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December 29, 2022

**VIA ELECTRONIC FILING**

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

Attention Filing Center:

In accordance with Administrative Law Judge John Mellgren's December 19, 2022 Memorandum issued in the above-referenced docket, requesting that Idaho Power Company file copies of certain documents related to all appeals of the Energy Facility Siting Council's site certificate for the Boardman to Hemingway Transmission Line, attached is Irene Gilbert's Motion to Amend Opening Brief, Amended Opening Brief, and Request for Oral Argument submitted in Oregon Supreme Court docket S069924, along with the Oregon Supreme Court's Order Denying Irene Gilbert's Motion to File Amended Brief, Granting Respondents' Motion to Strike Amended Brief, and Denying Irene Gilbert's Request for Oral Argument.

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

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Irene Gilbert Amended Opening Brief	<a href="#">11-84</a>
Irene Gilbert Request for Oral Argument	<a href="#">85-90</a>
Order	<a href="#">91-91</a>

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<sup>1</sup> Page range is based on the PDF page number, which includes this cover letter.

December 29, 2022  
Page 2

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

Respectfully submitted,



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Attorney for Idaho Power Company

Attachments

re Gilbert  
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Jocelyn C. Pease  
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419 SW 11th Ave, Suite 400  
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To: Justices, Oregon Supreme Court

Date: December 21, 2022

From: Irene Gilbert  
2310 Adams Ave.  
La Grande, Or. 97850

Re: AMENDED OPENING BRIEF, OAH CASE NO. 2019-ABC-02833 SUPREME COURT NO,  
S069924

Enclosed Please find my Request to Amend Opening Brief, Copies of significant References,  
Request for Oral Arguments, and Amended Opening Brief. Opening Brief for the above Appeal.

Thank you very much.

A handwritten signature in cursive script that reads "Irene Gilbert". The signature is written in black ink and is positioned below the text "Thank you very much."

**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  
Pro Se *Petitioner*

v.

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

Energy Facility Siting Council

OAH Case No. 2019-ABC-02833

Supreme Court No. S069924

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**MOTION TO AMEND OPENING BRIEF**

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To the Justices of Oregon Supreme Court:

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

**THE OPENING BRIEF SUBMITTED TO THE COURT ON DECEMBER 20, 2022 WAS NOT THE CORRECT BRIEF**

Please accept the correct Opening Brief submitted with this request.

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

I was unable to access the Contested Case Record due to the volume and lack of an index. On December 19, 2020 I found that as a pro se I could use standard referencing. In the course of identifying references from the Contested Case, the wrong Opening Brief was submitted on December 20, 2022.

Thank you for considering this request.

Dated: December 21, 2022.

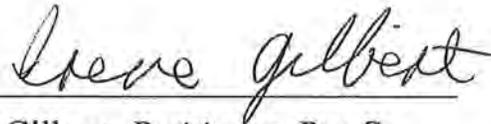
By: Irene Gilbert

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

CERTIFICATE OF FILING

I hereby certify that on this date I filed this Motion to Amend Opening Brief with the Appellate Court Administrator by Regular Mailing pursuant to ORAP 9.05(3).

DATED: December 21, 2022.

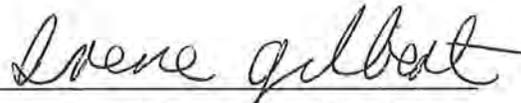
A handwritten signature in cursive script that reads "Irene Gilbert". The signature is written in black ink and is positioned above a horizontal line.

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

CERTIFICATE OF SERVICE

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

DATED December 21, 2022.



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

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

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

IRENE GILBERT

*Petitioner*

v.

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

*Respondents*

Energy Facility Siting Council

OAH Case No. 2019-ABC-02833

Supreme Court No. S069924

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**AMENDED APPELLANT'S BRIEF**

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To the Justices of Oregon Supreme Court:

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

**APPEAL TO OREGON SUPREME COURT**

**INTRODUCTION**

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

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

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

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

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

## CONTESTED CASE REGARDING OREGON TRAIL RESOURCES

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

## BACKGROUND

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

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

ERROR ONE:

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

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

**ERROR TWO:**

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

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

### ERROR THREE

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

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

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

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

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

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

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

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

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

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

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

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

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

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

This rule states:

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

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

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**

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).

“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.

**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, 2<sup>nd</sup> 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“**

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, 2<sup>nd</sup> paragraph) Page 11, 2<sup>nd</sup> 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 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, 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).
5. 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 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 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

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 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 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 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.**

Dated: December 21, 2022.

By:

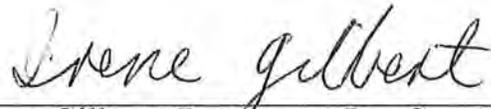


Irene Gilbert, *Petitioner, Pro Se*  
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CERTIFICATE OF FILING

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.

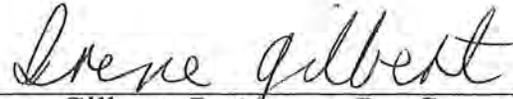


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CERTIFICATE OF SERVICE

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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Attorneys for STOP B2H

**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  
Pro Se *Petitioner*

v.

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

Energy Facility Siting Council

OAH Case No. 2019-ABC-02833

Supreme Court No. S069924

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**MOTION TO AMEND OPENING BRIEF**

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To the Justices of Oregon Supreme Court:

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

**THE OPENING BRIEF SUBMITTED TO THE COURT ON DECEMBER 20, 2022 WAS NOT THE CORRECT BRIEF**

Please accept the correct Opening Brief submitted with this request.

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

I was unable to access the Contested Case Record due to the volume and lack of an index. On December 19, 2020 I found that as a pro se I could use standard referencing. In the course of identifying references from the Contested Case, the wrong Opening Brief was submitted on December 20, 2022.

Thank you for considering this request.

Dated: December 21, 2022.

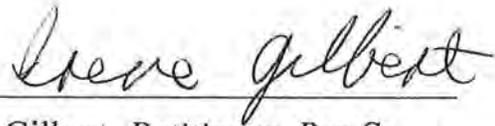
By: Irene Gilbert

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

CERTIFICATE OF FILING

I hereby certify that on this date I filed this Motion to Amend Opening Brief with the Appellate Court Administrator by Regular Mailing pursuant to ORAP 9.05(3).

DATED: December 21, 2022.

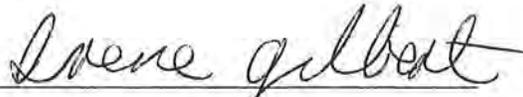
A handwritten signature in cursive script that reads "Irene Gilbert". The signature is written in black ink and is positioned above a horizontal line.

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

CERTIFICATE OF SERVICE

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

DATED December 21, 2022.



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

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

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

IRENE GILBERT  
*Petitioner*

v.

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

Energy Facility Siting Council

OAH Case No. 2019-ABC-02833

Supreme Court No. S069924

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**References Used/Attachment**

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ORS 197.250

ORS 358.055

ORS 358.057

ORS 358.905

ORS 358.910

ORS 469.320(1)

ORS 469.370(13)

ORS 469.401(2)

ORS 469.402

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ORS 469.503

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ORS 469.504

ORS 469.504(3)

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OAR 345-001-0010(33)

OAR 345-001-0010(52)

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

OAR 345-021-0100

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

OAR 345-022-0030

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

OAR 345-022-0040

OAR 345-022-0080

OAR 345-022-0090

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

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

OAR 345-025-0016

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

OAR 345-022-0030

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OAR 345-001-0010(33)

OAR 345-001-0010(52)

OAR 345-021-0050

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

OAR 345-021-0100 (1)

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

OAR 345-022-0000(2)

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OAR 345-022-0090.

OAR 345-022-0040

OAR 345-022-0080

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

OAR 345-025-0006(5)

OAR 345-025-0016

OAR 660-015-0000(5)

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OAR 345-022-0080

OAR 345-022-0090

ORS 469.503

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

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OAR 345-022-0080

OAR 345-022-0090

OAR 345-027-0110

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

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

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

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

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

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

1997 DLCD v Curry County, 33 Or LUBA 728.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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Keiser v Wilke 588 US \_\_ Q019 Kiser US Supreme Court.

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

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

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

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

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

Irene Gilbert Testimony (Written Testimony).

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

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

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

B2H. Draft Site Certificate, pages 25-30.

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

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

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

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

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

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

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



**GOLDER**

## TECHNICAL MEMORANDUM

**DATE** November 5, 2019

**Reference No.** 178839003

**TO** Sarah Esterson, Senior Siting Analyst  
Oregon Department of Energy

**CC** Gary Zimmerman (Golder)

**FROM** Kara Warner, Charlie Voss

**EMAIL** [kwarnar@golder.com](mailto:kwarnar@golder.com)

### REVIEW OF BAKEOVEN SOLAR PROJECT, EXHIBIT W: RETIREMENT AND FINANCIAL ASSURANCE

Bakeoven Solar Project (Bakeoven) is a solar photovoltaic energy generation facility proposed by Bakeoven Solar, LLC ("Applicant") with a nominal generating capacity of 303 megawatts (MW), and a proposed battery storage system capable of storing 100 MW of energy. The facility components are proposed to be sited on approximately 3,030 acres within a site boundary of approximately 10,615 acres in Wasco County, Oregon.

