

1 L. William Staudenmaier (#012365)
wstaudenmaier@swlaw.com
2 SNELL & WILMER L.L.P.
One Arizona Center
3 400 East Van Buren Street
Phoenix, Arizona 85004-2202
4 Telephone: (602) 382-6000
Facsimile: (602) 382-6070
5 Attorneys for Freeport-McMoRan Corporation

received
9/7/12
gll

6 **BEFORE THE ARIZONA NAVIGABLE STREAM**
7 **ADJUDICATION COMMISSION**

8 In re Determination of Navigability of
9 the Gila River

No. 03-007-NAV

10 **FREEPORT-MCMORAN**
11 **CORPORATION'S MEMORANDUM**
12 **REGARDING THE ORDINARY AND**
13 **NATURAL CONDITION OF THE**
14 **GILA RIVER**

15 Pursuant to the Commission's notice dated July 3, 2012, Freeport-McMoRan
16 Corporation ("Freeport") submits this memorandum regarding the ordinary and natural
17 condition of the Gila River at the time of statehood. The burden of proof in these
18 proceedings lies with the proponents of navigability, and based on the voluminous
19 evidence submitted by the parties, the record demonstrates that the Gila River was neither
20 navigable nor susceptible of navigation in its ordinary and natural condition at the time of
21 statehood. The Commission should reevaluate the evidentiary record and issue a revised
22 determination finding that Gila River was neither navigable nor capable of navigation in
23 its ordinary and natural condition on February 14, 1912.

24 **I. The Proponents of Navigability Bear the Burden of Proving the Gila River**
25 **was Navigable in its Ordinary and Natural Condition at Statehood.**

26 The burden of proof regarding the navigability of the Gila River, which must be
27 demonstrated by a preponderance of the evidence, "rests on the party asserting
28 navigability." *State v. ANSAC*, 224 Ariz. 230, 238, ¶9, 229 P.3d 242, 250 (App. 2010);
see also A.R.S. § 37-1128(A) ("If the preponderance of the evidence establishes that the
watercourse was navigable, the commission shall issue its determination confirming that

1 the watercourse was navigable.”). Consequently, in order for the Commission to
2 determine that the Gila River was navigable in its ordinary and natural condition at the
3 time of statehood, the proponents of navigability must establish that fact by a
4 preponderance of the evidence.

5 The preponderance of the evidence standard requires the Commission to
6 “determine whether a fact sought to be proved is more probable than not.” *Kent K. v.*
7 *Bobby M.*, 210 Ariz. 279, 284-285, ¶25, 110 P.3d 1013, 1019 (2005) (citation omitted);
8 *see also In re Appeal in Maricopa County*, 138 Ariz. 282, 283, 674 P.2d 836, 837 (1983)
9 (The “standard requires simply that the trier of fact find the existence of the contested fact
10 to be more probable than not.”). The preponderance of the evidence standard “does not
11 depend upon the number of witnesses; it merely means that the testimony which points to
12 one conclusion appears to the trier of facts to be more credible than the testimony which
13 points to the opposite one.” *Hewett v. Industrial Comm’n*, 72 Ariz. 203, 209, 232 P.2d
14 850, 854 (1951). Thus, if the preponderance of the evidence presented to this
15 Commission does not demonstrate that the Gila River was navigable in its ordinary and
16 natural condition at the time of statehood, the Commission must find the Gila River to be
17 non-navigable.

18 The proponents of navigability encourage the Commission to weigh evidence
19 “liberally” in favor of navigability. *See* Defenders of Wildlife Memorandum on Remand,
20 dated January 27, 2012 (“DOW Memorandum”), at 9. The Supreme Court in *PPL*
21 *Montana*, however, rejected the Montana Supreme Court’s use of a “liberally construed”
22 navigability test. *PPL Mont., LLC v. Montana*, 132 S. Ct. 1215, 1226 (2012). Rather
23 than rely on such a test, proponents of navigability are required to demonstrate, by a
24 preponderance of evidence, that every disputed segment of the Gila River, in its ordinary
25 and natural state, is navigable in fact, and that the River’s susceptibility to navigation is a
26 “commercial reality.” *Id.* at 1234.

27 ...

