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BEFORE THE PUBLIC UTILITY COMMISSION OF OREGON

IN THE MATTER OF IDAHO POWER COMPANY'S PETITION FOR PUBLIC
CONVENIENCE AND NECESSITY, Docket: PCN-5

Intervenor, Greg Larkin, Surrebuttal Testimony

Date: March 20, 2023

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INTRODUCTION

Idaho Power witness testimony of Lindsay Barretto provides conclusive documentation that Idaho Power is premature in applying for a Certificate of Public Convenience and Necessity. Areas I will address in this Surrebuttal Testimony include: 1. While Idaho Power is unwilling to allow interveners access to details of their cost figures for the B2H Project, this document confirms the fact that there are multiple items outstanding which will significantly increase costs beyond the 2016 estimate which was compiled prior to the details regarding as yet to be completed work. It adds to the documentation supporting a failure on the part of the developer to provide a legitimate budget for the project. For example, the cost of compliance with the requirements of the Record of Decision and specific requirements included in that document in order to obtain a Notice to Proceed with the project are now apparent. The table provided and included with Ms. Baretto's Testimony, Exhibit 402, Page 1 states that Idaho Power has received the Bureau of Land Management Right of Way Grant. While that is true, it is misleading due to the fact that the Environmental Impact Statement requires

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the issuance of an additional document , the Notice to Proceed (NTP) prior to them actually being able to construct the transmission line. The Record of Decision (ROD) outlines the requirements in order to have a NTP issued. The following requirements relate directly to the ability of the Public Utility Commission to evaluate whether or not a Certificate of Public Convenience and Necessity should be issued: (ROD)(Exhibit 702 Pages B-2 and B-3 EIS Record of Decision, Section B, November, 2017)

- A. "Completion of biological resources surveys including but not limited to federally listed species under the Endangered Species Act as outlined in the final USFWS Biological Assessment (December 2016) and BLM sensitive species, to inform final engineering and design, as well as the NOAA Fisheries Biological Opinion";

Note: The Energy Facility Siting Council removed from their evaluations and mitigation requirements federal protected species under the Endangered Species Act. The federal laws apply to all sections of the B2H

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line, and the above requirement applies in order for a Notice to Proceed to be issued.

- B. “Compliance with the stipulations in the Programmatic Agreement dated February 7, 2017, including completion and approval of the Class III cultural resources report; paleontological approvals, completion of analysis and preparation of summary reports including preparation and approval of Historic Property Management Plans (HMTP), Paleontological Resource Treatment Plan (PRTP) and mitigation measures at sensitive locations where resources cannot be avoided, **regardless of jurisdiction**”;

Note: This plan applies to all federally listed historic properties along the entire length of the line., but does not include the unlisted properties which EFSC is required by rule to provide mitigation for and which represent additional incomplete work and costs to mitigate.

- C. “Acquisition of remaining Federal permits and **acquisition of required state and local permits**, stipulations and **conditions of approval set forth in all agency decisions, including fully developed environmental management plans**”.

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Note: To receive federal approval to proceed with construction, the developer must first fully develop (finalize) environmental management plans required by the state.

- D. “Development of a complete and comprehensive Greater Sage-Grouse Compensatory Mitigation Plan (CMP) in accordance with the Mitigation Framework provided in Appendix C of the Final EIS that quantifies the direct and indirect impacts of the B2H Project on Greater Sage-Grouse and identifies a suite of appropriate site-specific compensatory mitigation options for selection and implementation. The Habitat Quantification Tool (HQT) developed for the State of Oregon by the Sage Grouse Conservation Partnership (SageCon) Quantification Technical Team will be used to determine the appropriate amount of compensatory mitigation for direct and indirect impacts. The final Greater Sage-Grouse CMP must be reviewed by the cooperating agencies and a recommendation will be made to the authorized officer for approval prior to the NTP (refer to Appendix C in the Final EIS)”.

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Note: Again, for federal approval of a NTP, the developer must complete Greater Sage Grouse Mitigation Plan for the entire route where impacts to Greater Sage-Grouse may occur.

E. “Development of a CMP for impacts on Riparian Conservation Areas.

Residual impacts from the B2H Project on Riparian Conservation Areas that warrant compensatory mitigation would include permanent habitat loss in areas where RCA’s are located in conifer forest types (refer to Appendix C in the Final EIS)”.

Note: Riparian Conservation Areas include riparian corridors, wetlands, intermittent streams and other areas that help maintain the integrity of the aquatic environment. Not only are there multiple areas in the initial application which impact these areas, but the Amendment 1 adds additional areas where the developer intends to run roads parallel to, near or cross riparian conservation areas.

Ms. Barretto’s testimony avoided reference to the fact that the ROD requires updates to multiple Plans based the results of the ROD requirements. These

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evaluations and plan updates will impact critical plans such as the Reclamation Plan, Plant and Wildlife Conservation Measures, Agricultural Protection Plan, Fire Prevention and Suppression Plan, Traffic, Cultural Resources Protection and Management Plan, Habitat Protection and Monitoring Plan, etc. as listed on Page B-3 of Exhibit 701, Appendix B- Mitigation and Monitoring Plan of Record of Decision.

The requirements for surveys, identification of issues and mitigation require a substantial amount of work and cost which must be included in the costs of the B2H project. From the limited access to information which I have, it appears that there has been no updating to include these costs between the 2016 budget and the current one.

Ms. Barretto's Response fails to support a showing that Idaho Power has completed the surveys, Land Use Approvals, permits and mitigation plans necessary to support the issuance of a CPN. Exhibit 402 in Ms. Barretto's Reply Testimony lists 33 Land Use Approvals and Permits that have not been issued

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including several that are included in the EFSC Site Certificate evaluation. These Approvals and Permits are required in order to determine if the developer complies with the PUC requirements that they complete an independent evaluation.

General statements about options the developer “may use” or “possible mitigation measures” or “planned processes to establish mitigation” provide no basis for evaluation of whether or not the mitigation will actually address the required areas of concern. They fail to provide the commissioners the necessary information to determine the impacts regarding weeds, fire, traffic, noise, helicopter use, etc. that is necessary to justify the issuance of the CPN.

I am concerned that the public is not being included in the decision process for the ROD required plans, however, there is the future opportunity to appeal the decisions should they not protect the public and private resources. I asked Irene Gilbert to contact the BLM to request copies of the final plans they approve so that this opportunity can be pursued should the final plans be inadequate. To date, she has not received a response from BLM.

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The lack of final plans required by the Energy Facility Siting Council are of the greatest concern. The lack of final mitigation plans and the delegation of the approval of the final plans to the Oregon Department of Energy (ODOE) creates the likelihood that the plans will fail to adequately protect the public and resources. ODOE worked with the developer in arguing against all Appeals of the Council decisions resulting in eight attorneys arguing against the public. The Amicus Brief of Ann Morrison submitted during that process documents and provides examples and explanation regarding the legitimacy of the public concern. It includes examples such as the disregard of public input, recommending denial of standing, recommending all parties with the exception of Idaho Power and ODOE only be granted limited standing, argued the validity of issues, blocked discovery and argued against petitioners throughout the Contested Case processes.(Previously submitted Exhibit 406, Pages 29, 31, 32, 35, 36, 37, and 41) A failure of ODOE to provide legitimate mitigation from such serious public safety, health and costs as those resulting from fire(Exhibit 701 January 10, 2022 submission by Irene Gilbert to Judge Melgrin, Pages 5-8), traffic, noise, crashes into Life Flight Ambulances allows for no public appeal since these

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plans are all being completed outside the public EFSC process and after appeal timeframes have expired. The only opportunities available will not occur until after a transmission line is constructed and the damages have actually occurred for such things as noise, helicopter crashes with Emergency Flights originating from the roof of the Grande Ronde Hospital helicopter pad, catastrophic fires, etc. The developer has not completed the requirements which impact issues noted in the Environmental Impact Statement Record of Decision or final Mitigation Plans required by the Site Certificate. A decision regarding the issuance of a Certificate of Public Convenience and Necessity requires the information which will not be available until these plans are approved. (Reply Testimony of Lindsay Barretto, her Exhibit 403, Page 1) Only one plan has supposedly been completed to date. That is the Removal-fill Compensatory Wetland Non-Wetland Mitigation Plan. I do not believe it has been made available and which, according to the Draft Plan will not comply with the ROD requirements to provide compensation for impacts to Riparian Conservation Areas such as riparian areas located in conifer forest types. (Exhibit 702, Page B-3)

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The issuance of a Site Certificate, while technically a correct statement on Exhibit 403, Page 1, Errata of Ms. Barretto's testimony fails to disclose that at least 13 of the required Planning Documents which will show what the impacts to safety, costs and impacts of this development will be are only in draft form and are not going to be final until after all briefs are submitted. None of the final plans are currently available to be included in this Rebuttal, and only one will be finalized to be included as an exhibit prior to the April 12 exhibit deadline.

Since the information was not provided in the application or site certificate, issuing a Certificate of Public Convenience when the only thing available is a general document of potential actions that may or may not occur leaves the Public Utilities Commissioners and the public unable to determine if the impacts should preclude the issuance of this certificate.

This problem has occurred due to the fact that Idaho Power failed to complete final plans even when the plans did not rely upon identification of the specific location of project features. The developer has had over a decade to develop these final plans for submission with the application. EFSC decided to issue a site certificate prior to having the documentation regarding programs and mitigation

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necessary to comply with council standards which is to be include in the required plans. The public should not be penalized by the issuance of a Certificate of Public Convenience and initiation of condemnation proceedings due to the above failings.

The Public Utilities Commission has it's own rules and need to investigate whether the applicant has complied with them prior to requesting or receiving a Certificate of Public Convenience and Necessity.

Surrebuttal Response to summary of incomplete plans starting on Page 13 of Ms.

Barretto's Reply Testimony:

1. Attachment BB-1 – Plan for an Alternative Practice (Page 13)

I do not believe that Idaho Power can meet the requirements for an exemption under OAR 629-610-0090. This rule requires the landowner to request the exemption. I have no plans to do so and I am confident there are other landowners s who will not want their land use changed from meeting the definition of forest land to any other designation. There is a request for data regarding this issue due to the fact that a change to

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another designation or exemption may result in the loss of tax increases and/or the need to show income from the property. (Exhibit Letter to requesting disclosure of contact from Idaho Power regarding Alternate Practice) I believe the landowner continues to be required to pay taxes on the land that the transmission line absorbs as well as any penalties due to a failure to restore the timber. Since ODOE is only currently requiring a bond of \$1.00 for site restoration, and the site certificate fails to require the developer to return the area to timber production, an exemption may result in owners being required to absorb the costs of reforestation when the transmission line is removed. Idaho Power is not compensating landowners for the expenses regarding this proposed Plan for Alternative Practice. In addition, I will be arguing during any efforts to take my land through eminent domain that it is by the definitions contained in Oregon Land Use Statutes "forest land". The soil capacity to produce trees is the critical item for determining this, and the County Planner and Idaho Power failed to establish soil classifications for all soils in the combined Timber/Grazing zone or apply the 2008 and 2011 statute changes in making

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their determination. Since the courts are required by law to require at a minimum the value of existing timber as well as the timber that can be produced on my land for the life of the development as well as increased costs of harvest of the remaining timber, I intend to require a jury decision regarding this issue. The significance of the issue to the PUC is in relation to the future costs and unmitigated costs to timber landowners due to Idaho Power's failure to provide mitigation consistent with the law and the EFSC calculation of forest values. I reserve the right to add exhibits regarding this issue following the responses I receive from data requests regarding the impacts of this potential change.

BB-2 – Fish Passage Plans and Designs

The current plan fails to identify what is planned to meet the definition of “effective erosion control measures and sediment barriers” Since many of these crossings contain federally protected Threatened and Endangered fish species which ODOE has not addressed in their Site Certificate requirements, and the fact that the file documents the existence of these species either currently in the

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waterways, or which were historically present in the waterways, fish passage requires involvement of the US Fish and Wildlife Service as well as creating the necessity to include measures to mitigate for federal requirements to address Riparian Conservation Areas requirements of the ROD. Please see (Exhibit 703, Legislative Council response to Rep. Greg Barretto request for interpretation) of whether or not the removal of federally threatened and endangered species evaluation in the Site Certificate constituted a breach of federal law and the response stating that removing the evaluation from the Threatened and Endangered Species EFSC Requirements did not constitute a breach of federal law so long as these species are addressed in Habitat Mitigation planning. Habitat mitigation includes providing for alternate fish passage and effective erosion control and sediment barriers. The plan fails to identify where these impacts will occur, what the impacts will actually be or provide with specificity the mitigation planned to control erosion and protection of stream habitat during and after construction.

