

## **Energy Facility Siting Council Meeting**

**August 29-30-31, 2022**

**Agenda Item B: Council Review of the Proposed Order, Proposed Contested Case  
Order/Exceptions Hearing**

Council Materials

## **August 30, 2022 – Day 2**

### **Issue, Exception/Response**

Issue PS-4: Exception: Cooper; Response: Idaho Power Company

Issue PS-6: Exception: Horst/Cavinato; Response: Idaho Power Company

Issue HCA-7: Exception: Williams; Response: Idaho Power Company

Issue HCA-3: Exception: Marlette, Gilbert; Response: Department; Idaho Power Company

Issue SR-3: Exception: Deschner; Response: Department; Idaho Power Company

Issue SR-7: Exception: Stop B2H; Response: Idaho Power Company

Issue SR-5: Exception: Geer; Response: Department; Idaho Power Company

Issue SR-6: Exception: L. Barry, Stop B2H; Response: Department; Idaho Power Company

Issue R-2: Exception: L. Barry; Response: Idaho Power Company

Issue R-4: Exception: L. Barry; Response: Idaho Power Company

Issue R-3: Exception: L. Barry; Response: Idaho Power Company

Issue FW-7: Exception: A&K March; Response: Idaho Power Company

Issue FW-1: Exception: Stop B2H; Response: Department; Idaho Power Company

Issue FW-3: Exception: Gilbert, Geer; Response: Idaho Power Company

Issue FW-6: Exception: Geer; Response: Department; Idaho Power Company

**BEFORE THE ENERGY FACILITIES SITING COUNCIL  
for the  
STATE OF OREGON**

<b>IN THE MATTER OF:</b>	)	<b>PETIONER MATTHEW COOPER'S</b>
	)	<b>EXCEPTIONS TO ADMINISTRATIVE</b>
THE PROPOSED BOARDMAN TO	)	<b>LAW JUDGE WEBSTER'S RULINGS:</b>
HEMINGWAY TRANSSMISSION LINE	)	<b>PROPOSED CONTESTED CASE</b>
	)	<b>ORDER, ISSUE PS-4</b>
	)	
	)	<b>DATED JUNE 30, 2022</b>
	)	
<b>OAH Case No. 2019-ABC-02833</b>	)	
	)	

*Issue PS-4: Fire Protection: Whether Applicant adequately analyzed the risk of wildfire arising out of operation of the proposed facility and the ability of local firefighting service providers to respond to fires.*

Dr. Cooper disagrees with many of the factual and legal conclusions, and characterizations of the evidence, that are contained in the Proposed Contested Case Order (PCCO). Dr. Cooper has limited the exceptions detailed here to one specific exception. However, please do not misinterpret filing only one as agreement with the ALJ's rulings and conclusions in the PCCO.

**Exception No. 1:** The ALJ erred in *not* including the Department's recommended amendment to Recommended Public Services Condition 6 regarding accuracy of response times presented in the ASC Exhibit U, Table U-10. <sup>1</sup>Mr. Cooper feels strongly

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<sup>1</sup> In the Matter of Boardman to Hemmingway, OAH Case No. 2019-ABC-02833 Proposed Contested Case Order, at pp. 225-26.

that *the Department was correct* in its recommended provisions, especially recommendation #2:

Identify. . . 2) updated information from the LGRFPD on the number of full-time and volunteer employees, number and type of equipment/vehicles, and response times to the facility. Response time must consider LGRFPD crew mobilization time and access limitations (e.g. road condition, level of service and impact of multi-users from Morgan Lake Park, residents and emergency services.<sup>2</sup>

As the ALJ admits, ASC Exhibit U, Table U-10 contained information which was later proved to be erroneous, as it was based on information obtained when “neither Morgan Lake Park nor surrounding properties were within the district’s protection jurisdiction.” This included patently absurd response times of “4 to 8 minutes” from LGRFPD’s station in Island City to Morgan Lake park and environs, which Mr. Cooper conclusively demonstrated would take more like 20 minutes. Thus, it makes sense that Idaho Power should seek accurate and updated information in regard to staffing, equipment, and other factors which may influence its ability to respond to a fire in this region.

#### **IN CONCLUSION:**

Dr. Cooper feels strongly that the ALJ gave, at best, cursory consideration of the many points raised in his Closing Brief, and instead chose to unquestioningly accept IPC’s statements in their entirety. He respectfully requests that EFSC deny the site certificate and/or remand this issue back to ODOE for updated analysis, or at the very minimum, affirm *all* of ODOE’s recommendations and amendments.

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<sup>2</sup> ODOE Closing Brief at 127.



**CERTIFICATE OF MAILING**

On June 30, 2022, I certify that I filed the foregoing EXCEPTIONS TO THE PROPOSED CONTESTED CASE ORDER with the Hearings Coordinator via electronic mail, and with each party entitled to service, as noted below.

*/s/ Matthew J. Cooper*

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**BEFORE THE ENERGY FACILITIES SITING COUNCIL  
for the  
STATE OF OREGON**

<b>IN THE MATTER OF:</b>	)	<b>PETIONERS JOEHORST AND</b>
	)	<b>ANNA CAVINATO’S EXCEPTIONS</b>
<b>THE PROPOSED BOARDMAN TO</b>	)	<b>TO ADMINISTRATIVE LAW</b>
<b>HEMINGWAY TRANSSMISSION LINE</b>	)	<b>JUDGE WEBSTER’S RULINGS:</b>
	)	<b>PROPOSED CONTESTED CASE</b>
	)	<b>ORDER, MOTION FOR SUMMARY</b>
	)	<b>DETERMINATION, PROCEDURAL</b>
	)	<b>RULINGS; ISSUES NC2 AND PS6</b>
<b>OAH Case No. 2019-ABC-02833</b>	)	
	)	<b>DATED JUNE 30, 2022</b>

Mr. Horst strongly disagrees with rulings made by the ALJ on many things. While Mr. Horst is not addressing all of these decisions, his most important points are made here.

**1. As to the limited parties’ concerns regarding PS6**

On page 214 of the ALJ's ruling, second paragraph, the judge writes:

“After final route selection and prior to construction of the transmission line, these safety measures will be fully vetted by the Department, in consultation with Union County and the City of La Grande where applicable.”

Mr. Horst has written in his testimony, rebuttals, letters, and briefs (1) “the city of La Grande specifically has requested on several occasions that the Mill Creek route not be used as it is most impactful to the residents of the city of La Grande due to the condition of the streets in this area, the streets getting to this location, geological hazard, and other hurdles as well. The ALJ did not

(1) See Mr. Horst’s closing brief (pg. 2) dated 02/28/2022, also Mr. Horst’s Direct testimony (pg1) dated 09/16/21.

respond to this specific issue at all. It is unclear to Mr. Horst as to why there was no response to this as it is probably the most significant reason this route should not be used. The city of La Grande's opinion holds a lot of weight why this route should not be used. If the department and IPC followed the City of La Grande's recommendations at all, the Millcreek route would not even be on the table. It has become very clear the ALJ is very biased as she is overlooking the important points and simply responding to the points that can easily be responded to.

**2. Ruling on Idaho Power's Motion to Strike Portions of Mr.. Horst's Response Brief regarding Issue PS-6:**

In the second paragraph of page 217, the ALJ writes:

“In the motion, Idaho Power moves to strike, or in the alternative give no weight to, statements in Mr. Horst's Response Brief pertaining to granting Idaho Power access to his property as unsupported by evidence in the record. Motion at 11. The ALJ agrees that this portion of Mr. Horst's brief is testimonial in nature, unsupported by evidence in the record, and not material to Issue PS-6. Therefore, the challenged statements are given no weight.”

Mr. Horst would like to make it clear that IPC's assertion they were not allowed access to study the road for necessary repairs is untrue and unsupported by evidence. (see Mr. Horst's response brief, pg. 4) dated 03/30/2022. It is unclear to Mr. Horst as to why this was even included in the rulings.

**3. As to the limited parties' concerns regarding NC2**

On page 193 of the ALJ's ruling it reads:

*“Authority to grant the variance.* Limited parties argue that the Council lacks the authority to grant a variance under the Noise Rules because, by statute, that authority rests solely with the EQC. In response, the Department and Idaho Power assert that the Council has comprehensive authority over energy facility siting matters, including the authority to apply the DEQ noise rules..... “

On page 194 the ALJ added:

“Furthermore, as set out in the findings, when the DEQ suspended its responsibilities on noise control matters, the agency specifically contemplated that local governments and in some cases, other agencies, would take over enforcement. The DEQ also recognized that the Department and the Council would continue to review site certificate applications to ensure that proposed facilities meet the State noise requirements. .....

It does authorize the Department and the Council granting exceptions or variances as long as they meet state requirements! The paragraph continues:

“...Considering that the DEQ has lacked the ability to process requests for exceptions and variances to the noise standards for the last 30 plus years, it would be absurd to conclude that the Council lacks the authority to make findings and rule on an applicant’s request for a variance and/or exception under **ORS 467.060, OAR 340-035-0010 and OAR 340-035-0100.209.**” (Emphasis added.)

There is nowhere in these three ordinances or statutes (in the previous paragraph), that give the department or the council the ability to grant these variances or exceptions. The ordinances the ALJ referenced are as follows:

**Under ORS 467.060 reads:**

(1) The Environmental Quality Commission by order may grant specific variances from the particular requirements of any rule or standard to such specific persons or class of persons or such specific noise emission source, upon such conditions as it may **consider necessary to protect the public health, safety and welfare**. . . . The commission shall grant a specific variance only if it finds that strict compliance with the rule or standard is inappropriate because:

(1)(d) reads: **No other alternative facility or method of operating is yet available.**

There are other alternatives and methods available... One real good alternative, and the only route that should ever have been proposed, is using the route that the BLM initially approved across government property as opposed to the later inserted routes that is privately owned (See direct testimony McAllister). Other methods include modifying the existing power line, putting the line underground in key places, and there are other methods as well. (See STOP B2H direct testimony, Exhibit #4.)

**OAR 340-035-0010 reads:**

(2) In establishing exceptions, the Department shall consider the protection of **health, safety, and welfare of Oregon citizens** as well as the feasibility and cost of noise abatement; **the past, present, and future patterns of land use**; the relative timing of land use changes; and other legal constraints. For those exceptions which it **authorizes the Department shall specify the times during which the noise rules can be exceeded** and the quantity and quality of the noise generated, and when appropriate shall specify the



increments of progress of the noise source toward meeting the noise rules. [emphasis added]

The only times that have been given is “during foul weather”. “During foul weather” is not specific at all! The noise, from these power lines, will be able to be heard very often especially during high humidity, fog, ice, changes in the dew point and as a result of maintenance. (See STOP B2H direct testimony, Exhibit #5.)

### **Rule 340-035-0100**

#### Variances

(1) Conditions for Granting. The Commission may grant specific variances from the particular requirements of any rule, regulation, or order to such specific persons or class of persons or such specific noise source **upon such conditions as it may deem necessary to protect the public health and welfare. [emphasis added]**

The requested variances would do the opposite, it would harm the public health and welfare. The people of IPC do not have to live or listen to the noise, so it is not protecting their health and welfare. Variances are most certainly only to our disadvantage. How is a variance in this situation deemed necessary to protect the public health and welfare?

Again, there is nowhere in these three ordinances or statutes that give the department or the council the ability to grant these variances or exceptions.

Mr. Horst does not believe the ALJ either read these statutes or simply is following guidance by the and the department.

It would be absurd to think that the EQC or the DEQ would allow exceptions or variances to exceeded noise standards. Would exceptions or variances be allowed for excessive water or air pollution? Especially when it is unclear what or when the exceeded amount will be.

ORS 467.010 recognizes noise pollution equal to air and water pollution.

**Oregon statute ORS 467.010 says** “The Legislative Assembly finds that the increasing incidence of noise emissions in this state at unreasonable levels is as much a threat to the environmental quality of life in this state and the health, safety and welfare of the people of this state as is pollution of the air and waters of this state.”

### **Conclusion:**

Mr. Horst feels that the proposed Mill Creek route will have significant impacts to the health and welfare of Mr. Horst and Anna Cavinato as well as three other residents that live on the upper portion of Hawthorne Dr. The City of La Grande has also expressed concerns about the impacts this route would have on the residents of La Grande.

According to the laws and statutes of Oregon, specifically the 3 the ALJ referenced, while the department and/or the council may some ability to give exceptions or variances, exceptions or variances do not apply here legally.

Mr. Horst, as well as many other people, have spent a lot of hours, time, and money trying to get some kind of compromise from Idaho power and the department. For the most part, all of this time has been wasted time as the ALJ has ruled against almost every contested case issue, and ruled in favor of IPC and the department (who is supposed to be working for the citizens of Oregon),

Mr. Horst owns a very busy auto repair business; the time Mr. Horst has spent, just simply trying to get some resolve on important issues the B2H project will create, hundreds of hours. This has literally cost Mr. Horst thousands of dollars. The final rulings by the ALJ are very disappointing and discouraging to what should be a fair judicial system.

The biased in the ALJ's rulings are overwhelming, It has become very clear the ALJ is biased and is clearly under the guidance of the department. This should not ever happen under any circumstances. The ALJ's rulings have been very consistent with the department's testimony, motions to dismiss, and basically any of their ideals.

IPC could have prevented many of these contested case issues if they would have just tried to work with landowners.

The EFSC should remove, at a minimum, the Mill Creek route and should strongly consider removing the Morgan Lake route as well. There would be far less impact to Oregon citizens as well as the Oregon Trail if the recommended BLM route was used.

The EFSC should also deny any exceptions or variances in accordance with Oregon Law. The BLM preferred route would also minimize the need for these exceptions or variances.

Mr. Horst has asked this question many times and never received an answer...

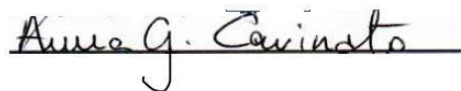
**Why is the Oregon Department of Energy using their resources (that I am sure are paid by citizens of Oregon and not by the citizens of Idaho) working for Idaho Power Company as opposed to the citizens of Oregon?**

Sincerely,

Joe Horst,



Anna Cavinato



**CERTIFICATE OF MAILING**

On June 30, 2022, I certify that I filed the foregoing EXCEPTIONS TO THE PROPOSED CONTESTED CASE ORDER with the Hearings Coordinator via electronic mail, and with each party entitled to service, as noted below.



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**BEFORE THE ENERGY FACILITY SITING COUNCIL  
OF THE STATE OF OREGON**

In the Matter of the Application for Site  
Certificate for the

BOARDMAN TO HEMINGWAY  
TRANSMISSION LINE

APPLICANT IDAHO POWER  
COMPANY'S RESPONSE TO LIMITED  
PARTIES' EXCEPTIONS FOR  
CONTESTED CASE ISSUE PS-4 AND  
PS-6

OAH Case No. 2019-ABC-02833

**July 14, 2022**



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1 **I. INTRODUCTION**

2 Pursuant to OAR 345-015-0085(6) and the May 31, 2022 Proposed Contested Case Order,  
3 Applicant Idaho Power Company (“Idaho Power” or the “Company”) submits its Response to  
4 Limited Parties’ Exceptions for Issues PS-4 and PS-6.

5 **II. STANDARD OF LAW**

6 In a contested case before the Energy Facility Siting Council (“EFSC” or the “Council”),  
7 the applicant bears the burden of proof to establish by a “preponderance of the evidence”<sup>1</sup> that the  
8 proposed facility complies with the Council’s statutes, ORS 469.300 to 469.570, and that the  
9 Application for Site Certificate (“ASC”) and proposed site conditions—as modified in the Oregon  
10 Department of Energy’s (“ODOE”) Proposed Order—satisfy each of the Council’s siting  
11 standards.<sup>2</sup> Proof by a preponderance of the evidence means that the fact finder is persuaded that  
12 the facts asserted are more likely than not true.<sup>3</sup> Furthermore, the applicant must demonstrate by  
13 a preponderance of evidence that the facility complies with all other statutes, administrative rules,  
14 and local government ordinances “identified in the project order, as amended, as applicable to the  
15 issuance of a site certificate for the proposed facility.”<sup>4</sup>

16 Parties or limited parties “with specific challenges to findings, conclusions and/or  
17 recommended site certificate conditions in [ODOE’s] Proposed Order bear the burden” of  
18 producing evidence in support of the facts or positions they have asserted, and the burden of

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<sup>1</sup> OAR 345-021-0100(2) (“The applicant has the burden of proving, by a preponderance of the evidence in the decision record, that the facility complies with all applicable statutes, administrative rules and applicable local government ordinances.”); *see also* ORS 183.450(2) (“The burden of presenting evidence to support a fact or position in a contested case rests on the proponent of the fact or position.”).

<sup>2</sup> OAR 345-022-0000(1)(a).

<sup>3</sup> *Riley Hill General Contractor v. Tandy Corp.*, 303 Or 390, 402 (1987).

<sup>4</sup> OAR 345-021-0100(2); OAR 345-022-0000(1)(b).

1 convincing the trier of fact that their alleged facts are true or their position on the identified issue  
2 is correct.<sup>5</sup> In particular, the parties or limited parties must establish how the applicant failed to  
3 satisfy EFSC’s siting standards and/or how ODOE “erred in its findings, conclusions and/or  
4 recommended site certificate conditions.”<sup>6</sup> To meet this burden of proof, parties or limited parties  
5 challenging the Proposed Order must provide factual testimony or evidence to substantiate their  
6 asserted claims;<sup>7</sup> unsubstantiated factual arguments or legal conclusions are insufficient to  
7 demonstrate the applicant’s failure to establish compliance with any applicable standard.<sup>8</sup>

8 After the hearing and briefing phases of a contested case, the Hearing Officer must issue a  
9 Proposed Contested Case Order stating the Hearing Officer’s findings of fact and conclusions of  
10 law.<sup>9</sup> Parties and limited parties may then file any exceptions to the Proposed Contested Case  
11 Order for the Council’s consideration.<sup>10</sup> If the parties or limited parties file exceptions, the parties  
12 or limited parties must identify for each exception the finding of fact, conclusion of law, or  
13 recommended site certificate condition to which the parties or limited parties except and must state  
14 the basis for their exception.<sup>11</sup>

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<sup>5</sup> Order on Case Management Matters and Contested Case Schedule at 11 (Jan. 14, 2021) (emphasis in original) [hereinafter, “First Order on Case Management”]; Second Order on Case Management Matters and Contested Case Schedule at 7 (Aug. 31, 2021) (emphasis in original) [hereinafter, “Second Order on Case Management”]; *see also* ORS 183.450(2) (the burden of presenting evidence to support a fact or position in a contested case rests on the proponent of the fact or position); *see also* Ruling on Idaho Power Company’s Motion to Dismiss Issues FW-5, HCA-6, LU-4, LU-7, LU-8, PS-1, PS-5, SS-1, and SS-2 at 3 (Nov. 2, 2021).

<sup>6</sup> First Order on Case Management at 11; Second Order on Case Management at 7.

<sup>7</sup> First Order on Case Management at 11; Second Order on Case Management at 7.

<sup>8</sup> First Order on Case Management at 11; Second Order on Case Management at 7. Idaho Power has no obligation to disprove unsubstantiated claims and allegations raised by the limited parties. *See* Ruling on Idaho Power Company’s Motion to Dismiss Issues FW-5, HCA-6, LU-4, LU-7, LU-8, PS-1, PS-5, SS-1, and SS-2 at 3.

<sup>9</sup> OAR 345-015-0085(4).

<sup>10</sup> OAR 345-015-0085(5).

<sup>11</sup> OAR 345-015-0085(5).

1 **III. RESPONSE TO EXCEPTIONS**

2 **A. Issue PS-4**

3 The Hearing Officer granted limited party status to Matthew Cooper and John Winters to  
4 raise PS-4, which asks:

5 *Whether Applicant adequately analyzed the risk of wildfire arising out of operation*  
6 *of the proposed facility and the ability of local firefighting service providers to*  
7 *respond to fires.*<sup>12</sup>

8 In the Proposed Contested Case Order, the Hearing Officer concluded that:

9 In summary, a preponderance of the evidence establishes that Idaho Power adequately  
10 analyzed both the risk of wildfire arising out of operation of the proposed facility and  
11 the ability of local firefighting service providers to respond to fires in or near the project  
12 area. Mr. Cooper has not demonstrated otherwise.<sup>13</sup>

13 Only Matthew Cooper filed an exception on this issue. For the reasons discussed below, Idaho  
14 Power requests that the Council adopt without modification the Hearing Officer’s findings of fact  
15 and conclusions of law relevant to PS-4.

16 Mr. Cooper’s exception argues that the Hearing Officer erred by “*not* including the  
17 Department’s recommended amendment to Recommended Public Services Condition 6 regarding  
18 accuracy of response times presented in the ASC Exhibit U, Table U-10.”<sup>14</sup> However, the Hearing  
19 Officer *did in fact* include a Second Amended Recommended Public Services Condition 6, which  
20 specifically provides that the plan finalization process for the Fire Prevention and Suppression  
21 Plan shall consider (among other things) the precise information Mr. Cooper asserts should be  
22 included:

23 [U]pdate Table PS-9 of the Proposed Order based on information obtained from the  
24 [La Grande Rural Fire Protection District (“LGRFPD”)] on the number of full-time

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<sup>12</sup> Second Order on Case Management at 5.  
<sup>13</sup> Proposed Contested Case Order at 225.  
<sup>14</sup> Matthew Cooper Exception for PS-4 at 1 (June 30, 2022).

1 and volunteer employees, number and type of equipment/vehicles, and response times  
2 to the facility. Response time must consider LGRFPD crew mobilization time and  
3 access limitations (e.g., road condition, level of service and impact of multi-users from  
4 Morgan Lake Park, residents and emergency services).<sup>15</sup>

5 Additionally, Mr. Cooper asserts that the response times of “4 to 8 minutes” included in the ASC,  
6 Exhibit U are patently absurd.<sup>16</sup> Because Idaho Power will update the response times per the  
7 Second Amended Recommended Public Services Condition 6, this point is entirely moot.  
8 However, to ensure that the record is correct on that issue, Idaho Power would further note that  
9 the record in this case demonstrates that the estimated response times were reasonable at the time  
10 they were provided for the response location in question. Idaho Power addressed this issue in the  
11 Sur-Sur-Rebuttal Testimony of Douglas J. Dockter and fully addressed this issue in its Response  
12 Brief. For the reader’s convenience, Idaho Power’s discussion of this issue is set forth below.

13 As the Company explained in its Response Brief, Mr. Cooper primarily focused his  
14 evidence and testimony on the response time necessary for the LGRFPD to reach the Project site,  
15 which is estimated in the ASC to take four to eight minutes.<sup>17</sup> Mr. Cooper argues that, based on  
16 estimates from the deposition of LGRFPD Fire Chief Craig Kretschmer, it would actually take  
17 LGRFPD 17 to 23 minutes to reach the Morgan Lake area.<sup>18</sup> However, as Idaho Power explained,  
18 the four-to-eight-minute estimated response time in the ASC was not to reach Morgan Lake,  
19 because the LGRFPD’s jurisdiction did not extend into the Morgan Lake area at the time that Idaho  
20 Power prepared the ASC.<sup>19</sup> As demonstrated in the record, Mr. Cooper has been aware of this fact

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<sup>15</sup> Proposed Contested Case Order at 302.

<sup>16</sup> Matthew Cooper Exception for PS-4 at 2.

<sup>17</sup> Idaho Power’s Closing Arguments for Contested Case Issues PS-2, PS-3, PS-4, PS-5, PS-8, PS-9, and PS-10 at 30.

<sup>18</sup> Closing Brief of Matthew J. Cooper on Issue PS-4 at 15-16 (Feb. 28, 2022).

<sup>19</sup> Idaho Power’s Closing Arguments for Contested Case Issues PS-2, PS-3, PS-4, PS-5, PS-8, PS-9, and PS-10 at 30-31.

1 since at least January 2021,<sup>20</sup> yet he continues to insist that the estimate in the ASC was inaccurate  
2 despite being aware of the fact that the estimate was accurate at the time it was provided.<sup>21</sup>

3 Moreover, the fact that it may take the LGRPD more than eight minutes to reach the  
4 Morgan Lake area does not support Mr. Cooper’s position that Idaho Power failed to analyze the  
5 response capabilities of fire response organizations, because the LGRFPD has mutual aid  
6 agreements with both the City of La Grande Fire Department and the Oregon Department of  
7 Forestry,<sup>22</sup> and both of those agencies would likely reach the Morgan Lake area more quickly than  
8 the LGRFPD.<sup>23</sup> In any event, Mr. Dockter testified in his live Sur-Sur-Rebuttal Testimony that a  
9 more accurate range of response times for the LGRFPD to the top of Morgan Lake Road could be  
10 anywhere between 12 and 23 minutes, which would depend in part on the time needed to muster  
11 a crew.<sup>24</sup>

12 Mr. Cooper’s exception does not identify any incorrect finding of fact or conclusion of law,  
13 and for that reason Idaho Power requests that the Council adopt without modification the Hearing  
14 Officer’s findings of fact and conclusions of law in the Proposed Contested Case Order relevant  
15 to PS-4.

16 **B. Issue PS-6**

17 Dale and Virginia Mammen, and Joe Horst and Anna Cavinato, were granted limited party  
18 status for PS-6, which asks whether Idaho Power “adequately evaluated the potential traffic

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<sup>20</sup> Idaho Power / Sur-sur-rebuttal of Douglas J. Dockter / Issue PS-4 / Exhibit A, Matt Cooper Response to Idaho Power Discovery Request No. 3, Attachment 16, Email Thread from Jim Kreider, p. 4 of 4 (filed Jan. 5, 2022).

<sup>21</sup> Closing Brief of Matthew J. Cooper on Issue PS-4 at 15-16 (Feb. 28, 2022).

<sup>22</sup> Idaho Power’s Closing Arguments for Contested Case Issues PS-2, PS-3, PS-4, PS-5, PS-8, PS-9, and PS-10 at 31-32.

<sup>23</sup> Idaho Power / Sur-sur-rebuttal of Douglas J. Dockter / Issue PS-4 / Exhibit C, Map of La Grande Area Fire Response Agencies (filed Jan. 10, 2022).

<sup>24</sup> Dockter Testimony, Cross-Examination Hearing Day 3, January 13, 2022 (Tr. Day 3), page 15, lines 10-17.

1 impacts and modifications needed on Hawthorne Drive and Modelaire Drive (Hawthorne  
2 Loop)[,]” which are located in Union County, in and just outside of the City of La Grande.<sup>25</sup>

3 In the Proposed Contested Case Order, the Hearing Officer concluded that:

4 [T]he preponderance of the evidence establishes that Idaho Power adequately  
5 evaluated the potential traffic impacts and modifications needed on the Hawthorne  
6 Loop as well as the unpaved, private-access portion of Hawthorne Drive.<sup>26</sup>  
7

8 Only Mr. Horst and Ms. Cavinato filed exceptions on this issue. For the reasons discussed below,  
9 Idaho Power requests that the Council adopt without modification the Hearing Officer’s findings  
10 of fact and conclusions of law relevant to PS-6.

11 In their pleading, Mr. Horst and Ms. Cavinato make two arguments against the Hearing  
12 Officer’s conclusions in the Proposed Contested Case Order. In the first argument, Mr. Horst and  
13 Ms. Cavinato argue that in concluding that traffic safety measures will be fully vetted by ODOE,  
14 in consultation with Union County and the City of La Grande, the Hearing Officer improperly  
15 failed to consider the City of La Grande’s opposition to the Mill Creek Route.<sup>27</sup> In the second  
16 argument, Mr. Horst and Ms. Cavinato point to their denial of Idaho Power’s assertion that the  
17 Company was not allowed access to their property to study the private access portion of Hawthorne  
18 Drive, and claim that the Hearing Officer erred in concluding that their denial should be given no  
19 weight as there was no evidence in the record to support it.<sup>28</sup> As an initial matter, both of these  
20 arguments raised in Mr. Horst’s and Ms. Cavinato’s Exception were addressed in the contested

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<sup>25</sup> Second Order on Case Management at 5.

<sup>26</sup> Proposed Contested Case Order at 215.

<sup>27</sup> Petitioners Joe Horst and Anna Cavinato’s Exceptions to Administrative Law Judge Webster’s Rulings: Proposed Contested Case Order, Motion for Summary Determination, Procedural Rulings; Issues NC-2 and PS-6 at 1-2 (June 30, 2022) [hereinafter, “Horst/Cavinato Exceptions”]; *see also* Proposed Contested Case Order at 214.

<sup>28</sup> Horst/Cavinato Exceptions at 2; *see also* Proposed Contested Case Order at 217.

1 case and were fully litigated.<sup>29</sup> For the reasons discussed in Idaho Power’s briefing as well as  
2 below, Mr. Horst and Ms. Cavinato have failed to provide persuasive evidence that Idaho Power  
3 failed to adequately evaluate the potential traffic impacts and modifications needed on Hawthorne  
4 Drive and Modelaire Drive (Hawthorne Loop).

5 **1. Horst/Cavinato, Exception 1, PS-6**

6 Mr. Horst and Ms. Cavinato argue that the Proposed Contested Case Order is in error  
7 because, in concluding that traffic safety measures will be fully vetted by ODOE in consultation  
8 with Union County and the City of La Grande, the Hearing Officer failed to consider the City of  
9 La Grande’s opposition to the Mill Creek Route.<sup>30</sup> Mr. Horst and Ms. Cavinato specifically argue  
10 that the Hearing Officer failed to address the fact that the City of La Grande opposed the Mill  
11 Creek Route because of the condition of the streets in the La Grande area (e.g., Hawthorne Drive  
12 and Modelaire Drive) and due to potential geologic hazards, and ODOE and Idaho Power should  
13 have followed the recommendations of the City of La Grande and removed the Mill Creek Route  
14 from the ASC.<sup>31</sup> This argument is not persuasive for several reasons.

15 *a. Condition of Hawthorne Drive and Modelaire Drive*

16 First, with respect to the conditions of roads in the La Grande area, Mr. Horst and  
17 Ms. Cavinato maintained in their Closing Argument that the entirety of Hawthorne Drive and  
18 Modelaire Drive will need substantial modifications before they can be utilized as access roads.<sup>32</sup>

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<sup>29</sup> Applicant Idaho Power Company’s Motion to Strike Portions of the Response Briefs Filed by Irene Gilbert, Susan Geer, Joe Horst and Anna Cavinato, Charles Lyons, Lois Barry, Michael McAllister, Peter Barry, Gail Carbiener, The STOP B2H Coalition, and Suzanne Fouty at 10-11 (Apr. 6, 2022); Idaho Power’s Response Brief and Motion to Strike for Contested Case Issues PS-1 and PS-6 at 10-27 (Mar. 30, 2022); Idaho Power’s Closing Arguments for Contested Case Issues PS-1 and PS-6 at 28-35 (Feb. 28, 2022).

<sup>30</sup> Horst/Cavinato Exceptions at 1-2.

<sup>31</sup> Horst/Cavinato Exceptions at 1-2.

<sup>32</sup> Closing Argument of Joe Horst and Anna Cavinato on Issues PS-6, SS-3, HCA-4, and NC-2 at 6.



1 Specifically, Mr. Horst and Ms. Cavinato claimed that the width of Hawthorne Drive is as narrow  
2 as 14 feet, and therefore does not meet Idaho Power’s minimum requirements listed in the ASC.<sup>33</sup>  
3 Furthermore, Mr. Horst and Ms. Cavinato argued that the private access portion of Hawthorne  
4 Drive would have to be significantly modified to account for the steep grade of the road.<sup>34</sup> Finally,  
5 Mr. Horst and Ms. Cavinato claimed that passage of construction vehicles along Hawthorne Drive  
6 and Modelaire Drive would endanger pedestrians and animals.<sup>35</sup>

7 In response to these claims, Idaho Power provided expert testimony by Luke Grebe, Senior  
8 Transportation Engineer of HDR, Inc.,<sup>36</sup> who concluded that it is very unlikely that substantial  
9 road modifications will be necessary because the curves and steeper sections of Hawthorne Drive  
10 are in fact within typical construction vehicle parameters.<sup>37</sup> As explained in Idaho Power’s  
11 Transportation and Traffic Plan, provided in Attachment U-2 (the “Traffic Plan”), the minimum  
12 requirement for an access road width is 14 feet for the travel way, with a 16- to 20-foot-wide road  
13 surface for turns.<sup>38</sup> With regard to maximum grade, industry guidance ranges between 18 and 30  
14 percent based on the surfacing and length of the road.<sup>39</sup> As noted in Exhibit B to Mr. Grebe’s  
15 Rebuttal Testimony (“Mr. Grebe’s Access Road Field Report”), Hawthorne Drive, including the  
16 private access portion, is typically 15 to 23 feet wide.<sup>40</sup> Horizontal curves appear to range from a

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<sup>33</sup> Closing Argument of Joe Horst and Anna Cavinato on Issues PS-6, SS-3, HCA-4, and NC-2 at 6.

<sup>34</sup> Closing Argument of Joe Horst and Anna Cavinato on Issues PS-6, SS-3, HCA-4, and NC-2 at 5.

<sup>35</sup> Closing Argument of Joe Horst and Anna Cavinato on Issues PS-6, SS-3, HCA-4, and NC-2 at 4-5.

<sup>36</sup> Idaho Power / Rebuttal Testimony of Luke Grebe / Issue PS-6 / Exhibit A, Curriculum Vitae of Luke Grebe.

<sup>37</sup> Idaho Power / Rebuttal Testimony of Luke Grebe (Nov. 11, 2021) / Issue PS-6, pp. 39-41 of 43.

<sup>38</sup> ASC, Exhibit U, Attachment U-2 at 25 (ODOE - B2HAPPDoc3-38 ASC 21\_Exhibit U\_PublicServices\_ASC 2018-09-28. Page 116 of 143).

<sup>39</sup> Idaho Power / Rebuttal Testimony of Luke Grebe / Issue PS-6 / Exhibit D, BPA, Transmission Line Access Road Geometrics Design STD-DT-000101, p. 3 of 5; Idaho Power / Rebuttal Testimony of Luke Grebe / Issue PS-6 / Exhibit E, PAC, TA 501 Roads – Construction, p. 8 of 10.

<sup>40</sup> Idaho Power / Rebuttal Testimony of Luke Grebe / Issue PS-6 / Exhibit B, Luke Grebe, Access Road Field Review, p. 8 of 9.

1 60 to 75 feet radius, and grades are approximately 15-17 percent when measured on Google  
2 Earth.<sup>41</sup> These metrics all fall within the minimum access road requirements stated in Idaho  
3 Power’s application.<sup>42</sup>

4 Similarly, Mr. Grebe visited Modelaire Drive and determined that the road met the  
5 minimum access road requirements stated in Idaho Power’s Traffic Plan. The road is paved,  
6 approximately 30 feet wide, and owned and maintained by the City of La Grande.<sup>43</sup> Modelaire  
7 Drive follows a gradual circular loop through the hillside neighborhood with grades approaching  
8 15 percent.<sup>44</sup> Based on these findings, Mr. Grebe determined that the road alignment, width, and  
9 grade of Modelaire Drive meet the minimum access road requirements necessary to support  
10 construction traffic as discussed in Idaho Power’s Traffic Plan, and therefore modifications for  
11 Modelaire Drive are unnecessary.<sup>45</sup> Mr. Grebe noted, however, that the intersections of Modelaire  
12 Drive and/F Avenue and F Avenue and/Sunset Drive are separated by approximately 150 feet of  
13 road;<sup>46</sup> therefore, the close nature of these intersections could require flaggers or pilot vehicles to  
14 maneuver long vehicles through the intersections in accordance with the Traffic Plan.<sup>47</sup>

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<sup>41</sup> Idaho Power / Rebuttal Testimony of Luke Grebe / Issue PS-6 / Exhibit B, Luke Grebe, Access Road Field Review, pp. 7-8 of 9.

<sup>42</sup> Idaho Power / Rebuttal Testimony of Luke Grebe / Issue PS-6 / Exhibit B, Luke Grebe, Access Road Field Review, p. 8 of 9.

<sup>43</sup> Idaho Power / Rebuttal Testimony of Luke Grebe / Issue PS-6, p. 25 of 43.

<sup>44</sup> Idaho Power / Rebuttal Testimony of Luke Grebe / Issue PS-6, p. 25 of 43.

<sup>45</sup> Idaho Power / Rebuttal Testimony of Luke Grebe / Issue PS-6, p. 25 of 43.

<sup>46</sup> Idaho Power / Rebuttal Testimony of Luke Grebe / Issue PS-6, p. 26 of 43; Idaho Power / Rebuttal Testimony of Luke Grebe / Issue PS-6 / Exhibit B, Luke Grebe, Access Road Field Review, p. 6 of 9.

<sup>47</sup> Idaho Power / Rebuttal Testimony of Luke Grebe / Issue PS-6, p. 26 of 43; Idaho Power / Rebuttal Testimony of Luke Grebe / Issue PS-6 / Exhibit B, Luke Grebe, Access Road Field Review, p. 6 of 9.

1           Finally, even if Idaho Power were to later determine that the width, grade, or other  
2 conditions<sup>48</sup> of Hawthorne Drive or Modelaire Drive could not accommodate the movement of  
3 typical construction vehicles, the Company could and would likely avoid narrow road conditions  
4 and possible traffic congestion issues by airlifting materials and equipment by helicopter.<sup>49</sup> And  
5 even if Idaho Power did decide to substantially modify and use the private access portion of  
6 Hawthorne Drive or Modelaire Drive, Idaho Power's Traffic Plan would ensure safe passage for  
7 pedestrians and animals by implementing certain protective measures, such as coordinating with  
8 nearby property owners to implement one-way traffic for short intervals of time (approximately  
9 half an hour) or using flaggers and pilot spotter vehicles.<sup>50</sup> Such measures would also address the  
10 concerns of these limited parties regarding potential issues with slope stability, loose boulders, and  
11 landslides.<sup>51</sup> Based on the preponderance of the evidence, Mr. Horst and Ms. Cavinato have not  
12 demonstrated that the private access portion of Hawthorne Drive or Modelaire Drive require  
13 substantial modifications under Idaho Power's access road parameters or that the Company's  
14 proposed safety measures are inadequate.

15           For all of these reasons, even though the Company conservatively included the private  
16 access portion of Hawthorne Drive within its site boundary to allow for substantial modifications,

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<sup>48</sup> In support of their argument that the private access portion of Hawthorne Drive will require substantial modifications, Mr. Horst and Ms. Cavinato also note that the gravel road suffers from an uncovered gas pipe as well as low overhead power lines. Closing Argument of Joe Horst and Anna Cavinato on Issues PS-6, SS-3, HCA-4, and NC-2 at 6. Regarding the uncovered gas pipe, movement of gravel and re-surfacing to cover the pipe would likely not constitute substantial modifications. Idaho Power / Rebuttal Testimony of Luke Grebe / Issue PS-6 / pp. 23-24 of 43. Similarly, Mr. Grebe has already noted the potential need to raise power and/or telephone lines along Hawthorne Drive in his Access Road Field Report, but these actions do not constitute substantial modifications. Idaho Power / Rebuttal Testimony of Luke Grebe / Issue PS-6 / Exhibit B, Luke Grebe, Access Road Field Review, p. 8 of 9; *see also* Idaho Power / Rebuttal Testimony of Luke Grebe / Issue PS-6 / pp. 23-24 of 43.

<sup>49</sup> Idaho Power / Rebuttal Testimony of Luke Grebe / Issue PS-6, pp. 40-41 of 43.

<sup>50</sup> Idaho Power / Rebuttal Testimony of Luke Grebe / Issue PS-6, pp. 40-41 of 43.

<sup>51</sup> Closing Brief of Dale and Virginia Mammen on Issue PS-6 Traffic Safety at 7-8; Closing Argument of Joe Horst and Anna Cavinato on Issues PS-6, SS-3, HCA-4, and NC-2 at 4, 5.

1 if necessary, Idaho Power has demonstrated by a preponderance of the evidence that the need for  
2 substantial modifications for the entirety of Hawthorne Drive is highly unlikely. Furthermore, the  
3 Company’s measurements of Modelaire Drive are also within the safety parameters of the Traffic  
4 Plan and substantial modification to the road is likely unnecessary. Finally, even if Idaho Power  
5 later determines that substantial modifications are necessary to the access roads, the Company’s  
6 Traffic Plan would ensure safe passage for pedestrians and animals by implementing protective  
7 measures, as discussed above. Mr. Horst and Ms. Cavinato have not provided persuasive evidence  
8 to demonstrate otherwise.

9 *b. Opinion of the City of La Grande*

10 Mr. Horst and Ms. Cavinato argue that the Hearing Officer erred in not considering the  
11 City of La Grande’s opposition to Idaho Power’s inclusion of the Mill Creek Route in the  
12 Company’s application.<sup>52</sup> Specifically, they claim that the City of La Grande’s opinion on this  
13 matter holds “a lot of weight” and ask why the Hearing Officer did not respond to this opinion at  
14 all.<sup>53</sup> This concern is without basis.

15 First, contrary to these limited parties’ arguments, the Hearing Officer explicitly considered  
16 the La Grande City Council’s opposition to the Mill Creek Route. However, the Hearing Officer  
17 correctly found that Mr. Horst’s and Ms. Cavinato’s arguments relying on the City of La Grande’s  
18 opinion fell outside the scope of Issue PS-6—which was limited to whether Idaho Power  
19 adequately evaluated the potential traffic impacts and modifications needed on Hawthorne Drive

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<sup>52</sup> Horst/Cavinato Exceptions at 1-2.

<sup>53</sup> Horst/Cavinato Exceptions at 1-2.

1 and Modelaire Drive.<sup>54</sup> In other words, the Hearing Officer explicitly found that the City of  
2 La Grande’s opinion on the Mill Creek Route simply is not relevant to resolution of the issue raised  
3 in PS-6. Furthermore, the Hearing Officer correctly noted that Idaho Power’s route selection was  
4 outside the Council’s jurisdiction,<sup>55</sup> and therefore it could not consider the appropriateness of  
5 Idaho Power’s selection of the Mill Creek Route versus the Morgan Lake Alternative.<sup>56</sup>

6 In their Closing Arguments, Mr. Horst and Ms. Cavinato specifically argued that  
7 ORS 757.667 mandates that the City of La Grande has the final authority to approve Idaho Power’s  
8 access control plan and that Idaho Power failed to provide the City of La Grande and Union County  
9 a sufficiently detailed access control plan and related traffic safety mitigation measures prior to  
10 site certification.<sup>57</sup> ORS 757.667 provides that:

11 Nothing in ORS 757.600 to 757.667 shall diminish, or authorize regulations that  
12 diminish, a city’s authority to control the use of its rights of way and to collect  
13 license fees, privilege taxes, rent or other charges for the use of the city’s rights of  
14 way.<sup>58</sup>

15  
16 However, the Hearing Officer correctly found that this argument was in error as it was irrelevant  
17 to resolution of PS-6, and regardless, “[a]fter final route selection and prior to construction of the

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<sup>54</sup> Proposed Contested Case Order at 213 n. 239 (“In his Closing Statement on Issue PS-6, Mr. Horst also challenges Idaho Power’s selection of the Mill Creek Route, arguing that the La Grande City Council strongly opposes this proposed route, that Idaho Power did not sufficiently coordinate and consult with the City regarding this route, and that the Company did not provide sufficient site-specific information in the ASC. Horst Closing Statement at 2-4. These arguments fall outside the scope of Issue PS-6. Further, Idaho Power’s route selection falls outside Council’s jurisdiction.”).

<sup>55</sup> “It is the Council’s responsibility to review, evaluate and issue orders either approving or denying ASCs submitted by an applicant. ***The Council does not have authority to evaluate structures that are not proposed by the applicant.*** An amendment to the site certificate would be required if a certificate holder proposes related and supporting facilities to the energy facility not included in or evaluated in the ASC.” *In re the Application for a Site Certificate for the Wheatridge Wind Energy Facility*, Final Order at 30 (Apr. 28, 2017) (emphasis added).

<sup>56</sup> Proposed Contested Case Order at 213 n. 239.

<sup>57</sup> Closing Argument of Joe Horst and Anna Cavinato on Issues PS-6, SS-3, HCA-4, and NC-2 at 2-4.

<sup>58</sup> Mr. Horst and Ms. Cavinato also cite to ORS 197.050 through ORS 197.195 for the proposition that there “must be coordination between state and local governments or any entity dealing with land use issues.” Closing Argument of Joe Horst and Anna Cavinato on Issues PS-6, SS-3, HCA-4, and NC-2 at 3. However, again, these statutes are unrelated to the EFSC process for this issue.

1 transmission line, these safety measures will be fully vetted by [ODOE], in consultation with  
2 Union County and the City of La Grande where applicable.”<sup>59</sup>

3 Moreover, as Idaho Power explained in its Response Brief, ORS 757.667 is inapplicable  
4 to the EFSC process.<sup>60</sup> This statute is found in the laws relating to the Public Utility Commission  
5 of Oregon’s jurisdiction over utilities and a city’s authority to control the use of its rights-of-way  
6 with respect to utility infrastructure. However, for the purposes of energy facility siting under  
7 ORS 469.300 *et seq.*, EFSC is the “one-stop shop” for energy facility siting permits,<sup>61</sup> and thus  
8 has final decision-making authority over Idaho Power’s preliminary access control plan as it relates  
9 to the issuance of a site certificate, as well as site certificate conditions delegating to ODOE  
10 authority to review and approve follow-up actions for the access control plan and related traffic  
11 safety mitigation measures.<sup>62</sup>

12 That said, as the Hearing Officer correctly found, the recommended site certificate  
13 conditions will ensure that Idaho Power’s final access control and traffic safety plans will not only  
14 meet with ODOE’s approval, but also the approval of relevant county and other local

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<sup>59</sup> Proposed Contested Case Order at 213 n. 239, 214.

<sup>60</sup> Idaho Power’s Response Brief and Motion to Strike for Contested Case Issues PS-1 and PS-6 at 11-16.

<sup>61</sup> ORS 469.300(26) (“‘Site certificate’ means the *binding* agreement between the State of Oregon and the applicant, authorizing the applicant to construct and operate a facility on an approved site, incorporating all conditions imposed by the council on the applicant.”) (emphasis added in parenthetical); OAR 345-021-0000(1) (“Except for facilities that the Council has determined exempt as described in OAR 345-015-0350 to 345-015-0370 or for which a separate site certificate is not required according to ORS 469.320(5), a person may not construct or expand a facility unless the Council has granted a site certificate or an amendment to an existing site certificate.”); *see also, e.g.*, 1985 Or. Op. Att’y Gen. No. OP-5796 (“[W]here an agency is given discretion to issue a permit, license or certificate relating to a project for which a site certificate has been issued, that discretion is preempted by EFSC and such action must be taken in conformity with the site certificate.”).

<sup>62</sup> ORS 469.402 (“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 if, in the council’s discretion, the delegation is warranted under the circumstances of the case.”).

1 jurisdictions—including Union County and the City of La Grande.<sup>63</sup> After final route selection and  
2 prior to construction, the Company will be required to vet access control locations through field  
3 verifications in coordination with landowners, applicable agencies, and local governments.<sup>64</sup> As  
4 part of such coordination, Recommended Land Use Condition 6 requires Idaho Power to obtain  
5 and comply with road approach permits and “work in” county right-of-way permits from Union  
6 County, and to provide copies of such permits to ODOE prior to construction.<sup>65</sup> Furthermore, in  
7 compliance with EFSC’s agency consultation requirement for monitoring and mitigation plans,  
8 OAR 345-026-0016,<sup>66</sup> Recommended Public Services Condition 2 requires Idaho Power to  
9 consult with appropriate counties and local jurisdictions (e.g., Union County and the City of La  
10 Grande) requiring the plans:

11 At least 90 days prior to construction of a facility phase or segment in each affected  
12 county and jurisdiction, unless otherwise approved by the Department, the  
13 certificate holder shall complete the following to address traffic impacts and  
14 transportation coordination in each county and jurisdiction:  
15

- 16 a. The certificate holder shall, in accordance with the OAR 345-026-  
17 0016 agency consultation process outlined in the draft  
18 Transportation and Traffic Plan (Attachment U-2 of the Final Order  
19 on the ASC) submit to the Department a final county-specific  
20 Transportation and Traffic Plan associated with the phase or  
21 segment of the facility to be constructed. The protective measures  
22 described in the draft Transportation and Traffic Plan, Attachment

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<sup>63</sup> Proposed Contested Case Order at 214 (“After final route selection and prior to construction of the transmission line, these safety measures will be fully vetted by [ODOE], in consultation with Union County and the City of La Grande where applicable.”).

<sup>64</sup> Proposed Order, Attachment B-5, Road Classification Guide and Access Control Plan (No Maps) at 10 (July 2, 2020) (ODOE - B2HAPPDoc2 Proposed Order on ASC and Attachments 2019-07-02. Page 8460 of 10016).

<sup>65</sup> Proposed Order, Attachment 1: Draft Site Certificate at 15 (ODOE - B2HAPPDoc2 Proposed Order on ASC and Attachments 2019-07-02. Page 719 of 10016).

<sup>66</sup> OAR 345-026-0016 (“In the site certificate, the Council must include conditions that address monitoring and mitigation to ensure compliance with the standards contained in OAR Chapter 345, Division 22 and Division 24. The site certificate applicant, or for an amendment, the certificate holder, must develop proposed monitoring and mitigation plans in consultation with the Department and, as appropriate, other state agencies, local governments and tribes. Monitoring and mitigation plans are subject to Council approval. The Council must incorporate approved monitoring and mitigation plans in applicable site certificate conditions.”).

1 U-2 to the Final Order on the ASC, shall be included and  
2 implemented as part of the final county-specific Plan, unless  
3 otherwise approved by the Department, in consultation with the  
4 county or jurisdiction;

5 b. The final county-specific Transportation and Traffic Plan submitted  
6 to the Department, county, and jurisdiction shall include:

7 i. The identification of the final material/equipment  
8 transportation, access, and haul routes and documentation of  
9 the existing condition of the routes/roads;

10 ii. Attachment B-5 Road Classification Guide and Access  
11 Control Plan attached to the Final Order on the ASC updated  
12 to reflect the final of the facility. Include applicable road  
13 segment maps with road names for existing public roads,  
14 road names in Appendix A: Access Road Segment Attribute  
15 Table, road improvements designations, and final access  
16 control device description and locations;

17 1. If, at final facility design, substantial modification of  
18 existing roads not identified as related or supporting  
19 facilities in Attachment B-5 (maps) of the Final Order  
20 on the ASC is necessary, the certificate holder must  
21 submit an Amendment Determination Request (OAR  
22 345-027-0357), or submit a site certificate amendment  
23 request to the Department, prior to the modification to  
24 determine whether the road modifications are related  
25 or supporting facilities. Substantial modification of  
26 existing roads shall be as defined in Attachment B-5,  
27 which includes repairs to more than 20 percent of road  
28 surface, defined by the road prism width and  
29 longitudinal distance over a defined road segment.

30 iii. List any road use permits, encroachment permits,  
31 oversize/overweight permits, or road use or other legal  
32 agreements obtained by the construction contractor or  
33 applicant.



1 c. The final Transportation and Traffic Plan for a phase or segment of  
2 the facility must be approved by the Department, in consultation  
3 with each county or jurisdiction, prior to construction.<sup>67</sup>

4 Given these requirements, the Council may be assured that Idaho Power’s final access control and  
5 traffic safety plans will meet the approval of Union County and the City of La Grande.<sup>68</sup>

6 Moreover, approval of Idaho Power’s phased approach for such plans, which is dictated by  
7 Recommended Land Use Condition 6 and Public Services Condition 2, is within the Council’s  
8 authority per ORS 469.402, which states:

9 If the Energy Facility Siting Council elects to impose conditions on a site certificate  
10 . . . that require subsequent review and approval of a future action, the council may  
11 delegate the future review and approval to the State Department of Energy if, in the  
12 council’s discretion, the delegation is warranted under the circumstances of the  
13 case.<sup>69</sup>

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<sup>67</sup> Proposed Order, Attachment 1: Draft Site Certificate at 35-36 (ODOE - B2HAPPDoc2 Proposed Order on ASC and Attachments 2019-07-02. Page 739-740 of 10016). Note that Mr. Horst references draft Land Use Condition 9 as evidence that Idaho Power has not provided a sufficiently detailed access control plan or traffic safety plan. Closing Argument of Joe Horst and Anna Cavinato on Issues PS-6, SS-3, HCA-4, and NC-2 at 4 (referencing ASC, Exhibit K at K-366 (ODOE - B2HAPPDoc3-19 ASC 11\_Exhibit K\_Land Use\_ASC 2018-09-28. Page 375 of 614)). This condition has been transformed into Public Services Condition 2.

<sup>68</sup> Critically, neither the City of La Grande nor Union County have raised concerns about the Mill Creek Route, the Morgan Lake Alternative, the Road Classification Guide and Access Control Plan (Attachment B-5), or the Traffic Plan in this case. Proposed Order, Transportation and Traffic Plan (ODOE - B2HAPPDoc2 Proposed Order on ASC and Attachments 2019-07-02. Page 9725 of 10016). Indeed, given the City of La Grande’s preference for the Morgan Lake Alternative, as discussed by Mr. Horst and Ms. Cavinato in their Closing Argument and Exception, as well as other considerations, Idaho Power has focused its efforts toward permitting the Morgan Lake Alternative as opposed to Mill Creek Route. Idaho Power/ Rebuttal Testimony of Joseph Stippel (Nov. 12, 2021)/ Issues NC-1 and NC-2/ pp. 8-9 of 16. Mr. Horst and Ms. Cavinato, without evidence, further claim that the Mill Creek Route is the preferred route in the La Grande area, but that is incorrect as discussed above. Closing Argument of Joe Horst and Anna Cavinato on Issues PS-6, SS-3, HCA-4, and NC-2 at 6. However, as noted by Joseph Stippel of Idaho Power, the Company has retained the Mill Creek Route in the ASC in the event that the Morgan Lake Alternative is not approved. Idaho Power/ Rebuttal Testimony of Joseph Stippel/Issues NC-1 and NC-2/ p. 10 of 16.

<sup>69</sup> The plain language of ORS 469.402 provides EFSC with clear authority to delegate to ODOE the authority to review and approve follow-up actions following certification, and there is nothing in the Public Services Standard that indicates that the Council intended to limit such authority. *State v. Gaines*, 346 Or 160, 175 (2009) (citing *Portland Gen. Elec. Co. v. Bureau of Labor & Indus.*, 317 Or 606, 611 (1993)) (holding that the court ordinarily “presumes that legislature intended terms to have plain, natural, and ordinary meaning”).

1 In this case, access road improvements and traffic safety measures are dependent on final facility  
2 design. Therefore, the Council can appropriately delegate authority to ODOE to review and  
3 approve final access control and traffic safety plans after site certification.

4 In sum, the preponderance of the evidence demonstrates that Idaho Power has and will  
5 continue to appropriately coordinate with the City of La Grande and Union County regarding  
6 appropriate access locations and traffic safety mitigation measures, including plans for specific  
7 road access improvements, after site certification and final facility design and prior to construction.  
8 Moreover, the preponderance of the evidence demonstrates that Idaho Power has appropriately  
9 considered the City of La Grande’s concerns regarding the Milk Creek Route but may nevertheless  
10 include the Mill Creek Route in the ASC as a viable option as route selection is not under the  
11 purview of the Council.<sup>70</sup>

12 For the above reasons, the Hearing Officer’s conclusion that the City of La Grande’s  
13 opposition to Idaho Power’s inclusion of the Mill Creek Route in the ASC was irrelevant to  
14 determination of PS-6 was correct, and the Council should adopt the Hearing Officer’s findings  
15 and conclusions on these issues without modification.

16 **2. Horst/Cavinato, Exception 2, PS-6**

17 Mr. Horst and Ms. Cavinato further argue that the Hearing Officer was incorrect in  
18 concluding that no weight be given to Mr. Horst’s and Ms. Cavinato’s statement that Idaho  
19 Power’s “assertion they were not allowed access [to their property] to study [the private access

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<sup>70</sup> *In re the Application for a Site Certificate for the Wheatridge Wind Energy Facility*, Final Order at 7, n. 22 (Apr. 28, 2017) (“It is the Council’s responsibility to review, evaluate and issue orders either approving or denying ASCs as put forth by an applicant; the Council does not have authority to propose alternatives[.]”).

1 portion of Hawthorne Drive] for necessary repairs is untrue and unsupported by evidence.”<sup>71</sup>  
2 However, the Hearing Officer’s conclusion was appropriate.

3 First, Idaho Power notes that Mr. Horst’s and Ms. Cavinato’s statement that Idaho Power  
4 failed to seek Mr. Horst’s consent to access his property for the purposes of conducting surveys is  
5 unsupported by evidence in the record and therefore the Hearing Officer correctly concluded that  
6 such statement be given no weight.<sup>72</sup> However, should the Council nevertheless agree to consider  
7 Mr. Horst’s and Ms. Cavinato’s unsubstantiated arguments, Idaho Power wishes to clarify that  
8 Luke Grebe stated the following in his Rebuttal Testimony regarding right-of-entry to the private  
9 access portion of Hawthorne Drive, not to Mr. Horst’s and Ms. Cavinato’s property in particular:

10 The unpaved portion of Hawthorne Drive is privately-owned and there was no  
11 approved right of entry at the time of Idaho Power’s site visit. Accordingly, the  
12 Company was unable to perform site reconnaissance of the private portion of  
13 Hawthorne Drive.<sup>73</sup>

14 It is further worth noting that Mr. Horst and Ms. Cavinato had the opportunity to respond  
15 to this evidence in their own sur-rebuttal testimony by claiming that no one from Idaho Power had  
16 contacted them about right-of-entry to the private access portion of Hawthorne Drive, but they did  
17 not do so. If Mr. Horst and Ms. Cavinato had previously made this argument, Idaho Power would  
18 have had an opportunity to respond with its own evidence, demonstrating that Mr. Horst had  
19 refused right-of-entry. However, the record is now closed, and Idaho Power does not have the  
20 opportunity to provide testimony or evidence on this subject. Accordingly, the Council should

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<sup>71</sup> Horst/Cavinato Exceptions at 2.

<sup>72</sup> Proposed Contested Case Order at 217; *see also* Response Brief of Joe Horst and Anna Cavinato on Issues HCA-4, NC-2, PS-6, and SS-3 at 4 (Mar. 30, 2022) (“IPC, nor anyone else has ever contacted me for access to my property. If Mr. Grebe wanted access to the road on May 19, 2021 to see what improvements would be needed, the many hazards present, ETC, to use the Mill Creek route, I would have certainly had no objections to that. Being denied access to my property has never been mentioned previously in Mr. Grebe’s or IPC’s testimony.”).

<sup>73</sup> Idaho Power/ Rebuttal Testimony of Luke Grebe (Nov. 11, 2021) / Issue PS-6, p. 26 of 43.

1 decline to consider Mr. Horst's and Ms. Cavinato's statement for that reason alone, and should  
2 adopt the Hearing Officer's findings and conclusions on these issues without modification.

3 **IV. CONCLUSION**

4 For the reasons discussed above, Idaho Power respectfully requests that the Council reject  
5 the limited parties' exceptions to the Proposed Contested Case Order regarding PS-6.

DATED: July 14, 2022

**MCDOWELL RACKNER GIBSON PC**



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**CERTIFICATE OF FILING AND SERVICE**

I hereby certify that on July 14, 2022, **APPLICANT IDAHO POWER COMPANY'S RESPONSE TO LIMITED PARTIES' EXCEPTIONS FOR CONTESTED CASE ISSUES PS-4 AND PS-6** was emailed to:

Alison Greene Webster, Senior Administrative Law Judge  
Hearings Officer  
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I further certify that on July 14, 2022, **APPLICANT IDAHO POWER COMPANY'S RESPONSE TO LIMITED PARTIES' EXCEPTIONS FOR CONTESTED CASE ISSUES PS-4 AND PS-6** was served by First Class Mail or electronic mail as indicated below:

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*/s/ Suzanne Prinsen*

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Suzanne Prinsen  
Legal Assistant



**BEFORE THE ENERGY FACILITIES SITING COUNCIL  
for the  
STATE OF OREGON**

IN THE MATTER OF:	)	<b>PETITIONER WILLIAMS'S</b>
	)	<b>EXCEPTION TO</b>
<b>THE APPLICATION FOR SITE</b>	)	<b>ADMINISTRATIVE LAW</b>
<b>CERTIFICATE FOR THE BOARDMAN</b>	)	<b>JUDGE WEBSTER'S</b>
<b>TO HEMINGWAY TRANSMISSION</b>	)	<b>PROPOSED CONTESTED CASE</b>
<b>LINE</b>	)	<b>ORDER RE: ISSUE HCA-7</b>
	)	
<b>OAH Case No. 2019-ABC-02833</b>	)	

Petitioner John Williams now seeks exception from the Administrative Law Judge's ruling in the above-titled matter as it pertains to Archeological Resource Site 6B2H-MC-10, Issue HCA-7. Specifically, Mr. Williams seeks exceptions in the three Conclusions of Law in the ALJ's decision which are excerpted in quotes below, with his argument following each decision. (PCCO pp. 169-170)

1. "First, to the extent that Mr. Williams asserts Idaho Power failed to address archaeological resources on his property other than Site 6B2H-MC-10, these claims fall outside the scope of Issue HCA-7. Issue HCA-7 is limited to the adequacy of Idaho Power's evaluation of Site 6B2H-MC-10."

Mr. Williams has consistently raised issues in his filings in this contested case about the broader issue of archeological resources on his property. He is a prose petitioner and has trusted that the remedy, wherein cultural resources are identified and documented, will prevail. This applies to known Site 6B2H-MC-10, and all sites identified on the property during this process. His evidence has demonstrated that at least three cultural resources sites are present on his property in addition to Site 6B2H-MC-10.

2. “Second, and contrary to Mr. Williams’ contention, Site 6B2H-MC-10 is not listed on the NHRP. In 2021, the Oregon Trail La Grande to Hilgard Segment was listed on the NRHP, but there is no evidence that Site 6B2H-MC-10, a hunting blind, was included in that listing.”

Although site 6B2H-MC-10 is not currently listed in the NRHP, neither has it been evaluated for its eligibility. An unevaluated site is customarily treated as eligible for the NRHP until formally evaluated, a process which will involve further documentation as well as consultation with the appropriate parties to the *Programmatic Agreement (PA) among the Bureau of Land Management, the U.S.D.A. Forest Service, the Bonneville Power Administration, the U.S. Army Corps of Engineers, Bureau of Reclamation, the Advisory Council on Historic Preservation, the Oregon State Historic Preservation Officer, the Idaho State Historic Preservation Officer, the Washington Department of Archaeology and Historic Preservation (SHPO), the Confederated Tribes of the Umatilla Indian Reservation, Tribal Historic Preservation Officer, National Park Service and Idaho Power Company Regarding Compliance with the National Historic Preservation Act for the Construction of the Boardman to Hemingway 500 kV Transmission Line Project (PA)*. This assumption of eligibility applies to all other previously undocumented sites on Mr. Williams’ property as well.

3. “Third, Idaho Power has yet to evaluate Site 6B2H-MC-10 because the site is not located within the Direct Analysis Area. Rather, Site 6B2H-MC-10 is located just south of the Direct Analysis Area’s southern boundary...”

Site 6B2H-MC-10, and the additional undocumented sites, are within the undertaking's indirect Area of Potential Effects (APE), if not the direct effects of APE, for at least one iteration of this project. As Idaho Power's contractor (Tetra Tech) has made clear, the exact locations of the various project components are relocated on a frequent basis. The PA requires Idaho Power to provide the Bureau of Land Management sufficient understanding of each resource to come to a conclusion about how the undertaking will affect those resources. Until that location is finalized, and certainly until the sites are formally documented, it is impossible to understand exactly how the undertaking will affect the characteristics that make each site eligible for inclusion in the NRHP.

For the past two years of this contested case, Mr. Williams has worked to address the protection of cultural resources of which he sees himself as steward in negotiation with Idaho Power Company (IPC), but Mr. Williams retains his standing in this matter. Although IPC and Mr. Williams have agreed in principle to a follow-up cultural survey on his property in the summer of 2022, this does not settle the matter for Mr. Williams. He will remain in this case until he has satisfactory agreements for identifying, evaluating, assessing effects, ensuring the confidentiality of the sites, and, thereby, protecting the HCA resources on his property. As outlined in the PA, IPC is responsible for preparing reports documenting these phases of work on HCAs. The PA details the required contents of a Historic Properties Management Plan (HPMP) which will include cultural resource protection measures, resource-specific mitigation plans, and monitoring plans for historic properties that may be affected by the undertaking,

from construction to operation and maintenance through decommissioning. Mr. Williams anticipates maintaining his position in the case until that document is finalized.

Finally, Mr. Williams wishes to bring the following information to the Energy Facility Siting Counsel's attention:

The Site Condition for mitigating scenic impacts at Morgan Lake Park by lowering tower heights and making them H-framed will mean that there will be more of them. Consequently, the number of access roads will increase and their locations will change. Therefore, Mr. Williams takes exception to the fact that there have been no maps, or adjustments to the site boundary that he is aware of, and no discussion about these changes with him. The site certificate either needs to be denied or suspended until these adjustments – and possible amendments to the Application for Site Certificate – are made, reflecting these new site conditions.

Numerous new access roads may directly or indirectly affect:

- \* Historic, Cultural, Archeological resources on Mr. Williams' property;
- \* Wildlife impacts near the park and possible impacts to a wetland adjacent to the park; and
- \* Possible new risks of flooding from Morgan Lake.

These resources must be assessed before the site condition can be determined as less impactful. Mr. Williams is discussing arrangements with IPC contractors to assess the risk of flooding, even though the Council did not agree to give him standing on the flooding issue in his request for contested case.

Nonetheless, a study will occur and Mr. Williams respectfully requests that the application and site certificate be placed on hold until such assessment can be made.

DATED: this 30<sup>th</sup> day of June, 2022.

/s/ John C. Williams  
John C. Williams

<b>CERTIFICATE OF MAILING</b>
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On June 30, 2022, I certify that I filed the foregoing EXCEPTION TO THE PROPOSED CONTESTED CASE ORDER with the Hearings Coordinator via electronic mail, and with each party entitled to service, as noted below.

/s/ John C. Williams  
John C. Williams

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**BEFORE THE ENERGY FACILITY SITING COUNCIL  
for the  
STATE OF OREGON**

<b>IN THE MATTER OF:</b>	)	<b>PETITIONER, JoAnn Marlette’s,</b>
	)	<b>EXCEPTIONS TO</b>
THE PROPOSED BOARDMAN TO	)	<b>ADMINISTRATIVE LAW JUDGE</b>
HEMINGWAY TRANSMISSION LINE	)	<b>WEBSTER’S RULINGS: PROPOSED</b>
	)	<b>CONTESTED CASE ORDER, ISSUE</b>
	)	<b>HCA-3</b>
<b>OAH Case No. 2019-ABC-02833</b>	)	
	)	<b>DATED JUNE 30, 2022</b>

**ISSUE STATEMENT HCA-3:** *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.*

The risk of the visual and physical damage to the National Historic Oregon Trail Interpretive Center, as well as the pristine ruts of the Historic Oregon Trail, adversely affecting and impacting the NHOTIC and the Historic Oregon Trail, along with the visitor experience, has not been adequately assessed and therefore a site certificate must be denied.

Ms. Marlette incorporates by reference the arguments and all submissions provided by co-petitioner, Ms. Gilbert, regarding issue HCA-3 and the Proposed Contested Case Order regarding Issue HCA-3. Furthermore, Ms. Marlette is incorporating the exceptions filed by petitioners Stop B2H, Lois Barry, and Whit Deschner regarding scenic values as they are relevant to the mitigation of the visual impacts that must be mitigated. In particular, Stop B2H offers an improved Site Condition, Scenic Resources Condition 3 that must be incorporated into the HPMP when it is updated. Ms. Marlette also incorporates her own direct testimony, closing,

and all exhibits therein into this briefing on specific exceptions to the ALJ's proposed order.<sup>1</sup>  
This will stand as the briefing in support of Ms. Marlette's exception for issue # HCA-3.

In terms of Bureau of Land Management's visual resource assessment, "sensitivity" is a measure of the general public's acceptance of visual change to the landscape. But, when you look inside their assessment approach, this sensitivity is never analyzed (*per the Exception filings of STOP, Barry, Deschner*). Idaho Power generically claims that all users are "sensitive" and they state this as if it has been analyzed and assessed, thus justifying their conclusion that a line of 150 towers will have no significant impact on viewers' experience of the Oregon Trail.

In an historically-significant area, the visual character of the landscape greatly contributes to the visitor's experience—allowing visitors the opportunity to look through the eyes of the emigrants who once traveled by foot, horse and wagon along the Historic Oregon Trail. No amount of testimony by Idaho Power Company's expert witnesses that this proposed B2H utility corridor will have "No Significant Impact" (or "Less than Significant Impact") will alter the fact that the project's impact will be **More Than Significant**. These conclusions by Idaho Power in their Application for Site Certificate are pathetic, considering the profound physical and visual damage that will result, no matter how much it is white-washed on paper.

Visual intrusions at any level are cumulative, and can easily lead to automatically lowering the resource standards, leading to further intrusions one step at a time<sup>2</sup>. It's not

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<sup>1</sup> I have filed professionally and in good faith consistently throughout this laborious process for nearly two years on two issues. I am exhausted and do not have time or energy for an additional briefing on specific exceptions since I have been traveling and dealing with family matters. However, I want to state on the record and directly to the Council that I fully disagree with and take an exception to the Proposed Contested Case Order as it relates to my issue HCA-3, the cumulative effects on the NHOTIC, and the draft HPMP (the mitigation plan). Until more—especially cumulative analysis and under-grounding—are completed and the draft mitigation plan (HPMP) is updated, the site certificate should not be issued.

<sup>2</sup> **Code of Federal Regulations 376 CFR 800.6 (a)(1) Criteria of adverse effect:** An adverse effect is found when an undertaking may alter, directly or indirectly, any of the characteristics of an historic property that qualify the

unreasonable to assume that, in the future, other negative intrusions will be permitted based on the proposed transmission towers creating an already compromised and devalued landscape.

JoAnn Marlette respectfully requests that EFSC deny the site certificate and/or remand this issue back to ODOE for updated analysis, and for further development of the draft Historical Properties Management Plan (HPMP) as the current version is not specific enough to make a determination of compliance.

DATED: June 30, 2022

Respectfully Submitted,

/s/ JoAnn Marlette

<b>CERTIFICATE OF MAILING</b>
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On June 30, 2022, I certify that I filed the foregoing EXCEPTIONS TO THE PROPOSED CONTESTED CASE ORDER with the Hearings Coordinator via electronic mail, and with each party entitled to service, as noted below.

/s/ JoAnn Marlette

**By: Arrangement for hand delivery or US Mail:**

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

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property for inclusion in the National Register of Historic Places in a manner that would diminish the integrity of the property's location, design, setting, materials, workmanship, feeling or association. Consideration shall be given to *all* qualifying characteristics of an historic property, including those that may have been identified subsequent to the original evaluation of the property's eligibility for the National Register of Historic Places. Adverse effects may include reasonably foreseeable effects caused by the undertaking that may occur later in time, be farther removed in distance, or, be cumulative.

**By: Electronic Mail:**

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**STATE OF OREGON**  
**for the**  
**OREGON DEPARTMENT OF ENERGY**

IN THE MATTER OF:	)	<b>CONTESTED CASE EXCEPTION ISSUE</b>
	)	<b>HCA-3 and RELATED SITE CERTIFICATE</b>
	)	<b>CONDITIONS</b>
<b>BOARDMAN TO HEMINGWAY</b>	)	
<b>TRANSMISSION LINE</b>	)	
		OAH Case No. 2019-ABC-02833

TO: ENERGY FACILITY SITING COUNCIL MEMBERS

FROM; IRENE GILBERT, PRO-SE PETITIONER

INTRODUCTION:

As you consider this exception, I encourage you to keep in mind the following facts

You are being asked to allow a developer to negatively impact the experience the Oregon Trail for all future generations. This is a huge responsibility, as I am sure you are all aware of. Five current members of the council and one who's term expired a year

1 Exception to HCA-3 Visual impacts to Oregon Trail Resources

ago, but who has not been replaced are going to decide what impacts are acceptable and what compensation this developer must be required to provide. This resource has significant value to citizens of Oregon and the Nation, and the file for this contested case shows that virtually all testimony in both the EIS and EFSC processes from the public objected to the developer being allowed to damage the Oregon Trail Resources. The rules promulgated by the EFSC are presented as “yes”, “no” decisions, however, the council uses their “discretion” in establishing whether or not they are met. You are being asked to consider both the short and long term impacts of your decisions and each of you must determine whether you are acting in an ethical manner if you decide to allow destruction of this irreplaceable public resource absent mitigation that is consistent with the actual impacts to the resources and the requirements of the statutes and rule. What is clear from the public testimony in the file is that if the people you represent were given a vote, there would be no B2H. This developer minimizes the impacts of this development by treating the Oregon Trail as a single resource as opposed to multiple sites that have special characteristics, significance and meaning. A generic treatment may benefit the developer in arguing for mitigation that does not address the true impact of the transmission line to specific locations. It serves to mask the fact that every site determined eligible for listing as an Oregon Trail National Historic Trail is individually evaluated and determined to need protection due to the unique characteristics it possesses. For example, the route going down into the Grande Ronde Valley is the steepest grade the early pioneers had to traverse on their entire



journey across the country. The site on the Webster land which the family has tried to protect was the site of a camp and spring that was used, and their father took dozens of school children to visit and teach them through experiencing the ruts and camp site used by hundreds of early settlers about the Oregon Trail. This site is valued as a cultural heritage to those children. The designated trail is not just a super highway where one curve is pretty much the same as the next. Our children and grandchildren should not be denied the experiences of standing on the Oregon Trail and seeing it through the eyes of our forefathers.

