

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF PIMA

FARMERS INVESTMENT COMPANY, a corporation,

Plaintiff,

vs.

THE ANACONDA COMPANY, a corporation; AMERICAN SMELTING & REFINING COMPANY, a corporation; DUVAL CORPORATION, a corporation; PIMA MINING COMPANY, a corporation; BOYD LAND AND CATTLE COMPANY, a corporation; DUVAL SIERRITA CORPORATION, a corporation; ANDREW L. BETTBY, as State Land Commissioner and THE STATE LAND DEPARTMENT, a department of the State of Arizona,

Defendants.

No. 116542

MOTION FOR PARTIAL SUMMARY JUDGMENT AS TO COMMERCIAL LEASE NO. 906

Plaintiff, FARMERS INVESTMENT COMPANY, a corporation, (hereinafter designated 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 Complaint adjudging and determining that Commercial Lease No. 906 described and identified in said Count Four of plaintiff's Complaint as amended is invalid and void, and enjoining further pumping of the water wells of PIMA MINING COMPANY, defendant herein, as constructed 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.

SNEED & WILMER
By Mark Wilmer
Mark Wilmer
Attorneys for Plaintiff

MEMORANDUM IN SUPPORT OF PETITION

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 or 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 is 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 or 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 Constitution 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 trusts as the lands producing the same."

Article X, Section 3 provides as follows:

"§ 3. Mortgage or other encumbrance; sale or lease at public auction

Section 3. 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 the 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 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. Oct. 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 1965, 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;

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.

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 37-201 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 that 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 transport 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 great 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, 845. (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 anomalous. 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 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 cotenants 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 242-43.

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 there 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 al., 259 P.2d 325.) The grantee or lessee of such interest acquires a profit a prendre in real property, 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, 5 Cal.2d 110, 122, 43 P.2d 788, 101 A.L.P. 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-Johnston Oil Corp. v. Welden, 4 Cal.2d 637, 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.

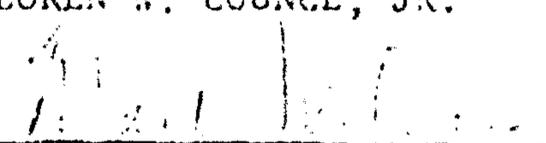
Words & Phrases, Permanent Edition, Vol. 34,
"Profit A Prendre" (including pocket part.)

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.

Respectfully submitted,

SNELL & WILMER

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Mark Wilmer

10-11-66 DEC 2 1966

Lease No. 936

STATE LAND DEPARTMENT
STATE OF ARIZONA
COMMERCIAL LEASE

THIS INDENTURE, made and entered into this 24th day of October, 1966,
by and between the State of Arizona, hereinafter called the lessor, and
PIMA MINING COMPANY
of Tucson, State of Arizona, hereinafter called the lessee:

WITNESSETH, that the State Land Commissioner, by virtue of the authority vested in him by law, and in consideration of the application heretofore made, and the covenants and agreements of this lease, hereinafter set forth, has this day leased to the said lessee the State Land, as hereinafter described, subject to any and all indebtedness that may be known to be due or that may be proven to be due hereafter.

TO HAVE AND TO HOLD the same for the period ending the 23rd day of October, 1970, and subject to the conditions and reservations elsewhere set forth herein. The lessee agrees to pay as rental therefor an amount to be determined by the State Land Commissioner each year by an appraisal made by him, or his duly authorized agent, as provided by law. The rental so fixed by the State Land Commissioner will be due and payable annually in advance. \$10.00 per acre or 1¢ per 1000 gallons water removed, whichever is greater, for Lots 1 & 2; SE ¼. \$1.00 per acre or 1¢ per 1000 gallons water removed, whichever is greater, for the SE.

IT IS HEREBY COVENANTED AND AGREED by both parties hereto that this lease is issued subject to all the provisions and requirements thereto, which are found in the various Acts of the Legislature of the State of Arizona, the same as though they were fully set forth herein.

IT IS HEREBY FURTHER COVENANTED AND AGREED that all of the covenants, conditions and agreements, included in this lease, shall be, become and are a part of the lease, the same as though set forth in full over the signatures of the contracting parties hereto.

IN WITNESS WHEREOF, the Arizona State Land Commissioner, by virtue of the powers vested in him by law, has caused these presents to be executed by said lessor, at Phoenix, Arizona, on the day and year first above written, and the said lessee has hereunto affixed his signature at the place and on the day and year as set forth herein.

By O. M. Ladd
State Land Commissioner.

(SEAL)

By James C. Timmons
Deputy State Land Commissioner.

Signed in the County of Pima, State of Arizona, on the 24th day of October, 1966.

(Signed Hereto) _____

This lease is
drawn in duplicate

A-41
A-41

EXHIBIT 18

(57)

(A) The lessee will not sublet or assign the land herein described or this lease without the written consent of the State Land Commissioner, first obtained, and will, upon the expiration of the lease, surrender peaceable possession of the said land.

(B) The lessee will not permit any loss, nor commit or cause any waste in, to or upon said land; nor cut or remove nor allow to be cut or removed any timber or standing trees that may be upon said land, save and except only such as may be necessary for the improvement of said land, (and then only with the written consent of the State Land Commissioner) or for fuel for the domestic use of said lessee; provided that nothing herein shall be construed to permit the cutting of saw timber for any purpose.

(C) That the lessor excepts and reserves out of the grant hereby made, all oils, gases, coal, ores, limestone, minerals, fossils, and fertilizers of every name and description that may be found in or upon the land herein described, or any part thereof.

(D) The lands herein described are subject to the execution by lessor of drilling permits and leases for the purpose of prospecting for, and the extraction of, oil and/or gases.