28

1 **II. The Commission Must Determine Whether the Gila River was Navigable in**
2 **its “Ordinary and Natural Condition” at the Time of Statehood.**

3 In *State v. ANSAC*, the Court of Appeals held that the legal test to be applied by
4 the Commission in evaluating the navigability of a river is “to determine what the [r]iver
5 would have looked like on February 14, 1912, in its ordinary and natural condition.” 224
6 Ariz. at 241, ¶28, 229 P.3d at 253. For purposes of navigability, “ordinary means
7 [o]ccurring in the regular course of events; normal; usual.” *Id.*, ¶26, 229 P.3d at 253
8 (internal quotations and citations omitted). Natural, on the other hand, means “in the
9 regular course of things in the universe and without accidental or purposeful
10 interference,” and “untouched by civilization, i.e., man-made diversions.” *Id.*, ¶27, 229
11 P.3d at 253 (internal quotations and citations omitted).

12 The Court of Appeals further explained that the Commission must expressly state
13 in its determination that it has factored out the effects of pre-statehood diversions. *Id.* at
14 240, ¶22, 229 P.3d at 252. Although the Court acknowledged that the Commission had
15 considered “‘all of the historical and scientific data and information, documents and other
16 information produced’ in evaluating the [r]iver’s navigability,” the Court nevertheless
17 rejected the Commission’s non-navigability determination because the report “made no
18 mention of those other dams and diversions” *Id.* To ensure that the Commission’s
19 revised final determination of navigability for the Gila River will not be subject to
20 challenge on these grounds, the Commission should make explicit findings regarding
21 what the Gila River “would have looked like on February 14, 1912, in its ordinary (*i.e.*,
22 usual, absent major flooding or drought) and natural (*i.e.*, without man-made dams,
23 canals, or other diversions) condition.” *Id.* at 241, ¶28, 229 P.3d at 253.

24 The Court of Appeals also provided guidance regarding the appropriate time
25 period for the Commission to consider when determining what a river would have looked
26 like “without man-made dams, canals or other diversions.” *Id.* The Court determined
27 that evidence of pre-settlement conditions should be considered “the best evidence of the
28 River’s natural condition.” *Id.* Thus, when reevaluating the evidence in the record, the

1 Commission should pay particular attention to pre-settlement evidence, and the revised
2 report and findings should reflect careful consideration of the ordinary and natural
3 condition of the Gila River prior to modern day settlement.

4 This does not mean that the Commission may not consider evidence of stream
5 conditions occurring after man-made diversions were initiated. To the contrary, the
6 Court of Appeals noted that “[e]ven if evidence of the River’s condition after man-made
7 diversions is not dispositive, it may nonetheless be informative and relevant. Assuming
8 the evidence has indicia of reliability, the determination of the relevance and weight to be
9 afforded the evidence is generally for ANSAC to make.” *Id.* at 243, ¶31, 229 P.3d at
10 255.

11 The modern era on the Gila River began in the 1870s, as farming communities
12 began to irrigate fields adjacent to the Gila River. *See* Exhibit 2, SFC Engineering Co.,
13 *Arizona Stream Navigability Study for the Upper Gila River and San Francisco River* at
14 3-18, 5-8 (received Sept. 26, 2003) (the “Upper Gila ASLD Report”) (describing early
15 farming, and noting that “the earliest constructed canal in the Safford Valley” was built in
16 1874). Although the Commission is not limited to considering pre-settlement evidence,
17 the Commission should pay particular attention to evidence of navigability of the Gila
18 River prior to this era.

19 **III. The Gila River was neither Navigable nor Susceptible of Navigation in its**
20 **Ordinary and Natural Condition at the Time of Statehood.**

21 The proponents of navigability have failed to offer sufficient evidence to
22 demonstrate that it is more likely than not that the Gila River was navigable or
23 susceptible of navigability in its ordinary and natural condition at the time of statehood.
24 On the contrary, the preponderance of the evidence establishes that the Gila River was
25 not navigable in its ordinary and natural condition. Thus, the Commission properly
26 found that “the Gila River from the New Mexico border to its confluence with the
27 Colorado River above Yuma, except for the end of the Gila River affected by the
28 backwater of the Colorado River, was not navigable or susceptible of navigability or used

1 or susceptible of use as a highway for commerce over which trade and travel was or may
2 be conducted in the ordinary modes of travel on water as of February 14, 1912.” Report,
3 Findings and Determination Regarding the Navigability of the Gila River from the New
4 Mexico Border to the Confluence with the Colorado River (“Gila Report”), at 88.