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“Temporary” impacts to waters of the state. Not all impacts are temporary. For example, construction or modification of a road located within or adjacent to the riparian area will have permanent impacts due to the use of the road by Idaho Power employees as well as the public. This will create the ongoing introduction of hazardous materials deposited on the road surface by vehicular traffic. This hazardous material then washes into the waterway during storms creating a hazardous condition for fish and humans when the water is used for domestic purposes. None of the referenced actions which primarily reference other draft plans provide any assurance that waters of the state or riparian areas will not be impacted during construction, or operation of the development. For example, the noxious weed plan fails to comply with state law requiring the developer describe how they intend to monitor and mitigate the transmission site to assure that NO NOXIOUS weeds are allowed to go to seed. The plan limits the developers responsibility to areas where the habitat is disrupted even though their actions can bring noxious weeds onto the site which will germinate in undisturbed areas.

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While the limitations on the plan may comply with EFSC requirements, they fail to comply with Oregon Statutes and there is no indication that the developer intends to incorporate requirements which comply with the Oregon Statutes. The costs associated with the transfer of noxious weeds onto private land is a cost issue that is evaluated by the PUC. An additional concern is the fact that the site certificate provides no setbacks from riparian areas to limit the movement of hazardous materials into waterways. The legislature passed rules in 2019 in order to protect waterways from the kinds of actions that the developer is intending. They become effective January 1, 2024 and will mandate setbacks from waterways. The developer will be required to comply with these regulations.

Agricultural Lands Assessment

The Agricultural Mitigation Plan has not been completed as has been documented by Ms. King's Discovery Question response. The statement that the project will not cause a substantial change in accepted farm practices or a marked increase in the costs of accepted farm practices is simply untrue. While there are multiple documents in the EFSC files identifying impacts, which currently have no specific mitigation identified. :

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Right of Way Clearing Assessment:

The above arguments also apply to impacts to farm and forest practices within forest lands. For example, in my own case, the transmission line will create a barrier from having heavy equipment access a corner of my property with equipment such as excavators due to height restrictions. The only way that equipment will be able to access this area would be to obtain permission from a surrounding landowner to allow me to go across their land, and potentially have to take down their fences to access the property through a round about route.

It has already been established and documented that the Noxious Weed program fails to comply with State Statutes and the PUC is to determine appropriateness of issuing a Certificate of Public Convenience and Necessity based upon their independent determination of the costs and safety considerations rather than simply accept ODOE's evaluation of their rules which do not necessarily include requirements of other agencies.

Limitations and inadequacies of the Noxious Weed Plan and Revegetation Plan have been reviewed multiple times by different individuals and agencies. I do not

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need to repeat the concerns here, however, I am incorporating by reference all comments regarding Noxious Weed Management submitted by Susan Geer in both the EFSC process as well as this process. Since I have Data Requests which relate to this topic, and have previously submitted Exhibits, in I reserve the right to include exhibits which show a lack of compliance with the requirement the developer not negatively impact accepted farm and/or forest practices on adjoining land in my final arguments. Idaho Power efforts at controlling erosion as a result of the project are limited to actions that are taken on the site but fail to address the impacts of water when their actions are unsuccessful and water flows onto adjoining properties. Erosion from water moving off the site of the transmission line which will very likely occur due to a lack of effective mitigation and the fact that construction such as road development or other construction activity damages the ground cover and compacts soil resulting in increased amounts of water flowing off the site.

Page 17 Avian Protection Plan:

In spite of the statement that their Avian Protection Plan addresses electrocution, collision and nesting birds, the current plan fails to meet any of

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these three items. They refused to install bird diverters on the power lines even though the transmission line will cross migratory bird routes into and out of Ladd Marsh. They are placing structures in forested areas which provide habitat for a large diversity of local and migratory species. They are not completing wildlife surveys for riparian areas or Ladd Marsh wildlife area. They are not doing post construction monitoring of raptor or other nesting sites to determine if sites are being abandoned. They are doing general wildlife surveys and including at risk, migratory and threatened wildlife species rather than doing species specific surveys for at risk species. Providing training regarding regulations and procedures following one of the listed interactions does nothing to establish the potential for damages to the species or mitigation to avoid the occurrences.

Page 21 of Ms. Baretto's Testimony regarding the process for consideration of RFA-I

Ms. Barretto mistakenly describes the Amendment Process for RFA-I. Since this amendment adds land to the site as well as new roads, there is the potential that there will be a requirement for condemnation if they are able to condemn land for access roads. These landowners may or may not have participated in previous

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EFSC processing of the Site Certificate. The normal process is required to approve this amendment including the opportunity for a Contested case as well as Appeal to the Oregon Supreme Court. Having looked at the locations of some of the roads on the maps provided in the initial application, it appears highly likely that there will be requests for Contested Cases regarding RFA-1.

/s/Greg Larkin

Greg Larkin, Intervenor

CERTIFICATE OF MAILING

On March 20, 2023, I certify that I filed the above Surrebuttal Response to Idaho Power's Reply Testimony was submitted via the OPUC Filing Center, for the Docket # PCN-5 and to the following party as noted below.

/s/Greg Larkin

Greg Larkin

Intervenor PCN-5

By US Postal Service

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Appendix B – Mitigation and Monitoring Requirements

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Additional Project-Specific Mitigation Measures

Additional mitigation and monitoring measures have been developed for the Boardman to Hemingway Transmission Line Project (B2H Project) through the National Environmental Policy Act (NEPA) process that address direct, indirect, and cumulative impacts to resources. Agency-required mitigation measures were described initially in Chapter 2 of the Final Environmental Impact Statement (Final EIS) (refer to Table 2-13). The Applicant has incorporated these required mitigation measures into the draft Plan of Development (POD) (Appendix D of this Record of Decision [ROD]). The agency-approved final POD will be required to include application of the mitigation measures consistent with the language in the POD and this appendix.

Several policies relating to compensatory mitigation have changed since the publication of the Final EIS. In particular, President Trump's Executive Order on *Promoting Energy Independence and Economic Growth*, issued on March 28, 2017, rescinded President Obama's Memorandum *Mitigating Impacts on Natural Resources from Development and Encouraging Related Private Investment*, issued on November 3, 2015. Additionally, Secretary Zinke issued Secretarial Order No. 3349 – *American Energy Independence* on March 29, 2017, which, among other things, rescinded Secretarial Order 3330 – *Improving Mitigation Policies and Practices of the Department of the Interior* (Oct. 31, 2013). The BLM specifically considered the earlier compensatory mitigation policies as part of the environmental review of the B2H Project and included references to these policies in the Final EIS. The BLM has considered whether the policy changes trigger an obligation to supplement the Final EIS pursuant to 40 CFR 1502.9(c)(1). While consistent with the rescinded policies, the purpose of the compensatory mitigation identified and analyzed as a requirement in the Final EIS was to satisfy the requirements of NEPA, as well as BLM's statutory obligations under FLPMA. Even though the policies have changed, the environmental analysis (including the proposed action and its effects) has not, nor has the underlying purpose of complying with NEPA. Thus, the BLM has determined that the policy changes regarding compensatory mitigation do not represent a substantial change in the proposed action or “significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.” (*Id.* § 1502.9(c)(1)(i), (ii)).

Final Notice to Proceed Requirements

Explanation of the Notice to Proceed Process

Several details concerning design, construction, and mitigation actions will not be finalized at the time the right-of-way grant is issued. Post-Record of Decision (ROD) requirements consist of completing an acceptable final POD, which will include mitigation requirements and right-of-way grant stipulations required to be met before the final notice to proceed (NTP) is issued. This final POD covering B2H Project-wide practices and requirements will contain the final construction and operation plans outlined in the attached draft POD, including any updates and revisions to those plans required by this ROD, as well as additional NTP requirements outlined in the right-of-way grant.

The Applicant may not initiate any construction or other surface-disturbing activities on the right-of-way without the prior written authorization of the BLM Authorized Officer or his/her delegate in the form of a final NTP. Any final NTP will authorize construction or use only as therein expressly stated and only for the particular location or use therein described. Prior to the issuance of each NTP, all applicable environmental protection and mitigation plans needed will be completed by the Applicant and approved by the Authorized Officer or his/her delegate, and proof of possession of all required and applicable Federal permits will be submitted by the Applicant to the BLM. The Authorized Officer may suspend or terminate in whole or in part any NTP that has been issued when, in his/her judgment, unforeseen

conditions arise that result in the approved terms and conditions being inadequate to protect the public health and safety or to protect the environment.

As an option, additional NTPs may be issued for specific pre-construction activities prior to completion of the final POD, including for geotechnical investigation (analyzed in the Final EIS) provided that all necessary survey work associated with the geotechnical investigation is completed, and the reports are reviewed and approved by the pertinent agencies before BLM issues a NTP for this activity.

The final POD for construction will include adequate details regarding what mitigation and how these mitigation measures will be implemented. A final NTP will be issued on receipt of an agency-approved final POD for construction, approved mitigation and monitoring and other stipulations as described in the ROD.

Issuance of the right-of-way grant establishes the Applicant's right to use the authorized public lands to construct, operate and maintain a high-voltage electric transmission line and associated facilities, and sets forth the terms and conditions of that authorization. For example, the Applicant is required to pay rent in accordance with 43 CFR 2806 from the date the grant is issued. However, the Applicant is not permitted to use the granted areas for the proposed B2H Project until the actions listed below are completed and a NTP is issued. Consistent with the requirements of the ROD, the following activities will be performed after the issuance of the ROD and right-of-way grant and prior to issuance of the NTP for the B2H Project:

- Acquisition of authorizations on state and private lands
- Completion of biological resources surveys including but not limited to federally listed species under the Endangered Species Act as outlined in the final USFWS Biological Assessment (December 2016) and BLM sensitive species, to inform final engineering and design, as well as the NOAA Fisheries Biological Opinion
- Completion of final engineering to include final structure locations, final access road layout including field verification of structure locations, and proposed access roads for the Selected Route
- Layout and field verification of all temporary work areas to include material storage yards, fly yards/laydown areas and portable concrete batch plants
- Compliance with the stipulations in the Programmatic Agreement dated February 7, 2017, including completion and approval of the Class III cultural resources report; paleontological resources report and approval; and biological resources preconstruction surveys reports and approvals; completion of analysis and preparation of summary reports including preparation and approval of Historic Property Management Plans (HMTP), Paleontological Resources Treatment Plan (PRTP) and mitigation measures at sensitive locations where resources cannot be avoided, regardless of jurisdiction
- Jurisdictional Waters of the United States delineation and any other resource surveys required to support permitting
- Acquisition of remaining Federal permits and acquisition of required state and local permits, stipulations and conditions of approval set forth in all agency decisions, including fully developed environmental management plans
- Development of a complete and comprehensive Greater Sage-Grouse Compensatory Mitigation Plan (CMP) in accordance with the Mitigation Framework provided in Appendix C of the Final EIS that quantifies the direct and indirect impacts of the B2H Project on Greater Sage-Grouse and identifies a suite of appropriate site-specific compensatory mitigation options for selection and implementation. The Habitat Quantification Tool (HQT) developed for the State of Oregon by the Sage Grouse Conservation Partnership (SageCon) Quantification Technical Team will be used to determine the appropriate amount of compensatory mitigation for direct and indirect impacts.

The final Greater Sage-Grouse CMP must be reviewed by the cooperating agencies and a recommendation will be made to the authorized officer for approval prior to the NTP (refer to Appendix C in the Final EIS).

- Development of a CMP for impacts on Riparian Conservation Areas. Residual impacts from the B2H Project on Riparian Conservation Areas that warrant compensatory mitigation would include permanent habitat loss in areas where RCAs are located in conifer forest types (refer to Appendix C in the Final EIS).

In general, a POD is used to document a Federal right-of-way Applicant's construction, operation, rehabilitation, and Environmental Protection Plans and is submitted to BLM for acceptance and NTP approval (43 CFR Part 2804.25). The POD provides direction to the Applicant's construction personnel, construction contractor(s) and crews, Compliance Inspection Contractor (CIC), environmental monitors, and agency personnel regarding specifications of construction. The POD also provides direction to the agencies and Applicant's personnel for operation and maintenance of the B2H Project.

