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DEPARTMENT OF
WATER RESOURCES

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BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF THE WATER RIGHTS OF: MICHAEL BEER AND LORI BEER AND WATER RIGHT NO. 29-13740	Docket No. CM-DC-2021-001 **LRPOA'S POST-HEARING MEMORANDUM**

COMES NOW, Respondent LAVA RANCH PROPERTY OWNERS ASSOCIATION, INC. ("LRPOA" or "Association"), by and through its counsel of record, BARKER ROSHOLT & SIMPSON LLP, and hereby submits the following post-hearing memorandum in this matter.

ARGUMENT

This case concerns a delivery call filed by Petitioners Mike and Lori Beer ("Beers") pursuant to Rule 30 of the Department's Conjunctive Management Rules, IDAPA 37.03.11 et seq. ("CM Rules"). The call involves a remote area within Basin 29 that is not located within any organized water district, groundwater management area, or other administrative area regulated by IDWR. The Association does not hold a water right license or decree for its Upper Well and instead relies upon a statutory exemption for certain de-minimus domestic water use made by its members.

The Beers have proposed water right administration within a limited "area of common ground water supply" that apparently would only affect three groundwater wells in the subdivision, including the Association's Upper Well. *See Amended Petition* at Ex. A.[1] As explained below, the Hearing Officer should deny the Beers' delivery call for several reasons. First, since the Association's beneficial use water right has not been claimed or decreed in the Snake River Basin Adjudication (SRBA), there is no legal basis for IDWR to proceed with conjunctive administration at this time. Second, the Beers have not carried their burden of proof to establish a hydraulic connection between the spring and the Upper Well. Third, the Beers have failed to produce sufficient technical information required for IDWR to determine an ACGWS, a required "pre-condition" for conjunctive administration. Finally, and in the alternative, the Beers' water right is not being materially injured and certain policy considerations warrant denial of their delivery call as against the Association's de-minimus domestic use from its Upper Well.

For these reasons the Association requests that the Hearing Officer deny the Beers' delivery call accordingly.

I. IDWR Does Not Have Jurisdiction to Define the Elements of the Association's De-Minimus Domestic Beneficial Use Water Right.

This case presents a unique and unprecedented proceeding where a couple holding a domestic water right license seeks to curtail an exempt de-minimus domestic water use that benefits hundreds who do not have their own water supplies. As set forth below, there are threshold jurisdictional issues that the Hearing Officer must take into account given the agency's recent determination that LRPOA must have a "beneficial use" claim water right. While the

[1] The proposed ACGWS includes the Association's Upper Well, Well #13 (Tobias), and Well #14 (Gest). *See* Ex. 506, Fig. A-1, and attached well logs.

Association reserves all rights with respect to the Hearing Officer's interlocutory decision denying the motion to dismiss, the status with the SRBA Court provides an alternative means to deny the Beers' delivery call at this time. The fact that the SRBA Court has not decreed the Association's beneficial use water right, and the Court has not authorized interim administration in this area, prohibit IDWR from curtailing the Association's de-minimus domestic water use.

The Association is relying upon Idaho's express domestic exemption for use of the Upper Well for the benefit of its members. *See* I.C. §§ 42-227; 42-111(b). The Upper Well was drilled for the Association's use in September 1977. *See* Ex. 24. In the interlocutory order entitled *Order Denying Motion to Dismiss*, the Hearing Officer concluded that the "withdrawal and domestic use of ground water creates a beneficial use water right." *Sept. 8th Order* at 3.[2] The elements of a domestic beneficial use water right, including the priority date, can only be determined by the Snake River Basin Adjudication (SRBA) District Court. *See* I.C. §§ 42-1409(1)(d); 42-1411(2)(d). Despite entry of the *Final Unified Decree* in 2014, the SRBA Court retained jurisdiction to adjudicate any deferred de-minimus domestic and stockwater right claims. *See Final Unified Decree* at 13, ¶ 17 (Aug. 26, 2014).