Exhibit W of the preliminary Application for Site Certificate (pASC)<sup>1</sup> contained the Applicant's proposal for compliance with Oregon Administrative Rule (OAR) 345-021-0010(1)(w) for facility retirement and site restoration (also referred to herein as "decommissioning") information required in a pASC, and with the Oregon Energy Facility Siting Council (EFSC or "Council") Retirement and Financial Assurance Standard (OAR 345-022-0050).<sup>2</sup> Exhibit W includes proposed approaches to financial assurance, including that scrap value be considered to discount decommissioning bond obligations, separate financial assurance for separate facility portions, and a phased approach to the amount required in a decommissioning bond. The purpose of this memorandum is to provide the Oregon Department of Energy (ODOE) and the Council with the following:

- A summary of the case-history context surrounding the Council's current policy regarding scrap value.
- Recommendations regarding a change to or retention of the Council's policy, including rationale.
- Evaluation of potential financial risk associated with the Applicant's financial assurance proposal.
- Options for ODOE and the Council based on the Applicant's financial assurance proposal, and recommendations for compliance with the Council's Retirement and Financial Assurance Standard.

<sup>1</sup> Reviewed online at <https://www.oregon.gov/energy/facilities-safety/facilities/Pages/BSP.aspx> (accessed October 2019)

<sup>2</sup> Chapter 345 of Oregon Administrative Rules is available online at <https://secure.sos.state.or.us/oard/displayChapterRules.action?selectedChapter=79> (accessed October 2019)

whether the certificate holder becomes insolvent, the second is whether a new investor can be found to step in to so the facility would remain operational.

The remaining chance event is for the scenario where the Council reduces the decommissioning cost by the scrap metal value but does not agree to reduce the decommissioning bond to \$1.00 for the first 20 years. If the certificate holder becomes insolvent and no new investors step up so the facility would remain operational, there is a chance creditors will take legal action for the scrap value. The expected monetary loss for a branch is the probability-weighted average of its possible values. Estimating the chance event probabilities is outside the scope of this technical memorandum. However, while the probabilities for the Owner to become insolvent and Bakeoven to declare bankruptcy (i.e., no new investors step forward) are likely to be small, they are not zero and the likelihood in the future may be higher.

### 2.3 Recommendation

The Council is advised to deny the Applicant's request to reduce the decommissioning bond to \$1.00 once Bakeoven begins commercial operation. Furthermore, already stated in Section 1.4, the Council is advised not to reduce the facility retirement and restoration cost estimate by the estimated scrap or salvage value. These recommendations are based on the assumption that the Council's objective in deciding on the Applicants requests is to minimize the risk to the State. As stated in Section 2.1, while the financial return to the Applicant would be improved by eliminating the requirement for a decommissioning bond during the first 20 years of operation, the associated risk would entirely be borne by the State with no clear benefit. In addition, making these exceptions would set a precedent that, if applied to future applications for site certificate, would result in the State managing a portfolio of decommissioning costs. Ultimately, the liability could negatively impact the State's credit rating.

The above recommendations assume a fundamental objective of minimizing the monetary risk to the State. The objective determines how the potential outcomes of a decision should be measured and the kinds of uncertainties to be considered. Another consideration is the Council's risk appetite – the amount and type of risk they are prepared to accept on behalf of the State in pursuit of EFSC objectives. Facility retirement and site restoration bonding requirements are required to manage or mitigate the risk of exposing the State to become responsible for these costs. Eliminating or reducing the bonding requirements transfers the risk to the State.

*pin risk  
State  
with no  
clear  
benefit  
will generate  
future revenue  
of state management  
of a portfolio of  
decommissioning  
cost could have  
impact the State's  
credit rating*

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## ITEM 1A. RISK FACTORS

IDACORP and Idaho Power operate in a highly regulated industry and business environment that involves significant risks, many of which are beyond the companies' control. The circumstances and factors set forth below should not be considered a complete list of potential risks that the companies may encounter. These risk factors may have a material impact on the business, financial condition, or results of operations of IDACORP and Idaho Power and could cause actual results or outcomes to differ materially from those discussed in any forward-looking statements. These risk factors, as well as other information in this report, including without limitation, in Part II - Item 7 - "Management's Discussion and Analysis of Financial Condition and Results of Operations - Matters Impacting Future Results" in this report, and information in other reports the companies file with the SEC, may be important to understanding any statement in this 2019 Annual Report or elsewhere and should be considered carefully when making any investment decisions relating to IDACORP or Idaho Power.

IDACORP's and Idaho Power's businesses regularly face risks, many of which may cause future results to be different than anticipated as of the date of this report. Below are certain important utility-specific regulatory, operational, legal and compliance, financial and investment, and general business risks. IDACORP's and Idaho Power's reactions to material future developments as well as the utility industry's reactions to those developments may also impact the Companies' future results.

**Utility-Specific Regulatory Risks**

Utility-specific regulatory risk includes the risks that federal, state, or local regulators may impose additional requirements and costs on Idaho Power and the utility industry, or require Idaho Power as a utility to make adverse changes to its business models, strategies, and practices.

*State or federal regulators may not approve customer rates that provide timely or sufficient recovery of Idaho Power's costs or allow Idaho Power to earn a reasonable rate of return, which could cause IDACORP's and Idaho Power's financial condition and results of operations to be adversely affected.* The prices that the IPUC and OPUC authorize Idaho Power to charge customers for its retail services, and the tariff rate that the FERC permits Idaho Power to charge for its transmission services, are generally the most significant factors influencing IDACORP's and Idaho Power's business, results of operations, liquidity, and financial condition. Idaho Power's ability to recover its costs and earn a reasonable rate of return can be affected by many regulatory factors, including the timing difference between when Idaho Power incurs costs and when Idaho Power recovers those costs in customers' rates (often called "regulatory lag" in the utility industry), and differences between the costs included in rates and the amount of actual costs incurred. Idaho Power is often required to incur costs before the IPUC, OPUC, or FERC approves the recovery of those costs, such as construction costs for new facilities, changes in the long-term cost-effectiveness or changes to the operating conditions of Idaho Power's assets that could result in early retirements of utility facilities, the costs of compliance with legislative and regulatory requirements, increased funding levels of a defined benefit pension plan, and the costs of damage from fires, weather-related events, and natural disasters. The IPUC, OPUC, and FERC may not allow Idaho Power to recover some or all of those costs on the basis that they find Idaho Power did not reasonably or prudently incur those costs or for other reasons. Ratemaking has generally been premised on estimates of historic costs based on a test year, so if a given year's actual costs are higher than historic costs, rates may not be sufficient to cover actual costs. While rate regulation is also premised on the assumption that rates established are fair, just, and reasonable, regulators have considerable discretion in applying this standard. Decisions are subject to judicial appeal, which could lead to further uncertainty in regulatory proceedings.

Economic, political, legislative, public policy, or regulatory pressures may lead stakeholders to seek rate reductions or refunds, limits on rate increases, or lower allowed rates of return on investments for Idaho Power. The ratemaking process typically involves multiple intervening parties, including governmental bodies, consumer advocacy groups, and customers, generally with the common objective of limiting rate increases or even reducing rates. The IPUC and OPUC may adopt different methods of calculating the allocation of the total utility costs in their respective jurisdictions, resulting in certain costs excluded in both states. Compliance with state and federal regulatory standards may also limit Idaho Power's ability to operate profitably. In the past, Idaho Power has been denied recovery, or required to defer recovery pending the next general rate case, including denials or deferrals related to capital expenditures for long-term project expenses. Adverse outcomes in regulatory proceedings or significant regulatory lag may cause Idaho Power to record an impairment of its assets or otherwise adversely affect cash flows and earnings and result in lower credit ratings, reduced access to capital and higher financing costs, and reductions or delays in planned capital expenditures.

For additional information relating to Idaho Power's state and federal regulatory framework and regulatory matters, see Part I - Item 1 - "Business - Utility Operations," Part II - Item 7 - "Management's Discussion and Analysis of Financial Condition and

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Results of Operations - Regulatory Matters," and Note 3 - "Regulatory Matters" to the consolidated financial statements of Part II - Item 6 in this report.

**Idaho Power's cost recovery mechanisms may not function as intended and are subject to change or elimination, which may adversely affect IDACORP's and Idaho Power's financial condition and results of operations.** Idaho Power has power cost adjustment mechanisms in its Idaho and Oregon jurisdictions and a fixed cost adjustment mechanism in Idaho. The power cost adjustment mechanisms track Idaho Power's actual net power supply costs (primarily fuel and purchased power less wholesale energy sales) and compare these amounts to net power supply costs being recovered in retail rates. A majority of the differences between these two amounts is deferred for future recovery from, or refund to, customers through rates. Volatility in power supply costs continues to be significant, in large part due to fluctuations in hydropower generation conditions and high costs for the purchase of renewable energy under mandatory long-term contracts. While the power cost adjustment mechanisms function to mitigate the potentially adverse impact on net income of power supply cost volatility, the mechanisms do not eliminate the cash flow impact of that volatility. When power costs rise above the level recovered in current retail rates, Idaho Power incurs the costs but recovery of those costs is deferred to a subsequent collection period, which can adversely affect Idaho Power's operating cash flow and liquidity until those costs are recovered from customers. The fixed cost adjustment mechanism is a decoupling mechanism designed to remove a portion of Idaho Power's disincentive to invest in and support energy efficiency activities. This mechanism allows Idaho Power to charge Idaho residential and small commercial customers when it recovers less than the base level of fixed costs per customer that the IPUC authorized for recovery in the most recent general rate case. The power cost and fixed cost adjustment mechanisms are generally subject to change at the discretion of applicable state regulators, who could decide to modify or eliminate either mechanism in a manner that adversely impacts IDACORP's and Idaho Power's financial condition, cash flows, and results of operations.

### Operational Risks

Operational risk relates to risks arising from the systems, assets, processes, people, and external factors that affect the operation of IDACORP's or Idaho Power's businesses.

