

1 L. William Staudenmaier (#012365)
wstaudenmaier@swlaw.com
2 SNELL & WILMER L.L.P.
One Arizona Center
3 400 East Van Buren Street
Phoenix, Arizona 85004-2202
4 Telephone: (602) 382-6000
Facsimile: (602) 382-6070
5 Attorneys for Freeport-McMoRan Corporation

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6 **BEFORE THE ARIZONA NAVIGABLE STREAM**
7 **ADJUDICATION COMMISSION**

8 In re Determination of Navigability of
9 the Lower Salt River

No. 03-005-NAV

**FREEPORT-MCMORAN
CORPORATION'S MEMORANDUM
REGARDING THE ORDINARY AND
NATURAL CONDITION OF THE
LOWER SALT RIVER**

13 Pursuant to the Commission's notice dated July 3, 2012, Freeport-McMoRan
14 Corporation ("Freeport") submits this memorandum regarding the ordinary and natural
15 condition of the Lower Salt River at the time of statehood. The burden of proof in these
16 proceedings lies with the proponents of navigability, and based on the voluminous
17 evidence submitted by the parties over many years, the record demonstrates that the
18 Lower Salt River was neither navigable nor susceptible of navigation in its ordinary and
19 natural condition at the time of statehood. The Commission should reevaluate the
20 evidentiary record and issue a revised determination finding that the Lower Salt River
21 was neither navigable nor capable of navigation in its ordinary and natural condition on
22 February 14, 1912.

23 **I. The Proponents of Navigability Bear the Burden of Proving the Lower Salt**
24 **River was Navigable in its Ordinary and Natural Condition at Statehood.**

25 The burden of proof regarding the navigability of the Lower Salt River, which must
26 be demonstrated by a preponderance of the evidence, "rests on the party asserting
27 navigability." *State v. ANSAC*, 224 Ariz. 230, 238, ¶9, 229 P.3d 242, 250 (App. 2010);
28 *see also* A.R.S. § 37-1128(A) ("If the preponderance of the evidence establishes that the

1 watercourse was navigable, the commission shall issue its determination confirming that
2 the watercourse was navigable.”). Consequently, in order for the Commission to
3 determine that the Lower Salt River was navigable in its ordinary and natural condition at
4 the time of statehood, the proponents of navigability must establish that fact by a
5 preponderance of the evidence.

6 The preponderance of the evidence standard requires the Commission to
7 “determine whether a fact sought to be proved is more probable than not.” *Kent K. v.*
8 *Bobby M.*, 210 Ariz. 279, 284-285, ¶25, 110 P.3d 1013, 1019 (2005) (citation omitted);
9 *see also In re Appeal in Maricopa County*, 138 Ariz. 282, 283, 674 P.2d 836, 837 (1983)
10 (The “standard requires simply that the trier of fact find the existence of the contested fact
11 to be more probable than not.”). The preponderance of the evidence standard “does not
12 depend upon the number of witnesses; it merely means that the testimony which points to
13 one conclusion appears to the trier of fact to be more credible than the testimony which
14 points to the opposite one.” *Hewett v. Industrial Comm’n*, 72 Ariz. 203, 209, 232 P.2d
15 850, 854 (1951). Thus, if the preponderance of the evidence does not demonstrate that the
16 Lower Salt River was navigable in its ordinary and natural condition at the time of
17 statehood, the Commission must find the Lower Salt River to be non-navigable.

18 **II. The Commission Must Determine Whether the Lower Salt River was** 19 **Navigable in its “Ordinary and Natural Condition” at the Time of Statehood.**

20 In *State v. ANSAC*, the Court of Appeals held that the legal test to be applied by
21 the Commission in evaluating the navigability of the Lower Salt River is “to determine
22 what the [Lower Salt] River would have looked like on February 14, 1912, in its ordinary
23 and natural condition.” 224 Ariz. at 241, ¶28, 229 P.3d at 253. For purposes of
24 navigability, “ordinary means [o]ccurring in the regular course of events; normal; usual.”
25 *Id.*, ¶26, 229 P.3d at 253 (internal quotations and citations omitted). Natural, on the other
26 hand, means “in the regular course of things in the universe and without accidental or
27 purposeful interference,” and “untouched by civilization, i.e., man-made diversions.” *Id.*,
28 ¶27, 229 P.3d at 253 (internal quotations and citations omitted).

