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ARIZONA COURT OF
APPEALS DIVISION TWO

IN THE COURT OF APPEALS

STATE OF ARIZONA

MAY 13 | 11 PM 1974

DIVISION TWO

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

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BY

ABSTRACT OF RECORD ON APPEAL
Volume II
Pages 86 to 180

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Attornays for Appellant

FCTL001037

* * *

(TITLE OF ACTION)

DUVAL'S MOTION FOR LEAVE
TO FILE WRITTEN MEMORANDUM
AND PRESENT ORAL ARGUMENT
AND MEMORANDUM

Filed: September 4, 1973

Duval Defendants move the Court for an order permitting Duval Defendants to file a written memorandum and to present oral argument on the Motion of Farmers Investment for Partial Summary Judgment as to Commercial Lease No. 906 for the reason that such Motion necessarily involves a determination of the most important single issue in this lawsuit: whether water pumped from land located within a groundwater basin may be transported for use on land elsewhere within the same basin. This issue is common to all defendants and could substantially determine the entire lawsuit. This issue was the central issue

of Plaintiff's Motion for Summary Judgment previously filed herein on June 8. 1970, responded to by all defendants, and denied.

(Signed FENNEMORE, CRAIG, von AMMON & UDALL, by James W. Johnson, Attorneys for Duval Defendants)

MEMORANDUM

Determination of Plaintiff's Motion for Partial Summary Judgment necessarily involves a determination of whether or not groundwater may be transported from one point to another within the same groundwater basin subject to the doctrine of reasonable use. This is the most important single issue in this lawsuit and its resolution may determine the entire case. If the Court wishes to consider Plaintiff's Motion, then the remaining defendants should be permitted to file responses.

Plaintiff casts its argument in the light of a single State commercial lease and disguises the important issue by pro-

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ceeding on a false premise. Under this contrivance, the plaintiff reraises against only one defendant the same complex issues contained in its June 8, 197[illegible] Motion for Summary Judgment. The false premise is that the owner of soil is also the owner of the water underlying the soil. That is not true. Under Arizona law, the corpus of water cannot be owned. At best, the owner of the soil enjoys the right to the reasonable use of the water underlying his land, and only to the use of it. There is no ownership in the water itself.[1]

1/ Although there are a number of cases which in dicta broadly state groundwater belongs to the owner of the soil, such statements are made to distinguish groundwater from appropriable water which is subject to use in order of priority of appropriation and not to imply any right of absolute ownership in the water itself. Such statements also derive from a time when the English rule obtained that the corpus of precolating (sic) water was subject to private ownership. This rule has been rejected in virtually every arid American jurisdiction in favor of the doctrine of reasonable use. This illustrates the danger of ruling on Plaintiff's Motion

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State v. Anway, 87 Ariz. 206, 349 P. 2d 774 (1960); Jarvis v. State Land Department. 104 Ariz. 527, 455 P. 2d 385 (1969), modified 106 Ariz. 506, 479 P. 2d 169 (1970) and cases cited therein.

From its first invalid premise, Plaintiff makes two arguments which resolve into the same thing. First, Plaintiff argues that since water is part of the land, a lease for the development of water from such land constitutes "a sale of a part of an interest in the State lands involved. . . ." (Plaintiff's Memorandum, page 10.), which violates constitutional prohibitions on sales of State lands. Plaintiff's second argument is the "profit a prendre" argument, that water

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1/ (continued) without thorough briefing and consideration of all the legal and factual issues involved. A good discussion of the rejection of the rule of private ownership and the adoption of the doctrine of reasonable use is contained in Wiel, Water Rights in Western States (3d ed.) §§ 1039 et seq.

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is a product or resource of the land which can be mined, severed as personal property, owned, and therefore bought and sold. Consequently, Plaintiff argues, the rent charged is not really "rent for the use of land," (Plaintiff's Memorandum, page 12.) but "at best is a contract for sale of water mined from State school land at a price of 1¢ per 1,000 gallons." Plaintiff relies entirely on oil lease cases. However, unlike oil, groundwater is not subject to severance from the land overlying the body of groundwater. Unlike oil, water is not subject to private ownership. Unlike oil, rights in water are measured by reasonable and beneficial use. Unlike oil, water cannot be bought and sold, only its use is subject to conveyance.

It is the position of Duval Defendants and the other mining company defendants, that all owners of land overlying

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a common groundwater basin have equal and coexisting rights to the reasonable use of water from the common supply. Hydrologically, equitably and legally, the groundwater which was subjacent to land represented by State Lease No. 906 cannot be considered as that water within the vertical boundary lines of the leased property on the date of that lease but must be considered to have included the entire common supply percolating within the groundwater basin. Conversely, the groundwater which is momentarily contained within the boundaries of the leased property is subject to pumpage and reasonable use not only on the leased property but on all lands overlying the common supply, including the Pima mill. To hold otherwise, would not only ignore applicable legal authorities, notably Jarvis v. State Land Department, but would also ignore what Plaintiff calls the "fugacious,"

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nature of groundwater. The common body of groundwater may percolate beneath all lands within a groundwater basin, yet no particular water may ever be specifically identified with any piece of land.

Therefore, Pima is entitled to the use of groundwater from the groundwater basin in which it is situate. It is not purchasing water but is only using water which it is already entitled to use. The lease cannot be construed as a sales contract and the rent cannot be construed as a purchase price. The lease is what it says it is: a lease "for the development of water." Pima is already entitled to the use of the water, and the lease merely provides the situs for the development of that use.

Plaintiff's Motion for Partial Summary Judgment does not raise mere collateral issues. The issues involve not just the State lease here in question but potentially

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the pumpage, transportation and use of groundwater anywhere in the State for any purpose.

It seems impossible that Plaintiff's Motion could be granted without also determining the fundamental issues of this lawsuit. The same issues were raised in Plaintiff's Motion for Summary Judgment filed June 8, 1970, and Plaintiff's present Motion should be denied for the same reasons then stated by the responses of the defendants. The issues raised are complex. They can be properly considered only by a trial on the merits. However, if the Court chooses to consider Plaintiff's Motion, then it should afford the remaining defendants the opportunity to brief and argue the issues which they consider to so vitally affect their interests.

Respectfully submitted this 31st day of August, 1973.

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(Signed FENNEMORE, CRAIG, von AMMON & UDALL, by James W. Johnson, Attorneys for Duval Defendants)

* * *

(TITLE OF ACTION)

FICO'S RESPONSE TO DEFENDANT PIMA'S COMMERCIAL LEASE NO. 906 PLEADINGS

Filed: September 5, 1973

The age-old device of setting up a straw man with appropriate built-in imperfections thereby predisposing the poor fellow to an untimely end at the hands of erudite counsel as employed by PIMA in its reply to FICO's Motion for Summary Judgment on Count Four and in its countering Motion for Partial Summary Judgment is best exposed and disposed of by a summary of the facts legally established, and a Justice Alfred Lockwood loved to say "a recourse to fundamental and well

established legal principles."

Bits and pieces of tender beef and succulent vegetables carefully selected may be fashioned into a delicious stew but bits and pieces of statutes, constitutional provisions and court decisions taken completely out of context can generally be fashioned into arguments persuasive only to the simple or unsophisticated legal mind. PIMA has labored mightily only to achieve this usual result.

PIMA first converts FICO's assertions that the commercial lease, if in fact not truly a lease must constitute an agreement for the transfer of title to a material, to wit, water, which, but for PIMA's activities, would remain part and parcel of a piece of state land, into a FICO primary claim that the lease is a sale of mineralized land.

By this reverse alchemy by words so to speak, PIMA thereby achieves the dross

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of an indefensible position for FICO and wholly avoids a confrontation with the statutes and arguments discussed by FICO in its Opening Memorandum demonstrating the invalidity of the claim that a commercial lease of state land may be used to transfer title to a natural product of such land.

PIMA wholly defaults in answering FICO's argument that a commercial lease, as that term is used in the Enabling Act, the Arizona Constitution and the Arizona statutes means a lease of the surface of the land for business or other commercial activity. The Arizona cases recognize this as the purpose of a commercial lease.

Columbia Inv. Co. v. M. M. Sundt Const. Co., 1 Ariz. App. 124, 400 P. 2d 132.

These facts are established of record:

FACT I

Commercial Lease 906 purports to lease a parcel of Arizona School Land to Pima Mining Company which is located within the boundaries of a Critical Groundwater Basin, for a ten year term, beginning in 1966.