**IDACORP's and Idaho Power's business, financial condition, and results of operations may be negatively affected by changes in customer growth or customer usage.** Changes in the number of customers and customers' use of electricity are affected by a number of factors, such as population growth or decline in Idaho Power's service area, expansion or loss of service area, changes in customer needs and expectations, adoption rates of energy efficiency measures, customer-generated power such as from solar panels and gas-fired generators, demand-side management requirements, regulation or deregulation, and adverse economic conditions. An economic downturn or recession could also negatively impact customer use and reduce revenues and cash flows, thus adversely affecting results of operations. Many electric utilities, including Idaho Power, have experienced a decline in usage per customer, in part attributable to energy efficiency activities. State or federal regulations may be enacted to encourage or require mandatory energy conservation or technological advances that increase energy efficiency, which could further reduce usage per customer. Also, changing customer needs and expectations could lead to lower customer satisfaction, reduced loyalty, difficulty in obtaining rate increases, legislation to deregulate electric service, and customers seeking alternative sources of energy and electric service. If customers choose to generate their own energy, discontinue a portion or all service from Idaho Power, or replace electric power for heating with natural gas, demand for Idaho Power's energy may decline and adversely impact the affordability of its services for remaining customers. While Idaho Power has recently experienced a net growth in usage due to an increase in the number of customers, when adjusted for the impacts of weather, the average monthly usage on a per customer basis for Idaho residential customers has declined from 1,039 kWh in 2010 to 936 kWh in 2019. Rate mechanisms, such as the Idaho fixed cost adjustment, are designed to address the financial disincentive associated with promoting energy efficiency activities, but there is no assurance that the mechanism will result in full or timely collection of Idaho Power's fixed costs, which are currently collected in large part through the company's volume-based energy rates that are based on historical sales volume. Any undercollection of fixed costs would adversely impact revenues, earnings, and cash flows. The formation of municipal utilities or similar entities for distribution systems within Idaho Power's service area could also result in a load decrease. The loss of loads resulting from some of these events may result in IDACORP and Idaho Power modifying or eliminating large generation or transmission projects. This could in turn result in reduced revenues as well as write-downs or write-offs if regulators determine that the costs of the projects were incurred imprudently, which could have a material adverse impact on IDACORP's and Idaho Power's financial condition, results of operations, and cash flows.

Conversely, if Idaho Power were to experience an unanticipated increase in the demand for energy through, for example, the rapid addition of new industrial and commercial customers or population growth in the service area, Idaho Power may be required to rely on

higher-cost purchased power to meet peak system demand and may need to accelerate investment in additional generation or transmission resources. If the incremental costs associated with the unanticipated changes in loads

3 PPA provide more assurance than TRAs line

1 In addition to the PPA, the applicant relies on the warranties provided by solar panel  
2 manufactures to demonstrate that the useful life of a solar project exceeds 25 years, and  
3 argues that this is reason for Council to find that the likelihood of facility abandonment during  
4 initial operation would be low.

5  
6 In ASC Exhibit W, the applicant provides an example to support its proposal – the 2016  
7 SunEdison bankruptcy case. The applicant describes that at the time of their bankruptcy in  
8 2016, SunEdison had an entire portfolio of development and operating assets. When SunEdison  
9 declared Chapter 11 bankruptcy, these assets were repackaged and sold to other energy  
10 developers, such as Terra Nova, NRG Energy, and the Middle Eastern-backed firm Greenko  
11 Energy. Because of the way in which these deals are structured, the applicant argues that it is  
12 not realistic that a multi-million dollar energy generation project would ever need to be  
13 decommissioned in the first 20 years of facility operation, or during the term of the Power  
14 Purchase Agreement, as there is both a contractual obligation to deliver energy and a revenue  
15 stream. On this basis, the applicant requests Council consideration of a phased approach to  
16 financial security for decommissioning because the risk of facility abandonment within the first  
17 20 years of operations is near zero.

18  
19 During the Council's review of the DPO, it was concluded that uncertainties remain in the  
20 assurances provided to the State by a PPA, even with consideration of the applicant's proposed  
21 conditions to execute a security interest with the State. Council concluded that the variation in  
22 proposal to meet the standard, from the historically accepted full bond or letter of credit  
23 amount necessary for facility decommissioning, would be more appropriately evaluated  
24 through rulemaking, where information and expertise of subject matter experts could be  
25 considered, rather than relying solely on information provided by the applicant in favor of the  
26 proposal.



27  
28 *Council Appointed Consultant Review of Applicant's Proposal*

29  
30 In accordance with ORS 469.470(6), at the September 26-27, 2019 meeting, Council appointed  
31 Golder Associates, Inc. (Golder) based on their experience and qualifications related to the  
32 Council's Retirement and Financial Assurance standard, as a qualified consultant to provide  
33 technical expertise in review of the above-requested approach (i.e. discounted  
34 decommissioning amount based on scrap metal value, and a phased decommissioning surety  
35 approach). Golder's scope of work included: review case history and context of ODOE's policy  
36 of not allowing scrap value to be applied to decommissioning bond amounts; and evaluate the  
37 financial risk of the phased decommissioning surety approach.

38  
39 *Summary of Review of Applicant's Request for Use of Scrap Metal Value*

40  
41 Council has historically reviewed requests for consideration of scrap metal value. In the early  
42 2000s, Council allowed retirement bonds to be reduced to account for the value of salvage or  
43 scrap metals. In 2006 and 2007, the Department recommended and Council agreed to  
44 implement a policy limiting use of scrap value in decommissioning estimates and bond amounts

1 the State, with unclear value in return to the Department, Council, and State for accepting that  
2 risk.

3  
4 Based on the findings presented here, the Council confirms that it would not change its policy  
5 on use of scrap metal value in lowering a bond or letter of credit obligation as there has been  
6 no change in the risks previously identified by Council as the reasons to limit use of scrap metal  
7 value.

8  
9 Summary of Review of Applicant's Request for Phased Decommissioning Surety  
10 Approach

11  
12 Charlie Voss, Principle in Risk and Decision Analysis at Golder, reviewed the applicant's phased  
13 decommissioning surety approach and analyzed that the approach, of reducing the bond  
14 amount to \$1 for the first 20 years of operation, would result in significant risks to the State  
15 including risk of a non-operational facility and the potential for the State to incur all costs  
16 associated with the decommissioning if the assets in bankruptcy are not acquired by another  
17 solar operator/developer. Moreover, if the certificate holder were to become insolvent and no  
18 new investors stepped up so the facility would remain operational, there is a chance creditors  
19 would take legal action for the scrap value. While the probabilities for the applicant to become  
20 insolvent and declare bankruptcy (i.e., no new investors step forward) are likely to be small,  
21 they are not zero and the likelihood in the future may be higher based on technology changes,  
22 energy market changes, or other future changes that are unknown at this time. The potential  
23 risk is elevated because the developer is an independent power producer, and not a public  
24 utility, which would have access to rate recovery authorization from a state PUC to dismantle  
25 and restore a facility site. As was stated above under the Department's assessment of scrap  
26 metal value, accepting such a proposal would have the effect of putting extra risk upon the  
27 Department, the Council, and the State, with unclear value in return to the Department,  
28 Council, and State for accepting that risk.

29  
30 Therefore, based on Golder's analysis and the above-stated risk, the Council will not consider a  
31 phased decommissioning surety as sufficient for meeting the Council's standard.

32  
33 *Conclusion*

34  
35 Subject to compliance with Retirement and Financial Assurance Conditions 1, 2 and 3, the the  
36 Council finds that the proposed facility can be restored adequately to a useful, non-hazardous  
37 condition following permanent cessation of construction or operation of the proposed facility.  
38 Subject to compliance with Retirement and Financial Assurance Conditions 4 and 5, the Council  
39 finds that the applicant has a reasonable likelihood of obtaining a bond or letter of credit in a  
40 form and amount satisfactory to the Council to restore the site to a useful, non-hazardous  
41 condition.



# Oregon

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*RFPA  
Exhibit*

**To:** Energy Facility Siting Council

**From:** Christopher M. Clark, Siting Policy Analyst & Rules Coordinator

**Date:** August 13, 2021

**Subject:** Agenda Item G (Action Item):  
Surety Bond Template Update for the August 27, 2021, EFSC Meeting

**Attachments:** Attachment 1: Draft Amended Bond Template  
Attachment 2: Draft Amended Letter of Credit Template

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## STAFF RECOMMENDATION

Staff recommends the Council amend the Surety Bond Template, as shown in Attachment 1, to ensure that a bond would perform if a Surety gives notice of its intent to cancel a bond and the certificate holder fails to provide an acceptable replacement.

## BACKGROUND

The Council has adopted rules requiring each certificate holder to provide a surety bond or letter of credit before beginning construction of a facility. The bond or letter of credit must be provided in a form and amount satisfactory to the Council to restore the site to a useful, non-hazardous condition, and must be maintained at all times until the facility has been retired. OAR 345-025-0006(8). These requirements provide assurance that the people of Oregon will not be burdened with the costs of restoring the site if the certificate holder is unable or unwilling to properly decommission the facility following permanent cessation of construction or operation of the facility.

Both bonds and letters of credit are commonly used and accepted forms of security, but there are some important differences. A surety bond provides a guarantee that the principal (e.g. the certificate holder), will meet the requirements of a contract (e.g. the site certificate.) If there is a documented breach in the terms of the contract, the surety will make payment to the Obligee (e.g. the State) to ensure that the contract is fulfilled. A letter of credit, on the other hand, is a bank's guarantee that it will pay a set amount to the letter holder upon demand and does not typically require proof of a breach to perform.

As shown in the table below, the Council has financial assurance on file for approximately \$168.2 million in estimated retirement costs. About 56 percent of the total amount was assured through letters of credit, with the remaining 44 percent assured through surety bonds.

