IN THE SUPREME COURT OF THE STATE OF ARIZONA

FILED
JAN - 2 1974
CLIFFORD H. WARD
CLERK SUPREME COURT
BY

FARMERS INVESTMENT COMPANY, a corporation, Petitioner, vs. PIMA MINING COMPANY, a corporation; ANDREW L. BETTWY, State Land Commissioner; STATE LAND DEPARTMENT; THE HONORABLE ROBERT O. ROYLSTON, Judge of the Pima County Superior Court; and THE PIMA COUNTY SUPERIOR COURT, Respondents.	No. 11439 SPECIAL ACTION PETITION

COMES NOW FARMERS INVESTMENT COMPANY, an Arizona corporation, and petitions the Supreme Court of Arizona to review the orders and judgment of the Superior Court of Pima County and the Honorable Robert O. Roylston, the presiding judge, as to Count IV of a civil action pending in that Court, entitled "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; Amax Copper Mines, Inc., and The Anaconda Company, as partners in and constituting Anamax Mining Company, a partnership, and Anamax Mining Company; Andrew L. Bettwy, as State Land Commissioner and The State Land Department, a department of the State of Arizona, Defendants", which is Cause #110542.

Two questions of public importance justifying review by the Court were ruled upon by Judge Roylston, which may be stated as follows:

Question 1: Does the State Land Commissioner have authority by reason of the terms and provisions of the Arizona

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Groundwater Code (Title 45, Article 7, Chapter 1, Arizona Water Code, as amended, Section 45-301 et seq.) to enter into a "commercial lease" of State land located within a critical groundwater area designated as such by the State Land Commissioner, for a ten-year term for the express and stated purpose of authorizing the lessee to sink wells into the water basin underlying this State land and by means thereof to pump groundwater and transport the same for use outside the critical groundwater area?

Said otherwise, if Tucson had obtained ten-year "commercial leases" from the State Land Commissioner instead of purchasing well sites in Jarvis v. State Land Department, 104 Ariz. 527, 456 P.2d 385, would the decision have been in favor of the right of Tucson to continue pumping Avra Valley water for use in Tucson?

Question II: Does the State Land Commissioner have authority under the trust obligations and limitations of Section 28 of the Enabling Act (as followed and adhered to by the relevant Arizona Constitutional and Statutory provisions) to execute "commercial" leases of State land for ten-year terms without advertising or offering the same at public auction, which

(a) amount to a conveyance of the groundwater underlying a parcel of State land and authorization to withdraw and transport the same for use away from the State land and not for the benefit of the land from which the groundwater is to be withdrawn?

(b) have for the lease purpose and authorize the dumping of tailings wastes upon the State land, thereby destroying the utility and value of said State land for any purpose after the expiration of the ten-year term except the continued storage of the tailings wastes?

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Petitioner, in support of its Petition, respectfully shows the Court:

I

Petitioner, FARMERS INVESTMENT COMPANY (hereinafter for brevity "FICO") is an Arizona corporation engaged in a general farming business in the State of Arizona. Respondent PIMA MINING COMPANY (hereinafter for brevity "PIMA") is an Arizona corporation engaged in the mining business in Pima County, Arizona.

II

On November 24, 1969 FICO filed suit in the Pima County Superior Court, Cause #116542, against 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; Amax Copper Mines, Inc., and The Anaconda Company as partners in and constituting Anamax Mining Company, a partnership, and Anamax Mining Company; Andrew L. Bettwey, as State Land Commissioner; and The State Land Department, a department of the State of Arizona (hereinafter for brevity "Cause #116542") asserting as to each mining defendant that said defendants were wrongfully pumping groundwater from an area theretofore lawfully designated as a Critical Groundwater Area by the State Land Commissioner, and transporting it for use in the mining and milling operations and activities of each of the defendants outside of said Critical Groundwater Area. The City of Tucson intervened in said action and thereafter Amax Copper Mines, Inc., a Nevada corporation, as a partner in the mining venture of Anamax Mining Company, said partnership consisting of The Anaconda Company and Amax Copper Mines, Inc. as successor to the property and mining operations of The Anaconda Company, were made parties by court

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order and appeared and filed their pleadings in the action.

Andrew L. Bettwy, as State Land Commissioner, and the State Land Department, were also brought in as parties defendant and the pleadings appropriately amended.

Count IV of the Complaint as amended stated a claim only against defendants Pima Mining Company, Andrew L. Bettwy as State Land Commissioner, and the State Land Department. Count IV is the only claim made by FICO in Cause #116542 material to this Petition. A true copy of the Complaint as amended is reproduced in the Appendix hereto.

The location of FICO'S farming operations and irrigation wells and of the mills, tailings ponds and wells of all the defendants in Cause #116542 are located and shown illustratively upon Exhibit "A" hereto. The mine pit of defendant PIMA is located generally westerly from the mill of that defendant.

III

The Santa Cruz River basin south of Tucson extends generally in a north - south direction from Nogales, Arizona, to and past the Tucson, Arizona area. The bed or channel of the Santa Cruz River in this area is generally dry except during periods of heavy precipitation in its watershed area. Groundwater constitutes the water resource of the area for all purposes.

IV

A part of the Santa Cruz River basin area commonly referred to as the Upper Santa Cruz Basin which is material to this Petition lies south of Tucson and was designated as the Sahuarita-Continental Critical Groundwater Area by the State Land Commissioner and the State Land Department of the State of Arizona

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pursuant to the provisions of Article 7, Chapter 1, Arizona State Water Code, as amended (Section 45-301 et seq., A.R.S.) generally referred to as the Groundwater Code, on October 14, 1954. This designation has remained in full force and effect to the present time.

V

Petitioner farms approximately 5,000 acres of its land in the Upper Santa Cruz Basin and within the Critical Groundwater Area above described, as a pecan orchard. These trees are maturing and presently yielding annual crops of pecan nuts in increasing amounts. The pecan orchard has an appraised value, as determined by a qualified appraiser, of approximately $30 million, which sum Petitioner represents to be in fact the fair approximate value of the pecan orchard. Water for the irrigation of these pecan trees is essential to the healthy growth of said trees and to the setting and ripening of the pecan nuts.

VI

On October 2[illegible], 1[illegible] the then State Land [illegible]missioner executed "Commercial Lease No. 906" in favor of [illegible]MA as Lessee, a true copy of which is annexed hereto as Exhibit B. Said lease by its terms was "for the purpose of: developme[illegible] of water farm from deep wells, booster pump and power substat[illegible]n, gathering tanks, pipelines, power lines, etc." The lease further provided: "In addition to commercial use of this land, the land can also be used for grazing." (Exhibit B, "Special Conditions".)

VII

At all times material hereto, the land which is the subject of Lease No. 906 has been land acquired by the State of Arizona subject to the provisions, conditions and trust obligations imposed by Section 28 of the Enabling Act and the Arizona Statutes and Constitutional provisions controlling the use and disposition of such land, and at all times has been located

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within the exterior boundaries of the Sahuarita-Continental Critical Groundwater Area.

VIII

Respondent PIMA is an Arizona corporation which owns and operates a copper mine and mill located approximately seven miles westerly from the pecan orchard of Petitioner and approximately two miles westerly from the westerly boundary of said Sahuarita-Continental Critical Groundwater Area, and outside the boundary thereof.

IX

PIMA executed said Lease No. 906 on December 5, 1966 and thereafter drilled and placed in operation four large water wells in the leased area and connected the discharge from said wells to its collector, storage and transmission lines and system whereby the water discharged by said wells is pumped from the area of said wells a distance of approximately seven miles to the mine and mill of PIMA, which are located outside of and approximately two miles beyond the westerly boundary of said Critical Groundwater Area. At the mill and mine of PIMA, the water is used in the mining business of PIMA, and thereafter the wastes from the milling process are conveyed and stored in the tailing ponds of said mining company.

Each of said wells so drilled by PIMA is capable of producing approximately 5,000 gallons per minute, and during the year 1972, PIMA pumped from the wells within the boundaries of said State lease in excess of 3,163,000,000 gallons of water and transported the same out of said Critical Groundwater Area for use at its mine and mill aforesaid. PIMA continues to pump water from said water farm located on the property covered by Commercial Lease No. 906 at a rate equal to or in excess of that hereinabove described with reference to the rate of withdrawal in the year 1972.

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X

On or about June 15, 1973 FICO filed its "Motion for Partial Summary Judgment as to Commercial Lease No. 906" seeking an adjudication that said lease was invalid and void and that the withdrawal of groundwater from the area covered by said Lease No. 906 was illegal and in violation of the rights of FICO.

On or about August 20, 1973 PIMA filed its "Motion for Partial Summary Judgment re Commercial Lease No. 906". Copies of each of said motions for partial summary judgment are found in the Appendix to this Petition which is filed as a separate document from this Petition.