FACT II

The lease expressly stated that it was for the purpose of "development of water farm from deep wells, booster pump and power substation gathering tanks, pipelines, power lines, etc." (Exhibit I to PCO's Motion) and that "The rental so fixed by the State Land Commissioner shall be due and payable annually in advance $10.00 per acre of [sic] 1¢ per 1000 Gallons of water removed, whichever is greater * * ." (Emphasis added)

FACT III

The water produced and removed (mined) from the state leased land is and

at all times has been pumped several miles to the mill and mine of PIMA outside of the critical groundwater area where it serves the customary and usual mining and milling uses.

FACT IV

PIMA has mined and removed and is currently mining and removing from the underground of this parcel of state land literally millions of gallons of groundwater daily and transporting it for use outside the critical groundwater area and for a use unrelated to any mining, milling, agricultural, commercial or other beneficial use on the leased premises.

FACT V

FICO has large, valuable, agricultural property in the critical groundwater area adjacent to PIMA's commercial leasehold No. 906 consisting of large acreage of maturing pecan trees and other agricultural crops.

PIMA ASSERTS THESE ADDITIONAL

FACTS AS UNPROVEN

FACT I

FICO has not proved damage and hence has no standing to complain.[1]

FACT II

PIMA has "raised against FICO the defenses of laches and estoppel."

FICO'S FAILURE TO PROVE DAMAGE

There is no assertion in the rather unusual affidavit of "expert" Fox asserting in PIMA's behalf that in effect PIMA

1/ When compared to the early clamor and affidavits to this effect based upon the asserted "return flow" from the tailing ponds of defendants it is conceivable that the mines may have found themselves between the proverbial "rock" of depletion of the critical groundwater basin through pumping and transporting water outside its boundaries and the "hard place" of the charge of polluting Tucson's drinking water. The resounding silence by PIMA and other defendants as to these claims of recharge to the basin from the mill effluent amounting to claims of recharge by quantities of up to 80% of the water pumped is quite amusing and instructive.

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has a private acquifer that this "private acquifer" enjoyed by PIMA is outside the boundaries of the critical groundwater basin. Neither does Mr. Fox dispute that PIMA's pumps are within the area or that the water pumped comes from within the subterranean water underlying the PIMA leasehold. Likewise Mr. Fox does not assert that there is no hydrological connection between the PIMA acquifer and the critical groundwater basin. Absent such a connection the water of the entire basin responds to the usual law of hydraulics that water seeks its own level.

The legislature did not see fit to recognize the peculiar hydrological theories espoused by PIMA in legislating as to how the boundaries of a critical groundwater area should be established and by which one who claims to be improperly within a designated area may cause an amendment or alteration of the designated area to reflect

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such exemption. (Sections 45-308 A. R. S. et seq.). So long as the boundaries of the critical groundwater area remain intact all groundwater in the basin is subject to the conclusive presumption that it is subject to the same restrictions as all other groundwater found therein.

THE APPLICABLE LAW

Counsel for FICO relied on memory rather than a refresher reading of State Land Department v. Tucson Sand and Rock Co., 107 Ariz. 74, 481 P. 2d 867 in making the statement quoted by PIMA on page 7 of its summary judgment filing. We said at page 11 of our Opening Memorandum "water is plainly not timber or other natural product of such land."

PIMA says FICO made the statement "judicially." Not so.

We made it stupidly.

In Tucson Sand and Rock, supra, our Supreme Court was dealing with the mining

and removal of sand and rock under a Mineral Lease at a royalty of 5¢ per ton.

The Court first concluded that the Arizona Legislature had not historically considered sand, stone and gravel as minerals. The Court said:

> "It is clear that the Arizona Legislature, almost from statehood, has construed the words of the Enabling Act, 'other products of land', as including sand, stone and gravel, and has not included sand, stone and gravel within the leasing of minerals."
> 107 Ariz. at 77

Our quick reading of the language of Section 28 of the Arizona Enabling Act (p. 4 FICO memo)

> " * * 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"

caused us to equate "other natural product of such lands" with products similar

to "timber" i.e., growing on or produced by the land. In this we were wrong. Plainly the Court construed natural product to mean "naturally occurring" or a like construction.

Certainly if sand, rock and stone is a (sic) "natural product of the land" water is equally so.

The Supreme Court then held:

> "One further matter. It is to be noted that A.R.S. § 27-234 subsec. C (since amended) provides that the royalty for sand, rock and gravel shall not be more than five cents per cubic yard. Placing such a limitation upon the products of State lands is in direct contravention of the language used in §28 of the Enabling Act, supra, and, consequently, is a breach of trust and void. Lassen v. Arizona ex rel. Arizona Highway Department, 385 U. S. 458, 87 S. Ct. 584, 17 L. Ed. 2d 515." 107 Ariz. at 78

There is no dispute but that the requirements of the Enabling Act were not met when this lease was awarded. There should be little dispute also that the

lease is accordingly void.

FICO did not rely upon the above quoted phrase from Section 28 of the Enabling Act (and following constitutional and statutory provisions) in filing its motion and hence did not research the meaning of the phrase "or other natural products of such lands" properly.

The motion, wholly adequate under the reasoning and precedents relied upon in FICO's Opening Memorandum, now is unnecessarily (but, from FICO's viewpoint, pleasantly) buttressed.

In Jarvis v. State Land Department, 104 Ariz. 527, 456 P. 2d 385 our Supreme Court said:

> "In 1954, pursuant to the terms of the Ground Water Code, the Avra and Altar Valleys were declared critical, being included within and as a part of the Marana Critical Ground Water Area. This is an official act of a state agency, the records of which we take judicial notice. State ex rel. Smith v. Bohannan, 101 Ariz. 520, 421 P. 2d 877.

> 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." 456 P. 2d at 388

In the second Jarvis case, 106 Ariz. 506, 479 P. 2d 169 the Supreme Corut (sic) reaffirmed this holding. The Court said:

> "We also pointed out in our first decision in this case that the Avra-Altar Valleys are a part of a critical water area, being included within the Marana Critical Ground Water Area. For the reason that a critical ground water area is a ground water basin or subdivision '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,' we held that additional users would

> necessarily deplete the supply of the existing users. Consequently, the conveyance of ground waters off the lands on which wells in the Avra Valley are located impairs the supply of the other land owners within the critical area." 479 P. 2d at 172

As to the claim that PIMA "has raised the defense of laches and estoppel" we point out that (a) the conduct of PIMA constitutes a continuing trespass and wrong and hence, short of acquiring a right by adverse possession and prescription such a defense does not lie; but (b) more importantly the Supreme Court rules this defense out in Jarvis I. The Court said:

> "We do not think these allegations raise an estoppel. Petitioners were sufficiently concerned to engage attorneys to meet and confer with Tucson. Thereafter, the legal rights were as apparent to Tucson as to petitioners. Silence does not operate as an estoppel where the means of knowledge is equally available to both parties. Cityco Realty Co. v. Slaysman, 160 Md. 357, 153 A. 278, 76

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A.L.R. 296; Anno. 304, 310. Estoppel by silence cannot be invoked by one who knows the true character of his own title. Certainly, petitioners were under no duty to protect Tucson by advising it as to what its legal rights were. To make the silence of a party operate as an estoppel, there must have been a duty to speak. Ray v. First National Bank of Arizona, 88 Ariz. 337, 356 P. 2d 691. Remaining passive and silent does not deprive a person of his legal rights. In addition there must be some act to induce or encourage another to alter his position. Grant County Deposit Bank v. Greene, 6 Cir., 200 F. 2d 835." 456 P. 2d at 390.

The record is clear that for about a year FICO met with the mines in attempting to find a solution to their water needs. There is no indication that these meetings were fruitful for FICO first, in June, 1969, served formal protest on defendants and this being unavailing, filed this suit. More significantly, even with this litigation pending PIMA has proceeded with a further expansion and has enlarged its water draft on its

"water farm" on Lease No. 905.

SPECIFIC RESPONSE TO VARIOUS PIMA CLAIMS

(a) PIMA claims: "the lease must be a lease since it provides for return of possession of the land to the State October 23, 1976."

Does it also provide for a return to the state's possession of the billions of gallons of water removed by PIMA and used up by PIMA in earning millions of dollars of profit?

Somehow the argument brings to mind a picture of a "gentlemen" at the circus with three shells and a pea -- or is it two -- generally utilized by said gentleman for mulcting rubes out of dollars.

(b) PIMA says: "Arizona law plainly permits leasing of land for commercial purposes for ten years or less and of lands for mineral purposes for twenty years or less."