1 The Court of Appeals further explained that the Commission must expressly state
2 that it has factored out the effects of pre-statehood diversions, and not simply the effects
3 of Roosevelt Dam. *Id.* at 240, ¶22, 229 P.3d at 252. Although the Court acknowledged
4 that the Commission had considered “‘all of the historical and scientific data and
5 information, documents and other information produced’ in evaluating the River’s
6 navigability,” the Court nevertheless rejected the Commission’s non-navigability
7 determination because the report “made no mention of those other dams and diversions . .
8 . . .” *Id.*, ¶22, 229 P.3d at 252. To ensure that the Commission’s revised final
9 determination of navigability for the Lower Salt River will not be subject to challenge on
10 these grounds, the Commission should make explicit findings regarding what the Lower
11 Salt River “would have looked like on February 14, 1912, in its ordinary (*i.e.*, usual,
12 absent major flooding or drought) and natural (*i.e.*, without man-made dams, canals, or
13 other diversions) condition.” *Id.* at 241, ¶28, 229 P.3d at 253.

14 The Court of Appeals also provided guidance regarding the appropriate time
15 period for the Commission to consider when determining what the Lower Salt River
16 would have looked like “without man-made dams, canals or other diversions.” *Id.*, ¶28,
17 229 P.3d at 253. The Court stated that the ancient Hohokam diversions had ceased by
18 the 1800s, and “[c]onsequently, the [Lower Salt River] could be considered to be in its
19 natural condition after many of the Hohokam’s diversions had ceased to affect the River,
20 but before the commencement of modern-era settlement and farming in the Salt River
21 Valley” *Id.* at 242, 229 P.3d at 254. The Court stated that evidence of conditions
22 during this period should be considered “the best evidence of the River’s natural
23 condition.” *Id.* Thus, when reevaluating the evidence in the record, the Commission
24 should pay particular attention to evidence from this timeframe, and the revised report
25 and findings should reflect careful consideration of the ordinary and natural condition of
26 the Lower Salt River prior to modern day settlement.

27 This does not mean that the Commission may not consider evidence of stream
28 conditions occurring after man-made diversions were initiated. To the contrary, the

1 Court of Appeals noted that “[e]ven if evidence of the River’s condition after man-made
2 diversions is not dispositive, it may nonetheless be informative and relevant. Assuming
3 the evidence has indicia of reliability, the determination of the relevance and weight to be
4 afforded the evidence is generally for ANSAC to make.” *Id.* at 243, ¶31, 229 P.3d at
5 255.

6 **III. The Lower Salt River was neither Navigable nor Susceptible of Navigation in**
7 **its Ordinary and Natural Condition at the Time of Statehood.**

8 The proponents of navigability have failed, despite multiple opportunities, to offer
9 sufficient evidence to demonstrate that it is more likely than not that the Lower Salt River
10 was navigable or susceptible of navigability in its ordinary and natural condition. On the
11 contrary, the preponderance of the evidence establishes that the Lower Salt River was not
12 navigable in its ordinary and natural condition. Thus, the Commission properly found
13 “the Lower Salt River from Granite Reef Dam to its confluence with the Gila River was
14 not used or susceptible of use for commercial trade or travel as of February 14, 1912 and
15 therefore was not navigable as of that date nor was it susceptible to navigation.” Report,
16 Findings and Determination Regarding the Navigability of the Lower Salt River from the
17 Granite Reef Dam to the Gila River Confluence (December 21, 2005), at 44 (“Lower Salt
18 Report”).

19 **A. The Commission has already made Appropriate Findings to Show that the**
20 **Proponents of Navigability have not satisfied their Burden of Proof.**

21 The factual findings made by the Commission in the Lower Salt Report
22 demonstrate that the proponents of navigability have not shown that it is more likely than
23 not that the Lower Salt River was navigable in its ordinary and natural condition. The
24 factual findings made by the Commission with regard to the ordinary and natural
25 condition of the Lower Salt River prior to modern-day settlement and farming include:

26 1. Despite there being an estimated population between 80,000 and 150,000
27 and over 140,000 acres in production at the peak of Hohokam culture, there is “no
28 evidence other than speculation that the Hohokam utilized the Salt River for commerce or

1 travel,” and there is “no evidence of boating by the Hohokam.” The Hohokam’s “use of
2 the river was strictly to divert water from the river for use in irrigation.” Salt River
3 Report at 25.

