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IN THE COURT OF APPEALS

STATE OF ARIZONA

DIVISION TWO

FARMERS INVESTMENT COMPANY, a corporation, Appellant, vs. ANDREW L. BETTWY, as State Land Commissioner and THE STATE LAND DEPARTMENT, a department of the State of Arizona and PIMA MINING COMPANY, a corporation, Appellees.	2 CA-CIV 1645 Pima County Superior Court No. 116542

11439-2

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BY

ABSTRACT OF RECORD ON APPEAL
Volume I
Pages 1 to 85

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(114)

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TABLE OF CONTENTS

Volume I	Page
Amendment to Amended Complaint by Adding Count Four Filed: (not dated or file stamped)	1
Copy of Commercial Lease No. 306, attachment	7
Acceptance of Service and Consent to Amendment of Pleadings Filed: January 27, 1972	7
Answer of Pima Mining Company to Count Four of Amended Complaint Filed: April 10, 1972	10
Motion to Compel Discovery Against Defendants Duval Corporation and Duval Sierrita Corporation Filed: June 13, 1972	14
Motion to Compel Discovery Filed: June 13, 1972	21
Motion for Partial Summary Judgment as to Commercial Lease No. 306 Filed: June 18, 1973	30
Minute Entry (continuance) Dated: June 29, 1973	65

TABLE OF CONTENTS

Volume I	Page
Defendant's Motion for Partial Summary Judgment re Commercial Lease No. [illegible]	66
Affidavit in Support of Defendant's Motion for Partial Summary Judgment	
Memorandum in Support of Defendant's Motion for Partial Summary Judgment and in Opposition to Plaintiff's Motion for Partial Summary Judgment Filed: August 23, 1973	
Affidavit of George L. Komadina	82

TABLE OF CONTENTS

Volume II	Page
Duval's Motion for Leave to File Written Memorandum and Present Oral Argument and Memorandum Filed: September 4, 1973	86
FICO's Response to Defendant Pima's Commercial Lease No. 906 Pleadings Filed: September 5, 1973	94
FICO's Response to Duval's Motion for Leave to File Memorandum and Argue Filed: September 6, 1973	119
Pima's Reply to FICO's Response to Pima's Summary Judgment Motion Filed: September 10, 1973	122
Motion of American Smelting and Refining Company to File Written Memorandum and Present Oral Argument Filed: September 10, 1973	127
Response to Motion of American Smelting and Refining Company for Leave to File Written Memorandum and Present Oral Argument Filed: September 10, 1973	130

TABLE OF CONTENTS

Volume II	Page
Designation of Contents of Record on Appeal Filed: January 30, 1974	170
Appellee's Designation of Additional Contents of Record on Appeal Filed: February 8, 1974	173
Amendment to Appellee's Designation of Additional Contents of Record on Appeal Filed: March 13, 1974	178

SUPERIOR COURT OF ARIZONA

PIMA COUNTY

FARMERS INVESTMENT COMPANY, a corporation, Plaintiff, vs. ANDREW L. BETTWY, as State Land Commissioner and THE STATE LAND DEPARTMENT, a department of the State of Arizona and PIMA MINING COMPANY, a corporation, Defendants.	No. 116542

ABSTRACT OF RECORD ON APPEAL

Mark Wilmer, Esquire
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3100 Valley Center
243 North Central Avenue
Phoenix, Arizona 85073
Attorneys for Plaintiff

* * *

(TITLE OF ACTION)

AMENDMENT TO AMENDED
COMPLAINT BY ADDING
COUNT FOUR

Filed: (not dated or
file stamped)

COUNT FOUR

I

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

II

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

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

III

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

IV

On December 5, 1966, the State Land Department, acting through its predecessor State Land Commissioner, upon application of Pima Mining Company, issues to

said company Commercial Lease No. 906 leasing to Pima Mining Company Lots 1 and 2 and the South one-half, North one-quarter and Southeast one-quarter of Section 2, Township 17 North, Range 13 East, Pima County, constituting all of Section 2, all within the critical groundwater area aforesaid. A copy of this lease is hereto attached as Exhibit I. Pima Mining Company has constructed four large irrigation type water wells within said leased area and has pumped and is now pumping large quantities of groundwater from the groundwater supply subjacent to said state land and transporting the same for use outside of the Sahuarita-Continental Groundwater Area.

V

Plaintiff protested the pumping of groundwater in the critical groundwater area and the transportation of the water so withdrawn for use outside of the

critical area by Pima Mining Company informally prior to June, 1969, and formally June, 1969 and continuing thereafter and demanded that such illegal use be terminated.

VI

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

VII

While defendants State Land Department and Andrew L. Bettwy as State Land Commissioner have considered the protests of plaintiff with respect to the granting of the aforesaid Commercial Lease and the withdrawal of large amounts of water through the wells constructed within the boundaries of said Commercial Lease, said Andrew L. Bettwy and the State Land Department have permitted said unlawful use

by Pima Mining Company to continue but have stated a willingness to cancel said leases in the event of a judicial determination that the same constitutes an unlawful and wrongful exercise of the powers of the State Land Department and of the State Land Commissioner.

VIII

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

of Arizona.

IX

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

WHEREFORE, plaintiff prays that judgment be entered herein finding and declaring that the aforesaid Commercial Lease No. 906 is an invalid and void lease and that the actions of Pima Mining Company in withdrawing water from the state lands the subject of said lease constitute waste and a wrongful and illegal act as to plaintiff herein; for an injunction restraining and enjoing (sic) further trespasses by reason of the use of said Commercial Lease 906; for an order directing the said Andrew L. Bettwy as State Land Commissioner and the State Land Department to cancel said lease and to take appropriate action to prevent further breach of trust on the part of any utilization of said Commercial Lease No. 906

and the withdrawal of groundwater thereunder for purposes not beneficial to the use of the aforesaid land; and for such other and further relief as may be appropriate.

