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

8 In re Determination of Navigability of
9 the San Pedro River

No. 03-004-NAV

**FREEPORT-MCMORAN
CORPORATION'S MEMORANDUM
REGARDING THE ORDINARY
AND NATURAL CONDITION OF
THE SAN PEDRO RIVER**

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

22 **I. The Proponents of Navigability Bear the Burden of Proving the San Pedro**
23 **River was Navigable in its Ordinary and Natural Condition at Statehood.**

24 The burden of proof regarding the navigability of the San Pedro River, which must
25 be demonstrated by a preponderance of the evidence, "rests on the party asserting
26 navigability." *State v. ANSAC*, 224 Ariz. 230, 238, ¶9, 229 P.3d 242, 250 (App. 2010);
27 *see also* A.R.S. § 37-1128(A) ("If the preponderance of the evidence establishes that the
28 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 San Pedro River was navigable in its ordinary and natural condition at
3 the 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 fact 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 does not demonstrate that the
15 San Pedro River was navigable in its ordinary and natural condition at the time of
16 statehood, the Commission must find the San Pedro River to be non-navigable.

17 The parties asserting that the San Pedro River is navigable encourage the
18 Commission to weigh evidence “liberally” in favor of navigability. *See* Defenders of
19 Wildlife Memorandum on Remand, dated January 27, 2012 (“DOW Memorandum”), at 3.
20 The Supreme Court in *PPL Montana*, however, rejected the Montana Supreme Court’s use
21 of a “liberally construed” navigability test. *PPL Mont., LLC v. Montana*, 132 S. Ct. 1215,
22 1226 (2012). Rather than rely on such a test, the proponents of navigability in this matter
23 are required to demonstrate, by a preponderance of evidence, that every disputed segment
24 of the San Pedro River, in its ordinary and natural state, is navigable in fact, and that a
25 river’s susceptibility to navigation is a “commercial reality.” *Id.* at 1234.

26 **II. The Commission Must Determine Whether the San Pedro River was**
27 **Navigable in its “Ordinary and Natural Condition” at the Time of Statehood**

28 In *State v. ANSAC*, the Court of Appeals held that the legal test to be applied by the

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

9 The Court of Appeals further explained that the Commission must find that it has
10 factored out the effects of pre-statehood diversions and obstructions. *Id.* at 240, ¶22, 229
11 P.3d at 252. To ensure that the Commission’s revised final determination of navigability
12 for the San Pedro River will not be subject to challenge on the grounds that the
13 Commission did not properly factor out pre-statehood diversions, the Commission should
14 make explicit findings regarding what the San Pedro River “would have looked like on
15 February 14, 1912, in its ordinary (*i.e.*, usual, absent major flooding or drought) and
16 natural (*i.e.*, without man-made dams, canals, or other diversions) condition.” *Id.* at 241,
17 ¶28, 229 P.3d at 253.

18 The Court of Appeals also provided guidance regarding the appropriate time
19 period for the Commission to consider when determining what a river would have looked
20 like “without man-made dams, canals or other diversions.” *Id.* Generally, “the best
21 evidence of the [r]iver’s natural condition” is prior to man-made diversions and dams. *Id.*
22 Thus, when reevaluating the evidence in the record, the Commission should pay
23 particular attention to evidence from this timeframe, and the revised report and findings
24 should reflect careful consideration of the ordinary and natural condition of the San Pedro
25 River prior to modern day settlement along the river.

26 This does not mean that the Commission may not consider evidence of stream
27 conditions occurring after man-made diversions were initiated. To the contrary, the
28 Court of Appeals noted that “[e]ven if evidence of the River’s condition after man-made

1 diversions is not dispositive, it may nonetheless be informative and relevant. Assuming
2 the evidence has indicia of reliability, the determination of the relevance and weight to be
3 afforded the evidence is generally for ANSAC to make.” *Id.* at 243, ¶31, 229 P.3d at
4 255.

5 **III. The San Pedro River was neither Navigable nor Susceptible of Navigation in**
6 **its Ordinary and Natural Condition at the Time of Statehood.**

7 The proponents of navigability have failed to proffer any evidence—much less
8 sufficient evidence to satisfy the preponderance of the evidence standard—that the San
9 Pedro River was navigable in its ordinary and natural condition at the time of statehood.
10 In fact, the preponderance of the evidence establishes that San Pedro River was not
11 navigable in its ordinary and natural condition. Thus, the Commission properly found
12 “the San Pedro River was not used or susceptible to being used, in its ordinary and
13 natural condition, as a highway for commerce, over which trade and travel were or could
14 have been conducted in the customary modes of trade and travel on water as of February
15 14, 1912.” Report, Findings and Determination Regarding the Navigability of the San
16 Pedro River from the Mexican Border to the Confluence with the Gila River (October 18,
17 2006), at 27 (“San Pedro Report”).