4 2. Fur trappers in the 1820s to 1840s “did not use boats for travel on the rivers
5 or streams in [the Salt River Valley] but traveled by foot, horses or mules along the side
6 of the rivers or streams.” Salt River Report at 26.¹

7 3. At the time settlement began in the Salt River Valley, the Lower Salt River
8 was “erratic, unpredictable, often flashing with lots of water in it, and other times it’s
9 virtually dry,” with highly variable flow. Salt River Report at 28.

10 4. From the time modern settlement began in the late 1860s to statehood,
11 other than “isolated attempts of boating or floating of logs,” there is “no record of any
12 sustained commerce, travel or fishing on the Lower Salt River.” Salt River Report at 30.

13 5. No expert opined or submitted evidence that the Lower Salt River was
14 navigable or susceptible of navigation in its ordinary and natural condition. Salt River
15 Report at 41-42.

16 The Court of Appeals in *State v. ANSAC* did not reject any of these factual
17 findings. Rather, the Court instructed the Commission to explicitly support its findings in
18 a manner consistent with the Court’s interpretation of the “ordinary and natural”
19 condition requirement. The Commission can and should do so by reiterating each of the
20 findings identified above and by making reference to the abundant evidence in the record,
21 some of which is described below, that supports a finding of non-navigability for the
22 Lower Salt River.

23 ...

24 ...

25 ...

26 _____
27 ¹ This finding, in support of the Commission’s determination that the Lower Salt River was not navigable, is
28 consistent with the United States Supreme Court’s recent ruling in *PPL Montana v. Montana*, 132 S.Ct. 1215, 1233
(2012), that “[m]ere use by initial explorers or trappers, who may have dragged their boats in or alongside the river
despite its nonnavigability in order to avoid getting lost, or to provide water for their horses and themselves, is not
itself enough” to prove navigability of a watercourse.

1 **B. The Evidence in the Record shows that the Lower Salt River was neither**
2 **Navigable nor Susceptible of Navigation in its Ordinary and Natural**
3 **Condition.**

4 The following evidence, although not an exhaustive list of relevant evidence in the
5 record, provides a strong basis for the Commission to issue a revised final determination
6 that the Lower Salt River, in its ordinary and natural condition, was not navigable on
7 February 14, 1912:

8 1. During the mid- to late-nineteenth century, the Lower Salt River was
9 notoriously erratic, with “violent fluctuations in flow.” Assessment of the Salt River’s
10 Navigability Prior to and on the Date of Arizona’s Statehood, February 14, 1914 at 124
11 (evidence item no. 16; received Apr. 7, 2003) (the “Littlefield Report”). As a result, the
12 Lower Salt River was not reliably navigable, and the sudden fluctuations, turbulence, and
13 debris “would have made maintaining a stable channel for navigation difficult.” *Id.*

14 2. Other evidence in the record also supports the conclusion that in the mid-
15 1800s the flow of the Salt River both fluctuated “wildly” depending on rainfall and
16 “varie[d] greatly from month to month and year to year.” *Historical and Scientific*
17 *Evidence Concerning Navigability of the Lower Salt River*, Apr. 2003 at 21 (evidence
18 item no. 29; received Apr. 3, 2003) (the “Kupel Report”). As the Kupel Report indicates,
19 the flow patterns of the Salt River changed dramatically throughout the years based on
20 the widely varying amounts of water in the river at any given time. *Id.* at 21-22.

21 3. Historical records regarding the lower Salt River extend back to the 1820s.
22 *See Arizona Stream Navigability Study for the Salt River: Granite Reef Dam to the Gila*
23 *River Confluence* at 7-11 (evidence item no. 30; received Apr. 7, 2003) (the “ASLD
24 Report”). Beginning in the 1820s, there were numerous expeditions along the Salt River.
25 *Id.* All accounts of these expeditions show that these explorers traveled by foot, horse, or
26 wagon and that none attempted to navigate the Salt River. *Id.* As noted above, such
27 expeditions are insufficient to demonstrate that the Lower Salt River was navigable at the
28 time of statehood even under the Arizona Court of Appeals’ standards for determining
the River’s “ordinary and natural” condition. *PPL Montana*, 132 S.Ct. at 1233.