5 **A. The Commission has already made Appropriate Findings to Show that the**
6 **Proponents of Navigability have not satisfied their Burden of Proof.**

7 The factual findings made by the Commission in the Gila Report demonstrate that
8 the proponents of navigability have not shown that it is more likely than not that the Gila
9 River was navigable at statehood in its ordinary and natural condition. The factual
10 findings made by the Commission with regard to the ordinary and natural condition of the
11 Gila River prior to modern-day settlement and farming include:

12 1. The Gila River “is erratic, unstable and unpredictable, characterized by
13 periodic floods, sometimes extreme, in its ordinary and natural condition.” Gila Report at
14 88.

15 2. The segments of the river that go through deep bedrock canyons both
16 upriver of Safford near the New Mexico border and below Coolidge Dam have rapids,
17 waterfalls and other obstacles that prevent them from being considered navigable or
18 susceptible of navigability as a highway for commerce. *Id.* at 87.

19 3. The segments of the river which lie in the broad alluvial plains, in particular
20 below Safford to the confluence with the Salt River and down to the Colorado River,
21 except for narrows at Gillespie Dam site and Painted Rock Dam site, were “a braided
22 stream of two or more channels interspersed with sandbars, sand islands and other
23 obstacles, which shifted with floods and high flow of water, and as such, had a
24 configuration that would be impossible to be considered navigable or susceptible of
25 navigability as of statehood.” *Id.* at 87-88.¹

26
27
28 ¹ Similar conditions were noted by the United States Supreme Court when it determined that the Red River in
Oklahoma is non-navigable. *Oklahoma v. Texas*, 258 U.S. 574 (1922) (“At all times there is an almost continuous
succession of shifting and extensive sand bars. Ordinarily the depth of water over the sand bars is from 6 to 18

1 4. “Although there is significant evidence of prehistoric irrigation, particularly
2 in the Phoenix basin area and the middle Gila between Florence and the confluence with
3 the Salt River, which was one of the most densely populated areas in the southwest with a
4 population estimated at between 20,000 and 150,000 at their peak, there is no evidence of
5 the use of the Gila River by prehistoric cultures for boating or travel on the water.” *Id.* at
6 27.

7 5. There is no evidence of prehistoric inhabitants attempting to float logs
8 down the Gila River or for other commercial purposes. *Id.*

9 6. There is no evidence in the archeological record to indicate that any of the
10 prehistoric cultures located along the Gila River used it as a means of transportation. *Id.*
11 at 29.

12 7. There has been no documented use of the river for commercial trade and
13 travel or for regular flotation of logs. *Id.*

14 8. Mountain men exploring the southwest in the early 1800s used horseback
15 or walked and “did not use canoes, rafts or other types of boats on the Gila River or other
16 Arizona rivers, except for the Colorado.” *Id.* at 32.²

17 9. Failed attempts to float supplies down the Gila River by the military in the
18 1840s “demonstrates that the Gila River was not practical for navigation” in its ordinary
19 and natural condition. *Id.* at 33.

20 10. A party exploring a 231 mile stretch of the Gila River in 1775 described the
21 Gila River as intermittent, erratic, and in many reaches, dry. *Id.* at 39.

22 11. In the 1850s, a member of the Commission charged with surveying the new
23 boundary following the Gadsden Purchase described the Gila River as not navigable and
24 that it did not always run in the same bed. *Id.*

25 inches and elsewhere from 3 to 6 feet. There is no permanent or stable channel. Such as there is shifts irregularly
26 from one side of the bed to the other and not infrequently separates into two or three parts.”).

27 ² This finding, in support of the Commission’s determination that the Gila River was not navigable, is consistent
28 with the United States Supreme Court’s recent ruling in *PPL Montana*, 132 S.Ct. at 1233, that “[m]ere use by initial
explorers or trappers, who may have dragged their boats in or alongside the river despite its nonnavigability in order
to avoid getting lost, or to provide water for their horses and themselves, is not itself enough” to prove navigability
of a watercourse.

