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12 **BEFORE THE ARIZONA NAVIGABLE STREAM**  
13 **ADJUDICATION COMMISSION**

14 In re Determination of Navigability of the ) No. 04-009-NAV  
15 Verde River )  
16 ) **SALT RIVER PROJECT'S**  
17 ) **RESPONSIVE POST-HEARING**  
18 ) **MEMORANDUM**  
19 )

20 The Salt River Project Agricultural Improvement and Power District and Salt River  
21 Valley Water Users' Association (collectively, "SRP") submit their responsive post-hearing  
22 memorandum on the navigability of the Verde River. The proponents of navigability<sup>1</sup>  
23 erroneously argue that the proper standard to be applied in navigability decisions is an  
24 extremely liberal one and that the evidence presented before this Commission demonstrates  
25 navigability. Contrary to the arguments asserted by Proponents, the evidence in the record  
26 clearly demonstrates that the Verde River was not "navigable" at statehood nor is susceptible  
27 to navigation under the proper legal standard.

28 **I. Proponents Misstate the Legal Standard of Navigability.**

29 Although Defenders of Wildlife ("DOW") correctly states that the navigability-for-title  
30 standard must be consistent with federal and state law, the test that it, and the State Land

31 <sup>1</sup> The proponents of navigability ("Proponents") include the Arizona State Land Department ("SLD")  
32 and the Defenders of Wildlife, et al. ("DOW").

1 Department (“SLD”), advocates deviates from well-recognized legal doctrine. Proponents  
2 substantially understate the rigor of the test for navigability under the federal cases and the  
3 Arizona statutes.

4  
5 **A. The “ordinary and natural condition” portion of the navigability definition  
refers to the condition of the river at statehood.**

6 The evidence demonstrates that the Verde River is not, was not at statehood, and never  
7 has been used or susceptible to being used as a “highway for commerce.” See Salt River  
8 Project’s Opening Post-Hearing Memorandum, at 2-9 (March 21, 2006) (“SRP Mem.”).  
9 Proponents have not met their burden of proving that the river is or was “navigable,” under  
10 any conditions at any time. See A.R.S. § 37-1128(A). Faced with this challenge, Proponents  
11 argue that the evidence in the record concerning irrigation diversions or other man-made  
12 structures should figure into the Commission’s navigability determination. They contend that  
13 the river must be evaluated in its pre-development condition. The evidence is clear, however,  
14 that the Verde River was not used or susceptible to being used as a “highway for commerce”  
15 prior to settlement, and it was not used or susceptible to being used as a “highway for  
16 commerce” after settlement began.

17 Proponents’ argument about the meaning of “ordinary and natural condition” ignores  
18 the plain language of the federal test and Arizona statutes. The statutes, for example, provide  
19 that a watercourse is “navigable” if it “was in existence on February 14, 1912 and **at that time**  
20 was used or susceptible to being used, it is ordinary and natural condition, as a highway for  
21 commerce . . . .” A.R.S. § 37-1101(5) (emphasis added). The focus of this statutory inquiry,  
22 therefore, is on the river as of February 14, 1912—not upon the river as it might have existed  
23 at the dawn of civilization or some speculation about what the river might have looked like in  
24 1912 if nobody lived here to see it. The statutes require that the Commission focus its  
25 attention on the river as of the date of statehood.

26 This statutory requirement is consistent with the test applied by the federal courts. In a  
27 case involving the Gulkana River in Alaska, for example, the federal district court stated that

1 “the requirement that title navigability be determined at the time of statehood means only that  
2 when making a title navigability determination, the *Daniel Ball* test is to be applied to the  
3 **physical dimensions and physical configuration existing at the time of statehood.**”

4 Alaska v. United States, 662 F. Supp. 455, 463 (D. Alaska 1987), aff’d, 891 F.2d 1401 (9th  
5 Cir. 1989), cert. denied, 495 U.S. 919 (1990) (emphasis added). The Ninth Circuit Court of  
6 Appeals, in a subsequent Alaska case regarding the Kukpowrak River, put it even more  
7 succinctly: “The key moment for the determination of title is the instant when statehood is  
8 created.” Alaska v. United States, 213 F.3d 1092, 1097 (9th Cir. 2000) (quoting Utah v.  
9 United States, 482 U.S. 193, 196 (1987)). Navigability-for-title decisions make clear that the  
10 time for determining whether title of a navigable watercourse passes to the state under the  
11 equal footing doctrine is at the date of statehood.