The Association has not filed a de-minimus domestic water right claim in the SRBA. The SRBA Court procedures for filing such claims are outlined in its 2012 Order. *See Order Governing Procedures et al.* (June 28, 2012). Such domestic claims were allowed to be deferred pursuant to the Court's prior January 17, 1989 order and Administrative Order No. 10 dated March 22, 1995. The SRBA Court has not yet ordered claimants to file such claims by a date certain. Recently, the United States attempted to force the Court to set a deadline for the filing of such claims. *See U.S. Motion* (Subcase No. 00-92095; November 15, 2021). The United States,

[2] The Association reserves all rights with respect to this interlocutory order, including the right to appeal the determinations made therein if necessary.

State of Idaho, and others have participated in settlement negotiations over this issue and the moderator recently submitted a report to the Presiding Judge. *See Settlement Moderator's Report* at 2 (Subcase No. 00-92095; Oct. 24, 2022) (Special Master Booth reporting the parties' agreement to stay proceedings). In response to that report the Presiding Judge recently issued an order staying all litigation on the United States' motion until December 31, 2023. *See Stay Order / Order Setting Status Conference* (Subcase No. 00-92095; Nov. 8, 2022).

Given the current procedural stage in the SRBA, the Association is not required to file a de-minimus domestic beneficial use water right claim by a date certain. As such, the elements of its water use, including the priority date, have yet to be adjudicated. IDWR has no authority to adjudicate and determine water right elements for water rights subject to the Snake River Basin general stream adjudication. *See* I.C. § 42-1406A; *See also, Walker v. Big Lost River Irr. Dist.*, 124 Idaho 78 (1993). Consequently, IDWR cannot administer or curtail LRPOA's de-minimus domestic water right use where the priority date has yet to be determined by the SRBA Court.

Furthermore, the SRBA Court has not authorized interim administration of groundwater in this remote area of Basin 29. *See Order Granting State of Idaho's Motion for Order of Interim Administration of Water Rights in a Portion of Administrative Basin 29* (Subcase No. 92-00021, Oct. 31, 2003) (only authorizing administration in area of Basin 29 including ESPA). Until a motion is filed and the SRBA Court issues an order granting such administration, IDWR cannot administer or curtail LRPOA's groundwater use for the benefit of other water rights, including the Beers' water right license 29-13740. *See* I.C. § 42-1417.

Finally, where the evidence indicates the Association's first withdrawal and use occurred in September 1977 (Ex. 24), decades prior to the Beers' licensed water right priority (5/8/2006) (Ex. 501), LRPOA's water right would be senior in priority and not subject to curtailment

anyway.[3] *See* I.C. § 42-106 ("as between appropriators, the first in time is first in right"). If the SRBA Court ultimately determines that the LRPOA Upper Well has a senior priority, the Beers' delivery call would not be effective as against that use.

In sum, the Association submits that until the SRBA Court determines the elements of its de-minimus domestic water use, and further authorizes interim administration of groundwater rights in this area Basin 29, IDWR has no jurisdiction to conjunctively administer the Upper Well. Therefore, IDWR should deny and dismiss the Beers' delivery call as a matter of law.

II. The Beers Failed to Establish a Hydraulic Connection Required for Conjunctive Administration.

Alternatively, in the event the Hearing Officer concludes that IDWR does have jurisdiction to proceed with conjunctive administration, the following procedures and standards apply and are dispositive as to the Beers' delivery call.

First, since the Association does not have a decreed water right from the SRBA Court, the "connected sources" general provision for Basin 29 does not apply. Hence, the Beers carried the burden to show, by a preponderance of the evidence, that the spring source of their water right is hydraulically connected to the groundwater source supplying the Association's Upper Well. *See Moe v. Harger*, 10 Idaho 302, 77 P. 645, 647 (1904); *Independent Irr. Co. v. Baldwin*, 43 Idaho 371, 252 P. 489, 491 (1926) ("It is clear that it was not the official duty of respondents [IDWR] to deprive appellants of the right to the use of the waters of Scott slough in the absence of proof that Scott slough was a tributary of Snake river") (emphasis added); *Order on Plaintiffs' Motion for Summary Judgment* at 94 (Fifth Jud. Dist., Gooding County Dist. Ct., Case No. CV-2005-600) (June 2, 2006).

[3] LRPOA Board member Adrienne Buckley testified that the Upper Well was one of a number of wells drilled for the Association's benefit at the early stages of the subdivision's development. *Buckley Test.* 0:41.

