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

8 In re Determination of Navigability of
9 the Verde River

No. 04-009-NAV

**FREEPORT-MCMORAN
CORPORATION'S MEMORANDUM
REGARDING THE ORDINARY AND
NATURAL CONDITION OF THE
VERDE 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 Verde River at the time of statehood. The burden of proof in these
16 proceedings lies with the proponents of navigability, and based on the considerable
17 evidence submitted by the parties in these proceedings, the record demonstrates that the
18 Verde River was neither navigable nor susceptible of navigation in its ordinary and
19 natural condition at the time of statehood. The Commission should reevaluate the
20 evidentiary record and issue a revised determination that Verde River was neither
21 navigable nor capable of navigation in its ordinary and natural condition on February 14,
22 1912.

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

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

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

6 The preponderance of the evidence standard requires the Commission to
7 “determine whether a fact sought to be proved is more probable than not.” *Kent K. v.*
8 *Bobby M.*, 210 Ariz. 279, 284-285, ¶25, 110 P.3d 1013, 1019 (2005) (citation omitted);
9 *see also In re Appeal in Maricopa County*, 138 Ariz. 282, 283, 674 P.2d 836, 837 (1983)
10 (The “standard requires simply that the trier of fact find the existence of the contested fact
11 to be more probable than not.”). The preponderance of the evidence standard “does not
12 depend upon the number of witnesses; it merely means that the testimony which points to
13 one conclusion appears to the trier of facts to be more credible than the testimony which
14 points to the opposite one.” *Hewett v. Industrial Comm’n*, 72 Ariz. 203, 209, 232 P.2d
15 850, 854 (1951). Thus, if the preponderance of the evidence does not demonstrate that the
16 Verde River was navigable in its ordinary and natural condition at the time of statehood,
17 the Commission must find the Verde River to be 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 10. 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, the proponents of navigability are required to demonstrate, by a
24 preponderance of evidence, that every disputed segment of a stream, in its ordinary and
25 natural state, is navigable in fact, and that a river’s susceptibility to navigation is a
26 “commercial reality.” *Id.* at 1234.

27 ...

28 ...

1 **II. The Commission Must Determine Whether the Verde 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 that it has factored out the effects of pre-statehood diversions. *Id.* at 240, ¶22, 229 P.3d at
14 252. Although the Court acknowledged that the Commission had considered “‘all of the
15 historical and scientific data and information, documents and other information
16 produced’ in evaluating the River’s navigability,” the Court nevertheless rejected the
17 Commission’s non-navigability determination because the report “made no mention of
18 those other dams and diversions” *Id.* To ensure that the Commission’s revised final
19 determination of navigability for the Verde River will not be subject to challenge on these
20 grounds, the Commission should make explicit findings regarding what the Verde River
21 “would have looked like on February 14, 1912, in its ordinary (*i.e.*, usual, absent major
22 flooding or drought) and natural (*i.e.*, without man-made dams, canals, or other
23 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 stated that
27 evidence of pre-settlement conditions should be considered “the best evidence of the
28 [r]iver’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 Verde 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 In 1865, civilian settlement of the middle and lower Verde River Valley began.
12 *See Report, Findings and Determination Regarding the Navigability of the Verde River*
13 *from its Headwaters to the Confluence with the Salt River* (March 24, 2008), at 25
14 (“Verde Report”). But it was not until 1880 that “most of the arable land in the Verde
15 River Valley was under cultivation.” *Id.* at 25-26. Although the Commission is not
16 limited to considering pre-settlement evidence, the Commission should pay particular
17 attention to evidence from prior to this era.

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

20 The proponents of navigability have failed to offer sufficient evidence to
21 demonstrate that it is more likely than not that the Verde River was navigable or
22 susceptible of navigability in its ordinary and natural condition at the time of statehood.
23 To the contrary, the preponderance of the evidence establishes that the Verde River was
24 not navigable in its ordinary and natural condition. Thus, the Commission properly
25 found “the Verde River from its headwaters at Sullivan Lake to its confluence with the
26 Salt River was not used or susceptible of use as a highway for commerce over which
27 trade and travel was or may be conducted in the ordinary modes of travel on water as of
28 February 14, 1912.” *Verde Report* at 53-54.

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

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

8 1. Based on all of the historical and scientific data and information,
9 documents and other evidence produced and considered by the Commission, the Verde
10 River “is erratic, unstable and unpredictable, characterized by periodic floods, sometimes
11 extreme, in its ordinary and natural condition.” Verde Report at 53.

12 2. In the reaches “above the Verde Valley and below the Verde Valley to
13 Bartlett Dam, the steep, narrow bedrock canyons, lack of accessibility to the river,
14 waterfalls, rapids, exposed boulders and other obstacles, and the steep gradient of the
15 river, navigation as a highway for commerce is not possible.” *Id.*

16 3. “In the Verde Valley and the reach below Bartlett Dam, the river spreads
17 out over a large flood plain and has braided characteristics, with shifting sandbars and
18 sand islands, which make it impossible to be considered as navigable or susceptible of
19 navigation.” *Id.*

20 4. “There is no evidence in the archeological record that would indicate that
21 any of the prehistoric cultures located in the study area used the Verde River as a means
22 for transportation by boat or other water craft and there has been no documented use of
23 the river as a highway for commerce for commercial trade and travel or regular floatation
24 of logs. All travel in the study area during this period was by foot.” *Id.* at 23.