I hope you will require full compliance with the rules and statutes as you evaluate this issue. I believe you have an ethical as well as a legal obligation not to leave future children having to read about what used to be but no longer exists because Idaho Power wants to increase their profits by building this line.

I am including by reference my previous submissions regarding this issue as they contain lengthy documentation regarding why the Proposed Order and Proposed Contested Case Order need to be rejected.

THE FOLLOWING STATUTE LANGUAGE ESTABLISHES THE COUNCIL ROLE, DUTIES AND RESPONSIBILITIES UNDER THE OREGON STATUTES IN EVALUATING COMPLIANCE WITH THE COUNCIL STANDARDS WHICH PROVIDE PROTECTION FOR THE OREGON TRAIL RESOURCES. THE PLAIN LANGUAGE OF THESE STATUTES SUPPORT THIS EXCEPTION TO THE PROPOSED CONTESTED CASE ORDER

**469.470 Powers and duties;** ”The Energy Facility Siting Council shall:

(2) In accordance with the applicable provisions of ORS chapter 183, and subject to the provisions of ORS 469.501 (3), adopt standards and rules to perform the functions vested by law in the council including the adoption of standards and rules for the siting of energy facilities pursuant to ORS 469.501, and implementation of the energy policy of the State of Oregon set forth in ORS 469.010 and 469.310.”

“**469.310 Policy.** In the interests of the public health and the welfare of the people of this state, it is the declared public policy of this state that **the siting, construction and operation of energy facilities shall be accomplished in a manner consistent with protection of the public health and safety and in compliance with the energy policy and air, water, solid waste, land use and other environmental protection policies of this state.** It is, therefore, the purpose of ORS 469.300 to 469.563, 469.590 to 469.619, 469.930 and 469.992 to exercise the jurisdiction of the State of Oregon to the maximum extent permitted by the United States Constitution **and to establish in cooperation with the federal government a comprehensive system for the siting, monitoring and regulating of the location, construction and operation of all energy facilities in this state.**”

**469.360 Evaluation of notice of intent, site application or expedited review request; costs; payment.** (1) The Energy Facility Siting Council shall evaluate each notice of intent, site certificate application or request for expedited review.

## **469.370**

“ (3) Any **issue** that may be the basis for a contested case shall be raised not later than the close of the record at or following the final public hearing prior to issuance of the department’s proposed order. Such **issues shall be raised with sufficient specificity to afford the council, the department and the applicant an adequate opportunity to respond to each issue.**”

**(7) At the conclusion of the contested case, the council shall issue a final order, either approving or rejecting the application based upon the standards adopted under ORS 469.501 and any additional statutes, rules or local ordinances determined to be applicable to the facility by the project order, as amended.**”

**NOTE: Under ORS 469.503, the file must contain a preponderance of evidence that the development complies with the standard. In the event that the developer has not provided a preponderance of evidence that they comply with OAR345-022-0090, the council must deny the application. Indications of future events that are supposed to occur do not constitute “evidence” supporting compliance and can not be considered “Findings of Fact”.**

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

“(b) **Council use of information generated and documents prepared for the federal agency review;**”

5 Exception to HCA-3 Visual impacts to Oregon Trail Resources

**“ (e) To the extent consistent with applicable state standards, establishment of conditions in any site certificate that are consistent with the conditions established by the federal agency. “**

**NOTE: Per ORS 469.370(13): Idaho Power should be using the methods used by BLM in evaluating visual impacts rather than developing their own methods.**

#### **469.401**

**The duration of the site certificate or amended site certificate shall be the life of the facility.**

**(2) The site certificate or amended site certificate shall contain conditions for the protection of the public health and safety, for the time for completion of construction, and to ensure compliance with the standards, statutes and rules described in ORS 469.501 and 469.503. The site certificate or amended site certificate shall require both parties to abide by local ordinances and state law and the rules of the council in effect on the date the site certificate or amended site certificate is executed,”**

**NOTE: Including requirements that a developer complete activities that are required to demonstrate compliance with the standards until after a site certificate is issued can not be interpreted as assuring compliance with the Standards, Statutes and Rules when the information must be available to determine eligibility under council rules.**

**469.402 Delegation of review of future action required by site certificate.** 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 if, in the council's discretion, the delegation is warranted under the circumstances of the case. [1995 c.505 §27; 1999 c.385 §3]

**NOTE: This statute does not remove the requirement under 469.370 that the council must determine that the file contains a preponderance of evidence that the developer complies with the statutes and rules regarding the conditions which EFSC is required to evaluate. Nothing in the plain language of this rule provides for EFSC to delegate the decision regarding whether or not the developer is in compliance with the standards to then Oregon Department of Energy.**

**469.421** (1) Subject to the provisions of ORS 469.441, any person submitting a notice of intent, ,,,(3), an application for a site certificate or a request to amend a site certificate shall pay all expenses incurred by the Energy Facility Siting Council and the department related to the review and decision of the council.

(5) Requires an additional annual fee to pay for ODOE ensuring compliance with site certificate conditions.

(8) Requires an additional fee to pay for a share of the programs and activities of the council and the department.

**Note:** Per the above statutes, the Oregon Department of Energy Siting Department is funded by energy developers. The more facilities that are approved, the greater their staffing and budget becomes. This could be interpreted as interfering with a balanced review of issues.  
7 Exception to HCA-3 Visual impacts to Oregon Trail Resources

THIS REQUEST FOR EXCEPTION TO THE PROPOSED CONTESTED CASE DECISIONS REGARDING THE CONTESTED CASE, RECOMMENDED SITE CERTIFICATE CONDITIONS AND MOTION TO STRIKE PORTIONS OF MY TESTIMONY AND EXHIBITS IS APPROPRIATE DUE TO MY STANDING AS AN INDIVIDUAL, AS A PARTY REPRESENTING THE PUBLIC INTEREST AND AS CO-CHAIR OF STOP B2H COALLITION.

1. The proposed contested case order statement as a conclusion of law (page 139) fails to address the issue of the contested case.
2. The file fails to include a preponderance of evidence supporting a determination of compliance with the requirements to identify the resources, impacts and mitigation for visual impacts to historic, cultural and archaeological resources .
3. Council documented that the public has not had an opportunity to review, comment or obtain a contested case hearing on impacts due to the fact that significant amounts of information has not been made available in the application.
4. Findings of fact must be supported by a preponderance of evidence in the file. Statements from the developer and recommendations in the Proposed Order developed by the Oregon Department of Energy who is a respondent in this contested case do not constitute “findings of fact”. The only thing they show is that both the respondents agree with one another.

HCA-3 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.

**Quotes from the text of my accepted contested case represented by the shortened issue statement above developed by the Oregon Department of Energy is provided below for purposes of interpreting the issue statement and documenting that the issue is not limited to only the Historic, Cultural and Archaeological Rules and which documents the need for an exception regarding the Proposed Contested Case Order striking parts of my testimony:**

“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 sites.**

”**The extent of damages to the public resources are not identified in relation to the necessary mitigation and most of the mitigation listed fails to apply to visual impacts.** The appeals court

has determined that mitigation must be consistent with the damages to the resource. There is no indication of the amount or type mitigation that will be required, and most of the indicated mitigation methods fail to address the visual damages they are intended to compensate for. In addition, there is no formal plan to monitor and assure that the mitigation remains in place for the life of the project. The following mitigation methods identified fail to address the visual damages.”

#### END OF CONTESTED CASE LANGUAGE ACCEPTED FOR HEARING

I am requesting that Council not rely upon the Oregon Department of Energy to share my argument with council during your review, but allow me to present them in any verbal portion of your review. ODOE was a respondent who, along with Idaho Power argued against me on my contested case issues. I am incorporating my arguments during the course of this contested case process”. Due to the fact that there are portions of my contested case with overlap with the contested case issues of Ms. Marlette as well as documentation included in the Cross Examination and documents provided in Lois Berry’s submissions and testimony which relate directly and indirectly to my contested case, I am incorporating the material provided by both those individuals in my request for exceptions in my contested case.

#### REASONS NECESSITATING THIS EXCEPTION REQUEST

The contested case is necessary based upon the failure of the developer to identify all resources included under OAR 345-022-0090 and other rules of the council related to visual impacts of Oregon Trail resources.



The file lacks a preponderance of evidence showing that individual historic trail resources were identified, direct and indirect impacts disclosed for each of them, and specific, required mitigation proposed that will result in remaining unmitigated impact being less than significant. The following arguments and references document the fact that the file for the Boardman to Hemingway transmission line lack the required preponderance of evidence to demonstrate that the project meets the EFSC requirements on the date the site certificate is issued, or in the case of Land Use Goals, the date the application is filed. Not only does the file show a failure to provide a preponderance of evidence supporting statements made by the applicant and included in the Proposed Order, but information is also not being interpreted in a logical manner in some cases and in others, it is entirely lacking.

#### INTRODUCTION:

This contested case addresses the visual impacts this development will have on the Oregon Trail. The developer has failed to comply with the legal requirements that there be a preponderance of evidence in the file documenting compliance with the rules and statutes protecting these resources. The Proposed Contested Case Order recommends the council rule against me on my accepted Contested Case Issue HCA-3. This Proposed Order needs to be overruled for the following reasons:

- It fails to comply with OAR 345-022-0090 providing for specific protection of these resources.
- It fails to comply with LCDC rules providing protection to these resources.

**Documentation:** Idaho Power response to my discovery request Exhibit 4, in response to Question Number 7:

**“ Idaho Power has not yet established the necessary mitigation for potential impacts to specific resources.”**

--It fails to comply with the visual component of the Protected Areas Standard regarding visual impacts. [OAR 345-022-0040](#) .

--It fails to comply with the Programmatic Agreement with BLM, stating that Oregon EFSC will address visual impacts consistent with 106 NEPA requirements as an alternative to including this review in the EIS. ORS **469.370(13)** A failure to do so will result in the BLM being required to initiate a supplement to the EIS to evaluate the Historic Properties component of the NEPA review. In the event that an exception is not approved, BLM needs to be notified of that so they can initiate a supplemental EIS.

--The Proposed Contested Case Order fails to comply with the plain language of the rules and statutes which apply.

This exception request is current based upon the information in the file provided by ODOE including the multiple changes that have occurred in the tables and language in Exhibit S. For example, the additional information contained on Pages 10 through 66 of the Application for Site Certificate, Exhibit S Errata Sheet, while providing a description of the locations, fails to identify the impacts that the development will have on the visual qualities of the sites.

(B2HHappDoc3-55 ASC Exhibit S\_Errata Info-Redacted 2019-03-06 Pages 10-66)

NOTE: I REFERENCE THE PROPOSED CONTESTED CASE ORDER IN SEVERAL INSTANCES AS IT PROVIDES DOCUMENTATION OF A FAILURE TO COMPLY WITH THE STATUTES AND RULES.

SECOND AMENDED PROJECT ORDER FOR OAR 345-022-0090 states and requires:

**“Prior to construction, the developer must complete a cumulative effects assessment of the impacts the development will have on historic properties referenced in 376 CFR 800.5 and provide appropriate mitigation for the impact **Prior to the start of construction at any location along the proposed transmission line, the developer must provide site specific information regarding the direct and indirect impacts for all areas of the Oregon Trail (NHT) including camps, associated markers, glyphs or other trail elements located within 5 miles of the proposed transmission line. Documentation must including at least one photograph of the location directed toward the area where the transmission line would be visible. Information must include proposed site specific mitigation. The public will be provided an opportunity to review, comment and request a contested case if the information fails to document eligibility for the standard. Council will make a determination regarding compliance with the standard and whether the recommended mitigation is adequate. Council determination will be included in the Final; Historic Properties Management Plan issued prior to the start of construction. (--OAR 345-022-0080; OAR 345-022-0090; --OAR 660-015-0000(5) ORS 469.503 (1) OAR 345-0020-0010) and 469.370(13)****

FACTUAL STATEMENTS REGARDING A FAILURE TO COMPLY WITH OAR 345-022-0090, AND COUNCIL RULES PROTECTING THESE REOURCES

13 Exception to HCA-3 Visual impacts to Oregon Trail Resources

1. The file does not contain site specific documentation of direct and indirect impacts to all Oregon Trail resources within 5 miles of the transmission line route and photos.
  - A. In response to my discovery request, Idaho Power identified the method used to determine whether there would be visual impacts on the Oregon Trail and related resources was the Digital Elevation Model. They stated this model does not provide site specific information. It is a general tool that indicates that a 6 foot object would be visible. It does not indicate how much of an object would be visible, how many objects would be visible. It is a “yes”, “no” tool indicating whether or not there will be some sort of visual impact. (Pro Se Petitioner Irene Gilbert Issue HCA-3 Direct Evidence Exhibit 5, Answer 4)
  - B. Table S-14 “Impacted Resources Subject to or Potentially Subject to EFSC Standards in the Analysis Area” Provides no information other than there will be impacts due to either being in the footprint of the development or in the Visual Assessment area and appears that resources not in the footprint will not have specific mitigation, but only considered under “Potential Cumulative Visual Impacts” (B2HAppDoc3-36 ASC 19\_Exhibit S\_Cultural\_ASC\_Public 2018-09-28 Page 147)
  - C. Table S-15: “Type, Timing, Duration, and Mitigation Measures Related to Permanent Direct Impacts to Cultural Resources” Table documents specific mitigation for resources subject to ground disturbance will not occur until after site certificate is issued. Documentation showing a Preponderance of Evidence in the File that the standard is met is missing. (Amended Preliminary Application for Site Certificate

2. The file fails to identify the site specific mitigation that will address the identified impacts.

1. Documentation: Item 80 and 81 of Proposed Contested Case Order suggesting the generic requirement for mitigation of NRHP-eligible Oregon Trail/NHT resources within the 5 mile viewshed require at least one minimization measure (example, paint color, shorten) and one of the items listed in Item 81 of the Proposed Contested Case Order.

NOTE; None of the items on the list are quantified, all appear to provide minimal mitigation value, none appear to reflect the permanent nature of the changes and there is no indication of which applies to any given resource.

3. The file fails to disclose remaining impacts once mitigation occurs to determine if mitigation is adequate to address direct and indirect impacts at impacted locations.
4. The applicant has not submitted or obtained approval of an amendment providing the additional information required for council to determine if the relevant standards are met.
5. In the Proposed Contested Case Order the Department recommends the public be denied the opportunity to know what resources will be impacted, how they will be

impacted and the mitigation that will be required for large swaths of private land and access to due process. Item 82

**A. Documentation from the Project Order regarding OAR 345-022-0090**

**requirements: “The public will be provided an opportunity to review, comment and request a contested case if the information fails to document eligibility for the standard.”**

**B. Documentation from the Proposed Contested Case Order:**

- i. See Item 82 of the Proposed Contested Case Order recommending a change that HCA-3 resources not be addressed through an Amended Site Certificate and instead be provided directly to the Oregon Department of Energy. Accepting this recommendation would constitute egregious harm to me personally and the public which I represent. It would avoid the public process required to determine if the development meets the requirements for approval of the Historic, Cultural or Archaeological Properties rules.
- ii. See Item 87 stating the Oregon Department of Energy is determining that the proposed routes are not likely to result in significant adverse impacts to any historical, cultural or archaeological resources in spite of the fact the file fails to include a preponderance of information on large areas of privately owned property.

Delegation of review of future actions cannot avoid the council's duty to establish eligibility under the statutes and rules. (ORS 469.503(1) ) and OAR 345-0021-0010.

The lack of information required to issue a site certificate showing compliance with OAR 345-022-0090 is documented by the Memo from Council authorizing the developer to submit information regarding OAR 345-022-0090 by use of an Amendment to the Site Certificate after the initial site certificate is issued.

. The Second Amended Project Order States: "On April 24, 2018 the Department issued a memo titled, "Energy Facility Siting Council Decisions for Linear Facilities site Restricted Access within a Site Boundary: Boardman to Hemingway Transmission Line". "Once IPC gains access to previously restricted areas, IPC shall include that information via a site certificate amendment process. Exhibit S shall include as much information as possible about the field surveys conducted to date for cultural resources on state, private, and federal lands, and the schedule for future surveys."

The proposed order states that the Oregon Department of Energy has concluded the development complies with OAR 345-022-0090 This contested case is regarding the act that the file lacks documentation to support such a determination.

The cumulative effects determination which the Proposed Contested Case Order claims has been completed, could not have been done due to the missing information. In order to start construction on any segment of the development, there are requirements including a Cumulative Effects determination that must include information on the entire line. Even for

requirements that can be addressed segment by segment, if the developer has not met all requirements for the entire line, they must document that the single segment would be built even if other sections of the transmission line fail to be approved or built. ORS 469.503

ADDITIONAL FILE DOCUMENTS SHOWING THERE IS A LACK OF INFORMATION NEEDED TO DETERMINE ELIGIBILITY FOR A SITE CERTIFICATE:

OAR 345-0022-0080 and OAR 345-0022-0090 and ORS 469.503 state the information that must be available and require that in order to issue a site certificate, the **council** must determine that the construction and operation of the facility, taking into account “the results of all surveys conducted for historic, cultural, and archaeological resources, as well as an **analysis of any significant adverse impacts** anticipated and **proposed mitigation** measures----.” The decision is specifically assigned by statute to the council.

NOTE: Follow – up actions after the determination of eligibility can be delegated to the department, but the determination that the file contains documentation of eligibility in order to issue a site certificate must be made by the Energy Facility Siting Council according to the plain language of the statute. Kisor v Wilkie, 588 U.S. \_\_\_ (2019) Kisor( The use of Auer deference does not apply unless a regulation is genuinely ambiguous.( Wis. Cent. Ltd. V United States, 138 S. Ct. 2067, 2070 (2018) (CITING Perrin v. United States, 444 U.S. 37, 42, 100S. Ct. 311, 63 I. Ed. 2d 199 (1979)

The Oregon Department of Energy is a party to the Programmatic Agreement and have committed to documenting compliance with the 106 NEPA review requirements instead of 18 Exception to HCA-3 Visual impacts to Oregon Trail Resources



having BLM do a Supplemental NEPA review to evaluate 106 compliance. Item IV A of the Programmatic Agreement states that in consultation with the parties to the agreement, it must be identified what the effects will be on each historic property within the APEs. While EFSC is not obligated to comply with the NEPA requirements, if they do not do so, the authorization to begin construction on federal lands cannot occur until BLM completes this action. The file contains the following documents showing a failure to provide the site specific information necessary to comply with the Programmatic Agreement. (B2HAPPDoc3-36 ASC 19\_Exhibit S\_Cultural\_ASC-Public 2018-09-28.Pages 338) and (B2HAppDoc8-24 ApASC Reviewing Agency Comment SHPO\_Pouley 2017-11-13 Page 14-21 ORS 183.332 requires state rules that conform to federal rules. Following is an excerpt regarding my Discovery Request from Idaho Power:

Motion at 2-3; Objections at 2-3. In the motion, Ms. Gilbert asserts that IPC did not sufficiently answer the question as to its use of two different models to evaluate visual impacts. She seeks an order compelling IPC to disclose “the methods, or model used for the BLM process due to the fact that the outcomes were different in evaluating the same resources for the Environmental Impact Statement and the EFSC application. In response to the motion, IPC stated that it applied one methodology along the entire length of the project, a methodology developed specifically to comply with Council standards that incorporated aspects of both the BLM and SHPO methodologies.

Documents from the Proposed Order and Application identifying missing information required to document the site specific information required to determine eligibility under the Historic Properties standard developed per ORS 469.503. and OAR 345-021-0010)

1. The Oregon Department of Energy retained Golder Associates to evaluate Exhibit S for completeness. Their report contains multiple instances where problems were identified but information was not provided. They include: Discrepancies in total resource counts; (Page 8) No complete listing of archaeological sites or objects within the analysis area (ORS 358.905(l)(c) (page 6);
2. Exhibit S fails to clearly identify resources and potential impacts to them.(Page 7); for all properties, but particularly for lineal resources, eligibility recommendations must state clearly whether the recommendation applies to the resource in its entirety or only the segment of the resource that was surveyed;(Page 10).; The Visual Assessment of Historic Properties Plan (appended to the PA and Attachment S-2) and the Bureau of Land Management (BLM National Historic Trails Study (Attachment S-8) both provide various methodologies for identification, evaluation and assessment of effects to historic trails. The report uses neither of these documents, nor the MPD, consistently for its evaluation of trail or trail-related properties.)(Page 10) In some instances, report authors neglected to evaluate archaeological sites for significance under eligibility criteria other than Criteria D.”

Kellen Tardaeather confirmed this in her memo available at B2HAPPDOC15 ASC ODOE Direction to IPC Oregon Trail segments and Exemption in ORS 192.345 2018-1-04 She stated:

1. The specific details identified by ODOE’s consultant have not been provided by the applicant and are required in order for the council to determine eligibility for purposes of issuing a site certificate.(B2HAPPDoc8-21 ApASC Reviewing Agency Comment SHPOI HRA 2017-II-03 (Pages 2 through 10)

The applicant failed to provide information regarding the impacts to Historic and Cultural Sites that is specific to the locations and detailed enough to allow a decision regarding an appropriate type and amount of mitigation and determine what the remaining impacts will be. This information is required by the Second Amended Project Order. (B2HAPPDoc15 ApASC Second Amended Project Order 2018-07-26 Page 21)

The Project Order makes specific mention of the need to “including the segments of the Oregon Trail that are listed or eligible for listing on the National Register of Historic Places (NRHP) and discuss measures to avoid or mitigate for impacts to historic trails.” (B2HAPPDoc15 ApASC Second Amended Project Order 2018-07-26 Page 21)

1. Attachment A: Cultural Resources Technical Report Comment Matrix Starting on Page 14 and continuing through “Attachment Intensive Level Survey—Visual Assessment of Historic Properties Report”. Includes comments such as: Report fails to include names and qualifications of those who led field surveys. There is no indication whether the people doing the Intensive Level Surveys were qualified to do so. The phrase “not associated with an event or person significant in national history” contains few references to the person and individual who can be significant locally as well as nationally. In general, integrity of trail segments is not investigated. There is a lack of support for determination that subsurface components are unlikely to provide additional information. Golder also references the “Attachment – Intensive Level Survey—Visual Assessment of Historic Properties Report Boardman to Hemingway Transmission Line Project, SHPO Case ”, #08-2232” Built Environment Tracking Sheet

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contains multiple comments in the “Explanation of Recommendation” and “Additional Comments” sections regarding Insufficient property identification to make an eligibility recommendation. There also is; no definition of property type or registration requirements, no photographs, evaluates several sections of trail together, cannot determine if integrity is high or low, etc.) (B2HAppDoc8-24 ApASC Reviewing Agency Comment SHPO\_Pouley 2017-11-13, Pages 14-21)

Documentation also is provided in Table S-10 entitled “Project Effects to and Proposed Mitigation of Aboveground Resources”. All Oregon Trail Segments listed on Page S-101 of that table state there are “Potential Adverse Effect and make the same recommendation for Mitigation which is “Design Modification, Public Interpretation Funding, Print/Media Publication” Not only are the actual Adverse Effects not identified and quantified for the segments in order to determine the significance of the effects, but the mitigation recommended is a boiler plate statement which fails to address what the actual mitigation planned for the resource is. The recommended mitigation is the same 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, Page 105

The Section L of the application contains information regarding existing conditions at different locations and appears to do a subjective evaluation regarding impacts in relation to changes to those existing conditions. For example, there are multiple comments that the transmission lines will be co-dominant with existing landscape features such as mountains in the background. The

applicant needs to make available the location of Oregon Trail sites that will have direct or indirect impacts from the transmission line. The information must identify locations, what is located there currently, how far the transmission line is from the site, what the impacts will be, and what amount of mitigation will be required to address the impacts at each of the locations. This is not information that can be withheld from the application as it is necessary to determine whether or not the development will be in compliance with the standard. It is also not “confidential” since the Oregon Trail route is public information.

Documentation providing data regarding the substantial, significant and cumulative direct and indirect impacts to the Oregon Trail resources in Oregon can be found on Pages 98 and 99 of the Application and page 749 of the Historic Properties Management Plan. It states that there is a **total of 177.97 miles** of Congressionally Designated Route of the Oregon Trail National Historic Trail **in all of Oregon**. Of that, 43.89 miles would have “potential” views due to being within one half mile (2640 feet) of the site boundary. (B2HAPPDoc1-21. ApASC Exhibit S Revised\_Cultural 2018-08-09 Page 749) The development will permanently alter the site of 25% of the National Historic Trail in Oregon located within 2640 feet of the transmission line, and cause visual damage to an unidentified additional miles located between ½ mile and 5 miles of the development which must be included in the assessment of impacts and required mitigation.

There is not enough “razzle dazzle” in the world to convince the people of Eastern Oregon, and Oregon citizens throughout the state that this is not a **significant impact!**

Due to the failure of the Application and Proposed Order to require compliance with OAR 345-022-0090 the following site certificate conditions need to be imposed;

Site Certificate Condition:

The developer must provide documentation supporting their decision regarding the 229 objects and sites selected for ILS study which Idaho Power based their decision that only 39 had the potential to be NTHP eligible or meet one of the criteria. “ (Historic Properties Management Plan, Boardman to Hemingway Transmission Line Project, September, 2018, Page 19)

There appears to be nothing in the file other than their statement regarding the fact that they limited the original 764 built resources to 229 for the ILS study and then reduced this number to 39. A statement of the developer does not constitute “evidence” let alone a “preponderance of evidence”.

BASIS FOR REQUIRING ADDITIONAL INFORMATION REGARDING SITES THE DEVELOPER CLAIMED THEY COULD NOT ACCESS

This exception to requiring full disclosure of the impacts of the project and mitigation methods for areas of the site that are available for survey resulted in a withholding of information from the public and the council. The result is that the Energy Facility Siting Council accepted and made eligibility decisions based on an incomplete application and the public has had no opportunity to consider impacts to any of the omitted areas. The council needs to rescind their determination that the application was complete and suspend any further action on the site

certificate until Idaho Power provides the missing but available information so that a full and complete review of the impacts of this development on Historic and Cultural sites and objects can be completed. The need for this site certificate condition is documented by multiple recent newspaper accounts stating the company is obtaining court orders to access areas they claimed were not accessible and statements in the Second Amended Project Order. ((B2HAPPDoc15 ApASC Second Amended Project Order 2018-07-26 Page 19.)

In the event that Site Certificate Condition Number Two is not adopted, then Site Certificate Number Three needs to be included in the Final Order.

Site Certificate Condition:

“All information provided post site certificate for locations which were not included in the original application based upon the “Energy Facility Siting Council Decisions for Linear Facilities site Restricted Access within a Site Boundary: Boardman to Hemingway Transmission Line” that is submitted after a site certificate is issued must be addressed with a Type A Amendment allowing the public access to a full contested case process due to the failure to disclose all accessible information to the public and the council during the original application process.”

The failure to submit a complete application denies the council and the public access to information necessary to determine if the impacts to The Oregon Trail and other cultural and historic sites and objects that need to be protected can be to the extent that this project can go forward. Gould v. Deschutes County, 216 Or Ap. 150(2007) requires that a mitigation proposal

must be adequately developed or defer consideration of the plan to allow a full right to public participation in the plan. This has not occurred. :

It is well documented that Idaho Power has falsely stated that they were unable to access multiple locations the transmission line is scheduled to cross. They withheld information regarding impacts of this development on multiple areas where it will impact resources on private land in Oregon. Table S-3 shows as much as 51% of the proposed right of way has not had Pedestrian Surveys done. The developer needs to complete the surveys for any areas which they obtained permission to enter between the time the application was submitted and the time a decision is made. (B2HAPPDoc3-36 ASC 19\_Exhibit S\_Cultural\_Public 2018-09-28 Page 86)

**Project Order for the B2H Requires Information that is available in areas they have access to, but which is not provided in the file, as noted below:**

Exhibit S – Historic, Cultural and Archaeological Resources Applicable Paragraphs: All paragraphs apply. Related Council and Other Standards: Historic, Cultural, and Archaeological Resources [OAR 345-022- 0090] Discussion: The application shall include the survey methodology, survey areas, and the results of all surveys conducted for historic, cultural, and archaeological resources, as well as an analysis of any significant adverse impacts anticipated and proposed mitigation measures. The applicant should work closely with the State Historic Preservation Office (SHPO) to understand the report formatting and submission requirements, and to receive guidance on any survey protocols. The application shall include map(s) showing important historic trails located within the Historic, Cultural, and Archaeological Resources

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analysis area, including the segments of the Oregon Trail that are listed or eligible for listing on the National Register of Historic Places (NRHP), and discuss measures to avoid or mitigate for impacts to historic trails. SHPO has advised that the proposed transmission line crosses many land forms that are generally perceived to have a high probability for possessing archaeological sites and buried human remains. As discussed previously, the applicant has proposed a “phased survey” approach for data collection during the site certificate review process. The Department understands that the entirety of the site boundary for the proposed facility may not have yet been surveyed for cultural resources due to limited site access. On April 24, 2018 the Department issued a memo titled; “Energy Facility Siting Council Decisions for Linear Facilities with Restricted Access within a Site Boundary: Boardman to Hemingway Transmission Line”. This memo outlines how the Department will review applications and make recommendations to Council for historic, cultural and archaeological resources that have been evaluated in the pASC and ASC. **Once IPC gains access to previously restricted areas, IPC shall include that information via a site certificate amendment process.**

RESPONSE TO PROPOSED ORDER RECOMMENDATION TO STRIKE PORTIONS OF MY RESSPONSE BRIEF AND PROPOSED SITE CERTIFICATE CONDITIONS ON ISSUE HCA-3.

I provide as documentation of the scope of my arguments to include all impacts to the visual effects of the development on the Oregon Trail:

1. The language of my contested case is as follows:
  - a. “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  
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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 sites.**

2. The Department's brief statement of this issue incorporated both my contested case issue as well as that of Ms. Marlette. While the issues are related they are not the same and the use of a one line general statement to incorporate both our contested cases cannot be used as a basis for eliminating portions of my contested case issue. My issue was significantly broader than Ms. Marlette's and included the entire Oregon Trail Resource as opposed to being focused on the impacts to the Oregon Trail Interpretive Center located in Baker County. It also was not limited to only one EFSC standard, but identified the "issue" of visual impacts and mitigation for those impacts which is required under multiple standards including OAR 346-015-0190, ORS 469.401, OAR 345-022-0090, OAR 345-022-0030.

RULES AND STATUTES SUPPORTING THESE EXCEPTIONS TO THE EXCLUSION OF ARGUMENTS AND SITE CERTIFICATE CONDITIONS.

RULES IN ADDITION TO PREVIOUSLY LISTED STATUTES PROTECTING THE VISUAL CHARACTERISTICS OF THE SITES THE DEVELOPMENT WILL NEGATIVELY IMPACT WHICH ARE THE SUBJECT OF MY CONTESTED CASE:

--OAR 345-022-0030 LCDC compliance

--OAR 345-022-0040 Protected Areas

--OAR 345-022-0080 Scenic Resources.

**(1)**”.....to issue a site certificate, **the Council** must find that the design, construction and operation of the facility, taking into account mitigation, are not likely to result in significant adverse impact to scenic resources and values identified as significant or important in local land use plans, tribal land management plans and federal land management plans for any lands located within the analysis area described in the project order.”

--OAR 345-022-0090 Historic, Cultural and Archaeological Resources

“to issue a site certificate, the Council must find that the construction and operation of the facility, taking into account mitigation, are not likely to result in significant adverse impacts to: Historic, cultural or archaeological resources that have been listed on, or would likely be listed on the National Register of Historic Places;

--OAR 660-015-0000(5) Goal 5: Natural Resources, Scenic and Historic Areas, and Open Spaces

--ORS 183.332 When there are federal laws and regulations that apply to activities regulated by the state, agencies should adopt rules that correspond with equivalent laws and rules

--ORS 192.345 Does not allow the withholding of information regarding the Oregon Trail location or impacts.

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Note: The developer is withholding from the public portions of the information regarding the Oregon trail impacts.

--ORS 358.055 Oregon Trail; **promotion as major tourist attraction.** The Oregon Business Development Department shall promote the Oregon Trail as a major tourist attraction in this state, consistent with maintaining the historical integrity of the Oregon Trail.

***Code of Federal Regulations 376 CFR 800.6 (a)(1) Criteria of adverse effect.***

An adverse effect is found when an undertaking may alter, directly or indirectly, any of the characteristics of a historic property that qualify the property for inclusion in the National Register in a manner that would diminish the integrity of the property's location, design, **setting**, materials, workmanship, **feeling, or association**. Consideration shall be given to all qualifying characteristics of a historic property, including those that may have been identified subsequent to the original evaluation of the property's eligibility for the National Register. Adverse effects may include reasonably foreseeable effects caused by the undertaking that may occur later in time, be farther removed in distance or be cumulative.

**\*\*\*Specific adverse effects have not been identified for sites. Discussions of a potential process is all that is provided.**

.The Draft Proposed Order states that the approval of this route, specifically, where it passes within 127 feet of the NHTNM should be assumed to meet the visual impact requirements of the EFSC standard due to the BLM prepared ROD. The role of NEPA is to identify impacts, not determine required site specific mitigation. The charge of the Counsel is to determine eligibility

under EFSC's rules regarding visual impact. Page 61 of Proposed Contested Case Order, Item 79 states, according to the department: "Council must evaluate potential impacts and appropriate mitigation in the order, consistent with OAR 345-0011-0010(33), based on potential impacts to listed or likely NRHP-eligible individual trail segments within the affected area."

Use of the NEPA process for review of visual impacts did not use the same methodology as that used in NEPA, and the BLM rules related to the resources is not the same as those that must be followed in approving a site certificate.

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

**(b) Council use of information generated and documents prepared for the federal agency review;**

Council cannot base decisions on their standards by picking and choosing some parts of the NEPA document, but ignoring the rest.

ORS 358.905

LITIGATION SUPPORTS THE NEED TO PROVIDE AN EXCEPTION TO THE DECISIONS IN THE PROPOSED CONTESTED CASE ORDER FAILING TO SUPPORT THE CONTESTED CASE AND RELATED SITE CERTIFICATE CONDITIONS:

Gould v. Deschutes County, 216 Or Ap. 150(2007) requiring that a mitigation proposal must be adequately developed or defer consideration of the plan to allow a full right to public participation in the plan.. “

The developer’s arguments that in order to establish a “precedent”, the case must be exactly like the one establishing precedent fails to consider thousands of case orders which reference previous cases to support a current, entirely different situation.

Wis. Cent. Ltd. V United States, 138 S. Ct. 2067, 2070 (2018) (CITING Perrin v. United States, 444 U.S. 37, 42, 100S. Ct. 311, 63 I. Ed. 2d 199 (1979)

Amerada Hess Pipeline Corp. v. Fed. Energy Regulatory Com’n. 117 D.3s 596 (D.C. Cir. 1997)

Kisor v Wilkie, 588 U.S.\_\_(2019 Kisor( The use of Auer deference does not apply unless a regulation is genuinely ambiguous.

(s)

Irene Gilbert, Pro-Se Petitioner



On June 29, 2022, I certify that I filed the foregoing CONTESTED CASE EXCEPTION ISSUE HCA-3 and  
RELATED SITE CERTIFICATE CONDITIONS

with the Hearings Coordinator via electronic mail, and with each party entitled to service, as  
noted below.

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**BEFORE THE  
ENERGY FACILITY SITING COUNCIL  
OF THE STATE OF OREGON**

**IN THE MATTER OF THE  
APPLICATION FOR SITE  
CERTIFICATE FOR THE BOARDMAN  
TO HEMINGWAY TRANSMISSION  
LINE**

**OREGON DEPARTMENT OF  
ENERGY'S RESPONSE TO  
EXCEPTIONS – ISSUE HCA-3  
(OAH Case No. 2019-ABC-02833)**



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## I. INTRODUCTION

The Hearing Officer in the above-referenced matter issued a Proposed Contested Case Order (“PCCO”) on May 31, 2022. On June 29 and June 30 2022, Limited Parties Ms. Gilbert and Ms. Marlette timely filed exceptions to the PCCO regarding Issue HCA-3, respectively.<sup>1,2</sup>

In the Hearing Officer’s December 4, 2020 *Amended Order on Party Status, Authorized Representatives and Properly Raised Issue for Contested Case* Issue HCA-3 was granted as a contested case issue.

Issue HCA-3 is: Whether Historic, Cultural and Archeological 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.

### A. Background on Exceptions

Parties to the contested case are entitled to file exceptions to the PCCO and present argument to the Energy Facility Siting Council (“Council”) pursuant to both the Administrative Procedures Act and the Model Rules adopted by Council.<sup>3</sup> Exceptions are written objections to the proposed findings, conclusions of law or conditions.<sup>4</sup> The exceptions must be based on the existing record, and should not include new or additional evidence.

## II. ANALYSIS

### A. Gilbert Exceptions on Issue HCA-3 and Department Position

In her exception, Ms. Gilbert provides a list of allegations, as stated below:

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<sup>1</sup> Exceptions to Administrative Law Judge Webster’s Rulings: Proposed Contested Case Order By Limited Party Gilbert Dated June 29, 2022 (hereinafter “Gilbert Exception on Issues HCA-3”).

<sup>2</sup> Exceptions to Administrative Law Judge Webster’s Rulings: Proposed Contested Case Order By Limited Party Marlette Dated June 30, 2022 (hereinafter “Marlette Exception on Issues HCA-3”).

<sup>3</sup> ORS 183.469; OAR 137-003-0060

<sup>4</sup> OAR 345-015-0085(5)

1. The proposed contested case order statement as a conclusion of law (page 139) fails to address the issue of the contested case.<sup>5</sup>
2. The file fails to include a preponderance of evidence supporting a determination of compliance with the requirements to identify the resources, impacts and mitigation for visual impacts to historic, cultural and archaeological resources.
3. Council documented that the public has not had an opportunity to review, comment or obtain a contested case hearing on impacts due to the fact that significant amounts of information has not been made available in the application.
4. Findings of fact must be supported by a preponderance of evidence in the file. Statements from the developer and recommendations in the Proposed Order developed by the Oregon Department of Energy who is a respondent in this contested case do not constitute “findings of fact”. The only thing they show is that both the respondents agree with one another.

The analysis included in Gilbert Exception on HCA-3 focuses on whether the PCCO adequately determined that the record provides a preponderance of evidence (#2 and #4 above) that the applicant has the ability to comply with the Council’s Historic, Cultural and Archeological standard. Ms. Gilbert cites facts and evidence to support this allegation and offers specific resolution, which the Department addresses below. The Department does not address Ms. Gilbert’s exceptions listed as #1 and #3 above because she does not appear to offer any specific arguments on those points.

Ms. Gilbert identifies the following facts as evidence that IPC has not provided a preponderance of evidence on the record to demonstrate compliance with the standard:

---

<sup>5</sup> Ultimately, Council is tasked with making conclusions of law on whether the applicant has demonstrated an ability to comply with the applicable standards. The Department considers a potential omission in the Hearing Officer’s conclusion of law for a specific contested case issue to be immaterial to the Council’s ultimate conclusion of law unless the omission in some way precluded Council from analyzing whether the applicant can or cannot meet the standard. In this instance, the Conclusion of Law in the PCCO refers to recommended HCA Condition 2, where the issue refers to the adequacy of HCA Condition 1. This is not an error. As identified in the PCCO’s Findings of Fact #84-85, the two conditions are interrelated (HCA Condition 1 is part of HCA Condition 2). The Conclusion of Law therefore does address the contested case issue, but even if the Department were to agree with Ms. Gilbert that it does not, Ms. Gilbert has not provided any arguments as to how the Hearing Officer’s alleged failure to address the contested case issue would impact Council’s analysis of compliance with the Historic, Cultural and Archaeological Resources standard.

- IPC’s response to Gilbert Discovery Request on Issue HCA-3, Question 7 stating, “IPC has not yet established the necessary mitigation for potential impacts to specific resources.”<sup>6</sup>
- ASC Exhibit S, Exhibit S Errata Sheet provides a description of resource locations, but fails to identify the impacts on the visual quality of the impacted resources.<sup>7</sup>
- The Second Amended Project Order identifies that site specific information regarding the direct and indirect impacts to Oregon National Historic Trail (“ONHT”) resources must be provided prior to construction.
- IPC’s response to Gilbert Discovery Request on Issue HCA-3, Question 4 affirms that visual impact assessment methodology did not provide site specific information (i.e. how much of an object would be visible, how many objects would be visible)
- ASC Exhibit S Table S-14 provides no information other than whether impacts would occur.
- ASC Exhibit S Table S-15 identifies that specific mitigation would not be identified until after site certificate is issued.
- PCCO lines 80 and 81 refer to mitigation that is generic; none are quantified, all appear to provide minimal mitigation and do not appear to reflect permanent nature of changes

First, Ms. Gilbert’s allegation that the applicant failed to provide a preponderance of evidence on the record to meet the standard is not unique in the exception – it is the same argument Ms. Gilbert has offered throughout the contested case proceeding on Issue HCA-3. The Department refrains from repeating its analysis for arguments that have already been raised and addressed.<sup>8</sup>

The Department agrees that Ms. Gilbert has identified facts and evidence on the record, as listed above, that affirm that the specific scope and scale of mitigation for potential visual impacts to ONHT resources, at a site-specific level, have not yet been identified or executed. However, the PCCO includes Findings of Fact #60-82 which explain, offer and address any questions raised by Ms. Gilbert’s cited facts. The Department does not consider Ms. Gilbert’s facts to offset or negate the PCCO’s Findings of Fact #60-82 or to necessitate her proffered

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<sup>6</sup> Gilbert Issue HCA-3 Direct Evidence Exhibit 4 IPC Responses to Discovery.

<sup>7</sup> B2HHappDoc3-55 ASC Exhibit S\_Errata Info-Redacted 2019-03-06 Pages 10-66

<sup>8</sup> See ODOE Closing Brief, pp. 36 – 50 and ODOE Response to Closing Arguments, pp. 25-37.

resolution (of a proposed site certificate condition requiring that finalization of impacts and mitigation be evaluated through a future Type A review amendment process).

These arguments are therefore already addressed in the PCCO (see PCCO Findings of Fact and Opinion pages 55-64, 162-166).

For the reasons described above, Ms. Gilbert's exceptions should be rejected.

The PCCO does not identify facts on the record related to the role of the Oregon Historic Trails Association ("OCTA") and Oregon Historic Trails Advisory Council ("OHTAC") in the evaluation of IPC's final visual impact assessment and finalization of the scope and scale of mitigation for those impacts. The Department recommends Council consider incorporating the following facts into the PCCO, which further support a finding of compliance with the Historic, Cultural and Archaeological Resources standard.

After Finding of Fact #68:

- The pre-construction finalization of the HPMP will be based on a final visual assessment of historic properties (Phase 7), conducted in accordance with the Visual Assessment of Historic Properties Study Plan (ASC Exhibit S Attachment S-2), which will be reviewed and commented on by federal and state agencies, and consulting parties through the BLM's Programmatic Agreement.<sup>9</sup>
- OCTA, a non-governmental agency focused on protection and preservation of ONHT resources is a concurring party to the Programmatic Agreement and therefore will, prior to construction of the transmission line, review and comment on the impacts and mitigation resulting from the final visual assessment of historic properties, including ONHT resources.<sup>10</sup>

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<sup>9</sup> ODOE - B2HAPPDoc3-36 ASC 19\_Exhibit S\_Cultural\_ASC\_Public 2018-09-28. Page 224 of 783.

<sup>10</sup> ODOE - B2HAPPDoc3-36 ASC 19\_Exhibit S\_Cultural\_ASC\_Public 2018-09-28. Page 327 of 783, lines 17-20.

- Oregon Historic Trails Advisory Council is a concurring party to the Programmatic Agreement and therefore will, prior to construction of the transmission line, review and comment on the impacts and mitigation resulting from the final visual assessment of historic properties, including ONHT resources.<sup>11</sup>

B. Marlette Exceptions on Issue HCA-3 and Department Position

In her exception, Ms. Marlette provides two allegations. First, she alleges flaws in IPC’s visual impact assessment methodology and how the factor of user “sensitivity” was evaluated. She claims that “sensitivity” was never evaluated because IPC assumed all users were “sensitive.” She does not identify any specific flaws in the PCCO’s presentation of relevant facts, conclusions, opinion or recommended conditions

Contrary to Ms. Marlette’s allegation, “visual sensitivity” was a factor considered in IPC’s visual impact assessment and was used to inform the significance of potential visual impacts and potential mitigation for impacts from the proposed transmission line at ONHT resources. As referred in the PCCO, Finding of Fact #201,

“In its visual assessment, IPC conservatively assumed the highest possible degree of sensitivity and subjective value for each resource evaluated. In ASC Exhibit R Attachment R-1, IPC explained: Viewer groups associated with each resource were evaluated to understand certain characteristics that inform the extent to which potential changes in landscape character and quality would be perceived (perception of change). This assessment assumes a high sensitivity exists among all viewer groups based on the identification of the resource as important in a planning document. Therefore, this assessment instead focuses on understanding characteristics that describe the relationship of the observer to the potential impact, and the landscape context of that relationship. Viewer characteristics assessed included viewer location (distance), viewer geometry (superior, inferior, or at grade), and viewer duration or exposure (BLM 1986). The landscape context included consideration of landscape type – i.e., focal or panoramic.<sup>12</sup>

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<sup>11</sup> ODOE - B2HAPPDoc3-36 ASC 19\_ Exhibit S\_Cultural\_ASC\_Public 2018-09-28. Page 327 of 783, lines 21-26.

<sup>12</sup> ODOE - B2HAPPDoc3-35 ASC 18\_ Exhibit R\_Scenic Resources\_ASC 2018-09-28, page 150 of 570; emphasis added.

Ms. Marlette’s first allegation/exception is unsupported and without merit and should be rejected.

Mr. Marlette also appears to take exception to the PCCO’s omission of an amended condition proposed by STOP B2H Coalition (proposed amended Scenic Resources Condition 3). Other than stating the STOP B2H Coalition’s proposed amended condition is “improved” and that is “must be incorporated into the HPMP,” there are no facts or legal arguments to support the exception. While Mr. Marlette incorporates by reference exceptions filed by other limited parties (Stop B2H, L. Barry, W. Deschner), the Department does not attempt to interpret or apply other limited parties exceptions on separate contested case issues to Ms. Marlette’s request for incorporation of a condition offered by another limited party. This exception should be rejected.

### **III. CONCLUSION**

For the reasons set forth above, the Department recommends that the Council reject the exceptions on Issue HCA-3 and affirm, with additional findings of fact presented in this response, the Hearing Officer’s findings of fact, conclusions of law and opinion on this issue.

DATED this 15<sup>th</sup> day of July, 2022.

Respectfully submitted,

ELLEN F. ROSENBLUM  
Attorney General

*/s/ Patrick Rowe*  
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## CERTIFICATE OF SERVICE

I hereby certify that on July 15, 2022, the foregoing Oregon Department of Energy's  
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I further certify that on July 15, 2022, the foregoing Oregon Department of Energy's  
RESPONSE TO EXCEPTIONS – ISSUE HCA-3, was served by First Class Mail or electronic  
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DATED this 15<sup>th</sup> day of July, 2022.

*/s/ Svetlana Gulevkin*  
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**BEFORE THE ENERGY FACILITY SITING COUNCIL  
OF THE STATE OF OREGON**

In the Matter of the Application for Site  
Certificate for the

BOARDMAN TO HEMINGWAY  
TRANSMISSION LINE

APPLICANT IDAHO POWER  
COMPANY'S RESPONSE TO LIMITED  
PARTIES' EXCEPTIONS FOR  
CONTESTED CASE ISSUES HCA-3  
AND HCA-7

OAH Case No. 2019-ABC-02833

**July 14, 2022**

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1 **I. INTRODUCTION**

2 Pursuant to OAR 345-015-0085(6) and the May 31, 2022 Proposed Contested Case Order,  
3 Applicant Idaho Power Company (“Idaho Power” or the “Company”) submits its Response to  
4 Limited Parties’ Exceptions for Issues HCA-3 and HCA-7.

5 **II. STANDARD OF LAW**

6 In a contested case before the Energy Facility Siting Council (“EFSC” or the “Council”),  
7 the applicant bears the burden of proof to establish by a “preponderance of the evidence”<sup>1</sup> that the  
8 proposed facility complies with the Council’s statutes, ORS 469.300 to 469.570, and that the  
9 Application for Site Certificate (“ASC”) and proposed site conditions—as modified in the Oregon  
10 Department of Energy’s (“ODOE”) Proposed Order—satisfy each of the Council’s siting  
11 standards.<sup>2</sup> Proof by a preponderance of the evidence means that the fact finder is persuaded that  
12 the facts asserted are more likely than not true.<sup>3</sup> Furthermore, the applicant must demonstrate by  
13 a preponderance of evidence that the facility complies with all other statutes, administrative rules,  
14 and local government ordinances “identified in the project order, as amended, as applicable to the  
15 issuance of a site certificate for the proposed facility.”<sup>4</sup>

16 Parties or limited parties “with specific challenges to findings, conclusions and/or  
17 recommended site certificate conditions in [ODOE’s] Proposed Order bear the burden” of  
18 producing evidence in support of the facts or positions they have asserted, and the burden of

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<sup>1</sup> OAR 345-021-0100(2) (“The applicant has the burden of proving, by a preponderance of the evidence in the decision record, that the facility complies with all applicable statutes, administrative rules and applicable local government ordinances.”); *see also* ORS 183.450(2) (“The burden of presenting evidence to support a fact or position in a contested case rests on the proponent of the fact or position.”).

<sup>2</sup> OAR 345-022-0000(1)(a).

<sup>3</sup> *Riley Hill General Contractor v. Tandy Corp.*, 303 Or 390, 402 (1987).

<sup>4</sup> OAR 345-021-0100(2); OAR 345-022-0000(1)(b).

1 convincing the trier of fact that their alleged facts are true or their position on the identified issue  
2 is correct.<sup>5</sup> In particular, the parties or limited parties must establish how the applicant failed to  
3 satisfy EFSC’s siting standards and/or how ODOE “erred in its findings, conclusions and/or  
4 recommended site certificate conditions.”<sup>6</sup> To meet this burden of proof, parties or limited parties  
5 challenging the Proposed Order must provide factual testimony or evidence to substantiate their  
6 asserted claims;<sup>7</sup> unsubstantiated factual arguments or legal conclusions are insufficient to  
7 demonstrate the applicant’s failure to establish compliance with any applicable standard.<sup>8</sup>

8 After the hearing and briefing phases of a contested case, the Hearing Officer must issue a  
9 Proposed Contested Case Order stating the Hearing Officer’s findings of fact and conclusions of  
10 law.<sup>9</sup> Parties and limited parties may then file any exceptions to the Proposed Contested Case  
11 Order for the Council’s consideration.<sup>10</sup> If the parties or limited parties file exceptions, the parties  
12 or limited parties must identify for each exception the finding of fact, conclusion of law, or  
13 recommended site certificate condition to which the parties or limited parties except and must state  
14 the basis for their exception.<sup>11</sup>

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<sup>5</sup> Order on Case Management Matters and Contested Case Schedule at 11 (Jan. 14, 2021) (emphasis in original) [hereinafter, “First Order on Case Management”]; Second Order on Case Management Matters and Contested Case Schedule at 7 (Aug. 31, 2021) (emphasis in original) [hereinafter, “Second Order on Case Management”]; *see also* ORS 183.450(2) (the burden of presenting evidence to support a fact or position in a contested case rests on the proponent of the fact or position); *see also* Ruling on Idaho Power Company’s Motion to Dismiss Issues FW-5, HCA-6, LU-4, LU-7, LU-8, PS-1, PS-5, SS-1, and SS-2 at 3 (Nov. 2, 2021).

<sup>6</sup> First Order on Case Management at 11; Second Order on Case Management at 7.

<sup>7</sup> First Order on Case Management at 11; Second Order on Case Management at 7.

<sup>8</sup> First Order on Case Management at 11; Second Order on Case Management at 7. Idaho Power has no obligation to disprove unsubstantiated claims and allegations raised by the limited parties. *See* Ruling on Idaho Power Company’s Motion to Dismiss Issues FW-5, HCA-6, LU-4, LU-7, LU-8, PS-1, PS-5, SS-1, and SS-2 at 3.

<sup>9</sup> OAR 345-015-0085(4).

<sup>10</sup> OAR 345-015-0085(5).

<sup>11</sup> OAR 345-015-0085(5).

1 **III. RESPONSE TO EXCEPTIONS**

2 **A. Issue HCA-3**

3 The Hearing Officer granted limited party status to Irene Gilbert and JoAnn Marlette to  
4 raise HCA-3, which asks:

5 *Whether Historic, Cultural and Archeological Resources Condition [2]<sup>12</sup> [Historic*  
6 *Properties Management Plan (“HPMP”)] related to mitigation for crossings of*  
7 *Oregon Trail resources provides adequate mitigation for visual impacts and*  
8 *sufficient detail to allow for public participation.<sup>13</sup>*

9 In the Proposed Contested Case Order, the Hearing Officer concluded:

10 [A] preponderance of the evidence establishes that the EFSC HPMP provides  
11 adequate mitigation for visual impacts to HCA resources. Recommended HCA  
12 Condition 2 requires that Idaho Power conduct all construction activities in  
13 compliance with the final Department-approved EFSC HPMP. The Council’s rules  
14 do not require further public review and comment on the EFSC HPMP prior to  
15 finalization and approval of the plan.<sup>14</sup>

16 Both Ms. Gilbert and Ms. Marlette filed exceptions for HCA-3. For the reasons discussed  
17 below, Idaho Power requests that the Council adopt without modification the Hearing Officer’s  
18 findings of fact and conclusions of law relevant to HCA-3.

19 **1. Irene Gilbert, Exceptions, HCA-3**

20 Ms. Gilbert’s exceptions to the Proposed Contested Case Order take the form of lengthy  
21 and far-ranging assertions and lists of concerns that would be impossible to address point by point  
22 in any economical fashion. Instead, they can be categorized into two basic arguments: (1) the  
23 Proposed Contested Case Order is in error because Idaho Power’s ASC fails to include adequate

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<sup>12</sup> This issue statement has been amended to refer to the correct condition number. See Proposed Contested Case Order at 31 n. 21 (May 31, 2022).

<sup>13</sup> Second Order on Case Management at 4.

<sup>14</sup> Proposed Contested Case Order at 166.

1 evidence supporting a determination of compliance with OAR 345-022-0090 (i.e., the Cultural  
2 Resources Standard), which requires that the applicant identify historic, cultural, and  
3 archaeological resources within the analysis area, assess impacts to such resources, and specify  
4 potential mitigation measures for both direct and indirect (i.e., visual) impacts to such resources;<sup>15</sup>  
5 and (2) the Proposed Contested Case Order is in error because Idaho Power’s failure to submit a  
6 complete ASC denied the Council and the public access to information necessary to make a fully-  
7 informed decision regarding compliance with the Council’s standards.<sup>16</sup> For the following reasons,  
8 Ms. Gilbert’s arguments are not persuasive, and the preponderance of the evidence demonstrates  
9 that Idaho Power’s HPMP provides adequate mitigation for visual impacts to historic, cultural, and  
10 archaeological resources.

11 *a. Irene Gilbert, Issue HCA-3, Exception 1*

12 Ms. Gilbert argues that the Proposed Contested Case Order is in error because Idaho  
13 Power’s application fails to identify historic, cultural, and archaeological resources within the  
14 analysis area, assess impacts to such resources, and specify potential mitigation measures for both  
15 direct and indirect (i.e., visual) impacts to individual resources.<sup>17</sup> While Ms. Gilbert does not  
16 identify specific findings of fact or conclusions of law to which she takes exception as required by  
17 OAR 345-015-0085(5), she makes the following specific claims related to HCA-3: (A) Idaho  
18 Power’s assessment of visual impacts is flawed because the Company used a methodology for  
19 compliance with EFSC’s Cultural Resources Standard that is different from the one the Bureau of  
20 Land Management (“BLM”) used to evaluate compliance with National Environmental Policy Act

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<sup>15</sup> Irene Gilbert Contested Case Exception Issue HCA-3 and Related Site Certificate Conditions at 8 (June 29, 2022) [hereinafter, “Gilbert Exception for HCA-3”].

<sup>16</sup> Gilbert Exception for HCA-3 at 8.

<sup>17</sup> Gilbert Exception for HCA-3 at 14-16.



1 (“NEPA”) requirements;<sup>18</sup> (B) Idaho Power’s cumulative impact analysis, which employed a “bare  
2 earth” digital elevation model, was insufficient to assess site-specific visual impacts and was not  
3 complete due to missing information;<sup>19</sup> (C) the proposed mitigation measures for visual impacts  
4 (e.g., paint color, height of towers, etc.), which were approved by ODOE, are unquantifiable and  
5 not specific to individual resources;<sup>20</sup> (D) the EFSC HPMP is unclear as to which mitigation  
6 measures are being considered for a particular resource—specifically as these issues relate to  
7 Oregon Trail or National Historic Trail segments;<sup>21</sup> (E) tables from Exhibit S and comments from  
8 ODOE and its consultants demonstrate that Idaho Power failed to provide site-specific  
9 documentation for individual resources;<sup>22</sup> and (F) Idaho Power failed to provide adequate  
10 reasoning for its National Register of Historic Places eligibility determinations in the Intensive  
11 Level Survey.<sup>23</sup> Since these claims are not tied to a specific exception to the Proposed Contested  
12 Case Order as required by OAR 345-015-0085(5), the claims should be rejected on that basis.  
13 Nevertheless, should the Council wish to consider Ms. Gilbert’s arguments, Idaho Power addresses  
14 each of her claims below.

15 i. Exception 1A: Visual Assessment Methodology

16 Ms. Gilbert argues that Idaho Power’s assessment of visual impacts is flawed because the  
17 Company used a methodology for compliance with EFSC’s Cultural Resources Standard that is  
18 different from the one BLM used to evaluate compliance with NEPA requirements.<sup>24</sup> In making

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<sup>18</sup> Gilbert Exception for HCA-3 at 6, 12,18-19, 30.

<sup>19</sup> Gilbert Exception for HCA-3 at 13-14, 17-18.

<sup>20</sup> Gilbert Exception for HCA-3 at 15.

<sup>21</sup> Gilbert Exception for HCA-3 at 15.

<sup>22</sup> Gilbert Exception for HCA-3 at 14, 19-22.

<sup>23</sup> Gilbert Exception for HCA-3 at 23-24.

<sup>24</sup> See Gilbert Exception for HCA-3 at 6, 12,18-19, 30; Irene Gilbert / Contested Case Opening Argument (Sept. 16, 2021) / Issue HCA-3, p. 3 of 14.

1 her argument, Ms. Gilbert references Item 79 (finding of fact) of the Proposed Contested Case  
2 Order, which provides that the Council is the ultimate arbiter for evaluating potential impacts and  
3 appropriate mitigation for historic, cultural, and archaeological resources under OAR 345-001-  
4 0010(33)—a finding of fact in the Proposed Contested Case Order that neither Ms. Gilbert nor  
5 Idaho Power dispute.<sup>25</sup> Ms. Gilbert’s apparent intent in invoking Item 79 (finding of fact) is to  
6 support her primary argument that the Council cannot pick and choose which aspects of BLM’s  
7 NEPA evaluation methodology it will adopt when reviewing Idaho Power’s ASC.<sup>26</sup> However, this  
8 argument is without merit.

9 As an initial matter, the arguments raised in Ms. Gilbert’s Exception 1A were addressed in  
10 the contested case and were fully litigated. As Idaho Power discussed in its briefing,<sup>27</sup> EFSC rules  
11 do not mandate any specific methodology for assessing visual impacts for purposes of  
12 demonstrating compliance with the Cultural Resources Standard. Moreover, the Oregon State  
13 Historic Preservation Office (“SHPO”) and BLM prescribe different methodologies to assess  
14 visual impacts. It should be noted that the BLM is required to utilize specific visual resource  
15 methods for addressing the agency’s visual resource management responsibilities.<sup>28</sup> However, the  
16 BLM’s visual resource management responsibilities and measures for assessing impacts are based  
17 on inventory information and impact assessment methods that are not necessarily aligned with the  
18 methods for inventorying and assessing the Project’s impacts upon historic and cultural properties  
19 in accordance with EFSC’s standards, particularly EFSC’s definition of “significant” adverse

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<sup>25</sup> Gilbert Exception for HCA-3 at 30 (citing Proposed Contested Case Order at 61).

<sup>26</sup> Gilbert Exception for HCA-3 at 30-31 (citing ORS 469.370(13)).

<sup>27</sup> Idaho Power’s Closing Arguments for Contested Case Issues HCA-3, HCA-4, HCA-6, and HCA-7 at 36-38 (Feb. 28, 2022).

<sup>28</sup> Idaho Power / Testimony of Kirk Ranzetta / Issues HCA-3, HCA-4, and HCA-7, p. 80 of 89.

1 impacts as defined in OAR 345-001-0010(52).<sup>29</sup> Therefore, to assess compliance with Section  
2 106 of the National Historic Preservation Act, and to determine potential visual impacts to historic  
3 and cultural properties under EFSC standards, Idaho Power incorporated some aspects of the BLM  
4 visual impacts methodology and some aspects of the SHPO methodology used for establishing the  
5 thresholds for a significant adverse impact to a historic property, while also aligning the inventory  
6 and impact assessment with the regulatory requirements of 36 CFR Part 800.<sup>30</sup> Idaho Power then  
7 used this single methodology for the entire length of the proposed transmission line, and will  
8 continue to use this methodology for future Project refinements consistent with the requirements  
9 of the Section 106 Programmatic Agreement to which ODOE, SHPO, and Idaho Power are  
10 parties.<sup>31</sup>

11 Importantly, in crafting the Company’s assessment methodology for assuring compliance  
12 with the EFSC standards, Idaho Power coordinated with the SHPO, the BLM, and ODOE as  
13 discussed in the 2013 Visual Assessment of Historic Properties (“VAHP”) Study Plan.<sup>32</sup>  
14 Considering the differences between BLM’s NEPA responsibilities and the EFSC siting standards,  
15 Idaho Power’s hybrid BLM/SHPO methodology was reasonable and appropriate to assess visual  
16 impacts from the Boardman to Hemingway Transmission Line project (“B2H” or the “Project”).

17 In sum, to the extent Ms. Gilbert is arguing that Idaho Power was required to use BLM’s  
18 visual impact methodology as a matter of law, that argument fails because the Cultural Resources

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<sup>29</sup> Idaho Power / Testimony of Kirk Ranzetta / Issues HCA-3, HCA-4, and HCA-7, p. 80 of 89.

<sup>30</sup> Idaho Power / Testimony of Kirk Ranzetta / Issues HCA-3, HCA-4, and HCA-7, p. 80 of 89; *see also* ASC, Exhibit S, Attachment S-2: VAHP Study Plan, Section 4.5 at 14-15 (ODOE – B2HAPPDoc3-36 ASC 19\_ Exhibit S\_Cultural\_ASC\_Public 2018-09-28. Page 217-218 of 783).

<sup>31</sup> Idaho Power / Testimony of Kirk Ranzetta / Issues HCA-3, HCA-4, and HCA-7, p. 81 of 89.

<sup>32</sup> Idaho Power / Testimony of Kirk Ranzetta / Issues HCA-3, HCA-4, and HCA-7, pp. 80-81 of 89. The VAHP Study Plan guided Idaho Power’s visual assessment of aboveground historic and cultural resources potentially affected by the construction and operation of B2H, and is provided as Attachment S-2 in Exhibit S of the ASC.

1 Standard does not dictate any specific methodology. Moreover, Ms. Gilbert has failed to show, as  
2 a factual matter, how any specific aspect of the BLM’s methodology that Idaho Power did not  
3 employ is necessary to satisfy the Cultural Resources Standard and/or the definition of  
4 “significant” impacts. Rather, the preponderance of the evidence in the record demonstrates that  
5 Idaho Power’s hybrid methodology satisfies the Cultural Resources Standard.

6 For the above reasons, the Council should adopt the Hearing Officer’s findings and  
7 conclusions on these issues without modification.

8 ii. Exception 1B: Cumulative Impact Analysis

9 While a cumulative impact analysis is required for the federal Section 106 process<sup>33</sup> under  
10 36 CFR 800.5 analysis,<sup>34</sup> it is not required under EFSC rules. However, Idaho Power presented  
11 the results of the cumulative impact analysis in Exhibit S of the ASC in response to a comment in  
12 the Second Amended Project Order that noted the Confederated Tribes of the Umatilla Indian  
13 Reservation’s concerns regarding the potential for cumulative impacts to cultural resources.<sup>35</sup>

14 A cumulative impact, as that term is used in the NEPA context, is “the impact on the  
15 environment which results from the incremental impact of the action when added to other past,  
16 present, and reasonably foreseeable future actions.”<sup>36</sup> In other words, the cumulative impact  
17 assessment considers each of the expected individual impacts of a particular development, and

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<sup>33</sup> In this case, the Bureau of Land Management or BLM is the lead agency for the federal Section 106 process. Proposed Order at 50 (ODOE - B2HAPPDoc2 Proposed Order on ASC and Attachments 2019-07-02. Page 57 of 10016).

<sup>34</sup> Specifically, this regulation requires federal agencies to apply “criteria of adverse effects” to determine whether a project will adversely impact historic characteristics of a property that may qualify the property for inclusion on the National Register of Historic Places. 36 CFR 800.5(a)(1). “Adverse effects may include reasonably foreseeable effects caused by the undertaking that may occur later in time, be farther removed in distance or be cumulative.” *Id.*

<sup>35</sup> Second Amended Project Order at 24 (ODOE – B2HAPPDoc15 ApASC Second Amended Project Order 2018-07-26. Page 26 of 29). *See also* ASC, Exhibit S at S-6 (ODOE – B2HAPPDoc3-36 ASC 19\_Exhibit S\_Cultural\_ASC\_Public 2018-09-28. Page 12 of 783).

<sup>36</sup> 40 CFR 1508.7.

1 then determines what the overall impact will be on a resource as a whole. In performing a  
2 cumulative impact assessment for visual impacts to the Oregon Trail, Idaho Power started by  
3 considering the results of each of the site-specific analyses of the Oregon Trail segments with a  
4 view of the Project, and based on that data produced an overall assessment of the number of miles  
5 of the Oregon Trail that would be indirectly impacted.<sup>37</sup> In this way, the cumulative impacts  
6 assessment produces a *general* indication of the magnitude for indirect impacts on the Oregon  
7 Trail as a whole. However, as noted in the Proposed Order, the site-specific analysis performed  
8 during the Intensive Level Survey “is more precise in its assessment of impacts to contributing  
9 resources associated with the Oregon Trail and [better] informs Project planning in an effort to  
10 avoid, reduce, or mitigate impacts.”<sup>38</sup> Accordingly, for purposes of determining mitigation  
11 measures, Idaho Power relied on the Intensive Level Survey.

12 As in her Closing Argument, Ms. Gilbert argues that 36 CFR 800.5 requires Idaho Power  
13 to identify cumulative adverse impacts, and that since Idaho Power is treating the Oregon Trail as  
14 a *single* historic site, all cumulative impacts for each trail segment and appropriate mitigation  
15 measures must be identified prior to site certification in order to determine compliance with the  
16 Cultural Resources Standard.<sup>39</sup> In other words, Ms. Gilbert argues that Idaho Power cannot  
17 determine the cumulative impact of B2H on the Oregon Trail without first accounting for all  
18 impacts to each individual segment, which presumably cannot be achieved until Idaho Power has

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<sup>37</sup> Proposed Order at 440-442 (ODOE - B2HAPPDoc2 Proposed Order on ASC and Attachments 2019-07-02. Page 447-449 of 10016). *See also* Proposed Order, Attachment S-9: Historic Properties Management Plan, Section 4.3.1.1 at 22 (ODOE - B2HAPPDoc2 Proposed Order on ASC and Attachments 2019-07-02. Page 9618 of 10016).

<sup>38</sup> Proposed Order, Attachment S-9: Historic Properties Management Plan at 22 (ODOE - B2HAPPDoc2 Proposed Order on ASC and Attachments 2019-07-02. Page 9618 of 10016).

<sup>39</sup> Gilbert Exception for HCA-3 at 13-14, 17-18; Irene Gilbert’s Contested Case Closing Regarding Issue HCA-3 at 4-5, 10. Ms. Gilbert mistakenly refers to 36 CFR 800.5 as “376 CFR 800.5”.

1 obtained access to all properties along the B2H route.<sup>40</sup> As an initial matter, the arguments raised  
2 in Ms. Gilbert’s Exception 1B were addressed in the contested case and were fully litigated. As  
3 Idaho Power explained in its briefing, Ms. Gilbert’s argument is meritless for several reasons.

4 *First*, as Idaho Power explained in its Response Brief,<sup>41</sup> there are no EFSC rules requiring  
5 an applicant to perform a cumulative impact assessment; rather, 36 CFR 800.5, which defines  
6 adverse effects as including cumulative impacts, is specific to the federal Section 106 process and  
7 is therefore outside the Council’s jurisdiction. Compliance with the federal requirements will be  
8 evaluated in the Section 106 process, and therefore the Council can be assured that the  
9 requirements for the cumulative impact analysis will be met. However, federal requirements are  
10 not identical to state requirements and are outside the Council’s jurisdiction.<sup>42</sup> Accordingly,  
11 because 36 CFR 800.5 is irrelevant to the Council’s determination of whether Idaho Power  
12 complied with the Cultural Resources Standard and because Ms. Gilbert has not otherwise  
13 addressed why this federal regulation is pertinent to determination of HCA-3, 36 CFR 800.5  
14 should not be considered by the Council in its review of the Proposed Contested Case Order.

15 *Second*, Ms. Gilbert’s assertion that Idaho Power must assess each Oregon Trail segment  
16 prior to site certification and prior to performing a cumulative impact assessment for the entire  
17 trail is impractical. The Company has, where feasible, consistently identified impacts and potential

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<sup>40</sup> Gilbert Exception for HCA-3 at 17-18 (“Even for requirements that can be addressed segment by segment, if the developer has not met all requirements for the entire line, they must document that the single segment would be built even if other sections of the transmission line fail to be approved or built.”).

<sup>41</sup> Idaho Power's Response Brief for Contested Case Issues HCA-3, HCA-4, HCA-6, and HCA-7 at 7-12 (Mar. 30, 2022).

<sup>42</sup> ORS 469.503(3) (requires EFSC to find that “the facility complies with all other *Oregon* statutes and administrative rules identified in the project order”) (emphasis added in parenthetical).

1 mitigation measures to *specific segments* of the Oregon Trail.<sup>43</sup> However, due to right-of-entry  
2 constraints and efforts to avoid unnecessary disturbance of cultural resources, Idaho Power is  
3 unable to perform a *complete* site-specific assessment, including subsurface exploration, for each  
4 Oregon Trail segment prior to site certification. Importantly, the very nature of the cumulative  
5 impact assessment is to build on the assessment of specific Oregon Trail segments and provide a  
6 general evaluation of the adverse visual impact to the Oregon Trail as an entire resource.  
7 Accordingly, while Idaho Power acknowledges that the cumulative impact assessment is based on  
8 incomplete information as the Company is unable to access certain trail segments, the cumulative  
9 impact assessment represents the best general overview of visual impacts to the entire Oregon Trail  
10 that Idaho Power is able to provide at this time.