So PIMA says, Arizona law does permit

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leases, even though it prohibits sales of land and its mineral leases allow for permanent removal of non-fugacious products such as metal -- hence a lease for "commercial purposes" which allows "mining" and removal of water is allowable.

Ergo, says PIMA, leases must allow extraction and removal of fugacious materials if non-fugacious materials may be removed -- otherwise "all of the outstanding mineral leases issued by the state are illegal and void."

Even though counsel for PIMA represent Cyprus Mines, a co-owner of PIMA, and are we assume sophisticated in mining terms, we assume a temporary spell of forgetfulness in making this representation to the Court.

The Enabling Act makes specific reference to "leasing of the lands referred to in this section, in such manner as the Legislature of the State of Arizona may

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prescribe * * * for <u>mineral purposes</u>
* * * for a term of twenty years or less"
as exempt from the requirements of the
Enabling Act for appraisal, publication
of notice of sale and sale at public
auction.

A "mineral lease" in mining parlance has long been recognized as conferring a right to explore for minerals in place and, if discovered, a right to mine and remove the mineral. A "mining lease" is, in a sense, a phrase of art, conferring recognized legal rights quite different from the use and occupation rights conferred by the usual lease of the surface or land.

In <u>Gordon v. Empire Gas & Fuel Co.</u> 63 F. 2d 487 (C.A. 5 1933) a case often cited, the Fifth Circuit Court of Appeals said:

> " * * * In Stephens County v. Mid-Kansas Oil & Gas Co., 113 Tex. at page 172, 254 S.W. 290,

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29 A.R.S. 566, the Supreme Court declares it makes no difference whether the instrument by its words gives the right to mine and appropriate the minerals, or demises the land with such right, or conveys the minerals. The substantial result is the same. Agreements permitting the use of the land to explore, and then if mineral is discovered giving the right to take the mineral either for a definite term or so long as it can be produced in paying quantities upon a reserved royalty, are familiar, and in legislative and judicial as well as in common speech are called mineral leases for want of a better name. They are called leases in the very cases which hold them to convey a base fee. In Theisen v. Robison, Commissioner, 117 Tex. at page 508, 8 S.W. (2d) 646, 651, they are referred to as well known: 'In legal effect, the grants authorized by the acts are not essentially different from the grant in the ordinary oil and gas lease such as was before the court in the Stephens County Case.' * * *" 63 F. (2d) at 489 (Emphasis added)

See also: United States v. Atomic Fuel Coal Company, 383 F. 2d 1 (1967 C.A. 4) quoting with approval from Miller v.

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Kellerman, 228 F. Supp. 446, 459-460,

> "A mineral lease is a contract which permits the lessee to explore for minerals on the lands of the lessor in consideration of certain commitments by lessee."

54 Am.Jur. 2d, 301 et seq. Sec. 120 et seq. "Mines and Minerals."

PIMA'S DISCUSSION OF FICO'S CALIFORNIA CASES

This portion of PIMA's Response to FICO's Memorandum merits the full consideration permitted by a separate division of FICO's Reply. Apparently the California practice is to fail to read the Memorandum to which a reasponse (sic) is in process of preparation. At least this is the only theory upon which PIMA's consideration of FICO's California precedents can be reconciled.

PIMA states: "Whether or not plaintiff knows it, Stone v. City of Los Angeles 299 Pac. 838, discussed by FICO

at pages 12, 13, 14 of FICO's Opening Memorandum does not have much legal validity." This case was discussed and quoted from by FICO for the sole reason that it points up and discusses fully the essential differences between an oil lease and a commercial lease.

FICO follows its quotation from Stone with the citation to Callahan v. Martin, 43 P. 2d 788 which PIMA quotes as robbing Stone of "legal vitality" as rejecting the "oil in place" theory. FICO follows its citation to Callahan with a quotation from another California Supreme Court case, Dabney-Johnson Oil Corp. v. Walden, 52 P. 2d 237 (1935):

> " * * Plaintiff contends that by reason of the fact that we have rejected the oil and gas in place theory as applied to oil rights * * * "

The case then discusses the profit a prendre theory and states unequivocally that the right to remove oil and gas as

a profit a prendre "is an estate in real property." (p. 15 FICO Opening Brief)

FICO's Opening Brief also discusses and quotes extensively from Wall v. Shell Oil Company, 25 Cal. Rptr. 908 (1963) which again repeats the holdings in Callahan and Dabney-Johnson that an oil and gas lease as a profit a prendre is an estate in real property -- an ownership of a part of the land.

So PIMA smugly concludes:

> "Therefore, although plaintiff does not seem to be aware of it, its only authority for contending that an oil and gas lease constitutes a sale of land decisively has been overruled and the law is exactly to the contrary." (p. 6, PIMA memo)

The balance of PIMA's argument wherein it preens its copper colored tresses and fingers the gold in its pocket derived from its rape of Arizona's resources and the desecration of a once beautiful valley while it speaks of the revenue the state

derives from its illegal activities, the jobs provided and the taxes paid, is devoted to the thesis that FICO is simply seeking to continue its "theft" (PIMA so kindly describes the normal agricultural activities of FICO) of the critical groundwater area water. PIMA forgets that the restraint accepted by the farmers of the Upper Santa Cruz Valley by agreeing to the designation of the area as a critical groundwater basin is one of the reasons there is water available at its present levels and that the purpose of the legislative Act was to protect the agricultural resources of the state from activities such as PIMA and the other mines are now pursuing.

So when PIMA speak (Komadina affidavit) of the royalties paid the State of Arizona let PIMA also speak of the billions of gallons of bargain price water removed from the state lease land and the millions

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of pounds of copper produced and sold at sky high prices realized thereby.

Let PIMA also speak of the desecration of the landscape by the ugly scars on the skyline and the ugly piles of rubble obscuring some of these scars and the price paid by the residents of Green Valley in lost enjoyment of their retirement homes.

And when PIMA through Mr. Komadina tells us that 3,734,333,000 gallons of water were poured back upon another state lease, No. 907, let PIMA also speak of the pollution thereby caused to the entire water basin -- unless the statement that "there thus remained on the lands covered by Commercial Lease 907 3,734,333,000 gallons of water" means that PIMA, at least, has finally acknowledged that the earlier affidavit claims from the mines that 80% or thereabouts of the water taken from the valley was recharged to the basin from the tailings ponds were

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unjustified in fact.

Finally, PIMA wholly ignores the fact that there is another source of water the use of which would go far to conserve the dwindling groundwater resource of Pima County but which is not presently otherwise usable by others due to its high nitrate content. That resource is the Tucson city sewage plant effluent.

Despite the ready availability of this water PIMA rejects it -- even though the price of copper has escalated to double the price when the PIMA mining operation was begun -- solely because it costs more than the illegally pumped groundwater.

CONCLUSION

PIMA asserts need for the groundwater and emphasizes the financial benefits which will flow from its continued use by PIMA as if in the belief every man has his price.

If in fact, as FICO believes, this

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use of the groundwater from the critical groundwater basin is illegal, PIMA has no more right to continue taking this water than it would have to mine its ore from beneath the critical groundwater basin and from under FICO's lands and transport it up the hill to its mill if the situation was reversed and the water was on the hill and the ore in the valley. Each is equally critical to PIMA's operation -- PIMA cannot mine and mill without both ore and water.

Would the Court countenance removal of ore from beneath FICO's lands and carting it up the hill just because PIMA needs it to operate successfully?

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

* * *

(TITLE OF ACTION)

FICO'S RESPONSE TO
DUVAL'S MOTION FOR
LEAVE TO FILE MEMO-
RANDUM AND ARGUE

Filed: September 6, 1973

FICO objects to DUVAL's request to orally argue in opposition to FICO's Motion for Partial Summary Judgment adjudicating the invalidity of PIMA's Commercial Lease No. 906. FICO does not object to any amicus written filings DUVAL desires to make.

DUVAL does not have any "Water farm" rights based upon a State commercial lease of State school land. Nonetheless DUVAL asserts that somehow its rights are one with PIMA's right and hence it should be permitted to orally argue PIMA's position.

The rule is generally accepted and enforced in most courts of record that,

barring unusual circumstances, only one attorney for a party may cross-examine a witness or argue objections an points of law. This salutory rule springs undoubtedly from humanitarian reasons inspired by a court's reluctance to countenance a form of legal "piling on" forbidden in professional sports although perhaps much enjoyed by youthful schoolboys.

