

January 6, 2023

From: Irene Gilbert

To: Honorable Judge Mellgrin:

Re: Your request to hear from individuals with Appeals to the Oregon Supreme Court regarding the impacts of appeals on the Boardman to Hemingway Transmission Line request for a Certificate of Public Convenience.

I am a Pro Se Petitioner appealing to the Oregon Supreme Court regarding the impacts to the Oregon Trail resources along the route of the Transmission Line. I am attaching a copy of my Opening Brief for your review since it includes multiple issues regarding this transmission line which impact the timing of the issuance of a Certificate of Public Convenience prior to the decision from the Oregon Supreme Court. In the event the courts support any of the arguments, the Site Certificate would be remanded to the Council to process and Amendment to the Site Certificate to address the issue. They include:

1. The public was not allowed to participate in review of the level of impact and whether or not the suggested mitigation would provide adequate mitigation to address those impacts as required by the Counsel in the Project Order. The Project Order requires missing information regarding Oregon Trail impacts to be reviewed as an amendment to the Site Certificate which incorporates public involvement into the process. Delegation of the decision to the Oregon Department of Energy excludes the public from participation in the identification and mitigation of impacts which is required to issue a site certificate. I
2. The currently issued Site Certificate fails to include documentation that the Historic Properties standard is met which fails the test of requiring the file to contain a preponderance of evidence that each standard is met due to the delegation of the identification and determination regarding the historic properties standard to some future date.

3. The Oregon Statutes require the decision regarding compliance with standards to be made by the Council prior to issuing a Site Certificate. This decision was delegated to the Oregon Department of Energy.
4. The Site Certificate fails to comply with the Standard Requiring identification and mitigation for indirect impacts to Oregon Trail Resources not eligible for listing in the National Register of Historic Properties (NRHP) OAR 345-22-0090(b) and (c).

#### ADDITIONAL ISSUES IN THE APPEAL WHICH IMPACT THE ISSUANCE OF A CERTIFICATE OF PUBLIC CONVENIENCE

5. Plans to delay completion of the required The Historic Properties Management Plan until after the plans required by the federal Programmatic Agreement Plans are complete means that there will be no completion of this requirement to issue a Site Certificate for an undetermined amount of time which could be months or years.
6. The Site Certificate allows Idaho Power to construct segments of the transmission line when they do not have rights to construct other segments which are lacking information regarding impacts and whether mitigation for Oregon Trail Resources is possible under EFSC rules. This can potentially leaving sections of the transmission line isolated and unusable due to an inability to connect them to the remainder of the proposed line. It removed the mandatory requirement that the developer show that they would construct and use a segment of the transmission line even if other sections of the line were not approved. This change was not identified as “substantial” and only appears as a footnote in the Site Certificate. This change in the Mandatory Condition was not made under the ORS 183 requirements for changing the rule.

In the event that any of these issues related to impacts to Oregon Trail Resources are supported by the courts, construction cannot begin. Depending upon the requirement to address the issue, it would likely require the start of an Amendment Process that would extend for months or years given the substantial number of objections from the public due to the impacts on these resources.

Currently if Idaho Power is granted a Certificate of Public Convenience and Necessity, private landowners who have their land condemned will have

remnants of the Oregon Trail Ruts, Pioneer Cemeteries, Campgrounds and other Oregon Trail Resources that have not been designated as official Historic Sites left with no protection other than that Idaho Power cannot place a Transmission Line Structure Directly on top of the resources destroying them completely.

A related issue which will result in similar processes and which support the fact that it is premature for the Public Utility Commission to issue a Certificate of Public Convenience is as follows:

Idaho Power has submitted an Amendment to the Site Certificate to add just under 1,000 acres of new area to the site. This area is almost exclusively composed of roads which create multiple concerns regarding impacts on wildlife, resources, noxious weeds and a host of additional issues. and also includes changes to sections of the transmission line. The review includes the opportunity for the public to request contested cases and appeal to the Oregon Supreme Court regarding the new impacts that will occur due to these areas being added to the site. None of this area was included in the area Idaho Power indicated would be covered by a Certificate of Public Convenience and it adds a significant number of concerns regarding the impacts these changes will create for citizens and resources of the state. Given that Idaho Power currently employs 6 attorneys representing them and pays for two additional attorneys to represent the Oregon Department of Energy in arguing their cases, the ratepayers in Oregon should be able to hear the cha ching, cha ching of Idaho Power spending their money throughout this state. It makes one wonder if Idaho Power has any concern regarding their fiscal responsibility when the public is paying the bills.