Thereafter, FICO filed its "Response to Defendant Pima's Commercial Lease No. 906 Pleadings". PIMA in turn filed a Reply to FICO'S Response. The State Land Department filed its Response to the motions for summary judgment on Commercial Lease No. 906, and the matter was subseouently argued before the Respondent, Robert O. Roylston, Judge of the Superior Court of Pima County, Arizona, who took the matter under advisement. Thereafter, PIMA filed its Supplemental Memorandum and FICO filed its Supplemental Memorandum as authorized by the Superior Court. Copies of each of the aforementioned Responses, Replies and Supplemental Memoranda are also found in the Appendix filed herewith.

On November 15, 1973 Judge Roylston entered a minute order as follows:

> The Court having taken under advisement plaintiff's Motion for Partial Summary Judgment as to commercial lease no. 906, and also having taken under advisement defendant Pima Mining Company's Motion for Summary Judgment on Count Four of plaintiff's Complaint,
>
> IT IS ORDERED that the plaintiff's motion is denied and defendant Pima Mining Company's motion is granted.
>
> IT IS FURTHER ORDERED that judgment in favor of defendant Pima Mining Company and against the plaintiff on Count Four be entered.

It appearing that there is no just reason for delay of entry of final judgment as to Count Four,

IT IS ORDERED that upon signing and filing of Judgment on Count Four, that the appeal time as to Count Four shall commence pursuant to Rule 54 (b).

Judge Boylston thereafter entered a formal written judgment in accordance with the minute order hereinabove set forth, which by its terms became a final judgment upon its entry by the Clerk of the Pima County Superior Court on December , 1973.

XI

The issues involved in the partial summary judgment proceedings above described were limited to the issues presented by Count IV of the Complaint as amended, and the only parties to said Count IV were PICO as Plaintiff; Pima Mining Company, a corporation; Andrew L. Bettwy, State Land Commissioner; and the State Land Department, as Defendants.

XII

In support of its Motion and opposing PICO's Motion, PMA filed the affidavit of George Romadine, its Vice President and General Manager, that its use was a valid use because:

(a) A portion of the PMA mine pit from which PMA mines its ore is leased from the State of Arizona and Arizona receives royalty payments upon the ore so mined, which royalties have annually averaged $895,000.00.

(b) Additionally, PMA pays mine tax, income tax, severance and sales taxes to the State of Arizona.

(c) The water pumped from the wells on the leased property is used in processing ore mined from the PIMA pit, which includes the use of this water to convey the milling wastes or tailings to tailings ponds on Sections 9 and 10, also leased from the State of Arizona pursuant to Commercial Leases Nos. 007-01 and 007-02.

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(d) PIMA also leases from the State of Arizona rights of way over other State land to enable PIMA to utilize the water as aforesaid and pays royalties to the State.

(e) The tailings wastes dumped upon Commercial Leases 907-01 and 907-02 contain more water than PIMA withdraws from the ground in the Critical Groundwater Area. In the year 1972, PIMA dumped tailings wastes on the State lands in Sections 9 and 10 under Commercial Leases 907-01 and 907-02 totalling 4,991,267,000 gallons of tailings water slurry, of which 1,256,934,000 gallons was reclaimed, pumped back to the mine and mill and re-used. PIMA alleged that there remained on the lands covered by Leases No. 907-01 and 907-02 3,734,333,000 gallons of water. In 1972, PIMA pumped 3,163,842,000 gallons of water from beneath the lands covered by Commercial Lease No. 906. (True copies of Commercial Lease No. 907-01 and Commercial Lease No. 907-02 are annexed hereto as Exhibits C and D).

Additionally, PIMA has contended that it withdraws most of its water from an aquifer within the Critical Groundwater Area underground but separate from the aquifer feeding FICO'S wells.

XIII

FICO, by its Motion for Partial Summary Judgment, asserted that Commercial Lease No. 906 contravened the Arizona Enabling Act, Section 28 thereof, the Arizona Constitution and Statutes enacted pursuant to the requirements of the Enabling Act, and that the withdrawal and transportation of groundwater from within the Sahuarita-Continental Critical Groundwater Area for use outside of said area was illegal and contrary to law and that FICO as a beneficial user of groundwater upon lands within said Critical Area was entitled to assert the illegality of the

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leases aforesaid (a) by reason of contravening the Arizona Groundwater Code, and (b) by reason of contravening the Enabling Act and related Arizona constitutional and statutory restrictions when disposing of State land and natural products thereof.

XIV

FICO does not have an adequate or speedy remedy by appeal, and the immediate resolution of the legal issues here involved is of sufficient importance, not only to FICO but to the economy of the Tucson area, to justify this Petition to the Arizona Supreme Court and for the Court to accept jurisdiction of this Petition for the following reasons:

1. The Central Arizona Project (hereinafter for brevity "CAP") designed to bring Colorado River water to central and south-central Arizona, is now under construction. The Tri-County Water Conservation District authorized by the Arizona Legislature, the Central Arizona Water Conservation District (hereinafter for brevity "CAWCD") has been organized and has contracted with the Secretary of the Interior for all of the Colorado River water which will be available when the CAP is completed. CAWCD is now entering into subcontract with Arizona water users for the allocation of the water to be made available by the CAP. The contract with the Secretary of the Interior gives first priority to municipal and industrial uses, and the policy adopted by the Arizona Water Commission and the CAWCD gives municipal and industrial uses first priority, recreational uses second priority, and agricultural uses third priority. These subcontracts will be completed within approximately one year, and once the water is under contract there will be no more water available for use from the CAP.

Presently, there is water available from the CAP for contract to the defendants in Cause #116542 to the full extent of their present uses, or approximately 59,000 acre feet per annum. This water is not presently available to FICO or other

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agricultural users in the Tucson area, and unless there remains CAP water in excess of that claimed and contracted for by municipal, industrial and recreational uses within the CAWCD, it will not be available to FICO. Unless the issue as to the legal availability of groundwater to PIMA is resolved prior to the close of the contracting period, the availability of the water to the Upper Santa Cruz Basin may be foreclosed and lost. Additionally, presently one of the defenses asserted by PIMA is that there is no source of water available to PIMA except the groundwater now being pumped by it, and hence PIMA asserts it would be inequitable to enjoin PIMA'S use of this groundwater, thereby injuring the economy of the State. The question therefore justifies early resolution.

2. The City of Tucson presently has available approximately 30,000 acre feet of effluent per annum from its municipal disposal plant which is "mild domestic sewage". This amount will increase to an estimated 80,000 acre feet by the year 2000- Tucson is prepared to make such changes in its treatment plant as may be required - if any changes are in fact required - to make this effluent useable in the mining and milling operations of PIMA, and has prepared engineering and cost studies which show that the effluent can be delivered to the PIMA collector system for approximately $50.00 per acre foot. This water is presently wasted into the bed of the Santa Cruz River. Tucson is willing to supply this water to PIMA (and the other mining defendants), but due to lack of any expression of real interest in contracting for this water, Tucson is presently studying alternative uses and will make a decision with respect to the disposition of this available water in the reasonably near future. FICO therefore asserts that an early resolution of the legality of PIMA'S present water uses would be in the public interest, as well as in the interest of FICO.

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3. The use which PIMA is presently making of water from within the Critical Groundwater Area amounts to exhausting a resource which cannot be replaced and to a continuing trespass upon the property rights of FICO, and a continuing wrongful taking and use of property, a portion of which belongs to FICO.

4. Continued depletion of the water resource of the State land under the terms of Commercial Lease No. 906 amounts to a waste of State land and a breach of trust imposed by the Enabling Act limitations upon the uses which may be made of State land and to a direct violation of the Constitution of Arizona and the Arizona Statutes implementing the trust provisions of Section 28 of the Enabling Act.

5. Under the disclosures made by the affidavit of Mr. Komadino supporting the Motion for Partial Summary Judgment filed by PIMA, additional mis-use of State land is disclosed, in that two sections of State land are being used as a waste dump for PIMA'S tailings, thereby destroying said land for all future use or for future sale at its true value. No provision is made in either State Lease No. 907-01 or Lease No. 907-02 for the removal of the materials dumped upon said State land and the restoration thereof to its condition prior to the execution of these leases. In effect, the leases amount to a sale of the State land, since the lands have been effectively destroyed through the dumping of huge amounts of tailings, thereby rendering the lands unuseable for any purpose other than continued storage of such tailings, and no provision is made for the continued payment of rental for such use by PIMA after the expiration of the term of the existing leases.

6. In addition to the water withdrawals made by PIMA from the Critical Groundwater Area for use outside the area, the other mining defendants in Cause #110542 are likewise

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withdrawing groundwater from within the Critical Groundwater Area for use outside the area. The total amount so withdrawn substantially exceeds 50,000 acre feet per year and these withdrawals from the groundwater basin underlying the Critical Groundwater Area are being made jointly by all defendants in Cause #116542 (but for the separate use of each defendant) for use outside the Critical Groundwater Area. Additionally, a part of the water use made by PIMA is from wells within the area leased under Commercial Lease No. 906, and a part is from wells in the same general area within the Critical Groundwater Area but outside the boundaries of Commercial Lease No. 906. The interrelation of these uses and the uses made by the other defendants renders and will render the trial preparation and trial of Cause #116542 difficult and economically unfeasible unless and until the validity of the summary judgment entered by Judge Roylston is determined. The delay incident to the ordinary appeal processes is such that great and irreparable damage and harm would be done to FICO through further exhausting an irreplaceable resource and also permitting continuing trespass upon and waste of State lands and the property rights of FICO.