The content of the POD, which is carried forward from and/or refined from the information and data disclosed in the EIS, consists of (1) background information, direction, and implementation plans and (2) detailed mapping to facilitate execution of environmental protection and mitigation measures. Background information and direction includes the B2H Project description, including explanation of the Applicant's and agencies' roles and responsibilities; description of construction, operation, and maintenance activities; specification of land use and access; and description of design features and other measures for environmental protection to avoid sensitive environmental resources. The POD iterations supporting the Draft and Final EISs also contained implementation plans detailing the Applicant's commitment to mitigate adverse impacts resulting from construction, operation, and maintenance of the B2H Project.

The draft POD for the B2H Project (Appendix D of this ROD) was revised in September 2016. The draft POD contains updated framework Environmental Protection Plans; and additional information related to the engineering, micro-siting, contracting and permitting of the Selected Alternative; and the initial layout of access roads, temporary work areas, and locational constraints (e.g., special status species habitat) of the Selected Alternative.

The draft POD in Appendix D of this ROD contains the following implementation plans that will need to be updated or expanded to include BLM's additional ROD requirements once final survey data informs final engineering design:

- Blasting Plan Framework
- Framework Reclamation Plan
- Framework Plant and Wildlife Conservation Measures Plan
- Framework Agricultural Protection Plan
- Framework Fire Prevention and Suppression Plan
- Framework Operations, Maintenance, and Emergency Response Plan
- Framework Traffic and Transportation Management Plan
- Framework Stormwater Pollution and Prevention Plan
- Framework Spill Prevention and Response Plan
- Cultural Resources Protection and Management Measures
- Visual Resources Protection Plan
- Biological Resources Habitat Protection and Monitoring Plan
- Mitigation Framework (also included in Appendix C of the Final EIS)

Upon completion of the final POD, the Applicant will submit the final POD for review and acceptance by the BLM and any agencies with jurisdictional or regulatory authority over resources affected by the B2H Project. The final POD will detail the Applicant's construction plans and specifications, and construction practices and procedures for the Selected Alternative. The final POD will be developed in coordination with the CIC and adequate coordination with all BLM state and field offices, USFWS, and any additional cooperators identified by BLM, which may require multiple agency and Applicant in-person meetings and may include field visits to similar projects to develop acceptable designs and site-specific implementation of mitigation measures.

The final POD also will describe the processes and procedures the Applicant will employ to comply with the requirements of the RODs for the B2H Project and will include the Environmental Compliance Management Plan. The final POD will be appended to the BLM right-of-way grant.

The final POD may be required to contain additional resource mitigation plans described within this decision. The final POD will contain a mapset generated specifically for the NTP process that shows B2H Project detail, sensitive resources identified by BLM and B2H Project mitigation proposed to avoid and minimize impacts to those resources.

The final POD will contain an adequate construction schedule and detailed plan as to how the schedule will be shared, updated and maintained. An overall B2H Project schedule is suggested and a separate more detailed short-term schedule is suggested for 3- to 4-week construction periods. Additional detail will be required in the preconstruction checklist for NTP issuance. The schedule will include a sequencing of construction activities and any changes will be timely provided.

Construction POD development and implementation will ensure agency personnel are involved throughout the B2H Project area and specific areas will be identified where resources driven by law and policy require intensive agency involvement.

These additional requirements will enable BLM to comply with current regulation and policy. The final POD will be updated to include all additional BLM requirements in appropriate or additional POD sections.

Biological Resources Mitigation

Greater Sage-Grouse Mitigation

BLM's Greater Sage-Grouse Approved Resource Management Plan Amendments (ARMPAs) were approved September 18, 2015, in response to the threats identified in USFWS's 2010 "warranted but precluded" finding and guided by the USFWS's Conservation Objective Team Report and the BLM National Technical Team Report. The BLM's Greater Sage-Grouse RODs and ARMPAs designated greater sage-grouse habitat areas, including Priority Habitat Management Areas (PHMAs), changed management objectives including realty actions such as transmission rights-of-way, and established conservation standards for designated PHMAs. BLM's RODs and ARMPAs, however, specifically indicated that the land-use plan amendments and the management directions for realty action decisions do not apply to several priority transmission projects, including the B2H Project. Even though the conservation management standards for greater sage-grouse set forth in the BLM's ROD and RMPAs do not apply to these projects, the BLM identified through the Project-specific NEPA and decision-making process conservation measures for greater sage-grouse that are similar to those in the BLM's ROD and RMPAs and the ROD requires the Applicant to achieve a net conservation benefit. Refer to Appendix C in the Final EIS.

The BLM and cooperating agencies collaborated to prepare a Mitigation Framework that includes Greater Sage-Grouse (Appendix C in the Final EIS) to address avoidance, minimization, and compensatory mitigation actions for the B2H Project. The framework outlined the analysis and potential mitigation required to support selection of an alternative that would be consistent with agency missions and goals pertaining to Greater Sage-Grouse conservation (refer to Section C.2.2.1 in Appendix C in the Final EIS). The framework also was developed to facilitate relevant cooperating-agency decision-making or evaluation of compliance with applicable plans and policies during B2H project implementation.

Further, the agencies collaborated with the Applicant to identify feasible strategies to avoid, minimize, and compensate for the potential effects of the B2H Project on Greater Sage-Grouse pursuant to the applicable plans and policies. Strategies included B2H Project siting considerations, development of additional onsite mitigation, and development of appropriate offsite mitigation that could be implemented to facilitate reasonable development of the B2H Project consistent with applicable agency plans and policies pertaining to Greater Sage-Grouse. The impact assessment method that will be used to determine the appropriate amount of compensatory mitigation, guidance detailing what criteria should be used when identifying a potential sage-grouse compensatory mitigation area, and management actions that will be undertaken in the compensatory mitigation area(s) are described in Section C.2.2.1 in Appendix C in the Final EIS.

The final CMP will be developed by the Applicant in accordance with the Mitigation Framework presented for review by the BLM and the cooperating agencies when the final design and engineering of the selected route is completed. The final CMP will evaluate and assess the levels of disturbance associated with direct and indirect effects to identify appropriate levels of final mitigation to demonstrate a net conservation benefit. The comprehensive CMP will be included as an appendix to the final POD for review by the cooperating agencies. Based on the cooperating agency comments, the BLM will provide the final review and approval of the CMP. The BLM requires the Applicant to receive a NTP, which documents final approval of the CMP prior to any surface-disturbing activity (other than geotechnical) associated with construction of the transmission line being permitted.

Biological Resources Conservation and Wildlife Variance Management Plans

The final POD for construction must include a Biological Resources Conservation Plan and a Wildlife Variance Management Plan approved by BLM and agencies with jurisdictional authority over affected biological resources. The Biological Conservation Plan will explain the survey process for all special status wildlife and plant species and include an advance coordination requirement with BLM prior to all survey work efforts. The Biological Conservation Plan will require the survey team to operate under the guidance and direction of BLM. No survey work will take place without adequate prior coordination and advance guidance by BLM and any agencies with jurisdictional authority over resources being affected.

The Wildlife Variance Management Plan will document how information regarding the condition of biological resources will be collected during construction and provided to the BLM authorized officer or their designee (CIC) so they might consider modification of certain seasonal wildlife restrictions, if warranted.

The BLM will require the Applicant to prepare a final Biological Resources Mitigation and Monitoring Report, in consultation with the CIC, which documents the application of mitigation measures, including variances and adaptive management, and monitoring results to ascertain the effectiveness of mitigation.

Migratory Bird Mitigation

The draft POD commits to appropriate avoidance and minimization measures that would effectively reduce impacts during construction and operation. Reclamation requirements would effectively restore

habitats within the areas disturbed during construction and appropriate seed mixes would be considered to restore the habitats back to an ecologically functioning vegetation community similar to what was disturbed within the limitations of the draft POD's Vegetation Management Plan for operation and maintenance. The BLM's obligations under Executive Order 13186 Responsibilities of Federal Agencies to Protect Migratory Birds (January 17, 2001) and resulting Memorandum of Understanding between the BLM and USFWS to *Promote the Conservation of Migratory Birds* (April 12, 2010) are met through the on-site mitigation that is being applied to the projects through avoidance, minimization, and reclamation of disturbed habitats. The BLM's obligations and conservation responsibilities under the MOU are also met through the many habitat improvement and restoration projects completed on BLM managed lands to benefit multiple species. Compensatory mitigation required for Greater Sage-Grouse also will also provide benefits to sagebrush obligate migratory bird species in greater sage-grouse habitat.

The Migratory Bird Nest Management, Monitoring, and Reporting Plan developed for the final POD will outline the steps to be taken by the Applicant and its contractors and subcontractors to avoid or minimize impacts on nesting birds during construction of the B2H Project. The final Plan will be developed in response to specific requirements of the Migratory Bird Treaty Act (MBTA) and will be consistent with guidelines provided in Migratory Bird Conservation Actions for Projects to Reduce the Risk of Take during the Nesting Season (USFWS 2014). It will apply to birds nesting on all types of land ownership and management across the entire B2H Project area.

Cultural Resources Mitigation

Section 106 of the National Historic Preservation Act, 54 USC 306108, requires Federal agencies to take into account the effects of their undertakings on historic properties (36 CFR 800.1(a)). BLM executed a Programmatic Agreement (PA) to set forth the requirements for complying with the Section 106 process, which the Applicant must satisfy prior to receiving a NTP from BLM. The PA identifies processes and procedures to identify historic properties and to determine if historic properties are eligible for listing on the NRHP and if these properties would be adversely affected by the B2H Project's construction and/or operations and maintenance.

The undertaking and the identified area of potential effects covers the entire B2H Project regardless of land status or jurisdiction. The PA and its identification, evaluation, and process apply to all jurisdictions, not exclusively to BLM or Federal lands.

The Applicant will submit to the BLM all reports stipulated by the PA in accordance with the project schedule. As specified in the PA, the reports will be reviewed by the BLM, tribes and the Concurring Parties to the PA. Upon the BLM's acceptance and approval of the Class III inventory reports and HPMPs, the BLM will notify the Applicant in writing that the procedures established in the PA are completed and a NTP can be issued. Fulfillment of these obligations will be among the elements to be completed before the BLM issues an NTP.

Historic Property Management Plan

A Historic Properties Management Plan (HPMP) is under preparation to develop mitigation measures for properties eligible for inclusion in the National Register of Historic Places (NRHP) and that would be adversely affected during construction, reclamation of temporary disturbance, and/or operations and maintenance of the B2H Project. The HPMP is being prepared in consultation with the BLM, Idaho and Oregon State Historic Preservation Officers (SHPOs), Advisory Council on Historic Preservation, Tribal Historic Preservation Officers (THPOs), tribes, and concurring parties to the PA.

The HPMP is designed to guide protection of historic properties during implementation and operation and maintenance of the project. It will identify general treatments for adverse effects to certain categories of historic properties that may be affected directly or indirectly by the project. It will also include a monitoring plan, inadvertent discovery plan, and Native American Graves Protection and Repatriation Plan. The methods for evaluating cultural resources for eligibility and effects will also be outlined in the HPMP.

BLM will prepare an HPMP Framework in accordance with the PA. Identification of cultural resources in the B2H Project area will occur during Class III inventories to be conducted in each state, including National Register eligibility determinations and findings of effects. Upon completion of Class III and Visual Assessment of Historic Properties (VAHP) inventories for the B2H Project, the Final HPMP, containing property specific mitigation and monitoring will be prepared. The purpose of the property specific mitigation and monitoring plans is to supplement the HPMP with site-specific information, including mitigation, treatment, and monitoring of remaining unavoidable direct and indirect effects on historic properties. These plans will provide a clear description of the specific mitigation strategy proposed to address the direct, indirect, and cumulative effects on individual historic properties. The Final HPMP with these specific plan conditions must be finalized and approved by the BLM and Concurring Parties as specified in the PA prior to the issuance of an NTP for applicable portions of the B2H Project.