If PIMA's position is in fact the same as DUVAL's or vice versa, then the legal situation is the same as if counsel for both were jointly representing PIMA and only one counsel would be permitted to argue. If the legal situations are sufficiently dissimilar so that PIMA's counsel may not fully advance DUVAL's position to DUVAL's satisfaction, then DUVAL's position is not material to a solution of the PIMA - FICO dispute.

All DUVAL's arguments will do is

serve to blur the sharpness of the legal issues as to Commercial Lease No. 906 as presently posed.

Oral arguments, like birds on the wing, must be knocked down as they fly by and there is no time for discriminating between the material and the irrelevant. The result is confusion and a blurred picture. But written arguments can be sorted out and the relevancy of each to the material issues of the case under legal scrutiny ca be determined and selectively answered. Hence FICO has no reason for opposing any such arguments any party wishes to file. If in fact the legal position which FICO asserts is unsound it should be exposed as such. But it should not be obfuscated through interjection of extraneous arguments, related to the general subject matter but not a specific for the legal malady which fatally infects Commercial Lease No. 906.

The request is unfair and prejudicial and is objected to by FICO on these grounds. Certainly DUVAL and ANACONDA do not suggest that California counsel for PIMA is not fully competent to orally state all of the reasons PIMA's lease is, in his opinion, valid. Mr. Bevan, it should be remembered, has never yet been found short of words or the breath to enunciate his views.

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

* * *

(TITLE OF ACTION)

PIMA'S REPLY TO FICO'S
RESPONSE TO PIMA'S
SUMMARY JUDGMENT MOTION

Filed: September 10, 1973

It has been difficult to ascertain upon what FICO has based its Summary Judgment Motion. Now that FICO apparently

has ascertained it, FICO chides us for having attacked "straw" arguments earlier. FICO now claims that its motion is based upon the fact that "a commercial lease [is being] used to transfer title to a natural product of such land" [Response, page 2].

Inasmuch as FICO "stupidly" denied previously that water was "a natural product of such land," perhaps we may be forgiven for not having attacked previously FICO's present claim, since it was not made previously and could not possibly have been made previously in view of the injudicious but nonetheless judicial admission made in Mr. Wilmer's sworn papers served on June 15, 1973.

FICO now says that its motion was based upon the ground that the State Land Department for years has been engaging in an illegal practice, namely, leasing land for water development purposes to

industry and municipalities pursuant to commercial leases [ARS 27-281(A)] instead of pursuant to mineral leases [ARS 27-271] or pursuant to common mineral product leases [ARS 27-234 et seq.]. Plaintiff has not been kind enough to tell us which one of the latter two type leases is applicable to leases for water development purposes, and we challenge FICO to tell us how the specific statutory provisions of either of the latter two leasing statutes could be applied to water development.

In any event, at least the broad general outlines of FICO's newly found position have become delineated. This position is most readily rebutted by ARS 37-212(B)(1-4) quoted by FICO at page 7 of its original memorandum. As there made clear, state lands are classified in five groups, i.e., those suitable for:

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1. agriculture;

2. grazing;

3. commerce or homesites;

4. valuable products, or

5. "Lands which may become agricultural lands by expenditure of a reasonable amount for the development of water thereon."

Obviously, then, water cannot be a "valuable" product of the land. If it were, there could be no category (5) because the existence of water thereon automatically would turn the land into category (3), namely, "Lands containing timber, stone or other products which may become valuable."

Thus, the State Land Department has known what it has been doing these many years. It has leased lands to mines and cities for the purpose of extracting water and using it in industry and commerce or for commercial sale by municipalities.

FCTL001077

Indeed, if water development leases had to be in the form of mineral or common mineral product leases, then all agricultural leases in the State perforce also must be voided. The reason for this is that all agricultural leases allow development of water therefrom.

Moreover, since FICO is a holder of agricultural leases and user of water therefrom, it comes into court with unclean (albeit well washed) hands.

However, the main point is that water development never has been considered in this State a sale of a natural product, and undoubtedly for good and sufficient reasons. Thus, upon the rationale expressed in State Land Department v. Tucson Rock and Sand Co., 107 Ariz. 74, 481 P. 2d 867 (1971), this Court should construe the various leasing statutes harmoniously so as to uphold the validity of ARS 37-212. That section, properly construed, plainly

FCTL001078

treats valuable product land quite differently from agricultural (and possibly agricultural) land from which water may be developed. That being so, water under land is not and cannot logically be considered a valuable product within the meaning of the statute.

Consequently, FICO's motion must be denied and Pima's motion must be granted.

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

* * *

(TITLE OF ACTION)

MOTION OF AMERICAN SMELTING AND REFINING COMPANY TO FILE WRITTEN MEMORANDUM AND PRESENT ORAL ARGUMENT

Filed: September 10, 1973

AMERICAN SMELTING AND REFINING COMPANY ("ASARCO") moves the Court for an Order permitting ASARCO to file a written

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memorandum and present oral argument on plaintiff's Motion for Partial Summary Judgment as to Commercial Lease No. 906 on the limited issue whether water pumped from land within a groundwater basin may be transported for reasonable, beneficial use on land elsewhere within the same basin.

This question was the issue presented by plaintiff's Motion for Summary Judgment filed against the several mining company defendants on June 8, 1970, which plaintiff now seeks to present under a different guise.

(Signed EVANS, KITCHEL & JENCKES, P. C., by Burton M. Apker, Attorneys for Defendant American Smelting and Refining)

MEMORANDUM IN SUPPORT OF MOTION

The question whether Pima Mining Company is improperly transporting water away from the State Land simply does not need to be decided on plaintiff's present

Motion. To completely dispose of the Motion, the only essential determination is whether Pima's state lease is valid at all.

The other question -- whether transportation of groundwater from one parcel to another parcel within the same basin for a reasonable, beneficial use is improper -- can only be decided in this case after a full trial on the merits. This was made abundantly clear to plaintiff when it filed its Motion for Summary Judgment three years ago. When the mining company defendants showed the Court the issues as to limitations of action, estoppel, latches (sic), lack of clean hands, equal protection, due process, location of the respective parcels within a common basin, use of the water as reasonable and beneficial and frugal or as wasteful, adequacy of remedy at law, and balancing of the equities, plaintiff was obliged to abandon its

motion. ASARCO wants the opportunity to show the Court that those identical issues and defenses lie to the question plaintiff now seeks to present to the Court in disguised form.

(Signed EVANS, KITCHEL & JENCKES, P. C., by Burton M. Apker, Attorneys for Defendant American Smelting and Refining)

* * *

(TITLE OF ACTION)

RESPONSE TO MOTION OF AMERICAN SMELTING AND REFINING COMPANY FOR LEAVE TO FILE WRITTEN MEMORANDUM AND PRESENT ORAL ARGUMENT

Filed: September 10, 1973

FARMERS INVESTMENT COMPANY (FICO) objects to the request of AMERICAN SMELTING AND REFINING COMPANY (ASARCO) for leave to orally argue the questions presented by FICO's Motion for Partial Summary Judgment with respect to the

validity of Commercial Lease No. 906 wherein PIMA MINING COMPANY is lessee.

FICO makes reference to its response to the similar motions made by the other mining defendants similarly seeking permission to orally argue the rights of PIMA on the Motion for Partial Summary Judgment.

FICO does not object to a written memorandum of any kind filed by ASARCO as a friend of the Court or in any other capacity, but it does object to having four sets of lawyers argue the same legal question in opposing this motion directed to the client of only one of this group of attorneys.

FICO did not abandon its original Motion for Summary Judgment for the reasons stated and contrary to the statement of DUVAL, the motion was not denied.

By reason of the various affidavits filed by various professional people

employed by the defendants relating to the return flow of effluent from the mining operations, particularly the tailings ponds and other affidavit claims made by the defendants (as to most of which they now seem to have second thoughts), PICO determined that the issue was not ripe for consideration of a Motion for Summary Judgment. In view of the magnitude of the various interests involved PICO concluded that a Court would be uneasy in entertaining a Motion for Summary Judgment without all parties having had a full opportunity for discovery.

This discovery has now been substantially completed.

However, the issues presented by the validity of Commercial Lease 906 are peculiar to the rights of PIMA MINING COMPANY. The claims of PIMA to continue pumping water under this state lease present a question which merits the imme-

FCTL001084

diate concern and attention of the Court and hence the motion has been now presented in that discovery is substantially completed.

As FICO said in its response to the DUVAL motion, if the position of each of the defendants is sufficiently similar to that of PIMA to justify joining the voices of the other defendants with the voice of PIMA, then in effect four sets of lawyers are asking to argue one case, which has never been considered either fair or proper.