(Signed SNELL & WILMER, by Roger W. Perry and Mark Wilmer, Attorneys for Plaintiff)

(Copy of Commercial Lease No. 906 attachment to Amendment to Amended Complaint by Adding Count Four is incorporated by reference thereto)

* * *

(TITLE OF ACTION)

ACCEPTANCE OF SERVICE
AND CONSENT TO AMENDMENT
OF PLEADINGS

Filed: January 27, 1972

The undersigned, ANDREW L. BETTWY, State Land Commissioner of the State of Arizona, and the STATE LAND DEPARTMENT,

a department of the State of Arizona, hereby consent that the Motion of Pima Mining Company to Bring in an Additional Party Defendant, dated approximately the 23rd day of December, 1971, may be granted and that the undersigned, ANDREW L. BETTWY as State Land Commissioner and the STATE LAND DEPARTMENT, a department of the State of Arizona, may be added as parties defendant in the above entitled and numbered litigation.

The undersigned, ANDREW L. BETTWY, as State Land Commissioner and the STATE LAND DEPARTMENT, a department of the State of Arizona, consent that the pleadings of the plaintiff in said cause may be amended by the addition thereto of a Count Four to the pleadings now on file with the Court, which poses for judicial determination the validity of a lease agreement issued by the State Land Department dated December 5, 1966 to Pima Mining Company,

being Commercial Lease No. 906 whereby there was leased to Pima Mining Company Lots 1 and 2 and the South One-half, North One Quarter and Southeast One Quarter of Section 2, Township 17 South, Range 13 East, Pima County, a copy of which lease is attached to the said Count Four.

In this connection the said Andrew L. Bettwy as State Land Commissioner and the State Land Department respectfully show the Court that there is presently pending before the State Land Commissioner and the State Land Department a proceeding having for its purpose the determination of the validity of the aforementioned Commercial Lease and that the State Land Commissioner and the State Land Department believe the matter can best be resolved by a court rather than in the administrative hearing before the State Land Department and the State Land Commissioner.

Accordingly the said Andrew L. Bettwy and the State Land Department consent as aforesaid and hereby enter their appearance in the above entitled and numbered cause as defendants therein.

DATED January 26, 1972.

(Signed ANDREW L. BETTWY, as State Land Commissioner and on behalf of the State Land Department, a department of the State of Arizona)

* * *

(TITLE OF ACTION)

ANSWER OF PIMA MINING COMPANY TO COUNT FOUR OF AMENDED COMPLAINT

Filed: April 10, 1972

Defendant, PIMA MINING COMPANY, answers Count Four of the Amended Complaint as follows:

1. Answering paragraph I, incorporates by reference its answer to paragraph I of Count Two of the Amended

Complaint.

2. Answering paragraph II, admits that it is a corporation doing business in Pima County, Arizona; admits that the State Land Department is a department of the State of Arizona and that Andrew L. Bettwy is its Commissioner and admits that the Department and its Commissioner have the power and duties invested in them by law; except as so admitted denies the allegations thereof.

3. Answering paragraph II, incorporates by reference its answers to paragraphs III, IV and V of Count Two of the Amended Complaint.

4. Answering paragraph IV, admits the allegations contained in the first two sentences thereof; admits that it has constructed four industrial wells within said leased area which pump large quantities of groundwater; except as so admitted, denies the allegations thereof.

5. Answering paragraph V, defendant admits the allegations thereof except denies that plaintiff made reference to use by defendant outside of said critical area in any protest which preceded the filing of the above action on November 24, 1969.

6. Answering paragraph VI, admits that the lands leased by said Commercial Lease No. 906 are within the Sahuarita-Continental Groundwater Area; except as so admitted, denies the allegations thereof.

7. Answering paragraph VII, defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations thereof and therefore denies said allegations, except admits that the Commissioner and the Department have continued to allow defendant to exercise its rights under said Commercial Lease.

8. Answering paragraph VIII, denies the allegations thereof.

9. Answering paragraph IX, denies the allegations thereof.

AFFIRMATIVE DEFENSES TO COUNT FOUR

10. Defendant incorporates by reference as separate and distinct affirmative defenses to Count Four the First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, Eleventh and Thirteenth Affirmative Defenses set forth in its Answer to the Amended Complaint.

WHEREFORE, defendant, PIMA MINING COMPANY, prays as follows:

1. That plaintiff take nothing by its Amended Complaint.

2. That defendant be awarded its costs of suit.

3. For such other and further relief as this Court may deem proper.

(Signed VERITY & SMITH and
MUSICK, PEELER & GARRETT,
By Bruce A. Bevan, Jr.,
Attorneys for Defendant
Pima Mining Company)

(Verified by DAVID P. EVANS,
Secretary of Pima Mining
Company, before a Notary
Public on April 6, 1972)

* * *

(TITLE OF ACTION)

MOTION TO COMPEL DISCOVERY
AGAINST DEFENDANTS DUVAL
CORPORATION AND DUVAL
SIERRITA CORPORATION

Filed: June 13, 1972

Plaintiff, FARMERS INVESTMENT COMPANY, pursuant to Rule 37 (a) (2) of the Arizona Rules of Civil Procedure, moves that this Court enter its order compelling defendants DUVAL CORPORATION and DUVAL SIERRITA CORPORATION to designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, to appear at a

properly noticed deposition and testify as to matters known or reasonably available to the organization as required by Rule 30 (b) (6) of the Arizona Rules of Civil Procedure as Amended.

DATED this 12 day of June, 1972.

(Signed SNELL & WILMER, by J. Michael Hennigan, Attorneys for Plaintiff)

MEMORANDUM

I

On May 24, 1972, plaintiff notified defendants, Duval Corporation and Duval Sierrita Corporation (hereinafter referred to as defendants) that their deposition would be taken on May 30, 1972, and in that Notice plaintiff designated with reasonable particularity the matters upon which the examination was to be conducted.

On the date and time specifi[illegible] the examination the attorneys for defendants

appeared with Mr. Ben Messer, a Vice President of Duval. During the course of the interrogation it was revealed that Mr. Messer was considered to be the single person most knowledgeable upon the subject matter set forth in the Notice for Deposition, but that no attempt had been made to gather corporate knowledge or information beyond that personally possessed by Mr. Messer. (See Deposition transcript of Ben G. Messer, P. 49). Consequently, although in many instances Mr. Messer stated that he was able to speak for the corporation, in many other instances he stated that he could testify only as to his personal knowledge and did not know the extent of other information available within the corporate structure.

In all instances, Mr. Messer, on advice of counsel, refused to testify as to information which came into his possession as a result of conversations or

communications with experts retained especially for the litigation.