The number and location of historic properties within the Project which may ultimately need to be included in the HPMP is unknown at this time. The right to use the granted area in each state is withheld until treatment as identified in the HPMP is finalized, and until the avoidance, minimization, and/or compensation of adverse effects for each historic property is completed in accordance with the PA. After complying with stipulations of the PA, compensatory mitigation may be warranted for residual impacts to an extent that leads to achieving a solution for the mitigation of these remaining unavoidable effects found acceptable through negotiation and consultation among the applicable land-managing agencies, tribal governments, and concurring parties. Determining appropriate compensatory mitigation is dependent on a number of factors, and must be developed for individual historic properties/cultural resources by qualified professional archaeologists in consultation with land-managing agencies, tribal governments, and concurring parties. Compensatory mitigation for cultural resources is further discussed in the Appendix C of the Final EIS (Section C.2.2.3 Cultural Resources).

The Applicant will post a financial security (such as a cash, cashier's or certified check, certificate or book entry deposits, negotiable U.S. Treasury bonds equal in value to the bond amount, or surety bonds from the approved list of sureties (U.S. Treasury Circular 570 available on-line), (made payable to the Bureau of Land Management) in an amount sufficient to cover all post-fieldwork costs associated with implementing the HPMP, or other treatment activities, as negotiated by the Applicant where they contract for services in support of this PA. Such costs may include, but are not limited to, treatment; post-field analyses; research and report preparation; interim and summary reports preparation; the curation of B2H Project documentation and artifact collections in a BLM approved curation facility; and the repatriation and reburial of any human remains, sacred objects, or objects of cultural patrimony. The Applicant will post a financial security prior to BLM issuing an NTP for the segment where historic property treatment is required. The security posted is subject to forfeiture if the Applicant does not complete tasks within the time period established in the HPMP, but the BLM and the Applicant may agree to extend any such time periods. The BLM will notify the Applicant that the security is subject to forfeiture and will allow the Applicant 15 days to respond before action is taken to forfeit the security. The BLM will release the financial security, in whole or in part, as specific tasks are completed and accepted by the BLM.

The BLM will monitor activities pursuant to the Programmatic Agreement and the HPMP. Should the Applicant or its cultural resources contractor fail to comply with any provision of the PA or HPMP, the BLM may, at its discretion, counsel the Applicant and/or its cultural resources contractor regarding

performance requirements, or suspend the permits under which the PA is executed. Such suspension could, at the BLM's discretion, result in the issuance of a "stop work" order for the entire B2H Project if the BLM determines that the severity of the failure to comply warrants it.

Monitoring Plan

The monitoring plan is an appendix to the HPMP and spells out the procedures for monitoring historic properties and cultural resources during implementation of the project. It will also be part of the final POD to be used during project construction. As an NTP requirement and a requirement of the PA, the BLM will develop a monitoring plan in consultation with participating tribes and Federal land managing agencies. This plan will contain the following provisions:

- Tribal monitoring is to be considered as a component of environmental monitoring.
- The Applicant will facilitate tribal monitoring activities for participating tribes. The tribal government must request tribal monitoring in writing to the BLM.

The BLM will develop the monitoring plan in coordination with the participating tribal governments, and will coordinate review and acceptance of the Monitoring Plan.

Cultural Resources Survey and Data Recovery

Any B2H Project-related cultural resources survey and data recovery work will be coordinated with and authorized by the BLM, including (1) review and approval of the scope of work and contractors selected and (2) reporting protocol. No cultural resources survey or data recovery work may be conducted without prior authorization by and coordination with the BLM.

National Conservation Lands

National Historic Trail Mitigation

The ROD requires as a condition of approval of the ROW grant that the Applicant satisfy all applicable mitigation measures proposed in Chapter 2 of the Final EIS and included in the draft POD (Appendix D of this ROD) for the B2H Project related to impacts to the Oregon National Historic Trail (NHT) and trails under study for congressional designation.

To meet the policy and purposes of the National Trails System Act (NTSA Sec. 9(a)), to permit a project which will not substantially interfere with the nature and purposes of the trail (NTSA Sec. 7(c)), and to safeguard the nature and purposes of the Oregon NHT described in the Oregon NHT Comprehensive Management and Use Plan (CMUP) (National Park Service 1999), the BLM will apply a mitigation hierarchy to address impacts to the Oregon NHT from the B2H Project based on direction from BLM Manual 6280. This manual lays out the agency policy for compliance with the NTSA and management of the trails, as well as guidance for analysis of NHT in the NEPA process. The manual stipulates that the NEPA documentation for NHTs needs to include analysis of the potential impacts on the nature and purpose of the designated NHT as well as those undergoing a National Trail Feasibility Study. The analysis needs to take into account the trail resources, qualities, values, associated settings, and the primary use or uses of any NHTs. The manual also discusses mitigation to impacts and requires consideration of mitigation opportunities "to the level commensurate with the adverse impact to the nature and purposes; resources, qualities, values and associated settings; and the primary use or uses of the NHT." The following discussion focuses on the Oregon NHT where additional compensatory mitigation was identified as required by the BLM. Note that mitigation requirements for impacts on

Historic and Cultural Resources associated with NHTs will be in accordance with the PA for the B2H Project.

Avoidance and minimization measures to mitigate impacts on Oregon NHT will be applied for the life of the impacts from the B2H Project. Through conclusions described in Section 3.2.15 of the Final EIS, effects on two-trail related resource categories (National Trail Management and Components and Scenic and Recreation Resources) would remain after applying avoidance and minimization measures, requiring compensatory mitigation at a degree that is commensurate with the impacts. While direct impacts on the physical trails themselves generally can be avoided (e.g., spanning the trails), the indirect visual impacts become more challenging to mitigate due to the scale of the B2H Project components, including transmission line structures and the geometrically shaped and cleared right-of-way. The areas of high residual impacts, by segment, are described below where successful implementation of compensatory mitigation measure would be required to not substantially interfere with the trail's nature and purpose.

In Segment 1, the B2H Project would highly impact the Boardman high potential route segment and cross a contributing trail segment (Well Spring Segment) adjacent to the NWSTF.

In Segment 2, the B2H Project would highly impact views from the NPS auto tour route south of Ladd Canyon but by being located southwest of La Grande, would avoid high impacts on the portion of the NPS auto tour route adjacent to Hilgard Junction and on the Blue Mountains high potential historic segment of the Oregon NHT.

In Segment 3, the B2H Project would be viewed directly adjacent to a viewpoint associated with the National Historic Oregon Trail Interpretive Center (NHOTIC) resulting in high impacts. Additionally, views from the Flagstaff Hill/NHOTIC high potential historic site which is derived from National Park Service (NPS) data, contributing trail segments, recreation opportunities, and the Oregon Trail ACEC – Flagstaff Hill portion would be impacted by the B2H Project. East of Pleasant Valley, the B2H Project would highly impact views from contributing trail segments in the Oregon Trail ACEC – Straw Ranch I portion. The B2H Project also would highly impact views from the NPS auto tour route where I-84 is paralleled south and east of Baker City.

In Segment 4, the B2H Project would highly impact views from the Birch Creek Interpretive Site, located in the Oregon Trail ACEC – Birch Creek portion, as well as views from the adjacent contributing trail segments and the Alkali Springs High Potential Route Segment farther to the south. Additionally, the B2H Project would highly impact views from the NPS auto tour route north of Huntington.

Low impacts would occur on the Oregon NHT and resources in Segments 5 and 6 of the B2H Project.

National Trail Management and Components

The objective for compensatory mitigation is to offset high residual impacts on National Trail Management Components to meet the NTSA requirement to not substantially interfere with the nature and purposes of the trail as well as objectives associated with both NPS and BLM national trail management.

The detailed application of compensatory mitigation measures will be identified in the final detailed compensatory mitigation plan for the final route in the Record of Decision and following final engineering and design. This plan will identify the level of residual impacts on Federal protection components (National Trail Management Components) and the level of compensatory mitigation identified to be commensurate with the adverse impacts identified in the Final EIS. The types of compensatory mitigation measures could include establishing protective barriers, such as fences or berms, closing roads to motorized vehicles near sites or road segments that are historic properties/cultural

resources (e.g., trail routes), purchasing mineral rights in trail-associated special management areas or hardening ground surfaces and establishing erosion controls; and funding updates of trail management plans. Acquisition of historic trail segments off-site and on other land ownership is encouraged to protect these sites by incorporating them into public or collaborative public/private management. For example, compensatory mitigation may include projects, such as securing additional trail land or perpetual conservation easements, along the affected National Trails Systems components.

Scenic and Recreation Resources

The objective for compensatory mitigation will be to offset high residual impacts on views, and associated settings, from trail-associated recreation sites and other trail-associated viewing locations.

The detailed application of compensatory mitigation measures, as described above, will be identified in the final detailed compensatory mitigation plan. This plan will identify the level of residual impacts on trail-associated recreation sites and the level of compensatory mitigation identified to be commensurate with the adverse impacts identified in the Final EIS. Note, most of these trail-associated recreation sites are also associated with Federal protection components (e.g., NHOTIC) described above. Compensatory mitigation measures could include fee-purchases, easements, restoration work, fund updates to existing interpretive sites, including the NHOTIC, identify and fund new interpretive sites or areas, and acquire mineral rights in trail-associated special management areas.

Historic and Cultural Resources

The requirements for compensatory mitigation for residual impacts on the historic and cultural aspects will be identified through the process described in previous Cultural Resources section of this appendix. Examples of potential compensatory mitigation projects include interpretive signs, kiosks, and visitor centers that would describe the site and provide background information to the public. Additional actions that could promote these locations for public interest would be to produce relevant school programs and curriculum, establish parking areas at historic trail access points, and build turnstiles and gates in existing fences where trails could be accessed. Many of the efforts could dovetail with recreation and visitor services to augment recreation sites. For example, a recreation area near historic trail ruts could be expanded to include a hiking area and interpretive panels for this section of the trail. Additionally, Federal management of NHTs through the designation of additional trail-associated special management areas or funding updates to trail management plans would facilitate long-term management of trail resources in consideration of the level of impacts resulting from the B2H Project

All mitigation measures will be durable, additional, timely, monitored, adaptively managed, and reported upon.

The final detailed compensatory mitigation plan will be developed through both coordination with BLM National Trails, and cultural resource staff and the guidance of the cooperating agencies. This final detailed compensatory mitigation plan will be reviewed by the cooperating agencies and a recommendation will be made to the Authorized Officer for approval prior to any issuance of Notice to Proceed.

Monitoring and Enforcement

The BLM is responsible for ensuring compliance with all mitigation measures required in its ROD. These measures will be incorporated into the Applicant's final POD. The final POD for construction must be reviewed and accepted by the BLM Authorized Officer before the BLM will issue any NTP for the B2H Project other than for the short term geotechnical investigation work. The BLM also has incorporated

standard terms, conditions, and stipulations into the right-of-way grant. Failure on the part of the grant holder(s) to adhere to these terms and conditions could result in various administrative actions up to and including suspension and even termination of the right-of-way grant and requirements to remove the facility and rehabilitate disturbances.

The BLM and USFS will be responsible for enforcement of the terms and conditions of the BLM's right-of-way grant and USFS's special use permit (collectively, "authorizations") on Federal lands during the terms of the respective authorizations. Compliance with state and local permits and authorizations also is an enforceable condition of the BLM's right-of-way grant.

Compliance Inspection Contractor Requirements

The BLM requires the holder to provide for an environmental CIC, to monitor activities during the construction, operation, and reclamation phases of the B2H Project and provide reports to designated BLM contacts in accordance with the approved communications plan. The Applicant will be required to provide cost recovery for the BLM's costs to review the CIC's reports and perform other tasks associated with monitoring during any phase of the B2H Project (43 CFR 2805.16(a)).

The CIC will monitor construction activities on Federal and non-Federal lands, document B2H Project disturbance that occurs along the entire B2H Project, and assist the Applicant in ensuring compliance with the terms and conditions of the Federal authorizations and complying with the Final EIS analysis. In addition, the CIC must ensure that the B2H Project adheres to any state and local permits that contains conditions to construct.

The CIC will supervise and support a team of compliance monitors consisting of individuals with experience with ultra-high voltage transmission construction that includes projects in the western United States as well as expertise and experience regarding the resources for which mitigation is required, including biological, cultural, and soil science expertise. The CIC is required to ensure compliance with all avoidance, minimization, and mitigation commitments contained in this ROD.

Approvals developed in connection with all NTP requirements for the transmission line construction will be developed in coordination with the CIC for the B2H Project before finalized and before any NTP is issued.

The CIC also will perform post-construction monitoring and will monitor the reclamation for the transmission line, temporary permitted areas and ancillary facilities. The CIC will maintain a B2H Project history, develop and implement an effective communication plan including daily and weekly conference calls, a B2H Project SharePoint site, and a record of all B2H Project communications as well as a project close out report and transfer of records to the BLM, USFS, or other applicable Federal agency.

