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December 21, 2022

VIA ELECTRONIC FILING

Public Utility Commission of Oregon
Filing Center
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Re: Docket No. PCN-5 – In the Matter of IDAHO POWER COMPANY, Petition for Certificate of Public Convenience and Necessity.

Attention Filing Center:

In accordance with Administrative Law Judge John Mellgren's December 19, 2022 Memorandum issued in the above-referenced docket, requesting that Idaho Power Company file copies of certain documents related to all appeals of the Energy Facility Siting Council's site certificate for the Boardman to Hemingway Transmission Line, attached are the Opening Briefs[1] submitted by the STOP B2H Coalition, Michael McAllister, and Irene Gilbert in Oregon Supreme Court dockets S069919, S069920 and S069924, as well as an Amicus Brief submitted by Anne Morrison aligned with STOP B2H.

Below is a table referencing the page range of each document included with this filing.

Document	**Page Range[2]**
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[1] Idaho Power is excluding petitioners' excerpts of the record that were filed with their opening briefs pursuant to ALJ Mellgren's Memorandum stating, Idaho Power must file copies of "[a]ny opening brief(s) (***excluding*** any excerpts of record)." (emphasis added) ALJ Memorandum at 1 (Dec. 19, 2022).
[2] Page range is based on the PDF page number, which includes this cover letter.

If you have any questions about these filings, please do not hesitate to contact me.

Respectfully submitted,

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Attachments

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 STOP B2H COALITION, *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. S069919 EXPEDITED JUDICIAL REIVEW UNDER ORS 469.403

APPELLANT STOP B2H COALITION'S OPENING BRIEF AND EXCERPT OF RECORD

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I. STATEMENT OF THE CASE

A. Nature of the Case

This appeal seeks review of a Final Order issued by the Oregon Energy Facility Siting Council ("EFSC"), following a Contested Case Hearing on an Application for a Site Certificate on the proposed Boardman to Hemingway high tension powerline, referred to by EFSC as a transmission facility. Appellant STOP B2H Coalition ("STOP") appeals this Final Order because of the numerous defects which it contains, which will cause harm to STOP and its members.

B. Nature of the Order

Appellants appeal the Order granting Respondent Idaho Power Company ("IPC") a Site Certificate for the Boardman to Hemingway Transmission Line (hereafter "B2H"), which was served on STOP by EFSC on October 18, 2022.

C. Basis for Supreme Court Jurisdiction

The Order is subject to direct expedited appeal, pursuant to ORS 469.403. STOP timely filed a Petition for Review consistent with ORS 469.403.

D. Date of Order and Notice of Appeal

The Order was served on October 18, 2022

E. Questions Presented on Appeal

1. Whether a party's status in a Contested Case proceeding can be limited, based on the request of an opposing party who wishes to limit its

opponent's ability to participate in the proceeding?

2. Whether EFSC can administer and grant exceptions to regulations promulgated by another agency, without a specific grant of authority from that agency?

3. Whether EFSC can administer and grant a variance pursuant to a statute that includes a delegation of authority by the Legislature only to a specific (and different) agency?

4. Whether an agency may modify a previously promulgated Rule, using an administrative Order, without going through the rulemaking process specified in the Oregon Administrative Procedure Act ("APA")?

5. Whether an agency may lawfully interpret a Rule that defines "significance," in a way that allows it (or an applicant) to ignore significant visual impacts that are likely to occur from a proposed project?

F. Summary of the Argument

1. OAR 137-003-005(3)(c) provides no legal basis for allowing other parties to limit the participation of someone who wishes to be a full party, and meets the requirements for being one. A party can choose, in their Petition for Party Status, to limit their own participation. There is no authority for the notion that an opposing party (whose interest lies in limiting another party's ability to fully participate in a contested case proceeding) should have the ability to request

and obtain limits on the ability of another party to participate in an administrative proceeding.

2. Agency powers are inherently limited by the statutes and the rules which authorize them to act. OAR 340-035-0035(6) sets forth the standard for granting exceptions to the Oregon Department of Environmental Quality's ("DEQ") promulgated ambient anti-degradation noise pollution standards. EFSC exceeded its authority, when it relied on a DEQ Memorandum that suggested that EFSC would ensure *compliance with* OAR 340-035-0035, as somehow delegating the DEQ authority to *grant exceptions to* the DEQ noise rules to EFSC.

3. When the legislature granted the power to the Oregon Environmental Quality Commission ("EQC") to grant "specific variances" to the noise requirements in ORS chapter 467.100 *et seq,* the exercise of that power was limited by the statute to EQC. The legislature did not grant the variance authority to any other agency, and EFSC exceeded its authority when it usurped that power and granted a blanket noise variance to IPC for this entire 300-mile powerline.

4. The Oregon APA sets forth the law that controls agency rulemaking. *See* ORS 183.335 *et seq.* An agency cannot modify or amend its own Rules, without going through the statutorily required rulemaking process. When EFSC used a "Project Order" to modify the requirements of OAR 345-021-0010(x)(E) - to reduce the area from one mile, to one half mile - it violated the APA, by

impermissibly modifying a Rule without going through notice and comment as required by the APA.

5. EFSC misinterpreted OAR 345-001-0010(28), its rule defining "significance," in its treatment of the visual impacts of this proposed 300-mile powerline project. EFSC found that a newly-created, never peer reviewed, IPC scenic resource impact methodology met the requirements of the Rule, and that IPC's proposed conclusion that there would be no significant visual impacts was valid. This was despite the fact that the methodology did not consider or evaluate Oregonians' subjective feelings when determining if there would be "impacts on the human population" caused by the dramatic changes to the landscape (including at Parks, and along the Historic Oregon Trail), due to the addition to the landscape of many massive towers and the heavy-duty conductor lines stringing them together.

G. Summary of Relevant Facts

STOP summarized the bulk of the relevant facts in its Petition for Review. In lieu of repeating the factual background as presented in that document, STOP incorporates that factual background here and will provide specific factual citations from the Excerpt of Record as necessary, within each Assignment of Error.

II. FIRST ASSIGNMENT OF ERROR

EFSC erred when it ratified the ALJ Decision to limit STOP B2H

Coalition's party status, despite STOP's well supported request for unqualified or full party status.

A. Preservation of Assignment

STOP requested unqualified "party" status in its Petition for Party Status. ER at 1-16. STOP outlined how the large Coalition represented broad public interests, and how its status should not be limited during the Contested Case proceeding. ER at 1,15-16. STOP strenuously objected to the effort by IPC to limit STOP's party status. Rec at B2HAPPDoc262 OAH STOP B2H Appeal of the Order on Party Status and Issues_K.Anuta_2020-11-06. At pp. 2-8.

B. Standard of Review

The Oregon APA directs that an Order in a Contested Case be issued "only as supported by, and in accordance with, reliable, probative and substantive evidence." ORS 183.450(5). Agency decisions must "be rational, principled, and fair, rather than *ad hoc* and arbitrary." *Gordon v. Bd. of Parole & Post Prison Supervision*, 343 Or 618, 633, 175 P3d 461 (2007) (describing that principle as one "embodied in the APA"). The Oregon Court of Appeals has interpreted ORS 183.450(5) as prescribing the preponderance of evidence standard of proof in contested cases. *See*, *e.g., Gallant v. Bd. Of Medical Examiners*, 159 Or App 175, 180, 974 P2d 814 (1999).

"Agencies are creatures of statute" with limited authority and function. *City*

of Klamath Falls v. Environmental Quality Commission, 318 Or 532, 545, 870 P2d 825 (1994). "Administrative agencies… derive their authority from (1) the enabling legislation that mandates that particular agency's function and grants power, and (2) from general laws affecting administrative bodies." *1000 Friends of Oregon v. Land Conservation Development Commission* 301 Or 622, 627, 724 P2d 805 (1986). Agency "authority may also be circumscribed by the agency's own regulations." *City of Klamath Falls v. EQC, supra*, 318 Or at 545.

In issuing a decision on the IPC application for a Site Certificate, EFSC must follow its Rules, and the Rules of other Agencies "because an agency has only those powers that the legislature grants and cannot exercise authority that it does not have." *SAIF Corp v. Shipley*, 326 Or 557, 561, 955 P2d 244 (1998). *See also, Smith v. Veterinary Medical Examining Board*, 175 Or. App. 319, 327, 27 P3d 1081, *rev. den*. 332 Or 632 (2001) ("An agency must comply with the statutes that govern it and follow its own rules"); *Peek v. Thompson*, 160 Or App 260, 264-265, 980 P2d 178 (1999) *rev. dismissed* 329 Or 553 (1999) ("It is, of course, axiomatic that an agency must follow its own rules."); and *Pena v. Travelers Ins. Co. (In Re Pena)*, 294 Or App 740, 745 432 P3d 382 (2018), *rev. den.* 364 Or 723 (2019) ("[W]here an agency has enacted a specific and mandatory rule governing what evidence is considered, it must follow that rule.")

ORS 183.482(8)(a) provides that:

> "The court may affirm, reverse or remand the order. If the court finds that the agency has erroneously interpreted a provision of law and that a correct interpretation compels a particular action the court shall: (A) Set aside or modify the order; or (B) Remand the case to the agency for further action under a correct interpretation of the provision of law."

ORS 183.482(8)(b) then provides:

> "The court shall remand the order to the agency if the court finds the agency's exercise of discretion to be: (A) Outside the range of discretion delegated to the agency by law; (B) Inconsistent with an agency rule, an officially stated agency position, or a prior agency practice, if the inconsistency is not explained by the agency; or (C) Otherwise in violation of a constitutional or statutory provision."

ORS 183.482(8)(c) goes on to provide that:

> "The court shall set aside or remand the order if the court finds that the order is not supported by substantial evidence in the record. Substantial evidence exists to support a finding of fact when the record, viewed as a whole, would permit a reasonable person to make that finding."

C. Argument

On August 22, 2019, STOP (and several other public interest groups) submitted extensive comments in response to the Draft Proposed Order on the proposed B2H project.[1] As noted on the first page of those comments, STOP (and

[1] *See,* Rec at B2HAPPDoc2 Proposed Order on ASC and Attachments 2019-07-02. Page 6321 (STOP DPO Comment). STOP notes that the Record as filed does not comply with ORAP 4.20(b). That Rule requires either chronological, or reverse chronological order, which the Record as transmitted to STOP is not presented in. The same ORAP further requires that the Record "must be consecutively numbered at the bottom of each page," which the Record as transmitted to STOP is not. The EFSC Record is also out of compliance with ORAP 4.20(e), which provides that

its co-signatories) "are nonprofit public interest organizations, with a strong interest in responsible energy generation and distribution, protection of public and private lands, ... preservation of cultural resources, our lands and heritage, and alignment with carbon reduction goals to enable sustainable adaptation to the affects of climate change."[2] STOP has over 700 members, and it sought to represent the broad interests of those members through advocating on their behalf in the Contested Case.

STOP's comments included 90 pages of analysis of the proposed B2H project.[3] Some broad categories discussed in those comments include the "need" standard, sufficiency of notice, noise, scenic resources, recreation resources, protected areas, geology, soils, fish and wildlife habitat, endangered species, cultural resources, and fire safety.[4] Many of these issues are inextricably

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"the index must be electronically linked to the document(s)." Had there been a process for Objecting to the Record, STOP would have done so. STOP recognizes the short timeframe for filing the Record set by ORS 469.403 and ORAP 12.35. However, STOP also has its own time constraints imposed by the same Rule for preparing and filing this Brief. The improperly prepared Record has made that task (and likely will make this Court's review of the matter) immensely more difficult.

[2] *Id.*

[3] Rec at B2HAPPDoc5-1 All DPO Comments Combined-Rec'd 2019-05-22 to 08-22. Page 5567 – 5658 (STOP DPO Comment).

[4] *Id.*

intertwined. Additionally, STOP incorporated by reference comments from several of its members into its own, including comments made by limited parties Lois Barry and Susanne Fouty.[5]

STOP had participated fully throughout the underlying Oregon Department of Energy ("ODOE") and EFSC process, and sought to continue its full participation in the Contested Case. STOP demonstrated a broad public interest in the outcome of this proceeding in its Petition for Party Status in the Contested Case Hearing. *See* ER at 1-16 (Excerpt of STOP Petition for Party Status).

The APA provides that a "party has the right to respond to *all issues* properly before the presiding officer and present evidence and witnesses on those issues." ORS 183.413(2)(e)(emphasis added). *See also,* ORS 183.417(1) (same). ORS 183.310(7)(c) provides yet more context, providing a definition for "party" noting that interested persons may "request[] to participate before the agency as a party or in a *limited party* status" (emphasis added). *See also,* ORS 183.417(2) ("Agencies may adopt rules of procedure governing participation in contested case proceedings by persons appearing as *limited parties*.")(emphasis added), and ORS 183.450(3) ("Every party shall have the right of cross-examination of witnesses who testify and shall have the right to submit rebuttal evidence. Persons appearing

[5] *See, e.g., Id* at Page 5600, 5611.

in a *limited party status* shall participate in the manner and to the extent prescribed by rule of the agency.")(emphasis added).

These statutes controlled the underlying proceeding in this case. All of these statutes position a party seeking to participate as *the* party who may seek either full party status, or to limit *their own status*. All of these statutes give a party (as opposed to limited party) the ability to fully participate.

Absent from the language, context, or clear meaning of these laws are the opportunity for *opposing parties* to try to limit each other's participation. Yet that is what occurred in this case. IPC argued for, and EFSC ultimately approved, limiting STOP (and all other parties, *other than* ODOE and IPC) to being able to participate on *only* a limited scope of issues. ER at 35-41 (Order on Party Status). This significantly and dramatically limited the rights of STOP (and all other intervenors) to fully participate.

The Model Rules of Procedure for Contested Cases also make reference to the concept of "limited" party status. *See*, OAR 137-003-0005. However, as with the statutory references, the reference in the Model Rules addresses the ability of a party to limit *their own* status, should they choose to do so.[6] The Model Rules do

[6] OAR 137-003-0005(2) provides that "A person requesting to participate as a party or limited party shall file a petition…". OAR 137-003-0005(9) allows an agency to "specify areas of participation and procedural limitations as it deems appropriate," but nothing in that rule gives *opposing parties* an opportunity to

not provide for such a limitation to be *imposed* on a party, based on the request of another (opposing) party.

The spirit and letter of the APA favor broad public participation in these fundamentally public processes once the statutory jurisdiction requirements have been satisfied. *See, e.g.,* ORS 183.413(2)(e); ORS 183.417(1); ORS 183.310(7)(c). The requirements under ORS 469.370, OAR 345-015-0016(3), and OAR 137-003-005 amount to what is ordinarily required to satisfy the basic notion of "exhaustion" under general principles of administrative law.

In this case, EFSC concluded that this means participation in a Contested Case must necessarily be extremely narrow. That conclusion contravenes both the letter and spirit of the APA.

The statutory language should be enough, on its own, to make it plain that only STOP can choose to limit its participation. However, as noted, the decision to limit STOP's participation also contravenes the Model Rules and EFSC's own rules.

The Final Order made reference to OAR 137-003-0005, which includes a list of factors to consider when evaluating party status. *See* ER at 184 (Final Order

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provide input on this matter. *See also* OAR 345-015-0016(3)-(4) (EFSC rule outlining petition for party status procedure, also lacking any provision for opposing party input).

citing –and reaffirming– November 25, 2020 EFSC Order on Party Status – which is at ER 34-42). However, there is nothing in the Record that shows that STOP's participation was ever evaluated using the factors in OAR 137-003-0005(7).

The OAR 137-003-0005(7) factors are:

(a) Whether the petitioner has demonstrated a personal or public interest that could reasonably be affected by the outcome of the proceeding;
(b) Whether any such affected interest is within the scope of the agency's jurisdiction and within the scope of the notice of contested case hearing;
(c) When a public interest is alleged, the qualifications of the petitioner to represent that interest; [and,]
(d) The extent to which the petitioner's interest will be represented by existing parties

The Final Order incorporated EFSC's interim Order following STOP's appeal on Party Status. The Administrative Law Judge ("ALJ") Order from which STOP appealed recognized STOP had a "broad public interest in this matter[.]"[7] However, the ALJ Order provides no further analysis on the qualifications of STOP, or the extent to which STOP's interest will be represented by existing parties. No analysis of each of the factors in OAR 137-003-0005(7) is provided.

The Order simply states that despite its broad public interest, STOP "does not have a statutory or due process right to respond and present evidence on all

[7] Rec at B2HAPPDoc219 Hearing Officer Order on Party Status and Issues_OAH_2020-10-29. Page 25.

issues in this contested case proceeding."[8] EFSC went on to uphold this Order on appeal – again without doing an analysis of the factors specified in the Rule.[9]

The factors in OAR 137-003-0005(7), if properly considered, all point to a conclusion that STOP was uniquely qualified to participate in this proceeding as an unqualified, or "full" party. First, STOP's members and leadership are subject-matter experts, as demonstrated in its DPO comments and Petition for Party Status. ER at 1-16. That fits factors 7(a) & (c). Second, STOP's interest in the outcome of this process is broad and far-reaching, as it represents over 700 members. ER at 1 (Petition p. 1). That also fits factors 7(a) & (c).

As to factor 7(d) there are no other existing parties that adequately represent the broad Coalition of interests that STOP represented. Nor did any party below argue that some other party adequately represented STOP's many interests. As STOP's filing showed, STOP represented the interest of many hundreds of others, including other public interest organizations. Even if, in theory, an analysis under OAR 137-003-0005(7)(d) could potentially serve to limit (rather than outright deny) party status, this factor should have weighed heavily in favor of finding

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[8] *Id.*

[9] Rec at B2HAPPDoc288 EFSC's Order on Appeals of Hearing Officer Order on Party Status, Auth Reps and Issues_2020-11-25. Page 18 (ALJ Order on Party Status).

STOP qualified to participate as a "full" party in this proceeding.

IPC filed a Response to STOP's Petition for Party Status. In it, IPC's argument recognized that "the rules are not entirely clear on this point, it appears that limited party status is appropriate where a petitioner seeks participation regarding specific areas of the proceeding only."[10] Given that statement, and STOPS unqualified request for full party status (and its Coalition representation of broad public interest on multiple topics), IPC's arguments (and EFSC's acceptance of those arguments) that STOP's participation could be limited are in error.

IPC (and EFSC) presupposed that *all* intervenors sought party status *only* on a limited basis. IPC (and EFSC) utterly failed to address the (7)(a)-(d) factors, and failed to place proper weight on STOP's unequivocal and well supported request for full party status.

At the appeal to EFSC on this issue, IPC argued that because OAR 137-003-0005(8) states that "[a] petition to participate as a party may be treated as a petition to participate as a limited party," an agency decision maker does not have to justify its decision to limit a party's status pursuant to the other Model Rules (such as OAR 137-003-0005(7)). That again, makes no sense. OAR 137-003-0005(7) in

[10] Rec at B2HAPPDoc102 IPC Response to Petitions for Party Status B2H 2020-09-22. Page 2 (citing OAR 137-003-0005(3)(c)).

fact expressly requires the agency to consider specific factors on a Petition for Party or Limited Party Status.

OAR 137-003-0005(8) does not render section -0005(7) entirely superfluous, which IPC's reading of the Rule would do. Instead, subpart (8) merely relieves an agency which receives a petition *labeled* as a Petition for Party Status, that in actuality is a request *only* for limited participation, from having to grant full party status to that party once the error is discovered.

This is not the situation that existed here. STOP had clearly and unequivocally requested full Party status, and it unequivocally qualified under the Rules for such status. Allowing an opposing party to insist that the agency impose limited party status, over the objections of a qualifying party, violates the APA, the Model Rules, and the due process rights of the qualified full party.

In its Response to STOP's Request for Party Status, ODOE cited the EFSC statute which codifies ordinary rules for exhaustion in an administrative setting.[11] ODOE noted that "[v]irtually all of the petitions in this matter request status as a party, rather than a limited party," and seemingly cited that as justification for then *limiting* the ability of petitioners to participate.[12] ODOE made similar arguments

[11] *See,* Rec at B2HAPPDoc193 ODOE Second Amended Response to Petitions for Party Status_2020-10-06. Page 2, 3, 5 (citing ORS 469.370).

[12] *Id* at Page 5.

regarding the relevance and purpose of OAR 137-003-0005(8).[13]

Yet ODOE also failed to address the factors under OAR 137-003-0005(7)(a-d). Despite the provisions of the APA and the Model Rules, EFSC ruled that STOP would be granted only limited party status. EFSC ignored STOP's presentation of its broad public interest, its broad presentation of issues throughout the process, and its request for unqualified "full" party status. In lieu of applying the factors specified in the Rule, EFSC simply reaffirmed the ruling by the ALJ – but as noted that ruling failed to specifically address each of the factors in OAR 137-003-0005(7)(a-d). As outlined, at least three of those factors weigh heavily in favor of granting STOP party status without qualification. No valid factual or legal reasoning to the contrary was provided by EFSC in its Order.

EFSC specifically held that, regardless of the outcome in the then-pending case, *Friends of the Columbia Gorge v. Energy Facility Siting Council*, 368 Or 123, 486 P3d 787 (2021), it could restrict STOP's right to participate under the Attorney General Model Rules and EFSC's own rules. ER at 41 (EFSC Order on Appeals). That holding was not consistent with either the case law, or the APA, or the Model Rules.

In the *Friends of the Columbia Gorge* case, this Court faced a challenge to

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[13] *Id*.

EFSC's adoption of new rules addressing the process for amending site certificates, and a handful of other procedural matters. Addressing the issue of party status, this Court laid out the rights, and historical significance of public participation under, the Oregon APA. This court specifically noted that the adoption of rules allowing for "limited" party status in 1979 was an effort to allow "[a]ny person **requesting to participate** before the agency as a party or in a limited party status," and the Court went on to distinguish a different piece of legislation authorized "agencies to limit the scope of participation, which now applied only to limited parties rather than to all intervenors." *Id* 368 Or at 130 (citing ORS 183.310(7); Or. Laws 1979, ch. 593, § 21(3)).

The *Friends* Court's focus and holding were *not* that opposing parties could request (and the agency could, in response to that request, impose) limited party status on another opposing party. Rather, the Court recognized that a party seeking to participate *could limit its own* participation by request, and if that was done an agency could have rules which applied to parties seeking limited intervention.

EFSC's position in the *Friends* case was that *all* intervenors were automatically classified as "limited parties." *Id* 368 Or at 132-133. This Court did not address or uphold that position. Instead the Court held that EFSC's then in place rules improperly categorically restricted the rights of *all* parties.

In the matter at hand, at the request of IPC, EFSC again treated all

intervenors as "limited" parties. EFSC also refused to apply the criteria in the Model Rules to determine which of the intervenors who sought full party status were entitled to that status, despite STOP requests that EFSC do so. This highlights the arbitrary, unfair, and unlawfulness of EFSC's approach.

The result of EFSC's arbitrary actions was a significant limit on STOP's ability to participate in the Contested Case Hearing. EFSC never justified its limitation of STOP's party status with the requisite findings pursuant to OAR 137-003-0005(7). Instead, EFSC refused to address STOP's Petition for Party Status in any meaningful way.

This Court should find EFSC's treatment of STOP's Petition for Party Status unlawful, and remand this proceeding with instructions directing EFSC to: (1) Conduct the proper analysis of party status that is mandated by the APA and the Model Rules for at least STOP (if not all other parties); and (2) if full party status is found, reconduct the Hearing with STOP allowed to exercise its full rights under the APA.[14] STOP is confident that if the analysis is fairly and lawfully done, STOP

[14] To the extent that IPC or ODOE/EFSC try to argue that doing as STOP requests (and as the law provides) will take a great deal of additional time and money, and that a lengthy complex Contested Case process will have to be repeated, the Court should keep in mind that this is a problem *entirely of IPC's & ODOE/EFSC's own creation*. IPC chose to try to impose limited party status on other parties – including STOP. ODOE/EFSC chose to go along with that sort of unlawful imposition of limited rights. Making unlawful (and non-strategic) choices in filing or ruling on Motions comes with consequences.

will be found to be a full party, who should have been allowed to fully participate in the Contested Case Hearing on all issues – as provided for in the APA.

III. SECOND ASSIGNMENT OF ERROR

a. <u>First Sub-Assignment</u>: EFSC erred when it held that it has the authority to grant variances, under a statute (ORA 467.060) in which the legislature gave that authority solely to a different agency (the EQC).

b. <u>Second Sub-Assignment</u>: Similarly, but separately, EFSC erred when it held that it could grant exceptions to noise rules promulgated by a different agency (the DEQ).

A. Combined Preservation of Sub-Assignments

STOP B2H Coalition raised the issues of the authority (or not) to grant exceptions and variances to DEQ noise pollution control rules in its Petition for a Contested Case Hearing.[15] STOP continued to raise these issues throughout the Contested Case Hearing process, including in testimony by fact witnesses (ER at 50-58 (Kreider Testimony); ER at 62-71 (Standlee Testimony); ER at 72-74 (Hector statement)).[16] STOP also raised these issues in its Closing Argument (ER

[15] Rec at B2HAPPDoc72 Petition for Contested Case Fuji Kreider 2020-08-27. Page 9-10 (STOP's Petition).

[16] Numerous documents which were properly before EFSC at the time it issued the Final Order in this matter, and were in "the Record" before the agency, but have for some reason been omitted from the Record as filed with this Court. That includes (in part) the Kreider Testimony, Standlee Testimony, and the transcript from Mr. Standlee's cross-examination. Because neither ORS 469.403 nor ORAP 12.35 provide mechanisms (or sufficient time) for Objections to the form or

at 106-110), and, its Exceptions to the Proposed Contested Case Order ER at 140-150.

B. Standard of Review

The Standard of Review outlined under Section II B of this brief is equally applicable here. Rather than restating the Standard, STOP incorporates the prior Section by reference.

C. Combined Argument

It is undisputed that IPC's proposed B2H facility cannot comply with DEQ's noise rules, and will result in noise pollution exceedances above the anti-degradation standard in those rules in at least some locations. ER at 82-86 (Excerpt of IPC Rebuttal testimony Stippel). As a result, IPC has sought a facility-wide (i.e. 300 mile long) blanket exception to noise pollution laws, and also a variance which would allow B2H to emit noise pollution above and beyond the anti-degradation standard.

There are two agencies that have the authority to grant that kind of relief. DEQ may issue exceptions pursuant to its Rules. *See,* OAR 340-035-00035(6). The EQC may issue variances pursuant to statute. *See,* ORS 467.060. Despite this,

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content of the record, Excerpts of these documents (as they existed in the underlying agency proceedings) are included in STOP's Excerpt of Record.

EFSC has in its Site Certificate Order, issued a blanket variance and exceptions across numerous affected Noise-Sensitive Receptors, also known as "NSRs." ER at 872 (Final Order).

IPC and ODOE argued below that ORS 469.310 provides EFSC "comprehensive" authority over energy facility siting matters.[17] An agency which has *broad* authority is not an agency which has *all* authority. The IPC/ODOE argument ignores the case law describing the inherent limitations of agency power.

IPC notes that "ORS 469.370 grants EFSC authority to assess energy facility compliance with state statutes and rules normally administered by other agencies."[18] Assessing *compliance with* a statute or rule is different than authority to grant *exceptions to or variances from* statutes and rules. This Court should reject IPC and ODOE/EFSC's efforts to broaden agency authority beyond what has been delegated by the Legislature.

IPC's position has been that *because* it cannot (or more accurately will not) comply with the noise Rules, it is entitled to relief from those Rules.[19] That

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[17] Rec at B2HAPPDoc1168 NC-1, NC-2, NC-3, NC-4, NC-6 IPC Response Brief and Motion to Strike _Till_2022-03-30. Page 16; Rec at B2HAPPDoc1339 ODOE Response to Closing Arguments_2022-03-30. Page 80.

[18] Rec at B2HAPPDoc1168 NC-1, NC-2, NC-3, NC-4, NC-6 IPC Response Brief and Motion to Strike _Till_2022-03-30. Page 17.

[19] Rec at B2HAPPDoc1168 NC-1, NC-2, NC-3, NC-4, NC-6 IPC Response

explanation is insufficient to justify a variance under ORS 467.060. The fact that an applicant cannot meet the requirements of a Rule is a basis for *denying an application*, not a basis for creating or granting a blanket variance to a valid Rule.

The proposed variance grants IPC the right to maintain a higher level of intrusion of noise than the law would otherwise allow. This is noise pollution of the type which the Legislature found to be: "as much a threat to the environmental quality of life in this state... as is pollution of the air and waters of the state." ORS 467.010. This law should be followed, not ignored or read out of existence by creation of variances.

The only time the law does not have to be followed, is when the expert agency on the matter (the EQC), which has been granted specific authority to make (or decline to make) findings (for the reasons outlined in ORS 467.060) that a variance is justified or authorized. The same is true for an exception to the DEQ Rules. The only time the noise standards do not have to be met, is if – pursuant to the procedure and requirements outlined by OAR 340-035-00035(6) – DEQ finds that an exception is appropriate.