In his seminal article on conjunctive administration, Professor Douglas L. Grant explained the following regarding the applicable burden of proof:

> Generally, however, the senior appropriator has the burden of proving interference by the junior when the crucial issue was whether any hydrologic connection existed between the sources of supply for the two water rights. In contrast, the junior appropriator had the burden of proof when hydrologic connection between the sources of supply was clear (e.g., the senior was on a stream and the junior was on a visibly connected creek) . . . In terms of the previously listed factors affecting allocation of the burden of proof, when a senior appropriator seeks to enjoin a junior diversion, the senior – the person seeking judicial intervention to change an existing situation – must prove the water sources for the two diversions are connected.

Douglas L. Grant, *The Complexities of Managing Hydrologically Connected Surface and Groundwater Under the Appropriation Doctrine*, 22 Land & Water L. Rev. 1, at 92 (1987) (emphasis added).

The Beers failed to carry their burden of proving connected water sources at hearing. As to hydraulic connection between the groundwater source and the spring, the only qualified experts that provided testimony and evidence on this issue were Mike McVay (IDWR) and Dr. Erick Powell (LRPOA expert witness).[4] In his December 7, 2021 report, Mr. McVay concluded that "identification of a definite connection between the spring and the well cannot be made." Ex. 516 at 13. Mr. McVay confirmed this opinion in his October 3, 2022 report and further identified several factors that confounded the definite connection. Ex. 519 at 11. Mr. McVay also listed several recommendations that would assist in making that determination. *See id.* Mr. McVay confirmed he did not know what the spring was connected to at this time as that data is not available. *See McVay Test.* 3:46. Confirming his prior reports, Mr. McVay testified that the water sources for the Upper Well and spring could be separate. *See id.* 3:49.

[4] The Beers' conjectural evidence regarding the alleged Upper Well power records and limited spring flow measurements from 2019-2021 does not prove a hydraulic connection. *See* Ex. 506 at 9, 13; Ex. 519 at 10-11; Ex. 2 at 3 ("there is no definitive conclusion that can be made by these graphs that the spring decline is a result of power use"). The Beers' analysis of LRPOA power records fails to take into account that the reported power use included the Upper Well pump, the pump at the High County tanks, and the pump at the Lower Well (pavilion). *Buckley Test.* at 1:02-05. Power use from the High County Tanks or Lower Well would not equate to pumping at the Upper

The Association's expert, Dr. Erick Powell, concurred with Mr. McVay's findings and stated he had "not seen any definitive scientific evidence that concludes that the Lot 182 spring is hydraulically connected to the LRPOA well." Ex. 2 at 10. Dr. Powell also agreed with Mr. McVay's conclusions about the lack of evidence of hydraulic connection at hearing. *Powell Test.* 4:44-45.

Without proof of a certain hydraulic connection, there is no basis for IDWR's conjunctive administration of the Beers' water right together with Association's exempt domestic use from the Upper Well. As such, since the Beers failed to carry their burden of proof on the issue of hydraulic connection the Hearing Officer should deny their delivery call accordingly.

III. Since There is No Definitive Evidence of an Area of Common Ground Water Supply the Beers' Delivery Call Should be Denied.

The area subject to the Beers' delivery call is not within an organized water district or a groundwater management area. Consequently, IDWR may consider the call to be a petition for designation of the GWMA. *See* CM Rule 30.06. Determining an "area of common ground water supply" (ACGWS) is "critical in a surface to ground water call" as its "boundary defines the world of water users whose rights may be affected by the call." *See Memorandum Decision and Order* at 9 (Fourth Jud. Dist., Ada County Dist. Ct., Case No. CV-WA-2015014500; Apr. 22, 2016) ("*Sun Valley Order*").

In his *Sun Valley Order*, Judge Wildman further noted that "determining the applicable area of common ground water supply is the single most important factor relevant to the proper and orderly processing of a call involving the conjunctive management of surface and ground water." *Id.* (emphasis added)*; see also*, *Memorandum Decision and Order* at 11 (Fifth Jud. Dist., Blaine County Dist. Ct., Case No. CV07-21-243; Feb. 10, 2022) ("The Court held that the

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Well. LRPOA provided power records to IDWR in the summer of 2021 (these documents are part of the record).

establishment of an area of common ground water supply is a necessary pre-condition to conjunctive administration of interconnected ground and surface water rights under the plain language of the CM Rules").