#### CONCLUSION:

Idaho Power was premature in requesting that a Certificate of Public Convenience be issued prior to knowing the outcome of Appeals and completion of the necessary Management Plans to determine if the project meets the eligibility requirements of the EFSC standards and prior to establishing what the costs and impacts will be based upon the actual route and site boundary. Providing a Certificate of Public Convenience and Necessity would allow Idaho Power to condemn private land without knowing if the line can actually be constructed as proposed.

Respectfully Submitted for your consideration,

Irene Gilbert

Pro Se Petitioner, Oregon Supreme Court Appeal

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Attached: --Copy of my Appellant Brief to Oregon Supreme Court

**IN THE SUPREME COURT OF THE STATE OF OREGON**

In the Matter of the Application for Site  
Certificate for the Boardman to  
Hemingway Transmission Line

IRENE GILBERT

*Petitioner*

v.

OREGON DEPARTMENT OF ENERGY,  
OREGON ENERGY FACILITY SITING  
COUNCIL, and IDAHO POWER  
COMPANY

*Respondents*

Energy Facility Siting Council

OAH Case No. 2019-ABC-02833

Supreme Court No. S069924

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**OPENING BRIEF**

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To the Justices of Oregon Supreme Court:

Petitioner, IRENE GILBERT, unrepresented Pro Se, provides the following arguments regarding the above-captioned case:

**APPEAL TO OREGON SUPREME COURT**

**INTRODUCTION**

I participated in the contested cases before the Oregon Energy Facility Siting Council as a limited party for the issues included in this appeal. I appeared as Co-Chairman of STOP B2H, representative of the public interest, and to represent my personal interest and concern for the impacts of this proposed development.

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This document addresses appeals regarding three issues before the court. Each is presented in a separate section of this document with one table of references since many of the statutes and rules apply to more than one issue. I also included copies of some of the more significant references. The basis for the appeal are included after the Issue Statement.

I had intended to present arguments on additional Site Certificate issues, however, I was unable to access the Contested Case Record. After calling the Court Clerk yesterday, I found that I was not required to use the Oregon Department of Energy (ODOE) Bate Stamp files. I was then able to identify references supporting my arguments, however, did not have time to develop additional concerns. I would like to draw your attention to some things that I found to be of concern regarding the processes that were used in the Contested Case procedures: (1) All requests for Summary Determination from Idaho Power and ODOE were approved and the cases were denied access to a Contested Case process. (2) All citizen requests to require Discovery from Idaho Power and ODOE were denied. (3) All citizen requested Site Certificate Conditions were Denied. (4) Oregon Department of Energy was allowed to develop the Statements of the Contested Case Issues resulting in narrowing of issues and (4) Petitioners were required to use the referencing methods developed by ODOE rather than standard referencing

in spite of multiple requests to use standard referencing and notices that the files provided for Petitioners use had multiple “glices”.

I have reverted to standard referencing for this document per the Court Clerk and the fact that I have been unable to access the court records submitted by ODOE due to the sizes of the files and lack of a table of contents that is readable and takes me to the documents.

## CONTESTED CASE REGARDING OREGON TRAIL RESOURCES

“Whether Historic, Cultural and Archaeological Resources Condition 1 (HPMP) related to mitigation for crossings of Oregon Trail Resources provides adequate mitigation for visual impacts and sufficient detail to allow for public participation.”