1 4. A map filed in the Arizona Land office in Prescott in 1870, just a few years
2 after modern settlement began, shows that the Lower Salt River had two distinct
3 channels, a common occurrence in arid streams. Kupel Report at 21-22. Typically, only
4 one channel would flow, if at all, and as the flow increased during a storm event, the
5 other channel would begin to flow. *Id.* At flood levels, both channels would flow, and
6 the result would be a single, wide watercourse that exhibited an overland, “sheet-like”
7 flow that could not support navigation. *Id.*

8 5. The Lower Salt River was a braided stream. *Geomorphic Character of the*
9 *Lower Salt River*, March 2003 at 2 (evidence item no. 26, received April 2, 2003) (the
10 “Schumm Report”). Typical of braided streams, the Lower Salt River is made up of a
11 network of “several, small branching and reuniting shallow channels separated from each
12 other by branch islands or channel bars.” *Id.* Braided streams like the Lower Salt River
13 can only be navigable where there is “abundant perennial flow,” *id.* at 4, a condition that
14 did not exist on the Salt River in the nineteenth century. *See The Nonnavigability of the*
15 *Salt River from Granite Reef Dam to the Confluence with the Gila River, Arizona*, August
16 1996 at 3 (evidence item no. 8; received Aug. 30, 1996) (the “Dorsey Report”). (“Before
17 any man-made structures were placed on the river, the river had a rather nominal flow. . .
18 .”). The lower Salt River was wide and shallow, contained numerous bars and islands,
19 and would not have been favorable for navigation. Schumm Report at 4.² In fact,
20 “sustained navigation [along the Lower Salt River] would not be possible and any
21 attempt to maintain a navigation channel would fail.” *Id.*

22 6. At least three river fords were established on the Salt River by 1871. Kupel
23 Report at 11-12. The presence of established fords on the Salt River as early as 1871,
24 just a few years after modern settlement began, indicates that the flow was frequently low
25

26 ² Similar conditions were noted by the United States Supreme Court when it determined that the Red River in
27 Oklahoma is non-navigable. *Oklahoma v. Texas*, 258 U.S. 574 (1922) (“At all times there is an almost continuous
28 succession of shifting and extensive sand bars. Ordinarily the depth of water over the sand bars is from 6 to 18
inches and elsewhere from 3 to 6 feet. There is no permanent or stable channel. Such as there is shifts irregularly
from one side of the bed to the other and not infrequently separates into two or three parts.”).

1 enough to cross on foot. *Id.*; see also *A Historical Analysis of Portions of the Salt and*
2 *Gila Rivers, Arizona*, February 1987 (evidence item no. 12; received Sept. 26, 1996) at
3 32 (“During most of the year, the [Gila and Salt] rivers were easily forded either on foot,
4 on horseback, or in wagons.”).

5 7. The federal government commissioned surveys of the Lower Salt River
6 area in 1868, 1888, 1899, and 1910-11. See Littlefield Report at 11. The surveyors were
7 instructed to note the presence of navigable rivers, *id.* at 17-26, and “while those surveys
8 were done at varying times of year, in different years, and by several individuals, all of
9 the descriptions and plats that resulted from this work consistently portrayed the Salt
10 River as being a non-navigable stream.” *Id.* at 52. In fact, federal surveyors had “explicit
11 instructions” to meander all navigable bodies of water, but the Salt River was not
12 meandered at all by federal surveyors. Dorsey Report at 18.

13 8. In 1877, the federal government passed the Desert Land Act, relating to
14 lands irrigated from non-navigable streams. See Littlefield Report at 102-03. The federal
15 government approved forty-one applications for lands irrigated with water from the
16 Lower Salt River, *id.*, indicating that the federal government viewed the Lower Salt River
17 as non-navigable during the relevant period of time.

18 9. Beginning in the late nineteenth century, the federal government issued
19 patents to private parties who wished to stake claims to land adjacent to the Lower Salt
20 River. “[N]one of the federal patents that overlay the Salt River (regardless of their
21 respective dates) contain any provisions for reserving the bed of the river to the State of
22 Arizona,” as would have occurred if the river had been navigable. Littlefield Report at
23 71-72. Even when it was clear from a patent that the claimed land included a portion of
24 the riverbed, the patent was issued without qualification. *Id.* at 74-79.