12 Proponents argue that the Commission should assume away irrigation diversions along  
13 the Verde River. Both SLD and DOW specifically point to evidence of irrigation diversions  
14 that occurred following statehood. See State Land Department’s Opening Post-Hearing  
15 Memorandum, at 9 (March 21, 2006) (“SLD Mem.”); Defenders of Wildlife Opening Post-  
16 Hearing Memorandum, at 12 (March 21, 2006) (“DOW Mem.”). Proponents report that, in  
17 1914, there were purportedly diversions for more than 121 cubic feet per second (“cfs”) on the  
18 river. Even if the Commission takes into account the 121 cfs in considering whether the river  
19 was susceptible to navigation as of statehood, SRP can find no other reported decision of a  
20 river deemed navigable with streamflow characteristics similar to the Verde River. See SRP  
21 Mem., at Appendix B.

22 As part of its argument that the Commission must consider the “ordinary and natural  
23 condition” of the Verde River, the SLD astonishingly contends that the Commission also must  
24 disregard evidence of flood conditions on the river. See SLD Mem., at 9. It is perplexing that  
25 the SLD would assert that any naturally occurring event should be ignored by the  
26 Commission. This line of reasoning is contradictory to the SLD’s own argument about the  
27 meaning of “ordinary and natural condition.” Historical accounts and streamflow records

1 show that violent flood events have occurred on the Verde River. See SRP Mem., at 4.  
2 Other descriptions indicate periods of nominal flow in the river. Id. Both flooding and  
3 drought-like conditions represent the “ordinary and natural condition” of the Verde River.  
4 Simply because evidence of flooding and drought is persuasive indicia of non-navigability  
5 does not mean that the Commission should disregard those facts, as the SLD asserts. These  
6 events demonstrate that the Verde River was neither navigable nor susceptible to navigation.

7 In asserting their argument relating to the meaning of “ordinary and natural condition,”  
8 Proponents rely primarily on decisions by the United States Supreme Court deciding  
9 navigability in contexts other than “public trust” title. For example, DOW relies upon the  
10 decision in Economy Light & Power v. United States, 256 U.S. 113 (1921), for the  
11 proposition that the Commission must evaluate the Verde River before the construction of any  
12 dams or manmade diversions. See DOW Mem., at 6. Economy Light, however, was a case  
13 involving a determination of the Federal Government’s powers under the Commerce Clause  
14 of the United States Constitution and the Rivers & Harbors Appropriation Act of 1899.  
15 Economy Light, 256 U.S. at 117.

16 “Navigability for title determination under the equal footing doctrine is distinguishable  
17 from navigability for determination of federal jurisdiction under the Commerce Clause.”  
18 Defenders of Wildlife v. Hull, 199 Ariz. 411, 421, 18 P.3d 722, 732 (2002). Under  
19 Commerce Clause cases, courts decide whether a watercourse is navigable for purposes of  
20 federal regulation and may take into account reasonable improvements to a river to enhance  
21 navigation. See United States v. Appalachian Elec. Power Co., 311 U.S. 377, 407-08 (1940),  
22 reh’g denied, 317 U.S. 594 (1941); Puget Sound Power & Light Co. v. Fed. Energy  
23 Regulatory Comm’n, 644 F.2d 785, 787 (9th Cir. 1981). Significantly, navigability  
24 determinations under the Commerce Clause may arise after statehood. Appalachian Elec.  
25 Power & Light Co., 311 U.S. at 408 (“Although navigability to fix ownership of the river bed  
26 or riparian rights is determined . . . as of the formation of the Union in the original states or  
27

1 the admission to statehood of those formed later, navigability, for purpose of the regulation of  
2 commerce, may arise later.”).

3 No court in a navigability-for-title case has ever adopted the holding of Economy Light  
4 in construing the words “ordinary and natural condition” in the process of finding a particular  
5 river navigable to mean that the river must be evaluated in its pre-development condition.  
6 Furthermore, other courts have distinguished and limited the holding of Economy Light, even  
7 within the narrow context in which it was decided. For example, in a subsequent 1940  
8 decision, the United States Supreme Court held that, although courts can assume away some  
9 artificial obstructions to navigation in a Commerce Clause case, those assumptions must be  
10 within reason: “There must be a balance between cost and need at a time when the  
11 improvement would be useful.” Appalachian Elec. Power Co., 311 U.S. at 407-08.

