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

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

No. 04-008-NAV

**FREEPORT-MCMORAN
CORPORATION'S MEMORANDUM
REGARDING THE ORDINARY
AND NATURAL CONDITION OF
THE UPPER 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 Upper 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, the record demonstrates that the Upper Salt River was
18 neither navigable nor susceptible of navigation in its ordinary and natural condition at the
19 time of statehood. The Commission should reevaluate the evidentiary record and issue a
20 revised determination finding that Upper Salt River was neither navigable nor capable of
21 navigation in its ordinary and natural condition on February 14, 1912.

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

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

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

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

18 The proponents of navigability encourage the Commission to weigh evidence
19 “liberally” in favor of navigability. *See* Defenders of Wildlife Memorandum on Remand,
20 dated January 27, 2012 (“DOW Memorandum”), at 10. The Supreme Court in *PPL*
21 *Montana*, however, rejected the Montana Supreme Court’s use of a “liberally construed”
22 navigability test. *PPL Mont., LLC v. Montana*, 132 S. Ct. 1215, 1226 (2012). Rather
23 than rely on such a test, proponents of navigability are required to demonstrate, by a
24 preponderance of evidence, that every disputed segment of the Upper Salt River, in its
25 ordinary and natural state, is navigable in fact, and that the River’s susceptibility to
26 navigation is a “commercial reality.” *Id.* at 1234.

27 ...

28 ...

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

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

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

24 The Court of Appeals also provided guidance regarding the appropriate time
25 period for the Commission to consider when determining what a river would have looked
26 like “without man-made dams, canals or other diversions.” *Id.* The Court determined
27 that evidence of pre-settlement conditions should be considered “the best evidence of the
28 River’s natural condition.” *Id.* Thus, when reevaluating the evidence in the record, the

1 Commission should pay particular attention to pre-settlement evidence, and the revised
2 report and findings should reflect careful consideration of the ordinary and natural
3 condition of the Upper Salt River prior to modern day settlement.

4 This does not mean that the Commission may not consider evidence of stream
5 conditions occurring after man-made diversions were initiated. To the contrary, the
6 Court of Appeals noted that “[e]ven if evidence of the River’s condition after man-made
7 diversions is not dispositive, it may nonetheless be informative and relevant. Assuming
8 the evidence has indicia of reliability, the determination of the relevance and weight to be
9 afforded the evidence is generally for ANSAC to make.” *Id.* at 243, ¶31, 229 P.3d at
10 255.

11 The modern era on the Upper Salt River began in the 1880s when “major efforts to
12 control the flow of the Salt” began. *See Arizona Stream Navigability Study for the Salt*
13 *River: Granite Reef Dam to the Confluence of the White and Black Rivers* at 3-12, -13, -
14 21 (received Oct. 26, 2004) (the “ASLD Report”). Although the Commission is not
15 limited to considering evidence from before the 1880s, the Commission should pay
16 particular attention to evidence of navigability of the Upper Salt River prior to this era.

17 **III. The Upper Salt River was neither Navigable nor Susceptible of Navigation in**
18 **its Ordinary and Natural Condition at the Time of Statehood.**

19 The proponents of navigability have failed to offer sufficient evidence to
20 demonstrate that it is more likely than not that the Upper Salt River was navigable or
21 susceptible of navigability in its ordinary and natural condition at the time of statehood.
22 On the contrary, the preponderance of the evidence establishes that the Upper Salt River
23 was not navigable in its ordinary and natural condition. Thus, the Commission properly
24 found that “the Upper Salt River from its confluence with the White and Black Rivers to
25 Granite Reef Dam was not used or susceptible of use as a highway for commerce over
26 which trade and travel was or may be conducted in the customary modes of trade or
27 travel on water as of February 14, 1912.” Report, Findings and Determination Regarding
28 the Navigability of the Upper Salt River from the Confluence of the White and Black