1 12. Several reports from surveyors in the 1850s and 1860s indicate that the Gila
2 River was not navigable. *Id.*

3 13. Nine federal surveys on the Gila River between 1867 and 1912 all
4 determined that the Gila River was not navigable. *Id.* at 45.

5 14. Due to the erratic nature of the Gila River, it could not historically be relied
6 on for commercial navigation. *Id.* at 50.

7 15. The Gila River has never been “a satisfactory highway for commerce or
8 susceptible to being a highway for commerce.” *Id.* at 56.

9 16. Despite flowing for 500 miles across Arizona, there are only 13 historical
10 boating events on the Gila River between 1846 and 1909. *Id.* at 57. Most were for
11 recreational purposes and were unsuccessful.

12 17. There are no reported attempts to float logs down the Gila River. *Id.* at 59.

13 18. The evidence submitted to the Commission, including flow data and river
14 geomorphology, “does not support a finding of navigability or susceptibility of
15 navigability, but in fact tends to support a finding of non-navigability.” *Id.* at 77.

16 19. The Gila River was never used in either prehistoric or historic times as a
17 highway for commerce or for any significant transportation on the water of goods or
18 people. *Id.* at 78.

19 20. The evidence submitted to the commission shows that “there was never
20 sufficient water to actually use the river as an avenue for transportation or highway for
21 commerce, regardless of its condition prior to 1880.” *Id.* at 78-79.

22 21. Throughout the history of the Gila River, it has always been “an erratic,
23 unreliable, unstable and unpredictable watercourse” that “was not navigable or
24 susceptible of navigability in 1860 and before . . . settlers began to divert water for
25 irrigation. . . .” *Id.* at 79.

26 . . .
27 . . .
28 . . .

1 **B. The Evidence in the Record shows that the Gila River was neither Navigable**
2 **nor Susceptible of Navigation in its Ordinary and Natural Condition.**

3 The following evidence, although not an exhaustive list of relevant evidence in the
4 record, coupled with the Commission's findings described above, provides a strong basis
5 for the Commission to issue a revised final determination that the Gila River, in its
6 ordinary and natural condition, was not navigable on February 14, 1912:

7 1. Although the Gila River's flow could fluctuate greatly, there are numerous
8 reports of very low water flow on the Gila River prior to significant modern-era
9 diversions. See Upper Gila ASLD Report at 3-24; Exhibit 4, JE Fuller/Hydrology &
10 Geomorphology, Inc., *Arizona Stream Navigability Study for the Gila River: Colorado*
11 *River Confluence to the Town of Safford* at IV-1 (received Feb. 20, 2004) (the "Lower
12 Gila ASLD Report") (stating that, according to a 1775 explorer, the Gila River was at
13 times "dry"); see also Exhibit 17, Jack L. August, Jr., *The Lower Gila River: A Non-*
14 *Navigable Stream on February 14, 1912* at 1, 19 (the "August Report") (noting that,
15 according to a 1911 observer, "one could walk across the river and hardly dampen the
16 shoes" and that, according to an 1891 report, there was a propensity for "sudden floods"
17 during summer rains); Exhibit 12, Douglas R. Littlefield, *Assessment of the Navigability*
18 *of the Gila River Between the Mouth of the Salt River and the Confluence with the*
19 *Colorado River Prior to and on the Date of Arizona's Statehood, February 14, 1912* at
20 72 (received Nov. 14, 2005) (the "Littlefield Report") (noting "erratic" water flow).

21 2. The geography of the Gila River prevented reliable navigation. "[D]ryland
22 rivers [such as the Gila River] are inherently unstable and more prone to changes in
23 channel configuration." Lower Gila ASLD Report at VII-9 to -10. Such shifting
24 channels, which would frustrate attempts at regular commercial navigation, were reported
25 long before statehood. See *id.* at IV-41 (noting that, in an 1888-89 report, the water flow
26 of the Gila River could not be taken by self-recording instruments "owing to the
27 shallowness of the streams and the unstable character of their channels"); Littlefield
28 Report at 104-15 (recording reports of shifting channels as early as 1775).

1 3. The Upper Gila is located mostly in relatively narrow canyons controlled
2 by bedrock outcroppings between broad alluvial plains. Gila Report at 63. For the entire
3 Upper Gila, the Arizona State Land Department's consultant concluded that the bedrock
4 geology made access to the river difficult, prevented development of extensive irrigation
5 systems, and prevented development of large population centers near the river. Upper
6 Gila ASLD Report at 6.