12 Proponents’ arguments about what is meant by the “ordinary and natural condition” of  
13 a watercourse are not determinative of this Commission’s final conclusion.

14 **B. Commercial activity is essential under the federal test for navigability.**

15 Beginning with the first pronouncement of the federal navigability test in The Daniel  
16 Ball, the United States Supreme Court emphasized that a finding of navigability necessitated  
17 evidence of commerce. 77 U.S. (10 Wall.) 557, 564-65, 19 L.Ed. 999 (1870).<sup>2</sup> Subsequent  
18 navigability decisions interpreting The Daniel Ball have required a finding of commercial  
19 activity in deciding that a watercourse is a “highway for commerce.” See United States v.  
20 Oregon, 295 U.S. 1, 21 (1935); United States v. Utah, 283 U.S. 64, 81-82 (1931); Oklahoma  
21 v. Texas, 258 U.S. 574, 588-89 (1922); The Montello, 87 U.S. 430, 441-42 (1874); United

22  
23 <sup>2</sup> In response to a request by the Commission for briefing on the meaning of commerce in the context  
24 of navigability-for-title case, SRP previously submitted a separate “commerce” brief, which is  
25 incorporated herein by this reference. See Salt River Project’s Brief Regarding Commerce (February  
26 27, 2006). Another “commerce” brief filed by Phelps Dodge Corporation similarly explores the  
27 history of the term “highway for commerce” and correctly concludes that a “navigable” watercourse  
requires evidence of beneficial or practical usefulness. See Phelps Dodge Corporation’s Brief  
Regarding the Meaning and Necessity of “Commerce” When Determining the Navigability of a  
Watercourse (February 27, 2006). SRP expressly incorporates the legal arguments in those two briefs  
by this reference.

1 States v. Crow, Pope & Land Enterprises, Inc., 340 F. Supp. 25 (N.D. Ga. 1972); Harrison v.  
2 Fite, 148 F. 781, 784 (8th Cir. 1906); Toledo Liberal Shooting Co. v. Eric Shooting Club, 90  
3 F. 680, 682 (6th Cir. 1898).

4 Yet, Proponents ask that this Commission overlook decades of established  
5 jurisprudence in interpreting the meaning of “highway for commerce.” The SLD contends  
6 that the United States Supreme Court has adopted “a liberal test” for determining whether a  
7 watercourse is a “highway for commerce.” SLD Mem., at 11. The SLD relies, in part, on the  
8 Court’s decision in Utah v. United States, 403 U.S. 9, 11 (1971), for that proposition. In Utah,  
9 the Court had historic evidence that ranchers used nine boats to haul livestock across the Great  
10 Salt Lake in their commercial ranching operations before statehood. Id. Furthermore, other  
11 evidence before the Court indicated that boats were used to transport salt, passengers, freight,  
12 ore, and cedar posts on the lake. Id. at 11-12. Together, this evidence of commercial activity  
13 on the Great Salt Lake led the Court to conclude that the lake was used as a “highway.” There  
14 is no evidence of comparable historic commercial boating activity on the Verde River. See  
15 Section II, infra; SRP Mem., at 2-7.

16 DOW argues that “the term ‘highway for commerce’ can be misleading and should not  
17 be interpreted by this Commission as a requirement that commercial activity occur on the river  
18 in order for it to be navigable.” DOW Mem., at 7. DOW goes so far as to assert that a finding  
19 of navigability is warranted when any type of travel is possible on a river. Id. at 9.<sup>3</sup>  
20 “Navigability,” however, is not the equivalent of “floatability.” See United States v. Oregon,  
21 295 U.S. at 23 (“At most, the evidence shows such an occasional use of boats, sporadic and