The CM Rules "govern the distribution of water from ground water sources and areas having a common ground water supply." CM rule 20.01 (emphasis added). The determination of an area of common ground supply is a threshold prerequisite for conjunctive administration. In light of the lack of technical data for a properly characterized aquifer, IDWR cannot lawfully designate an ACGWS in this case.

Designation of an "area of common ground water supply" (ACGWS) is governed by Rule 31. The Director is authorized to consider all available data and information, including "testimony and opinion of expert witnesses" related to designation of a GWMA. *See* CM Rule 31.01 and .02. A ground water source will be determined to be an ACGWS if "the ground water source supplies water to or receives water from a surface water source; or diversion and use of water from the ground water source will cause water to move from the surface water source to the ground water source." CM Rule 31.03.a; b. The Beers identified a proposed "area of common ground water supply" based upon a general topographic description only, not based upon documented groundwater hydrology. *See Amended Petition* at 3, Ex. A; *M. Beer Test.* 3:00. Such a failure is fatal to their case as the alleged boundary is not based upon the scope of any defined aquifer and no qualified witness provided testimony in support of this proposed area.[5]

[5] Mike McVay testified that Mr. Beer was not qualified to offer an opinion on a technical "area of common ground water supply" in this case. *See McVay Test.* 3:47. Mr. Beer further admitted he has had no formal training on these pertinent technical subjects and was not offering an expert opinion in this case. *See M. Beer Test.* 1:36-1:38.

Notably, IDWR's witness Mike McVay confirmed that he did not know what an ACGWS would be and was not asked to define or review an ACGWS in this case. *See McVay Test.* 3:45. Mr. McVay testified that the fractured rock aquifer holds less water and that he didn't know what type of aquifer the Upper Well was located in. *See id.* 3:48-49. Dr. Powell similarly could not render an opinion on an ACGWS as there is "insufficient data" to make that determination. *See* Ex. 2 at 10. Although the Beers' submitted limited evidence regarding certain surface flow measurements made from 2019 forward, they did not produce any "water level measurements, studies, reports, computer simulations, pumping tests," or related data that would properly define the scope of a ACGWS in this region.[6] The only common theme from groundwater and spring and surface flow supplies in the area is that they have generally declined over time. *See generally M. Beer Test.*; *G. Haskett Test., Buckley Test., H. Scott Test., J. Patterson Test., T. Bland Test.*, Exs. 20, 23, 24.

Without sufficient data and evidence, IDWR cannot properly designate an ACGWS necessary for conjunctive administration in this matter. The Hearing Officer should deny the Beers' delivery call accordingly.

IV. The Evidence Related to the Beers' Reasonable Beneficial Use under Water Right 29-13740 Demonstrates Their Water Right is Not Materially Injured.

In the event the Hearing Officer finds that the above threshold issues do not preclude conjunctive administration in this case, the delivery call should still be denied since the Beers have failed to demonstrate that the beneficial use of their water right 29-13740 has been materially injured.

[6] The only ground water level measurements from the Upper Well are found in Exs. 17 and 18. If the water level was at 21 ft in 2015 and only dropped to 22.2 ft in 2022, it doesn't follow that the Beers' spring would be flowing high in 2015 and low in 2022. This fact suggests that some other factor is affecting spring flow. *See* Ex. 2 at 9 ("The fact that pumping has not occurred at the LRPOA well for almost a year and the 2022 precipitation data is 'above average', but the Lot 182 spring has not seen the rebound of flow indicates that there is something structurally different about the spring in 2022 then there was in 2020").

The CM Rules provide the basis for "determining the reasonableness" of the water use by seniors and juniors, as well as determining "material injury." CM Rule 20.05; 42. The Idaho Constitution and statutes "do not permit waste and require water to be put to beneficial use." *See IGWA v. IDWR*, 160 Idaho 119, 369 P.3d 897, 909 (2016). Indeed, concepts "like beneficial use, waste, reasonable means of diversion and full economic development require a highly fact driven analysis." *Id.* at 912. The Idaho Supreme Court has held that the "concept that beneficial use acts as a measure and limit upon the extent of a water right is a consistent them in Idaho water law." *See A&B Irr. Dist. v. Spackman*, 155 Idaho 640, 650 (2013). The facts in this case show that the Beers' single household beneficial use is not materially injured by the Association's de-minimus domestic use from the Upper Well.