If they are dissimilar, then permitting the request to orally argue the matter can only cause confusion and serve to obscure the limited issues involved in the PIMA case.

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

* * *

(TITLE OF ACTION)

RESPONSE OF DEFENDANT
STATE LAND DEPARTMENT
TO MOTION FOR SUMMARY
JUDGMENT ON COMMERCIAL
LEASE NO. 906

Filed: September 10, 1973

The legal issues in this matter have been fully set forth by the Plaintiff FICO and the Defendant Pima Mining Company. The State Land Department agrees with the position and arguments set forth by Pima Mining Company in its Memorandum and adopts that argument as its own. In addition to the argument set forth in Defendant Pima Mining Company's Memorandum, Defendant State Land Department would like to point out that the Plaintiff's argument, if followed to its logical conclusion, would result in absurdity in this Defendant's attempt to administer state trust lands. If water is a product of state

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land as alleged by Plaintiff and can only be sold at public auctions as natural products of state land are sold under A.R.S. § 37-481, et seq., rather than being disposed of as mineral products as is presently being done by the State Land Department, the result would be that no agricultural lease could be entered into permitting the lessee to use groundwater for irrigation purposes on the lands subject to the lease. It is the position of the Defendant State Land Department that it would be patently absurd to attempt to separate the water from the leasing procedures.

It is elementary law in Arizona that water is not subject to appropriation. Bristor v. Cheatham, 75 Ariz. 227, 255 P. 2d 173 (1953). Whether or not a particular use of water is within a particular groundwater basin and is subject to restrictions placed on critical ground-

water areas necessarily involves determinations of fact, to wit: (1) whether or not the water is indeed being used outside of the groundwater basin (see Jarvis v. City of Tucson, 104 Ariz. 527, 456 P. 2d 385, modified 106 Ariz. 506, 479 P. 2d 169 (1969); and (2) if the use is in compliance with the critical groundwater code and the Jarvis case, whether or not the use is a reasonable use, or, alternatively, whether or not it constitutes a waste of water. Both of these issues are fundamental fact issues which must be resolved prior to the consideration of Plaintiff's motion.

Without wanting to become involved in the semantical barbs being hurled by counsel, it seems to the State Land Department that the motion for summary judgment is an attempt to circumvent the real issue in the law suit -- whether or not the transportation of groundwater from one

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location within a critical groundwater area to a different location within the basin for a commercial purpose is a reasonable use. This ultimate issue should not be clouded by permitting Plaintiff to succeed in its motion for summary judgment.

In the event it is determined, after factual issues are resolved by this court, that water is a natural product of state land, rather than a mineral product of state land, the factual record could then be used to support or challenge such a conclusion. Granting Plaintiff's motion in view of the ramifications that such action would have on all of the agricultural, grazing, commercial and mining leases issued by the State of Arizona would create chaos and we believe it would be improvident for the court to grant the relief asked for by Plaintiff at this time.

FCTL001089

(Signed GARY K. NELSON, The Attorney General, by Peter C. Gulatto, Attorneys for Defendant State Land Department)

* * *

(TITLE OF ACTION)

MINUTE ENTRY (hearing)

Dated: September 10, 1973

Judge: The Honorable Robert O. Roylston

HEARING ON MOTION FOR SUMMARY JUDGMENT:

Appearances: Robert O. Lesher--City of Tucson

John Lacy and Bruce Bevan--Pima Mining

Burt Apker--American Smelting & Refining Co.

James Johnson--Duval Mine

Thomas Chandler--Boyd Land & Cattle and the Anaconda Co.

Peter Gulatto--State Land Department

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FILED IN COURT: Response of State Land Department

FILED IN COURT: Affidavit

Messrs. Johnson and Counce argue to the Court on the Motion for Protective Order.

The Court takes the Motion for Protective Order concerning the deposition of Milton D. Webb under advisement.

HEARING ON MOTION FOR SUMMARY JUDGMENT AS TO DEFT. PIMA MINING CO.:

IT IS ORDERED that the requests for oral argument by any parties other than the plaintiff, Pima Mining and State Land Dept., are denied.

Messrs. Wilmer, Bevan and Gulatto argue to the Court.

Mr. Bevan requests that he be given permission to make a closing argument relative to his motion for summary judgment.

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IT IS ORDERED that the request is denied.

IT IS ORDERED that any party to the action who wishes to do so may file a written memo relating to any of the issues raised either by the Motions or during the argument heard this date within fifteen (15) days from this date.

At that time the matters will be taken under advisement.

* * *

(TITLE OF ACTION)

SUPPLEMENTAL MEMORANDUM
OF PIMA MINING COMPANY

Filed: September 13, 1973

Pursuant to leave of Court granted September 10, 1973 Pima Mining Company ("Pima") hereby supplements its previous memoranda and oral argument.

1. The Enabling Act.

The Enabling Act prohibits (i) the

sale of certain trust lands and (ii) the sale of "natural products" from such lands except per advertisement and at a public auction to the highest bidder.

Our first contention is that water is not a natural product of the trust lands nor of any other lands. The last we heard, water falls from the heavens. In contrast to minerals, rock and hydrocarbons, water is not produced as a product of land but simply percolates through land after its descent.

If our first contention be incorrect, we next contend that the Enabling Act was intended to and does exempt from its proscription the depletion of the natural products of trust lands if used for "grazing, agricultural, commercial and domestic purposes [and] for mineral purposes . . ."

What <u>was</u> the purpose of these exemptive provisions of the Enabling Act? The purpose

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presumably was not to state the obvious, that is to say that leases not in conflict with the prohibitory provisions of the Act were not in conflict therewith. Instead, the obvious purpose must have been to exempt certain types of leases which otherwise would have conflicted with the prohibitory provisions of the Act.

If so, which prohibitory provisions of the Act were intended to be the subject of the lease exemptions? There are only two prohibitions. The first is against sale of the land. Obviously the lease exemptions do not authorize a sale of the land. Nor would such an "exemption" be necessary to make it clear that a lease of land was not a prohibited "sale" thereof (FICO's argument to the contrary notwithstanding).

The only other prohibition in the Enabling Act is against sale, without

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advertisement and auction, of the "natural products" of trust lands. Thus, if the exemptive lease provisions of the Act have any meaningful utility, it is to exempt leases for certain purposes from the restrictions against sale from trust lands of their natural products.

Only construed in this way is the Enabling Act harmonious. Thus, the Act intends and authorizes depletion of water (arguendo, a "natural product" of trust lands) for "grazing," "agricultural" and "domestic purposes." Similarly, the Act intends and authorizes depletion and sale of natural products such as minerals [ARS 27-234, 235] without such being subject to the restrictions of the Act.

Similarly, if water is used for a "commercial purpose" pursuant to a lease of ten years or less, such also is exempted from the advertisement and auction requirements of the Act.

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Only by construing the exemptive lease provisions as authorizing depletion of "natural products" of trust lands can absurdity in the construction of the Enabling Act be avoided. Absent such a construction, the sale of mineral natural products of trust lands per mineral leases [ARS 27-234-235] would violate the Act. Absent such a construction, so would depletion of water for grazing, agricultural and domestic purposes.

Therefore, the depletion of water for "commercial purposes" likewise is exempted by the specific, express provisions of the Enabling Act. Were this not true, there simply would have been no reason for this exemption.

Here, there can be no doubt that Pima is using the instant water for "commercial purposes." No purpose could be more "commercial" than the milling of ore and the transportation of resulting

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tailing deposits.

Consequently, the exemptive provisions of the Enabling Act apply and its prohibitory provisions do not.

2. The Transportation Off the Land Issue.

FICO repeatedly mentions that Pima transports (albeit temporarily) water away from lands within the Critical Groundwater Area. Such does not violate the Enabling Act. Sale of minerals and their shipment away from trust lands is expressly authorized per ARS 27-234, 235. Similarly, there is nothing in the Enabling Act which requires water of trust land leased per Commercial Leases to be put to commercial use on that land itself. Otherwise, rather interesting questions would arise concerning water put to use for grazing cattle, for aspirating agriculture and for thirsty domestics.

However, FICO also contends that its

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requirements for proving damage have been met, per Jarvis v. City of Tucson, by the removal from Lease 906 lands, within a Critical Groundwater Area, of water for temporary use outside the Area. Even if such a fleeting removal constituted a showing of damage to FICO, it is only a prima facie and not a conclusive showing. Pima has raised an issue of fact on this point by the Fox Affidavit which is to the effect that there is no hydraulic continuity between the wells on Lease 906 and those of FICO. Thus, contrary to the situation in Jarvis, there is contrary evidence rebutting plaintiff's prima facie showing.