25 10. In 1898, the United States published a “statistical atlas” containing a
26 depiction of the navigable rivers of the United States. *Historical and Hydrological*
27 *Analysis of the Salt River with Reference to Navigability*, December 1996 at 36-37
28 (evidence item no. 17; received December 11, 1996). The information was gathered in

1 1890, 22 years before statehood, and during a time “when diversions for irrigation use
2 were small and prior to the construction of dams and bridges. . . .” *Id.* Notably, the only
3 river in Arizona identified in the Atlas as navigable was the Colorado River. *Id.*

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

13 12. Other than these sixteen boating attempts, there are no historical accounts
14 of river navigation in the Salt River Valley. Dorsey Report at 19. All historical accounts
15 of transportation in the Salt River Valley in the late nineteenth century relate to
16 construction of roadways and rail lines. *Id.*

17 13. There were several ferry crossings on the Lower Salt River, *id.* at 3-24 to 3-
18 27; but the ferries did not use the river as a channel for shipping and commerce. The
19 purpose of the ferries was simply to cross the river and “not use the river for
20 transportation.” *An Historical Analysis of the Salt River (1830-1912)*, May 1988 at 18
21 (evidence item no. 12; received Sept. 26, 1996). As a number of federal courts have
22 previously concluded, the existence of a ferry, like a bridge, “does not establish that the
23 river is a channel for useful commerce. To the contrary, the existence of a bridge, or a
24 ferry, establishes that the river is an obstruction to commerce which must be overcome.”
25 *North Dakota v. United States*, 770 F.Supp. 506, 511 (D.N.D. 1991), *aff’d*, 972 F.2d 235
26 (8th Cir. 1992). Accordingly, the existence of ferries used to cross the Lower Salt River
27 supports the Commission’s prior finding that the River was non-navigable at statehood.

28 . . .

1 **C. The Evidence in the Record relied on by the Proponents of Navigability does**
2 **not Satisfy the Preponderance of Evidence Standard.**

3 The evidence relied on by the proponents of navigability does not show that the
4 Lower Salt River was navigable or susceptible of navigability in its ordinary and natural
5 condition. For example, in separate memoranda filed on January 13, 2012, both the
6 Arizona State Land Department and the Defenders of Wildlife rely heavily on estimates
7 of average annual flow rates from the ASLD Report in an attempt to show that, prior to
8 development, the Lower Salt River was perennial and had sufficient flow to be navigable
9 in its ordinary and natural state. The Commission, however, has already addressed these
10 flow rate estimates, finding them “questionable as to providing proof of navigability
11 since as an average they necessarily reflect floods . . . followed by periods of drought.”
12 Lower Salt Report at 44. The Commission found that the high estimate of 1,730 cubic
13 feet per second “is far below the flow of any river reported in the legal decisions
14 submitted to the Commission.” *Id.* The Commission also noted that it would be
15 “practically impossible” to consider a river navigable or susceptible of navigation with
16 “such a flow spread over a wide area in a braided stream.” *Id.*

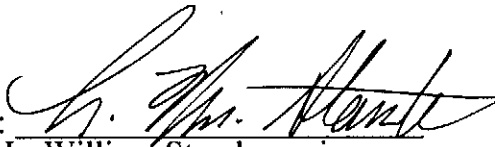
17 Similarly, in their January 13, 2012 memoranda, the Arizona State Land
18 Department and the Defenders of Wildlife cite the various attempts to boat on the Lower
19 Salt River to support their claim that the River was actually navigable. As discussed
20 above, however, these few examples of isolated attempts to navigate a watercourse over a
21 more than thirty-year period are not sufficient to establish navigability or susceptibility of
22 navigation. The proponents of navigability are required to demonstrate, by a
23 preponderance of evidence, that the Lower Salt River, in its ordinary and natural
24 condition, was “really navigable” as of February 14, 1912. *PPL Montana*, 132 S. Ct. at
25 1227 (2012) (internal quotations and citation omitted). Proponents also must show that
26 the evidence of navigability they offer is consistent with “commercial reality.” *Id.* at
27 1234. General references to average annual streamflows and scattered attempts to boat
28 the River simply do not meet these standards.

