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7
8 **BEFORE THE ARIZONA NAVIGABLE STREAM**
9 **ADJUDICATION COMMISSION**

10 In re Determination of Navigability of
the Santa Cruz River

No. 03-002-NAV

11 **FREEPORT-MCMORAN**
12 **CORPORATION'S MEMORANDUM**
13 **REGARDING PROCEEDINGS ON**
14 **REMAND FOR THE SANTA CRUZ**
RIVER

15 On April 27, 2010, the Arizona Court of Appeals decided *Arizona v. Arizona*
16 *Navigable Stream Adjudication Commission*, 224 Ariz. 230, 229 P.3d 242 (2010)
17 (hereinafter "*Arizona v. ANSAC*"), and remanded to the superior court a matter in which
18 the Arizona Navigable Stream Adjudication Commission (the "Commission") had
19 previously found the Lower Salt River to be non-navigable. The superior court (in both
20 Maricopa and Pima Counties) subsequently remanded to the Commission six previously
21 appealed navigability determinations for reconsideration in light of *Arizona v. ANSAC*.

22 On December 14, 2011, the Commission issued a notice (the "Notice") confirming
23 the remand of its navigability determinations for the Lower Salt River, the Upper Salt
24 River, the Gila River, the Verde River, the San Pedro River, and the Santa Cruz River.
25 The Notice requested that interested parties submit memoranda describing what the
26 Commission should do to comply with *Arizona v. ANSAC*.

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1 Freeport-McMoRan Corporation (“Freeport”) hereby recommends a course of
2 action for the Commission to ensure that its revised determination as to the Santa Cruz
3 River will satisfy the requirements of *Arizona v. ANSAC*.

4 **I. Procedural Recommendations.**

5 Freeport recommends that, in reconsidering its navigability determination for the
6 Santa Cruz River, the Commission should follow the procedures proposed in the
7 memorandum Freeport filed with the Commission on January 13, 2012 (“January 13
8 Memorandum”) in connection with the reconsideration of the navigability of the Lower
9 Salt River. The procedures recommended in the January 13 Memorandum included, in
10 short:

- 11 1. reopening the record to allow any interested party to submit additional evidence on
12 the new factual and legal issues raised in *Arizona v. ANSAC*;
- 13 2. holding an additional evidentiary hearing pursuant to A.R.S. § 37-1126;
- 14 3. abstaining from making a final determination until the Commission has retained
15 new legal counsel and the United States Supreme Court has issued its decision in
16 *PPL Montana v. State of Montana* (U.S. No. 10-218, argued Dec. 7, 2011);
- 17 4. making final determinations at a single public hearing (addressing all six
18 watercourses), preferably at the State Capitol where the Commission’s office is
19 located; and
- 20 5. issuing a revised navigability determination that expressly factors out the effects
21 of pre-statehood diversions.

22 Freeport believes the foregoing procedures will protect the due process rights of
23 all parties, and ensure compliance with *Arizona v. ANSAC* in the most efficient manner.
24 Of particular importance, the Commission should ensure that it issues final decisions for
25 all six watercourses at the same time. Doing so will help ensure that any future appeals
26 of the decisions can be handled in a coordinated manner. This will reduce the burdens
27 on, and improve administrative efficiency for, both the Commission and the parties
28 involved in such appeals.

1 **II. Substantive Recommendations.**

2 After reopening the record, the Commission should carefully weigh the evidence
3 already in its record, as well as any new evidence submitted by interested parties. After
4 evaluating all such evidence and conferring with its new legal counsel, the Commission
5 will be in a position to issue revised final determinations of navigability for each
6 watercourse.

7 On the current state of the record, Freeport believes there is a very strong basis for
8 the Commission to issue a revised final determination that the Santa Cruz River, in its
9 ordinary and natural condition, was not navigable on February 14, 1912. Such a
10 determination would be supported by the following evidence already in the
11 Commission's record:

- 12 1. Historically, the Santa Cruz Valley was a very important transportation corridor for
13 travelers due to the availability of water along some portions of the river. *See* Arizona
14 Stream Navigability Study for the Santa Cruz River at § 3-64 (evidence item no. 19)
15 (the "Fuller Report"). Yet, similar to the San Pedro Valley, all travel in the Santa
16 Cruz Valley occurred on overland routes along or near the river, and not by boat on
17 the river. *Id.*
- 18 2. Prior to settlement in the late 1800's, the upper Santa Cruz River reportedly had
19 perennial stream reaches from its headwaters to Tubac. *Id.* at § 3-28. There is not,
20 however, any evidence that the early indigenous people (Hohokam and O'odham) that
21 populated the Santa Cruz Valley used boats at any time in the past. *Id.* at § 6-3;
22 Executive Summary at 3 ("No evidence was found to suggest that the early
23 inhabitants of the [Santa Cruz river] valley used boats on the river"). Likewise, "no
24 archaeological evidence of the navigation along the Santa Cruz River has been found"
25 despite the "well-documented use of the river as a transportation and settlement
26 corridor in historic times." *Id.* at § 3-34. In fact, there is no evidence that anyone
27 ever attempted to navigate the Santa Cruz River. *Id.* at § 6-5. This is because "[t]he
28 river was much too shallow most of the time for small boats even in the perennial

- 1 stretches.” *Id.* at § 3-64.
- 2 3. One of the few alleged instances of boating on the Santa Cruz include the portrayal by
3 a land speculator that the Santa Cruz was capable of “floating steam boats,” later
4 determined to be an account of “pure fiction.” *Id.* at § 6-5. The only other reported
5 instances of boating on the river are accounts of people boating on a man-made lake
6 in the 1880s that was later washed away by floods in 1890, and several instances of
7 rafters floating the river during post-statehood floods. *Id.* § 6-5. Other than this, there
8 is no evidence of boating at any time on Santa Cruz River and no evidence of the river
9 ever being used to transport goods or people. *Id.*; *see also* Jack August, *The Upper*
10 *Santa Cruz River: History of a Lessing Stream* at 144 (evidence item no. 8)
11 (“Virtually no evidence exists to suggest the [Santa Cruz] river was at any time
12 navigable.”).
- 13 4. In contrast to the upper Santa Cruz River (south of Tucson), the lower Santa Cruz
14 River has never had perennial flow. Fuller Report, § 6-7.
- 15 5. Historic accounts of the Santa Cruz River in the early- to mid-nineteenth century
16 indicate that the river was not susceptible of navigability. For example, the Santa
17 Cruz was described in 1804 near Tubac as follows: “[o]nly in the rainy season does it
18 enjoy a steady flow. During the rest of the year it sinks into the sand in many places.”
19 Leonard and Philip Halpenny, *Review of the Hydrogeology of the Santa Cruz Basin*
20 *in the Vicinity of the Santa Cruz-Pima County Line* at 3-1 (evidence item no. 6). One
21 report from 1821 describes it as only flowing “during the rainy seasons.” *Id.* at 3-2.
22 Any another report from 1852 describes the Santa Cruz River as follows: “strange as
23 it may appear, notwithstanding all the rain that had fallen, the river, such is the
24 uncertainty of the streams in this county, was quite dry.” *Id.* at 3-3.
- 25 6. Climatic data for the Santa Cruz River demonstrates that the river was not susceptible
26 to navigability. Typical of desert climates, the total precipitation during the summer
27 monsoons was generally greater than the total for the remaining months of the year.
28 Fuller Report, § 4-6. Consequently, the majority of “flow events” along the Santa

1 Cruz occurred during the summer monsoons. *Id.* at § 4-8.

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

5 Although Freeport does not bear the burden of proof on the issue of navigability,
6 *see Arizona v. ANSAC*, 224 Ariz. at 238-39, 229 P.3d at 250-51, the evidence cited above,
7 and other evidence in the record, is more than sufficient to support a determination that
8 the Santa Cruz River was non-navigable on February 14, 1912 in its ordinary and natural
9 condition.

10 **III. Conclusion**

11 For the foregoing reasons, Freeport urges the Commission to follow the
12 procedures suggested above and, at the end of that process, to issue a revised
13 determination finding that Santa Cruz River was non-navigable in its ordinary and natural
14 condition.¹

15 RESPECTFULLY SUBMITTED this 27th day of January, 2012.

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18
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27 ¹ By separate memoranda filed simultaneously with this memorandum, Freeport will address the
28 evidence supporting a conclusion that the San Pedro, Gila, Verde, and Upper Salt Rivers were
also non-navigable on February 14, 1912.

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CERTIFICATE OF MAILING

ORIGINAL AND SIX COPIES of the foregoing hand-delivered for filing this 27th day of January, 2012 to:

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1700 W. Washington, Room B-54
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COPY mailed this 27th day of January, 2012 to:

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