In speaking to the procedure for deposing a corporation, the language of Rule 30 is plain and unambiguous:

> The organization so named shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which he will testify. <u>The persons so designated shall testify as to matters known or reasonably available to the organization.</u> (Ariz. Rules Civ. Pro. 30 (b) (6)). (Emphasis added)

If, through some tortured construction of that language some ambiguity remains, it should be resolved by the following language from the Federal Advisory Committee responsible for drafting the amended rule:

> The new procedure should be viewed as an added facility for discovery, one which may be advantageous to both sides as well as an improvement in the deposition process. It will

reduce the difficulties now encountered in determining, prior to the taking of a deposition, whether a particular employee or agent is a "managing agent." See Note, Discovery Against Corporations Under the Federal Rules, 47 Iowa L. Rev. 1006-1016 (1962). It will curb the "bandying" by which officers or managing agents of a corporation are deposed in turn but each disclaims knowledge or facts that are clearly known to persons in the organization and thereby to it. Cf. Haney v. Woodward & Lothrop, Inc., 330 F. 2d 940, 944, (4th Cir. 1964). The provision should also assist organizations which find that an unnecessarily large number of their officers and agents are being deposed by a party uncertain of who in the organization has knowledge. Some courts have held that under the existing rules a corporation should not be burdened with choosing which person is to appear for it. E.g., United States v. Gahagan Dredging Corp., 24 F. R. D. 328, 329 (S.D.N.Y. 1958). This burden is not essentially different from that of answering interrogatories under Rule 33, and is in any case lighter than that of an examining party ignorant of who in the corporation has knowledge. (48 F. R. D. 515 (1970)). (Emphasis added)

I I

Costs and Attorneys' Fees

Absent a finding that defendants' failure to appear as required by Rule 30 was "substantially justified," or that "other circumstances make an award of expenses unjust," this Court is obligated to require defendants to pay the reasonable expenses, including attorneys' fees, caused by the failure. Rule 37 (d) is specific:

> In lieu of any order or in addition thereto, the court shall require the party failing to act or the attorney advising him or both to pay the reasonable expenses, including attorneys' fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

It is respectfully submitted that no such circumstances exist in this case as would preclude the imposition of expenses and attorneys' fees.

WHEREFORE, plaintiff FARMERS INVESTMENT COMPANY, respectfully requests that this Court enter its Order:

1. Requiring defendants to appear pursuant to a proper notice, with a properly designated person to testify as to facts known to the corporations or which are reasonably obtainable by them;

2. Requiring defendants to pay plaintiff's reasonable expenses and attorneys' fees incurred as a result of their failure to comply with the mandate of Rule 30 of the Arizona Rules of Civil Procedure; and

3. For such other and further relief as the Court may deem just in the premises.

(Signed SNELL & WILMER, by J. Michael Hennigan, Attorneys for Plaintiff)

* * *

(TITLE OF ACTION)

MOTION TO COMPEL DISCOVERY

Filed: June 13, 1972

Plaintiff, FARMERS INVESTMENT COMPANY, pursuant to Rule 37 (a) (2) of the Arizona Rules of Civil Procedure, moves that this Court enter its Order compelling each defendant in the above-named action to respond in detail to Interrogatory No. 1 of plaintiff's Additional Interrogatories to Defendants, dated June 24, 1971.

In addition, for the reasons set forth in the attached Memorandum of Points and Authorities, plaintiff requests that this Court enter its Order permitting further discovery of the opinions held by each expert expected to testify at the trial of this matter and of the facts upon which such opinions are based.

Pursuant to Rule 37 (a) (4) of the

Arizona Rules of Civil Procedure, plaintiff urges that upon the granting of this Motion, the Court award plaintiff its reasonable expenses incurred in obtaining this Order, including reasonable attorneys' fees.

DATED this 12 day of June, 1972.

(Signed SNELL & WILMER, by J. Michael Hennigan, Attorneys for Plaintiff)

MEMORANDUM OF POINTS AND AUTHORITIES

I. Introduction

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

II. Interrogatories

Rule 26 (b) (4) (A) (i) provides in pertinent part:

> A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify

and a summary of the grounds for each opinion.

In elaborating upon the reasons for permitting expert discovery, the Federal Advisory Committee stated in pertinent part:

> In cases of this character, a prohibition against discovery of information held by expert witnesses produces in acute form the very evils that discovery has been created to prevent. Effective cross-examination of an expert witness requires advance preparation. The lawyer even with the help of his own experts frequently cannot anticipate the particular approach his adversary's expert will take or the data on which he will base his judgment on the stand. (48 F. R. D. 487, 503 (1970)).

Reading amended Rule 26 together with the advisory committee notes it must be concluded that a party is permitted, through interrogatories, to discover enough detailed data to enable him to effectively cross-examine his opponent's expert witnesses. In seeking such data,

plaintiff, on June 24, 1971, submitted interrogatories to each defendant requesting the information outlined by amended Rule 26 (b) (4).

Each defendant responded to those requests with names and addresses of probable expert witnesses together with a statement of the general subject matter upon which each was to testify. This is not to say that each defendant was equally deficient in his response. As can be observed from the copies of the responses attached hereto, the responses varied considerably in quality and detail. However, no defendant replied with sufficient detail or comprehensiveness so as to comply with the letter and spirit of the Rule.

Despite the obvious inadequacies of those responses, plaintiff chose not to seek an order to compel discovery at that time. This, in part, was the result

of a sense of compassion. The detail [illegible]

[illegible] adequately respond to such

interrogatories in this case presents a

formidable task for any of the parties.

Rather, plaintiff sought similar infor-

mation through less burdensome means.

III. Documentary Discovery

Although Rule 26 (b) (4) provides

that a court order is required for

"further discovery by other means" of

expert opinions and data, the State Bar

Committee's note to the Arizona revision

of Rule 26 (b) makes it clear that the

motion ordinarily should be unnecessary.

Indeed, the State Bar Committee in its

note stated, in pertinent part:

> "It is intended as the [illegible] direction that the motion shall be [illegible] perfunctory, and that it will be automatically [illegible] having the [illegible] exception [illegible] are unable [illegible] (16 Ariz. Rev. Stat. Sup. [illegible])

Seeking to avoid a motion, on March 3, 1972, plaintiff submitted requests for documents pursuant to Ariz. R. Civ. Pro. 34 in order to discover substantially that information regarding expert testimony and witnesses which previously had been sought unsuccessfully through interrogatories.