Here, John Hector - the former DEQ noise control program manager (and author of the DEQ Noise manual that IPC claims it relied upon) characterized the

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Brief and Motion to Strike _Till_2022-03-30. Pages 7 and 22.

noise exceedance that will be created by the B2H powerline as "four (4) times louder than as the preexisting level of sound." ER at 66. **(**Standlee Testimony Exhibit). According to Hector, the proposed B2H powerline will have "a major impact." *Id.*

Despite all of that, EFSC proposed in the Site Certificate to grant both a noise exceedance and a variance – something that only DEQ and EQC have authority to do. Agencies do not have the authority to administer rules promulgated by other agencies, or to administer statutes which delegate power to other agencies. This is because delegation is an inherently limited grant of power. *SAIF Corp v. Shipley*, *supra.* 326 Or at 561; *City of Klamath Falls v. EQC, supra.* 318 Or at 545. *See also, Corvallis Lodge No. 1411 v. OLCC,* 67 Or App 15, 20, 677 P.2d 76 (1984) ("Accountability of government is the central principle running through the delegation cases."); *State v. Self*, 75 Or App 230, 236-237, 706 P2d 975 (1985) ("A legislative enactment is complete if it contains a full expression of legislative policy and sufficient procedural safeguards to protect against arbitrary application.")(citations omitted).

ORS 467.060 is either a valid law because it contains a full expression of legislative policy delegating the power to grant variances to noise pollution laws to EQC, or it is incomplete, because it (silently) contemplates *an unnamed or any* agency having the power to grant those variances. If the latter, that delegation is

illegal for its lack of completeness. *Corvallis Lodge No. 1411 v. OLCC*, *supra*. Here, as a matter of law, EFSC cannot contravene the plain language of the Noise statute. The statute gives a limited grant of authority (to grant a variance) to EQC. It does not give EFSC that authority. Nor did EQC ever delegate to EFSC that authority.

STOP does not argue that EFSC (or ODOE) do not have authority to engage in rulemaking, should either or both of the agencies seeks to change *their own rules.* But EFSC (and ODOE) are bound by ordinary notions of delegation of authority. Here the issue concerns implementation and interpretation of a DEQ regulation and a statute which delegates authority to EQC. EFSC has no authority to change either or to insert itself where it was not specifically delegated the power to do so by either the Legislature or either of the agencies who did get authority from the Legislature.

ODOE's position throughout the Contested Case Hearing has been that because "ORS 469.310 provides that the purpose of the energy facility siting statutes is to create 'a comprehensive system for the siting, monitoring, and regulating of the location, construction and operation of all energy facilities in the state,'"[20] In other words, EFSC suddenly has "comprehensive authority" sufficient

[20] Rec at B2HAPPDoc887 ODOE Response to Direct Evidence and Testimony_2021-11-12 Page 62.

to grant a variance pursuant to *another* agency's rules.[21]

However, the provision that ODOE is citing to is merely an aspirational, introductory policy statement. The Court of Appeals in Oregon has regularly distinguished between aspirational and operative language in statutes in the context of agency authority. *See, e.g., Price v. Department of Human Services*, 243 Or App 65, 73, 259 P3d 86 (2011)(distinguishing "the unambiguous mandate" of operative statutory language, from statutory *policy* language which is "merely aspirational... [and] couched in nonoperational terms"); *See also Bennett v. City of Dallas*, 96 Or App 645, 649, 773 P2d 1340 (1989)(Court of Appeals rejecting to make enforceable a policy statement that "does not purport to be a decisional standard, mandatory or otherwise"). This Court has similarly regularly recognized the distinction between language which is merely aspirational, and therefore not mandatory. *See e.g., State v. Bartol*, 368 Or 598, 620, 496 P3d 1013 (2021)("this court must give effect to the proportionality requirement of Article I, section 16, which "is not merely aspirational, but was intended to protect Oregon's citizens...") citing *State v. Rodriguez*, 347 Or 46, 80, 217 P3d 659 (2009).

EFSC's position that the aspirational, introductory policy statement

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[21] *Id*.

contained in ORS 469.310 (a statutory section expressly called "Policy,") gives it authority to administer rules promulgated by other agencies, or that the Legislature has in this aspirational language somehow granted EFSC that same authority granted specifically to *other agencies* in different statutes, strains credulity. ORS 469.310 can hardly be read to be a sufficiently specific to grant this extraordinary authority to EFSC, sufficient to override the specific statutory authority granted to a completely different agency or entity (EQC) by ORS 467.060 regarding variances to DEQ rules and standards, and who may grant them (EQC). *See* ORS 467.060(1)-(2).

In an attempt to further support of its position, EFSC points to an Internal Management Directive ("IMD") by DEQ. ER at 824, 826 (Final Order). In that IMD DEQ noted that it no longer had the resources necessary to run its noise control program, and that although the DEQ noise control program has been terminated "the noise statutes and administrative rules remain in force," and then further noting that "[e]nforcement now falls under the responsibility of local governments, and in some cases, other agencies." ER at 80-81 (DEQ IMD). The IMD also specifically notes that EFSC, "under the Department of Energy, is authorized to approve the siting or large energy facilities in the state. EFSC staff review applications to *ensure that the proposed facilities meet* the State noise regulations." *Id* (emphasis added).

The IMD notably, does *not* delegate authority to *grant exceptions to or variances from* the DEQ Rules to other agencies or to EFSC. Rather, it only states that DEQ thinks that EFSC will *ensure compliance with* standards in the existing DEQ Noise Rules.

Rather than ensuring "compliance with" the Rules, EFSC is granting both exceptions and a variance to the DEQ Noise Rules. EFSC cannot usurp a variance power which belongs solely to the EQC, merely because of an aspirational, non-specific policy statement created by a different agency's enabling authority chapter. To the extent that EFSC is arguing that the DEQ Rules, or the EQC statute mean something different, that interpretation is at odds with what the statute and Rules say, and it is not entitled to any deference. *See, Don't Waste Oregon Com. v. Energy Facility Citing,* 320 Or. 132, 142, 881 P2d 119 (1994)(explaining that, where an agency has interpreted one of *its own* rules, courts will defer to that agency's interpretation as long as it is plausible); *See also, Chevron v. NRDC*, 467 US 837, 844-45 (1984)(Holding in the federal context that an agency is entitled to deference when it interprets a statute that it administers); and *New Jersey Air Nat'l Guard v. FLRA*, 677 F.2d 276, 281-82 n. 6 (3rd Cir 1982), *cert. den.* 459 US 988 (1982)(Holding, in the federal context, that an agency is **not** entitled to deference when interpreting a statute administered by another agency).

EFSC further posited that an exception to DEQ noise standards is warranted

because exceedances would be unusual or infrequent. ER at 854 (Final Order). In reality, foul weather is neither 'infrequent' nor 'unusual' in this section of Oregon. John Hector, former DEQ noise control program manager, noted that the 48 days-per-year of exceedances predicted by ODOE does not meet the criteria of unusual or infrequent. ER at 68 (Standlee Exhibit). EFSC is not within their discretion to make this kind of decision on behalf of DEQ/EQC under DEQ regulations, and EFSC has exceeded its authority by granting both a variance and exceptions in this case.

Nor is there evidence that strict compliance is inappropriate because "special circumstances render strict compliance unreasonable, unduly burdensome, or impractical due to special physical conditions or cause." ORS 467.060(1)(b). The noise control statutes are meant to preserve what little is left of quiet places in Oregon. Here, the only conditions beyond IPC's control are those that are borne from the circumstances meant to be addressed by the statute, and those which are inevitable in siting powerline projects.

If the DEQ noise regulations are to have any meaningful authority, they cannot be circumvented simply because the power line, *by the power company's own design choices*, will exceed noise regulations. If IPC buried the line, there would be no noise issue. IPC cannot be allowed to circumvent noise regulations simply because it does not **want** to meet those regulations. ORS 467.060(1)(c)

does not apply, and there is no evidence in the Record that strict compliance would result in any impact to any Oregon business, plant, or operation.

Finally, ORS 467.060(1)(d) is not satisfied either. Jim Kreider provided testimony to the effect that IPC's current "needs" are already met, and future "needs" can be met through multiple avenues, some of which IPC is already in the process of procuring. *See generally,* ER at 50-58 (Kreider Testimony.)

Since none of the statutorily authorized criteria for a variance are met, no variance could (or should) have been granted by EQC. Nor does EFSC have authority to step in and do what the EQC did not do, and likely could not lawfully do.

For each of the outlined reasons, the Court should hold that EFSC's actions in attempting to assume (or usurp) the variance authority granted to the EQC by statute, and similarly DEQ's authority to issue exceptions under its Rules, were unlawful. This Court should also order that this Application for Site Certificate be remanded with instructions that EFSC must re-analyze this application to do what the DEQ IMD stated, which is to "ensure compliance with" the noise standards - not to grant exceptions to and a variance from such compliance.

IV. THIRD ASSIGNMENT OF ERROR

EFSC (and ODOE) erred when it issued an Order that purported to change the distance requirements in OAR 345-021-0010(x)(E), reducing the distance from

1 mile to ½ mile, without going through the rulemaking process required by the APA.

A. Preservation of Assignment

STOP B2H Coalition raised issues around the sufficiency of Exhibit X in its DPO comments.[22] STOP similarly raised the issue in its Petition for Party Status. ER at 8-10. STOP continued to raise the issue throughout the Contested Case Hearing process, including in testimony by fact witnesses (ER at 50-55 Kreider Testimony); in its Closing Argument (ER at 104-106); and its Exceptions. ER at 140-146.

B. Standard of Review

STOP reincorporates the Standard of Review in Section II B, as the Standards for this Assignment are the same.

C. Argument

OAR 345-021-0010(x)(E) is unequivocal in requiring that the applicant include "[a] list of the names and addresses of all owners of noise sensitive property, as defined in OAR 340-035-0015, **within one mile** of the proposed site boundary." *Id.* (Emphasis added). Notwithstanding the Rule, ODOE modified (and EFSC affirmed) allowing the IPC Application for a Site Certificate to include a list

[22] Rec at B2HAPPDoc5-1 All DPO Comments Combined-Rec'd 2019-05-22 to 08-22. Page 5582-83.

that extended to only **one-half mile**. ER at 846 (Final Order).

As noted, ODOE opted not to follow its own Rule in OAR 345-021-0010(x)(E). It instead only required IPC to compile in the Application a list of names and addresses of all owners of noise sensitive property within one *half* mile of the site boundary. However, neither ODOE or EFSC engaged in a rulemaking before modifying the requirements in the validly promulgated rule that required a one-mile list. ODOE simply made the change, and tried to justify it as somehow lawful "because of the linear nature of the proposed facility."[23]

To lawfully amend or modify the proximity requirements in OAR 345-021-0010(1)(x)(E), EFSC/ODOE were required to comply with the rulemaking procedures in ORS 183.335. Instead, EFSC simply ratified language proposed by ODOE. That language cited a different EFSC rule which, if interpreted in the way ODOE proposed and EFSC ratified, would render the rest of EFSC's rules meaningless, because its rules could thereby be amended on the fly to suit whatever situation it faced - resulting in a purely results-oriented Site Certificate application approval procedure.

ODOE posits that OAR 345-021-0010(1) allows it, or EFSC, to modify its rules on the fly, without undertaking the rulemaking procedures required by ORS

[23] Rec at B2HAPPDoc1339 ODOE Response to Closing Arguments_2022-03-30 at p.78.

183.335.[24] STOP does not dispute that OAR 345-021-0010(1) purports (as read by ODOE/EFSC) to say that EFSC or ODOE may modify its rules. However, to the extent that the Rule is read that way, it is an unlawful Rule. OAR 345-021-0010 cannot override the statutory requirement in ORS 183.335, which sets forth the various (extensive) requirements for "adoption, amendment or repeal of any rule," with some very limited exceptions.

EFSC's ratification of ODOE's modification of the clear "one mile" requirement in the Rule is arbitrary, *ad hoc,* and contrary to the law. *See, Gordon, supra*. While legally EFSC *may* have had the authority to modify this requirement *if* it engaged in a full rulemaking process to potentially create an exception, neither ODOE nor EFSC conducted any such rulemaking.[25] The Rule modification was on its face unlawful, and there is no evidence in the Record (much less sufficient evidence) to support a modification of this Rule as written.

To the extent that ODOE/EFSC try to argue that OAR 345-021-0010(1)

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[24] Rec at B2HAPPDoc1157 OAH_ODOE Response to Closing Arguments-2022-0330. Page 78.

[25] *See, e.g., Burke v. Pub. Welfare Div.,* 31 Or App 161, 165, 570 P2d 87 (1977)("the interpretive amplification or refinement of an existing rule is a new exercise of agency discretion and must be promulgated as a rule under the APA to be valid") *See also, Brown v. Parks and Rec. Dept.,* 296 Or App 886, 892, 443 P3d 1170 (2019) *quoting Smith v. TRCI,* 259 Or App 11, 25 312 P3d 568 (2013)("If a rule 'is susceptible to reasonable interpretations other than [that given by the agency]' in purporting to apply it, then it has been amplified and refined")(modifications in original).

creates a valid mechanism for modifying any rule on the fly, that interpretation flies in the face of the APA and the case law that requires agencies to follow the APA Rulemaking requirements to change a Rule. As STOP pointed out in its Closing Brief, and Exceptions, there is another more plausible way to read this Rule, one that does not contravene the APA. ER at 104-106 (STOP Closing); ER at 140-146 (STOP Exceptions).

The Rule should instead be interpreted to refer to lawful modifications of a given Rule that has taken place as required by the APA, prior to the issuance of a Project Order being issued. If, for example, ODOE had adopted a Temporary Rule under ORS 183.335(5) which found that the linear nature of the project somehow created some substantial prejudice to IPC and the public interest, then (after the adoption of such a rule) the Project Order could take the modified rule into account. That, of course is not what happened in this case. Here EFSC has relied on an administrative rule to **bypass** the rulemaking statute. *See* ORS 183.335(11)(a)(". . . a rule is not valid unless adopted in substantial compliance with the provisions of this section").

In short, what happened here was that ODOE/EFSC improperly modified the identification area boundary, and the action of doing so tainted the entire proceeding. That action violates the due process rights created by the Rule, and it harms the interests of all members of the public – who are entitled to have the

agency follow the law, not unlawfully change it without following the ORS 183.335 rulemaking procedures. Validly promulgated Rules have the force of law, and citizens are entitled to rely on them. *Haskins v. Employment Dept.*, 156 Or App 285, 288, 965 P2d 422 (1998); *See also*, *City of Klamath Falls v. EQC, supra*.

EFSC's Final Order on this matter ultimately does require a larger list of NSRs, based on the 1-mile proximity, for purposes of actions taken under the Site Certificate. ER at 859 (Final Order). However, that is not the same as requiring that a one-mile list be included in the Application – which is what was noticed to the public for comment. The Application must comply with the law, because that Application is the foundation upon which the public process (as required in the APA) is based.[26]

An incomplete Application deprives the public of the functions of the public process. The Rule requirement for a one-mile list is mandatory ("must identify"). On the face of the Rule, there is no discretionary language for modification for any purpose, let alone simply because a project happens to be very long.

This Court should hold that an agency cannot simply modify its Rules "on the fly" without following the dictates of the APA. The Court should further hold

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[26] In fact, IPC's proposal of a one mile list in the Site Certificate could be read as a tacit admission by them that they recognize that STOP was right on this point and that the agency's attempt to amend its Rule without going through rulemaking was an unlawful act that needed to be "cured" in some manner.

that to the extent that EFSC and/or ODOE claims that its current Rules authorize amendment without going through APA rulemaking, that Rule is unlawful (or that it instead should be interpreted as STOP has argued herein).[27] In addition, the Court should remand this proceeding with instructions that EFSC/ODOE require that ICP follow all of the rules, including providing a one-mile list, when submitting an Application.

V. FOURTH ASSIGNMENT OF ERROR

EFSC erred when it interpreted its "significance" Rule to allow the use of an Idaho Power Company self-created visual impact analysis methodology, which failed to take into account significant visual impacts that are likely to occur from the project, including but not limited to impacts on views of the Historic Oregon Trail, and views from Morgan Lake Park.

A. Preservation of Assignment

STOP B2H Coalition first raised the issue of the propriety of IPC's visual impact methodology, and EFSC's failure to account for significant impacts not properly accounted for through the use of that methodology, in STOP's DPO comments.[28] STOP similarly raised the issue in its Petition for Party Status. ER at

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[27] *See* ER at 104-106 (STOP Closing, outlining a more plausible interpretation of this Rule).

[28] Rec at ODOE - B2HAPPDoc2 Proposed Order on ASC and Attachments 2019-07-02. Page 6354-6355; 6399-6400 (STOP DPO Comments).

10-16. STOP continued to raise the issue throughout the Contested Case Hearing process, including in testimony by fact witnesses (ER at 59-61 Barry Testimony); its Closing Argument (ER at 122-125); and, its Exceptions. ER at 156-164.

B. Standard of Review

STOP again reincorporates the Standard of Review outlined in Section II B.

C. Argument

If the simulated view on the left below was the normal view out a window one day, and the view on the right below was the same view a few weeks later (post construction), would this change be viewed as significant by (or would it have an important consequence for) the viewer? [29]

According to the IPC visual assessment methodology, the answer to that question

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[29] Images from Rec at B2HAPPDoc1232 SR-3 Exception_Deschner_2022-06-30 at Page 6.

is No - this change is not significant.

OAR 345-022-0080 provides that "to issue a site certificate, the Council must find that the design, construction and operation of the facility, taking into account mitigation are *not likely to result in significant adverse impact* to scenic resources and values identified as significant or important..." (emphasis added). OAR 345-001-0010(28) then provides the relevant definition for "significance." It states that "'Significant' means having an important consequence, either alone or in combination with other factors, based upon the magnitude and likelihood of the impact on the affected human population or natural resources, or on the importance of the natural resource affected, considering the context of the action or impact, its intensity and the degree to which possible impacts are caused by the proposed action."

EFSC erred when it failed to recognize that IPC's newly created in-house[30] visual impact methodology failed to incorporate an important aspect of "significance" for the purpose of determining the extent of adverse impacts to visual resources along the Oregon Trail. The IPC methodology failed to incorporate constituent subjective feelings about changes into its determination of

[30] ER at 99 (Cross Examination Hearing Day 6 (Louise Kling) pp. 117-118 (acknowledging that IPC's in-house-developed methodology was not peer reviewed)).

significance.

The IPC methodology was created using pieces of peer reviewed and well accepted visual impact methodologies created the Bureau of Land Management ("BLM") and the U.S. Forest Service ("USFS"). ER at 99 (Kling Cross Transcript). However, key components of those methodologies (the components related to subjective feelings) were not included in the IPC created methodology). ER at 98-101 (*Id.*).

ODOE failed to insist that IPC's methodology take into account subjective perceptions and reactions of viewers, when determining whether a potential impact was, or was not, going to be significant. EFSC ratified that failure in its Final Order ,when it accepted the IPC methodology (and the conclusions reached through its use).

IPC's analysis methods do not sufficiently protect against the permanent, significant adverse impacts to important, irreplaceable visual resources along the National Historic Oregon Trail or near its National Historic Oregon Trail Interpretive Center (NHOTIC). The analysis did not include any constituent information on subjective reactions, to determine the impact on the affected human population. Table R-1-1 of the IPC Scenic Resources Application materials defines "on the affected human population" as "[t]he impact on the human population is measured in terms of the viewer's perception of impacts to valued scenic attributes

of the landscape."[31] However, in the IPC methodology, viewer perception is derived solely from viewer characteristics: location (distance) viewers geometry (angles), and viewer duration or exposure.[32] Viewer perception is **not** evaluated for how the experience would change (as required in the BLM methodology)[33] or the expectations, desires, preferences, acceptable levels of quality, behaviors and values (as required by the USFS 1994 SMS).[34]

The experience of being "on the trails" and re-tracing the steps of the pioneers is not something measured by a stationary KOP or what direction one is looking. The human population was not studied to determine the "impact on the affected human population." Only the human viewpoints were considered, not how the humans who would be affected would feel or experience the change. In other words, a key feature of how the intrusion of the powerline would create an impact and how it would affect the human population was not evaluated. Yet those

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[31] Rec at B2HAPPDoc3-35 ASC 18_Exhibit R_Scenic Resources_ASC 2018-09-28 p. 144.

[32] Rec at B2HAPPDoc916 SR-2, SR-3, SR-7, R-1, R-2, R-3, R-4 Rebuttal Testimony of Kling (Email 1 of 5)_Till_2021-11-12 Page 41.

[33] *Id* at 232, 234 (Exhibit C to Kling Rebuttal describing methodology).

[34] Rec at B2HAPPDoc498 SR-1, SR-4, SR-6 IPC's Motion for Summary Determination_Till for Rackner_2021-05-28 at Pages 417-422 (IDAHO POWER – Exhibit G to Motions for Summary Determination).

sorts of impacts are what the EFSC rule on "significance" requires be assessed.

ODOE initially raised the issue of "significance" in 2016 with a Request for Additional Information ("RAI") #24, requesting that the methodology incorporate the Council's definition of "significant" when drawing conclusions concerning visual impacts.[35] Four years later, in the Proposed Order ODOE was still pointing to EFSC's definition of "having an important consequence . . . based upon the magnitude and likelihood of the impact on the affected human population"[36] citing the hundreds of commenters during the DPO and public hearings who spoke about negative visual impacts.[37]

However, the methodology created by IPC's consultant, in conjunction with IPC attorneys[38] is a self-serving piecemeal approach made up of portions of legitimate, comprehensive, peer-reviewed visual resource impact methodologies.

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[35] Rec at B2HAPPDoc1-20.1 ApASC Exhibit R_Scenic Resources. Includes RAIs 2013-2016_2017-06-28 p. 5 (Noting that Exhibit R does "not consider the definition of 'significant' set forth in the Councils rules . . . when drawing its conclusions using the BLM/USFS methodologies," and instead relies on a "rating" system to support a significance finding.)

[36] Rec at B2HAPPDoc2 Proposed Order on ASC and Attachments 2019-07-02 at p. 531.

[37] *Id.*

[38] Rec at B2HAPPDoc1056 Transcript for Cross Examination Hearing Day 6_Till_2022-01-20 at Page 68, lines 6-14 (admitting IPC attorney was involved in creating methodology).

Because this applicant-created methodology is missing critical pieces (such as subjective viewer perceptions of the project's proposed impacts) it is inaccurate and misleading in its current form. It does not accurately evaluate whether an expected impact is, or is not, "significant."

For example, under the IPC methodology, going from this current view near the NHOTIC:

to this view, with massive power line towers dominating the center view:

is deemed insignificant.[39] That makes no sense. It ignores an important consequence, specifically the magnitude of the subjective impact on people viewing the Historic Oregon Trail and thinking about the view that the pioneers would have seen while on that trail. Moreover, EFSC refused to consider a simple solution to this problem – requiring that IPC underground the power line in areas such as NHOTIC or other similar places.

Similarly at Morgan Lake Park, which looks like this:[40]

visitors would be going from an entrance view that currently looks like this:

[39] Images from ER at 94-95 (Kling Exh D).

[40] Image from ER at 45-49 (O'Toole Decl).

to a transformed view that would look something like this:

Under the IPC (EFSC accepted) methodology this change would not be considered

significant, or something that would be viewed as a matter of consequence by a regular Park user.[41]

This is an absurd result. Under the absurd results doctrine an agency interpretation of its own rules that leads to an absurd result is disfavored. *See generally*, *Johnson v. Star Machinery Co*, 270 Or 694, 704-706, 530 P2d 53 (1974) (incorporating the federal "absurd results" rule into Oregon law).

In this case, we have an agency interpreting its rules in a way that leads to an absurd result. Clearly significant changes in what is seen from an important Park or from the NOHTEC, are being deemed "not significant" because of the use of an untested newly created methodology. This Court should reject EFSC's interpretation of its Rules in a way that approves of a methodology and a result which claims this sort of visual intrusion is not significant.

IPC removed (or ignored) key portions of the various methodologies it used (presumably because IPC felt those components would be unfavorable to IPC's project). ODOE/EFSC should not have accepted this "cooked up" methodology. Because they did, EFSC erred when it found that there would be no significant visual impact from this proposed project.

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[41] Images from Rec at B2HAPPDoc2 Proposed Order on ASC and Attachments 2019-07-02. Page 6354-6355 and Attachments 5.1 and 5.2. of 10016 (STOP DPO Comments).

EFSC held that "the applicant developed a visual impact methodology based on the BLM and USFS visual impact assessment methods," and went on to note that EFSC rules do not require or provide any specific methodology for analyzing visual impacts. ER at 604 (Final Order). EFSC acknowledged that its definition of "significant," which "means having an important consequence, either alone or in combination with other factors, based upon the magnitude and likelihood of the impact on the affected human population or natural resources..." *Id* citing OAR 345-001-0010(52)(2020) (amended July 29, 2022 to OAR 345-001-0010(28)).

While no *particular* methodology may have been required for assessing the magnitude of visual impacts, EFSC should have required IPC to analyze the project's visual impacts (including the subjective impacts) and to present those impacts accurately. EFSC should have required IPC to evaluate the likely subjective impacts on the human viewers who would visit scenic and recreational areas through which the power line would run.

IPC's position that its methodology was sufficiently "protective," by considering all viewers to be "highly sensitive," should be given little weight in the face of IPC's clear interest in limiting its own costs in building this power line. EFSC was repeatedly notified of this shortcoming. Nonetheless, it failed to insist that IPC remedy this problem, and present an accurate assessment of expected visual impacts that disclosed whether impacts were likely to be "significant."

As noted already, according to the EFSC findings, based on the IPC created methodology, the new 300 mile power line and its many hundreds of towers allegedly do not create any "significant" change in the view or impacts on humans who wish to enjoy the scenic, historic or recreational vistas through which the power line will run. Yet in reality, the towers and power line clearly will be a *significant* alteration of what people visiting NHOTIC, or Morgan Park, or similar areas will experience. This change would plainly be "a matter of consequence" and it would have impacts on how a person (particularly all those people who have been to these locations before the construction of a massive power line) would visually experience and react to those locations.

Rather than pretending that this significant change will not affect the human population (which is what IPC's self-serving methodology did) EFSC should have either: (1) rejected the IPC methodology as not consistent with its Rule defining significance, or (2) required that IPC underground the line in this (and other key sections).[42]

[42] EFSC mistakenly concluded that it did not have authority to insist on this form of mitigation. ER at 486 (Final Order). As STOP pointed out repeatedly, that is not correct. Mitigation is entirely within the discretion of EFSC and it cannot be artificially limited by the Applicant. ER at 125-127 (STOP Closing) & ER at 162-164 (STOP Exceptions).

EFSC's finding that IPC's self-created methodology for visual impact assessment was sufficient to meet the requirements of OAR 345-022-0080, or OAR 345-022-0040, was error, given the definition of "significance" provided by OAR 345-001-0010(28). This Court should conclude that EFSC's finding that there would be no significant visual impacts was in error, because it was based on an interpretation of significance that ignored a key component of view perceptions (the subjective component).[43] The Court should remand the matter to EFSC for further proceedings consistent with the Court's conclusions.

VI. CONCLUSION

For over a decade, STOP B2H Coalition has represented a broad coalition and the public interest, acting as a check on IPC, ODOE and EFSC. Despite its consistent, broad participation throughout the facility siting process, EFSC allowed IPC to impose limited party status on STOP, limiting STOP's ability to fully participate in the Contested Case hearing. This was in contravention of ordinary notions of public participation under the Oregon APA, and contrary to the express language of the APA and the Model Rules.

Throughout this process, EFSC (and ODOE) have sought to expand their authority well beyond that delegated by the Legislature. EFSC's attempt to usurp

[43] EFSC also erred by not requiring mitigation measures such as undergrounding in key areas.

EQC power is patently unlawful. Likewise, its attempt to translate a DEQ *Internal* Management Directive (one that assumes EFSC will ensure compliance with Rules) into a valid grant of authority to issue exceptions, presents an unlawful overstepping of the bounds of its authority and of the valid DEQ rules.

Further still, EFSC has attempted to use a rule it promulgated to avoid following the rulemaking statute in the Oregon APA to change its rules to fit its whims. The Court should clearly indicate that agencies cannot side step the APA rulemaking requirements in this "on the fly manner.

Finally, EFSC's interpretation of its Rule defining significance created an absurd result regarding visual impacts from this proposed facility. The Court should find that EFSC's approval of the IPC methodology and its output, as consistent with EFSC's rules, was unlawful.

This Court should reverse and remand the Final Order back to EFSC for proceedings consistent with its opinion.

Dated: December 20, 2022.

By: */s/ Karl G. Anuta*

_____

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Index of Excerpt of Record

*Document was properly before the Decision Maker at the time of the Decision, but was not included in the Record transmitted by the agency. The complete document is included here for context and convenience

CERTIFICATE OF COMPLIANCE WITH BRIEF LENGTH AND TYPE SIZE REQUIREMENTS

Brief length

I certify that this brief complies with the word-count limitation of 14,000 words in ORAP 5.05(2)(b), and the word count of this brief (as described in ORAP 5.05(2)(a)) is 11,523 words.

Type Size

I certify that the size of the type in this brief is not smaller than 14-point for both the text of the brief and footnotes as required by ORAP 5.05(4)(f).

Dated: December 20, 2022.

/s/ Karl G. Anuta.

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CERTIFICATE OF FILING

I hereby certify that on this date I filed this Opening Brief and Excerpt of Record on behalf of Petitioner STOP B2H Coalition with the Appellate Court Administrator by electronic filing pursuant to ORAP 16.