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22 <sup>3</sup> DOW also argues that the Oregon Court of Appeals’ decision in Northwest Steelheaders Ass’n v.  
23 Simantel, 112 P.3d 383 (Or. Ct. App. 2005), supports its interpretation of the term “highway for  
24 commerce.” DOW Mem., at 8. Notably, DOW neglects to point out that the Oregon court recognized  
25 that a finding of navigability under The Daniel Ball is restricted to “the customary mode of trade and  
26 travel” at the time of statehood. Id. at 390 (“The only relevant limitation is that the particular mode of  
27 transport be one that was common at the time of statehood.”); see also SRP Mem., at 16. The  
information on modern recreational boating presented to the Commission in this case is clear that  
such boating was conducted via lightweight craft, which are the product of modern technology. See  
SRP Mem., at 16-17. The evidence of modern boating, therefore, does not suggest that the Verde  
River was susceptible to use as a “highway for commerce” by the boats available as of statehood.

1 ineffective, as has been observed on lakes, streams, or ponds large enough to float a boat, but  
2 which nevertheless were held to lack navigable capacity.”); United States v. Rio Grande Dam  
3 & Irrigation Co., 174 U.S. 690, 699 (1899) (the Rio Grande in New Mexico “is not a stream  
4 over which, in its ordinary condition, trade and travel can be conducted . . . [i]ts use for any  
5 purposes of transportation has been and is exception, and only in times of temporary high  
6 water.”); Crow, Pope & Land, 340 F. Supp. at 32 (“The mere fact that a river will occasionally  
7 float logs, poles, and rafts downstream in times of high water does not make the river  
8 navigable.”). DOW is mistaken in its characterization of the meaning of “highway for  
9 commerce” under the federal test for navigability.

10 Moreover, DOW relies that the Arizona Court of Appeals’ decision in Defenders of  
11 Wildlife v. Hull, 199 Ariz. 411, 416, 18 P.3d 722, 727 (2002), in advancing its argument that  
12 “highway for commerce” does not actually require any commercial activity. See DOW Mem.,  
13 at 8. The Hull court, however, was faced with deciding whether various presumptions and  
14 evidentiary exclusions in the 1994 navigability statutes were constitutional. One of the  
15 presumptions in the statute required a finding of non-navigability if a watercourse was not  
16 used or susceptible of being used for commercial trade and travel. The court found this  
17 statutory **presumption** conflicted with The Daniel Ball test. Id. at 421, 18 P.3d at 732. The  
18 issue of whether the federal navigability test required commercial activity was not presented  
19 to or decided by the Hull court.

20 Even the decision by the Ninth Circuit Court of Appeals in Alaska v. Ahtna, Inc., 891  
21 F.2d 1401, 1405 (9th Cir. 1989), upon which Proponents rely, requires a finding of  
22 commercial activity to determine that a watercourse is “navigable.” Proponents cite this  
23 decision to support its theory that recreational activity alone is sufficient for a finding of  
24 “navigability.” See DOW Mem., at 9. The Ahtna court couched its holding of navigability  
25 based upon its conclusion that the activity on the lower Gulkana River was commercial.<sup>4</sup> The

26 <sup>4</sup> The parties in that case also stipulated to facts specific to the lower Gulkana River concerning the  
27 type of watercraft customary at statehood and the load capacity of those boats. See 891 F.2d at  
1405.

1 Ninth Circuit held that guided fishing and sightseeing tours that had been conducted for nearly  
2 twenty years was commercial activity where “[a] substantial industry of such transportation  
3 for profit emerged in the lower Gulkana, which industry today employs approximately 400  
4 people.” 891 F.2d at 1405. Clearly, Ahtna also requires a finding of commercial activity as a  
5 prerequisite in finding a watercourse “navigable.”

6 Without any evidence that the Verde River was a “highway for commerce,” Proponents  
7 argue that the river was susceptible to commerce. DOW contends that, based upon the  
8 holding in State of Oregon v. Riverfront Protective Ass’n, 672 F.2d 792, 795 (9th Cir. 1982),  
9 a river is navigable “despite occasional impediments such as sand or gravel bars, and despite  
10 the fact that it is only navigable a few months out of the year.” DOW Mem., at 10. The  
11 record is clear, however, that the McKenzie River at issue in that case supported the  
12 transportation of “[t]housands of logs and millions of board feet of timber,” 672 F.2d at 795,  
13 and had an annual mean flow rate of approximately 4,000 cfs. See SRP Mem., Appendix B.  
14 Those characteristics bear no relation to those of the Verde River.

