

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 Gila River

No. 03-007-NAV

11 **FREEPORT-MCMORAN**  
12 **CORPORATION'S MEMORANDUM**  
13 **REGARDING PROCEEDINGS ON**  
14 **REMAND FOR THE GILA 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 County) 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  
Commission should do to comply with *Arizona v. ANSAC*.

26 Freeport-McMoRan Corporation ("Freeport") hereby recommends a course of  
27 action for the Commission to ensure that its revised determination as to the Gila River  
28 will satisfy the requirements of *Arizona v. ANSAC*.

1 **I. Procedural Recommendations.**

2 Freeport recommends that, in reconsidering its navigability determination for the  
3 Gila River, the Commission should follow the procedures proposed in the memorandum  
4 Freeport filed with the Commission on January 13, 2012 (“January 13 Memorandum”) in  
5 connection with the reconsideration of the navigability of the Lower Salt River. The  
6 procedures recommended in the January 13 Memorandum included, in short:

- 7 1. reopening the record to allow any interested party to submit additional evidence on  
8 the new factual and legal issues raised in *Arizona v. ANSAC*;
- 9 2. holding an additional evidentiary hearing pursuant to A.R.S. § 37-1126;
- 10 3. abstaining from making a final determination until the Commission has retained  
11 new legal counsel and the United States Supreme Court has issued its decision  
12 *PPL Montana v. State of Montana* (U.S. No. 10-218, argued Dec. 7, 2011);
- 13 4. making final determinations at a single public hearing (addressing all six  
14 watercourses), preferably at the State Capitol where the Commission’s office is  
15 located; and
- 16 5. issuing a revised navigability determination that expressly factors out the effects  
17 of pre-statehood diversions.

18 Freeport believes the foregoing procedures will protect the due process rights of  
19 all parties, and ensure compliance with *Arizona v. ANSAC*, in the most efficient manner.  
20 Of particular importance, the Commission should ensure that it issues final decisions for  
21 all six watercourses at the same time. Doing so will help ensure that any future appeals  
22 of the decisions can be handled in a coordinated manner. This will reduce the burdens  
23 on, and improve administrative efficiency for, both the Commission and the parties  
24 involved in such appeals.

25 **II. Substantive Recommendations.**

26 After re-opening the record, the Commission should carefully weigh the evidence  
27 already in its record, as well as any new evidence submitted by interested parties. After  
28 evaluating all such evidence and conferring with its new legal counsel, the Commission

1 will be in a position to issue revised final determinations of navigability for each  
2 watercourse.

3 On the current state of the record, Freeport believes there is a very strong basis for  
4 the Commission to issue a revised final determination that the Gila River, in its ordinary  
5 and natural condition, was not navigable on February 14, 1912. Such a determination  
6 would be supported by the following evidence already in the Commission's record:

- 7 1. The modern era on the Gila River began in the 1870s, as farming communities began  
8 to irrigate fields adjacent to the Gila River. *See* Exhibit 2, SFC Engineering Co.,  
9 *Arizona Stream Navigability Study for the Upper Gila River and San Francisco River*  
10 at 3-18, 5-8 (received Sept. 26, 2003) (the "Fuller Report: Upper Gila") (describing  
11 early farming, and noting that "the earliest constructed canal in the Safford Valley"  
12 was built in 1874).
- 13 2. Although the River's flow could fluctuate greatly, there were numerous reports of  
14 very low water flow on the Gila River prior to significant diversions from the River.  
15 *See* Fuller Report: Upper Gila at 3-24 (stating that, according to an 1859 report, the  
16 Gila River "only becomes a respectable river after it receives the water from [the Salt  
17 River]"); Exhibit 4, JE Fuller/Hydrology & Geomorphology, Inc., *Arizona Stream*  
18 *Navigability Study for the Gila River: Colorado River Confluence to the Town of*  
19 *Safford* at IV-1 (received Feb. 20, 2004) (the "Fuller Report: Lower Gila") (stating  
20 that, according to a 1775 explorer, the Gila River was at times "dry"); *see also* Exhibit  
21 17, Jack L. August, Jr., *The Lower Gila River: A Non-Navigable Stream on February*  
22 *14, 1912* at 1, 19 (the "August Report") (noting that, according to a 1911 observer,  
23 "one could walk across the river and hardly dampen the shoes" and that, according to  
24 an 1891 report, there was a propensity for "sudden floods" during summer rains);  
25 Exhibit 12, Douglas R. Littlefield, *Assessment of the Navigability of the Gila River*  
26 *Between the Mouth of the Salt River and the Confluence with the Colorado River*  
27 *Prior to and on the Date of Arizona's Statehood, February 14, 1912* at 72 (received  
28 Nov. 14, 2005) (the "Littlefield Report") (noting "erratic" water flow).

