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8 **BEFORE THE ARIZONA NAVIGABLE STREAM**
9 **ADJUDICATION COMMISSION**

10 In re Determination of Navigability of
11 the Lower Salt River, from Granite Reef
Dam to the Gila River Confluence

No. 03-005-NAV

**FREEPORT-MCMORAN
CORPORATION'S MEMORANDUM
REGARDING PROCEEDINGS ON
REMAND**

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15 On December 14, 2011, the Arizona Navigable Stream Adjudication Commission
16 (the "Commission") issued a notice (the "December 14th Notice") confirming the remand
17 of six previously appealed Commission navigability determinations regarding the Lower
18 Salt River, the Upper Salt River, the Gila River, the Verde River, the San Pedro River
19 and the Santa Cruz River. The December 14th Notice requested that interested parties
20 submit memoranda describing what the Commission should do to comply with the Court
21 of Appeals opinion in the Lower Salt River case and how the Commission should handle
22 the other remanded cases. December 14th Notice at 1. As authorized in the December
23 14th Notice, Freeport-McMoRan Corporation ("Freeport") submits this memorandum
24 addressing the status of each of these cases and recommending a course of action for the
25 Commission to ensure that its revised determinations for each watercourse will satisfy the
26 requirements of the Court of Appeals' opinion in the Lower Salt River case.

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1 **I. The Commission Should Reopen the Record for Each Watercourse to Allow**
2 **Submittal of Supplemental Evidence and then Hold Additional Hearings.**

3 In *State of Arizona v. Arizona Navigable Stream Adjudication Commission*, 224
4 Ariz. 230, 229 P.3d 242 (App. 2010) (“*Arizona v. ANSAC*”), the Arizona Court of
5 Appeals issued a narrow ruling that overturned the Commission’s decision regarding the
6 Lower Salt River. Specifically, the court held that the Commission “should have
7 considered *both* the River’s ordinary condition *and* its natural condition in determining its
8 navigability.” *Id.* at 242, 229 P.3d at 254 (emphasis in original). In reaching this
9 conclusion, the court stated that, aside from consideration of the effects of Roosevelt
10 Dam, the Commission did not explicitly evaluate “the effect of the numerous other dams,
11 canals, and man-made diversions identified in its report as existing on February 14,
12 1912.” *Id.* at 240, 229 P.3d at 252.

13 The Court of Appeals decision is a controlling legal precedent, and the
14 Commission is obligated to follow and apply the court’s holding. To ensure that this is
15 done in the most efficient way possible, Freeport urges the Commission to adopt the
16 following procedures for each of the remanded cases:

- 17 1. The Commission should simultaneously reopen the record for each of the remanded
18 cases to allow any interested party to submit additional evidence, either to support or
19 oppose a determination of navigability. At this time, Freeport does not anticipate
20 submitting any additional evidence, based on confidence that the record for each of
21 the six watercourses already contains abundant evidence from which the Commission
22 can determine that all were non-navigable on February 14, 1912, even after factoring
23 out the effects of pre-statehood dams, canals and other man-made diversions.
24 Nevertheless, because it is possible that some interested party may wish to
25 supplement the current record, either in favor of or opposing a determination of
26 navigability, the Commission should provide such an opportunity. Doing so would
27 assure that a complete record is developed by the Commission.

28 . . .