7 4. The middle Gila runs from Safford to the Salt River confluence. In this
8 reach, there is much evidence of the river being partly an underground stream, rising and
9 sinking according to local formations. Gila Report at 8-9. In each of the valleys of the
10 middle Gila, the river is dry for a few days each year. *Id.* at 51. The river flows through a
11 broad, flat valley and a broad, sandy channel. *Id.* The channel through at least most of
12 this reach is braided. *Id.* at 9, 63, 68-69.

13 5. The lower Gila starts at the Salt River confluence southwest of Phoenix and
14 runs to the Gila River confluence near Yuma. In this reach, the river flows mostly over
15 deep alluvium, and except near Arlington and Painted Rock Dam, the river flows over a
16 wide, unconfined floodplain. *Id.* The river's normal or low flow is greatly reduced by
17 infiltration in these alluvial basins, and the river tends to move laterally during high water
18 or flood periods. *Id.* The flow of the river is "braided, and it has many sandbars, sand
19 islands, and other obstructions in the river bed." *Id.* The Arizona State Land
20 Department's consultants acknowledged that the floodplain of the lower Gila is
21 comprised mostly of sand, so the bank material can be easily mobilized by floods of
22 significant magnitude and duration. Lower Gila ASLD Report at VII-6.

23 6. Early explorers did not view the Gila River as a navigable waterway. The
24 federal government commissioned at least ten separate surveys of the Gila River area
25 over a nearly fifty year period beginning in the mid-1800s, and the surveyors "all
26 concluded in their field notes and plats that they did not consider the Gila River to be
27 navigable." August Report at 13; Littlefield Report at 23, 55. In 1854 a surveyor wrote,
28 "[i]t is doubtful whether [the Gila River] can ever be navigated, except at its floods, and

1 these are by no means regular.” Upper Gila ASLD Report at 3-14. In 1879 an explorer
2 submitted a report to Congress that mentioned the Gila River but failed to state that it was
3 navigable, “although navigability was certainly a characteristic [the explorer] would have
4 discussed.” Littlefield Report at 90.

5 7. There are several accounts that pre-date modern diversions indicating that
6 the Gila River was not navigable. For example, a member of an 1847 military
7 reconnaissance mission noted, “[t]he Gila becomes so low . . . that a sand-bar forms at its
8 mouth during the summer, and at no time does it supply much water.” August Report at
9 32. A member of the commission charged with reviewing the Gadsden Purchase
10 commented in 1855 that the Gila “is not navigable.” Littlefield Report at 108. In 1859,
11 “[o]ne of Arizona Territory’s most notable pioneers” noted that “[t]he Colorado is the
12 only navigable stream” in Arizona and New Mexico. August Report at 33. Similarly, in
13 1865, the Arizona Territorial Legislature declared that “the Colorado River is the only
14 navigable water in this Territory.” Littlefield Report at 110.

15 8. Although local newspapers discussed commerce and waterways, Littlefield
16 Report at 112, there are only seven historical accounts of boating on the Gila River before
17 1900. Exhibit 18, *Accounts of Historical Gila River Boating* at 1 (noting, additionally,
18 the operation of two ferries across the river before 1900). “Yet in those instances where
19 boating was attempted, it was reported in the press more for its novelty than for being
20 practicable on a regular and reliable basis.” Littlefield Report at 112. Such attempts
21 were most often made using “small, low draft boats,” rather than commercial watercraft.
22 Upper Gila ASLD Report at 4-8; Littlefield Report at 131.³ At least one of the boating
23 attempts reported very dangerous boating conditions, *see* Upper Gila ASLD Report at 3-
24 28, 4-8, and another ran aground so often it “was forced to jettison a portion of the
25 cargo.” Lower Gila ASLD Report at IV-2; Littlefield Report at 106. “Travel on the river
26

27 ³ As the United States Supreme Court has noted, “[i]t is not, however, . . . ‘every small creek in which a fishing skiff
28 or gunning canoe can be made to float at high water which is deemed navigable, but, in order to give it the character
of a navigable stream, it must be generally and commonly useful to some purpose of trade or agriculture.” *U.S. v. Rio Grande Dam & Irr. Co.*, 174 U.S. 690, 698-99 (1899) (citations omitted).