1 Rivers to Granite Reef Dam (December 13, 2007) (“Upper Salt Report”), at 64.

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

4 The factual findings made by the Commission in the Upper Salt Report
5 demonstrate that the proponents of navigability have not shown that it is more likely than
6 not that the Upper Salt River was navigable at statehood in its ordinary and natural
7 condition. The factual findings made by the Commission with regard to the ordinary and
8 natural condition of the Upper Salt River prior to modern-day settlement and farming
9 include:

10 1. Although there is significant evidence of prehistoric irrigation in the lower
11 reach of the Upper Salt River basin, “[t]here is no evidence in the archeological record
12 that would indicate that any of the prehistoric cultures located in the study area used the
13 Upper Salt River as a means of transportation by boat or other watercraft and there has
14 been no documented use of the River for commercial trade and travel or for regular
15 floatation of logs. All travel in the study area during this period was by foot.” Upper Salt
16 Report at 22.

17 2. Mountain men exploring the southwest in the early 1800s used horseback
18 or walked and “did not use canoes, rafts or other types of boats on the Upper Salt River
19 or other Arizona rivers except for the Colorado.” *Id.* at 23.

20 3. Failed attempts to float supplies down the Upper Salt River by both the
21 military and by early settlers prior to modern day settlements demonstrates that the Upper
22 Salt River was not practical for navigation in its ordinary and natural condition. *Id.*

23 4. Repeated federal surveys made between 1868 and 1911 indicate that the
24 surveyors did not believe the Upper Salt River was navigable. *Id.* at 35.

25 5. There is no evidence of commercial fishing having ever occurred on the
26 Upper Salt River. *Id.* at 40.

27 6. “The rapids, waterfalls and other obstructions on the two upper reaches of
28 the Upper Salt River made travel by boat of any size impossible. Also, due to the

1 mountainous terrain and steep canyons, access to the river in these areas was virtually
2 impossible.” *Id.*

3 7. The ordinary and natural condition of the Salt River and Tonto Creek prior
4 to the construction of Roosevelt Dam was not navigable because the river “was erratic,
5 unstable and undependable.” *Id.* at 47.

6 8. There are no documented successful attempts of use of the Upper Salt River
7 for commercial purposes. *Id.* at 61.

8 9. The Upper Salt River was “extremely erratic, unstable and unpredictable in
9 its disposition.” *Id.* at 52.

10 10. Expert witness reports and testimony confirming that “the geomorphology
11 and hydrology of the Upper Salt River make it clearly non-navigable,” was “unrefuted in
12 the record.” *Id.* at 59.

13 11. “[N]o evidence was submitted to the Commission by any expert who
14 opined that the river was navigable at or about the time of statehood, or for that matter,
15 was susceptible of navigability in its ordinary and natural condition.” *Id.* at 59-60.

16 **B. The Evidence in the Record shows that the Upper Salt River was neither**
17 **Navigable nor Susceptible of Navigation in its Ordinary and Natural**
18 **Condition.**

19 The following evidence, although not an exhaustive list of relevant evidence in the
20 record, coupled with the Commission’s findings described above, provides a strong basis
21 for the Commission to issue a revised final determination that the Upper Salt River, in its
22 ordinary and natural condition, was not navigable on February 14, 1912:

23 1. Variations in water flow on the Upper Salt River prevented reliable
24 navigation. Although one expert estimated that the water flowing down portions of the
25 Upper Salt River was often several feet in depth in historical times, ASLD Report at 4,
26 the water flow on the Upper Salt River fluctuated wildly, sometimes “go[ing] from a few
27 hundred cubic feet per second (c.f.s.) to over 100,000 c.f.s. in a few short hours.” Exhibit
28 8, U.S. Dep’t of Agriculture, Forest Service, *Evaluation of Navigability at the Time of
Statehood* at 4 (received Feb. 5, 1998) (the “Forest Service Report”); *see also* ASLD

1 Report at 3-24 (recounting historical descriptions of a “highly variable” water flow); *Id.*
2 at 3-29 (reporting that, according to a 1901 observer, “[f]or the greater part of the year,
3 the Salt River is a river only in name”); Exhibit 29, Douglas R. Littlefield, *Assessment of*
4 *the Navigability of the Parts of the Upper Salt River and Tonto Creek Between Granite*
5 *Reef Dam and the Inundation Lines of Roosevelt Lake Prior to and on the Date of*
6 *Arizona’s Statehood, February 14, 1912* at 135 (the “Littlefield Report”) (summarizing
7 historical descriptions of a “completely dry” Salt River).

