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SET ONE

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ARIZONA COURT OF
APPEALS DIV TWO

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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

FARMERS INVESTMENT COMPANY, a corporation, Appellant,	11439-2
-vs-	2 CA-CIV 1645
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.	(Pima County Superior Court No. 116542)

APPELLEES' ANSWERING BRIEF

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STATE LAND DEPARTMENT

(118)

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STATEMENT OF THE CASE

In November 1969, Farmers Investment Company ("FICO") filed a suit in Pima County Superior Court against five defendant mining companies alleging those defendants were unlawfully using groundwater from the Santa Cruz-Continental Critical Groundwater Area to the injury of FICO. At a subsequent date, which does not appear on the pleadings, an Amended Complaint was filed which included an additional defendant ANDREW L. BATTEY, as State Land Commissioner, and THE STATE LAND DEPARTMENT, a department of the State of Arizona. The Answer of the State of Arizona Defendants was filed on or about July 21, 1973.

In June 1973, FICO filed its Motion for Summary Judgment on Count Four of the Amended Complaint against Pima Mining Company and the State of Arizona seeking a declaration that Commercial Lease No. 906, through which the State of Arizona was selling water from state trust land to Pima Mining Company, was void as contravening

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the Enabling Act.

Pima Mining Company filed a Motion for Summary Judgment against FICO for a determination that the lease was valid.

The trial judge, The Honorable Robert O. Roylston, after hearing oral arguments on the two motions and considering the briefs filed, granted Pima Mining Company's Count Four [illegible]. Judge Roylston made the Judgment a final appealable judgment.

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STATEMENT OF FACTS

The facts of the case relating to Count Four are very simple. The State Land Department owns state school trust land in what has since been designated the Sahuarita-Continental Critical Groundwater Area. The State acquired the trust lands under a grant by the Enabling Act, upon admission to statehood. The Sahuarita-Continental Critical Groundwater Area was designated on October 14, 1964. On October 24, 1966, the State Land Department executed Mineral Lease No. [illegible] for 319 acres of land in the Critical Groundwater Area. The lease was subsequently signed by the lessee, Pima Mining Company, on December [illegible], 1966. The lease was for the express purpose of selling the water from the land. The lease was for a ten year period, ending October 23, 1976, and specifically states:

> . . . [t]his lease is issued for the purposes of: development of water from deep wells, booster pump and power substations, gathering tanks, pipelines, power lines. In

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addition to commercial use of this land, the land can also be used for grazing.

The rental was fixed at $10.00 per acre or 1¢ per 1,000 gallons of water removed for Lots 1 and 2; S2NE Quarter: $1.00 per acre or 1¢ per 1,000 gallons removed, whichever is greater, for the SE Quarter.

The water which is sold is not being used on the ground but is being transported and used elsewhere by Pima Mining Company.

Farmers Investment Company owns and farms approximately 7,700 acres of land within the Critical Groundwater Area of the asserted value of fifty million dollars.

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ARGUMENT

I

THE BENEFICIAL USE DOCTRINE DOES NOT APPLY TO DISPOSITION OF PRODUCTS OF STATE LAND

In Farmers Investment Co. v. Pima Mining Co., ___ Ariz. ___, Cause No. 11439, June 19, 1974, the Arizona Supreme Court in a Special Action (which was filed after the Judgment was rendered below on Count Four and which in the same judgment being appealed here) determined that water is a "natural product" of state land and can only "be sold to the highest bidder at public auction in the same manner as timber, stone and gravel." The State Land Department alleged that water is a "mineral" product of state land. The issue may be submitted to the United States Supreme Court by petition for certiorari.

Appellant first argues that the general water law, as set forth in Bristor v. Cheatham, 75 Ariz. 227, 255 P.2d 173 (1953); Jarvis v. State Land Department, 104 Ariz. 527, 456 P.2d

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385 (1969); and Jarvis v. State Land Department, 106 Ariz. 506, 479 P.2d 169 (1970), and other cases, applies to state land. This contention is totally in error.

Water being a product of state land (whether "natural product" or mineral) is part of the trust res. By an Act of June 20, 1910, Ch. 310, 36 Stat. 557, Congress (Section 24 of the Enabling Act) prescribed detailed conditions under which granted lands are to be administered:

> 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 grant- ing 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.
>
> Disposition of any of said lands, or of any money or thing of value directly or indirectly derived therefrom, for any object other than for such particular lands, or the lands from which such money or thing of value shall have been derived, were granted or

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confirmed, or in any manner contrary to the provisions of this Act, shall be deemed a breach of trust.

