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

10 In re Determinations of Navigability of
11 the Gila River, the Lower Salt River, the
12 San Pedro River, the Santa Cruz River,
13 the Upper Salt River, and the Verde
14 River

Nos. 03-002-NAV, 03-004-NAV, 03-005-
NAV, 03-007-NAV, 04-008-NAV, 04-
009-NAV

**FREEPORT-MCMORAN
CORPORATION'S MEMORANDUM
REGARDING THE IMPACT OF THE
UNITED STATES SUPREME
COURT'S PPL MONTANA DECISION
ON CASES PENDING BEFORE THE
COMMISSION**

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17 Freeport-McMoRan Corporation ("Freeport") submits this memorandum
18 concerning the impact of the United States Supreme Court's unanimous decision in *PPL*
19 *Montana, LLC v. Montana*, 565 U.S. ___, 80 U.S.L.W. 4177 (2012) on cases currently
20 pending before the Arizona Navigable Stream Adjudication Commission (the
21 "Commission"). The *PPL Montana* opinion addresses the navigable status of certain
22 segments of the upper Missouri River, the Clark Fork River and the Madison River in
23 Montana. Because navigability for title is determined by a federal test based largely on
24 decisions of the United States Supreme Court, the *PPL Montana* opinion is both binding
25 precedent for the Commission and Arizona's courts, and the latest and most persuasive
26 word on how the navigability test must be applied in Arizona.

27 The Supreme Court's decision in *PPL Montana* clarifies and reaffirms several
28 important principles for the Commission to apply as it considers the navigability of the

1 Lower Salt, Upper Salt, Verde, Gila, Santa Cruz and San Pedro Rivers, including the
2 requirement that these streams be analyzed on a segment-by-segment basis. Most
3 importantly, *PPL Montana* rejected the Montana Supreme Court's use of a "very liberally
4 construed" navigability test. 565 U.S. ___, slip op. at 9. Rather than rely on such a test,
5 proponents of navigability are required to demonstrate, by a preponderance of evidence,
6 that every disputed segment of a stream, in its ordinary and natural condition, was "really
7 navigable" as of February 14, 1912. *Id.*, slip op. at 11 (emphasis added) (quoting *Shively*
8 *v. Bowlby*, 152 U.S. 1, 31 (1894)). Proponents also must show that the evidence of
9 navigability they offer is consistent with "commercial reality." *Id.*, slip op. at 24.

10 In short, in light of the *PPL Montana* precedent, the Commission should: (a)
11 analyze the navigability of Arizona streams on a segment-by-segment basis; (b) find that
12 streams are non-navigable unless the proponents of navigability establish by a
13 preponderance of evidence that specific stream segments are "really navigable;" and (c)
14 ultimately, conclude that the Gila River, the Lower Salt River, the San Pedro River, the
15 Santa Cruz River, the Upper Salt River, and the Verde River were not navigable on
16 February 14, 1912.

17 I. Burden of Proof and Segment-by-Segment Analysis.

18 The Arizona Court of Appeals has held that "the burden of proof lies with the
19 proponents of navigability, who must prove navigability by a preponderance of the
20 evidence." *State of Arizona v. Arizona Navigable Stream Adjudication Commission*, 224
21 Ariz. 230, 239, 229 P.3d 242, 251 (2010) (hereinafter "*State v. ANSAC*"). Although the
22 *PPL Montana* court chose not to address the burden of proof, 565 U.S. ___, slip op. at 24,
23 the Court did clarify and reaffirm an important component of that issue in holding that
24 navigability must be proven "on a segment-by-segment basis." *PPL Montana*, 565 U.S.
25 ___, slip op. at 14 ("To determine title to a riverbed under the equal-footing doctrine, this
26 Court considers the river on a segment-by-segment basis to assess whether the segment
27 of the river, under which the riverbed in dispute lies, is navigable or not."). Moreover,
28 this is not a new concept in navigability analysis. As the Supreme Court stated, "[t]he

1 segment-by-segment approach to navigability for title is well settled, and it should not be
2 disregarded.” *Id.* at 15. As a result, in Arizona the proponents of navigability for each of
3 the six watercourses currently before the Commission must prove, by a preponderance of
4 the evidence, that each discernable segment of each watercourse is “really navigable” in a
5 commercially realistic sense.

6 Although *PPL Montana* left open the possibility of a *de minimis* exception to the
7 segment-by-segment approach, the Court made clear that any such exceptions would be
8 exceedingly limited in practice:

9 [T]he kinds of considerations that would define a *de minimis* approach
10 would be those related to principles of ownership and title, such as
11 inadministrability of parcels of exceedingly small size, or worthlessness of
12 the parcels due to overdivision. . . . An analysis of segmentation must be
sensibly applied. A comparison of the nonnavigable segment’s length to the
overall length of the stream, for instance, would be simply irrelevant to the
issue at hand.