DATED: December 20, 2022.

s/ *Karl G. Anuta*

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CERTIFICATE OF SERVICE

I certify that service of a copy of this Opening Brief and Excerpt of Record will be accomplished on the following participants in this case, who are registered users the appellate courts' eFiling system, by the appellate courts' eFiling system at the participants' email address as recorded this date in the appellate eFiling system, or via email:

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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: MICHAEL McALLISTER, 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 S069920 EXPEDITED JUDICIAL REVIEW UNDER ORS 469.403

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I. STATEMENT OF THE CASE

A. Nature of the Proceeding and Relief Sought

This appeal seeks judicial review of a Final Order of the Energy Facility Siting Council ("EFSC" or "the Council"). After concluding that the proposed Boardman to Hemingway Transmission Line ("B2H") project complies with the requirements of ORS 469.300 to 469.520 and all other requirements, the Final Order approves a site certificate for the project. The Council did this, however, without first considering Petitioner Michael McAllister's properly-raised evidence and argument regarding noncompliance with ORS 469.370(13).[1] The Council's Final Order incorporates its Order on Party Status, Authorized Representatives,

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[1] ORS 469.370(13) requires:

"For a facility that is subject to and has been or will be reviewed by a federal agency under the National Environmental Policy Act, 42 U.S.C. Section 4321, et seq., the council shall conduct its site certificate review, to the maximum extent feasible, in a manner that is consistent with and does not duplicate the federal agency review. Such coordination shall include, but need to be limited to:

(a) Elimination of duplicative application, study and reporting requirements;
(b) Council use of information generated and documents prepared for the federal agency review;
(c) Development with the federal agency and reliance on a joint record to address applicable council standards;
(d) Whenever feasible, joint hearings and issuance of a site certificate decision in a time frame consistent with the federal agency review; and
(e) To the extent consistent with applicable state standards, establishment of conditions in any site certificate that are consistent with the conditions established by the federal agency."

and Issues, dismissing Petitioner's issue relating to ORS 469.370(13) from the contested case.

The Council is obligated to consider properly-raised issues during the contested case. By excluding Petitioner's issue the Council failed to do so, improperly denying Petitioner the right to be heard on his issue related to noncompliance with ORS 469.370(13). Accordingly, Petitioner seeks reversal and remand.

B. Nature of the Decision Sought to be Reviewed

The agency order for which Petitioner seeks review is a "Final Order" of the Council, approving Idaho Power Company's ("IPC" or "Applicant") application. ER-1715. This final order incorporates the Council's determination to exclude Petitioner's issue. ER-0998.

C. Statutory Basis for Original Appellate Jurisdiction

This Court has exclusive jurisdiction to hear and decide this appeal of the Final Order of the Energy Facility Siting Council pursuant to ORS 469.403(3).

D. Timeliness of Appeal

The Council issued its Final Order in this matter on September 27, 2022. Service of the Council's Order became effective on October 18, 2022. Petitioner filed his Petition for Judicial Review within 60 days thereafter on December 6, 2022, therefore this appeal was timely filed under ORS 469.403(3).

E. Nature and Jurisdictional Basis of the Agency Action

ORS 469.330 through ORS 469.370 grant the Council authority to review an application for site certificate. ORS 469.370 authorizes the Council to issue a final order on the application at the conclusion of the contested case approving or rejecting the application based on the standards adopted under ORS 469.501 and any additional statutes, rules, or local ordinances determined to be applicable to the facility by the project order.

F. Question Presented on Appeal

Did Petitioner properly raise an issue relating to ORS 469.370(13) that the Council should have considered in the contested case before issuing its Final Order?

G. Summary of the Arguments

Petitioner brings this appeal to seek review of the exclusion of a properly raised issue from the contested case: that federal agency assessments should have been incorporated into IPC's application so that the Council's review could be consistent with that of the U.S. Department of Interior, Bureau of Land Management's ("BLM") review under the National Environmental Policy Act ("NEPA"). Petitioner timely raised his concern during the required public comment period, namely: that the Council was considering an incomplete application because IPC's application excluded the BLM's assessments as to a

segment of the project in Union County. As Petitioner raised in his Petition for Party Status, the exclusion of the BLM's assessments from the application is inconsistent with ORS 469.370(13).

The Council denied Petitioner the opportunity to be heard on this "consistency of review" issue, which was properly before the presiding officer in the contested case. The Council concluded that this issue was not properly raised for consideration in the contested case because the issue was outside of the Council's jurisdiction. That conclusion is based on a misinterpretation of (1) Petitioner's concerns raised during the appropriate public comment period, and (2) the applicable law, ORS 469.370(13).

The Council erred in excluding from the contested case Petitioner's properly raised issue relating to ORS 469.370(13). In excluding that issue the Council committed material procedural error that prejudiced Petitioner's substantial right to a full and fair hearing, rendered a decision not supported by substantial evidence or substantial reason, and misconstrued and misapplied applicable law.

First, contrary to the Council's conclusions, Petitioner properly raised the "consistency of review" issue for consideration in the contested case, meeting all requirements under ORS 469.370(3) and (5) and OAR 345-015-0016(3). This issue speaks directly to the need for the Council to review the project in a manner consistent with the BLM's federal agency review and is therefore an issue related

to ORS 469.370(13). Issues of compliance with ORS 469.370(13) are undisputedly within the Council's jurisdiction.

Second, the Council misconstrued Petitioner's argument so as to exclude it from the Council's jurisdiction, which was not supported by the facts in the record or substantial reason.

Third, because the question of whether the Council's actions complied with ORS 469.370(13) is a matter within the Council's jurisdiction, the Council made an error of law in concluding that the issue as the Council framed it—"whether the Council's failure to consider the Agency Selected NEPA Route constitutes a violation of ORS 469.370(13)"—is outside of its jurisdiction.

H. Statement of the Facts and Procedural History

Petitioner has been involved with the siting of the B2H transmission line throughout the life of the project, beginning in 2008, to promote siting the project such that impacts are properly mitigated on federal, state, and private lands and public trust resources are protected. ER-194, 196, 212, 217 – 0240 (petition and public comments). To that end, Petitioner repeatedly raised the issue (to representatives of ODOE, the Council, and IPC) that the Council's review of the project should be consistent with that of the reviewing federal agency, here the BLM. ER-201– 210, 217 – 227, 0230 – 0240 (public comments).

Respondents ODOE and the Council have also been involved in the siting of

this project since 2008 when IPC submitted its first Notice of Intent (NOI) to ODOE. ER-989 – 994. ODOE "supervise[s] and facilitate[s] the work and research on energy facility siting applications at the direction of EFSC." ORS 469.040. Applicant IPC coordinated with ODOE/EFSC throughout the siting process, during which ODOE issued three separate project orders governing IPC's application, and IPC submitted three iterations of its application. ER-988. The relevant timeline of events is as follows, as stated in the Final Order:

- August 2008: Applicant submitted first NOI. ER-989.
- July 6, 2010: Applicant submitted revised NOI. ER-988-989.
- March 2, 2012: ODOE issued its first Project Order in accordance with OAR-345-015-0160. ER-989.
- February 27, 2013: Applicant submitted a preliminary application for site certificate to ODOE. ER-990.
- May 2013: BLM issued a press release identifying the routes it intended to analyze in the Draft Environmental Impact Statement (DEIS). Applicant indicated its intent to amend the application to include alternative route segments identified in the DEIS. ER-990.
- December 22, 2014: ODOE issued the First Amended Project Order establishing and updating requirements for the site certificate application. ER-990.
- November 2016: BLM issued its Final Environmental Impact Statement (FEIS) identifying the agency's selected route. ER-990.
- July 19, 2017: Applicant submitted an amended preliminary application for site certificate to ODOE. ER-990.

- September 15, 2017: ODOE issued to Applicant a determination of an incomplete application detailing required information. ER-991.

- September 15, 2017 to September 21, 2018: ODOE issued formal requests for additional information to Applicant. ER-991.

- July 26, 2018: ODOE issued the Second Amended Project Order. ER-991.

- September 21, 2018: ODOE determined the application to be complete after reviewing Applicant responses to requests for additional information. ER-991.

- September 28, 2018: Applicant filed its "complete" application. ER-991.

- May 22, 2019: ODOE issued the Draft Proposed Order recommending approval of the site certificate and providing notice of the public comment period on the Draft Proposed Order. ER-993.

- July 2, 2020, ODOE issued its Proposed Order recommending approval of the site certificate. ER-995.

Each of the project orders address use of information in the BLM's FEIS and the Council's obligation to review the application for site certificate consistent with BLM review under NEPA. ER-39, 73, 101.

As set forth in the timeline above, the BLM studied routes of the B2H project through Union County, completing an environmental analysis pursuant to NEPA and releasing its findings and assessments in its November 2016 FEIS, including its preferred route for the Union County segment. ER-121, 990. This preferred route "was developed in conjunction with cooperating agencies after

considering all route alternatives and variations" and it "maximizes use of existing utility or infrastructure corridors, avoids or minimizes impacts on resources, and minimizes use of private lands."[2]

Inexplicably, the BLM's environmentally preferred alternative and related assessments for a Union County segment were excluded from IPC's final application. ER-122, 153. Despite that omission, ODOE deemed the application "complete" on September 21, 2018, and advanced it for review. ER-991.

Petitioner's DPO Comment

On May 22, 2019, ODOE issued its Draft Proposed Order (DPO) recommending approval of the site certificate and gave notice of a public comment period on the DPO. ER-993. During the public comment period, Petitioner submitted comment on the DPO record, again raising that the Council's review should be consistent with that of the BLM, and his concerns that ODOE and the Council's site certificate review had not been, and would not be, consistent with that of the BLM with respect to a Union County segment. ER-106 – 116. He explained that, because the BLM's assessments were absent from the application,

[2] U.S. Dept. of Interior, Bureau of Land Management Press Release, Nov. 28, 2016, https://www.blm.gov/press-release/environmental-impact-statement-boardman-hemingway-project-released (last visited Nov. 16, 2022); U.S. Dept. of Interior, Bureau of Land Management Final Environmental Impact Statement, Volume 1A Chapter 2, Proposed Action Alternatives at 201-202 https://eplanning.blm.gov/eplanning-ui/project/68150/570 (last visited Nov. 27, 2022).

ODOE/EFSC was processing an incomplete application. ER-108 – 116. Petitioner argued that BLM's Agency Identified Route (the Glass Hill Alternative) should be included in the application, such that the Council's review could and would be consistent with that of the BLM under NEPA. Specifically, Petitioner stated in DPO comment:

> "I am requesting that Idaho Power Corporation amend their Oregon EFSC Application for Site Certificate to include the U.S. Bureau of Land Management's Agency Identified Route A for consideration by the State of Oregon EFSC board members. It is the only route that was fully subjected to environmental analysis and public comment during the Federal EIS. It was established through community consultation and environmental review in a multi-year process. It must be on the table for full consideration by Oregon EFSC for a 'Complete Application' review.

ER-109.

After the DPO comment period, ODOE issued its Proposed Order recommending approval of the site certificate on July 2, 2020. ER-995. Concurrently with the issuance of the Proposed Order, ODOE issued a Notice of Proposed Order and Contested Case pursuant to ORS 469.370(4) and OAR 345-015-0014. ER-995.

Petition for Party Status and Contested Case Proceeding

On August 27, 2020, Petitioner timely filed his Petition for Party Status in the contested case proceeding and again raised the issue of the lack of consistency

between federal and state agency review and the failure to comply with ORS 469.370(13). ER-197. The Petition included the following assertions:

- "IPC's proposed B2H facility has been reviewed by the United States Department of Interior's Bureau of Land Management (BLM) under the National Environmental Policy Act (NEPA), 42 U.S.C. Section 4321, et seq. The BLM has, in fact, identified the least impactful route through Union County, which is depicted on the interactive map on IPC's website as the 'Agency Selected Route (NEPA).'" ER-0195-196.

- IPC admittedly disregarded this route identified by the BLM. ER-196.

- IPC's application and deliberate exclusion of the NEPA route is inconsistent with ORS 469.370(13). ER-197.

- EFSC member Hanley Jenkins inquired why IPC had excluded NEPA Route during the June 20, 2019, Public Hearing in La Grande, OR. IPC's only apparent response was that delays in the BLM's process were inconvenient for IPC, and the Union County segment did not cross federal lands and therefore it could disregard BLM review as to that segment. ER-197.

- IPC's admitted disregard without adequate justification for the BLM identified, NEPA-consistent route runs counter to ORS § 469.370(13). ER-197-198.

ODOE responded to petitions on September 22, 2020, in which it crafted issue statements and, based on its articulation of the issues raised, identified issues it determined to be properly raised in the contested case. ER-262-346. With respect to Petitioner's consistency of review concerns, ODOE determined the following in evaluating his petition:

ODOE Evaluation of Issues Identified in Petition No. of Issues in Petition = 8			Contested Case Issue (Yes/No)?
Issue 1	Issue Statement:	Applicant did not include the Agency Selected Route (NEPA) issued by the BLM in its ROD in the application to EFSC.	No
	Is Issue Within EFSC Jurisdiction (Yes/No)?	No. Council may not consider alternative routes or recommend alternative routes not proposed by the applicant in the application for site certificate.	
	Was the Issue Raised on the record of the DPO (Yes/No)?	Yes. Oral 06-20-2019; Written 06-23-2019 and 01-14-2019	
	Raised with Sufficient Specificity (Yes/No)?	N/A	
Issue 8	Issue Statement:	Applicant/Department does not comply with ORS 469.370(13) (Facility subject to NEPA, EFSC must conduct review, to maximum extent feasible, consistent with and does not duplicate the federal agency review)	No
	Is Issue Within EFSC Jurisdiction (Yes/No)?	Yes. Under ORS 469.370(13)	
	Was the Issue Raised on the record of the DPO (Yes/No)?	No. Statutory recommendations for EFSC listed under ORS 469.370(13), for EFSC to conduct its review to the maximum extent feasible, consistent with the federal agency review, is not raised in DPO comments.	
	Raised with Sufficient Specificity (Yes/No)?	N/A	

ER-326, 328 (ODOE Response to Petitions). In response, Petitioner provided the following:

> "In its response to my petition, ODOE improperly dismisses nearly all the issues I raised during the public comment period as not properly raised or, with respect to what I see as the most significant issue I raised in my comments—that the site certificate review was not consistent with the federal agency (the Bureau of Land Management ("BLM")) review, that it was not raised at all. In attempting to limit this Court's consideration of the majority of issues I raised, ODOE does not fully or accurately represent my public comments…
>
> "First, and most significantly, ODOE claims with respect to "Issue 8" (EFSC did not conduct review, to the maximum extent feasible, in a manner consistent with the federal agency review), that I did not raise this issue on the record of the DPO. This is incorrect. The primary purpose, intent, and focus of my comments was the fact that the site certificate review (with respect to the segment of the transmission line

> with which my comments are concerned) was not consistent with federal agency review. Indeed, my public comments, as well as numerous letters I wrote to ODOE and Idaho Power Company ("IPC"), call out the failure to pursue consistency with the BLM (the relevant federal agency conducting review) and request that IPC and EFSC take action to ensure such consistency...
>
> "EFSC's failure to comply with its statutory obligation to conduct review to the *maximum extent feasible* with the federal agency review, including but not limited to its failure to meet its obligation to use information generated for federal agency review and to rely on a joint record to address council standards, is an important issue of great public concern, which ODOE seeks to exclude on a technicality. I now make the same request of this Court that I previously asked of EFSC: that it protect the public interest and the members of Union County by requiring consistency with the federal agency review when siting the transmission line through Union County."

ER-354 – 355.

On October 2, 2020, with permission from the hearing officer, Petitioner submitted his Supplemental Reply to Parties' Response to Petition, again explaining the issue he raised, and why he properly raised the issue of inconsistency of state and federal agency review in public comment and sought to challenge this in the contested case. Petitioner submitted:

> "First, I wish to underscore that I properly raised the issue that EFSC did not conduct its review, to the maximum extent feasible, in a manner consistent with the federal agency review (ORS 469.370(13)). In my public comment, I raised that, at that time, review could not be consistent with the federal agency review with respect to Union County because Idaho Power Company (IPC) was disregarding the Bureau of Land Management (BLM) review of the Union County segment, knowingly and intentionally excluding the BLM's environmentally preferred route in its application. In my comment I point out the inconsistency, ask that it be remedied, and point to how

> the Morgan Lake Alternative is not consistent with EFSC standards. Indeed, the entire thrust of my comment was to request EFSC to ensure consistency with the BLM review…
>
> "I reiterate that throughout the life of this project, my primary concern has been siting the line such that impacts are properly mitigated, consistent with the BLM's review and NEPA analysis. EFSC did not conduct review, to the maximum extend feasible, consistent with the federal agency review. This is evidenced by its failure to require any reasonable justification from IPC as to why it chose to disregard the environmentally preferred route. My public comments, including my reference to the "incomplete application" speak directly to this issue. The Court should not exclude from its consideration the critical issue of EFSC's compliance with ORS 469.370(13) with respect the Union County segment."[3]

ER-367 – 369.

On October 29, 2020, the hearing officer in the contested case proceeding concluded that the issue Petitioner raised regarding compliance with ORS 469.370(13), which she articulated in part as "whether Council's failure to consider the Agency's Selected NEPA Route constitutes a violation of ORS 469.370(13)," was outside of the Council's jurisdiction and therefore was not properly raised for consideration in the contested case. ER-446.

Petitioner's Appeal of the Exclusion of his Issue to the Council

On November 6, 2020, Petitioner appealed this determination to the Council. In his Appeal, he explained for the Council:

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[3] Petitioner further explained his position and raised his intent to appeal the issue in his Request for Clarification Re Appeal. ER-0666 – 0668.

> "In my Petition and public comment, I specifically raised the issue that review of IPC's application was not consistent with federal agency review, calling the application "incomplete" for this reason. ORS 469.370(13) specifically requires that the council *shall* conduct its site certificate review…in a manner that is consistent with and does not duplicate federal agency review, including development with the federal agency and reliance on a joint record [sic] to address applicable council standards. As I have previously raised, the Council did not, and to this day has not, complied with this law as it relates to the Union County segment of the transmission line. Tellingly, in excluding the issue of whether the Council has complied with ORS 469.370—a matter that falls squarely within the Council's jurisdiction—the Order does not address the language of the statute at all or the fact that I raised the issue of consistency of review during the process. Rather, it misstates the issue and ignores its primary intent, framing it in order to construe it as outside of the Council's jurisdiction…
>
> "Further, not only did I raise this issue of compliance with ORS 469.370(13) in my public comment, but I raised it with sufficient specificity such that Chairmen Jenkins expressly asked IPC why it had excluded the BLM's identified environmentally preferred route at the public meeting to which IPC provided an entirely inadequate—if not false—justification (*see* transcript excerpt included in Ex. 1, p. 2). The Council asked no follow up questions and the public—outraged by IPC's response—was denied the opportunity to do so".

ER-475 – 476.

On November 20, and 25, 2020, the Council held a meeting during which it discussed numerous petitioner appeals on party status and issues to be included in the contested case.[4] Immediately following the last day of the meeting, the Council

[4] Available at https://soundcloud.com/odoe/november-energy-facility?in=odoe/sets/november-19-20-2020-efsc-meeting (last accessed Dec. 18, 2022). This recording was apparently inadvertently omitted from the agency record filed with the Court.

affirmed the exclusion of Petitioner's issue relating to ORS 469.370(13) on November 25, 2020. ER-557.[5]

Finally, after the hearing officer issued her Proposed Contested Case Order, Petitioner once again raised the improper exclusion of his issue from the proceeding before the Council issued its Final Order approving the site certificate. ER-947 – 948 (ODOE's Response to Procedural and Process Objections), ER-0998 (Final Order). The Council issued the site certificate on September 27, 2022. ER-1715. The Council incorporated by reference its determination on party status and proper issues for the contested case in the Final Order finding compliance with all applicable statutes and rules. ER-998.

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[5] Petitioner was granted standing to challenge three other issues, identified as FW-13, R-2, and SP-2 in the contested case. ER-0639-0642, 0655, 0658-0659 (Amended Order on Party Status). EFSC dismissed FW-13 and SP-2 on summary determination. ER-1009, 1026-1027 (Final Order). Petitioner lost on Issue R-2. ER-1021 (Final Order).

At the time EFSC dismissed Petitioner's "consistency of review" argument, he expressed his intent to appeal the exclusion of this issue from consideration and sought clarification on the timing and process to appeal such exclusion. ER-0668. At that time ODOE took the position that the Council's Order on Appeals of the Hearings Officer's Order on Petitions for Party Status was not appealable or subject to judicial review at that time because the denial of issues to be heard in the Contested Case does not constitute an appealable Final Order. ER-0903-0904 (email from ODOE attorney).

II. ARGUMENT

A. Assignment of Error: the Council erred in excluding Petitioner's properly raised issue relating to ORS 469.370(13) from the contested case. In doing so, the Council committed material procedural error that prejudiced Petitioner's substantial right to a full and fair hearing, rendered a decision not supported by substantial evidence or substantial reason, and misconstrued and misapplied applicable law.

1. Preservation of Error

Petitioner challenged the exclusion of the relevant issue to the Council during the contested case. ER-475 – 476 (Appeal of Denial of Full Party Status and Issue Limitation). The Council denied Petitioner's request to present evidence on the issue during the contested case, affirmed the dismissal of Petitioner's issue, and incorporated this determination in its Final Order. ER-0998 (Final Order).

2. Standard of Review

Pursuant to OAR 345-022-0000, "[t]o issue a site certificate for a proposed facility or to amend a site certificate, the Council shall determine that the preponderance of the evidence on record supports" its conclusions. With respect to judicial review of the Council's orders, ORS 469.403(6) states that "[e]xcept as otherwise provided in ORS 469.320 and this section, the review by the Supreme Court shall be the same as the review by the Court of Appeals described in ORS 183.482." Pursuant to ORS 183.482, this Court reviews the Council's final orders for errors of law, abuse of discretion, and lack of substantial evidence in the whole

record. ORS 183.482(7) & (8).

B. Argument Supporting Assignment of Error

Throughout the siting process of the B2H transmission line, Petitioner repeatedly raised that ODOE and the Council should incorporate BLM assessments into review of IPC's application for site certificate. ER-201– 210, 217 – 227, 230 – 240. (Petition for Contested Case and supporting documents). The Council improperly denied Petitioner the opportunity to be heard on this "consistency of review" issue during the contested case, which Petitioner raised during the DPO public comment period. As an issue relating to ORS 469.370(13), Petitioner's issue was within the Council's authority to address during the site certificate proceeding and it should have addressed the issue in deciding whether to issue the site certificate and what conditions should be included. The Council erred in concluding the issue was outside its jurisdiction and therefore not properly raised for consideration in the contacted case.

1. Petitioner properly raised the "consistency of review" issue for consideration in the contested case and the Council erred in dismissing it.

Under ORS 183.482(7), the Court shall remand the order for further agency action if it finds that either the fairness of the proceeding or the correctness of the action may have been impaired by a material error in procedure. This includes failure to comply with ORS 183.417(8) requiring the officer presiding at the

hearing to ensure that the record developed at the hearing shows a full and fair inquiry into the facts necessary for consideration of all issues properly before the presiding officer in the case and the correct application of the law to those facts. Petitioner's excluded issue was properly before the presiding officer in the contested case, and he should have been allowed to present evidence for full and fair inquiry.[6] ORS 183.482(7), ORS 183.417(8). Petitioner need not show that fairness of the proceedings *was* impaired, but that it *may have been* impaired by the error. *Pulito v. Oregon State Bd. of Nursing*, 366 Or 612, 625–26, 468 P3d 401 (2020).

As provided in ORS 469.370(3) and (5), OAR 345-015-0016(3), and the Amended Order on Party Status (December 4, 2020), to be considered in the contested case, an issue must meet the following requirements:

1. The issue must be within the jurisdiction of the Council.[7] "To be within the Council's jurisdiction, the issue must *be related to* a Council standard expressed in a rule or an applicable, relevant statute identified in the Project Order." ER-583.

2. The issue must have been raised in person or in writing prior to the close of the public record on the DPO, during the period of May 22, 2019, through August 22, 2019. ER-0583.[8]

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[6] ODOE categorizes Petitioner's challenge regarding the exclusion of the issue as one of procedure. ER-944, 947 – 948 (ODOE Response to Procedural and Process Objections).

[7] OAR 345-015-0016(3).

[8] ORS 469.370(5)(b); OAR 345-015-0016(3).

3. The issue must have been raised with sufficient specificity to afford the decision maker an opportunity to respond to the issue. "To have raised an issue with sufficient specificity, the person must have presented facts at the public hearing that support the person's position on the issue." OAR 345-015-0016(3). ER-583.

Petitioner satisfied each of these requirements as to his excluded "consistency of review" issue. First, Petitioner raised an issue "related to…an applicable, relevant statute identified in the Project Order." Specifically, Petitioner repeatedly raised, including in DPO comment, that absent inclusion of the BLM's Agency Preferred Route, ODOE and the Council were processing an "incomplete application" and the application should be amended to incorporate BLM's assessments. ER-108 – 109. He stated in his DPO comment:

- "[t]he application is incomplete because IPC did not include the Agency Selected Route, adopted by the…NEPA process conducted by the U.S. Department of Interior's Bureau of Land Management…" ER-108.

- "Idaho Power Corporation and others are currently processing an incomplete application. IPC has been asked to amend their application repeatedly, to include Agency Identified Route A. This issue should not become a Contested Case…" ER-108.

- "I am requesting that Idaho Power Corporation amend their Oregon EFSC Application for Site Certificate to include the U.S. Bureau of Land Management's Agency Identified Route A for consideration by the State of Oregon EFSC board members. It is the only route that was fully subjected to environmental analysis and public comment during the Federal EIS. It was established through community consultation and environmental review in a multi-year

> process. It must be on the table for full consideration by Oregon EFSC for a 'Complete Application' review."

ER-109.

Petitioner's request to the Council asserts that the Council's review should be consistent with the BLM's review, which identified an Agency Preferred Route through Union County under NEPA.[9] This is necessary for the Council to "conduct its site certificate review, to the maximum extent feasible, in a manner that is consistent with and does not duplicate the federal agency review" as ORS 469.370(13) requires. The Council has acknowledged that ORS 469.370(13) is matter within its jurisdiction and ODOE expressly references this requirement in the operative Project Order, stating "EFSC will review the application for site certificate, to the [maximum] extent feasible, in a manner that is consistent with and does not duplicate BLM review under NEPA." ER-601 (Amended Order on Party Status and Issues), ER-101(Second Amended Project Order). While Petitioner did not cite the relevant statute in his comments—nor is this required of members of the public under OAR 345-015-0016(3)— his expressed concerns are "related to a Council standard expressed in a rule or an applicable, relevant statute identified in the Project Order," as required. ER-583 (Amended Order on Party Status.

[9] The relevant segment at issue is the "Glass Hill Alternative" segment in Union County.

Second, Petitioner timely raised his concern on the DPO record during the period of May 22, 2019, through August 22, 2019. ER-106. Finally, Petitioner raised this with sufficient specificity to afford the decision maker an opportunity to respond to the issue. During the June 20, 2019, public hearing on the Draft Proposed Order, Petitioner orally expressed concern for IPC's disregard of the BLM's environmentally preferred route. ER-149. Following these remarks, Councilmember Hanley Jenkins asked the following to IPC representatives: "I'm going to ask a really hard question tonight: Why wasn't the BLM route proposed as part of your application to EFSC?" ER-155. Petitioner's concern that the BLM route should be included for the Council's review, such that it could be consistent, is clear from his comments and specific enough to allow the Council to respond, as indicated by Councilmember Jenkins' question to IPC.

Petitioner's issue met the requirements under ORS 469.370(3) and (5) and OAR 345-015-0016(3). Accordingly, this issue was properly before the presiding officer in the contested case. The Council erroneously excluded the issue and failed to allow full and fair inquiry into this properly raised issue. Petitioner should have been allowed to present evidence on this issue prior to the Council's finding of compliance with the requirements of ORS 469.300 to 469.520.

2. The Council erred in concluding Petitioner's issue as raised in DPO comment was outside of its jurisdiction.

a. The Council misconstrued Petitioner's argument so as to exclude it from the Council's jurisdiction.

Under ORS 183.482(8)(c), the Court shall set aside or remand the order if it finds that the order is not supported by substantial evidence in the record. Substantial evidence review includes review of the whole record, including the evidence that would detract from the agency's order. *Castro v. Bd. of Parole*, 232 Or App 75, 82-83, 220 P3d 772 (2009). The agency's order must contain "substantial reasoning" that connects the facts to the ultimate conclusion of law. *Id.* at 83. Here, the Council's narrow framing of Petitioner's issue is not supported by the record, and it failed to connect the record facts with its ultimate conclusion that the issue was outside the Council's jurisdiction.

In the contested case, Petitioners are not masters of their own claims. Rather, the Council defines the issues to be presented in the contested case based on its interpretation of a petitioner's DPO comment. *Cf.* ER-475 – 476 (Petitioner Appeal of issues raised to Council explaining issue), ER-640 (Amended Order on Party Status and Issues). In framing the relevant issue, the Council ignored that, in his comments, Petitioner had consistently sought to achieve consistency in review between ODOE/EFSC and the BLM, stating that, absent inclusion of the BLM's findings, ODOE and the Council were processing an incomplete application and

that "[the BLM route] must be on the table for full consideration by Oregon EFSC for a 'Complete Application' review." ER-109.