**Table 1: Energy Facility Security Deposits as of April 1, 2021.**

Project Name	Instrument	20-21 Value
Biglow Canyon Wind Farm	LOC	\$17,825,000
Columbia Ethanol Project	Bond	\$315,244
Carty Generating Station	LOC	\$23,011,000
Coyote Springs Cogeneration	LOC	\$4,117,500
Golden Hills Wind	Bond	\$11,903,000
Hermiston Generating Project	Bond	\$7,102,200
Hermiston Power Project	LOC	\$5,139,883
Klamath Cogeneration Project	Bond	\$5,431,244
Klamath Generation Peakers	Bond	\$709,759
Klondike Wind Power III	Bond	\$11,857,000
Leaning Juniper Wind Power	Bond	\$12,245,000
Mist Underground Storage Facility	Bond	\$4,557,800
Montague Wind Power	Bond	\$7,865,000
Port Westward Generating Project	LOC	\$11,276,462
Shepherds Flat Central	LOC	\$10,451,000
Shepherds Flat North	LOC	\$8,672,000
Shepherds Flat South	LOC	\$10,225,000
South Mist Pipeline Extension	Bond	\$120,228
Summit Ridge Wind Farm	LOC	\$63,129
Stateline Wind Project-1&2	Bond	\$7,004,000
Stateline Wind Project-3	Bond	\$4,903,000
Wheatridge Renewable Energy Facility 1	LOC	\$3,444,000
<b>TOTAL</b>		<b>\$168,238,449</b>

The Council has adopted standardized templates for each security instrument that is accepted under the rules. The Council and Department periodically review the template language to ensure that the templates provide adequate assurance for the costs associated with retirement and site restoration and is consistent with current industry and regulatory practices. While both the bond and letter of credit templates were reviewed and are attached to this staff report, staff is not recommending changes to the letter of credit template at this time.

#### **BOND TEMPLATE ASSESSMENT**

The bond template provides that the bond will perform only when the certificate holder has failed to fulfill its obligations to retire the facility and restore the site. When a certificate holder permanently ceases construction or operation of a facility it must provide an application for termination of its site certificate that includes a final retirement plan for the site explaining the actions that will be taken to restore the site to a useful, non-hazardous condition. OAR 345-027-0110. The bond is released once the restoration activities described in an approved retirement plan are complete. If the certificate holder fails to submit a retirement plan, or fails to comply



# Oregon

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**To:** Energy Facility Siting Council

**From:** Sarah Esterson, Senior Policy Advisor

**Date:** September 10, 2021

**Subject:** Agenda Item D (Information Item): Overview of the Energy Facility Siting Council's Retirement and Financial Assurance standard (Part 2) for the September 24, 2021 EFSC Meeting

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## BACKGROUND

The Energy Facility Siting Council (Council) was created to oversee a comprehensive system for the siting, monitoring and regulating of the location, construction and operation of all energy facilities in Oregon. ORS 469.300. To carry out this purpose, the legislature entrusted the Council with the authority to decide whether to issue a site certificate for any energy facility proposed to be constructed or operated in Oregon. ORS 469.470(1). The Council's decision to issue a site certificate is binding upon state agencies and local governments and requires those agencies and governments to issue any permits specified in the site certificate without further proceedings. ORS 469.401(3).

In order to issue a site certificate, the Council must, in part, determine that the preponderance of the evidence on the record of proceedings on an application supports the conclusion that the facility, "complies with the applicable standards adopted by the council pursuant to ORS 469.501 or the overall public benefits of the facility outweigh any adverse effects on a resource or interest protected by the applicable standards the facility does not meet." ORS 469.503(1). With some exceptions, the Council must make similar finding of compliance for other state laws and administrative rules, and with the statewide land use planning goals adopted by the Land Conservation and Development Commission. See ORS 469.503(3) and (4).

The legislature provided the Council with broad authority to determine both the scope and format of its standards, but has provided a number of subjects which the standards may address, including the "financial ability and qualifications of the applicant." ORS 469.501(1)(d). The Council adopted a standard to address this subject under OAR 345-022-0050, the "Retirement and Financial Assurance Standard."

In Part 1 of this overview, presented at the August 27, 2021 Council meeting, staff provided a summary of how the Retirement and Financial Assurance Standard works, legislative and rulemaking history of the standard, and an overview of the substantive requirements of the standard and its associated application requirements. In Part 2, staff will provide a more

detailed explanation of how the standard is applied, including an explanation of the process for retiring a site and for preparing, reviewing, and updating cost estimates.

#### **APPLICATION OF THE STANDARD**

As part of its review, the Council must review the applicant's proposed retirement estimate and determine if the amount is sufficient, and if any additional monitoring and mitigation programs or conditions are required to ensure that the site will be able to be restored to a useful, non-hazardous condition. The Council's rules establish additional procedural and substantive requirements through mandatory conditions and compliance obligations. These include rules:

- Requiring the certificate holder to submit a bond or letter of credit that is acceptable to Council prior to beginning construction and maintaining that bond or letter of credit until the facility has been retired. OAR 345-025-0006(8)
- Requiring the certificate holder to submit a proposed retirement plan for Council approval within 2 years after permanent cessation of construction or operation of the facility, and retiring the facility according to the plan. OAR 345-025-0006(9)
- Authorizing use of the bond or letter of credit to retire the facility according to a retirement plan developed by the Department if the Council finds that the certificate holder failed to meet its obligations to retire the facility. 345-025-0006(16)

#### **PREPARATION AND REVIEW OF DECOMMISSIONING COST ESTIMATE**

Decommissioning a facility typically includes dismantling facility structures and components, removing materials from the site for recycling or disposal, and restoring the site to a useful, nonhazardous condition. The extent of required decommissioning activities may be influenced by the zoning of the site, agreements with underlying landowners, and ongoing use of related or supporting facilities for other purposes.

It is important to note that a certificate holder is not required to remove all facility components as part of the decommissioning process. Certain facility components, such as access roads or transmission infrastructure may be left in place if they would support allowed uses at the site. For many facilities sited on lands zoned for Exclusive Farm Use, foundations and buried utility infrastructure are only required to be removed to a depth of three feet, and components that are more than three feet below grade may be abandoned.

#### *Estimated Cost of Site Restoration*

While no specific methodology is required to be used when estimating decommissioning costs, all applicants must include the specific actions and tasks to restore the site to a useful, non-hazardous condition; an estimate of the total and unit costs of restoring the site to a useful, non-hazardous condition; and a discussion and justification of the methods and assumptions used to estimate site restoration costs. OAR 345-021-0010(1)(w)(B)-(D).

While the applicant is also required to estimate the projected useful life of the facility no discounting of future costs is allowed, and the estimate must be provided using current cost values. OAR 345-021-0010(1)(w)(C). As discussed below, an annual inflation adjustment is provided to ensure that future price changes are accounted for.

### Inflation Adjustments

Site certificate conditions for the decommissioning bond or letter of credit require certificate holders to adhere to two inflation adjustments. The first inflation adjustment requires an evaluation of the change in dollar value from the quarter/year the estimate is based to the quarter/year of facility construction commencement. Site certificate conditions prescribe, with some flexibility, the first adjustment method as follows:

- The final amount of the bond or letter of credit must be adjusted to present value, using the U.S. Gross Domestic Product Implicit Price Deflator, Chain Weight, as published in the Oregon Department of Administrative Services' "Oregon Economic and Revenue Forecast" or by any successor agency and using the index value and the quarterly index value for the date of issuance of the bond or letter of credit.
- If at any time the index is no longer published, the certificate holder must request Department/Council input on an acceptable, comparable calculation to adjust the approved dollar amount to present value.

The second inflation adjustment applies annually after the initial bond or letter of credit is received from the certificate holder by the Department:

- The total bond or letter of credit amount must be adjusted on annual basis, based on a date cycle consistent with the date of issuance/effective date, using the same methods identified above.

The condition requires the bond or letter of credit amount to be evaluated annually by the Department's Fiscal Analyst, and to be adjusted based on changes in the prices of goods and services in the U.S., as reflected by the GDP Price Deflator. Based on this review, the Department issues letters to all certificate holders requesting adjustment of the bond or letter of credit amount to ensure the condition is both satisfied and accurately accounted.

### Built Facility Adjustments

Site certificate conditions for the decommissioning bond or letter of credit allow certificate holders to adjust the final amount based on final number of facility components built within the allowed construction duration. It is fairly standard for a built facility to include significantly less number of facility components than the maximum number approved. This adjustment applies solely to the number of facility components.

Historically, site certificate conditions have not authorized a certificate holder to change the tasks, actions or cost estimating method as part of the adjustment. Because site certificate conditions do not allow adjustment to the decommissioning tasks, actions or cost estimating method, if requested by a certificate holder, would be considered substantive given that the standard requires Council to find that the facility decommissioning amount is satisfactory for restoring the site to a useful, nonhazardous condition, prior to approval. Therefore, based on typical site certificate condition language, a change in tasks, actions and estimating methods would necessitate formal review, likely in the form of an amendment.

Adjustment Considerations

Council’s evaluation of whether an applicant or certificate holder’s decommissioning estimate is satisfactory for restoring the facility site to a useful, nonhazardous condition is discretionary. More specifically, to find that a decommissioning estimate is satisfactory, there is not a specific estimating method or tool that must be used; there is not a specific or average amount that must be identified; and there are not restrictions on the process Council imposes to ensure that the decommissioning amount is satisfactory for the duration of facility operations. Therefore, given that estimating methods differ, and decommissioning activities and cost may vary over time, beyond variation in inflation, Council has the authority to consider whether site certificate conditions should contemplate other types of adjustments, as part of its findings of whether the decommissioning estimate is satisfactory. Other types of adjustments could include periodic revaluation in estimating methods and/or decommissioning and restoration actions by the certificate holder, the Department or Department’s third-party consultant.