Although each defendant found the requests objectionable on several grounds, the principal objection was that the requests sought information compiled by experts in anticipation of the present litigation.

Thereafter, on May 18, 1972, plaintiff sought informally by letter to obtain the required expert information from each defendant. Although responses to those requests have not yet been received from all defendants, preliminary indications from defendants Pima and Duval indicate an unwillingness to cooperate

informally. Consequently, it appears a Court Order will be required.

IV. Conclusion

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 to 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 the expert material must begin immediately.

Consequently, plaintiff respectfully requests that this Court enter its Order compelling each defendant to comply with requests by plaintiff for information

which has been compiled by defendants' experts in anticipation of the present litigation, whether those requests come in the form of interrogatories, requests for the production of documents, requests for admissions, depositions, or other discovery. In addition, plaintiff respectfully requests that this Court enter its Order compelling each defendant to respond in detail to plaintiff's interrogatory number one submitted on June 24, 1971, and to award reasonable costs and attorneys' fees in conjunction with that order.

DATED this 12 day of June, 1972.

(Signed SNELL & WILMER, by J. Michael Hennigan, Attorneys for Plaintiff)

TITLE OF ACTION

MOTION FOR PARTIAL
SUMMARY JUDGMENT AS
TO COMMERCIAL LEASE
NO. [illegible]

Filed: June 28, 1973

Plaintiff, FARMERS INVESTMENT COM-
PANY, a corporation, (hereinafter desig-
nated as "FICO") moves the Court for an
order granting a summary judgment in favor
of FICO and against the defendants in
Count Four of plaintiff's Amended Com-
plaint adjudging and determining
Commercial Lease No. [illegible] de[illegible]
identified in said Count Four
tiff's Complaint as amended
and void, and enjoining [illegible]

[illegible]PANY [illegible]

on said state lands and enjoining further removal of ground water from said state school land through use of the state land rights of way granted to PIMA as described in Paragraph VII of Count Two of FICO's Complaint as amended, or otherwise; together with such other and further relief as the Court may deem appropriate.

This motion is based upon the records and files of this cause, the exhibits and affidavits annexed hereto, and the Memorandum following.

(Signed SNELL & WILMER, by Mark Wilmer, Attorneys for Plaintiff)

MEMORANDUM IN SUPPORT OF MOTION

Factual Matters

(Affidavit - Exhibit II)

1. On October 24, 1966, the State Land Commissioner executed State Land Department "Commercial Lease" No. 906. Pima Mining Company executed this instrument as Lessee December 5, 1966. A copy is annexed hereto as Exhibit I.

2. This lease is for a period ending October 23, 1976 and expressly states " * * that this lease is issued for the purpose of: development of water farm from deep wells, booster pump and power substation, gathering tanks, pipelines, power lines, etc."

3. The stated rental is fixed at "$10.00 per acre or 1¢ per 1000 gallons water removed, whichever is greater, for Lots 1 and 2; S2NE. $1.00 per acre of (sic) 1¢ per 1000 gallons water removed, whichever is greater, for the SE."

4. Pima Mining Company has caused four deep water wells of approximately 5000 gallons per minute capacity to be drilled and constructed on said state school land and has installed large pumps therein, has constructed power lines, pipe lines, storage tanks, booster pumps and other equipment and paraphernalia necessary to enable Pima Mining Company to pump many thousand acre feet of ground water annually from the ground water supply subjacent to the surface of said state land and has caused and is presently causing the ground water supply a part of said state land to be mined therefrom, stored and transported away from said land. This ground water pumped from the ground water which is a part of the said tract of state school land is not put to any beneficial or other use on said state land but is transported away from and put to uses unconnected with said

state land.

5. The Sahuarita-Continental Critical Groundwater Area was designated as a critical groundwater area by the State Land Commissioner and the State Land Department pursuant to the provisions of Article 7, Chapter 1, State Water Code, as amended (Sections 45-301 et seq. ARS) generally referred to as the Ground Water Code, on October 14, 1954, which designation remains in full force and effect to the date hereof. The area lies south of Tucson, Arizona and in what is commonly referred to as the Upper Santa Cruz Basin.

6. FICO now owns and at the time said Critical Groundwater Area was designated it owned agricultural land in the aforesaid Critical Groundwater Area which it then had farmed and is presently farming to various crops, mostly as a pecan orchard. A substantial part of said acreage is contiguous to and in the general area of the

state school land embraced within the terms of said Commercial Lease 906. FICO relies upon and requires the use of ground water of the area for the irrigation of its crops.

7. The state land the subject of said Commercial Lease at the time said Sahuarita-Continental Critical Groundwater Area was designated and to the present time is a part of and within said Critical Groundwater Area and the uses which Pima Mining Company has made and now makes of the ground water withdrawn from said state land is in connection with its mining and milling of copper ore at its mine and mill located approximately four miles westerly from the lands the subject of Lease 906.

Matters of Law

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 of [sic] 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;

* * * * * * *

"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 Con-
stitution 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
orders as the lands producing
the same."

Article X, Section 3 provides as
follows:

"3. Mortgage or other encum-
brance, sale or lease at
public auction.

Section 3. No mortgage
or other encumbrance of the
said lands, or any part there-
of, 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 high-
est 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 auc-
tion shall first have been duly
given by advertisement, which
shall set forth the nature,
time and place of such transac-
tion, and a full and
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 procured 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. October 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:

> "§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, nor made in substantial conformity with the provisions hereof, shall be null and void."

Section 37-101 ARS, 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 than agricultural, grazing, mining, oil, homesite or rights-of-way."

Section 37-212 (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, Title 37 (Pocket Part)

provides as follows:

"§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, Title 37 (p. 26 of the supplement) provides as follows:

"§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 §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.

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. 36, §1.

There has been little debate in Arizona as to the purpose and effectiveness of the Enabling Act since Murphy v. State, 65 Ariz. 338, 181 P. 2d 336 (1947). Any legislative Act and any state action which contravenes its express provisions is a breach of trust and void.