To determine Petitioner's issue was not properly raised, the Council defined Petitioner's issue as follows:

> **d. Issues Not Properly Raised**
>
> (1) *Route Selection – Alternatives Analysis*
>
> (i) Whether Applicant was required to include the least impactful route, the Agency Selected NEPA route, in its application to Council.
>
> (ii) Whether Council's failure to consider the Agency Selected NEPA Route constitutes a violation of ORS 469.370(13).[54]

ER-640 (Amended Order on Party Status).

Based on this construction of Petitioner's issue, the Council held the matter was outside of its jurisdiction, adopting the reasoning:

> An applicant's choice of routes, and whether Applicant selects the route with the least environmental impact, are matters that fall outside Council's jurisdiction. There is no siting standard requiring Council to consider routes not proposed by Applicant and no siting standard allowing Council to recommend routes that are not proposed in the ASC. Because Applicant's selection of the Morgan Lake Alternative route (instead of the Agency Selected NEPA Route, or other possible routes) falls outside Council's jurisdiction, the above issues are not properly raised for consideration in the contested case. OAR 345-015-0016(3).

ER-640.

Petitioner challenged this construction of his issue (first set out in the hearing officer's interim order on party status) and sought to correct the issue

statement on appeal to the Council, arguing (1) the correct framing of his issue, (2) how the record supports his articulation of the issue, and (3) that the issue raised was within Council's jurisdiction. Petitioner explained to the Council:

> "In my Petition and public comment, I specifically raised the issue that review of IPC's application was not consistent with federal agency review, calling the application 'incomplete' for this reason.
>
> "While I did not cite the statute in my public comment…the very core of my comment seeks that Council conduct its review, with respect to the segment of the projection through Union County, consistent with the federal agency review, which it did not and has not done…
>
> "Further, not only did I raise this issue of compliance with ORS 469.370(13) in my public comment, but I raised it with sufficient specificity such that Chairmen Jenkins expressly asked IPC why it had excluded the BLM's identified environmentally preferred route at the public meeting to which IPC provided an entirely inadequate—if not false—justification (*see* transcript excerpt included in Ex. 1, p. 2). The Council asked no follow up questions…"

ER-475 – 476. The Council did not address any of Petitioner's arguments presented on appeal and affirmed the hearing officer's framing of the issue and the conclusion that it was not within the Council's jurisdiction because "there is no siting standard allowing Council to recommend routes that are not proposed in the ASC." ER-557 (Council Order on Appeals), ER-640 (Amended Order on Party Status and Issues).

Contrary to the Council's conclusions, Petitioner's issue as raised, interpreted properly, is within the Council's jurisdiction.[10] As Petitioner explained on appeal, his argument is encompassed in the language of the ORS 469.370(13), which requires that:

> "For a facility that is subject to and has been or will be reviewed by a federal agency under the National Environmental Policy Act, 42 U.S.C. Section 4321, et seq., the council shall conduct its site certificate review, to the maximum extent feasible, in a manner that is consistent with and does not duplicate the federal agency review."

The BLM had already identified its Agency Preferred Route prior to the time ODOE determined IPC's application excluding this route was complete. ER-990 – 991. Under the statute the Council must conduct its site certificate review, to the maximum extent feasible, in a manner that is consistent with this previously conducted federal agency review. Accordingly, to comply with this requirement, BLM's Agency Preferred Route must be included in the application for ODOE to determine the application is "complete," which is a determination that ODOE makes prior to issuing its DPO and advancing the application for further processing. *See* ER-988 – 91 (Final Order). IPC's final application excluded the BLM's assessments. ER-121 (June 20, 2019 hearing transcript). As such, Petitioner raised that the application was incomplete, and that these assessments

[10] In contrast, Petitioner did not suggest that the Council review the BLM's NEPA process for legal adequacy, which would be the subject for a federal challenge, and in that instance, would be outside of the Council's jurisdiction.

should be included such that the Council's review could be consistent with the reviewing federal agency. This is a matter within Council's jurisdiction as an issue "*related to* a Council standard expressed in a rule or an applicable, relevant statute identified in the Project Order," namely ORS 469.370(13). ER-583 (emphasis added).

In determining Petitioner's issue was not proper for consideration in the contested case, the Council construed the issue too narrowly. Petitioner did not merely raise that the Council must consider alternative routes not proposed by IPC, but that the ODOE and the Council were obligated to review the project consistent with the reviewing federal agency and could not do this if ODOE and the Council advanced the "incomplete application" that excluded the BLM's assessments as to the studied Union County segments. The Council ignored these facts in its ultimate conclusion and failed to address the arguments Petitioner raised regarding the issue statement and therefore failed to provide "substantial reasoning" that connects the facts to the ultimate conclusion of law.

3. The Council erred in concluding the relevant issue is outside of its jurisdiction.

a. In concluding that the issue of "whether the Council's failure to consider the Agency Selected NEPA Route constitutes a violation of ORS 469.370(13)," the Council ignores what the law requires and ODOE's active role throughout the siting process.

Under ORS 183.482(8)(a), the Court shall remand "[i]f the court finds that the agency has erroneously interpreted a provision of law." The determination of the meaning of a statute such as ORS 469.370(13) is one of law, ultimately for the court to decide. *Springfield Educ. Ass'n v. Springfield School Dist. No.* 19, 290 Or. 217, 224, 621 P2d 547 (1980). A court's deference to an agency's interpretation of a statute is not automatic but depends upon whether the legislature delegated specific authority to the agency to flesh out the statutory term. *Id*. To accord any deference to the agency interpretation, however, it is necessary for the agency to express in its order its reasoning demonstrating the tendency of the order to advance the policy embodied in the words of the statute. Explicit reasoning will enable the court on judicial review to give an appropriate degree of credence to the agency interpretation. *Dickinson v. Davis,* 277 Or. 665, 561 P2d 1019 (1977); *see also Home Plate, Inc. v. OLCC*, 20 Or.App. 188, 190, 530 P2d 862 (1975).

As explained above in Section II.B.2, the Council too-narrowly defined Petitioner's "consistency of review" issue, in part, as "whether Council's failure to

consider the Agency Selected NEPA Route constitutes a violation of ORS 469.370(13)," acknowledging by footnote that the statute requires the Council to conduct its review in a manner consistent with federal agency review to the maximum extent feasible. ER-604, fn 30. The Council reasoned that, based on its articulation of the issue, it was outside of Council's jurisdiction because "[t]here is no siting standard that requires Applicant to propose the least impactful route or the route recommended by a federal agency," and "[t]here is no siting standard requiring Council to consider routes not proposed by Applicant and no siting standard allowing Council to recommend routes that are not proposed in the ASC." ER-640.

In making this determination, the Council does not confront the statutory language: it provides no discussion or reasoning relating to the language of the statute or what the provision actually requires in the context of the site certificate process when concluding that it *does not* require the Council to "consider" the assessments of the reviewing federal agency in this instance. It does not explain why the statute does not apply to the facts of this case. Nor is it correct in concluding that the Council cannot consider the Agency Selected NEPA route. The statute requires the Council's review to be consistent with BLM's review, thereby "considering" its assessments. While there may not be a standard expressly requiring IPC to propose the least impactful route or the route recommended by a

federal agency, there is a standard requiring the Council's review to be consistent with the federal agency and that it rely on a joint record to assess compliance with state standards. ORS 469.370(13). Accordingly, whether the state agency's failure to consider the federal agency's assessments—and thereby conduct consistent review—violates the ORS 469.370(13) is matter within the Council's jurisdiction. In concluding otherwise, the Council failed to reconcile its obligations under the statute with its claim that that consideration of the BLM's assessments is outside of its jurisdiction. The Council ignores ODOE/EFSC's role and scope of involvement throughout the entire siting process, during which, as detailed below, ODOE establishes the requirements for the application in the form of the project order, may amend its project order at any time, reviews preliminary version of the application to ensure the applicant has satisfied the requirements in the project order, and determines when an application is complete for further processing.[11] *See* Section II.B.3(b) *infra.*

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[11] The Council states in its Final Order that, while "the BLM explores and evaluates all reasonable alternatives based on the agency's review and public feedback," which results in "the identification of the agency's preferred alternative," the Council does no such comparative analyses. ER-1033 – 34. Therefore, if the Council reviewed the application consistent with the BLM's review as required by ORS 469.370(13), then this assessment of alternatives would somehow be incorporated into the Council's review. The Council's comparison of its less comprehensive study further underscores the importance to the public that the BLM's assessments are incorporated for the Council's review because the BLM identifies environmentally preferred alternatives, as it did here, whereas the Council does not.

b. The Council failed to acknowledge that ODOE establishes the contents of the application, directs the applicant throughout the siting process, and determined when the application is complete.

The Council, through its ODOE staff, has been involved in the siting of this project since 2008 when the applicant submitted its first NOI to ODOE. ER-989, fn 9. IPC coordinated with ODOE/EFSC throughout the project, during which time ODOE issued three separate project orders governing the application, and applicant submitted three iterations of its application. *See* Section I.H, *supra*, pages 6-7.

Pursuant to OAR 345-015-0160, ODOE issues the project order following review of the NOI establishing the following, among other criteria: "[a]ll state statutes and administrative rules containing standards or criteria that must be met for the Council to issue a site certificate;" "all requirements in OAR 345-021-0010;" and "any other data and information that must be included in the application for a site certificate to allow the Council to determine whether the proposed facility will comply with applicable statues, administrative rules and local government ordinances." OAR 345-015-0160(1)(a), (c), & (e). As such, ODOE's project order is the blueprint for the project application. *See* ORS 469.330. ODOE or the Council may amend the project order at any time throughout the siting process. ORS 469.330(4) and OAR 345-015-0160(3).

Here, ODOE issued the initial project order on March 2, 2012, issued its first amended project order updating requirements for the site certificate application on

December 22, 2014, and issued its second amended project order on July 26, 2018. ER-989 – 991. In turn, IPC submitted its preliminary application for site certificate February 27, 2013, submitted its amended preliminary application on July 19, 2017, and submitted the final "complete" application on September 28, 2018, after responding to requests for additional information from ODOE. ER-990 – 991.

ODOE is charged with determining completeness of the application. OAR 345-015-0190(5). According to ODOE's *Energy Facility Site Certificate Project Guide*, "an application is complete …when the applicant has responded to all the requirements in the project order." Oregon Department of Energy, July 2015 (citing OAR 345-015-0190(5)).[12] If ODOE finds the application is incomplete for, among other reasons, failure to comply with all requirements set forth in the project order, it issues a determination of an "incomplete application" to the applicant detailing required additional information, as ODOE did once in this matter on September 15, 2017. Section I.H, *supra*, page 7.

In sum, ODOE (1) determines the contents of the application through its project order, (2) may amend the project order at any time; and (3) determines whether the application is "complete" for further processing, which requires the application to satisfy all requirements ODOE established in the project order or

[12] Available at: https://www.oregon.gov/energy/facilities-safety/facilities/Documents/Fact-Sheets/Site-Certificate-Project-Guide.pdf (last visited Nov. 19, 2022).

any amended project order it issued. Therefore, the application is not, as the Council represents in its conclusions, a take-it-or-leave it proposition directed by the applicant over which it has no control. Rather, the applicant works closely with ODOE throughout the process to satisfy its requirements and respond to requests for information in order to ensure that its "complete application" will result in Council issuance of the site certificate. As such, the applicant does not submit a final application that ODOE has not, in effect, already approved.

Here, the requirements of ORS 469.370(13) are among the statutory criteria that must be met prior to the Council's issuance of a site certificate. *See* ORS 469.320 (requiring that no facility shall be constructed or operated except in conformity with the requirements of ORS 469.300 to ORS 469.563); OAR 345-015-0160(1)(a). Consistent with these requirements, ODOE's second amended project order directs the following:

> "VII. USE OF INFORMATION IN THE FINAL ENVIRONMENTAL IMPACT STATEMENT
>
> "Pursuant to ORS 469.370(13), EFSC will review the application for site certificate, to the [maximum] extent feasible, in a manner that is consistent with and does not duplicate BLM review under NEPA. This includes elimination of duplicative study and reporting requirements and EFSC use of information prepared for the federal review. "

ER-101. As a requirement set forth in the project order, this criterion must be met for ODOE to consider the application "complete." Therefore, if the BLM has provided review and study of a project, as it had in this case, such assessments

must be included to allow the Council to "review the application for site certificate, to the [maximum] extent feasible, in a manner that is consistent with and does not duplicate BLM review under NEPA." *Id.*; ORS 469.370(13). Here, ODOE determined the application complete when it excluded the BLM's assessments with respect to a Union County segment. *See* Section I.H, *supra*, pages 7 & 9. ODOE could have determined the application to be incomplete and issued additional requests for information, as it had done before, to ensure the application included all BLM assessments for the Council's consideration on review of the application. Failure to do so violated 469.370(13) and compliance with this provision is a matter within the Council's jurisdiction.

The Council's conclusion that the question of "whether Council's failure to consider the Agency Selected NEPA Route Constitutes a violation of ORS 469.370(13)" is outside its jurisdiction entirely ignores the mandate of ORS 469.370(13). Contrary to legislative intent, the Council's apparent interpretation of the statute in this case renders the requirement meaningless as it allows the applicant to sidestep the requirement (for example when the federal agency's timing is inconvenient, as IPC stated it was here) by merely excluding routes that the federal agency has reviewed and studied, as IPC has done here. *See LandWatch Lane County v. Lane County*, 364 Or 724, 738, 441 P3d 221 (2019) (courts "generally interpret statutes to give effect to all their provisions"); *State v.*

Clemente-Perez, 357 Or 745, 755, 359 P3d 232 (2015) (courts "assume that the legislature did not intend any portion of its enactments to meaningless surplusage."). The result of the Council's interpretation is to allow applicants to circumvent the burden or inconvenience of complying with the statute, and potentially cater to private interests, by intentionally excluding routes that have been, or must be, reviewed by the appropriate federal agency consistent with NEPA.

In addition, the Council's interpretation promotes waste of both federal and state government resources. In its view, the federal government may spend resources to study routes and make findings, only to have its study disregarded at the applicant's behest because, the Council reasons, the applicant may apply for whatever it chooses, or conversely, exclude whatever chooses. Here, the BLM studied and analyzed possible transmission line routes through Union County and identified its *environmentally preferred* route. Federal agency work and expertise were wasted with respect to the Union County segment that IPC chose to exclude in its application, which ODOE nonetheless deemed complete. The Council's interpretation also results in waste of state resources because it must duplicate studies rather than coordinate them with the applicable federal agency with "reliance on a joint record to address applicable council standards." ORS 469.370(13). Thus, the Council's interpretation is inconsistent with the apparent

policy of the statute. *See State v. Vasquez-Rubio*, 323 Or 275, 282-83, 917 P2d 494 (1996) (if a statute has two or more plausible meanings," the court "will refuse to adopt the meaning that would lead to an absurd result…").

Further, the Council's interpretation also leads to judicial inefficiencies and inconsistent results. Council Member Mary Winters addressed the problematic nature of the conclusion that Petitioner's issue fell outside the Council's jurisdiction as follows:

> "It confused me, that while I understand the legal principal that we are bound by EFSC rules not by BLM and federal…what is outside our jurisdiction, it makes no sense to me that if the federal process had a preferred alternative through the EIS process that we could then choose a different route. How would that ever work if we did that? If they have a preferred alternative through that process, and say it went on appeal up to the Ninth Circuit…I have been involved in NEPA…up to the Ninth Circuit, and you have then a decision out of a federal agency that then becomes binding on that agency and the applicant; then if we decided something else, that would be a mess."

EFSC Council Meeting, November 19-20, 2020 (Day 2, Audio 2), at 2:32:56 through 2:34:05).[13] In response, explaining that Petitioner's issue is purportedly outside of the Council's jurisdiction, the Council's lawyer stated that "the Council's decision is one of compliance with state laws… " and in the instance that the Council's approval of an application is ultimately precluded by a federal

[13] Available at https://soundcloud.com/odoe/november-energy-facility?in=odoe/sets/november-19-20-2020-efsc-meeting (last accessed Dec. 18, 2022). This recording was apparently inadvertently omitted from the agency record filed with the Court.

agency decision, "[IPC] would need to come back to the Council and amend its application or submit a new one." *Id*. at 2:34:10 through 2:35:17. In this explanation, the Council's attorney failed to address Petitioner's invocation of ORS 469.370(13) and its requirements, which is a state—not federal—law with which the Council must comply. The Council's attorney further acknowledged the inefficiency and potential tension between the state and federal processes, and the "unfortunate" inconvenience levied on the public, which must follow and respond to two separate processes. EFSC Council Meeting, November 19-20, 2020 (Day 2, Audio 2), at 2:35:29 through 2:36:22. In doing so, he also failed to recognize that ORS 469.370(13), in fact, if followed, would coordinate the state and federal processes and avoid the very potential issues that arise from the scenario Council Member Winters posed.

Under the applicable framework in which ODOE directs the application and determines when it is complete, failure to "consider" the Agency Selected NEPA route may constitute a violation of ORS 469.370(13). Indeed, the issue defined is ultimately whether there has been compliance with ORS 469.370(13)—a question unequivocally within the Council's jurisdiction. Accordingly, the Council should have addressed the issue in determining compliance with ORS 469.300 to 469.520 in order to issue the site certificate. The Council has misconstrued and misapplied the applicable law and made findings not supported by the record facts in

concluding the issue is outside its jurisdiction.

III. CONCLUSION

For the foregoing reasons, Petitioner respectfully requests the Court to reverse and remand the decision and Final Order of the Energy Facility Siting Council on the B2H transmission line.

DATED this 20th day of December 2022.

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EXCERPT OF RECORD[1]

INDEX

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[1] Documents listed in chronological order pursuant to ORAP 5.50(5)(b).

COMBINED CERTIFICATE OF COMPLIANCE WITH BRIEF LENGTH AND TYPE SIZE REQUIREMENTS, AND CERTIFICATES OF FILING AND SERVICE

Brief length

I certify that this brief complies with the word-count limitation in ORAP 5.05(1)(b)(i)(A) and that the word-count of this Opening Brief is 8,523 words.

I certify that the size of the type in this brief is not smaller than 14-point for both the text of the brief and footnotes.

Filing

I certify that I filed this brief with the Appellate Court Administrator on this date.

Service

I certify that service of a copy of this brief will be accomplished on the following participant(s) in this case, who is a registered user of the appellate courts' eFiling system, by the appellate courts' eFiling system at the participant's email address as recorded this date in the appellate eFiling system:

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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

OPENING BRIEF

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 befor 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 befor 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: (l) 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

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

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

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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 befor 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:

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”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(l)469.405(l),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(l)(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

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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 estabished that mitigation cannot be vague, imprecise, hortatory statements that could not functionas 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).

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ERROR THREE

EFSC is not making the final eligibility determination on this issue. 469.401(l)469.405(l),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

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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.(l). ORS 469.405(l) 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 469.50l. 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

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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 excedance 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 counsil 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

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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 he 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

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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. (B2HAPPDoc1-21.2ApASC 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

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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 Supplimental Response to Irene Gilbert's Discovery Request No. l (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

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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

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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.

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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.

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Dated: December 20, 2022.

By: _____

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.

_____

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.

_____

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

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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

References Used/Attachment

ORS 174.010

ORS 197.646(1) and (3)

ORS 197.250

ORS 358.055

ORS 358.057

ORS 358.905

ORS 358.910

ORS 469.320(l)

ORS 469.370(13)

ORS 469.401(2)

ORS 469.402

ORS 469.501

ORS 469.503

ORS 469.504(1)

ORS 469.504

ORS 469.504(3)

ORS 469.505(2) ORS 469.505

OAR 345-001-0010(33)

OAR 345-001-0010(52)

OAR 345-021-0010(B), (L)(C)(v), (R)(A), (B), (C)(iii)(D)

OAR 345-021-0100

OAR 345-022-0000(l)(a), (2) and (3)(c)

OAR 345-022-0030

OAR 345-022-0050(1) and (2)

OAR 345-022-0040

OAR 345-022-0080

OAR 345-022-0090

OAR 345-022-0040

OAR 345-022-0080

OAR 345-022-0090 (l)(a), (b), and (c)

OAR 345-025-0006(5) and (8)

OAR 345-025-0016

OAR 660-015-0000(5) LCDC OAR 345-022-0090

OAR 345-022-0030

OAR 345-022-0040

OAR 345-022-0080

OAR 345-001-0010(33)

OAR 345-001-0010(52)

OAR 345-021-0050

OAR 345-021-0010(B), (L)(C)(v), (R)(A), (B), (C)(iii)(D)

OAR 345-021-0100 (1)

OAR 345-022-0000(l)(a)

OAR 345-022-0000(2)

OAR 345-022-0030

OAR 345-022-0040

OAR 345-022-0080

OAR 345-022-0090.

OAR 345-022-0040

OAR 345-022-0080

OAR 345-022-0090 (l)(a), (b), and (c)

OAR 345-025-0006(5)

OAR 345-025-0016

OAR 660-015-0000(5)

OAR 345-022-0030

OAR 345-022-0040

OAR 345-022-0080

OAR 345-022-0090

ORS 469.503

OAR 345-022-0000(l)(a)

OAR 345-022-0000 (l)(b)

OAR 345-022-0030

OAR 345-022-0040

OAR 345-022-0080

OAR 345-022-0090

OAR 345-027-0110

2007 Gould v Deschutes County, 216 Or Ap. 150.

March 16, 2005 Sisters Forest Planning Committee v Deschutes Cty. Court of Appeals State of Oregon, Mitigation must be “clear and objective”.

Jan. 2010. Scott v City of Jacksonville OR LUBA (2009-107).

1996. Herman v. Valley Insurance Co.. 145 Or, Ap 124 & 127-28, P2d 985.

1997. Aver v. Robbins, 519 US 452, 461. 117 S CT. 905, 137 L Ed 2d 79.

1977. Marbet v. Portland General Electric, 277 Or 447, 561 P2d 154.

1997 DLCD v Curry County, 33 Or LUBA 728.

1998 DLCD v Tillamook Co., 34 Or LUBA 586.

May 12, 1995. Attachment 5 to P. Rowe Declaration, Section-by-Section Analysis of A-Engrossed Senate Bill 951, Pg. 14.

Gilbert Issue HCA-3 Direct Evidence Exhibit 4 IPC Responses to Discovery.

Exhibit 1-- From the transcript of Scott Hartell's sworn statement, Page 15, 16 &22.

February 5, 2021 Marlette Exhibit 9 (IPC Response to Gilbert Discovery Req. 4.

July 26, 2018. Second Amended Project Order 2018-07-26, Pg. 21, Lines 5-7, 17-19, 23-24, and 32-34).

B2HAPPDoc8-21 Ap ASC Reviewing Agency Comment SHPO HRA 2017-11-03 Pg. 5, Middle of page.

March 16, 2005. Sisters Forest Planning Committee v Deschutes County. Court of Appeals State of Oregon.

1993. Moor v. Mutual of Enumclaw Insurance Co., 317 Or 235, 237, 855, P2d, 626.

Jan. 2010. Scott v City of Jacksonville OR LUBA (2009-107).

1977. Marbet v. Portland General Electric, 277 Or 447, 561 P2d 154.

1997. DLCD v Curry County, 33 Or LUBA 728.

1998 DLCD v Tillamook Co., 34 Or LUBA 586.

September 27, 2022. Final Order on the ASC for the B2H Transmission Line. Page 302 lines 19-21, Pg. 329 lines 20-24, Pg. 332, lines 20-24, Pg. 333 lines 34-35, Pg. 337, footnote #339.

Gilbert Issue HCA-3 Direct Evidence Exhibit 4 IPC Responses to Discovery.

September 27, 2022 Contested Case Order, As Amended and Adopted by Council 2022-09-27, Page 5.

March 2021. Public Utilities Commission staff report, Docket No. LC79 for the 2019 Integrated Resource Plan, Pages 2 & 4.

2005. Wetherell v. Douglas County, 50 Or LUBA 167

2007. Gould v Deschutes County, 216 Or Ap. 150.

2012. Rogue Advocates v. Josephine County, 66, Or LUBA 45.

2019. Cattoche v Lane Co. 79 Or LUBA 466.

Scott v City of Jacksonville OR LUBA (Jan. 2010, 2009-107).

1977. Marbet v. Portland General Electric, 277 Or 447, 561 P2d 154.

Potts v. Clackamas County 42 Or LUBA.

Keiser v Wilke 588 US__Q019 Kiser US Supreme Court.

May 12, 1995. Attachment 5 to P. Rowe Declaration, Section-by-Section Analysis of A-Engrossed Senate Bill 951, Page 14 of 14.

Gilbert Issue HCA-3 Direct Evidence Exhibit 4 IPC Responses to Discovery.

January 23 & 24, 2022. Transcript EFSC Meeting minutes: Pg. 10, 2nd to last paragraph, Pg. 11, 2nd paragraph & Pg. 12, last 2 paragraphs.

February 5, 2021. Marlette Exhibit 9 (IPC Response to Gilbert Discovery Req. 4.

March 12, 2021. Marlette Exhibit 10 as well as Irene Gillbet Exhibit 4, IPC Suplimental Response to Gilbert's Discovery Requests.

Irene Gilbert Testimony (Written Testimony).

2020. Exhibit 12, Pg. 19-21.10K and 10Q Reports to Securities and Exchange Commission.

Exhibit 7. Bakeoven Solar Project. Final Order on Application for Site Certificate. Page 139, lines 19-26, Pg. 141, lines 9-31.

March 12, 2021. Marlette, Exhibit 10. Supplemental Response to Discovery.

B2H. Draft Site Certificate, pages 25-30.

Bakeoven Solar Project. Final Order on Applicaiton for Site Certificate. Page 141, lines 9-31.

August 13, 2021. Christopher M. Clark, Memo to Energy Facility Siting Council. Page 2, Table 1, Energy Facility Security Deposits as of April 1, 2021.

September 10, 2021. Sarah Esterson memo to EFSC, Agenda D of September 24, 2021, EFSC meeting.

Golder Tech memo. Ref. No. 178839003. November 5, 2019, from Kara Warner & Charlie Voss to Sarah Esterson. Page 8, section 2.3.

Transcript of Scott Hartell's deposition. Pages 12-19 and pages 21 & 22.

Proposed Contested Case Order, Findings, Page 65, Item 90 & 92. Page 66, Items 94, 95, & 66.

(UCZPSO) Article-5.00 A-4 Timber Grazing Zone, Section 5.01.

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	)	Energy Facility Siting Council OAH Case No. 2019-ABC-02833
STOP B2H COALITION, *Petitioner* v. OREGON DEP'T OF ENERGY, OREGON ENERGY FACILITY SITING COUNCIL, and IDAHO POWER COMPANY *Respondents*	)	Supreme Court No. S069919 APPLICATION OF ANNE MORRISON, ATTORNEY, TO APPEAR AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER'S PETITION FOR EXPEDITED REVIEW EXPEDITED JUDICIAL REVIEW UNDER ORS 469.403

APPLICATION

Pursuant to ORAP 8.15, Anne Morrison respectfully applies to appear before the Oregon Supreme Court as *Amicus Curiae*, in support of the Expedited Petition for Review filed in this matter. Anne Morrison intends to present in this Brandeis brief an essential background for this case that does *not* affect a private interest of her own. ORAP 8.15(1)(a).

Anne Morrison is aligned with the STOP B2H COALITION, the Petitioner on review before this court. ORAP 8.15(1)(b).

The deadline that is relevant to the timeliness of this *Amicus* application is December 20, 2020. ORAP 8.15(1)(c). This application is

timely because it was filed within 14 days of the filing of the Petition for Review (filed on December 6, 2020). ORAP 8.15(1)(d); ORAP 8.15(5)(b).

Anne Morrison is a retired attorney and a decades-long resident of eastern Oregon who speaks as a private citizen to voice her concern regarding the process by the Energy Facility Siting Council has issued a site certificate for the Boardman to Hemingway transmission, as resulting from multiple flawed actions by an ethically compromised state agency. As an attorney, *amicus* knows that it is critical to the function of a democratic government that government agencies represent the interests of a state's own residents, and that those interests are jeopardized when an agency's allegiance is compromised because it receives substantial funding directly from the entities which that agency is expected to regulate.

If allowed to appear, Anne Morrison will work to assist this Court in considering the background of and the process by which the site certificate has been issued, as well as the fact that the Oregon Department of Energy, which is statutorily mandated to protect the health and welfare of the people of the state of Oregon and to comply with Oregon's environmental policies enacted to protect the natural resources of the state, has been compromised as a state agency,

because it has received over $4 million from applicant Idaho Power Company for its work to assist applicant in obtaining the Boardman to Hemingway Site Certificate.

Pursuant to ORAP 8.15(3) Anne Morrison's proposed *Amicus* Brief in support of the Petition for Expedited Review is filed concurrently with this application, and that Brief complies with the requirements of ORAP 8.15.

Anne Morrison respectfully requests that this Court grant its application to appear before the Supreme Court as *Amicus Curiae* on this matter.

Dated: December 20, 2022.

Respectfully submitted,

s/ *Anne Morrison*
Anne Morrison, OSB #891510
1501 Cedar Street
La Grande, OR 97850
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for proposed Amicus Anne Morrison

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on December 20, 2022 I filed this Application of Anne Morrison To Appear as Amicus Curiae in Support of Petition for Review by electronic filing.

I hereby certify that on December 20, 2022, I filed the foregoing Application to Appear as *Amicus Curiae* with the Appellate Court Administrator by electronic filing, using the court's eFiling system.

