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BEFORE THE ARIZONA NAVIGABLE STREAM ADJUDICATION COMMISSION

In Re Determination of Navigability)	No. 03-004-NAV
Of the San Pedro River)	
)	PHELPS DODGE CORPORATION'S
)	OPENING POST-HEARING
)	MEMORANDUM FOLLOWING
)	EVIDENTIARY HEARINGS

During 2003 and 2004, this Commission conducted public hearings and accepted evidence regarding the navigability of the San Pedro River on the date of Arizona's statehood. A.R.S. § 3-7-1128(A); *id.* § 37-1101(3). These evidentiary hearings concluded on March 9, 2004. Phelps Dodge Corporation ("Phelps Dodge") now requests that the Commission find the San Pedro River not navigable.

On March 12, 2003, Phelps Dodge submitted a memorandum to the Commission in which Phelps Dodge emphasized the evidentiary standard that must be satisfied in order for the Commission to determine that the San Pedro River is navigable for title purposes under Arizona Revised Statutes Section 37-1128(A). Phelps Dodge hereby incorporates that memorandum by reference. Proponents of navigability must demonstrate by a preponderance of the evidence that a river was navigable on February 14, 1912. *Id.*; Defenders of Wildlife, 199 Ariz. at 420, 18 P.3d at 731; Arizona Ctr. for Law in the Public Interest v. Hassell, 172 Ariz.

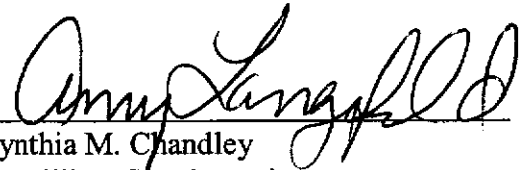
356, 363 n.10, 837 P.2d 158, 165 n.10 (App. 1991) (“The burden of proof rests on the party asserting navigability . . .”).

Here, the proponents of navigability have not carried their evidentiary burden. More than a year has passed since the Commission’s first evidentiary hearing on the San Pedro River’s navigability in Bisbee. Nevertheless, the evidence in the record does not even approach a “preponderance of evidence” establishing navigability. On the contrary, the evidence that has been presented to the Commission supports a determination that the San Pedro River was not navigable on the date of Arizona’s statehood.

Accordingly, Phelps Dodge requests that the Commission find the San Pedro River not navigable for title purposes.

RESPECTFULLY SUBMITTED this 8th day of April, 2004.

RYLEY CARLOCK & APPLEWHITE

By 
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this 8th day of April, 2004, to

Arizona Navigable Stream Adjudication Commission
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Phoenix, Arizona 85007
...

AND one copy MAILED
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A handwritten signature in cursive script, reading "Lisa Lyrob", is written over a horizontal line.