Lassen v. State ex rel. Ariz. Highway Dept., 385 U.S. 458, 87 S. Ct. 584, 17 L. Ed. 2d 515; State Land Department v. Tucson Rock and Sand Co., 107 Ariz. 74, 481 P. 2d 867

Ground water in Arizona is a part of the soil owned (subject to the reasonable use doctrine) by the owner of the soil. In the first Jarvis case, 104 Ariz. 527, 456 P. 2d 385, the Arizona Supreme Court said:

> "Thirty-seven years ago in Maricopa County Municipal Water District, et al. v. Southwest Cotton Co., 39 Ariz. 65, 4 P. 2d 369, rehearing denied, 39 Ariz. 367, 7 P. 2d 254, this court predicted that the time would soon come when it would be necessary to consider the extent of the rights of the surface owners to the water flowing or lying beneath the soil. That day arrived twenty-one years later in 1952. In the first decision in Bristor v. Cheatham, 73 Ariz. 228, 240 P. 2d 185, a majority of this court held that in Arizona the doctrine of prior appropriation applied to the use of ground water. The doctrine was bitterly assailed on rehearing and the court then in deciding that the owners of

the land had a vested property right in the water underlying unequivocally committed this state to the doctrine of reasonable use rather than prior appropriation. Bristor v. Cheatham, 75 Ariz. 227, 255 P. 2d 173. The rule that the owner of 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. 460; McKenzie v. Moore, 20 Ariz. 1, 176 P. 568; Maricopa County Municipal Water Dist. et al. v. Southwest Cotton Co., supra; Bristor v. Cheatham, supra; State ex rel Morrison v. Anway, 87 Ariz. 206, 349 P. 2d 774.

* * * * * * *

"We said in State v. Anway, supra, that because of the pronouncements in Howard v. Perrin, supra, and Maricopa County Municipal Water District et al. v. Southwest Cotton Co., 39 Ariz. 65, 4 P. 2d 369, that the doctrine of reasonable use ' * * * is a rule of property, * * *.' By Art. 2, §17 of the Constitution of Arizona ' * * * No private property shall be taken or damaged for public or private use without just compensation having first been made, or paid into court for the owner. * * * ' We think this language of the Constitution is clear and unambiguous,

> needs no interpretation and means exactly what it says. Hence, assuming that Tucson can exercise the power of eminent domain to condemn rights in percolating water, a point we do not decide, compensation must be first paid to the petitioners or into court on their behalf."
> 456 P. 2d at 386-87, 389.

And in Jarvis v. State Land Department, 106 Ariz. 506, 479 P. 2d 169, Justice Struckmeyer repeated the rule:

> "The right to exhaust the common supply by transporting water for use off the lands from which they are pumped is a rule of law controlled by the doctrine of reasonable use and protected by the constitution of the state as a right of property." (Emphasis added)

The lease contract is in effect a sale of a part of or an interest in the state lands involved made in violation of the requirements of the Enabling Act and hence void.

If, however, PIMA rejects this view and relies upon the device of a commercial lease to avoid the stringent requirements

of the Act, it likewise must fail in avoiding the finding of illegality.

1. A lease of property for a "commercial" purpose presupposes a use -- not an exhaustion or wasting of the property.

The tenant's common law "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. Anything more than this was "waste." 93 C.J.S. 559 et seq. "Waste."

2. If a "commercial lease" may become the vehicle for the sale of tangible personal property then the specific provisions governing removal of timber, minerals, rock, sand and gravel are superfluous and unneeded.

3. The definition of "Commercial Lands" in Section 37-101 as "used principally for business * * * is inconsistent with the claim that extraction and carrying away of a part of the corpus of the

estate is a "commercial" enterprise.

4. The classification of state land required by Section 37-212 shows plainly that a commercial use is not a wasting use.

5. The statute controlling leases "for commercial purposes" for a term of over ten years (Section 37-281.02) plainly demonstrates that the lease involved is one involving an annual rental "of not less than the appraised rental value of the land" limited to leases of this duration to leases of lands "within the boundaries of an unincorporated city or town or within three miles outside of the boundaries of incorporated cities and towns having a population of ten thousand or less, or within five miles of the boundaries of cities and towns having a population in excess of ten thousand."

It is the plain intent of the Enabling Act (and the Arizona Constitution) that

state school lands be protected against raids by whatsoever device predatory interests might fashion for this purpose.

State v. Murphy, supra.

At 1¢ per 1000 gallons PIMA MINING COMPANY is buying and carrying away water from the state school lands held in trust by the State of Arizona for approximately $3.25 per acre foot. For $3.25 PIMA receives and uses over 325,000 gallons of water which belongs to this state school land. This is water which requires no treatment, and in the water system of Tucson would have a value as delivered to its water users many times $3.25. Even untreated C.A.P. water for agricultural uses is expected to command a subsidized cost of roughly three times this figure, and delivered to municipalities as untreated canal water of from 10 to 20 times this amount.

Water is plainly not "timber or other natural product" of such land and if it were then the provision of Section 28 "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" governs.

This lease, at best, is a contract for sale of water mined from state school land at a price of 1¢ per 1000 gallons, upon credit; either than (sic) or it is a sale of state school land measured by a price of 1¢ per 1000 gallons of real property removed.

While the transaction is cast in the form of a "commercial lease" it is apparent from the instrument itself and the depositions, answers to interrogatories and admissions in the various pleadings that its true purpose was to authorize

PIMA to mine the ground water subjacent to the land surface and transplant it to its mine and mill for use in its mining business. Either the 1¢ per 1000 gallons was regarded as compensation to the state for the water taken and used or the state was truly victimized by the transaction.

In the early United States Supreme Court case of Hervey v. Rhode Island Locomotive Co., 93 U. S. 664, 23 L. Ed. 1003 the Supreme Court observed:

> "It is true the instrument of conveyance purports to be a lease, and the sums stipulated to be paid are for rent; but this form was used to cover the real transaction * * * It was evidently not the intention of the parties that this sum should be paid as rent for the use of the engine for one year."

No more so was the price of 1¢ per 1000 gallons intended as rent for the use of the land; it was the value set for the taking, carrying away and consumption of a part of the "rented" property or for the

consumption of a valuable asset of the state.

Since there is some considerable similarity between the lease agreement in question and an oil lease, the California case of Stone v. City of Los Angeles, 299 Pac. 838 is of value in reaching a conclusion as to how well this "commercial lease" harmonizes with the usual understanding of the term "commercial lease."