- 1 2. After providing a suitable period of time (Freeport believes 30 days would be
2 appropriate) for parties to submit any additional evidence, the Commission should
3 then hold one additional hearing for each watercourse pursuant to A.R.S. § 37-1126.
4 These hearings can and should be held either on the same day at the State Capitol
5 building, or, if the Commission concludes that the hearings for the San Pedro River
6 and Santa Cruz River should be held in Pima County, then as close as possible in time
7 to each other.
- 8 3. Following these hearings, the Commission should take each of the six watercourses
9 under consideration while awaiting at least two developments. First, the Commission
10 should not make a final determination of navigability on these watercourses until it
11 has retained new legal counsel and allowed that counsel a reasonable period of time to
12 become familiar with the six cases. In light of the Commission's long-standing
13 reliance on its legal counsel to assist in preparing the Commission's reports, having
14 the new counsel on board well in advance of the Commission's issuance of revised
15 determinations appears to be prudent. Second, the Commission should await the
16 United States Supreme Court's pending decision in the case *PPL Montana v. State of*
17 *Montana*, No. 1-218 (U.S., argued Dec. 7, 2011). Although the *PPL Montana* case
18 does not address precisely the same issues raised by the Arizona Court of Appeals in
19 the Lower Salt case, it will constitute the United States Supreme Court's latest word
20 on the test of navigability for title purposes. Because this is a federal test, the Court's
21 decision should be analyzed to determine whether it affects any portion of the
22 Commission's determination for each of the six watercourses. With a decision
23 expected from the Court in the next few months, the opinion of the Court in *PPL*
24 *Montana* should coincide well with the Commission's retention of new legal counsel.
- 25 4. Finally, the Commission should simultaneously make revised final determinations of
26 navigability regarding all six watercourses pursuant to A.R.S. § 37-1128(A).
27 Consistent with past practice, the Commission may make and issue these final
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1 determinations for all six watercourses at a single public hearing in one location –
2 preferably at the State Capitol where the Commission’s office is located.

3 **II. The Commission Should Issue Revised Navigability Determinations that**
4 **Expressly Factor Out the Effects of Pre-Statehood Diversions.**

5 The Court of Appeals made clear that the Commission must expressly state that it
6 has factored out the effects of pre-statehood diversions, and not simply the effects of
7 Roosevelt Dam. *See Arizona v. ANSAC*, 224 Ariz. at 242, 229 P.3d at 254. Although the
8 Court acknowledged that the Commission’s report on the Lower Salt River stated that the
9 Commission had considered “‘all of the historical and scientific data and information,
10 documents and other information produced’ in evaluating the River’s navigability,” the
11 court nevertheless rejected the Commission’s non-navigability determination because the
12 report “made no mention of those other dams and diversions” *Id.* To ensure that the
13 Commission’s revised final determinations of navigability for each of the six remanded
14 watercourses will no longer be subject to challenge on these grounds, the Commission
15 should make explicit findings regarding what each river “would have looked like on
16 February 14, 1912, in its ordinary (*i.e.*, usual, absent major flooding or drought) and
17 natural (*i.e.*, without man-made dams, canals, or other diversions) condition.” *Id.* at 241,
18 229 P.3d at 253.

19 The Court of Appeals also indicated the appropriate time period for the
20 Commission to consider when determining what each of these watercourses would have
21 looked like “without man-made dams, canals or other diversions.” On this point, the
22 court stated that the ancient Hohokam diversions had ceased by the 1800s, and
23 “[c]onsequently, the river could be considered to be in its natural condition after many of
24 the Hohokam’s diversions had ceased to affect the River, but before the commencement
25 of modern-era settlement and farming in the Salt River Valley” *Id.* at 242, 229 P.3d
26 at 254. The court stated that evidence of conditions during this period should be
27 considered “the best evidence of the River’s natural condition.” *Id.*

28 . . .

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

7 **III. The Commission should carefully Review the Record to Determine the Most**
8 **Persuasive Evidence and then Issue Revised Final Determinations.**

9 After re-opening the record for each of the remanded watercourses, the
10 Commission should carefully weigh the evidence already in its record, as well as any new
11 evidence submitted by interested parties. After evaluating all such evidence and
12 conferring with its new legal counsel, the Commission will be in a position to issue
13 revised final determinations of navigability for each watercourse. Although the following
14 is not an exhaustive list of relevant evidence, Freeport believes it will provide a very
15 strong basis for the Commission to issue a revised final determination that the Lower Salt
16 River, in its ordinary and natural condition, was not navigable on February 14, 1912¹:

- 17 1. During the mid- to late-nineteenth century, the Lower Salt River was notoriously
18 erratic, with “violent fluctuations in flow.” Assessment of the Salt River’s
19 Navigability Prior to and on the Date of Arizona’s Statehood, February 14, 1914 at
20 124 (evidence item no. 16; received Apr. 7, 2003) (the “Littlefield Report”). As a
21 result, the Lower Salt River was not reliably navigable, and the sudden fluctuations,
22 turbulence, and debris “would have made maintaining a stable channel for navigation
23 difficult.” *Id.*
- 24 2. Other evidence in the record also supports the conclusion that in the mid-1800s the
25 flow of the Salt River both fluctuated “wildly” depending on rainfall and “varie[d]
26 greatly from month to month and year to year.” *Historical and Scientific Evidence*

27 _____
28 ¹ Freeport will submit separate memoranda, on or before the January 27, 2012 deadline, identifying the relevant evidence in the existing record for each of the other five remanded watercourses.

