

1 L. William Staudenmaier (#012365)
wstaudenmaier@swlaw.com
2 Kory A. Langhofer
klanghofer@swlaw.com (#024722)
3 SNELL & WILMER L.L.P.
One Arizona Center
4 400 East Van Buren Street
Phoenix, Arizona 85004-2202
5 Telephone: (602) 382-6571
Facsimile: (602) 382-6070
6 Attorneys for Freeport-McMoRan Corporation

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

10 In re Determination of Navigability of
the San Pedro River

No. 03-004-NAV

11 **FREEPORT-MCMORAN**
12 **CORPORATION'S MEMORANDUM**
13 **REGARDING PROCEEDINGS ON**
14 **REMAND FOR THE SAN PEDRO**
15 **RIVER**

16 On April 27, 2010, the Arizona Court of Appeals decided *Arizona v. Arizona*
17 *Navigable Stream Adjudication Commission*, 224 Ariz. 230, 229 P.3d 242 (2010)
18 (hereinafter "*Arizona v. ANSAC*"), and remanded a matter in which the Arizona
19 Navigable Stream Adjudication Commission (the "Commission") had previously found
20 the Lower Salt River to be non-navigable. The Superior Court (in both Maricopa and
21 Pima Counties) subsequently remanded to the Commission six previously appealed
22 navigability determinations for reconsideration in light of *Arizona v. ANSAC*.

23 On December 14, 2011, the Commission issued a notice (the "Notice") confirming
24 the remand of its navigability determinations for the Lower Salt River, the Upper Salt
25 River, the Gila River, the Verde River, the San Pedro River, and the Santa Cruz River.
26 The Notice requested that interested parties submit memoranda describing what the
Commission should do to comply with *Arizona v. ANSAC*.

27 . . .

28 . . .

1 Freeport-McMoRan Corporation ("Freeport") hereby recommends a course of
2 action for the Commission to ensure that its revised determination as to the San Pedro
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 San Pedro 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 in
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 (addressing all six
18 watercourses), preferably at the State Capitol where the Commission's office is
19 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 San Pedro 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 San Pedro River Valley was historically "a significant transportation route
13 through southern Arizona." Arizona Stream Navigability Study for the San Pedro
14 River at 3-1 (evidence item no. 16) (the "Fuller Report"). Yet, "travel was along the
15 river rather than in it." *Id.*
- 16 2. Geologic investigations of the San Pedro Valley indicate that the river is not
17 susceptible to navigation due to "seasonal low flow, intermittent flow conditions (no
18 flow), shifting channels, and erosive conditions during periods of high flow and
19 floods." *Id.* at 5-16. While the upper reach of the San Pedro was partly perennial, the
20 lower reach was "an entrenched, broad, braided channel" with only isolated reaches of
21 perennial flow. *Id.* at 7-1.
- 22 3. Historic accounts of the San Pedro River in the mid- to late-nineteenth century
23 suggest that the San Pedro was not considered to be navigable. For example, the San
24 Pedro River was described in 1846 by a United States military unit as "an
25 insignificant stream a few yards wide, and only a foot deep." *Id.* at 3-13. Two reports
26 from the early 1870's describe it as an "insignificant sand-bed" and generally "dry as
27 a lime-burner's lot excepting during the 'rainy season.'" *Id.* at 3-19. One report from
28 the mid-nineteenth century describes the lower portion of the San Pedro as "a few

1 yards wide and one foot deep.” *Id.* at 5-13. Other reports from the late 1850s note
2 that water “rarely runs above” the surface of the San Pedro near the confluence with
3 the Gila River and that no flow from the San Pedro River actually reaches the
4 confluence with the Gila River. *Id.* at 5-13.

5 4. Historical descriptions of the San Pedro River indicate that prior to 1890, the San
6 Pedro River “was an irregularly flowing stream, marshy in places, free-flowing in
7 other places, entrenched or subsurface in still other places.” *Id.* at 3-1. During this
8 time, some of the San Pedro River flowed year round, but those areas were generally
9 “a few feet wide and perhaps a foot deep, in other areas meandering through marshes
10 such that it could ‘hardly be said to have [had] a course.’” *Id.* at 3-26. Historical flow
11 rates indicate that the average and median flow depths, for those portions of the San
12 Pedro River that did flow, were generally less than one foot. *Id.* at iv.