11 In conducting the cumulative impact assessment, Idaho Power used a “bare earth” digital  
12 evaluation model, which represented the best illustration of the potential for cumulative indirect  
13 impacts within the Visual Assessment Analysis Area based on currently available information.  
14 Specifically, Idaho Power contracted with AECOM to prepare a cumulative impacts analysis for  
15 the Oregon Trail utilizing various Oregon Trail Geographic Information System (“GIS”) data sets  
16 from the National Park Service, SHPO, and the BLM.<sup>44</sup> AECOM collected this data on a  
17 cumulative basis to provide a general indication of potential cumulative visual impacts from within

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<sup>43</sup> See, e.g., ASC, Exhibit S at S-138 – S-144 (ODOE - B2HAPPDoc3-36 ASC 19\_Exhibit S\_Cultural\_ASC\_Public 2018-09-28. Page 93-99 of 783); ASC, Exhibit S, Errata Sheet at S-6 – S-10 (Feb. 2019) (ODOE - B2HAPPDoc3-55 ASC Exhibit S\_Errata Info\_Redacted 2019-03-06. Page 6-10 of 79); Proposed Order, Attachment S-9: Historic Properties Management Plan, Appendix A.1: Resource Inventory Tables with Management Recommendations for Resources Potentially Protected under OAR 345-022-0090 (ODOE - B2HAPPDoc2 Proposed Order on ASC and Attachments 2019-07-02. Page 9640 of 10016).

<sup>44</sup> ASC, Exhibit S at S-143 (ODOE - B2HAPPDoc3-36 ASC 19\_Exhibit S\_Cultural\_ASC\_Public 2018-09-28. Page 98 of 783).

1 the Visual Assessment Analysis Area based on a “bare earth” digital elevation model.<sup>45</sup> This  
2 modeling consists of establishing Project heights and using ground elevation data to determine  
3 whether an area would have views of the Project or whether intervening landforms would block  
4 views.<sup>46</sup> AECOM further considered several variables that would bear on the magnitude of the  
5 cumulative impacts to the Oregon trail, including distance to the Project, intervening topography,  
6 vegetation, atmospheric conditions, and the built environment.<sup>47</sup> While consideration of these  
7 factors is not truly reflective of the magnitude of impacts, consideration of such variables  
8 represents the best illustration of the potential for cumulative indirect impacts within the Visual  
9 Assessment Analysis Area based on a “bare earth” digital elevation model.<sup>48</sup> As a result of the  
10 cumulative impacts analysis, AECOM found that 43.89 miles of the Oregon Trail would have a  
11 potential view that is within a half mile of the Project’s site boundary.<sup>49</sup> For “Contributing Trail  
12 Segments” or segments of the Oregon Trail that have been previously identified by surveys or  
13 listed on the National Register of Historic Places, approximately 89.35 miles of these segments  
14 fall within the Visual Assessment Analysis Area and about 27.43 of those miles would have a  
15 potential view that is within a half mile of B2H.<sup>50</sup>

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<sup>45</sup> ASC, Exhibit S at S-143 (ODOE - B2HAPDoc3-36 ASC 19\_Exhibit S\_Cultural\_ASC\_Public 2018-09-28. Page 98 of 783).

<sup>46</sup> ASC, Exhibit S, Attachment S-2: VAHP Study Plan at 9 (ODOE - B2HAPDoc3-36 ASC 19\_Exhibit S\_Cultural\_ASC\_Public 2018-09-28. Page 212 of 783).

<sup>47</sup> ASC, Exhibit S at S-143 (ODOE - B2HAPDoc3-36 ASC 19\_Exhibit S\_Cultural\_ASC\_Public 2018-09-28. Page 98 of 783).

<sup>48</sup> ASC, Exhibit S S-143 (ODOE - B2HAPDoc3-36 ASC 19\_Exhibit S\_Cultural\_ASC\_Public 2018-09-28. Page 98 of 783).

<sup>49</sup> Proposed Order, Attachment S-9: Historic Properties Management Plan at 22 (ODOE - B2HAPDoc2 Proposed Order on ASC and Attachments 2019-07-02. Page 9618 of 10016). There are a total of 177.97 miles of Congressionally Designated Route for the Oregon Trail. *Id.*

<sup>50</sup> Proposed Order, Attachment S-9: Historic Properties Management Plan at 22 (ODOE - B2HAPDoc2 Proposed Order on ASC and Attachments 2019-07-02. Page 9618 of 10016).



1           Regardless, Ms. Gilbert argues that the “bare earth” digital elevation model is insufficient  
2 for the cumulative impact analysis as it does not provide site-specific information but is rather a  
3 simple tool indicating whether there would be a visual impact on the resource or not.<sup>51</sup> With  
4 respect to this argument, Ms. Gilbert ignores the fact that the *purpose* of cumulative impact  
5 assessment is to provide a general description of adverse visual impacts to the Oregon Trail as a  
6 whole. Furthermore, it is important to note that while the cumulative effects data are used to  
7 produce a general indication of the magnitude for indirect impacts on the Oregon Trail, the  
8 site-specific analysis performed during the Intensive Level Survey is more precise in its assessment  
9 of impacts and better informs Project planning to avoid, reduce, or mitigate impacts.<sup>52</sup>  
10 Accordingly, due to the more generalized results from the cumulative impacts data, AECOM  
11 provided a site-specific analysis of each trail segment—including a discussion of the visual  
12 integrity of the Oregon Trail segment and the visual impact to the segment where applicable—and  
13 its associated resources to produce more effective avoidance and mitigation plans.<sup>53</sup> These  
14 assessments are available in the February 2019 Errata Sheet to Exhibit S of the ASC.<sup>54</sup>

15           For the above-mentioned reasons, the preponderance of the evidence demonstrates that,  
16 although not required by applicable rules and regulations, Idaho Power performed an adequate  
17 cumulative impact assessment of the Oregon Trail. Moreover, after site certification, Idaho Power  
18 will perform Phase 2 surveys of Oregon Trail resources located on properties that were previously

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<sup>51</sup> Gilbert Exception for HCA-3 at 14; *see also* Irene Gilbert’s Contested Case Closing Argument Regarding Issue HCA-3 at 12.

<sup>52</sup> Proposed Order, Attachment S-9: Historic Properties Management Plan at 22 (ODOE - B2HAPPDoc2 Proposed Order on ASC and Attachments 2019-07-02. Page 9618 of 10016).

<sup>53</sup> Proposed Order at 440-42 (ODOE - B2HAPPDoc2 Proposed Order on ASC and Attachments 2019-07-02. Page 447-449 of 10016); Proposed Order, Attachment S-9: Historic Properties Management Plan at 22 (ODOE - B2HAPPDoc2 Proposed Order on ASC and Attachments 2019-07-02. Page 9618 of 10016).

<sup>54</sup> *See* ASC, Exhibit S, Errata Sheet (ODOE - B2HAPPDoc3-55 ASC Exhibit S\_Errata Info\_Redacted 2019-03-06. Page 1-79 of 79).

1 inaccessible to the Company to determine site-specific impacts and mitigation measures for such  
2 resources.<sup>55</sup> Per ODOE’s Recommended Historic, Cultural, and Archaeological Resources  
3 Condition 2, Idaho Power will be required to submit to ODOE, SHPO, and applicable Tribal  
4 Governments an updated EFSC HPMP with site-specific mitigation measures based on new survey  
5 data and updated National Register of Historic Places eligibility information.<sup>56</sup> Accordingly, the  
6 site certificate will ensure that Idaho Power determines site-specific impacts, National Register of  
7 Historic Places eligibility, and mitigation measures for *all* trail resources, and that such  
8 determinations are updated and reviewed by appropriate agencies and tribes prior to construction.

9 For the above reasons, the Council should adopt the Hearing Officer’s findings and  
10 conclusions on these issues without modification.

11 iii. Exception 1C: Mitigation for Visual Impacts

12 Ms. Gilbert argues that the mitigation measures listed in the EFSC HPMP are  
13 unquantifiable, insufficient to address permanent visual impacts, and give no indication of which  
14 specific mitigation method applies to any given resource.<sup>57</sup> In support of her argument, Ms. Gilbert  
15 invokes Items 80 and 81 (findings of fact) of the Proposed Contested Case Order, which detail that  
16 ODOE recommended the Council require that mitigation include at least one minimization  
17 measure (design modification) and one measure resulting in restoration, preservation and  
18 maintenance, or compensation (OAR 345-001- 0010(33)(b) and (c), (d) or (e)) directly benefiting  
19 the affected area (i.e., the county where the impacted resource is located).<sup>58</sup> Item 81 (finding of

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<sup>55</sup> ASC, Exhibit S at S-25 (ODOE - B2HAPPDoc3-36 ASC 19\_Exhibit S\_Cultural\_ASC\_Public 2018-09-28. Page 31 of 783).

<sup>56</sup> Proposed Order, Attachment 1: Draft Site Certificate at 33-34 (ODOE - B2HAPPDoc2 Proposed Order on ASC and Attachments 2019-07-02. Page 737-738 of 10016).

<sup>57</sup> Gilbert Exception for HCA-3 at 15.

<sup>58</sup> Gilbert Exception for HCA-3 at 15 (citing Proposed Contested Case Order at 61-62).

1 fact) further describes the ODOE-recommended mitigation measures (other than design  
2 modification) in order of priority:

- 3 (1) Purchase of conservation easement or other land protection where trail traces exist;
- 4 (2) Historic trails restoration within and outside the facility area;
- 5 (3) Land acquisition;
- 6 (4) Public signage, publication/print/media, and/or interpretive plans;
- 7 (5) Trail segment management plans;
- 8 (6) Additional literature or archival review (e.g., historic maps, local papers);
- 9 (7) Remote sensing;
- 10 (8) National Register of Historic Places nomination;
- 11 (9) Recording—including HABS/HAER/HALS; and
- 12 (10) Funding for public interpretation, archeological resource, or other program  
13 benefiting Oregon Trail resources.<sup>59</sup>

14 Ms. Gilbert does not take exception to Items 80 and 81 of the Proposed Contested Case Order;  
15 nevertheless, she appears to claim that the listed mitigation measures in Item 81 are insufficiently  
16 vague and inappropriate for permanent visual impacts to historic, cultural, and archaeological  
17 resources. As an initial matter, the arguments made in Ms. Gilbert’s Exception 1C were addressed  
18 by the expert testimony of Dr. Kirk Ranzetta and were fully litigated in the contested case, and are  
19 incorrect for the following reasons.

20 First, as detailed in Idaho Power’s briefing,<sup>60</sup> the Programmatic Agreement—to which  
21 BLM, ODOE, and SHPO are parties—recognizes such measures (e.g., print or media publication,

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<sup>59</sup> Gilbert Exception for HCA-3 at 15 (citing Proposed Contested Case Order at 62).

<sup>60</sup> Idaho Power’s Closing Arguments for Contested Case Issues HCA-3, HCA-4, HCA-6, and HCA-7 at 45-46.

1 trail segment management plans, literature or archival review, recording, etc.) as appropriate  
2 mitigation for direct, *indirect (visual)*, and cumulative effects to historic properties.<sup>61</sup> Second, in  
3 support of its ASC and the Proposed Order, Idaho Power provided the expert testimony of Dr.  
4 Ranzetta, who testified that mitigation measures aimed at historic preservation through educational  
5 materials and signs, as well as print publications, have always been considered appropriate and  
6 reasonable measures to address visual impacts, particularly when combined with other mitigation  
7 measures.<sup>62</sup> Educational materials and print or media publications provide added flexibility to  
8 Idaho Power’s suite of mitigation measures due to the nature of potential Project effects, the ability  
9 to minimize those effects, and the location of where the effects occur.<sup>63</sup> Furthermore, educational  
10 materials, print or media publications, and archival records have provided an effective means of  
11 raising awareness and building appreciation about Oregon Trail resources to a wider audience and  
12 provide opportunities to build advocacy for the trail’s long-term conservation.<sup>64</sup> For these reasons,  
13 mitigation measures such as signage and publication/print/media, as well as trail segment  
14 management plans, are appropriate mitigation measures to address visual impacts from B2H. Ms.  
15 Gilbert has failed to provide sufficient evidence or testimony demonstrating that the mitigation  
16 measures listed in Item 81 are neither common nor appropriate methods to address visual impacts  
17 to historic, cultural, and archaeological resources; rather, the preponderance of the evidence in the  
18 record demonstrates that these mitigation measures are standard and appropriate means to mitigate

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<sup>61</sup> ASC, Exhibit S, Attachment S-5: Programmatic Agreement at 18-19 (ODOE - B2HAPPDoc3-36 ASC 19\_ Exhibit S\_Cultural\_ASC\_Public 2018-09-28. Page 342-343 of 783).

<sup>62</sup> Idaho Power / Rebuttal Testimony of Kirk Ranzetta / Issues HCA-3, HCA-4, and HCA-7, p. 79 of 89.

<sup>63</sup> Idaho Power / Rebuttal Testimony of Kirk Ranzetta / Issues HCA-3, HCA-4, and HCA-7, p. 79 of 89.

<sup>64</sup> Idaho Power / Rebuttal Testimony of Kirk Ranzetta / Issues HCA-3, HCA-4, and HCA-7, p. 79 of 89.

1 potential visual impacts to historic and cultural resources in compliance with the Cultural  
2 Resources Standard.

3 In addition, Ms. Gilbert appears to claim that Idaho Power’s proposed mitigation regarding  
4 the height and paint color of transmission towers is insufficient to address visual impacts to historic  
5 and cultural resources.<sup>65</sup> Again, this argument is without merit.

6 As previously discussed in Idaho Power’s briefing,<sup>66</sup> and as explained by Dr. Ranzetta,  
7 mitigation in the form of height reductions, design modifications, and dull exterior finishes for  
8 transmission towers are common ways of minimizing the visual effects of transmission line  
9 facilities, and they are generally viewed as effective.<sup>67</sup> Specifically, such measures are commonly  
10 recognized by BLM as addressing visual impacts from energy facilities.<sup>68</sup> These types of  
11 mitigation measures are discussed in Exhibit R of the ASC as ways to avoid and/or minimize visual  
12 impacts and follow guidelines based on BLM’s *Best Management Practices for Reducing Visual*  
13 *Impacts of Renewable Energy Facilities on BLM Lands*.<sup>69</sup> In Section 3.3.3.2 of Exhibit R of the  
14 ASC, for instance, Idaho Power discusses the rationale behind its decisions that minimized visual  
15 effects while balancing other environmental resource concerns at the National Historic Oregon  
16 Trail Interpretive Center (“NHOTIC”), such as minimizing impacts to active agricultural areas.<sup>70</sup>

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<sup>65</sup> Gilbert Exception for HCA-3 at 15; *see also* Irene Gilbert / Contested Case Opening Argument / Issue HCA-3, p. 1 of 14.

<sup>66</sup> Idaho Power’s Closing Arguments for Contested Case Issues HCA-3, HCA-4, HCA-6, and HCA-7 at 42-44.

<sup>67</sup> Idaho Power / Rebuttal Testimony of Kirk Ranzetta / Issues HCA-3, HCA-4, and HCA-7, pp. 76-77 of 89.

<sup>68</sup> Idaho Power/ Rebuttal Testimony of Kirk Ranzetta/ Issues HCA-3, HCA-4, and HCA-7/Exhibit B, BLM, Best Management Practices for Reducing Visual Impacts of Renewable Energy Facilities on BLM-Administered Lands at 17-18 (BLM/WY/PL-13/013+1340) (2013).

<sup>69</sup> ASC, Exhibit R, Section 3.3.3.2 at R-118 (ODOE - B2HAPPDoc3-35 ASC 18\_Exhibit R\_Scenic Resources\_ASC 2018-09-28. Page 122 of 570); Idaho Power / Rebuttal Testimony of Kirk Ranzetta / Issues HCA-3, HCA-4, and HCA-7 / Exhibit B, BLM, Best Management Practices for Reducing Visual Impacts of Renewable Energy Facilities on BLM-Administered Lands (BLM/WY/PL-13/013+1340) (2013).

<sup>70</sup> ASC, Exhibit R, Section 3.3.3.2 at R-118 (ODOE - B2HAPPDoc3-35 ASC 18\_Exhibit R\_Scenic Resources\_ASC 2018-09-28. Page 122 of 570).

1 Several options were explored to reduce potential effects, including adjusting tower siting to  
2 minimize their presence in the landscape, avoid “skylining,” utilizing a different type of  
3 transmission tower (H-frame vs. lattice), reducing transmission facility heights, and utilizing  
4 natina or galvanized finishes to reduce reflectivity on the towers themselves.<sup>71</sup> Given the visual  
5 resource management level in this area (Visual Resource Management Class II<sup>72</sup>), Idaho Power  
6 concluded that after taking into account the mitigation options, the Project would result in medium  
7 intensity impacts that would not “preclude the resource from providing the visual qualities that  
8 currently exist within the [Area of Critical Environmental Concern]” and thus resulted in a less  
9 than significant impact.<sup>73</sup> The final implementation of measures to reduce the visibility of the  
10 Project near NHOTIC would be finalized in coordination with EFSC and SHPO through the  
11 implementation of the EFSC HPMP and the Programmatic Agreement.

12 Ms. Gilbert has not provided persuasive evidence or testimony to support her assertion that  
13 Idaho Power’s mitigation measures in the form of tower height reductions and design  
14 modifications are insufficient to address visual impacts. For these reasons, the preponderance of  
15 the evidence demonstrates that Idaho Power’s mitigation measures will be sufficient under the  
16 Cultural Resources Standard.

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<sup>71</sup> ASC, Exhibit R, Section 3.3.3.2 at R-118 - R-119 (ODOE - B2HAPPDoc3-35 ASC 18\_Exhibit R\_Scenic Resources\_ASC 2018-09-28. Page 122-123 of 570).

<sup>72</sup> BLM manages visual resources through a Visual Resource Management System. ASC, Exhibit R at R-4 (ODOE – B2HAPPDoc3-35 ASC 18\_Exhibit R\_Scenic Resources\_ASC 2018-09-28. Page 8 of 570). Under such system, visual resources are assigned to management classes, and a Class II Objective requires that the existing character of the landscape be retained and that the level of change to the characteristic landscape be low. *Id.*

<sup>73</sup> Idaho Power / Rebuttal Testimony of Kirk Ranzetta / Issues HCA-3, HCA-4, and HCA-7, p. 77 of 89; *see also* ASC, Exhibit R, Section 3.3.3.2 at R-119 (ODOE - B2HAPPDoc3-35 ASC 18\_Exhibit R\_Scenic Resources\_ASC 2018-09-28. Page 123 of 570).

1                                   iv.     Exception 1D: Specificity of EFSC HPMP

2             Ms. Gilbert also seems to argue that the EFSC HPMP is unclear as to which mitigation  
3 measures are being considered for a particular resource—specifically as these issues relate to  
4 Oregon Trail or National Historic Trail segments.<sup>74</sup> This argument is demonstrably incorrect.  
5 Appendix A.1 of the EFSC HPMP includes Tables HCA-1 and HCA-2, which list specific  
6 resources, impacts to the resources, and potential mitigation measures for such resources.  
7 Table HCA-1, in particular, lists specific Oregon Trail/National Historic Trail segments where  
8 Idaho Power will either avoid direct impacts or where there are no anticipated impacts.<sup>75</sup> Measures  
9 to avoid direct impacts are described in detail. For instance, for the Whiskey Creek Segment of the  
10 Oregon Trail (O-BK-UN-1), the summary in the “Avoidance Measure and/or Management  
11 Recommendation” column provides, in part, that “[f]or the new road, [Idaho Power] will relocate  
12 or reduce the size of the new road to avoid Site # B2H-UN-005; for the existing road, all  
13 improvements will be made within the existing road prism thereby avoiding any new impacts[.]”<sup>76</sup>

14             Table HCA-2, on the other hand, lists specific Oregon Trail/National Historic Trail  
15 segments that are: (1) eligible for listing on the National Register of Historic Places; and (2) may  
16 experience indirect (i.e., visual) impacts from the Project.<sup>77</sup> This table further provides a summary  
17 of potential mitigation measures for visual impacts. For instance, for Segment 6B2H-RP-09 of the  
18 Oregon Trail, the “Avoidance Measure and/or Management Recommendation” column provides,

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<sup>74</sup> Gilbert Exception for HCA-3 at 15.

<sup>75</sup> Proposed Order, Attachment S-9: Historic Properties Management Plan, Appendix A.1, Table HCA-1 (ODOE - B2HAPPDoc2 Proposed Order on ASC and Attachments 2019-07-02. Page 9642-9649 of 10016).

<sup>76</sup> Proposed Order, Attachment S-9: Historic Properties Management Plan, Appendix A.1, Table HCA-1 (ODOE - B2HAPPDoc2 Proposed Order on ASC and Attachments 2019-07-02. Page 9647 of 10016),

<sup>77</sup> Proposed Order, Attachment S-9: Historic Properties Management Plan, Appendix A.1, Table HCA-2 (ODOE - B2HAPPDoc2 Proposed Order on ASC and Attachments 2019-07-02. Page 9651- 9659 of 10016).

1 in part, that “[a]rchival research and documentation [t]esting [is] needed” and it may be prudent to  
2 “publish [a] research focus article on professional society prestaton, or public education and  
3 outreach[.]”<sup>78</sup>

4 In sum, Ms. Gilbert has not provided persuasive evidence or testimony to support her  
5 assertion that the EFSC HPMP is unclear which mitigation measures are being considered for a  
6 particular resource. Rather, the preponderance of the evidence from the EFSC HPMP demonstrates  
7 that Idaho Power’s mitigation measures are sufficiently detailed for particular resources in  
8 compliance with the Cultural Resources Standard. For these reasons, the Council should adopt the  
9 Hearing Officer’s findings and conclusions on these matters.

10 v. Exception 1E: Site-Specific Documentation for Individual  
11 Resources

12 As in her Closing Argument, Ms. Gilbert argues that the Company failed to provide  
13 adequate documentation of specific impacts to, and mitigation measures for, historic and cultural  
14 resources.<sup>79</sup> Specifically, Ms. Gilbert points to a November 3, 2017 memorandum from Historical  
15 Research Associates, Inc. (“HRA”), a consultant firm contracted by Golder Associates, Inc. to  
16 review Exhibit S of the ASC,<sup>80</sup> to argue that: (1) Exhibit S presents no complete list of  
17 archaeological objects, as defined in ORS 358.905(1)(a), and archaeological sites, as defined in  
18 ORS 358.905(1)(c), within the analysis area on either public or private lands;<sup>81</sup> (2) “Exhibit S does

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<sup>78</sup> Proposed Order, Attachment S-9: Historic Properties Management Plan, Appendix A.1, Table HCA-2 (ODOE - B2HAPPDoc2 Proposed Order on ASC and Attachments 2019-07-02. Page 9652 of 10016).

<sup>79</sup> Gilbert Exception for HCA-3 at 14, 19-22; *see also* Irene Gilbert’s Contested Case Closing Argument Regarding Issue HCA-3 at 12-13.

<sup>80</sup> *See* Historical Research Associates, Inc. Memorandum at 2-20 (Nov. 3, 2017) (ODOE - B2HAPPDoc8-21 ApASC Reviewing Agency Comment SHPO\_HRA 2017-11-03. Page 7-20 of 20).

<sup>81</sup> Historical Research Associates, Inc. Memorandum at 6 (ODOE - B2HAPPDoc8-21 ApASC Reviewing Agency Comment SHPO\_HRA 2017-11-03. Page 7 of 20).



1 not clearly identify resources and potential impacts to them[;]”<sup>82</sup> (3) in some instances, Idaho  
2 Power neglected to evaluate archaeological sites for significance under eligibility criteria other  
3 than Criterion D;<sup>83</sup> (4) there were discrepancies in total resource counts;<sup>84</sup> (5) Idaho Power failed  
4 to draft eligibility recommendations stating clearly whether the recommendation applies to the  
5 resource in its entirety or only the segment of the resource that was surveyed (with a clear,  
6 corresponding description of the resource and/or segment);<sup>85</sup> and (6) Idaho Power does not use the  
7 Visual Assessment of Historic Properties Plan (Attachment S-2 to Exhibit S of the ASC), BLM’s  
8 National Historic Trails Study (Attachment S-8 to Exhibit S of the ASC), and the Oregon Trail  
9 Multiple Property Documentation consistently in its analysis.<sup>86</sup> These concerns—which were fully  
10 addressed during the contested case—are based on a misunderstanding of the record. As Idaho  
11 Power explained, in response to HRA’s comments, ODOE issued four Requests for Additional  
12 Information to Idaho Power,<sup>87</sup> and Idaho Power subsequently revised Exhibit S and provided an  
13 Errata Sheet to address all of these issues.<sup>88</sup>

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<sup>82</sup> Historical Research Associates, Inc. Memorandum at 7 (ODOE - B2HAPPDoc8-21 ApASC Reviewing Agency Comment SHPO\_HRA 2017-11-03. Page 8 of 20).

<sup>83</sup> Historical Research Associates, Inc. Memorandum at 8 (ODOE - B2HAPPDoc8-21 ApASC Reviewing Agency Comment SHPO\_HRA 2017-11-03. Page 9 of 20). Criterion D for listing on the National Register of Historic Places is for a resource that has “yielded or may be likely to yield, information important in prehistory or history.” 36 CFR 60.4(d).

<sup>84</sup> Historical Research Associates, Inc. Memorandum at 8 (ODOE - B2HAPPDoc8-21 ApASC Reviewing Agency Comment SHPO\_HRA 2017-11-03. Page 9 of 20).

<sup>85</sup> Historical Research Associates, Inc. Memorandum at 10 (ODOE - B2HAPPDoc8-21 ApASC Reviewing Agency Comment SHPO\_HRA 2017-11-03. Page 11 of 20).

<sup>86</sup> Historical Research Associates, Inc. Memorandum at 10 (ODOE - B2HAPPDoc8-21 ApASC Reviewing Agency Comment SHPO\_HRA 2017-11-03. Page 11 of 20).

<sup>87</sup> See ODOE Request for Additional Information (Mar. 6, 2019) (ODOE - B2HAPPDoc18 ASC ODOE RAIs\_ Exhibit S\_AA\_U\_W 2018-12-08 to 2019-04-06. Page 1 of 17).

<sup>88</sup> See Idaho Power Responses to Requests for Additional Information and Agency Comment Letters (Jan. 14, 2019) (ODOE - B2HAPPDoc19 ASC IPC Responses to ASC RAIs and Agency Comment Letters\_ 2019-01-14 to 2019-04-12. Page 1 of 41).

- 1        1) Table S-2 of Exhibit S provides a list of all cultural resources, including archaeological  
2            objects and sites, within the analysis area.<sup>89</sup>
- 3        2) Table S-2 of Exhibit S clearly identifies resources by Assigned Trinomial or Other ID,  
4            where feasible, and describes whether the impacts to such resources are direct or indirect,  
5            and whether the impacts have been avoided.<sup>90</sup>
- 6        3) As shown in the Errata Sheet to Exhibit S, the Intensive Level Survey included consistent  
7            consideration of Criterion D where feasible.<sup>91</sup> Where aboveground and visible  
8            characteristics were not sufficient to meet Criterion D for listing on the National Register  
9            of Historic Places, Idaho Power noted that “[s]urface and/or subsurface archaeological  
10           survey/testing would be necessary to verify whether archaeological remains would be  
11           significant under [National Register of Historic Places] Criterion D.”<sup>92</sup>
- 12       4) Idaho Power, for the most part, addressed discrepancies in the number of resources  
13           evaluated in Exhibit S. Nevertheless, Idaho Power acknowledges a typological error in  
14           Exhibit S and the EFSC HPMP to the Proposed Order regarding the total number of  
15           resources considered in the Intensive Level Survey. Exhibit S of the ASC states that the  
16           Intensive Level Survey included 231 resources in the Visual Assessment analysis area, but

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<sup>89</sup> ASC, Exhibit S at S-29 – S-129 (ODOE - B2HAPPDoc3-36 ASC 19\_Exhibit S\_Cultural\_ASC\_Public 2018-09-28. Page 35-85 of 783).

<sup>90</sup> ASC, Exhibit S at S-29 – S-129 (ODOE - B2HAPPDoc3-36 ASC 19\_Exhibit S\_Cultural\_ASC\_Public 2018-09-28. Page 35-85 of 783).

<sup>91</sup> *See, e.g.*, ASC, Exhibit S, Errata Sheet at S-35 – S-37 (ODOE - B2HAPPDoc3-55 ASC Exhibit S\_Errata Info\_Redacted 2019-03-06. Page 35-37 of 79) (consideration of Criterion D for Whiskey Creek Segment (O-BK-UN-1/B2H-UN-005)).

<sup>92</sup> ASC, Exhibit S, Errata Sheet at S-37 (ODOE - B2HAPPDoc3-55 ASC Exhibit S\_Errata Info\_Redacted 2019-03-06. Page 37 of 79).

1 then goes on to state that Idaho Power considered 229 resources for the study.<sup>93</sup> The  
2 Proposed Order similarly mistakenly states that the Intensive Level Survey  
3 addressed 229 of the 764 built environment resources identified in Oregon.<sup>94</sup> After  
4 consulting with Idaho Power’s expert witness Kirk Ranzetta regarding the confidential  
5 Intensive Level Survey, counsel for Idaho Power confirmed that 231 resources were indeed  
6 evaluated for the Intensive Level Survey, and of those resources 130 were evaluated for  
7 Project effects, while 101 were eliminated from the study.<sup>95</sup> As for Ms. Gilbert’s reference  
8 to alleged discrepancies in Table S-10 of the August 9, 2018 draft of Exhibit S,<sup>96</sup> that table  
9 was not included in the final Exhibit S for the ASC, and therefore is not before the  
10 Council.<sup>97</sup>

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<sup>93</sup> ASC, Exhibit S at S-138 (ODOE – B2HAPPDoc3-36 ASC 19\_Exhibit S\_Cultural\_ASC\_Public 2018-09-28. Page 93 of 783) (“The [Intensive Level Survey] study included 231 resources in the Visual Assessment analysis area .... Of the 229 resources, 101 were eliminated from the study....”).

<sup>94</sup> Proposed Order, Attachment S-9: Historic Properties Management Plan at 19 (July 2, 2020) (ODOE - B2HAPPDoc2 Proposed Order on ASC and Attachments 2019-07-02. Page 9615 of 10016).

<sup>95</sup> ASC, Exhibit S, Confidential Attachment S-10: Intensive Level Survey – Visual Assessment of Historic Properties Report (ODOE – B2HAPPDoc3-36 ASC 19\_Exhibit S\_Cultural\_ASC\_Public 2018-09-28. Page 778 of 783).

<sup>96</sup> Gilbert Exception for HCA-3 at 20-22; *see also* Irene Gilbert’s Contested Case Closing Argument Regarding Issue HCA-3 at 15.

<sup>97</sup> With regard to Ms. Gilbert’s argument that in Table S-10 the proposed mitigation (i.e., “Design Modification, Public Interpretation Funding, Print/Media Publication”) is too general and does not change depending on whether the impact is direct or indirect, Idaho Power notes that the proposed mitigation in the final Exhibit S of the ASC and the Proposed Order’s EFSC HPMP is tailored to the type of impact anticipated for the resource. Moreover, pursuant to Recommended Historic, Cultural, and Archaeological Resources Condition 2, Idaho Power will be required to submit to ODOE, SHPO, and applicable Tribal Governments an updated EFSC HPMP with site-specific mitigation measures based on new survey data and updated National Register of Historic Places eligibility information. Proposed Order, Attachment 1: Draft Site Certificate at 33 (ODOE - B2HAPPDoc2 Proposed Order on ASC and Attachments 2019-07-02. Page 737 of 10016). Accordingly, Ms. Gilbert’s arguments regarding Table S-10 are unsupported by the record. Ms. Gilbert also argues that Table S-14—entitled “Impacted Resources Subject to or Potentially Subject to EFSC Standards in the Analysis Area”—provides no information regarding the resources and specific mitigation. Gilbert Exception for HCA-3 at 14; ASC, Exhibit S, Table S-14 (ODOE - B2HAPPDoc3-36 ASC 19\_Exhibit S\_Cultural\_ASC\_Public 2018-09-28. Page 147 of 783). Ms. Gilbert ignores the fact that the table is a summary and the footnote to the table provides that “[m]ore detailed information pertaining to the listed resources may be obtained from Table S-2 and Attachments S-6 [Confidential Cultural Resources Technical Report] and S-10 [Confidential Intensive Level Survey].” ASC, Exhibit S at S-209 (ODOE - B2HAPPDoc3-36 ASC 19\_Exhibit S\_Cultural\_ASC\_Public 2018-09-28. Page 164 of 783). Furthermore, Tables S-15 and S-16 of Exhibit S, as well as Appendix A.1 of the Proposed Order’s EFSC HPMP, provide more information regarding mitigation measures for

1        5) A review of the Errata Sheet to Exhibit S and the EFSC HPMP demonstrates that Idaho  
2        Power clearly stated whether the National Register of Historic Places recommendation  
3        applied to a resource in its entirety or only the segment of the resource that was surveyed.<sup>98</sup>  
4        Idaho Power’s National Register of Historic Places recommendations (Unevaluated,  
5        Listed/Eligible Under Criterion A-D, and Not Eligible) for the Oregon Trail and its specific  
6        segments are provided in Tables HCA-1 (Oregon Trail/NHT Inventory in Analysis Area  
7        with Avoided/No Impacts) and HCA-2 (NRHP-Eligible Oregon Trail/NHT Inventory in  
8        Analysis Area with Potential Indirect Impacts) of Appendix A-1 to the Proposed Order’s  
9        EFSC HPMP.<sup>99</sup>

10       6) Regarding Idaho Power’s methodology for assessing visual impacts to trails, Idaho Power  
11       refers the Council to the discussion for Exception 1A above.<sup>100</sup>

12       Ms. Gilbert also references comments from ODOE Senior Siting Analyst Kellen  
13       Tardaewether and the HRA Memorandum to argue that: (1) Idaho Power cannot withhold  
14       information regarding the locations of Oregon Trail resources; and (2) Idaho Power failed to  
15       provide sufficiently detailed information regarding individual Oregon Trail resources such that the  
16       Council could determine eligibility for purposes of issuing a site certificate.<sup>101</sup> As to the first

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individual resources. ASC, Exhibit S, Table S-15 (ODOE - B2HAPPDoc3-36 ASC 19\_ Exhibit S\_ Cultural\_ ASC\_ Public 2018-09-28. Page 166 of 783) & Table S-16 (ODOE - B2HAPPDoc3-36 ASC 19\_ Exhibit S\_ Cultural\_ ASC\_ Public 2018-09-28. Page 168 of 783); Proposed Order, Attachment S-9: Historic Properties Management Plan, Appendix A.1 (ODOE - B2HAPPDoc2 Proposed Order on ASC and Attachments 2019-07-02. Page 9640 of 10016). Accordingly, Ms. Gilbert’s arguments regarding Table S-14 are unsupported by the record.

<sup>98</sup> See, e.g., ASC, Exhibit S, Errata Sheet at S-28 – S-30 (ODOE - B2HAPPDoc3-55 ASC Exhibit S\_Errata Info\_Redacted 2019-03-06. Page 28-30 of 79) (determination that component 3B2H-SA-05 of the Oregon Trail Unnamed segment is likely eligible for listing on the National Register of Historic Places).

<sup>99</sup> Proposed Order, Attachment S-9: Historic Properties Management Plan, Appendix A-1, Tables HCA-1 and HCA-2 (ODOE - B2HAPPDoc2 Proposed Order on ASC and Attachments 2019-07-02. Page 9642-9659 of 10016).

<sup>100</sup> See also Idaho Power Company’s Closing Arguments for Contested Case Issues HCA-3, HCA-4, HCA-6, and HCA-7 at 36-41

<sup>101</sup> Gilbert Exception for HCA-3 at 20-22; see also Irene Gilbert’s Contested Case Closing Argument Regarding Issue HCA-3 at 13, 15-16.

1 argument, Ms. Gilbert relies on Ms. Tardaewether’s conclusion that under ORS 192.345(11),  
2 Idaho Power may exempt from public disclosure information concerning the location of  
3 archaeological sites or objects, such as tribal resources, but may not withhold such information  
4 “relating to a site that is all or part of an existing, commonly known and publicized tourist facility  
5 or attraction[,]” such as Oregon Trail resources that are a major tourist attraction in Oregon.<sup>102</sup> As  
6 to the second argument, Ms. Gilbert relies on the matrix notes from the HRA Memorandum that  
7 conclude that Exhibit S failed to include sufficient property identification information for Oregon  
8 Trail resources, such as location descriptions and photographs, to determine resource integrity and  
9 eligibility for listing on the National Register of Historic Places.<sup>103</sup>

10 Again, Idaho Power has already responded to both Ms. Tardaewether’s and HRA’s  
11 concerns by providing the Errata Sheet to Exhibit S of the ASC, which includes photographs of  
12 the Oregon Trail resources, descriptions of the locations of such resources, a summary of the  
13 historical significance of the resources, whether the Oregon Trail resources would qualify for  
14 listing under the National Register of Historic Places criterion, whether the resources will  
15 experience direct or indirect impacts, whether avoidance of the resources is recommended, and

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<sup>102</sup> Email from Kellen Tardaewether, ODOE Senior Siting Analyst, to David Stanish, Idaho Power at 1-2 (Dec. 4, 2018) (ODOE - B2HAPPDoc15 ASC ODOE Direction to IPC Oregon Trail Segments and Exemptions in ORS 192.345 2018-12-04. Page 1-2 of 2). Similarly, Ms. Gilbert references the matrixes to HRA’s November 3, 2017 memorandum to argue that Idaho Power provided “no definition of property type or registration requirements, no photographs, evaluates several sections of trail together, cannot determine if integrity is high or low, etc.” Gilbert Exception for HCA-3 at 21; Irene Gilbert’s Contested Case Closing Argument Regarding Issue HCA-3 at 14-15; *see also* Historical Research Associates, Inc. Memorandum, Attachment A: Cultural Resources Technical Report Comment Matrix & Attachment B: Intensive Level Survey--Visual Assessment of Historic Properties Report (ODOE - B2HAPPDoc8-24 ApASC Reviewing Agency Comment SHPO\_Pouley 2017-11-13. Page 14-21 of 21). However, for the same reasons discussed above, a simple review of the Errata Sheet to Exhibit S demonstrates that Ms. Gilbert’s claim is unsubstantiated.

<sup>103</sup> Gilbert Exception for HCA-3 at 21; *see also* Historical Research Associates, Inc. Memorandum, Attachment A: Cultural Resources Technical Report Comment Matrix & Attachment B: Intensive Level Survey--Visual Assessment of Historic Properties Report (ODOE - B2HAPPDoc8-24 ApASC Reviewing Agency Comment SHPO\_Pouley 2017-11-13. Page 14-21 of 21).

1 whether further testing or subsurface exploration is needed to assess historical significance and  
2 potential impacts.<sup>104</sup> While Ms. Gilbert concedes in her Closing Argument and Exception that the  
3 Errata Sheet to Exhibit S of the ASC indeed provides a description of the locations of trail  
4 resources, she further claims that the Errata Sheet “fails to identify the impacts that the  
5 development will have on the visual qualities of the sites.”<sup>105</sup> A simple review of the Errata Sheet  
6 to Exhibit S of the ASC demonstrates that Ms. Gilbert’s argument is unsubstantiated; for example,  
7 for the Powell Creek Segment (B2H-BA-337) of the Oregon Trail, Idaho Power determined that  
8 “visual impacts are not likely due to intervening topography, existing modifications to the  
9 landscape, and distance from Project.”<sup>106</sup>

10 Moreover, while the Proposed Order’s EFSC HPMP provides some specific avoidance  
11 measures for direct impacts and mostly general mitigation measures for visual impacts to Oregon  
12 Trail resources,<sup>107</sup> pursuant to Recommended Historic, Cultural, and Archaeological Resources  
13 Condition 2, Idaho Power will be required to submit to ODOE, SHPO, and applicable Tribal  
14 Governments an updated EFSC HPMP with site-specific mitigation measures for all resources  
15 based on new survey data and updated National Register of Historic Places eligibility information  
16 in coordination with the federal Section 106 process.<sup>108</sup> Furthermore, Recommended Historic,  
17 Cultural, and Archaeological Resources Condition 1 requires Idaho Power to avoid *all* direct

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<sup>104</sup> See ASC, Exhibit S, Errata Sheet at S-10 – S-70 (ODOE - B2HAPPDoc3-55 ASC Exhibit S\_Errata Info\_Redacted 2019-03-06. Page 10-70 of 79).

<sup>105</sup> Gilbert Exception for HCA-3 at 12; *see also* Irene Gilbert’s Contested Case Closing Argument Regarding Issue HCA-3 at 9.

<sup>106</sup> ASC, Exhibit S, Errata Sheet at S-59 (ODOE - B2HAPPDoc3-55 ASC Exhibit S\_Errata Info\_Redacted 2019-03-06. Page 59 of 79).

<sup>107</sup> See Proposed Order, Attachment S-9: Historic Properties Management Plan, Appendix A-1, Tables HCA-1, HCA-2, and HCA-4b (ODOE - B2HAPPDoc2 Proposed Order on ASC and Attachments 2019-07-02. Page 9642 of 10016).

<sup>108</sup> Proposed Order, Attachment 1: Draft Site Certificate at 33 (ODOE - B2HAPPDoc2 Proposed Order on ASC and Attachments 2019-07-02. Page 737 of 10016).

1 impacts to Oregon Trail resources consistent with the requirements of the EFSC HPMP, which  
2 Idaho Power will achieve by micrositing portions of the Project or using flagging, fencing, or  
3 signage to protect these resources from degradation by construction and maintenance vehicles.<sup>109</sup>  
4 Accordingly, the preponderance of the evidence demonstrates that, where feasible, Idaho Power  
5 has provided all necessary information and documentation regarding Oregon Trail resources.

6 For these reasons, the Council should adopt the Hearing Officer’s findings and conclusions  
7 on these matters.

8 vi. Exception 1F: Ms. Gilbert’s Recommended Site Certificate  
9 Condition Regarding the Intensive Level Survey

10 Ms. Gilbert apparently takes exception to the Hearing Officer’s determination in the  
11 Proposed Contested Case Order that certain of her proposed site certificate conditions that were  
12 presented in her Closing Argument were untimely,<sup>110</sup> and argues that Idaho Power failed to provide  
13 adequate reasoning for its National Register of Historic Places eligibility determinations in the  
14 Intensive Level Survey.<sup>111</sup> Therefore, Ms. Gilbert again proposes the following site certificate  
15 condition:

16 The developer must provide documentation supporting their decision regarding the  
17 229 objects and sites selected for [Intensive Level Survey] study which Idaho  
18 Power based their decision that only 39 had the potential to be [National Register  
19 of Historic Places] eligible or meet one of the criteria.<sup>112</sup>  
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<sup>109</sup> Proposed Order, Attachment 1: Draft Site Certificate at 33 (ODOE - B2HAPPDoc2 Proposed Order on ASC and Attachments 2019-07-02. Page 737 of 10016).

<sup>110</sup> Proposed Contested Case Order at 166-67.

<sup>111</sup> Gilbert Exception for HCA-3 at 23; *see also* Irene Gilbert’s Contested Case Closing Argument Regarding Issue HCA-3 at 18-19.

<sup>112</sup> Gilbert Exception for HCA-3 at 23; *see also* Irene Gilbert’s Contested Case Closing Argument Regarding Issue HCA-3 at 18.

1           The Hearing Officer’s decision to reject Ms. Gilbert’s proposed site condition as untimely  
2 should be adopted by the Council for the following reasons.

3           First, Ms. Gilbert’s proposed site condition is untimely as it was filed after the deadline  
4 prescribed in the Hearing Officer’s schedule. The Council’s rules specifically state that parties  
5 must submit proposed site certificate conditions to the hearing officer in writing “according to a  
6 schedule set by the hearing officer.”<sup>113</sup> Consistent with that requirement, the Hearing Officer  
7 adopted an updated schedule for submittal of Proposed Site Conditions in the Second Order on  
8 Case Management,<sup>114</sup> which required that they be filed by September 17, 2021. Thus, any  
9 proposed site certificate conditions submitted after September 17, 2021, are appropriately  
10 considered untimely, and should be denied by the Hearing Officer for consideration.<sup>115</sup>

11           Second, Ms. Gilbert’s proposal is based on a misunderstanding of the record, and therefore,  
12 if it is considered, should be rejected on its merits. As previously detailed in Idaho Power’s  
13 briefing,<sup>116</sup> Idaho Power wishes to clarify that of the 231 resources selected for the Intensive Level  
14 Survey, 130 were evaluated for Project effects because they were unevaluated, listed, or had the  
15 potential to be listed on the National Register of Historic Places. Of those resources, Idaho Power  
16 determined that potential adverse effects are anticipated for 39 resources, and 14 of the 39

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<sup>113</sup> OAR 345-015-0085 (Hearing Officer’s Proposed Contested Case Order) (emphasis added).

<sup>114</sup> Second Order on Case Management at 10 (“Submit direct testimony and evidence OAR 345-015-0043 and proposed site certificate conditions pursuant to OAR 345-015-0085(1)” set for September 17, 2021).

<sup>115</sup> The Hearing Officer made an exception to this rule for revisions to site certificate conditions that were made by Idaho Power or ODOE to accommodate requested changes by limited parties to existing conditions. *See* Proposed Contested Case Order at 205-05. This approach was reasonable as it allowed for some “back-and-forth” discussions among the parties regarding existing conditions and because all of such adopted changes were proposed by ODOE or Idaho Power to benefit the limited parties.

<sup>116</sup> Idaho Power’s Response Brief for Contested Case Issues HCA-3, HCA-4, HCA-6, and HCA-7 at 24-25 (Mar. 30, 2022).



1 resources require further consultation and research before making a recommendation on Project  
2 effect avoidance, minimization, and/or mitigation strategies.<sup>117</sup>

3 Furthermore, as discussed above, Idaho Power’s Errata Sheet to Exhibit S of the ASC  
4 provides Idaho Power’s eligibility determinations for Oregon Trail resources and associated  
5 archaeological sites and objects (e.g., cemeteries), and the Company’s reasoning for such  
6 determinations.<sup>118</sup> However, Idaho Power’s National Register of Historic Places  
7 recommendations for other archaeological sites and objects, which do not meet the exemption  
8 provided in ORS 192.345(11) for commonly known attractions, are properly withheld for  
9 confidentiality purposes consistent with state law.<sup>119</sup> Accordingly, the preponderance of the  
10 evidence demonstrates that Idaho Power provided adequate reasoning for its National Register of  
11 Historic Places eligibility determinations, and that Ms. Gilbert’s proposed site certificate condition  
12 is unnecessary.

13 To the extent Ms. Gilbert wishes to now challenge whether an archaeological site or object  
14 is “commonly known” for purposes of its inclusion in the Errata Sheet to Exhibit S of the ASC,  
15 she has not previously argued this issue or provided evidence regarding common knowledge of  
16 any specific archaeological object or site whose summary was withheld from Exhibit S as

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<sup>117</sup> Proposed Order, Attachment S-9: Historic Properties Management Plan at 19 (ODOE - B2HAPPDoc2 Proposed Order on ASC and Attachments 2019-07-02. Page 9615 of 10016).

<sup>118</sup> ASC, Exhibit S, Errata at S-10 (ODOE - B2HAPPDoc3-55 ASC Exhibit S\_Errata Info\_Redacted 2019-03-06. Page 10 of 79) (“Section 3.3.2.2 added to include redacted extracts from Attachment S-10. Section titled Oregon Trail ILS-Resource Descriptions and Evaluations.... This section provides textual extracts from the Oregon Trail ILS recorded within the Project Analysis Area. Some portions of the extracts have been redacted to conform with the confidentiality requirements associated with state and federal cultural resource laws and regulations. In other instances, repetitive text has been removed for readability.”).

<sup>119</sup> Under ORS 192.345(11), information concerning the location of archaeological sites or objects as those terms are defined in ORS 358.905, except if the governing body of an Indian tribe requests the information and the need for the information is related to that Indian tribe’s cultural or religious activities, is “exempt from disclosure under ORS 192.311 [] to 192.478[.]” ORS 192.345(11) further provides that information concerning the location of archaeological sites will not be exempt from public disclosure where such information relates “to a site that is all or part of an existing, commonly known and publicized tourist facility or attraction.”

1 confidential. As the record is now closed, further consideration of this novel argument would  
2 unfairly prejudice Idaho Power.

3 *b. Irene Gilbert, Issue HCA-3, Exception 2*

4 Ms. Gilbert also argues that the Proposed Contested Case Order is in error because Idaho  
5 Power failed to submit a complete ASC, and therefore denied the Council and the public access to  
6 information necessary to make a fully informed decision regarding compliance with the Council's  
7 standards. While Ms. Gilbert does not identify specific findings of fact or conclusions of law for  
8 which she takes exception as required by OAR 345-015-0085(5), she makes the following claims  
9 related to HCA-3: (A) the Court of Appeals' decision in *Gould v. Deschutes County*, 216 Or App  
10 150 (2007), requires that the EFSC HPMP be adequately developed (i.e., that it include all site-  
11 specific mitigation plans) prior to issuance of the site certificate to ensure adequate public  
12 review;<sup>120</sup> (B) the plain language of OAR 345-022-0090 requires the Council, and not ODOE, to  
13 determine whether site-specific impacts and mitigation comply with the Cultural Resources  
14 Standard—and therefore a phased approach is inappropriate as it deprives the Council of an  
15 opportunity to make a final determination;<sup>121</sup> and (C) because Idaho Power has gone to court and  
16 petitioned to gain access to previously inaccessible properties to perform surveys, and in certain  
17 cases gained access to those properties, Idaho Power must provide descriptions of site-specific  
18 impacts and mitigation measures for resources on those properties prior to site certification.<sup>122</sup> As  
19 these claims are not tied to a specific exception to the Proposed Contested Case Order as required  
20 by OAR 345-015-0085(5), the claims should be rejected on that basis. Nevertheless, should the

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<sup>120</sup> Gilbert Exception for HCA-3 at 25.

<sup>121</sup> Gilbert Exception for HCA-3 at 7, 16, 18.

<sup>122</sup> Gilbert Exception for HCA-3 at 24-25.

1 Council wish to consider Ms. Gilbert’s arguments, Idaho Power addresses each of her claims  
2 below.

3 i. Exception 2A: Gould v. Deschutes County

4 Ms. Gilbert cites *Gould v. Deschutes County*, 216 Or App 150 (2007) in support of her  
5 argument that Idaho Power’s EFSC HPMP does not provide site-specific mitigation and is  
6 therefore not detailed enough to provide the public an adequate opportunity to review the final  
7 plan.<sup>123</sup> However, *Gould* does not support Ms. Gilbert’s assertion and is wholly inapplicable to  
8 Idaho Power’s EFSC HPMP.

9 As an initial matter, this legal issue was fully briefed and litigated in the Contested Case.  
10 As discussed in Idaho Power’s briefing, at issue in *Gould* was an Oregon Land Use Board of  
11 Appeals (“LUBA”) decision to uphold a county’s conditional approval of a conceptual master plan  
12 for a destination resort development, the approval of which was required to comply with the  
13 Deschutes County Codes.<sup>124</sup> The Deschutes County Code required a three-step process for  
14 approval of a destination resort conceptual master plan; the first step of the process is consideration  
15 and approval of the conceptual master plan at a public hearing.<sup>125</sup> At the public hearing, the  
16 applicant is to submit evidence of the conceptual master plan’s compliance with the Deschutes  
17 County Code, and the subsequent approval of the conceptual master plan is based on the  
18 evidentiary record created at the public hearing.<sup>126</sup> Petitioner appealed LUBA’s decision to affirm  
19 the county’s approval of the conceptual master plan because no draft wildlife mitigation plan had

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<sup>123</sup> Gilbert Exception for HCA-3 at 25; Irene Gilbert / Contested Case Opening Argument Regarding Issue HCA-3 / Issue HCA-3, p. 1 -2 of 14.

<sup>124</sup> *Gould*, 216 Or App at 153.

<sup>125</sup> *Gould*, 216 Or App at 153-154.

<sup>126</sup> *Gould*, 216 Or App at 153-154.

1 been provided and reviewed at the public hearing, and as a result the county allowed for *future*  
2 submittal of the wildlife mitigation plan outside of the public hearing process.<sup>127</sup> Consequently,  
3 the record did not include substantial evidence to support the county’s approval of a mitigation  
4 plan because no draft mitigation plan was available for public review.<sup>128</sup> The Court opined that  
5 the county should have postponed approval of the conceptual master plan to allow for a public  
6 hearing on a draft mitigation plan to determine that the project complied with the Deschutes  
7 County Code.<sup>129</sup> Based on its findings, the Court concluded that the evidentiary record was  
8 insufficient to support the Land Use Board of Appeal’s approval of the county’s decision that the  
9 wildlife mitigation plan of the conceptual master plan complied with the applicable code  
10 requirements, and therefore, the Land Use Board of Appeal’s decision was unlawful.<sup>130</sup> This  
11 opinion does not support Ms. Gilbert’s argument for three reasons.

12 *First, Gould* is not binding precedent in this contested case because the court in *Gould* was  
13 applying the requirements contained in a county code, not the EFSC regulations, and the review  
14 process contemplated under the county code is not analogous to the review process laid out under  
15 the EFSC process.<sup>131</sup> The Deschutes County regulations specifically laid out a three-step process  
16 that includes a public hearing for the creation of the record.<sup>132</sup> Under that county process, a public  
17 hearing on draft mitigation plans serves as the first step in the approval process. Thus, the county’s  
18 actions had impermissibly denied the public its right to review by bypassing the public hearing

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<sup>127</sup> *Gould*, 216 Or App at 156-157 (emphasis added).

<sup>128</sup> *Gould*, 216 Or App at 157.

<sup>129</sup> *Gould*, 216 Or App at 162.

<sup>130</sup> *Gould*, 216 Or App at 163.

<sup>131</sup> *Gould*, 216 Or App. at 153.

<sup>132</sup> *Gould*, 216 Or App. at 153.

1 and allowing the future draft plan to be reviewed and approved by an agency without public  
2 review.<sup>133</sup>

3 Unlike the county code at issue in *Gould*, the Council’s governing statutes and regulations  
4 do not require that monitoring and mitigation plans related to the Council’s siting standards be  
5 submitted for public comment before finalization. Rather, under ORS 469.402, the Council may  
6 delegate the approval of a future action, including the approval of monitoring and mitigation plans,  
7 to ODOE.<sup>134</sup> Additionally, the Council’s regulations require an applicant to develop its monitoring  
8 and mitigation plans “in consultation with [ODOE] and, as appropriate, other state agencies, local  
9 governments and tribes” but do not require public comment prior to finalization.<sup>135</sup> Consistent  
10 with those requirements, Idaho Power *must* submit the final EFSC HPMP to ODOE, SHPO, and  
11 applicable Tribal Governments, for review and ODOE’s approval prior to construction based on  
12 (1) new survey data from previously unsurveyed areas and (2) the final facility design.<sup>136</sup> Because  
13 of these different approval requirements, the holding in *Gould* does not support Ms. Gilbert’s  
14 assertion that, in an EFSC proceeding, the public must be afforded the right to review and comment  
15 on previously reviewed mitigation plans before issuance of a site certificate.

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<sup>133</sup> *Gould*, 216 Or App at 163 (“The county’s decision, however, allows the mitigation plan justification to be established by future discussions among Thornburgh, ODFW, and BLM, and not on evidence submitted during the public hearings. That robs interested persons of the participatory rights allowed by the county ordinance.”).

<sup>134</sup> ORS 469.402 (“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 if, in the council’s discretion, the delegation is warranted under the circumstances of the case.”).

<sup>135</sup> OAR 345-025-0016 (“In the site certificate, the Council must include conditions that address monitoring and mitigation to ensure compliance with the standards contained in OAR Chapter 345, Division 22 and Division 24. The site certificate applicant, or for an amendment, the certificate holder, must develop proposed monitoring and mitigation plans in consultation with the Department and, as appropriate, other state agencies, local governments and tribes. Monitoring and mitigation plans are subject to Council approval. The Council must incorporate approved monitoring and mitigation plans in applicable site certificate conditions.”).

<sup>136</sup> Proposed Order, Attachment 1: Draft Site Certificate, at 33-34 (ODOE - B2HAPPDoc2 Proposed Order on ASC and Attachments 2019-07-02. Page 737-738 of 10016).

1           *Second*, Idaho Power, unlike the applicant in *Gould*, submitted a draft mitigation plan that  
2 was subject to public review and that is part of the project record. In *Gould*, the Court of Appeals  
3 reversed LUBA’s opinion affirming the county decision after concluding that the record did not  
4 contain substantial evidence to support the county’s findings of compliance with the applicable  
5 Deschutes County Code because no draft mitigation plan existed at the time of the public  
6 hearing.<sup>137</sup> In contrast, Idaho Power submitted its EFSC HPMP as part of its ASC, which was  
7 subject to public review and comment and which the Council may consider in reaching its final  
8 decision.

9           The Council must determine that the Project, taking into account mitigation, is not likely  
10 to result in significant adverse impacts to historic, cultural, and archaeological resources.<sup>138</sup> In  
11 EFSC proceedings, the Council’s factual findings must be supported by “substantial evidence in  
12 the record.”<sup>139</sup> As discussed above, the court in *Gould* determined that the county’s conclusion  
13 that impacts will be successfully mitigated was not supported by substantial evidence because the  
14 petitioner had not provided any plan to mitigate those impacts. However, unlike *Gould*, Idaho  
15 Power has developed the EFSC HPMP, submitted that plan for public review and comment, and  
16 ODOE has reviewed and addressed both that draft and the public comments in the Proposed Order.  
17 Idaho Power’s draft EFSC HPMP and ODOE’s assessment of the adequacy of that plan in the  
18 Proposed Order provide substantial evidence to support the conclusion that, taking into account  
19 mitigation, no significant impacts to historic, cultural, or archaeological resources will occur as a

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<sup>137</sup> *Gould*, 216 Or App at 163. Under the Deschutes County Code, the county’s decision must be based on evidence submitted at public hearings on the application. *Id.*

<sup>138</sup> OAR 345-022-0090(1).

<sup>139</sup> ORS 183.482(8)(c). Substantial evidence exists to support a finding of fact when the record, viewed as a whole, would permit a reasonable person to make that finding. *Id.*

1 result of the Project. Accordingly, the holding in *Gould* is inapplicable where Idaho Power has  
2 provided substantial evidence demonstrating compliance with EFSC’s Cultural Resources  
3 Standard.

4 For these reasons, Idaho Power’s draft EFSC HPMP is sufficiently detailed to allow the  
5 Council to make an informed decision on the Project’s compliance with applicable siting  
6 standards. Moreover, from a policy perspective, it would further be impractical to require Idaho  
7 Power to incorporate final project design and site-specific mitigation measures into the draft plan  
8 or to subject the final plan to another round of public review and comment. As stated above, Idaho  
9 Power is unable to complete a full inventory of historical and cultural resources prior to site  
10 certification due to the Company’s inability to access certain areas within the Project site boundary.  
11 Due to such constraints, it would be completely unreasonable to require Idaho Power’s EFSC  
12 HPMP to include site-specific mitigation measures prior to site certification. Moreover, by the  
13 time a site certificate is issued, the Draft Proposed Order and Proposed Order will have undergone  
14 lengthy review processes—with parties having full opportunities to identify any deficiencies in the  
15 monitoring or mitigation plans. It would be unduly burdensome to then conduct yet another public  
16 process to review any changes or additions to the plans. For these reasons, Ms. Gilbert’s argument  
17 is without merit and the Hearing Officer’s findings and conclusions should be adopted without  
18 modification.

19 ii. Exception 2B: Phased Approach

20 As in her Closing Argument, Ms. Gilbert appears to argue that the plain language of  
21 OAR 345-022-0090 requires that the Council, and not ODOE, determine whether site-specific

1 impacts and mitigation comply with the Cultural Resources Standard.<sup>140</sup> In effect, Ms. Gilbert  
2 seems to imply that Idaho Power’s phased approach<sup>141</sup> to determining site-specific impacts and  
3 mitigation measures for historic and cultural resources is inappropriate<sup>142</sup> because the Council is  
4 the only entity with the authority to make final determinations as to impacts and mitigation  
5 measures under OAR 345-022-0090.<sup>143</sup> In making her argument, Ms. Gilbert references Items 82  
6 and 87 (findings of fact) of Proposed Contested Case Order, which provide that ODOE concluded  
7 that B2H—when taking into account mitigation, was in compliance with the Cultural Resources  
8 Standard and that Idaho Power could submit additional survey information prior to construction

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<sup>140</sup> Gilbert Exception for HCA-3 at 7, 16, 18; *see also* Irene Gilbert’s Contested Case Closing Argument Regarding Issue HCA-3 at 10-11.

<sup>141</sup> A description of Idaho Power’s phased approach to field surveys is available in Section III.C.2.a. of Idaho Power’s Closing Argument for HCA-3. Idaho Power Company’s Closing Arguments for Contested Case Issues HCA-3, HCA-4, HCA-6, and HCA-7 at 14-17.

<sup>142</sup> For example, in her Exception, Ms. Gilbert noted that Table S-15 of Exhibit S detailed how Idaho Power would not select specific mitigation measures for resources subject to ground disturbance until after the Council had issued the site certificate; Ms. Gilbert argued that this phased approach to surveying historic and cultural resources prevented the public from properly reviewing the Company’s proposed mitigation and violated the Cultural Resources Standard. Gilbert Exception for HCA-3 at 14-15; ASC, Exhibit S, Table S-15 at S-211 (ODOE - B2HAPPD0c3-36 ASC 19\_ Exhibit S\_Cultural\_ASC\_Public 2018-09-28. Page 166 of 783). However, as Idaho Power has continuously explained, site-specific mitigation measures will be determined during Phase 2 when Idaho Power has gained access to previously unavailable sites and is able to perform subsurface exploration pursuant to a final facility design—thus preventing unnecessary disturbance of historic, cultural, and archaeological resources. ASC, Exhibit S at S-25 (ODOE - B2HAPPD0c3-36 ASC 19\_ Exhibit S\_Cultural\_ASC\_Public 2018-09-28. Page 31 of 783).

<sup>143</sup> To support this argument, Ms. Gilbert relies on *Kisor v. Wilkie*, in which the U.S. Supreme Court concluded that *Auer* deference to an agency’s interpretation of its own regulation can arise only if a regulation is genuinely ambiguous. Gilbert Exception for HCA-3 at 18 (citing *Kisor v. Wilkie*, 139 S Ct 2400, 2414 (2019)); Irene Gilbert’s Contested Case Closing Argument Regarding Issue HCA-3 at 11 (same). Ms. Gilbert also relies on *Wisconsin Central Ltd. v. United States* for the proposition that a court’s job is to interpret the words in a statute or regulation consistent with their ordinary meaning. Gilbert Exception for HCA-3 at 18 (referencing *Wis. Cent. Ltd. v. United States*, 138 S Ct 2067, 2070 (2018) (citing *Perrin v. United States*, 100 S Ct 311 (1979))); Irene Gilbert’s Contested Case Closing Argument Regarding Issue HCA-3 at 11 (same). Idaho Power **does not** argue that OAR 345-022-0090 is ambiguous and agrees that determination regarding the status of the ASC under the Cultural Resources Standard for purposes of issuing a site certificate rests with the Council under a plain meaning interpretation of the regulation; however, Ms. Gilbert seems to confuse ODOE’s actual purpose—which is to provide staff *recommendations* to the Council regarding Idaho Power’s compliance with EFSC’s siting standards. Accordingly, it is rightly within ODOE’s discretion to recommend that the Council find that Idaho Power’s preliminary descriptions of impacts and mitigation measures in the draft EFSC HPMP are sufficient for purposes of issuing a site certificate compliant with the Cultural Resources Standard. Furthermore, as discussed in more detail above, ORS 469.402 specifically allows the Council to delegate authority to ODOE to review and approve future actions by the applicant via site certificate conditions.



1 regarding impacts and mitigation for resources, as opposed to seeking an amendment.<sup>144</sup> While  
2 Ms. Gilbert does not take exception to the accuracy of the above findings of facts, she challenges  
3 the ability of ODOE to make compliance determinations for follow-up actions after the Council  
4 has issued a site certificate.

5 Ms. Gilbert’s challenge is baseless; as Ms. Gilbert acknowledges in her Closing Argument  
6 and Exception, follow-up actions after the determination of site certificate eligibility *can* be  
7 delegated to ODOE.<sup>145</sup> ORS 469.402 specifically provides that, “[i]f the Energy Facility Siting  
8 Council elects to impose conditions on a site certificate . . . that require subsequent review and  
9 approval of a future action, the council may delegate the future review and approval to the State  
10 Department of Energy if, in the council’s discretion, the delegation is warranted under the  
11 circumstances of the case.”<sup>146</sup> Therefore, it is entirely appropriate for EFSC to adopt a condition  
12 to the site certificate delegating authority to ODOE to approve the final EFSC HPMP, where Idaho  
13 Power is unable to evaluate certain historic, archaeological, and cultural resources due to right-of-  
14 entry constraints and in order to prevent potentially unnecessary disturbance of subsurface  
15 resources. Consistent with ORS 469.402 and pursuant to Recommended Historic, Cultural, and  
16 Archaeological Resources Condition 2, Idaho Power is required to submit the final EFSC HPMP—  
17 including descriptions of site-specific impacts and mitigation measures—to ODOE, SHPO, and  
18 applicable Tribal Governments, for review and ODOE’s approval prior to construction based on

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<sup>144</sup> Gilbert Exception for HCA-3 at 16-17 (citing Proposed Contested Case Order at 62-64).  
<sup>145</sup> Gilbert Exception for HCA-3 at 18; Irene Gilbert’s Contested Case Closing Argument Regarding Issue HCA-3 at 11.  
<sup>146</sup> The plain language of ORS 469.402 provides EFSC with clear authority to delegate to ODOE the authority to review and approve follow-up actions following site certification, and there is nothing in the Cultural Resources Standard that indicates that the Council intended to limit such authority. *State v. Gaines*, 346 Or 160, 175 (2009) (citing *Portland Gen. Elec. Co. v. Bureau of Labor & Indus.*, 317 Or 606, 611 (1993)) (holding that the court ordinarily presumes that legislature intended terms to have plain, natural, and ordinary meaning).

1 (1) new survey data from previously inaccessible areas and (2) the final facility design.<sup>147</sup>  
2 Moreover, the Proposed Order’s EFSC HPMP already provides a thorough explanation of the  
3 types of mitigation Idaho Power might employ and under what circumstances such mitigation  
4 measures would be employed to address direct and indirect impacts to Oregon Trail resources,  
5 thereby providing the Council sufficient specificity to ensure that the ultimate site-specific  
6 mitigation will satisfy the Cultural Resources Standard.<sup>148</sup>

7 For these reasons, the Council should adopt the Hearing Officers findings and conclusions  
8 on these matters.

9 iii. Exception 3B: Access to Previously Inaccessible Private Properties

10 Ms. Gilbert takes exception to the Hearing Officer’s rejection of the following proposed  
11 condition, which she proposed for the first time in her Closing Arguments:

12 All information provided post site certificate for locations which were not included  
13 in the original application based upon the ‘Energy Facility Siting Council Decisions  
14 for Linear Facilities site Restricted Access within a Site Boundary: Boardman to  
15 Hemingway Transmission Line’ that is submitted after a site certificate is issued  
16 must be addressed with a Type A Amendment allowing the public access to a full  
17 contested case process due to the failure to disclose all accessible information to  
18 the public and the council during the original application process.<sup>149</sup>  
19

20 Ms. Gilbert argued in her brief and continues to argue in her exceptions that since Idaho Power  
21 petitioned the courts and has recently gained access to certain previously inaccessible properties  
22 to perform surveys, Idaho Power must provide descriptions of site-specific impacts and mitigation

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<sup>147</sup> Proposed Order, Attachment 1: Draft Site Certificate at 33-34 (ODOE - B2HAPPDoc2 Proposed Order on ASC and Attachments 2019-07-02. Page 737-738 of 10016).

<sup>148</sup> Proposed Order, Attachment S-9: Historic Properties Management Plan, Appendix A-1, Tables HCA-1 and HCA-2 (ODOE - B2HAPPDoc2 Proposed Order on ASC and Attachments 2019-07-02. Page 9642-9659 of 10016).

<sup>149</sup> Gilbert Exception for HCA-3 at 24-25.

1 measures for resources on those properties prior to site certification or otherwise seek an  
2 amendment.<sup>150</sup>

3 The Hearing Officer rejected this condition because it was untimely filed.<sup>151</sup> Her decision  
4 should be adopted by the Council for the following reasons.

5 First, Ms. Gilbert’s proposed site condition is untimely as it was filed after the deadline  
6 prescribed in the Hearing Officer’s schedule. As discussed above, the deadline for filing site  
7 certificate conditions was September 17, 2021, and Ms. Gilbert first proposed this condition in her  
8 Closing Arguments.

9 Second, Ms. Gilbert’s proposal is based on a misunderstanding of the record, and therefore,  
10 if it is considered, should be rejected on its merits. To support this site certificate condition,  
11 Ms. Gilbert relies on ODOE’s April 24, 2018 memorandum entitled “Energy Facility Siting  
12 Council Decisions for Linear Facilities site Restricted Access within a Site Boundary: Boardman  
13 to Hemingway Transmission Line” (“Linear Facilities Memorandum”), which concluded that once  
14 Idaho Power gained access to previously restricted areas, the Company would be required to  
15 submit a site certificate amendment.<sup>152</sup> However, ODOE’s recommendation in the Linear  
16 Facilities Memorandum is outdated and ODOE has since recommended that resource information  
17 obtained from newly accessed sites would be reviewed and approved by ODOE via Recommended  
18 Historic, Cultural, and Archaeological Resources Condition 2, which requires Idaho Power to  
19 submit to ODOE, SHPO, and applicable Tribal Governments an updated EFSC HPMP based on

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<sup>150</sup> Gilbert Exception for HCA-3 at 25-26; Irene Gilbert’s Contested Case Closing Argument Regarding Issue HCA-3 at 19-20.

<sup>151</sup> Proposed Contested Case Order at 166-67.

<sup>152</sup> Gilbert Exception for HCA-3 at 26; Irene Gilbert’s Contested Case Closing Argument Regarding Issue HCA-3 at 19-20.

1 new site-specific survey data and updated National Register of Historic Places eligibility  
2 information.<sup>153</sup> Furthermore, Idaho Power is at the beginning of its Phase 2 survey process and is  
3 still petitioning county courts to gain access to private properties and restricted areas. While Ms.  
4 Gilbert has stated that Idaho Power is just initiating the process to gain right-of-entry to certain  
5 previously inaccessible properties,<sup>154</sup> Ms. Gilbert has offered no evidence that the Company has  
6 been able to complete additional investigations and surveys of cultural resources. Moreover, even  
7 if Idaho Power had already gained access to *all* previously restricted areas, it would still be  
8 impractical to provide descriptions of site-specific impacts and mitigation measures for all  
9 resources at this time because final facility design is pending, and the Company will not perform  
10 an Enhanced Archaeological Survey and subsurface shovel probing prior to final route selection  
11 in order to avoid unnecessary disturbance of archaeological sites and objects.

12 For these reasons, the preponderance of the evidence demonstrates that it is appropriate  
13 pursuant to ODOE’s Recommended Historic, Cultural, and Archaeological Resources Condition 2  
14 for Idaho Power to provide descriptions of site-specific impacts and mitigation measures for  
15 resources on previously inaccessible properties in the final EFSC HPMP, after site certification  
16 and in coordination with the federal Section 106 process. Accordingly, the Hearing Officer’s  
17 findings and conclusions should be adopted without modification.

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<sup>153</sup> Proposed Order at 47, 47 n.54 (ODOE - B2HAPPDoc2 Proposed Order on ASC and Attachments 2019-07-02. Page 54 of 10016) (“The approach described in this section provides an alternative to the recommendations outlined in the Departments’ Energy Facility Siting Council Decisions for Linear Facilities with Restricted Access within a Site Boundary: Boardman to Hemingway Transmission Line memo (April 2018).”).

<sup>154</sup> Gilbert Exception for HCA-3 at 24.

1           **2.       JoAnn Marlette, Exceptions, HCA-3**

2           Ms. Marlette provides two arguments against the Proposed Contested Case Order: (1) the  
3 Proposed Contested Case Order is in error because B2H will result in a “More Than Significant”  
4 impact to Oregon Trail resources regardless of any amount of expert testimony or evidence  
5 presented by Idaho Power;<sup>155</sup> and (2) the Proposed Contested Case Order is in error because sites  
6 that are potentially eligible for listing on the National Register of Historic Places will now be  
7 permanently ineligible because they will have been degraded by the Project.<sup>156</sup> Since these claims  
8 are not tied to a specific exception to the Proposed Contested Case Order as required by OAR 345-  
9 015-0085(5), the claims should be rejected on that basis. Nevertheless, should the Council wish to  
10 consider Ms. Marlette’s arguments, Idaho Power addresses each of her claims below.