The California court said:

> "Omitting all of the other questions presented, and confining ourselves to a consideration of the terms of the act granting the lands in question to the city of Venice, it is admitted by both parties, and we think correctly, that the uses for which these lands may be leased by appellants are limited by the terms of the grant. In other words, appellants cannot lease the property for uses or purposes not authorized by the Granting Act or contemplated by the Legislature in passing it.
>
> "Again referring to that portion of the Granting Act which we have quoted, we find

the uses to which the lands may be put are limited to the following: (1) The city may itself use the lands for the establishment and improvement of a harbor and may construct and maintain the necessary and convenient utilities, structures, and appliances to carry out these purposes; (2) the city may grant franchises thereon for a period of not to exceed twenty-five years; (3) the city may lease the lands for a like period 'for purposes consistent with the trusts upon which said lands are held by the State of California, and with the requirements of commerce or navigation at said harbor'; (4) the city cannot grant, convey, or give away all or any portion of said lands for any purpose whatsoever.

* * *

"It is a fundamental canon of the construction of statutes that the words used therein must be held to be used in their usual and ordinary sense unless an intention appears on the part of the Legislature to give them some other or special meaning. We have therefore to consider the meaning of the word 'lease' as used in the act and the extent of the power vested in the city of Los Angeles to 'lease' the premises in question.

"A lease, as ordinarily understood, is an agreement whereby the relation of landlord and tenant is created. It imports the giving, for a consideration by the owner of the greater estate, of the possession and use of a lesser estate in his property with a reversion to the owner of the greater estate at the end of the term. * * *

"It is now well-settled law in California that the lessee of oil land has a different and greater interest in the property than in the usual and ordinary usufructuary lease known to ordinary commerce and trade.

* * *

"We have the further distinction between the rights under the oil lease and the usual usufructuary lease in the change in the character of the property in the oil when it is recovered and brought to the surface. In place it is part of the realty, and, in the absence of a special contract to the contrary, belongs to the owner of the ground. When brought to the surface, it becomes personal property, and a part of it at least belongs to the oil operator."

* * *

"From the foregoing authorities we have not hesitated to conclude that the interest of the lessee of the leased property under an oil lease differs materially from and is much greater than the interest of the tenant under the ordinary usufructuary lease."

* * *

" * * * 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 a part of the realty. When it is brought to the surface, it becomes personalty, and a part of it is the 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 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 Pac. at 840, 841, 842, 843. (Emphasis added)

See also:

Callahan v. Martin, 43 P. 2d 788 (Cal. Sup. Ct.) 1935;

Dabney v. Edwards, 53 P. 2d 962 (Cal. Sup. Ct.) 1935.

In Dabney-Johnson Oil Corp. v. Walden, 52 P. 2d 237 (Cal. Sup. Ct.) 1935, that Supreme Court said:

> " * * * 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 instruments as reformed will not support the judgment for defendants. Our recent decision in Callahan v. Martin, 43 P.(2d) 788, 791, contains a discussion of this theory. The use of 'oil and gas in place' terminology, which describes an unlimited grant of oil rights as a present transfer of a fee in definite corporeal real property is anamolous. It fails to take into account the fugacious and vagrant nature of oil and other hydrocarbon substances. Oil actually brought to the surface to which the grantee's right attaches may be not only the oil and and [sic] gas in place beneath the surface of the assignor's land at the time of the assignment, but also oil drawn from beneath the surface of other lands. In our decision in Callahan v. Martin, we reject the oil and gas in place doctrine, as have many other courts, including the Supreme

Court of the United States, Ohio Oil Co. v. Indiana, 177 U. S. 190, 20 S. Ct. 576, 44 L. Ed. 729, but we find that nevertheless oil rights may be recognized and transferred as interests in real property on other theories which give due recognition to the fugacious character of the substances involved.

"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. Under the usual oil and gas lease the owner confers on the lessee for the term of the lease an exclusive right of profit to drill for and produce oil; the lessee usually returning to the lessor for the privilege granted a rent or royalty measured by a fraction of the oil produced. Or the owner may grant rights which make the grantees co-tenants with him and with each other in the right to drill for and produce oil and other hydrocarbon substances. 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." 52 P. (2d) at 243-44.

While we recognize that water and oil may have different properties the similarity as between ground water in place and ground oil in place is striking.

Each is fugacious -- each has what may be termed fungible characteristics. The water and the oil within the ground

subjacent to the surface may be here today and have moved on tomorrow but it will have been replaced by other water and oil of the same general quality and in the same amount.

Hence the decisions dealing with oil leases, in the absence of cases dealing with contracts having to do with the sale and removal of ground water are persuasive.

In Wall v. Shell Oil Company, 25 Cal. Reptr. 908 (1963) Justice Roy Herndon discussed the legal effect of an oil lease:

> "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. 2d 292, 302, et seq., 259 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 110, 122, 43 P. 2d 788, 101 A. L. R. 871.)

"'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. (Citation.) 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.' (Dabney-Johnson Oil Corp. v. Walden, 4 Cal. 2d 537, 52 P. 2d 237, 243.)" 25 Cal. Reptr. at 911. (Emphasis added)

That the instrument in question gave rise to a "profit a prendre" in PIMA -- a right to take water and remove it from the state school land -- is clear.

Words & Phrases, Permanent Edition, Vol. 34, "Profit A Prendre" (including pocket part.)

Commercial Lease No. 906 clearly was not a usufructuary lease such as was plainly intended by the Enabling Act, Arizona Constitution and the Arizona statutes heretofore quoted. It was therefore void.

(Signed SNELL & WILMER, by Mark Wilmer and Loren W. Counce, Jr., Attorneys for Plaintiff)

(Underlining is as appears on the Court document)

* * *

(TITLE OF ACTION;

MINUTE ENTRY (CONTINUANCE)

Dated: June 29, 1973

Judge: The Honorable Robert O. Roylston

RE: MOTION FOR PARTIAL SUMMARY JUDGMENT

On motion of the Court,

IT IS ORDERED that the hearing date of July 16, 1973, be, and is hereby vacated; and the matter is reset for hearing on September 10, 1973, at the hour of 9:00 a.m., in Division III of this Court.