1 **IV. Conclusion and Requested Action.**

2 The Commission's determination of non-navigability for the Lower Salt River is
3 correct. The Commission should reaffirm that determination because the evidence in the
4 record fails to establish that the Lower Salt River was navigable or susceptible of
5 navigability in its ordinary and natural condition. Accordingly, Freeport urges the
6 Commission to issue a revised determination finding that the Lower Salt River was non-
7 navigable in its ordinary and natural condition at statehood. In doing so, the Commission
8 should expressly apply the Court of Appeals' interpretation of "ordinary and natural" and
9 base its determination on the abundant evidence in the record to support a finding of non-
10 navigability even after factoring out "man-made dams, canals, or other diversions."

11 RESPECTFULLY SUBMITTED this 7th day of September, 2012.

12 SNELL & WILMER L.L.P.

13
14
15 By: 
16 L. William Staudenmaier
17 One Arizona Center
18 400 East Van Buren Street
19 Phoenix, Arizona 85004-2202
20 *Attorneys for Freeport-McMoRan*
21 *Corporation*

22 ORIGINAL AND SIX COPIES of the
23 foregoing hand-delivered for filing this
24 7th day of September, 2012 to:

25 Arizona Navigable Stream Adjudication Commission
26 1700 W. Washington, Room B-54
27 Phoenix, AZ 85007

28 COPY mailed this 7th day of September,
2012 to:

Fred E. Breedlove III
Squire Sanders & Dempsey LLP
1 E. Washington Street, Suite 2700
Phoenix, AZ 85004-2556
Attorney for the Commission

- 1 Laurie A. Hachtel
Attorney General's Office
1275 W. Washington Street
Phoenix, AZ 85007-2997
Attorneys for State of Arizona
- 4 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.
- 7 Sally Worthington
John Helm
Helm & Kyle, Ltd.
1619 E. Guadalupe #1
Tempe, AZ 85283
Attorneys for Maricopa County
- 11 Sandy Bahr
202 E. McDowell Road, Ste. 277
Phoenix, AZ 85004
Sierra Club
- 13 Julie Lemmon
1095 W. Rio Salado Pkwy., Ste. 102
Tempe, AZ 85281
*Attorney for Flood Control District
of Maricopa County*
- 16 Carla Consoli
Lewis and Roca
40 N. Central Avenue
Phoenix, AZ 85004
Attorneys for Cemex
- 19 John B. Weldon, Jr., Mark A. McGinnis,
Scott M. Deeny
Salmon, Lewis & Weldon, P.L.C.
2850 E. Camelback Road, Suite 200
Phoenix, AZ 85016
*Attorneys for Salt River Project Agricultural
Improvement and Power District and Salt
River Valley Water Users' Association*
- 24 Charles Cahoy
P.O. Box 5002
Tempe, AZ 85280
Attorney for City of Tempe
- 27 William Tabel
P.O. Box 1466
Mesa, AZ 85211-1466
Attorney for City of Mesa
- 28

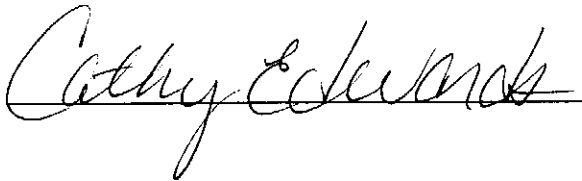
1 Cynthia Campbell
200 W. Washington, Suite 1300
2 Phoenix, AZ 85003
Attorney for City of Phoenix

3 Thomas L. Murphy
4 Gila River Indian Community Law Office
Post Office Box 97
5 Sacaton, AZ 85147
Attorney for Gila River Indian Community

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

10 James T. Braselton
Mariscal Weeks McIntyre & Friedlander PA
11 2901 N. Central Avenue, Suite 200
Phoenix, AZ 85012-2705
12 *Attorneys for Various Title Companies*

13 Steve Wene
Moyes Sellers & Hendricks
14 1850 N. Central Avenue, Suite 1100
Phoenix, AZ 85004-4527
15 *Attorneys for Arizona State University*

16 

17
18
19
20
21
22
23
24
25
26
27
28