## BACKGROUND

Oregon Statutes establish the importance of Oregon Trail Resources to the state as a major tourist attraction (ORS 358.055). The statutes also establish the need to both recognize the value of these trails (ORS 358.057) and require the state to preserve and protect them due to them being finite, irreplaceable and nonrenewable(ORS 358.910) The Project Order states that all requirements of the Historic, Cultural and Archaeological Resources standard apply. (Second Amended Project Order 2018-07-26 Page 21, Lines 1-6) The Energy Facility

Siting Council agreed to allow the developer to delay providing information Regarding Oregon Trail resources, impacts and mitigation for resources located on private land **where landowners denied the developer access.** Information regarding these resources was to be **provided by an amendment** after site certificate was issued but before the start of construction. Information required to address visual impacts to locations that could be accessed was to be included in the submitted application including identifying the resources present, the site specific impacts, planned mitigation, and all paragraphs of the Historic, Cultural and Archaeological Resources standard apply to this development. Second Amended Project Order 2018-07-26, Page 21 Lines 1-7, Lines 17-19, and Lines 23-26; a Page 28, Lines 19-25). This required information was not included in the application, draft Historic Properties Plan or site certificate.( Final Order on the ASC for the Boardman to Hemingway Transmission Line, September 27, 2022, Page 497 Lines 7-14) ; (Marbet v. Portland General Electric, 277 Or 447, 561 P2d 154 (1977))

**ERROR ONE:**

1. The statement of my contested case limited the scope of my arguments beyond my accepted issue. (DLCD v Curry County, 33 Or LUBA 728 (1997) (DLCD v Tillamook Co., 34 Or LUBA 586 (1998)) My accepted contested case language included:



”I am requesting party status and a contested case regarding the fact that the proposed mitigation listed on Page 463 of the proposed order fails to provide mitigation for damages to an irreplaceable public resource that are consistent with the visual damages the plan is supposed to provide mitigation for and the fact that the mitigation plan has not been completed to the extent that the public is able to participate in the plan. The plan fails to identify what mitigation is proposed for what site and where that mitigation activity will be occurring and fails to provide clear and objective methods that will address the actual impacts at the site.....”

**ERROR TWO:**

ORS 469.401(1)469.405(1),ORS 469.370(7), OAR 345-021-0010 (dd)(2) EFSC issued a site certificate lacking required documentation of eligibility. Mitigation for impacts (OAR 345-001-0010(33))is not in the record and will not be determined for several years for some Historic Properties due to relying on Section 106 review results. (Jan. 23 & 24 Council meeting Minutes, Pages 14 Last 2 Sentences and Page 15, first 3 lines and third paragraph; Page 16, Middle Paragraph,) ORS 469.503) and (OAR 345-022-0000(1)(a) and (b) require the record to contain a preponderance of evidence showing compliance with Council statutes and rules. Absent the specific information identifying what resources will be impacted, the extent of the negative impacts and how those impacts will be mitigated, the file fails to contain a preponderance of evidence the construction and operation of the

facility, including mitigation are not likely to significantly, as defined in (OAR 345-001-0010(52)) adversely impact Oregon Trail resources listed or likely to be listed on the National Register of Historic Places (OAR 345-022-0090(l)(a) ; or archeological sites located on private land (OAR 345-022-0090(l)(b) or archaeological sites on public land(OAR 345-022-0090(l)(c). Courts have established that mitigation cannot be vague, imprecise, hortatory statements that could not function as legally sufficient conditions of approval. (Sisters Forest Planning Committee v Deschutes Cty. Court of Appeals State of Oregon, March 16, 2005 PAGE NUMBER ) (Gould v Deschutes Cty. 216 Or Ap. 150(2007 PAGE NUMBER) (Scott v City of Jacksonville Or LUBA (Jan. 2010, 2009-107 AGE NUMBER) Table HCA-4b provides a generic listing of the types of mitigation that may be required. (Final Order on the ASC for the Boardman to Hemingway Transmission Line, September 27, 2022, Page 497, ) The Site Certificate fails to address the identification and mitigation of indirect impacts to Oregon Trail Sites OAR 345-022-0090(l)(b) and(c) It only address the requirement that the transmission line not directly damage or destroy them. The Site Certificate includes a statement that resources not likely eligible for NRHP listing are not protected and need no further evaluation. ( Final Order on the ASC for the Boardman to Hemingway Transmission Line, September 27, 2022, Page 477, Lines 23-32).

## ERROR THREE

EFSC is not making the final eligibility determination on this issue.