7. Determination of the validity of the summary judgment in favor of PIMA and the order denying summary judgment to FICO does not involve complicated facts.

The question may be stated thus: Does a lease granted by the State Land Commissioner and the State Land Department of State land lying within a Critical Groundwater Area for the purpose of permitting the lessee to construct large water withdrawal wells on such State land and to pump large quantities of groundwater from the land so leased for use outside said Critical Area contravene Arizona water law or the provisions of Section 28 of the Enabling Act and the

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Arizona Constitutional and Statutory provisions implementing the trust obligations imposed by the Enabling Act?

8. The determination made by the Honorable Robert O. Roylston in granting the motion of PIMA for summary judgment as to the validity of Lease No. 906 and the use of water from the wells constructed under the provisions of said lease, and the denial by said Judge of the motion of FICO for a determination that said use was illegal and wrongful, was arbitrary and capricious in that, totally as a matter of law, the lease contract relied upon by PIMA was void and in contravention of the Enabling Act, the Arizona Constitution and Statutes and the use of the groundwater pursuant to the terms and provisions of said Commercial Lease No. 906 was unlaw and contrary to law. Accordingly, denial of FICO'S motion was for the same reason arbitrary and capricious.

WHEREFORE, Petitioner prays that a hearing be held on this Petition at a time and place to be fixed by the Court; that upon such hearing, the Court shall assume jurisdiction of the matters and things set forth in this Petition; and for such other and further relief, order and proceeding as the Court in its discretion may determine that the interests of justice require.

SMALL & WILMER

By _____
Mark Wilmer

By _____
Loren W. Counce, Jr.
Attorneys for Petitioner
3100 Valley Center
Phoenix, AZ 85073

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STATE OF ARIZONA)
) ss: AFFIDAVIT
COUNTY OF MARICOPA)

MARK WILMER, being first duly sworn, says:

Affiant is attorney for Farmers Investment Company, a corporation, the Petitioner herein, and makes this Affidavit for and on behalf of said Petitioner for the reasons (a) that Petitioner is a corporation and accordingly, this verification must be made by an agent; (b) that affiant is and has been personally familiar with the proceedings from the time this litigation was instituted, and is personally familiar with the scope of the proceedings herein, including the answers to interrogatories, depositions and similar matters, and since the factual assertions made in the foregoing Petition are based upon matters of record in this cause, including depositions, discovery, interrogatories and similar matters, he is better informed as to the matters and things set forth in said Petition than any other agent or representative of the corporation Petitioner.

Affiant has read the foregoing Petition and knows the contents thereof; the matters and things therein set forth are true and correct based upon the matters and things disclosed in the record in this cause; that the assertions with respect to the availability of the CAP water and related statements are based upon the deposition of Wesley Elwood Steiner, Jr., Executive Director of the Arizona Water Commission and also State Water Engineer, taken on September 24, 1973 in this cause, and the statements related to the available water effluent from the City of Tucson are based upon the deposition of Tucson Assistant City Manager Frank Brooks, whose responsibility is related to water and sewage matters

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of the City of Tucson; the reliability and accuracy of the matters depicted upon Exhibit A are supported by the affidavit of John R. Erickson, Civil Engineer and Hydrologist, and by the records on file in this action.

Further affiant saith not.

Mark Wilmer

SWORN TO and SUBSCRIBED before me this 2nd day of January, 1974.

Notary Public

My Commission Expires:

September 16, 1976

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MEMORANDUM IN SUPPORT OF PETITION

ARGUMENT

Part One

We believe the material facts necessary to a decision of this matter are few. We state them as follows:

1. FICO is a farming enterprise landowner requiring groundwater for the successful growing and maturing of its crops, chiefly pecan nuts.

2. In 1954, the Sahuarita-Continental Critical Groundwater Area was duly designated by the State Land Commissioner and the State Land Department pursuant to the Arizona Groundwater Code, Section 45-301 et seq., A.R.S. This designation has continued in effect to the present time. FICO'S farms are located within this Critical Groundwater Area.

3. Subsequently, PIMA built an ore mill and developed an open pit mining operation approximately seven miles westerly from the westerly boundary of FICO'S farm, and approximately two miles to the west of and outside the boundary of the Sahuarita-Continental Critical Groundwater Area milling the open pit ore at its mill located as described.

4. On October 24, 1966, the then State Land Commissioner, as lessor, executed Commercial Lease No. 906 to PIMA as lessee, and PIMA executed the lease on December 5, 1966. PIMA thereafter entered into possession of the leased land and drilled and equipped four large water wells capable of producing 5,000 gallons per minute, and connected these wells into PIMA'S water gathering, storage and transportation system and has continuously pumped said wells and transported the water from the Critical Groundwater Area aforesaid some seven miles for use in its mining business. In 1972, PIMA pumped and transported over 3,100,000,000 gallons of water from within

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the Critical Groundwater Area leased to PIMA by Commercial Lease No. 906 to its mill and mine.

On the first day of July, 1967 and the second day of December, 1968, respectively, Commercial Leases No. 907-01 and 907-02 were executed by the State Land Commissioner and PIMA, copies of which leases are annexed hereto as Exhibits C and D, for use by PIMA as tailings waste dumps. PIMA is now dumping very large quantities of tailings wastes in these areas leased to PIMA by Leases No. 907-01 and 907-02.

5. The lands which are the subject of Commercial Leases No. 906, No. 907-01 and No. 907-02 are lands which were acquired by the State of Arizona from the United States subject to the trust obligations and related provisions of Section 28 of the Enabling Act and the applicable Arizona Constitutional and Statutory provisions hereinafter set forth.

We believe the legal principles necessary to a decision are few and well-established in this jurisdiction. We state them as follows:

1. In Murphy v. State, 65 Ariz. 358, 181 P.2d 336 (1947) Justice La Prade set forth the policy and obligations assumed by Arizona when it accepted statehood and the Enabling Act as stated by Senator Beveridge in his report as Chairman of the Committee on Territories (65 Ariz. 351) here quoted in part:

> "The fourth important difference between the House and Senate bills is that the former bill has no restriction regarding the disposal of the lands granted the proposed new states, whereas the latter bill places on these lands careful and rigid, though entirely reasonable and practicable, restrictions.
>
> "The Senate bill (secs. 10 and 28) expressly declares that the lands granted and confirmed to the new states shall be held in trust, to be disposed of only as therein provided and for the several objects specified. The same trust feature is extended to the proceeds of the granted lands. Mortgages are entirely forbidden, and the

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sales and leases are required to be made to the highest bidder at a public auction, after notice by advertisement, except that these formalities are dispensed with in the case of any lease for a period of five years or less.

"Appraisal is required before sale or lease, and sales or other disposition for a price less than the value so fixed or the minimum prices mentioned in the bill are forbidden, as well as transactions upon credit, unless accompanied by security."

* * *

"Transactions in contravention of the act are declared to be void, and it is made the duty of the Attorney-General to take such proceedings at law and in equity as may be necessary or appropriate to enforce the provisions relative to the application and disposition of the lands and the proceeds or funds derived therefrom."

Justice La Prade then commented upon the "ingenuity of politically ambitious men" and the many cases arising from efforts to circumvent the provisions of the New Mexico Enabling Act and concluded that in summary, these cases demonstrated "that every act of the Legislature that in any manner circumvents the plain provisions of the Enabling Act is struck down as unconstitutional and void". (Emphasis the court's).

The Court proceeded to apply the same policy and rule to Arizona's dealings with State land.

The Court in Murphy was speaking of Legislative acts -- here we deal merely with administrative acts of a State official in disposing of State lands. See also: Lassen v State ex rel. Ariz. Highway Dept., 385 U.S. 458, 87 S.Ct. 584, 17 L.Ed2d 515; State Land Dept. v. Tucson Rock and Sand Co., 107 Ariz. 74, 481 P.2d 867 (1971).

2. Even though an instrument purports to be a lease and the sums stipulated to be paid be called "rent", the real

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form and effect of the transaction will be determined to be a sale if in fact this is its purpose and effect. Hervey v. Rhode Island Locomotive Co., 93 U.S. 664, 23 L.Ed. 1003 (1877).

17 Am. Jur. 2d, Sec. 269 "Contracts", states the applicable principle succinctly and clearly:

> "What a contract is styled or labeled by the parties does not determine its character or their legal relationship, nor is the name given a contract determinative in its construction. While in certain cases captions or names of contracts must be considered in order to ascertain the meaning and nature of the contract, the greater weight must be given to the operative contractual clauses of the agreement. Calling a contract a lease or a sale, for instance, will not make it a lease or a sale. It may be said, therefore, that the proper construction of a contract is not dependent upon any name given it by the parties, but upon the entire body of the contract and its legal effect as a whole."

