

1 L. William Staudenmaier (#012365)  
wstaudenmaier@swlaw.com  
2 Kory A. Langhofer  
klanghofer@swlaw.com (#024722)  
3 SNELL & WILMER L.L.P.  
One Arizona Center  
4 400 East Van Buren Street  
Phoenix, Arizona 85004-2202  
5 Telephone: (602) 382-6571  
Facsimile: (602) 382-6070  
6 Attorneys for Freeport-McMoRan Corporation

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

10 In re Determination of Navigability of  
the Verde River

No. 04-009-NAV

11 **FREEPORT-MCMORAN**  
12 **CORPORATION'S MEMORANDUM**  
13 **REGARDING PROCEEDINGS ON**  
14 **REMAND FOR THE VERDE 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 a matter in which the Arizona  
18 Navigable Stream Adjudication Commission (the "Commission") had previously found  
19 the Lower Salt River to be non-navigable. The Superior Court (in both Maricopa and  
20 Pima Counties) subsequently remanded to the Commission six previously appealed  
21 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*.

27 Freeport-McMoRan Corporation ("Freeport") hereby recommends a course of action for  
28 the Commission to ensure that its revised determination as to the Verde River will satisfy the  
requirements of *Arizona v. ANSAC*.

1 **I. Procedural Recommendations.**

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

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

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

26 **II. Substantive Recommendations.**

27 After re-opening the record, the Commission should carefully weigh the evidence  
28 already in its record, as well as any new evidence submitted by interested parties. After

1 evaluating all such evidence and conferring with its new legal counsel, the Commission  
2 will be in a position to issue revised final determinations of navigability for each  
3 watercourse.

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

- 9 1. The modern era on the Verde River began no earlier than 1864, when the Verde  
10 Valley was settled and irrigation and farming began. *See* Exhibit 31, Jon Fuller,  
11 *Arizona Stream Navigability Study for the Verde River* at 3-2, 3-15, 7-23 (the "Fuller  
12 Report").
- 13 2. Long before statehood, water flows on the Verde River varied tremendously, and  
14 prevented reliable navigation. Some of the earliest accounts describe it as "so shallow  
15 you could cross it on clumps of grass" such that "the water was forced into standing  
16 pools," and that "when it rained the water was absorbed into the ground immediately,  
17 so very little ran into the river channel." Fuller Report at 3-13 (reporting descriptions  
18 from 1873 and 1879). Other early accounts, however, noted violent flooding. *Id.*  
19 (quoting an 1875 description of "the Verde suddenly com[ing] raging down, tearing  
20 away everything before it—great trees and even rocks tossed about like so much  
21 straw").
- 22 3. The geography of the Verde River prevented navigation. The Verde River was a  
23 "braided" river with wide and shallow flow, and a steep pitch that was "not conducive  
24 to navigation." Exhibit 30, Stanley A. Schumm, *Geomorphic Character of the Verde*  
25 *River* at 14 (received Dec. 10, 2004). There were "marked changes in valley width  
26 caus[ing] dramatic alterations of water depth and velocity." *Id.* Notably, although  
27 gradients of four feet per mile make a river an inferior option for transportation and  
28

1 commerce, the Verde River had a very steep gradient of twelve to twenty-five feet per  
2 mile, making navigation “impossible.” *Id.*

3 4. Early explorers did not view the Verde River as a navigable waterway. The federal  
4 government commissioned surveys of the Verde River area beginning in the early  
5 1870s—and “while those surveys were done at varying times of year, in different  
6 years, and by at least eight individuals, all the descriptions and plats that resulted from  
7 this work consistently portrayed the Verde River as being a non-navigable stream.”  
8 Exhibit 32, Douglas R. Littlefield, *Assessment of the Verde River’s Navigability Prior*  
9 *to and on the Date of Arizona’s Statehood, February 14, 1912* at 47, 73 (received July  
10 21, 2005) (the “Littlefield Report”). In 1879 an explorer submitted a report to  
11 Congress mentioning the Verde River but failing to state that it was navigable,  
12 “although navigability was certainly a characteristic [the explorer] would have noted.”  
13 *Id.* at 113.

14 5. Historical records indicate that the territorial and federal governments did not view  
15 the Verde River as a navigable waterway. For example, in 1877, the federal  
16 government passed the Desert Land Act of 1877, relating to lands irrigated from non-  
17 navigable streams. *See id.* at 102-03. From 1890 and later, the federal government  
18 gave initial approval to more than fifty applications for land irrigated from the Verde  
19 River, *id.* at 103, indicating that the federal government viewed the Verde River as  
20 non-navigable during the relevant period of time. Similarly, beginning in the late  
21 nineteenth century, the federal government issued patents to private parties who  
22 wished to stake claims to land surrounding the Verde River. “[N]one of the federal  
23 patents . . . that overlay the Verde River (regardless of their respective dates) contain  
24 any provisions for reserving the bed of the river to the State of Arizona,” as would  
25 have been necessary if the river had been navigable. *Id.* at 92. Even when it was  
26 clear from a patent that the claimed land included riverbed, the patent was issued  
27 without qualification. *E.g., id.* at 94 (describing patents from 1884 and 1886).  
28 Similarly, the colonial-era government of Arizona did not view the Verde River as