15 DOW also relies on United States v. Utah, 283 U.S. 64 (1931), for the proposition that  
16 susceptibility as a “highway for commerce” can be demonstrated where a river was not  
17 historically navigated due to its remote location. See DOW Mem., at 10. Its reliance on this  
18 case is misplaced. The Utah Court held that a river could be found susceptible to navigation  
19 “where conditions of exploration and settlement explain the infrequency or limited nature of  
20 such use.” Id. at 83. No such evidence exists for the Verde River. To the contrary, the  
21 evidence reveals that human settlement has developed along the Verde River for hundreds of  
22 years. Had it been “navigable,” surely the prehistoric inhabitants, Indian tribes, explorers, and  
23 early settlers would have utilized the Verde River as a “highway for commerce.” See SRP  
24 Mem., at 2-4.

## 25 **II. Proponents Overstate the Evidence of Navigability.**

26 Virtually all of the expert testimony and other evidence presented at the hearings  
27 favored a finding that the Verde River was not “navigable.” Proponents have the burden of



1 proof. See A.R.S. § 37-1128(A). In order to achieve their desired finding of navigability,  
2 they must show, by a preponderance of the evidence, that the Verde River was used or was  
3 susceptible to being used as a “highway for commerce” on February 14, 1912. Faced with this  
4 landslide of evidence, Proponents have the difficult task of trying to discredit the evidence  
5 presented by the other side and also attempt mount their own case so as to meet their burden  
6 of proof. They have failed in that effort.

7  
8 **A. No evidence exists in the record to support a finding that the Verde River  
was ever actually used as a “highway for commerce.”**

9 Proponents take the historical evidence and, in an attempt to meet their burden of  
10 proof, stretch the evidence of actual navigation on the river. A review of the record shows,  
11 however, no evidence of a multitude of boats on the Verde River at or before statehood. The  
12 best evidence that the SLD’s consultant could muster was a set of anecdotal accounts of eight  
13 boating attempts over the course of thirty years.<sup>5</sup> The record does not support the existence of  
14 more than a handful of boats in central Arizona over the entire period from 1873-1903. See  
15 SRP Mem., at 5-7 and Appendix A.

16 The accounts that appear in the Fuller Report do not support Proponents’ theory that  
17 the Verde River was a “highway for commerce.” One of the few historic boating accounts—  
18 upon which Proponents rely in arguing that the Verde River is “navigable”—is based wholly  
19 on supposition. Proponents cite as evidence the account in which a historian describes a  
20 newspaper article about floating logs or timber down the Verde River that he once recalled  
21 reading. See DOW Mem., at 13; SLD Mem., at 13. Yet, the article was never located, and  
22 there simply is no evidence in the record that logs were ever floated on the Verde River. See  
23 SRP Mem., at 6. Two other accounts that Proponents cite merely show that soldiers and  
24 civilians near Camp Verde had a boat that was used to reach the other side of the river during  
25 periods of seasonal high flow. See DOW Mem., at 13; SLD Mem., at 12. The record only  
26

27 <sup>5</sup> See Fuller, et al., Arizona Stream Navigability Study for the Verde River, Salt River Confluence to  
Sullivan Lake (June 2003) (EI 31) (“Fuller Report”).

1 shows that the river was crossed under exceptional circumstances, but does not establish that  
2 travel occurred either upstream or downstream. The other handful accounts of historic  
3 boating on the river do not indicate that the river provided a reliable “highway” for trade and  
4 travel. That Proponents were forced to rely upon such speculative and unreliable evidence, in  
5 itself, speaks volumes about the state of the record with respect to the navigability of the  
6 Verde River.

7 These scattered accounts do not meet Proponents’ burden of proof. The few accounts  
8 of attempted boating on the Verde River in the years leading up to statehood are isolated and  
9 sporadic. This small number of accounts did not and cannot transform the river into a  
10 “highway for commerce.”

11 **B. Proponents’ reliance upon modern recreational boating does not**  
12 **demonstrate that the Verde River was susceptible to navigation at**  
13 **statehood.**

14 Proponents argue that the Verde River is navigable because it was susceptible to being  
15 used as a “highway for commerce.” Yet, the evidence of modern recreational boating  
16 presented to the Commission does not prove navigability of the Verde River, especially when  
17 compared to the hydrologic and geomorphologic data.