The CIC's primary responsibility will be to observe all work activities, recommend methods to prevent noncompliance, and provide reports to the BLM including reports of noncompliant situations. Additional responsibilities are described in the draft POD. Any conflicting information found in the draft POD is superseded by this decision.

The BLM will review the scope of work for all CIC third-party contractors proposed to work on the B2H Project and approve the contractor. The contractor may include EIS, biological, cultural resources, compliance, and monitoring contractors.

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From: Irene Gilbert

January 10, 2022

2310 Adams Ave.

La Grande, Oregon 97850

To: Honorable Judge Mellgrin:

Re: I am a Pro Se petitioner with an appeal currently before the Oregon Supreme Court regarding the Boardman to Hemingway transmission line.

Please consider my previously submitted comments related to Idaho Power's request for a Certificate of Public Convenience as well as the additional information included in this document.

I have been involved with Idaho Power's transmission line application for over 10 years. As such, I have watched multiple events unfold.

I will try to avoid repetition of previous written and verbal comments as they stand on their own merit. I agree with the comment from PacifiCorp that the Commission must investigate and document an independent decision regarding whether the transmission line is necessary,

that it reflects and addresses safety issues, and that it is the most practical and best serves the public interest compared to other alternatives available. Below comments reflect information regarding these issues:

1. IS IT A “NECESSITY”:

The comments provided to date show a preponderance of evidence that supports a finding that in the not so distant future the need for high voltage transmission lines is likely to diminish rather than increase. This is due, in part, to the rapid development of alternative energy sources which support local generation and use of microgrids rather than reliance upon high voltage electric lines. The US Military is transitioning to microgrids for security reasons and given the increasing risk of terrorist activities related to electric distribution, that decision is supported by real world events.

Staff to the Commission have questioned why, given how close the different portfolios are, Idaho Power continues to insist upon attempting to justify this transmission line. The only plausible reason is because of the income flow and profit that the developer will realize that would not occur when need is addressed through other viable alternatives.

Examples:

--Energy Vault is developing a green hydrogen storage project which will provide at least 293 MW hrs. of energy capable of powering 2,000 electric customers in Calistoga, California which could be expanded to 700MWh.

This project is projected to start commercial operation in 2024. ("PG&E, Energy Vault plan largest US utility-scale battery, green hydrogen long-duration storage project" from Utility Dive, Jan. 6, 2023 by Stephen Singer)

<https://www.utilitydive.com/news/california-wildfires-battery-storage-fuel-cells-hydrogen/639771/>

--X-Energy Reactor Co., backed by private funding and \$1.2 billion in federal funding is developing a small modular nuclear reactor which could be expanded to provide 320 MW of energy. This company is projected to expand to \$500 billion by 2040. ("Nuclear SMR developer X-energy to merge with Ares Management-backed SPAC, creating \$2B company.")

<https://www.utilitydive.com/news/X-energy-ares-management-spac-merger-small-modular-nuclear-smr/638097/>

These companies are not pipe dreams. They are functioning entities which are producing products which will move energy away from requiring high voltage transmission lines.

These kinds of energy resources are not occurring in 100 years which Idaho Power claims will be the minimum need for this transmission line. They are occurring now and in less than 20 years. There is a growing risk that this transmission line will become a stranded asset due to alternate energy production methods that will move consumers away from the use of a grid controlled by Electric Utilities. Someone will be required to pay for the development and it will be the low income customers lacking the resources to install alternative energy generating resources.

SAFETY:

Terrorism: It is clear given recent attacks on transmission infrastructure that a large transmission line such as this creates a set of risks for Domestic Terrorism attacks which are not created with local generation and use of energy. The Boardman to Hemingway transmission line will create more vulnerable infrastructure. If this expense were

directed toward development of microgrids and local energy development, it would make a significant contribution to safe access to renewable energy. FERC analysis determined that taking out nine sub stations of the 55,000 nationwide could cause a coast to coast black out. (“Attacks on Pacific north-west power stations raise fears for US electric grid”, Dani Anguiano, Dec. 2022, The Guardian. <https://www.theguardian.com/us-news/2022/dec/09/us-power-grid-pacific-northwest-attacks>)

Fire: The Oregon Public Utility Commission has determined that Idaho Power's wildfire plan is weak and lacking in several areas. One of the areas that should be significant in a determination of whether a Certificate of Public Convenience is justified is the failure to provide a viable plan to mitigate the risk of wildfire to Oregon citizens.

--Concern is justified based upon statement such as that made by Mitch Colburn less than a year ago indicating to the Oregon Public Utility Commissioners that Idaho Power believes its wildfire plan “mitigates risk in a cost-effective and meaningful way for the roughly 20,000 customers it serves in Eastern Oregon.” Idaho Power has on multiple occasions

indicated that their customers are the 20,000 people in Oregon receiving power from them. When they decided to run a transmission line across the entire length of 5 Oregon Counties, they assumed responsibility for citizens and resources placed at risk in those counties. This is not reflected in their approach to fire protection. ("Oregon regulators approve utility wildfire mitigation plans but question Idaho Power omissions" April 26, 2022 by Kavya Blaraman) <https://www.utilitydive.com/news/oregon-regulators-approve-utility-wildfire-mitigaton-plans-but-question-i/622724/>

-- Idaho Power has indicated in their filings with the Oregon Department of Energy that they plan to rely upon local firefighting resources to address wildfire risks. This is in spite of the fact that local resources have indicated they lack manpower and equipment needed to assume this responsibility.

-- Idaho Power has indicated there are no high fire risk areas along the entire Boardman to Hemingway transmission line . Existing risk assessments identify multiple areas in Union County alone where the fire risk is considered high.

Examples:

(A)The Union County Community Wildfire Protection Plan for Union County, August 10, 2005 shows most of Union County as having a high wildfire risk.

Of interest is the fact that the Morgan Lake area where the transmission line is planned has the highest risk of any of the areas in the county

evaluated. Other areas crossed by the transmission line which are also rated as high risk are Perry/Hillgard, Medical Springs and Kamela to name several. (Starting on Page 37 of Document)

(B) Union County, Oregon Environmental and societal risk assessment, Page 5-6) shows Union County as having a high risk of fire with 26% of the county very high and 29% high.

<https://www.augurisk.com/risk/state/oregon/union-county/41061>

(C)Northeast Oregon Multi-Jurisdictional Natural Hazard Mitigation Plan, Pages 4-25to 4-26) Lists the Probability of Future Fire Event and the Communities Vulnerability as High.

Greg Larkin/702

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Idaho Power does not show a record of having processes in place that will result in avoiding wildfire risk. On August 25, 2022 it was reported that

Idaho Power paid \$1.5 million dollars as a result of two fires which burned approximately 12,000 acres of land. (**“Idaho Power Company to Pay \$1.5 Million in Civil Settlement for Powerline and Lime Hill Fires”**, Oregon Department of Justice news release, August 25, 2022.)

<https://www.justice.gov/usao-or/pr/idaho-power-company-pay-15-million-civil-settlement-powerline-and-lime-hill-fires>

A 2020 fire in Umatilla County was caused by downed power lines.

(**“Umatilla fire caused by downed power lines”** by Antonio Sierra,

Jade McDowell and Alex Castle, East Oregonian, Sep 10, 2020)

https://www.eastoregonian.com/news/local/umatilla-fire-caused-by-downed-power-lines/article_e271b108-f2bd-11ea-a294-c3b06d84b588.html

Hazardous Waste Management: Idaho Power was fined \$1 million as part of a settlement due to a failure to control pollution at 15 of their **hydroelectric facilities in Idaho**. (**“Idaho Power Faces \$1 million Fine After reporting Violations”** by Associated Press, April 8,

2022) <https://www.usnews.com/news/best-states/idaho/articles/2022-04-08/idaho-power-faces-1-million-fine-after-reporting-violations>

An additional payment of over \$750,000 was made to the Nez Perce Tribe due to environmental damages. (**“Settlement in Idaho Power Permit Case to Fund Over \$500,000 in Tribal River Restoration Projects by Buck Ryan, September 8, 2022.”**)

<https://www.snakeriverwaterkeeper.org/settlement-in-idaho-power-permit-case-to-fund-over-500000-in-tribal-river-restoration-projects/>

These examples show a failure on the part of Idaho Power to do an accurate assessment of safety risks in areas they plan to place the transmission line as well as a failure to develop and maintain programs to minimize the risks.

COSTS “PRACTICABILITY”

The costs of local development of renewable energy resources such as wind and solar are rapidly going down, while the costs of development of

transmission infrastructure, is rapidly increasing. The disparity in the costs of providing energy through energy resources such as wind and solar in Idaho have already been determined to be less than utilizing this infrastructure to move energy from Oregon to Idaho. I understand that Idaho Power cancelled a contract for solar energy when it was determined that the cost was lower than the projections for energy obtained through this transmission line. In spite of Idaho Power's claims to the contrary, the cost of transmission line components are increasing significantly. For example, the following news article appeared on December 19, 2022:"

Utilities sound alarm over distribution transformer shortage as procurement times surpass 1 year and costs triple"

and NuScale obtained a budget change due to the inflated costs for the "price of steel, electrical equipment and other construction commodities not seen for more than 40 years." "commodities such as carbon steel piping and fabricated steel plates have increased by more than 50% since 2020."

(NuScale Reaches Key Milestone in the Development of the Carbon Free

Power Project”, Business Wire, Jan. 9, 2023)

<https://www.businesswire.com/news/home/20230109005322/en/>

UNDERSTATED FUTURE LITIGATION COSTS:

Idaho Power is ignoring the cost impact of future litigation regarding this transmission line and how those will impact the legitimacy of a certificate of public convenience even after the current appeals are resolved. An

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Amendment was just filed adding multiple roads in all Counties crossed by the transmission line. This amendment must be reviewed based upon compliance with all EFSC standards. There are multiple concerns which are not currently before the court due to the limits on the verbiage that could be submitted and a failure on my part to submit two issues timely. Unresolved issues are ripe for and in need of court interpretation due to conflicts between Oregon Statutes and actions by the Oregon Department of Energy and Siting Council when Site Certificates and Amended Site Certificates are issued. The litigation will continue through the life of this project in areas

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such as noise. Even though the Siting Council allowed an exception to the DEQ noise standard, every individual who is exposed to noise increases of more than 10 dBA above the current noise level at their residences during a portion of the time can initiate civil action in the county where they reside and can request a jury trial to determine damages.

COST COMPARISON: Increases in costs of steel and concrete.

Table 1, "Summary Estimating Template" included in Idaho Power's Application to the Oregon Department of Energy, Exhibit W, Attachment W-1, there will be 1,076 Latis Towers and 90 H-Frame Towers used.

The application for Site Certificate does not appear to list the amount of steel used per each transmission structure, so I am simply providing the cost figures.

Comparing January 2016 to January 2022 cost of steel:

Using the State of Oregon, Oregon Department of Transportation, figures, steel material values increased from \$163.60 on January of

2016 to \$439.56 on January of 2022. This chart entitled "Steel Material Vales" is included as a photograph attachment as I was unable to save the graph to my computer.

Calculation of cost comparing 2018 to 2022 costs of concrete. Note: a cubic yard of concrete weighs 2,000 lbs. Or 1 ton. Using the Oregon Department of Transportation Monthly Asphalt Cement Material Price Tables (Tables were available for 2018, 2019, 2020, 2021 and 2022) the average price per ton for each year rounded off were: 2018=\$462; 2019=\$496; 2020=\$404; 2021=\$478; 2022=\$690.

On Page B-64 of their application for site certificate it states that each

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of the Y-frame structures uses 80 cubic yards of concrete and each of the H-frame structures uses 93 cubic yards of concrete. To calculate the difference in price between 2018 and 2022, I multiplied the number of latis structures (1,076) times the cubic yards of concrete

for each structure (80) to equal 86,080 tons of concrete. I then multiplied the number of H frame structures (90) times the cubic yards of concrete for each structure (93) to equal 8,370 tons of concrete.

By adding the two figures together you find that the development will require 94,450 tons of concrete for just the minimum number of transmission structures, not counting other developments related to the transmission line. In 2018, 94,450 tons of concrete times the average cost of \$462 per ton equals \$43,635,900. In 2022, 94,450 tons of concrete times the average cost per ton of \$691 per ton equals \$65,264,950. While Idaho Power can predict based upon their liberal assumptions that the cost of construction materials such as concrete and steel will slow or decline, the figures do not support their rosey outlook.