Applicant/Certificate Holder Requests for Adjustments

Applicant’s and certificate holders often request Council consideration of other adjustments to the decommissioning amount, either short or long term. Some applicants have requested that Council allow credit for the scrap value of metals in facility components to be included in decommissioning cost estimates, but since at least the mid-2000’s the Council has not allowed scrap values to be considered based on concerns over fluctuating market value and the risk that third party creditors or other parties could assert a claim against the scrap or salvage value in the event that a certificate holder became insolvent or declared bankruptcy.

Some applicants have requested Council consideration of a reduced bond or letter of credit after the facility is in commercial operation, based on assurance provided through a security agreement and an executed Power Purchase Agreement. For example, in one ASC, an applicant proposed to submit to the Department, prior to construction, a bond or letter of credit in the approved amount, to be in place until the facility was in commercial operation. Then, after the initial year of operation, applicant proposed to file a Uniform Commercial Code (UCC) financing statement with the State of Oregon, where evidence of the filing would be provided to the Department prior to construction and the bond or letter of credit would be reduced to \$1. Then, in Year 20, or the last year of the applicant’s Power Purchase Agreement (PPA), whichever were later, the bond or letter of credit would be based on the full facility decommissioning amount, for the remainder of the facility’s operational life.

Council’s review of the above example concluded that uncertainties remain in the assurances provided to the State by a PPA, even with consideration of the applicant’s proposed conditions to execute a security interest with the State. Council concluded that 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 rulemaking, where information and expertise of subject matter experts could be considered, rather than relying solely on information provided by the applicant in favor of the proposal.

*Bond code found*



# ENERGY FACILITY SITING COUNCIL

Hanley Jenkins, Chair ■ Marcy Grail, Vice-Chair ■ Kent Howe ■ Mary Winters ■ Jordan Truitt ■ Cynthia Condon

## Energy Facility Siting Council January 23-24, 2020 Meeting Minutes

Thursday, January 23, 2020 at 5:00 p.m.

Friday, January 24, 2020 at 8:00 a.m.

Best Western Plus Hood River Inn – Columbia Room  
1108 E. Marina Way  
Hood River, OR 97031

### Table of Contents

- A. Consent Calendar – Approval of minutes; Council Secretary Report; and other routine Council business.
- B. Pre-Approved Financial Institutions – Council Decision (Action Item) – Maxwell Woods, Senior Policy Advisor.
- C.1 Boardman to Hemingway Transmission Line, Council Review of Draft Proposed Order and Public Comments (Action Item) – Kellen Tardaewether, Senior Siting Analyst, Sarah Esterson, Senior Siting Analyst, Maxwell Woods, Senior Policy Advisor.
- C.2 Boardman to Hemingway Transmission Line, Council Review of Draft Proposed Order and Public Comments (Action Item) – Kellen Tardaewether, Senior Siting Analyst, Sarah Esterson, Senior Siting Analyst, Maxwell Woods, Senior Policy Advisor.
- D. Permanent Amendment Rulemaking – Council Decision (Action Item) – Christopher Clark, Rules Coordinator
- E. Public Comment Period – This time was reserved for the public to address the Council regarding any item within the Council’s jurisdiction that is not otherwise closed for comment.
- F. (Working Lunch) Shepherds Flat South Request for Amendment 2, Turbine Repower Amendment (Action Item) – Chase McVeigh-Walker, Senior Siting Analyst.
- G. Shepherds Flat Central Request for Amendment 3, Turbine Repower Amendment (Action Item) – Chase McVeigh-Walker, Senior Siting Analyst
- H. Council Review of Requests for Reconsideration and Rehearing, Summit Ridge Wind Farm Site Certificate Amendment #4 (Possible Action Item) – Maxwell Woods, Senior Policy Advisor, and Patrick Rowe, Legal Counsel.
- I. Solar PV Rulemaking (Information Item) – Christopher Clark, Rules Coordinator.

The meeting materials presented to Council are available online at: <https://www.oregon.gov/energy/facilities-safety/facilities/Pages/Council-Meetings.aspx>

they would be further discussing more about this and the transportation and management plan in Public Services on Friday.

Council Member Winters stated that a use agreement is different than a condition of approval that requires to upgrade infrastructure, like paving it for example. It surprised her that you could have commercial use on a road that was typically for recreation and that it's gravel.

Chair Jenkins responded to Council Member Winters that it's residential and recreational and that it's too steep to pave. It would be a toboggan run certain times of the year, if it got icy and it was paved you'd have no control. There is no room to pave it either.

Council Member Winters asked if it's a gravel road doesn't it still become an issue in the winter?

Chair Jenkins replied that they sand it, and people use chains that live up there. There is very little recreational use of Morgan Lake in the winter except for some ice fishing. There is very little use of the park during the winter.

Mr. Woods asked Council if they could talk more about this tomorrow, there were a lot of comments that came up regarding these roads. The proposed route does go over the road they were talking about, but both routes would use the road. Mr. Woods went on to mention the Glass Hill Alternative, the BLM called Glass Hill it's preferred route even though this is not their land. It's not preferred by anyone except BLM, the land owners preferred the land further to the East. Numerous comments came in asking how Council couldn't even consider BLM's preferred route. The response is it's not Federal land, and Idaho Power is not required to comply with non-Federal land identified by the BLM. So the Glass Hill route is not even in the application.

Chair Jenkins stated that they were not being presented as an alternative. Even though there is a fair amount of testimony related to this.

Ms. Tardaewether thanked Mr. Woods for bringing that point up as people are still asking about why other alternative routes were not being included.

**Section IV.G. Retirement and Financial Assurance: OAR 345-022-0050**

Council Member Winters: I don't know about the rest of you, but I had little to no ability to figure out if this is appropriate or a good deal, referring to staff's proposed conditions allowing Idaho Power to variation to the typical bond requirements. Even simple bonds are not easy, and making it complicated usually means it's hard to call out the bond. The bond is only as good as it's enforceability. Ms. Winters asked Patrick if they've done research on this.

Legal Counsel Rowe responded that his predecessor is the one who researched this along with Mr. Woods. So Mr. Woods would probably be in a better position to speak about it. He did have a chance to review her analysis, and his understanding was that it is sufficient. DOJ did look at this and they found it was sufficient, but maybe Mr. Woods would be able to speak more to that.

Mr. Woods stated that ODOE and DOJ have worked on this issue since it's been one of the bigger issues of how to do this that is fair yet minimize risk to the State. There were two parts to this, one being the facility would never likely be removed according to Idaho Power and second is that Idaho Power is a regulated utility in two states that has rate recovery options. The argument is that there would be money if the facility had to be retired and removed. He felt this was a reasonable approach.

Council Member Howe stated \$140 million today wouldn't have the same purchasing power in 100 years.

Mr. Woods responded that inflation is built in, and it's different than the 1/16<sup>th</sup> construction. The \$140 million was on 2016 dollars. So at the time of construction commencement, should Council approve the approach would be updated for inflation at the time of construction and again in the future to account for it. Secretary Cornett mentioned that every single bond the agency has annual inflation built in.

Ms. Tardaewether asked if the department had ever cashed in or used a bond?

Secretary Cornett confirmed to his knowledge a bond has never been cashed in.

Council Member Winters stated it's not an easy process, but 50 years seems like a long time to her. Technology is changing extremely fast, so in 50 years the world could be so different. She felt 20 years seemed more reasonable to her. If the project had to be abandoned or changed going through the PUC today is very hard, and protective of the rate payers. Their purpose is to protect the rate payers so they don't care. The bond is where they are acting on behalf of local governments protecting against bankruptcy.

Chair Jenkins agreed with Mary that 50 years was a long time. He understands transmission lines, and knows the plan is they would remain there a long time. They would more likely be repowered than replaced. He is 70 years old looking back 50 years there had been a lot of changes.

**Meeting adjourned at 7:38 pm**

## Friday, January 24, 2020 – Hood River, OR

**Call to Order:** The meeting was called to order at 8:01 a.m. on January 24, 2020 by Chair Hanley Jenkins.

**Roll Call:** Council Chair Hanley Jenkins, Vice Chair Marcy Grail, and Council Members Kent Howe, Mary Winters, and Jordan Truitt were present.

Oregon Department of Energy representatives present were Assistant Director for Siting/Council Secretary, Todd Cornett, Senior Policy Advisor Maxwell Woods, Rules Coordinator Christopher Clark, Senior Siting Analyst Kellen Tardaewether, Senior Siting Analyst Sarah Esterson, Senior Siting Analyst Chase McVeigh-Walker, Operations Analyst Sean Mole, Division Assistant Michiko Mata, and Public Affairs Specialist Cliff Voliva. EFSC Counsel Patrick Rowe of the Department of Justice was also present.

### Opening Remarks

Secretary Cornett indicated there were no agenda modifications.

### C.2 Boardman to Hemingway Transmission Line, Council Review of Draft Proposed Order and Public

**Comments<sup>4</sup> (Information Item)** – Kellen Tardaewether, Senior Siting Analyst, Sarah Esterson, Senior Siting Analyst, Maxwell Woods, Senior Policy Advisor. Council received a presentation reviewing the Boardman to Hemingway Transmission Line Draft Proposed Order (DPO), comments received on the DPO and responses from Idaho Power (applicant) to comments received on the DPO. The Boardman to Hemingway Transmission Line is a proposed 500 kV transmission line, approximately 280 miles long in Oregon, that would cross five Oregon counties. Idaho Power Company is the applicant. This item was continued from the December 2019 meeting. For project details visit [Department's Boardman to Hemingway Transmission Line Project webpage](#).

More information is located on the [Council Meetings website](#) for additional details pertaining to this presentation.