25 5. Mountain men exploring the southwest in the early 1800s used horseback
26 or walked and “did not use canoes, rafts or other types of boats on the Verde River or
27 other Arizona rivers, except for the Colorado.” *Id.* at 24.

28 . . .

1 6. Accounts from early settlers in the Verde River Valley demonstrate that
2 while portions of the Verde River were perennial, periodic floods caused much erosion
3 and damage and frequently changed the course of the river. *Id.* at 27.

4 7. Although some attempts were made to float logs down the river, none of
5 the attempts were successful. *Id.* at 27.

6 8. All transportation along the river occurred on land, and there is no evidence
7 of the Verde River being used as a highway for commerce or that it was susceptible to
8 navigation. *Id.* at 27-28.

9 9. In its report, the Commission considered the Verde River's condition prior
10 to 1860 and prior to significant diversion of water for irrigation by modern settlers. *Id.* at
11 28.

12 10. Reports from early settlers describe the Verde River as perennial, but none
13 indicate that it was in any way navigable in its ordinary and natural condition due to
14 flooding, marshes, and other natural conditions. *Id.* at 29-30.

15 11. Dr. Douglas Littlefield, an expert witness that the Commission found to be
16 highly credible, found that no contemporary believed the Verde River was navigable in
17 any reliable way. *Id.* at 3.

18 12. The federal land surveys made between 1850 and 1912 indicate that the
19 surveyors did not believe the Verde River was navigable. *Id.* at 32.

20 13. None of the few historical attempts to boat the Verde River show that the
21 Verde was used for commercial transportation as a highway for commerce. *Id.* at 36.
22 None of these boating attempts carried goods for commercial trade, and there was no
23 navigation upriver. *Id.*

24 14. There is no evidence that commercial fishing ever occurred on the Verde
25 River. *Id.* at 37.

26 15. Prior to modern settlement, the geomorphology, geology, and hydrology of
27 the Verde River made it not susceptible to navigation due to a combination of the steep
28 gradient of the river, deep canyons, rapids, great variation in flow, destructive floods, and

1 segments of wide, shallow, and braided streambed. *Id.* at 42-44.

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

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

9 1. Long before statehood, water flows on the Verde River varied
10 tremendously, preventing navigation. Some of the earliest accounts describe it as "so
11 shallow you could cross it on clumps of grass" such that "the water was forced into
12 standing pools," and that "when it rained the water was absorbed into the ground
13 immediately, so very little ran into the river channel." See Exhibit 31, Jon Fuller,
14 *Arizona Stream Navigability Study for the Verde River* at 3-13 (the "ASLD Report")
15 (reporting descriptions from 1873 and 1879). Other early accounts also noted violent
16 flooding. *Id.* (quoting an 1875 description of "the Verde suddenly com[ing] raging down,
17 tearing away everything before it—great trees and even rocks tossed about like so much
18 straw").

19 2. The geography of the Verde River prevented navigation. Segments of the
20 Verde River were "braided," with wide and shallow flow, and a steep pitch that was "not
21 conducive to navigation." Exhibit 30, Stanley A. Schumm, *Geomorphic Character of the*
22 *Verde River* at 14 (received Dec. 10, 2004). Notably, gradients of four feet per mile
23 make a river an inferior option for transportation and commerce; the Verde River had a
24 very steep gradient of twelve to twenty-five feet per mile, making navigation
25 "impossible." *Id.*

26 3. Early explorers did not view the Verde River as a navigable waterway. The
27 federal government commissioned surveys of the Verde River area beginning in the early
28 1870s—and "while those surveys were done at varying times of year, in different years,
and by at least eight individuals, all the descriptions and plats that resulted from this work

1 consistently portrayed the Verde River as being a non-navigable stream.” Exhibit 32,
2 Douglas R. Littlefield, *Assessment of the Verde River’s Navigability Prior to and on the*
3 *Date of Arizona’s Statehood, February 14, 1912* at 47, 73 (received July 21, 2005) (the
4 “Littlefield Report”). Likewise, in 1879, an explorer submitted a report to Congress
5 mentioning the Verde River but failed to state that it was navigable, “although
6 navigability was certainly a characteristic [the explorer] would have noted.” *Id.* at 113.