13 5. In the late 1800s, the character of the San Pedro River was significantly changed by
14 arroyo cutting due in large part to a series of large floods that impacted the San Pedro
15 River over several years and a large earthquake that occurred in 1887. *Id.* 5-11.
16 During this time, the San Pedro became more entrenched and intermittent. *Id.* The
17 San Pedro’s entrenchment was likely a natural cycle within the fluvial system and was
18 not significantly affected by human disturbances. *Id.* 5-16.

19 6. Despite the San Pedro River being one of the “most intensely studied rivers in the
20 southwest,” *Id.* at 7-10, there are no published accounts of boating or boating attempts
21 on the San Pedro River prior to statehood. *Id.* at 2-10.

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

27 . . .

28 . . .

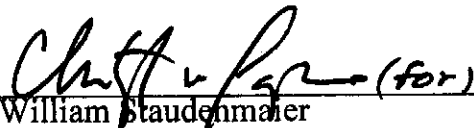
1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

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 San Pedro River was non-navigable in its ordinary and natural condition.¹

RESPECTFULLY SUBMITTED this 27th day of January, 2012.

SNELL & WILMER L.L.P.

By  (for)

L. William Staudenmaier
Kory A. Langhofer
One Arizona Center
400 East Van Buren Street
Phoenix, Arizona 85004-2202
Attorneys for Freeport-McMoRan Corporation

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

CERTIFICATE OF MAILING

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

ORIGINAL AND SIX COPIES of the foregoing hand-delivered for filing this 27th day of January, 2012 to:

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

COPY mailed this 27th day of January, 2012 to:

Laurie A. Hachtel
Attorney General's Office
1275 W. Washington Street
Phoenix, AZ 85007-2997
Attorneys for State of Arizona

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.

Sally Worthington
John Helm
Helm & Kyle, Ltd.
1619 E. Guadalupe #1
Tempe, AZ 85283
Attorneys for Maricopa County

Sandy Bahr
202 E. McDowell Road, Ste. 277
Phoenix, AZ 85004
Sierra Club

Julie Lemmon
930 S. Mill Avenue
Tempe, AZ 85281
Attorney for Flood Control District of Maricopa County

Carla Consoli
Lewis and Roca
40 N. Central Avenue
Phoenix, AZ 85004
Attorneys for Cemex

...

...

1 John B. Weldon, Jr., Mark A. McGinnis,
2 Scott M. Deeny
3 Salmon, Lewis & Weldon, P.L.C.
4 2850 E. Camelback Road, Suite 200
5 Phoenix, AZ 85016
6 *Attorneys for Salt River Project Agricultural
7 Improvement and Power District and Salt
8 River Valley Water Users' Association*

9 Charles Cahoy
10 P.O. Box 5002
11 Tempe, AZ 85280
12 *Attorney for City of Tempe*

13 William Tabel
14 P.O. Box 1466
15 Mesa, AZ 85211-1466
16 *Attorney for City of Mesa*

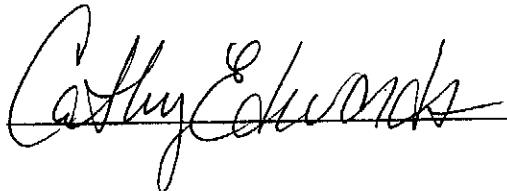
17 Cynthia Campbell
18 200 W. Washington, Suite 1300
19 Phoenix, AZ 85003
20 *Attorney for City of Phoenix*

21 Thomas L. Murphy
22 Gila River Indian Community Law Office
23 Post Office Box 97
24 Sacaton, AZ 85147
25 *Attorney for Gila River Indian Community*

26 Michael J. Pearce
27 Maguire & Pearce LLC
28 2999 N. 44th Street, Suite 630
Phoenix, AZ 85018-0001
*Attorneys for Chamber of Commerce and
Home Builders' Association*

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

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

25
26 
27
28