Allowing Idaho Power to manipulate their methods of determining costs or avoid including some costs or reduce the amount available for cost over runs unfairly punishes the electric customers since they, not Idaho Power

will be stuck paying for the poor accounting. The poorest of this group will most likely be the ones who actually have to pay the bill as noted above.

There is a lack of completed programs and incomplete staff work everywhere a light is shined on Idaho Power's application for a Certificate of Public Convenience. This is consistent with the history of this utility. The public has waited over 50 years for fish ladders promised on their dams. The PUC has asked several times for an updated budget, but it has been kicked down the road multiple times due to a failure to meet deadlines for its production. Currently, the Public Utilities Commission has no documentation regarding the need for, availability of resources or costs to citizens to construct 75% of the cost and capacity of this transmission line. Idaho Power has not documented a need for the additional 24% they will be incorporating into their portfolio.

Justifying this line by using capacity that would transport excess energy from Oregon to other states for wholesale use makes no sense. This would be an intermittent use and if the costs for Oregon Renewable Energy

increase as expected, the costs will limit this use anyway. It is clear that Idaho Power could meet their need through the use of other portfolios not including B2H as is shown in the evaluations of portfolios presented to the Oregon Public Utility Commission. It is also clear that PacifiCorp has currently provided no documentation or justification for the need for any of the capacity of the line nor done any analysis of other resources available to them.

CONCLUSION:

When IP responds to requests, they provide the minimum they believe will be required, as in the wildfire plan. They have a track record of deceit, distortion, misdirection, and minimal adherence to laws and requirements. Currently all plans required for developing this transmission line to comply with EFSC requirements are in draft, not final form. Attached you will find an Amicus Brief from Anne Morrison filed in the appeals currently being processed by the court. It documents the types of actions being taken to avoid being required to adhere to anything more than their own interpretations of requirements. It reflects actions that are consistent with

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that have been employed in actions required and acted upon by the OPUC.

Idaho Power was premature in requesting that a Certificate of Public Convenience be issued prior to knowing the outcome of Appeals, Amendments to the Site

Certificate and completion of the Management Plans to determine if the project

meets the requirements of the EFSC standards. Providing a Certificate of Public

Convenience and Necessity would allow Idaho Power to condemn private land

without knowing if the line can actually be constructed as proposed, absent a

defensible budget, absent an understanding of how the costs will impact electric

users, absent any justification for the necessity of 75% of the cost and capacity of

the line, and absent programs to protect the public from safety hazards

associated with the development. I urge you to place a hold on any Certificate of

Public Convenience until Idaho Power has cleared eligibility requirements with

both the Energy Facility Siting Council and the Oregon Public Utility Commission.

Respectfully Submitted for your consideration,

Irene Gilbert, Pro Se Petitioner, Oregon Supreme Court Appeal

2310 Adams Ave.

La Grande, Oregon 97850

CERTIFICATE OF SERVICE BY USPS:

John Williams

PO Box 1384

La Grande, Oregon 97850

Attached: --Copy of Amicus Brief by Anne Morrisson

--Copy of Oregon Department of Transportation Steel cost figures.

12C	Encina Silt Loam			X	MBL	3.3	
14C	Emily Cobble Silt Loam		X		M	3.3	100
13C	Emily Silt Loam		X		M	3.3	100
13D	Cowsly Very Stony Silt Loam		X		M	3.0	80
11D	Cowsly Silt Loam		X		M	3.0	80
11C	Cowsly Silt Loam	X			CFL	3.0	80
10C	Coughanour Silt Loam	X			L		
10B	Coughanour Silt Loam	X			MBL		
10A	Coughanour Silt Loam	X			MBL		
9B	Conley Silty Clay Loam	X			B		
9A	Conley Silty Clay Loam	X			B		
8	Catherine Silty Clay Loam	X			B/L		
7	Catherine Silt Loam	X			B/L		
6F	Anatone-Klicker Complex			X	M	4.4	63
5E	Anatone-Rocker Complex			X	M	4.2	
4E	Anatone Extremely Stony Loam			X	M	3.0	
3C	Alicel Silt Loam	X			L		
2B	Alicel Loam	X			L		
1B	Alicel Fine Sandy Loam	X			L		
Symbol	Map Unit Name	Crop	Forest	Range	Land	AC/ AUM	Cubic Feet

NPT: North Powder Terrace

F: Foothill

B: Bottom

CFL: Cricket Flat Terrace

L: Grande Ronde Terrace

M: Mountain

March 16, 1993

Pilot Program Soil Ratings for Union County

Pilot Program Soil Ratings for Union County							
March 16, 1993							
T: Grande Ronde Terrace				M: Mountain			
B: Bottom				CFT: Cricket Flat Terrace			
NPT: North Powder Terrace				F: Foothill			

Symbol	Map Unit Name	Crop	Forest	Range	Land	AC/ AUM	Cubic Feet
1B	Alicel Fine Sandy Loam	X			T		
2B	Alicel Loam	X			T		
3C	Alicel Silt Loam	X			T		
4E	Anatone Extremely Stony Loam			X	M	3.0	
5E	Anatone-Rocker Complex			X	M	4.2	
6F	Anatone-Klicker Complex			X	M	4.4	63
7	Catherine Silt Loam	X			B/T		
8	Catherine Silty Clay Loam	X			B/T		
9A	Conley Silty Clay Loam	X			B		
9B	Conley Silty Clay Loam	X			B		
10A	Coughanour Silt Loam	X			NPT		
10B	Coughanour Silt Loam	X			NPT		
10C	Coughanour Silt Loam	X			T		
11C	Cowsly Silt Loam	X			CFT	3.0	99
11D	Cowsly Silt Loam		X		M	3.0	99
12D	Cowsly Very Stony Silt Loam		X		M	3.0	99
13C	Emily Silt Loam		X		M	2.7	106
14C	Emily Cobble Silt Loam		X		M	2.7	106
15C	Encina Silt Loam			X	NPT	2.3	

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3A	ԼաՇարդե շիբ Լոսն	X			B		
3B	ԼաՇարդե շիբ Լոսն	X			B		
32E	Կիսկել -Կնիսուե Կոմբլեք		X		W	ՏՑ	Ը3
34E	Կիսկել շիուկ շիբ Լոսն		X		W	ԳԻ	Ը3
33E	Կիսկել շիուկ շիբ Լոսն		X		W		ԸԹ
33E	Կիսկել շիուկ շիբ Լոսն		X		W	ՏՆ	Ը3
35E	Կնիսել Լեկ շիուկ շիբ Լոսն		X		W	ՅՕ	80
3I	Լեկ շիբ Լոսն	X			B		
30B	Լարբել Բուե Շարդ Լոսն	X			L		
30B	Լարբել Կոմեշ Շարդ Լոսն	X			L		
38E	Խիսկիւնսոն Լարսն շիբ Լոսն		X		WBL	ՏՆ	82
38C	Խիսկիւնսոն Լարսն շիբ Լոսն		X		WBL	ՏՆ	82
3AD	Խիսկիւնսոն Կիսկել շիբ Լոսն			X	WBL		
30C	Խիսկիւնսոն շիբ Լոսն	X			WBL		
30B	Խիսկիւնսոն շիբ Լոսն	X			WBL		
32	Խո Լաե շիբ Լոսն	X			B	0՝2	
34	Խոօթ Լարսն շիբ Լոսն	X			B	0՝2	
33	Խոօթ Բուե Շարդ Լոսն	X			B	0՝2	
33	Խոօթ շիբ Լոսն	X			B	0՝2	
31E	Խելել շիբ Լոսն		X		W		132
31E	Խելել շիբ Լոսն		X		W		132
30E	Խալ Կնիս շիուկ Լոսն		X		W	ԳԻ	Ը2
10E	Խալ Կնիս շիուկ Լոսն		X		W		Ը2
10E	Խալ Կնիս շիուկ Լոսն		X		W	ՏՆ	Ը2
18E	Կնիս-Կոկել Կոմբլեք			X	EW	ԸՅ	
18E	Կնիս-Կոկել Կոմբլեք			X	EW	ԳՅ	
12E	Կնիս Լեկ Կոքիլ շիբ Լոսն			X	EW	ՅՕ	
12D	Կնիս Լեկ Կոքիլ շիբ Լոսն			X	EW	Տ՝2	
10E	Էուսն շիբ Լոսն			X	WBL	ՅՕ	
12E	Էուսն շիբ Լոսն			X	WBL	ՅՕ	
Ցարթ	Մեթ Լուի Մանե	Ըրոթ	Բորեշ	Կնիս	Լարդ	ԱՄՄ ՎԸ	ԲԵԳ Ըրիկ

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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

AMENDED APPELLANT'S 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 before the Oregon Energy Facility Siting Council as a limited party for the issues included in this appeal. I appeared as Co-

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Chairman of STOP B2H, representative of the public interest, and to represent my personal interest and concern for the impacts of this proposed development.

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

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

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Department of Energy was allowed to develop the Statements of the Contested Case Issues resulting in narrowing of issues and (4) Petitioners were required to use the referencing methods developed by ODOE rather than standard referencing in spite of multiple requests to use standard referencing and notices that the files provided for Petitioners use had multiple “glitches”.

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

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both recognize the value of these trails (ORS 358.057) and require the state to preserve and protect them due to them being finite, irreplaceable and nonrenewable(ORS 358.910) The Project Order states that all requirements of the Historic, Cultural and Archaeological Resources standard apply. (Second Amended Project Order 2018-07-26 Page 21, Lines 1-6) The Energy Facility Siting Council agreed to allow the developer to delay providing information Regarding Oregon Trail resources, impacts and mitigation for resources located on private land **where landowners denied the developer access.** Information regarding these resources was to be **provided by an amendment** after site certificate was issued but before the start of construction. Information required to address visual impacts to locations that could be accessed was to be included in the submitted application including identifying the resources present, the site specific impacts, planned mitigation, and all paragraphs of the Historic, Cultural and Archaeological Resources standard apply to this development. Second Amended Project Order 2018-07-26, Page 21 Lines 1-7, Lines 17-19, and Lines 23-26; a Page 28, Lines 19-25). This required information was not included in the application, draft Historic Properties Plan or site certificate.(Final Order on the ASC for the Boardman to Hemingway Transmission Line, September 27, 2022,

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Page 497 Lines 7-14) ; (Marbet v. Portland General Electric, 277 Or 447, 561 P2d 154 (1977)

ERROR ONE:

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

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

ERROR TWO:

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ORS 469.401(1)469.405(1),ORS 469.370(7), OAR 345-021-0010 (dd)(2) EFSC issued a site certificate lacking required documentation of eligibility. Mitigation for impacts (OAR 345-001-0010(33))is not in the record and will not be determined for several years for some Historic Properties due to relying on Section 106 review results. (Jan. 23 & 24 Council meeting Minutes, Pages 14 Last 2 Sentences and Page 15, first 3 lines and third paragraph; Page 16, Middle Paragraph,) ORS 469.503) and (OAR 345-022-0000(1)(a) and (b) require the record to contain a preponderance of evidence showing compliance with Council statutes and rules. Absent the specific information identifying what resources will be impacted, the extent of the negative impacts and how those impacts will be mitigated, the file fails to contain a preponderance of evidence the construction and operation of the facility, including mitigation are not likely to significantly, as defined in (OAR 345-001-0010(**52**)) adversely impact Oregon Trail resources listed or likely to be listed on the National Register of Historic Places (OAR 345-022-0090(1)(a) ; or archeological sites located on private land (OAR 345-022-0090(1)(b) or archaeological sites on public land(OAR 345-022-0090(1)(c). Courts have established that mitigation cannot be vague, imprecise, hortatory statements that could not functionas legally sufficient conditions of approval. (Sisters Forest

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Planning Committee v Deschutes Cty. Court of Appeals State of Oregon, March 16, 2005 PAGE NUMBER) (Gould v Deschutes Cty. 216 Or Ap. 150(2007 PAGE NUMBER) (Scott v City of Jacksonville Or LUBA (Jan. 2010, 2009-107 AGE NUMBER) Table HCA-4b provides a generic listing of the types of mitigation that may be required. (Final Order on the ASC for the Boardman to Hemingway Transmission Line, September 27, 2022, Page 497,) The Site Certificate fails to address the identification and mitigation of indirect impacts to Oregon Trail Sites OAR 345-022-0090(l)(b) and(c) It only address the requirement that the transmission line not directly damage or destroy them. The Site Certificate includes a statement that resources not likely eligible for NRHP listing are not protected and need no further evaluation. (Final Order on the ASC for the Boardman to Hemingway Transmission Line, September 27, 2022, Page 477, Lines 23-32).