Moreover, as the files of even this action reflect, in 1971 FICO made the very same claims in the Arizona Supreme Court that it is making now. Then, FICO claimed that Lease 906 was invalid and that all of Pima's pumping was a violation

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of the reasonable use doctrine since water was being removed from a critical groundwater area. FICO asked the Supreme Court to avoid a lengthy, unnecessary trial if its claims were correct. Pima contended they were incorrect and presented to that Court the Fox Affidavit.

The Supreme Court answered FICO by refusing to grant FICO's petition for an injunction against Pima and against the State Land Department. We can only infer therefrom that the Court did not share FICO's simplistic view of this case.

To conclude, we submit that FICO's Count 4 is not well founded and that summary judgment thereon in favor of Pima should be granted.

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

* * *

(TITLE OF ACTION)

MEMORANDUM OF DUVAL
DEFENDANTS ON THE CROSS
MOTIONS FOR SUMMARY
JUDGMENT ON STATE
COMMERCIAL LEASE NO.
906 OF FICO AND PIMA

Filed: September 25, 1973

FICO's motion for summary judgment should be denied. Its motion is based on the premise that there has been an illegal sale of groundwater underlying State Commercial Lease No. 906 or that there has been an illegal transportation of water therefrom. As a matter of law, neither is true. Pima is legally entitled to the use it is making of the water extracted from State Commercial Lease No. 906, and there has been no sale of any kind nor any unlawful transportation.

Under the doctrine of reasonable use all land overlying a common basin of groundwater is entitled to the use of water

from the common supply for beneficial purposes.

The Pima mining and milling properties involved in this lawsuit, as well as the mining and milling properties of the other defendants except a small part of the Duval pit area where de minimis amounts of water are used for dust control, lie entirely within the Sahuarita-Continental Subdivision of the Santa Cruz Groundwater Basin. The Sahuarita-Continental Subdivision was so designated by the State Land Department on June 8, 1954 in the mandatory exercise of the duty imposed by A.R.S. § 45-303. By statute a Groundwater Subdivision is:

> . . . an area of land overlying as nearly as may be determined by known facts, a distinct body of groundwater. It may consist of any determinable part of a groundwater basin. A.R.S. § 45-301(6).

In other words, the defendants'

properties all over a common water supply: the Sahuarita-Continental Subdivision of the larger Santa Cruz Groundwater Basin. Under the doctrine of reasonable use as applied in Arizona and elsewhere, all such lands overlying a common basin have an absolute right to the use of water from the common supply for beneficial purposes. In mining water from Commercial Lease No. 906, Pima is not purchasing water but is extracting water which it is already entitled to use. Commercial Lease No. 906 is not a sale of water but is exactly what it says it is: a lease of a situs for the development of a well field. The rent does not represent the price paid for water because the water which is extracted therefrom is water which Pima already has the right to use.

The same situation was present in Jarvis v. State Land Department, 106 Ariz. 506, 479 P. 2d 169 (1970) (Jarvis II).

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In Jarvis II, the City of Tucson was permitted to deliver water from its well fields located in the Marana Critical Groundwater Area to Ryan Field. This transportation of water was legal because Ryan Field overlies the common basin of water from which the water delivered to it by Tucson is taken:

> Its lands overlie the Avra-Altar Water Basin and geographically it lies within the Marana Critical Groundwater Area so as to entitle it to withdraw from the common supply for all purposes except agriculture. Tucson should not be prohibited from delivering water to Ryan Field for lawful purposes since the Ryan Field supply is from the common basin over which it lies and from which it could legally withdraw water by sinking its own wells for domestic purposes. 106 Ariz. at 510, 479 P. 2d at 173 (Emphasis added)

Admittedly in Jarvis II Ryan Field was situated within the Marana Critical Groundwater Area. However, it was not the fact that Ryan Field lay within the

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Critical Groundwater Area but the fact that Ryan Field overlay the common basin which made the delivery permissible. The Supreme Court states unequivocably (sic) that land overlying the water basin is entitled to withdraw water from the common supply. Jarvis II did not involve the situation where water is transported to land which overlies the common supply but which is outside the Critical Groundwater Area. Nevertheless, the Arizona Supreme Court went on in the next paragraph of its opinion to state that Tucson could deliver water to customers lying outside the Critical Groundwater Area if it could show that such customers were on lands overlying the common supply:

> Until Tucson can establish that its customers outside the Marana Critical Groundwater Area but within the Avra-Altar Valleys' drainage areas overly [sic] the water basin so as to be entitled to with-

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> draw water from it, there are no equities which will relieve it of the injunction heretofore issued. 106 Ariz. at 510, 479 P. 2d at 173.

Such a showing has been made in this case. The lands of the mining company defendants are situated within the Sahuarita-Continental Subdivision of the Santa Cruz Basin, so designated by the State Land Department as land overlying a distinct body of groundwater.

> Groundwater is a unique substance and it clouds the issues in this case to attempt to characterize it as a "mineral" or "product of the land."

Significantly the Supreme Court in Jarvis II speaks in terms of "Tucson's delivery of water" and not of its sale. Water is not subject to private ownership in the State of Arizona and therefore it cannot be bought and sold. One can enjoy no greater ownership in water than to be entitled to the reasonable use of it. Charges for furnishing water may be

characterized only as charges for the "delivery" of water, as the Supreme Court did in Jarvis II. For this reason, the plaintiff's references to the cost of CAP water in its motion for summary judgment are misleading since estimated charges for CAP water represent delivery charges and not purchase of the corpus itself. Arizona v. California, 83 S. Ct. 1468, 373 U. S. 546 (1963); Boulder Canyon Project Act, 45 Stat. 1057 (1928), 43 U.S.C. §§ 617-617t.

The Arizona courts have repeatedly said in the case of appropriable waters that water does not belong to the appropriator. The appropriator enjoys only the right to the use of such water. See, e.g., City of Phoenix v. State ex rel. Conway, 53 Ariz. 28, 85 P. 2d 56 (1939). Similarly, in the case of groundwater, the owner of the soil is the owner of the groundwater underlying the soil only in

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the sense that he is entitled to use such water beneficially on land which overlies the common supply without regard to prior uses by his neighbors from the common supply. Reasonable use on land overlying the common basin supply is the measure and extent of ownership in groundwater.[1] Bristor v. Cheatham, 75 Ariz. 227, 255 P. 2d 173 (1953); State v. Anway, 87 Ariz. 201, 349 P. 2d 771 (1960); Jarvis v. State Land Dept. (Jarvis I), 104 Ariz. 527, 456 P. 2d 527 (1969), modified, 106 Ariz. 506, 479 P. 2d 169 (1970).

Therefore, water is a unique substance. It is neither a product of the land nor a part of the land itself. Yet it is even more inseparable from the land than either

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1/ Water may be transported away from the common supply only where the rights of others are not injured. Fourzan v. Curtis, 43 Ariz. 140, 147, 29 P. 2d 722 (1934); Jarvis II.

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products or minerals. Groundwater exists solely for the beneficial enjoyment of the land entitled to its use. It is more in the nature of an appurtenance than a mineral or product. Unlike natural gas, oil, extractive minerals, building aggregate, timber or any other mineral or natural product, groundwater may not be removed and transported away without restriction.[2] Water is essential for the beneficial use and enjoyment of land. Where its extraction would injure the remaining users in the basin, it may be used only in such a way that except for amounts consumptively used, its return to the common supply is not prevented.

It is easy to see that groundwater is different from minerals in place, timber products, and other materials which

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2/ Would the court for example rule that a reservation of mineral rights in a conveyance reserved the right to mine and sell groundwater?

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may be permanently severed from the land. So too, water is different from gas and oil. While gas and oil, like water, may percolate underground and fill voids left by extractions under any particular piece of land, gas and oil may be permanently removed. Water may not. What is not consumptively used must be permitted to return to the common basin supply. The common supply is appurtenant to all lands overlying the common basin. Pima's primary right to the use of the water extracted from State Commercial Lease No. 905 exists not just because of the lease itself but also because of its ownership and beneficial use of other properties located within the Sahuarita-Continental Groundwater Basin Subdivision.

The water used by Pima [illegible] State Commercial Lease No. 906 is appurtenant to its properties and Pima is entitled to the use of that water without regard

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to its characterization as a mineral, natural product or anything else. Such characterization is a mere label and is neither useful nor appropriate in this case since the water extracted by Pima is not being sold and, as a matter of law, is not being removed from the land from which it is being taken.