469.401(1)469.405(1),ORS 469.370(7), Requires the Energy Facility Siting Council (EFSC) to make the final decision regarding eligibility. (Note: This objection is not as a result of EFSC allowing the developer to delay submission of Information until after the site certificate was issued for Historic Properties which are on private property which they were denied access to if they were being addressed through a Site Certificate Amendment as required in the Project Order. It is due to the fact that the developer failed to provide the required information on resource impacts and mitigation for areas which they did have access to in the Application, and delegating the approval of mitigation for all impacts to the Oregon Department of Energy in a way that avoids required public participation in the siting process.) Neither EFSC or the public are required to be included in the decisions regarding whether the mitigation that ODOE requires will result in the development complying with the rule requirements. The public will have no recourse in the event the mitigation required does not protect the Historic Property views being damaged by the project. The information in the site certificate and application regarding impacts fails to identify what the impacts will be at specific properties and the mitigation being proposed to address those impacts. (Jan. 23 & 24 Council meeting Minutes Page 16, First 3 lines of last paragraph.) The final eligibility

decision was delegated to ODOE to occur at a future date after the Site Certificate and Contested Case Process is completed and without public involvement or opportunity to review the decisions.

ODOE will argue in error that they have the authority to make the final eligibility decision under ORS 469.420. This fails to comply with the plain language of the statute and related statutes addressing approval of site certificates. Under ORS 469.300(2) EFSC is the only entity allowed by statute to make the eligibility determination and it must be made prior to the issuance of a site certificate. ORS 469.370(7), 469.(1). ORS 469.405(1) all refer exclusively to “the council” and none to the Department or staff). ORS 469.503 states: “In order to issue a site certificate, the **Energy Facility Siting Council** shall determine that the preponderance of the evidence on the record supports the following conclusions:

The facility complies with the applicable standards adopted by the council pursuant to ORS 469.501. Arguments that ORS 469.402 allows ODOE to make the eligibility decision are without merit and fail to comply with the plain language of ORS 469.402 which states, “If the Energy Facility Siting Council elects to impose conditions **on a site certificate or an amended site certificate**, that require subsequent review and approval of a future action, the council may delegate the future review and approval to the State Department of Energy.....” The language of the statute indicates that there must be a certificate or an amended site certificate

which requires some future action. In order to issue a site certificate the file must contain a preponderance of evidence in the record that the standard is met. In this case, the Historic Properties Plan is the document which is to contain the information regarding impacts and mitigation for the impacts to Oregon Trail Resources necessary to determine whether the Historic Properties standard is being met. This requires the final plan be approved prior to the issuance of a site certificate, not after. This application is also supported by OAR 345-025-0016 which requires completed plans to be approved by council and included in the site certificate. A change in the interpretation of the plain language of this rule would constitute an exceedance of authority which is specifically precluded under *Keiser v Wilke* 588 US \_\_Q019 Kiser US Supreme Court providing that the rule must be ambiguous, decisions cannot be one time decisions which are not being required of other applicants, must be the official determination of those able to make decisions regarding the issue, cannot be a surprise to those impacted. In the case of ORS 469.402, the plain language of the statute and the legislative record show that the interpretation of the rule exceeds the legislative intent for the following reasons: The rule requires the delegation to occur in a site certificate, , so the council would already have had to clear eligibility. If the legislature had intended to include the department in those authorized to determine eligibility they would have adopted changes to statutes specifically requiring EFSC to do so including

ORS 469.504 and ORS 469.503. Attachment 5 to P. Rowe Declaration, Page 14 of 14, Section-by-Section Analysis of A-Engrossed Senate Bill 951, May 12, 1995, discusses the delegation of responsibility for completion of actions to the Oregon Department of Energy. It states: “There has been continuing uncertainty under existing law regarding whether the **EFSC may delegate the approval of the fulfillment of conditions to a site certificate. These reviews commonly require relatively little discretion, or require the expertise of particular state agencies other than the EFSC. Some site certificates contain a relatively large number of these types of conditions,....**” The description of the types of approvals that can be delegated as requiring “little discretion or the expertise of state agencies” clearly indicates that the approvals would not include a complex set of requirements and conditions that must be met to establish eligibility for the Historic Properties standard where decisions must be made regarding the significance of the impacts at given locations, whether the proposed mitigation is adequate given the impacts and whether it will reduce the impacts to a level where they are no longer significant. The delegation of approving the final Historic Properties Management Plan to the department without any Council decision, without any public process, or any amendment to the site certificate exceeds the respondent's statutory authority and facially violates the Siting Act's substantive siting standards. Table S-10 in the application is entitled “Project Effects to and