11                   *a.       JoAnn Marlette, Issue HCA-3, Exception 1*

12           Ms. Marlette argues that the Proposed Contested Case Order is in error because B2H will  
13 result in a “More Than Significant” impact to Oregon Trail resources regardless of any amount of  
14 expert testimony or evidence presented by Idaho Power.<sup>157</sup> However, this argument is contrary to  
15 the preponderance of the evidence provided in this case for the following reasons.

16           First, as discussed in Idaho Power’s briefing, Idaho Power will be able to adequately  
17 protect Oregon Trail segments as the Company has provided a sufficient list of avoidance and  
18 mitigation measures in the EFSC HPMP designed specifically to address potential significant  
19 adverse effects to segments of the Oregon Trail.

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<sup>155</sup> Petitioner JoAnn Marlette’s Exceptions to Administrative Law Judge Webster’s Rulings: Proposed Contested Case Order, Issue HCA-3 at 2 (June 30, 2022) [hereinafter, “Marlette Exception for HCA-3”].

<sup>156</sup> Marlette Exception for HCA-3 at 2-3.

<sup>157</sup> Marlette Exception for HCA-3 at 2.

1 According to the EFSC HPMP, Idaho Power designed B2H to avoid direct impacts to  
2 resources recommended as eligible for or listed on the National Register of Historic Places,  
3 including significant archaeological sites, historic buildings, and trails.<sup>158</sup> Where all reasonable  
4 avoidance and minimization measures have been implemented and a significant impact is still  
5 considered probable for a resource, Idaho Power will likely implement data recovery as a  
6 mitigation measure.<sup>159</sup> Data recovery for pre-contact and historic era archaeological resources may  
7 include surface collection or in-field artifact analysis and recording; detailed surface mapping;  
8 controlled scientific excavation; photo documentation; archival research; geomorphological  
9 studies; laboratory analysis; and curation.<sup>160</sup>

10 With regard to visual or indirect impacts, Idaho Power will also attempt to avoid such  
11 impacts where possible. However, where visual impacts are unavoidable, mitigation methods may  
12 include historic documentation, photographic documentation (modern and historic), collection of  
13 oral histories, or architectural, landscape, or engineering documentation.<sup>161</sup> For historic trails, in  
14 particular, potential mitigation approaches for indirect impacts include:

- 15 • Recording, including the Historic American Building Survey, Historic American  
16 Engineering Record, and Historic American Landscape Survey;
- 17 • Additional literature or archival review (*e.g.*, historic maps, local papers, etc.);
- 18 • Remote sensing and metal detector surveys;

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<sup>158</sup> Proposed Order, Attachment S-9: Historic Properties Management Plan, Section 6.2.1 at 26 (ODOE - B2HAPPDoc2 Proposed Order on ASC and Attachments 2019-07-02. Page 9622 of 10016).

<sup>159</sup> Proposed Order, Attachment S-9: Historic Properties Management Plan, Section 6.2.1, Table 6-1 at 26 (ODOE - B2HAPPDoc2 Proposed Order on ASC and Attachments 2019-07-02. Page 9622 of 10016).

<sup>160</sup> Proposed Order, Attachment S-9: Historic Properties Management Plan, Section 6.2.1, Table 6-1 at 26 (ODOE - B2HAPPDoc2 Proposed Order on ASC and Attachments 2019-07-02. Page 9622 of 10016).

<sup>161</sup> Proposed Order, Attachment S-9: Historic Properties Management Plan, Section 6.2.2 at 29 (ODOE - B2HAPPDoc2 Proposed Order on ASC and Attachments 2019-07-02. Page 9625 of 10016).

- 1 • Purchase of conservation easement or other land protection where trail traces exist;
- 2 • Historic trails restoration within and outside the Project area;
- 3 • Public signage, publication/print/media, interpretive plans, information
- 4 pamphlets;
- 5 • Trail segment management plans;
- 6 • Funding for public interpretation, archeological resources, or other programs
- 7 benefiting Oregon Trail resources;
- 8 • National Register nomination; and
- 9 • Design Modification.<sup>162</sup>

10 More detailed lists of these management and mitigation methods for indirect impacts are  
11 available in Tables 6-3 and 6-4 of the EFSC HPMP.<sup>163</sup> As with significant direct impacts, Idaho  
12 Power will address resource-specific mitigation measures for significant indirect impacts through  
13 resource-specific treatment and/or mitigation plans designed during Phase 2.<sup>164</sup> The Company will  
14 determine appropriate resource-specific mitigation through consultation with ODOE and SHPO,  
15 as well as tribes and historic preservation societies.<sup>165</sup>

16 Importantly, consistent with the requirements of OAR 345-021-0010(1)(s)(E), the EFSC  
17 HPMP includes a Monitoring Plan that addresses the monitoring of cultural resources subject to

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<sup>162</sup> Proposed Order, Attachment S-9: Historic Properties Management Plan, Section 6.2.2, Tables 6-3 and 6-4 at 30-31 (ODOE - B2HAPPDoc2 Proposed Order on ASC and Attachments 2019-07-02. Page 9626-9627 of 10016); Proposed Order, Attachment S-9: Historic Properties Management Plan, Appendix A-1, Tables HCA-1, HCA-2 and HCA-4b (ODOE - B2HAPPDoc2 Proposed Order on ASC and Attachments 2019-07-02. Page 9640 of 10016).  
<sup>163</sup> Proposed Order, Attachment S-9: Historic Properties Management Plan, Section 6.2.2, Tables 6-3 and 6-4 at 30-31 (ODOE - B2HAPPDoc2 Proposed Order on ASC and Attachments 2019-07-02. Page 9626-9627 of 10016).  
<sup>164</sup> Proposed Order, Attachment S-9: Historic Properties Management Plan, Section 6.2.2 at 29 (ODOE - B2HAPPDoc2 Proposed Order on ASC and Attachments 2019-07-02. Page 9625 of 10016).  
<sup>165</sup> Proposed Order, Attachment S-9: Historic Properties Management Plan, Section 6.2.2 at 29 (ODOE - B2HAPPDoc2 Proposed Order on ASC and Attachments 2019-07-02. Page 9625 of 10016).

1 EFSC standards and provides details regarding the roles and responsibilities of various personnel  
2 in the field.<sup>166</sup> Idaho Power’s Cultural Resources Team, in particular, which is a part of the  
3 Company’s environmental inspection team and will report to and coordinate with the Construction  
4 Contractor’s Environmental Manager, is responsible for conducting cultural resource field  
5 monitoring and ensuring compliance with the requirements of the EFSC HPMP pursuant to the  
6 Monitoring Plan.<sup>167</sup> The Company’s Cultural Resources Team will be led by a Cultural Resources  
7 Specialist and will be made up of Cultural Resources Monitors, including a Lead Cultural  
8 Resources Monitor.<sup>168</sup> Where previously undocumented cultural resources are discovered during  
9 the construction and operations and maintenance phases of the Project, the Monitoring Plan directs  
10 the Cultural Resources Specialist or Cultural Resources Monitors to halt construction, investigate,  
11 and take all appropriate actions to protect the resources discovered pursuant to an Inadvertent  
12 Discovery Plan (Section 8.0 of the EFSC HPMP).<sup>169</sup> The Cultural Resources Specialist is further  
13 responsible for preparing and distributing a Cultural Resources Monitoring Results report, or any  
14 other outstanding report actions (*e.g.*, mitigation) under the EFSC HPMP, to ODOE, SHPO, and  
15 appropriate tribes.<sup>170</sup>

16 Second, the Hearing Officer has adopted robust conditions to ensure that Idaho Power  
17 complies with the procedures discussed above. Recommended Historic, Cultural, and

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<sup>166</sup> Proposed Order, Attachment S-9: Historic Properties Management Plan, Section 7.0 at 31 (ODOE - B2HAPPDoc2 Proposed Order on ASC and Attachments 2019-07-02. Page 9627 of 10016).

<sup>167</sup> Proposed Order, Attachment S-9: Historic Properties Management Plan, Section 7.1 at 31 (ODOE - B2HAPPDoc2 Proposed Order on ASC and Attachments 2019-07-02. Page 9627 of 10016).

<sup>168</sup> Proposed Order, Attachment S-9: Historic Properties Management Plan, Section 7.1.1 at 31-32 (ODOE - B2HAPPDoc2 Proposed Order on ASC and Attachments 2019-07-02. Page 9627-9628 of 10016).

<sup>169</sup> Proposed Order, Attachment S-9: Historic Properties Management Plan, Section 7.3.3 at 36 (ODOE - B2HAPPDoc2 Proposed Order on ASC and Attachments 2019-07-02. Page 9632 of 10016).

<sup>170</sup> Proposed Order, Attachment S-9: Historic Properties Management Plan, Section 7.3.1 at 36 (ODOE - B2HAPPDoc2 Proposed Order on ASC and Attachments 2019-07-02. Page 9632 of 10016).



1 Archaeological Resources Condition 1 requires Idaho Power to avoid direct impacts to historic,  
2 cultural, and archaeological resources consistent with the requirements of the EFSC HPMP, which  
3 Idaho Power will achieve by micro-siting portions of the Project or using flagging, fencing, or  
4 signage to protect these resources from degradation by construction and maintenance vehicles  
5 consistent with the requirements of the Programmatic Agreement and the EFSC HPMP.<sup>171</sup> And  
6 Recommended Historic, Cultural, and Archaeological Resources Condition 2 requires Idaho  
7 Power to conduct all construction in compliance with the EFSC HPMP, minimizing and mitigating  
8 direct and indirect impacts such that the facility is not likely to result in significant adverse impacts  
9 to resources as described in OAR 345-022-0090(1).<sup>172</sup> Ms. Marlette has not otherwise provided  
10 persuasive evidence or testimony to support her claim; accordingly, a preponderance of the  
11 evidence in the record demonstrates that the construction of the Project is unlikely to result in  
12 significant adverse impacts<sup>173</sup> to historic, cultural, and archaeological resources. Therefore, the  
13 Council should adopt the Hearing Officers findings and conclusions on these matters.

14 *b. JoAnn Marlette, Issue HCA-3, Exception 2*

15 Ms. Marlette also asserts that sites that are potentially eligible for listing on the National  
16 Register of Historic Places will now be permanently ineligible because they will have been  
17 degraded by the Project.<sup>174</sup> This argument is not supported by the evidence in the record.

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<sup>171</sup> Proposed Order, Attachment 1: Draft Site Certificate at 33 (ODOE - B2HAPPDoc2 Proposed Order on ASC and Attachments 2019-07-02. Page 737 of 10016).

<sup>172</sup> Proposed Order, Attachment 1: Draft Site Certificate at 33-34 (ODOE - B2HAPPDoc2 Proposed Order on ASC and Attachments 2019-07-02. Page 737-738 of 10016).

<sup>173</sup> “Significant” is defined as “having an important consequence, either alone or in combination with other factors, based upon the magnitude and likelihood of the impact on the affected human population or natural resources, or on the importance of the natural resource affected, considering the context of the action or impact, its intensity and the degree to which possible impacts are caused by the proposed action.” OAR 345-001-0010(52). Nothing in this definition is intended to require a statistical analysis of the magnitude or likelihood of a particular impact. *Id.*

<sup>174</sup> Marlette Exception for HCA-3 at 2-3.

1 First, and most importantly, Ms. Marlette does not point to any site in particular that she  
2 fears will become permanently ineligible or provide any evidence to support her concern. For that  
3 reason alone, this argument should be rejected. Moreover, while it is difficult for Idaho Power to  
4 speculate as to whether or not the Project could cause any unspecified segment of the Oregon Trail  
5 to no longer be eligible for listing on the National Register of Historic Places, all available evidence  
6 suggests that such an event is unlikely to occur here. Nevertheless, according to Dr. Ranzetta's  
7 expert testimony, loss of listing eligibility is unlikely considering that several segments of the  
8 Oregon Trail in Oregon evaluated as a part of the Project currently have views of existing electrical  
9 transmission facilities and their eligibility for listing on the National Register of Historic Places  
10 has not been rescinded.<sup>175</sup> This includes the Oregon Trail – Well Springs Segment (B2H-MO-  
11 007), which contains views of a new wind farm near Juniper Canyon located to the south of this  
12 listed segment, as well as an existing transmission line within view of its eastern extremity.<sup>176</sup>  
13 Other resources that retain views of existing transmission lines and remain eligible for listing on  
14 the National Register of Historic Places include, but are not limited to, B2H-MO-008/3B2H-SA-  
15 06, 3B2H-SA-03, 3B2H-SA-04, as well as the newly listed segment of the Oregon Trail located at  
16 6B2H-RP-09, which has views of an existing 230-kV transmission line.<sup>177</sup> Accordingly, it is  
17 unlikely that segments of the Oregon Trail will be rendered ineligible because of B2H's  
18 construction. Ms. Marlette has failed to provide evidence to support her conclusory assertion in  
19 her testimony or briefing that a historic or cultural resource has or will be degraded such that the  
20 resource will lose its eligibility to be listed on the National Register of Historic Places. Rather, a

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<sup>175</sup> Idaho Power / Rebuttal Testimony of Kirk Ranzetta / Issues HCA-3, HCA-4, and HCA-7, p. 84 of 89.

<sup>176</sup> Idaho Power / Rebuttal Testimony of Kirk Ranzetta / Issues HCA-3, HCA-4, and HCA-7, p. 84 of 89.

<sup>177</sup> Idaho Power / Rebuttal Testimony of Kirk Ranzetta / Issues HCA-3, HCA-4, and HCA-7, p. 84 of 89.

1 preponderance of the evidence in the record demonstrates that the construction of the Project is  
2 unlikely to degrade any historical or cultural resources such that they will no longer be eligible for  
3 listing on the National Register of Historic Places. Therefore, the Hearing Officer’s findings of  
4 fact and conclusions of law on HCA-3 should be adopted without modification.

5 **3. Gilbert and Marlette, Exception, HCA-3**

6 Both Ms. Gilbert and Ms. Marlette cite rules that they argue are: (1) applicable to  
7 compliance with the Cultural Resources Standard; and (2) not properly addressed by the Proposed  
8 Contested Case Order under HCA-3. Ms. Gilbert, in particular, argues that her statement of  
9 HCA-3 was not limited to one EFSC standard, but rather identified the issue of “visual impacts  
10 and mitigation, which is required under multiple standards including[:] [OAR 345-022-0040  
11 (Protected Areas Standard)], [OAR 345-022-0080 (Scenic Resources Standard)], OAR 345-022-  
12 0090 [(Cultural Resources Standard)], [and] OAR 345-022-0030 [(Land Use Standard)].”<sup>178</sup>  
13 Ms. Gilbert is in essence seeking to apply requirements for visual impact assessments specific to  
14 Scenic Resources—or another EFSC standard listed above—to the EFSC visual assessment  
15 requirements for cultural resources. However, because the Cultural Resources Standard and the  
16 Scenic Resources Standard, for instance, measure different types of impacts for different types of  
17 resources, the analysis required for one cannot be substituted for the other. Furthermore, to the  
18 extent Ms. Gilbert is now claiming to oppose the framing of HCA-3, she waived that opportunity  
19 when she failed to file an appeal on that issue.<sup>179</sup> Ms. Marlette similarly attempts in her Exception

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<sup>178</sup> Gilbert Exception for HCA-3 at 27-28.

<sup>179</sup> HCA-3 was initially Issue 7 of Ms. Gilbert’s Petition for Party Status. *See* Irene Gilbert Petition for Party Status at 4-5 (Aug. 27, 2020). In her objections to ODOE’s recommendations regarding the framing of her issues, she notes that Issue 7 was “[f]ine as amended in [the] ODOE list of issues.” *See* Irene Gilbert Objection to Recommendations Regarding Contested Case Issues for the B2H Proposed Transmission Line at 2 (Oct. 2, 2020). Ms. Gilbert also did

1 for HCA-3 to incorporate by reference the exceptions filed by petitioners STOP B2H Coalition,  
2 Lois Barry, and Whit Deschner under the Scenic Resources Standard.<sup>180</sup> To the extent Ms. Gilbert  
3 and Ms. Marlette are raising issues outside the scope of HCA-3, those issues should not be  
4 considered by the Council here.<sup>181</sup>

5 As discussed in Idaho Power’s Closing Argument for the Cultural Resources Standard  
6 issues, the relevant regulatory requirements under the Council’s jurisdiction are contained in  
7 OAR 345-022-0090 (General Standards for Siting Facilities: Historic, Cultural and  
8 Archaeological) and OAR 345-021-0010(1)(s) (Contents of an Application, Exhibit S).<sup>182</sup> The  
9 other standards raised by Ms. Gilbert and Ms. Marlette are inapplicable to HCA-3.

10 Ms. Gilbert’s and Ms. Marlette’s exceptions to HCA-3 do not identify any incorrect finding  
11 of fact or conclusion of law, and for that reason Idaho Power requests that the Council adopt  
12 without modification the Hearing Officer’s findings of fact and conclusions of law in the Proposed  
13 Contested Case Order relevant to HCA-3.

14 **B. Issue HCA-7**

15 The Hearing Officer granted limited party status to John Williams for HCA-7, which asks:

16 *Whether Applicant adequately evaluated archeological resource ‘Site 6B2H-MC-*  
17 *10’on Mr. Williams’ property, Parcel 03S37E01300.*<sup>183</sup>  
18

19 In the Proposed Contested Case Order, the Hearing Officer concluded that:  
20

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not raise the framing of this issue in her appeal to the Hearing Officer’s Order on Party Status. *See* Irene Gilbert Appeal of Judge Greene-Webster’s Order on Party Status and Issues for Contested Case Hearings (Nov. 5, 2020).

<sup>180</sup> Marlette Exception for HCA-3 at 1-2.

<sup>181</sup> Second Order on Case Management at 3-4. Ms. Gilbert was granted limited party status for LU-7, LU-8, and LU-11; to the extent she wished to raise exceptions under those issues, she was free to do so. *See id.*

<sup>182</sup> Idaho Power Company’s Closing Arguments for Contested Case Issues HCA-3, HCA-4, HCA-6, and HCA-7 at 6-9.

<sup>183</sup> Second Order on Case Management at 4.

1 [T]he preponderance of the evidence establishes that Idaho Power adequately  
2 evaluated Site 6B2H-MC-10 consistent with the Council’s HCA standard.<sup>184</sup>  
3

4 Mr. Williams filed exceptions for HCA-7 on June 30, 2022. In that pleading, Mr. Williams  
5 raises two arguments: (1) the Proposed Contested Case Order is in error because HCA-7 was  
6 improperly limited to Idaho Power’s evaluation of Site 6B2H-MC-10;<sup>185</sup> and (2) the Proposed  
7 Contested Case Order is in error because—even though Site 6B2H-MC-10 is not listed on the  
8 National Register of Historic Places and is not located in the Direct Analysis Area—Idaho Power  
9 should be required to evaluate the site prior to site certification.<sup>186</sup> As these claims are not tied to  
10 a specific exception to the Proposed Contested Case Order as required by OAR 345-015-0085(5),  
11 the claims should be rejected on that basis. Nevertheless, should the Council wish to consider Mr.  
12 Williams’ arguments, Idaho Power addresses each of his claims below. For the following reasons,  
13 Idaho Power requests that the Council adopt without modification the Hearing Officer’s findings  
14 of fact and conclusions of law relevant to HCA-7.

15 **1. John Williams, Issue HCA-7, Exception 1**

16 Mr. Williams argues that the Proposed Contested Case Order is in error because HCA-7  
17 was improperly limited to Idaho Power’s evaluation of one particular site—Site 6B2H-MC-10.<sup>187</sup>  
18 Specially, Mr. Williams asserts that he “has consistently raised issues in his filings in this contested  
19 case about the broader issue of archeological resources on his property” and Idaho Power’s  
20 archaeological work is incomplete because an archaeologist he hired located a rock alignment and  
21 two lithic scatters near or on the centerline of the Project, which were not addressed in Tetra Tech’s

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<sup>184</sup> Proposed Contested Case Order at 170.

<sup>185</sup> Petitioner Williams’s Exception to Administrative Law Judge Wester’s Proposed Contested Case Order Re: Issue HCA-7 at 1 (June 30, 2022) [hereinafter, “Williams Exception for HCA-7”].

<sup>186</sup> Williams Exception for HCA-7 at 2-4.

<sup>187</sup> Williams Exception for HCA-7 at 1.

1 Summary of Surveys.<sup>188</sup> The first site identified by Mr. Williams’ archaeologist is a rock  
2 alignment, which is described as a pre-contact hunting blind.<sup>189</sup> The second site is described as a  
3 lithic scatter located along Sheep Creek north of the centerline of the Project.<sup>190</sup> The third site is  
4 described as another lithic scatter, located on the West bank of Sheep Creek, near to or on the  
5 centerline of the Project.<sup>191</sup> Mr. Williams claims that further evaluation of these sites—as well as  
6 Site 6B2H-MC-10—might entitle portions of his property for listing on the National Register of  
7 Historic Places.<sup>192</sup>

8 As an initial matter, additional resources other than Site 6B2H-MC-10 are not germane to  
9 the issues on which Mr. Williams has standing and fall outside the scope of HCA-7. As noted  
10 above, the Hearing Officer framed that issue to include one particular site—which was the only  
11 site referenced in Mr. Williams’ Petition for Party Status as a particular resource of concern.<sup>193</sup> To  
12 the extent that Mr. Williams is now challenging the framing of HCA-7, he waived that opportunity  
13 when he failed to file an appeal regarding that issue.<sup>194</sup>

14 Moreover, regardless as to whether the Proposed Contested Case Order evaluates sites  
15 other than Site 6B2H-MC-10, any other sites that may be present on Mr. Williams’ property will  
16 be assessed during the Enhanced Archaeological Survey in Phase 2. In particular, during that  
17 phase, Idaho Power will consult with Mr. Williams and assess the additional sites about which he

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<sup>188</sup> Williams Exception for HCA-7 at 1; *see also* John Williams / Direct Testimony of John C. Williams / Issue HCA-7, p. 2 of 20.

<sup>189</sup> John Williams / Direct Testimony of John C. Williams / Issue HCA-7, p. 2 of 20.

<sup>190</sup> John Williams / Direct Testimony of John C. Williams / Issue HCA-7, p. 2 of 20.

<sup>191</sup> John Williams / Direct Testimony of John C. Williams / Issue HCA-7, p. 2 of 20.

<sup>192</sup> Williams Exception for HCA-7 at 2; *see also* Closing Argument of John C. Williams Regarding Contested Case Issue HCA-7 at 1.

<sup>193</sup> John Williams Petition for Party Status at 1 (Aug. 27, 2020).

<sup>194</sup> Although Mr. Williams filed an appeal to the Hearing Officer’s Order on Party Status, he did not appeal the framing of HCA-7; rather, he appealed the deadline for filing appeals and the fact that he was only granted standing for issues where he demonstrated a personal interest. *See* Appeal of Mr. Williams of Order on Party Status (Nov. 6, 2020).

1 is concerned to determine whether they exist, and if so, how best to protect them.<sup>195</sup> Moreover,  
2 resource eligibility and listings on the National Register of Historic Places will be updated prior to  
3 construction, as required by Recommended Historic, Cultural, and Archaeological Resources  
4 Condition 2.<sup>196</sup> Importantly, regardless of the phase in which they are identified, Idaho Power is  
5 still required under Recommended Historic, Cultural, and Archaeological Resources Condition 1  
6 to avoid any direct impacts to such resources consistent with the requirements of the EFSC  
7 HPMP.<sup>197</sup> Accordingly, Idaho Power will protect all resources on Mr. Williams' property  
8 regardless of when they are identified. Therefore, the Hearing Officer's findings of fact and  
9 conclusions of law on HCA-7 should be adopted without modification.

10 **2. John Williams, Issue HCA-7, Exception 2**

11 Mr. Williams acknowledges that Site 6B2H-MC-10 is not listed on the National Register  
12 of Historic Places and is not located in the Direct Analysis Area; nevertheless, Mr. Williams argues  
13 that the Proposed Contested Case Order is in error because Idaho Power should be required to  
14 survey his property prior to site certification.<sup>198</sup> As Idaho Power previously discussed in the  
15 Company's briefing,<sup>199</sup> Idaho Power appropriately did not evaluate Site 6B2H-MC-10 because it  
16 is 5.14 meters south of the Direct Analysis Area's southern boundary.<sup>200</sup> It is therefore not included  
17 in Idaho Power's direct impacts analysis. During Phase 2, Idaho Power will conduct an evaluation

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<sup>195</sup> Idaho Power / Rebuttal Testimony of Kirk Ranzetta / Issues HCA-3, HCA-4, and HCA-7, p. 88 of 89.  
<sup>196</sup> Proposed Order, Attachment 1: Draft Site Certificate at 33 (ODOE - B2HAPPDoc2 Proposed Order on ASC and Attachments 2019-07-02. Page 737 of 10016).  
<sup>197</sup> Proposed Order, Attachment 1: Draft Site Certificate at 33 (ODOE - B2HAPPDoc2 Proposed Order on ASC and Attachments 2019-07-02. Page 737 of 10016).  
<sup>198</sup> Williams Exception for HCA-7 at 2-4.  
<sup>199</sup> Idaho Power's Closing Arguments for Contested Case Issues HCA-3, HCA-4, HCA-6, and HCA-7 at 55-60.  
<sup>200</sup> Proposed Order, Attachment 3: Idaho Power Responses to Select DPO Comments, at 25-26 (Nov. 7, 2019) (ODOE - B2HAPPDoc2 Proposed Order on ASC and Attachments 2019-07-02. Page 7531 of 10016); *see also* Proposed Order, Table HCA-7: Potentially Impacted Resources under OAR 345-022-0090(1)(a), at 492 (ODOE - B2HAPPDoc2 Proposed Order on ASC and Attachments 2019-07-02. Page 499 of 10016).

1 of indirect impacts to the site in accordance with ODOE’s recommendations in the Proposed Order  
2 and consistent with the processes contained in the Programmatic Agreement.<sup>201</sup> Accordingly,  
3 Idaho Power has adequately evaluated Site 6B2H-MC-10 consistent with the Council’s standards.  
4 Therefore, the Hearing Officer’s findings and conclusions on HCA-7 should be adopted without  
5 modification.

6 **3. John Williams, Issue HCA-7, Exception 3**

7 Finally, Mr. Williams argues that since Idaho Power proposes to lower tower heights at  
8 Morgan Lake Park, and therefore there will be more towers intersecting with access roads, Idaho  
9 Power must either revise the Project site boundary prior to site certification or seek an  
10 amendment.<sup>202</sup> First, this issue is outside the scope of HCA-7, for which Mr. Williams was granted  
11 limited party status, and therefore should not be considered here. Second, should Idaho Power  
12 later determine that changes to the site boundary are required due to the Company’s proposed site  
13 certificate condition concerning the towers at Morgan Lake Park, the Company will seek an  
14 amendment to its site certificate.

15 Mr. William’s exceptions to HCA-7 do not identify any incorrect finding of fact or  
16 conclusion of law, and for that reason Idaho Power requests that the Council adopt without  
17 modification the Hearing Officer’s findings of fact and conclusions of law in the Proposed  
18 Contested Case Order relevant to HCA-7.

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<sup>201</sup> Proposed Order, Table HCA-7: Potentially Impacted Resources under OAR 345-022-0090(1)(a), at 492 n.498 (ODOE - B2HAPPDoc2 Proposed Order on ASC and Attachments 2019-07-02. Page 499 of 10016). For more information concerning Idaho Power’s phased approach to evaluating direct and indirect impacts to cultural resources, please see Section III.C. of Idaho Power’s Closing Argument. Idaho Power’s Closing Arguments for Contested Case Issues HCA-3, HCA-4, HCA-6, and HCA-7 at 11-25.

<sup>202</sup> Williams Exception for HCA-7 at 4-5.



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**IV. CONCLUSION**

For the reasons discussed above, Idaho Power respectfully requests that the Council reject the limited parties’ exceptions to the Proposed Contested Case Order regarding HCA-3 and HCA-7.

DATED: July 14, 2022

**MCDOWELL RACKNER GIBSON PC**



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**CERTIFICATE OF FILING AND SERVICE**

I hereby certify that on July 14, 2022, **APPLICANT IDAHO POWER COMPANY'S RESPONSE TO LIMITED PARTIES' EXCEPTIONS FOR CONTESTED CASE ISSUES HCA-3 AND HCA-7** was emailed to:

Alison Greene Webster, Senior Administrative Law Judge  
Hearings Officer  
Office of Administrative Hearings  
[OED\\_OAH\\_Referral@oregon.gov](mailto:OED_OAH_Referral@oregon.gov)

I further certify that on July 14, 2022, **APPLICANT IDAHO POWER COMPANY'S RESPONSE TO LIMITED PARTIES' EXCEPTIONS FOR CONTESTED CASE ISSUES HCA-3 AND HCA-7** was served by First Class Mail or electronic mail as indicated below:

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*/s/ Suzanne Prinsen*

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Suzanne Prinsen  
Legal Assistant

**BEFORE THE ENERGY FACILITIES SITING COUNCIL  
for the  
STATE OF OREGON**

<b>IN THE MATTER OF:</b>	)	<b>EXCEPTIONS TO</b>
	)	<b>ADMINISTRATIVE LAW JUDGE</b>
THE PROPOSED BOARDMAN TO	)	<b>WEBSTER’S RULINGS: PROPOSED</b>
HEMINGWAY TRANSSMISSION LINE	)	<b>CONTESTED CASE ORDER</b>
	)	
	)	<b>BY PETITIONER WHIT</b>
	)	<b>DESCHNER</b>
	)	<b>ISSUE SR-3</b>
<b>OAH Case No. 2019-ABC-02833</b>	)	
	)	<b>DATED JUNE 30, 2022</b>

**Issue Statement SP-3: NHOTIC/Oregon Trail visual impact assessment**

Issue SR-3: Whether Applicant adequately assessed the visual impact of the proposed project in the vicinity of the NHOTIC and properly determined the impact would be “less than significant.”

**Scenic Resources (OAR 345-022-0080)**

(1) Except for facilities described in section (2), to issue a site certificate, the Council must find that the design, construction and operation of the facility, taking into account mitigation, are not likely to result in significant adverse impact to scenic resources and values identified as significant or important in local land use plans, tribal land management plans and federal land management plans for any lands located within the analysis area described in the project order.

(2) The Council may issue a site certificate for a special criteria facility under OAR 345-015-0310 (Request for Expedited Review of Special Criteria Facilities) without making the findings described in section (1). However, the Council may apply the requirements of section (1) to impose conditions on a site certificate issued for such a facility.

## INTRODUCTION

Petitioner Whit Deschner (Mr. Deschner) disagrees with the facts, opinions and characterizations of the impact on the scenic resource and visitor experience of the NHOTIC/Oregon Trail as a result of the proposed IPC towers and transmission line found in the Proposed Contested Case Order (PCCO). Mr. Deschner has repeatedly presented evidence (direct, , closing, and response briefs) showing that Idaho Power (IPC) mitigations will not be sufficient to present a significant adverse impact to the scenic resources of this area and the visitor experience of that resource. Additionally, Mr. Deschner incorporates Lois Barry’s Exceptions to Findings, Conclusions, and Opinion regarding visual impact assessment methodology on SR-6 and R-2,3,4, in addition to Stop B2H’s Exceptions to Findings, Conclusions, and Opinion on SR-7. He finds the conclusions and Opinion stated in the PCCO are not accurate or legally appropriate.

Mr. Deschner requests that the Energy Facility Siting Council (EFSC) deny the site certificate and reverse the PCCO. In the alternative, Mr. Deschner requests to remand this issue back to ODOE and IPC for updated analysis of the impact to the NHOTIC/Oregon Trail visual impact assessment by 1) analyzing the visual impact of towers AND the transmission lines together, 2) assess the impact on visitor experience rather than just the physical attributes of towers AND lines using an established social science methodology, and 3) provide information on what developments IPC is referring to when it states that the proposed towers and transmission lines *“would be one of several developments contributing to the overall landscape character and quality, therefore the existing landscape character would be retained within the boundary of the ACEC and resource change would be medium. (PCCO, p. 108, #205).*

## **BACKGROUND**

Idaho Power proposes to build a transmission line and towers in full view of the NHOTIC/Oregon Trail, an important asset to Baker County enjoyed by thousands of visitors each year and by residents on a regular basis. One of the standards that IPC must be in compliance with is OAR 345-022-0080 (Scenic Resources) which requires “that the design, construction and operation of the facility, taking into account mitigation, are not likely to result in significant adverse impact to scenic resources and values identified as significant or important in local land use plans...”

The major issue concerning the SR-3 issue of Idaho Power Corporation (IPC) is that IPC will build high voltage powerlines in front of the National Historic Oregon Trail Interpretive Center which will have a significant impact on the Center’s Viewshed and visitor experience.

Significant has a definition and it includes consideration of how it affects the human population and the importance of the natural resource affected:

OAR 345-001-0010 (52) defines “significant” as “having an important consequence, either alone or in combination with other factors, based upon the magnitude and likelihood of the impact on the affected human population or natural resources, or on the importance of the natural resource affected, considering the context of the action or impact, its intensity and the degree to which possible impacts are caused by the proposed action. Nothing in this definition is intended to require a statistical analysis of the magnitude or likelihood of a particular impact.”

While “significant” is defined by OAR 345-001-0010(52), defining the magnitude of the impact on the affected human population is a subjective, delicate and a near-impossible task. IPC, however, would have the Council believe that the impact is “less than significant.” The words, “less than significant” appear 138 times in exhibit R, 169 times in exhibit L, and 220



Here is an example of how IPC seeks diminish the impact of its transmission lines and towers :

(Proposed Order, Exhibit L page L-3/118)

#### Summary and Conclusion

Visual impacts to the Oregon Trail ACEC – NHOTIC Parcel will be medium intensity, resulting from both medium resource change and viewer perception. Impacts will result from the combined influence of the Project and other past or present actions. Medium intensity impacts will not preclude the NHOTIC Parcel from providing the visual qualities that exist within the ACEC, or as influenced from the surrounding landscape. Visual impacts to the NHOTIC Parcel will be less than significant.

Thus, IPC has shifted the focus from the human experience to this proposed permanent project to the physical attributes of the towers, ignoring completely the reality that its project involves both towers and transmission lines, that combined have a very large impact on the scenic resources.

Towers, combined with pylons and wires in this view-scape will visually have “more than a significant” impact. Letting them build in plain view of the Interpretive Center is blatantly letting them ruin a public resource.

Although IP claim to have used 80 some resources for reference in rating the scenic value, the ones they named are outdated. These references gave them work sheets where the numbers added up to “less than significant”—words that allow them to justify putting their power lines in the viewshed of the NHOTIC. It is akin to reverse engineering. It is the nature of IP’s business to crunch words and numbers in their favor. The following photos from Mr. Deschner’s direct testimony highlight the impact of the towers and transmission lines on the viewshed and thus the human experience.

Figure 1 provides a visual sense of what kinds of changes we are talking about. Would this new view be a “less than significant” change? According to Idaho Power it is not. Figure 2 provides a local landmark for scale.

If this is the normal view out a window one day:



And this was the view the next day



Figure 1: Comparison of viewshed with and without the transmission lines and towers.  
(Deschner Direct Testimony, p. 3)

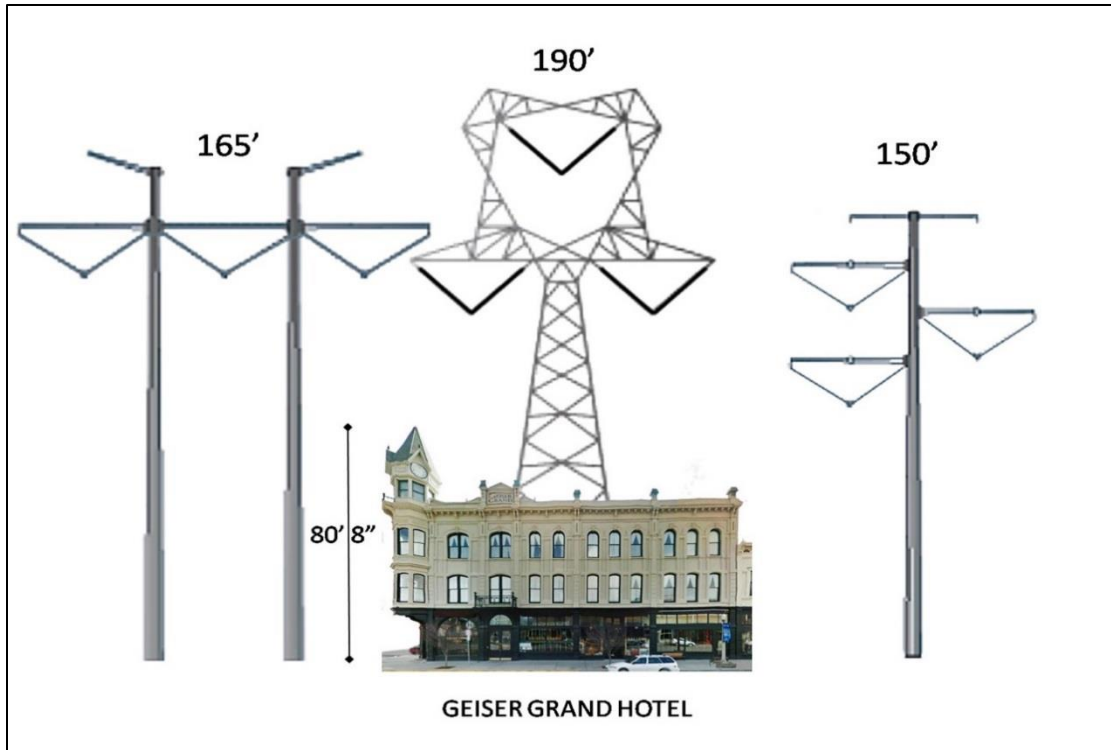


Figure 2: Comparison of IPC towers to local landmark. (Deschner Direct Testimony, p. 11/27)

Then there are the power lines which are absent from any discussion of impact. Figure 3 below shows how the power lines will impact the viewshed. The top picture taken of lines was with a cloudy neutral background. The lines will be even more noticeable in high contrast lighting, like at sunrise or sunset. Note the contrast left of center in the lower second photo where the lines cross the canyon. Idaho Power’s solution? Magic paint on a different lower structure “will practically make the project unseen.” No mention is made of the wires also being seen, especially in different light/contrast conditions.



Figure 3: Visibility of transmission lines as a function of light conditions. (Deschner Direct Testimony, p. 11/27)

The transmission lines and towers are not isolated features but extend across the landscape.

Figure 4 is a rough estimate of where the route will go as seen from KOV 5, “panorama point.”

From this perspective, the transmission lines and towers will have to cross this expanse and they will be blatantly obvious.



Figure 4: Estimated route of transmission line as seen from Panorama Point and IPC's KOV 5 (Deschner Direct Testimony, p. 6/27)

## EXCEPTIONS

**Exception 1:** FOF, #205, p. 108

**Judge Webster (ALJ) erred in stating as a fact that “*Impacts would slightly reduce the scenery adjacent to the NHOTIC parcel but would not alter the overall scenic quality of the NHOTIC parcel such that resource change would be medium.*”**

The overall scenic quality of the area would NOT be retained within the boundary of the ACEC and the resource change would NOT be medium” because

1. The reduction in tower heights will result in increased number of towers that will occur in the landscape increasing their visual impact (from 7 to 9)
2. The ALJ fails to take into account the added visual impacts created by the power lines that will cross the viewshed and reflect light in different light/contrast conditions (see Figure 3).

The combination of lines and towers will create a continuous visual disruption of the landscape that will impact visitor experience.

3. The statement that “*Potential visual impacts of the proposed facility within the NHOTIC parcel would include visual impacts from intermittent views of transmission structures, typically from elevated vantage points*” ignores the fact that visitors would experience multiple view of the

towers AND transmission lines as they walk the various trails in the ACEC in addition to seeing from elevated vantage points and the trails to and from the Center.

4. The scenic quality is something ‘experienced’ by visitors. IPC has attempted to narrow an experience down to how tall or how bright the towers are and completely ignores the additional impact of the transmission lines and how the uncluttered nature of current viewshed is an integral part of the visitor experience.

**Exception 2:** FOF, # 206, p. 109

***The ALJ erred in stating as fact that “Because no development is proposed within a half mile corridor centered on the Oregon Trail within the ACEC, the resource values for which the NHOTIC parcel was designated to protect would not be impacted by the proposed transmission line”***

The proposed mitigations are not sufficient to prevent an impact to the visual resource values of the area for the following reasons:

1. The absence of development within a half mile corridor is meaningless because the area is open and therefore the towers AND lines will be highly visible and create a continuous visual disruption of the landscape that will impact visitor experience from all angles.
2. IPC fails to discuss the visual impacts from the power lines that will cross the viewshed and reflect light in different light/contrast conditions (see Figure 3 above). The juxtaposition of the existing and proposed towers and lines of different heights will not hide but accentuate the visual disruption.
3. Height reductions would not significantly reduce visual impacts because these IPC

towers still will be 129 feet in height and dwarf the existing towers (80 feet) making them highly visible. Thus, proximity to the existing transmission line will not diminish the visibility of the IPC towers. In addition, the reduction in the height results in the need to add two more towers increasing the number towers in this area from 7 to 9. Plus, the decrease in tower heights do not address the impact of the transmission lines.

4. The change in tower structure to mimic the existing 230 KV lines would not significantly reduce visual impacts because they are still much higher than the existing lines and increase the number of transmission lines which creates a horizontal disruption of the landscape.
5. The addition of a natina on the metal towers will not make them invisible and thus their presence on the landscape will be noticeable. The towers will still be visible as silhouettes in certain lighting and will cast shadows and the transmission lines will remain visible as well.
6. Visitors frequently visit both the interpretative center and walk the trails resulting in multiple exposure to the towers and lines.
7. Many people are repeat visitors so the impact of the towers and lines on their experience occurs over and over.

**Exception 3:** Conclusion of Law, p. 142

**The ALJ erred in her conclusion when she stated that IPC “*properly determined that the impact would be less than significant as defined by Council rule.*”**

The ALJ is in err for the reasons listed under Exception 2.

**Exception 4:** Opinion, p. 254

***The ALJ erred in her opinion that “Idaho Power accurately assessed the visual impact of the proposed project in the vicinity of the NHOTIC and properly determined that the impact would be medium, meaning less than significant as defined by Council rule”***

First, the ALJ focused on the wrong parameter “the visual impact” when the correct parameter is the experience on the affected human population (the visitors) as a result of how the towers AND lines alter the landscape which currently has very limited development. IPC attempts to make the case that tower height reductions, change in tower structure, and the addition of a natina on the metal towers are sufficient to reduce the visual impacts on the viewer from significant to ‘medium’ without any OAR that defines “medium’, in addition to completely ignoring the combined impact of the transmission line and the nature of the current visitor experience as it occurs in an uncluttered landscape.

Second, to comply with OAR 345-022-0080, IPC must have mitigations that result in the project (the towers AND the lines) having a significant adverse impact to scenic resources and values, with the definitions of Significant (OAR 345-001-0010 (52)) making clear that what is of concern in this case is the impact on the **human experience**.

Third, IPC ignores the added effect of the transmission lines which result in a horizontal visual disruption of the landscape that is continuous linked by large towers. The project includes both features and how they separately and together impact the visuals and the visitor experience.



However, IPC has only focused on the visual aspect of the towers and so has failed to do a complete visual analysis and has done no analysis on impacts to the visitor experience.

Fourth, while, IPC has made some physical changes to the towers, IPC has provided no documentation that those changes are sufficient to reduce the impact on human visitors on their experience of the area from significant to medium because IPC has no measures of how to assess the human experience of this scenic resource and how it is altered due to the towers and lines with their high visual contrast and scale dominance of the landscape.

Therefore, IPC has not demonstrated that the impact on the human population is no longer significant, only that the towers will be less tall (though there will be more of them) and the metal less glaring with the natina. The exclusion of an analysis of the transmission lines and their creation of a visual disruption of the landscape when combined with the towers results in a failure to demonstrate compliance with the Scenic Resource OAR and would result in a significant impact to this scenic resource and the human experience from this proposed project.

## **CONCLUSIONS**

Mr. Deschner requests that the Energy Facility Siting Council (EFSC) deny the site certificate and reverse the PCCO. In the alternative, Mr. Deschner requests to remand this issue back to ODOE and IPC for updated analysis of the impact to the NHOTIC/Oregon Trail visual impact assessment by 1) analyzing the visual impact of towers AND the transmission lines together, 2) assess the impact on visitor experience rather than just the physical attributes of towers AND lines using an established social science methodology, and 3) provide information on what

developments IPC is referring to when it states that the proposed towers and transmission lines “would be one of several developments contributing to the overall landscape character and quality, therefore the existing landscape character would be retained within the boundary of the ACEC and resource change would be medium. (PCCO, p. 108, #205).

**CERTIFICATE OF MAILING**

On June 30, 2022, I certify that I filed the foregoing EXCEPTIONS TO THE PROPOSED CONTESTED CASE ORDER with the Hearings Coordinator via electronic mail, and with each party entitled to service, as noted below.

*/s/ Whit Deschner*

Whit Deschner

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**BEFORE THE  
ENERGY FACILITY SITING COUNCIL  
OF THE STATE OF OREGON**

**IN THE MATTER OF THE  
APPLICATION FOR SITE  
CERTIFICATE FOR THE BOARDMAN  
TO HEMINGWAY TRANSMISSION  
LINE**

**OREGON DEPARTMENT OF  
ENERGY'S RESPONSE TO  
EXCEPTIONS – ISSUE SR-3  
(OAH Case No. 2019-ABC-02833)**

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## I. INTRODUCTION

The Hearing Officer in the above-referenced matter issued a Proposed Contested Case Order (“PCCO”) on May 31, 2022. On June 30, 2022, Mr. Deschner timely filed exceptions to the PCCO regarding Issue SR-3.<sup>1</sup>

In the Hearing Officer’s December 4, 2020 *Amended Order on Party Status, Authorized Representatives and Properly Raised Issue for Contested Case* Issue SR-3 was granted as a contested case issue.

Issue SR-3 is: Whether Applicant adequately assessed the visual impact of the proposed project in the vicinity of the NHOTIC and properly determined the impact would be “less than significant.”

### A. Background on Exceptions

Parties to the contested case are entitled to file exceptions to the PCCO and present argument to the Energy Facility Siting Council (“Council”) pursuant to both the Administrative Procedures Act and the Model Rules adopted by Council.<sup>2</sup> Exceptions are written objections to the proposed findings, conclusions of law or conditions.<sup>3</sup> The exceptions must be based on the existing record, and should not include new or additional evidence.

### B. Exceptions

In his exception, Mr. Deschner identifies four exceptions to the PCCO, as listed below:

1. Mr. Deschner takes exception to the Hearing Officer’s Finding of Fact #205, which states that “Impacts would slightly reduce the scenery adjacent to the NHOTIC parcel but would not alter the overall scenic quality of the NHOTIC parcel such that resource change would be medium.”
2. Mr. Deschner takes exception to the Hearing Officer’s Finding of Fact #206, which states that “Because no development is proposed within a half mile corridor

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<sup>1</sup> Exceptions to Administrative Law Judge Webster’s Rulings: Proposed Contested Case Order By Limited Party Deschner Dated June 30, 2022 (hereinafter “Deschner Exception on Issue SR-3”).

<sup>2</sup> ORS 183.469; OAR 137-003-0060

<sup>3</sup> OAR 345-015-0085(5)



centered on the Oregon Trail within the ACEC, the resource values for which the NHOTIC parcel was designated to protect would not be impacted by the proposed transmission line.

3. Mr. Deschner takes exception to the Hearing Officer's conclusion that the Applicant had "properly determined that the impact would be less than significant as defined by Council rule."
4. Mr. Deschner takes exception to the Hearing Officer's Opinion that "Idaho Power accurately assessed the visual impact of the proposed project in the vicinity of the NHOTIC and properly determined that the impact would be medium, meaning less than significant as defined by Council rule."

C. Summary of Department Position

Mr. Deschner's exceptions to the Hearing Officer's Findings of Fact (Exceptions 1 and 2) are misinformed, as those findings merely relate evidence in the record and do not represent the Hearing Officer's own conclusions. Mr. Deschner's exceptions to the Hearing Officer's conclusion and opinion on Issue SR-3 (Exceptions 3 and 4) do not demonstrate that the Hearing Officer failed to consider relevant evidence, or that the Hearing Officer's conclusions that IPC's visual impact assessment was adequate were not based on substantial evidence on the record.

## II. ANALYSIS

A. Exception 1

Mr. Deschner takes exception to the Hearing Officer's Finding of Fact #205, which states that "Impacts would slightly reduce the scenery adjacent to the National Historic Oregon Trail Interpretive Center ("NHOTIC") parcel but would not alter the overall scenic quality of the NHOTIC parcel such that resource change would be medium."<sup>4</sup>

Mr. Deschner's exception to this Finding of Fact is not well founded, as Finding of

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<sup>4</sup> Petitioner Deschner's Exceptions to the Proposed Contested Case Order. June 30, 2022. Page 8.

Fact# 205 only relates what was stated in the Proposed Order and does not reflect the Hearing Officer's judgements about the impacts of the proposed facility. Many of Mr. Deschner's substantive concerns about this finding are also raised in Exception 4, related to the Hearing Officer's conclusions about the proposed facility, and are addressed under that heading.

B. Exception 2

Mr. Deschner takes exception to the Hearing Officer's Finding of Fact #206, which states that "Because no development is proposed within a half mile corridor centered on the Oregon Trail within the ACEC, the resource values for which the NHOTIC parcel was designated to protect would not be impacted by the proposed transmission line."<sup>5</sup>

As in Exception 1, Mr. Deschner's exception to this Finding of Fact is not well placed, as Finding of Fact #206 only relates what was stated in the Proposed Order and does not reflect the Hearing Officer's judgements about the potential impacts of the proposed facility. Many of Mr. Deschner's substantive concerns about this finding are also raised in Exception 3, related to the Hearing Officer's conclusions about the proposed facility, and are addressed under that heading.

C. Exception 3

Mr. Deschner takes exception to the Hearing Officer's conclusion that IPC had "properly determined that the impact would be less than significant as defined by Council rule," for the reasons described in Exception 2.

Mr. Deschner claims that the overall resource change would be greater than medium because the use of shorter towers as mitigation will result in an increased number of towers, the Hearing Officer failed to take the additional visual contrast, visual disruption and other visual

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<sup>5</sup> Petitioner Deschner's Exceptions to the Proposed Contested Case Order. June 30, 2022. Page 9.

impacts of towers and conductors. Mr. Deschner also argues that scenic quality is dependent on the uncluttered nature of the current viewshed and that the evaluation fails to account for the presence of multiple towers within a given visitors field of vision.<sup>6</sup>

Mr. Deschner argues that the absence of development within a half-mile corridor is meaningless due to the open nature of the landscape. He also argues that IPC inappropriately relies on proximity to an existing power line as a mitigating factor due to the greater size of proposed facility towers, and that the reliance on a natina finish to reduce visual impacts will not address silhouetting of towers against the sky.

While the Department recognizes that Mr. Deschner may disagree with the outcome of the assessment, he has not shown that the Hearing Officer failed to consider relevant evidence or that the Hearing Officer's conclusions were not based on substantial evidence on the record when concluding that IPC determined that the visual impacts would be less than significant as defined by Council rule. The number of towers and their finish, the existing setting and viewshed and the potential impacts of conductors are all discussed in detail in IPC's Visual Impact Analyses provided in ASC Exhibit R as well as Rebuttal Testimony provided by Louise Kling on behalf of the applicant. The findings and conclusions in the PCCO demonstrate that the Hearing Officer reviewed this documents and made her decisions based on all the evidence in the record.

#### D. Exception 4

Mr. Deschner takes exception to the Hearing Officer's Opinion that "Idaho Power accurately assessed the visual impact of the proposed project in the vicinity of the NHOTIC and

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<sup>6</sup> Petitioner Deschner's Exceptions to the Proposed Contested Case Order. June 30, 2022. Pages 8-9.

properly determined that the impact would be medium, meaning less than significant as defined by Council rule.”

Mr. Deschner argues that the Hearing Officer should have focused on how the experience of the human population (*e.g.*, visitors to the NHOTIC) would be affected by the construction and operation of the proposed facility and should have considered the impacts of both towers and lines on the landscape. Mr. Deschner requests that the Council either deny the site certificate or, in the alternative, remand this issue back to the Department and IPC for updated analysis of the impact to the NHOTIC/Oregon Trail visual impact assessment by 1) analyzing the visual impact of towers AND the transmission lines together, 2) assess the impact of towers and lines on visitor experience using an established social science methodology, and 3) provide information on what developments IPC is referring to when it states that the proposed towers and transmission lines “would be one of several developments contributing to the overall landscape character and quality, therefore the existing landscape character would be retained within the boundary of the Area of Critical Environmental Concern and resource change would be medium.

As above, the Department recognizes that Mr. Deschner may disagree with the methods used for and outcome of the visual impacts assessment, however his exceptions do not demonstrate that the assessment was legally deficient or failed to meet the requirements of the Council’s standards. The Department further believes that Mr. Deschner’s requests for the issue to be remanded for further investigation is unnecessary. The applicant has already provided adequate analysis that includes impacts of towers and conductors and sufficiently describes existing development in the viewshed of NHOTIC in ASC Exhibit R as well as Rebuttal Testimony provided by Louise Kling on behalf of the applicant.

### III. CONCLUSION

For the reasons set forth above, the Department recommends that the Council reject the exceptions on Issue SR-3 affirm the Hearing Officer's findings of fact, conclusions of law and opinion on these issues.

DATED this 15<sup>th</sup> day of July, 2022.

Respectfully submitted,

ELLEN F. ROSENBLUM  
Attorney General

*/s/ Patrick Rowe*

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## CERTIFICATE OF SERVICE

I hereby certify that on July 15, 2022, the foregoing Oregon Department of Energy's  
RESPONSE TO EXCEPTIONS – ISSUE SR-3, was emailed to:

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I further certify that on July 15, 2022, the foregoing Oregon Department of Energy's  
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**BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF OREGON  
for the  
OREGON DEPARTMENT OF ENERGY**

IN THE MATTER OF:

**BOARDMAN TO HEMINGWAY  
TRANSMISSION LINE**

**STOP B2H COALITION**

**EXCEPTIONS TO PROPOSED  
CONTESTED CASE ORDER**

OAH Case No. 2019-ABC-02833



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iii. *Scenic Resources (SR-7)*

a. *Substantive Exceptions Related to SR-7*

STOP repeatedly presented evidence and legal arguments regarding IPC's in-house developed unique and never peer reviewed scenic resource impact methodology. STOP noted that even though no particular methodology was required for scenic resource impact analysis, a methodology – rather than an amalgamation of self-serving portions of established (or, outdated) methodologies – is required. *See*, STOP Closing pp.21-24 and STOP Response Brief pp.33-35.

STOP takes exception to the Opinion, as well as a number of Findings of Fact, and the Conclusion of Law for SR-7. Additionally, STOP incorporates Lois Barry's Exceptions to Findings, Conclusions, and Opinion regarding visual impact assessment on SR-6, because those also apply to SR-7, as both issues challenge visual impact assessment.

STOP takes exception to the Findings of Fact related to Scenic Resources broadly, to the extent that any impact "on the affected human population" has been omitted. This phrase appears in OAR 345-001-0010(52), the definition of "significant" in the context of impacts, but neither the findings related to Scenic Resources, nor the Conclusion of Law, nor the Opinion contain any discussion on the impacts **to the affected human population**. Instead, IPC has merely made assumptions about viewer sensitivity, without actually assessing the significance of real subjective impacts.

Those assumptions and their qualitative ratings were created and evaluated solely by IPC's attorney and their consultant<sup>26</sup> after being required to respond to repeated requests from ODOE to address the Council's definition of significant and how it affects IPC's (mistaken)

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<sup>26</sup> STOP Closing p.21 and Cross Examination Transcript, Hearing Day 6 (Louise Kling) pp.117-118 (acknowledging that IPC's in-house-developed methodology was not peer reviewed).

conclusion of no significant impact. For the reasons outlined in STOP’s Closing IPC’s chosen approach was improper. *See*, STOP Closing pp.21-23.

Finding of Fact #199 (PCCO p.104) notes that “Idaho Power’s methodology for assessing impact to visual resources incorporated the BLM visual ‘sensitivity level’ criterion and the USFS visual ‘concern’ criterion, both of which measure the degree to which viewers subjectively value a visual resource.” This is not factually correct. The evidence was clear that some, but not all, of the parts of the BLM and USFS methodologies were incorporated.

Specifically, there are key parts for establishing the baseline<sup>27</sup> for “Scenic Quality and Attractiveness” and “Landscape Character” (two components of the first baseline step in the three step IPC methodology.)<sup>28</sup> Yet in establishing baseline, IPC fails completely to mention a key factor - *viewer sensitivity*.<sup>29</sup> The USFS’ baseline methods rely on “Landscape Character” which also has no visual *concern* if one reads the details.<sup>30</sup> The final component part of the baseline assessment implies some measure of effects to human populations, as it is called “Viewer Groups and Characteristics.” However, when you look under the hood, one only finds viewer: location, geometry, and duration/exposure;<sup>31</sup> not viewers’ **subjective value or experience**.

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<sup>27</sup> ODOE - B2HAPPDoc3-35 ASC 18\_Exhibit R\_Scenic Resources\_ASC 2018-09-28. p.147(“BLM... Visual values are established through the visual resource inventory (VRI) process, which classifies scenery based on the assessment of three components: scenic quality, **visual sensitivity**, and distance.” And “USFS describes baseline condition in a similar manner; however baseline components include measures of scenic attractiveness and integrity, landscape visibility (i.e., distance zones), and **concern level (i.e., sensitivity)**”).

<sup>28</sup> ODOE - B2HAPPDoc3-35 ASC 18\_Exhibit R\_Scenic Resources\_ASC 2018-09-28. p.146.

<sup>29</sup> *Id.* pp.147-149.

<sup>30</sup> *Id.* pp.149-150.

<sup>31</sup> ODOE - B2HAPPDoc3-35 ASC 18\_Exhibit R\_Scenic Resources\_ASC 2018-09-28. p.150.

In Finding of Fact #201 (PCCO p.105) the ALJ asserts that “Idaho Power conservatively assumed the highest possible degree of sensitivity and subjective value for each **resource evaluated.**” (emphasis added). In ASC Exhibit R Attachment R-1, Idaho Power explained:

Viewer groups associated with each resource were evaluated to understand certain characteristics that inform the extent to which potential changes in landscape character and quality would be perceived (perception of change). *This assessment assumes a high sensitivity exists among all viewer groups based on the identification of the **resource** as important in a planning document. **Therefore, this assessment instead focuses on understanding characteristics that describe the relationship of the observer to the potential impact, and the landscape context of that relationship.*** Viewer characteristics assessed included viewer location (distance), viewer geometry (superior, inferior, or at grade), and viewer duration or exposure (BLM 1986). The landscape context included consideration of landscape type – i.e., focal or panoramic.<sup>32</sup> (emphasis added)

The ALJ misses the point in her “finding.” The implication of IPC’s use of the words “high sensitivity” is that this alone means that the model is taking into consideration “significance and affects to the human population”.<sup>33</sup> But that is not the reality. While it is true that IPC’s newly created approach “assumes a high sensitivity among all viewer groups,” there is nothing in evidence beyond this repeated assertion to demonstrate *how* (or even *if*) impacts to views of scenic resources are being measured.

If one examines the methodology closely the high viewer sensitivity is not being measured, rather it’s the distance, geometry and duration that are being measured. The subsequent “Finding of Fact #202” further illuminates the issue. The ALJ outlines the model and describes what is being measured or assessed at each step in the three-part process. PCCO pp.105-107. In a nutshell: (1) In the evaluation of **baseline conditions**, existing landscape characteristics and qualities are described and/or ranked. However, although the title of sub-part

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<sup>32</sup> ODOE - B2HAPPDoc3-35 ASC 18\_Exhibit R\_Scenic Resources\_ASC 2018-09-28, p.150. (emphasis added.)

<sup>33</sup> OAR 345-001-0010(52).

c. is: “Viewer group and characteristics” the actual description is not viewer subjective impacts. Instead it is at its heart a description of where someone is standing or looking. The key part reads:

“Viewer characteristics [of the supposedly “highly sensitive viewers”] assessed included viewer location (distance), viewer geometry (superior, inferior, or at grade), and viewer duration or exposure (BLM 1986). The landscape context included consideration of landscape type—i.e., focal or panoramic.”<sup>34</sup>

In short, the “highly sensitive viewers’ characteristics are all being measured **in terms of location**, not in terms of the “significance” of the impacts.

In the second part of the IPC process “(2) Impact likelihood...”, there are four sub-parts with the last one being germane to this discussion. That is subpart “d. Magnitude of impact – resource change and viewer perception.” PCCO p.106. Here, resource change is determined by physical change (ie: a tower, a road cut that wasn’t there before; and determined by the IPC consultant); and “viewer perception” is not about how someone subjectively experiences or perceives the change<sup>35</sup>, but rather “Idaho Power assessed viewer perception as low, medium or high based on **the location** of the viewer relative to the potential medium to high magnitude impact.” *See* Kling Rebuttal p.45 (emphasis added).

In the third part of the IPC methodology, “(3) Consideration of intensity, causation, and context (based upon Council’s definition of “significant” OAR 345-001-0010(52))” there are three sub-parts. PCCO p.106. The sub-section germane to this discussion is “a. Impact intensity,” which is a determination of significance based on a two-factor variable comparison:

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<sup>34</sup> ODOE - B2HAPPDoc3-35 ASC 18\_Exhibit R\_Scenic Resources\_ASC 2018-09-28. p.10.

<sup>35</sup> STOP B2H SR-7 Lois Barry Direct Testimony, pp.1-2; ODOE - B2HAPPDoc3-35 ASC 18\_Exhibit R\_Scenic Resources\_ASC 2018-09-28. p.147.

resource change and viewer perception. Again, and at risk of redundancy, there is not an assessment of Oregonians subjective perceptions in the context of affected impacts to human populations. It is simply a measure of the **resource change** due to the project and where the **viewer happens to be looking** at it. STOP, along with others (including Ms. Barry) have repeatedly attempted to point out these important distinctions.<sup>36</sup>

There has been a perennial debate over the course of the case (from the pASC, ASC, DPO, PO, discovery, MSD, testimony, cross examination, closing and response), regarding this visual impact assessment methodology which IPC created and then used. There has been broad confusion and disagreements about: which methodologies and which versions of methodologies are being applied, what the terms and definitions of the jargon used by various agencies vs common language mean, and what conclusions are reached (i.e.: no significant impacts) after the consultant and attorney completed *their* subjective scoring.

In her Opinion, the ALJ leans on this supposed “sensitivity,” as opposed to actual subjective viewer interpretation. PCCO p.256. As STOP outlined in its closing arguments, this is error because IPC used in part an outdated USFS methodology combined with portions of a BLM manual. No complete, cohesive methodology to analyze visual resource impacts was provided.

Furthermore, STOP takes exception to the Opinion on SR-7 (PCCO p 255) where the ALJ agrees with IPC’s ludicrous claim that they cannot apply the USFS updated “SMS methodology under the Council’s standards, because the Department specifically requested that the Company use a methodology that applied the Council’s definition of “significance. In fact, the current (1995) SMS methodology, including Chapter 3 Constituent Information, comes the

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<sup>36</sup> See STOP Direct SR7 Barry pp 1-3, Closing pp.21-24, Response pp.33-35

closest to any approach used in IPC’s hybridized methodology to assessing the “effects on the human population.” The SMS approach would assess the expectations, desires, preferences, acceptable levels of quality, behaviors and values.<sup>37</sup> *See*, STOP Closing p.22 (“The experience of being ‘on the trails’ and re-tracing the steps of the pioneers is not something measured by a stationary KOP. The human population was not studied to determine the ‘impact on the affected human population.’”).

This type of assessment (the SMS) has been embraced as best practices<sup>38</sup> and STOP believes would satisfy the Council’s definition of significance. In addition, STOP excepts the ALJ’s opinion that “because Idaho Power attached the highest viewer sensitivity value to all of the resources evaluated, data collection on viewers’ subjective evaluations is unnecessary.” PCCO p.256. First, note that the ALJ correctly stated that IPC looks at “resources evaluated.” That is very different from viewer **perception** of impacts.

Second, within the model the use of the “high user sensitivity” appears in two ways: 1) it is an assumption “based on the identification of the resource as important in a planning document.”<sup>39</sup> 2) It is an obscure variable within the Viewer Groups (under baseline) and Magnitude of Impact (in Step 2, viewer perception).<sup>40</sup> However, again under deeper scrutiny the

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<sup>37</sup> ODOE - B2HAPPDoc3-35 ASC 18\_Exhibit R\_Scenic Resources\_ASC 2018-09-28 p.144 (USFS 1995 SMS).

<sup>38</sup> Lois Barry Exhibit 7 to Direct Testimony, R-4 (Changes and challenges in USDA Forest Service Scenic Resource Management under the 2012 Forest Planning Rule, Nancy A. Brunswick, Regional Landscape Architect, USDA Forest Service Visual Resource Stewardship Conference Proceedings GTR-NRS-P-183); *see also*, Best Management Practices for Reducing Visual Impacts of Renewable Energy Facilities on BLM-Administered Lands, First Edition, December 2013; Guide To Evaluating Visual Impact Assessments for Renewable Energy Projects, Robert Sullivan and Mark Meyer, Natural Resource Report NPS/ARD/NRR—2014/836.

<sup>39</sup> ODOE - B2HAPPDoc3-35 ASC 18\_Exhibit R\_Scenic Resources\_ASC 2018-09-28. p.150.

<sup>40</sup> ODOE - B2HAPPDoc3-35 ASC 18\_Exhibit R\_Scenic Resources\_ASC 2018-09-28. pp.10-11, 146-157

viewer perceptions are still being measured merely by distance, angles, duration, etc. In short, even if one claims to “assume” that all viewers are “highly sensitive” that assumption is pointless unless it applied or measured in the analysis in a way that takes into account the significance or subjective impacts of the proposed power line on viewers.

IPC’s newly created methodology for visual impact assessment was created and conducted solely by IPC’s consultant and their attorney. Their qualitative (therefore, necessarily subjective) assessment and ratings do not meet the requirements of OAR 345-022-0080, or OAR 345-022-0040 in light of the definition of “significance” in OAR 345-001-0010(52). The impacts to “affected human population,” are solely and subjectively those of the developers. In short, the weight of the evidence, as well as the law, is in STOP’s favor on this point. *See*, STOP Closing pp.21-24 and STOP Response pp.33-35.

*b. Site Conditions and Mitigation Exceptions Under SR 7*

In discussing proposed site conditions for SR-7, the ALJ concluded that:

“[i]n its Closing Argument on Issue SR-7, STOP B2H proposes a site certificate condition requiring Idaho Power to underground the transmission line for 1.7 miles in the area the NHOTIC as a mitigation measure to ensure compliance with the Scenic Resources standard. Because STOP B2H did not submit this proposed condition in accordance with the set schedule, it is untimely. Moreover, even if STOP B2H had submitted this proposal in a timely fashion, it is neither necessary nor appropriate. As discussed above in connection with Issue SR-2, the Council lacks jurisdiction to require Idaho Power to underground the project segment near the NHOTIC. Consequently, this proposed site certificate condition is denied.”

PCCO p.257. As previously outlined, STOP’s submission was in no way untimely, any more than ODOE’s and IPC’s were. For reference, STOP’s most-recently submitted proposed site condition for SR-7 is attached as Exhibit D. This site condition, while not in the ASC, is appropriate for Council consideration given that IPC provided an engineering report and their study concluded that the costs would be very high. PCCO p.251, n.338. IPC’s witness on this matter, Dennis Johnson of POWER Engineers stated during cross-examination that from a



technical perspective and “from a constructability perspective, “yes, we could build such a line.”<sup>41</sup> Mr. Johnson also explained how in his assessment he changed the distance from 1.5 to 1.7 miles because he saw another way to route the undergrounding which would better hide the terminal of the line.<sup>42</sup>

Considering the outpouring of public outcry about the NHOTIC’s viewshed, this mitigation measure cries out for Council consideration. Costs will be bore by ratepayers, not the company. Cost is also not a consideration under the Council’s review standards but protecting scenic resources and protected areas is required; therefore, no mitigation measure should be completely off the table, particularly one that IPC’s own witness acknowledged is buildable.<sup>43</sup>

As discussed, the assertion that STOP’s proposed site condition was “untimely” is not accurate. The ALJ’s approach unfairly limited STOP’s ability to participate in the ongoing back-and-forth exchange between the parties on language of site conditions that was sustained throughout the closing argument and response briefing phase. OAR 345-015-0085(2) is clear that “any party or limited party may present evidence relating to the appropriateness, scope or wording of any other party’s proposed site certificate conditions and may present written proposed findings of fact, briefs and other argument concerning proposed conditions.” EFSC should remand with instructions to consider all positions presented on site certificate condition responses related to SR-7, including STOP’s Recommended Scenic Resource Condition 3 (and all other matters on which conditions were presented but not considered). *See generally*, Exhibit D.

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<sup>41</sup> Cross Examination Hearing Day 6 (Dennis Johnson) p.19 (acknowledging that IPC could bury the line.)

<sup>42</sup> *Id.*, p.16 (describing the more hidden terminus.)

<sup>43</sup> *Id.*

Finally, the ALJ wrongly asserted that EFSC “does not have jurisdiction to require Idaho Power to underground the project segment near the NHOTIC.” PCCO p.257. In the face of what has been argued to be rather broad siting jurisdiction otherwise, it is confounding that EFSC would lack jurisdiction to propose mitigation simply because it is something an applicant for a site certificate found undesirable. Limiting jurisdiction based on a regulated entity’s wishes would be akin to artificially narrowing the “purpose and need” statement in a NEPA matter, wherein the government’s duty is “not to consider an infinite range of alternatives, only reasonable or feasible ones.” *City of Carmel-By-The-Sea v. U.S. Dep't of Transp.*, 123 F3d 1142, 1155 (9th Cir 1997) *citing* 40 CFR § 1502.14(a)-(c).

Here, as STOP has discussed, the evidence shows that IPC’s own witness viewed undergrounding as feasible (or “constructable” or “buildable” in his own words). STOP does not seek an unreasonable range of mitigation options, merely fair consideration of alternatives that would lead to compliance with the relevant subsections of OAR 345-021-0010 regarding impacts to visual resources. There is no reason why EFSC would lack jurisdiction to implement undergrounding as a mitigating site condition—where appropriate—to limit significant impacts to visual resources.

*iv. Soil Protection (SP-1)*

As noted previously, STOP incorporates the exceptions outlined by Dr. Suzanne Fouty on this issue, and adopts those exceptions as its own.

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**BEFORE THE ENERGY FACILITIES SITING COUNCIL  
for the  
STATE OF OREGON**

<b>IN THE MATTER OF:</b>	)	<b>EXCEPTION TO</b>
	)	<b>ADMINISTRATIVE LAW JUDGE</b>
THE PROPOSED BOARDMAN TO	)	<b>WEBSTER’S RULINGS: SUMMARY</b>
HEMINGWAY TRANSSMISSION LINE	)	<b>DETERMINATION AND</b>
	)	<b>PROPOSED CONTESTED CASE</b>
	)	<b>ORDER</b>
	)	
	)	<b>BY PETITIONER SUSAN GEER</b>
<b>OAH Case No. 2019-ABC-02833</b>	)	<b>ISSUE SR-5</b>
	)	
	)	<b>DATED JUNE 27, 2022</b>

**INTRODUCTION**

**Issue SR-5: Whether the Rice Glass Hill Natural Area should be evaluated as a Protected Area.**

Petitioner Susan Geer (Ms. Geer) disagrees with many of the factual and legal conclusions and the characterizations of the evidence that are contained in the Motion for Summary Determination (MSD) granted to Idaho Power (IPC) and the Proposed Contested Case Order (PCCO). Ms. Geer presented evidence showing that many of the findings and conclusions stated in the MSD and PCCO are not accurate or legally appropriate.

Ms. Geer requests that Energy Facility Siting Council (EFSC) deny the site certificate and reverse the PCCO. In the alternative, Ms. Geer requests the EFSC deny the route that goes through the Rice Glass Hill Natural Area; or to re-route and amend the ASC to avoid the area.