1 was frequently interrupted due to hazards such as sand bars or snags.” *Id.* at X-1.

2 **C. The Evidence in the Record relied on by the Proponents of Navigability does**
3 **not Satisfy the Preponderance of Evidence Standard.**

4 The evidence relied on by the proponents of navigability does not show that is
5 more likely than not that the Gila River was navigable or susceptible of navigability in its
6 ordinary and natural condition. For example, the proponents of navigability emphasize
7 that the Commission must evaluate the Gila River in its pre-settlement condition, prior to
8 irrigation diversions that began the 1870s. *See* January 27, 2012 Defenders of Wildlife
9 Memorandum on Remand for the Gila River (“DOW Memorandum”) at 7-8. As noted in
10 Sections III.A. and III.B. above, however, the evidence previously submitted to the
11 Commission demonstrates that prior to modern settlement, the Gila River was neither
12 navigable nor susceptible of navigation. Additionally, the Commission has already found
13 that *before* settlers began to divert water for irrigation, the Gila River was “an erratic,
14 unreliable, unstable and unpredictable watercourse” that “was not navigable or
15 susceptible of navigability in 1860 and before.” Gila Report at 79.

16 The proponents of navigability cite various attempts to boat the Gila River to
17 support their claim of navigability, including examples of modern day recreational
18 boating on the river. *See* January 27, 2012 Defenders of Wildlife Memorandum on
19 Remand (“DOW Memorandum”) at 8-9; January 27, 2012 Maricopa County and Flood
20 Control District of Maricopa County Memorandum to ANSAC at 9-10 (“County
21 Memorandum”); January 27, 2012 Arizona State Land Department Memorandum at 7-8.
22 With regard to modern-day boating, however, the United States Supreme Court recently
23 held that such evidence is not sufficient to demonstrate navigability unless the proponent
24 of navigability shows: “(1) the watercraft are meaningfully similar to those in customary
25 use for trade and travel at the time of statehood; and (2) the river’s post-statehood
26 condition is not materially different from its physical condition at statehood.” *PPL*
27 *Montana*, 132 S.Ct. at 1233. Because no such showing has been made for modern-day
28 watercraft on the Gila River, any such evidence is insufficient to support a finding of

1 navigability. Furthermore, the Commission has already reviewed the few attempts at
2 boating described in the record and has determined that “there was never sufficient water
3 to actually use the river as an avenue for transportation or highway for commerce,
4 regardless of its condition prior to 1880.” Gila Report at 78-79.

5 Lastly, the proponents of navigation rely heavily on the report and testimony of
6 Mr. Hjalmar Hjalmarson to support their claim that the Gila River was navigable in its
7 ordinary and natural condition. See DOW Memorandum at 8; County Memorandum at 2-
8 7; ASLD Memorandum at 5-6. The proponents also criticize the report and testimony of
9 Dr. Stanley Schumm. County Memorandum at 7-8. The Commission has already
10 addressed the credibility of these two experts, finding that Dr. Schumm’s testimony,
11 reports, and exhibits were impressive, Gila Report at 70, and finding Mr. Hjalmarson’s
12 credibility to be “not high.” Gila Report at 76. While the Commission is free to
13 reevaluate the credibility of the evidence in the record, it is important to remember that it
14 is the Commission’s responsibility, not that of the Court of Appeals or any other person,
15 to determine the credibility of witnesses and the evidence in the record. *Hewett v.*
16 *Industrial Comm’n*, 72 Ariz. 203, 209, 232 P.2d 850, 854 (1951) (“[W]hen two equally
17 honest and experienced expert witnesses reach opposite conclusions, the only thing the
18 trier of fact can do is to decide which one of these witnesses is more probably correct in
19 his conclusion. In so doing, he may take into consideration the experience of the
20 witnesses . . . and their interest or bias, conscious or unconscious, in the result to be
21 reached.”).