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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	)	Energy Facility Siting Council OAH Case No. 2019-ABC-02833
STOP B2H COALITION, *Petitioner* v. OREGON DEP'T OF ENERGY, OREGON ENERGY FACILITY SITING COUNCIL, and IDAHO POWER COMPANY *Respondents*	)	Supreme Court No. S069919 *AMICUS* BRIEF OF ANNE MORRISON IN SUPPORT OF PETITIONER'S PETITION FOR EXPEDITED REVIEW EXPEDITED JUDICIAL REVIEW UNDER ORS 469.403

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I. INTRODUCTION

Anne Morrison, *amicus*, submits this Brandeis brief on the fundamental issue raised by the Stop B2H Coalition and individual petitioners: whether the Energy Siting Facility Council (EFSC, or Council) erred in issuing a site certificate for the Boardman-to-Hemingway transmission line. *Amicus* submits this Brandeis brief to provide a broader context for the appeals of the decision to issue a site certificate for the B2H transmission line, now pending before this Court.

As a decades-long resident of eastern Oregon, *amicus* speaks as a private citizen to voice her concern regarding EFSC's issuance of a site certificate for the 300-mile, five county-long B2H line, as resulting from multiple flawed actions by an ethically compromised state agency. As a retired attorney, *amicus* knows that it is critical to the function of a democratic government that government agencies represent the interests of a state's own residents, and that those interests are jeopardized when an agency's allegiance is compromised because it receives substantial funding directly from the entities which that agency is expected to regulate.

The EFSC's decision to issue a siting certificate allowing construction of the B2H transmission line raises the broader issue: When a state agency abandons its statutory obligation to protect the

interests of Oregon residents, and instead uses its vast resources against the interests of Oregonians who are not positioned to challenge corporate and agency interests*, who represents the interests of everyday Oregonians?*

Consideration of this question should guide this court in deciding this case, as discussed below.

II. BACKGROUND

From its inception, the B2H project has been controversial and hotly contested. Opponents have raised numerous concerns,[1,2] including whether the line is actually needed or being built merely because extant provisions of the 1936 Rural Electrification Act guarantee utilities an automatic 10%, rate-payer-paid return on the cost of constructing energy

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[1] *See, e.g.,* Todd Brown, *Regulate Eminent Domain,* The [La Grande] Observer, Sept. 14, 2010; Cherise Kaechele, *Union County Commissioners Approve, Appoint B2H Advisory Committee*, The [La Grande] Observer, Dec. 16, 2015; Jayson Jacoby, *B2H Battle: Officials Try to Limit Effects of Proposed Power Line*, The [La Grande] Observer, Dec 1, 2016; Cherise Kaechele, *County, City Hold Joint Session; Commissioners, Councilors Meet to Discuss B2H*, The [La Grande] Observer, Aug 2, 12017; Erick Peterson, *Power Play: In the Path of the New Eastern Oregon Transmission Line,* Capital Press, Feb 12, 2022. These small newspapers do not have hyperlinks to their articles, but the articles can be accessed by typing the titles into a search engine.

[2] ODOE - B2HAPPDoc2-1 Proposed Order on ASC w Hyperlink Attachments 2019-07-02, Attachment 2: DPO Comment Index and DPO Comments. (https://onedrive.live.com/?authkey=%21AEBe%2Dm62XANUTiQ&cid=026041F18E096594&id=26041F18E096594%215420&parId=26041F18E096594%215419&o=OneUp)

facilities. Coley Girouard, *How Do Electric Utilities Make Money?*, Apr 28, 2015, https://blog.aee.net/how-do-electric-utilities-make-money. Those concerns are heightened when the line is proposed at a time when America's energy system is poised to transition from the traditional grid system epitomized by high-voltage transmission into one which relies on local systems to distribute local sources of energy, decreasing the need for traditional transmission lines.[3]

Opponents have also voiced concerns about the proposed B2H line when the traditional energy industry has been widely accused of

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[3] *See, e.g.*, Dameon Pesanti, *BPA Drops I-5 Corridor Reinforcement Project*, May 18, 2017, https://www.columbian.com/news/2017/may/18/bpa-drops-i-5-corridor-project-transmission-line/; Todd Woody, *An Experimental Green Suburb Rises in Riverside County. Is it the Future of Single-Family Housing?*, Nov. 26, 2022, https://www.latimes.com/business/story/2022-11-26/is-this-experimental-green-suburb-the-future-of-single-family-housing; Lisa Cohn, *What are Non-Wire Alternatives?* June 21, 2019, https://www.microgridknowledge.com/about-microgrids/article/11429614/what-are-non-wires-alternatives; Catherine Von Burg, *Microgrids to Provide Energy Resilience Beyond Transmission Lines*, 2018, https://www.batterypoweronline.com/articles/microgrids-to-provide-energy-resilience-beyond-transmission-lines/; Erica Gies, *Microgrids Keep These Cities Running When the Power Goes Out*, Dec 4, 2017, https://microgridknowlwdgw.com/news/04122017/microcrid-emergency-power-backup-renewable-energy-cities-electric-grid/; Elisa Wood, *How Many Hurricanes Must Slam the Grid Before We Get the Message?*, Sept 2, 2021, https://www.microgridknowledge.com/editors-choise/article/11427757/how-many-hurricanes-must-slam-the-grid-before-we-get-the-message.

actively impeding the change to green power for financial gain.[4] It is significant that the line would serve only as a conduit for transporting electrical power to Idaho residents, while causing significant damage to Oregon's own resources and the interests of affected Oregon property owners. The line is not an energy source and generates no power. Energy still must be purchased and transmitted, raising electrical rates across the region.

III. OREGON LAW CREATES A PARTICULAR POTENTIAL FOR UNDUE INDUSTRY INFLUENCE.

A. Corruption in the energy industry, including undue industry influence on legislators and regulators, has been a growing nationwide concern.

The past decade has seen growing numbers of reports regarding corruption in the energy industry.[5] In 2021, the energy/natural resources

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[4] Mario Alejandro Ariza, Miranda Green, Annie Martin, *Leaked: US Power Companies Secretly Spending Millions to Protect Profits and Fight Clean Energy,* July 2022, https://www.theguardian.com/environment/2022/jul/27/leaked-us-leaked-power-companies-spending-profits-stop-clean-energy?

[5] The number of articles addressing this issue is staggering. For a general overview, s*ee generally,* Leah Cardamore Stokes, *et.al., Short Circuiting Policy: Interest Groups and the Battle Over Clean Energy and Climate Policy in the United States,* Oxford University Press (2020); Heather Payne, *Game Over: Regulatory Capture, Negotiation, and Utility Rate Cases in an Age of Disruption*, 52 U.S.F.L. Rev. 75, (2017); Adam Nix, Stephanie Decker, Carola Wolf, *Enron and the California Energy Crisis: The Role of Networks in Enabling Organizational Corruption*, January 12, 2022, https://www.cambridge.org/core/journals/business-history-review/article/enron-and-the-california-energy-crisis-the-role-of-

industry was among the top five spenders for federal lobbying, paying out over $307,000,000.[6] In multiple states, utilities have become embroiled in one corruption scandal after another.[7] Utilities have been implicated in corporate payouts, sometimes involving billions of dollars, made to secure legislators' votes on legislation favorable to the energy industries.[8] Major utilities have also been implicated in efforts to mislead

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networks-in-enabling-organizational-corruption/457B1E245C6E6DE8903F531DD768D3F4.

[6] Dan Auble, Brendan Glavin and Pete Quist, Layers of Lobbying: An Examination of 2021 State and Federal Lobbying from K Street to Main Street, June 22, 2022, https://www.opensecrets.org/news/reports/layers-of-lobbying/state-and-federal-lobbying.

[7] *See generally*, Matt Kasper, *First Energy Scandal is Latest Example of Corruption, Deceit,* July 23, 2020, https://www.energyandpolicy.org/utility-corruption/; U.S. Attorney's Office, District of South Carolina, *Former SCANA Executive Pleads Guilty to Fraud Charges Tied to Failed SC Nuclear Project,* July 23, 2020, https://www.justice.gov/usao-sc/pr/former-scana-executive-pleads-guilty-conspiracy-commit-mail-and-wire-fraud; Jaclyn Diaz, *An Energy Company Behind A Major Bribery Scandal In Ohio Will Pay A $230 Million Fine*, July 23, 2021, https://www.npr.org/2021/07/23/1019567905/an-energy-company-behind-a-major-bribery-scandal-in-ohio-will-pay-a-230-million-; Justin Gillis, *When Utility Money Talks*, N.Y. Times, Aug. 2, 2020, https://www.nytimes.com/2020/08/02/opinion/utility-corruption-energy.html

[8] *See,* Justin Gillis, supra; Mary Ellen Klas, Nicholas Nehamas, Ana Claudia Chacin, *This Florida Utility's Secret Cash Helped GOP Win Gainesville State Senate Seat,* Aug. 8, 2022, https://www.tampabay.com/news/florida-politics/2022/08/08/this-florida-utilitys-secret-cash-helped-gop-win-gainesville-state-senate-seat/; Mary Ellen Klas, Nicholas Nehamas, *DeSantis Got $25K from Nonprofit*

legislators, regulators, and the public; and to influence rulemaking, sometimes by placing industry-supported utility regulators in powerful agency positions. As a result, multiple major energy projects have failed, communities have seen the liability on their investments soar, and ratepayers have seen utility rates skyrocket.[9]

Secretly Funded by Florida Utility, Sep. 7, 2022, https://www.seattletimes.com/nation-world/nation-politics/desantis-got-25k-from-nonprofit-secretly-funded-florida-utility/; Jason Garcia, *Man Behind 'Ghost' Candidate Cash also Led Dark-Money Group Supporting Florida's Big Utility Companies*, Oct 20, 2021, https://www.orlandosentinel.com/news/os-ne-prem-senate-ghost-candidate-dark-money-utility-industry-20211020-sbve4xsysvazne3qxnci4epxmi-story.html; Mark Gillispe, Julie Carr Smyth, *A Year Out, $60M Bribery Scandal Felt in Business, Politics*, July 19, 2021, https://www.seattletimes.com/business/a-year-out-60m-bribery-scandal-felt-in-business-politics/; Jaclyn Diaz, *An Energy Company Behind A Major Bribery Scandal In Ohio Will Pay A $230 Million Fine*, July 23, 2021, https://www.npr.org/2021/07/23/1019567905/an-energy-company-behind-a-major-bribery-scandal-in-ohio-will-pay-a-230-million-; Nate Monroe, *Florida Power & Light dominated the state. Now scandal darkens its future*, July 28, 2022, https://news.yahoo.com/florida-power-light-dominated-state-205851312.html, Akela Lacy, *Energy Companies Have Spent Billions on Projects That Go Nowhere*, August 7 2020, https://theintercept.com/2020/08/07/nuclear-power-energy-utility-bribery-scandal/; Mark Pischea, *Energy Corruption Not Just an Ohio Problem, It Is a Monopoly Problem,* September 4, 2020, https://insidesources.com/energy-corruption-not-just-an-ohio-problem-it-is-a-monopoly-problem/; Andrew J. Tobias, *FBI Raid Brings Scrutiny on Obscure but Powerful Ohio Energy Regulator*, Dec. 06, 2020, https://www.cleveland.com/open/2020/12/fbi-raid-brings-scrutiny-on-obscure-but-powerful-ohio-energy-regulator.html.

[9] Jeff Amy, *Georgia Nuclear Plant's Cost Now Projected to Top $30B*, May 3, 2022, https://www.usnews.com/news/best-states/florida/articles/2022-05-08/georgia-nuclear-plants-cost-now-

Industry analysts warn that the energy sector is particularly vulnerable to corruption because individuals in government have power over multi-million dollar decisions related to the siting, construction, and operation of the energy system.[10] Some analysts have discussed these issues in terms of "regulatory capture," where the regulations guiding utility behavior become so complex and onerous that the utilities themselves become the experts and are largely trusted by legislators and public service commissions to steer policy. *Id.*[11]

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forecast-to-top-30-billion; Ray Long, *ComEd to Give Back $38 Million in Wake of Madigan Scandal, But Critic Says it Falls Short*, Aug 17, 2022, https://www.chicagotribune.com/politics/ct-comed-returns-38-million-over-madigan-scandal-20220817-bctxrnaec5gvpgg64xh5gsh4ru-story.html; Hannah Grover, *PRC Accuses PNM of Misleading Regulators, Requires Utility to Issue Rate Credits Upon San Juan Unit Closures*, June 30, 2022, https://nmpoliticalreport.com/2022/06/30/prc-accuses-pnm-of-misleading-regulators-requires-utility-to-issue-rate-credits-upon-san-juan-unit-closure/; Tracy Samilton, *Consumers Energy Seeks "Crippling" Wind Farm Tax Clawbacks from Tuscola County Schools,* November 13, 2022, https:/www.michiganradio.org/environment-climate-change/2022-11-13/consumers-energy-seeks-crippling-wind-farm-tax-clawbacks-from-tuscola-county-schools.

[10] Matthias Ruth, *Corruption and the Energy Sector,* November 2002, https://pdf.usaid.gov/pdf_docs/PNACT875.pdf; Pischea, *supra.*

[11] In the context of undue industry influence on legislation in other states, Oregon law generally requires appellate challenges to power lines sitings that involve tens of thousands of pages of documents and multiple agency hearings over many years, to be briefed, heard and decided within six months. ORS 469.403. In contrast, the normal appellate process for comparatively simple issues often allows years for cases to be briefed, argued and decided.

There is no reason why Oregon would be immune from the same powerful corrupting forces at play in other states, and ODOE has its own history of involvement in corruption scandals. In 2015, Governor John Kitzhaber resigned amid accusations that ODOE officials, including the Department's director, had urged a contractor to give a $60,000 subcontract to Kitzhaber companion Cylvia Hayes, despite her marked lack of experience or qualifications, or the fact that Hayes' firm had scored lowest in ODOE's competitive bidding process.[12,13]

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[12] Benjamin Brink, *Documents Detail Oregon's Intervention in Subcontract for Cylvia Hayes, Companion of Gov. John Kitzhaber*, Jan 26, 2011, https://www.oregonlive.com/politics/2011/01/documents_detail_states_interv.html; Nigel Jaquiss, *The Cylvia Files*, June 14, 2011, https://www.wweek.com/portland/article-17619-the-cylvia-files.html.

[13] Oregon's Department of Justice chose not to prosecute the ODOE employees involved but recommended they be fired. *Id.* Four employees were placed on leave but ultimately reinstated without criminal charges or discipline for their actions following the Department of Justice's admission of mistakes in the DOJ investigation. Nigel Jaquiss, *Updated: Four Suspended ODOE Employees To Be Reinstated*, June 1, 2011, https://www.wweek.com/portland/blog-27212-updated-four-suspended-odoe-employees-to-be-reinstated.html.

B. Oregon law charges ODOE with conflicting responsibilities.

The Oregon Department of Energy is charged with implementing inherently conflicting, and possibly mutually exclusive, responsibilities.

1. ODOE is charged with assisting and advising the Energy Facility Siting Council (EFSC) regarding the legal and technical complexities of siting decisions.

The EFSC serves as Oregon's one-stop permitting authority for siting large energy facilities, and one of ODOE's major responsibilities is to provide staff and technical support to the EFSC regarding the approval of large energy facilities. Throughout the siting process, ODOE is responsible for researching issues, making recommendations, and advising the Council regarding decisions related to siting applications. ORS 469.040(1) provides:

> "The State Department of Energy shall be under the supervision of the Director of the State Department of Energy, who shall:
>
> " * * *
>
> "(b) Supervise and facilitate the work and research on energy facility siting applications at the direction of the Energy Facility Siting Council."

Additionally, ORS 469.450(6) provides that ODOE "shall provide clerical and staff support to the council and fund the activities of the council." The EFSC's website explains the relationship further:

> "Oregon Department of Energy employees serve as staff members for the council, handling the ongoing work related to the regulation of energy facilities. Staff are energy experts who research issues involved with locating, building and operating

> large energy facilities. They make recommendations to the council based on their research and analysis."[14]

Thus, ODOE staff have been involved in the siting B2H siting process since 2010, when Idaho Power submitted its first Notice of Intent to the Department. *See,* Final Order on the ASC for the Boardman to Hemingway at Transmission Line at 3. ODOE staff has worked closely with Idaho Power staff throughout the 14 years of the siting process. *See generally, id*. at 2-8 (procedural history).

2. ODOE also has a statutory obligation to protect the Oregon public.

ODOE's statutory responsibilities regarding the siting of an energy facility are not unlimited. At the same time that ODOE provides staff to advise the EFSC in regard to decisions regarding the siting, construction, operation and regulation of energy facilities, ODOE is also mandated to protect the health and welfare of the people of the state of Oregon and to comply with Oregon's environmental policies enacted to protect the natural resources of the state.[15]

ORS 469.310 provides:

> "In the interests of the public health and the welfare of the people of this state, it is the declared public policy of this state that the siting, construction and operation of energy facilities shall be

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[14] https://www.oregon.gov/energy/facilities-safety/facilities/Pages/About-the-Council.aspx.

[15] Note that the law requires compliance with, not avoidance or the issuance of exceptions or variances to, the various Oregon environmental protection laws.

> accomplished in a manner **consistent with** protection of the public health and safety and in compliance with the energy policy and air, water, solid waste, land use and other environmental protection policies of this state."

(Emphasis added). The statutory mandate is reiterated in OAR 345-001-0020(1), which provides in pertinent part:

> "These rules are to ensure that the siting, construction, operation and retirement of energy facilities and disposal facilities and the transport of radioactive materials are done **consistent with** protection of the public health and safety and in compliance with the energy policy and air, water, solid waste, land use and other environmental protection policies of Oregon."

(Emphasis added).

The policies regarding public health, welfare and environmental concerns with which ODOE is required to comply are expansive in their scope. They include, but are not limited to, policies which require Oregon's Department of Agriculture to protect Oregon's water resources,[16] policies which require the Department of Environmental Quality to enforce noise regulations promulgated in accordance with

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[16] ORS 568.225(1) provides:

" * * * [I]t is hereby declared to be the policy of the Legislative Assembly to provide for the conservation of the renewable natural resources of the state and thereby to conserve and develop natural resources, control and prevent soil erosion, control floods, conserve and develop water resources and water quality, * * * conserve natural beauty, promote recreational development, promote collaborative conservation efforts to protect and enhance healthy watershed functions, assist in the development of renewable energy and energy efficiency resources, * * * protect public lands and protect and promote the health, safety and general welfare of the people of this state."

state policy,[17] and policies which require Oregon's Department of Forestry to manage Oregon forestlands to maximize benefits.[18,19]

The mandate to ODOE to site energy facilities consistent with and in compliance with Oregon's environmental protection laws is not restricted to a particular stage of the siting process, and it is not time

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[17] ORS 467.010 provides that the DEQ shall adopt and enforce compliance with standards designed to " * * * provide protection of the health, safety and welfare of Oregon citizens from the hazards and deterioration of the quality of life imposed by excessive noise emissions, it is hereby declared that the State of Oregon has an interest in the control of such pollution, and that a program of protection should be initiated.
* * * "

[18] ORS 526.460 (1) sets forth the policy guiding Oregon's Department of Forestry. That statute provides:

> " * * * The environmental benefits include maintenance of a forest cover and soil, air and water resources. Other benefits provided are habitats for wildlife and aquatic life, recreation and forest range. Management of all forestlands in Oregon should be encouraged to provide continuous production of all forest benefits."

[19] Some of the many additional environmental policies and statutes with which ODOE is mandated to comply when siting an energy facility include those which require Oregon's Water Resources Commission to manage Oregon's water resource for multiple purposes, ORS 536.220(2)(a); the Department of Agriculture and to protect Oregon's native plants, ORS 564.105, and to control noxious weeds, ORS 569.180; the Environmental Quality Commission to protect Oregon waters from pollution, ORS 468B.015, and to safeguard the quality of Oregon's air, ORS 468A.010; the State Fish and Wildlife Commission to protect Oregon's wildlife, ORS 496.012; and the Department of Forestry to prevent and suppress wildfires, ORS 477.005.

limited. It does not permit ODOE to claim that by soliciting public input at the start of the siting process, it has met its obligation to protect the public and is free to disregard the public interest regarding siting decisions, including mitigation planning, thereafter. It is a mandate to site, construct, operate, and retire energy facilities in a manner consistent with protecting public health, public safety and Oregon's environmental protections – and to do so through the entire siting process, from inception to completion. The mandate to site energy facilities in accordance with Oregon's public health and safety environmental protection laws is neither optional nor aspirational.[20] The statute imposes on ODOE the concrete responsibility to comply with Oregon's environmental laws and public interests when making siting decisions.

ODOE's dual obligations create the potential for a conflict of interest between ODOE's duty to protect the public health and safety

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[20] Nor would a failure of any other agency to become involved in the siting process be an excuse for ODOE to avoid its charge to act in the public interest. Oregon law imposes on ODOE an independent obligation to comply with Oregon's environmental laws when working to site an energy facility.

As one example, the Oregon Department of Agriculture has been unable to fund its native (rare) plant protection program consistently since 2014 and therefore unable to update its list of rare plants since 1988. This list was started using the federal list and has never been updated for an Oregon-specific list. The standard is meaningless without an updated list and ODOE has not consulted the ODA since 2013.

and to comply with state environmental policies, and ODOE's concomitant role as an advisor regarding the siting and regulation of energy facilities within the state. ODOE is placed in an inherently conflicted position:

– ODOE is charged with advising industry applicants regarding the technical details of siting a facility.

– ODOE is paid by the applicant for ODOE's work to research, evaluate, and make recommendations regarding an energy facility siting application.

– ODOE also advises the EFSC whether the application which an applicant has paid ODOE to help develop complies with applicable laws.

– And ODOE must protect the public's interests in the siting process.

It is difficult to imagine a more perfect way to mire an agency in conflicting obligations.

C. Oregon's funding system invites undue industry influence by giving ODOE a direct financial stake in seeing energy projects move forward.

Oregon law invites undue industry influence in the siting process by creating a unique funding scheme for ODOE. Like other departments and agencies, ODOE receives funding through the legislature. But ODOE differs from other agencies because industry applicants and project operators don't pay into Oregon's general fund to reimburse

agency expenses; instead, an applicant pays ODOE directly for work related to developing an application. ORS 469.421 provides in pertinent part:

> "(1) Subject to the provisions of ORS 469.441, any person submitting * * * an application for a site certificate or a request to amend a site certificate shall pay all expenses incurred by the Energy Facility Siting Council and the department related to the review and decision of the council."

Reimbursable expenses may include legal expenses, expenses incurred in processing and evaluating the application, expenses incurred in issuing a final order or site certificate, expenses incurred in commissioning an independent study, or expenses incurred by the council in making rule changes that are specifically required and related to the particular site certificate. *Id.* In addition, Oregon law requires facility operators to continue direct payments to ODOE after a facility has been completed, including annual fees for costs associated with

monitoring the operation of a facility, ORS 469.421(5),[21] and an annual assessment to fund the programs and activities of EFSC and ODOE.[22,23]

Oregon law allows–and, in fact, *requires*–an applicant to reimburse ODOE directly for expenses related to the development of a project. At its essence, the statutory scheme sets up an arrangement where an industry applicant pays the Department the salaries of the

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[21] ORS 469.421(5) provides that each holder of a certificate shall pay an annual fee following issuance of a site certificate. The fee includes:

> "costs based on the size and complexity of the facility, anticipated costs of ensuring compliance with certificate conditions, anticipated costs of conducting inspections and compliance reviews, and anticipated costs of compensating agencies and local governments for expenses incurred at the request of the council."

[22] ORS 469.421(8)(a) provides that in addition to any other required fees, each energy resource supplier shall pay ODOE annually its share of an assessment to fund the programs and activities of the council and the department.

[23] The B2H transmission line is hardly the only project which may be paying costs and fees to ODOE. The EFSC website lists 18 operating facilities under EFSC jurisdiction, 5 approved facilities, 5 proposed facilities, as well as 8 facilities under review or construction. https://www.oregon.gov/energy/facilities-safety/facilities/Pages/Facilities-Under-EFSC.aspx?Paged=TRUE&p_Facility_Page=8_%3cdiv%20style%3d%27text%2dalign%3aleft%27%3e%3ca%20title%3d%27Click%20for%20more%20info%27%20href%3d%27%2e%2e%2fPages%2fWES%2easpx%27%3eWest%20End%20Solar%20Project%3c%2fa%3e%3c%2fdiv%3e&p_Title=West%20End%20Solar%20Project&p_ID=143&PageFirstRow=61&&View={0820E20D-761F-4D86-88A6-28050E77AD6A}

individuals who are assigned to work on the Idaho Power's project and whose duties involve advising the applicant regarding the project–not unlike having an industry applicant's own employees work on the applicant's behalf from inside ODOE. If needed, a billion-dollar corporation can always provide additional funding to support additional consultants and experts to analyze and give direction regarding its own project. Oregon's funding blueprint gives ODOE employees a direct incentive to see that the project which generates contributes to agency funding and which directly pays their own livelihoods remains viable by ignoring issues that might make a project unbuildable, and pushing for completion of the project, regardless of merit. Further, ODOE will benefit from ongoing direct payments generated by completed projects for decades into the future, giving ODOE an additional financial incentive to see that projects move forward, regardless of compliance with laws to protect public health, public welfare, or Oregon's environmental assets.

Over the past decade, the energy industry has repeatedly been involved in scandals involving the use of illicit means to obtain undue influence and control over regulatory decisions related to the industry.[24]

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[24] See, Dave Anderson, *FirstEnergy attributed Ohio Utility regulator's actions to $4.3 million payment,* March 3, 2021, https://energynews.us/2022/02/15/former-ohio-regulator-linked-to-4m-payoff-directed-agency-to-limit-response-to-firstenergy-corruption; Jaxon Van Derbeken, *PG&E to Pay $86.5 Million for Backdoor Lobbying of*

Where a state's siting process openly invites undue influence, and a billion-dollar corporation stands to reap hundreds of millions of dollars in profits from an energy project, there is no reason to assume that a corporation would not attempt to exert similar influence over energy regulators in Oregon.

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Regulators, March 18, 2017, https://www.nbcbayarea.com/news/local/pge-to-pay-865-million-for-backdoor-lobbying-of-regulators/48759/; Andy Balaskovitz, *Former Ohio Regulator Shaped Agency Response to Corruption Scandal,* February 15, 2022, https://energynews.us/digests/former-ohio-regulator-shaped-agency-response-to-corruption-scandal/; Dave Pomerantz, *Arizona Commissioner Justin Olson answered Questions About Arizona's Energy Policy by Copying Parts of an APS Memo Verbatim, Emails Show*, October 18, 2018, https://www.energyandpolicy.org/justin-olson-arizona-aps-emails; Matt Kasper, *Electric Utility Industry Created Their Own Air Pollution Permits, Had Private Meetings with Texas Regulators,* May 27, 2015, https://www.republicreport.org/2015/electric-utility-industry-created-their-own-air-pollution-permits/; Jeremy Pelzer, *Texts shed additional light on how Sam Randazzo was named PUCO chair, worked to help FirstEnergy,* August 22, 2022, https://www.msn.com/en-us/news/politics/texts-shed-additional-light-on-how-sam-randazzo-was-named-puco-chair-worked-to-help-firstenergy/ar-AA10WipX; Daniel Tait, *Questionable Campaign Contributions Tick Back Up as Election Nears, Emails Show,* October 25, 2010, https://www.energyandpolicy.org/questionable-campaign-contributions-tick-back-up-for-eaton-as-election-nears/. *See generally*, Maryanne Demasi, *From FDA to MHRA: Are Drug Regulators for Hire?*, June 29, 2022, https://www.bmj.com/content/377/bmj.o1538.full; Rauf Fattakh, *Corruption in the Energy Industry: 10 Serious Consequences*, Nov 16, 2020, https://energycentral.com/c/ec/corruption-energy-industry-10-serious-consequences.

D. Oregon law provides the perfect means for ODOE to control the siting process because of the Department's influence over EFSC.

1. ODOE is perfectly situated to influence the EFSC regarding siting decisions because of the makeup of the EFSC.

The EFSC consists of seven part-time, **unpaid volunteers** who determine whether a proposed energy facility meets multiple exceeding complex legal and technical siting standards.[25] In addition to their side

[25] The EFSC regulates numerous kinds of facilities, including electric power plants, solar generating facilities, transmission lines, underground natural gas storage facilities, liquified natural gas storage facilities, intrastate natural gas pipelines, and radioactive waste disposal sites and nuclear installations. ORS 469.300(11).

And ORS 469.501(1) lists the many disciplines in which councilors must make decisions. They include:

– an applicant's expertise regarding constructing and operating a proposed facility;
– seismic hazards;
– federal and state protected areas;
– the applicant's financial ability and qualifications;
– the facility's effects on fish and wildlife, including threatened and endangered fish, wildlife or plant species;
– the facility's impacts on historic, cultural or archaeological resources;
– the protection of public health and safety;
– the storage, transportation and disposal of nuclear waste;
– the facility's impacts on recreation, scenic and aesthetic values;
– the ability of local communities to provide sewers and sewage treatment, water, storm water drainage, solid waste management, housing, traffic safety, police and fire protection;
– the need for additional nongenerating facilities, consistent with Oregon's energy policies; and
– compliance with statewide planning goals adopted by the Land Conservation and Development Commission.

activity of making billion-dollar siting decisions on behalf of the state of Oregon, most councilors hold demanding professional positions, or are engaged in significant other civic and volunteer activities. *See,* https://www.oregon.gov/energy/facilities-safety/facilities/Documents/General/EFSC-members.pdf.