Proposed Mitigation of Above ground Resources”. All NHRP Oregon Trail Segments listed on this table state there are “Potential Adverse Effect and make the same recommendation for Mitigation which is “Design Modification, Public Interpretation Funding, Print/Media Publication” (B2HAPPDoc1-21.2 ApASC Exhibit S Revised\_Cultural 2018-08-09, Pages 104-106) ) The actual Adverse Effect is not identified and quantified for the segments in order to determine the significance of the effects. Also, the mitigation recommended in Table S-10 is the same list of Final Environmental Impact Statement (FEIS) allowed mitigation for all locations whether there will be direct and indirect effects, or only indirect effects. (B2HAPPDoc1-21.2 ApASC Exhibit S Revised\_Cultural 2018-08-09, Pages 104-106)

What is clear as reflected on Table S-12 (B2HAPPDoc1-21.2 ApASC Exhibit S Revised\_Cultural 2018-08-09, Pages ) is that the actual adverse impacts to Oregon Trail resources have not been determined other than there are “Potential” effects and the site specific mitigation for impacts have not been identified due to the repeated use of potential mitigation methods which may or may not be implemented at the sites. (B2HAPPDoc1-21.2 ApASC Exhibit S Revised\_Cultural 2018-08-09 Pages 111 and 112) The Oregon Department of Energy and Idaho Power have both stated that the file does not contain site specific mitigation (“Direct Evidence Exhibit 4 IPC Responses to Discovery” NEED

PAGES)(“Oregon Department of Energy Response to Exceptions – Issue HCA-3 OAH Case No. 2019-ABC-02833”).

ERROR FOUR: The Site Certificate cannot rely upon the Environmental Impact Statement final 106 HPMP requirements for determining mitigation for historic properties when the federal requirements and time frames are not consistent with EFSC rules. (ORS 469.370(13) ) (B2HAPPDoc15 ASC Second Amended Project Order 2018-07-26 Page 27, Lines 32-34.) “When a development requires a NEPA review, EFSC is required to use information prepared for the federal agency to avoid duplicative study and reporting requirements, and the use of documents prepared for the federal agency **to the extent the information is consistent with state standards.**” (ORS 469.370(13) ) The federal HPMP fails to comply with EFSC requirements for the following reasons: (A) According to Idaho Power's Supplemental Response to Irene Gilbert's Discovery Request No. 1 (Mar 12, 2021, page 4, last paragraph, it states, “The methodology that the BLM applied in the NEPA review process was specifically tailored to assess compliance with the federal NePA requirements. In the EFSC process Idaho Power developed its own methodology to determine compliance with the Council's Historic, Cultural and Archaeological Resources Standard. Any differences in results between the state and federal studies are due to the differences between the applicable standards, differing prescribed methods of analysis in the federal and state process, or the



timing of the different studies” (B)It allows mitigation that is not allowed in EFSC rules. (C)The federal 106 HPMP only includes or requires mitigation for NRHP eligible or likely eligible resources covered by EFSC rule OAR 345-022-0090(l)(a),. (Final Order on the ASC for the Boardman to Hemingway Transmission Line, September 27, 2022, Page 477, Lines 8-10, Lines 24-33) (D) The EIS required HPMP does not require mitigation for Oregon Trail resources on public or private land that are not NRHP eligible or likely eligible as required by EFSC. (OAR 345-022-0090(l)(b) and (l)(c)) (E) Council cannot delay documentation of eligibility until after a site certificate is issued. (ORS 469.503) (OAR 345-022-0000(l)) (ORS 469.370(13) ) (E)To rely upon information from the Final Environmental Impact Statement to provide documentation for compliance with the Historic Properties Standard, IPC would have to had supply the needed information or specific references to the information from the FEIS (or its supporting resource reports) in the application for site certificate. The Site Certificate is proposing the use of documents that were not developed when the site certificate was issued and suggesting that the mitigation from this future document should be considered as meeting the requirement that the file contain a “preponderance of evidence” that the Oregon Trail resources have been addressed as required by the EFSC rules, The Project Order requires the use of the FEIS, but only where federal rules are the same as EFSC, and in this case, the mitigation