13 *Id.* at 18. Under this standard, segmentation is the most appropriate approach, and the
14 Commission may combine segments only when the segment-by-segment method cannot
15 be “sensibly” applied. There has been no showing, for any of the rivers before the
16 Commission, that a segment-by-segment analysis cannot be applied. As a result, each of
17 these rivers must be analyzed on a segment-by-segment basis, and the proponents of
18 navigability bear the burden of proving that each segment is navigable.

19 Because they bear the burden of proof, the proponents of navigability cannot rely
20 on isolated examples of actual or attempted boating on short stretches of a river to prove
21 that the entire river is navigable. To the contrary, proponents must demonstrate, by a
22 preponderance of evidence, that specific segments of each stream are, in fact, navigable.
23 Furthermore, even if the proponents of navigability were able to make such a showing,
24 this would result only in a determination that those specific segments are navigable – not
25 a determination that the entire stream is navigable. In the cases before the Commission,
26 no specific evidence has been offered to demonstrate that any particular segment of a
27 river is navigable. Having offered no such evidence, the proponents have failed to meet
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1 their burden of proof, and the Commission should therefore find that none of these
2 streams is navigable.

3 **II. PPL Montana’s Standards for Determining Navigability.**

4 Section 37-1101(5) of the Arizona Revised Statutes defines navigability as
5 follows:

6 “Navigable” or “navigable watercourse” means a watercourse that was in
7 existence on February 14, 1912, and at that time was used or was
8 susceptible to being used, in its ordinary and natural condition, as a highway
for commerce, over which trade and travel were or could have been
conducted in the customary modes of trade and travel on water.

9 This definition is derived from the Supreme Court’s opinion in *The Daniel Ball*, 77 U.S.
10 (10 Wall) 557, 563 (1870). See *State v. ANSAC*, 224 Ariz. at 235, 229 P.3d at 247; *PPL*
11 *Montana*, 565 U.S. ___, slip op. at 13. While this basic definition is well established, the
12 Supreme Court clarified several aspects of the test in *PPL Montana*. The Commission
13 should evaluate and apply each of these points as it analyzes the navigability of streams
14 in Arizona.

15 **a. Each Watercourse must be Navigable in its “Ordinary” Condition.**

16 First, the Court emphasized that a stream must be navigable in its “ordinary”
17 condition. This requires the Commission to disregard assertions of navigability based on
18 major flooding or drought conditions. Seasonal variations in water flow are expected, but
19 “[w]hile . . . a river need not be susceptible of navigation at every point during the year,
20 neither can that susceptibility be so brief that it is *not a commercial reality*.” *PPL*
21 *Montana*, 565 U.S. ___, slip op. at 14 (emphasis added). This point is also well-
22 established in Arizona, where the court of appeals has held that a stream is not navigable
23 unless is it navigable “in its ordinary (*i.e.*, usual, *absent major flooding or drought*) . . .
24 condition.” *State v. ANSAC*, 224 Ariz. at 241, 229 P.3d at 253 (emphasis added). In light
25 of this standard, anecdotal examples of boating during seasonal floods are legally
26 insufficient to demonstrate navigability and should not be relied upon by the
27 Commission.

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1 For example, the proponents of navigability have at times argued to this
2 Commission that streams are navigable even where boating would have been impossible
3 absent flood conditions. *See, e.g., In re Determination of Navigability of the Santa Cruz*
4 *River*, Memorandum on Remand filed by Defenders of Wildlife, *et al.*, at 4 (Jan. 27,
5 2012) (arguing that the Santa Cruz river was navigable, while conceding that in Pinal
6 County “the river’s flow was only continuous during flood times”); *In re Determination*
7 *of Navigability of the San Pedro River*, Memorandum on Remand filed by Defenders of
8 Wildlife, *et al.*, at 4 (Jan. 27, 2012) (hereinafter, “San Pedro Brief”) (arguing that the San
9 Pedro River was navigable, while conceding that prior to 1890 it was “an irregularly
10 flowing stream, marshy in places . . . entrenched or subsurface in still other places”).
11 Such arguments are inconsistent with *PPL Montana*’s requirement that a stream be
12 navigable under “ordinary” conditions, and therefore should be rejected.

13 **b. Each Watercourse must have been “Really Navigable” for Trade and**
14 **Travel, not for Other Purposes.**

15 The Supreme Court also strongly reaffirmed the principle that “[n]avigability must
16 be assessed as of the time of statehood, *and it concerns the river’s usefulness for ‘trade*
17 *and travel,’ rather than for other purposes.” PPL Montana*, 565 U.S. ___, slip op. at 21
18 (emphasis added). In other words, the river in question must be “really navigable.” *Id.* at
19 11. This standard requires a showing of actual, meaningful commerce or at least a
20 demonstrated susceptibility to support meaningful commerce – not mere supposition
21 based on generalized data concerning widely varying flow patterns on a river. In
22 assessing susceptibility, moreover, “it must be determined whether trade and travel could
23 have been conducted ‘*in the customary modes of trade and travel on water,*’ over the
24 relevant river segment in [its] natural and ordinary condition.” *Id.*, at 22 (quoting *United*
25 *States v. Utah*, 283 U.S. 64, 76 (1931)) (emphasis added).

