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FILED
AUG 19 1974
CLIFFORD H. WARD
CLERK SUPREME COURT
BY

FILED
AUG 20 1974
CLERK COURT OF APPEALS
Division Two

IN THE SUPREME COURT OF THE STATE OF ARIZONA

2CA-CIV-1645

FARMERS INVESTMENT COMPANY, a corporation, Petitioner, v. PIMA MINING COMPANY, a corporation; ANDREW L. BETTWY, Stand Land Commissioner; STATE LAND DEPARTMENT; THE HONORABLE ROBERT O. ROYLSTON, Judge of the Pima County Superior Court, Respondents.	NO. V-23 RESPONSE TO PETITION FOR TRANSFER TO SUPREME COURT (RULE 47(e))

Respondent Pima Mining Company ("Pima") hereby responds to and opposes the motion of Petitioner ("Fico") for an order transferring appeal 2CA - Civ 1645 to the Supreme Court on the following grounds.

(1) This is now the third time during the pendency of the Superior Court action Fico brought in 1969 that Fico has requested this Court to restate its views concerning the reasonable use doctrine but without any court having passed upon, much less determined, even one of the factual issues raised by Pima in its affirmative defenses. There is no more reason now for this Court to restate its views concerning that doctrine than there was on June 19, 1974 when this Court opined that it is not possible to

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do so in the light of Pima's affirmative defenses.

(2) The issue of reasonable use never was involved in the proceedings below nor was it determined by the Superior Court. Pima will not repeat but will simply adopt by reference its arguments in this regard set forth in its Brief to the Court of Appeals.

(3) If the Superior Court did attempt to decide the reasonable use issue, such was in error because the factual issues raised by Pima's affirmative defenses were not determined. As the record reflects, Pima reserved its right to raise such issues in the event the Enabling Act was determined adversely to Pima.

(3) In the Court of Appeal proceedings, Pima has admitted judicially that the issue of reasonable use was not involved in the summary judgment proceedings and if the Superior Court did somehow determine same, Pima has confessed that such was in error.

(4) The summary judgment proceedings below involved only Pima's extraction of water pursuant to Commercial Lease 906. Since that Lease has been declared null and void, any issue regarding whether Pima's former use of that water was reasonable or not is now quite moot.

(5) Fico cannot obtain any more relief from this Court (or from the Court of Appeals) even if "reasonable use" is an issue on appeal. Fico has admitted judicially in its Court of Appeals Brief (pp. 2 - 3) that its Motion for Summary Judgment did not involve or raise the reasonable use issue. Thus, no summary judgment <u>for</u> Fico may be granted regarding this issue.

Fico has said that Pima's Motion for Summary Judgment decided that issue <u>against</u> Fico. Pima's summary judgment has been ordered vacated by this Court and Pima has before, and does again now agree that its summary judgment must be vacated.

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Thus, Fico is protected completely and can obtain no further relief.

(6) In Special Action No. 11439, on January 22, 1974, this Court denied the Petition to Intervene brought by three other defendants in the Superior Court action below. This Court, in denying that Petition, said that it would not treat the reasonable use issue. This made it unnecessary for the Intervenors to be heard.

Now, however, if the instant transfer is to be made, we are confident that those intervenors again would wish to and should be heard regarding their views about that issue. Yet, no more reason exists now than it did on January 22, 1974 or on June 19, 1974 for this Court to restate its views on an issue that was not even considered below.

To conclude: Fico has labored mightily for five years to avoid trying the issues of a lawsuit which it has brought. Fico's latest attempt to have Pima's use of water declared unreasonable without any Court deciding any facts or issues regarding such use should be denied.

Respectfully submitted,

VERITY & SMITH
and
MUSICK, PEELER & GARRETT

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PROOF OF SERVICE BY MAIL

I caused the within RESPONSE TO PETITION FOR TRANSFER TO SUPREME COURT to be served by mail on the Petitioner and other Respondents on August 17, 1974, as follows:

Snell & Wilmer
Suite 3100 Valley Center
Phoenix, Arizona 85073

Attention: Mark Wilmer, Esq.

The Honorable Robert O. Roylston
Superior Court of the State of Arizona
Pima County Courthouse
Phoenix, Arizona

Peter C. Gullato, Esq.
Assistant Attorney General
159 State Capitol Building
Phoenix, Arizona 85007

Bruce A. Bevan Jr.
BRUCE A. BEVAN, JR.

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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, Response to Petition for Transfer Pursuant to Rule 47(e), Court of Appeals, State of Arizona Division Two, No. 2 CA – CIV 1645, dated August 17, 1974. Court of Appeals Instruments (Part One) Pages 95-98.

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

Craig D. Swick
Signature

Subscribed and sworn to before me this 12/14/2005
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