1 navigable. In 1865 the Arizona Territorial Legislature requested funds for improving  
2 the navigability of the Colorado River. *See id.* at 129. As part of that request, the  
3 legislature noted, “[T]he Colorado River is the only navigable water in this Territory.”  
4 *Id.*

- 5 6. There are only four known accounts of boating on the Verde River before 1900.  
6 Fuller Report at 3-20 to -21, 8-3 (noting, additionally, the operation of a ferry across  
7 the river in or about 1887 “during period of high water”). Boating attempts on the  
8 Verde were made using “canvas canoes, a steel boat, skiffs, and flat-bottomed boats,”  
9 rather than commercial watercraft. *Id.* at 8-3. One historian also believes logs were  
10 floated down the Verde River in 1890 or 1891, although no contemporaneous  
11 accounts of this event have been located. *Id.* at 3-21. Notwithstanding the limited use  
12 of the Verde for boating or the floating of logs, a historian who has written  
13 extensively on the history of the Verde River reported that he “has not heard or does  
14 not know of the Verde River *ever* being navigated for commercial purposes.” *Id.* at 4-  
15 2. (emphasis added).

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

### 21 III. Conclusion

22 For the foregoing reasons, Freeport urges the Commission to follow the  
23 procedures suggested above and, at the end of that process, to issue a revised  
24 determination finding that Verde River was non-navigable in its ordinary and natural  
25 condition.<sup>1</sup>

26  
27 <sup>1</sup> By separate memoranda filed simultaneously with this memorandum, Freeport will address the  
28 evidence supporting a conclusion that the Santa Cruz, Upper Salt, Gila, and San Pedro Rivers  
were also non-navigable on February 14, 1912.

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

2 SNELL & WILMER L.L.P.

3  
4 By Chad W. Page (for)  
5 L. William Staudenmaier  
6 Kory A. Langhofer  
7 One Arizona Center  
8 400 East Van Buren Street  
9 Phoenix, Arizona 85004-2202  
10 *Attorneys for Freeport-McMoRan Corporation*

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12  
13  
14  
15  
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23  
24  
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26  
27  
28  
Snell & Wilmer

L.L.P.  
LAW OFFICES  
One Arizona Center, 400 E. Van Buren  
Phoenix, Arizona 85004-2202  
(602) 382-6000

**CERTIFICATE OF MAILING**

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

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

COPY mailed this 27th day of January, 2012 to:

Laurie A. Hachtel  
Attorney General's Office  
1275 W. Washington Street  
Phoenix, AZ 85007-2997  
*Attorneys for State of Arizona*

Joy E. Herr-Cardillo  
Timothy M. Hogan  
Arizona Center for Law in the Public Interest  
2205 E. Speedway Blvd.  
Tucson, AZ 85719  
*Attorneys for Defenders of Wildlife, et al.*

Sally Worthington  
John Helm  
Helm & Kyle, Ltd.  
1619 E. Guadalupe #1  
Tempe, AZ 85283  
*Attorneys for Maricopa County*

Sandy Bahr  
202 E. McDowell Road, Ste. 277  
Phoenix, AZ 85004  
*Sierra Club*

Julie Lemmon  
930 S. Mill Avenue  
Tempe, AZ 85281  
*Attorney for Flood Control District  
of Maricopa County*

Carla Consoli  
Lewis and Roca  
40 N. Central Avenue  
Phoenix, AZ 85004  
*Attorneys for Cemex*

...

...

1 John B. Weldon, Jr., Mark A. McGinnis,  
2 Scott M. Deeny  
3 Salmon, Lewis & Weldon, P.L.C.  
4 2850 E. Camelback Road, Suite 200  
5 Phoenix, AZ 85016  
6 *Attorneys for Salt River Project Agricultural  
7 Improvement and Power District and Salt  
8 River Valley Water Users' Association*

9 Charles Cahoy  
10 P.O. Box 5002  
11 Tempe, AZ 85280  
12 *Attorney for City of Tempe*

13 William Tabel  
14 P.O. Box 1466  
15 Mesa, AZ 85211-1466  
16 *Attorney for City of Mesa*

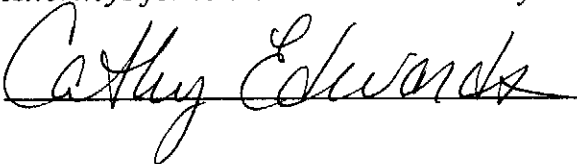
17 Cynthia Campbell  
18 200 W. Washington, Suite 1300  
19 Phoenix, AZ 85003  
20 *Attorney for City of Phoenix*

21 Thomas L. Murphy  
22 Gila River Indian Community Law Office  
23 Post Office Box 97  
24 Sacaton, AZ 85147  
25 *Attorney for Gila River Indian Community*

26 Michael J. Pearce  
27 Maguire & Pearce LLC  
28 2999 N. 44th Street, Suite 630  
Phoenix, AZ 85018-0001  
*Attorneys for Chamber of Commerce and  
Home Builders' Association*

James T. Braselton  
Mariscal Weeks McIntyre & Friedlander PA  
2901 N. Central Avenue, Suite 200  
Phoenix, AZ 85012-2705  
*Attorneys for Various Title Companies*

Steve Wene  
Moyes Sellers & Hendricks  
1850 N. Central Avenue, Suite 1100  
Phoenix, AZ 85004-4527  
*Attorneys for Arizona State University*

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26   
27  
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