8 2. The geography of the Upper Salt River prevents navigation. The canyon
9 reaches of the Upper Salt River “are very steep and rapids are frequent,” making
10 navigation “impossible.” Exhibit 28, Stanley A. Schumm, *Geomorphic Character of the*
11 *Upper Salt River* at 12 (Jan. 2005).¹

12 3. Outside the canyon reaches, the Upper Salt River was braided, “wide,
13 shallow, and steep,” with “marked changes of valley width caus[ing] dramatic alterations
14 of water depth and velocity,” making navigation through the non-canyon portions of the
15 Upper Salt River “hazardous.” *Id.*

16 4. Early explorers did not view the Upper Salt River as a navigable waterway.
17 The federal government commissioned surveys of the Upper Salt River area in 1868,
18 1881, and 1911. Littlefield Report at 33. The surveyors were instructed to note the
19 presence of navigable rivers, but “surveys undertaken for the Upper Salt River above
20 Granite Reef Dam and Tonto Creek and below the inundation lines of Theodore
21 Roosevelt Lake gave no indication that the federal surveyors in charge of that work
22 believed either stream to be navigable.” *Id.* at 44.

23 5. Historical records indicate that the federal government did not view the
24 Upper Salt River as a navigable waterway. For example, in 1877, the federal government
25 passed the Desert Land Act, relating to lands irrigated from non-navigable streams. *See*
26

27 ¹ The United States Supreme Court recently held that exactly these kinds of conditions made the “Great Falls”
28 stretch of the Missouri River non-navigable under the federal test of navigability for title. *See PPL Montana*, 132
S.Ct. at 1224, 1232 (17-mile Great Falls stretch includes a “constant succession of rapids and falls,” making it non-
navigable “from the head of the first waterfall to the foot of the last.”).

1 Littlefield Report at 69. Beginning in 1890, the federal government approved five
2 applications for land irrigated from the Upper Salt River, *id.* at 70, indicating that the
3 federal government viewed the Upper Salt River as non-navigable during the relevant
4 period of time. Similarly, beginning in the late nineteenth century, the federal
5 government issued patents to private parties who wished to stake claims to land
6 surrounding the Upper Salt River. “[N]one of the federal patents that overlay the Upper
7 Salt River or Tonto Creek (regardless of their respective dates) contain any provisions for
8 reserving the bed of the river to the State of Arizona,” as would have occurred if the river
9 had been navigable. *Id.* at 60. Even when it was clear from a patent that the claimed land
10 included riverbed, the patent was issued without qualification. *Id.* at 61-62.

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

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

26
27 ² Moreover, as the United States Supreme Court has noted, “[i]t is not, however, . . . every small creek in which a
28 fishing skiff or gunning canoe can be made to float at high water which is deemed navigable, but, in order to give it
the character of a navigable stream, it must be generally and commonly useful to some purpose of trade or
agriculture.” *U.S. v. Rio Grande Dam & Irr. Co.*, 174 U.S. 690, 698-99 (1899) (citations omitted).

1 8. Research into historical records revealed no evidence “that any profitable
2 commercial enterprises were conducted using the Upper Salt River for trade and travel.”
3 See Exhibit 4, SFC Engineering Co., *Arizona Stream Navigability Study for the Upper*
4 *Salt River 5* (received May 30, 1997). Commercial shipping operations were not
5 developed on the Upper Salt River. ASLD Report at 3. Similarly, in pre-Anglo days, the
6 Upper Salt River was not used for “commercial trade [or] travel or for any regular
7 flotation of logs.” ASLD Report at 2-22.