* * *

(TITLE OF ACTION)

DEFENDANT'S MOTION FOR
PARTIAL SUMMARY JUDGMENT
RE COMMERCIAL LEASE NO. 906

AFFIDAVIT IN SUPPORT OF DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT

MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT AND IN OPPOSITION TO PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

Filed: August 29, 1973

Defendant Pima Mining Company ("Pima") moves the Court for an order granting a summary judgment in favor of Pima and against plaintiff on Count 4 of plaintiff's Amended Complaint.

The ground of this motion is that there are valid defenses to said Count as to which there are no triable issues of fact. This Motion will be based upon this Motion, the Affidavits and Memorandum

annexed hereto and upon all the records and files of this action.

(Signed VERITY & SMITH and MUSICK, PEELER & GARRETT, by Bruce A. Bevan, Jr., Attorneys for Defendant Pima Mining Company)

PIMA MINING COMPANY'S MEMORANDUM RE SUMMARY JUDGMENT MOTIONS

In Count Four of the Amended Complaint, plaintiff alleges that a lease from the State to Pima in fact is an illegal "sale" of land. We believe this non sequitur can and should be disposed of now rather than to have the lengthy and complex enough trial confused by spurious issues.

If by some rather inconceivable circumstance, this Court should determine that the instant lease constitutes a sale of mineralized land, there then are further triable issues of fact before plaintiff can prevail, all as set forth in part 4 of this Memorandum.

A R G U M E N T

1. No Land Has Been Sold.

Plaintiff cites various laws to the effect that certain State land may not be sold. Besides plaintiff's interesting arguments, the only fact set forth to support its claim that an illegal sale has occurred is the existence of the instant lease. That lease clearly provides for return of possession of the land to the State on October 23, 1976. Thus, if the law recognizes any distinction between a sale and a lease, then this is a lease, not a sale of the instant land.

Plaintiff argues, however, that this is a "sale" because the lease allows development therefrom and use of a fugacious substance, water. Yet the very laws it cites expressly provide that

> "Nothing herein . . . shall prevent

> "1. Theleasing of any of the lands . . . for . . . commercial . . . purposes, for . . . ten years or less . . .
>
> "2. The leasing of any of said lands . . . for mineral purposes . . . for . . . twenty years or less . . ." [Article X, Section 3, Constitution]

Thus, Arizona law expressly allows, despite its prohibition against sale, leases of such lands. Further, its mineral leases expressly allow permanent removal of even non-fugacious products such as metals, stone and timber [A.R.S. 27-235(B)(1)]. Therefore, plaintiff's argument that a lease allowing an exhaustion of a valuable product is a sale is rebutted by the constitutional and statutory scheme forbidding sale but allowing mineral removal and sale. A.R.S. 27-231, et seq.

In short, if plaintiff's argument were sound, Arizona's statutes allowing mineral leasing, extraction and shipment

of minerals are and have been highly illegal.

Plaintiff contends (page 12) there is considerable similarity between the instant lease and an oil lease. Plaintiff then cites certain California cases which plaintiff claims support the contention that the instant lease is a sale of State land.

Plaintiff first cites Stone v. City of Los Angeles, 114 C. A. 192, 299 Pac. 838 apparently for the proposition quoted therein that oil is part of the realty and therefore an oil lease involves a sale of land [page 14, Memorandum]:

> "In place, it is part of the realty . . .
>
> * * *
>
> Thus a sale of a part of the freehold . . . is just as much a sale as though the city should convey the oil in place . . . "

Whether or not plaintiff knows it, Stone v. City of Los Angeles, a 1931

District Court of Appeal case, does not have much legal vitality.

Callahan v. Martin 3 Cal. 2d 110, 43 P. 2d 788 (1935), a Supreme Court case, rejected that "oil in place theory." As that Court pointed out, the right to drill for oil is a profit a prendre, which although an estate in real property or a chattel real, was and is "not real property." [3 C. 2d at p. 118; p. 15, Memorandum] The Court further pointed out the distinction between (i) real property (i.e., "things real") in California Civil Code Section 14(2) and (ii) servitudes upon land per Sections 801 and 802 of the Civil Code. Among such servitudes in gross per Civil Code Section 802 is the "right of taking water."

Thus, the right to take water from land is not the taking of real property nor does such constitute the "sale" of land or real property.

In Boone v. Kingsbury, 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 609, 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 184."

Therefore, although plaintiff does not seem to be aware of it, its only authority for contending that an oil or water lease constitutes a sale of land decisively has been overruled and the

law is expressly and exactly to the contrary.

2. <u>There Has Been No Use of Any Mineral by Pima</u>.

As pointed out in <u>Campbell v. Flying v. Cattle Co.</u>, 25 Ariz. 577, 220 Pac. 417 (1923), not all Arizona land is precluded from being sold. As the Court stated:

> "All non-mineral lands, with certain exceptions, are subject to sale and . . . mineral lands are not."

Thus, plaintiff must show that not only has the instant land been sold but that it is "mineral" in character.

The State Land Department never has classified land as being "mineral" merely because it contained underground water. Numerous other Commercial leases for the production of water exist. Many of these were to Bagdad Copper (represented by Snell & Wilmer). Such classifications

by the State Land Department are pursuant to the power vested in it by A.R.S. 37-212 which requires classification of lands as, e.g., lands suitable for commercial purposes or lands containing timber, stone or other valuable products. These interpretations by the responsible State agency must be given great weight. State v. Boyd, 60 Ariz. 388, 138 P. 2d 284 (1943).

More importantly, plaintiff denies in its moving papers that the instant land is mineral in character. Plaintiff cites the Enabling Act, the Constitution and certain Acts of the Legislature, all of which preclude the "sale or contract for sale of any timber or other natural product of such lands." [Emphasis added]

The above quoted language constitutes the sole constitutional prohibition against land sale pertinent to these motions. Yet, at page 11 of its Memorandum, plaintiff

judicially admits, "Water is plainly not 'timber or other natural product of such land. . . ."

Consequently, plaintiff has destroyed its sole basis for Count Four.

Since (i) all that Pima takes from the lands under Commercial Lease 906 is water and (ii) water is not a "natural product of such land" and (iii) the only legal prohibition relied on by plaintiff is against sale of land with certain "natural product," it necessarily follows that the instant lease of land violates no law. Therefore, Count Four should be disposed of now rather than be left dangling to confuse the less spurious issues which remain to be tried in this case.