- 1 3. The geography of the Gila River prevented reliable navigation. “[D]ryland rivers  
2 [such as the Gila River] are inherently unstable and more prone to changes in channel  
3 configuration.” Fuller Report: Lower Gila at VII-9 to -10. Such shifting channels,  
4 which would frustrate attempts at regular commercial navigation, were reported long  
5 before statehood. *See id.* at IV-41 (noting that, in an 1888-89 report, the water flow of  
6 the Gila River could not be taken by self-recording instruments “owing to the  
7 shallowness of the streams and the unstable character of their channels”); Littlefield  
8 Report at 104-15 (recording shifting channels as early at 1775).
- 9 4. Early explorers did not view the Gila River as a navigable waterway. The federal  
10 government commissioned no fewer than ten separate surveys of the Gila River area  
11 over a nearly fifty year period beginning in the mid-1800s, and the surveyors “all  
12 concluded in their field notes and plats that they did not consider the Gila River to be  
13 navigable.” August Report at 13; Littlefield Report at 23, 55. In 1854 a surveyor  
14 wrote, “It is doubtful whether [the Gila River] can ever be navigated, except at its  
15 floods, and these are by no means regular.” Fuller Report: Upper Gila at 3-14. And  
16 in 1879 an explorer submitted a report to Congress that mentioned the Gila River but  
17 failed to state that it was navigable, “although navigability was certainly a  
18 characteristic [the explorer] would have discussed.” Littlefield Report at 90.
- 19 5. There are several accounts that pre-date modern diversions indicating that the Gila  
20 River was not navigable. For example, a member of an 1847 military reconnaissance  
21 mission noted, “The Gila becomes so low . . . that a sand-bar forms at its mouth  
22 during the summer, and at no times does it supply much water.” August Report at 32.  
23 A member of the commission charged with reviewing the Gadsden Purchase  
24 commented in 1855 that the Gila “is not navigable.” Littlefield Report at 108. In  
25 1859 “[o]ne of Arizona Territory’s most notable pioneers” described the Gila River  
26 but noted that “[t]he Colorado is the only navigable stream” in Arizona and New  
27 Mexico. August Report at 33. In 1865 the Arizona Territorial Legislature requested  
28 funds for improving the navigability of the Colorado River. *See* Littlefield Report at

1 110. As part of that request, the legislature noted, “[T]he Colorado River is the only  
2 navigable water in this Territory.” *Id.*

3 6. Although local newspapers discussed commerce and waterways, Littlefield Report at  
4 112, there are only seven historical accounts of boating on the Gila River before 1900.  
5 Exhibit 18, *Accounts of Historical Gila River Boating* at 1 (noting, additionally, the  
6 operation of two ferries across the river before 1900). “Yet in those instances where  
7 boating was attempted, it was reported in the press more for its novelty than for being  
8 practicable on a regular and reliable basis.” Littlefield Report at 112. Such attempts  
9 were most often made using “small, low draft boats,” rather than commercial  
10 watercraft. Fuller Report: Upper Gila at at 4-8; Littlefield Report at 131. At least one  
11 of the boating attempts reported very dangerous boating conditions, *see* Fuller Report:  
12 Upper Gila at 3-28, 4-8, and another ran aground so often it “was forced to jettison a  
13 portion of the cargo,” Fuller Report: Lower Gila at IV-2; Littlefield Report at 106.  
14 “Travel on the river was frequently interrupted due to hazards such as sand bars or  
15 snags.” *Id.* at X-1.

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

### 21 **III. Conclusion**

22 For the foregoing reasons, Freeport urges the Commission to follow the  
23 procedures suggested above and, at the end of that process, to issue a revised  
24 determination finding that Gila River was non-navigable in its ordinary and natural  
25 condition.<sup>1</sup>

26  
27 <sup>1</sup> By separate memoranda filed simultaneously with this memorandum, Freeport will address the  
28 evidence supporting a conclusion that the Santa Cruz, Upper Salt, Verde, and San Pedro Rivers  
were also non-navigable on February 14, 1912.

1 RESPECTFULLY SUBMITTED this 27th day of January, 2012.

2 SNELL & WILMER L.L.P.

3  
4 By Cheryl W. Page (for)  
5 L. William Staudenmaier  
6 Kory A. Langhofer  
7 One Arizona Center  
8 400 East Van Buren Street  
9 Phoenix, Arizona 85004-2202  
10 *Attorneys for Freeport-McMoRan Corporation*

11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28  
Snell & Wilmer

L.L.P.  
LAW OFFICES  
One Arizona Center, 400 E. Van Buren  
Phoenix, Arizona 85004-2202  
(602) 382-6000

**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*

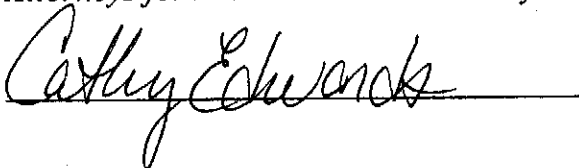
17 Cynthia Campbell  
18 200 W. Washington, Suite 1300  
19 Phoenix, AZ 85003  
20 *Attorney for City of Phoenix*

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