Although each of the complex standards which the councilors are required to address involves a discrete discipline, most councilors have limited to no expertise regarding the areas in which they are asked to make determinations. Three of the individuals who made the million-dollar B2H siting decisions on behalf of the state of Oregon have land use backgrounds and one is a tribal cultural resource specialist. *Id.* The combined council possesses professional expertise in just two of the many hyper-technical areas in which the councilors are expected to make determinations. Consequently, the council is extraordinarily dependent upon the advice and recommendations of ODOE staff and industry-paid consultants to guide their decisions.

2. ODOE is perfectly situated to influence EFSC decision-making because EFSC relies on ODOE for everything up to and including legal advice.

EFSC is housed within the Department of Energy, and relies on ODOE for research, analysis, and legal advice, ORS 469.040(1)(b), as well as for staff and clerical support. ORS 469.450(6). Further, in a facility siting proceeding, ODOE again plays conflicting roles: ODOE

advises the industry applicant regarding the siting of a facility (and is paid by the applicant to do so); ODOE is an automatic, mandatory party to any contested case, (OAR 345-015-0080(2)), and ODOE then advises EFSC whether to approve or overrule ODOE's earlier actions and decisions as a party. ODOE and EFSC are in fact so closely connected that an officer or employee of ODOE may appear in a contested case on behalf of EFSC. OAR 345-001-0060(1). Similarly, the EFSC may appoint a Council member, an ODOE employee, or other person to serve as hearing officer for the contested case. OAR 345-15-0023(1).

It is a cardinal principle of legal ethics that an attorney is prohibited from representing a client if the representation involves a conflict wherein the representation of one client will be directly adverse to another client. ORPC 1.7(a)(1). It is another indication of how deeply intertwined the relationship between ODOE and the EFSC is that from the inception of the B2H project until a petitioner objected, [26,27] a single

[26] Irene Gilbert's Exceptions to Procedures Used During B2H Contested Case and Process and Request for Exception to Summary Determinations FW-4, LU-5, NC-5, M-2, FW-9, FW-10, FW-11, at 5-6.

[27] ODOE has made a partial record of this case available on its website; however, in *amicus'* experience, the website has malfunctioned repeatedly and has been inaccessible as often as not. Further, *amicus* understands that ODOE filed the tens of thousands of pages comprising the record of this case with the Supreme Court only days ago, and

attorney, Patrick Rowe, advocated on behalf of ODOE while also advising the EFSC in the B2H siting process.[28] The intimate relationship between the two entities – as if the two were but a single client, or as if there is no conflict between the role of representing a party to a proceeding while also providing "objective" advice to the decision maker – is indicated by the fact that Rowe's dual representation apparently raised no ethical concerns regarding a possible conflict of interest for ODOE/EFSC counsel Rowe, or for the Department of Justice, or for administrators within ODOE.

Still, the EFSC is presented as somehow being an independent decision-making body.

3. The EFSC's makeup also raises ethical concerns.

Additionally, the Council's makeup raises concerns regarding the ethics of individual members. Hanley Jenkins, who served for 30 years as a county planning director, chaired the majority of the B2H

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because *amicus* is not a party to this case, she has not even been able to access the late-filed record. Therefore, *amicus* is only able to reference documents by title.

[28] *See also*, March 1, 2021 letter from EFSC Chair Marcy Grail (discussing EFSC's role as the sole decision maker regarding extremely complex large infrastructure projects, EFSC's reliance on and very warm relationship with ODOE staff, and requesting legislative funding on behalf of ODOE. Morrison Decl., Ex. 3.

proceedings.[29] As planning director, Jenkins became embroiled in controversy when he advocated fiercely to develop a wind farm within the county, then deleted his emails with the developer in their entirety following a public records request. Bill Rautenstrauch, *County reprimands planning director*, The [La Grande] Observer, May 5, 2011; Staff report, *E-mail probe doesn't pass smell test*, The [La Grande] Observer, May 11, 2011; Editorial, *County Probes Accusation that Planning Chief Deleted e-mails re: Wind Farm*, The [La Grande] Observer, September 11, 2011.[30] Concerns that the B2H siting process has been overseen by someone with a history of ethically questionable ties to a developer are amplified because Jenkins sat on the EFSC for almost the entirety of the B2H siting process, from 2012 through 2022, serving his last two years in violation of ORS 469.450(2)(providing that

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[29] The actual EFSC Chair, Marcy Grail, recused herself on all B2H issues: "Chair Grail stated as she has previously recused herself on all Boardman to Hemingway action items and handed over the running of the meeting for Agenda Items B and to Vice-Chair Howe." 2021-08-27 EFSC-Meeting Minutes-APPROVED. pdf, p. 4 of 15. https://www.oregon.gov/energy/facilities-safety/facilities/Council%20Meetings/2021-08-27-EFSC-Meeting-Minutes-APPROVED.pdf.

[30] The Observer does not have hyperlinks to these articles, but if one types in the title in a search engine, the article appears.

no councilor shall serve more than two four-year terms). [31,32] https://www.oregon.gov/energy/facilities-safety/facilities/Documents/General/EFSC-members.pdf. As chair of the B2H siting process, Jenkins has played a particularly active role in swaying the Council to make decisions that favor Idaho Power. As an example, ORS 469.370(13) requires that when a proposed facility has been reviewed by a federal agency under NEPA, the EFSC is required by statute to coordinate its review with the NEPA review. Jenkins, however, referenced his experience to advise the Council to disregard the statutory requirement: "We can only use the route and alternatives that are submitted to us by Idaho Power." November 19-20, 2020, EFSC

[31] Jenkins remained on the EFSC after the expiration of his second term, purportedly because he was needed so that the EFSC could have a quorum. This argument never made sense, because in December 2021, EFSC changed its rules to allow for a smaller quorum of just four members, yet Jenkins did not resign. https://www.oregon.gov/energy/About-Us/Documents/2021-01-07-HB-2064-One-Pager.pdf; and https://www.oregon.gov/energy/Get-Involved/rulemakingdocs/2021-12-17-R218-EFSC-2-2021-Tracked-Changes.pdf

[32] Jenkins no longer serves on the EFSC. Having served for nearly the full duration of the B2H siting process, he resigned in early December 2022, almost immediately after the EFSC approved the B2H application. https://www.oregoncapitalinsider.com/news/oregon-insiders-whos-who-in-and-around-state-government/article_3a042794-7727-11ed-b2f5-b354446f7689.html

Council meeting day 2, Audio 2 at 2:32.00-

https://soundcloud.com/odoe/sets/november-19-20-2020-efsc-meeting .

IV. ODOE HAS RECEIVED MORE THAN $4 MILLION FROM IDAHO POWER FOR WORK RELATING TO B2H, CREATING AN ACTUAL CONFLICT OF INTEREST WITHIN THE DEPARTMENT OF ENERGY.

ODOE has in fact received substantial funding directly from Idaho Power Company to fund ODOE's work on the B2H line. Idaho Power has paid ODOE more than $4,000,000 for salaries and other expenses directly related to ODOE's work on B2H. *Declaration of Fuji Kreider, Ex. 4.* The millions of dollars ODOE has received directly from Idaho Power for expenses relating to the development of Idaho Power's own project has transformed ODOE's conflict of interest from a potential or theoretical conflict into an actual conflict. The fact that the Department receives such a substantial income from industry applicants and project operators gives administrators and employees a tangible and compelling financial reason to choose the industry applicant's interests when weighing the Department's responsibility to assist in siting a facility against the Department's responsibility to protect the public interest by ensuring that Oregon's policies regarding public health and welfare, and environmental protection are enforced.

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V. ODOE HAS REPRESENTED THE INTERESTS OF IDAHO POWER BY USING THE SUBSTANTIAL RESOURCES AVAILABLE TO ODOE TO ELIMINATE EVERY CHALLENGE TO SITING THE B2H LINE.

As a state agency, ODOE has substantial resources at its disposal. ODOE has highly trained, experienced employees assigned to the B2H project. ODOE Response to McAllister Disc. Requests at 3. [33] ODOE also has untold clerical and support staff available to work on the B2H project, *id.,* and ODOE has the resources and ability to retain additional expert assistance and/or witnesses from outside the agency. *Id*. Additionally, through Oregon's Department of Justice, ODOE has legal resources at its disposal to assist and represent the Department in the siting process.

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[33] ODOE's Response discloses the credentials of several of its employees assigned to siting the Idaho Power project:

> "K. Tardaewether: Education - B.A. International Studies, B.S Environmental Science, M.A. International Environmental Policy in Energy Analysis; Years of Professional Experience – 15; Years at ODOE – 4.5;
>
> S. Esterson: Education - B.S. Public Affairs and Environmental Management; M.P.A; Years of Professional Experience – 15; Years at ODOE – 6
>
> M. Woods: Education – B.A. Environment, Economics, and Politics; B.A. History; M.S. Environmental Science; Years of Experience – 15; Years at ODOE – 7."

ODOE noted that each of these employees "has collectively evaluated dozens of ASC and Requests for Amendments." *Id.* An additional employee, Wally Adams, assisted ODOE at the January 2022 cross-examination hearings. Proposed Contested Case Order at 15-16.

The Department's resources to advance B2H are virtually infinite, given that ODOE's expenses are reimbursed by Idaho Power. The fact that ODOE has expended more than $4,000,000 of Idaho Power's money to site the B2H line indicates that ODOE has not hesitated to use Idaho Power's substantial resources to advance the project that Idaho Power has paid ODOE to work on, and to do so on the terms that Idaho Power desires.

A. ODOE has advised EFSC to adopt siting standards which represent the interest of developers and do not protect the public.

The EFSC is responsible for adopting the standards which govern the siting of energy facilities in Oregon.[34] Because the EFSC's small group of volunteers lack technical expertise in the complex issues involved in siting an energy facility, EFSC is heavily reliant on ODOE for advice regarding adoption of siting standards, and EFSC has adopted

[34] ORS 469.501(1) states,

> "The Energy Facility Siting Council shall adopt standards for the siting, construction, operation and retirement of facilities. * * *." Additionally, ORS 469.470(2) provides in pertinent part that EFSC shall " * * * adopt standards and rules to perform the functions vested by law in the council including the adoption of standards and rules for the siting of energy facilities pursuant to ORS 469.501."

standards, and delayed the adoption of other standards,[35] that benefit applicants at the expense of the public.

The standard regarding retirement of facilities and financial assurance, OAR 345-22-0050(2), provides one example. That standard requires merely that the Council find that an applicant has *a reasonable likelihood* of obtaining a bond or letter of credit to cover the cost of retiring an energy project, (emphasis added) – not that the applicant actually *post* a bond. The same standard requires only that a bond be in an undefined, subjective amount "*satisfactory to the Council* to restore the site to a useful, non-hazardous condition." (Emphasis added). At a time when multiple billion-dollar energy projects have failed nationwide,[36] the EFSC's standard imposes no actual requirement that would protect the Oregon public. ODOE has represented the interests

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[35] One example of these delayed standards includes the protracted rulemaking process over updating the outdated rules/standards on "Protected, Scenic and Recreational Areas," OAR chapter 345, division 22. The Protected Areas and Scenic Resources Standards were last amended in 2007. The Recreation standard was last amended in 2002. The process for updating these rules began in 2018. https://www.oregon.gov/energy/facilities-safety/facilities/Council%20Meetings/2022-12-16-Item-G-Protected-Areas-Rulemaking-Staff-Report.pdf

[36] *See,* Gillis, Klas, Nehamas *supra;* Chacin *supra*; Klas *supra*; Nehamas *supra*; Garcia *supra*; Gillispe, Smyth, *supra*; Diaz *supra*; Monroe *supra*; Pischea *supra*; Tobias, *supra*; Amy, *supra;* Long, *supra*.

of industry applicants generally by advising EFSC to adopt siting "standards" which provide no protection to the public whatsoever.

B. ODOE has advocated on behalf of Idaho Power and against the public interest by treating the public as an adversary throughout these siting proceedings.

1. ODOE has represented the interests of Idaho Power by disregarding public input when siting the B2H project.

Oregon law requires ODOE to consider public comments when siting an energy facility. Nearly 700 public comments were received by ODOE in the summer of 2019,[37] and 52 individuals petitioned to be parties to the contested case in August 2020, raising 71 issues. (ODOE's Response to Petitions for Party Status and Limited Party Status, 2020-09-11, p. 1 and Table 1.)

Acting in its capacity as a state agency, ODOE argued against full party status for every public petitioner, and against nearly every issue the petitioners raised. *See*, ODOE Second Amended Response to Petitions for Party/Limited Party Status, October 6, 2020, at 5, Table 1, and Attachment 1, Amended ODOE Evaluation of Petitions. ODOE has argued to eliminate issues raised by petitioners appearing on behalf of

[37] ODOE - B2HAPPDoc2-1 Proposed Order on ASC w Hyperlink Attachments 2019-07-02, Attachment 2: DPO Comment Index and DPO Comments. (https://onedrive.live.com/?authkey=%21AEBe%2Dm62XANUTiQ&cid=026041F18E096594&id=26041F18E096594%215420&parId=26041F18E096594%215419&o=OneUp)

public entities such as Eastern Oregon University, Oregon-California Trails Association, the Stop B2H Coalition, QWest Corp/CenturyLink, and the Baker County Fire Defense Board. Amended Order on Party Status Authorized Representatives, and Properly Raised issue for the Contested Case at 2-4.

ODOE's most obvious example of disregarding public input occurred in Union County, where Idaho Power disregarded the Bureau of Land Management's "least impactful" NEPA route, and instead proposed two routes which cross on the periphery of the city of La Grande and just 125 feet from a beloved, undeveloped local recreation area and wetlands. ODOE disregarded the groundswell of public comments it received, as well as the obligations imposed on Idaho Power by the NEPA process, and repeatedly advised EFSC that the Council was permitted to assess only the routes that had been proposed by Idaho Power.[38] According to ODOE, the EFSC – and by implication,

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[38] *See, e.g.*, ODOE's Second Amended Response to Petitions for Party/Limited Party Status, October 6, 2020 at 68 (denying EFSC jurisdiction in regard to Geer issue 3), and at 98 (regarding McAllister issue 1). *See also,* Final Order at 47-48 (discussing that the standards adopted by the EFSC:

> "do not require the applicant to compare alternative corridors. Nor do they allow the Council to evaluate or consider alternative routes not proposed in the application for site certificate.* * * Therefore, in the application, an applicant may propose any route, and alternative routes for Council's review, regardless of a federal

the state – has neither authority nor jurisdiction, or even the authority to make suggestions, when determining the route of a 300-mile long high-voltage line as it crosses through the state.

2. ODOE argued that petitioners should be denied standing.

In total, 52 individuals petitioned for party status. Order on Petitions for Party Status, Authorized Representatives and Issues for Contested Case at 2-3. As a state agency and party to the contested cases, ODOE argued that a number of citizen petitioners asserting concerns about the B2H project should be denied standing. *See,* ODOE's Second Amended Response to Petitions for Party/Limited Party Status, October 6, 2020. ODOE asserted that three petitioners failed to timely file petitions, *id.* at 8, 112-114. ODOE also argued for denial of standing based upon one petitioner's failure to recognize the need to timely file an appeal of the ALJ's denial of limited party status. ODOE Objection to G. Carbiner Request for Party Status for Issue HCA-5. Additionally, ODOE argued that three petitioners had failed to identify an applicable standard*,* ODOE's Second Amended Response to Petitions

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agency's selected route in the ROD for the NEPA review process. Further, the Council may not recommend an alternative route that is not proposed in the application."

for Party/Limited Party Status at 32, 33, 112; and that 45 petitioners failed to show a personal interest or a public interest. *Id.* at 21-121.[39]

3. ODOE unilaterally rephrased petitioners' issues so as to eliminate or narrowly define the issues petitioners had raised.

ODOE filed repeated responses to the petitions for party status.[40] In those responses, ODOE unilaterally rephrased, reconstrued, and significantly restricted the issues raised by the petitioners to this case. The case of Susan Geer provides one example.

Geer is a trained botanist and ecologist and an expert in her field, employed by the Wallowa Whitman National Forest, who has lived in eastern Oregon for over 20 years and is intimately familiar with the ecology of the region. Geer submitted two written comments with concerns about native and imperiled plant communities along the proposed B2H route. Declaration of Anne Morrison, Ex. 1 and 2. She questioned the "Noxious Weed Plan" in Idaho Power's site application;

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[39] ODOE asserted 26 times that a petitioner failed to show a personal interest, *id.* at 21, 24, 26, 35, 36, 44, 50, 54, 73, 74, 75, 83, 89, 90, 92, 93, 94, 96, 102, 103, 105, 107, 109, 111, 114, 115.

ODOE asserted 19 times that a petitioner failed to show a public interest. *Id*. at 29, 32, 33, 41, 48, 56, 57, 58, 76, 78, 88, 89, 111(x2), 113, 116, 119, 120, 121.

[40] ODOE Response to Petitions for Party/Limited Party Status, September 22, 2020; ODOE Amended Response to Petitions for Party/Limited Party Status, September 28, 2020, and ODOE Second Amended Response to Petitions for Party/Limited Party Status, October 6, 2020.

Geer noted that Idaho Power's "weed plan" disregarded concerns expressed by county weed management professionals from Morrow, Union, and Umatilla counties; that the plan proposed only annual weed treatments, which in Geer's experience would be inadequate and ineffectual; that while Oregon law imposes on landowners and managers the responsibility to control specified weeds on their property, Idaho Power's plan would exclude Idaho Power from responsibility for controlling entire classes of weeds, including those most aggressive and devastating to native habitat; and would allow the company to request a release from weed management obligations from ODOE at any time; additionally, if Idaho Power's weed control proved unsuccessful after five years, the plan would allow Idaho Power to request a waiver from ODOE regarding further weed control obligations. Morrison Decl., Ex. 1. In her second letter, Geer detailed concerns that Idaho Power's plan ignored Oregon's environmental protection laws by failing to consider Oregon's Climate Plan or the Oregon State Conservation Strategy, or to take into account the state's designated natural areas. Morrison Decl., Ex. 2. Geer also noted that Idaho Power's proposed Morgan Lake route did not comply with statutory requirements to consider the BLM's NEPA route. *Id.*

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ODOE recast Geer's concerns as:

> "Applicant's Noxious Weed Plan does not comply with ORS Chapter 569 because it does not identify responsibility of applicant for control of most weed species and only requires annual control."

ODOE Second Amended Response to Petitions for Party/Limited Party Status, October 6, 2020, at 61; and as:

> "Applicant fails to comply with Threatened and Endangered species standard because it did not evaluate current State-listed T&E plant species (Lists 1 and 2 Climate Vulnerable plants."

Id. at 62; and as:

> "The Draft Noxious Weed Plan (attachment P1-5) is not sufficient because it appears to relieve applicant of weed monitoring and weed control responsibilities after 5 years, which is not reasonable given that weed control is an issue into perpetuity, and improperly allows for compensatory mitigation if weed control is unsuccessful."

Id. at 63.

As with every other petitioner, ODOE's reframing of Geer's original statements precluded discussion of multiple statues, administrative rules, and EFSC standards, as well as the multiple state agencies and state environmental protection policies, plans and programs implicated by Geer's original statement. And as with every other petitioner, ODOE's rephrasing of Geer's statements excluded multiple significant issues from being addressed in the contested case, while also successfully constraining the reach of the issues that remained.

Subsequently, ODOE and Idaho Power filed simultaneous motions for summary determination against Geer's issues as restated by ODOE. *See*, ODOE Motion for Summary Determination of Contested Case Issue TE-1, May 28, 2021; Idaho Power's Motion for Summary Determination of Contested Case Issue TE-1, May 28, 2021. Because Geer's issues had been redefined, Geer's own proposed amended conditions were rejected, (*id*. at 121) and ODOE instead proposed minimal changes to the application conditions. ODOE Rebuttal to Direct Testimony, Evidence, and Response to Proposed Site Certificate Conditions, November 12, 2021, at 27-28, 31-32.

4. ODOE argued that all petitioners should be denied full party status.

ODOE addressed the issue of party status in a manner that further restricted the ability of the public to raise issues of public concern in the siting proceedings. At a time when it appeared to be an unsettled issue, (ODOE Response to Petitions Regarding Limited Party vs. Party Status at 1, FN 1), ODOE argued that all petitioners should be granted limited party status. As with every other petitioner to the contested case, ODOE argued that Geer should be granted limited party status – in Geer's case, preventing her from using information regarding any one of her complex and closely related issues (as restated) in regard to the

other two issues (as restated). ODOE Second Amended Response to Petitions for Party/Limited Party Status, October 6, 2020, at 6-8.

5. ODOE argued that petitioners failed to raise valid issues.

ODOE spared no effort to eliminate issues from the contested case by arguing that petitioners had not raised valid issues. ODOE argued 74 times that petitioners' issues were not within EFSC jurisdiction. ODOE Second Amended Response to Petitions for Party/Limited Party Status, October 6, 2020.[41] ODOE argued 43 times that petitioners' issues had not been raised on the record of the Draft Proposed Order.[42] And the Department argued 73 times that petitioners failed to raise issues with sufficient specificity.[43]

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[41] ODOE asserted that petitioners' issues were not within EFSC jurisdiction, *id.* at 21, 22, 24, 25, 28, 32(x2), 33(x2), 34(x3), 35, 39, 40, 41, 46, 48, 51, 53, 54, 55, 59, 61, 62, 64, 66, 67, 68, 70, 71, 75, 76, 77(x4), 78(x2), 79(x2), 80, 81, 84, 85(x2), 86, 87(x3), 88, 89(x2), 91(x2), 93, 95, 99, 100(x3), 101, 102, 105, 108, 112, 113(x2), 116(x2), 118, and 122.

[42] *Id*. at 21, 22, 26, 29, 30, 31, 37(x2), 39, 45, 50, 54, 55, 58, 61, 62, 63, 76, 77 (x4), 78, 79(x2), 85(x2), 86, 87(x2), 91, 93, 95, 97(x2), 101, 102, 103, 105, 108, 109,118.

[43] *Id.* at 21, 22, 24, 25, 28, 32(x2), 33(x2), 34 (x3), 35, 39, 40, 41, 46, 48, 51, 53, 54, 55, 59, 61, 62, 64, 66, 67, 68, 70, 71, 75, 76, 77(x4), 78(x2), 79(x2), 80, 81, 84, 85(x2), 86, 87(x3), 88, 89(x2), 91(x2), 93, 95, 99, 100(x3), 101, 102, 105, 108, 112, 113(x2), 116(x2), 118, 122.

6. ODOE blocked petitioners' attempts to obtain discovery in the contested case.

After thirty-six petitioners filed requests for discovery orders in the contested case following the informal discovery period, per OAR 137-003-0025(3), (Proposed Contested Case Order at 3), ODOE exerted its power and resources as a state agency to argue for denial of petitioners' requests for discovery. ODOE's response to Petitioner McAllister's motion for discovery from ODOE is demonstrative.

McAllister's motion included 31 questions and was supplemented with an additional request. Petitioner McAllister's Motion for Discovery Order for ODOE, Issues FW-13, R-2, SP-2, Dated February 19, 2021. McAllister requested such prosaic information as copies of ODOE's communications with landowners near Morgan Lake Park, (id. at 3); the documentation relied on by ODOE to determine that the Morgan Lake Alternative complied with EFSC standards, *(id.* at 20); or production of a map which clearly specified, by name, how ODOE identified the three different routes under discussion. (*Id.* at 8, 28). ODOE's 22-page response demonstrates the way in which ODOE has used its Idaho Power-funded legal firepower to muddle and obfuscate, to confuse issues, to prevaricate, and to avoid straightforward responses. In its response to McAllister's request alone, ODOE objected to the petitioner's prosaic discovery requests by denying 20 times that the

petitioner's requested information was relevant, (ODOE Response to Michael McAllister Informal Discovery Request, February 2021 at 4, 5, 6, 7, 8(x2), 9(x2), 10 (x2), 11 (x2), 13, 16, 17(x2), 18, 19(x2), and 21); or by asserting 6 times that the requested information requested had previously been provided somewhere in a list of documents in the voluminous record of the case, (*id*. at 3, 14, 16, 20, 21, 23); or by asserting 7 times that the requested information was or "may be" outside EFSC jurisdiction, (*id.* at 5, 7, 8, 10, 11, 13, 19). It is hardly surprising that ODOE's legal counsel has been able to run circles around untrained, self- represented citizens. The more significant fact is that legally unsavvy and outgunned citizens have been forced to represent public concerns on their own, against a state agency, because the agency charged with protecting those interests has utterly abdicated its obligation to do so.

7. ODOE moved for summary determination against petitioners, and supported/did not oppose Idaho Power's own motions for summary determination.

ODOE continued to work *in tandem* with Idaho Power when the Department filed eight motions for summary determination, to accompany Idaho Power's 34 motions for summary determination on contested case issues. Proposed Contested Case Order at 5, 19. On June 25, 2021, ODOE filed a 41-page response to Idaho Power's

motions for summary determination; ODOE's response formally supported or made no objection in regard to each of Idaho Power's motions. *See,* ODOE Response to Applicant's Motions for Summary Determination of Limited Party Issues.

8. ODOE argued against petitioners' cases on the merits.

Together, ODOE and Idaho Power litigated petitioners' remaining claims on the merits:

a). On October 1, 2021, Idaho Power and ODOE each filed individual Objections to the Limited Parties' Direct Testimony and Exhibits.

b). On November 12, 2021, the Department filed the 125-page ODOE Response to Direct Testimony, Evidence, and Response to Proposed Site Certificate Conditions. One would fully expect Idaho Power to be able to produce expert witnesses and consulting firms as needed to counter petitioners' remaining claims, and the billion-dollar corporation did so. *See, e.g.*, Idaho Power – Rebuttal Testimony of Chris James - Issue FW-7, with supporting exhibits A-H, November 12, 2021. But so too did ODOE produce witnesses to rebut petitioners' arguments and to advance Idaho Power's application. *See, e.g.*, Written Rebuttal Testimony of Tim Butler, Oregon Department of Agriculture, on Behalf of the Oregon Department of Energy, November 10, 2021; Written Rebuttal

Testimony of Sarah Reif on Behalf of the Oregon Department of Energy for Issue-FW-7, November 12, 2021; ODOE Written Rebuttal Testimony of Greg Apke, on Behalf of the Oregon Department of Energy For Issue FW-7.

c). On December 3, 2021, petitioners filed multiple motions to cross-examine the expert witnesses of Idaho Power/ODOE; ODOE responded, requesting that at least one of those requests be denied. *See*, ODOE Objection to Marches' Request for Cross Examination, December 10, 2021.

d.) On February 28, 2022 – having spent the previous 12 years, working to preclude public participation in the siting process, denying the applicability of pertinent statutes and standards to Idaho Power's application, obfuscating information vital to assessing Idaho Power's application, and eliminating the multitude of public concerns about the B2H project, the Department filed ODOE's Closing Brief. That brief duly asserts, "the Department believes the preponderance of evidence supports a conclusion the proposed facility, subject to the recommended site certificate conditions, complies with the requirements of the EFSC's standards and other applicable laws and rules." ODOE Closing Brief at 222-223.

e). On March 30, 2022, ODOE submitted its Response to Closing Arguments Brief.[44] One last time, ODOE argued against petitioners' issues, raised pursuant to the very policies that the Department is mandated to implement.

> *9. In addition to litigating against public petitioners in its capacity as a party to the siting proceedings, ODOE used its position as an advisor to the EFSC to advise EFSC to uphold every one of the ALJ's decisions which were favorable to ODOE/Idaho Power as parties.*

a). Thus, on October 6, 2020, ODOE advised the EFSC to uphold the ALJ's rulings denying party status, which were favorable to ODOE/Idaho Power. ODOE Second Amended Response to Petitions for Party/Limited Party Status, October 6, 2020, at 8. ODOE also advised the EFSC to uphold the ALJ's rulings regarding limited party status, and the validity of issues identified by petitioners, all of which were uniformly favorable to ODOE/Idaho Power as parties. *Id*. at 5-6, Attachment at 21-123.

b.) On June 25, 2021, ODOE responded fawningly to Idaho Power's multiple motions for summary determination of petitioners' claims, recommending hand-in-hand with Idaho Power that the EFSC uphold each of the ALJ's rulings on summary determinations. ODOE's

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[44] B2HAPP Contested Case ODOE Response to Closing Arguments 2022-03-30.

Response to Applicant Motions For Summary Determinations of Party Limited Party Status Issues at 1-41.

c.) On November 12, 2021, ODOE advised EFSC to uphold the ALJ's rulings against petitioners' remaining cases on the merits, (ODOE Rebuttals to Direct Testimony and Evidence and Response to Site Certificate Conditions at 16-125) – all of which were uniformly favorable to ODOE/Idaho Power as parties.

d.) On February 28, 2022, ODOE reiterated those arguments in its 222-page Closing Brief.

e). On July 15, 2020, ODOE recommended in a 31-page filing that the Council find that there were no procedural errors that occurred in the contested case proceeding, and that "the Hearing Officer successfully conducted her duties under OAR 345-015-0023." ODOE Responses to Procedural and Process Objections.

f). And on August 24, 2022, ODOE advised that EFSC should deny petitioners additional time to argue their exceptions before the Council, (ODOE Response to Stop B2H Request for Additional and Equal Time at 1-2); that EFSC should deny petitioners the opportunity to respond to site certificate conditions newly proposed by the ALJ to which petitioners had never had the opportunity to respond, (*id.* at 2-4); and that EFSC should deny petitioners time for oral arguments on

exceptions relating to procedural matters to uphold the ALJ's rulings regarding petitioners' procedural exceptions. (*Id.* at 5-8).