3. Withdrawal of groundwater from a critical groundwater area and transportation of water so withdrawn for use outside the critical groundwater area contravenes the public policy of the State of Arizona as established and declared by the Arizona Groundwater Code,(Title 45, Article 7, Section 45-301, et seq., A.R.S.)

Accordingly, a lease of State land located within a critical groundwater area, designated as such pursuant to the provisions of the Arizona Groundwater Code (Title 45, Article 7, Section 45-301, et seq., A.R.S.) which in fact constitutes a sale of the groundwater of the State land so leased for removal from and use away from the State land and the critical groundwater area is void as contrary to public policy and beyond the power of the State Land Commissioner.

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4. Drilling of water wells in an area subsequent to its designation as a critical groundwater area, and withdrawal and transportation of groundwater outside of the critical area for use outside the critical area as a matter of law causes a farm owner within said area prior to the designation of the area and lawfully using groundwater for growing crops a justiciable claim against the one so transporting water for use outside the area.

As stated in Jarvis v. State Land Department, 104 Ariz. 527, 456 P.2d 385 (hereinafter for convenience Jarvis I):

> " . . . That these lands are within a Critical Ground Water Area is alone sufficient to grant petitioners the relief sought since a Critical Ground Water Area is a ground water basin or a subdivision thereof 'not having sufficient ground water to provide a reasonably safe supply for irrigation of the cultivated lands in the basin at the then current rates of withdrawal.' A.R.S. §45-301. Manifestly, a ground water area or subdivision of a basin which does not have a reasonable safe supply for the existing users can only be but further impaired by the addition of other users or uses." 104 Ariz. 530 (Emphasis added)

The Court in State ex rel. Morrison v. Anway, 87 Ariz. 206, 349 P.2d 774 stated that the doctrine of reasonable use as protected by the Groundwater Code "is a rule of property" protected by the Arizona Constitution. (Repeated in Jarvis I at 104 Ariz. 531).

5. If in fact the Lease No. 906 be considered a true lease, then the withdrawal and conveyance away from the leased premises constitutes waste, since a tenant's "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. Any additional use constituted "waste". 93 C.J.S. 559 et seq. "Waste". (Additional legal principles may be stated in the following argument as peripherally applicable).

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Part Two

For convenience, FICO will first set out the Enabling Act, Constitutional and Statutory provisions believed applicable.

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

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"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:

"S 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:

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"§ 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, not made in substantial conformity with the provisions thereof, shall be null and void."

Section 37-101 A.R.S., 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 then agricultural, grazing, mining, oil, homesite or rights-of way."[1]

Section 37-212 A.R.S., (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, A.R.S., Title 37 (pocket part) provides as follows:

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[1]The attempted broadening by the Legislature of the term "commercial use" as found in the Enabling Act by the addition of the phrase "or any general purpose" is plainly beyond the power of the Legislature, since it deprives the narrow limitation language "commercial use" found in the Enabling Act of any real meaning.

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"§ 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, A.R.S., Title 37 (p.29 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.

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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, S 1.

A review of the foregoing statutory enactments demonstrates that the Legislature understood the term "commercial" to mean use of the surface area of the land leased for business purposes.

Such was the holding of the Court of Appeals in Columbia Investment Co. v. M.M. Sundt Const. Co., 1 Ariz. App. 124, 400 P.2d 132.

That Commercial Lease No. 906 was entered into without any advertisement or call for bids was not disputed. PIMA filed its application for the lease, it was reviewed by Louis C. Duncan, Deputy State Land Commissioner, the State Land Commissioner, and the State Land Department, and then executed as a Commercial Lease. (Deposition of Louis C. Duncan, May 31, 1973, page 5).

The affidavit filed by PIMA with its Motion for Partial Summary Judgment as to Commercial Lease No. 906 and opposing FICO'S Motion for Partial Summary Judgment adjudicating this lease to be invalid, have been summarized in Paragraph VII of the Petition and will not be reviewed in detail here. The affidavit is reproduced in the Appendix. However, paragraphs 5 and 7 of this affidavit are of importance sufficient to justify reproduction in haec verba here. Paragraph 5 reads:

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"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."

Paragraph 7 reads:

"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."

Paragraph 7 is less than candid in its implications, and unless read in connection with paragraph 5, is misleading. These two paragraphs read together assert that PIMA has also leased two other sections of State land for ten-year terms under "commercial leases" for use as a tailings dump and that in 1972 tailings containing 4,991,267,000 gallons of water were dumped (PIMA prefers the word "deposited", but in fact the area is a tailings dump, neither more nor less) and that of this amount 1,256,934,000 gallons was reclaimed and pumped back for re-use by PIMA in its mining business. Commercial Leases 907-01 and 907-02 (Exhibits "C" and "D" hereto), each for a ten-year term, make no provision for restoration of the premises to their condition at the beginning of the term, and no provision for continued responsibility in the lessee for blowing dust and tailings or other maintenance of the dump area. In effect, the tailings dump then becomes the responsibility of the State of Arizona.

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It requires a considerable amount of self-assurance to seriously assert that use of an area as a dump grounds amounts to a commercial use of the property. It may facilitate other commercial enterprises of the one dumping wastes, but it certainly does not amount to carrying on a commercial enterprise at the dump. Such use and the lease authorizing it in effect constitutes a sale of State land at a price of $400.00 per acre (without complying with the Enabling Act requirements) with two important exceptions: the land is not subject to taxation to PIMA and PIMA is freed from responsibility for maintenance and other care of the tailings dump after the lease expires. It is plain that the land will be substantially destroyed for any beneficial use and that control of dust and blowing fines from the tailings dump must then become the responsibility of the State of Arizona. It seems clear that PIMA will effectively continue to use and occupy the land into the foreseeable future, since the literally tons of tailings wastes dumped upon the property cannot be moved, but without payment of either rent or taxes.

It is also noteworthy that since Tucson has intervened claiming pollution of its groundwater supply, PIMA makes no representation that this waste water, which it states is deposited on the land, is available for use in the basin.

While we believe the reasoning expressed and conclusions reached in State Land Department v. Tucson Rock and Sand Co., 107 Ariz. 74, 481 P.2d 867 are equally applicable to this case, we recognize that we are here dealing with a fugacious substance rather than with rock and sand which has a fixed situs. In reason, however, this difference does not seem of legal consequence. In Jarvis v. State Land Department, 104 Ariz. 527, 456 P.2d 385 (hereinafter Jarvis I), this Court said:

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> "The rule that the owner of the 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, supra; State ex rel Morrison v. Anway, 87 Ariz. 206, 349 P.2d 774."
> 104 Ariz. at 529

Certainly if the owner of land sinks a shaft and physically removes by use of a hoist a yard of earth from below the surface and sells it for any purpose, the water which is contained therein, be it saturated or relatively dry, is part of the earth sold and title passes to the purchaser with the rest of the earth. Should the rule be different if instead of sinking a shaft and using a hoist the owner drills a hole into the underground and inserts a device called a pump down the hole to the underground to drive the water as it drains into the hole from the surrounding material to the surface by use of impellers and then sells one the water?

Courts have considered the legal effect of a lease entered into for the purpose of authorizing the lessee to drill a hole into the underground and by means of a pump bring to the surface a different fugacious material, petroleum or crude oil.

In Stone v. City of Los Angeles, 299 P.838, the California Appellate Court adhered to the "oil in place" theory and said:

> "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 part of the realty. When it is brought to the surface it becomes personalty and a part of it is 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

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> 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 P. 843

This "oil in place" theory was not shared by all California Appellate Courts, and in Callahan v. Martin, 43 P.2d 788 (1935), the California Supreme Court ruled:

> ". . . But, as a development of a logical theory appropriate to the facts, the oil and gas in place doctrine, which in terms describes a grant of an interest in oil rights which is unlimited as to duration as a present transfer of a defeasible fee in definite corporeal real property, seems not to take into account the circumstance that the oil actually brought to the surface, and to which the assignee's rights attach, 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 off from beneath the surface of other lands. There is a further difficulty in applying the oil and gas in place theory, which implies a present transfer of definite corporeal real property, when the operating oil lease is not of unlimited duration, or for so long as oil shall be produced in paying quantities, but for a fixed period of years which may not exhaust the oil, or when the assignment of landowner's royalty is to extend only to oil produced during a fixed period of years.
>
> "By reason of these anomalies, as the law relating to oil and gas has developed during recent years, and the relationships arising from dealings in this type of property have been analyzed more closely by the courts, the oil in place doctrine has been rejected by a large number of jurisdictions, and other theories developed, which give due recognition to the fugacious, vagrant nature of oil and other hydrocarbon substances, yet in their logical application protect oil interests as estates in real property."

* * *

"Giving full weight to this statement of the nature of the landowner's rights in oil and gas, we are of the view that an operating lessee under a lease for a term of years, or for a term of years and so long as oil shall be produced in paying quantities, has an interest or estate in real property in the nature of a profit a prendre, which is an incorporeal hereditament, and that the assignee of a royalty interest in oil rights under an assignment by the landowner also has an interest or estate in real property in the nature of an incorporeal hereditament." 43 P. 2d 791, 792

In Dabney-Johnston Oil Corporation v. Walden, 52 P.2d 237, 243 the California Supreme Court again said:

> "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.
>
> "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."