Ms. Geer raises one specific exception to the ALJ Proposed Contested Case Order, as it relates to Issue SR-5. The exception is addressed below, demonstrating that the facts, or reasoning/analysis or conclusion by the ALJ is incorrect. The error is material to EFSC's decision.

## **EXCEPTION**

- 1. Judge Webster (ALJ) erred in concluding that "Because the Rice Glass Hill Natural Area was not registered as a Natural Area as of May 11, 2007, Idaho Power was not required to evaluate the Rice Glass Hill Natural Area as a Protected Area in ASC Exhibit L."**<sup>1</sup>

Ms. Geer recognized the conservation value<sup>2</sup> of the Glass Hill property and was familiar with natural areas. Upon learning private lands are eligible as State Natural Areas, Ms. Geer recommended the program to Mr. Rice. "The natural area network is designed to include at

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<sup>1</sup> Page 27 In the Matter of Boardman to Hemmingway, OAH Case No. 2019-ABC-02833 Proposed Contested Case Order

<sup>2</sup> During the 20 plus years Joel Rice has owned land on Glass Hill, there has been no development, timber harvest, or livestock grazing. The land has been managed solely for native plants and animals. The majority of acres in Rice Glass Hill Natural area have been protected under a conservation easement (with Rocky Mountain Elk Foundation) since 2001; the remaining acres were acquired after that date and Joel Rice is in the process of applying for an additional conservation easement (with Blue Mountain Land Trust) to cover those acres. The Glass Hill property meets the criteria for a conservation easement under the Universal Conservation Easement Act (UCEA) of 1982, adopted by the state of Oregon. UCEA Section 1(1) authorizes the creation of a non-possessory interest in real property that imposes limitations or affirmative obligations on the owner of the property for the purpose of "retaining or protecting [the property's] natural, scenic, or open space values," "assuring its availability for agricultural, forest, recreational or open-space use," "protecting natural resources," "maintaining or enhancing air or water quality," or "preserving the historical, architectural, archaeological or cultural aspects of [the] property." The history of conservation easements dictates that they must serve the public good in some way.

least one good example of each ecosystem type, geologic formation and at-risk species is represented in each ecoregion in which they naturally occur. Natural Areas protect many high-quality native ecosystems and rare plant and animal species. ....These areas are to be used for scientific research, education and nature interpretation.”<sup>3</sup> The Glass Hill property contains several special species and priority plant associations<sup>4</sup>, so the Rice application was accepted to the program in 2019<sup>5</sup>.

Energy Facility Siting Council (EFSC) Rule OAR 345-022-0040 Protected Areas says, “References in this rule to protected areas designated under federal or state statutes or regulations are to the designations in effect as of May 11, 2007.”

The Rule goes on to list various designations of protected areas and among them is this one:

(i) State natural heritage areas listed in the Oregon Register of Natural Heritage Areas pursuant to ORS 273.581 (Natural areas register); The Rule wording has a 2007 date and a list of specific Protected Areas in existence at that time, but *categories* of protected areas are listed too. The categories listed as of May 11, 2007, are protected. i.e., the date refers to the **categories** as well as to those individual areas which are listed. Natural areas is a category of area that is protected.

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<sup>3</sup> Page 2 Oregon Natural Areas Program. 2020. Oregon Natural Areas Plan. Oregon Parks and Recreation Department and the Oregon Biodiversity Information Center, Institute for Natural Resources – Portland, Portland State University, Portland, OR. 189 pp.

<sup>4</sup> Dedication Agreement for Glass Hill as a State Natural Area, including Oregon Register of Natural Resources Summary Form for the site, a statement of management objectives, and a map delineating the boundary of the site. Dated November 8, 2020

<sup>5</sup> Letter from Noel Bachellor, OPRD to Joel Rice confirming Registration in the Natural Areas Program at Sept.18, 2019 committee meeting. Dated October 17,2019.

EFSC should apply OAR 345-022-0040 to protect the categories of areas that are listed in the rule. EFSC recognizes the Protected Areas rule (345-022-0040) is outdated and unclear. There is no doubt the intent is to protect areas deemed worthy by state or federal agencies. Rice Glass Hill State Natural Area is worthy of protection and was designated by Oregon Parks and Recreation Department (OPRD). Also, it seems obvious that the 2007 date, the original date of the rule, is relictual in the sense that the rules were intended to be updated every 5 years, but the schedule has been neglected.

As Ms. Geer said in reply to the ex parte communication dated May 23, 2021, “the EFSC rule-making process initiated in November 2020 is clearly due to their recognition that the, ”goalposts” ARE unclear in OAR 345-022-0040 as it stands, they are not only ambiguous but many years out of date, given that goal was to update them every 5 years.” Seven groups or individuals responded to said ex parte communication<sup>6</sup> (Exhibit 1, attached for convenience); a review of the responses provides insight into just how ambiguous and unclear the rule is. Furthermore, the ambiguity and lack of clarity are severe enough to have caused the rulemaking process to become protracted.

EFSC is on record as agreeing. In the agenda from the October EFSC rulemaking<sup>7</sup>

“Issue 4 – Lists of Protected Areas, Affected rules: OAR 345-022-0040(1)

Issue description: The rule contains lists of *designations* and specific protected areas that may

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<sup>6</sup> P. 5 In the Matter of Boardman to Hemmingway, OAH Case No. 2019-ABC-02833  
Proposed Contested Case Order

<sup>7</sup> Attachment 1: “October 22-23 EFSC Meeting Agenda Item D: Protected Areas, Scenic Resources, and Recreation Rulemaking Project Attachment 1: Issues Analysis Document October 9, 2020

be incomplete or out of date.” (Emphasis added).

The EFSC rulemaking document continues with “Discussion: Because the lists in the rule are not intended to be exhaustive....” And “Staff notes that stakeholders are not likely to rely on the lists provided in rule because publicly available lists and geospatial data identifying protected areas are maintained by other sources.” Various lists of Protected Areas exist on the internet, including Natural Areas, and it is easy to request an up-to-date listing of Natural Areas from the State Natural Areas Program at any time.

## **CONCLUSION**

Contrary to the ALJ’s statement, Idaho Power Company is required to evaluate the Rice Glass Hill Natural Area as a Protected Area in ASC Exhibit L. IPC has failed to demonstrate the Protected Areas standard OAR 345-022-0040 has been met for the Glass Hill Natural Area.

EFSC should recognize and state that the rule identifies all Oregon State Natural Areas that are identified pursuant to ORS 273.581 (Natural areas register), including the Rice Glass Hill Natural Area. Clearly the date applies to the category of Protected Areas specified at the time of that OAR’s writing 13 years ago, and it makes absolutely no sense to regard that category as static. The Natural Areas register provides an updated list of Protected Areas.

Ms. Geer requests that Energy Facility Siting Council (EFSC) deny the site certificate and reverse the PCCO. In the alternative, Ms. Geer requests the EFSC deny the route that goes through the Rice Glass Hill Natural Area; or to re-route and amend the ASC to avoid the area.



**CERTIFICATE OF MAILING**

On June 27, 2022, I certify that I filed the foregoing EXCEPTION TO THE PROPOSED CONTESTED CASE ORDER with the Hearings Coordinator via electronic mail, and with each party entitled to service, as noted below.

/s/ Susan M. Geer  
Susan M. Geer

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May 23, 2021

Alison Greene Webster  
Senior Administrative Law Judge  
Office of Administrative Hearings

RE: Reply to Notice of *ex parte* communication pursuant to OAR 137-003-0055(2)

I provide my response to Idaho Power's letter of April 22 to the Energy Facility Siting Council.

In that letter, IPC says they have, "concern about rule changes that would move the goalposts for applicants that are in the middle of a contested case proceeding, including Idaho Power and its Boardman to Hemingway Transmission Line Project (B2H)."

IPC is being purposefully dense. The EFSC rule-making process initiated in November 2020 is clearly due to their recognition that the ,"goalposts" ARE unclear in OAR 345-022-0040 as it stands, they are not only ambiguous but many years out of date, given that goal was to update them every 5 years.

IPC claims that, "If adopted, ODOE's proposed rule changes would introduce new Protected Area resources that have not yet been analyzed by Idaho Power and ODOE for B2H, and inject a significant amount of uncertainty into the B2H contested case process that has been in development for over 12 years and is now finally near the finish line."

The statement is completely misleading. The "project in development over 12 years" resulted in the "Agency Selected Route" identified in 2016 by the BLM (as stated on page 1 of the 2017 Supplemental Siting Study in the ASC) and subsequently the USFS Final ROD signed 11.15.18, NOT either of the "Proposed Routes" in the DPO now being falsely represented by IPC as "fully reviewed".

On page 2 of their April 22 letter IPC says, "The Protected Area Standard currently includes a May 11, 2007 cut-off date, such that the standard applies only to resources designated as of that date. The cut-off date provides certainty for developers as to which resources should be analyzed as a protected area...".

This is a questionable interpretation of the mention of "May 11, 2007" that is completely self-serving for IPC, and makes no sense. Clearly the date applies to the list of Protected Areas at the time of that OAR's writing 13 years ago, and it makes absolutely no sense to regard that list as static. Updated lists of Protected Areas are available.

IPC goes on to state, "As Idaho Power considered possible routes for B2H in the early stages of this process, avoidance of "protected areas" under the EFSC standard was a major factor in the Company's siting decisions."

On the contrary, it appears to me that Idaho Power did nothing to seek local information on areas worthy of protection. Following a protracted NEPA process that resulted in selection of a route of "least environmental impact" in 2016 (BLM), IPC-in a baffling move-ditched that route and proposed 2 different routes, both being closer and more impactful in the area of La Grande than the Agency Selected route. It is nearly inconceivable to myself and other local biologists and naturalists that IPC proposed a route next to Morgan Lake Park, an extremely important recreation and scenic spot, and the adjacent Twin Lakes, a hidden gem full of unique assemblages which should be part of the Natural Areas

program, not to mention the Rice Glass Hill Natural Area, of huge ecological significance with a Conservation Easement dated 2001.

IPC then talks more about “proposed elimination the ‘cut-off date’” again, a distortion of reality since the 2007 date is clearly not a ‘cut-off date’ but the artifact of an OAR forgotten by EFSC and in desperate need of review.

Next IPC complains that, “a private landowner with a parcel that will be crossed by the project sought designation of his land as a state “natural area” through the Oregon Parks and Recreation Department without informing Idaho Power or ODOE.”

This is ridiculous. The landowner in question is Joel Rice, and his goal as a landowner for the entire time he has owned land in Union County since 1999, has been conservation for native plants and animals. To that end he acquired a Conservation Easement with Rocky Mountain Elk Foundation in 2001, and worked with ODFW’s Access and Habitat program for many years, since 2008. The Rice Glass Hill acres are highly valued habitat not only because of their high quality vegetation but because they are continuous with a large piece of ODFW land known as Ladd Marsh Management Area along Foothill Road. The ODFW land, Rice land and adjacent land owned by the Smutz family makes up the Glass Hill Access area. The property is also continuous with Rebarrow Forest, a research forest of EOU which provides more continuous wildlife habitat. While long valued for elk, other animals and plants are under-appreciated on the landscape, so when Joel Rice learned of the State Natural Areas program he was eager to apply. IPC’s implication that there is something wrong with Joel Rice’s application to the Natural Areas program is just plain mean. Further, their implication that it was his job to “inform” IPC of his acceptance to the program is ludicrous.

IPC was not unaware that Rice manages his land solely for native plants and animals; public comments by Joel Rice and several other parties in every phase of the B2H process show as much. Since the Access and Habitat program, the designation of the Glass Hill Access Area, and Rebarrow Forest, are all part of the State of Oregon, it does not stand to reason that IPC or ODOE could have overlooked these or the relationship to the Rice property. It is really contradictory that IPC says they chose a Route between the Rebarrow and the Ladd Marsh Game Management Area, when so much of the habitat value is dependent on the continuity of these parcels. From my perspective as a botanist and ecologist, certain of the plant communities of the Rice property are the most unique of the Glass Hill monocline/Mill Creek fault area assemblages. The presence of the Douglas clover, spotted frogs and white headed woodpeckers of course adds to their value in the eyes of the Natural Areas Program. At the landscape level, the series of moist meadows and wetlands along the Glass Hill monocline/Mill Creek fault from the headwaters of Sheep Creek to Twin Lake and perhaps beyond, is truly an under-appreciated biological treasure which the State of Oregon should go to great lengths to preserve.

IPC then talks again about the inconvenience of “eliminating the cut-off date” and the possibility of the Council giving them an exception for B2H. .

While it would have been better for all concerned if OARs were clearly written and regularly updated, the fact that they were not, does not warrant destruction of an extremely valuable and unique piece of Oregon’s natural heritage, especially in light of the fact that the Routes now being considered in the State process--were rejected by the two federal agencies in their NEPA process.

IPC speaks of, "creating uncertainty for projects under review". Yet how much uncertainty has been created in a process where the Applicant has not only completely ignored the "Agency Preferred Route" of the federal process already completed, for no apparent reason. Also, they have either by negligence or deceit, mislead us with their portrayal of the routes; one example is in Attachment B-6 2017 Supplemental Siting Study Table 3.1.1 lists Mill Creek as "BLM Preferred Alternative in FEIS" – when it was not.

Similar to their complaints about the timing of clarifying rules for Protected Areas, IPC complains of EFSC, "clarifying the criteria for identifying important recreational resources. While it is not clear precisely what is intended here, this could be problematic to the extent that it may require analysis of resources that were not previously identified in our ASC."

While IPC may find the current clarification process "problematic", it signals openness to a more thorough evaluation, in the public interest, as it should.

Sincerely,

Susan Geer, contested case petitioner  
906 Penn Ave  
La Grande OR 97850





code, hoping to save on materials and labor by choosing to follow obsolete requirements, 2x4's rather than 2x6's and R15 rather than R50 insulation.

This self-serving choice is obviously unacceptable. If using a different and more demanding methodology is *disruptive and problematic*, the resulting problems are entirely Idaho Power's responsibility.

Without a consistent methodology, the Council must accept an applicant's determination that a project is "not likely to result in significant adverse impact" based solely on the applicant's choice of criteria. This regulatory oversight has allowed Idaho Power to determine that the B2H transmission line will have "no significant impact" or "less than significant impact" on at least 21 of the 24 Protected, Scenic and Recreation areas they ostensibly analyzed.

The obsolete 1974 USFS VMS manual was designed to help foresters avoid locating clear cuts and transmission lines where they would be seen from visitor centers, viewing platforms or highway overlooks. This choice resulted in applicant's absurd evaluation of potential impacts on Important Recreation Opportunities based entirely on whether hikers, boaters and picnickers would be looking up, down, sideways, straight on or peripherally. The cumulative effect of transmission towers bordering a site, the importance of preserving undeveloped natural areas and the cultural and historic resonance of protected areas to communities is therefore missing from applicant's evaluations.

The 1995 USFS SMS (Scenic Management System) manual, which supersedes the 1974 manual, recognizes that forested areas are not simply being observed by viewers, but are being experienced by visitors. A 30 page chapter contains information on appropriate methodology for analyzing recreationists' appreciation of and expectations from undeveloped natural surroundings and their attitudes about the impact of proposed projects, as well as methods for researching the reactions of residents who value these unspoiled locations as part of their local heritage.

Manuals are superseded for a reason. The current situation defies logic and is, literally, ridiculous. ODOE maintains that no specific manual is required for analyzing projects; however, a manual is required, and common sense indicates that the most recent method of analysis would be followed. No other state regulatory agency allows applicants to choose the criteria by which their applications for licensure or certification will be evaluated. Chaos would result if ODOT, DEQ and other regulatory agencies allowed applicants to choose their licensing criteria.

One example of this regulatory error follows:

*The applicant's revised analysis changes the previous conclusion low resource change to a conclusion of high resource change because the landscape character and scenic attractiveness of the park will be reduced due to areas where the proposed facility will be close (within 0.2-1 mile) and vegetation will provide no or limited screening, primarily around the southern and southwestern shores of Little Morgan Lake [a 27 acre lake in a remote natural wild area valued by birders, botanists and hikers] where visual contrast will be strong and the proposed facility will appear dominant. Based on the applicant's methodology and revised conclusions under*

*visual contrast and scale dominance, resource change, and viewer perception the applicant maintains the impacts are still less than significant.*

Proposed Order, p. 531

## **COMMENT TWO: BACKGROUND**

*. . . Due to the scale and complexity of the B2H Project, Idaho Power has been working through the federal and state permitting processes for approximately 12 years, including the following major milestones in the*

*EFSC process:*

- *Notice of Intent (2010)*
- *Project Order (2012)*
- *Preliminary Application (2013)*
- *First Amended Project Order (2014)*
- *Amended Preliminary Application (2017)*
- *Second Amended Project Order (2018)*
- *Complete Application (2018)*
- *Draft Proposed Order (5/2019)*
- *Proposed Order (7/2020)*
- *Contested Case (2020-present)*

To put this timeline in perspective: Three other transmission projects, of similar scale and complexity, selected in 2008 at the same time as Idaho Power's B2H as "fast track projects," are already complete and in service. Another is under construction, scheduled for completion this year. Two have been cancelled.

It is not *scale and complexity*, but the errors and omissions in Idaho Power's OPUC and DOE applications, followed by the numerous time extensions needed to correct them, that have caused delays in their application process. The fact that Idaho Power hastily chose two inappropriate routes for the B2H is delaying the project even further.

### THE "FAST TRACK B2H" FALLS FAR BEHIND

In the meantime, what happened to the other six "fast track transmission projects on President Obama's 2008 list?

Gateway West, Wyoming/Idaho, several segments are complete and in service.

Susquehanna to Roseland, New Jersey/Pennsylvania, complete and in service, May 2015.

Hampton-Rochester La Crosse Line, Minnesota/Wisconsin, complete and in service, April 2016.

Trans-West Express, line under construction, April 2019 site approval. Completion projected 2021.

1-5 Corridor Reinforcement Transmission Line cancelled by BPA in May 2017: [doubling costs] *prompted us to take a hard look at all of our transmission practices and analytics, including a fresh look at load (electrical demand) forecasts, generation changes and market dynamics.*

SunZia Southwest Transmission Project, New Mexico/Arizona. New Mexico regulators rejected the SunZia project in 2018 based on uncertainties about the route and withdrawal of partners.

#### TIME LINE FOR B2H PROJECT

2007 1st IRP with B2H presented to OPUC.

2008 President Obama names B2H one of the seven fast track transmission projects,\*designed “to speed economic recovery by creating thousands of jobs.”

2008 Idaho Power files its first Plan for Preliminary EFSC Application for Site Certificate (ASC).

2010 Idaho Power files new plan for ASC.

2011 President Obama’s Pilot Project Rapid Response Team arrives in Idaho to “help move the project along.” Idaho Power plans to have rights of way approved between 2012 – 2014.

2013 Idaho Power submits its Preliminary ASC, 5 years after its first submission.

2016 Idaho Power’s fails “essential” completed construction date for B2H.

2018 Idaho Power receives OPUC acknowledgement of IRP. Using that acknowledgement as “proof of need,” the Company promptly delivers 240 lb. 17,000 page EFSC Applications for Site Certificates to 5 eastern Oregon county planning offices with a 30 day response period. County Commissioners are informed “it’s a done deal.”

2018 Idaho Power, citing time constraints, announces its choice of the Mill Creek and Morgan Lake routes for the B2H. Within a month, BLM announces the Environmentally Preferred and Alternate routes for the B2H. The BLM Environmentally Preferred route is remote, far to the west of Idaho Power’s selected routes which would border the city of La Grande’s viewshed or Morgan Lake City Park.

2018 Idaho Power’s Seconded Amended ASC is finally “completed.” Because of numerous errors and omissions, this was a 12 year process.

2020 Idaho Power files, then withdraws its 2019 IRP, receives at least five time extensions to modify its IRP.

2020 Idaho Power sends a letter to local landowners stating that the Mill Creek Route is no longer under consideration.

2021 Based on 76 errors, omissions and discrepancies in Idaho Power's ASC, ALJ Webster Green grants 36 individuals Contested Case standing on the B2H EFSC application. The hearing calendar continues through July 2022.

2021 Judge Simon will rule on BLM and USFS failures to conduct adequate NEPA evaluations of B2H proposed routes. Court may require a Supplemental EIS which will result in another delay in the application process well into 2022.

2021 IPUC staff notes that *Idaho Power proposes using B2H, a project estimated to cost \$1 billion to \$1.2 billion, with a 21 percent ownership share at \$292 million, to fill a 5 MW capacity deficiency in August 2029.*

2021 Idaho Power "expects to finalize permitting" for B2H.

After fourteen years, Idaho Power is still burdening state agencies and concerned citizens with its flawed applications. It is truly ironic that the Company is now arguing against possibly *disruptive and problematic* agency activities.

Sincerely,

Lois Barry  
60688 Morgan Lake Road  
PO Box 566  
La Grande, Oregon 97850

## **CERTIFICATE OF MAILING**

On May 28, 2021, I mailed the foregoing RESPONSE TO NOTICE OF EX PARTE COMMUNICATIONS PURSUANT TO OAR 137-003-0055(2) issued on this date in OAH Case No. 2019-ABC-02833.

**By: First Class Mail:**

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[Lois Barry, Petitioner](#)



May 28, 2021

Alison Greene Webster, Senior Administrative Law Judge  
Oregon Department of Energy  
500 Capitol Street NE  
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**SENT VIA EMAIL TO:** OED OAH [Referral@oregon.gov](mailto:Referral@oregon.gov) and service list

**RE: OAH-2019-ABC-02833 Petitioner McAllister's Rebuttal to Idaho Power Company's Ex Parte Communication with the Energy Facility Siting Council.**

Dear ALJ Green Webster,

I greatly appreciate the opportunity to respond to Idaho Power Company's (IPC) improper ex parte communication to the Energy Facility Siting Council (EFSC) seeking to influence the outcome of this case. It is troubling that IPC presumably regarded such attempts to influence the decision-maker on matters directly related to issues parties are currently litigating to be appropriate and raises further concerns of undisclosed past conduct and communications, which have been sought and denied in discovery.<sup>1</sup> Here, IPC not only asks EFSC to halt its rulemaking duties, but to ensure that Oregon Department of Energy (ODOE) will not interfere with IPC's transmission line to the detriment of Oregon's protected areas, scenic resources, recreation resources, and the interests of its residents.

**IPC Misconstrues the Project History to Claim Unfair Surprise.**

IPC's most recent ex parte attempt to improperly influence the outcome of this case is consistent with a past pattern of misconstruing facts, the record, and the history of this project in order to achieve IPC objectives that provide no benefit to the Oregon public. Significantly here, while IPC claims the rulemaking in question would unfairly prejudice IPC such that the Council should "pause the rulemaking entirely" and direct ODOE staff to ensure that the B2H project is not impacted, any prejudice IPC suffers is a result of its own making. Not only has IPC long been aware of the issues relating to Protected Areas, Scenic Resources, and Recreation on the Morgan Lake Alternative, which petitioners are now litigating in this case, it chose to pursue this high impact route instead of the Bureau of Land Management's (BLM) Agency Preferred Route—identified as the Agency Preferred Alternative since 2014—that obviates the issues IPC details in its ex parte communication.

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<sup>1</sup>I sought such communications in my discovery requests and subsequent motion for discovery order, which was denied on the basis of relevance. IPC's April 22, 2021 letter to EFSC underscores the relevance of communications I requested but have been withheld. I respectfully request that the ALJ reconsider my Motion for Discovery Order with respect to my requests for IPC communications.

Among material misrepresentations IPC has made in its Application for Site Certificate (ASC) relevant to its current claim of unfair prejudice are those found in **IPC’s Application for Site Certificate, Exhibit B Project Description**, and the associated **Attachment B-6 2017 Supplemental Siting Study**. Indeed, the entire Supplemental Siting Study as it relates to the routes with which IPC’s ex parte communication is concerned (Mill Creek and Morgan Lake Alternative) is founded on false premises including that (1) the Mill Creek route was the BLM’s agency preferred route in its FEIS (it was not), and (2) that the actual Agency Preferred Route in the FEIS, the Glass Hill Alternative, was not carried forward (it was). Here, IPC misrepresents, among other things: the origin of both its Proposed Mill Creek Route and its Morgan Lake Alternative; the BLM’s study of identified routes; the BLM’s conclusions in its Final Environmental Impact Statement (FEIS); and the BLM’s fundamental role in this process, falsely claiming the BLM *developed* the Mill Creek route.<sup>2</sup> Importantly, IPC’s concerns expressed in its April 22, 2021 ex parte communication primarily, if not entirely, pertain to this stretch of the transmission line through Union County and the contested case issues relating to Protected Areas, Scenic Resources, and Recreation on this segment—the standards subject to the current rulemaking with which IPC is concerned.

Understanding the significance of the falsehoods contained in **Attachment B-6 2017 Supplemental Siting Study** requires explanation. In December of 2014, the BLM identified the Glass Hill Alternative Route (referenced in the ASC) as the Agency Preferred Alternative for this project. In November 2016, the BLM identified this same route as its Agency Preferred Alternative pursuant to its analysis of proposed routes under National Environmental Policy Act (NEPA). Contrary to this well-documented fact, IPC represents in its 2018 Exhibit B Project Description that the “*Glass Hill Alternative Corridor Segment was not carried forward by BLM as the agency preferred route*” as its “Basis for Corridor Change.” See Table B-6, Page B-39 of **Exhibit B (IPC Basis for Corridor Change)**. This is patently false. In fact, the Glass Hill Alternative Corridor, has been the Agency Preferred Route since 2014 when it was identified as the NEPA preliminary preferred alternative in the Draft Environmental Impact Statement (DEIS).

Further, IPC falsely represents that the Mill Creek Route (rather than the Glass Hill Route) is the BLM’s Agency Preferred NEPA Alternative. For example, Table 3.1.1 “Summary of the EFSC and NEPA Status of the Routes and Stations Considered in the Amended pASC” (Attachment B-6 at p. 3) represents the following:

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<sup>2</sup> The BLM did not “develop” any routes for this project. The BLM only evaluated routes that were developed by others and presented for comparative analysis.

**Table 3.1-1. Summary of the EFSC and NEPA Status of the Routes and Stations Considered in the Amended pASC**

Route Originator	Route Designation	EFSC Status	Status in FEIS
<b>Union County</b>			
IPC	Proposed Route	Proposed Route in the Amended pASC.	BLM's Agency Preferred Alternative in the FEIS.
IPC	Morgan Lake	Not Analyzed in the Draft Amended pASC. IPC Alternative Route in the Amended pASC.	Not Analyzed in the FEIS.
BLM	Mill Creek	Not Analyzed in the Draft Amended pASC. Proposed Route in the Amended pASC.	BLM's Agency Preferred Alternative in the FEIS.

As stated above, Mill Creek is not the BLM’s Agency Preferred Alternative in the FEIS. The BLM did not analyze this route. IPC further states that “In Union County, the Proposed Route includes portions of the Proposed Route that were included in the Draft Amended pASC and the Mill Creek Route that was developed by the BLM.” (Exhibit B, Attachment B-6 at p.9) This is, again, a gross misrepresentation of the Mill Creek (IPC Proposed) Route. Not only is the Mill Creek Route not the Agency Preferred Alternative, as conveyed throughout IPC’s ASC, the Mill Creek route was not developed by the BLM. As stated above, the BLM did not “develop” routes for this project, but evaluated routes presented, which did not include either the Mill Creek or Morgan Lake Route.

IPC has since acknowledged in its discovery responses that the Mill Creek Route is **not the BLM’s Agency Preferred Alternative** in the FEIS, as it falsely claimed in its ASC. Specifically, in response to McAllister Request No. 13, IPC states “Table 3.1-1 indicating that the Mill Creek route was part of BLM's agency preferred alternative in the Final EIS, that statement is incorrect.” (See attached Exhibit 1, IPC Discovery Responses). IPC has also represented to the Hearing Officer that this is a “typographical error.” (See Applicant Idaho Power Company’s Objections to Discovery Requests at p.129, submitted to ALJ March 5, 2021). This is clearly not so, as the misrepresentation is consistently perpetuated throughout the Exhibit B Project Description (2018) and Attachment B-6 Supplemental Siting Study. See Exhibit B at p.40 (omitting that the Glass Hill Alternative was the BLM selected route in the DEIS); p. 41 (inferring that the Glass Hill Alternative was eliminated by the BLM); p. 44 (again failing to recognize the Glass Hill Alternative was identified as the Agency Preferred Alternative); Attachment B-6 at p.1 (falsely asserting that in March 2016, BLM “developed a revised Agency Preferred Alternative” when, in fact, the only route that the BLM has ever identified as its preferred alternative is the Glass Hill Route)). Thus, IPC’s claim this is a typo is not credible and implies that either IPC is unaware of the contents of its own application or that it purposefully misrepresented this fact to ODOE.

IPC further falsely claims in its Supplemental Siting Study that “*The Morgan Lake Alternative was developed by IPC with input from local Land owners*” (Attachment B-6 at p. 9, 3.2.3.3 IPC’s Morgan Lake Alternative). In reality, the majority of landowners opposed the Morgan Lake Alternative due to impacts on the natural resources, including Scenic Resources, Recreation Resources, and land meeting Protected Area criteria. Troublingly, a single landowner, who had recently acquired land in the area, developed and proposed the Morgan Lake Route, which IPC readily adopted and has since pursued. This fact is reflected in IPC’s private correspondence with this landowner, attached hereto as Exhibit 2, stating IPC intended to adopt the route the landowner proposed (now called the Morgan Lake Alternative). While the Glass Hill Alternative was developed to minimize impacts on sensitive resources including Protected Areas, Scenic Resources, and Recreation, the Morgan Lake Alternative was developed to minimize impacts to one new landowner’s personal interest. And, unlike the Glass Hill Alternative, IPC’s Morgan Lake Route was not studied or subjected to public comment.

IPC’s misrepresentations outlined above and its course of action during the application process undermine its claims of unfair prejudice if EFSC continues with “the current direction of the rulemaking to update the standards related to Protected Areas, Scenic Resources, and Recreation Resources.” For reasons that remain unclear, IPC chose to exclude the actual Agency Preferred Alternative identified in the FEIS and evaluated pursuant to NEPA from its application, while at the same time falsely representing to ODOE that the Mill Creek Route (for which it has applied) was the Agency Preferred Route in the FEIS. In reality, in the eleventh hour of the project, IPC opted to apply for multiple routes through Union County that had never been studied, and remain unevaluated by the BLM.<sup>3</sup> IPC chose to pursue one of these unevaluated routes, the Morgan Lake Alternative, in favor of a single land owner who proposed the route to IPC.

Significantly, the concerns IPC raised to the Council in its ex parte communication would be moot if IPC had pursued the route the reviewing federal agency identified pursuant to NEPA analysis. NEPA’s stated purpose is to “encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation.” 42 USC § 4321. This is consistent with ODOE’s stated mission and values,<sup>4</sup> the purpose of EFSC oversight which seeks to “ensure that **Oregon** has an adequate energy supply while **protecting Oregon’s environment and public safety**,<sup>5</sup> and the discussed updates to EFSC’s Protected Areas, Scenic Resources, and Recreation standards that IPC contests.

Contrary to IPC’s claims, “the current direction of the rulemaking” does not unfairly prejudice IPC. IPC chose to (1) exclude the BLM’s agency evaluated and preferred route from the ASC,

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<sup>3</sup> The issue of the need for the BLM to conduct supplemental study on these newly added routes is currently being litigated in federal district court. Case No. 2:19-cv-01822-SU.

<sup>4</sup> See <https://www.oregon.gov/energy/About-Us/Pages/Mission-Values.aspx>

<sup>5</sup> <https://www.oregon.gov/energy/facilities-safety/facilities/pages/about-the-council.aspx#:~:text=The%20Energy%20Facility%20Siting%20Council,disposal%20sites%2C%20and%20other%20projects.>

(2) include routes that have not been studied, and (3) pursue a route that has been the source of public concern since it became known to the public due to its impacts on, among other things, Scenic Resources, Recreation Resources, and sensitive areas that meet the Protected Area criteria. IPC and ODOE have advanced the position that an applicant may apply for any route it chooses, regardless of NEPA and the federal agency review—or the underlying motives driving selection of a specific route—so long as the applied for route comports with EFSC standards.<sup>6</sup> Accordingly, IPC must accept the outcomes of its decision to apply for, or not apply for, a particular route. Now, after excluding the actual Agency Preferred Route evaluated pursuant to NEPA, which obviates the issues giving rise to IPC’s current concerns, IPC asks that EFSC conform its standards and rulemaking procedures to ensure IPC’s success to the detriment of Oregon’s protected areas, scenic resources, recreational resources, and the interests of its residents. Oregonians should not suffer the consequences of IPC’s poor business decisions.

**IPC’s Claims Regarding “Other Problems with ODOE’s Proposals” are Baseless.**

Finally, IPC’s contentions in **Section III** of its April 22, 2021 ex parte communication further undermine IPC’s credibility and expose IPC’s claims of potential prejudice as a red herring. Here, IPC appears to purport that it relied on an absurd interpretation of OAR 345-022-0040(2) in its *Alternative Route Analysis*, which runs counter to the interpretation ODOE provided to IPC in the Second Amended Project Order. Specifically, ODOE states:

Note that OAR 345-022-0040(1) generally prohibits siting of transmission lines through protected areas, which include state parks. However, under OAR 345-022-0040(2), EFSC may approve a route that passes through a protected area if the council determines that other routes outside the protected area would “have greater impacts.” If the transmission line routing proposed by the applicant will pass through a protected area, the applicant shall describe in detail the alternative routes it studied and provide analysis in the application to support a finding that routing the transmission line through the protected area would have less impacts than the alternatives. (Second Amended Project Order, July 26, 2018, at p. 14).

In the subsequent ODOE rulemaking project that IPC contests, ODOE explains that “Staff believes this rule is intended to allow a transmission line...to pass through a protected area when greater impacts cannot be avoided, but the construction implies that a linear facility could be sited on a protected area when other lesser impact alternatives may be available.” (October 22-23 EFSC Meeting, Agenda Item D (October 9, 2020)). The proposed amendment only seeks to clarify that the original intent of the rule is to allow the project to pass through a protected area only when Council finds that no alternative routes or sites would have lesser impacts, which is the logical interpretation.

---

<sup>6</sup> This position conflicts with ORS 469.370(13) requiring that that the council *shall* conduct its site certificate review...in a manner that is consistent with and does not duplicate federal agency review, including development with the federal agency and reliance on a joint records to address applicable council standards.

The analytical framework has never changed. Rather, ODOE seeks to clarify the construction of the language so as not to achieve an absurd result. IPC appears to argue that the proper analytical framework is to conclude that an alternative may pass through protected areas if that alternative has *greater* impacts than other routes. This is nonsensical and has clearly never been the intent of OAR 345-022-0040(2). If IPC relied on this perverse interpretation, as it appears to claim, this exposes troubling fundamental issues with its route analysis.

IPC's ex parte communication asking EFSC to halt required, common-sense rulemaking claiming unfair prejudice, at its core, intends to obscure the fact that, in the eleventh hour of what IPC points out was a 12-year process, it added new routes that had never been studied, while excluding the Agency Preferred NEPA route, which adequately addressed the issues of Protected Areas, Scenic Resources, and Recreation that are the basis of IPC's current concern. EFSC should not bend standards and procedures to suit the needs of an Idaho corporation at the expense of Oregon's natural resources and the public interest of Oregonians.

Sincerely,

Michael McAllister  
Petitioner

CERTIFICATE OF SERVICE

On May 28, 2021, I emailed the foregoing Rebuttal to Idaho Power Company's Ex Parte Communications to the Administrative Law Judge in OAH Case No. 2019-ABC-02833, with copies sent as follows:

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**By: Hand Delivery**

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PO Box 1384  
La Grande, OR 97850

Michael McAllister  
Petitioner

# **EXHIBIT 1**

# **EXHIBIT 1**

February 5, 2021

Subject: OAH Case No. 2019-ABC-02833 - Boardman to Hemingway Transmission Line – Idaho Power Company’s Responses to Michael McAllister Discovery Request Nos. 1-46

**Issue No. R-2, SP-2, FW-13**

**MICHAEL MCALLISTER’S DISCOVERY REQUEST NO. 1:**

Identify all individuals likely to have discoverable information that you may use to support your claim that the Morgan Lake Alternative Route (“MLA”) complies with OAR-345-022-0100, OAR-345-022-0060 (incorporated OAR 635-415-0025), and OAR-345-022-0022.

**IDAHO POWER’S RESPONSE TO MICHAEL MCALLISTER’S DISCOVERY REQUEST NO. 1:**

Idaho Power objects to this request as vague, ambiguous, and overbroad. Without waiving this objection, Idaho Power identified its witnesses for these issues (to the extent the identity of such witnesses is known at this time) below in response to Question 2.

February 5, 2021

**Issue No. R-2, SP-2, FW-13**

**MICHAEL MCALLISTER'S DISCOVERY REQUEST NO. 13:**

Explain the basis for your claim in Attachment B-6 of the ASC that the Mill Creek Route is the Agency Preferred Alternative in the FEIS.

- a. Produce the documents on which you rely to make this claim.

**IDAHO POWER'S RESPONSE TO MICHAEL MCALLISTER'S DISCOVERY REQUEST NO. 13:**

Idaho Power objects to this request as vague and ambiguous, as it is unclear what statement in Attachment B-6 you are referring to.

Without waiving that objection, if this request is referring to the statement in Table 3.1-1 indicating that the Mill Creek route was part of BLM's agency preferred alternative in the Final EIS, that statement is incorrect and an error on Idaho Power's part. For the Blues Mountain segment of the project, in the Final EIS, BLM identified the Glass Hill Alternative as modified by route variations S2-A2, S2-D2, and S2-F2 as the Environmentally Preferable Action Alternative Route and BLM's Agency Preferred Alternative Route.

# **EXHIBIT 2**

# **EXHIBIT 2**

27 February 2015

Brad Allen  
Via electronic mail

**Subject: Elk Song Ranch Alternative Routes**

Dear Brad and June Allen:

Thank you for providing an alternative route for Boardman to Hemingway Transmission Line Project where it crosses your property known as the Elk Song Ranch. We took your proposed route and modified it slightly to avoid known constraints in the area. Both your proposed route (red dashed line) and the modified routes (orange line and yellow line) are shown on the attached map and explained below.

Your proposed route follows the general route of the Glass Hill Road area you state has a higher human presence than the location of the proposed route. In the siting of a transmission line we must consider the impacts to the human as well as the natural environment. We modified your proposed route to avoid passing over several structures and to be further away from Morgan Lake, a local recreation site. We also developed an alternative route (yellow line) that would further reduce impacts to Morgan Lake. The above recommendations reflect the same methodology we used for routing along the entire length of the project.

A site visit to the area by Idaho Power transmission engineers and final design of the transmission line could result in further refinement of the modified route on the Elk Song Ranch. Please contact me if you would like to discuss any aspect of the routing.

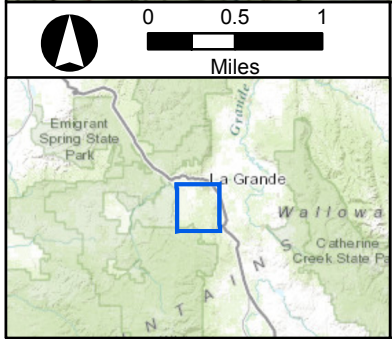
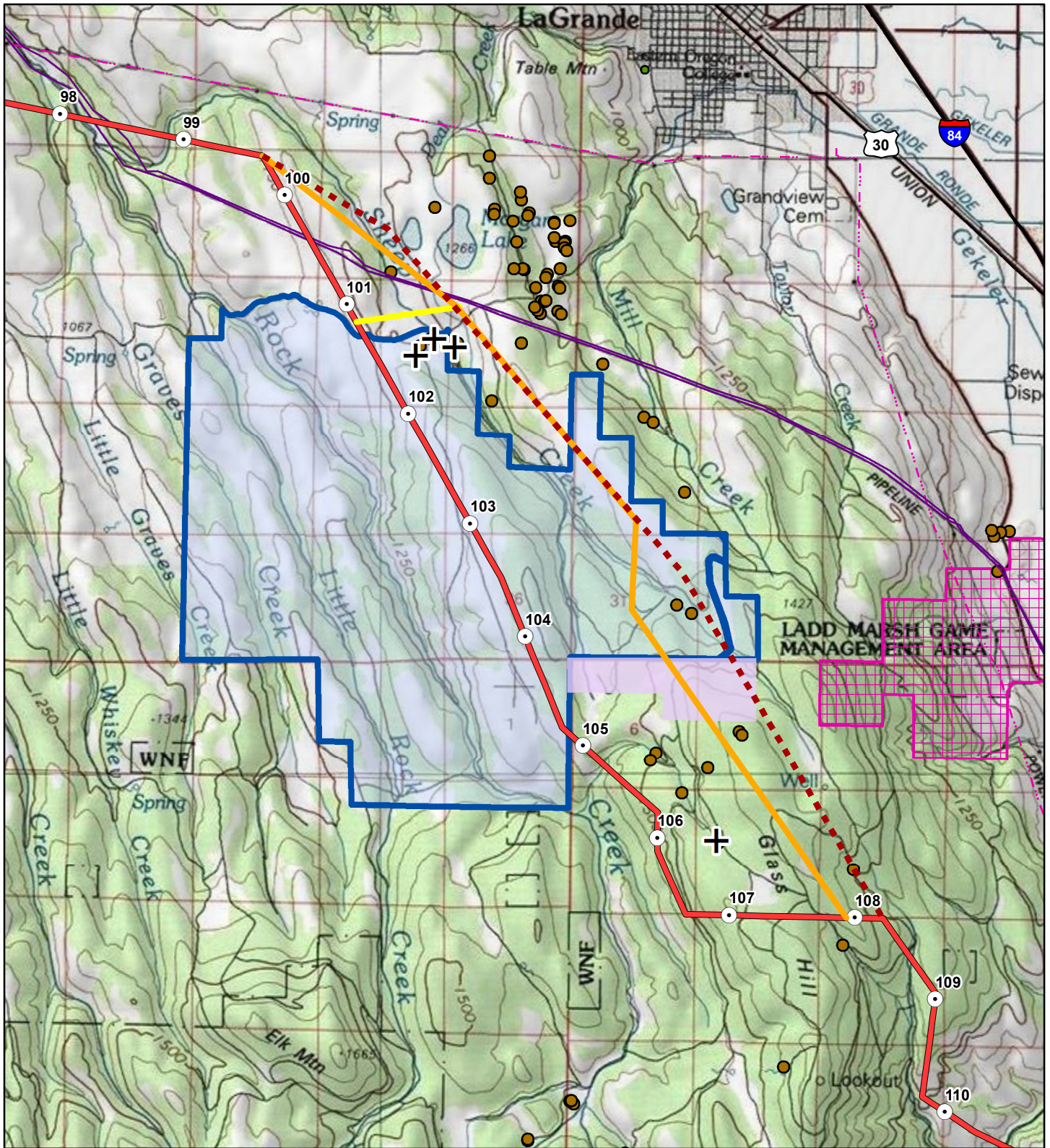
Regards,

Todd Adams  
B2H Project Leader

Enc: map

cc: D Gonzalez BLM  
T Gertch BLM  
R Straub BLM  
Z Funkhouser IPC  
M Colburn IPC






<p><b>B2H Project</b></p> <ul style="list-style-type: none"> <li><span style="color: red;">—</span> Proposed Corridor</li> <li>○ Mile Marker</li> </ul> <p><b>Elk Song Re-Routes</b></p> <ul style="list-style-type: none"> <li><span style="color: red;">- - -</span> Proposed by Stakeholder</li> <li><span style="color: orange;">—</span> IPC Proposed Alternate</li> <li><span style="color: yellow;">—</span> IPC Proposed Alternate Variation</li> </ul> <p><b>Existing Transmission</b></p> <ul style="list-style-type: none"> <li><span style="color: purple;">- - -</span> 230 kV</li> </ul>	<ul style="list-style-type: none"> <li><span style="border: 2px solid blue; display: inline-block; width: 20px; height: 10px;"></span> Elk Song Ranch</li> <li><span style="background-color: lightpurple; display: inline-block; width: 20px; height: 10px;"></span> Glass Hill Rebarrow Forest</li> <li><span style="border: 2px solid pink; display: inline-block; width: 20px; height: 10px;"></span> Wildlife Management Area</li> <li><span style="color: purple;">—</span> Existing Pipeline</li> <li>● Structures (Not Verified)</li> <li>⊕ NSR</li> </ul>
--	--

**Elk Song Ranch  
Alternative Routes**

Boardman to Hemingway  
Transmission Line Project  
Oregon - Idaho

February 2015



AN IDACORP company



-----Original Message-----  
From: Brad Allen <[bradallen4030@hotmail.com](mailto:bradallen4030@hotmail.com)>  
To: [wildlandmm@netscape.net](mailto:wildlandmm@netscape.net) <[wildlandmm@netscape.net](mailto:wildlandmm@netscape.net)>  
Sent: Sat, Mar 7, 2015 9:09 am  
Subject: Fwd: B2H Elk Song Ranch Alternative Route

Sent from my iPhone

Begin forwarded message:

**From:** "Adams, Todd" <[TAdams@idahopower.com](mailto:TAdams@idahopower.com)>  
**To:** ""[bradallen4030@hotmail.com](mailto:bradallen4030@hotmail.com)"" <[bradallen4030@hotmail.com](mailto:bradallen4030@hotmail.com)>  
**Cc:** "Don Gonzalez" <[dgonzale@blm.gov](mailto:dgonzale@blm.gov)>, "Gertsch, Tamara" <[tgertsch@blm.gov](mailto:tgertsch@blm.gov)>, "Renee L 'Straub" <[rstraub@blm.gov](mailto:rstraub@blm.gov)>, "Funkhouser, Zach" <[ZFunkhouser@idahopower.com](mailto:ZFunkhouser@idahopower.com)>, "Colburn, Mitchel" <[MColburn@idahopower.com](mailto:MColburn@idahopower.com)>  
**Subject:** B2H Elk Song Ranch Alternative Route

Brad,

Attached please find a map showing your alternative route as you proposed along with a suggested route variation as explained in the letter. Don't hesitate to contact me if you have any questions.

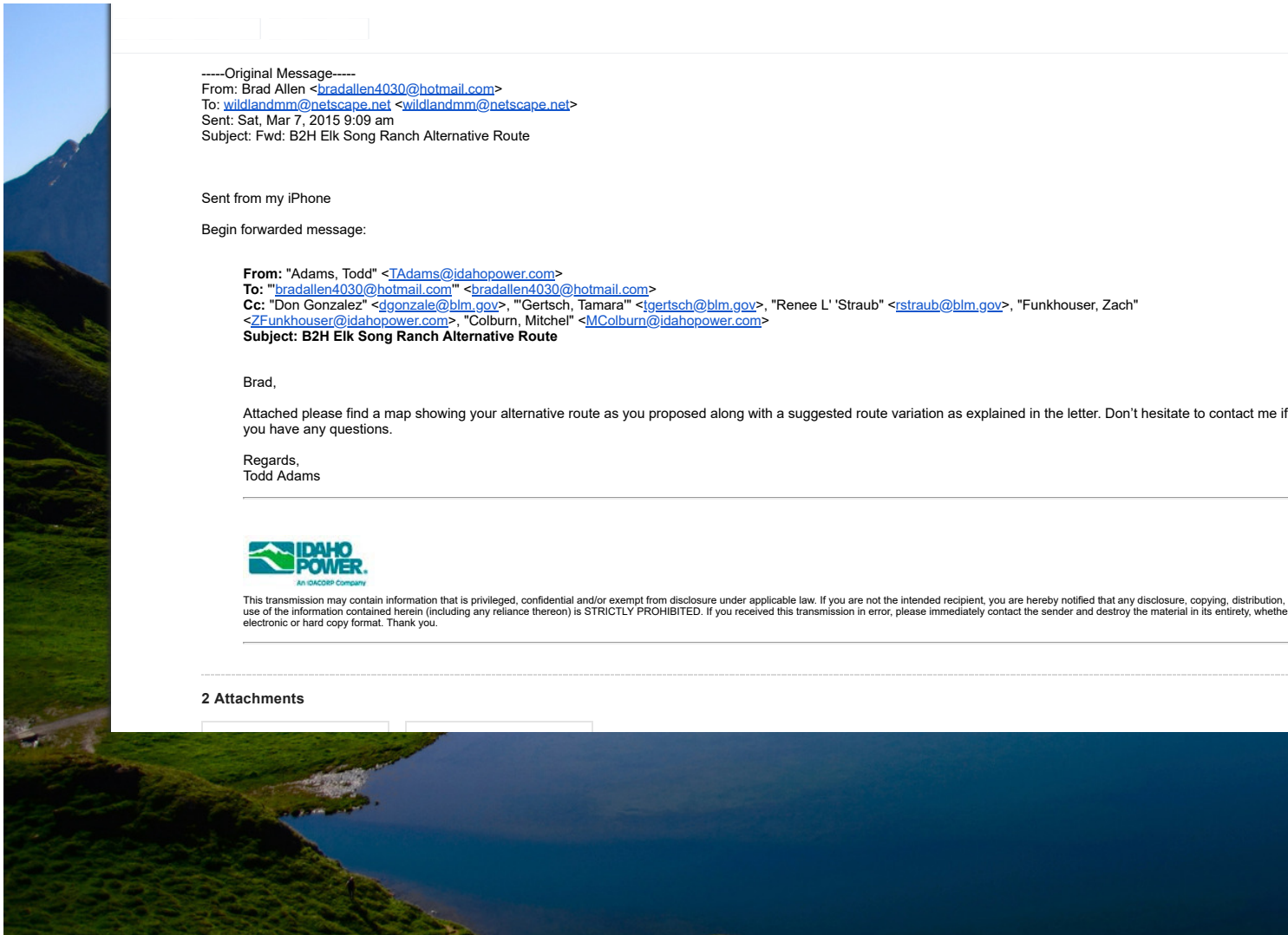
Regards,  
Todd Adams



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2 Attachments





**BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF OREGON  
for the  
OREGON DEPARTMENT OF ENERGY  
IN THE MATTER OF:**

**THE APPLICATION FOR SITE  
CERTIFICATE FOR THE  
BOARDMAN TO HEMINGWAY  
TRANSMISSION LINE**

**RESPONSE TO NOTICE OF  
COMMUNICATIONS PURSUANT TO  
OAR 137-003-0055(2)**

OAH Case No. 2019-ABC-02833

**Hearings Officer Webster:**

27 May 2021

Alison Greene Webster  
Senior Administrative Law Judge  
Office of Administrative Hearings

RE: Rebuttal to Notice of *ex parte* communication pursuant to OAR 137-003-0055(2)

On April 22, 2021, Idaho Power submitted a letter to Council describing IPC's concerns regarding potential proposed rulemaking revisions to update the siting standards related to Protected Areas, Scenic Resources, and Recreation Resources. Their letter described IPC's concerns that the proposed rule revisions, if enacted, could impact the contested case regarding IPC's application for a site certificate for the Boardman to Hemingway transmission line. This action was recognized by Administrative Law Judge Alison Greene Webster as *ex parte* communication pursuant to OAR 137-003-0055(2). Consequently, the ALJ offered all parties and limited parties opportunity to rebut the substance of IPC's letter in writing.

This letter constitutes the rebuttal evidence response of Karen Antell to IPC's *ex parte* communication with Council.

In their letter of April 22, 2021 to Chair Grail and Councilmembers, Idaho Power states that rule changes proposed by ODOE "would introduce new Protected Area resources that have not yet been analyzed by Idaho Power and ODOE for B2H, and inject a significant amount of uncertainty into the B2H contested case process". Idaho Power further states that "any designation of a new natural area could derail a project when it is

well into a contested case process.” Idaho Power specifically mentions that in 2019 “a private landowner with a parcel that will be crossed by the project sought designation of his land as a state ‘natural area’ through the Oregon Parks and Recreation Department without informing Idaho Power or ODOE.” Idaho Power claims that “it would be unreasonable to ask Idaho Power” to re-route around the site.

In their *ex parte* communication, Idaho Power mischaracterizes several aspects of well-documented events. I wish to rebut and correct several statements in their letter to the EFSC.

**1. Idaho Power claims a May 11, 2007 cut-off date for the Protected Area Standard. However, the current Morgan Lake route was not even proposed until 2016, nearly a decade later.**

The general public, and landowners on Glass Hill, participated in the NEPA process in good faith. At the last minute, after completion of the NEPA process, in which the BLM recommended a different route, Idaho Power proposed the current Morgan Lake route over Glass Hill without consultation with affected landowners, and without thorough review of habitat or Protected Areas within the path of the new route. Idaho Power’s request to Council now for exemption to siting rules, disregards the established process developed by EFSC and ODOE, which is designed to protect the public’s interest and to provide private landowners a measure of representation.

**2. In their letter to Council, Idaho Power states that the proposed transmission line route was designed intentionally to cross the Joel Rice property in order to avoid other known Protected Areas on Glass Hill, and they identify a cut-off date of May 11, 2007 for identification of known Protected Areas. The Rice property was protected by a conservation easement with the Rocky Mountain Elk Foundation on 28 December 2001, six years prior to announcement of the proposed B2H transmission line.**

Idaho Power admits that they knew about Eastern Oregon University’s Rebarrow Research Forest and Oregon Department of Fish and Game’s Ladd Marsh Game Management Area on Glass Hill southwest of La Grande. Although they don’t mention it in their *ex parte* communication to Council, they also were aware of the close proximity of La Grande’s Morgan Lake Park and Oregon Trail ruts on the adjacent Webster property.

Idaho Power states that the proposed transmission line route was designed to cross the Joel Rice property in order to avoid these other known Protected Areas (paragraph 1, page 3). The Rice property was protected by a conservation easement with the Rocky Mountain Elk Foundation on 28 December, 2001. This predates by nearly a decade the 2009 date in which the Project Order for the proposed B2H line was issued.

**3. Idaho Power suggests that the Rice property was designated an Oregon State Natural Area in a last-minute attempt to avoid having the line pass through the property (last paragraph, Page 2). Extensive factual evidence to the contrary exists.**

Oregon State Natural Area status is not a courtesy designation that is automatically granted upon request. The Rice property contains extraordinary and unique habitat and wildlife qualities. Indeed, it is because the area represents such an outstanding example of Blue Mountains forest ecosystems that it was selected for Natural Area status.

“The Oregon Legislature established the **Oregon Natural Areas Program** in 1979 as a way to protect and recognize high quality native ecosystems and rare plant and animal species. The program is managed by the Oregon Parks and Recreation Department and includes lands of many different ownerships.”

<https://www.oregon.gov/oprd/PRP/Pages/PLA-natural-resource.aspx>

The stated purpose of the Oregon Natural Areas Program is as follows:

“Purpose: (1) To protect examples of terrestrial and aquatic ecosystems; (2) to serve as gene pool reserves; (3) to serve as benchmarks against which the influences of human activities may be compared; and (4) to provide outdoor laboratories for research and education.”

Dr. Rice recognized the unique and outstanding habitat qualities, plant diversity, and exceptional wildlife potential when he began purchasing land on Glass Hill decades ago. I’ve been a PhD Botany/Biology Professor at Eastern Oregon University since 1988. Dr. Rice first requested my help with surveying his property for native plants about 20 years ago. I began developing a vascular plant checklist and inventory of species for the Rice property on Glass Hill prior to 2007. I completed a more detailed description of the Plants of Winn Meadow in 2011. Winn Meadow is owned by Dr. Rice, and is adjacent to EOU’s Rebarrow Research Forest. On 12 January, 2012, I sent this document to Keith Georgeson, B2H project manager.

Enrollment in the Oregon State Natural Area is not Joel Rice’s first step toward protecting the natural values of his land. The following timeline provides specific information about additional, long-standing efforts by Joel Rice to pursue official, certified, conservation protections for his property on Glass Hill.

- 1) First, Dr. Rice placed most of his property on Glass Hill in a conservation easement with the Rocky Mountain Elk Foundation on 28 December 2001. This predates by over a decade any notice of interest in constructing a power line through the area by Idaho Power. Dr. Rice has a lifelong interest in land conservation. The Rocky Mountain Elk Foundation provided him a means to begin to establish some conservation status for his land, while also allowing hunting access as a benefit to the community.

- 2) Subsequently, Dr. Rice also enrolled this same Glass Hill land in Oregon Department of Fish and Wildlife's Access and Habitat Program. The property was most recently reenrolled in March, 2016. This program promotes good stewardship of private lands in order to maintain high quality wildlife habitat for the public benefit.
- 3) Finally, designation of the Rice property in Oregon's State Natural Area program in 2019-20 was an act of extreme generosity of Dr. Joel Rice to the state of Oregon. His desire has always been to see the unique values of the land, habitat, and wildlife protected in perpetuity for the public good. In doing so, he has foregone opportunities for making personal financial gains from resource extraction, such as timber harvest or livestock grazing. He has done everything he could to protect the outstanding natural qualities of his private land, while also keeping access open for public hunting and recreational use. His generosity has been widely appreciated by the community of La Grande.

The current Oregon Natural Areas Plan published in 2020, and administrated by Oregon Parks and Recreation, describes ecosystem types that occur within the state and identifies priority areas for protection. Riparian and meadow ecosystems in Douglas-fir, Grande fir, and Western larch forest types are considered a priority for natural area designation and protection. The Rice property contains outstanding examples of these priority habitats at mid-elevation in NE Oregon. This is one reason why the state of Oregon enrolled the Rice property into the state Natural Areas program.

In 2011, Mr. Keith Georgeson was the B2H Project Manager. In email communications with Glass Hill landowners and an in-person meeting held on Glass Hill, Mr. Georgeson was made well aware of the unique and high-quality natural values of the Glass Hill area, including EOU's Rebarrow Forest, and the Rice properties. Consequently, in 2012, the Coulter Ridge Alternative route was proposed following a line farther south of the current Morgan Lake Route, in order to avoid all of the current Protected Areas, including ODFW, EOU Rebarrow Forest, Morgan Lake, and the Joel Rice property.

Upon learning about the Oregon State Natural Area designation for the Rice property, Idaho Power's response should have been to immediately recognize the importance of this outstanding Natural Area to all Oregonians, and to reconsider the proposed Morgan Lake route in good faith. Instead, they chose to malign the intentions of not just Joel Rice, but also the knowledgeable scientists and individuals who oversee the Oregon State Natural Areas program.

In the long run, the state of Oregon and its citizens will benefit far more from both private and public land partnerships and protections such as the Oregon State Natural Areas program provides, than from Idaho Power's proposed transmission line.

Sincerely,

Dr. Karen Antell  
Professor of Biology  
Eastern Oregon University

### **CERTIFICATE OF MAILING**

On May 27, 2021, I mailed the foregoing RESPONSE TO NOTICE OF EX PARTE COMMUNICATIONS PURSUANT TO OAR 137-003-0055(2) issued on this date in OAH Case No. 2019-ABC-02833.

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[Karen Antell, Petitioner](#)



**BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF OREGON  
for the  
OREGON DEPARTMENT OF ENERGY  
IN THE MATTER OF:**

**THE APPLICATION FOR SITE  
CERTIFICATE FOR THE  
BOARDMAN TO HEMINGWAY  
TRANSMISSION LINE**

**RESPONSE TO NOTICE OF  
COMMUNICATIONS PURSUANT TO  
OAR 137-003-0055(2)**

OAH Case No. 2019-ABC-02833

**Hearings Officer Webster:**

**Idaho Power was successful in influencing the Oregon Department of Energy to extend the process for promulgation of the Protected Area rules. Per their letter dated April 22, 2021, their motivation was to avoid having to provide protection for areas impacted by the Boardman to Hemingway Transmission Line. Following are my responses to the statements made by Idaho Power in their illegal ex parte communications with the Oregon Energy Facility Siting Council.**

I reviewed the following documents in coming to my conclusions:

1. Idaho Power's letter to the Energy Facility Siting Council dated April 22, 2021
2. The verbal and written transcripts of the April 23, 2021 Energy Facility Siting Council public comments and discussions regarding the procedure for implementing the Protected Area rule revisions.
3. The email I received from Elaine Albrich.
4. "Vegetation of Winn Meadow Glass Hill, Union co., Oregon" by Dr. Karen Antell, August 16, 2011
5. "Deed of Conservation Easement" between Joel Rice and the Rocky Mountain Elk Foundation dated December 28, 2001. File Number 20015945.

6. The email from me to Brad Allen dated June 8, 2016 just prior to the announcement that the Morgan Lake route was going to be proposed.

Following is a list of a portion of the information in Idaho Power's 5 page letter which I believe are misleading.

**Idaho Power claims that the promulgation of the Protected Area standard would result in moving a "goalpost" regarding their application.**

There exists no "goalpost" date for the issue of protected properties. The statutes define when the standard is to be applied, and for this type of issue, it is the date the Site Certificate is issued.

Idaho Power's actions to influence the Oregon Department of Energy to extend the timeframe for completing the Amendments to their Protected Areas standard will not keep them from having to address the legitimate Protected Areas including the "Rice parcel". This rule should have been updated years ago had the Oregon Department of Energy maintained their rules in a manner consistent with the state policy in ORS 469.010 requiring them to pay special attention to the preservation and enhancement of environmental quality and ORS 469.100 stating that all agencies shall review their rules and policies to determine they are consistent with ORS 469.010.

469.320 Requires an amended site certificate to add area to the site. The review includes all rules included in the processing of the original site certificate. Idaho Power has stated that there will be the need for amending the site certificate which will require a review of the Protected Areas standard as it exists at that time. Hopefully the Energy Facility Siting Council will not allow this developer to avoid addressing all legitimate protected areas by putting off the updating of the Amendment Rules beyond a single public meeting.

**Idaho Power claims that this rule would introduce a protected Area resource that has not already been analyzed by Idaho Power.**

This point is moot since Idaho Power has not completed all the required analysis regarding either of the two other Protected Areas that will be crossed by the transmission line. The Rice property would only be added to this list which it should already have been. OAR 345-022-0000(2) requires

that the developer evaluate specific items to be allowed to cross a protected area. There was some discussion regarding this rule in the January 23, 2020 EFSC meeting at approximately 42.55. It was stated that no project had been approved previously that crossed a protected area and that there was a meeting “a couple of years ago” where ODOE staff discussed one additional route and it was agreed the planned route was better than the other one they were presented with. This statement in a council meeting regarding discussions is not documentation nor does it provide a “preponderance of evidence” that the development complies with the rules and statutes requiring a review of alternative routes. The fact that BLM identified a preferred route other than either of the ones proposed by Idaho Power makes any argument that there was not a better route questionable.

The ex parte communication does not appear to have any purpose other than extending the timeframe for getting these rules implemented due to Idaho Power’s belief that this will benefit them.

Evidence supporting this conclusion:

- A. Idaho Power submission of a 5 page letter to the Energy Facility Siting Council dated April 22, 2021 which is devoted almost entirely to their arguments regarding what they see as potential impacts of this rule revision on the Boardman to Hemingway Transmission Line.
- B. The fact that the letter was not submitted until the day prior to the topic appearing on the agenda which failed to provide opportunity for the public at large to prepare arguments in opposition to their recommendations.
- C. The fact that this rule revision was not scheduled for Public Comment, and yet six individuals representing developers and industry associations spoke in support of the recommendations from Idaho Power.
- D. This rule revision did not propose significant changes other than correcting the omission of protected areas that have been designated since 2007. Any issues could easily have been included during the completion of the formal rule amendment timeframe when the public at large along with the developers and special interest groups are provided opportunity to influence changes in the rule language.

- E. The testimony provided by Idaho Power and others calling a simple update to the Protected Areas standard “major”, supports the possibility that the presenters may have been coached.
- F. The actual changes proposed in the rule include the following which can hardly be considered “major”:
  - a. Updating the date for identifying “Protected Areas” to include those areas determined to be protected after 2007.
  - b. Requiring the developer to identify the responsible party for managing protected areas. (Page 6)
  - c. (Page 18) Adds the requirement to identify the responsible party for managing protected area. Other changes are simply word smithing which does not change the requirements.
  - d. Changing the word “shall” to “may” which is less restrictive on actions of the council, (Page 39) and
  - e. While there is a lot of red ink on pages 39 through 41 it is due to removing the examples of the areas which fall under the different protected area topics and referring instead to the enabling legislation, removing areas recommended for inclusion as Wilderness areas from inclusion, and adding federally designated special resource management areas.
  - f. On page 40 where it appears there are additional federally protected areas added, they are areas that have been treated as protected due to federal law, and areas included previously in other areas of the rule.
- G. I was contacted directly by email from Elaine Albrich of Davis, Wright and Tremaine on April 22, 2021 with a request that I comment in support of more than one workshop for the Protected Areas Rule, stating “we” would like to see at least 3 workshops and indicating that since there was no public comment period scheduled for this rule, I would have to comment during the open “Public Comment” period.

The above actions lend support for my belief that Idaho Power's ex parte communication to the Council is for the following reasons::

- A. They intended to influence the Energy Facility Siting Council actions in a manner they believed would support their defense of the contested cases regarding Protected Areas.
- B. They enlisted the support of representatives from other organizations to make comments in order to increase the probability that the rules would be delayed.
- C. They wanted to assure the updates to the Protected Area standard would not occur until after the site certificate process is completed for the Boardman to Hemingway transmission line in order to avoid providing protection for the Rice property.
- D. They were successful in delaying the implementation of necessary revisions to the Protected Area standard by a minimum of months while the Oregon Department of Energy schedules public input sessions.

**Idaho Power states on Page 3 of their letter to the Council that a change in the cut off date for protected areas for B2H would make their analysis obsolete and could require the project to be rerouted well into the contested case.**

This argument and the statements indicating that it was nearly 10 years into the EFSC process before Idaho Power became aware of the protected status of the Rice property and the statement on the prior page that they did not become aware of the status of the Rice property until 2020 is not supported by documentation. They claim that early in the process avoidance of protected areas was a major factor in their siting decisions. The developer is the responsible party for identifying protections for land they plan to cross and they had several methods available to them to determine that this land is protected. They may not have intended to initially run the transmission line across the Rice property, however, just prior to June 8, 2016 it was disclosed by Brad Allen that Idaho Power was going to use the "Morgan Lake" route as one of the routes proposed. By this time, they should have done an analysis of the impacts of the line on not only the Rice property, but also the other properties that this route would now impact. If that had been done, they would have discovered the 2001 Conservation Easement was in force. That document states that the purpose of

the Easement is to “protect forever the relatively natural wildlife habitat, open space forest land and other natural and open space values of the real property described below, assuring its availability for forest, recreational and open space use, and protecting natural resources through private conservation effort, which are recognized in the Oregon Conservation and Highway Scenic Preservation Easement Act, ORS 271.215 to 271.795, inclusive ( 1999).” This document also talks to the importance of the property as a migration corridor. They also would have identified the “Vegetation of Winn Meadow Glass Hill, Union Co., Oregon” August 16, 2011 documentation of the plant species present and the importance of the area as part of the wildlife corridor between Ladd Marsh and the Rebarrow property in providing a continuous, uninterrupted by development, wildlife corridor. Joel Rice, the property owner, also made an impassioned comment during the Environmental Impact Statement process regarding the need to protect this property.

**Idaho Power indicates that if the Council were to adopt one or more methodologies for analyzing impacts to protected areas it would be “disruptive and Problematic” for them to have to use a different method for their analysis.**

It should be noted that Idaho Power ignored the accepted and proven methods for completing the noise measurements required for multiple locations including protected areas. Their actions in using unproven methods have necessitated several contested cases. This alone is evidence of the need for requiring a standard that provides consistent, accurate results.

While it would be possible to respond to additional comments in the remainder of the document provided by Idaho Power, the above information documents the fact that Idaho Power misrepresented the situation and status of the Boardman to Hemingway Project in relation to the Protected Area updates and in so doing, succeeded in leaving any protected properties designated between 2007 and the present day and into some future timeframe as yet undetermined vulnerable to development impacts.

The council is encouraged to bring the Protected Area Amendments before the public in a legitimate rulemaking process as defined by statute rather than allowing Idaho Power and others to word smith the draft rule until it becomes meaningless. Pushing this rule promulgation out for months accomplishes nothing other than allowing irreparable damage to protected areas because the paperwork designating them was not completed before an arbitrary date

## **CERTIFICATE OF MAILING**

On May 26, 2021, I mailed the foregoing RESPONSE TO NOTICE OF EX PARTE COMMUNICATIONS PURSUANT TO OAR 137-003-0055(2) issued on this date in OAH Case No. 2019-ABC-02833.

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**BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF OREGON  
for the  
OREGON DEPARTMENT OF ENERGY  
IN THE MATTER OF:**

**THE APPLICATION FOR SITE  
CERTIFICATE FOR THE  
BOARDMAN TO HEMINGWAY  
TRANSMISSION LINE**

**RESPONSE TO NOTICE OF  
COMMUNICATIONS PURSUANT TO  
OAR 137-003-0055(2)**

OAH Case No. 2019-ABC-02833

May 28, 2021

Alison Greene Webster  
Senior Administrative Law Judge  
Office of Administrative Hearings

RE: Reply to notice of ex parte communication, pursuant to OAR 137-003-0055(2) from Idaho Power to EFSC, OAH Case No. 2019-ABC-02833

Judge Webster:

I reply here to Idaho Power Company's improper ex parte communication to the Energy Facility Siting Council on April 22, 2021. Surprisingly, in that letter, Idaho Power felt it was not inappropriate to ask the EFSC to postpone or indefinitely suspend the (already overdue) rulemaking process related to Protected Areas, Scenic Resources, and Recreation Resources, because continuing that process might negatively impact Idaho Power's position in the B2H contested case. The request itself indicates that it is Idaho Power, not "landowners," who are "gaming the system." Other parties and limited parties in the B2H contested case will provide important historical and procedural references in detail, but I will keep my responses general and brief.

Idaho Power argues that it should not have to analyze or evaluate all Protected Areas that the project may affect, but rather only those identified more than 13 years ago, because the "goalposts" have been moved as other Protected Areas were added over those years. At the time those "goalposts" were relevant, the current B2H route was not identified as a proposed route, so those evaluations would be obsolete now, as Idaho Power surely knows. Given the massive,

irreversible impact that the project will have on the land, Idaho Power Company should of course be required to meet all current relevant protection standards as a condition of construction.

Idaho Power is also concerned that the Council could adopt one or more methodologies for analyzing impacts to protected areas. They claim this "would be incredibly disruptive and problematic for B2H to potentially require a new or different methodology for analysis at this stage of our process." It should be noted that, rather than employing standardized methods, Idaho Power created its own methodology for assessing noise impacts (for example), and so introduced unproven methods into the analysis which are now under challenge in the contested case.

Additionally, Idaho Power is concerned that ODOE Staff is "signaling some openness to clarifying the criteria for identifying important recreational resources. While it is not clear precisely what is intended here, this could be problematic to the extent that it may require analysis of resources that were not previously identified in our ASC." This openness to clarification may be "problematic" for Idaho Power, only in that it signals ODOE openness to a more thorough siting evaluation, in the public interest, as it should.

It is evident that Idaho Power improperly attempted to influence the EFSC evaluative process in hopes of securing a more favorable outcome in the B2H contested case, through both misinformation and omission of fact. Given Idaho Power's historical subterfuge and lack of transparency regarding the B2H proposal, that finding is perhaps not surprising, but it is most concerning and damaging to the public's interest in environmental resource protection.

Sincerely,

Charles A. Lyons, contested case petitioner  
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## **CERTIFICATE OF MAILING**

On May 28, 2021, I mailed the foregoing RESPONSE TO NOTICE OF EX PARTE COMMUNICATIONS PURSUANT TO OAR 137-003-0055(2) issued on this date in OAH Case No. 2019-ABC-02833.

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May 28, 2021

**Via Electronic Mail Only**

Alison Greene Webster  
Senior Administrative Law Judge  
Office of Administrative Hearings

RE: Reply to Notice of *ex parte* communication pursuant to OAR 137-003-0055(2)

**I. Introduction**

On April 22, 2021, Idaho Power Company (IPC) submitted a letter to EFSC describing IPC's concerns about proposed rulemaking revisions to update the state's energy facilities siting standards related to Protected Areas, Scenic Resources, and Recreation Resources. That letter described IPC's concerns that, if enacted, the rules could impact the B2H contested case.

IPC's action was properly recognized by ALJ Webster as an *ex parte* communication. Consequently, pursuant to OAR 137-003-0055(2) the ALJ offered all parties and limited parties an opportunity to rebut the substance of IPC's letter in writing.