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

10 The evidence relied on by the proponents of navigability does not show that is
11 more likely than not that the Upper Salt River was navigable or susceptible of
12 navigability in its ordinary and natural condition. For example, the proponents of
13 navigability rely on a report that estimates a maximum average annual flow rate of 1,800
14 cubic feet per second (“cfs”). See Arizona State Land Department Memorandum re
15 Upper Salt River (January 27, 2012) at 4-5. Yet the Commission found this flow rate
16 estimate to be “somewhat questionable.” Upper Salt Report at 63. In fact, the
17 Commission has already considered the evidence submitted by the experts and found that
18 none of the three segments of the Upper Salt River were susceptible to navigability in
19 their ordinary and natural condition:

20 In reach one above Roosevelt Lake and reach two before the construction
21 of Horse Mesa, Mormon Flat and Stewart Mountain Dams, the steep,
22 narrow bedrock canyons, lack of accessibility to the river, waterfalls,
23 rapids, exposed boulders and other obstacles, and the steep gradient of the
24 river, navigation as a highway for commerce was not possible. In the areas
25 such as Tonto Basin and reach three below Granite Reef Dam, the river
26 spread out over a larger floodplain and was considered a braided stream of
two or more flow channels interspersed by shifting sand bars and sand
islands, which would make it impossible to be considered as navigable or
susceptible of navigation.

27 *Id.* at 63.

28 ...

1 The proponents of navigability also cite eight attempts to navigate the Upper Salt
2 River over a forty-year period as “ample evidence” of historic boating. Yet a mere eight
3 boating attempts over a forty-year period in no way establishes that the Upper Salt River
4 was “really navigable.” *PPL Montana*, 132 S. Ct. at 1227 (internal quotations and
5 citation omitted). The fact that nearly all of these attempts were unsuccessful
6 demonstrates that the Upper Salt was not at all susceptible to navigability. The
7 proponents also must show that the evidence of navigability they offer is consistent with
8 “commercial reality.” *Id.* at 1234. Other than mid-to-late twentieth century examples of
9 recreational boating and rafting, there is no evidence that any navigation on the Upper
10 Salt prior to statehood could be consistent with commercial reality.³

11 IV. Conclusion and Requested Action.

12 The Commission’s determination of non-navigability for the Upper Salt River is
13 correct. The Commission should reaffirm that determination because the evidence in the
14 record fails to establish that the Upper Salt River was navigable or susceptible of
15 navigability in its ordinary and natural condition. Accordingly, Freeport urges the
16 Commission to issue a revised determination that expressly applies the Court of Appeals’
17 interpretation of “ordinary and natural.” Based on that interpretation, and the absence of
18 evidence of navigability, the Commission should conclude that the Upper Salt River was
19 non-navigable in its ordinary and natural condition at statehood.

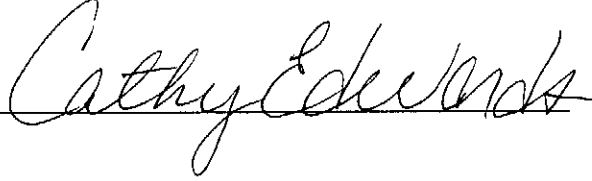
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26 ³ As the United States Supreme Court recently held, present-day recreational boating on a river is not sufficient to
27 demonstrate navigability unless the proponent of navigability shows: “(1) the watercraft are meaningfully similar to
28 those in customary use for trade and travel at the time of statehood; and (2) the river’s post-statehood condition is
not materially different from its physical condition at statehood.” *PPL Montana*, 132 S.Ct. at 1233. Because no
such showing has been made for modern-day watercraft on the Upper Salt River, any such evidence is insufficient to
support a finding of navigability.

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