In Wall v. Shell Oil Company, 25 Cal.Rptr. 908 (1962), the District Court of Appeal ruled (per Justice Herndon):

> "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.

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> 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). 25 Cal.Rptr. 911 (Emphasis added)

Arizona is firmly committed to the holding that percolating groundwater is part of the soil in which it occurs. The subsidence of the earth in areas of over-pumping of groundwater reported from time to time in the public press tells us that some part of the underground is removed when groundwater is pumped to the surface and not replaced. Common sense buttresses this conclusion.

Unless we are to reject that which reason and logic requires, we must conclude that Commercial Lease No. 906 authorizes the removal and passing of title to a part of the tract of land "leased" for a price and on credit.

If we reach this conclusion, we need only recall the rigid restrictions of the Enabling Act to conclude that Judge Roylston was indeed wrong and that the lease violates the plain policy and intent of the Enabling Act.

> "Said lands shall not be sold or leased, in whole or in part, except to the highest bidder at public auction . . . "

> " . . . nor shall any sale or contract for the sale of any timber or other natural product of such land be made save at the place, in the manner and after notice by publication provided for sales and leases of lands themselves . . . "

> "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 . . ."

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PIMA, in the trial court, of course attempted to bring this lease within the exception contained in the Enabling Act permitting "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 . . .".

This contention cannot withstand careful scrutiny.

1. The lease is not a lease; it operates as a conveyance of an interest in land. PIMA asserted in the trial court that it must be a lease since it requires the surrender of possession and the return of possession to the lessor at the end of the term. PIMA did not discuss in connection with that contention the fact that many billions of gallons of water, taken from the earth under the leased premises, would not be returned.

2. The purpose of the conveyance is not for a commercial purpose unless we are to give the term "commercial" a reading wholly foreign to the intent of the Enabling Act. It cuts athwart the prohibition against the sale of natural products of the land for if the reading PIMA would give the work "commercial" is a fair reading, then the Land Department is at liberty to "lease" timber land, land containing sand, rock and gravel, and any other natural product for the harvest and full use and disposition thereof, free of Enabling Act limitations so long as it calls the lease a "commercial" lease and limits the term thereof to "ten years or less."

If the State Land Department had described the lease in Tucson Rock and Sand as a "commercial lease" rather than a "mineral lease", would this Court have ruled in favor of Tucson Rock and Sand?

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FICO has not discussed at length the patent lack of authority of the State Land Commissioner to execute and deliver Commercial Lease No. 906 under the rationale of the Jarvis decisions for the reason we can add little to the impact of the question and the answer which must be given, unless established groundwater law and property rights resting thereon is to be upset.

If the City of Tucson, instead of purchasing privately owned land in Avra Valley for well sites for withdrawal and transportation to Tucson of groundwater from that critical groundwater area, had obtained "commercial leases" from the State Land Commissioner within which to sink its wells and from which to pump groundwater for use outside the Marana Critical Groundwater Area, would this Court have sanctioned such groundwater use by Tucson?

CONCLUSION

FICO respectfully prays:

(a) That this Court accept jurisdiction of its Petition and review the proceedings here brought forward;

(b) That upon such review it vacate the orders and judgment of Judge Roylston and direct the entry of appropriate orders and judgment by the Court below by directing that PIMA'S Motion be denied and that FICO'S Motion be granted, with the entry of an appropriate judgment finalizing such order; and

(c) For such other and further relief as the Court may deem appropriate.

SNELL & WILMER

By Mark Wilmer
Mark Wilmer

By Loren W. Counce, Jr.
Loren W. Counce, Jr.