The Stop B2H Coalition (STOP) responds in this comment to both the general nature of this communication, and attempts to correct a number of misrepresentations in IPC's assertions to EFSC.

**II. Background**

IPC begins by addressing the avoidance requirement within the protected areas standard, OAR 345-022-0040, and its analytical framework and "2007 cut-off date." The current rules include an outdated listing of resources. There is no "analytical framework" per se, except a desire for avoidance. That is one of the reasons that ODOE is trying to update the 2007 rules. The state needs to do its work and move forward.

When IPC first applied for a site certificate for the Boardman to Hemingway (B2H) project in 2010, and again in 2013, there were two routes in Union County that were undergoing National Environmental Policy Act (NEPA) review by the Bureau of Land Management (Bureau) and the US Forest Service (USFS). The two routes put forward for analysis by the federal agencies did not include protected areas in Union County.

By the time the Application for Site Certificate was filed (2017), IPC had replaced these two Union County NEPA-reviewed routes with their own selected routes. The NEPA reviewed routes were, as a result, dropped from ODOE/EFSC review.

IPC provides a distorted (and purely self-serving) narrative of the project's background. EFSC, and all parties, need to recognize that the people of Eastern Oregon: ratepayers, taxpayers, property owners, recreationists, conservationists, and more, have also worked tirelessly as volunteers (which cannot be said for IPC), many since 2006, to engage professionally throughout this 15-year process. Over this time, STOP and others have gained considerable knowledge of the energy industry as well as the protected, scenic and recreation areas at issue. Hundreds of thousands of volunteer hours, and considerable personal resources have gone into providing rigorous analysis of the errors and omissions in IPC's applications.

### **III. "ODOE's Proposed Elimination of the Cut Off Date Would Render IPC's Protected Area Analysis for B2H Obsolete and Potentially Require that the Project be Re-Routed Well into the Contested Case"**

The IPC title of this section is illuminating. If IPC was so confident in their analysis and willing to stand by its choices regarding the environment, why is it so concerned? Section II of IPC's letter seems to focus on a particular parcel and portion of the route in Union County.

First, IPC would not be in this situation had it not chosen to pre-empt the public processes. Mark Stokes, B2H Project Manager, said at the DPO Public hearing in La Grande on June 20, 2018<sup>1</sup> the company was experiencing delays with the federal process and decided to move ahead. If IPC had let the federal process play-out before applying to EFSC, there would have been minimal challenges to the BLM environmentally preferred route.

In short, IPC has created many of its own current "problems" by trying to rush or side step the proper sequence of analysis. Having made its own bed, IPC should now be forced to lie in it.

IPC claims that it did not know of the valuable resources (protected, scenic and recreational) that would be affected by its new alignments/routes in Union County. That is farcical, and contrary to what STOP and others know to be the fact. Moreover, even if it were true, then IPC should have contacted adjacent and nearby landowners to get more information.

The Bureau, in a letter to IPC in February of 2015, did ask IPC to assess the "constructability" of this new (secretly designed) route. The conservation easements that were being developed to adjoin contingent properties of existing protected areas for recreation and species protections have been in the works since 2001 (with the first Rocky Mtn Elk Foundation easement on the Rice property) before anyone knew of the B2H and well-before 2007. The property in question was never put on county or state lists, but the work was in progress and IPC knew very well about it, as testified by EOU's Karen Antell and early meetings with Keith Georgeson, IPC Project Leader before Mark Stokes. There was an attempt to "thread the needle" between known sensitive and protected areas in Union County without adequate analysis and without any public review until the DPO phase of the EFSC process.

Second, in its letter, IPC says that proposed rule changes "would introduce new Protected Area resources that have not yet been analyzed by IPC and ODOE for B2H, and inject a significant amount of uncertainty into the B2H contested case process... " and that in 2019 "a

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<sup>1</sup> See Transcript from the DPO Public Hearing in La Grande on June 20, 2019 at 150-151.

private landowner with a parcel that will be crossed by the project sought designation of his land as a state ‘natural area’ through the Oregon Parks and Recreation Department without informing IPC or ODOE ... it would be unreasonable to ask IPC” to re-route around the site.”

To re-route around this site might require an amended application, which IPC claims would be burdensome. The Company wants EFSC to believe that it would be a major inconvenience; however, if the line were to be re-routed, there are alternative routes already available, like the exhaustively analyzed federal Right of Way proposed in the Records of Decision (by both BLM and USFS).

As active interveners in all of the Oregon and Idaho Public Utility Commission processes, STOP knows that IPC frequently chooses to “pause the process, to correct errors in their application process. In fact, the Company asked the OPUC, to “pause” five times in its recent duties to provide oversight to the 2019 IRP process.<sup>2</sup> IPC’s “delays” are self-created, and their self-imposed deadlines are continually being pushed further into the future. In a recent IPC Integrated Resources Planning meeting, in April 22, 2021, their Advisory Council<sup>3</sup> discovered that the supposed “need” for the B2H has moved from 2026 into the 2030’s. Energy conservation and new technologies continue to push the supposed need further into the future. To ask the company to pause to “re-route” if necessary—too finally get it right—is indeed a timely request for the public to make.

Third, IPC’s contention that “. . . this rule change may even encourage landowners to try to game the system to introduce a siting obstacle late in the process” is at best speculative and disingenuous at worst. Given IPC’s clandestine communications with one landowner in 2015 while a public process was under way, PC’s concern about “gaming the system” appears to be little more than projection. The unsupported implication that a Union County citizen, was trying to “game the system” is self-serving hyperbole intended only to chill public participation in public processes. This landowner is not a party to this contested case, but others (working in the public interest,) are supporting his land which is a valuable community resource; they are parties in the case. The intent of this maligned property owner is clear from his testimony during the DPO comment period<sup>4</sup> and the background section of his application for renewal to the ODFW access and habitat program.<sup>5</sup>

## VI. Other problems

***Change to Alternative Route Analysis.*** STOP believes that as above, IPC’s objection is speculative and hyperbolic. To claim that an inordinate amount of work and resources *might* have to go into determining if alternative routes have “greater or lesser impacts” per rule change is an

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<sup>2</sup> OPUC Docket #74: <https://apps.puc.state.or.us/edockets/Docket.asp?DocketID=21987&Child=action>; Staff report: <https://edocs.puc.state.or.us/efdocs/HAU/lc74hau16475.pdf> Procedural History pp 6-8; STOP’s Final Comments: <https://edocs.puc.state.or.us/efdocs/HAC/lc74hac18632.pdf> p 1.

<sup>3</sup> [https://docs.idahopower.com/pdfs/AboutUs/PlanningForFuture/irp/2021/2021\\_IRP\\_Aurora\\_Workshop.pdf](https://docs.idahopower.com/pdfs/AboutUs/PlanningForFuture/irp/2021/2021_IRP_Aurora_Workshop.pdf), Slide 71 and discussion. Fifteen percent reserve margin not until 2030 and beyond.

<sup>4</sup> See Joel Rice-EFSC comments *available at*: <https://www.oregon.gov/energy/facilities-safety/facilities/Pages/B2H.aspx>

<sup>5</sup> See Glass Hill Access & Habitat Program Application Materials at p. 6, *available at*: [https://www.dfw.state.or.us/lands/AH/minutes/2016/april/2016-10\\_Glass\\_Hill.pdf](https://www.dfw.state.or.us/lands/AH/minutes/2016/april/2016-10_Glass_Hill.pdf)

exaggeration, particularly because alternative routes or sites have been thoroughly studied. Not only that, but IPC must follow the law, regardless of whether or not it is convenient or preferable for its shareholders.

***Methodology for Analysis of Impacts and Criteria for Important Recreation***

**Resources.** IPC claims that this “would be incredibly disruptive and problematic for B2H to potentially require a new or different methodology for analysis at this stage of our process.” STOP contends that is essential to the public and developers to adopt a standardized methodology for the analysis and review of protected, scenic and recreational areas. An updated consistent methodology could have prevented many of the contested cases. Again, the Company is promoting self-serving interests and is apparently indifferent to the needs and obligations of the State of Oregon to manage its lands and protect its citizens.

**V. Conclusion**

Under the veil of ODOE rulemaking communication, IPC’s April 22, 2021 letter demonstrates a desire to influence the Council on several contested case issues in the Boardman to Hemingway case OAH 2019-ABC 02833. STOP B2H appreciates the ALJ responding to this situation by providing all parties (full and limited) an opportunity to respond.

STOP finds it alarming that IPC considered it appropriate to ask the Council, as the ultimate decision-maker in an ongoing matter (and an entity serving the public interest,) to forego their public responsibilities in favor of the interests of a private corporation to effectively pause its rulemaking to ensure IPC’s success in an active case.

While IPC cries foul, it cites what amounts to little more than inconvenience associated with *following the law*. IPC’s protestations should be viewed with appropriate skepticism. It is the job of the State to protect the public’s interest, and the public’s right to participate in public processes. The State must proceed with the processes that they are mandated to perform in the interest of the public good. As a part of its *ex parte* efforts, IPC has presented several misrepresentations in its letter.

Sincerely,



Mike J. Sargetakis  
*Of attorneys for STOP B2H Coalition*

## CERTIFICATE OF MAILING

On May 28, 2021, I certify that I filed the foregoing RESPONSE TO NOTICE OF EX PARTE COMMUNICATIONS PURSUANT TO OAR 137-003-0055(2) in OAH Case No. 2019-ABC-02833 with the Hearings Coordinator via electronic mail, and with each party entitled to service, as noted below.

*/s/ Mike J. Sargetakis*

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**BEFORE THE  
ENERGY FACILITY SITING COUNCIL  
OF THE STATE OF OREGON**

**IN THE MATTER OF THE  
APPLICATION FOR SITE  
CERTIFICATE FOR THE BOARDMAN  
TO HEMINGWAY TRANSMISSION  
LINE**

**OREGON DEPARTMENT OF  
ENERGY'S RESPONSE TO  
EXCEPTIONS – ISSUE SR-5  
(OAH Case No. 2019-ABC-02833)**

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## I. INTRODUCTION

The Hearing Officer in the above-referenced matter issued a Proposed Contested Case Order (“PCCO”) on May 31, 2022. On June 27, 2022, Ms. Geer timely filed exceptions to the PCCO regarding Issue SR-5.<sup>1</sup>

In the Hearing Officer’s December 4, 2020 *Amended Order on Party Status, Authorized Representatives and Properly Raised Issue for Contested Case* Issue SR-5 was granted as a contested case issue, but was dismissed on July 21, 2021 on summary determination<sup>2</sup> by the Hearing Officer following the applicant’s, Idaho Power Company (“IPC”) Motion for Summary Determination.

Issues SR-5 is: Whether the Rice Glass Hill Natural Area should be evaluated as a Protected Area.

### A. Background on Exceptions

Parties to the contested case are entitled to file exceptions to the PCCO and present argument to the Energy Facility Siting Council (“Council”) pursuant to both the Administrative Procedures Act and the Model Rules adopted by Council.<sup>3</sup> Exceptions are written objections to the proposed findings, conclusions of law or conditions.<sup>4</sup> The exceptions must be based on the existing record, and should not include new or additional evidence.

### B. Exceptions

Geer Exception on Issue SR-5 disputes the Hearing Officer’s conclusions on the issue which state that “Because the Rice Glass Hill Natural Area was not registered as a Natural Area

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<sup>1</sup> Exceptions to Administrative Law Judge Webster’s Rulings: Proposed Contested Case Order By Limited Party Geer Dated June 27, 2022 (hereinafter “Geer Exception on Issue SR-5”).

<sup>2</sup> Ruling and Order on Motions for Summary Determination of Contested Case Issue SR-5, July 21, 2021.

<sup>3</sup> ORS 183.469; OAR 137-003-0060

<sup>4</sup> OAR 345-015-0085(5)

as of May 11, 2007, Idaho Power was not required to evaluate the Rice Glass Hill Natural Area as a Protected Area in ASC Exhibit L.”<sup>5</sup>

C. Summary of Department Position

The Hearing Officer correctly dismissed Issue SR-5 from the contested case because Idaho Power had no obligation under the applicable standard to evaluate the Rice Glass Hill Natural Area as a Protected Area. Ms. Geer’s assertion that the Protected Areas standard could be interpreted to require consideration of a Protected Area designated after May 11, 2007 if the category of designation was in existence at that time is inconsistent with the text of the rule.

**II. ANALYSIS**

A. Applicable Laws and Rules

*Motions for Summary Determination*

Per OAR 137-003-0580(6), a Motion for Summary Determination shall be granted if:

- (a) The pleadings, affidavits, supporting documents (including any interrogatories and admissions) and the record in the contested case show that there is no genuine issue as to any material fact<sup>6</sup> that is relevant to resolution of the legal issue as to which a decision is sought; and
- (b) The agency or party filing the motion is entitled to a favorable ruling as a matter of law.

*Protected Areas standard*

The Council’s Protected Areas standard (OAR 345-022-040) that has been in place throughout this contested case states:

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<sup>5</sup> Susan Geer’s Exception to the Proposed Contested Case Order. June 27, 2022. Page 2.

<sup>6</sup> A material fact is “one that, under applicable law, might affect the outcome of the case. *Zygar v. Johnson*, 169 Or Ap 638, 646, 10 P3d 326 (2000), rev den, 331 Or 583 (2001). The standard for granting summary judgment can be thought of as proceeding in two steps: “whether a genuine issue of fact exists, and, if not, whether the moving party [is] entitled to judgment as a matter of law.” *Metro. Prop. & Cas. V. Harper*, 168 Or App 358, 363, 7 P3d 541 (2000).

*“References in this rule to protected areas designated under federal or state statutes or regulations are to the designations in effect as of May 11, 2007.”*

**B. Ms. Geer’s Arguments**

Ms. Geer does not contend that the Hearing Officer disregarded any material facts or that there is a genuine dispute over any facts related to this issue. Rather, she contends the Hearing Officer’s legal conclusion was in error, arguing that the Hearing Officer erred in concluding that “Because the Rice Glass Hill Natural Area was not registered as a Natural Area as of May 11, 2007, Idaho Power was not required to evaluate the Rice Glass Hill Natural Area as a Protected Area in ASC Exhibit L.”<sup>7</sup>

Ms. Geer acknowledges that the Rice Glass Hill was not designated as a State Natural Area until 2019. She argues, however, that the rule refers to categories of designations, not just individual protected areas and that because the State Natural Areas Program was in place in 2007, the Rice Glass Hill Natural Area should be considered. Ms. Geer requests that the Council deny the proposed route that crosses through the Rice Glass Hill Natural Area or require the applicant to avoid the area.

The Hearing Officer considered Ms. Geer’s argument but found that:

based on the plain language in OAR 345-022-0040(1)(i) Idaho Power is entitled to a ruling as a matter of law on Issue SR-5. The Protected Area standard applies to state natural areas listed in the Oregon Register of Natural Areas as of May 11, 2007. The Rice Glass Hill Natural Area joined the Register of Natural Areas as of September 18, 2019. Because the Rice Glass Hill Natural Area was not registered as a Natural Area as of May 11, 2007, Idaho Power was not required to evaluate the Rice Glass Hill Natural Area as a Protected Area in ASC Exhibit L.<sup>8</sup>

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<sup>7</sup> S. Geer Exception on Issue SR-5, p. 2 and footnote 1, citing the PCCO Page 27.

<sup>8</sup> July 21, 2021 Ruling and Order on Motion for Summary Determination on Contested Case Issue SR-5, Page 6.

The Department believes this was a correct ruling. The word “designations” in OAR 345-022-040 clearly refers to the designations of protected areas, and the qualifying effective date applies to those designations. Inclusion of the Rice Glass Hill Nature Area as a Protected Area under the Council’s current standard cannot be supported by a plausible interpretation of the rule.<sup>9</sup>

### III. CONCLUSION

The Hearing Officer correctly concluded as a matter of law that because the Rice Glass Hill Natural Area was not registered as a Natural Area as of May 11, 2007, the applicant had no obligation to evaluate the Rice Glass Hill Natural Area as a Protected Area. For this reason, the Department recommends the Council reject the exceptions on Issue SR-5 and affirm the Hearing Officer’s dismissal of Issue SR-5 on summary determination.

DATED this 15<sup>th</sup> day of July, 2022.

Respectfully submitted,

ELLEN F. ROSENBLUM  
Attorney General

/s/ Patrick Rowe  
Patrick Rowe, OSB #072122  
Senior Assistant Attorney General  
Counsel for the Oregon Department of Energy

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<sup>9</sup> The Department notes that Council adopted revisions to the Protected Area Rules at its June 2022 meeting. However, even under the amended rules Idaho Power would not be required to evaluate the Rice Glass Hill Natural Area because under the amended OAR 345-022-0040, the protected areas that must be considered are those “designated on or before the date the application for site certificate or request for amendment was determined to be complete . . .” [2022-07-22-Item-C-Protected-Areas-Rulemaking-Staff-Report-Att-1-NOPR.pdf \(oregon.gov\)](#) Here, the ASC was determined to be complete on September 21, 2018. ODOE – B2HAPPDoc1 ASC Determination of Complete Application 2018-09-21 Page 2-3 of 3.

## CERTIFICATE OF SERVICE

I hereby certify that on July 15, 2022, the foregoing Oregon Department of Energy's RESPONSE TO EXCEPTIONS – ISSUE SR-5, was emailed to:

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I further certify that on July 15, 2022, the foregoing Oregon Department of Energy's RESPONSE TO EXCEPTIONS – ISSUE SR-5, was served by First Class Mail or electronic mail as indicated below:

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**BEFORE THE ENERGY FACILITY SITING COUNCIL**

**for the**

**STATE OF OREGON**

**IN THE MATTER OF:** ) **PETITIONER LOIS BARRY**  
 ) **EXCEPTIONS TO**  
**THE PROPOSED BOARDMAN TO** ) **ADMINISTRATIVE LAW JUDGE**  
**HEMINGWAY TRANSMISSION** ) **WEBSTER’S RULINGS:**  
**LINE** ) **MOTION FOR SUMMARY**  
 ) **DETERMINATION: ISSUE SR-6**  
**OAH Case No. 2019-ABC-0283** )  
 ) **DATED JUNE 30, 2022**

**INTRODUCTION:**

*Whether Applicant’s visual impact assessments are invalid because Applicant did not incorporate Oregonians’ subjective evaluation of their resources to evaluated visual impacts, thereby invalidating the visual impact analysis for Morgan Lake Park and other protected areas, scenic resources and important recreational opportunities.*

**DOCUMENTS:**

In addition to those listed in the ALJ’s Ruling And Order On Motion For Summary Determination Of Contested Case Issue SR-6 OAH Case No. 2019-ABC-02833 (page 2), the following should have been included:

November 5, 2020 RE: Petitioner Lois Barry Appeals Denial of Petition for Contested Case Standing in the Matter of the ASC for B2H Transmission Line

Energy Facility Siting Council’s (EFSC or Council) rules at OAR 345-001- 0010 (52):  
*Significant” means having an important consequence, either alone or in combination with other factors, based upon the magnitude and likelihood of the impact on the affected human population or natural resources, or on the importance of the natural resource affected, considering the context of the action or impact, its intensity and the degree to which possible impacts are caused by the*

*proposed action. Nothing in this definition is intended to require a statistical analysis of the magnitude or likelihood of a particular impact. (emphasis added)*

## **SPECIFIC EXCEPTIONS**

Ms. Barry takes exception to each of the ALJ's ten "Undisputed Facts" as outlined in her July 26, 2021 Ruling.<sup>1</sup>

As a basis for presenting these exceptions, Ms. Barry adds two Undisputed Facts:

**L. B. Undisputed Fact #1:** The fact that a statement has been published in Idaho Power's ASC does not verify that statement's accuracy, relevance, logic or completeness.<sup>2</sup>

**L. B. Undisputed Fact #2:** Following are the commonly accepted definitions of perception:

- *the ability to see, hear, or become aware of something through the senses. "the normal limits to human perception"*
- *the state of being or process of becoming aware of something through the senses. Similar: discernment, appreciation, impression, judgment, etc.*
- *a way of regarding, understanding, or interpreting something; a mental impression. "Hollywood's perception of the tastes of the American public."<sup>3</sup>*

None of these definitions refers to *position*.

Ms. Barry's following exceptions to the Undisputed Facts #4 (page 3) and #7 (page 5) are central to understanding the serious basic flaws in Idaho Power's visual assessment methodology and the ALJ's error in accepting them.

Ms. Barry takes **exception to Undisputed Fact #4** (p. 3) in which the ALJ quotes a misleading statement by Idaho Power about an RAI from ODOE. IPC characterizes the RAI as: *asking that the definition of "significance" provided in the Energy Facility Siting Council's (EFSC or Council) rules at OAR 345-001- 0010(53) be considered in the*

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<sup>1</sup> Ruling And Order On Motion For Summary Determination Of Contested Case Issue SR-6 OAH Case No. 2019-ABC-02833

<sup>2</sup> The ALJ has uncritically quoted and accepted as "undisputed facts" portions of Idaho Power's ASC, even though those portions of the ASC are based on Idaho Power's misleading summaries, "assumptions" and "interpretations."

<sup>3</sup> Definitions from *Oxford Languages*.



analysis. (page 3) The RAI, below, shows that Idaho Power's summary omits the important focus of the RAI:

*Exhibit R (and its attachments) do not consider the definition of "significant" set forth in the Council's rules at OAR 345-001-0010(53) when drawing its conclusions using the BLM/USFS methodologies. Provide an analysis of how the impact "rating" for each potentially affected scenic resource supports an affirmative Council finding on the Scenic Resource Standard (taking into account mitigation). That analysis should address and incorporate the EFSC definition of "significant" when drawing conclusions concerning visual impacts.*<sup>4</sup> (emphasis added)

In truth, Idaho Power was being asked for more than 'consideration' of *the definition of "significance."* Applicant was asked to provide an analysis that supported their conclusion that the project would have "no significant impact on the affected human population" as stipulated in OAR 345-001-0010(53). ODOE makes precisely the same RAI in June 2016.<sup>5</sup> Idaho Power's response to each RAI evades the focus of the RAI.

*Exhibit R now provides a more robust discussion and analysis of the relative visual impacts of the ROW corridor that better address the "significance" standard as well as screening criteria based on distance and visibility of certain Project features. id.*

Idaho Power also uses this RAI as rationale for departing from USFS manuals appropriate for analysis on forested land, and for using "portions" of manuals to fabricate a delusive visual impact assessment methodology which does not, by any means, satisfy the RAI requests for evidence based on the EFSC Council rule.

Ms. Barry takes **exception to Undisputed Fact #7** (p. 5) where the ALJ again quotes Idaho Power's ASC: *In its visual assessment analyses, Idaho Power conservatively assumed the highest possible degree of sensitivity and subjective value for each resource evaluated.* "Sensitivity" to resources shifts in this

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<sup>4</sup> ODOE RAI-2- R-24, Exhibit R-4, June 2016.

<sup>5</sup> ODOE RAI-2-R-24, Exhibit R-5, March 2017.

paragraph to become “sensitive viewer groups” whose subjective responses to the project’s impact on valued resources will “instead” be evaluated by their physical positions: locations, angle of sight and length of exposure.

The ALJ has erred in accepting this irrational decision to substitute position for viewers’ perception which continues throughout Exhibits R, T, and L as the basis for Applicant’s findings of “no significant impact.”

*Viewer groups associated with each resource were evaluated to understand certain characteristics that inform the extent to which potential changes in landscape character and quality would be perceived (perception of change).*

*Perceive* and *perception* are not arcane or esoteric terms. The ALJ errs in accepting Idaho Power’s skewed analysis of viewer’s positions as an indicator of viewer’s “perception” of changes to scenic, recreation and protected areas.

Ms. Barry takes exception to **Undisputed Facts #1-3** (pp. 2-3) which state that “no specific methodology” is required in “understanding the potential visual impacts of the proposed facility” on:

1. ... *understanding the potential visual impact of the proposed facility to Scenic Resources.*
2. ... *understanding the potential visual impact of the proposed facility to important Recreation sites.*
3. ... *The Second Amended Project Order also provided the same direction with regard to Exhibit L and the Protected Area standard:*

Note that the three Standards cited refer to areas, not to visitors to those areas. Reliance on these Standards without acknowledging the EFSC definition of “significance” limits the scope of the ALJ’s decision.

**Ms. Barry takes exception to Undisputed Facts #5, & #6** (p. 4) as quoted by the ALJ. This “methodology for assessing impact to visual resources” is accepted as a logical lead into the description of Viewer Groups in #7 (page 5).

*Viewer groups associated with each resource were evaluated to understand certain characteristics that inform the extent to which potential changes in landscape character and quality would be perceived (perception of change). This assessment assumes a high sensitivity exists among all viewer groups based on the identification of the resource as important in a planning document.<sup>6</sup>*

Idaho Power “instead” focuses on viewer location, angle of sight, and for how long:

*Therefore, this assessment instead focuses on understanding characteristics that describe the relationship of the observer to the potential impact, and the landscape context of that relationship. Viewer characteristics assessed included viewer location (distance), viewer geometry (superior, inferior, or at grade), and viewer duration or exposure (BLM 1986). The landscape context included consideration of landscape type – i.e., focal or panoramic.<sup>7</sup>*

**Ms. Barry takes exception to Undisputed Fact #6** (page 5). The ALJ has once again accepted Idaho Power’s misleading summary of a document central to the ASC’s visual impact assessment methodology. The 1974 & 1995 USFS manuals are far from analogous. Conceptually, the SMS differs markedly from the VMS in that it:

*increases the role of constituents throughout the inventory and planning process; and it borrows from and is integrated with the basic concepts and terminology of Ecosystem Management. The Scenery Management System provides for improved integration of aesthetics with other biological, physical, and social/cultural resources in the planning process. (1995 USFS 12/104)*

Ms. Barry takes exception to **Undisputed Fact # 8** (p. 5). The ALJ assumes that a statement’s appearance in the ODOE Proposed Order is evidence of compliance. ODOE did not conduct due diligence assessing Idaho Power’s ASC Exhibits R, T & L, e.g. failing to require “the more robust discussion and analysis of the relative visual impacts of the ROW corridor” relevant to OAR345-001-0010(5) as IPC promised in the RAI’s.

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<sup>6</sup> ODOE - B2HAPPDoc3-35 ASC 18\_Exhibit R\_Scenic Resources\_ASC 2018-09-28, page 150; emphasis added.

<sup>7</sup> Ibid.

Ms. Barry's takes exception to **Undisputed Fact #9** (p. 7) that *the applicant adopted each of the methodologies to use evaluative criteria based upon the Council's definition of "significant" under OAR 345-001-0010(53)*. See Exception to Fact # 4.

Ms. Barry takes exception to **Undisputed Fact #10** (p. 7): The selected quotations from the 1995 USFS are misleading. After quoting a passage which refers to "the aesthetic experience to people" (p. 63), Applicant then shifts to "valued landscape attributes" (p. 65) as "context" for constituent information. Ms. Barry offers a more relevant quote:

*... some of the most useful information for scenery management concerns 1) how constituents use an area and 2) what visitors and other constituents feel, value, desire, prefer, and expect to encounter in terms of landscape character and scenic integrity. (SMS p. 66 of 104)*

## **ALJ OPINIONS**

Ms. Barry takes Exception to the following Opinions:

### **1. Standard of Review for Motion for Summary Determination.** (p. 8)

*(7) The administrative law judge shall consider all evidence in a manner most favorable to the non-moving party or non-moving agency.*

Ample evidence, including Ms. Barry's objections to Idaho Power's failure to use accepted definitions of the word *perception*, was provided in Ms. Barry's Opposition to Idaho Power's Motion for Summary Determination (June 25, 2021). The ALJ chose to disregard it.

### **2. Statement of Applicable Law 2** (page 9).

The ALJ states that Idaho Power had no obligation under the Council's Siting Standards to incorporate Oregonians' subjective evaluations of the resource. However,

the ALJ quotes as pertinent (page 9), “the standards may address but need not be limited to the following subjects.” (emphasis added) The Council rules include siting standards and all other relevant regulations. The ALJ erred by citing only three siting standards and ignoring the definition of “significant” provided in the EFSC rule at OAR 345-001-0010(53).

The ALJ ignored Idaho Power’s failure, in every instance, to provide evidence per OAR-345-001-0010(53) that supports Applicant’s conclusion of ‘no or less than significant impact’ on the affected human population.

**Second** (p. 13):

It does not exceed the scope of Issue SR-6 to expect a reasonable methodology that supports Idaho Power’s findings with substantial evidence. The absence of evidence including *Oregonians’ subjective evaluation of their resources to evaluated visual impacts*” essential to support Idaho Power’s findings of ‘no or less than significant impact’ is the basis for SR-6.

**Third** (id):

*Indeed, as Idaho Power notes, because Idaho Power assumed that all Oregonians would evaluate the identified scenic, recreation or protected resource as having the highest sensitivity, more specific constituent data could only operate to take away from, but not add to, the value placed on the identified resource in the visual impact assessment.* (emphasis added)

Ms. Barry questions Judge Webster’s readiness to accept Idaho Power’s “assumptions,” which she refers to once in her narrative of Idaho Power’s “interpretation” of SR-6 (p. 11) and twice in her summary of Idaho Power’s responses

and arguments (p. 12). An assumption is “a thing that is accepted as true or as certain to happen, **without proof.**” By construing statements in the ASC as facts in a manner favorable to IPC/ODOE, rather than considering them in a manner most favorable to Ms. Barry, the ALJ erred in her ruling.

Idaho Power has consistently evaluated resources, not people’s reaction to the project’s impact on those resources. When, belatedly, Idaho Power attempted to correct that oversight, they contrived the absurd methodology that defines viewer perception as viewer position. That is why Idaho Power’s methodology is unreasonable and their conclusions of ‘no or less than significant impact’ are not supported by substantial evidence.

#### **L. B. OPINION**

One might reasonably ask why inventories of existing landscapes, followed by evaluations of the degree of alteration to the existing landscapes, are visually assessed in Idaho Power’s ASC if no people will ever be in or near those areas. If people with expectations, feelings, and concerns will indeed be physically present, it is appropriate to expect that the Visual Impact Assessment would go beyond extended analyses of the areas to an equally precise analysis of how the proposed project will impact the affected human population, e.g. *Oregonians’ subjective evaluations*, not a general assumption of “sensitive viewers” followed by an analysis of those viewers’ positions.

Ms. Barry contends that the ALJ’s readiness to embrace Idaho Power’s assumptions and imprecise language opened the door for accepting Idaho Power’s wildly improbable conclusions that no matter where the project’s towers are located, or how

high or how numerous they are, the project will have ‘no or less than significant impact’ on the affected human population.

IPC Staff A: I wonder how Mr. Hiker will perceive Idaho Power’s plans to construct a parade of thirteen 130’ transmission towers, some within .2 miles of the natural area of Little Morgan Lake which has been protected from human development for the last fifty years.

IPC Staff B: I suppose Mr. Hiker will miss being in a natural environment and will hate to see his favorite open views to the south and west defaced by steel transmission towers, but I have recorded Mr. Hiker’s perceptions as ‘intermittently continuous and looking head-on.’ Therefore the project will have ‘less than significant impact’ on his enjoyment of hiking near Little Morgan Lake.

IPC Staff A: I wonder how Ms. Birder will perceive Idaho Power’s plans to construct a project that will border Morgan Lake City Park with thirteen 130’ transmission towers looped with buzzing, popping transmission lines?

IPC Staff B: I think Ms. Birder will see that as invasive and destructive, having her favorite birding area industrialized, but I have recorded her perceptions as “in motion, looking peripherally.’ Therefore the project will have ‘less than significant impact’ on her enjoyment of bird songs and bird sightings at Morgan Lake Park.”<sup>8</sup>

## **CONCLUSION:**

Idaho Power’s self-serving visual impact assessment methodology is based on assumptions, interpretations, evasions, omissions and misleading summaries, what logicians refer to as “loose language.” That approach is customary in marketing, but is entirely unacceptable as the basis for evaluating the magnitude of a 305 mile transmission line’s impact on important resources and the affected human population.

No site certificate should be issued until Idaho Power has completed a logically defensible, comprehensive and accurate Visual Impact Assessment of the scenic, recreation and protected areas that would be impacted by the B2H.

LOIS BARRY

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<sup>8</sup>Vegetation will block views of the towers from most locations in the park, so viewer perception could be intermittent and peripheral while viewers are moving through the park, but could be continuous and/or head-on while engaging in activities such as camping, picnicking, and fishing. ODOE Exhibit T, T-44.

**CERTIFICATE OF MAILING**

On June 30, 2022, I certify that I filed the foregoing EXCEPTIONS TO THE ALJ RULING ON MSD SR-6 with the Hearings Coordinator via electronic mail, and with each party entitled to service, as noted below.

*/s/ Lois Barry*

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**BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF OREGON  
for the  
OREGON DEPARTMENT OF ENERGY**

IN THE MATTER OF:

**BOARDMAN TO HEMINGWAY  
TRANSMISSION LINE**

**STOP B2H COALITION**

**EXCEPTIONS TO PROPOSED  
CONTESTED CASE ORDER**

OAH Case No. 2019-ABC-02833

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First, factual disputes existed as to which IRP was relevant to the inquiry. IPC posited that its 2019 IRP (which did not exist at the time of the application) was the relevant IRP. STOP noted that it was actually the 2017 IRP that should be considered.

The ALJ did not construe this factual dispute in a manner most favorable to STOP. Instead, the ALJ mistakenly found in paragraphs 13-14 of her “undisputed facts” recital that the 2019 IRP was properly considered here. *See*, Need MSD Ruling p.7. The issue of whether the entire facility had, or had not, been acknowledged in an IRP was an issue requiring a factual determination. The issue of which IRP applied, required a factual determination. Here again, the ALJ erred by not viewing the evidence on these issues in the light most favorable to STOP.

The ALJ incorporated her Need MSD Order into the PCCO. For each and every reason set forth in STOP’s prior briefing (and in these Exceptions) on the Need issue, STOP takes exception to that July 29, 2021 Order, and the PCCO’s reliance on it.

*iii. Scenic Resources (Issue SR-6)*

In the PCCO the ALJ incorporates her prior ruling granting IPC’s MSD on Issue SR-6. PCCO p.27. In that prior ruling, the ALJ held that the relevant “standards simply require that the applicant demonstrate that the proposed facility is not likely to result in significant adverse impacts to identified resources. Consequently, the fact that Idaho Power did not collect constituent information in accordance with USFS SMS does not invalidate the visual impact assessment.” MSD Ruling and Order on Issue SR-6 pp.12-13 (SR-6 MSD Ruling). This holding highlights the crux of the factual dispute at the heart of SR-6. It was error for the ALJ to make this holding, because it relied on a reading of **the facts** that favored IPC, not STOP.

As outlined in STOP’s June 25, 2021 Memorandum in Opposition to IPC MSD on Issue SR-6 (STOP SR-6 Opp Memo), the issue of the reasonableness (or not) of the methodology

created by Idaho Power, and its sufficiency for determining the extent of impacts, are questions of fact. *See e.g.*, STOP SR-6 Opp Memo p.3.<sup>5</sup> STOP also outlined that as a matter of law, IPC was not entitled to a ruling in its favor. STOP SR-6 Opp Memo p.4. The ALJ mistakenly ignored these points and construed the evidence in a light more favorable to IPC, rather than in the light most favorable to STOP. On an MSD, that was improper.

For each of the reasons set forth in the STOP SR-6 Opp Memo, STOP takes exception to The ALJ's SR-6 MSD Ruling and the PCCO's reliance on the reasoning and Order therein.

*iv. Fish & Wildlife (Issue FW-1)*

In the PCCO, the ALJ incorporates her prior ruling granting IPC's MSD on Issue FW-1, pertaining to sage grouse impacts. PCCO p.20. STOP had previously timely presented a Memorandum in Opposition to that Motion. STOP pointed out in that Memo that IPC's characterization of the facts omitted any actual analysis of impacts to Sage Grouse habitat. *See*, STOP FW-1 Opp Memo p.3. Further, STOP pointed out that IPC was not entitled to a ruling as a matter of law, because OAR 635-140-0025 requires that development be mitigated for both direct and indirect impacts. IPC has not – to date – done the impact analysis. Consequently, there is currently no way to ensure compliance with the Rule's requirement.

In her August 5, 2021 ruling on this MSD the ALJ set forth a number of allegedly “undisputed facts” and she construed those facts in IPC's favor - not in STOP's favor. *See*, Ruling and Order on MSD on Issue FW-1 pp.2-14 (FW-1 MSD Ruling). For example, there has been no actual analysis of impacts, something that is a clear requirement to determine the issue

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<sup>5</sup> In addition to STOP raising this issue, the Council itself emphasized the importance of having a subjective evaluation of impacts on Oregonians. *See e.g.*, EFSC ORDER ON APPEALS, November 25, 2020 pp.4, 19.

**BEFORE THE  
ENERGY FACILITY SITING COUNCIL  
OF THE STATE OF OREGON**

**IN THE MATTER OF THE  
APPLICATION FOR SITE  
CERTIFICATE FOR THE BOARDMAN  
TO HEMINGWAY TRANSMISSION  
LINE**

**OREGON DEPARTMENT OF  
ENERGY'S RESPONSE TO  
EXCEPTIONS – ISSUE SR-6  
(OAH Case No. 2019-ABC-02833)**



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## I. INTRODUCTION

The Hearing Officer in the above-referenced matter issued a Proposed Contested Case Order (“PCCO”) on May 31, 2022. On June 30, 2022, STOP B2H and Ms. Barry timely filed exceptions to the PCCO regarding Issue SR-6.<sup>1,2</sup> The Department responds to both exceptions below.

In the Hearing Officer’s December 4, 2020 *Amended Order on Party Status, Authorized Representatives and Properly Raised Issue for Contested Case* Issue SR-6 was granted as a contested case issue, but was dismissed on July 26, 2021 on summary determination<sup>3</sup> by the Hearing Officer following the applicant’s, Idaho Power Company (“IPC”), Motion for Summary Determination.

Issue SR-6 is: Whether Applicant’s visual impact assessments are invalid because Applicant did not incorporate Oregonians’ subjective evaluation of their resources to evaluated visual impacts, thereby invalidating the visual impact analysis for Morgan Lake Park and other protected areas, scenic resources and important recreational opportunities.

### A. Background on Exceptions

Parties to the contested case are entitled to file exceptions to the PCCO and present argument to the Energy Facility Siting Council (“Council”) pursuant to both the Administrative Procedures Act and the Model Rules adopted by Council.<sup>4</sup> Exceptions are written objections to the proposed findings, conclusions of law or conditions.<sup>5</sup> The exceptions must be based on the existing record, and should not include new or additional evidence.

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<sup>1</sup> Exceptions to Administrative Law Judge Webster’s Rulings: Proposed Contested Case Order By Limited Party STOP B2H Coalition Dated June 30, 2022 (hereinafter “STOP Exception on Issue SR-6”).

<sup>2</sup> Exceptions to Administrative Law Judge Webster’s Rulings: Proposed Contested Case Order By Limited Party L. Barry Coalition Dated June 30, 2022 (hereinafter “L. Barry Exception on Issue SR-6”).

<sup>3</sup> Ruling and Order on Motions for Summary Determination of Contested Case Issue SR-6, July 26, 2021.

<sup>4</sup> ORS 183.469; OAR 137-003-0060

<sup>5</sup> OAR 345-015-0085(5)

## B. Exceptions

In her exception, Ms. Barry identifies the following:

1. Hearing Officer's MSD Ruling did not reference Ms. Barry's appeal on the denial of her contested case petition and therefore is in error.
2. Hearing Officer's MSD Ruling identifies ten "Undisputed Facts" which Ms. Barry disagrees are undisputed. Ms. Barry also presents two additional "undisputed facts."
3. Hearing Officer's Opinion included in the MSD Ruling includes errors within the: Standard of Review, Statement of Applicable Law, and second and third paragraphs.

In STOP's exception, they take exception to the Hearing Officer's findings presented in the MSD Ruling and Order that "the fact that Idaho Power did not collect constituent information in accordance with USFS SMS does not invalidate the visual impact assessment" because such information collection was not required by the standard.

## C. Summary of Department Positions

Ms. Barry's exceptions to the Hearing Officer's findings of fact are not well placed because the Hearing Officer's findings merely serve to relate evidence in the record. Ms. Barry's own findings of fact primarily consist of legal conclusions, but to the extent that they are factual are inadmissible.

The core question presented by issue SR-6 is whether Idaho Power was required to incorporate Oregonians' subjective evaluation of resources when assessing visual impacts. Neither Ms. Barry nor STOP identified a material dispute of fact, error of omission, or legal error in the Hearing Officer's conclusion that Idaho Power had *no obligation* under the Council's siting standards to incorporate Oregonians' subjective evaluations of the resource. The parties agree on the material fact – rather than consider Oregonians' subject evaluations, Idaho Power's visual impact methodology assumed that all identified visual resources were highly valued / sensitive to impacts. The question as to whether Idaho Power's visual impact assessment is

invalid because it did not consider subjective evaluations is one of law and a question that is readily answered – no statute or rule requires an applicant to apply a particular methodology for assessing visual impacts. Accordingly, the Hearing Officer correctly granted Idaho Power’s motion for summary determination on Issue SR-6.

## II. ANALYSIS

### A. Standard for MSDs

Per OAR 137-003-0580, a Motion for Summary Determination shall be granted if:

- (a) The pleadings, affidavits, supporting documents (including any interrogatories and admissions) and the record in the contested case show that there is no genuine issue as to any material fact<sup>6</sup> that is relevant to resolution of the legal issue as to which a decision is sought; and
- (b) The agency or party filing the motion is entitled to a favorable ruling as a matter of law.

### B. Barry Exception on Omitted Reference in MSD Ruling

Ms. Barry takes exception to the exclusion of her Appeal of the Denial of Petition for Contested Case Standing in the Matter of the ASC for B2H Transmission Line from the Hearing Officer’s Ruling and Order On Motion for Summary Determination of Contested Case. The appeal is included in the record of decision in this contested case, and as a result this exception has no effect. The Department recommends Council reject this exception.

### C. Barry Exception on MSD Ruling’s reference to “Undisputed Facts”

Ms. Barry takes exception to ten “Undisputed Facts” in the Ruling and Order On Motion For Summary Determination Of Contested Case Issue SR-6 OAH Case No. 2019-ABC-02833.

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<sup>6</sup> A material fact is “one that, under applicable law, might affect the outcome of the case. *Zygar v. Johnson*, 169 Or Ap 638, 646, 10 P3d 326 (2000), rev den, 331 Or 583 (2001). The standard for granting summary judgment can be thought of as proceeding in two steps: “whether a genuine issue of fact exists, and, if not, whether the moving party [is] entitled to judgment as a matter of law.” *Metro. Prop. & Cas. V. Harper*, 168 Or App 358, 363, 7 P3d 541 (2000).

Ms. Barry also presents two additional “undisputed facts”: (1) claiming that “the fact that a statement has been published in Idaho Power’s ASC does not verify that statement's accuracy, relevance, logic or completeness,” and (2) provides definitions of “perception” from the Oxford Languages Dictionary.

Ms. Barry takes exceptions to the Hearing Officer’s findings of fact because she disagrees with statements made by the applicant, however, her exceptions lack merit because the Hearing Officer’s findings merely describe evidence in the record. To the extent that Ms. Barry alleges certain “undisputed facts” in her exceptions, they are largely legal arguments but to the extent they are alleged “facts” they are inadmissible because she does not contend they were previously asserted or identify where they can be found in the record. The Department recommends Council reject this exception.

D. Barry Exceptions on Standard of Review, Statement of Applicable Law, and second and third paragraphs in MSD Ruling

Ms. Barry takes exception to the Hearing Officer’s failure to consider Ms. Barry’s definition of the word “perception” in granting Applicant’s Motion for Summary Determination on Issue SR-6. Ms. Barry explains that the definition was provided in her reply brief submitted on June 25, 2021. The Department notes that Ms. Barry’s legal arguments were considered in the Hearing Officer’s Ruling and Order on Issue SR-6, and the failure to find a purported fact compelling or material to the legal question is not grounds to grant an exception.

Ms. Barry takes exception to the Hearing Officer’s statement that the applicant had no obligation under the Council’s Siting Standards to incorporate Oregonians’ subjective evaluation of the resource. She points to the definition of “significant” under OAR 345-001-0010(53) as a relevant standard or regulation that must be considered. The Council’s definitions are used to

inform application of the Council’s rules and standards, but are not intended to create substantive requirements.

The Hearing Officer’s Ruling and Order adequately addresses Ms. Barry’s arguments that the applicant was required to provide additional evidence related to impacts on the “affected human population” by assuming that the affected population was highly sensitive to visual impacts.

Ms. Barry takes exception to the Hearing Officer’s conclusion that Ms. Barry’s objections to the applicant’s methodology as “unreasonable” and “not supported by substantial evidence” exceed the scope of Issue SR-6. The Hearing Officer’s conclusion in this regard was correct because Issue SR-6 is limited to the question of whether the applicant’s visual impact assessments are invalid because applicant did not incorporate Oregonians’ subjective evaluation of their resources to evaluated visual impacts. Objections to the methodology on other grounds were not properly raised.

Ms. Barry takes exception to the Hearing Officer’s “readiness to accept Idaho Power’s ‘assumptions’, specifically the assumption that Oregonians would evaluate the identified scenic, recreation or protected resource as having the highest sensitivity. She appears to assert the assumption was invalid because it is not supported by evidence. The Hearing Officer was correct in concluding that the applicant’s use of a sufficiently conservative assumption in place of constituent information is appropriate in the conduct of a visual impacts assessment.

The Department recommends Council reject these exceptions.

E. STOP B2H Exception

Similar to Barry’s exception, STOP B2H takes exception to the Hearing Officer’s finding in her Ruling and Order that “the fact that Idaho Power did not collect constituent information in

accordance with USFS SMS does not invalidate the visual impact assessment” because such information collection was not required by the standard. As explained above, the Hearing Officer was correct in her finding that the collection of constituent information is not required by any Council Standard and that the applicant’s use of a sufficiently conservative assumption in place of constituent information is appropriate in the conduct of a visual impacts assessment.

### III. CONCLUSION

Ms. Barry and STOP disagree with the applicant’s visual impacts assessment methodology and Hearing Officer’s conclusions on Issue SR-6. However, neither limited party identified a material dispute of fact, error of omission, or legal error in the Hearing Officer’s conclusions for dismissing Issue SR-6.

For the reasons set forth above, the Department recommends that the Council reject the exceptions on Issue SR-6 and affirm the Hearing Officer’s findings of fact, conclusions of law and opinion.

DATED this 15<sup>th</sup> day of July, 2022.

Respectfully submitted,

ELLEN F. ROSENBLUM  
Attorney General

*/s/ Patrick Rowe*  
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## CERTIFICATE OF SERVICE

I hereby certify that on July 15, 2022, the foregoing Oregon Department of Energy's RESPONSE TO EXCEPTIONS – ISSUE SR-6, was emailed to:

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Secretary for EFSC  
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I further certify that on July 15, 2022, the foregoing Oregon Department of Energy's RESPONSE TO EXCEPTIONS – ISSUE SR-6, was served by First Class Mail or electronic mail as indicated below:

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DATED this 15<sup>th</sup> day of July, 2022.

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**BEFORE THE ENERGY FACILITY SITING COUNCIL**

**for the**

**STATE OF OREGON**

**IN THE MATTER OF:** ) **PETITIONER LOIS BARRY**  
 ) **EXCEPTIONS TO**  
**THE PROPOSED BOARDMAN TO** ) **ADMINISTRATIVE LAW JUDGE**  
**HEMINGWAY TRANSMISSION** ) **WEBSTER’S PROPOSED**  
**LINE** ) **CONTESTED CASE ORDER**  
 ) **ISSUES R-2, R-3 & R-4**  
 )  
**OAH Case No. 2019-ABC-0283** )  
 ) **DATED JUNE 30, 2022**

**INTRODUCTION:**

Petitioner Lois Barry disagrees with many of the factual and legal conclusions and characterizations of the evidence that are contained in the Proposed Contested Case Order (PCCO). Ms. Barry presented evidence showing that many of the findings and conclusions stated in the PCCO are not accurate or legally appropriate. Primarily, the ALJ has accepted statements in Idaho Power’s ASC, Exhibits T as factual when, in many cases they are not.<sup>1</sup>

***Issue R-2 Whether the visual impacts of the proposed facility structures in the viewshed of Morgan Lake Park are inconsistent with the objectives of the Morgan Lake Park Recreation Use and Development Plan and therefore should be reevaluated.***

The ALJ dismisses Idaho Power’s need to comply with the Morgan Lake Plan because the record establishes “there are no proposed project components located within

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<sup>1</sup> For extensive analysis of ASC inaccuracies, see Lois Barry Exceptions to ALJ’s Rulings, Motion for Summary Determination, Issue R-6, June 30, 2022.

the park boundary.” (PCCO 234). Idaho Power has repeatedly asserted this irrelevant statement and the ALJ has erred in accepting it.

Exhibit T, Recreation – the visual assessment extends two miles<sup>2</sup> from the project site boundary, and for Exhibit R, Scenic, ten miles.<sup>3</sup> The project will come within .2 miles of the park boundary. Theoretically the two miles visual impact of the project could overshadow the entire area of Morgan Lake Park even though the project is not located with the park boundary.

The ALJ notes that “the Morgan Lake Plan did not identify any specific scenic views.” (PCCO 235) Again, this is irrelevant. The long unbroken views of rolling forested views unmarred by any signs of human development to the south and west of Morgan Lake Park are “scenery,” and Idaho Power admits that “scenery is a valued attribute of the recreational opportunities at Morgan Lake Park.”<sup>4</sup> No rule or statute requires identification of “specific views.”

The ALJ notes that *the Company revisited its impact analysis of the park*. It would be more accurate to state that the Company made a somewhat complete visual impact analysis of Morgan Lake Park for the first time:

*The Revised Supplemental Analysis [ November of 2021] also recognized that the proposed facility would be visible from approximately 16 percent of the park, primarily from the access road and day-use parking areas located to the south of Morgan Lake, and undeveloped areas west and south of Little Morgan Lake. Idaho Power acknowledged that in those areas of the park, where the towers are not screened, the visual contrast will be high.(PCCO 235)*

Ms. Barry takes exception to the the ALJ’s conclusion, based on a review of various Idaho Power analyses, that:

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<sup>2</sup> ODOE Exhibit T, T-2.

<sup>3</sup> ODOE Exhibit R, R-2

<sup>4</sup> Kling Rebuttal Ex. B at 17.

*Contrary to the limited parties' contentions, the Revised Supplemental Analysis confirms that, taking into account mitigation, the proposed facility's impact on recreational opportunities at Morgan Lake Park will be less than significant.*

The initial mitigation proposed was four H-frame towers with natina finish; after the belated Supplementary Analysis (actually the first analysis of the park beyond the small camping and dock areas) proposed mitigation was expanded to an additional nine 130' towers, totaling thirteen. Yes, the visual contrast where the towers are not screened will be high.

However, the ALJ accepts Idaho Power's conclusion that the "proposed facility's impact ... will be less than significant," because "Idaho Power looked to the values and objectives of the Morgan Lake Plan." Ms. Barry takes exception to the ALJ's decision, based on that slender thread of irrelevant 'evidence,' that the "Revised Supplemental Analysis confirms that, taking into account mitigation, the proposed facility's impact on recreational opportunities at Morgan Lake Park will be less than significant." (PCCO p. 236).

Ms. Barry again references her Exceptions to the ALJ's Ruling on MSD, SR-6 filed June 30, 2022. IPC's conclusions are based solely on impacts to areas and do not comply with OAR 345-001-0010(52)<sup>5</sup> to consider project's "magnitude and likelihood of impact on the affected human population."

Ms. Barry takes exception to the ALJ's accepting Idaho Power's conclusion that the effect of transmission towers bordering a beloved city park which has been protected

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<sup>5</sup> Energy Facility Siting Council's (EFSC or Council) rules at OAR 345-001- 0010 (52): "Significant" means having an important consequence, either alone or in combination with other factors, based upon the magnitude and likelihood of the impact on the affected human population or natural resources, or on the importance of the natural resource affected, considering the context of the action or impact, its intensity and the degree to which possible impacts are caused by the proposed action. Nothing in this definition is intended to require a statistical analysis of the magnitude or likelihood of a particular impact. (emphasis added)

by the Morgan Lake Park Plan for 50 years is “less than significant.” That is IPC’s conclusion based on a skewed definition of the word “perception” and IPC’s focus on impacted areas, not the actual perceptions of the people who will use those impacted areas. The ALJ has failed to require support for IPC’s self-serving conclusions.

**Issue R-3** *Whether the mitigation proposed to minimize the visual impacts of the proposed facility structures at Morgan Lake Park (\$100,000 for recreational facility improvements) is insufficient because the park’s remote areas will not benefit from the proposed mitigation.*

If the ALJ’s is correct in her assertion that the \$100,000 MOA offered by Idaho Power to the City of La Grande for park improvements is outside the Council’s jurisdiction, the only mitigation offer on the table would be IPC’s first offer of four shorter H frame towers with natina finish to replace the 150 towers initially planned for the site, which was then replaced with a subsequent offer of thirteen 130’ towers after public comments alerted Idaho Power to the existence of the natural area around Little Morgan Lake (aka Twin Lake). Thirteen towers, many in pristine natural areas without vegetative screening!

*As previously discussed, to mitigate for the potential visual impacts Idaho Power has proposed micrositing so that project components are not visible from the vast majority of the park and, for those components that will be visible from certain remote areas in the park, the Company has proposed design changes to minimize the visible impact. (PCCO p. 239)*

Surely the Energy Facility Siting Council will require specific information concerning unspecified design changes before issuing a Site Certificate. Ms. Barry reiterates her Site Condition:

*Because Idaho Power has not recognized the adverse impact of transmission towers impacting the view-shed of Morgan Lake Park, its proposed mitigation to lower tower heights and coat them with ‘natina finish’ is obviously inadequate.*

*Idaho Power should bury the parts of the transmission line that would in any way obstruct the irreplaceable top-of-the-world views from the Park.*

*A liquid natural gas/petroleum line is buried on the ridge close to the Morgan Lake Park entrance. Line burial in this area is certainly possible. If Idaho Power chooses to avoid the cost of burying the line, the B2H should be moved further to the west, using topography and distance as avoidance to protect the open views from the Park that would be impacted.<sup>6</sup>*

This Site Condition preceded Idaho Power's subsequent supplementary mitigation offer of 13 towers. A reasonable person might ask how replacing four 150' towers within sight of an undeveloped natural area with thirteen 130' towers is mitigation at all. It would be an invasive industrial nightmare. Ms. Barry has learned that Idaho Power has offered to bury a transmission line near the hospital in the Hailey/Ketchum area, at a cost of \$14 million, for "aesthetic reasons." Idaho Power should be prepared to bury the transmission line at Morgan Lake Park for the same reason.

*Also as previously discussed, the Recreation standard does not require the Council to find that the project will have no impacts to Morgan Lake Park, only that overall the project has a less than significant impact on the recreational activities at the park. (PCCO p.239)*

At this point, Ms. Barry must ask: How does one measure thirteen 130' towers on the skyline as *less than significant*? Obviously no one is "measuring." Idaho Power is deciding.

*Ms. Barry's proposed condition is both untimely and inappropriate. The proposed condition is untimely because Ms. Barry did not submit it in accordance with the established schedule. It is inappropriate because the Council cannot consider other routes or the undergrounding of segments that Idaho Power did not propose in the ASC.... (PCCO 243)*

Ms. Barry disputes the ALJ's decision that her proposed Site Condition is untimely. The schedule for filing documents became fluid after Idaho Power requested an opportunity to respond to Responses. Furthermore, if the ALJ is willing to accept a

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<sup>6</sup> Lois Barry, Closing Arguments Issues R-4, R-3, R-2, February 28, 2022, p. 20.

Revised Supplementary Analysis of Morgan Lake Park three years after the ODOE Proposed Order, a Site Condition offered within weeks of the ALJ's schedule should be accepted.

Ms. Barry assumes that the Council can consider undergrounding segments as appropriate mitigation. If the only way to avoid "significant impact" on an area that would be crossed by the proposed transmission line is to bury it, that would be the Council's decision, especially when the identified impacts are now substantially more than those initially reported in the ASC. In this case, it would then be Idaho Power's decision to assume the cost of line burial as mitigation or not.

**Issue R-4:** *Whether Applicant's visual impact assessment for Morgan Lake Park adequately evaluates visual impacts to the more than 160 acres of undeveloped park land and natural surroundings as visual simulations were only provided for high-use area.*

Idaho Power has created a limited methodology for visual impact assessment of Morgan Lake Park. By omitting consideration of the Council's definition of "significance," (id) this methodology fails to support applicant's consistent conclusions of the project's "less than significant impact" on Morgan Lake Park.

Prior to Idaho Power's Revised Supplementary Analysis of Morgan Lake Park, ASC Exhibit T focused only on the small high-use areas surrounding the dock and camp grounds that are concentrated in a small area along the western shore of Morgan Lake. Because Idaho Power assessed only impact to developed areas, there was no analysis of the equally important *"quality outdoor recreational experience harmonious with a natural forest and lake area (as opposed to typical city park activities)."*<sup>7</sup>

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<sup>7</sup> ASC Exhibit T, Attachment T-4 at T-4-16 (ODOE - B2HAPPDoc3-37 ASC 20\_Exhibit T\_Recreation ASC 2018- 09-28. Page 115 of 291.

*In response to Ms. Barry's claim that Idaho Power did not provide a sufficient visual impact analysis of the remote, undeveloped areas in the park, Idaho Power conducted an additional analysis of potential visual impacts in both the developed and undeveloped areas of the park where visitors engage in dispersed recreation activities. (POCC p. 240)*

Ms. Barry takes exception to the ALJ dismissing 6 pages of text enumerating 13 errors and omissions in the ASC visual impact assessment<sup>8</sup> by stating, in effect, she believes that IPC eventually did a better job of it.

*Idaho Power properly offered the Revised Analysis, video simulations, and tree study as evidence in response to limited parties' claims that the Company did not adequately evaluate the park's undeveloped areas.; it is relevant and material to the Council's review under the Recreation standard and is entitled to evidentiary weight. (PCCO fn 314, p. 241)*

Ms. Barry disputes the ALJ's acceptance of this supplementary effort as "proper." The fact that it was necessary for IPC to write a 19 page Revised Supplemental Analysis of Morgan Lake Park with several animated, video and visual simulation attachments which focused on a portion of Morgan Lake Park that was previously ignored in the visual impact assessments supports Ms, Barry's Issue R-4 precisely.

IPC's belated attempt to shore up their inadequate visual impact assessment was provided long after any of the requisite procedures for public comments, analysis and contested cases had been concluded. "The evidence was admitted without objection" because it appeared to be evidence relevant to Cross Examination, not as aspects of, or Amendments to, the ASC. Ms. Barry therefore takes exception to the ALJ's decision that it is "relevant and material to the Council's review under the Recreation standard and is entitled to evidentiary weight."

*The Company's evaluation showed potentially high intensity impacts in areas where there is no vegetation screening, and that there would be low or no visibility of the project from areas where trees will screen views of the towers.*

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<sup>8</sup> Lois Barry, Closing Arguments Issues R-4, R-3, R-2, February 28, 2022, pp. 10-15.



*Idaho Power acknowledged in its analysis that there could be high magnitude impacts in areas south of Morgan Lake and Little Morgan Lake due to the project's proximity and the lack of screening. 312 The Company determined that "viewer perception will range from low to high throughout Morgan Lake Park" and that because of this range, "viewer perception for the park as a whole will be medium." (PCCO 240)*

*In summary, Idaho Power's supplemental analysis of Morgan Lake Park adequately evaluates the proposed project's visual impacts in the undeveloped areas of the park. A preponderance of evidence establishes that although the project will result in long-term visual impacts of varying intensity in Morgan Lake Park, these visual impacts will not preclude visitors from engaging<sup>9</sup> in recreational opportunities in the park. Hence, the project's impacts to the park will be less than significant. (PCCO 241)*

Ms. Barry takes exception to the ALJ's substitution of engaging for enjoying.<sup>10</sup>

This entire evaluation process has been beset by verbal imprecision. Ms. Barry assumes the ALJ is suggesting the presence of the project will not prevent visitors from "engaging," -- "participating," in recreational opportunities. One can be a most unwilling, even fearful participant when "engaging" in an activity. That is a far cry from "enjoying" -- "taking delight or pleasure in an activity or occasion," such as enjoying hiking and fishing in the natural areas of a unique park with unparalleled 360 degree views on the top of a mountain, within 2 miles of La Grande.<sup>11</sup>

*In other words, this issue concerns the scope of the Morgan Lake Park evaluation and the Company's conclusions regarding magnitude of impact, but it does not encompass challenges to Idaho Power's methodology for assessing impacts to visual resources. (PCCO p.241)*

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<sup>10</sup> Although the Project will introduce moderate contrast to the landscape, it will not preclude visitors from enjoying the day use and overnight facilities offered at Morgan Lake Park. ODOE Exhibit T, T-44.

<sup>11</sup> As explained in Attachment T-3, Table T-3-1, Morgan Lake Park is an important opportunity primarily because of its unique designation status as a city park, rareness, and special qualities per OAR 345-021-0010(1)(t)(A)

Ms. Barry takes exception to the ALJ's separation of the ASC methodology from the conclusions based on that methodology. A valid conclusion is tested on its adherence to the process used to reach that conclusion. It is not logical to separate them.

**CONCLUSION:**

Idaho Power has failed to meet standards of truth and logic in creating and defending its visual impact methodology. The ALJ has failed to critically examine Idaho Power's documentation, accepting IPC's statements as 'evidence,' while dismissing the comprehensive information provided by those commenting on the ASC because it disagrees with Idaho Power's 'evidence.'

Ms. Barry requests that no Site Certificate be issued until the numerous substantive issues raised by Ms. Barry and the other public participants in this convoluted process have been, in each case, adequately resolved.

<p style="text-align: center;"><b>CERTIFICATE OF MAILING</b></p>
--

On June 30, 2022, I certify that I filed the foregoing EXCEPTIONS TO THE PROPOSED CONTESTED CASE ORDER with the Hearings Coordinator via electronic mail, and with each party entitled to service, as noted below.

*/s/ Lois Barry*

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>

**BEFORE THE ENERGY FACILITY SITING COUNCIL  
OF THE STATE OF OREGON**

In the Matter of the Application for Site  
Certificate for the

BOARDMAN TO HEMINGWAY  
TRANSMISSION LINE

APPLICANT IDAHO POWER  
COMPANY'S RESPONSE TO LIMITED  
PARTIES' EXCEPTIONS FOR  
CONTESTED CASE ISSUES R-2, R-3, R-  
4, SR-3, SR-5, SR-6, AND SR-7

OAH Case No. 2019-ABC-02833

**July 14, 2022**

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1 **I. INTRODUCTION**

2 Pursuant to OAR 345-015-0085(6) and the May 31, 2022 Proposed Contested Case Order,  
3 Applicant Idaho Power Company (“Idaho Power” or the “Company”) submits its Response to  
4 Limited Parties’ Exceptions for Issues R-2, R-3, R-4, SR-3, SR-5, SR-6, and SR-7.

5 **II. STANDARD OF LAW**

6 In a contested case before the Energy Facility Siting Council (“EFSC” or the “Council”),  
7 the applicant bears the burden of proof to establish by a “preponderance of the evidence”<sup>1</sup> that the  
8 proposed facility complies with the Council’s statutes, ORS 469.300 to 469.570, and that the  
9 Application for Site Certificate (“ASC”) and proposed site conditions—as modified in the Oregon  
10 Department of Energy’s (“ODOE”) Proposed Order—satisfy each of the Council’s siting  
11 standards.<sup>2</sup> Proof by a preponderance of the evidence means that the fact finder is persuaded that  
12 the facts asserted are more likely than not true.<sup>3</sup> Furthermore, the applicant must demonstrate by  
13 a preponderance of evidence that the facility complies with all other statutes, administrative rules,  
14 and local government ordinances “identified in the project order, as amended, as applicable to the  
15 issuance of a site certificate for the proposed facility.”<sup>4</sup>

16 Parties or limited parties “with specific challenges to findings, conclusions and/or  
17 recommended site certificate conditions in [ODOE’s] Proposed Order bear the burden” of  
18 producing evidence in support of the facts or positions they have asserted, and the burden of

---

<sup>1</sup> OAR 345-021-0100(2) (“The applicant has the burden of proving, by a preponderance of the evidence in the decision record, that the facility complies with all applicable statutes, administrative rules and applicable local government ordinances.”); *see also* ORS 183.450(2) (“The burden of presenting evidence to support a fact or position in a contested case rests on the proponent of the fact or position.”).

<sup>2</sup> OAR 345-022-0000(1)(a).

<sup>3</sup> *Riley Hill General Contractor v. Tandy Corp.*, 303 Or 390, 402 (1987).

<sup>4</sup> OAR 345-021-0100(2); OAR 345-022-0000(1)(b).

1 convincing the trier of fact that their alleged facts are true or their position on the identified issue  
2 is correct.<sup>5</sup> In particular, the parties or limited parties must establish how the applicant failed to  
3 satisfy EFSC’s siting standards and/or how ODOE “erred in its findings, conclusions and/or  
4 recommended site certificate conditions.”<sup>6</sup> To meet this burden of proof, parties or limited parties  
5 challenging the Proposed Order must provide factual testimony or evidence to substantiate their  
6 asserted claims;<sup>7</sup> unsubstantiated factual arguments or legal conclusions are insufficient to  
7 demonstrate the applicant’s failure to establish compliance with any applicable standard.<sup>8</sup>

8 After the hearing and briefing phases of a contested case, the Hearing Officer must issue a  
9 Proposed Contested Case Order stating the Hearing Officer’s findings of fact and conclusions of  
10 law.<sup>9</sup> Parties and limited parties may then file any exceptions to the Proposed Contested Case  
11 Order for the Council’s consideration.<sup>10</sup> If the parties or limited parties file exceptions, the parties  
12 or limited parties must identify for each exception the finding of fact, conclusion of law, or  
13 recommended site certificate condition to which the parties or limited parties except and must state  
14 the basis for their exception.<sup>11</sup>

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<sup>5</sup> Order on Case Management Matters and Contested Case Schedule at 11 (Jan. 14, 2021) (emphasis in original) [hereinafter, “First Order on Case Management”]; Second Order on Case Management Matters and Contested Case Schedule at 7 (Aug. 31, 2021) (emphasis in original) [hereinafter, “Second Order on Case Management”]; *see also* ORS 183.450(2) (the burden of presenting evidence to support a fact or position in a contested case rests on the proponent of the fact or position); *see also* Ruling on Idaho Power Company’s Motion to Dismiss Issues FW-5, HCA-6, LU-4, LU-7, LU-8, PS-1, PS-5, SS-1, and SS-2 at 3 (Nov. 2, 2021).

<sup>6</sup> First Order on Case Management at 11; Second Order on Case Management at 7.

<sup>7</sup> First Order on Case Management at 11; Second Order on Case Management at 7.

<sup>8</sup> First Order on Case Management at 11; Second Order on Case Management at 7. Idaho Power has no obligation to disprove unsubstantiated claims and allegations raised by the limited parties. *See* Ruling on Idaho Power Company’s Motion to Dismiss Issues FW-5, HCA-6, LU-4, LU-7, LU-8, PS-1, PS-5, SS-1, and SS-2 at 3.

<sup>9</sup> OAR 345-015-0085(4).

<sup>10</sup> OAR 345-015-0085(5).

<sup>11</sup> OAR 345-015-0085(5).

1 **III. RESPONSE TO EXCEPTIONS**

2 **A. Issue SR-6**

3 The Hearing Officer granted limited party status to STOP B2H and Lois Barry to raise  
4 SR-6, which asked:

5 *Whether Applicant’s visual impact assessments are invalid because Applicant did*  
6 *not incorporate Oregonians’ subjective evaluation of their resources to evaluated*  
7 *visual impacts, thereby invalidating the visual impact analysis for Morgan Lake*  
8 *Park and other protected areas, scenic resources and important recreational*  
9 *opportunities.*<sup>12</sup>

10 The Hearing Officer granted Idaho Power summary determination of SR-6,<sup>13</sup> and incorporated her  
11 ruling into the Proposed Contested Case Order.<sup>14</sup> In the Proposed Contested Case Order, the  
12 Hearing Officer summarized her conclusion as follows:

13 The ALJ found Idaho Power’s visual impact assessments are valid. In addition, the  
14 ALJ found that Idaho Power had no obligation under the Council’s siting standards  
15 to incorporate Oregonians’ subjective evaluations of the resource and that Idaho  
16 Power’s visual impact methodology accounted for viewer subjective evaluations  
17 by assuming that all identified visual resources were highly sensitive to impacts.<sup>15</sup>

18 Both STOP B2H and Ms. Barry filed exceptions to the Hearing Officer’s ruling on Idaho  
19 Power’s motion for summary determination (“MSD”), as incorporated into the Proposed Contested  
20 Case Order. For the reasons discussed below, STOP B2H’s and Ms. Barry’s exceptions do not  
21 identify any incorrect finding of fact or conclusion of law, and for that reason Idaho Power requests  
22 that the Council adopt without modification the Hearing Officer’s findings and conclusions of law  
23 relevant to SR-6.

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<sup>12</sup> First Order on Case Management Matters and Contested Case Schedule at 7.  
<sup>13</sup> Ruling and Order on Motion for Summary Determination of Contested Case Issue SR-6 (July 26, 2021).  
<sup>14</sup> Proposed Contested Case Order at 27.  
<sup>15</sup> Proposed Contested Case Order at 27.

1           **1.       STOP B2H, Issue SR-6, Exception**

2           STOP B2H takes exception to the Hearing Officer’s ruling granting Idaho Power’s MSD  
3 in which she determined Idaho Power had no obligation under the EFSC standards to incorporate  
4 Oregonians’ subjective evaluations of the resource, and Idaho Power’s visual impact methodology  
5 accounted for viewer subjective evaluations by assuming all identified visual resources were  
6 highly sensitive to impacts:

7           First, as a matter of law, the Council’s rules *do not* require an applicant to employ  
8 a specific methodology for assessing visual impacts. The Scenic Resources,  
9 Recreation and Protective Areas standards simply require that the applicant  
10 demonstrate that the proposed facility is not likely to result in significant adverse  
11 impacts to identified resources. Consequently, the fact that Idaho Power did not  
12 collect constituent information in accordance with the [United States Forest Service  
13 (“USFS”)] [Scenery Management System (“SMS”)] does not invalidate the visual  
14 impact assessments.

15           Second, to the extent Stop B2H and Ms. Barry now contend that Idaho Power’s  
16 chosen methodology is “unreasonable” and the visual impact assessments are “not  
17 supported by substantial evidence,” these contentions exceed the scope of Issue SR-  
18 6. As explained above, the Council granted Stop B2H and Ms. Barry standing on  
19 whether “Applicant’s visual impact analysis failed to incorporate Oregonians’  
20 subjective evaluation of their resources.” Amended Order on Party Status at 20.  
21 Stop B2H’s and Ms. Barry’s new challenges to Idaho Power’s visual impact  
22 assessments may not be considered in the contested case. See generally ORS  
23 469.370(5)(b); OAR 345-015-0016(3).

24           Third, it is undisputed that, instead of collecting data regarding Oregonians’  
25 subjective evaluation of their resources, Idaho Power conservatively assumed that  
26 Oregonians attached the highest sensitivity value to these resources. Even if Stop  
27 B2H and Ms. Barry were not precluded from contesting generally the  
28 reasonableness of Idaho Power’s methodology, neither limited party has offered a  
29 cogent argument as to why Idaho Power’s approach is unreasonable and/or  
30 invalidates the visual impact analyses. Indeed, as Idaho Power notes, because Idaho  
31 Power assumed that all Oregonians would evaluate the identified scenic, recreation  
32 or protected resource as having the highest sensitivity, more specific constituent  
33 data could only operate to take away from, but not add to, the value placed on the  
34 identified resource in the visual impact assessment.<sup>16</sup>

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<sup>16</sup> Ruling and Order on Motion for Summary Determination on Contested Case Issue SR-6 at 12-13.

