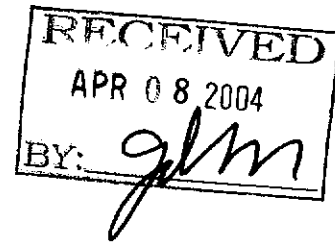


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BEFORE THE ARIZONA NAVIGABLE STREAM ADJUDICATION COMMISSION

In Re Determination of Navigability)
Of the Santa Cruz River)
)
)
)
)
_____)

No. 03-002-NAV

**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 Santa Cruz 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 Santa Cruz River not navigable.

On March 11, 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 Santa Cruz 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.

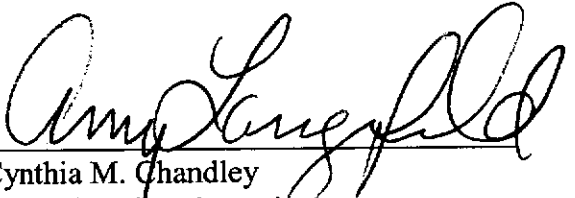
356, 363 n.10, 837 P.2d 158, 165 n.10 (App. 1991) (“The burden of proof rests on the party asserting navigability . . .”).

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 Santa Cruz River’s navigability in Nogales, and two additional hearings have been held in Tucson and Florence. 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 Santa Cruz River was not navigable on the date of Arizona’s statehood.

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

RESPECTFULLY SUBMITTED this 8th day of April, 2004.

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By 

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AND one copy MAILED
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