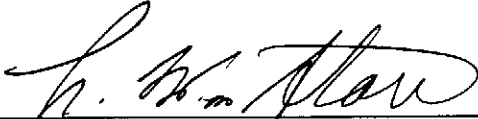
22 **IV. Conclusion and Requested Action.**

23 The Commission’s determination of non-navigability for the Gila River is correct.
24 The Commission should reaffirm that determination because the evidence in the record
25 fails to establish that the Gila River was navigable or susceptible of navigability in its
26 ordinary and natural condition. Accordingly, Freeport urges the Commission to issue a
27 revised determination that expressly applies the Court of Appeals’ interpretation of
28 “ordinary and natural.” Based on that interpretation, and the absence of evidence of

1 navigability, the Commission should conclude that the Gila River was non-navigable in
2 its ordinary and natural condition at statehood.

3 RESPECTFULLY SUBMITTED this 7th day of September, 2012.

4 SNELL & WILMER L.L.P.

5
6 By: 

7 L. William Staudenmaier
8 One Arizona Center
9 400 East Van Buren Street
10 Phoenix, Arizona 85004-2202
11 *Attorneys for Freeport-McMoRan Corporation*

12 ORIGINAL AND SIX COPIES of the
13 foregoing hand-delivered for filing this
14 7th day of September, 2012 to:

15 Arizona Navigable Stream Adjudication Commission
16 1700 W. Washington, Room B-54
17 Phoenix, AZ 85007

18 COPY mailed this 7th day of September,
19 2012 to:

20 Fred E. Breedlove III
21 Squire Sanders & Dempsey LLP
22 1 E. Washington Street, Suite 2700
23 Phoenix, AZ 85004-2556
24 *Attorney for the Commission*

25 Laurie A. Hachtel
26 Attorney General's Office
27 1275 W. Washington Street
28 Phoenix, AZ 85007-2997
Attorneys for State of Arizona

Joy E. Herr-Cardillo
Timothy M. Hogan
Arizona Center for Law in the Public Interest
2205 E. Speedway Blvd.
Tucson, AZ 85719
Attorneys for Defenders of Wildlife, et al.

...

...

- 1 Sally Worthington
John Helm
- 2 Helm & Kyle, Ltd.
1619 E. Guadalupe #1
- 3 Tempe, AZ 85283
Attorneys for Maricopa County
- 4
- 5 Sandy Bahr
202 E. McDowell Road, Ste. 277
- 6 Phoenix, AZ 85004
Sierra Club
- 7
- 8 Julie Lemmon
1095 W. Rio Salado Pkwy., Ste. 102
- 9 Tempe, AZ 85281
*Attorney for Flood Control District
of Maricopa County*
- 10
- 11 Carla Consoli
Lewis and Roca
- 12 40 N. Central Avenue
Phoenix, AZ 85004
Attorneys for Cemex
- 13
- 14 John B. Weldon, Jr., Mark A. McGinnis,
Scott M. Deeny
- 15 Salmon, Lewis & Weldon, P.L.C.
2850 E. Camelback Road, Suite 200
- 16 Phoenix, AZ 85016
*Attorneys for Salt River Project Agricultural
Improvement and Power District and Salt
River Valley Water Users' Association*
- 17
- 18 Charles Cahoy
P.O. Box 5002
- 19 Tempe, AZ 85280
Attorney for City of Tempe
- 20
- 21 William Tabel
P.O. Box 1466
- 22 Mesa, AZ 85211-1466
Attorney for City of Mesa
- 23
- 24 Cynthia Campbell
200 W. Washington, Suite 1300
- Phoenix, AZ 85003
Attorney for City of Phoenix
- 25
- 26 Thomas L. Murphy
Gila River Indian Community Law Office
- 27 Post Office Box 97
Sacaton, AZ 85147
Attorney for Gila River Indian Community
- 28

- 1 Michael J. Pearce
Maguire & Pearce LLC
- 2 2999 N. 44th Street, Suite 630
Phoenix, AZ 85018-0001
- 3 *Attorneys for Chamber of Commerce and
Home Builders' Association*
- 4
- 5 James T. Braselton
Mariscal Weeks McIntyre & Friedlander PA
- 6 2901 N. Central Avenue, Suite 200
Phoenix, AZ 85012-2705
- 7 *Attorneys for Various Title Companies*
- 8
- 9 Steve Wene
Moyes Sellers & Hendricks
- 10 1850 N. Central Avenue, Suite 1100
Phoenix, AZ 85004-4527
- 11 *Attorneys for Arizona State University*

12 