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

20 The factual findings made by the Commission in the San Pedro Report
21 demonstrate that the proponents of navigability have not shown that it is more likely than
22 not that the San Pedro River was navigable in its ordinary and natural condition. The
23 factual findings made by the Commission with regard to the ordinary and natural
24 condition of the San Pedro River prior to modern-day settlement include:

25 1. “[T]here is no evidence of any historical or modern commercial boating
26 having occurred on the San Pedro River.” San Pedro Report at 28.

27 2. The San Pedro River valley served as an overland trade route during
28 historical times, and there is no documented record of trade or travel on the river during

1 the period leading up to statehood. *Id.* at 24.

2 3. There is no evidence of “prehistoric river conditions that would support
3 navigation or use of the San Pedro River as a waterway.” *Id.* at 20.

4 4. None of the early military parties or other exploring parties in the San
5 Pedro River Valley believed there was sufficient water in the river to navigate or travel
6 by boat. *Id.* at 23.

7 5. There is no record of any commercial fishing industry along the San Pedro
8 River. *Id.* at 28.

9 **B. The Evidence in the Record shows that the San Pedro River was neither**
10 **Navigable nor Susceptible of Navigation in its Ordinary and Natural**
11 **Condition.**

12 The following evidence, although not an exhaustive list of relevant evidence in the
13 record, coupled with the Commission’s findings as noted above, provides a strong basis
14 for the Commission to issue a revised final determination that the San Pedro River, in its
15 ordinary and natural condition, was not navigable on February 14, 1912:

16 1. The San Pedro River Valley was historically “a significant transportation
17 route through southern Arizona.” Arizona Stream Navigability Study for the San Pedro
18 River at 3-1 (evidence item no. 16) (the “ASLD Report”). Yet, “travel was along the
19 river rather than in it.” *Id.*

20 2. Geologic investigations of the San Pedro Valley indicate that the river was
21 not susceptible to navigation due to “seasonal low flow, intermittent flow conditions (no
22 flow), shifting channels, and erosive conditions during periods of high flow and floods.”
23 *Id.* at 5-16. Even though the upper reach of the San Pedro was partly perennial, the lower
24 reach was “an entrenched, broad, braided channel” with only isolated reaches of
25 perennial flow. *Id.* at 7-1.

26 3. Historic accounts of the San Pedro River in the mid- to late-nineteenth
27 century suggest that the San Pedro was not considered to be navigable. For example, the
28 San Pedro River was described in 1846 by a United States military unit as “an
insignificant stream a few yards wide, and only a foot deep.” *Id.* at 3-13. Two reports

1 from the early 1870s describe it as an “insignificant sand-bed” and generally “dry as a
2 lime-burner’s lot excepting during the ‘rainy season.’” *Id.* at 3-19. One report from the
3 mid-nineteenth century describes the lower portion of the San Pedro as “a few yards wide
4 and one foot deep.” *Id.* at 5-13. Other reports from the late 1850s note that water “rarely
5 runs above” the surface of the San Pedro near the confluence with the Gila River and that
6 no flow from the San Pedro River actually reaches the confluence with the Gila River.
7 *Id.* at 5-13.

8 4. Historical descriptions of the San Pedro River indicate that prior to 1890,
9 the San Pedro River “was an irregularly flowing stream, marshy in places, free-flowing in
10 other places, entrenched or subsurface in still other places.” *Id.* at 3-1. During this time,
11 some of the San Pedro River was perennial, but those areas were generally “a few feet
12 wide and perhaps a foot deep, in other areas meandering through marshes such that it
13 could ‘hardly be said to have [had] a course.’” *Id.* at 3-26. Historical flow rates indicate
14 that the average and median flow depths, for those portions of the San Pedro River that
15 were perennial, were generally less than one foot. *Id.* at iv.