The Beers own water right 29-13740. Ex. 501. The water right is authorized for 0.04 cfs with a priority date of May 8, 2006. *See id.* The specific "domestic use is for 1 home." *Id.* (condition #2 on the license). In the *Statement of Completion for Submitting Proof of Beneficial Use*, the Beers confirmed their sole water use was for 1 domestic household, and that they did not use the water for irrigation, stockwater, or any other purposes.[7] *Compare with M. Beer Test.* 1:59-2:00 (describing how water from the cistern overflow apparently irrigates a small wetland area for aesthetic purposes). Mike Beer confirmed the licensed water right use at hearing, however he did note that they hand water certain plants and trees on the property with a five-gallon bucket, perhaps once a week. *M. Beer Test.* 1:56. The Beers do not hold a water right to the spring for any other purpose.

[7] The signed statement of completion dated May 4, 2008 is contained in IDWR's water right backfile for 29-13740. IDWR's water right file is part of the record in this proceeding. Despite Mr. Beer's testimony at hearing about "water sinking on the property," such a use was not identified as a beneficial use at the time the Beers submitted their proof to IDWR in 2008. *Compare Statement of Completion with M. Beer Test.* 2:00. It appears Mr. Beer was

The Beers have a 1,500 gallon cistern that receives water from the spring which is then pumped to their cabin for in-house domestic use. Ex. 503 at 6. At hearing, Mike Beer testified that the Beers' actual beneficial use is about 80 gallons per day per person (approximately 160 gallons total for the two of them). *M. Beer Test.* 1:54. Accordingly, the Beers have the ability to store nearly a 10-day supply of domestic water in the cistern (without any refill). Mr. Beer testified that they have not emptied the cistern over the course of three days. *See id.* 1:56. However, when water is pumped and used from the cistern, it automatically refills by gravity from the spring. *See id*.

Critically, for purposes of this case, Mr. Beer testified that the spring has always met their instantaneous water use needs. *See id.* 3:15. Mr. Beer confirmed that they can receive less water than their licensed quantity and still meet their daily beneficial use needs. *See id.* 2:57. As such, the Beers' water right has not been materially injured by any other water use, including by limited pumping from the Association's Upper Well.

Although the Beers contend their spring supply has declined seasonally and over time, that is a common experience as testified to by other landowners and water users in the subdivision, including seasonal variability for both wells and springs. *See* Ex. 20 (Scott Letter); Ex. 23 (Patterson Letter); Ex. 24 (Forgeon Letter); *Buckley Test.* 1:10; *Patterson Test.* 1:43; *Bland Test.* 1:53-54; *H. Scott Test.* 2:28-29; *M. Scott Test.* 2:35-36. Whereas drought conditions result from decreased precipitation, it is not surprising that water supplies in the subdivision will vary from year to year and even within a year. *See* Ex. 506 at 11, Fig. 8 (SPI 2000-2021).

Notably, although the spring flow hit a low point in July during the 2021 drought, the Beers were still able to receive sufficient water to meet their actual beneficial use given the storage benefit of their 1,500 gallon cistern. *M. Beer Test.* 3:15. This was even during a time

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confused about the "sinks" listed as a tributary on the source element of the license.

when the Association was restricted to solely using 2,500 gallons per day from the Upper Well for the entire subdivision. Ex. 15; *Bland Test.* 2:06-08, 2:11.

Finally, the Beers own a cabin within the Lava Ranch subdivision and have the benefits of membership in the Association. The Beers, as landowners in the subdivision, have the ability to supplement their water needs from the Association's wells as needed. *See* CM Rule 42.h. Although the evidence shows there is sufficient water from the spring water source to meet their daily beneficial use requirements, the Beers may still draw additional water from the Association's wells to fill their needs on a given day if they so choose.

In sum, the evidence in this case demonstrates that the Beers' actual beneficial use is being met with the existing water supplies and they are not suffering material injury to their water right.