26 Thus, the proponents of navigability must show that the rivers were actually used
27 for real commerce or, at a minimum, could have been used for trade and travel “in the
28 customary modes” by which trade and travel were conducted at the time of statehood.

1 Here again, the proponents of navigability have failed to make this demonstration for
2 specific segments of any watercourses currently before the Commission.

3 The Supreme Court also noted that evidence of explorers or trappers “who may
4 have dragged their boats in or alongside the river” is not appropriate evidence to support
5 a finding of navigability. *Id.*, at 22. A history of fur trapping along the Gila River, for
6 example, is not evidence that the River is navigable. Although the proponents of
7 navigability have offered evidence of such trapping expeditions in support of their
8 arguments,¹ under the standard set forth in *PPL Montana* such evidence simply is not
9 persuasive and should not be relied upon by this Commission on the issue of navigability.

10 **c. Modern-day recreational boating is not sufficient evidence of navigability.**

11 Reliance on evidence of modern recreational use of a watercourse also is strictly
12 limited by the decision in *PPL Montana*:

13 At a minimum . . . the party seeking to use present-day evidence for title
14 purposes must show: (1) *the watercraft are meaningfully similar to those in*
15 *customary use for trade and travel at the time of statehood*; and (2) the
river’s poststatehood condition is not materially different from its physical
condition at statehood.

16 *PPL Montana*, 565 U.S. at ___, slip op. at 23 (emphasis added). Absent these two
17 showings, evidence of modern-day recreational boating on rivers in Arizona is not, as a
18 matter of law, sufficient to establish navigability of any river segment.

19 Although the proponents of navigability in these proceedings have relied on
20 evidence of modern recreational boating on several streams, they have failed to satisfy
21 the standard imposed by the *PPL Montana* court. For example, Maricopa County relies
22 on evidence of “kayaks, rubber rafts, and canoes” on portions of the Gila River, *see*

23 ¹ *See, e.g., In the Matter of the Navigability of the Gila River*, Arizona State Land
24 Department’s Memorandum at 4 (Jan. 27, 2012) (noting that “trappers in 1825 found
25 plenty of beaver on the [Gila] River”); *In re Determination of Navigability of the Gila*
26 *River in Maricopa County*, Maricopa County and the Flood Control District of Maricopa
27 County’s Memorandum to the Arizona Navigable Stream Adjudication Commission
28 (ANSAC) Regarding the Arizona Court of Appeals’ Decision in the Lower Salt River
Case at 4-5 (Jan. 27, 2012) (hereinafter, “Maricopa County Brief”) (describing men
“trapping along the lower Gila during December 1827” to support a navigability
argument).

1 Maricopa County Brief at 5, but did not explain how such modern watercraft are
2 “meaningfully similar to those in customary use for trade and travel at the time of
3 statehood.” *PPL Montana*, 565 U.S. at ____, slip op. at 23. Similarly, the Defenders of
4 Wildlife, *et al.*, discuss various instances of modern recreational boating to support their
5 claims of navigability for the Gila, Upper Salt, Verde and San Pedro Rivers.² In those
6 filings as well, there is nothing that explains how these modern recreational activities
7 could satisfy the standard imposed by *PPL Montana*. Because that standard does not
8 allow reliance on such evidence, the Commission may not accept it as proof of
9 navigability.

10 III. Conclusion


11 In assessing navigability, the Commission should follow the standards articulated
12 by the United States Supreme Court in *PPL Montana*. This requires the Commission to
13 carefully assess navigability on a segment-by-segment basis. The proponents of
14 navigability are required to demonstrate, by a preponderance of evidence, that every
15 disputed segment of a stream, in its ordinary and natural condition, was “really
16 navigable” or susceptible to use “in the customary modes of trade and travel on water” as
17 of February 14, 1912. Because the proponents of navigability have failed to make this
18 showing for any specific segments of the rivers currently at issue, the Commission should
19 conclude that the Gila River, the Lower Salt River, the San Pedro River, the Santa Cruz
20 River, the Upper Salt River, and the Verde River are non-navigable.

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23 ² *In re Determination of Navigability of the Gila River*, Memorandum on Remand
24 filed by Defenders of Wildlife, *et al.*, at 9 (Jan. 27, 2012) (describing “modern boating” on
25 portions of Gila River); *In re Determination of Navigability of the Upper Salt River*,
26 Memorandum on Remand filed by Defenders of Wildlife, *et al.*, at 5, 9-10 (Jan. 27, 2012)
27 (citing modern evidence of “canoes, rafts and kayaks” used for recreational purposes); *In*
28 *re Determination of Navigability of the Verde River*, Memorandum on Remand filed by
Defenders of Wildlife, *et al.*, at 5-6, 8-10 (Jan. 27, 2012) (summarizing evidence of
modern recreational boating and canoeing); San Pedro Brief at 7-8 (discussing
recreational boating and canoeing).

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RESPECTFULLY SUBMITTED this 23rd day of March, 2012.

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CERTIFICATE OF MAILING

ORIGINAL AND SIX COPIES of the foregoing hand-delivered for filing this 23rd day of March, 2012 to:

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