<sup>4</sup> Audio for Agenda Item C.2 = 00:02:39 – January 24, 2020

Legal Counsel Patrick Rowe reminded council of where they were in the process, and this is their opportunity to provide any direction to staff in regards to changes, revisions, or supplementations between the DPO, and the Proposed Order. Mr. Rowe acknowledged they had really good discussions yesterday, but if they had any actual directions regarding to standards, he suggested that Council bring those up as they occur instead of waiting until the end.

Vice Chair Grail recused herself and stepped away from the council table.

**Section IV.G. Retirement and Financial Assurance: OAR 345-022-0050 (Continued from Thursday)**

Council Member Winters asked if they were going to go back to the financial piece they ended with Thursday evening?

Council Member Winters stated that she would like to give direction to staff regarding a shorter bond time.

Chair Jenkins also expressed interest in something less than the 50 years. Then asked the other Council Members how they felt.

Council Member Truitt stated that he agreed with Ms. Winters that they have no idea what the next 50 years will hold at the rate technology is improving. Mr. Truitt stated he didn't know if 50 years was a good timeline or not. Are the communities going to develop their own efficient energy sources along the way that they don't require the transmission line in the next 50 – 100 years. Are there studies or reports on this?

Ms. Tardaewether stated that there were additional comments that she wasn't sure if Council wanted them to review them or not.

Council agreed that they did want to bring them back up.

Secretary Cornett asked Ms. Tardaewether if she could bring up the 5 year language. This is where we want to look at the language to see where there is opportunity at 5 year increments to make changes and require additional bonding amounts based upon changed circumstances. He wanted Council to look at it, and see if it provided comfort, as circumstances change it's not just waiting for the 50 year period for something to kick in.

Mr. Woods said one more thing to consider about the standard itself is that the bonding is the "back-stop to the back-stop to the back-stop," meaning this only comes into play if Idaho Power or any of it's successors do not exist at a time when the transmission line would not be used. Requiring the State of Oregon to remove it from the landscape. The first obligation to the standard is met through mandatory conditions. If the facility is operated for a certain period of time, and then no longer needed, the owner of the facility has to remove and restore the land. Which would be Idaho Power or if purchased by another entity. It's only in the event that the owner goes bankrupt or the owner walks away from their obligation to maintain the facility, and no other ownership takes place. So this is used as a last piece of protection, this is not to be used to retire the facility at some point in the future.

Council Member Winters stated that this all assumes things have gone bad in the industry. The same way things have happened in nuclear sites even though this may not have happened in Oregon with energy sites it has happened with other industries that the public has had to pay for due to things going wrong. The 5-year is better protection because it's required, it's something that EFSC will need to be comfortable with the expertise to analyze the economics of the industry every 5 years, as it's a lot to ask of volunteer citizens to understand, believe, and trust the hired consultants. That is the purpose of bonds to begin with because EFSC members aren't experts at understanding the industry. Of course the entities are going to give good reports, they aren't going to say they will be going under in 3 years, and they really should be posting a bond. Reality is it's going to happen a couple years after they come in. It is a risk.

Ms. Tardaewether stated we could include language that the department may engage one of its consultants to do an independent review.

1 the 60 landowners of parcels that contain forest land, 19 responded; the applicant reviewed  
2 the responses to confirm the results of field surveys and GIS imagery surveys.

3  
4 As presented in ASC Exhibit K Attachment K-1, the applicant analyzed potential impacts from  
5 proposed facility construction and operation on all Goal 3 (agriculture) and Goal 4 (forest)  
6 lands, including rangeland. (See the Agricultural Assessment, Exhibit K, Attachment K-1 for  
7 detailed analysis of impacts on Goal 3 lands and Attachment K-2 for a detailed analysis of  
8 potential impacts on forest lands). Both local governing bodies within the forested portion of  
9 the proposed facility, Umatilla County and Union County, have established agriculture/forest  
10 zones. In Umatilla County, the zone is called the Grazing-Farm zone, and in Union County, the  
11 zone is called the Timber-Grazing zone. As explained further in Exhibit K (sections 6.5.2.2 and  
12 6.6.2.3), for hybrid agricultural/forest zones, the applicant worked closely with the Umatilla  
13 County Planning Department and Union County Planning Department to determine the  
14 predominant use of the parcels in the applicable agriculture/forest zones and analyzed the  
15 potential impacts of the proposed facility.

16  
17 In Umatilla County, the Grazing/Farm (GF) Zone is a hybrid farm-forest zone that includes  
18 agricultural land, rangeland, and forest land. The Umatilla County Development Code does not  
19 specify an approach for determining whether a particular parcel zoned GF is Goal 3 or Goal 4  
20 land. Consistent with Umatilla County Planning Department policy, therefore, county planning  
21 staff reviewed aerial photographs and determined that the land within the site boundary in the  
22 GF Zone is all forested Goal 4 land. Accordingly, in Umatilla County, the applicant classified all  
23 "hybrid" zone land within the analysis area as forest land. All land that could potentially be  
24 designated as forest land in the analysis area was analyzed.

25  
26 In Union County, the Timber-Grazing Zone is a hybrid zone and includes both farm and forest  
27 uses. The applicant worked closely with Union County to determine the predominant use on  
28 each of the 61 parcels that are crossed by the site boundary that are located wholly or partially  
29 within the Timber-Grazing Zone. In order to determine the predominant use on each parcel,  
30 data from the Natural Resources Conservation Service (NRCS) Soil Survey Geographic Database  
31 (SSURGO) was used along with the Union County tax lot data (parcel data). GIS mapping  
32 software was used to determine which SSURGO soil type comprised the most acres within each  
33 parcel. Accordingly, the analysis considered NRCS soil data when classifying land as either range  
34 or forest. Union County provided the applicant with a table listing the SSURGO soil types found  
35 throughout Union County and the corresponding predominant use value for each soil type. This  
36 analysis resulted in a preliminary predominant use value for each parcel within the site  
37 boundary based on SSURGO soils data. Union County then reviewed each parcel's initial  
38 predominant use value against 2011 aerial photography and tax lot records and adjusted the  
39 predominant use to reflect current land use. In the Timber-Grazing zone, none of the parcels  
40 involved in the analysis had their initial predominant use value adjusted through the Union  
41 County review process. However, SSURGO data for 18 of the total 61 parcels was not available  
42 and therefore the above analysis could not be performed. These 18 parcels are located in the  
43 vicinity of the National Forest and were determined to have a predominant use of forest.  
44 Accordingly, the applicant's analysis of forest lands in Union County includes an analysis of

page 266  
id's value

- 1           o Value of Economic Base = \$182/acre
- 2           o 530 acres lost x \$182/acre = \$97,000 lost plus or minus
- 3
- 4           • Umatilla County # Forested Acres = 715,000 acres
- 5           o Value of Forestland Economic Base = \$354,200,000
- 6           o Value of Economic Base = \$495/acre
- 7           o 246 acres lost x \$495/acre = \$120,000 plus or minus
- 8

9 The preliminary ASC was submitted in 2013, aligning with the reference date of the Oregon  
 10 Forest Resources Institute information source. However, due to the extended time interval  
 11 (2013 – 2020) of the ASC review, the Department was not able to locate an electronic version of  
 12 the referenced 2013 information source. Based on the Department’s review, electronic  
 13 information available from the Oregon Forest Resources Institute provides the following 2017  
 14 facts (see source references in footnotes):

- 15
- 16           • Union County # Forested Acres = 791,000 acres<sup>235</sup>
- 17           o Value of Forestland Economic Base = \$317,500,000<sup>236</sup>
- 18           o Value of Economic Base = \$401/acre
- 19           o 530 acres lost x \$401/acre = \$212,530/yr economic loss
- 20           o \$212,530/yr x 100 yrs = \$21.3 million economic loss, over 100 years
- 21
- 22           • Umatilla County # Forested Acres = 572,000 acres<sup>237</sup>
- 23           o Value of Forestland Economic Base = \$220,100,000<sup>238</sup>
- 24           o Value of Economic Base = \$385/acre
- 25           o 246 acres lost x \$385/acre = \$94,710/yr economic loss
- 26           o \$94,710/yr x 100 years = \$9.5 million economic loss, over 100 years
- 27

*\$401 per acre  
 x 100 yrs  
 -----  
 \$40,100 per acre*

*\$385  
 x 100  
 -----  
 \$38,500 per acre*

28 Based on the Department’s evaluation of Oregon Forest Resources Institute’s 2017 timber  
 29 harvest and economic base data by county, as presented above, potential impacts to the cost of  
 30 accepted forest practices from the proposed facility include an annual economic revenue loss of  
 31 \$212,530 and \$94,710 in Union and Umatilla counties, respectively; and, based on the 100 year  
 32 (or more) estimated useful life of the proposed facility, a long-term loss of \$21.3 million and  
 33 \$9.5 million in Union and Umatilla counties, respectively. The applicant notes that the actual  
 34 value of a particular landowner’s timber would be valued based on a timber appraisal  
 35 completed at the time of land acquisition. As further described below, in addition to the land

<sup>235</sup> Information source available at: <https://knowyourforest.org/sites/default/files/documents/Union-state-economic-19.pdf>. Accessed April 29, 2020.

<sup>236</sup> See Table A21, p. 101 in report available at: <http://theforestreport.org/wp-content/uploads/2019/07/OFRI-2019-Forest-Sector-Economic-Report-Web.pdf>. Accessed April 29, 2020.

<sup>237</sup> Information source available at: <https://knowyourforest.org/sites/default/files/documents/Umatilla-state-economic-19.pdf>. Accessed April 29, 2020.

<sup>238</sup> See Table A21, p. 101 in report available at: <http://theforestreport.org/wp-content/uploads/2019/07/OFRI-2019-Forest-Sector-Economic-Report-Web.pdf>. Accessed April 29, 2020.