1 *Concerning Navigability of the Lower Salt River*, Apr. 2003 at 21 (evidence item no.
2 29; received Apr. 3, 2003) (the “Kupel Report”). As the Kupel Report indicates, the
3 flow patterns of the Salt River changed dramatically based on the widely varying
4 availability of water. *Id.* at 21-22.

- 5 3. Historical records regarding the lower Salt River extend back to the 1820s. *See*
6 *Arizona Stream Navigability Study for the Salt River: Granite Reef Dam to the Gila*
7 *River Confluence* at 7-11 (evidence item no. 30; received Apr. 7, 2003) (the “Fuller
8 Report”). Beginning in the 1820s, there were numerous expeditions along the Salt
9 River. *Id.* All accounts of these expeditions show that these explorers traveled by
10 foot, horse, or wagon and none attempted to navigate the Salt River. *Id.*
- 11 4. A map filed in the Arizona Land office in Prescott in 1870 shows that the Lower Salt
12 River had two distinct channels, a common occurrence in arid streams. Kupel Report
13 at 21-22. Typically, only one channel would flow, if at all, and as the flow increased
14 during a storm event, the other channel would begin to flow. *Id.* At flood levels, both
15 channels would flow, and the result would be a single, wide watercourse that
16 exhibited an overland, “sheet-like” flow that could not support navigation. *Id.*
- 17 5. The Lower Salt River was a braided stream. *Geomorphic Character of the Lower Salt*
18 *River*, March 2003 at 2 (evidence item no. 26, received April 2, 2003) (the “Schumm
19 Report”). Typical of braided streams, the Lower Salt River is made up of a network
20 of “several, small branching and reuniting shallow channels separated from each other
21 by branch islands or channel bars.” *Id.* Braided streams like the Lower Salt River can
22 only be navigable where there is “abundant perennial flow,” *id.* at 4, a condition that
23 did not exist on the Salt River in the nineteenth century. *See* Dorsey report at 3
24 (Before any man made structures were placed on the river, the river had a rather
25 nominal flow. . . .”). The lower Salt River was wide and shallow, contained
26 numerous bars and islands, and would not have been favorable for navigation.
27 Schumm Report at 4. In fact, “sustained navigation [along the Lower Salt River]
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1 would not be possible and any attempt to maintain a navigation channel would fail.”

2 *Id.*

- 3 6. At least three river fords were established on the Salt River by 1871. Kupel Report at
4 11-12. The presence of established fords on the Salt River as early as 1871 indicates
5 that the flow was frequently low enough to cross on foot. *Id.*; see also *A Historical*
6 *Analysis of Portions of the Salt and Gila Rivers, Arizona*, February 1987 (evidence
7 item no. 12; received Sept. 26, 1996) at 32 (“During most of the year, the [Gila and
8 Salt] rivers were easily forded either on foot, on horseback, or in wagons.”).
- 9 7. The federal government commissioned surveys of the Lower Salt River area in 1868,
10 1888, 1899, and 1910-11. See Littlefield Report at 11. The surveyors were instructed
11 to note the presence of navigable rivers, *id.* at 17-26, and “while those surveys were
12 done at varying times of year, in different years, and by several individuals, all of the
13 descriptions and plats that resulted from this work consistently portrayed the Salt
14 River as being a non-navigable stream,” *id.* at 52. In fact, federal surveyors had
15 “explicit instructions” to meander all navigable bodies of water, but the Salt River
16 was not meandered at all by federal surveyors. *The Nonnavigability of the Salt River*
17 *from Granite Reef Dam to the Confluence with the Gila River, Arizona*, August 1996
18 at 18 (evidence item no. 8; received Aug. 30, 1996) (the “Dorsey Report”).
- 19 8. In 1877, the federal government passed the Desert Land Act of 1877, relating to lands
20 irrigated from non-navigable streams. See Littlefield Report at 102-03. The federal
21 government approved forty-one applications for lands irrigated with water from the
22 Lower Salt River, *id.*, indicating that the federal government viewed the Lower Salt
23 River as non-navigable during the relevant period of time.
- 24 9. Beginning in the late nineteenth century, the federal government issued patents to
25 private parties who wished to stake claims to land surrounding the Lower Salt River.
26 “[N]one of the federal patents that overlay the Salt River (regardless of their
27 respective dates) contain any provisions for reserving the bed of the river to the State
28 of Arizona,” as would have been necessary if the river had been navigable. Littlefield