allowed is not consistent. (B2HAPPDOC15 ApASC Second Amended Project Order 2018-07-26, Page 26, Lines 27-29) and (35-37) To rely upon the NEPA 106 results would require evaluation of the visual impacts data, methodology, standards, methods of analysis to determine differences and whether or not those differences impact the appropriate mitigation for the specific site being evaluated for negative impacts and appropriate mitigation.

**ERROR FIVE-The Site Certificate changed OAR 345-025-0006(5) absent a rule revision.**

This rule states:

OAR 345-025-0006(a) "For wind energy facilities, transmission lines or pipelines, if the certificate holder does not have construction rights on all parts of the site, the certificate holder may nevertheless begin construction, or create a clearing on a part of the site if the certificate holder has construction rights on that part of the site. (a) The certificate holder would construct and operate part of the facility on that part of the site even if a change in the planned route of a transmission line or pipeline occurs during the certificate holder's negotiations to acquire construction rights on another part of the site.

This is a mandatory condition is clear on its face. The Site Certificate includes the full language of condition as CON-GS-02 since it is mandatory, however, in the Final Order they changed the language to say “Modifications Proposed to the OAR 345-025-0006(5) mandatory condition language are as follows “The certificate holder may begin construction as defined in OAR 345-001-0010, or create a clearing on any part of the site if the certificate holder has construction rights on that part of the site even if a change in the planned route of transmission line occurs during the certificate holder's negotiations to acquire construction rights on another part of the site. For purposes of this rule, “construction rights” means the legal right to engage in construction activities..” This change was made in a **FOOTNOTE** in the Final Order after review of the Proposed Order. I find no discussion or approval of this change in the Mandatory procedures for approval of a Site Certificate. There has been no rule revision adopted under ORS 183.355 (ORS 469.503)(ORS 469.504), no notice to the public regarding the fact that the Council intended to overrule a site certificate condition. Under OAR 345-025-0006(5)(a) it is required that the certificate holder must establish that they would construct the portion of the line even if the route of the remaining line did not obtain construction rights. This change is not based upon a lack of clarity in the existing rule. It is made in reference to this one development, and it was not included in the department report to the council regarding significant changes in

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the Final Order. The department and council lack the authority to (a) add what is not there or remove what is there or (b) Reinterpret the application of their rules to change the requirements where the plain language of the rule is clear, as it is in this case. The US Superior Court severely limited the ability of an agency to interpret their rules in (Keiser v Wilke 588 US\_\_Q019 Kiser US Supreme Court ) requiring the following: (a) The rule must not be clear on it's face; (b) the change must be the official stance of the person(s) in agency who are authorized to make the change (c) the change cannot be a “surprise” to those impacted; (d) Also, (Marbet v. Portland General Electric, 277 Or 447, 561 P2d 154 (1977) The fact that this major change in a mandatory rule was made in a Footnote leaves the change suspect to having been made with the hope that it would not be noticed by those with appeal rights on issues which it directly impacts such as my contested case regarding Oregon Trail Resource scenic impacts.

I respectfully request that the Court find the Site Certificate null and void until the issues outlined above are rectified.



Dated: December 20, 2022.

By:

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Irene Gilbert, *Petitioner, Pro Se*  
*Representing Public and Personal Interest*

CERTIFICATE OF FILING

I hereby certify that on this date I filed this Request for Oral Argument with the Appellate Court Administrator by Regular Mailing pursuant to ORAP 9.05(3).

DATED: December 20, 2022.

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Irene Gilbert, *Petitioner, Pro Se*  
*Representing Public and Personal Interest*

## CERTIFICATE OF SERVICE

I further certify that I have this date served a copy of this Request for Oral Argument on each party in this case by U.S. Postal Service, Certified Mail.

DATED December 20, 2022.

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Irene Gilbert, *Petitioner, Pro Se*  
*Representing Public and Personal Interest*

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