LU-5 forest

regarding the location of the proposed facility within EFU zones.

(ODOE - B2HAPPDoc15 ApASC Second Amended Project Order 2018-07-26, pages 15-16 of 29.)

90. The proposed transmission line crosses forest-related land use zones in Umatilla and Union Counties. In Union County, the proposed facility crosses land in the Timber-Grazing Zone, a hybrid farm-forest zone that includes farmland, rangeland, and forestland. (ODOE - B2HAPPDoc3-19 ASC 11\_ Exhibit K\_Land Use\_ASC 2018-09-28, pages 42, 238 of 614.)

91. The Union County Zoning, Partition and Subdivision Ordinance (UCZPSO) requires land in the Timber-Grazing Zone to be evaluated based on its "predominant use" to determine whether it is Goal 3 farmland or Goal 4 forestland.<sup>39</sup> Idaho Power worked with Union County planning staff to determine the predominant use of each of the 61 Union County parcels within the project site boundary located in the Timber-Grazing Zone. (ODOE - B2HAPPDoc3-19 ASC 11\_ Exhibit K\_Land Use\_ASC 2018-09-28, page 238 of 614.)

92. To determine the predominant use on each Union County hybrid-zoned parcel, Idaho Power used data from the National Resources Conservation Service Soil Survey Geographic Database (SSURGO), Union County tax lot data, and GIS mapping software. Based on a table provided by Union County planning staff listing each SSURGO soil type and the corresponding predominant use value for each soil type, Idaho Power assigned each parcel an initial predominant use value. Idaho Power then had Union County review each parcel's initial predominant use value against 2011 aerial photography and tax lot records to adjust the predominant use to reflect current land use. (ODOE - B2HAPPDoc3-19 ASC 11\_ Exhibit K\_Land Use\_ASC 2018-09-28, page 239 of 614).

93. Union County's review of Idaho Power's predominant use analysis did not result in any adjustments to the predominant use value Idaho Power initially assigned to parcels in the Timber-Grazing Zone. For 18 of the 61 parcels in the Timber-Grazing Zone located near the National Forest, there was no SSURGO data available. Therefore, for these 18 parcels, in the

<sup>39</sup> In this context, Union County defines "predominant use" as "the most common use of a parcel when differentiating between farmland and forest land." UCZPSO 1.08. The Union County Zoning Ordinance further states:

In determining predominant use NRCS Soil Conservation Service soil maps will be used to determine soil designations and capabilities. The results of this process will be the most important method in determining the predominant use of the parcel. Other factors which may contribute to determining predominant use include parcel characteristics such as a commercial stand of timber, and the current use of the property. Removing a commercial stand of timber from a property will not result in a conversion of predominant use unless the property is disqualified as forest land by the Oregon Department of Forestry.

(UCZPSO 1.08.)

absence of soil data, Idaho Power conservatively determined that the land had a predominant use of forestland. (ODOE - B2HAPPDoc3-19 ASC 11\_Exhibit K\_Land Use\_ASC 2018-09-28, page 239 at 614.)

94. Idaho Power's predominant use analysis for the 61 parcels crossed by the proposed project in Union County's Timber-Grazing Zone showed that the predominant uses within the site boundary are split between forest and range land, with a negligible amount of high value crop land. (ODOE - B2HAPPDoc3-19 ASC 11\_Exhibit K\_Land Use\_ASC 2018-09-28, page 239 of 614.) Idaho Power determined that, for the Proposed Route in Union County, approximately 53 percent of Timber-Grazing zoned land has a predominant use of rangeland and about 47 percent had a predominant use of forestland. For the hybrid-zoned land along the Morgan Lake Alternative Route, Idaho Power determined that about 60 percent had a predominant use of rangeland and about 40 percent was forestland. (*Id.*)

95. In ASC Exhibit K, Attachment K-2, the Right-of-Way Clearing Assessment, Idaho Power addressed existing forestry practices adjacent to the project and impacts to those practices that may occur as a result of the construction and operation of the project. Idaho Power described the county costs of the project within the forested lands analysis area. Idaho Power explained that Union County has 899,000 acres (69%) of forestland out of a total land area of 1,303,000 acres.<sup>40</sup> Idaho Power explained that the "economic impact to forest sector jobs in Union County is approximately \$97,000, which will be partially offset by agriculture or range land uses after the conversion." (ODOE - B2HAPPDoc3-19 ASC 11\_Exhibit K\_Land Use\_ASC 2018-09-28, page 613 of 614.)

96. In ASC Exhibit K, Attachment K-2, Idaho Power also represented as follows:

The Forested Lands Analysis Area includes approximately 1,249 acres of forest and range lands; however, the forested acreage subject to permanent impact by conversion is substantially less (approximately 776 acres). Based on the results of the forested lands survey and analysis of the potential impacts and efforts to minimize and mitigate for project impacts, the Project will not cause (1) a substantial change in accepted forest or farm practices; or (2) a significant increase in the cost of accepted forest or farm practices on either lands to be directly impacted by the Project or on surrounding lands devoted to farm use.

(ODOE - B2HAPPDoc3-19 ASC 11\_Exhibit K\_Land Use\_ASC 2018-09-28, pages 613-14 of 614.)

<sup>40</sup> As addressed in the *Ruling on Issues LU-2, LU-3, LU-5 and LU-6*, in ASC Exhibit K, Attachment 2, Idaho Power erred in calculating the percentage loss to the forestland base in Umatilla and Union Counties. However, the math errors were not material to Idaho Power's Goal 4 analysis and/or the proposed facility's compliance with the Land Use Standard. As pertinent here, in Union County, the percentage of land that would be converted from forestland to agricultural or range use is actually .059 percent (and not .00059 percent, as erroneously stated in ASC Exhibit K). See *Ruling on Issues LU-2, LU-3, LU-5 and LU-6* at 6, 15-16.

*9% of total not relevant to standard*

## ARTICLE 5.00

### A-4 TIMBER-GRAZING ZONE

#### 5.01 PURPOSE

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. The A-4 Zone is also intended to allow other uses that are compatible with agricultural and forest activities, to protect scenic resources and fish and wildlife habitat, and to maintain and improve the quality of air, water and land resources of the county.

The A-4 Zone has been applied to lands designated as Timber-Grazing in the Land Use Plan. The provisions of the A-4 Zone reflect the forest land policies of the Land Use Plan as well as the requirements of ORS Chapter 215 and OAR 660-006 and 660-033. The minimum parcel sizes and other standards established by this zone are intended to promote commercial, agricultural, and forest operations.

#### 5.02 PERMITTED USES

In the A-4 Zone predominantly farmland lots and parcels shall comply with Section 2.02 Permitted Uses and predominantly forest land parcels shall authorize the following uses and activities and their accessory buildings and uses subject to the general provisions set forth by this ordinance.

In the A-4 Zone, the following uses and activities and their accessory buildings and uses are permitted subject to the general provisions set forth by this ordinance:

1. Farm use as defined in ORS 215.203.
2. Forest operations or forest practices including, but not limited to, reforestation of forest land, road construction and maintenance, harvesting of a forest tree species, application of chemicals, and disposal of slash.
3. Temporary on-site structures that are auxiliary to and used during the term of a particular forest operation.
4. Physical alterations to the land auxiliary to forest practices including, but not limited to, those made for purposes of exploration, mining, commercial gravel extraction and processing, landfills, dams, reservoirs, road construction or recreational facilities.

1  
2 The Council modifies General Standard of Review Condition 7<sup>77</sup> below to remove the language  
3 of the condition that does not apply to transmission lines and maintain the portion of the  
4 condition that would apply to the facility.

5  
6 **General Standard of Review Condition 7:** The certificate holder may begin construction, as  
7 defined in OAR 345-001-0010(12), or create a clearing on a part of the site if the certificate  
8 holder has construction rights on that part of the site and the certificate holder would  
9 construct and operate part of the facility on that part of the site even if a change in the  
10 planned route of transmission line occurs during the certificate holder's negotiations to  
11 acquire construction rights on another part of the site.

12 [CON-GS-02, Mandatory Condition OAR 345-025-0006(5)]

13  
14 **General Standard of Review Condition 8:** If the certificate holder becomes aware of a  
15 significant environmental change or impact attributable to the facility, the certificate holder  
16 shall, as soon as possible, submit a written report to the Department describing the impact  
17 on the facility and any affected site certificate conditions.