18 Evidence of modern boating does not present conclusive evidence that the river was  
19 susceptible to navigation. The testimony of Mr. John Colby, Mr. David Weedman, and Mr.  
20 Jim Slingluff does not further the Proponents’ case. Taken together, their testimony  
21 demonstrates that, at best, the river is able to support some boating in lightweight, modern  
22 craft at certain limited times of some years. See SRP Mem., at 14-18. Moreover, the  
23 testimony offered by Mr. Slingluff demonstrates the natural impediments to modern boating  
24 along the course of the river would have precluded the river from serving as a “highway for  
25 commerce” for the boats available around the time of statehood. As illustrated by Mr.  
26 Slingluff’s testimony before the Commission and the slides he offered into evidence, rock  
27 outcrops, boulders, and rapids are naturally occurring along the river. Id. at 15. Even

1 experienced boaters, such as Mr. Slingluff, in modern state-of-the-art equipment can have  
2 substantial difficulties boating many stretches of the Verde River today. Id.

3 Although there is limited evidence of modern recreational boating, the Commission  
4 should still find the Verde River “non-navigable.” Watercourses have been held “non-  
5 navigable,” even where there is evidence that boating has occurred at certain times. See  
6 Section I(B), supra; SRP Mem., at 17-18. Furthermore, data presented on the hydrologic and  
7 geomorphic characteristics of the Verde River contradicts the assertions by Proponents that  
8 the river was susceptible to navigation. Discharge rates are insufficient to have supported  
9 navigation. The average annual streamflow ranges from 42 to 781 cfs at various gauges along  
10 the Verde River. See Fuller Report, supra, at 7-10. Braided rivers, such as the Verde River,  
11 are generally wide, shallow, and steep. See Schumm, Geomorphic Character of the Verde  
12 River, at 14 (December 2004) (EI 30). The lower Verde River flows over shallow or exposed  
13 bedrock. Id. at 8. Overall, these conditions demonstrate that the Verde River is not conducive  
14 to navigation.

15 **C. DOW’s attack on Dr. Littlefield is unfounded.**

16 Although those who favor a finding of non-navigability could have prevailed merely by  
17 showing that Proponents have failed to carry their burden of proof and did not necessarily  
18 need to submit evidence of non-navigability, they did so anyway. SRP presented, among  
19 other things, direct live testimony by Dr. Douglas Littlefield, who also submitted an expert  
20 report to the Commission.<sup>6</sup> DOW’s arguments fail to rebut this evidence and, instead, they  
21 ask the Commission to simply disregard the facts.

22 DOW contends that Dr. Littlefield’s report and testimony “failed to apply the  
23 appropriate legal standard.” DOW Mem., at 15. Dr. Littlefield’s report was never intended or  
24 portrayed to be the conclusive determining factor with respect to navigability. That report is  
25 what it purports to be—a thorough analysis of historical evidence regarding contemporaneous  
26

27 <sup>6</sup> See Littlefield, Assessment of the Navigability of the Verde River’s Navigability Prior to and on the  
Date of Arizona’s Statehood, February 14, 1912 (July 7, 2005) (EI 32).

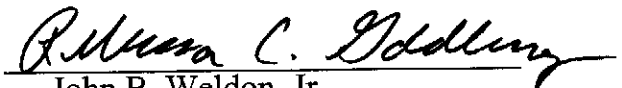
1 observations of whether the river was navigable. Dr. Littlefield did not attempt to opine, and  
2 did not say he was attempting to opine, about the nuances of the hundreds of federal and state  
3 court decisions regarding the "equal footing" and "public trust" doctrines. Dr. Littlefield's  
4 testimony and report are relevant, therefore, to the treatment of Verde River by those familiar  
5 with the river at, and prior to, statehood. Evidence of federal surveys and patents is  
6 persuasive evidence that the Verde River is "non-navigable."

7 **III. Summary and Requested Action**

8 Proponents have not satisfied their burden of showing that the Verde River was  
9 "navigable" at statehood or ever has been "navigable" as defined in A.R.S. § 37-1101. SRP  
10 requests that the Commission find the Verde River "non-navigable."

11 DATED this 11<sup>th</sup> day of April, 2006.

12 SALMON, LEWIS & WELDON, P.L.C.

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