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

8 In re Determination of Navigability of  
9 the Santa Cruz River

No. 03-002-NAV

**FREEPORT-MCMORAN  
CORPORATION'S MEMORANDUM  
REGARDING THE ORDINARY AND  
NATURAL CONDITION OF THE  
SANTA CRUZ 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 Santa Cruz 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 Santa Cruz 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 Santa Cruz River was neither navigable nor  
21 capable of navigation in its ordinary and natural condition on February 14, 1912.

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

24 The burden of proof regarding the navigability of the Santa Cruz 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 Santa Cruz 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 Santa Cruz River was navigable in its ordinary and natural condition at the time of  
16 statehood, the Commission must find the Santa Cruz River to be non-navigable.

17 The parties that urge a finding that the Santa Cruz River was navigable encourage  
18 the 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 Santa Cruz 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 Santa Cruz 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

1 the 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  
7 interference,” and “untouched by civilization, i.e., man-made diversions.” *Id.*, ¶27, 229  
8 P.3d at 253 (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 Santa Cruz 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 Santa Cruz 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 River’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 Santa  
25 Cruz 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 Santa Cruz 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 Santa  
9 Cruz River was navigable in its ordinary and natural condition at the time of statehood.  
10 In fact, the strong weight of the evidence establishes that Santa Cruz River was not  
11 navigable in its ordinary and natural condition. Thus, the Commission properly found  
12 “the Santa Cruz 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 Santa  
16 Cruz River from the Mexican Border to the Confluence with the Gila River (October 18,  
17 2006), at 27 (“Santa Cruz 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 Santa Cruz Report  
21 demonstrate that the proponents of navigability have not shown that the Santa Cruz River  
22 was navigable in its ordinary and natural condition. The factual findings made by the  
23 Commission with regard to the ordinary and natural condition of the Santa Cruz River  
24 prior to modern-day settlement include:

25 1. “The Santa Cruz River has never within history or known prehistory been  
26 considered a navigable river.” Santa Cruz Report at 26.

27 2. The Santa Cruz River was a “low-flowing perennial stream” in upper Santa  
28 Cruz County. In the middle segment, it generally went “subsurface” and surfaced near

1 San Xavier and Tucson. In the lower segment, it only flowed “intermittently” from  
2 Marana to the confluence with the Gila River. *Id.* at 24.

3 3. There is no record of any commercial fishing industry along the Santa Cruz  
4 River. *Id.* at 24.

5 4. There are no reports of any successful navigation over any significant  
6 portion or reach of the Santa Cruz River. *Id.* at 25.

7 **B. The Evidence in the Record shows that the Santa Cruz River was neither**  
8 **Navigable nor Susceptible of Navigation in its Ordinary and Natural**  
9 **Condition.**

10 The following evidence, although not an exhaustive list of relevant evidence in the  
11 record, provides a strong basis for the Commission to issue a revised final determination  
12 that the Santa Cruz River, in its ordinary and natural condition, was not navigable on  
13 February 14, 1912:

14 1. Historically, the Santa Cruz Valley was a very important transportation  
15 corridor for travelers due to the availability of water along some portions of the river.  
16 *See* Arizona Stream Navigability Study for the Santa Cruz River at § 3-64 (evidence item  
17 no. 19) (the “ASLD Report”). Yet, all travel in the Santa Cruz Valley occurred on  
18 overland routes along or near the river and not by boat on the river. *Id.*

19 2. Prior to settlement in the late 1800s, the upper Santa Cruz River reportedly  
20 had perennial stream reaches from its headwaters to Tubac. *Id.* at § 3-28. There is not,  
21 however, any evidence that the early indigenous people (Hohokam and O’odham) that  
22 populated the Santa Cruz Valley used boats at any time in the past. *Id.* at § 6-3;  
23 Executive Summary at 3 (“No evidence was found to suggest that the early inhabitants of  
24 the [Santa Cruz river] valley used boats on the river”). Likewise, “no archaeological  
25 evidence of navigation along the Santa Cruz River has been found” despite the “well-  
26 documented use of the river as a transportation and settlement corridor in historic times.”  
27 *Id.* at § 3-34. In fact, there is no evidence that anyone ever attempted to navigate the  
28 Santa Cruz River. *Id.* at § 6-5. This is because “[t]he river was much too shallow most  
of the time for small boats even in the perennial stretches.” *Id.* at § 3-64.

1           3.       One of the few alleged instances of boating on the Santa Cruz includes the  
2 portrayal by a land speculator that the Santa Cruz was capable of “floating steam boats,”  
3 an assertion later determined to be an account of “pure fiction.” *Id.* at § 6-5. The only  
4 other reported instances of boating on the river are accounts of people boating on man-  
5 made lakes in the 1880s which were later washed away by floods in 1890, and several  
6 instances of rafters floating the river during post-statehood floods. *Id.* § 6-5.<sup>1</sup> Other than  
7 these few attempts, there is no evidence of boating at any time on Santa Cruz River and  
8 no evidence of the river ever being used to transport goods or people. *Id.*; see also Jack  
9 August, *The Upper Santa Cruz River: History of a Lessing Stream* at 144 (evidence item  
10 no. 8) (“Virtually no evidence exists to suggest the [Santa Cruz] river was at any time  
11 navigable.”).