18 [GEN-GS-04, Mandatory Condition OAR 345-025-0006(6)]

19  
20 **General Standard of Review Condition 9:** Upon completion of construction, the certificate  
21 holder shall restore vegetation to the extent practicable and shall landscape all areas  
22 disturbed by construction in a manner compatible with the surroundings and proposed use.  
23 Upon completion of construction, the certificate holder shall remove all temporary  
24 structures not required for facility operation and dispose of all timber, brush, refuse and  
25 flammable or combustible material resulting from clearing of land and construction of the  
26 facility. In the annual report, the certificate holder shall report to the  
27 Department restoration activities, and applicable sections of the Reclamation and  
28 Revegetation Plan provided as Attachment P1-3 of the Final Order on the ASC, by county

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<sup>77</sup> Modifications proposed to the OAR 345-025-0006(5) mandatory condition language are as follows, "~~Except as necessary for the initial survey or as otherwise allowed for wind energy facilities, transmission lines or pipelines under this section, The certificate holder may not begin construction, as defined in OAR 345-001-0010, or create a clearing on any part of the site until the~~ 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 the purpose of this rule, "construction rights" means the legal right to engage in construction activities. ~~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, as defined in OAR 345-001-0010, or create a clearing on a part of the site if the certificate holder has construction rights on that part of the site and:~~

- (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; or~~
- (b) ~~The certificate holder would construct and operate part of a wind energy facility on that part of the site even if other parts of the facility were modified by amendment of the site certificate or were not built."~~

- 1 • Recreation may be addressed in the FEIS but it is unclear at this time as to whether the  
2 information that will be provided in the FEIS will be adequate to demonstrate compliance with  
3 the Council's Recreation standard.
- 4 • Private land easements or land acquisitions are outside EFSC jurisdiction. On April 24, 2018 the  
5 Department issued a memo titled; "Energy Facility Siting Council Decisions for Linear Facilities  
6 with Restricted Access within a Site Boundary: Boardman to Hemingway Transmission Line."  
7 This memo outlines how the Department will review applications and make recommendations  
8 to Council for biological, cultural and archaeological resources that have been evaluated in the  
9 pASC and ASC. For linear facilities, such as the B2H transmission line, there are situations where  
10 the applicant is able to conduct field surveys on several parcels within the site boundary but  
11 may not have access on adjacent parcels. In such circumstances, it may be possible that the  
12 combination of on-site field surveys plus a desktop evaluation of existing data, aerial  
13 photography, and "over the fence" surveys may meet the information requirements of Exhibits  
14 H, J, P, Q, and S. If the field survey coverage is sufficient for ODOE and the applicable reviewing  
15 agencies to consider that the information provided is representative of the biological species  
16 occurrence or habitat, it is possible that this information could be sufficient to be evaluated for  
17 compliance with the applicable Council standard. Such may be the case for the Council's Fish  
18 and Wildlife Habitat standard, Threatened and Endangered Species Standard, and the Structural  
19 Standard that require field surveys. Once site access is gained to unsurveyed areas for wetlands  
20 and waters of the state and historic, cultural and archaeological resources, that survey  
21 information must be provided to ODOE and EFSC via an amendment process for compliance  
22 with the applicable Council standard and statutory and obligations, for those specific areas and  
23 resources, if identified. Nevertheless, the applicable exhibits in the ASC shall include as much  
24 information as possible about the results of the field surveys conducted to date in the analysis  
25 area.

26  
27 For these reasons, it is recommended that work plans for resource reports that support the NEPA FEIS  
28 be written so that one set of ground studies collects all the information needed for both the FEIS and  
29 the application for site certificate. Where mitigation is proposed, the applicant may draft a single  
30 mitigation plan that meets both BIM and EFSC requirements.

31 To the extent that IPC will rely on the FEIS (or its supporting resource reports) for evidence of  
32 compliance with EFSC standards, ODOE suggests that IPC develop a document that cross-references the  
33 information from the resource reports and the FEIS with the information that is understood to be  
34 needed for the EFSC application. This document may be prepared before the application for site  
35 certificate is submitted to assist the applicant and ODOE with identifying areas where the NEPA process  
36 alone may not require enough information for a complete EFSC application. IPC can then supply the  
37 needed additional information in the application for site certificate.

### 38 39 **VIII. EXPIRATION DATE OF THE NOTICE OF INTENT**

40 In accordance with OAR 345-020-0060, the Boardman to Hemingway Transmission Line NOI was  
41 originally scheduled to expire on July 6, 2012. Pursuant to OAR 345-020-0060(1) on March 22, 2012, IPC  
42 submitted a petition requesting a one-year extension of the expiration of the NOI. On April 25, 2012, the  
43 Council granted IPC's petition and established the expiration date for the NOI as July 6, 2013. IPC  
44 submitted a pASC on February 27, 2013 ahead of the NOI expiration date. Due to route changes, IPC  
45 submitted the ApASC on July 19, 2017.

March 12, 2021

Idaho Power provides a redacted copy of Exhibit S, Attachment S-10, Appendix D (Visual Assessment of Historic Properties Forms) as Gilbert Request No. 1(f), Att. D, Redacted S-10, App. D. This attachment contains the assessment forms that Idaho Power's consultants completed while conducting the Intensive Level Surveys to assess potential impacts from the Project to historic resources within the analysis area. This attachment contains only the assessment forms for Oregon Trail resources, including resources located on both public and private lands. Each assessment form includes a description of the existing integrity of the resource and an analysis of the potential Project impacts. Idaho Power has redacted locational information from these assessment forms, particularly for those resources located on private lands and/or not generally accessible.

g. See response to Gilbert, Request No. 1(f), Att. D, Redacted S-10, App. D.

**IDAHO POWER'S SUPPLEMENTAL RESPONSE TO IRENE GILBERT'S DISCOVERY REQUEST NO. 1 (MAR. 12, 2021).**

a. In your Request for Discovery Orders, you clarified that you sought information regarding Idaho Power's decision to apply different methodologies to assess potential visual impacts in the BLM's NEPA review process and in the EFSC site-certificate process. That request, had it actually been made, would have been objectionable as not reasonably likely to produce information that is generally relevant to the contested case, because the issue before the Council is whether the analysis that the Company submitted in its Application for Site Certificate ("ASC") has demonstrated compliance with the Council's Historic, Cultural, and Archaeological Resources Standard. Any separate methodology demonstrating compliance with federal standards in the BLM NEPA review process is not generally relevant. Notwithstanding, Idaho Power provides the following supplemental response:

The methodology applied in the BLM NEPA review process to assess potential impacts and mitigation planning for cultural resources is detailed in the Final EIS, beginning on page 3-1378. Bureau of Land Management, Final Environmental Impact Statement and Proposed Land Use Amendments for the Boardman to Hemingway Transmission Line Project at 3-1378 (Nov. 2016) (available at [https://eplanning.blm.gov/public\\_projects/nepa/68150/90593/108795/03\\_Chapter\\_3\\_Part\\_3\\_3.2.13\\_to\\_3.2.19.pdf](https://eplanning.blm.gov/public_projects/nepa/68150/90593/108795/03_Chapter_3_Part_3_3.2.13_to_3.2.19.pdf)). For a summary of the methodology that Idaho Power applied in the EFSC site-certificate process to assess potential visual impacts to Oregon Trail resources, including the various elements from other methodologies that Idaho Power incorporated into its analysis, see Exhibit S, Attachment S-2, Section 4.0.

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. To the extent that you may be concerned that the state analysis resulted in a finding of no impact for a particular Oregon Trail segment, while the federal approach resulted in the finding of an impact, please note that a finding of an impact under either state or federal analysis will require mitigation by Idaho Power under the applicable standard.



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

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

IRENE GILBERT  
*Petitioner*

v.

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

Energy Facility Siting Council

OAH Case No. 2019-ABC-02833

Supreme Court No. S069924

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**REQUEST FOR ORAL ARGUMENT**

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To the Calendar Clerk for the Court of Appeals:

Petitioner, IRENE GILBERT, unrepresented Pro Se, hereby requests that the above-captioned case, scheduled to be submitted to the court on January 18, 2023, be scheduled for oral argument before the Oregon Court of Appeals on that date.

Petitioner is requesting, if possible, that her oral argument to follow the case S069919.

Since no Reply Briefs are allowed, Petitioner thinks it would only be fair to provide her the opportunity to present oral argument after having seen the Agency and IPC briefs. Petitioner believes the Justices would benefit from hearing her response to the Agency/IPC briefs, and from being able to ask her questions about

her brief.

Petitioner understands that she would only have a limited period of time to present the argument. Petitioner understands that she would need to be respectful and conduct herself in the same manner that any attorney would, and she promises to do so if allowed to argue.

Dated: December 21, 2022.

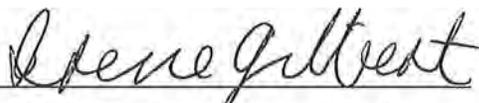
By: Irene Gilbert

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

CERTIFICATE OF FILING

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

DATED: December 21, 2022.

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

CERTIFICATE OF SERVICE

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

DATED December 21, 2022.



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

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Request for Oral Argument

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*Request for Oral Argument*

*5*



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.

EXPEDITED JUDICIAL REVIEW UNDER ORS 469.403

Energy Facility Siting Council  
2019ABC02833

S069924

**ORDER DENYING MOTION TO FILE AMENDED BRIEF, GRANTING MOTION TO  
STRIKE AMENDED BRIEF, AND DENYING MOTION TO PRESENT ORAL  
ARGUMENT**

Petitioner's motion to file an amended brief is denied. Respondent Idaho Power  
Company's motion to strike the amended brief is granted. Petitioner's motion to present  
oral argument is denied.



MARTHA L. WALTERS  
CHIEF JUSTICE, SUPREME COURT  
12/28/2022 4:25 PM

c: Lisa F Rackner  
Jocelyn Claire Pease  
Denise G Fjordbeck  
Jordan R Silk  
Patricia G Rincon  
Sara Kobak  
Andrew Lee  
Irene Gilbert

od

**ORDER DENYING MOTION TO FILE AMENDED BRIEF, GRANTING MOTION TO  
STRIKE AMENDED BRIEF, AND DENYING MOTION TO PRESENT ORAL  
ARGUMENT**

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REPLIES SHOULD BE DIRECTED TO: State Court Administrator, Records Section,  
Supreme Court Building, 1163 State Street, Salem, OR 97301-2563

**DOCKET PCN 5 - CERTIFICATE OF SERVICE**

I hereby certify that on December 29, 2022 Idaho Power Company's Letter regarding EFSC Appeals – Irene Gilbert's Motion to Amend Opening Brief, Amended Opening Brief, Request for Oral Argument, and Order was served by USPS First Class Mail to said person(s) at his or her last-known address(es) as indicated below:

**By: USPS First Class Mail:**

John C. Williams  
PO Box 1384  
La Grande, OR 97850

DATED: December 29, 2022

*/s/ Alisha Till*

\_\_\_\_\_  
Alisha Till  
Paralegal