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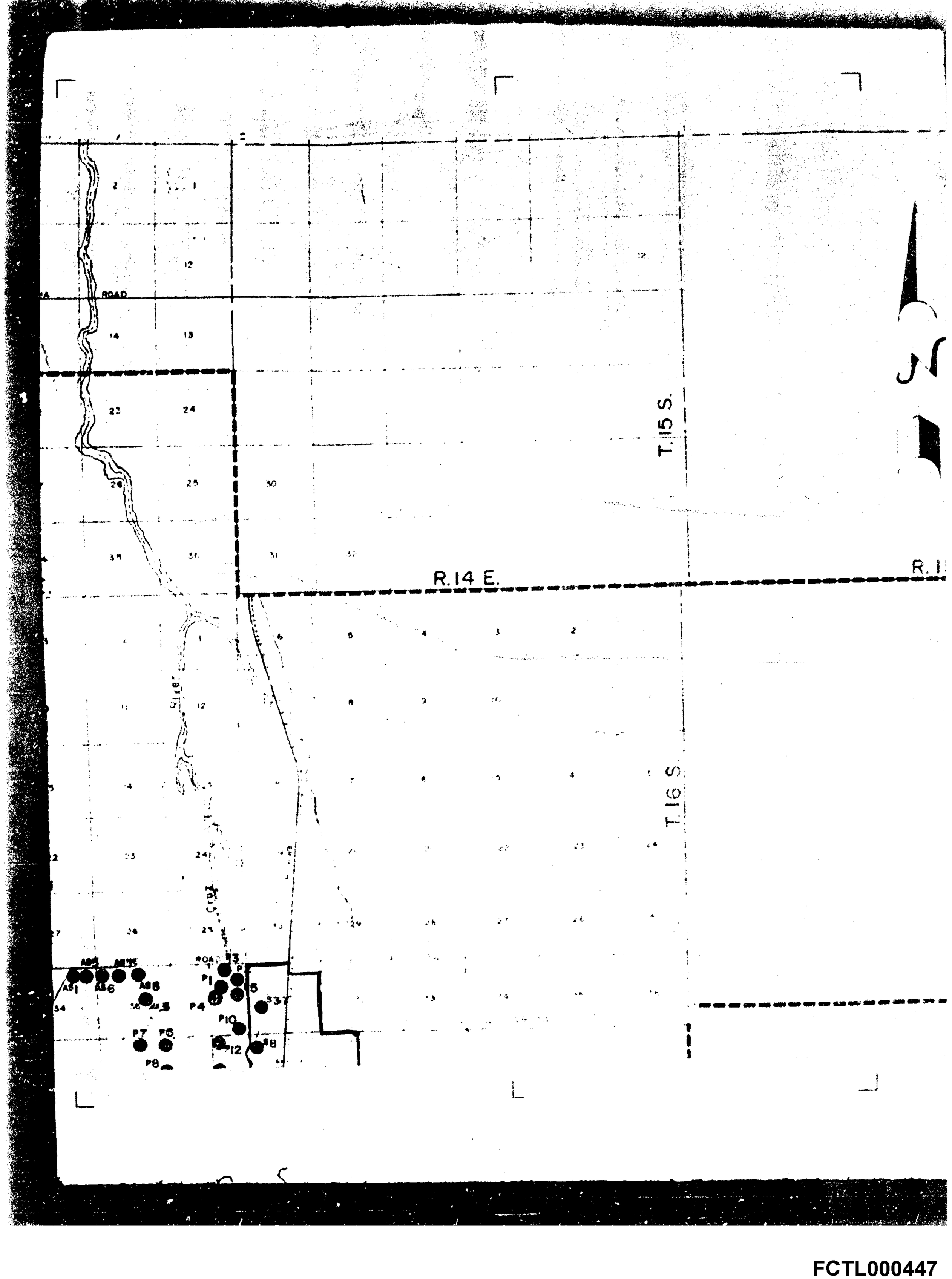
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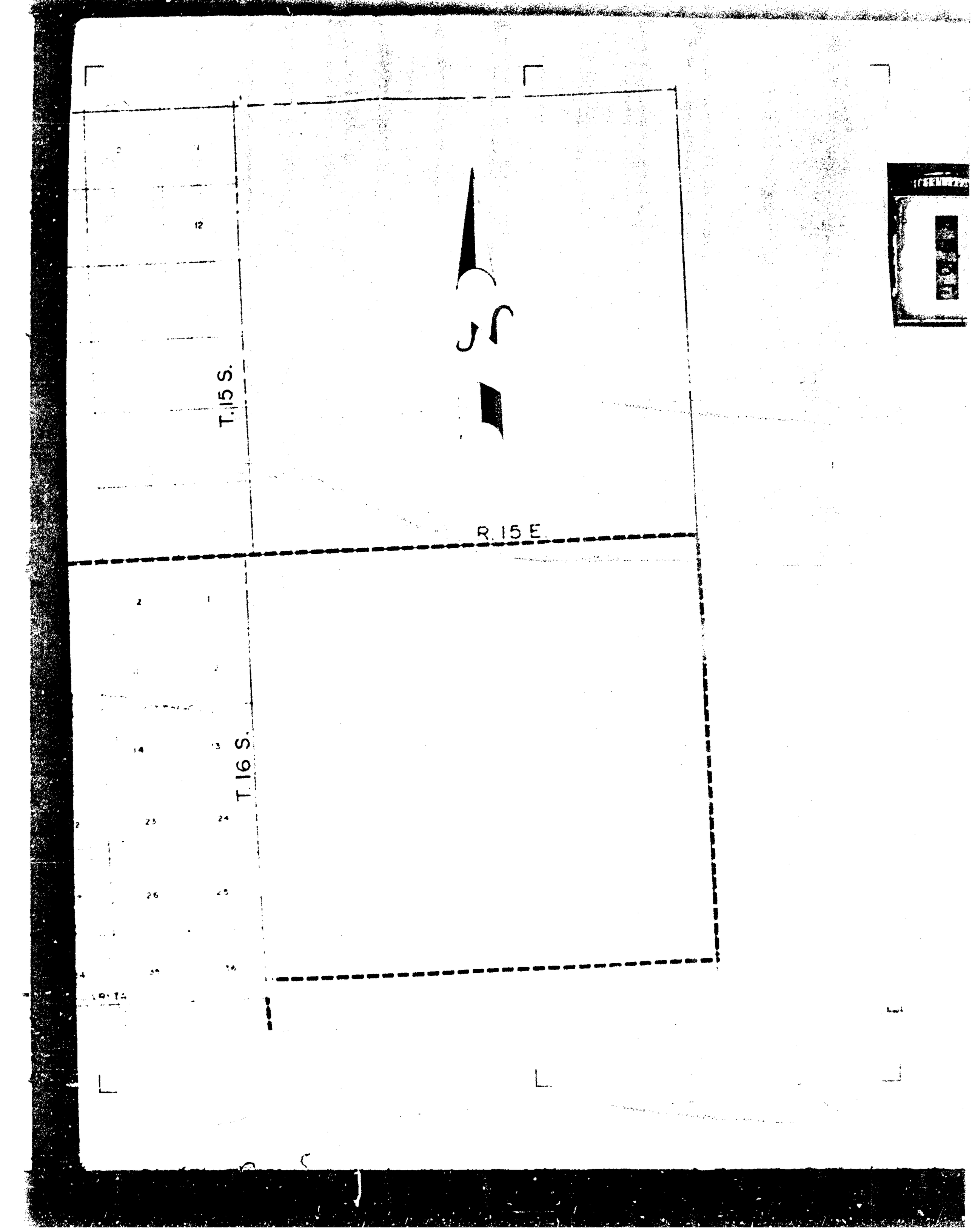
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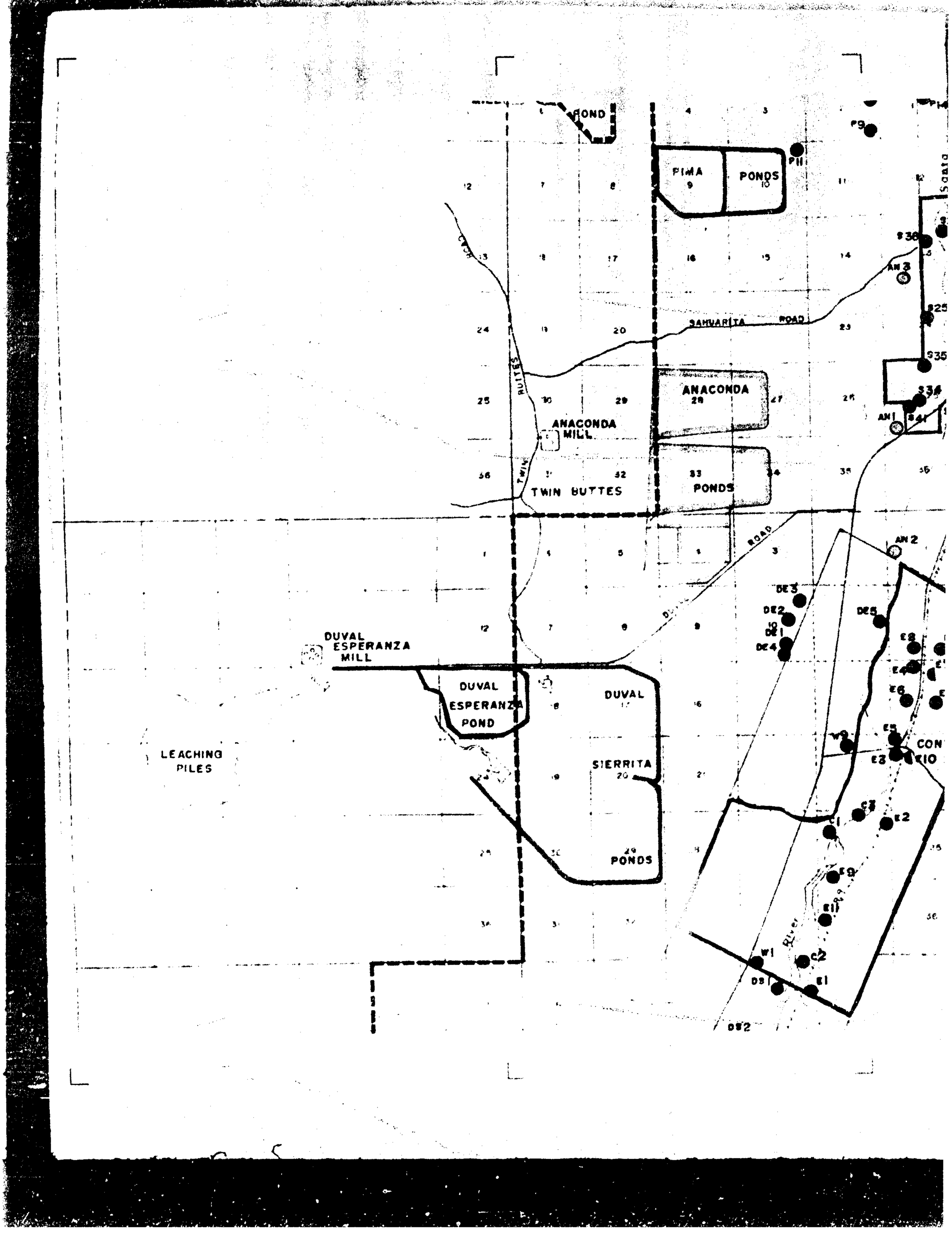
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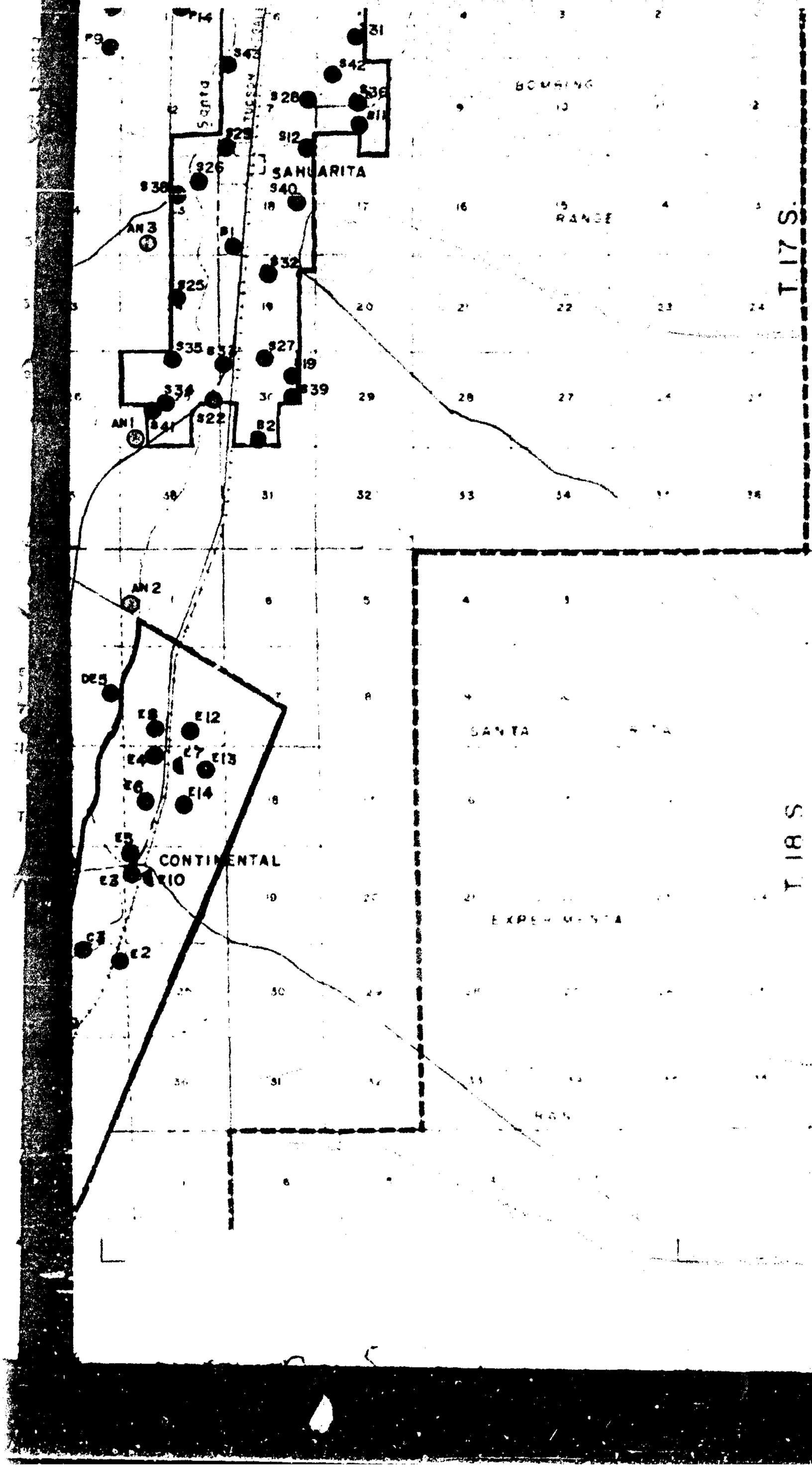