V. The Association's Upper Well / Policy Consideration of Use.

The Association invested in improvements to its Upper Well for the benefit of its landowners in 2015-16. *Buckley Test.* 0:39-0:42; Exs. 11-13. The well is conveniently located in the middle of the subdivision and provides a water supply for owners located on the south and east side. Exs. 3, 19; *Buckley Test.* 1:07-08; *Bland Test.* 2:21. Pursuant to a survey conducted by the Association in 2021, approximately 89 lots relied upon using water from the Upper Well. Ex. 16. Ms. Buckley has witnessed landowners filling water from the Upper Well tanks and members of the Association have communicated the need to use the Upper Well for a water supply. *Buckley Test.* 0:59. Tom Bland also testified that he has witnessed members filling tanks from the Upper Well. *Bland Test.* 2:12-13. Even lot owners with their own wells have used water from the Association's wells too. *Buckley Test.* 0:58. In addition, the well provides a water supply in case of a fire on the subdivision. *See id.* 1:36. Finally, hauling water solely from

the Lower Well causes damage to the subdivision roads. *Buckley Test.* 1:36; *Bland Test.* 2:23-25.

The water supply in the Upper Well appears to be stable as evidenced by ground water level measurements from the summer of 2015 (21 ft.) and fall of 2022 (22.2 ft.). Exs. 17, 18. Dr. Powell testified that such conditions are not indicative of a depleted aquifer, or one that has been mined. *Powell Test.* 6:02-04. The well historically pumped up to 5 gallons per minute. Ex. 17. In 2021, IDWR measured the well to pump 3.3 gallons per minute. Ex. 15 at 2. The well system includes two 1,700 gallon tanks and its current operation and use is identified in Ex. 14. It takes about 15 hours to fill the tanks. *Buckley Test.* 0:54. Providing water to multiple lot owners through a single source is certainly more efficient that having hundreds more individual wells drilled throughout the subdivision. As a matter of public policy, IDWR should encourage, not curtail such use in this circumstance.

Moreover, there is evidence that the Lower Well has experienced issues with supplying all of the lot owners' needs when the Upper Well was temporarily shut down in 2021, including pumping dirty water. *Bland Test.* 2:13-14. Using the Upper Well helps spread the demand of the Association's members and ensures a backup supply in case the Lower Well has issues again in the future. *Id.* Given this evidence, it is clear that the Association has a need to use the Upper Well for the benefit of its landowners. Further, the Association can limit the Upper Well to the exempt domestic use of 2,500 gallons per day or less. The above evidence shows that the water supply from the Upper Well is an important source for the Association's members' basic in-house water needs. Where numerous lot owners do not have their own well, the Upper Well provides vital water for use and enjoyment of their respective properties.

Denying or dismissing the Beers' delivery call in this regard is consistent with state policy to make the maximum and best use of available water resources. *See IGWA v. IDWR*, 160 Idaho 119, 369 P.3d 897, 909 (2016) ("The policy of beneficial use serving as a limit on the prior appropriation doctrine dovetails with the prescription in CMR 20.03 that '[a]n appropriator is not entitled to command the entirety of large volumes of water in a surface or ground water source to support his appropriation contrary to the public policy of reasonable use of water.'"). Curtailing a de-minimis exempt domestic use that is beneficial to hundreds of people in favor of a spring use for two people is not reasonable or good policy in this unique instance.

CONCLUSION

In this case, the Upper Well helps supply water to hundreds of lot owners that do not otherwise have access to water. It is clearly a health and safety issue for landowners to have access to water to make use of their property. The Beers are likewise entitled to use this water if needed. Curtailing the Association's de-minimus domestic use from the Upper Well would conflict with the concepts of reasonable beneficial use under Idaho law.

Based upon the evidence and arguments identified above, the Association respectfully requests the Hearing Officer to deny the Beers' water delivery call.

Dated this 18th day of November, 2022.

BARKER ROSHOLT & SIMPSON LLP

Travis L. Thompson

Attorneys for Lava Ranch Property Owners Assn.

CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of November, 2022, I served a true and correct copy of the foregoing LRPOA'S POST-HEARING MEMORANDUM:

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