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

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 any 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, 9 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

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> 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. . . .

Until the case of Lassen v. Arizona, 385 U.S. 458, 87 S.Ct. 584, 17 L.Ed.2d 515 (1967), the integrity of the trust was not fully protected. E.g., by prior decisions the Highway Department could obtain rights of way over state trust land without having to pay for the land actually taken. This was based on an enhancement of the remainder theory which permitted a general, unappraised enhancement to offset any award of damages for the property taken. This was a unique application of the enhancement theory and did not apply to any other eminent domain taking. See State of Arizona v. State Land Department, 62 Ariz. 248, 156 P.2d 901 (1945). In the Lassen case, however, the United States Supreme Court changed the entire concept of the administration of the trust lands. Recognizing that the trust must be strictly administered for the benefit of the beneficiary, the Court stated:

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The Enabling Act unequivocally demands both that the trust receive the full value of any lands transferred from it and that any funds received be employed only for the purposes for which the land was given. First, it requires that before trust lands or their products are offered for sale they must be "appraised at their true value" and that "no sale or other disposal . . . shall be made for a consideration less than the value so ascertained. . . ." The Act originally provided in addition that trust lands should not be sold for a price less than a statutory minimum. Second, it imposes a series of careful restrictions upon the use of trust funds. As this Court has noted, the Act contains "a specific enumeration of the purposes for which the lands were granted and the enumeration is necessarily exclusive of any other purpose." Ervien v. United States, 251 U.S. 41, 47, 64 L.Ed. 129, 130, 40 S.Ct. 75. The Act thus specifically forbids the use of "money or thing of value directly or indirectly derived" from trust lands for any purposes other than those for which that parcel of land was granted. It requires the creation of separate trust accounts for each of the designated beneficiaries, prohibits the transfer of funds among the accounts and directs with great precision their administration. "Words more clearly designed . . . to create definite and specific trusts and to make them in all respects separate and independent of each other could hardly have been chosen." United States v. Ervien, 246 F. 277, 279. All these restrictions in combination indicate Congress' concern both that the

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grants provide the most substantial support possible to the beneficiaries and that only those beneficiaries profit from the trust.

Lassen v. Arizona
87 S.Ct. at 588-89.
(Emphasis supplied.)

The Court further stated:

> Nothing in these restrictions is explicitly addressed to acquisitions by the State for its other public activities: the Enabling Act is, as we have noted, entirely silent on these questions. We must nevertheless conclude that the purposes of Congress require that the Act's designated beneficiaries "derive the full benefit" of the grant.

87 S.Ct. at 589.
(Emphasis supplied.)

The Arizona Supreme Court has subsequently made strict application of the Enabling Act mandatory. In State Land Department v. Tucson Rock and Sand Co., 107 Ariz. 74, 481 P.2d 867 (1971), the Court declared that a legislative attempt to control disposition of products of state land by establishing a maximum royalty for sand, rock and gravel was in direct contradiction to the language of Section 28 of the Enabling Act, and was there-

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fore a breach of the trust and void.

The United States Court of Appeals (9 Cir.) has also enforced strict application of the terms of Section 28 of the Enabling Act. In U. S.A. v. 2,562.92 Acres of Land, ___ F.2d ___, a decision rendered on March 28, 1974, Cause No. 72-2628, the Court in determining that a lessee has no compensable interest when the trust lands are acquired by another public agency for another public purpose, strictly applied provisions of Section 28 of the Enabling Act and the Lassen case, supra.

The Arizona Supreme Court again in Farmers Investment Co. v. Pima Mining Co., supra, made strict application of the provisions of Section 28 of the Enabling Act mandatory by declaring that a lease for disposal of a natural product of State trust land (water) which did not comply with auction, appraisal, and bidding procedures of the Enabling Act was void.

Within the framework of the foregoing cases

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we arrive at the question of whether the disposition of the state trust natural product, water, is subject to the beneficial use theory as asserted by appellant. The State Land Department submits that it does not apply.

Water is a product of the land and a thing of value. A landowner has a right to water percolating beneath the soil and such right is common to all the overlying landowners within a groundwater area.

