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

10 In re Determination of Navigability of
the Upper Salt River

No. 04-008-NAV

11 **FREEPORT-MCMORAN**
12 **CORPORATION'S MEMORANDUM**
13 **REGARDING PROCEEDINGS ON**
14 **REMAND FOR THE UPPER SALT**
15 **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*.

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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 Upper Salt
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 Upper Salt 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
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 (simultaneously addressing
18 all six watercourses), preferably at the State Capitol where the Commission’s
19 office is 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 Upper Salt 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. The modern era on the Upper Salt River began in the 1860s and 1870s. In 1867
13 Anglo settlers began to divert water from the Salt River, and in 1885 "major efforts to
14 control the flow of the Salt" began. See Exhibit 27, SFC Engineering Co., *Arizona*
15 *Stream Navigability Study for the Salt River: Granite Reef Dam to the Confluence of*
16 *the White and Black Rivers* at 3-12, -13, -21 (received Oct. 26, 2004) (the "Fuller
17 Report").
- 18 2. The variations in water flow on the Upper Salt River prevent reliable navigation.
19 Although at least one expert has estimated that the water flowing down the Upper Salt
20 River was often several feet in depth in historical times, Fuller Report at 4, the water
21 flow on the Upper Salt River fluctuates wildly, sometimes "go[ing] from a few
22 hundred cubic feet per second (c.f.s.) to over 100,000 c.f.s. in a few short hours." See
23 Exhibit 8, U.S. Dep't of Agriculture, Forest Service, *Evaluation of Navigability at the*
24 *Time of Statehood* 4 (received Feb. 5, 1998) (the "Forest Service Report"); see also
25 Fuller Report at 3-24 (recounting historical descriptions of a "highly variable" water
26 flow); *id.* at 3-29 (reporting that, according to a 1901 observer, "For the greater part of
27 the year, the Salt River is a river only in name"); Littlefield Report at 135
28 (summarizing historical descriptions of a "completely dry" Salt River).

- 1 3. The geography of the Upper Salt River prevents navigation. The canyon reaches of
2 the Upper Salt River “are very steep and rapids are frequent,” making navigation
3 “impossible.” Exhibit 28, Stanley A. Schumm, *Geomorphic Character of the Upper*
4 *Salt River* at 12 (Jan. 2005). Outside the canyon reaches, the Upper Salt River was
5 braided, “wide, shallow, and steep,” with “marked changes of valley width caus[ing]
6 dramatic alterations of water depth and velocity,” making navigation through the non-
7 canyon portions of Upper Salt River “hazardous.” *Id.*; see also Fuller Report at 4-10
8 (noting that “[h]istorical accounts of boating the Upper Salt River describe waterfalls
9 and rapids, and sheer canyon reaches that lacked beaches or bars on which to land”).
- 10 4. Early explorers did not view the Upper Salt River as a navigable waterway. The
11 federal government commissioned surveys of the Upper Salt River area in 1868,
12 1881, and 1911. Exhibit 29, Douglas R. Littlefield, *Assessment of the Navigability of*
13 *the Parts of the Upper Salt River and Tonto Creek Between Granite Reef Dam and the*
14 *Inundation Lines of Roosevelt Lake Prior to and on the Date of Arizona’s Statehood,*
15 *February 14, 1912* at 33 (the “Littlefield Report”). The surveyors were instructed to
16 note the presence of navigable rivers, but “surveys undertaken for the Upper Salt
17 River above Granite Reef Dam and Tonto Creek and below the inundation lines of
18 Theodore Roosevelt Lake gave no indication that the federal surveyors in charge of
19 that work believed either stream to be navigable.” *Id.* at 44.
- 20 5. Historical records indicate that the federal government did not view the Upper Salt
21 River as a navigable waterway. For example, in 1877, the federal government passed
22 the Desert Land Act of 1877, relating to lands irrigated from non-navigable streams.
23 See Littlefield Report at 69. From 1890 and later, the federal government approved
24 five applications for land irrigated from the Upper Salt River, *id.* at 70, indicating that
25 the federal government viewed the Upper Salt River as non-navigable during the
26 relevant period of time. Similarly, beginning in the late nineteenth century, the
27 federal government issued patents to private parties who wished to stake claims to
28 land surrounding the Upper Salt River. “[N]one of the federal patents that overlay the

1 Upper Salt River or Tonto Creek (regardless of their respective dates) contain any
2 provisions for reserving the bed of the river to the State of Arizona,” as would have
3 been necessary if the river had been navigable. *Id.* at 60. Even when it was clear
4 from a patent that the claimed land included riverbed, the patent was issued without
5 qualification. *E.g., id.* at 61-62.

6 6. There are several contemporaneous official accounts expressly indicating that the
7 Upper Salt River was not navigable in the mid- to late-nineteenth century. For
8 example, in 1865 the Arizona Territorial Legislature requested funds for improving
9 the navigability of the Colorado River. *See* Littlefield Report at 93. As part of that
10 request, the legislature noted, “[T]he Colorado River is the only navigable water in
11 this Territory.” *Id.* Similarly, in 1892, a territorial judge noted in a decision that the
12 Salt River was “a natural unnavigable stream.” *Id.* at 94.

13 7. Although local newspapers discussed commerce and waterways, Littlefield Report at
14 100, there are only “eight documented accounts of commercial and recreational
15 boating on the Upper Salt River between 1870 and 1910.” Fuller Report at 2-3, 3-34.
16 Boating attempts were generally made using “flat-bottomed boats, skiffs, or canvas
17 and wooden canoes,” rather than commercial watercraft. *Id.* at 6-4. Even with
18 relatively small, low-draft boats, several of the attempts at boating met perilous
19 conditions or ended in failure. *Id.* at 3-34 to -36 (describing boating attempts that pre-
20 date major diversions from the Upper Salt River).

21 8. Research into historical records revealed no evidence “that any profitable commercial
22 enterprises were conducted using the Upper Salt River for trade and travel.” *See*
23 Exhibit 4, SFC Engineering Co., *Arizona Stream Navigability Study for the Upper*
24 *Salt River 5* (received May 30, 1997). “Steamboats and commercial shipping
25 operations like those found on the Colorado and lower Gila Rivers apparently were
26 not developed on the Upper Salt River.” Fuller Report at 3. Even in pre-Anglo days,
27 the Upper Salt River was not used for “commercial trade [or] travel or for any regular
28 flotation of logs.” Fuller Report at 2-22.

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

III. Conclusion

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

RESPECTFULLY SUBMITTED this 27th day of January, 2012.

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

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:

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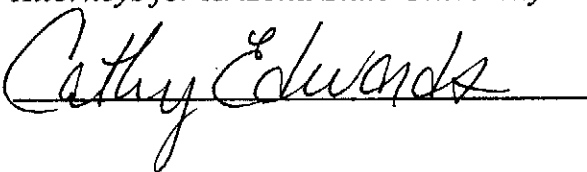
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