12           4.       Historic accounts of the Santa Cruz River in the early- to mid-nineteenth  
13 century indicate that the river was not susceptible of navigability. For example, the Santa  
14 Cruz was described in 1804 near Tubac as follows: “[o]nly in the rainy season does it  
15 enjoy a steady flow. During the rest of the year it sinks into the sand in many places.”  
16 Leonard and Philip Halpenny, *Review of the Hydrogeology of the Santa Cruz Basin in*  
17 *the Vicinity of the Santa Cruz-Pima County Line* at 3-1 (evidence item no. 6). One report  
18 from 1821 describes it as only flowing “during the rainy seasons.” *Id.* at 3-2. And  
19 another report from 1852 describes the Santa Cruz River as follows: “strange as it may  
20 appear, notwithstanding all the rain that had fallen, the river, such is the uncertainty of the  
21 streams in this county, was quite dry.” *Id.* at 3-3.

22           5.       Climatic data for the Santa Cruz River demonstrates that the river was not  
23 susceptible to navigability. Typical of desert climates, the total precipitation during the  
24 summer monsoons was generally greater than the total for the remaining months of the  
25

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26 <sup>1</sup> As the United States Supreme Court recently held, present-day recreational boating on a river is not sufficient to  
27 demonstrate navigability unless the proponent of navigability shows: “(1) the watercraft are meaningfully similar to  
28 those in customary use for trade and travel at the time of statehood; and (2) the river’s post-statehood condition is  
not materially different from its physical condition at statehood.” *PPL Montana*, 132 S.Ct. at 1233. Because no  
such showing has been made for modern-day watercraft on the Santa Cruz River, any such evidence is insufficient  
to support a finding of navigability.

1 year. ASLD Report, § 4-6. Consequently, the majority of “flow events” along the Santa  
2 Cruz occurred during the summer monsoons. *Id.* at § 4-8.

3 6. Hydrologic data for the Santa Cruz River also demonstrate that the river  
4 was not susceptible to navigability and that “prior to 1890, the Santa Cruz River was an  
5 intermittent stream with occasional marshlands or cienegas.” *Id.* at § 2-32.

6 Although Freeport does not bear the burden of proof on the issue of navigability,  
7 the evidence cited above, and other evidence in the record, is more than sufficient to  
8 support a determination that the Santa Cruz River was non-navigable on February 14,  
9 1912 in its ordinary and natural condition.

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

12 The evidence relied on by the proponents of navigability for the Santa Cruz River  
13 is far less than is required to show that the River was navigable or susceptible of  
14 navigability in its ordinary and natural condition. The Defenders of Wildlife, in the  
15 DOW Memorandum, rely primarily on their assertion that portions of the upper and  
16 middle Santa Cruz were, at times, perennial prior to settlement. Such an assertion,  
17 however, does not establish navigability. The Defenders of Wildlife offer no evidence  
18 that any perennial stretches of the Santa Cruz River had sufficient flow to support  
19 navigation of any kind. To the contrary, the Commission has already found that this  
20 portion of the river was “low-flowing,” Santa Cruz Report at 24, and the ASLD Report  
21 concluded that “[t]he river was much too shallow most of the time for small boats even in  
22 the perennial stretches.” ASLD Report, at 3-64.

23 As the United States Supreme Court recently held, “[n]avigability must be  
24 assessed at the time of statehood, and it concerns the river’s usefulness for “trade and  
25 travel,” rather than for other purposes.” *PPL Montana*, 132 S.Ct. at 1233 (citations  
26 omitted). Without evidence that the Santa Cruz River had sufficient flows to make it  
27 “susceptible of being used,’ as [a] highway[] of commerce at the time of statehood,” *id.*,  
28 there is no basis to conclude that the River was navigable. Without any history of actual


1 navigation and no showing that the River was even capable of potential navigation, the  
2 only plausible conclusion is that the Santa Cruz River was not navigable in its ordinary  
3 and natural condition.

4 **IV. Conclusion and Requested Action.**

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

13 RESPECTFULLY SUBMITTED this 7<sup>th</sup> day of September, 2012.

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25 7<sup>th</sup> day of September, 2012 to:

26 Arizona Navigable Stream Adjudication Commission  
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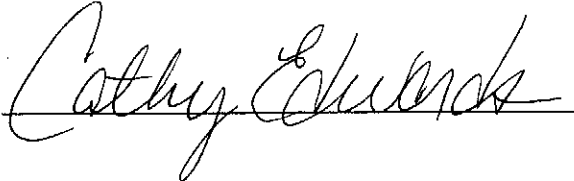
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