A critical groundwater area as established pursuant to A.R.S. § 45-301, et seq., has been described as a groundwater basin not having sufficient groundwater to provide a reasonably safe supply at the current rates of withdrawal so that the addition of other users must necessarily deplete the supply of existing users. Farmers Investment Co. v. Pima Mining Co., supra. Consequently, what the legislature has done is to restrict the landowner who was not making use of groundwater at the time an area was designated

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"critical" from using the water for certain designated purposes. Due to the mobile or transitory character of water, prior users are thus able to draw water while minimizing depletion by restricting other common owners' uses. The State Land Department submits that such a restriction on the use of a trust "product" provides the legislative vehicle for other users to deplete the trust res without compensation. This is unequivocally prohibited by Section 20 of the Enabling Act and consequently, a breach of the trust. The critical groundwater statutes are void insofar as state school trust lands are concerned.

The State Land Department is entitled to dispose of the natural product "water" from state lands so long as it complies with the provisions of the Enabling Act relating to disposition of natural products. Any restrictions, including determining whether there is a beneficial use contemplated by the purchaser is nonapplicable

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to the disposition of the trust water. Any other construction would either permit the depletion of trust property by other users without compensation or would inhibit the price which the product would bring at auction, either of which would violate the provisions of the Enabling Act and the intent of Congress.

Additionally, the Fifth Amendment, Art. 2, § 17 of the Arizona Constitution prohibits the taking of private property for a private use "except for private ways of necessity and for drains, flumes, or ditches, on or across the land of others for mining, agricultural, domestic or sanitary purposes. No private property shall be taken or damaged for public or private use without just compensation having first been made. . . ."

Depriving a landowner, the state school trust, of its right to percolating water by the creation of a critical groundwater district does not fall within the above stated exception, and constitutes a "taking" of private property for

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another's private use and is therefore in violation of Art. 2, § 17 of the Arizona Constitution.

Therefore it can only be concluded that to the extent that the Supreme Court has required adherence to the Enabling Act, appraisal, notice, and auction requirements of the sale of the natural products of state land is otherwise valid and the lower court's granting of the motion for summary judgment should stand.

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ARGUMENT

II

THE LAND DEPARTMENT HAS THE RESPONSIBILITY TO ADMINISTER LANDS FOR THE BEST INTERESTS OF THE TRUST

Appellant's second argument may be paraphrased as follows: Assuming the sale of the trust product, water, is illegal, does the large revenues resulting from the sale of water justify the State Land Department's disposition of the product?

Appellant has used an equitable argument that economic factors should not condone the continuation of what they consider an illegal practice. The State Land Department submits first, that the sale of natural products of state land in compliance with the directives of Section 28 of the Enabling Act is not an illegal use by virtue of the fact that the State has a right under section 28 of the Enabling Act to dispose of natural products of the trust. When disposing of natural

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products of the trust the State cannot be hampered by restrictions which will result in depletion of the trust res. This position has been more fully set forth in Argument I above. Secondly, the apparent admission by appellant that the sale of this natural product of state land yields a substantial return to the trust demonstrates that the sale of the product is in the best interest of the trust and reinforces the decision of the Commissioner to sell the product. Of course, the discretionary decision of the Commissioner in determining to sell the product is not at issue. What is at issue is whether or not the lease is valid. Based on the Farmers Investment Co. v. Pima Mining Co. decision, supra, and the arguments set forth above, the State Land Department submits the sale of a natural product of the trust is valid so long as the procedures for disposing of the product as set forth in Section 28 of the Enabling Act are adhered to. Under A.R.S. § 37-481 the State Land Department may "conserve, sell or other-

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wise administer the timber products, stone, gravel and other products and property upon lands belonging to the state under rules and regulations not in conflict with the Enabling Act and the Constitution. . . ." In the instant case, the Department has determined to sell a product which will eventually otherwise be depleted by appellant and other adjacent landowners. The decision to sell the product under these circumstances is irrefutably in the best interest of the trust. Consequently, it can only be determined that the motion for summary judgment, which effectively declared the validity of the sale of natural products of the trust, was properly granted (so long as the Farmers Investment Co. v. Pima Mining Co. case, supra, requiring compliance with the Enabling Act is followed.)