ERROR THREE

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

469.401(1)469.405(1),ORS 469.370(7), Requires the Energy Facility Siting Council (EFSC) to make the final decision regarding eligibility. (Note: This objection is

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

and Contested Case Process is completed and without public involvement or opportunity to review the decisions.

ODOE will argue in error that they have the authority to make the final eligibility decision under ORS 469.420. This fails to comply with the plain language of the statute and related statutes addressing approval of site certificates. Under ORS 469.300(2) EFSC is the only entity allowed by statute to make the eligibility determination and it must be made prior to the issuance of a site certificate. ORS 469.370(7), 469.(1). ORS 469.405(1) all refer exclusively to “the council” and none to the Department or staff). ORS 469.503 states: “In order to issue a site certificate, the **Energy Facility Siting Council** shall determine that the preponderance of the evidence on the record supports the following conclusions: The facility complies with the applicable standards adopted by the council pursuant to ORS 469.501. Arguments that ORS 469.402 allows ODOE to make the eligibility decision are without merit and fail to comply with the plain language of ORS 469.402 which states, “If the Energy Facility Siting Council elects to impose conditions **on a site certificate or an amended site certificate**, that require subsequent review and approval of a future action, the council may delegate the

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future review and approval to the State Department of Energy.....” The language of the statute indicates that there must be a certificate or an amended site certificate which requires some future action. In order to issue a site certificate the file must contain a preponderance of evidence in the record that the standard is met. In this case, the Historic Properties Plan is the document which is to contain the information regarding impacts and mitigation for the impacts to Oregon Trail Resources necessary to determine whether the Historic Properties standard is being met. This requires the final plan be approved prior to the issuance of a site certificate, not after. This application is also supported by OAR 345-025-0016 which requires completed plans to be approved by council and included in the site certificate. A change in the interpretation of the plain language of this rule would constitute an exceedance of authority which is specifically precluded under *Keiser v Wilke* 588 US __Q019 Kiser US Supreme Court providing that the rule must be ambiguous, decisions cannot be one time decisions which are not being required of other applicants, must be the official determination of those able to make decisions regarding the issue, cannot be a surprise to those impacted. In the case of ORS 469.402, the plain language of the statute and the legislative record show that the interpretation of the rule exceeds the legislative intent for the following

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reasons: The rule requires the delegation to occur in a site certificate, , so the council would already have had to clear eligibility. If the legislature had intended to include the department in those authorized to determine eligibility they would have adopted changes to statutes specifically requiring EFSC to do so including ORS 469.504 and ORS 469.503. Attachment 5 to P. Rowe Declaration, Page 14 of 14, Section-by-Section Analysis of A-Engrossed Senate Bill 951, May 12, 1995, discusses the delegation of responsibility for completion of actions to the Oregon Department of Energy. It states: “There has been continuing uncertainty under existing law regarding whether the **EFSC may delegate the approval of the fulfillment of conditions to a site certificate. These reviews commonly require relatively little discretion, or require the expertise of particular state agencies other than the EFSC. Some site certificates contain a relatively large number of these types of conditions,...**” The description of the types of approvals that can be delegated as requiring “little discretion or the expertise of state agencies” clearly indicates that the approvals would not include a complex set of requirements and conditions that must be met to establish eligibility for the Historic Properties standard where decisions must be made regarding the significance of the impacts at given locations, whether the proposed mitigation is

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adequate given the impacts and whether it will reduce the impacts to a level where they are no longer significant. The delegation of approving the final Historic Properties Management Plan to the department without any Council decision, without any public process, or any amendment to the site certificate exceeds the respondent's statutory authority and facially violates the Siting Act's substantive siting standards. Table S-10 in the application is entitled "Project Effects to and Proposed Mitigation of Above ground Resources". All NHRP Oregon Trail Segments listed on this table state there are "Potential Adverse Effect and make the same recommendation for Mitigation which is "Design Modification, Public Interpretation Funding, Print/Media Publication" (B2HAPPDoc1-21.2 ApASC Exhibit S Revised_Cultural 2018-08-09, Pages 104-106)) The actual Adverse Effect is not identified and quantified for the segments in order to determine the significance of the effects. Also, the mitigation recommended in Table S-10 is the same list of Final Environmental Impact Statement (FEIS) allowed mitigation for all locations whether there will be direct and indirect effects, or only indirect effects. (B2HAPPDoc1-21.2 ApASC Exhibit S Revised_Cultural 2018-08-09, Pages 104-106)

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What is clear as reflected on Table S-12 (B2HAPPD0c1-21.2 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. (B2HAPPD0c1-21.2ApASC 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 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)) (B2HAPPD0c15 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

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avoid duplicative study and reporting requirements, and the use of documents prepared for the federal agency **to the extent the information is consistent with state standards.**” (ORS 469.370(13)) The federal HPMP fails to comply with EFSC requirements for the following reasons: (A) According to Idaho Power's Supplemental Response to Irene Gilbert's Discovery Request No. 1 (Mar 12, 2021, page 4, last paragraph, it states, “The methodology that the BLM applied in the NEPA review process was specifically tailored to assess compliance with the federal NePA requirements. In the EFSC process Idaho Power developed its own methodology to determine compliance with the Council's Historic, Cultural and Archaeological Resources Standard. Any differences in results between the state and federal studies are due to the differences between the applicable standards, differing prescribed methods of analysis in the federal and state process, or the timing of the different studies” (B)It allows mitigation that is not allowed in EFSC rules. (C)The federal 106 HPMP only includes or requires mitigation for NRHP eligible or likely eligible resources covered by EFSC rule OAR 345-022-0090(l)(a),. (Final Order on the ASC for the Boardman to Hemingway Transmission Line, September 27, 2022, Page 477, Lines 8-10, Lines 24-33) (D) The EIS required HPMP does not require mitigation for Oregon Trail resources on

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public or private land that are not NRHP eligible or likely eligible as required by EFSC. (OAR 345-022-0090(l)(b) and (l)(c)) (E) Council cannot delay documentation of eligibility until after a site certificate is issued. (ORS 469.503) (OAR 345-022-0000(l)) (ORS 469.370(13)) (E)To rely upon information from the Final Environmental Impact Statement to provide documentation for compliance with the Historic Properties Standard, IPC would have to had supply the needed information or specific references to the information from the FEIS (or its supporting resource reports) in the application for site certificate. The Site Certificate is proposing the use of documents that were not developed when the site certificate was issued and suggesting that the mitigation from this future document should be considered as meeting the requirement that the file contain a “preponderance of evidence” that the Oregon Trail resources have been addressed as required by the EFSC rules, The Project Order requires the use of the FEIS, but only where federal rules are the same as EFSC, and in this case, the mitigation allowed is not consistent. (B2HAPPDOC15 ApASC Second Amended Project Order 2018-07-26, Page 26, Lines 27-29) and (35-37) To rely upon the NEPA 106 results would require evaluation of the visual impacts data, methodology, standards, methods of analysis to determine differences and whether or not those

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differences impact the appropriate mitigation for the specific site being evaluated for negative impacts and appropriate mitigation.

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

This rule states:

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

This is a mandatory condition is clear on its face. The Site Certificate includes the full language of condition as CON-GS-02 since it is mandatory, however, in the Final Order they changed the language to say “Modifications Proposed to the OAR

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

STATEMENT OF THE SECOND CONTESTED CASE ISSUE

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RFA-1: Whether the \$1 bond amount adequately protects the public from Idaho Power Co.'s facility abandonment and provides a basis for the estimated useful life of the transmission line.

INTRODUCTION

This appeal is regarding the fact that the Council failed to follow the plain language of OAR 345-022-0050(2) and the statutory context in allowing the Bond amount to be less than the \$140,779,000 they determined it would require to restore the facility to a useful, nonhazardous condition (September 27, 2022, Final Order on the ASC for the Boardman to Hemingway Transmission Line, Pg. 332, Ln. 20-24). According to the Law Insider, Restoration Bond means a performance Bond; a letter of credit or cash deposit posted to ensure the availability of sufficient funds to assure that right-of-way excavation and restoration work is completed in both a timely and quality manner. It is not a bond of \$1.00 to restore a project site that it has been determined will cost \$140,779,000. This reduction transfers the risk and responsibilities to the utility users and citizens of Oregon to assume the costs the bond is intended to protect them from.

Rules related to the above issue:

ORS 469.401 , ORS 469.501 and OAR 345-022-0050(1).

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“Before beginning construction of the facility, the certificate holder shall submit to the State of Oregon, through the Council, a bond or letter of credit in a form and satisfactory amount to the Council to restore the site to a useful, non-hazardous condition. The certificate holder shall maintain a bond or letter of credit in effect at all times until the facility has been restored. The Council may specify different amounts for the bond or letter of credit.”

Sarah Esterson provided memo to council dated Sept. 10, 2021, Agenda D of September 24, 2021, Page 5 council meeting providing three reasons for bond adjustments. They include (1) Inflation adjustment to present value when construction, starts (2) annual inflation adjustment (3) adjustment due to final number of facility componenets. Page 6 discusses request for reduction to \$1.00 bond and council decision this should be handled through rulemaking. The plain language of OAR 345-025-006(8) states that the bond or letter of credit must be provided prior to the need for site restoration. The amount must be consistent with Council's determination regarding the amount required to “restore the site to a useful, non-hazardous condition” OAR 345-025-006(8). The plain language of the rule, as well as the statutory context provided in OAR 345-027-0110 stating the council can draw on the bond to restore the site (September 27, 2022, Final Order on the ASC for the Boardman to Hemingway Transmission Line, Pg. 329, Ln. 20-24) do not leave the rule subject to interpretation ORS 174.010.

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THE RULES DO NOT:

ERROR ONE—Council applied discretion to allow a \$1.00 bond amount.

1. Provide for discretion on the part of the council beyond determining the amount that would be required to restore the site OAR 34522-0000(2) and (3)(c). The arguments that the amount should be “fair”, should be based upon the level or risk, or concerns regarding the cost to the developer to provide the bond are not relevant to Council decisions regarding compliance with this rule. (EFSC Transcript Jan. 23-24 Meeting Minutes, Page 10, 2nd to last paragraph) These items would only apply if the Council were applying a “Balancing Determination” which is not allowed for this standard OAR 345-022-0000(2) and (3)(c).

ERROR TWO –Bond amount is not dependent on amount of risk.

Rule does not Provide any language that would indicate council should adjust the bond amount based upon the likelihood that Idaho Power will default on their commitment to restore the site to a useful non-hazardous condition.

THE RULES DO:

ERROR THREE-Site Certificate fails to mitigate risk to state and citizens if developer fails to restore site“

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Provide a site restoration remedy to protect the state of Oregon and its citizens if the certificate holder fails to perform its obligation to restore the site or abandons the proposed facility. The site certificate fails to provide this. (September 27, 2022, Final Order on the ASC for the Boardman to Hemingway Transmission Line, Pg. 329, Ln. 20-24). In ODOE's presentation to Council in support of department recommendation to accept as little as a \$1.00 bond, it was stated that since Idaho Power is a regulated facility, the Public Utility Commission can do recovery from customers provides documentation that the Site Certificate provides for recovery from the citizens the rules are to protect from that. (Transcript of EFSC Thurs. Jan. 23, 2022 meeting, Page 10, Paragraph before last & Page 11, 2nd paragraph) Page 11, 2nd Paragraph, Commissioner Winters questioned that PUC would approve money from ratepayers.

ERROR FOUR-Fails to protect public from existing risk that developer will not restore site.

Protect the public from risks that exists if the developer fails to restore the site.

The file contains a preponderance of evidence that a risk does exist.

- a) Council member Winters summed up why council should not make the adjustments being objected to. She said:" Of course the entities are

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going to give good reports, they aren't going to say they will be going under in 3 years, Reality is, it's going to happen a couple years after they come in. It is a risk". (Transcript EFSC Jan 23 and 24, 2020, Page 12, last 2 paragraphs.)