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- CONTINENTAL FA
- SAHUARITA FARM

TAILINGS PONDS

- ANACONDA
- ASARCO
- DUVAL ESPERAN
- DUVAL SIERRITA
- PIMA

ACTIVE WELLS

- ANACONDA COMPA
- AMERICAN SMEL
- DUVAL ESPERAN
- DUVAL SIERRITA
- PIMA COMPANY
- FARMERS INVES
- STOCK OR DOME

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T. 18 S.

LEGEND

BOUNDARIES

- CRITICAL GROUNDWATER AREA
- CONTINENTAL FARM (FICO)
- SAHUARITA FARM (FICO)

TAILINGS PONDS

- ANACONDA
- ASARCO
- DUVAL ESPERANZA
- DUVAL SIERRITA
- PIMA

ACTIVE WELLS

- ANACONDA COMPANY
- AMERICAN SMELTING & REFINING COMPANY
- DUVAL ESPERANZA CORPORATION
- DUVAL SIERRITA CORPORATION
- PIMA COMPANY
- FARMERS INVESTMENT COMPANY
- STOCK OR DOMESTIC

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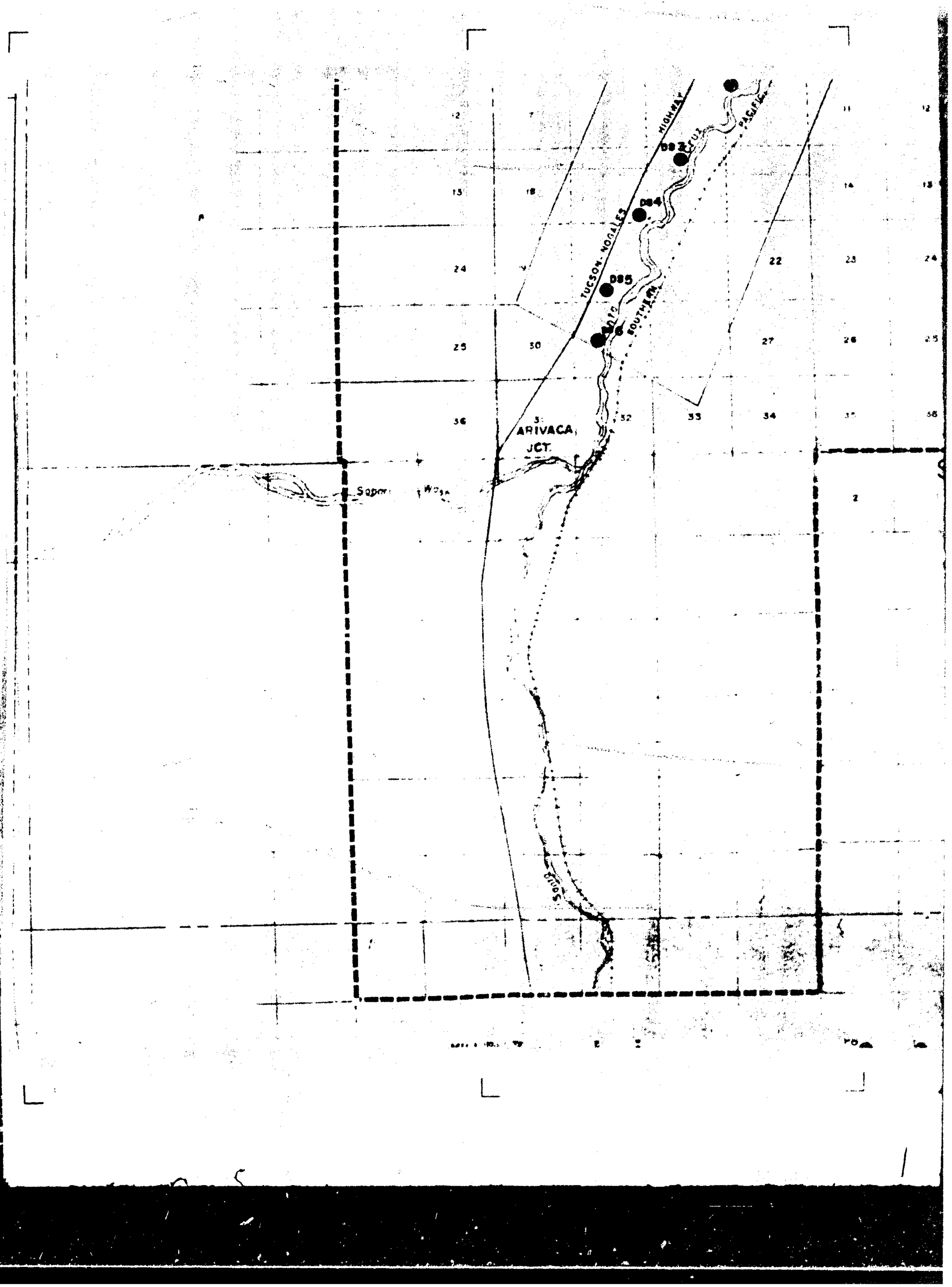
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PIMA CO.

SANTA CRUZ CO.

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UPPER SANTA CRUZ VALLEY

SAHUARITA - CONTINENTAL

CRITICAL AREA

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WATER RESOURCE

FARMERS INVESTMENT CO. v PIMA MINING COMPANY, et al.

PETITION FOR SPECIAL ACTION

EXHIBIT "A"

FCTL000454

STATE OF ARIZONA)
) ss: AFFIDAVIT
COUNTY OF MARICOPA)

JOHN R. ERICKSON, being first duly sworn, says:

Affiant is a registered professional engineer in the State of Arizona and other states and has been employed in a professional capacity in relationship to the case of Farmers Investment Company, Plaintiff, vs. The Anaconda Company, et al., Defendants, Cause #116542 in the Superior Court of Pima County, Arizona.

Exhibit A to which this Affidavit is attached has been prepared under the direction of affiant. The boundaries of the Critical Groundwater Area depicted thereon are those established from the boundaries set in the order establishing the Sahuarita-Continental Critical Groundwater Area. The information shown thereon in relationship to the location of the mills, mining pits and tailings ponds of the various defendants in said cause has been derived from discovery in said action based upon information supplied by the various defendants. Additionally, affiant has examined aerial photographs of the area for the purpose of confirming the locations as established. The location of the various wells of the defendants as shown thereon has been derived from answers to interrogatories and aerial viewing of the Upper Santa Cruz Basin area. The location of the FICO wells as shown thereon has been derived from information supplied by the records of Farmers Investment Company. The location of the FICO farming property as shown thereon has been derived from information supplied by Farmers Investment Company. The map Exhibit A has been prepared in accordance with engineering practices and

FCTL000455

is a reasonably accurate representation of the physical features depicted thereon.

Further affiant saith not.

John R. Erickson

SWORN TO and SUBSCRIBED before me this 27th day of December, 1973.

Notary Public

My Commission Expires:

My Commission Expires Feb. 15, 1977

FCTL000456

FOLLOWING IMAGES MAY NOT BE SHARP AND CLEAR.

RECORDS WERE Filed

WHEN DELIVERED FOR MICROFILMING.

DATE 8/6/80 OPERATOR

to Mailed: DEC 7 1966

Lease No. 933

STATE LAND DEPARTMENT
STATE OF ARIZONA

COMMERCIAL LEASE

THIS INDENTURE, made and entered into this 24th day of October, 19 66,

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, 19 76, 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; SWNE. $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. Haddock
State Land Commissioner.

By
Deputy State Land Commissioner.

(SEAL)

Signed in the County of Pima, State of Arizona, on the 5th day of December, 19 66

(Signed Here)
Lessee

This Lease is
Issued in duplicate
A-41
A-51

EXHIBIT B

FCTL000458

(A) The lessee will not sublet, 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 rights in the lessee hereon.

(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 lands embraced in this lease for public highways, railroads, tramways, telephone, telegraph, transmission lines, pipe lines, irrigation works, flood control, drainage works, levees, and other purposes, and this lease is to be subject to all existing rights-of-ways.

