between the wells
25 on Lease 906 and those of FICO. Thus, contrary to the situation
26 in Jarvis, there is contrary evidence rebutting plaintiff's prima
27 facie-showing.

28
29 Moreover, as the files of even this action reflect, in
30 1971 FICO made the very same claims in the Arizona Supreme Court
31 that it is making now. Then, FICO claimed that Lease 906 was
32 invalid and that all of Pima's pumping was a violation of the

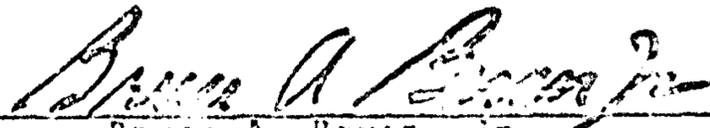
1 reasonable use doctrine since water was being removed from a cri-
2 tical groundwater area. FICO asked the Supreme Court to avoid a
3 lengthy, unnecessary trial if its claims were correct. Pima
4 contended they were incorrect and presented to that Court the Fox
5 Affidavit.

6
7 The Supreme Court answered FICO by refusing to grant
8 FICO's petition for an injunction against Pima and against the
9 State Land Department. We can only infer therefrom that the
10 Court did not share FICO's simplistic view of this case.

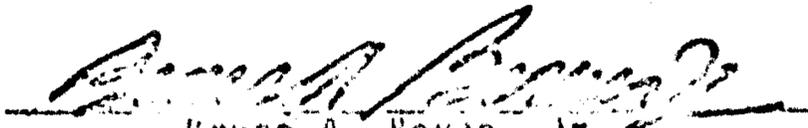
11
12 To conclude, we submit that FICO's Count 4 is not well
13 founded and that summary judgment thereon in favor of Pima should
14 be granted.

15
16 Respectfully submitted,

17 MUSICK, PEELER & GARRETT
18 and VERITY & SMITH

19 By: 
20 Bruce A. Bevan, Jr.
21 Attorneys for Defendant
22 Pima Mining Company

23
24
25 A copy of the foregoing SUPPLEMENTAL MEMORANDUM OF PIMA
26 MINING COMPANY was served by mail this 11th day of September,
27 1973 upon all counsel of record and Judge Roylston.

28
29
30 
31 Bruce A. Bevan, Jr.
32

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, Supplemental Memorandum of Pima Mining Company, 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 11, 1973.

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

