IN THE SUPREME COURT OF THE STATE OF OREGON

In the Matter of the Application for Site Certificate for the Boardman to Hemingway Transmission Line IRENE GILBERT *Petitioner* v. OREGON DEPARTMENT OF ENERGY, OREGON ENERGY FACILITY SITING COUNCIL, and IDAHO POWER COMPANY *Respondents*	Energy Facility Siting Council OAH Case No. 2019-ABC-02833 Supreme Court No. S069924

AMENDED APPELLANT'S BRIEF

To the Justices of Oregon Supreme Court:

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

APPEAL TO OREGON SUPREME COURT

INTRODUCTION

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

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

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

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

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

CONTESTED CASE REGARDING OREGON TRAIL RESOURCES

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

BACKGROUND

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

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

ERROR ONE:

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

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

ERROR THREE

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

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

ODOE will argue in error that they have the authority to make the final eligibility decision under ORS 469.420. This fails to comply with the plain language of the statute and related statutes addressing approval of site certificates. Under ORS 469.300(2) EFSC is the only entity allowed by statute to make the eligibility determination and it must be made prior to the issuance of a site certificate. ORS 469.370(7), 469.(l). ORS 469.405(l) all refer exclusively to "the council" and none to the Department or staff). ORS 469.503 states: "In order to issue a site certificate, the **Energy Facility Siting Council** shall determine that the preponderance of the evidence on the record supports the following conclusions: The facility complies with the applicable standards adopted by the council pursuant to ORS 469.50l. Arguments that ORS 469.402 allows ODOE to make the eligibility decision are without merit and fail to comply with the plain language of ORS 469.402 which states, "If the Energy Facility Siting Council elects to impose conditions **on a site certificate or an amended site certificate**, that require subsequent review and approval of a future action, the council may delegate the future review and approval to the State Department of Energy....." The language of the statute indicates that there must be a certificate or an amended site certificate

which requires some future action. In order to issue a site certificate the file must contain a preponderance of evidence in the record that the standard is met. In this case, the Historic Properties Plan is the document which is to contain the information regarding impacts and mitigation for the impacts to Oregon Trail Resources necessary to determine whether the Historic Properties standard is being met. This requires the final plan be approved prior to the issuance of a site certificate, not after. This application is also supported by OAR 345-025-0016 which requires completed plans to be approved by council and included in the site certificate. A change in the interpretation of the plain language of this rule would constitute an excedance of authority which is specifically precluded under Keiser v Wilke 588 US__Q019 Kiser US Supreme Court providing that the rule must be ambiguous, decisions cannot be one time decisions which are not being required of other applicants, must be the official determination of those able to make decisions regarding the issue, cannot be a surprise to those impacted. In the case of ORS 469.402, the plain language of the statute and the legislative record show that the interpretation of the rule exceeds the legislative intent for the following reasons: The rule requires the delegation to occur in a site certificate, , so the counsil would already have had to clear eligibility. If the legislature had intended to include the department in those authorized to determine eligibility they would have adopted changes to statutes specifically requiring EFSC to do so including ORS 469.504

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

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

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

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

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

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 469.40l , ORS 469.50l and OAR 345-022-0050(l).

> "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 (l) 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, 2nd to last paragraph) These items would only apply if the Council were applying a “Balancing Determination” which is not allowed for this standard OAR 345-022-0000(2) and (3)(c).

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

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

THE RULES DO:

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

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 ll, 2nd paragraph) Page 11, 2nd Paragraph, Commissioner Winters questioned that PUC would approve money from ratepayers.

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

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

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

a) Council member Winters summed up why council should not make the adjustments being objected to. She said:" Of course the entities are 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". (Transcipt 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 (l.) 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 Summery 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 is 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. **S**tate 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(l) 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:

_____

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CERTIFICATE OF FILING

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

DATED: December 21, 2022.

_____

Irene Gilbert, *Petitioner, Pro Se*

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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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