(E) That the lessor also reserves the right, as provided by law, to grant to the United States rights-of-way and easements over, across or upon the lands embraced in this lease for canals, reservoirs, dams, power or irrigating plants or works, railroads, tramways, transmission lines or other purposes, for irrigation works in connection with any government reclamation project.

(F) That if at any time after the execution of this lease, it is shown to the satisfaction of the State Land Commissioner, that there has been fraud or collusion upon the part of the lessee to obtain or hold this lease at a less rental than its value, or through such fraud and collusion a former lessee of said land has been allowed to escape payment of the rental due for the use of said land by the former lessee, this lease shall be null and void, at the option of the State Land Commissioner, insofar as it relates to the land affected by said fraud or collusion.

(G) That if at any time after the execution of this lease it is shown to the satisfaction of the State Land Commissioner that the lessee herein has misrepresented, by implication or otherwise, the value of the improvements placed upon the land herein embraced by a former lessee, or any other person or persons and the lessee herein not being the owner of said improvements at the time of the execution of this lease, this lease shall be null and void, at the option of the State Land Commissioner, insofar as it relates to the land upon which said improvements are situated.

(H) If the lessee should fail to pay the agreed rental when due, or fail to keep the covenants and agreements herein set forth, the State Land Commissioner, at his option, may cancel said lease or declare the same forfeited in the manner provided by law.

(I) That the State of Arizona shall be forever wholly absolved from any liability for damages which might result to the lessee herein on account of this lease having been forfeited for nonpayment of rentals due thereunder prior to the expiration of the full time for which it is issued.

(J) It is understood by the lessee that the establishment of any water right, or rights, shall be by and for the State of Arizona, and that no claim thereto shall be made by said lessee; such rights shall attach to and become appurtenant to the said land.

(K) If the lessee desires to place improvement on the land described herein the approval of the State Land Commissioner must first be obtained. That the lessee will, on or before the first day of July of each year during the term herein specified, file with lessor a sworn statement setting forth therein the character of improvements constructed on said demised premises and the actual cash value thereof.

(L) That said lessee shall have the right to remove from said demised premises, at the end of the term herein specified or upon the earlier termination thereof, all buildings, structures or improvements of whatever nature placed by it on said premises. Such right to be exercised within thirty (30) days from the date of the end of such term or earlier termination thereof.

(M) That said lessee shall give lessor thirty (30) days' notice in writing in advance of the abandonment of said premises or termination of these presents.

(N) The terms, conditions and covenants of this lease are subject to present laws relating to state lands and the rights of both lessor and lessee hereunder are each and all subject to such modifications as may be consistent with such amendments, revisions or repeals of existing laws as may hereafter be made and no provisions of this lease shall create any vested right in the lessee herein.

(O) Any improvements placed on this commercial lease must conform to existing Laws and Ordinances relative to commercial construction and maintenance in the area where this land is located. Approval granted by regulatory authorities will accompany application to place improvements when filed with the State Land Department.

(P) That the lessor also reserves the right to grant rights of way and easements over, across, or upon the land embraced in this lease for public highways, railroads, tramways, telephone, telegraph, transmission line, pipe lines, irrigation works, flood control, drainage works, logging and other purposes, and this lease is and shall be subject to all existing rights of way.

ASSIGNMENT OF LEASE

Phoenix, Arizona

The application of.....
for permission to assign Lease No.....and the application of.....
.....for the assumption of said Lease,
having been duly considered this.....day of....., 19.....
and without waiver of State rights which may exist against the lease assigned, and with this consent not
to be construed as initiating any new rights in assignee of lease, consent is hereby given for the assign-
ment applied for and it is ordered that the said Lease No.....and all rights thereunder be and
are hereby transferred to the said.....

.....
State Land Commissioner.

By.....
Deputy State Land Commissioner.

ASSIGNMENT OF LEASE

Phoenix, Arizona

The application of.....
for permission to assign Lease No.....and the application of.....
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State Land Commissioner.

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Deputy State Land Commissioner.

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.....
State Land Commissioner.

By.....
Deputy State Land Commissioner.

AFFIDAVIT IN SUPPORT OF MOTION

STATE OF ARIZONA)
) ss.
County of Maricopa)

MARK WILMER, being first duly sworn, on oath deposes and says:

Affiant is one of the attorneys for plaintiff, FARMERS INVESTMENT COMPANY, and as such is familiar with the things and matters stated in the foregoing Motion for Partial Summary Judgment and Memorandum in Support thereof. Affiant is familiar with the files and records of this action, including the depositions, interrogatories and other discovery and admissions of record, and in addition has become personally familiar with the material facts stated in the foregoing motion and memorandum. The matters of fact asserted in the foregoing motion and the memorandum attached thereto are true and correct of affiant's own knowledge.

Mark Wilmer
Mark Wilmer

SUBSCRIBED AND SWORN to before me this 15th day of June, 1973.

Lon Nell Karnes
Notary Public

My Commission Expires:
July 28, 1976

(Seal)

STATE OF ARIZONA)
)
COUNTY OF MARICOPA) ss:

I Craig Swick hereby certify:
Name

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

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

That there is on file in said Agency the following:

Microfilm of Farmer's Investment Company v. Pima Mining Company et al, Arizona Supreme Court Case No. 11439, Motion for Partial Summary Judgement as to Commercial Lease No. 906 from Farmer's Investment Company v. Anaconda Company, et al, Superior Court of the State of Arizona in and for the County of Pima, case no. 116542, June 15, 1973

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

Craig D. Swick
Signature

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

Etta Louise Muir
Signature, Notary Public

My commission expires 04/13/2009
Date