Respectfully submitted this 25th day of September, 1973.

(Signed FENNEMORE, CRAIG, von AMMON & UDALL, by James W. Johnson, Attorneys for Duval Defendants)

* * *

(TITLE OF ACTION)

FICO'S SUPPLEMENTAL MEMORANDUM RE COMMERCIAL LEASE NO. 906

Filed: September 26, 1973

The point was advanced on oral argument that Commercial Lease No. 906 should

be construed as a mineral lease since water could be considered a "mineral" and hence subject to the "mineral lease" exception stated in Section 28 of the Enabling Act and related constitutional and statutory provisions. While it is true that under certain circumstances and fact situations water may be classified as a mineral, it is clear that this is not the fact under the instant facts and circumstances.

The language of the Supreme Court in State Land Department v. Tucson Rock and Sand Co., 107 Ariz. 74, 481 P. 2d 867 in relation to the claim that rock and gravel should be classified as mineral is equally dispositive of this claim as to water. The Court said:

> "It is clear that the Arizona Legislature, almost from statehood, has construed the words of the Enabling Act, 'other products of land', as including sand, stone and gravel, and has not included

> sand, stone and gravel within the leasing of minerals.
>
> "Appellee relies on the language of A.R.S. § 27-231 et seq., formerly § 11-1601 et seq., and in particular § 11-1604, A.C.A. 1939, 1952 Cum.Supp. The statutory scheme by which minerals can be removed from State lands is that a discoverer of a valuable mineral deposit may locate it as a mineral claim. The locator is then given a preferred right to a mineral lease covering each claim. . . . " 107 Ariz. at 77

A further review of Article 3, Title 27, A.R.S. discloses that the legislature plainly did not consider water a mineral subject to a "mineral lease" and, equally importantly, that the lease in question was not issued in conformity with the state statutes governing lease of state lands for mineral claims since the Enabling Act only exempts leases for "mineral purposes" if made "in such manner as the Legislature of Arizona may prescribe."

A re-reading of Murphy v. State, 65 Ariz. 338, 181 P. 2d 336 refreshes the

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recollection as to the stern purpose the Congress had in drafting our Enabling Act inspired by loose practices and scandals in other states. It makes it clear that the various phrases employed were intended to cover every possible evasive disposition which might be attempted of these trust lands contrary to the intent of the Congress.

> " * * shall be by the said State held in trust, to be disposed of in whole or in part only in the manner herein provided * * "
>
> "Said lands shall not be sold or leased in whole or in part except to the highest bidder * * "
>
> " * * nor shall any sale or contract for the sale of any timber or other natural product of such lands be made * * "

"Certainly the fact that the lease granted PIMA the right to take and convert to its own use and benefit 1000 gallons of water for 1 cent (or $3.25 per acre foot) would qualify to most

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legal minds a sale or disposition of the water.)

> "All lands, leaseholds, timber and other products of the land, before being offered shall be appraised at their true value, and no sale or other disposal thereof shall be made * * "
>
> "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 * * "

We respectfully assert the Motion is valid and should be granted.

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

(Underlining is as appears on the Court document)

* * *

(TITLE OF ACTION)

MINUTE ENTRY

Dated: November 15, 1973

Judge: The Honorable Robert O. Roylston

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).

Mr. Bevan shall prepare a written judgment on Count Four.

* * *

(TITLE OF ACTION)

JUDGMENT AS TO COUNT FOUR
OF AMENDED COMPLAINT

Filed: December 6, 1973

The matter having come before the Cour pursuant to Plaintiff's Motion for Partial Summary Judgment as to Commercial Lease No. 906, and by Defendant Pima Mining Company's Motion for artial (sic) Summary Judgment Re Commercial Lease No. 906 which came before the Court on September 10, 1973, the Court having found that there is no genuine issue as to any

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material fact and that Defendant Pima Mining Company is entitled to judgment as a matter of law as to Count Four of Plaintiff's Amended Complaint, and it appearing that there is no just reason for delay for the entry of final judgment as to Count Four:

IT IS HEREBY ORDERED that judgment in favor of Defendant Pima Mining Company and against the Plaintiff on Count Four be and is hereby entered.

IT IS FURTHER ORDERED that upon the signing and filing of this judgment on Count Four, the appeal time as to Count Four shall commence pursuant to Rule 54(b), Arizona Rules of Civil Procedure.

Signed in open court this 6 day of Dec., 1973.

(Signed ROBERT O. ROYLSTON,
Judge of the Superior Court)

* * *

(TITLE OF ACTION)

NOTICE OF APPEAL

Filed: January 30, 1974

PLEASE TAKE NOTICE that FARMERS INVESTMENT COMPANY, a corporation, Plaintiff, hereby appeals to the Court of Appeals, Division 2, and hereby gives notice of such appeal from the judgment entered in the above-entitled Court and in the above-entitled and numbered cause on the 6th day of December, 1973, finding the issues of Count Fourt (sic) of Plaintiff's Amended Complaint on file herein in favor of PIMA MINING COMPANY, THE STATE LAND DEPARTMENT, and ANDREW L. BETTWY, State Land Commissioner, and directing the entry of and entering judgment in favor of said named Defendants and each of them and against the Plaintiff, FARMERS INVESTMENT COMPANY, a corporation.

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This Notice of Appeal is from the said judgment and the whole thereof except insofar as the Supreme Court of the State of Arizona has accepted jurisdiction of said judgment and cause in that certain cause presently pending in the Supreme Court of the State of Arizona entitled, "FARMERS INVESTMENT COMPANY, a corporation, Petitioner, vs. PIMA MINING COMPANY, et al, Respondents", No. 11439, in which FARMERS INVESTMENT COMPANY, a corporation, by a Petition for Special Action sought review of the judgment aforesaid entered by the Pima County Superior Court as to Count Four as hereinabove indicated. The judgment of the Pima County Superior Court was accepted for review by the Supreme Court of the State of Arizona and is presently pending before the Supreme Court of the State of Arizona on review, subject to this limitation as expressed by the said Supreme Court of the State of Arizona

in accepting review thereof:

> "Ordered: That the Court accepts jurisdiction of the Petition for Special Action, and it further appearing that the Court, in accepting jurisdiction of the Petition for Special Action, does not propose to write on the issue of reasonable use at this time."

It is the intent of this Notice of Appeal that notice be given as an appeal of all issues involved in said Count Four except insofar as the same is presently within the jurisdiction of and subject to review by the Supreme Court of the State of Arizona and to the extent the Supreme Court of the State of Arizona shall in fact exercise its jurisdiction in the review thereof.

DATED at Phoenix, Arizona, January 28, 1974.

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

* * *

(TITLE OF ACTION)

BOND FOR COST
ON APPEAL

Filed: January 30, 1974

KNOW ALL MEN BY THESE PRESENTS:

That we, FARMERS INVESTMENT COMPANY, a corporation, as Principal, and FIDELITY AND DEPOSIT COMPANY OF MARYLAND, as Surety, do hereby acknowledge ourselves jointly and severally bound to PIMA MINING COMPANY, THE STATE LAND DEPARTMENT and ANDREW L. BETTWY, as State Land Commissioner Defendants for all costs in the above entitled suit, not to exceed, however, the sum of TWO HUNDRED AND FIFTY AND NO/100th - - - Dollars ($250.00)

CONDITIONED, HOWEVER, that the said Principal will pay all costs if the appeal is dismissed or the judgment affirmed, or of such costs as the Appellate Court may

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award if the judgment is modified against the said Principal in said appeal during its pendency or at the final determination thereof, and judgment for said costs may be entered against us, and each of us, up to the full penalty of this bond, in the final judgment of this appeal.

Witness our hands and seals this 29th day of January, 1974.

(Signed FARMERS INVESTMENT COMPANY, INC., a corporation, by Mark Wilmer, Attorney for Plaintiff; and FIDELITY AND DEPOSIT COMPANY OF MARYLAND, by Lawrence E. Konz, Attorney-in-Fact)

* * *

(TITLE OF ACTION)

DESIGNATION OF CONTENTS
OF RECORD ON APPEAL

Filed: January 30, 1974

Plaintiff and Appellant, FARMERS INVESTMENT COMPANY, INC., a corporation, hereby designates as of record on appeal

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the following portions of the record:

1. Count Four of the Amended Complaint.

2. The Answers thereto of the Defendants, PIMA MINING COMPANY, STATE LAND DEPARTMENT, and ANDREW L. BETTWY, as State Land Commissioner.