FCTL000459

of water from land and wells, electric pump and power substations, gathering tanks, pipelines, power lines, etc.

In addition to Commercial use of this land the land can also be used for Grazing

The Lessee agrees to indemnify, hold and save Lessor harmless against all loss, damage, liability, expense, costs and charges incident to or resulting in any way from any injuries to person or damage to property caused by or resulting from the use, condition or occupation of the land.

DESCRIPTION OF LAND LEASED CONTAINED IN LEASE SUPPLEMENT ATTACHED HERETO AND MADE A PART HEREOF.

STATE OF ARIZONA
LAND DEPARTMENT

MO.	DAY	YR.
11	30	66

PIMA MINING COMPANY
P O BOX 7187
TUCSON ARIZONA 85713

V

RE	LEASE NUMBER	
3	00906	

TWP.	LOCATION N.S.	RANGE	E.W.	DESCRIPTION	ACRES		MERIDIAN	FUND	
16	2	17	S	13	E	LOTS 1 & 2 S2NE SE	319	71		30	4
						E 1/2 of 2					

(41)

FCTL000460

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 assignment 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.....

.....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 assignment 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.....

.....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 assignment 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.....

.....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 assignment 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.

FCTL000461

Written by: [illegible]

Checked by: [illegible]

Date Mailed: NOV 27 1968

Lease No. 907-01

STATE LAND DEPARTMENT
STATE OF ARIZONA

COMMERCIAL LEASE

THIS INDENTURE, made and entered into this 12th day of July, 19 68,

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 11th day of July, 19 78, 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.

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 [signature]
State Land Commissioner.

By [signature]
Deputy State Land Commissioner.

(SEAL)

Signed in the County of Pima, State of Arizona, on the 2nd day of December, 19 68

(Signed Here) [signature]
Lessee.

This lease is issued in duplicate

A-41
A-51

EXHIBIT C

FCTL000462

SUPPLEMENTAL CONDITIONS

(A) The lessee will not sub-let 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 lands embraced in this lease for public highways, railroads, tramways, telephone, telegraph, transmission lines, pipe lines, irrigation works, flood control, drainage ditches, logging and other purposes, and this lease is issued subject to all existing right of ways.

MO	DAY	YR
11	8	68

STATE OF ARIZONA
LAND DEPARTMENT

PIMA MINING COMPANY
P O BOX 7197
TUCSON ARIZ 85713

RE	LEASE NUMBER	
3	007	1

SEC.	LOCATION TOWNSHIP	RANGE	DESCRIPTION	ACRES	BEGINNING AT	FUND
10	17 S	13 E	ALL	640.00		41 6

LESSEE SIGNATURE: [signature]
DATE: Dec 2, 1968

COMMISSIONER: [signature]
DATE: DEC 12 1968

(44).

FCTL000464

SPECIAL CONDITIONS

That it is further understood and agreed that this lease is issued for the purpose of: Dumping and deposit of waste and tailings on the leased premises and to make other uses of said premises incidental to lessee's milling, leaching and mining operations, subject to the following conditions:

1. The lessee at the option of the State Land Department shall sign this lease, for a term of ten years with an annual rental of $40.00 per acre per year. The lessee shall be obligated to pay such rental for the ten-year period regardless of whether the lessee uses or occupies said leased premises during that time or they may pay that balance due of the $400.00 per acre commitment at any time and discharge their obligation.

2. Lessee covenants and agrees to conduct its operations so as not to damage any other lands in the vicinity, whether or not they are State Lands, and further agrees to conduct said operations so as not to pollute any fresh water supplies.

SEE UNDER SUPPLEMENTS FOR REMAINING CONDITIONS

DESCRIPTION OF LAND LEASED CONTAINED IN LEASE SUPPLEMENT ATTACHED HERETO AND MADE A PART HEREOF.

3. Prior to the deposit of waste or tailings on the leased premises, the State Land Department will require reasonable evidence that the lands to be so used do not contain minerals that could profitably be mined by open pit methods.

4. During the dumping operation, the lessee shall so construct the dump so as to provide a 25' setback at each 50' of elevations. Each setback will be so developed that shrubs, trees and forage will be started and grown by the lessee on the outer surfaces of the dump to keep down the air pollution by dust blowing from the dump as may be reasonably required by the local community or governmental agencies. At this time, it will not be necessary to actually plant trees, shrubs and forage on the north side of this dump. However, the 50' elevations will be developed the same as the south side. If dumping is approved on Section 4 to the north, then no vegetation will be necessary on the north side. If dumping is not approved on Section 4 to the north, then the lessee will be required to develop the same type of vegetative coverage on the north side as on the south side of the dump.

5. Upon completion of the use of the leased premises for deposit of waste and/or tailings thereon, the surface of the dumps are to be left reasonably level on the top.

The Lessee agrees to indemnify, hold and save the State harmless against all loss, damage, liability or expense of whatsoever kind or nature which may arise from any injuries to persons or loss to property sustained or resulting from the use, condition or occupation of the land.

FCTL000465

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 assignment 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.....

.....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 assignment 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.....

.....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 assignment 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.....

.....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 assignment 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.

FCTL000466

Written by: _____

Checked by: _____

Date Mailed: _____

Lease No. 907-02

STATE LAND DEPARTMENT
STATE OF ARIZONA

COMMERCIAL LEASE

THIS INDENTURE, made and entered into this 9th day of June, 1967,

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 8th day of June, 1977, 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.

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 _____
State Land Commissioner.

(SEAL)

By _____
Deputy State Land Commissioner.

Signed in the County of Pima, State of Arizona, on the 15th day of July, 1967

(Signed Here) PIMA MINING COMPANY
_____
Lessee.

This lease is
issued in duplicate

A-41
A-51

EXHIBIT "B"

FCTL000467

SUPPLEMENTAL CONDITIONS

(A) The lessee will not sub-let 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 lands embraced in this lease for public highways, railroads, tramways, telephone, telegraph, transmission lines, pipe lines, irrigation works, flood control, drainage works, logging and other purposes, and this lease is issued subject to all existing rights-of-ways.

STATE OF ARIZONA
LAND DEPARTMENT

MO	DAY	YR
06	22	67

Pima Mining Company
P. O. Box 7187
Tucson, Arizona 85713

RE	LEASE NUMBER	
03	907	02

TOWN.	LOCATION SEC	RANGE		DESCRIPTION	ACRES		BON. SEC	FUND	
10	10	17	S 13 E	W2 W2S2	480	00		031	04

Pima Mining Company

LESSEE SIGNATURE

DATE July 1, 1967

COMMISSIONER

DATE JUL 12 1967

480 00

(47)

FCTL000469

SPECIAL CONDITIONS

That it is further understood and agreed that this lease is issued for the purpose of: Dumping and deposit of waste and tailings on the leased premises and to make other uses of said premises incidental to lessee's milling, leaching and mining oporations, subject to the following conditions:

1. Prior to the commencement of the deposit of waste or tailings upon the leased premises, the lessee at the option of the State Land Department shall sign this lease, for a term of ten years with an annual rental of $40.00 per acre per year. The lessee shall be obligated to pay such rental for the ten-year period regardless of whether the lessee uses or occupies said leased premises during that time or they may pay that balance due of the $400.00 per acre commitment at any time and discharge their obligation.

2. Lessee covenants and agrees to conduct its operations so as not to damage any other lands in the vicinity, whether or not they are State Lands, and further agrees to conduct said operations so as not to pollute any fresh water supplies.

SEE UNDER SUPPLEMENTS FOR REMAINING CONDITIONS.

DESCRIPTION OF LAND LEASED CONTAINED IN LEASE SUPPLEMENT ATTACHED HERETO AND MADE A PART HEREOF.

3. Prior to the deposit of waste or tailings on the leased premises, the State Land Department will require reasonable evidence that the lands to be so used do not contain minerals that could profitably be mined by open pit methods.

4. During the dumping operation, the lessee shall so construct the dump so as to provide a 25' setback at each 50' of elevation. Each setback will be so developed that shrubs, trees and forage will be started and grown by the lessee on the outer surfaces of the dump to keep down the air pollution by dust blowing from the dump as may be reasonably required by the local community or governmental agencies. At this time, it will not be necessary to actually plant trees, shrubs and forage on the north side of this dump. However, the 50' elevations will be developed the same as the east and south side. If dumping is approved on Section 3 to the north, then no vegetation will be necessary on the north side. If dumping is not approved on Section 3 to the north, then the lessee will be required to develop the same type of vegetative coverage on the north side as on the south and east sides of the dump.

5. A setback of 50' to the west of the east 1/16th line of Section 10 so that there will be provided an assurance that the dumps will not encroach upon said 1/16th line.

6. Upon completion of the use of the leased premises for deposit of waste and/or tailings thereon, the surface of the dumps are to be left reasonably level on the top.

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 assignment 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.

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.....
State Land Commissioner.

By.....
Deputy State Land Commissioner.

FCTL000471

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, Special Action Petition filed January 2, 1974, pages 1-48.

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 12/12/05
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