7 4. Historical records indicate that the territorial and federal governments did
8 not view the Verde River as a navigable waterway. For example, in 1877, the federal
9 government passed the Desert Land Act, relating to lands irrigated from *non-navigable*
10 streams. *See id.* at 102-03. Beginning in 1890, the federal government gave initial
11 approval to more than fifty applications for land irrigated from the Verde River, *id.* at
12 103, indicating that the federal government viewed the Verde River as non-navigable
13 during the relevant period of time. Similarly, beginning in the late nineteenth century,
14 the federal government issued patents to private parties who wished to stake claims to
15 land surrounding the Verde River. “[N]one of the federal patents . . . that overlay the
16 Verde River (regardless of their respective dates) contain any provisions for reserving the
17 bed of the river to the State of Arizona,” as would have occurred if the river had been
18 navigable. *Id.* at 92. Even when it was clear from a patent that the claimed land included
19 a portion of the riverbed, the patent was issued without qualification. *Id.* at 94
20 (describing patents from 1884 and 1886). Similarly, the territorial government of
21 Arizona did not view the Verde River as navigable. In 1865, the Arizona Territorial
22 Legislature noted that, “[t]he Colorado River is the only navigable water in this
23 Territory.” *Id.* at 129.

24 5. There are only four known accounts of boating on the Verde River before
25 1900. ASLD Report at 3-20 to -21, 8-3 (noting, additionally, the operation of a ferry
26 across the river in or about 1887 “during period of high water”). These boating attempts
27 on the Verde were made using “canvas canoes, a steel boat, skiffs, and flat-bottomed
28 boats,” rather than commercial watercraft. *Id.* at 8-3. Notwithstanding the limited use of

1 the Verde for boating or the floating of logs, one historian reported that he “has not heard
2 or does not know of the Verde River *ever* being navigated for commercial purposes.” *Id.*
3 at 4-2. (emphasis added).¹

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

6 The evidence relied on by the proponents of navigability does not show that the
7 Verde River was navigable or susceptible of navigability in its ordinary and natural
8 condition. To support their position, the proponents of navigability cite to portions of the
9 record demonstrating that segments of the Verde River were perennial in their ordinary
10 and natural condition. See January 27, 2012 Arizona State Land Department
11 Memorandum on Remand at 4-5 (“ASLD Memorandum”). The Commission, however,
12 has addressed this issue, finding that although the Verde River was a perennial stream, “it
13 was a very erratic, unstable and unpredictable stream because the flow varies from very
14 low, sometimes less than 200 cfs, to annual floods estimated between 13,000 and 20,000
15 cfs.” Verde Report at 50. Furthermore, the Commission has determined that the
16 geomorphology, geology, and hydrology of the Verde River did not make it susceptible
17 to navigation in its ordinary and natural condition. Verde Report at 42-44. The fact that
18 portions of the river may be perennial is not enough to prove navigability of the river, or
19 even portions thereof.

20 The proponents of navigability also cite various attempts to navigate the Verde
21 River to support their claim of navigability, relying heavily on modern day recreational
22 boating on the river. See ASLD Memorandum at 7-8; January 27, 2012 Defenders of
23 Wildlife Memorandum on Remand at 8-10. As the United States Supreme Court recently
24 held, however, present-day recreational boating on a river is not sufficient to demonstrate
25 navigability unless the proponent of navigability shows: “(1) the watercraft are
26

27 ¹ Moreover, as the United States Supreme Court has noted, “[i]t is not, however, . . . every small creek in which a
28 fishing skiff 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).

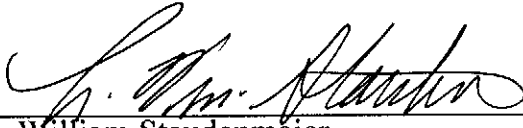
1 meaningfully similar to those in customary use for trade and travel at the time of
2 statehood; and (2) the river's post-statehood condition is not materially different from its
3 physical condition at statehood." *PPL Montana*, 132 S.Ct. at 1233. Because no such
4 showing has been made for modern-day watercraft on the Verde River, any such
5 evidence is insufficient to support a finding of navigability. Consistent with this holding,
6 the Commission has previously determined that the few documented modern-day boating
7 attempts do not make the river susceptible to navigation. Verde Report at 27-28; 36.

8 **IV. Conclusion and Requested Action.**

9 The Commission's determination of non-navigability for the Verde River is
10 correct. The Commission should reaffirm that determination because the evidence in the
11 record fails to establish that the Verde River was navigable or susceptible of navigability
12 in its ordinary and natural condition. Accordingly, Freeport urges the Commission to
13 issue a revised determination that expressly applies the Court of Appeals' interpretation
14 of "ordinary and natural." Based on that interpretation, and the absence of any evidence
15 of navigability, the Commission should conclude that the Verde River was non-navigable
16 in its ordinary and natural condition at statehood.

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

18 SNELL & WILMER L.L.P.

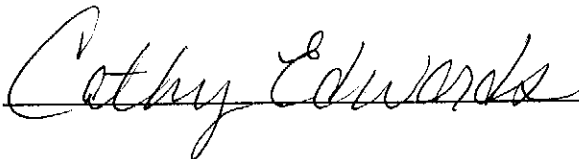
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26 foregoing hand-delivered for filing this
27 7th day of September, 2012 to:

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