1 First, STOP B2H argues that SR-6 included questions of fact regarding the reasonableness  
2 and sufficiency of Idaho Power’s visual impact assessment methodology that the hearing officer  
3 improperly resolved on summary determination.<sup>17</sup> However, those arguments exceed the scope of  
4 Issue SR-6. In their Petitions and Draft Proposed Order (“DPO Comments”), STOP B2H and  
5 Ms. Barry argued that Idaho Power must incorporate subjective evaluations of the visual resources  
6 into the Company’s visual impact assessment methodology because potential visual impacts,  
7 viewer perception, and enjoyment of visual resources are subjective.<sup>18</sup> Specifically, in their  
8 Petitions, they argued that Idaho Power is required to apply the United States Forest Service  
9 (“USFS”) Scenic Management System (“SMS”) to assess visual impacts, which they argued  
10 includes an evaluation of the viewer’s subjective experience.<sup>19</sup> The Hearing Officer initially  
11 concluded that those issues had not been raised with sufficient specificity in the limited parties’  
12 DPO Comments.<sup>20</sup> Following the limited parties’ appeal, the Council determined that neither  
13 limited party raised a concern regarding the SMS in their DPO Comments, but EFSC reframed  
14 this issue to relate to whether Idaho Power is required to incorporate subjective evaluations of  
15 resources into the Company’s assessments of potential scenic impacts.<sup>21</sup> However, because STOP  
16 B2H’s arguments regarding the reasonableness and sufficiency of Idaho Power’s visual impact  
17 assessment methodology are entirely different and much broader than the narrow question at issue

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<sup>17</sup> STOP B2H Exceptions to Proposed Contested Case Order at 9-10.

<sup>18</sup> Lois Barry’s Petition for Party Status at 2; STOP B2H DPO Comments at 34 (Aug. 22, 2019) (ODOE - B2HAPPDoc5-1 All DPO Comments Combined-Rec'd 2019-05-22 to 08-22. Page 5601 of 6396).

<sup>19</sup> STOP B2H’s Petition for Party Status at 26.

<sup>20</sup> Interim Order on Petitions for Party Status, Authorized Representatives and Issues for Contested Case at 21, 32 (Oct. 29, 2020).

<sup>21</sup> EFSC Order on Appeals of Hearing Officer Order on Party Status, Authorized Representatives and Issue at 4, 8 (Nov. 25, 2020); *see also* B2HAPP Council Review of Appeals on Hearing Officer Order on Party Status 2020-11-20 at 22:30 (statement of Chair Jenkins) (“I don’t support the requirement to use the 1995 management system, but I do think I can accept that, precept that the visual analysis can be discussed.”).

1 in SR-6 regarding whether Idaho Power is required to incorporate subjective evaluations, those  
2 arguments are outside the scope of SR-6 and the Hearing Officer was correct in finding the same.<sup>22</sup>

3 Next, STOP B2H argues that Idaho Power was not entitled to a ruling as a matter of law,  
4 because: (1) the question of whether Idaho Power should have incorporated Oregonians’ subjective  
5 analysis “is necessarily a fact question”; (2) whether it was reasonable to conduct an analysis  
6 based on “a completely outdated manual is clearly a factual dispute”; (3) the analysis is not  
7 supported by substantial evidence because the analysis was “based on a portion of a methodology  
8 which emphasized the importance of subjective constituent information, yet contained none”;<sup>23</sup>  
9 and (4) the Hearing Officer “mistakenly ignored” these points and “construed the evidence in a  
10 light more favorable to [Idaho Power].”<sup>24</sup>

11 Contrary to STOP B2H’s assertion, the question at issue in SR-6 is not whether Idaho  
12 Power “should have” incorporated Oregonians’ subjective analysis; rather, SR-6 asks whether  
13 Idaho Power *was required* to do so. And with respect to the latter, there is no dispute of fact. The  
14 parties agree on the only material facts: Idaho Power did not collect data from Oregonians  
15 addressing their subjective evaluations of visual resources; and instead, Idaho Power included in  
16 its assessments an assumption that all visual resources are highly valued, conservatively  
17 representing the highest possible degree of sensitivity and subjective value.<sup>25</sup> The question at issue

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<sup>22</sup> Ruling and Order on Motion for Summary Determination on Contested Case Issue SR-6 at 13 (“Second, to the extent Stop B2H and Ms. Barry now contend that Idaho Power’s chosen methodology is “unreasonable” and the visual impact assessments are “not supported by substantial evidence,” these contentions exceed the scope of Issue SR-6. As explained above, the Council granted Stop B2H and Ms. Barry standing on whether “Applicant’s visual impact analysis failed to incorporate Oregonians’ subjective evaluation of their resources.” Amended Order on Party Status at 20. Stop B2H’s and Ms. Barry’s new challenges to Idaho Power’s visual impact assessments may not be considered in the contested case. See generally ORS 469.370(5)(b); OAR 345-015-0016(3).”).

<sup>23</sup> STOP B2H Memorandum in Opposition to Idaho Power’s Motion for Summary Determination on Issue SR-6 at 4, which is cited in STOP B2H Exceptions to Proposed Contested Case Order at 10.

<sup>24</sup> STOP B2H Exceptions to Proposed Contested Case Order at 10.

<sup>25</sup> Idaho Power’s MSD of Contested Case Issues SR-1, SR-4, SR-5, and SR-6 at 18.

1 in SR-6 is purely a question of law—whether Idaho Power’s visual impact assessment  
2 methodology is invalid under EFSC’s rules because the Company did not collect data on  
3 Oregonians’ subjective evaluations of the visual resources. The law is clear on that question: no  
4 EFSC statute or rule mandates any particular methodology for assessing visual impacts, and no  
5 EFSC statute or rule requires an applicant to incorporate subjective evaluations into its  
6 assessments. Therefore, absent such a statute or rule, Idaho Power was entitled to summary  
7 determination on Issue SR-6.

8           Regarding STOP B2H’s arguments related to an alleged outdated manual and Idaho  
9 Power’s alleged reliance on only a portion of the methodology, those are simply additional  
10 attempts by STOP B2H to argue the “reasonableness” of Idaho Power’s methodology, which is  
11 outside the scope of Issue SR-6.

12           Finally, the Hearing Officer did not ignore STOP B2H’s points or construe evidence in  
13 favor of Idaho Power, as alleged by STOP B2H.<sup>26</sup> Rather, the Hearing Officer found that STOP  
14 B2H’s factual arguments were outside the scope of SR-6,<sup>27</sup> and decided SR-6 based on the law  
15 and without weighing any evidence.

16           For these reasons, STOP B2H’s exception has not identified any error in the Hearing  
17 Officer’s conclusions of law relating to SR-6, and for that reason Idaho Power requests that the  
18 Council adopt without modification the Hearing Officer’s findings and conclusions of law relevant  
19 to SR-6.

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<sup>26</sup> STOP B2H Exceptions to Proposed Contested Case Order at 10.

<sup>27</sup> Ruling and Order on Motion for Summary Determination on Contested Case Issue SR-6 at 13.

1           **1.       Lois Barry, Issue SR-6, Lois Barry’s Proposed “Undisputed Facts”**

2           In her Exception, Ms. Barry provides two assertions which she identifies as “Undisputed  
3 Facts”:

4           **L. B. Undisputed Fact #1:** The fact that a statement has been published in Idaho  
5 Power's ASC does not verify that statement's accuracy, relevance, logic or  
6 completeness.

7           **L. B. Undisputed Fact #2:** Following are the commonly accepted definitions of  
8 perception:

9           • the ability to see, hear, or become aware of something through the senses.    "the  
10 normal limits to human perception"

11           • the state of being or process of becoming aware of something through the senses.  
12 Similar: discernment, appreciation, impression, judgment, etc.<sup>28</sup>

13           • a way of regarding, understanding, or interpreting something; a mental  
14 impression. "Hollywood's perception of the tastes of the American public.

15 Ms. Barry provides no explanation or support for the addition of these alleged “undisputed facts.”

16           Idaho Power objects to Ms. Barry’s “undisputed facts” because she has provided no  
17 explanation for their inclusion or how they are relevant, she has not shown that these alleged facts  
18 are already in the record, and—given that Idaho Power objects to the alleged facts—they are not  
19 “undisputed.” Moreover, Ms. Barry’s Undisputed Fact #1 is a legal argument regarding the  
20 evidentiary weight provided to ASC contents, and is therefore not an undisputed fact as Ms. Barry  
21 claims. Similarly, Ms. Barry’s Undisputed Fact #2 is a legal argument as to what she asserts are  
22 “commonly accepted definitions” of the term “perception.” For these reasons, the Council should

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<sup>28</sup> Lois Barry’s Exceptions to Administrative Law Judge Webster’s Rulings: Motion for Summary Determination:  
Issue SR-6 at 2 (June 30, 2022).



1 not modify the Proposed Contested Case Order to include Ms. Barry’s proposed “undisputed  
2 facts.”

3 **2. Lois Barry, Issue SR-6, Exception 1**

4 Ms. Barry takes exception to Undisputed Fact #4 in the Hearing Officer’s Ruling on Idaho  
5 Power’s MSD for SR-6, summarizing Idaho Power’s description of its methodology in the ASC.<sup>29</sup>

6 As required by the Second Amended Project Order, Idaho Power included visual  
7 impact assessments as part of ASC Exhibits L, R, and T. In ASC Exhibit L  
8 Attachment L-3, ASC Exhibit R Attachment R-1, and ASC Exhibit T Attachment  
9 T-4, Idaho Power described its methodology for assessing the proposed facility’s  
10 impact to visual resources. ASC Exhibit R Attachment R-1, states as follows:

11 The methodology described in Attachment R-1 of this document  
12 was applied to the impact assessment and significance determination  
13 presented in Exhibits L, R, and T. This methodology, though rooted  
14 in impact assessment procedures established by the Bureau of Land  
15 Management (BLM) and United States Department of Agriculture  
16 Forest Service (USFS), addresses feedback from the Oregon  
17 Department of Energy (ODOE) received via Request for Additional  
18 Information (RAI) R-24, asking that the definition of “significance”  
19 provided in the Energy Facility Siting Council’s (EFSC or Council)  
20 rules at OAR 345-001-0010(53) be considered in the analysis.<sup>30</sup>

21 For important context, the RAI mentioned in that summary reads:

22 The visual impact assessment in Exhibit R, and IPC’s conclusions whether the  
23 project will result in a significant visual impact is based entirely on impact  
24 assessment methodologies used by the BLM and USFS. Although EFSC rules do  
25 not mandate a particular visual assessment methodology (only that it be described  
26 in detail), the basis of the EFSC findings pertaining to IPC’s compliance with the  
27 Scenic Resource Standard (and the findings related to protected areas and recreation  
28 areas) is whether the facility will have a “significant adverse impact” after taking  
29 into account mitigation (see OAR 345-022-0080).

30 Exhibit R (and its attachments) do not consider the definition of “significant” set  
31 forth in the Council’s rules at OAR 345-001-0010(53) when drawing its  
32 conclusions using the BLM/USFS methodologies. Provide an analysis of how the

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<sup>29</sup> Lois Barry’s Exceptions to Administrative Law Judge Webster’s Rulings: Motion for Summary Determination: Issue SR-6 at 2 (June 30, 2022).

<sup>30</sup> Ruling and Order on Motion for Summary Determination on Contested Case Issue SR-6 at 3.

1 impact “rating” for each potentially affected scenic resource supports an affirmative  
2 Council finding on the Scenic Resource Standard (taking into account mitigation).  
3 That analysis should address and incorporate the EFSC definition of “significant”  
4 when drawing conclusions concerning visual impacts.<sup>31</sup>

5 Ms. Barry challenges the portion of Undisputed Fact #4 that summarizes the purpose of  
6 the RAI as “asking that the definition of ‘significance’ provided in the Energy Facility Siting  
7 Council’s (EFSC or Council) rules at OAR 345-001-0010(53) be considered in the analysis.” She  
8 argues that the RAI was asking for more than just consideration of the definition of significance.  
9 Instead, Ms. Barry asserts Idaho Power was being asked to provide an analysis supporting the  
10 conclusion that the Project will not result in significant impacts.<sup>32</sup>

11 The distinction Ms. Barry is trying to make is not entirely clear. If Ms. Barry is arguing  
12 that ODOE was not at all requesting that Idaho Power consider the “significance” definition, she  
13 is wrong. The record evidence shows that ODOE requested Idaho Power to provide additional  
14 analysis supporting the conclusion that impacts would be less than significant *because Idaho*  
15 *Power’s prior analysis had not adequately considered EFSC’s definition of “significant.”*<sup>33</sup> Idaho  
16 Power revised its methodology to more specifically address the definition of “significant,” and  
17 ODOE approved of this revised methodology.<sup>34</sup> If Ms. Barry is arguing that Idaho Power missed  
18 the mark in responding to the RAI by addressing the significance definition and not providing  
19 additional analysis supporting the conclusion that the Project will not result in significant impacts,  
20 her argument relies on a distinction without a difference. When Idaho Power made changes to its

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<sup>31</sup> ASC, Exhibit R, Attachment R-1 at R-1-1 (ODOE - B2HAPPDoc3-35 ASC 18\_Exhibit R\_Scenic Resources\_ASC 2018-09-28. Page 140 of 570).

<sup>32</sup> Lois Barry’s Exceptions to Administrative Law Judge Webster’s Rulings: Motion for Summary Determination: Issue SR-6 at 3.

<sup>33</sup> ASC, Exhibit R, Attachment R-1 at R-1-1 (ODOE - B2HAPPDoc3-35 ASC 18\_Exhibit R\_Scenic Resources\_ASC 2018-09-28. Page 140 of 570) (emphasis added).

<sup>34</sup> ASC, Exhibit R, Attachment R-1 at R-1-1 (ODOE - B2HAPPDoc3-35 ASC 18\_Exhibit R\_Scenic Resources\_ASC 2018-09-28. Page 140 of 570).

1 approach to addressing the different aspects of the Council’s definition of “significant” in response  
2 to the RAI, those changes necessarily resulted in changes in the impact analysis because that  
3 analysis applied the definition of “significant” in determining the extent of the Project’s impacts.  
4 That being so, Undisputed Fact #4’s description of the purpose of the RAI would still be accurate.  
5 Thus, under either interpretation, Ms. Barry fails to identify any incorrect finding of fact and should  
6 be rejected.

7 Ms. Barry also asserts that Idaho Power improperly relied on that RAI as rationale for not  
8 applying the SMS to assess visual impacts and for applying only “portions” of the SMS. This is  
9 an attempt to argue the sufficiency of Idaho Power’s methodology, which, as discussed above, is  
10 outside the scope of Issue SR-6, and for that reason alone the Council should reject it.  
11 Additionally, this argument is unrelated to resolution of SR-6, because it does not challenge any  
12 factual finding from the Hearing Officer’s ruling on Idaho Power’s MSD of SR-6. Moreover, in  
13 the RAI, ODOE specifically critiqued the fact that Idaho Power’s “conclusions whether the project  
14 will result in a significant visual impact [are] *based entirely on impact assessment methodologies*  
15 *used by the BLM and USFS.”*<sup>35</sup> The plain text of the RAI clearly states that ODOE did not approve  
16 of Idaho Power’s initial analyses, because those analyses were based solely on the BLM and USFS  
17 methodologies—including the SMS—which ODOE deemed inadequate for applying the  
18 Council’s definition of “significant” to demonstrate compliance with EFSC standards. Therefore,  
19 there is no genuine question of fact that Idaho Power’s divergence from the SMS was consistent  
20 with, and not a manipulation as alleged by Ms. Barry, of the RAI.

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<sup>35</sup> ASC, Exhibit R, Attachment R-1 at R-1-1 (ODOE - B2HAPPDoc3-35 ASC 18\_Exhibit R\_Scenic Resources\_ASC 2018-09-28. Page 140 of 570) (emphasis added).

1 For these reasons, in Exception 1, Ms. Barry has not identified any error in the Hearing  
2 Officer’s findings of fact relevant to SR-6 and Idaho Power requests that the Council adopt without  
3 modification the Hearing Officer’s findings and conclusions of law relevant to SR-6.

4 **3. Lois Barry, Issue SR-6, Exception 2**

5 Ms. Barry takes exception to Undisputed Fact #7 in the Hearing Officer’s Ruling on Idaho  
6 Power’s MSD for SR-6 regarding how Idaho Power’s visual impact assessment methodology  
7 addressed viewer sensitivity and subjective value:<sup>36</sup>

8 7. In its visual assessment analyses, Idaho Power conservatively assumed the  
9 highest possible degree of sensitivity and subjective value for each resource  
10 evaluated. For example, in ASC Exhibit R Attachment R-1, Idaho Power explained:

11 Viewer groups associated with each resource were evaluated to  
12 understand certain characteristics that inform the extent to which  
13 potential changes in landscape character and quality would be  
14 perceived (perception of change). This assessment assumes a high  
15 sensitivity exists among all viewer groups based on the  
16 identification of the resource as important in a planning document.  
17 Therefore, this assessment instead focuses on understanding  
18 characteristics that describe the relationship of the observer to the  
19 potential impact, and the landscape context of that relationship.  
20 Viewer characteristics assessed included viewer location (distance),  
21 viewer geometry (superior, inferior, or at grade), and viewer  
22 duration or exposure (BLM 1986). The landscape context included  
23 consideration of landscape type – i.e., focal or panoramic.<sup>37</sup>

24 Ms. Barry asserts that Idaho Power improperly “substituted [physical] position for viewers’  
25 perception” in the Company’s visual impact assessment methodology and that the Hearing Officer  
26 “err[ed] in accepting Idaho Power’s skewed analysis of viewer’s positions as an indicator of

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<sup>36</sup> Lois Barry’s Exceptions to Administrative Law Judge Webster’s Rulings: Motion for Summary Determination: Issue SR-6 at 3-4.

<sup>37</sup> Ruling and Order on Motion for Summary Determination on Contested Case Issue SR-6 at 5.

1 viewer’s ‘perception’ of changes to scenic, recreation and protected areas.”<sup>38</sup> However,  
2 Ms. Barry’s exception fails for the following reasons. First, her arguments in this exception are  
3 another attempt to argue the sufficiency of Idaho Power’s methodology, which is outside the scope  
4 of Issue SR-6, and for that reason alone should be rejected. Furthermore, Undisputed Fact #7 is a  
5 factual description of the methodology Idaho Power applied to the Project. While Ms. Barry may  
6 disagree with Idaho Power’s choice of methodology, her exception does not identify, or attempt  
7 to identify, any errors in how the hearing officer described the methodology Idaho Power applied.  
8 Put another way, Ms. Barry is arguing about *what Idaho Power should have done*, but Undisputed  
9 Fact #7 simply describes *what Idaho Power did*.

10 For these reasons, Idaho Power requests that the Council adopt without modification the  
11 Hearing Officer’s findings and conclusions of law relevant to SR-6.

12 **4. Lois Barry, Issue SR-6, Exception 3**

13 Ms. Barry takes exception to the following findings of fact (Undisputed Facts #1-3 in the  
14 Hearing Officer’s Ruling on Idaho Power’s MSD for SR-6) discussing the Second Amended  
15 Project Order and the requirements for a visual impact assessment methodology:

16 1. In the Department’s Second Amended Project order for the proposed Boardman  
17 to Hemingway Transmission Line project (B2H Project or proposed facility), the  
18 Department ordered as follows with regard to Idaho Power’s methodology for  
19 assessing the visual impacts of the B2H Project on scenic resources:

20 A visual impact assessment is required as part of Exhibit R; while  
21 no specific methodology is required by EFSC rule, the applicant  
22 must demonstrate why the proposed facility is [in] compliance with  
23 the Scenic Resources standard. Visual simulations or other visual  
24 representations are not required, but can provide important evidence  
25 for use by the Department and Council in understanding the  
26 potential visual impact of the proposed facility to Scenic Resources.

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<sup>38</sup> Lois Barry’s Exceptions to Administrative Law Judge Webster’s Rulings: Motion for Summary Determination: Issue SR-6 at 4.

1 . . .  
2 2. The Second Amended Project Order provided similar direction with regard to  
3 Exhibit T and the Recreation standard:

4 A visual impact assessment is required as part of Exhibit T; while  
5 no specific methodology is required by EFSC rule, the applicant  
6 must demonstrate why the proposed facility is [in] compliance with  
7 the Recreation standard. Visual simulations or other visual  
8 representations are not required, but can provide important evidence  
9 for use by the Department and Council in understanding the  
10 potential visual impact of the proposed facility to important  
11 Recreation sites.

12 3. The Second Amended Project Order also provided the same direction with regard  
13 to Exhibit L and the Protected Area standard: “A visual impact assessment is  
14 required as part of Exhibit L; while no specific methodology are required by EFSC  
15 rule, the applicant must demonstrate why the proposed facility is [in] compliance  
16 with the Protected Areas standard.”<sup>39</sup>

17 Ms. Barry argues that the Project Order required Idaho Power to demonstrate only  
18 compliance with the applicable siting standards, and those standards all focus on impacts to  
19 resources, but not to visitors to those resources.<sup>40</sup> Ms. Barry argues that the Project Order  
20 incorrectly failed to acknowledge the EFSC definition of “significant.”

21 First, Ms. Barry’s “note[s] that the three Standards cited refer to areas, not to visitors to  
22 those areas.”<sup>41</sup> However, she provides no argument explaining the relevance of that statement to  
23 her exception or how Undisputed Facts #1-3 should be amended to address her concerns.  
24 Moreover, Undisputed Facts #1-3 are quotations from the Second Amended Project Order.  
25 Therefore, unless Ms. Barry shows that the hearing officer misquoted that order, there can be no

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<sup>39</sup> Ruling and Order on Motion for Summary Determination on Contested Case Issue SR-6 at 2-3.

<sup>40</sup> Lois Barry’s Exceptions to Administrative Law Judge Webster’s Rulings: Motion for Summary Determination: Issue SR-6 at 4.

<sup>41</sup> Lois Barry’s Exceptions to Administrative Law Judge Webster’s Rulings: Motion for Summary Determination: Issue SR-6 at 4.

1 basis for disputing those facts. For those reasons, the Council should reject this portion of Ms.  
2 Barry’s Exception 3.

3           Next, Ms. Barry argues: “Reliance on these Standards without acknowledging the EFSC  
4 definition of ‘significance’ limits the scope of the ALJ’s decision.”<sup>42</sup> Similar to the above, Ms.  
5 Barry provides no argument explaining the relevance of her statement to her exception or how  
6 Undisputed Facts #1-3 should be amended to address her concerns, and for that reason, the Council  
7 should reject this argument. Even so, to the extent Ms. Barry is asserting that the Second Amended  
8 Project Order did not explicitly reference the Council’s definition of significant, it is not clear how  
9 that would limit the scope of the Hearing Officer’s decision. Each of the three siting standards  
10 cited in the sections of the Second Amended Project Order quoted above require Idaho Power to  
11 demonstrate that impacts to the relevant resources will be less than significant as the Council has  
12 defined that term in its rules.<sup>43</sup> Importantly, in the Company’s visual impact assessment  
13 methodology, Idaho Power analyzed the Council’s definition of significant and incorporated each  
14 clause of that definition into its analysis.<sup>44</sup> The fact that the Second Amended Project Order did  
15 not cite the Council’s definition is immaterial to whether Idaho Power adequately interpreted that  
16 definition when demonstrating compliance with the siting standards.

17           For these reasons, Ms. Barry’s Exception 3 has not identified any error in the challenged  
18 factual findings and Idaho Power requests that the Council adopt without modification the Hearing  
19 Officer’s findings and conclusions of law relevant to SR-6.

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<sup>42</sup> Lois Barry’s Exceptions to Administrative Law Judge Webster’s Rulings: Motion for Summary Determination: Issue SR-6 at 4.

<sup>43</sup> OAR 345-022-0040; OAR 345-022-0080; OAR 345-022-0100.

<sup>44</sup> ASC, Exhibit R, Attachment R-1 at R-1-5 (ODOE - B2HAPPDoc3-35 ASC 18\_Exhibit R\_Scenic Resources\_ASC 2018-09-28. Page 144 of 570).

1           **5.       Lois Barry, Issue SR-6, Exception 4**

2           Ms. Barry takes exception to Undisputed Facts #5, 6, and 7 in the Hearing Officer’s Ruling  
3 on Idaho Power’s MSD for SR-6 summarizing Idaho Power’s description of its methodology:

4           5. Idaho Power’s methodology for assessing impact to visual resources  
5 incorporated the BLM visual “sensitivity level” criterion and the USFS visual  
6 “concern” criterion, both of which measure the degree to which viewers  
7 subjectively value a visual resource. Scenic resources that viewers value highly are  
8 considered “highly sensitive” (under the BLM VRM) or of “high concern” (under  
9 the USFS Scenery Management System (SMS)). (See ODOE -B2HAPPDoc3-35  
10 ASC 18\_Exhibit R\_Scenic Resources\_ASC 2018-09-28, page 147.)

11          6. In the ASC, Idaho Power explained its visual impact assessment methodology  
12 for establishing baseline conditions as follows:

13                   Baseline conditions were established by assessing indicators of scenic  
14 quality/attractiveness and landscape character for each resource. The  
15 assessment was completed using a combination of general observations  
16 made during field visits, baseline data collected at representative KOPs [key  
17 observation points], and review of landscape features relative to Project  
18 components using Google Earth. These data were used to identify baseline  
19 landscape character and scenic quality for each scenic resource. Viewer  
20 groups were also identified as part of establishing baseline conditions.  
21 KOPs were identified through review of applicable land use and resource  
22 plans, consultation with agencies and organizations, and viewshed analysis.  
23 The KOPs used in the analysis are indicated on the maps included as  
24 Attachment R-2.

25  
26                   The analysis area includes scenic resources administered by the BLM and  
27 USFS. Both agencies have established baseline scenic resources inventory  
28 procedures:

29  
30                   • The BLM manages visual resources through the Visual Resource  
31 Management System (BLM 1986). Visual values are established through  
32 the visual resource inventory (VRI) process, which classifies scenery based  
33 on the assessment of three components: scenic quality, visual sensitivity,  
34 and distance.

35  
36                   • The USFS manages scenic resources through the Visual Management  
37 System established in The National Forest Management, Volume 2,  
38 Agricultural Handbook 462 (1974) to inventory, classify, and manage lands  
39 for visual resource values. In 1995, the USFS visual resource management  
40 guidelines and monitoring techniques evolved into the Scenery



1 Management System (SMS) as described in *Landscape Aesthetics: A*  
2 *Handbook for Scenic Management, Agricultural Handbook* (USFS 1995).  
3 The USFS describes baseline condition in a similar manner; however  
4 baseline components include measures of scenic attractiveness and  
5 integrity, landscape visibility (i.e., distance zones), and concern level (i.e.,  
6 sensitivity).<sup>45</sup>

7 Because analogous concepts to scenic quality are found in the USFS SMS  
8 as scenic attractiveness and in the BLM Visual Resource Management  
9 system as scenic quality, the approach and terminology used by these land  
10 management agencies was used to assess baseline conditions on lands  
11 administered by these agencies. In other words, the BLM system was used  
12 on BLM lands and USFS system was used on USFS lands. To address  
13 scenic resources on non-BLM or non-USFS lands, the method that most  
14 closely matched the prevailing geographic location and physiography of the  
15 resource were used according to the following conventions:

- 16 • BLM methods were applied to scenic resources in non-forested areas.
- 17 • USFS methods were applied to scenic resources in forested areas.

18 7. In its visual assessment analyses, Idaho Power conservatively assumed the highest  
19 possible degree of sensitivity and subjective value for each resource evaluated. For  
20 example, in ASC Exhibit R Attachment R-1, Idaho Power explained:

21 Viewer groups associated with each resource were evaluated to understand certain  
22 characteristics that inform the extent to which potential changes in landscape  
23 character and quality would be perceived (perception of change). This assessment  
24 assumes a high sensitivity exists among all viewer groups based on the  
25 identification of the resource as important in a planning document. Therefore, this  
26 assessment instead focuses on understanding characteristics that describe the  
27 relationship of the observer to the potential impact, and the landscape context of  
28 that relationship. Viewer characteristics assessed included viewer location  
29 (distance), viewer geometry (superior, inferior, or at grade), and viewer duration or  
30 exposure (BLM 1986). The landscape context included consideration of landscape  
31 type – i.e., focal or panoramic.

32 Ms. Barry argues that Idaho Power visual impact assessment methodology “is accepted as  
33 a logical lead into the description of Viewer Groups in #7,” but “Idaho Power ‘instead’ focuses on

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<sup>45</sup> Ruling and Order on Motion for Summary Determination on Contested Case Issue SR-6 at 4-5.

1 viewer location, angle of sight, and for how long.”<sup>46</sup> Ms. Barry’s exception is flawed for the  
2 following reasons. First, Ms. Barry provides no argument explaining the relevance of her  
3 statement to her exception or how Undisputed Facts #5-7 should be amended to address her  
4 concerns. Second, Undisputed Facts #5-7 are descriptions of Idaho Power’s visual impact  
5 assessment methodology, comprised primarily of quotations from the ASC; and Ms. Barry has not  
6 identified any flaws in those quotes or descriptions.

7 Next, Ms. Barry asserts that the following text from Undisputed Fact #6 is misleading  
8 because the 1974 and 1995 USFS manuals “are far from analogous”:<sup>47</sup> “Because analogous  
9 concepts to scenic quality are found in the USFS SMS as scenic attractiveness and in the BLM  
10 Visual Resource Management system as scenic quality, . . .”<sup>48</sup> However, Ms. Barry’s argument  
11 fails as follows. First, the referenced text is a direct quote from ASC, Exhibit R.<sup>49</sup> While Ms.  
12 Barry may disagree with the ASC’s description of the relationship between the 1974 and 1995  
13 USFS manuals, Ms. Barry has not identified any flaws in the quote itself. Second, while Idaho  
14 Power disagrees with Ms. Barry’s description of the relationship between the two manuals, even  
15 if she was correct, it would not be relevant to SR-6, which is purely a legal issue unrelated to the  
16 manuals.

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<sup>46</sup> Lois Barry’s Exceptions to Administrative Law Judge Webster’s Rulings: Motion for Summary Determination: Issue SR-6 at 4, 5.

<sup>47</sup> Lois Barry’s Exceptions to Administrative Law Judge Webster’s Rulings: Motion for Summary Determination: Issue SR-6 at 5.

<sup>48</sup> Ruling and Order on Motion for Summary Determination on Contested Case Issue SR-6 at 5.

<sup>49</sup> See ASC, Exhibit R, Attachment R-1 at R-1-8 (ODOE – B2HAPPDoc3-35 ASC 18\_Exhibit R\_Scenic Resources\_ASC 2018-09-28. Page 147 of 570).

1 For these reasons, Ms. Barry’s Exception 4 has not identified any error in the Hearing  
2 Officer’s factual findings, and for that reason Idaho Power requests that the Council adopt without  
3 modification the Hearing Officer’s findings and conclusions of law relevant to SR-6.

4 **6. Lois Barry, Issue SR-6, Exception 5**

5 Ms. Barry takes exception to Undisputed Fact #8 in the Hearing Officer’s Ruling on Idaho  
6 Power’s MSD for SR-6 quoting ODOE’s discussion of the visual impacts assessment methodology  
7 in the Proposed Order:<sup>50</sup>

8 8. In the Proposed Order, the Department outlined Idaho Power’s three-part process  
9 for implementing the visual impact methodology and assessing impacts: . . .<sup>51</sup>

10 Ms. Barry argues that the Hearing Officer “assume[d] that a statement’s appearance in the ODOE  
11 Proposed Order is evidence of compliance,” and that “ODOE did not conduct due diligence  
12 assessing Idaho Power’s ASC Exhibits R, T & L.”<sup>52</sup> However, again, Ms. Barry misses the mark.  
13 First, the factual finding that Ms. Barry challenges is primarily quoted text from the Proposed  
14 Order; the Hearing Officer did not assume any facts in quoting what was in that order. Moreover,  
15 Ms. Barry has simply made a conclusory assertion regarding ODOE’s analysis. Ms. Barry has not  
16 provided any specific allegations of the purported inadequate review. Contrary to Ms. Barry’s  
17 conclusory assertion, the record clearly demonstrates ODOE reviewed Idaho Power’s  
18 methodology.<sup>53</sup> For these reasons, Ms. Barry has not identified any error in the Hearing Officer’s

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<sup>50</sup> Lois Barry’s Exceptions to Administrative Law Judge Webster’s Rulings: Motion for Summary Determination: Issue SR-6 at 5.

<sup>51</sup> Ruling and Order on Motion for Summary Determination on Contested Case Issue SR-6at 5-7.

<sup>52</sup> Lois Barry’s Exceptions to Administrative Law Judge Webster’s Rulings: Motion for Summary Determination: Issue SR-6 at 5.

<sup>53</sup> ASC, Exhibit R, Attachment R-1 at R-1-1 (ODOE - B2HAPPDoc3-35 ASC 18\_Exhibit R\_Scenic Resources\_ASC 2018-09-28. Page 140 of 570) (summarizing ODOE’s review). Idaho Power addresses in greater detail this concern regarding ODOE’s review of the methodology in the Company’s response to STOP B2H, Issue SR-7, Exception 2 below.

1 factual finding, and for that reason Idaho Power requests that the Council reject Exception 5 and  
2 adopt without modification the Hearing Officer’s findings and conclusions of law relevant to SR-6.

3 **7. Lois Barry, Issue SR-6, Exception 6**

4 Ms. Barry also takes exception to Undisputed Fact #9 in the Hearing Officer’s Ruling on  
5 Idaho Power’s MSD for SR-6, which was incorporated by reference into the Proposed Contested  
6 Case Order:

7 9. In the Proposed Order, the Department concurred with Idaho Power’s  
8 methodology for assessing visual impacts and recommended that Council, in its  
9 review, concur with the methodology. The Department identified the following  
10 reasons for its concurrence:

11 . . .

12 \* The applicant adapted each of the [BLM and USFW]  
13 methodologies to use evaluative criteria based upon the Council’s  
14 definition of “significant” under OAR 345-001-0010(53);

15 . . .<sup>54</sup>

16 Ms. Barry takes exception to this finding of fact for the same reasons as her exception to  
17 Undisputed Fact #4.<sup>55</sup> However, for the same reasons provided in Idaho Power’s response to  
18 Undisputed Fact #4, Ms. Barry’s exception should be rejected: Ms. Barry provides no argument  
19 explaining the relevance of her statement to her exception or how Undisputed Fact #9 should be  
20 amended to address her concerns; Undisputed Fact #9 is a description of the Proposed Order,  
21 comprised primarily of quoted text; and Ms. Barry has not identified any flaws in those quotes or  
22 descriptions; and, ODOE’s statement that Idaho Power “adapted each of the [BLM and USFW]  
23 methodologies" is supported by the record, which clearly states that Idaho Power’s methodology

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<sup>54</sup> Ruling and Order on Motion for Summary Determination on Contested Case Issue SR-6 at 6-7.

<sup>55</sup> See Lois Barry’s Exceptions to Administrative Law Judge Webster’s Rulings: Motion for Summary Determination: Issue SR-6 at 6 (taking exception to Undisputed Fact #9 in the Hearing Officer’s ruling but stating only “See Exception to Fact # 4” as the basis for the exception).

1 is “rooted” in the USFS and BLM methodologies but tailored to address the EFSC definition of  
2 “significant.”<sup>56</sup>

3 For these reasons, Ms. Barry has not identified any error in the Hearing Officer’s factual  
4 finding, and for that reason Idaho Power requests that the Council reject Exception 6 and adopt  
5 without modification the Hearing Officer’s findings and conclusions of law relevant to SR-6.

6 **8. Lois Barry, Issue SR-6, Exception 7**

7 Ms. Barry takes exception to Undisputed Fact #10 in the Hearing Officer’s Ruling on Idaho  
8 Power’s MSD for SR-6 describing the USFS SMS:<sup>57</sup>

9 10. The 1995 USFS Handbook includes a chapter on “Constituent Information.”  
10 Motion, Exhibit G at 65-78. The chapter “explains the importance of constituent  
11 information on scenery management, recreation management, and forest planning”  
12 and “examines the significance of scenic quality and aesthetic experience to people:  
13 to visitors of a National Forest; to people as part of the local setting in which they  
14 live; [and] to people living a far distance from the Forest.” Id. at 63, 65. As the  
15 “Context” for constituent information, the chapter notes:

16 The importance of constituent information as a foundation for  
17 understanding and identifying valued landscape attributes,  
18 landscape character, and scenic integrity cannot be over emphasized  
19 especially from a “cultural” landscape perspective. Constituent  
20 information is an essential ingredient in all phases of the Scenery  
21 Management System.<sup>58</sup>

22 Ms. Barry argues that the selected quotes from the SMS are misleading and offers what she  
23 deems to be a more relevant excerpt.<sup>59</sup> However, Undisputed Fact #10 describes the contents of  
24 the SMS and is comprised primarily of quoted text. Because Ms. Barry has not identified any text

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<sup>56</sup> See ASC, Exhibit R, at R-3 through R-8 (ODOE - B2HAPDoc3-35 ASC 18\_Exhibit R\_Scenic Resources\_ASC 2018-09-28. Page 7-12 of 570).

<sup>57</sup> Lois Barry’s Exceptions to Administrative Law Judge Webster’s Rulings: Motion for Summary Determination: Issue SR-6 at 6.

<sup>58</sup> Ruling and Order on Motion for Summary Determination on Contested Case Issue SR-6 at 7.

<sup>59</sup> Lois Barry’s Exceptions to Administrative Law Judge Webster’s Rulings: Motion for Summary Determination: Issue SR-6 at 6.

1 that was misquoted or misconstrued in the contents of the SMS, the Council should reject this  
2 exception for that reason alone. Additionally, Ms. Barry’s proposed addition is not relevant to  
3 SR-6, which is purely a legal issue.

4 For these reasons, Ms. Barry has not identified any error in the Hearing Officer’s factual  
5 finding and Idaho Power requests that the Council reject Exception 7 and adopt without  
6 modification the Hearing Officer’s findings and conclusions of law relevant to SR-6.

7 **9. Lois Barry, Issue SR-6, ALJ Opinions, Exception 1**

8 Ms. Barry next takes exception to several statements in the “Opinion” section of the  
9 Hearing Officer’s Ruling on Idaho Power’s MSD for SR-6. In her first exception to the Hearing  
10 Officer’s Opinions, Ms. Barry argues that the Hearing Officer failed to view all evidence in a light  
11 most favorable to the nonmoving parties and ignored Ms. Barry’s evidence, which included a  
12 definition of “perception.”<sup>60</sup> As explained above in response to STOP B2H’s exception for SR-6,  
13 there was no issue of fact relevant to resolution of SR-6 because the parties all agreed on the only  
14 relevant fact—that Idaho Power did not incorporate data regarding visitors’ subjective opinions  
15 into the visual impact assessments. The only remaining question was an issue of law—whether  
16 any Council rules require an applicant to include such data. Ms. Barry’s definition of “perception”  
17 is not relevant to that analysis, because “perception” is not an applicable standard or a defined term  
18 in EFSC rules. For these reasons, Ms. Barry’s exception has not identified any error in the Hearing  
19 Officer’s review of the MSD record and Idaho Power requests that the Council adopt without  
20 modification the Hearing Officer’s findings and conclusions of law relevant to SR-6.

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<sup>60</sup> Lois Barry’s Exceptions to Administrative Law Judge Webster’s Rulings: Motion for Summary Determination:  
Issue SR-6 at 6.

1           **10. Lois Barry, Issue SR-6, ALJ Opinions, Exception 2**

2           Ms. Barry takes exception to the following conclusion of law in the Hearing Officer’s  
3 Ruling on Idaho Power’s MSD for SR-6 concluding that no EFSC standard requires a specific  
4 visual impacts assessment methodology:

5           First, as a matter of law, the Council’s rules do not require an applicant to employ  
6 a specific methodology for assessing visual impacts. The Scenic Resources,  
7 Recreation and Protective Areas standards simply require that the applicant  
8 demonstrate that the proposed facility is not likely to result in significant adverse  
9 impacts to identified resources. Consequently, the fact that Idaho Power did not  
10 collect constituent information in accordance with the USFS SMS does not  
11 invalidate the visual impact assessments.<sup>61</sup>

12           Ms. Barry argues that the Hearing Officer erred by citing the siting standards only, and not  
13 referencing the Council’s definition of “significant.”<sup>62</sup> However, the Council’s definition of  
14 “significant” applies to all the siting standards and applies regardless of whether it is set forth  
15 specifically in the order, so the fact that the Hearing Officer did not separately cite to the Council’s  
16 definition does not affect the validity of the Hearing Officer’s conclusion.

17           Ms. Barry also argues that Idaho Power failed to provide evidence to support its  
18 conclusions that impacts would be less than significant. However, this broad challenge is outside  
19 the scope of SR-6, which relates to a specific legal question about whether the Company was  
20 required to incorporate subjective evaluations of visual impacts. Moreover, Ms. Barry’s assertion  
21 is false; Idaho Power provided its analysis demonstrating that impacts would be less than  
22 significant in Exhibits L, R, and T of the ASC. For these reasons, Ms. Barry’s exception has not  
23 identified any error in the Hearing Officer’s legal conclusion and Idaho Power requests that the

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<sup>61</sup> Ruling and Order on Motion for Summary Determination on Contested Case Issue SR-6 at 12-13.

<sup>62</sup> Lois Barry’s Exceptions to Administrative Law Judge Webster’s Rulings: Motion for Summary Determination: Issue SR-6 at 6-7.

1 Council adopt without modification the Hearing Officer’s findings and conclusions of law relevant  
2 to SR-6.

3 **11. Lois Barry, Issue SR-6, ALJ Opinions, Exception 3**

4 Ms. Barry takes exception to the following conclusion of law in the Hearing Officer’s  
5 Ruling on Idaho Power’s MSD for SR-6 addressing the limited parties’ arguments that Idaho  
6 Power bore the burden of proving that its visual impacts assessment methodology was  
7 “reasonable”:

8 Second, to the extent Stop B2H and Ms. Barry now contend that Idaho Power’s  
9 chosen methodology is “unreasonable” and the visual impact assessments are “not  
10 supported by substantial evidence,” these contentions exceed the scope of Issue SR-  
11 6. As explained above, the Council granted Stop B2H and Ms. Barry standing on  
12 whether “Applicant’s visual impact analysis failed to incorporate Oregonians’  
13 subjective evaluation of their resources.” *Amended Order on Party Status* at 20.  
14 Stop B2H’s and Ms. Barry’s new challenges to Idaho Power’s visual impact  
15 assessments may not be considered in the contested case. *See generally* ORS  
16 469.370(5)(b); OAR 345-015-0016(3).<sup>63</sup>

17 Ms. Barry argues that the absence of evidence relating to Oregonians’ subjective evaluation  
18 of the impact resources is relevant to resolution of SR-6.<sup>64</sup> However, Ms. Barry’s assertion  
19 misrepresents the Hearing Officer’s conclusion. The Hearing Officer was rejecting Ms. Barry’s  
20 broader challenges to the methodology generally, not Ms. Barry’s specific assertion regarding  
21 subjective evaluations. As the Hearing Officer correctly concluded, Ms. Barry was granted limited  
22 party status to raise only the specific challenge regarding whether subjective evaluations were  
23 required by law to be included in the methodology; Ms. Barry was *not* granted standing to raise

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<sup>63</sup> Ruling and Order on Motion for Summary Determination on Contested Case Issue SR-6 at 13.

<sup>64</sup> Lois Barry’s Exceptions to Administrative Law Judge Webster’s Rulings: Motion for Summary Determination: Issue SR-6 at 7.



1 broader assertions that the methodology was not reasonable.<sup>65</sup> Ms. Barry’s exception has not  
2 identified any error in the Hearing Officer’s legal conclusion and Idaho Power requests that the  
3 Council reject this exception and adopt without modification the Hearing Officer’s findings and  
4 conclusions of law relevant to SR-6.

5 **12. Lois Barry, Issue SR-6, ALJ Opinions, Exception 4**

6 Ms. Barry takes exception to the following conclusion of law in the Hearing Officer’s  
7 Ruling on Idaho Power’s MSD for SR-6 concluding that Idaho Power assumed high sensitivity for  
8 all potentially impacted resources:

9 Third, it is undisputed that, instead of collecting data regarding Oregonians’  
10 subjective evaluation of their resources, Idaho Power conservatively assumed that  
11 Oregonians attached the highest sensitivity value to these resources. Even if Stop  
12 B2H and Ms. Barry were not precluded from contesting generally the  
13 reasonableness of Idaho Power’s methodology, neither limited party has offered a  
14 cogent argument as to why Idaho Power’s approach is unreasonable and/or  
15 invalidates the visual impact analyses. Indeed, as Idaho Power notes, because Idaho  
16 Power assumed that all Oregonians would evaluate the identified scenic, recreation  
17 or protected resource as having the highest sensitivity, more specific constituent  
18 data could only operate to take away from, but not add to, the value placed on the  
19 identified resource in the visual impact assessment.<sup>66</sup>

20 Ms. Barry argues that because Idaho Power assumed high sensitivity, it did not offer proof  
21 to support that conclusion.<sup>67</sup> Ms. Barry’s assertion fails to identify any error in the Hearing  
22 Officer’s conclusion because, as Ms. Barry states, Idaho Power assumed high sensitivity. As a  
23 result, Ms. Barry’s assertion that the Company did not provide evidence of high sensitivity fails to  
24 identify any error in the Hearing Officer’s conclusion that the Company assumed high

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<sup>65</sup> See Amended Order on Party Status, Authorized Representatives and Issues for Contested Case at 30-31 (Dec. 4, 2020).

<sup>66</sup> Ruling and Order on Motion for Summary Determination on Contested Case Issue SR-6 at 13.

<sup>67</sup> Lois Barry’s Exceptions to Administrative Law Judge Webster’s Rulings: Motion for Summary Determination: Issue SR-6 at 7-8.

1 sensitivity. Moreover, as the Hearing Officer concluded, the Company assumed the highest  
2 sensitivity and, therefore, the only potential impact of collecting data could have resulted in  
3 determining that visitors in fact do *not* value certain resources as highly.<sup>68</sup> Idaho Power’s  
4 conservative assumption treated each potentially impacted resource as an important resource.  
5 Evidence that resources are, in fact, highly valued is not necessary when Idaho Power incorporated  
6 into its analysis an assumption that visitors value all resources. For these reasons, Ms. Barry has  
7 not identified any error in the Hearing Officer’s legal conclusions and Idaho Power requests that  
8 the Council adopt without modification the Hearing Officer’s findings and conclusions of law  
9 relevant to SR-6.

10 **13. Lois Barry, Issue SR-6, L.B. Opinion**

11 Ms. Barry includes in her exception a “L.B. Opinion” section in which she makes  
12 additional argument. As an initial matter, Ms. Barry’s arguments are not tied to any specific  
13 exceptions to the Proposed Contested Case Order as required by OAR 345-015-0085(5), and her  
14 claims should therefore be rejected.<sup>69</sup> Nevertheless, should the Council wish to consider  
15 Ms. Barry’s arguments, Idaho Power addresses each of her claims below.

16 Ms. Barry suggests that Idaho Power did not analyze the impact to the affected human  
17 populations.<sup>70</sup> This is not correct. Idaho Power addresses this response below in its response to  
18 STOP B2H, Issue SR-7, Exception 2. As explained there, Idaho Power analyzed potential impacts

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<sup>68</sup> Ruling and Order on Motion for Summary Determination on Contested Case Issue SR-6 at 13.

<sup>69</sup> OAR 345-015-0085(5) (“In an exception, the party shall specifically identify the finding of fact, conclusion of law or, in contested case proceedings on an application for a site certificate or a proposed site certificate amendment, recommended site certificate condition to which the party excepts and shall state the basis for the exception.”).

<sup>70</sup> Lois Barry’s Exceptions to Administrative Law Judge Webster’s Rulings: Motion for Summary Determination: Issue SR-6 at 8.

1 to the affected human population by assessing how viewers would perceive potential changes to  
2 the affected visual resources.<sup>71</sup>

3 Ms. Barry argues that Idaho Power’s analysis would produce a conclusion that impacts will  
4 be less than significant “no matter where the project’s towers are located, or how high or how  
5 numerous they are[.]”<sup>72</sup> This assertion is not supported by evidence in the record. While SR-6  
6 was resolved at the MSD stage, Ms. Barry and STOP B2H attempted to raise related concerns in  
7 their testimony for SR-6. Idaho Power provided expert witness testimony on SR-6 to address the  
8 limited parties’ arguments,<sup>73</sup> and fully briefed this issue in response to arguments that another  
9 limited party raised relating to SR-3.<sup>74</sup> As Idaho Power explained in its expert witness testimony  
10 and Closing Arguments, the Company’s analysis determined that, absent mitigation, the Project  
11 could potentially result in significant visual impacts to several resources.<sup>75</sup> For example, Idaho  
12 Power’s initial analysis of visual impacts determined that the potential impacts to the National  
13 Historic Oregon Trail Interpretive Center (“NHOTIC”), absent mitigation, could potentially be  
14 significant.<sup>76</sup> Therefore, to reduce the potential impacts, the Company modified the design for the  
15 Project segment near the NHOTIC to mitigate those impacts.<sup>77</sup> Specifically, Idaho Power proposes  
16 using H-frame towers with a natina/weathered-steel finish ranging in height from 100 feet to 129

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<sup>71</sup> Idaho Power’s Response Brief and Motion to Strike for Issues R-1, R-2, R-3, R-4, SR-2, SR-3, and SR-7 at 23-26.

<sup>72</sup> Lois Barry’s Exceptions to Administrative Law Judge Webster’s Rulings: Motion for Summary Determination: Issue SR-6 at 8-9.

<sup>73</sup> Kling Testimony, Cross-Examination Hearing Day 6, January 19, 2022 (Tr. Day 6), page 79, line 24 – page 80, line 14.

<sup>74</sup> Idaho Power’s Closing Arguments for Contested Case Issues R-1, R-2, R-3, R-4, SR-2, SR-3, and SR-7 at 53; *see also* Idaho Power’s Response Brief and Motion to Strike for Issues R-1, R-2, R-3, R-4, SR-2, SR-3, and SR-7 at 43 (addressing limited party’s argument that Idaho Power “manipulated” the Council’s definition of “significant”).

<sup>75</sup> ASC, Exhibit R at R-118, R-121 (ODOE - B2HAPPDoc3-35 ASC 18\_Exhibit R\_Scenic Resources\_ASC 2018-09-28. Page 122, 125 of 570).

<sup>76</sup> Proposed Order, Attachment 1: Draft Site Certificate at 32-33 (ODOE - B2HAPPDoc2 Proposed Order on ASC and Attachments 2019-07-02. Page 736-37 of 10016).

<sup>77</sup> Proposed Order, Attachment 1: Draft Site Certificate at 32-33 (ODOE - B2HAPPDoc2 Proposed Order on ASC and Attachments 2019-07-02. Page 736-37 of 10016).

1 feet for towers located directly to the west of the NHOTIC.<sup>78</sup> This proposed mitigation would be  
2 required in the site certificate through ODOE’s Recommended Scenic Resources Condition 3.<sup>79</sup>  
3 This mitigation would not have been necessary if the Company’s methodology had been  
4 manipulated to ensure a determination that impacts would be less than significant. This evidence  
5 demonstrates that, contrary to Ms. Barry’s assertion, Idaho Power’s analysis concluded that the  
6 typical design of the Project could potentially result in significant adverse impacts to some  
7 resources and, for that reason, the Company mitigated those impacts.

8 For these reasons, Ms. Barry’s arguments fail to identify any error in the Hearing Officer’s  
9 conclusions and Idaho Power requests that the Council reject this exception and adopt without  
10 modification the Hearing Officer’s findings and conclusions of law relevant to SR-6.

11 **B. Issue SR-7**

12 The Hearing Officer granted limited party status to STOP B2H to raise SR-7, which asks:

13 *Whether the methods used to determine the extent of an adverse impact of the*  
14 *proposed facility on scenic resources, protected area and recreation along the*  
15 *Oregon Trail were flawed and developed without peer review on public input.*  
16 *Specifically, whether Applicant erred in applying numeric values to the adverse*  
17 *impact and whether Applicant used unsatisfactory measurement*  
18 *locations/observation points in its visual impact assessment.*<sup>80</sup>

19 In the Proposed Contested Case Order, the Hearing Officer concluded:

20 The methodology Idaho Power used to determine the extent of adverse impact of  
21 the proposed facility on scenic resources, protected areas, and recreation along the  
22 Oregon Trail was reasonable and appropriate. Limited parties have not shown that  
23 the methodology was flawed, that Idaho Power erred in applying numeric values to

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<sup>78</sup> ASC, Exhibit R at R-120 (ODOE - B2HAPPDoc3-35 ASC 18\_ Exhibit R\_ Scenic Resources\_ ASC 2018-09-28. Page 124 of 570).

<sup>79</sup> Proposed Order, Attachment 1: Draft Site Certificate at 32-33 (ODOE - B2HAPPDoc2 Proposed Order on ASC and Attachments 2019-07-02. Page 736-37 of 10016).

<sup>80</sup> Second Order on Case Management at 6.

1 the adverse impact, and/or that the Company used unsatisfactory measurement  
2 locations/observation points in its visual impact assessment.<sup>81</sup>

3 STOP B2H filed exceptions to the Hearing Officer’s Proposed Contested Case Order. For  
4 the reasons discussed below, STOP B2H’s exceptions do not identify any incorrect finding of fact  
5 or conclusion of law, and for that reason Idaho Power requests that the Council adopt without  
6 modification the Hearing Officer’s findings and conclusions of law relevant to SR-7.

7 **1. STOP B2H, Issue SR-7, Exception 1**

8 STOP B2H argues that “even though no particular methodology was required for scenic  
9 resource impact analysis, a methodology – rather than an amalgamation of self-serving portions of  
10 established (or, outdated) methodologies – is required.”<sup>82</sup>

11 As an initial matter, STOP B2H’s arguments are not tied to any specific exceptions to the  
12 Proposed Contested Case Order as required by OAR 345-015-0085(5), and their claims should  
13 therefore be rejected.<sup>83</sup> Nevertheless, should the Council wish to consider STOP B2H’s  
14 arguments, Idaho Power addresses her claim below.

15 Moreover, this argument does not demonstrate any failure to comply with applicable EFSC  
16 standards. STOP B2H argues that a methodology is required, but that it should not be an  
17 “amalgamation.” Idaho Power addressed in the Company’s Response Brief the arguments that  
18 STOP B2H raises in this exception.<sup>84</sup> In its brief, the Company explained that Idaho Power  
19 developed a methodology specifically tailored to address the Council’s definition of “significant”

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<sup>81</sup> Proposed Contested Case Order at 142.

<sup>82</sup> STOP B2H Exceptions to Proposed Contested Case Order at 28.

<sup>83</sup> OAR 345-015-0085(5) (“In an exception, the party shall specifically identify the finding of fact, conclusion of law or, in contested case proceedings on an application for a site certificate or a proposed site certificate amendment, recommended site certificate condition to which the party excepts and shall state the basis for the exception.”).

<sup>84</sup> Idaho Power’s Response Brief and Motion to Strike for Issues R-1, R-2, R-3, R-4, SR-2, SR-3, and SR-7 at 20-21.

1 and, in doing so, incorporated relevant elements from the USFS scenic resource inventorying  
2 methodologies to assess the baseline scenic conditions at forested areas and elements from the  
3 BLM’s VRM to assess baseline conditions at non-forested areas.<sup>85</sup> Idaho Power assessed the  
4 magnitude of Project impacts using elements adapted from BLM’s inventorying methodology.<sup>86</sup>  
5 There is no basis in fact or law to support STOP B2H’s conclusion that a visual impact assessment  
6 methodology cannot incorporate elements from existing methodologies.

7 For these reasons, STOP B2H has not identified any error in the Hearing Officer’s  
8 Proposed Contested Case Order and Idaho Power requests that the Council adopt without  
9 modification the Hearing Officer’s findings and conclusions of law relevant to SR-7.

10 **2. STOP B2H, Issue SR-7, Exception 2**

11 STOP B2H includes the following exception:

12 STOP takes exception to the Findings of Fact related to Scenic Resources broadly,  
13 to the extent that any impact “on the affected human population” has been omitted.  
14 This phrase appears in OAR 345-001-0010(52), the definition of “significant” in  
15 the context of impacts, but neither the findings related to Scenic Resources, nor the  
16 Conclusion of Law, nor the Opinion contain any discussion on the impacts to the  
17 affected human population. Instead, IPC has merely made assumptions about  
18 viewer sensitivity, without actually assessing the significance of real subjective  
19 impacts.<sup>87</sup>

20 STOP B2H further argues that Idaho Power’s assessment of impacts to the affected human  
21 population were “evaluated solely by [Idaho Power’s] attorney and their consultant.”<sup>88</sup>

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<sup>85</sup> Idaho Power / Rebuttal Testimony of Louise Kling (Nov. 12, 2021) / Issues SR-2, SR-3, SR-7, R-1, R-2, R-3 and R-4, pp. 29-30 of 165.

<sup>86</sup> Idaho Power / Rebuttal Testimony of Louise Kling / Issues SR-2, SR-3, SR-7, R-1, R-2, R-3 and R-4, pp. 39-42 of 165.

<sup>87</sup> STOP B2H Exceptions to Proposed Contested Case Order at 28.

<sup>88</sup> STOP B2H Exceptions to Proposed Contested Case Order at 28.

1 As an initial matter, STOP B2H’s exception to the findings of fact “related to Scenic  
2 Resources broadly” fails to “specifically identify the finding of fact” to which STOP excepts and,  
3 their claim should therefore be rejected.<sup>89</sup> Nevertheless, should the Council wish to consider STOP  
4 B2H’s arguments, Idaho Power addresses their claims below.

5 The arguments raised in STOP B2H’s Exception 2 were addressed in the expert witness  
6 testimony of Louise Kling and have been fully briefed. As Idaho Power explained in its Response  
7 Brief on this issue,<sup>90</sup> STOP B2H’s assertion that Idaho Power failed to assess the “impacts to the  
8 affected human population” is wholly inconsistent with the record. In its methodology, Idaho  
9 Power analyzed the Council’s definition of “significant” to determine the framework for  
10 evaluating the significance of potential visual impacts.<sup>91</sup> Idaho Power interpreted the “impacts to  
11 the affected human population” clause of the Council’s definition to mean:

12 The impact on the human population is measured in terms of the viewer’s  
13 perception of impacts to valued scenic attributes of the landscape.<sup>92</sup>

14 The Company further explained its methodology at the hearing in this contested case.  
15 Idaho Power presented testimony from an expert and fact witness, Louise Kling, who has decades  
16 of experience in environmental planning and whom Idaho Power had retained as an expert  
17 consultant to help develop the Company’s visual impact assessment methodology and prepare the  
18 impact assessment.<sup>93</sup> Ms. Kling explained that Idaho Power assumed all visitors would be highly

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<sup>89</sup> OAR 345-015-0085(5).

<sup>90</sup> Idaho Power’s Response Brief and Motion to Strike for Issues R-1, R-2, R-3, R-4, SR-2, SR-3, and SR-7 at 23-26.

<sup>91</sup> ASC, Exhibit R, Attachment R-1 at R-1-5 (ODOE - B2HAPPDoc3-35 ASC 18\_Exhibit R\_Scenic Resources\_ASC 2018-09-28. Page 144 of 570).

<sup>92</sup> ASC, Exhibit R, Attachment R-1 at R-1-5 (ODOE - B2HAPPDoc3-35 ASC 18\_Exhibit R\_Scenic Resources\_ASC 2018-09-28. Page 144 of 570).

<sup>93</sup> See Idaho Power / Rebuttal Testimony of Louise Kling / Issues SR-2, SR-3, SR-7, R-1, R-2, R-3 and R-4, pp. 1-2 of 165 (summarizing Ms. Kling’s professional experience and her role in preparing Idaho Power’s visual impact assessments).

1 sensitive to change, and for that reason collecting data on subjective evaluations could only reduce  
2 the value attributed to the affected resources.<sup>94</sup> However, contrary to STOP B2H’s assertion, Idaho  
3 Power then applied a standardized methodology to assess objective factors that would affect how  
4 the Project will actually impact the scenery visible at the resources in question.<sup>95</sup> Namely, Idaho  
5 Power analyzed the viewers’ location in relation to the Project,<sup>96</sup> the geometric relationship of the  
6 viewer (e.g., whether the view of the Project would be direct and head-on),<sup>97</sup> and the level of  
7 viewers’ exposure to views of the Project and the duration of those views.<sup>98</sup> As a result, Idaho  
8 Power’s methodology accounted for both subjective and objective analyses of impacts to the  
9 affected human population, and STOP B2H’s assertion that the Company did not assess impacts  
10 to viewers is inconsistent with the evidence in the record.

11 Finally, STOP B2H’s assertion that Idaho Power’s methodology was evaluated solely by  
12 the Company and its consultants is clearly inconsistent with the record. STOP B2H bases this

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<sup>94</sup> Ruling and Order on Motion for Summary Determination on Contested Case Issue SR-6 at 13.

<sup>95</sup> Kling Testimony, Cross-Examination Hearing Day 6, January 19, 2022 (Tr. Day 6), page 79, lines 4-14 (“So again, any impact methodology for scenery or visual resource impacts needs to be systematic in the sense that it is standardized. And so by focusing on elements of the analysis that can be reasonably quantified in terms of how a viewer would move towards -- throughout a landscape, that introduces that standardization into the process and allows us to characterize viewer perception. And that, again, is an indicator of the extent to which a viewer would perceive a change.”).

<sup>96</sup> ASC, Exhibit R, Attachment R-1 at R-1-11 (ODOE - B2HAPPDoc3-35 ASC 18\_Exhibit R\_Scenic Resources\_ASC 2018-09-28. Page 150 of 570) (“The degree of perceived visual contrast and scale dominance of an object is influenced by its distance from the observer. As viewing distance increases, the Project would appear smaller and less dominant. Likewise, as distance increases, the apparent contrast of color would decrease (BLM 1986)”).

<sup>97</sup> ASC, Exhibit R, Attachment R-1 at R-1-11 (ODOE - B2HAPPDoc3-35 ASC 18\_Exhibit R\_Scenic Resources\_ASC 2018-09-28. Page 150 of 570) (“Viewer geometry refers to the spatial relationship of the observer to the viewed object (i.e., the Project), including both the vertical and horizontal angles of view (BLM 2013). The vertical angle of view refers to the observer’s elevation relative to the viewed object. The horizontal angle of view refers to the compass direction of the view from the observer to the object. Visibility is typically greater for observers whose viewing angle is directed toward a Project feature than for those with a lateral view.”).

<sup>98</sup> ASC, Exhibit R, Attachment R-1 at R-1-11 (ODOE - B2HAPPDoc3-35 ASC 18\_Exhibit R\_Scenic Resources\_ASC 2018-09-28. Page 150 of 570) (“Viewer duration/exposure refers to the length of time Project features may be in view. This description would disclose whether expected viewer exposure was limited to a short duration or number of viewpoints or prolonged and/or experienced from multiple viewpoints.”).



1 assertion solely on the fact that Idaho Power’s methodology was not peer-reviewed.<sup>99</sup> However,  
2 as explained in the Company’s Response Brief on this issue,<sup>100</sup> ODOE thoroughly assessed the  
3 Company’s methodology through multiple phases of review and comment.<sup>101</sup> As Ms. Kling  
4 explained at the hearing, ODOE’s review of Idaho Power’s methodology involved multiple  
5 meetings in which Idaho Power submitted the methodology for review, incorporated ODOE’s  
6 initial comments into the methodology, made additional changes, and then finally submitted the  
7 methodology for approval.<sup>102</sup>

8 STOP B2H’s Exception 2 does not identify any incorrect finding of law or fact, and for  
9 that reason Idaho Power requests that the Council adopt without modification the Hearing Officer’s  
10 findings and conclusions of law relevant to SR-7.

11 **3. STOP B2H, Issue SR-7, Exception 3**

12 STOP B2H takes exception to the following finding of fact discussing Idaho Power’s  
13 incorporation of elements from federal methodologies into the Company’s visual impact  
14 assessment methodology:

15 Idaho Power’s methodology for assessing impact to visual resources incorporated  
16 the BLM visual “sensitivity level” criterion and the USFS visual “concern”  
17 criterion, both of which measure the degree to which viewers subjectively value a  
18 visual resource. Scenic resources that viewers value highly are considered “highly  
19 sensitive” (under the BLM Visual Resource Management (VRM) or of “high  
20 concern” (under the USFS Scenery Management System (SMS)).<sup>103</sup>

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<sup>99</sup> Idaho Power also explained in its brief that no Council rule requires that a methodology be peer reviewed, and STOP B2H failed to show by a preponderance of the evidence that subjecting the methodology to peer-review would have affected compliance with the Council’s standards. Idaho Power’s Response Brief and Motion to Strike for Issues R-1, R-2, R-3, R-4, SR-2, SR-3, and SR-7 at 22.  
<sup>100</sup> Idaho Power’s Response Brief and Motion to Strike for Issues R-1, R-2, R-3, R-4, SR-2, SR-3, and SR-7 at 21-23.  
<sup>101</sup> ASC, Exhibit R, Attachment R-1 at R-1-1 (ODOE - B2HAPDoc3-35 ASC 18\_Exhibit R\_Scenic Resources\_ASC 2018-09-28. Page 140 of 570) (summarizing ODOE’s review).  
<sup>102</sup> Kling Testimony, Cross-Examination Hearing Day 6, January 19, 2022 (Tr. Day 6), page 195, line 12 – 196, line 6.  
<sup>103</sup> Proposed Contested Case Order at 104.

1 STOP B2H takes exception to this factual finding because (1) the evidentiary record indicates that  
2 Idaho Power incorporated “some, but not all” elements from the BLM and USFS methodologies;  
3 (2) Idaho Power did not include “viewer sensitivity” in its methodology; and (3) Idaho Power did  
4 not include data regarding viewers’ subjective evaluations of affected resources.<sup>104</sup>

5 *First*, STOP B2H’s first argument is not relevant to the validity of the Hearing Officer’s  
6 factual finding because STOP B2H’s assertion is consistent with the Hearing Officer’s finding.  
7 The Hearing Officer properly found that Idaho Power incorporated *certain elements* of the BLM  
8 and USFS methodologies; neither the Hearing Officer nor Idaho Power indicated that the Company  
9 incorporated “all” parts of those methodologies. Therefore, STOP B2H has not identified any  
10 error in the Hearing Officer’s finding.

11 *Second*, STOP B2H’s assertion that Idaho Power did not include viewer sensitivity is  
12 entirely incorrect. As discussed above in response to STOP B2H, Issue SR-7, Exception 2, Idaho  
13 Power accounted for viewer sensitivity by assuming that all visitors would be highly sensitive to  
14 change. Idaho Power then incorporated this assumption into its analysis.

15 *Finally*, as explained above in response to STOP B2H’s exception relating to SR-6, no  
16 Council rule requires Idaho Power to incorporate subjective evaluations into its visual impact  
17 assessment. Therefore, STOP B2H’s statement that Idaho Power did not do so is irrelevant to  
18 assessing whether Idaho Power adequately analyzed visual impacts.

19 For these reasons, STOP B2H’s Exception 3 does not identify any incorrect finding of law  
20 or fact, and for that reason Idaho Power requests that the Council adopt without modification the  
21 Hearing Officer’s findings and conclusions of law relevant to SR-7.

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<sup>104</sup> STOP B2H Exceptions to Proposed Contested Case Order at 30.

1           **4.       STOP B2H, Issue SR-7, Exception 4**

2           STOP B2H takes exception to the following finding of fact regarding Idaho Power’s  
3 assumption of high sensitivity:

4           In its visual assessment analyses, Idaho Power conservatively assumed the highest  
5 possible degree of sensitivity and subjective value for each resource evaluated.<sup>105</sup>

6 STOP B2H also takes exception to the following related finding from the Proposed Contested Case  
7 Order:

8           The ALJ finds that because Idaho Power attached the highest viewer sensitivity  
9 value to all of the resources evaluated, data collection on viewers’ subjective  
10 evaluations is unnecessary. Indeed, because Idaho Power assumed a high sensitivity  
11 among all viewer groups, additional constituent information would not add to, but  
12 could potentially reduce, the value that Idaho Power attributed to the affected  
13 resources. By assuming the highest viewer sensitivity, Idaho Power’s methodology  
14 adequately addressed the impacts “on the affected human population” as required  
15 by OAR 345-001-0010(53). Consequently, contrary to the limited parties’  
16 contentions, Idaho Power’s methodology for assessing the project’s visual impacts  
17 does not run afoul of the Council’s Scenic Resources, Protected Areas, and  
18 Recreation standards.<sup>106</sup>

19 STOP B2H takes exception to these findings because (1) Idaho Power did not measure viewer  
20 sensitivity; (2) Idaho Power’s assessment of “viewer group and characteristics” and “viewer  
21 perception” did not incorporate subjective evaluations, but instead measured impacts in terms of  
22 the viewers’ location; (3) Idaho Power included its own subjective evaluations of visual impacts;  
23 and (4) Idaho Power did not apply a “complete, cohesive methodology” to analyze visual  
24 impacts.<sup>107</sup>

25           Idaho Power addressed several of STOP B2H’s assertions in the Company’s MSD for  
26 SR-6, in Ms. Kling’s Rebuttal Testimony, and in the Company’s Closing Arguments. As the

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<sup>105</sup> Proposed Contested Case Order at 105.

<sup>106</sup> Proposed Contested Case Order at 256.

<sup>107</sup> STOP B2H Exceptions to Proposed Contested Case Order at 30-32.

1 Company explained in its MSD for SR-6, no applicable standard requires the Company to  
2 incorporate subjective evaluations of potentially impacted resources when assessing impacts to  
3 those resources.<sup>108</sup> The Company further explained in its Closing Brief that the methodology  
4 applied to assess visual impacts is a complete methodology that fully analyzes the Council’s  
5 definition of “significant.”<sup>109</sup>

6 STOP B2H’s concern that Idaho Power did not measure viewer sensitivity does not provide  
7 any basis to challenge the Hearing Officer’s Proposed Contested Case Order, because the Hearing  
8 Officer agreed with that statement by finding that Idaho Power assumed high sensitivity.<sup>110</sup>  
9 Because the Hearing Officer’s finding is entirely consistent with STOP B2H’s assertion, STOP  
10 B2H has not identified any error in the Hearing Officer’s factual findings.

11 STOP B2H’s assertion that Idaho Power’s methodology analyzed viewers’ physical  
12 relationship with the views of the Project rather than subjective evaluations fails to demonstrate  
13 any error in the Hearing Officer’s order or in the Company’s methodology. Idaho Power’s expert  
14 witness Louise Kling addressed this issue at length in her Rebuttal Testimony and Idaho Power  
15 addressed this issue in the Company’s Closing Arguments. As Ms. Kling explained in her  
16 testimony, Idaho Power assumed the highest input for the “viewer sensitivity” factor of its analysis,  
17 meaning that the Company assumed visitors to any Protected Area, Scenic Resource, or Recreation  
18 Opportunity would be sensitive to change.<sup>111</sup> Ms. Kling further explained at the hearing that Idaho  
19 Power’s intention “was to make an assumption that a high sensitivity to change existed within all

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<sup>108</sup> Idaho Power’s MSD for Contested Case Issues SR-1, SR-4, SR-5, and SR-6 at 16-17.  
<sup>109</sup> Idaho Power’s Response Brief and Motion to Strike for Issues R-1, R-2, R-3, R-4, SR-2, SR-3, and SR-7 at 20-21.  
<sup>110</sup> Proposed Contested Case Order at 256.  
<sup>111</sup> ASC, Exhibit R, Attachment R-1 at R-1-11 (ODOE - B2HAPPDoc3-35 ASC 18 Exhibit R Scenic Resources\_ASC 2018-09-28. Page 150 of 570); Kling Testimony, Cross-Examination Hearing Day 6, January 19, 2022 (Tr. Day 6), page 73, lines 20-24.

1 groups” and “given the high sensitivity that – the viewers' ability to detect change would be  
2 dependent on these elements of viewer geometry, which are well-established in visual resource  
3 methodologies, including the 2013 BLM reference that's cited” in Exhibit R.<sup>112</sup> In other words,  
4 because Idaho Power assumed that all viewers would be sensitive to change, the Company’s  
5 analysis measured how viewers would actually see impacts from the Project by assessing the  
6 objective criteria that affect the extent to which those viewers will be impacted. Ms. Kling further  
7 explained that this assessment of objective criteria that affects viewers “is pretty standard practice”  
8 when trying to “understand[] a viewer's relationship with an object or, in this case, a potential  
9 impact.”<sup>113</sup>

10           Regarding STOP B2H’s argument that Idaho Power’s assessment of visual impacts was  
11 “subjective,” STOP B2H’s characterization of the Company’s methodology is incorrect. As  
12 Ms. Kling explained in her Rebuttal Testimony, “visual resource practitioners follow a  
13 standardized methodology to increase objectivity, and importantly, repeatability to the  
14 process[.]”<sup>114</sup> To ensure that Idaho Power’s methodology would be objective and repeatable, the  
15 Company prepared a methodology that measured objective characteristics (such as viewer  
16 location) and applied a consistent methodology when analyzing impacts to all resources.<sup>115</sup>

17           Finally, STOP B2H’s assertion that Idaho Power’s methodology is not “complete” because  
18 it incorporated elements from other methodologies is illogical. As explained in Idaho Power’s

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<sup>112</sup> Kling Testimony, Cross-Examination Hearing Day 6, January 19, 2022 (Tr. Day 6), page 73, lines 20-24; *id.* at page 74, lines 3-7.