16 5. In the late 1800s, the character of the San Pedro River was significantly
17 changed by arroyo cutting due in large part to a series of large floods that impacted the
18 San Pedro River over several years and a large earthquake that occurred in 1887. *Id.* at 5-
19 11. During this time, the San Pedro became more entrenched and intermittent. *Id.* The
20 San Pedro’s entrenchment was likely a natural cycle within the fluvial system and was
21 not significantly affected by human disturbances. *Id.* at 5-16.

22 6. Despite the San Pedro River being one of the “most intensely studied rivers
23 in the southwest,” *Id.* at 7-10, there are no published accounts of boating or boating
24 attempts on the San Pedro River prior to statehood. *Id.* at 2-10.

25 Although Freeport does not bear the burden of proof on the issue of navigability,
26 the evidence cited above, and other evidence in the record, including the Commission’s
27 own findings, is more than sufficient to support a determination that the San Pedro River
28 was non-navigable at statehood in its ordinary and natural condition.

1 **C. The Evidence in the Record Cited by the Proponents of Navigability does not**
2 **satisfy the Preponderance of Evidence Standard.**

3 The evidence relied on by the proponents of navigability does not satisfy the
4 standard of proof in favor of navigability. To support its claim of navigability, the
5 proponents cite to portions of the record that show that segments of the San Pedro may
6 have been perennial in their ordinary and natural condition. For example, the Defenders
7 of Wildlife cite to the ASLD Report for support that the San Pedro River was “an
8 irregularly flowing stream, marshy in places, free-flowing in other places, entrenched or
9 subsurface in still other places” prior to 1890. DOW Memorandum at 4. Yet this same
10 report characterizes the upper San Pedro as “a small braided stream with a baseflow of
11 less than 10 cfs between vertical banks 130 to 260 feet wide.” ASLD Report at 5-16. It
12 also describes the lower San Pedro as having only “isolated” reaches of perennial flow
13 near areas of shallow bedrock and as generally intermittent. ASLD Report at 5-16 at 7-1,
14 7-22, 9-22. The fact that small portions of a watercourse may have been, at times,
15 perennial is not enough to prove navigability of the river, or even portions thereof.

16 The proponents also attempt to attribute changes to the San Pedro that altered its
17 ordinary and natural condition in the late 1800s to human disturbances. In the late 1800s,
18 the San Pedro River was significantly altered due to a series of large floods and a large
19 earthquake that occurred in 1887. ASLD Report at 5-11. Citing the ASLD Report, the
20 proponents of navigation attribute these changes in significant part to human
21 disturbances. DOW Memorandum at 5-6. But the ASLD Report makes clear that the
22 San Pedro’s entrenchment was a natural cycle within the fluvial system. ASLD Report at
23 5-11. While human disturbances may have affected the magnitude of the channel
24 changes, “*the driving force in these changes are probably not anthropogenic.*” *Id.* at 5-
25 16 (emphasis added). The ASLD Report’s finding that human disturbances “probably
26 have also affected the magnitude and rate of channel change” on the San Pedro is not
27 sufficient to satisfy the proponents’ burden of proof. Rather, the report’s findings that the
28 “driving force” in these geomorphic changes was due to non-human causes support a

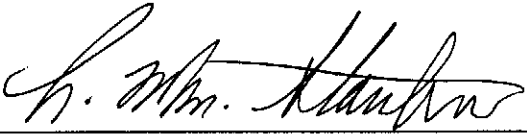
1 finding of non-navigability.¹

2 **IV. Conclusion and Requested Action.**

3 The Commission's determination of non-navigability for the San Pedro River is
4 correct. The Commission should reaffirm that determination because the evidence in the
5 record fails to establish that the San Pedro River was navigable or susceptible of
6 navigability in its ordinary and natural condition. Accordingly, Freeport urges the
7 Commission to issue a revised determination that expressly applies the Court of Appeals'
8 interpretation of "ordinary and natural." Based on that interpretation, and the absence of
9 any evidence of navigability, the Commission should conclude that the San Pedro River
10 was not navigable in its ordinary and natural condition at statehood.

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

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23 foregoing hand-delivered for filing this
24 7th day of September, 2012 to:

25 Arizona Navigable Stream Adjudication Commission
26 1700 W. Washington, Room B-54
27 Phoenix, AZ 85007

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...

27 ¹ Furthermore, as discussed in Section III.B. above, there is abundant evidence in the record from *before*
28 1880 to confirm that the San Pedro River has never been navigable or susceptible of navigation at any
point in recorded history. As a result, any human contribution to the post-1880 entrenchment is simply
irrelevant to the question of whether the San Pedro River is navigable.

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