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ARGUMENT

III

THE VALIDITY OF STATE LAND DEPARTMENT LEASES NOS. 907-01 AND 907-02

By its third argument appellant has alluded to the validity of State Land Department Leases Nos. 907-01 and 907-02, arguing that the use of this area as a tailing area constitutes a waste. Nowhere in the Complaint or anywhere else in the record has the validity of these leases been raised. To challenge the use in these proceedings is totally improper. Admittedly, any citizen of the State may seek to enforce the provisions of Section 28 of the Enabling Act. However, if FICO wishes to challenge those leases, it should be done by proper judicial vehicle and not as a collateral attack in these proceedings, which precludes the State and Pima Mining Co. from disputing factual allegations and raising other defenses. In any event, the Land Department submits that the terms of the Leases 907-01 and 907-02

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which yield the full appraised value of the land over the term of the leases, can be totally substantiated. Further, the environmental controls built into the leases and the fact that even after netting an amount equal to the full appraised value during the life of the leases, the state trust will still own the land in a terraced and landscaped condition, disprove all the inaccurate factual observations which appellant has set forth in its argument. If appellant seriously thinks it can demonstrate that Leases Nos. 907-01 and 907-02 are invalid, the State Land Department invites and challenges FICO to pursue the issue under the proper judicial procedures.

The only issue before the Court in this case is the validity of Lease No. 906. The Arizona Supreme Court in [illegible] Investment Co. v. Pima Mining Co., supra, [illegible] already declared the lease to be in violation of Section 28 of the Enabling Act and null and void; the Supreme Court further declined to express an opinion on Leases

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907-01 and 907-02. This Court should only address itself to the issues before it. Leases 907-01 and 907-02 are not before this Court.

The remaining arguments in appellant's question for review No. 3 regarding the use of the product which is properly purchased from State Land are somewhat of a rescript of the arguments set forth in appellant's question for review No. 1 and have been fully countered and discounted above.

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ARGUMENT

IV

THE ISSUES PRESENTED IN THIS APPEAL BY FICO ARE MOOT

The only issue ruled on by the court below in granting Pima Mining Company's motion for summary judgment on Count Four was the validity of Lease 906. In a Special Action the Arizona Supreme Court in Farmers Investment Co. v. Pima Mining Co. supra, expressly held "that State Land Department Lease No. 906, being in violation of the Arizona Constitution and the Act of Congress as expressed in Arizona's Enabling Act, is null and void."

The only relief sought by FICO in Count Four was to have the lease set aside thereby terminating the sale of water under the lease. This objective was accomplished by the Arizona Supreme Court decision. The practice of Arizona appellate courts is not to decide issues unless required to do so in order to dispose of an appeal

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under consideration. Virgil v. Herman, 102 Ariz. 31, 424 P.2d 159 (1967). Further, the appellate courts do not render advisory opinions. Phoenix Metals Corp. v. Roth, 79 Ariz. 106, 284 P.2d 645 (1955). The question regarding the validity of Lease 906 has been fully resolved. The lease was declared null and void by the Arizona Supreme Court. Any decision by this Court on whether the State has the right to sell natural products of the trust when the notice, appraisal and auction requirements of the Enabling Act are met, whether the trust res can be depleted by imposing critical groundwater code restrictions of state trust property and products, whether the doctrine of reasonable use must be applied to the use made by a purchaser of water from the trust, and indeed, whether Pima Mining Company's use is a beneficial use, would be advisory only.

This review of the issues presented by appellant cannot affect the validity of Lease No. 906. The Court should therefore decline to

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issue an advisory opinion in this case.

Respectfully submitted,

N. WARNER LEE
The Attorney General

PETER C. GULATTO
Assistant Attorney General

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AFFIDAVIT

STATE OF ARIZONA)
) ss.
COUNTY OF MARICOPA)

PETER C. GULATTO, being first duly sworn, upon his oath deposes and says:

That he served the attorneys for appellant and appellee, Pima Mining Company, in the foregoing case by forwarding two exact copies of APPELLEES' ANSWERING BRIEF in a sealed envelope, first class postage prepaid, and deposited same in the United States mail addressed to:

Mark Wilmer, Esq.
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Verity & Smith
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this 25th day of July, 1974.

Peter C. Gulatto

Subscribed and sworn to before me this 25th day of July, 1974.

Madelon O. Frall
Notary Public

My Commission Expires:
October 18, 1974

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, Appellees' Answering Brief in Farmers Investment Company v. Bettwy, filed September 23, 1974. Court of Appeals Instruments (Part Two) Page 118 with 28 Pages of the Brief 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