- b) The Public Utilities Commission staff report Docket No. LC 74, March 5, 2021, for the 2019 Integrated Resource Plan lists multiple questions and information that make the long-term need for this transmission line less than certain (Exhibit 9, Pg. 2 and 4).
- c) The company has provided a two-page list of factors that could impact "financial performance, cash flows, capital expenditures, dividends, plans for future operations, etc." in their 2020 10K and 10Q reports to the Securities and Exchange Commission (Exhibit 12, Pg. 19-21).

SUMMARY AND CONCLUSION

- **ERROR FIVE: The Council failed to comply with the rules or use reasonable judgment in determining the time frames and amount of bond** (Footnote 339, Pg. 337 of Final Order on the ASC for the Boardman to Hemingway Transmission Line, September 7, 2022).

ERROR SIX: The bond amount is not adequate to protect the public from the risk of having to restore the site. The department and council established \$140,779,000 as the amount required to restore the site. The \$1.00 bond amount, or other figures less than the amount, determined to be necessary based upon the amount of the facility developed would not provide funding adequate to restore the site.

- Council's actions are not consistent with recommendations and actions on other site certificates based upon their consultant's evaluation of reduced bond amounts. November 2019, ODOE Consultants Golder & Associates provided a report addressing bond reductions. In the Site Certificate for this Bakeoven Energy Development, Council made the following statements: “the variation in proposal to meet the standard, from the historically accepted full bond or letter of credit amount necessary for facility decommissioning, would be more appropriately evaluated through rule making,” ... “rather than relying solely on information provided by the applicant in favor of the proposal” (Exhibit 7 Bakeoven Solar Project-Final Order on Application for Site Certificate, Pg. 139, Ln. 19-26) “While the probabilities for the applicant to become insolvent and declare bankruptcy (ie., no new investors step forward) are likely to be small,

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- they are not zero”. “Council will not consider a phased decommissioning surety as sufficient for meeting the Council's standard.” (Bakeoven Solar Project-Final Order on Application for Site Certificate, Pg. 141, Ln. 9-31).

Retirement and Financial Assurance Conditions 4 and 5 (B2H PO Attach/Draft S.C. Pg. 25-30) fail comply with OAR 345-022-0050 due to the following:

1. Any application of the rule must include the entire language of the rule and related rules.
2. The rules regarding the bond are clear on their face precluding the Council applying them differently for this development *Gonzales v. Oregon* only supports an agency interpretation of their own rules when they are ambiguous *Auer v. Rosbbins*, 519 U.S. 452, 461,117 S. Ct. 905, 137 L Ed. 2d. 79 (1997).
3. A reduced bond amount will place the public agencies and citizens at financial risk and move responsibility for costs from the developer to the public for unplanned future events (September 27, 2022, Final Order on the ASC for the Boardman to Hemingway Transmission Line, Pg. 333, Ln. 34-35).
4. Reducing the bond amount is not consistent with past practices (August 13, 2021, Exhibit 1, Pg. 2, Table 1 of Christopher M. Clark's memo to council for Agenda Item G).

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5.

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An evaluation of the risk of unplanned events is not relevant beyond determining that a risk exists.

REQUESTED ACTION:

Remand the Order and require that once operation begins and for the life of the project, the bond amount be consistent with the amount the Counsel determined would be required to restore the site.

**APPEAL OF SUMMARY DETERMINING REGARDING FOREST
DEFINITION**

Ms. Irene Gilbert, Pro-Se Petitioner, requests that the Oregon Supreme Court reverse the Summary Determination denying a contested case on Issue **LU-5** “Whether calculation of forest lands must be based on soil class or whether it is sufficient to consider acreage where forest is predominant use.” and allow a Contested Case regarding this issue.

Ms. Gilbert raises four issues identified as material to the Ruling on Motion for Summary Determination which she has stated disagreement with demonstrating that there is disagreement regarding the facts and analysis contained in the Contested Case Decision. Each error is material to the Council decision and must be reviewed to “determine whether any genuine issue of material fact exists and

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whether defendant is entitled to judgment as a matter of law.” (*Herman v. Valley Ins. Co.*, 145 Or App 124, 127-28 928 P2d 985 (1996) and whether the evidence and inferences were viewed in a manor favoring the non-moving party. (*Moore v. Mutual of Enumclaw Ins. Co.*, 317 Or 235, 237. 855 P2d 626. (1993).

Errors in Stating there was no disagreement with the following:

Exception #1: The ALJ erred in finding that it is undisputed in that Union County, the Timber/Grazing Zone includes farmland, range land and forest land. (Proposed Contested Case Order, Findings, Pg. 65, Item 90).

I fully disagree that the factual issue is undisputed regarding the use of the Union County Zoning, Petitioning and Subdivision Ordinance.

No NRCS ratings identified for the areas and soils identified as Agricultural or Range in the Table 1 used in identifying “Forest Land” in the combined zones or 18 parcels adjoining National Forest Land. (**REFERENCE**) It is undetermined whether these soils, which compose 53% of the Preferred Route and 60% of the alternate route, are Forest Land. (Proposed Contested Case Order, Page 66, Item 94). In Scott Hartell's sworn responses to Discovery, he was asked whether he used anything other than the 1993 document and that he had not gone to other information. The lowest soil capacity was 63 on this document. When asked what

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he was calling forest land in the chart he responded, “What the chart indicates.”

Asked if that is the only thing, he responded “Correct”. Miss Pease identified the document as the pilot program soil rating for Union County dated March 16, 1993.

Mr. Hartell stated that for land not identified as forest land, he did not figure cubic feet per acre (Transcript of Scott Hartell's deposition. Pg. 12-19 and 21-22).

(UCZPSO) Article – 5.00 A-4 Timber-Grazing Zone, Section 5.01 states “The purpose of the Timber-Grazing Zone (A-4) is to protect and maintain forest lands for agriculture, grazing, and forest use, consistent with existing and future needs for agricultural and forest products”. This purpose statement provides documentation indicating that all the land in the A-4 zone may be “Forest Land”.

Exception #2: The Contested Case Order erred in finding Item 92 is undisputed. The finding states that Idaho Power used data from the National Resources Conservation Service Soil Survey Geographic Database (SSURGO), Union County tax lot data, and GIS mapping software to determine predominant use on each hybrid-zoned parcel.

I fully disagree that this factual statement is not disputed. The file contains a preponderance of evidence that no NRCS ratings were determined for any of the areas identified as Agricultural or Range in the combined zones or for the 18

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parcels adjacent to National Forest Land. (See Finding 94, Pg. 66). Scott Hartell's sworn statement (page 82) states the chart he used indicated only land with 63 cubic feet per acre or greater was considered “forest land”. Pg. 22 of Mr. Hartell's deposition states in response to my question regarding whether he figured out cubic feet per acre of productivity for all soils in the chart was, “No, I did not”. (*Potts v. Clackamas Co.*)

Exception #3: The Contested Case Order erred in finding Item 95 is undisputed. These finding states that Idaho Power Explained that the “economic impact to forest sector jobs in Union County is approximately \$97,000 which will be partially offset by agricultural, or range land uses after conversion.

I fully disagree that this factual statement is not disputed. I provided argument that the above amount was understating the value of forest land based upon the statute requiring compensation in the event of condemnation of forest land. The correct calculation just for the lost forest growth over the life of the project is included in the Site Certificate.

Exception #4: The Contested Case Order erred in finding Item 96 is undisputed. These finding states that the Project will not cause (1.) a substantial change in accepted forest or farm practices, or (2.) a significant increase in the cost

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of accepted forest or farm practices on either land to be directly impacted by the project or on surrounding lands devoted to farm or forest use.

This Item is in dispute. The contested case file contains a great deal of testimony and exhibits regarding the increased costs because of the lack of a weed control program that will preclude weeds spreading to adjacent farm and forest lands, the costs associated with being unable to do aerial spraying around the transmission line, etc.

The file and I personally provided a preponderance of evidence that the above items are in dispute. Since the hearings officer raised these issues of material fact and I have documented that they are disputed, the granting of the Summary Determination removing this issue from the contested case is incorrect.

There are multiple additional factual and legal areas of disagreement which are included in the contested case file, but which were not included in the Proposed Order granting Summary Determinations on five issues for which a summary determination was requested and granted. I have provided a preponderance of evidence supporting the fact that the SD on just one of my cases was based upon an incorrect application of the law and rules governing this action. Due to the strict limits on the number of pages that are allowed in this appeal, I am only able

to argue one of the Summary Determination Cases. I strongly believe that most, if not all the other 32 issues disposed of in similar manner were based upon an incorrect application of the rules.

Additional issues which are reflected in this Contested Case denial:

- The Contested Case issue was restated in a manner that inappropriate limited the scope of the case.
- Council lacks the authority to interpret rules of another agency, however, they interpreted Goal 4 requirements without contacting LCDC to establish how they were supposed to be applied.
- The Summary Determination Order did not include factual disagreements which had been presented.
- **I was denied the use of Exhibits provided in the record for this contested case to support arguments on other related cases based upon a “Proposed” Summary Determination on this issue. (Pg. 1, ¶ 1-3)**
- The Department failed to require the use of the mandatory alternate methods for identification of forest land where SSURGO data was unavailable
- The file contains no documentation or any statement indicating that ODOE contacted LCDC to obtain an interpretation of how the Goal 4 decisions are



- to be applied as required by statute.
- ORS 469.504 and OAR 345-021-0050 and the Second Project Order require the

Energy Facility Siting Council to determine that:

The facility complies with applicable substantive criteria from the affected local government's acknowledged comprehensive plan and land use regulations that are required by the statewide planning goals and in effect on the date the application is submitted. State law regarding the identification of forest land for Goal 4 included the requirement that all land in the combined zones have a determination regarding soil capacity to produce timber. When rules are not amended within one year with the new material, they must apply the state law to their decisions ORS 197.646(1) and (3) ORS 197.250.

Appeals court decision in *Wetherell v. Douglas County*, 50 Or LUBA_167(2005) determined that soils with potential to produce between 17 and 76 cubic feet per acre per year in wood fiber are considered moderately productive Forest Lands.

The Union County Planning Ordinance does not comply with the following requirements for determining Goal 4 forest land:

- Forest land definition depends upon the property's capacity for production

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- of commercial tree species (*Potts v. Clackamas County* 42 Or LUBA).
- The set of prioritized, mandatory methods to determine areas in the combined Agricultural/Timber zone subject to Goal 4 must be used and **it cannot be** determined that land is not forest land by using a different methodology (*Rogue Advocates v. Josephine County*, 66, Or LUBA 45 (2012)).
- A county cannot determine land is not forest land simply because it is not predominantly forested *Cattoche v. Lane Co.* 79 Or LUBA 466 (2019).

Hartell's chart, which he refers to as Exhibit 1, identifies 16 soil types as “Forest Land” and they include none with a cubic foot capacity per acre per year rating less than 63. There are 66 soil types with no cubic foot rating that are designated as “crop” or “range” that are being treated as “agricultural” land in the Grazing/Timber zone.

Allowing a developer to avoid complying with land use laws denies forest landowners and the public the Goal 4 protections which do not exist for

Agricultural land such as the requirement to compensate for habitat damages.

An even greater concern, and the reason I chose this Summary Determination to appeal, is the fact that allowing a County Ordinance to waive State Land Use Laws

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means that State Land Use Statutes become meaningless. Any county could overrule them.

I believe the above arguments and documentation provided you show that there is a need to reconsider all Summary Determinations. Denying contested cases for many different people regarding many different standards should be remanded. I am asking that the Summary Determination decisions be remanded back to Council to evaluate whether there were factual areas of disagreement in some of the 33 contested cases denied through this process. **To accept this outcome, you must believe that there was no disagreement regarding the facts of any of the cases where Summary Determinations were requested and given and that none of the individuals and groups would have prevailed in litigation regarding the issue.**

I am requesting, based upon the results before you, that this case as well as all the cases dismissed through Summary Determination be remanded back to the Energy Facility Siting Council requiring a reassessment of whether the Summary Determination decisions were consistent with the Rules and Statutes.

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Dated: December 21, 2022.

By:

Irene Gilbert, *Petitioner, Pro Se*
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CERTIFICATE OF FILING

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

DATED: December 21, 2022.

Irene Gilbert, *Petitioner, Pro Se*
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AMENDED APPELLANT'S BRIEF

CERTIFICATE OF SERVICE

I further certify that I have this date served a copy of this Amended Appellant Brief on each party in this case by U.S. Postal Service, Certified Mail.

DATED December 21, 2022.

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