ODOE advised EFSC to reject every petitioner's appeal of every decision in the contested case. Throughout the entire siting process, ODOE advocated solely for EFSC to uphold decisions favorable to Idaho Power.

10. ODOE has represented the interests of Idaho Power by failing to object to improper conduct by Idaho Power.

a. ODOE did not object to Idaho Power's *ex parte* contacts

In April, 2021, Idaho Power submitted an extensive and detailed letter directly to EFSC, discussing proposed rulemaking revisions. Notice of *Ex Parte* Communication Pursuant to OAR 137-003-0055(2). ODOE made no protest against Idaho Power's *ex parte* communication with EFSC, despite the fact that those communications stood to affect the pending

b. ODOE refused to address Idaho Power's misrepresentations to landowners.

On March 24, 2020, Idaho Power sent a letter to landowners along the Mill Creek route, one of Idaho Power's two proposed routes along the perimeter of La Grande city limits; B2H contested case; that letter informed the recipients that they no longer needed to remain involved in the siting process because Idaho Power was no longer pursuing the Mill Creek route. Kreider Dec., Ex. 5.

At the same time, Idaho Power continued to designate Mill Creek as its primary route, *see,* Kreider Dec., Ex. 6.; final Order at 47, line 5-9. In fact, the Mill Creek route is one of two routes ultimately approved in the site certificate. *See*, Final Order at 47, FN 34. Far from objecting to Idaho Power's duplicity, deceit, and misrepresentations, ODOE deferred to Idaho Power's actions, repeatedly advising that Idaho Power's actions and deceptions were a matter over which EFSC/ODOE had no jurisdiction. Kreider Dec., Ex. 6, Ex. 7.

C. ODOE's abrogation of its mandate to protect the public interest has resulted in EFSC decisions that are, on their face, stunning in their betrayal of the public interest and public trust.

Whether because of corruption, financial mismanagement, unanticipated weather catastrophes, or wildfire, multiple U.S. electric utilities have bankrupted in recent years, often leaving taxpayers liable, sometimes for billions of dollars in resulting costs.[45] Despite Idaho

[45] *See. e.g.,* Taylor Telford, Steven Mufson, *PG&E, The Nation's Biggest Utility Company, Files for Bankruptcy after California Wildfires*, January 29, 2019, https://www.washingtonpost.com/business/2019/01/29/pge-nations-biggest-utility-company-files-bankruptcy-after-california-wildfires; Theodore J. Kury, *Many Electric Utilities are Struggling - Will More Go Bankrupt?*, May 3, 2019, https://theconversation.com/many-electric-utilities-are-struggling-will-more-go-bankrupt-113458; Andrew Topf, *The 10 Biggest Energy Company Bankruptcies*, Oct 10, 2014, https://www.businesstimes.com.sg/opinion-features/columns/10-biggest-energy-company-bankruptcies; Steven Church, *Municipal Electricity Provider in California Files Bankruptcy,* May 25, 2021,

Power's many assurances to the contrary, (*See,* Final Order at 327-28) Idaho Power is not immune from the same issues or acts of nature confronting other billion-dollar utilities.

Oregon law recognizes the possibility that an energy facility or its developer or operator could fail: OAR 345-022-0050(2) requires that before issuing a site certificate, EFSC must find that an applicant has a reasonable likelihood of obtaining a bond or letter of credit, in a form and amount satisfactory to the Council, to restore the site to a useful, non-hazardous condition.

Here, EFSC accepted Idaho Power's estimate that it would cost $140,790,000 to restore the B2H site. Final Order on the ASC for the Boardman to Hemingway Transmission Line at 333.[46] Against this backdrop, ODOE betrayed all pretense of protecting the public welfare when it advised EFSC to accept a $1.00 (!) bond against the estimated $140,790,000 cost of retiring the facility, for the period between B2H's in-service date through its 50th year in service.[47] ODOE's incredible

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https://ampvideo.bnnbloomberg.ca/municipal-utility-in-california-files-bankruptcy-1.1608384; Energy News, *Liberty Power Bankruptcy - What Now?* April 20, 2021, https://electricityplans.com/liberty-power.

[46] It appears from the Final Order that EFSC determined the cost to retire the site based solely on information provided by Idaho Power. *Id.* at 330-332.

[47] It is indicative of the extraordinary hold that Idaho Power has had over ODOE and this siting process that Idaho Power *even protested*

recommendation shows how far the Department will go to serve the interests of Idaho Power, even while leaving Oregon taxpayers, ratepayers, and the state itself exposed to extreme financial risk.

Hundreds of everyday Oregon citizens have been pitted against the combined might of a billion-dollar corporation and the agency which has done its bidding. Idaho Power has infinite resources with which to purchase the services of witnesses, consultants, and the largest law firms to battle common citizens who have strived to protect the land where they have chosen to work, play, and live their lives.

Throughout the B2H siting process, ODOE has advocated only on Idaho Power's behalf. ODOE has interacted frequently and freely with the employees of Idaho Power, has strived to accomplish Idaho Power's

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the $1.00 bond as too onerous. The billion-dollar utility actually requested

> "that ODOE consider providing an additional option for the form of assurance required. That is, Idaho Power requests that it be allowed to provide a deposit for that same amount, because there are administrative costs associated with obtaining bonds and letters of credit which would far exceed the actual value of the bond and letters of credit."

"Idaho Power's Comment," Final Order, Attach. 4, DPO Comment/ Applicant Response, Department Response in Proposed Order Crosswalk Tables at 26. (referencing Recommended Retirement and Financial Assurance Condition 1).

goal of siting this transmission line, and received substantial compensation from Idaho Power for its efforts. The record documents ODOE's relentless efforts to benefit Idaho Power by seeing that the project that Idaho Power desires is constructed, according to the terms Idaho Power desires; ODOE has used a process designed to block public input, while making no true attempt to address the damage the transmission line will cause ODOE has acted without regard for the people whose lives the B2H project will affect, and with an obvious contempt for the laws enacted to protect Oregon's natural resources and its residents. *If* ODOE had sited B2H with the interests of Oregonians in mind, this state agency would not have needed to manipulate every stage of the process to preclude public input and concern about the B2H project. ODOE has betrayed the public trust at every turn.

Amicus believes that petitioners' claim can only be accurately assessed when viewed against the context in which the B2H site certificate was approved.

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VI. CONCLUSION

This Court should reverse the EFSC Final Order and remand this case to EFSC for further proceedings consistent with the court's Opinion.

Respectfully submitted,

s/ *Anne Morrison*
Anne Morrison, OSB #891510

for *Amicus Curiae* Anne Morrison

Certificate of Compliance with ORAP 5.05(2)

Brief length

I certify that this petition complies with the 14,000 word-count limitation in ORAP 5.05(1)(b)(i)(B) and that the word count of this brief, as described in ORAP 5.05(2)(a), is 10,164 words.

Type size

I further certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(4)(f).

DATED: December 20, 2022

s/ Anne Morrison
Anne Morrison

Certificate of Filing and Service

I hereby certify that on December 20, 2022, I filed the foregoing Application to Appear as *Amicus Curiae* with the Appellate Court Administrator by electronic filing, using the court's eFiling system.

I further hereby certify that on December 20, 2022, I served the foregoing Application to Appear as *Amicus Curiae* upon

Karl Anuta,
Mike Sargetakis
Attorneys for Petitioner Stop B2H Coalition

Jesse A. Buss
Attorney for Petitioner Michael McAllister

Lisa F. Rackner
Sara Kobak
Andrew J. Lee,
Attorneys for respondent Idaho Power Company

Denise G. Fjordbeck,
Patty Rincon
Jordan R. Silk,
Attorneys for Oregon Department of Energy and Energy Facility Siting Council

I additionally certify that on December 20, 2022 I served a true and correct copy of this Application to Appear as *Amicus Curiae* upon Jocelyn Claire Pease, attorney for respondent Idaho Power Company, by mailing such in an envelope with prepaid first-class postage addressed to:

Jocelyn Claire Pease
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DATED: December 20, 2022.

s/ *Anne Morrison*
Anne Morrison

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	)	Energy Facility Siting Council OAH Case No. 2019-ABC-02833
STOP B2H COALITION, *Petitioner* v. OREGON DEP'T OF ENERGY, OREGON ENERGY FACILITY SITING COUNCIL, and IDAHO POWER COMPANY *Respondents*	)	Supreme Court No. S069919 DECLARATION OF ANNE MORRISON, *AMICUS CURIAE,* IN SUPPORT OF PETITIONER'S PETITION FOR EXPEDITED REVIEW

1. I am an attorney and the *amicus* herein. I have personal knowledge of the matters set forth in this declaration.

2. Exhibit 1 is the August 22, 2019 letter/comment on the Draft Proposal Order, written by botanist Susan Geer to ODOE Senior Siting Analyst Kellen Tardaewether and discussing Geer's concerns regarding Idaho Power Company's "Noxious Weed Plan," (DPO Attachment 1-5). Ms. Geer has provided this comment to me as submitted in the record of the case; however, because I do not have access to the record I am unable to provide the record citation.

3. Exhibit 2 is the August 22, 2019 letter/comment on the Draft Proposal Order, written by botanist Susan Geer to ODOE Senior Siting Analyst Kellen Tardaewether and discussing Geer's concerns regarding Idaho Power's Amended application for Site Certificate and failure to comply with legal requirements pertaining to the protection and preservation of rare and native plants. Ms. Geer has provided this comment to me as submitted in the record of the case; however, because I do not have access to the record I am unable to provide the record citation.

4. Exhibit 3 is a March 1, 2021 letter from EFSC Chair Marcy Grail to Oregon's Joint Committee on Ways and Means and the Subcommittee on Natural Resources, discussing EFSC's role as sole decision maker regarding energy facilities, EFSC's warm relationship with and reliance on ODOE staff, and requesting legislative funding on behalf of ODOE. This document is available on the Oregon Legislature's website at https://olis.oregonlegislature.gov/liz/2021R1/Downloads/PublicTestimonyDocument/9946.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 17th day of December 2022 in La Grande, Oregon.

s/ Anne Morrison
Anne Morrison

August 22, 2019

Energy Facilities Siting Council
c/o Kellen Tardaewether, Senior Siting Analyst
Oregon Department of Energy
Via email B2H.DPOComments@Oregon.gov

Subject: Idaho Power Amended Application for the Boardman to Hemingway Transmission Project dated 9/28/2018; Draft Proposed Order dated 5/22/2019

Dear Chair Beyeler and Members of the Council;

I am a Botanist/Ecologist who has worked in eastern Oregon for over 20 years; although employed by Wallowa Whitman National Forest, I write to you today as a Union County citizen and landowner. I have reviewed Idaho Power Company's (IPC's) amended Application and offer the following comments for the consideration by the council in their decision on the pending Application for Site Certificate.

With regards to Exhibit P, IPC's "Noxious Weed Plan" (DPO Attachment P 1-5) is vastly inadequate and presents a threat to Oregon's native plant communities/wildlife habitat, promotes risk from wildfire, and presents a public menace. Oregon statute 569.180 (Noxious weeds as public nuisance policy) states, "In recognition of the imminent and continuous threat to natural resources…noxious weeds are declared to be a public nuisance and shall be detected, controlled and, where feasible, eradicated on all lands in this state." Chapter 569 of Oregon law covers weed control https://www.oregonlegislature.gov/bills_laws/ors/ors569.html including obligation of land occupant:

569.390 Owner or occupant to eradicate weeds. *Each person, firm or corporation owning or occupying land within the district shall destroy or prevent the seeding on such land of any noxious weed within the meaning of ORS 569.360 to 569.495 in accordance with the declaration of the county court and by the use of the best means at hand and within a time declared reasonable and set by the court, except that no weed declared noxious shall be permitted to produce seed.*

Excellent comments were provided in "B2H Noxious Weed Plan Comments" by a large group of weed professionals, submitted by Brian Clapp of Union County. The document states, "The County Weed Supervisors of Morrow, Umatilla, and Union counties met with the Oregon Dept. of Ag and Tri-County CWMA on August 22, 2O17 to go over the B2H Attachment P1-5 Noxious Weed Plan. In conjunction with comments from previous meetings with Malheur and Baker county weed supervisors, the following list of concerns was developed…" IPC's Noxious Weed Plan of 2018 (Attachment P1-5) does NOT include the suggestions made by the weed managers.

The foremost finding by weed managers in 2017 was that IPC illegally excludes themselves from responsibility for the FULL list of weeds. In 2018, IPC's Weed Plan still only obligates IPC to control weeds in Class A and Class T lists. It is widely recognized that these weed "Classes" are determined according to agricultural priorities, not according to which weeds are the biggest threats to natural areas. Treating only Class A and T, a shorter list of weeds which are not very common, is especially devastating for natural areas, i.e. the vast majority of the proposed B2H routes. Any invasive plant can devastate an area- regardless of which "list" it is on. In fact, Class B and C weeds are generally the worst weeds and tend to be those which are spreading most aggressively and to more areas, thus threatening and ultimately devastating the most native habitat. The Weed Managers state, "Every landowner and

land manager is responsible for the control of ALL state and county listed noxious weeds on their property/ ROW. Whether the weeds have been here for 50 years or don't show up till the 20th year of Operation, lPC will be held responsible for the control of noxious weeds in the areas they manage-the same as everyone else." IPC has offered nothing in response.

As an example of serious weeds that would be excluded according to IPC, two of the worst weeds which occur in Union County, *Leucanthemem vulgare* (ox eye daisy) and *Rosa rubiginosa* (sweet briar rose) are NOT included in Table 1 of the Weed Plan "Designated Noxious Weeds". These species are listed in Union County Class B http://union-county.org/wp-content/uploads/2017/04/Union-County-Weed-List-2019-and-cost-share-Ad.pdf. Other "Class B" list weeds include sulphur cinquefoil, whitetop, diffuse and spotted knapweed – all among the very worst noxious weeds, present in the proposed areas of disturbance and certain to spread to currently intact native plant communities, should B2H construction proceed. These weeds, which are even now devastating thousands of acres of native plant communities, would not be treated under IPC's Weed Plan – and neither would any of the other dozens of species on Class B and C lists, not to mention new invasives, which take some time to be added to a list. Union County Class "B" list alone includes 24 noxious weeds. Other landowners are required to follow County and State laws and control ALL noxious weeds. Why should Idaho Power be exempt?

Weed Surveys provided in Exhibit P-1 part 2a and b are misleading; many species which would NOT be controlled by IPC under their "Weed Plan" were included in the surveys. Surveys were done between 3-8 years ago, a very long time in terms of weed spread! Surveys done so long ago using an outdated list and in such an artificially limited area are not acceptable.

In addition to exempting themselves from the full list of weeds, IPC's Post Construction treatments is otherwise ridiculously limited and unacceptable. In fact I could not believe the State Weed Program would sign off on it. Perhaps they did not. No comments were provided in DPO Attachment 3, "Reviewing Agency Comments". Here is an excerpt from the IPC Plan (Monitoring 6.1):

As stated above, noxious weed monitoring and control will occur during the first 5-year period. When it is determined that an area of the Project has successfully controlled noxious weeds at any point during the first 5 years of control and monitoring, IPC will request concurrence from ODOE. If ODOE concurs, IPC will conclude that it has no further obligation to monitor and control noxious weeds in that area of the Project. If control of noxious weeds is deemed unsuccessful after 5 years of monitoring and noxious weed control actions, IPC will coordinate with ODOE regarding appropriate steps forward. At this point, IPC may suggest additional noxious weed control techniques or strategies, or may request a waiver from further noxious weed obligations at these sites.

Anyone who has tried to control weeds will realize that by treating weeds only once per year, many will be missed and weeds will spread. Further, noxious weeds cannot be "successfully controlled" in 5 years. My observations of disturbed areas on both public and private lands show that weed treatment and monitoring must continue in *perpetuity* to keep those areas weed free. An Alberta study by Cole et. al. in 2007 concluded, "Eradication attempts usually involve mechanical removal to prevent seed spread, followed by a systemic, residual herbicide treatment well beyond the infestation site. The key to the extirpation of these invasive plants is the on-going locating, marking, monitoring and managing by the municipalities, agricultural field men and land owners…" The treatment that IPC proposes fail in all ways; they are neither "on-going" nor do they extend "well beyond the infestation site". If there is any marking, monitoring and managing, IPC will be long gone and leaving that burden to residents and

County and State. It seems ludicrous that IPC be allowed to appeal to ODOE after 5 years to claim areas of the "Project" had "successfully controlled weeds"- and then be exempted from further responsibility--- while invasives return as soon as herbicide treatments cease.

In the same unreasonable vein, the Plan further states, "if control of noxious weeds is deemed unsuccessful…IPC will coordinate with ODOE regarding appropriate steps forward," including "request a waiver from further noxious weed obligations". Essentially IPC comes by once per year for 5 years at most, inevitably fails in weed control, and is ultimately not responsible. Landowners and County are burdened with more weed control, and our ever-shrinking valuable native plant communities are compromised or eliminated, leaving native animals without habitat.

IPC's Plan further states they are not responsible for "areas outside of the right of way (ROW)". Weed sites immediately outside areas of potential disturbance are nearly certain to but would not be recorded or treated! Noxious weeds spread quickly, often exploding exponentially in a single season. IPC is proposing a HUGE area of disturbance; their responsibility should not be limited to the ROW.

As IPC has proposed only annual treatments, one can surmise they would use primarily residual herbicides. Residual herbicides may seem like the answer to the dilemma of weeds constantly in seed production. Herbicides such as aminopyralid and imazapic have become the herbicides of choice for many species. I have been using these herbicides for years now and have found they prevent germination for up to 3 years following application in eastern Oregon. This means germination of native plants as well as weeds. Bare spots are created where weeds once were. Revegetation by anything at all is prevented. After 2-3 years when the soil born chemical is reduced, weeds pioneer the site. In addition, native plants next to the weeds can die as a result of root uptake of the herbicide even though they were not sprayed directly. When using aminopyralid, willows, aspen, conifers (especially larch) and desirable native forbs in certain families are often killed in this way. Successful revegetation very unlikely. Since IPC is proposing to treat weeds for only 5 years, it is very likely a couple of treatments using residual herbicides would suppress weeds for that time, only to explode on the – now bare—areas once occupied by valuable native plants.

In summary, IPC's Noxious Weed Plan does not comply with Chapter 569 of Oregon law. IPC denies responsibility for control of most weed species, denies responsibility for weed control after 5 years, controls weeds only annually, and even allows them a waiver when control has failed. EFSC should reject the Weed Plan and Application. As a condition of re-applying, IPC should be required to post a bond to secure weed management for the lifetime of the project, which they claim is 45 years. Much is at stake, and there is no going back when thousands of acres of native plant communities are lost to invasives.

Sincerely,

Susan Geer
906 Penn Ave.
La Grande OR 97850
susanmgeer@gmail.com
541-963-0477

August 22, 2019

Energy Facilities Siting Council
C/o Kellen Tardaewether, Senior Siting Analyst
Oregon Department of Energy
B2H.DPOComments@Oregon.gov

Subject: Idaho Power Amended Application for the Boardman to Hemingway Transmission Project dated 9/28/2018; Draft Proposed Order dated 5/22/2019

Dear Chair Beyeler and Members of the Council;

In my previous letter I wrote to you outlining problems with Idaho Power's Noxious Weed Plan, part of their amended Application for Site Certificate. Here I offer comments on the implications for rare plants and State-listed priority unprotected plant communities, should IPC's Amended Application be accepted.

First of all, I was dismayed to learn that Oregon Department of Agriculture Rare Plant program did not provide comments (DPO Attachment 3, Reviewing Agency Comments). Upon contacting Oregon's Rare Plant Co-coordinator, I learned that no funding was provided to him for that task! It is a tremendous oversight and disservice to Oregon's rare plants, to have no State involvement in an application with such HUGE potential impacts to Oregon's rare plants and habitats.

The Threatened and Endangered Species Standard at Oregon Administrative Rule (OAR) 345-022-0070 provides:

To issue a site certificate, the Council, after consultation with appropriate state agencies, must find that:

(1) For plant species that the Oregon Department of Agriculture has listed as threatened or endangered under [Oregon Revised Statute (ORS)] 564.105(2), the design, construction and operation of the proposed facility, taking into account mitigation:

(a) Are consistent with the protection and conservation program, if any, that the Oregon Department of Agriculture has adopted under ORS 564.105(3); or

(b) If the Oregon Department of Agriculture has not adopted a protection and conservation program, are not likely to cause a significant reduction in the likelihood of survival or recovery of the species

Furthermore, Site Certificate applicant requirements OAR 345-021-0010(1)(q) requires Exhibit Q include the following:

(A) Based on appropriate literature and field study, identification of all threatened or endangered species listed under ORS 496.172(2), ORS 564.105(2) that may be affected by the proposed facility.

(B) For each species identified under (A), a description of the nature, extent, locations and timing of its occurrence in the analysis area and how the facility might adversely affect it.

(C) For each species identified under (A), a description of measures proposed by the applicant, if any, to avoid or reduce adverse impact.

(D) For each plant species identified under (A), a description of how the proposed facility, including any mitigation measures, complies with the protection and conservation program, if any, that the Oregon Department of Agriculture has adopted under ORS 564.105(3).

(E) For each plant species identified under paragraph (A), if the Oregon Department of Agriculture has not adopted a protection and conservation program under ORS 564.105(3), a description of significant potential impacts of the proposed facility on the continued existence of the species and on the critical habitat of such species and evidence that the proposed facility, including any mitigation measures, is not likely to cause a significant reduction in the likelihood of survival or recovery of the species.

(F) concerns only animals

(G) The applicant's proposed monitoring program, if any, for impacts to threatened and endangered species.
[1]

To say that IPC meets these requirements is a stretch of the imagination!

First of all, an incomplete and outdated plant list was used in surveys. Exhibit P, Attachment P1-2 Revised Final Biological Survey Workplan, 3.2.1 "Agency Survey Requirements" states that ODA "requires that state-listed threatened and endangered species, which appear on ORNHIC List 1 and have the potential to occur in the project area, be considered for survey…Regardless of land ownership, suitable habitat for sensitive plants will be identified during the pre-survey vegetation mapping phase and refined during the species-specific surveys. Appendix C-2 provides information on sensitive species with the potential to occur within the project area."

In fact, the State entity which maintains the state list is ORBIC, not ORNHIC. Appendix C-2 is undated and contains only 8 of the 64 State T & E plants listed by ODA in 2019 (https://inr.oregonstate.edu/orbic/rare-species/ranking-documentation/vascular-plant-ranks). The likely conclusion is that most current State T & E plant species were not included in surveys. Also, strangely, neither OR/WA BLM, nor USFS Region 6, which jointly participate in ISSSP (Interagency special status/sensitive species program https://www.fs.fed.us/r6/sfpnw/issssp/agency-policy/) are mentioned at all! Instead, Idaho State BLM program plant are listed in Attachment P1-2, Appendix C-2. ISSSSP list was updated in 2015 and again in 2018; apparently none of those revisions were acknowledged by IPC in their surveys.

Exhibit Q part 3.4.2.3 "Summary of Potential Adverse Effects to Plants" finally mentions using 2016 **agency data** "BLM (2016), ORBIC (2016a), IDFG (2016),and USFS (2016) databases, along with field survey data results (see Exhibit P1, Attachment P1-7A, Biological Surveys Summary Report), were combined in GIS to generate species occurrence information". These references to 2016 lists appear to have only been added **post-survey** and hardly make up for the fact that IPC sponsored surveys themselves did not use proper or updated plant lists.

While I realize this a review of State mandates, not federal ones, all agencies purport to co-operate with each other in the effort to manage rare species to avoid further listing. Failing to use updated plant lists reflects negatively on IPC, and failure to survey for ISSSSP species reflects negatively on both IPC and the State of Oregon. It is incredible to me that the BLM and USFS have signed off on this (2018 Record of Decision). I believe this is a gross oversight. **It is imperative EFSC halt this faulty process immediately and require ODA Rare Plant Program involvement and comments and surveys for ISSSP list plants**!

Secondly, in contrast to the wording in (OAR) 345-022-0070, **no** State listed plants have a conservation program in place. Undoubtedly, this is because the State has not yet developed the programs. IPC does not propose any either. In addition, no critical habitat is named for any of the species. The State has apparently not found time or funding for ODA to address this; IPC does the bare minimum and does not provide any conservation program or critical habitat either. To add insult to injury, IPC does not propose **any** monitoring programs (as suggested) for impacts to T&E species!

Even with inadequate plant lists and little access to private lands, 5 State listed T&E plant species (DPO Exhibit Q) were found in surveys of the B2H "analysis area". IPC claims "only" two of these rare species (Mulford's milkvetch and Snake River goldenweed) will suffer "direct impacts", by blading with heavy equipment. IPC claims that," Avoidance and minimization measures …described in Section 3.5.4" will "mitigate" impacts. Upon reading 3.5.4 we find that this consists of "minimum buffer of 33 feet

between the disturbance and the edge of the T&E occurrence". Habitat for these plants will be completely fragmented and a buffer of 33 – or even a few hundred--feet will not stop invasion by noxious weeds. OAR 345-022-0070 says *the design, construction and **operation** of the proposed facility,* - following their "Noxious Weed Plan" IPC stops treating weeds after 5 years, leaving T&E plants to be overwhelmed! T&E species will suffer irreparable damage under B2H. The Oregon Conservation Strategy rightly recognizes, "Invasive species are the second-largest contributing factor causing native species to become at-risk of extinction in the United States."

To delve further into rare plants slated for damage by B2H, *Trifolium douglasii* is a USFWS "Species of Concern" https://www.fws.gov/oregonfwo/Documents/OregonSpeciesStateList.pdf yet not even considered in IPC's 3.5 "Avoidance to Minimize Impacts". Although List 1 under ORBIC's latest ranking https://inr.oregonstate.edu/orbic/rare-species/ranking-documentation/vascular-plant-ranks it is not shown as State listed Threatened or Endangered, so is ignored by IPC. Species of Concern are "Taxa whose conservation status is of concern to the U.S. Fish and Wildlife Service (many previously known as Category 2 candidates), but for which further information is still needed." Douglas clover has a global rank of G2 "*Imperiled because of rarity or because other factors demonstrably make it very vulnerable to extinction (extirpation), typically with 6-20 occurrences*". DPO Exhibit P Part 2b Appendix 3A and 3B Figure 9 of 23 shows Douglas clover directly on the Morgan Lake alternative! This is not even taking into account private lands where access was not granted for survey, contains additional occurrences of Douglas clover. The Morgan Lake/ Glass Hill area is THE main place where this rare plant grows in Oregon, and B2H is set to permanently alter and compromise its main habitat with weeds!

State List 1 and 2 species NOT specifically included on the Threatened and Endangered list were not required by OARs and thus were not addressed at all by IPC. It seems wrong to completely exclude species which are only a step away from listing at the highest level. In fact, in these times, any rare species which shows a Moderate or higher "Climate Vulnerability" as determined by ORBIC https://inr.oregonstate.edu/orbic/rare-species/ranking-documentation/vascular-plant-ranks should absolutely be considered in any Application. The fact that it was not runs counter to the Oregon Climate Plan. Speaking of Oregon and State Goals, IPC's Application made no mention at all of the Oregon Conservation Strategy! Both of these omissions are critical and unacceptable!

Even more disturbing was the exclusion of the State Natural Areas Plan
https://inr.oregonstate.edu/orbic/natural-areas-program.
A look at the list of unprotected plant associations according to the Natural Areas Plan reveals that many are located in the B2H "analysis area". Since I am most familiar with the Glass Hill area, I can point to Ponderosa pine/bluebunch wheatgrass, Ponderosa pine/Idaho fescue, Douglas fir/oceanspray, Mountain alder-snowberry riparian, and Western larch – mixed conifer forest as being plant communities slated for destruction under B2H in the Blue Mountains Ecoregion which are currently listed as "unprotected" by the Natural Areas program, and thus listed as top-priority in the Natural Areas Plan.

In conclusion, the ODA Rare Plant program was excluded from comments, and is apparently so underfunded they have not been able to provide essential conservation plans, critical habitat, or monitoring plans. Idaho Power surveys are outdated and used an incomplete list. ISSSSP lists were not included. Mitigation measures provided by IPC for State T&E species are pathetic. A Federal Species of Concern was not even considered in the Application. State List 1 and 2 species and Climate Vulnerable species were not considered. The Oregon Climate Plan and Oregon Conservation Strategy were ignored

and completely excluded. The State Natural Areas Plan and unprotected plant community types was not even discussed.

Considering all of these crucial exclusions and problems meeting Oregon laws, plans, and goals, EFSC must deny IPC's Application.