1 Report at 71-72. Even when it was clear from a patent that the claimed land included
2 riverbed, the patent was issued without qualification. *E.g., id.* at 74-79.

3 10. In 1898 the United States published a “statistical atlas” containing a depiction of the
4 navigable rivers of the United States. *Historical and Hydrological Analysis of the*
5 *Salt River with Reference to Navigability*, Dec. 1996 at 36-37 (evidence item no. 17;
6 received Dec. 11, 1996). The information was gathered in 1890, 22 years before
7 statehood, and in a time “when diversions for irrigation use were small and prior to
8 the construction of dams and bridges. . . .” *Id.* Notably, the only river in Arizona
9 marked as navigable in the atlas was the Colorado River. *Id.*

10 11. Although local newspapers in the late nineteenth century and early twentieth century
11 “emphasized the crucial importance the stream played to the economic well-being of
12 the region,” Littlefield Report at 169, there are only sixteen historical accounts of
13 boating on the Salt River between about 1873 and 1915, Fuller Report at 3-19 to -24,
14 and several of those led to accidents due to dangerous and unfavorable river
15 conditions. *Id.* at 8-3. The boats that were used in these attempts were “shallow
16 water, low-draft, floating boats used only to move in the downstream direction.” *Id.*
17 at 9-2. Unlike the Colorado River, steamboats and commercial shipping vessels were
18 not used on the Lower Salt River. *Id.*

19 12. There were several ferry crossings on the Lower Salt River, *id.* at 3-24 to -27, but the
20 ferries did not use the river as a channel for shipping and commerce. The purpose of
21 the ferries was simply to cross the river and “not use the river for transportation.” *An*
22 *Historical Analysis of the Salt River (1830-1912)*, May 1988 at 18 (evidence item no.
23 12; received Sept. 26, 1996).

24 13. Other than the sixteen documented boating attempts, there are no historical accounts
25 of river navigation in the Salt River Valley. Dorsey Report at 19. All historical
26 accounts of transportation in the Salt River Valley in the late nineteenth century relate
27 to construction of roadways and rail lines. *Id.*

28 . . .

1 **III. Conclusion and Requested Action.**

2 Although Freeport does not bear the burden of proof on the issue of navigability,²
3 the evidence cited above, and other evidence in the record, is more than sufficient to
4 support a determination that the Lower Salt River, in its "ordinary and natural condition"
5 as defined by the Court of Appeals, was non-navigable on February 14, 1912.
6 Accordingly, Freeport urges the Commission to follow the procedural process suggested
7 above and, at the end of that process, issue a revised determination finding that the Lower
8 Salt River is non-navigable. By separate memoranda filed on or before January 27, 2012,
9 Freeport will address the evidence supporting a conclusion that each of the other five
10 remanded watercourses also was non-navigable on February 14, 1912.

11 RESPECTFULLY SUBMITTED this 13th day of January, 2012.

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27 ² *Arizona v. ANSAC*, 224 Ariz. at 238-39, 239 P.3d at 250-51 ("[T]he burden of proof lies with
28 Appellants, as the proponents of navigability, who must prove navigability by a preponderance of the
evidence.").

CERTIFICATE OF MAILING

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

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

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