3. Plaintiff, FARMERS INVESTMENT COMPANY'S Motion for Summary Judgment with respect to Count Four.

4. Motion for Summary Judgment filed by PIMA MINING COMPANY with respect to Count Four.

5. All Responses and other pleadings filed by FARMERS INVESTMENT COMPANY, PIMA MINING COMPANY, STATE LAND DEPARTMENT, and ANDREW L. BETTWY, as State Land Commissioner, in relationship to each said Motion for Summary Judgment as filed by PIMA MINING COMPANY and FARMERS INVESTMENT COMPANY.

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6. All Minute Orders entered in the above cause in relationship to Count Four and the Motions for Summary Judgment above described.

7. The judgment entered herein on December 6, 1973 with respect to the Motion for Summary Judgment and Count Four of Plaintiff's Amended Complaint.

8. FARMERS INVESTMENT COMPANY'S Notice of Appeal filed herein.

9. FARMERS INVESTMENT COMPANY'S Bond for Cost of Appeal filed herein.

10. This Designation of Record as filed herein.

DATED at Phoenix, Arizona, this 29th day of January, 1974.

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

* * *

(TITLE OF ACTION)

APPELLEE'S DESIGNATION
OF ADDITIONAL CONTENTS
OF RECORD ON APPEAL

Filed: February 8, 1974

Defendant and Appellee, PIMA MINING COMPANY, hereby designates the following additional portions of the record, supplementing appellant's Designation of Contents of Record on Appeal:

1. FARMERS INVESTMENT COMPANY'S amended complaint, dated September 29, 1971.

2. Plaintiff FARMERS INVESTMENT COMPANY'S Motion to Compel Discovery, dated June 12, 1972.

3. Defendant DUVAL'S Memorandum in Opposition and Response to FARMERS INVESTMENT COMPANY'S Motion to Compel, dated July 24, 1972.

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4. Plaintiff FARMERS INVESTMENT COMPANY'S Motion to Compel Discovery against Defendants PIMA MINING COMPANY and AMERICAN SMELTING AND REFINING COMPANY, dated August 27, 1972.

5. Plaintiff FARMERS INVESTMENT COMPANY'S Motion to Compel II against all Defendants, dated August 27, 1972.

6. Defendant DUVAL'S Memoranda in Response and Opposition to Plaintiff FARMERS INVESTMENT COMPANY'S Motion to Compel, dated August 27, 1972.

7. Defendant PIMA MINING COMPANY'S Memorandum in Opposition to Plaintiff's Motion to Compel, dated October 17, 1972.

8. Minute Entry of November 3, 1972, setting aside Motion to Compel against Defendant and granting Motion to Compel against Defendant PIMA MINING COMPANY.

9. Reporter's transcript of record, if any, of hearing on November 3, 1972.

10. All Responses and other pleadings filed by FARMERS INVESTMENT COMPANY, PIMA MINING COMPANY, STATE LAND DEPARTMENT, and ANDREW L. BETTWY, as State Land Commissioner, in relationship to Motions for Summary Judgment as filed by the PIMA MINING COMPANY and FARMERS INVESTMENT COMPANY, including:

a. Defendant DUVAL'S Motion for Leave to File Written Memorandum and to Present Oral Argument, dated August 31, 1973.

b. Plaintiff FARMERS INVESTMENT COMPANY'S Response to Defendant PIMA MINING COMPANY'S Motion for Partial Summary Judgment, dated September 4, 1973.

c. Plaintiff FARMERS INVESTMENT COMPANY'S Response to Defendant DUVAL'S Motion for Leave to File Memorandum, dated September 5, 1973.

d. Defendant PIMA MINING COMPANY'S Reply to Plaintiff FARMERS INVESTMENT

COMPANY'S Response to Defendant PIMA MINING COMPANY'S Motion for Summary Judgment, dated September 6, 1973.

e. Motion for Leave to File Written Memorandum and Present Oral Argument by AMERICAN SMELTING AND REFINING COMPANY.

f. Plaintiff FARMERS INVESTMENT COMPANY'S Response to Motion of AMERICAN SMELTING AND REFINING COMPANY, dated September 7, 1973.

g. Response of Defendant STATE LAND DEPARTMENT to Motion for Summary Judgment, dated September 7, 1973.

h. Minute Entry of September 10, 1973, in Relation to Hearing on Motion for Summary Judgment.

i. Defendant PIMA MINING COMPANY'S Supplemental Memorandum on Motion for Summary Judgment.

j. Plaintiff FARMERS INVESTMENT COMPANY'S Supplemental Memorandum

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on Motion for Summary Judgment, dated September 25, 1973.

k. Memorandum of Defendant DUVAL on the Cross Motions for Summary Judgment, dated September 25, 1973.

ll. Reporter's transcript, if any, of Hearing on Motion for Summary Judgment, September 10, 1973.

Dated at Tucson, Arizona, this 6th day of February, 1974.

(Signed VERITY & SMITH and MUSICK, PEELER & GARRETT, by John C. Lacy, Attorneys for Defendant Pima Mining)

* * *

(TITLE OF ACTION)

AMENDMENT TO APPELLEE'S
DESIGNATION OF ADDITIONAL
CONTENTS OF RECORD ON
APPEAL

Filed: March 13, 1974

Defendant and Appellee, Pima Mining Company, hereby amends its Designation of Additional Contents of Record on Appeal as follows:

1. Items 3, 4, 5, 6, 7 and 8 of Appellee's Designation of Additional Contents of Record on Appeal are deleted from said designation.

(Signed VERITY & SMITH and MUSICK, PEELER & GARRETT, by John C. Lacy, Attorneys for Defendant Pima Mining)

Following this page is a reduced Xerox copy of Commercial Lease No. 906.

Written by: _____

Checked by: _____

Date Mailed: DEC 2 1966

Lease No. 030

116542

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 31st 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. Rental for 1966 of 19 for 1000 gallons water removed, whichever is greater, for Lots 1 & 2; Rental $1.00 per acre or 19 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 lessee, 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. Kelly
State Land Commissioner.

Deputy State Land Commissioner.

Signed in the County of Pima State of Arizona, on the 5th day of December, 1966

(Signed Here) _____
Lessee

This lease is issued in duplicate

A-41
A-51

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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 exception 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 irrigation 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 inadvertence or otherwise, the value of the improvements placed upon the land herein described, the value of the 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 annual rental when due, or fail to keep the covenants and agreements herein set forth, the State Land Commissioner, in his discretion, 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 relative 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 statutory 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 right-of-ways.

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SPECIAL CONDITIONS

That it is further understood and agreed that this lease is issued for the purpose of: development of water from deep wells, booster 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 harmless the State 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

PIMA MINING COMPANY
P O BOX 7187
TUCSON ARIZONA 85713

V

05905

SEC	TWP	RGE	DESCRIPTION	ACRES		FUND
19	6 S	17 E	LOTS 1 & 2 S2NE SE	319	71	30

E½ Sec 7-

FCTL001134

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.

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CERTIFICATE OF SERVICE

I hereby certify that on the 13 day of ~~April~~ May, 1974, two copies of the within Abstract of Record on Appeal were ~~delivered~~ mailed to each counsel for Appellees herein:

John C. Lacy, Esquire
Verity & Smith
902 Transamerica Building
Tucson, Arizona 85701

Bruce A. Bevan, Jr., Esquire
Musick, Peeler & Garrett
One Wilshire Boulevard
Suite 2000
Los Angeles, California 90017

Peter C. Gulatto, Esquire
Office of the Attorney General
150 State Capitol Building
1700 West Washington
Phoenix, Arizona 85007

Dated: ~~April~~ May 13, 1974.

ARIZONA ABSTRACTS
Post Office Drawer 17150
Tucson, Arizona 85710

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STATE OF ARIZONA)
) ss:
COUNTY OF MARICOPA)

I Craig Swick hereby certify:
Name

That I am Reference Librarian, Law & Research Library Division of the Arizona State
Title/Division
Library, Archives and Public Records of the State of Arizona;

That there is on file in said Agency the following:

Microfilm of Farmer's Investment Company v. Pima Mining Company et al, Arizona Supreme Court Case No. 11439-2, Abstract of Record on Appeal Volume II Pages 86 to 180, filed September 23, 1974. Court of Appeals Instruments (Part Two) Page 115 with Pages 86 to 180 of the Abstract following.

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

Craig D. Swick
Signature

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

Etta Louise Muir
Signature, Notary Public

My commission expires 04/13/2009.
Date

Notary Public State of Arizona
Maricopa County
Etta Louise Muir
My Commission Expires
04/13/2009

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