Sincerely,

Susan Geer
906 Penn Ave.
La Grande OR 97850
susanmgeer@gmail.com

March 1, 2021

Co-Chair Kathleen Taylor
Co-Chair Jeff Reardon
Members of the Joint Committee on Ways and Means Subcommittee on Natural Resources
900 Court St. NE
Salem, OR 97301

RE: Department of Energy Budget

Dear Co-Chair Reardon, Co-Chair Taylor and Members of the Committee:

My name is Marcy Grail, and I am an Assistant Business Manager for the Internal Brotherhood of Electrical Workers (IBEW) Local 125. IBEW Local 125 has approximately 3,300 members who work in the Pacific Northwest's electric utility industry. We represent members working in the utility, outside construction, and line clearance tree trimming sectors of the electric utility industry. I have also served as one of seven members of the governor appointed and senate confirmed Energy Facility Siting Council (EFSC) since 2016 and am currently the chair.

EFSC is charged with the review and decision making on large-scale energy projects that are key to the generation and transmission of energy to Oregonians, such as solar PV, wind, and high voltage transmission lines. Because these are large infrastructure projects, they can be extremely complex which often generates significant support and opposition. While EFSC is the sole decisionmaker on these projects, we are volunteers and therefore necessarily rely on the staff at the Oregon Department of Energy (ODOE. Staff completes the needed work with applicants, state agencies, local governments, tribal governments and members of the public to provide us the information and support necessary to be an independent decision-making body.

During the time that I have been on EFSC, I have witnessed an ODOE staff dedicated to a timely, fair, inclusive, and transparent review process. They proactively engage all interested stakeholders to ensure all relevant information is included in the record so they can be confident in their recommendations to us whether each proposed project meets all applicable standards and any impacts are minimized or mitigated. Despite the controversial nature of some of these projects and the charged positions of the different stakeholders that can result, ODOE staff ensures that all comments and positions are equally evaluated and presented to EFSC.

The work of EFSC is critical to Oregonians. It would be beyond challenging for EFSC members to fulfill their duties without the same level of continued and thorough support which has been provided by ODOE staff. In my role as chair, I have an even better view of staff's contribution to the successful execution of our duties. In summary, I respectfully request that you join me in support the ODOE budget and encourage your approval of it. Thank you for your consideration.

Sincerely,

Marcy Grail
Chair
Oregon Energy Facilities Siting Council

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	)	Energy Facility Siting Council OAH Case No. 2019-ABC-02833
STOP B2H COALITION, *Petitioner*	)	Supreme Court No. S069919 DECLARATION OF FUJI KREIDER IN SUPPORT OF AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONER'S PETITION FOR EXPEDITED REVIEW
v.	)	
OREGON DEP'T OF ENERGY, OREGON ENERGY FACILITY SITING COUNCIL, and IDAHO POWER COMPANY *Respondents*	)	

1. My name is Carol Fuji Kreider (Fuji Kreider). I have knowledge of the matters set forth in this declaration.

2. I am the Secretary/Treasurer of Petitioner Stop B2H Coalition. I manage the records and finances of the board of directors for the organization, incorporated in the State of Oregon in Aug 28, 2017 and designated by the IRS as a 501(c)(3) as a public benefit nonprofit on September 19, 2017. We are a 100% volunteer organization, with contracted attorneys to help us with this case. In my role I serve not only an administrative function but also as leadership: providing guidance and

assistance to all of our members as they navigated and participated in the Oregon Department of Energy/Energy Facilities Siting Council decision making processes in the matter of the Boardman to Hemingway transmission project. Hence, this required me to engage in email exchanges with ODOE staff and other actors involved in the process to gather information as the board or other volunteers needed.

3. Attached as Exhibit 4 is an email exchange dated August 4, 2022 between ODOE Senior Siting Analyst Kellen Tardaewhether and me, discussing the $4.14 million in reimbursement funds paid by Idaho Power Company to ODOE for work related to siting the B2H transmission line between 2013 and August 2022.

4. Attached as Exhibit 5 is a March 24, 2020 letter from Idaho Power Company to landowners, including me, along IPC's proposed Mill Creek Route, (name redacted) stating that because Idaho Power would be pursing the Morgan Lake Route in place of the Mill Creek Route, property owners near the Mill Creek Route "don't need to take any further action."

5. Attached as Exhibit 6 is an August 4, 2020 email exchange between ODOE Senior Siting Analyst Kellen Tardaewether and Jim and Fuji Kreider in which Tardaewether acknowledges IPC's March 24 letter

and states, ”IPC may publicly announce what it likes about which route it intends to construct and operate,” while clarifying that IPC had never removed the Mill Creek Route from its application.

6. Attached as Exhibit 7 is a November 3,2020 email exchange between Tardeawether and Fuji and Jim Kreider in which Tardeawether affirms that ”Idaho Power has not removed any routes” from the application, “so all of them continue to be under review,” and that “Idaho Power may represent their preferences for routes to the public and as a company and that does not impact the EFSC review.”

7. Attached as Exhibit 8 is a February 24, 2022 email exchange between ODOE Assistant Director for Siting Todd Cornett and Jim Kreider, cc:ed to me, in which Kreider complains that IPC is obtaining court orders to enter private property despite the fact that the IPC application has not been approved, and Cornett responds that IPC is not acting under EFSC authority to enter onto private land, therefore, IPC’s actions are “outside EFSC’s authority.”

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 17th day of Dec. 2022 in La Grande, Oregon.

s/Fuji Kreider
Fuji Kreider

Fuji Kreider

From: TARDAEWETHER Kellen * ODOE [Kellen.TARDAEWETHER@energy.oregon.gov]
Sent: Thursday, August 4, 2022 2:37 PM
To: Fuji Kreider
Subject: RE: Some questions-- again!

Hi Fuji!

- It sounds like Jesse is going to send an email to the parties and limited parties next week with some logistical info for the upcoming EFSC meeting to review the proposed order, PCCO, and exceptions. Any formal direction should come from Jesse, I'm just trying to help convey items that I believe will happen to help you but if there is any deviation from what this says and what Jesse says, his directions will be maintained. The meeting will have in-person, call-in and webinar connection abilities, same with all EFSC meetings and this information will be included in the Agenda for the meeting. There will be an opportunity for limited parties to submit recordings if they cannot attend and his email should have more info about how to do that. It also looks like parties and limited parties will have an opportunity to provide oral testimony for each issue where an exception was properly filed and Jesse's email may have more info on that as well.
- The Department executes a Cost Reimbursement Agreement (CRA) with every applicant who submits an application for site certificate and that CRA is what we bill towards for staff and DOJ work reviewing an application, drafting orders, attending meetings, etc. If we have a consultant assist us with reviewing the application, their time is billed toward the CRA, same with reviewing agencies who spend time reviewing and submit invoices may also be reimbursed under the CRA. The CRA executed with IPC has been amended (added to) several times over the years (since 2013) because the duration and complexity of the ASC review and when it was "on pause" during the NEPA review. The total CRA value since 2013 is $4.14 million. If you want a more detailed distribution of costs, I'll need to know more specifically what you're looking for. Since the EFSC process is *process* driven, there are always upswings in work and therefore billing as well as periods where there is less billing because there is less work.
- I've passed your comments about signage and parking along to those doing logistics for the meeting. It sounds like there will be parking info provided via email and links to the map below, I believe.

Hope this all helps and let me know what other questions you have!

Kellen

Kellen Tardaewether
Senior Siting Analyst
550 Capitol St. NE Salem, OR 97301
C: 503-586-6551
P (In Oregon): 800-221-8035
Stay connected!

From: Fuji Kreider <fkreider@campblackdog.org>
Sent: Monday, August 1, 2022 6:05 PM
To: 'Fuji Kreider' <fkreider@campblackdog.org>; TARDAEWETHER Kellen * ODOE <Kellen.TARDAEWETHER@energy.oregon.gov>
Subject: RE: Some questions-- again!

Ooops, one more: And, if a petitioner can't zoom-in (e.g.: Matt Cooper has a family gig for ashes to be spread … the whole week on the coast in an RV park)…. What to do? He is thinking about video-taping his testimony (depending on what Jesse says is the procedure, time, etc.) and sending it to be played (as if he was present on the webex/zoom).

Sorry I spaced-out that question below…. -Fuji

From: Fuji Kreider [mailto:fkreider@campblackdog.org]
Sent: Monday, August 1, 2022 6:01 PM
To: 'TARDAEWETHER Kellen * ODOE'
Cc: Fuji Kreider-CBD
Subject: Some questions-- again!

Hi Kellen,

Hope you are keeping cool—albeit, it seems that the heat wave is over—this one anyway. I have two or three questions for you:

1. I remember you or maybe it was Max or Todd, telling us that IPC pays ODOE around $40K per month for the work on processing the ASC, etc… Is this correct; and/or can you tell me how much (doesn't have to be exact)? Please let me know if I need a public records request for this info. If so, I'll do one—please tell me how quickly this can be processed and format/forms or link? Thanks. In the past the number/amount was shared, but I can't find that. We're a bit curious as to how much of their $200 million permitting costs have been for ODOE vs, OPUC/IRP, NEPA case, etc. You get the idea. I don't expect you to know all of that—just the ODOE costs are enough. Thanks!

2. The EFSC special hearing for exceptions in the contested case is on EOU campus. Parking is $2 per day unless folks park at the stadium (a bit of a walk for some). Anyway, I just wanted to give you guys a heads up – and also request/hope that there will be signage or something, for folks to follow how to get to the meeting/hearing. The Gilbert Center is fairly new (formerly Ackerman School Auditorium) and many in the community do not know where it is. Probably you could ask EOU (as part of your rental fees) to allow parking at the Gilbert parking lot for free? And/or ask them to put up the signage for you guys (& community).

We're looking forward to getting more information from Jesse Ratcliff—ASAP--on the procedures and what to prepare and expect. There isn't much time – and for some they are already telling us that they won't be in town, so, we'll need zoom (or webex) protocols, etc. for those that will need to zoom in…. If there is anyone else that we should be asking about things like this, please advise. Thanks Kellen!

Take care,
Fuji

IDAHO POWER
An IDACORP Company

March 24, 2020

Route Update: Boardman to Hemingway Transmission Line

I'm writing to update you on the Boardman to Hemingway transmission line. Until now, we have considered two routes for the line in Union County: the Mill Creek Route and the Morgan Lake Alternative. We're now focused on building the Morgan Lake Alternative. Please see the back side of this letter for a map of both routes.

As you may recall, in 2016, a committee of Union County residents asked the U.S. Bureau of Land Management to consider a route that parallels the existing transmission line along the hillside west of La Grande. That led to the Mill Creek Route, which would be visible from town.

With help from local landowners, Idaho Power developed the Morgan Lake Alternative. This route would run behind the ridge southwest of Morgan Lake Park, out of the city's view. To further reduce visibility near the park, strategic sections would use shorter, H-frame structures instead of lattice towers.

We've also committed to helping improve recreation at Morgan Lake Park. The community can choose the improvements. Idaho Power and our fellow project participants will help pay for them.

Over the past two years, the community has shown a preference for the Morgan Lake Alternative. That's why we are pursuing it instead of the Mill Creek Route.

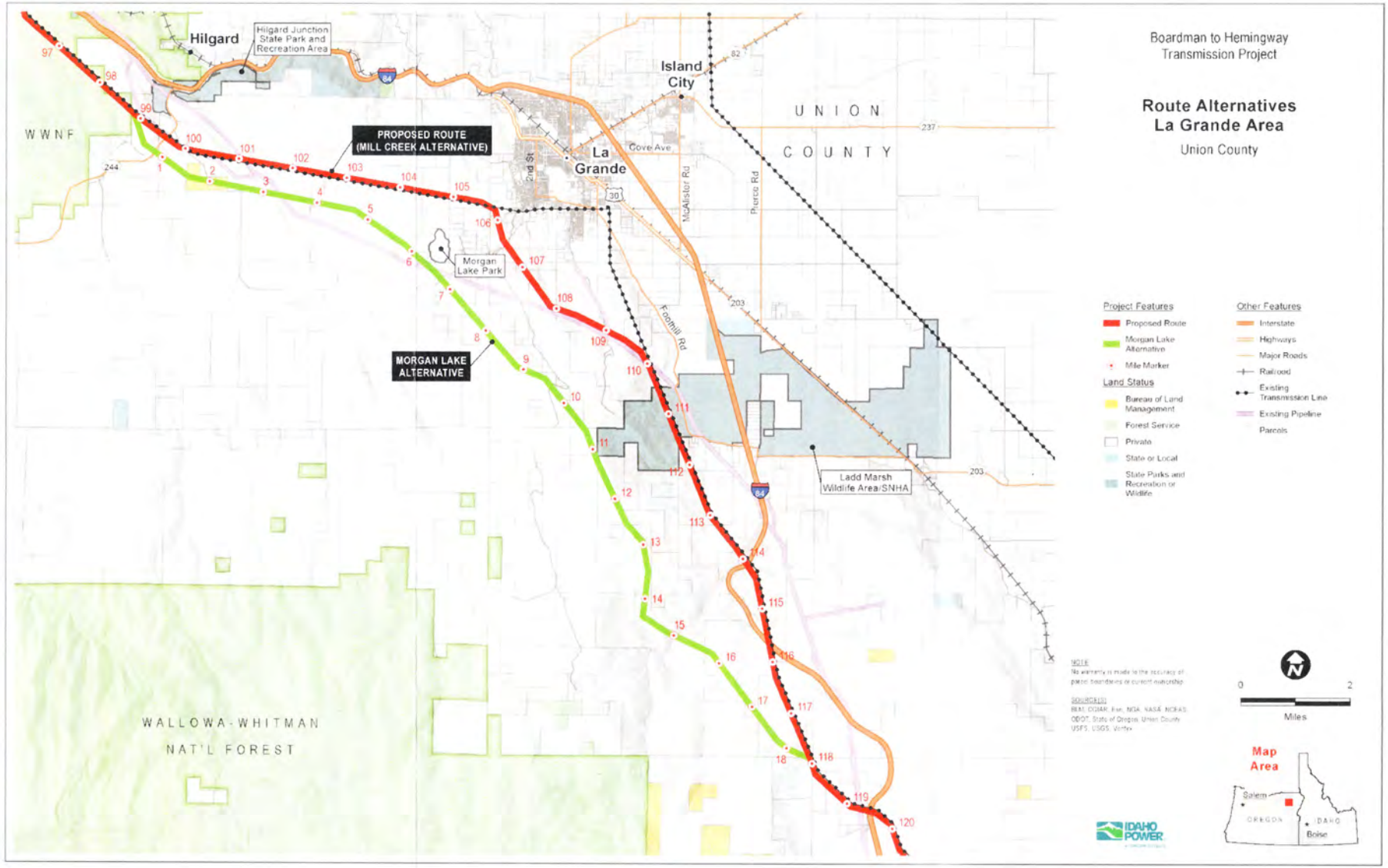
Since your property is near the Mill Creek Route, you don't need to take any further action. If you have any questions, please contact me at 208-388-2483 or mstokes@idahopower.com.

Sincerely,

M. Mark Stokes, P.E.
Idaho Power Engineering Project Leader
mstokes@idahopower.com

208-388-2323, or
1-800-488-6151
(outside the Treasure Valley)

1221 W. Idaho St. (83702)
P.O. Box 70
Boise, ID 83707


Boardman to Hemingway
Transmission Project
Route Alternatives
La Grande Area
Union County
Hilgard
Hilgard Junction State Park and Recreation Area
PROPOSED ROUTE (MILL CREEK ALTERNATIVE)
MORGAN LAKE ALTERNATIVE
Morgan Lake Park
Island City
La Grande
Cove Ave
2nd St
McAlister Rd
Pierce Rd
Foothill Rd
UNION
COUNTY
WWNF
WALLOWA-WHITMAN
NAT'L FOREST
Ladd Marsh Wildlife Area/SNHA
Project Features
Proposed Route
Morgan Lake Alternative
Mile Marker
Land Status
Bureau of Land Management
Forest Service
Private
State or Local
State Parks and Recreation or Wildlife
Other Features
Interstate
Highways
Major Roads
Railroad
Existing Transmission Line
Existing Pipeline
Parcels
Miles
Map Area
Salem
OREGON
IDAHO
Boise
IDAHO POWER

From: TARDAEWETHER Kellen * ODOE [Kellen.Tardaewether@oregon.gov]

Sent: Tuesday, August 4, 2020 8:10 AM

To: jim kreider

Cc: Fuji Kreider

Subject: RE: Question about primary and secondary routes in Union county in the PO

Good morning Jim and Fuji!

Sorry I missed the call. I'm not getting my voicemails forwarded for some reason and have tried having folks in the office help, obviously it isn't working so thank you for pointing it out and I'll try something different.

I know that most folks are familiar with the routes named from the NEPA review done by the BLM. Indeed, even IPC in its letter you attached is using a name of the route from the NEPA review and one from the EFSC review…which is confusing. The routes in the application under review by EFSC in the vicinity of La Grande in Union County are the proposed route and the Morgan Lake alternative. Regardless of the naming of the routes (proposed vs alternative- in your email you refer to it as preferred and secondary), EFSC reviews both routes the same against the applicable Council standards, etc. If Council approves both routes then the applicant would select which routes it prefers and comply with any conditions of approval for the selected route. I believe the proposed route (EFSC review) is the same as the Mill Creek Route (NEPA review).

I understand that IPC has sent out these letters. IPC may publicly announce what it likes about which route it intends to construct and operate. However, IPC has left both routes in the application under review, therefore the proposed order continues to review, and recommends approval (with conditions) of both routes. If the B2H proposed facility is approved by EFSC and IPC wishes to modify any routes, they would need to go through the EFSC amendment process or submit an amendment determination request (ADR). However, that does not appear to be what's happening. It appears that IPC is publicly announcing which route it would select if approved by EFSC, the Morgan Lake alternative and not the proposed route. Regardless, and as

mentioned, both routes will be reviewed by EFSC and if approved, IPC may select either route. Hope this helps!

Kellen

Kellen Tardaewether
Senior Siting Analyst
550 Capitol St. NE Salem,
OR 97301
P: 503-373-0214

C: 503-586-6551
P (In Oregon): 800-221-8035

From: jim kreider <jkreider@campblackdog.org>
Sent: Monday, August 3, 2020 3:31 PM
To: TARDAEWETHER Kellen * ODOE <Kellen.Tardaewether@oregon.gov>
Cc: Fuji Kreider <fkreider@campblackdog.org>
Subject: Question about primary and secondary routes in Union county in the PO

Kellen -- FYI - just tried to call you at the office and mobile numbers your mailbox is full ;-(

In reality I was tired of typing stuff and just wanted to talk about what's in this email and to ramble a bit - lucky you were out and the mailbox was full ;-)

Since you are primary keeper of all things related to this project I have a question that I would like clarification on. In my and others looking through the PO it appears that the Mill Creek route is the preferred route and Morgan Lake is the secondary. Is that a fact?

The reason I ask is we've had several people so far tell us that they didn't need to participate in the contested case process because they got a letter from Idaho Power saying they are pursuing the Morgan Lake Route instead of the Mill Creek Route. The first paragraph says ...

l'm writing to update you on the Boardman to Hemingway transmission line. Until now, we have considered two routes for the line in Union County: the Mill Creek Route and the Morgan Lake Alternative, We're now focused on building the Morgan Lake Alternative. Please see the back side of this letter for a map of both routes.

and the 2nd to last paragraph ...

Over the past two years, the community has shown a preference for the Morgan Lake Alternative. That's why we are pursuing it instead of the Mill Creek Route.

If there is no mention, suggestion, or hint of the route change in the PO as described in the attached letter what would one call the action of sending such a letter by Idaho Power to a landowner on the Mill Creek Route? Before I write to IPC I felt I needed to check with you to do do diligence by checking the facts I think are true to be sure they are true. True confessions -- I'll never read every page of every document and attachment but think I know someone who might have.

Thanks -- jim

From: TARDAEWETHER Kellen * ODOE [Kellen.Tardaewether@oregon.gov]

Sent: Tuesday, November 3, 2020 11:00 AM

To: Fuji Kreider

Cc: 'Jim Kreider'

Subject: RE: quick question...

I think it's best when discussing the state EFSC review, to use the terms for the routes proposed in the application for site certificate (ASC). So, in Union County, there is the proposed route and Morgan Lake alternative. That said, as you are aware, EFSC will review all routes and if all routes meet the applicable EFSC standards, the route(s) will be approved and Idaho Power will have the option to select which routes they want to construct and operate subject to the appliable site certificate conditions. The routes not selected will simply not be constructed therefore there will not be applicable site certificate conditions. The applicant does not need to amend it's site certificate to "remove" routes not constructed…again, if approved. Hope this helps,

Kellen

OREGON DEPARTMENT OF ENERGY

Kellen Tardaewether
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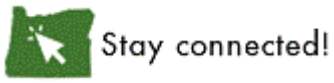

From: Fuji Kreider <fkreider@campblackdog.org>
Sent: Tuesday, November 3, 2020 9:57 AM
To: TARDAEWETHER Kellen * ODOE <Kellen.Tardaewether@oregon.gov>
Cc: 'Jim Kreider' <jkreider@campblackdog.org>; 'Fuji Kreider' <fkreider@campblackdog.org>
Subject: RE: quick question...

Hi again—"quick fingers"! ;-)

So basically, in Union County, the ASC route IS what we call the Mill Creek route; and the Morgan Lake is considered an "alternative." And, at this point, they are both in play. If they chose to remove or withdraw the Mill Creek route and go with the alternative, what would that do to the application and the process? It wouldn't be an amendment, right? An "amendment" would only come *after* a cite certificate was already issued, right?

Happy to know that Kaplan is already walking! Wow, time flies… I don't know about you, but during these days of covid, some things seem to be flying bye… and other things seem to be taking forever!

Fuji

From: TARDAEWETHER Kellen * ODOE [mailto:Kellen.Tardaewether@oregon.gov]
Sent: Tuesday, November 3, 2020 9:50 AM
To: Fuji Kreider
Cc: 'Jim Kreider'
Subject: RE: quick question...

Hi Fuji and Jim!

Kaplan is doing amazing and started walking and will start talking soon too. It's all very exciting!

As we have discussed and I've provided a written explanation before, the routes as proposed in the application for site certificate (ASC) are what EFSC is reviewing. The proposed route and alternative routes, including the Morgan Lake alternative are proposed in the application for site certificate so all are being reviewed by EFSC. Please note that there is not a Mill Creek Route proposed in the ASC and that is a term derived from the NEPA review. Idaho Power has not removed any routes from the ASC, so all of them continue to be under review. Idaho Power may represent their preferences for routes to the public and as a company and that does not impact the EFSC review. As I understand the letter they previously sent, it was to inform interested persons of their intended route, so people that have concerns about either or both routes have advance notice of their intended route selection, if approved by EFSC. Hope this helps,

Kellen

OREGON DEPARTMENT OF ENERGY

Kellen Tardaewether
Senior Siting Analyst
550 Capitol St. NE Salem,
OR 97301
P: 503-373-0214

C: 503-586-6551
P (In Oregon): 800-221-8035

Stay connected!

From: Fuji Kreider <fkreider@campblackdog.org>
Sent: Tuesday, November 3, 2020 9:29 AM
To: TARDAEWETHER Kellen * ODOE <Kellen.Tardaewether@oregon.gov>
Cc: 'Fuji Kreider' <fkreider@campblackdog.org>; 'Jim Kreider' <jkreider@campblackdog.org>
Subject: quick question...

Hi Kellen,

Hope you and Kaplan are well and hangin' in there during these crazy times… ;-)

I think we've asked you this before, but my memory?...

Idaho Power is still saying that they are not pursuing the Mill Creek route in Union County. Is this true? I think we told you about the letter that Mark Stokes sent to folks along the Mill Creek route that we "don't need to take any further action." Can you clarify what the status of the Mill Creek route is, because to our understanding it is still being considered in the EFSC process—and it's even the preferred route in Union County. Thanks a lot, Kellen.

Hope the day – and week – brings all of us some much needed joy/relief?!

All the best,

Fuji

Subject: Re: Precondemnation circuit court proceedings that I'd like to bring to the council's attention
Date: Thu, 24 Feb 2022 12:42:28 -0800
From:jim kreider <jkreider@campblackdog.org>
To:CORNETT Todd * ODOE <Todd.CORNETT@energy.oregon.gov>
CC: Fuji Kreider <fkreider@campblackdog.org>

Thanks Todd - I'm not sure you can understand my frustration. It has been amplified by ODOE/EFSC hiding behind rules to avoid a dialog on IPC's actions rather than dealing with the issue in front of them.

When I worked for the state as a director it was my job to make the rules work to get a job done and the human element was front and center. Rules could often be adapted to the situation to allow for timely resolution.

EFSC has sure bent, aka interpreted, rules to get the answers they wanted as demonstrated by the recent supreme court rulings against ODOE. Now they don't want to know about the reality, pain, and suffering they have created. This is the kind of government we all love to hate.

Could you please show me the ORS's and OAR's you are using to say ODOE/EFSC does not have any authority over IPC's actions for what they are doing. Having condemnation authority is not an issue in this situation since that is not occurring.

Page 47 lines 31-35 of the Proposed Order state the council can impose conditions on the applicant. Those lines read, "The Council can impose conditions requiring the applicant to conduct the necessary surveys prior to construction (pre-construction surveys) and submit survey results to applicable reviewing agencies and the Department for review and approval." Request that the council tell IPC that the "over the fence" methodology as provided is how they are to proceed and all court cases need to be dropped if they wish to proceed.

Thank you -- jim

On 2/22/2022 7:55 AM, CORNETT Todd * ODOE wrote:

> Hi Jim,
>
> I can appreciate the frustration of this situation because of how this issue is generally connected to Idaho Power's site certificate application with EFSC. As you point out, the Project Order articulates a way that Idaho Power can conduct literature surveys, desk top surveys and over the fence surveys in some circumstances in order for their application to be complete and reviewed by ODOE and EFSC. For those circumstances ODOE and EFSC are not requiring physical access to properties. It is important to note that the reason ODOE and EFSC are not requiring physical access to properties is because EFSC does not have any authority to force a landowner to allow Idaho Power or any other applicant on their property. Therefore, whatever statutes, rules or authority Idaho Power is using in their precondemnation efforts does not come from EFSC. And as such, EFSC simply does not have any authority to step in on this matter.

In your last sentence you indicate that you are willing to explain this in greater detail at the next Council meeting. The agenda is already set for this Friday's meeting so there will not be an opportunity to add it to that agenda. If you wish to request this issue be added to a future Council meeting per the rule below, please provide me with the following:

-Description of the agenda item
-Who will be presenting
-Anticipated amount of time of your presentation

345-011-0035: Requests to Place Items on the Agenda

(1) Any person may request formal Council action on a particular subject (an "action item") by submitting a written request to the Department of Energy. With the concurrence of the chair, the Council Secretary shall place the requested matter on the agenda for discussion at the next meeting occurring at least 14 days after the request is received by the Department. The Council shall treat the matter as an information item at that meeting and may take final action on the matter if a majority of the members present agree that the request is so substantial and of such immediate concern that the Council should not defer action until a future meeting. Normally, however, the Council will defer action on the matter until a future meeting.
(2) Any person may request Council discussion of an information item by submitting a written request to the Department. With the concurrence of the chair, the Council Secretary shall place the requested matter on the agenda for discussion at the next meeting occurring at least 14 days after the request is received by the Department.
(3) The provisions of section (1) do not apply to petitions requesting the Council to initiate a rulemaking proceeding, as described in OAR 137-001-0070, or petitions requesting the Council to issue a declaratory ruling, as described in OAR 137-002-0010.

Regards,

Todd

OREGON DEPARTMENT OF ENERGY

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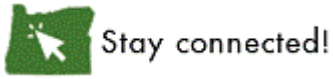

From: jim kreider <jkreider@campblackdog.org>
Sent: Thursday, February 17, 2022 5:04 PM
To: CORNETT Todd * ODOE <Todd.CORNETT@energy.oregon.gov>

Cc: Fuji Kreider <fkreider@campblackdog.org>
Subject: Precondemnation circuit court proceedings that I'd like to bring to the council's attention

Greetings Todd,
As I mentioned at the last EFSC meeting I wanted to bring Idaho Powers Precondemnation proceeding to the council's attention. I would appreciate your forwarding this information to them.
Idaho Power has begun serving precondemnation circuit court papers on landowners that refuse IPC entry to their property to conduct surveys. In an email to Senator Findley from Christy Splitt, ODOE Government Relations Coordinator, it says, "While pre-construction surveys associated *with an approved site certificate* are under EFSC's jurisdiction, for the Boardman to Hemingway project pre-construction surveys are not required to occur now since the project is currently under review and a final decision has not yet been made." If pre-construction surveys are not required to occur now how is Idaho Power able to bully landowners by doing this. They do not have permission to build it – period.
This is especially aggravating because in the proposed order ODOE lays out an "over the fence" process to survey land when refused permission from the landowner. Additionally the email from Christy Splitt says, "… the Energy Facility Siting Council do not have authority to step in." It is further stated, "The pre-condemnation proceedings that are described in the email and attached letter are not within EFSC's jurisdiction since EFSC does not have any eminent domain authority. Therefore, ODOE/EFSC has no authority to order Idaho Power to cease these activities as requested in the attached letter."
EFSC does not need eminent domain authority. This was anticipated! EFSC has the proposed order with a thoughtful "over the fence" process laid out. Please explain to us why EFSC does not have authority over its own process?
I hope after reading the attached materials you will understand why the public does not understand why EFSC is throwing landowners under the Idaho Power bus and creating additional financial and psychological challenges. Idaho Power can wait and do the surveys when to time period to do them opens.
I am more than happy to visit with you at your next meeting to explain this in greater details if needed.
Thank you for your consideration,
Jim Kreider