3. No "Waste" is Being Committed.

Implicit in plaintiff's Memorandum is the contention that "waste" is being committed by the State for "selling" its water so cheaply.

"Waste" is defined as an "unlawful" act. 93 C. J. S. 559. Thus, anything authorized by the landlord hardly can be legal waste and the State here expressly has authorized water production.

Perhaps, however, plaintiff and its counsel are not as much concerned with the relationship between the State and Pima as being violated as they perhaps may be by their concern for the natural resources of the State.

Although no such concern was expressed by Snell & Wilmer when similar commercial leases for water production purposes were issued to Bagdad Copper, let us assume that these lawyers have acquired new insight regarding law and morality.

Nevertheless, what they assert now on behalf of FICO is that the State should cease its Lease 906 so that water thereunder can be captured more easily by and without cost to FICO. FICO is unconcerned,

however, with the fact that a cessation of Commercial Lease 906 will cost the State not only direct revenues from said Lease but also millions and millions of dollars of royalties and taxes from Pima and similar millions of dollars of benefit arising from workmen being given jobs, producing taxable income and staying off welfare.

Thus is the State of Arizona accused of so wasting its natural assets by one whose only standing to so allege consists of its greedy claim that it should be allowed freely to drain State water to raise pecans in a venture which has been able to survive only on tax supported subsidies.

In any event, the State is not guilty of "wasting" State assets when it allows production of water or oil since these fugacious substances might be drained away by competitive, adjacent neighbors, such

as FICO. In Dabney-Johnston Oil Corp. vs. Walden, 4 C. 2d 637, 52 P. 2d 237 (1935) [pages 14-16, Memorandum] that Court held, in a portion of the decision not quoted by plaintiffs, that it is not waste for one co-tenant to drill for oil without the consent of his co-tenants. As the Court stated (4 C. 2d 655-656):

> " . . . In view of the fact that no enjoyment can be had of an estate in oil rights except through removal of the oil and other substances, it is held that it is not waste for a cotenant to go upon the land and produce oil . . . This principle, applicable to minerals in general, is of special importance in regard to fugacious substances, which may be lost entirely through drilling operations on other lands if the owners do not diligently seek to reduce them to possession."

Therefore, it is somehow unseemly for FICO to bleat that the State should deprive its citizens of water (and ultimately, mining and tax) revenues and instead "conserve" its water adjacent to FICO so

that FICO can drain it without charge to FICO.

In short, if the State's instant Lease constitutes "waste," then what FICO desires simply is "theft."

4. Further Issues for Plaintiff to Prove.

As indicated at the outset, to prevail on Count Four, plaintiff must prove a number of matters. In addition to proving such a "sale" of mineral land plaintiff must also prove that it has valid standing to complain of the alleged illegality. Thus, at page 3, item 6, plaintiff quietly alleges that its acreage is contiguous to Lease 206 and that plaintiff "relies upon and requires the use of ground water of the area for the irrigation of its crops."

True, this does not quite allege that FICO wants and could enjoy the free use and benefit of the water being pumped

from adjacent lands. Yet, before plaintiff can have standing to complain of Pima's pumping, plaintiff must show damage. To show damage, plaintiff must prove that Pima's pumping is depriving plaintiff of water.

Pima has denied that its pumping deprives plaintiff of water. The affidavit of Robert Fox served herein on July 22, 1971 demonstrates triable issues that (1) there is a fault severing hydraulic continuity between Pima's and FICO's water supplies and that (2) Pima's pumping and use of water is in a water basin separate from FICO's. Additionally, Pima has raised against FICO the defenses of laches and estoppel, on Count 4 as well as on the other counts of the Amended Complaint. Hence, these issues remain unsettled even if the instant lease were a "sale."

Pima does not wish to burden the

Court now with elaborate affidavits showing such triable issues, especially since FICO has put forward absolutely no proof of its injury, i.e., that its pumping is from the same water basin as is Pima's pumping. However, if the Court is of the view that a further showing of triable issues is necessary to defeat FICO's summary judgment motion, Pima moves the Court for leave to present specific affidavits and other proof upon the subject.

5. Conclusion.

We hope the Court is as convinced as we that FICO, as a matter of law, is not entitled to prevail on Count Four. We further believe that it would be in the interests of a more orderly trial to rule against FICO now and grant a partial summary judgment to Pima on Count Four.

(Signed VERITY & SMITH and MUSICK, PEELER & GARRETT, by Bruce A. Bevan, Jr., Attorneys for Defendant Pima Mining Company)

* * *

AFFIDAVIT OF
GEORGE A. KOMADINA

(Attached to foregoing Motion for Partial Summary Judgment and made a part thereof)

(Jurat)

GEORGE A. KOMADINA, first being duly sworn, deposes and says:

1. He is the Vice-President and General Manager of the defendant Pima Mining Company and as a result has knowledge of the following facts.

2. Portions of the pit from which Pima mines its ore have been leased from the State of Arizona subject to the payment of royalties as a result of its mining activity thereon.

3. Pima Mining Company has paid the State of Arizona mineral royalties as a result of its mining activity on said

State leases as follows:

Year	Dollars
1967	$ 684,000
1968	787,000
1969	864,000
1970	1,568,000
1971	917,000
1972	553,000
	$5,373,000
Annual Average	895,500

4. In addition to these royalties Pima pays income tax, severance tax and sales taxes on these State leases.

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.

6. Pima additionally leases from the State of Arizona rights of way so that water may be transported to the mill area and back to said tailing pond deposit area. Thus the State of Arizona has leased to Pima in effect a complete system for production of water, transportation of water to the mill area where the ore from State leases is processed and for transportation of tailings away from said mill via water to tailing ponds deposit areas. Each aspect of this system is necessary for the mining and milling of ore. Each of these elements also is essential to the payment of royalties by Pima Mining Company to the State of Arizona for the ore mined and milled upon State leases.

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.

(Signed by GEORGE A. KOMADINA
before a Notary Public on
August 20, 1973)

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. 11439-2, Abstract of Record on Appeal Volume I Pages 1 to 85, filed September 23, 1974. Court of Appeals Instruments (Part Two) Page 114 with Pages i, ii, iii, v and 1 through 85 following.

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