<sup>113</sup> Kling Testimony, Cross-Examination Hearing Day 6, January 19, 2022 (Tr. Day 6), page 73, lines 20-24; *id.* at page 74, lines 8-10.

<sup>114</sup> Idaho Power / Rebuttal Testimony of Louise Kling / Issues SR-2, SR-3, SR-7, R-1, R-2, R-3 and R-4, p. 29 of 165.

<sup>115</sup> See Kling Testimony, Cross-Examination Hearing Day 6, January 19, 2022 (Tr. Day 6), page 83, line 21 – page 84, line 2.

1 Response Brief on this issue,<sup>116</sup> the fact that Idaho Power’s methodology incorporated elements  
2 from different methodologies in no way supports STOP B2H’s conclusion that Idaho Power’s  
3 description of its methodology is incomplete. As explained in detail in Attachment R-1 of the  
4 ASC, Idaho Power developed a methodology specifically tailored to address the Council’s  
5 definition of “significant” and, in doing so, incorporated relevant elements from the USFS scenic  
6 resource inventorying methodologies to assess the baseline scenic conditions at forested areas and  
7 elements from the BLM’s VRM to assess baseline conditions at non-forested areas.<sup>117</sup> Idaho  
8 Power then applied this same complete methodology to assess potential impacts to all affected  
9 resources.<sup>118</sup> The fact that Idaho Power incorporated accepted elements from well-known resource  
10 inventorying methodologies in no way supports STOP B2H’s assertion that the Company’s  
11 methodology is somehow incomplete.

12 For these reasons, STOP B2H’s Exception 4 does not identify any incorrect finding of law  
13 or fact, and Idaho Power requests that the Council adopt without modification the Hearing  
14 Officer’s findings and conclusions of law relevant to SR-7.

15 **5. STOP B2H, Issue SR-7, Exception 5**

16 STOP B2H takes exception to the following summary of Idaho Power’s argument:

17 Idaho Power adds that, contrary to the limited parties’ contention, the Company  
18 could not apply the SMS methodology under the Council’s standards, because the  
19 Department specifically requested that the Company use a methodology that  
20 applied the Council’s definition of “significance.”<sup>119</sup>

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<sup>116</sup> Idaho Power’s Response Brief and Motion to Strike for Issues R-1, R-2, R-3, R-4, SR-2, SR-3, and SR-7 at 20-21.

<sup>117</sup> Idaho Power / Rebuttal Testimony of Louise Kling (Nov. 12, 2021) / Issues SR-2, SR-3, SR-7, R-1, R-2, R-3 and R-4, pp. 29-30 of 165.

<sup>118</sup> Idaho Power / Rebuttal Testimony of Louise Kling / Issues SR-2, SR-3, SR-7, R-1, R-2, R-3 and R-4, p. 29 of 165.

<sup>119</sup> Proposed Contested Case Order at 255.

1 STOP B2H takes exception to this statement for several reason: (1) the SMS “comes the closest”  
2 to assessing impacts on the affected human population; and (2) the SMS has been embraced as  
3 “best practices” that would satisfy the Council’s definition of “significant.”<sup>120</sup>

4 As an initial matter, the statement to which STOP B2H takes exception is not a finding of  
5 fact or conclusion of law; rather, the statement is merely the Hearing Officer’s summary of an  
6 argument that Idaho Power raised. The Hearing Officer’s opinion addressing SR-7 begins in the  
7 next paragraph of the Proposed Contested Case Order. For this reason alone, this exception should  
8 be rejected.

9 Moreover, Idaho Power addressed the Exception 5 concerns in its Closing Brief, where the  
10 Company explained that STOP B2H has not been granted limited party status to raise an issue  
11 regarding application of the SMS.<sup>121</sup> Additionally, as explained above in response to Lois Barry,  
12 Issue SR-6, Exception 1, the RAI clearly states that Idaho Power’s prior analysis based solely on  
13 the federal resource inventorying methodologies—including the SMS—was not acceptable  
14 because it did not directly assess the Council’s definition of “significant.”<sup>122</sup>

15 Further, STOP B2H’s insistence that Idaho Power should have applied the SMS is  
16 improperly raised. As Idaho Power explained in its Closing Brief on this issue,<sup>123</sup> STOP B2H  
17 cannot raise in this contested case any issue relating to the fact that Idaho Power did not apply the  
18 SMS, because STOP B2H failed to raise that issue in its DPO Comments.<sup>124</sup> The Council affirmed

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<sup>120</sup> STOP B2H Exceptions to Proposed Contested Case Order at 32-33.

<sup>121</sup> Idaho Power’s Closing Arguments for Contested Case Issues R-1, R-2, R-3, R-4, SR-2, SR-3, and SR-7 at 21-24.

<sup>122</sup> ASC, Exhibit R, Attachment R-1 at R-1-1 (ODOE - B2HAPPDoc3-35 ASC 18\_Exhibit R\_Scenic Resources\_ASC 2018-09-28. Page 140 of 570).

<sup>123</sup> Idaho Power’s Closing Arguments for Contested Case Issues R-1, R-2, R-3, R-4, SR-2, SR-3, and SR-7 at 21-24.

<sup>124</sup> ORS 469.370(3) (“Any issue that may be the basis for a contested case shall be raised not later than the close of the record at or following the final public hearing prior to issuance of the department’s proposed order. Such issues shall be raised with sufficient specificity to afford the council, the department and the applicant an adequate opportunity to respond to each issue.”).

1 the Hearing Officer’s determination that STOP B2H cannot raise this issue,<sup>125</sup> yet STOP B2H has  
2 repeatedly sought to raise it throughout this contested case. STOP B2H conceded in its Response  
3 Brief that it cannot argue “whether IPC was required to apply the SMS[.]”<sup>126</sup> Strangely, STOP  
4 B2H continues to argue in both its briefs and in its exceptions that the Company somehow erred  
5 because it did not do so. STOP B2H appears to argue that, regardless of whether Idaho Power was  
6 required to apply the SMS, the Company *should have* done so. However, this clear attempt to  
7 circumvent the Council’s prior order is also improper because STOP B2H did not raise *any* issue  
8 regarding the SMS in its DPO Comments. As the Company explained in its Closing Brief, STOP  
9 B2H relied solely on Ms. Barry’s Petition for Party Status as the basis for raising SR-7,<sup>127</sup> and  
10 Ms. Barry conceded in her Petition that she did not discuss the SMS *at all* in her DPO  
11 Comments.<sup>128</sup> Therefore, STOP B2H failed to raise *any* issue regarding the SMS in its DPO  
12 Comments and cannot raise this issue for the first time in this contested case. STOP B2H’s  
13 inappropriate and meritless arguments that Idaho Power erred by not applying the SMS should be  
14 rejected.

15 Additionally, contrary to STOP B2H’s assertion, the SMS is not an adequate tool for  
16 assessing visual impacts, nor would the SMS be helpful in assessing the Council’s specific  
17 definition of “significant.” As Ms. Kling explained during cross-examination, the “SMS is a  
18 planning tool that is used forest wide . . . for the inventory and management of scenic resources.

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<sup>125</sup> EFSC Order on Appeals of Hearing Officer Order on Party Status, Authorized Representatives and Issue at 7 (Nov. 25, 2020).

<sup>126</sup> STOP B2H Closing Argument Response to IPC and ODOE at 35 (Mar. 30, 2022).

<sup>127</sup> STOP B2H Petition for Party Status at 11 (“STOP incorporates by reference, Attachment 3, presented by Lois Barry, STOP B2H Coalition Board member.”).

<sup>128</sup> Lois Barry Petition for Party Status at 4 (“In my previous comments I did not cite [the SMS] because I was unaware of the reference until last week.”).



1 It's . . . not explicitly an impact assessment tool.”<sup>129</sup> Although the BLM methodology has elements  
2 that are “better suited” for assessing impacts,<sup>130</sup> the USFS SMS is “geared more towards an  
3 inventory and planning tool for the National Forest[.]”<sup>131</sup> Because the USFS SMS is an  
4 inventorying tool, it is helpful to establish baseline characteristics, but does *not* provide metrics to  
5 assess the significance of potential impacts to resources.<sup>132</sup>

6       Regarding the use of the SMS to determine whether impacts would be “significant” as the  
7 Council has defined that term, Idaho Power explained in its Response Brief that the Company  
8 initially applied the BLM methodology and the USFS SMS to assess visual impacts, but ODOE  
9 requested that the Company apply a different methodology that specifically addressed the  
10 Council’s definition of “significant.”<sup>133</sup> STOP B2H may disagree with ODOE’s position, but any  
11 argument that the Company should have disregarded such clear guidance from ODOE regarding  
12 what must be included in an ASC should be rejected. For that reason, the preponderance of the  
13 evidence in the record demonstrates that Idaho Power, in fact, could not have applied the USFS  
14 SMS to assess whether visual impacts from the Project would be “significant” as the Council has  
15 defined that term, and instead the Company had to develop its own methodology to assess impacts.

16       For these reasons, STOP B2H has not identified any error in the Hearing Officer’s factual  
17 findings and Idaho Power requests that the Council adopt without modification the Hearing  
18 Officer’s findings and conclusions of law relevant to SR-7.

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<sup>129</sup> Kling Testimony, Cross-Examination Hearing Day 6, January 19, 2022 (Tr. Day 6), page 51, lines 8-11.

<sup>130</sup> Kling Testimony, Cross-Examination Hearing Day 6, January 19, 2022 (Tr. Day 6), page 52, lines 7-10.

<sup>131</sup> Kling Testimony, Cross-Examination Hearing Day 6, January 19, 2022 (Tr. Day 6), page 51, lines 19-20.

<sup>132</sup> Kling Testimony, Cross-Examination Hearing Day 6, January 19, 2022 (Tr. Day 6), page 81, line 23 - page 82, line 3.

<sup>133</sup> ASC, Exhibit R, Attachment R-1 at R-1-1 (ODOE - B2HAPPDoc3-35 ASC 18\_Exhibit R\_Scenic Resources\_ASC 2018-09-28. Page 140 of 570).

1           **6. STOP B2H, Issue SR-7, Exception 6**

2           STOP B2H takes exception to the following rejection of STOP B2H’s proposed  
3 amendments to Scenic Resources Condition 3, which would have required Idaho Power to  
4 underground the Project segment near the NHOTIC:

5           In its Closing Argument on Issue SR-7, STOP B2H proposes a site certificate  
6 condition requiring Idaho Power to underground the transmission line for 1.7 miles  
7 in the area the NHOTIC as a mitigation measure to ensure compliance with the  
8 Scenic Resources standard. Because STOP B2H did not submit this proposed  
9 condition in accordance with the set schedule, it is untimely. Moreover, even if  
10 STOP B2H had submitted this proposal in a timely fashion, it is neither necessary  
11 nor appropriate. As discussed above in connection with Issue SR-2, the Council  
12 lacks jurisdiction to require Idaho Power to underground the project segment near  
13 the NHOTIC. Consequently, this proposed site certificate condition is denied.<sup>134</sup>

14 STOP B2H takes exception to this rejection of its proposed revisions because (1) Idaho Power  
15 concedes that it is technically feasible to construct the Project underground; (2) there is substantial  
16 public concern about impacts near the NHOTIC; and (3) contrary to the Hearing Officer’s  
17 statements, EFSC has the jurisdiction to require undergrounding.<sup>135</sup>

18           Idaho Power fully briefed this issue in the Company’s Closing Argument for SR-2.<sup>136</sup> As  
19 explained in that brief, STOP B2H’s exception is unavailing because, notwithstanding STOP  
20 B2H’s conclusory assertions to the contrary, the Council has determined that it lacks jurisdiction  
21 to require an applicant to construct a facility that the applicant has not proposed. The Council  
22 recently considered an analogous situation in the contested case for the Wheatridge Wind Energy  
23 Facility (“*Wheatridge*”). In *Wheatridge*, the applicant requested a site certificate to construct two  
24 groups of wind facilities, and either one or two parallel overhead transmission lines connecting

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<sup>134</sup> Proposed Contested Case Order at 257.

<sup>135</sup> STOP B2H Exceptions to Proposed Contested Case Order at 34-36.

<sup>136</sup> Idaho Power’s Closing Arguments for Contested Case Issues R-1, R-2, R-3, R-4, SR-2, SR-3, and SR-7 at 40-42.

1 the facilities to the grid.<sup>137</sup> In the contested case that followed, certain parties requested the  
2 inclusion of a condition limiting the applicant to one transmission line not to exceed 230 kV, and  
3 further requested a condition requiring that the line be located underground to avoid impacts to  
4 farms and wildlife habitat.<sup>138</sup> The Council, rejecting these parties’ requests, found as follows:

5 It is the Council’s responsibility to review, evaluate and issue orders either  
6 approving or denying ASCs as put forth by an applicant; *the Council does not have*  
7 *authority to propose alternatives such as one underground transmission line versus*  
8 *up to two, overhead parallel transmission lines, as proposed by the applicant.*<sup>139</sup>

9 The Council should continue to follow its prior decision in *Wheatridge*, and reject STOP B2H’s  
10 alternate proposal.<sup>140</sup> STOP B2H does not cite any Oregon law to support its position, and instead  
11 seeks to analogize to an unrelated standard in the federal National Environmental Policy Act  
12 review process. Because EFSC has already addressed this exact issue applying its own authority  
13 under Oregon law, STOP B2H’s analogy to the federal review process is not persuasive and should  
14 be rejected.

15 For these reasons, the Hearing Officer properly rejected STOP B2H’s proposed revisions  
16 to Scenic Resources Condition 3, and Idaho Power requests that the Council adopt without  
17 modification the Hearing Officer’s findings and conclusions of law relevant to SR-7.

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<sup>137</sup> *In re Application for a Site Certificate for the Wheatridge Wind Energy Facility*, Final Order at 12 (Apr. 28, 2017) [hereinafter “*Wheatridge* Final Order”].

<sup>138</sup> *Wheatridge* Final Order at 7, n.22.

<sup>139</sup> *Wheatridge* Final Order at 7, n.22 (emphasis added).

<sup>140</sup> Additionally, relying on *Wheatridge*, the Hearing Officer has already addressed a related concern during the summary determination phase of this contested case. HCA-5 previously asked: *Whether Applicant adequately analyzed the feasibility of undergrounding the transmission line as mitigation for potential visual impacts at Flagstaff Hill/NHOTIC*. Idaho Power moved for summary determination on that issue, citing *Wheatridge* for the proposition that the Council lacks jurisdiction to assess alternative facilities that are not included in the applicant’s ASC. The Hearing Officer agreed with Idaho Power’s position, concluding: “Because Idaho Power did not propose to underground any portion of the transmission line route . . . [HCA-5] is not a proper matter for the Council’s consideration.” The Hearing Officer then granted Idaho Power’s motion for summary determination. Ruling and Order on Motion for Summary Determination on Contested Case Issues HCA-2 and HCA-5 at 14-15 (Aug. 10, 2021).

1 **C. Issue SR-3**

2 The Hearing Officer granted limited party status to Mr. Whit Deschner to raise SR-3, which  
3 asks:

4 *Whether Applicant adequately assessed the visual impact of the proposed project*  
5 *in the vicinity of the NHOTIC and properly determined the impact would be “less*  
6 *than significant.”<sup>141</sup>*

7 In the Proposed Contested Case Order, the Hearing Officer concludes:

8 Idaho Power accurately assessed the visual impact of the proposed project in the  
9 vicinity of the NHOTIC and properly determined that the impact would be less than  
10 significant as defined by Council rule.<sup>142</sup>

11 Mr. Deschner filed exceptions to the Hearing Officer’s Proposed Contested Case Order  
12 relating to SR-3, which largely mirror the arguments he made in his testimony and briefing in the  
13 contested case.<sup>143</sup> For the reasons discussed below, Mr. Deschner’s exceptions do not identify any  
14 incorrect finding of law or fact, and for that reason Idaho Power requests that the Council adopt  
15 without modification the Hearing Officer’s findings and conclusions of law relevant to SR-3.

16 **1. Whit Deschner, Issue SR-3, Background**

17 Mr. Deschner begins his exceptions with several pages of argument that he has labeled as  
18 background information. In this section, Mr. Deschner primarily reiterates the arguments he made  
19 in his briefing and also raises new assertions. As an initial matter, Mr. Deschner’s arguments are  
20 not tied to any specific exceptions to the Proposed Contested Case Order as required by

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<sup>141</sup> Second Order on Case Management at 6.

<sup>142</sup> Proposed Contested Case Order at 142.

<sup>143</sup> Whit Deschner Exceptions to Administrative Law Judge Webster’s Rulings: Proposed Contested Case Order (June 30, 2022).

1 OAR 345-015-0085(5), and his claims should therefore be rejected.<sup>144</sup> Nevertheless, should the  
2 Council wish to consider Mr. Deschner’s arguments, Idaho Power addresses his claims below.

3 Mr. Deschner argues that it is “nearly impossible” to measure whether impacts will be  
4 significant.<sup>145</sup> Mr. Deschner’s assertion does not affect whether Idaho Power has adequately  
5 demonstrated compliance with the Council’s standards. Moreover, the Council has applied its  
6 standards in myriad cases and has previously applied its own definition of “significant.” Given  
7 the Council’s expertise, Idaho Power is confident that the Council can evaluate whether potential  
8 impacts will be significant and the extensive evidence Idaho Power has provided demonstrates that  
9 impacts will not be significant.

10 Next, Mr. Deschner points out that the phrase “less than significant” appears hundreds of  
11 times in Exhibits R, L, and T of the ASC.<sup>146</sup> Mr. Deschner has repeatedly identified this fact, but  
12 contrary to Mr. Deschner’s concern, an ASC for a linear energy facility like the Project should be  
13 expected to repeatedly discuss whether impacts are significant. Due to the length of the project—  
14 approximately 300 miles—and the size of the analysis area for scenic resources, recreation  
15 opportunities, and protected areas, it is wholly unsurprising that there are many such resources that  
16 were analyzed in Exhibits L, R, and T. For each potentially impacted resource, Idaho Power is  
17 required to demonstrate that impacts will be less than significant. Therefore, there is nothing  
18 improper about the fact that Idaho Power concluded that impacts to all the analyzed resources  
19 would be less than significant, or that the conclusion was repeated a number of times.

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<sup>144</sup> OAR 345-015-0085(5) (“In an exception, the party shall specifically identify the finding of fact, conclusion of law or, in contested case proceedings on an application for a site certificate or a proposed site certificate amendment, recommended site certificate condition to which the party excepts and shall state the basis for the exception.”).

<sup>145</sup> Whit Deschner Exceptions to Administrative Law Judge Webster’s Rulings: Proposed Contested Case Order at 3.

<sup>146</sup> Whit Deschner Exceptions to Administrative Law Judge Webster’s Rulings: Proposed Contested Case Order at 3-4.

1 Mr. Deschner next argues that constructing the Project within the viewshed of the NHOTIC  
2 will necessarily have a significant impact.<sup>147</sup> Idaho Power addressed this argument thoroughly in  
3 the Company’s Closing Argument on this issue.<sup>148</sup> As the Company explained, Mr. Deschner’s  
4 argument is based on a faulty understanding of EFSC’s standards, which Mr. Deschner appears to  
5 interpret as requiring the Company to prove that there will be **no** impacts whatsoever. Idaho Power  
6 is not required under any EFSC standard to demonstrate that the Project will result in zero impacts.  
7 If there were a “zero impacts” standard, no energy facilities could ever be developed. As  
8 Mr. Deschner acknowledges, applying EFSC’s standards the way he interprets them would make  
9 siting an energy facility a “near-impossible task.”<sup>149</sup> Rather, Idaho Power must demonstrate that  
10 the construction and operation of the Project is not likely to result in *significant* adverse impacts.<sup>150</sup>  
11 In other words, the Project conforms to the applicable EFSC standards so long as the potential  
12 impacts are less than significant. Therefore, the fact that the Project will be visible from the  
13 NHOTIC alone does not support a conclusion that the Project fails to comply with any applicable  
14 siting standard.

15 Mr. Deschner next provides two figures that he previously included in his testimony.<sup>151</sup>  
16 Mr. Deschner’s first figure provides a comparison between a window with a view of a hill and a  
17 window where the view is dominated by a lattice transmission tower. Idaho Power’s visual  
18 resources expert witness, Ms. Kling, explained in her Rebuttal Testimony that Mr. Deschner’s  
19 figure does not provide an accurate representation of the potential impacts to the NHOTIC for

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<sup>147</sup> Whit Deschner Exceptions to Administrative Law Judge Webster’s Rulings: Proposed Contested Case Order at 4.

<sup>148</sup> Idaho Power’s Closing Arguments for Contested Case Issues R-1, R-2, R-3, R-4, SR-2, SR-3, and SR-7 at 48-49.

<sup>149</sup> Whit Deschner Exceptions to Administrative Law Judge Webster’s Rulings: Proposed Contested Case Order at 3.

<sup>150</sup> See, e.g., OAR 345-022-0040(1).

<sup>151</sup> Whit Deschner Exceptions to Administrative Law Judge Webster’s Rulings: Proposed Contested Case Order at 5-6; Whit Deschner / Direct Testimony and Evidence of Whit Deschner (Sept. 17, 2021) / Issue SR-3, p. 11 of 16.

1 several reasons.<sup>152</sup> For one thing, Mr. Deschner’s comparison uses a lattice tower.<sup>153</sup> The towers  
2 near the NHOTIC will be H-frame towers with a weathered steel finish to reduce visual contrast.<sup>154</sup>  
3 Second, Mr. Deschner’s simulation of impacts includes skylined towers (i.e., towers sited on or  
4 near a ridgeline so that they are silhouetted against the sky), but the towers near NHOTIC will  
5 generally be seen from above and will not be skylined.<sup>155</sup> Finally, Mr. Deschner’s simulation  
6 shows a transmission tower from a very close perspective and in an enframed and focal perspective  
7 (i.e., through a window), but the Project will be located close to one mile from the main NHOTIC  
8 building.<sup>156</sup>

9 Mr. Deschner’s second figure compares the height of several transmission lines to the  
10 height of a hotel located in La Grande, Oregon.<sup>157</sup> Ms. Kling explained in her Rebuttal Testimony  
11 that this figure does not provide an accurate comparison of the potential impacts to the NHOTIC  
12 for several reasons.<sup>158</sup> As an initial matter, the Project towers near the NHOTIC will be shorter  
13 than the towers compared in Mr. Deschner’s testimony. The towers closest to the NHOTIC will  
14 be no taller than 130 feet,<sup>159</sup> but the shortest tower in Mr. Deschner’s diagram is 150 feet tall.  
15 More importantly, the height of the towers is only one factor in assessing potential visual impacts.  
16 Idaho Power included an extensive analysis demonstrating that impacts will be less than significant

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<sup>152</sup> Idaho Power / Rebuttal Testimony of Louise Kling / Issues SR-2, SR-3, SR-7, R-1, R-2, R-3 and R-4, pp. 122-23 of 165.

<sup>153</sup> Whit Deschner / Direct Testimony and Evidence of Whit Deschner (Sept. 17, 2021) / Issue SR-3, p. 11 of 16.

<sup>154</sup> Proposed Order, Attachment 1, Draft Site Certificate at 32-33 (ODOE - B2HAPPDoc2 Proposed Order on ASC and Attachments 2019-07-02. Page 736-37 of 10016).

<sup>155</sup> ASC, Exhibit T, Attachment T-4 at T-4-78 (ODOE - B2HAPPDoc3-37 ASC 20\_ Exhibit T\_Recreation\_ASC 2018-09-28. Page 177 of 291).

<sup>156</sup> ASC, Exhibit T, Attachment T-4 at T-4-78 (ODOE - B2HAPPDoc3-37 ASC 20\_ Exhibit T\_Recreation\_ASC 2018-09-28. Page 177 of 291).

<sup>157</sup> Whit Deschner Exceptions to Administrative Law Judge Webster’s Rulings: Proposed Contested Case Order at 6.

<sup>158</sup> Idaho Power / Rebuttal Testimony of Louise Kling / Issues SR-2, SR-3, SR-7, R-1, R-2, R-3 and R-4, pp. 123 of 165.

<sup>159</sup> Proposed Order, Attachment 1, Draft Site Certificate at 33 (ODOE - B2HAPPDoc2 Proposed Order on ASC and Attachments 2019-07-02. Page 737 of 10016).

1 based on factors like the tower’s finish, the superior vantage points of viewers, and the intermittent  
2 views of the Project, and distance from high-use areas.<sup>160</sup> Mr. Deschner’s height comparison does  
3 not address Idaho Power’s analysis of those factors.

4 Mr. Deschner next argues that Idaho Power discusses only the impacts from the towers,  
5 but not the visual impacts of the proposed transmission lines—i.e., the conductors.<sup>161</sup> Ms. Kling  
6 also addressed this concern in her Rebuttal Testimony,<sup>162</sup> where she explained that conductors are  
7 not typically the primary contributor to strong visual contrast, particularly with the dulled finish  
8 that Idaho Power will incorporate into Project design.<sup>163</sup> As explained in the ASC, the towers will  
9 be the primary source of visual contrast experienced from the NHOTIC.<sup>164</sup> For that reason, Idaho  
10 Power’s assessment of visual impacts to NHOTIC primarily addressed the potential impacts  
11 resulting from the towers.<sup>165</sup> However, it is important to note that the conductors will have a non-  
12 specular finish that will reduce reflectivity and the potential for glare.<sup>166</sup> Therefore, contrary to  
13 Mr. Deschner’s assertions, Idaho Power has analyzed and minimized the potential impacts  
14 resulting from the conductors.

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<sup>160</sup> ASC, Exhibit T, Attachment T-4 at T-4-81 (ODOE - B2HAPPDoc3-37 ASC 20\_Exhibit T\_Recreation\_ASC 2018-09-28. Page 180 of 291).

<sup>161</sup> Whit Deschner Exceptions to Administrative Law Judge Webster’s Rulings: Proposed Contested Case Order at 6.

<sup>162</sup> Idaho Power / Rebuttal Testimony of Louise Kling / Issues SR-2, SR-3, SR-7, R-1, R-2, R-3 and R-4, p. 124 of 165.

<sup>163</sup> See Idaho Power / Rebuttal Testimony of Louise Kling / Issues SR-2, SR-3, SR-7, R-1, R-3 and R-4 / Exhibit B, Sullivan *et al.*. *Electric Transmission Visibility and Visual Contrast Threshold Distances in Western Landscapes* (Apr. 2014), p. 23 of 46.

<sup>164</sup> ASC, Exhibit R at R-82 (ODOE - B2HAPPDoc3-35 ASC 18\_Exhibit R\_Scenic Resources\_ASC 2018-09-28. Page 86 of 570).

<sup>165</sup> See ASC Exhibit T, Attachment T-4 at T-4-47 (ODOE - B2HAPPDoc3-37 ASC 20\_Exhibit T\_Recreation\_ASC 2018-09-28. Page 146 of 291).

<sup>166</sup> ASC Exhibit T at T-58 (ODOE - B2HAPPDoc3-37 ASC 20\_Exhibit T\_Recreation\_ASC 2018-09-28. Page 63 of 291).



1 For these reasons, Mr. Deschner’s exception has not identified any error in the Hearing  
2 Officer’s factual finding and Idaho Power requests that the Council adopt without modification the  
3 Hearing Officer’s findings and conclusions of law relevant to SR-3.

4 **2. Whit Deschner, Issue SR-3, Exception 1**

5 Mr. Deschner takes exception to the following finding of fact discussing potential impacts  
6 to the NHOTIC:<sup>167</sup>

7 The Proposed Order found as follows:

8 . . . Potential visual impacts of the proposed facility within the  
9 NHOTIC parcel would include visual impacts from intermittent  
10 views of transmission structures, typically from elevated vantage  
11 points. . . Impacts would slightly reduce the scenery adjacent to the  
12 NHOTIC parcel but would not alter the overall scenic quality of the  
13 NHOTIC parcel such that resource change would be medium.<sup>168</sup>

14 Mr. Deschner challenges these factual finding for four reasons:<sup>169</sup> (1) Idaho Power’s  
15 mitigation reduced tower heights but increased the number of visible towers from 7 to 9; (2) the  
16 Proposed Contested Case Order did not assess potential impacts from the conductors; (3) visitors  
17 will experience multiple views of the Project as they walk throughout the NHOTIC; and (4) Idaho  
18 Power has “attempted to narrow an experience down to how tall or how bright the towers are and  
19 completely ignores the additional impact of the transmission lines and how the uncluttered nature  
20 of current viewshed is an integral part of the visitor experience.”<sup>170</sup>

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<sup>167</sup> Whit Deschner Exceptions to Administrative Law Judge Webster’s Rulings: Proposed Contested Case Order at 8.

<sup>168</sup> Proposed Contested Case Order at 108 (quoting Proposed Order at 283).

<sup>169</sup> It should be noted that the language Mr. Deschner challenges is actually from the Proposed Order, not the Hearing Officer’s Proposed Contested Case Order. The challenged factual finding simply found that the Proposed Order provided this summary of impacts to the NHOTIC.

<sup>170</sup> Whit Deschner Exceptions to Administrative Law Judge Webster’s Rulings: Proposed Contested Case Order at 8-9.

1           As a threshold matter, the findings at issue in Exception 1 are quotations from the Proposed  
2 Order. Therefore, unless Mr. Deschner shows that the hearing officer misquoted that order, there  
3 can be no basis for disputing those facts. For those reasons, the Council should reject this portion  
4 of Ms. Deschner’s Exception 1. Moreover, Mr. Deschner only provides conclusory statements to  
5 support his arguments, without any reference to any record evidence. Because Exception 1 is  
6 unsupported by evidence in the record, the Council should reject it.

7           Regardless, with respect to Mr. Deschner’s first assertion, although there will be nine total  
8 towers in the viewshed, these towers will be of reduced height and finished with a weathered steel  
9 appearance that will reduce the intensity of visual impacts by reducing the potential visual contrast  
10 of the transmission towers, and the preponderance of the evidence shows the impacts will be less  
11 than significant.<sup>171</sup>

12           Mr. Deschner’s second assertion misrepresents the record in this case. Although the  
13 specific factual finding he challenges, which quotes language from the Proposed Order, does not  
14 mention visual impacts from the conductors, Idaho Power’s expert witness, Ms. Kling, addressed  
15 Mr. Deschner’s concerns in her rebuttal testimony. As summarized above, the preponderance of  
16 the evidence shows that the conductors are not the primary cause of visual impacts; Idaho Power  
17 has further reduced the visual impacts of the conductors by applying a non-specular finish to the  
18 conductors; and as a result of these and other tower design modifications, the visual impacts to the  
19 NHOTIC will be less than significant.<sup>172</sup>

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<sup>171</sup> Idaho Power / Rebuttal Testimony of Louise Kling / Issues SR-2, SR-3, SR-7, R-1, R-2, R-3 and R-4, p. 58 of 165.

<sup>172</sup> Idaho Power / Rebuttal Testimony of Louise Kling / Issues SR-2, SR-3, SR-7, R-1, R-2, R-3 and R-4, p. 124 of 165.

1 Mr. Deschner’s third assertion is also incorrect. Contrary to Mr. Deschner’s assertion, the  
2 analysis of visual impacts to the NHOTIC specifically addressed the fact that viewers will see the  
3 Project from various areas within the NHOTIC. As Ms. Kling explained in her Rebuttal  
4 Testimony, as viewers move throughout the NHOTIC using the various trails, viewpoints,  
5 interpretation sites, and visitor center, views will be predominantly peripheral or intermittent,<sup>173</sup>  
6 meaning that viewers will most often not view the Project head-on or continuously.<sup>174</sup> However,  
7 those views from throughout the NHOTIC will be experienced from an elevated vantage point,  
8 where views across the top of transmission towers could be sustained.<sup>175</sup> This will further reduce  
9 the intensity of impacts. Based on these factors and the preponderance of the evidence, Idaho  
10 Power sufficiently analyzed impacts to viewers throughout the NHOTIC and demonstrated that  
11 those impacts will be less than significant.

12 Finally, Mr. Deschner’s fourth assertion is inconsistent with the evidence in the record of  
13 this contested case. Contrary to Mr. Deschner’s assertion, Idaho Power did not ignore the impact  
14 on visitors’ experience. Rather, impact to visitors is incorporated into the Council’s definition of  
15 “significant” by requiring an applicant to consider “the impact on the affected human  
16 population[.]”<sup>176</sup> As explained above in response to STOP B2H, Issue SR-7, Exception 2, Idaho  
17 Power interpreted the “impacts to the affected human population” clause of the Council’s  
18 definition to mean:

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<sup>173</sup> ASC Exhibit R, Attachment R-3 at R-3-64 (ODOE - B2HAPPDoc3-35 ASC 18\_Exhibit R\_Scenic Resources\_ASC 2018-09-28. Page 232 of 570).

<sup>174</sup> ASC Exhibit R, Attachment R-1 at R-1-15 (ODOE - B2HAPPDoc3-35 ASC 18\_Exhibit R\_Scenic Resources\_ASC 2018-09-28. Page 154 of 570).

<sup>175</sup> ASC Exhibit R, Attachment R-3 at R-3-64 (ODOE - B2HAPPDoc3-35 ASC 18\_Exhibit R\_Scenic Resources\_ASC 2018-09-28. Page 232 of 570).

<sup>176</sup> OAR 345-001-0010(52).

1 The impact on the human population is measured in terms of the viewer's  
2 perception of impacts to valued scenic attributes of the landscape.<sup>177</sup>

3 The Company's expert witness, Ms. Kling, further explained that Idaho Power assumed all  
4 visitors would be highly sensitive to change, and for that reason collecting data on subjective  
5 evaluations could only reduce the value attributed to the affected resources.<sup>178</sup> Idaho Power  
6 analyzed the viewer perception for all potentially impacted resources, including the NHOTIC.<sup>179</sup>  
7 Idaho Power's analysis of impacts to the NHOTIC demonstrated that:

8 Views of the Project will be experienced from an elevated vantage point, where  
9 views across the top of transmission towers could be sustained. As viewers move  
10 throughout the NHOTIC Parcel using the various trails, viewpoints, interpretation  
11 sites, and visitor center views will be predominantly peripheral or intermittent.  
12 Because these amenities are distributed throughout the NHOTIC Parcel, viewer  
13 exposure to the Project will be variable and medium at most.

14 Therefore, contrary to Mr. Deschner's assertion, Idaho Power's analysis assessed potential impacts  
15 to visitors' experience.

16 For these reasons, Mr. Deschner has not identified any error in the Hearing Officer's  
17 factual finding and Idaho Power requests that the Council adopt without modification the Hearing  
18 Officer's findings and conclusions of law relevant to SR-3.

### 19 **3. Whit Deschner, Issue SR-3, Exception 2**

20 Mr. Deschner takes exception to the following finding of fact describing ODOE's  
21 discussion of the NHOTIC in the Proposed Order:

22 206. The Department further found as follows:<sup>180</sup>

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<sup>177</sup> ASC, Exhibit R, Attachment R-1 at R-1-5 (ODOE - B2HAPPDoc3-35 ASC 18\_Exhibit R\_Scenic Resources\_ASC 2018-09-28. Page 144 of 570).

<sup>178</sup> Ruling and Order on Motion for Summary Determination on Contested Case Issue SR-6 at 13.

<sup>179</sup> ASC, Exhibit R, Attachment R-3 at R-3-64 (ODOE - B2HAPPDoc3-35 ASC 18\_Exhibit R\_Scenic Resources\_ASC 2018-09-28. Page 232 of 570).

<sup>180</sup> Whit Deschner Exceptions to Administrative Law Judge Webster's Rulings: Proposed Contested Case Order at 8-9.

1 [T]he NHOTIC parcel was designated to preserve the unique  
2 historic resource and visual qualities. The Oregon Trail ACECs,  
3 including NHOTIC, were specifically designated to preserve the  
4 unique historic resource, the Oregon Trail, and visual qualities  
5 within this geographic area. Because no development is proposed  
6 within a half mile corridor centered on the Oregon Trail within the  
7 ACEC, the resource values for which the NHOTIC parcel was  
8 designated to protect would not be impacted by the proposed  
9 transmission line. Additionally, recommended Historic, Cultural,  
10 and Archaeological Resources Condition 1 would require that the  
11 proposed facility avoid direct impacts to Oregon Trail and National  
12 Historic Trail resources. The number of towers visible would also  
13 vary depending on viewer position within the ACEC. As discussed  
14 in detail in ASC Exhibit L, to mitigate for potential visual impacts,  
15 the applicant proposes to use a modified tower structure, consisting  
16 of H-frame structure type with a natina (brown-weathered coloring)  
17 for towers proposed to be located directly west of the NHOTIC.  
18 There is an existing H-frame 230 kV transmission line in this area,  
19 visible from NHOTIC, and the proposed modified tower structure  
20 in this location would reduce visual impacts of the proposed facility  
21 by mimicking the existing H-frame 230 kV transmission line,  
22 though the proposed facility would have larger structures and would  
23 be made of steel, not wood.<sup>181</sup>

24 Mr. Deschner raises seven arguments in his exception:<sup>182</sup> (1) the Project’s distance from  
25 the Oregon Trail is not relevant because “the area is open and therefore the towers AND lines will  
26 be highly visible and create a continuous visual disruption of the landscape”; (2) the “juxtaposition  
27 of the existing and proposed towers and lines of different heights will not hide but accentuate the  
28 visual disruption;” (3) the reduction in tower height will not significantly reduce visual impacts  
29 because they will still be taller than the existing towers and result in the addition of two towers;  
30 (4) using H-frames will not significantly reduce visual impacts because they will be much higher  
31 than the existing 230-kV line and will increase the total number of towers; (5) the towers will still

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<sup>181</sup> Proposed Contested Case Order at 109 (quoting Proposed Order at 284). Like Mr. Deschner’s first exception, Mr. Deschner actually takes exception to ODOE’s finding in the Proposed Order, not the Hearing Officer’s finding in the Proposed Contested Case Order.

<sup>182</sup> Mr. Deschner lists seven arguments, hut his third and fourth arguments overlap substantially.

1 be visible despite the natina finish; (6) visitors will experience the Project from multiple angles as  
2 they travel throughout the NHOTIC; and (7) repeat visitors will experience the Project every time  
3 they visit.<sup>183</sup>

4 First, the findings at issue in Exception 2 are a quotation from the Proposed Order.  
5 Therefore, unless Mr. Deschner shows that the hearing officer misquoted that order, there can be  
6 no basis for disputing those facts. For those reasons, the Council should reject this portion of Mr.  
7 Deschner’s Exception 2. Second, Mr. Deschner only provides conclusory statements to support  
8 his arguments, without any reference to any record evidence. Because Exception 2 is unsupported  
9 by evidence in the record, the Council should reject it.

10 Moreover, Mr. Deschner’s first concern misapplies the applicable standard. As discussed  
11 above in response to Whit Deschner, Issue SR-3, Background, no standard requires Idaho Power  
12 to demonstrate that the Project will not be visible. Rather, Idaho Power must demonstrate that  
13 visual impacts will be less than significant. Idaho Power’s visual resources expert witness,  
14 Ms. Kling, addressed these concerns regarding visual impacts to the landscape near the NHOTIC  
15 in her testimony. Idaho Power’s analysis in the ASC demonstrated that the Project will be  
16 codominant with all existing features in the viewshed, including State Route 86 and the natural  
17 features of the Baker Valley and Blue Mountains.<sup>184</sup> As explained in Exhibit R of the ASC,  
18 codominance occurs “[w]here two or more features both attract attention and have generally equal

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<sup>183</sup> Whit Deschner Exceptions to Administrative Law Judge Webster’s Rulings: Proposed Contested Case Order at 9-10.

<sup>184</sup> ASC, Attachment R-3 at R-3-63 (ODOE - B2HAPPDoc3-35 ASC 18\_Exhibit R\_Scenic Resources\_ASC 2018-09-28. Page 231 of 570) (the Project will “appear co-dominant with SR 86 to the south, existing 230-kV H-frame transmission structures, and the natural features of Baker Valley and the Blue Mountains to the west”).

1 visual influence over the landscape, they are considered codominant.”<sup>185</sup> Ms. Kling further  
2 explained codominance at the hearing, where she testified that, notwithstanding the fact that the  
3 Project will be visible from the NHOTIC, Idaho Power's analysis demonstrated that the Project is  
4 codominant with existing features, including an existing transmission line, because “as [the  
5 viewer's] eye looks out on the landscape, [their] eye is seeing both features. It's not selecting one  
6 over the other.”<sup>186</sup> Because Mr. Deschner’s first assertion incorrectly asserts that the Project will  
7 result in significant impacts solely because the Project will be visible, this assertion has not  
8 identified any error in the quoted excerpt from the Proposed Order.

9 Contrary to Mr. Deschner’s second assertion, Idaho Power did address the visual impacts  
10 from the conductors, as discussed in its response to Whit Deschner, Issue SR-3, Background. As  
11 explained above, conductors will not be the primary cause of visual contrast and Idaho Power has  
12 further minimized the impacts from conductors by applying a non-specular finish. The  
13 preponderance of the evidence shows, taking into account the non-specular finish, the Project’s  
14 visual impacts will be less than significant. Therefore, Mr. Deschner’s second assertion has not  
15 identified any error in the quoted excerpt from the Proposed Order.

16 Regarding Mr. Deschner’s third and fourth assertions, which both challenge Idaho Power’s  
17 proposed mitigation on the basis that, notwithstanding Idaho Power’s design changes, the Project  
18 towers will still be taller than the existing transmission line towers, Idaho Power addressed this in  
19 response to Mr. Deschner’s first assertion immediately above. Although the Project towers will  
20 be taller, the Project will appear codominant with the existing landscape, including the existing

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<sup>185</sup> ASC, Exhibit R, Attachment R-1 at R-1-13 (ODOE - B2HAPPDoc3-35 ASC 18\_Exhibit R\_Scenic Resources\_ASC 2018-09-28. Page 152 of 570).

<sup>186</sup> Kling Testimony, Cross-Examination Hearing Day 6, January 19, 2022 (Tr. Day 6), page 162, lines 3-20.

1 transmission line, because “as [the viewer's] eye looks out on the landscape, [their] eye is seeing  
2 both features. It's not selecting one over the other.”<sup>187</sup> For this reason, Mr. Deschner’s assertions  
3 regarding the design changes do not identify any error in the quoted excerpt from the Proposed  
4 Order.

5 Idaho Power addresses Mr. Deschner’s concern that the natina finish to the towers “will  
6 not make them invisible” above in its response to Whit Deschner, Issue SR-3, Background. As  
7 explained above, Mr. Deschner’s concern misstates the applicable standard, because no EFSC rule  
8 requires an applicant to demonstrate that no visual impacts will occur. Rather, the applicant must  
9 demonstrate that impacts will be less than significant. Because the preponderance of the evidence  
10 shows that, with the reduced heights, the Project’s visual impacts will be less than significant,  
11 Mr. Deschner has not identified any error in the quoted excerpt from the Proposed Order.

12 Idaho Power addresses Mr. Deschner’s concern regarding visitors traveling throughout the  
13 NHOTIC above in its response to Whit Deschner, Issue SR-3, Exception 1. As explained above,  
14 Idaho Power analyzed these peripheral and intermittent views of the Project that will occur as  
15 people walk throughout the NHOTIC. The preponderance of the evidence shows, taking into  
16 account the viewer’s experience, the Project’s visual impacts will be less than significant and,  
17 therefore, Mr. Deschner has not identified any error in the quoted excerpt from the Proposed Order.

18 Finally, regarding Mr. Deschner’s concern that repeat visitors will view the Project each  
19 time they visit the NHOTIC, this is a newly raised argument that Mr. Deschner did not raise in the  
20 contested case. Because Mr. Deschner did not raise this issue before the Hearing Officer during  
21 the contested case, it was not possible for the Hearing Officer to make any findings of fact or

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<sup>187</sup> Kling Testimony, Cross-Examination Hearing Day 6, January 19, 2022 (Tr. Day 6), page 162, lines 3-20.



1 conclusions of law relevant to this argument, and for that reason it would be improper to allow  
2 exception to the Hearing Officer’s Proposed Contested Case Order on this basis.

3 For these reasons, Mr. Deschner’s exception has not identified any error in the Hearing  
4 Officer’s factual finding and Idaho Power requests that the Council adopt without modification the  
5 Hearing Officer’s findings and conclusions of law relevant to SR-3.

6 **4. Whit Deschner, Issue SR-3, Exception 3**

7 Mr. Deschner takes exception to the Hearing Officer’s conclusion of law for SR-3.<sup>188</sup>

8 Idaho Power accurately assessed the visual impact of the proposed project in the  
9 vicinity of the NHOTIC and properly determined that the impact would be less than  
10 significant as defined by Council rule.<sup>189</sup>

11 Mr. Deschner excepts to this conclusion for the same reasons listed in his second exception.  
12 For the reasons discussed above in Idaho Power’s response to his second exception, which Idaho  
13 Power incorporates by reference here, Mr. Deschner has not identified any error in the Hearing  
14 Officer’s conclusion of law and Idaho Power requests that the Council adopt without modification  
15 the Hearing Officer’s findings and conclusions of law relevant to SR-3.

16 **5. Whit Deschner, Issue SR-3, Exception 4**

17 Mr. Deschner takes exception to the following finding of fact summarizing the Hearing  
18 Officer’s conclusions regarding visual impacts to the NHOTIC:<sup>190</sup>

19 In summary, Idaho Power accurately assessed the visual impact of the proposed  
20 project in the vicinity of the NHOTIC and properly determined that the impact  
21 would be medium, meaning less than significant as defined by Council rule.<sup>191</sup>

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<sup>188</sup> Whit Deschner Exceptions to Administrative Law Judge Webster’s Rulings: Proposed Contested Case Order at 10-11.

<sup>189</sup> Whit Deschner Exceptions to Administrative Law Judge Webster’s Rulings: Proposed Contested Case Order at 10.

<sup>190</sup> Whit Deschner Exceptions to Administrative Law Judge Webster’s Rulings: Proposed Contested Case Order at 11.

<sup>191</sup> Proposed Contested Case Order at 254.

1 Mr. Deschner takes exception to this finding because: (1) the Hearing Officer “focused on  
2 the wrong parameter” by considering the visual impact of the Project, when “the correct parameter  
3 is the experience on the affected human population”; (2) the focus of the Council’s definition of  
4 “significant” is on the human experience; (3) the analysis must consider impacts of both the towers  
5 and the conductors; and (4) Idaho Power has provided no documentation that the design changes  
6 reduce the impact on the affected human experience.<sup>192</sup>

7 Again, Mr. Deschner only provides conclusory statements to support his arguments,  
8 without any reference to any record evidence. Because Exception 4 is unsupported by evidence  
9 in the record, the Council should reject it.

10 Regardless, Mr. Deschner’s assertion that the Hearing Officer erred by assessing visual  
11 impacts is incorrect. SR-3 specifically asks whether Idaho Power “adequately assessed the *visual*  
12 *impact*” to the NHOTIC,<sup>193</sup> and for that reason the Hearing Officer properly discussed Idaho  
13 Power’s analysis of visual impacts when resolving SR-3. Mr. Deschner asserts that the Hearing  
14 Officer must instead focus on the impact to the affected human population but, as explained above  
15 in response to Whit Deschner, Issue SR-3, Exception 1, Idaho Power’s analysis of visual impacts  
16 assessed impacts to the affected human population by measuring viewer perception of potential  
17 Project impacts.<sup>194</sup>

18 In his second argument, Mr. Deschner argues that the “concern” when determining whether  
19 impacts will be “significant” requires an applicant to focus on impacts to the human experience.

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<sup>192</sup> Whit Deschner Exceptions to Administrative Law Judge Webster’s Rulings: Proposed Contested Case Order at 11-12.

<sup>193</sup> Second Order on Case Management at 6 (emphasis added).

<sup>194</sup> ASC, Exhibit R, Attachment R-1 at R-1-5 (ODOE - B2HAPPDoc3-35 ASC 18\_Exhibit R\_Scenic Resources\_ASC 2018-09-28. Page 144 of 570).

1 Mr. Deschner has not expanded on this point, but Idaho Power believes he is referring to the fact  
2 that the definition of “significant” includes one clause referring to the “impact on the affected  
3 human population or natural resources[.]”<sup>195</sup> However, this is only one factor of the Council’s  
4 definition, and Mr. Deschner’s assertion that this is the primary or dominant focus of the definition  
5 is not supported by evidence in the record or grounded in any legal analysis. Moreover, Idaho  
6 Power analyzed impacts to the affected human population through its assessment of “viewer  
7 perception,” as discussed in detail above in response to Lois Barry’s exceptions for SR-6.

8 As to Mr. Deschner’s third argument regarding impacts of the conductors, as explained  
9 above in response to the Company’s response to Whit Deschner, Issue SR-3, Background, Idaho  
10 Power’s expert witness, Ms. Kling, demonstrated in her Rebuttal Testimony that the impacts from  
11 the conductors will not be significant.<sup>196</sup> Idaho Power also provided substantial evidence  
12 demonstrating that the impacts from the towers will not be significant. Therefore, the  
13 preponderance of the evidence shows that the impacts from the Project as-a-whole will be less than  
14 significant.

15 Finally, Mr. Deschner’s assertion that the Company has not provided evidence to  
16 demonstrate that the design changes reduce impacts to viewers is inconsistent with the evidence  
17 in the record. As Ms. Kling explained in her Rebuttal Testimony, Idaho Power assessed how  
18 viewers would perceive the visual impacts to the NHOTIC and proved that, taking into account

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<sup>195</sup> OAR 345-001-0010(52).

<sup>196</sup> Idaho Power / Rebuttal Testimony of Louise Kling / Issues SR-2, SR-3, SR-7, R-1, R-2, R-3 and R-4, p. 124 of 165.

1 mitigation, those impacts will be less than significant.<sup>197</sup> Idaho Power summarized Ms. Kling's  
2 analysis above in its response to Whit Deschner, Issue SR-3, Exception 1.

3 For these reasons, Mr. Deschner's exceptions have not identified any error in the Hearing  
4 Officer's findings of fact or conclusions of law relating to SR-3.

5 **D. Issue SR-5**

6 The Hearing Officer granted limited party status to Susan Geer to raise SR-5, which asked:

7 *Whether the Rice Glass Hill Natural Area should be evaluated as a Protected*  
8 *Area.*<sup>198</sup>

9 The Hearing Officer granted Idaho Power summary determination of SR-5,<sup>199</sup> and  
10 incorporated her ruling into the Proposed Contested Case Order.<sup>200</sup> In the Proposed Contested  
11 Case Order, the Hearing Officer summarized her conclusion as follows:

12 In the Ruling and Order on Motion for Summary Determination on Contested Case  
13 Issue SR-5, issued July 21, 2021 and incorporated herein by this reference, the ALJ  
14 dismissed Issue SR-5 from the contested case. The ALJ found that because the Rice  
15 Glass Hill Natural Area was not registered as a Natural Area as of May 11, 2007,  
16 Idaho Power had no obligation to evaluate the Rice Glass Hill Natural Area as a  
17 Protected Area in ASC Exhibit L.<sup>201</sup>

18 Ms. Geer challenges the Hearing Officer's conclusion of law for many of the same reasons  
19 she raised in her Response to Idaho Power's MSD of SR-5. For the reasons discussed below, none  
20 of Ms. Geer's arguments identifies any error in the Hearing Officer's conclusion of law and,  
21 therefore, Ms. Geer's exception should be rejected.

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<sup>197</sup> Idaho Power / Rebuttal Testimony of Louise Kling / Issues SR-2, SR-3, SR-7, R-1, R-2, R-3 and R-4, pp. 67-68 of 165; see also ASC Exhibit R, Attachment R-3 at R-3-63 (ODOE - B2HAPPDoc3-35 ASC 18\_Exhibit R\_Scenic Resources\_ASC 2018-09-28. Page 231 of 570).

<sup>198</sup> First Order on Case Management Matters and Contested Case Schedule at 7.

<sup>199</sup> Ruling and Order on Motion for Summary Determination on Contested Case Issue SR-5 (July 21, 2021).

<sup>200</sup> Proposed Contested Case Order at 27.

<sup>201</sup> Proposed Contested Case Order at 27.

1 In her DPO Comments and Petition for Party Status, Ms. Geer argued that Idaho Power  
2 must analyze the Rice Glass Hill Natural Area (“Glass Hill”) for compliance with the Council’s  
3 Protected Areas Standard. However, as Idaho Power explained in its MSD of SR-5, the Protected  
4 Areas Standard clearly states: “References in this rule to protected areas designated under federal  
5 or state statutes or regulations are to the designations in effect as of May 11, 2007[.]”<sup>202</sup> It is  
6 undisputed that Glass Hill was not designated as a State Natural Area until September 18, 2019.<sup>203</sup>  
7 Therefore, under the plain language of the rule, Idaho Power was *not* required to analyze Glass  
8 Hill for compliance with the Protected Areas Standard.

9 In her exception, Ms. Geer first argues that Glass Hill provides important conservation  
10 value.<sup>204</sup> However, the conservation value of Glass Hill is not at issue in SR-5. Regardless of the  
11 habitat present at Glass Hill, the Company is not required to analyze Glass Hill as a protected area.  
12 That said, to the extent Ms. Geer is primarily concerned about Glass Hill providing important  
13 habitat, any potential impacts to habitat are analyzed under the Council’s Fish and Wildlife Habitat  
14 Standard.<sup>205</sup>

15 Second, Ms. Geer argues that the May 11, 2007 cutoff date in the Protected Areas Standard  
16 refers only to the categories of protected areas, not the specific protected areas listed under each  
17 category.<sup>206</sup> Because the State Natural Areas Program existed prior to May 11, 2007, Ms. Geer  
18 argues that Idaho Power must analyze Glass Hill for compliance with the Protected Areas

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<sup>202</sup> OAR 345-022-0040(1).

<sup>203</sup> Idaho Power’s MSD of Contested Case Issues SR-1, SR-4, SR-5, and SR-6 at 14; *see also* Idaho Power / Glass Hill Registration Confirmation Letter / Issue SR-5 / Idaho Power MSD of Contested Case Issues SR-1, SR-4, SR-5 and SR-6 / Exhibit E page 1 of 1 (Oct. 17, 2019).

<sup>204</sup> Susan Geer Exception to Administrative Law Judge Webster’s Rulings: Summary Determination and Proposed Contested Case Order for Issue SR-5 at 2-3 (June 27, 2022).

<sup>205</sup> OAR 345-022-0060(1).

<sup>206</sup> Susan Geer Exception to Administrative Law Judge Webster’s Rulings: Summary Determination and Proposed Contested Case Order for Issue SR-5 at 3.

1 Standard. Ms. Geer’s interpretation is inconsistent with the plain language of  
2 OAR 345-022-0040(1), which specifies that the standard applies only to “designations in effect as  
3 of May 11, 2007[.]” Therefore, to warrant consideration under the Protected Areas Standard, the  
4 location must have been designated as one of the categories of Protected Areas prior to that date.  
5 The fact that the State Natural Areas Program existed prior to 2007 is immaterial, because Glass  
6 Hill had not been *designated* as a State Natural Area at that time.

7 Ms. Geer next argues that the Protected Areas Standard is “outdated and unclear.”<sup>207</sup>  
8 Ms. Geer’s opinion that the standard is “outdated” is not relevant to resolution of SR-5. Ms. Geer  
9 may argue that the rule is outdated as a basis for revisiting the rule, but her concern provides no  
10 basis to ignore the rule as it is currently written. As Ms. Geer states in her exception, EFSC is  
11 currently revising the rule, and Ms. Geer may raise her concerns in that rulemaking docket.  
12 However, when applying the Protected Areas Standard to the Project, the Council must apply the  
13 standard as it currently is in effect, regardless of whether Ms. Geer believes the current language  
14 is outdated.

15 Finally, Ms. Geer argues that an up-to-date list of the State Natural Areas is available and  
16 Idaho Power could have requested that list.<sup>208</sup> However, regardless of whether Idaho Power could  
17 have done so, it is clear that the Protected Areas Standard did not require the Company to request  
18 that list, because the Protected Areas Standard applies only to areas designated as of May 11, 2007.

19 Based on these arguments, Ms. Geer concludes that “EFSC should recognize and state that  
20 the [Protected Areas Standard] identifies all Oregon State Natural Areas that are identified

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<sup>207</sup> Susan Geer Exception to Administrative Law Judge Webster’s Rulings: Summary Determination and Proposed Contested Case Order for Issue SR-5 at 3.

<sup>208</sup> Susan Geer Exception to Administrative Law Judge Webster’s Rulings: Summary Determination and Proposed Contested Case Order for Issue SR-5 at 4-5.

1 pursuant to ORS 273.581 (Natural areas register), including [Glass Hill].”<sup>209</sup> However, such an  
2 interpretation would not be consistent with the plain language of the Protected Areas Standard,  
3 and therefore should be rejected.

4 For these reasons, Ms. Geer’s exception has identified no error in the Hearing Officer’s  
5 factual findings and conclusions of law relevant to SR-5, and Idaho Power requests that the Council  
6 adopt without modification the Hearing Officer’s findings and conclusions of law relevant to SR-5.

7 **E. Issue R-2**

8 The hearing officer granted limited party status to Mr. Michael McAllister and Ms. Lois  
9 Barry to raise R-2, which asks:

10 *Whether the visual impacts of the proposed facility structures in the viewshed of*  
11 *Morgan Lake Park are inconsistent with the objectives of the Morgan Lake Park*  
12 *Recreational Use and Development Plan [(“Morgan Lake Plan”)] and should*  
13 *therefore be reevaluated.*<sup>210</sup>

14 In the Proposed Contested Case Order, the Hearing Officer concluded:

15 Idaho Power is not required to demonstrate compliance with the Morgan Lake Park  
16 Plan because there are no proposed project components located within the park  
17 boundary. Nevertheless, Idaho Power considered the objectives and values of the  
18 Morgan Lake Plan in determining that scenery is a valued attribute of Morgan Lake  
19 Park, and incorporated that determination in its analysis of potential project  
20 impacts to the park.<sup>211</sup>

21 Although Ms. Barry and Mr. McAllister were both granted limited party status to raise R-2, only  
22 Ms. Barry filed exceptions to the Proposed Contested Case Order relating to R-2.<sup>212</sup> For the  
23 reasons discussed below, Ms. Barry’s exceptions do not identify any incorrect finding of law or

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<sup>209</sup> Susan Geer Exception to Administrative Law Judge Webster’s Rulings: Summary Determination and Proposed Contested Case Order for Issue SR-5 at 5.

<sup>210</sup> Second Order on Case Management at 6.

<sup>211</sup> Proposed Contested Case Order at 141.

<sup>212</sup> Mr. McAllister filed exceptions relating to Idaho Power’s route selection. Those exceptions are addressed in another response document where Idaho Power addresses miscellaneous issues that the limited parties raised.

1 fact, and for that reason Idaho Power requests that the Council adopt without modification the  
2 Hearing Officer’s findings and conclusions of law relevant to R-2.

3 **1. Lois Barry, Issue R-2, Exception 1**

4 Ms. Barry takes exception to the following finding of fact and conclusion of law regarding  
5 compliance with the Morgan Lake Plan:

6 First, the record establishes that Idaho Power is not required to demonstrate  
7 compliance with the Morgan Lake Plan for purposes of the Scenic Resources  
8 standard because there are no proposed project components located within the park  
9 boundary.<sup>213</sup>

10 Ms. Barry acknowledges that the Project will not be located within the boundary of Morgan  
11 Lake Park.<sup>214</sup> However, Ms. Barry argues that that fact is irrelevant, because Morgan Lake Park  
12 is within the analysis area for the Project and the visual impact of the Project “could overshadow  
13 the entire area of Morgan Lake Park.”<sup>215</sup>

14 Ms. Barry is conflating two distinct issues. Morgan Lake Park is within the analysis area  
15 for the Recreation Standard, and for that reason Idaho Power analyzed whether potential impacts  
16 to Morgan Lake Park are consistent with EFSC’s Recreation Standard. However, as the Council  
17 has already determined in its order on Mr. McAllister’s interlocutory appeal for R-2, Idaho Power  
18 is not required to demonstrate compliance with *the Morgan Lake Plan* because no Project  
19 component is proposed within the park.<sup>216</sup>

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<sup>213</sup> Proposed Contested Case Order at 234.

<sup>214</sup> Lois Barry Exceptions to Administrative Law Judge Webster’s Proposed Contested Case Order Issues R-2, R-3, and R-4 at 2.

<sup>215</sup> Lois Barry Exceptions to Administrative Law Judge Webster’s Proposed Contested Case Order Issues R-2, R-3, and R-4 at 1-2.

<sup>216</sup> EFSC Order on Interlocutory Appeal of Hearing Officer’s MSD Ruling on Issues FW-13, R-2 and SP-2 at 13-14 (Aug. 27, 2021). Although the order is dated August 27, 2021, the order was not filed into the administrative record of this contested case until September 17, 2021.



1 Ms. Barry’s exception has not identified any error in the Hearing Officer’s factual finding  
2 and Idaho Power requests that the Council adopt without modification the Hearing Officer’s  
3 findings and conclusions of law relevant to R-2.

4 **2. Lois Barry, Issue R-2, Exception 2**

5 Ms. Barry takes exception to the following finding of fact discussing Idaho Power’s revised  
6 supplemental analysis of impacts to Morgan Lake Park that the Company filed with its rebuttal  
7 testimony:

8 In its November 2019 supplemental analysis, Idaho Power noted that although  
9 Morgan Lake Park is an important recreation opportunity, the Morgan Lake Plan  
10 did not identify any specific scenic views or values as particularly important  
11 providing a quality outdoor recreational experience.<sup>217</sup>

12 Ms. Barry asserts that scenery is a valued attribute of Morgan Lake Park and no rule or  
13 statute requires identification of specific views.<sup>218</sup> Ms. Barry’s exception is misplaced, however,  
14 because even though the Morgan Lake Plan did not identify any specific views or values, the  
15 Hearing Officer properly concluded that Idaho Power nonetheless considered scenery to be a  
16 valued attribute of Morgan Lake Park.<sup>219</sup> The Hearing Officer clearly stated that Idaho Power  
17 determined that scenery is a valued attribute of Morgan Lake Park. Thus, Ms. Barry’s exception  
18 fails to identify any error in the Hearing Officer’s factual finding and Idaho Power requests that  
19 the Council adopt without modification the Hearing Officer’s findings and conclusions of law  
20 relevant to R-2.

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<sup>217</sup> Proposed Contested Case Order at 235.

<sup>218</sup> Lois Barry Exceptions to Administrative Law Judge Webster’s Proposed Contested Case Order Issues R-2, R-3, and R-4 at 2.

<sup>219</sup> Proposed Contested Case Order at 235; *see also* ASC, Exhibit R, Attachment R-1 at R-1-17 (ODOE - B2HAPPDoc3-35 ASC 18\_ Exhibit R\_Scenic Resources\_ASC 2018-09-28. Page 156 of 570); Idaho Power / Rebuttal Testimony of Louise Kling / Issues SR-2, SR-3, SR-7, R-1, R-2, R-3 and R-4, Exhibit E, Revised Morgan Lake Park Supplemental Analysis (Nov. 12, 2021), p. 17 of 18.

1           **3.       Lois Barry, Issue R-2, Exception 3**

2           Ms. Barry takes exception to the following factual finding discussing Idaho Power’s  
3 revised supplemental analysis of Morgan Lake Park:

4           In response to the limited parties’ ongoing claims that Idaho Power did not  
5 sufficiently consider the proposed facility’s potential impact to recreational  
6 opportunities in the undeveloped areas in the park, the Company revisited its impact  
7 analysis of the park. Idaho Power provided additional evidence of the project’s  
8 potential adverse impacts to Morgan Lake Park in Kling Rebuttal Exhibits E, F and  
9 G. Idaho Power specifically addressed disbursed recreation opportunities in  
10 undeveloped areas of the park such as bird watching and nature study (both of  
11 which are referenced in the Morgan Lake Plan Policy Statement).<sup>220</sup>

12           Ms. Barry believes “[i]t would be more accurate to state that the Company made a  
13 somewhat complete visual impact analysis of Morgan Lake Park for the first time”<sup>221</sup> in the  
14 supplemental analysis. Ms. Barry’s framing of Idaho Power’s analysis is inaccurate. Idaho Power  
15 first assessed potential impacts to Morgan Lake Park in the Company’s ASC.<sup>222</sup> After multiple  
16 commenters raised concerns in their DPO Comments about Idaho Power’s assessment of Morgan  
17 Lake Park, Idaho Power issued a supplemental analysis of Morgan Lake Park in the Company’s  
18 Responses to DPO Comments.<sup>223</sup> As the Hearing Officer correctly noted, Idaho Power then  
19 revisited its analyses to address additional concerns that limited parties raised.<sup>224</sup> Therefore, the  
20 preponderance of the evidence shows the supplemental analysis was not the “first time” Idaho  
21 Power completed visual impact assessment at Morgan Lake Park. Ms. Barry’s exception has not

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<sup>220</sup> Proposed Contested Case Order at 235.

<sup>221</sup> Lois Barry Exceptions to Administrative Law Judge Webster’s Proposed Contested Case Order Issues R-2, R-3, and R-4 at 2.

<sup>222</sup> ASC Exhibit T at T-13 (ODOE - B2HAPPDoc3-37 ASC 20\_Exhibit T\_Recreation\_ASC 2018-09-28. Page 18 of 291).

<sup>223</sup> See Proposed Order, Attachment 4: Idaho Power’s Supplemental Recreational Analysis of Morgan Lake Park (ODOE - B2HAPPDoc2 Proposed Order on ASC and Attachments 2019-07-02. Page 7696-7720 of 10016).

<sup>224</sup> Idaho Power / Rebuttal Testimony of Louise Kling / Issues SR-2, SR-3, SR-7, R-1, R-2, R-3 and R-4 / Exhibit E, Revised Morgan Lake Park Supplemental Analysis.

1 identified any error in the Hearing Officer’s factual finding and Idaho Power requests that the  
2 Council adopt without modification the Hearing Officer’s findings and conclusions of law relevant  
3 to R-2.

4 **4. Lois Barry, Issue R-2, Exception 4**

5 Ms. Barry takes exception to the following factual finding that impacts to Morgan Lake  
6 Park will be less than significant:

7 Contrary to the limited parties’ contentions, the Revised Supplemental Analysis  
8 confirms that, taking into account mitigation, the proposed facility’s impact on  
9 recreational opportunities at Morgan Lake Park will be less than significant. Indeed,  
10 as the Department notes, the Recreation standard does not require the Council to  
11 find that there will be no impact on a recreational opportunity, only that there is  
12 sufficient mitigation to ensure that impacts will be avoided, minimized, corrected  
13 or compensated so the impact is less than significant.<sup>225</sup>

14 Ms. Barry takes exception to this finding because (1) Idaho Power’s analysis did not  
15 consider the impacts on the affected human population; and (2) Ms. Barry disagrees with how  
16 Idaho Power defined “perception.”<sup>226</sup> As explained above in Idaho Power’s response to Lois  
17 Barry, Issue SR-6, Exception 2, Idaho Power analyzed impacts on the affected human population  
18 in the Company’s visual impacts assessments by assessing viewer perception and, although  
19 Ms. Barry may disagree with how Idaho Power defined perception, her concern that Idaho Power’s  
20 definition of “perception” may differ from how that term is defined in a dictionary is not relevant  
21 to compliance with any EFSC rule because “perception” is not an applicable standard or a defined  
22 term in EFSC rules. For these reasons, Ms. Barry’s exception fails to identify any error in the  
23 Hearing Officer’s factual finding and should be rejected.

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<sup>225</sup> Proposed Contested Case Order at 236.

<sup>226</sup> Lois Barry Exceptions to Administrative Law Judge Webster’s Proposed Contested Case Order Issues R-2, R-3, and R-4 at 4.

1 **F. Issue R-3**

2 The hearing officer granted limited party status to Lois Barry, Peter Barry, Colin Andrew,  
3 Kathryn Andrew, and Irene Gilbert to raise R-3, which asks:

4 *Whether the mitigation proposed to minimize the visual impacts of the proposed*  
5 *facility structures at Morgan Lake Park (\$100,000 for recreational facility*  
6 *improvements) is insufficient because the park’s remote areas will not benefit from*  
7 *the proposed mitigation.*<sup>227</sup>

8 In the Proposed Contested Case Order, the Hearing Officer concluded, in relevant part, the  
9 preponderance of the evidence shows, that with the recommended tower-type, tower-height, and  
10 tower-finish design changes the Project’s impacts to Morgan Lake Park will be less than  
11 significant; and that funds to be paid to the City of La Grande are intended to address recreation  
12 impacts and not visual impacts:

13 [A] a preponderance of the evidence supports Idaho Power’s conclusion (and the  
14 Department’s concurrence) that, with Recommended Recreation Condition 1, the  
15 impacts from the proposed facility at Morgan Lake Park will be less than  
16 significant.<sup>228</sup>

17 The funds paid to the City of La Grande are not intended to mitigate for the  
18 proposed facility’s visual impacts at Morgan Lake Park. Rather, the funds are  
19 intended for recreational improvements as mitigation for potential impacts to the  
20 park as a recreational resource. Recommended Recreation Condition 1 provides the  
21 mitigation for visual impacts.<sup>229</sup>

22 Although multiple limited parties had standing to raise R-3, only Lois Barry filed  
23 exceptions to the Proposed Contested Case Order.<sup>230</sup> For the reasons discussed below, Ms. Barry’s

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<sup>227</sup> Second Order on Case Management at 6.

<sup>228</sup> Proposed Contested Case Order at 239.

<sup>229</sup> Proposed Contested Case Order at 141.

<sup>230</sup> Peter Barry, who also has limited party status for R-3, sent an email to the service list for this contested case which he referred to as his exceptions to the Proposed Contested Case Order. However, because Mr. Barry’s email is not specific to any findings of fact or conclusions of law relevant to R-3, but rather raises general procedural concerns, Idaho Power addresses Mr. Barry’s purported exceptions in another response that deals with general and/or procedural exceptions.

1 exceptions do not identify any incorrect finding of law or fact, and for that reason Idaho Power  
2 requests that the Council adopt without modification the Hearing Officer’s findings and  
3 conclusions of law relevant to R-3.

4 **1. Lois Barry, Issue R-3, Exception 1**

5 In Ms. Barry’s first exception to Issue R-3, she challenges the following finding of fact  
6 regarding the design changes proposed as visual impact mitigation for Morgan Lake Park:

7 As previously discussed, to mitigate for the potential visual impacts Idaho Power  
8 has proposed micrositing so that project components are not visible from the vast  
9 majority of the park and, for those components that will be visible from certain  
10 remote areas in the park, *the Company has proposed design changes to minimize*  
11 *the visible impact.*<sup>231</sup>

12 Ms. Barry asserts that the “proposed design changes” referenced in this finding are  
13 “unspecified.”<sup>232</sup>

14 Contrary to Ms. Barry’s assertion, the referenced design changes have been specified in  
15 Recommended Recreation Condition 1, which sets forth specific tower-type, tower-height, and  
16 tower-finish requirements for the portion of the Project near Morgan Lake Park:

- 17 Recommended Recreation Condition 1: If the Morgan Lake alternative facility  
18 route is selected, the certificate holder shall construct the facility using tower  
19 structures that meet the following criteria for the transmission line that would be  
20 visible from Morgan Lake Park, specifically between milepost (MP) 6.0 to MP 6.9  
21 miles 5-7 of the Morgan Lake alternative, as shown on ASC Exhibit C, Attachment  
22 C-3, Map 8.  
23 a. H-frames;  
24 b. Tower height no greater than 130 feet; and  
25 c. Weathered steel (or an equivalent coating).<sup>233</sup>

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<sup>231</sup> Proposed Contested Case Order at 239 (emphasis added).

<sup>232</sup> Lois Barry’s Exceptions to Administrative Law Judge Webster’s Proposed Contested Case Order Issues R-2, R-3, & R-4 at 4-5.

<sup>233</sup> Proposed Contested Case Order at 116.

1           The standard design for the Project is a lattice structure ranging in height from 109 to 200  
2 feet,<sup>234</sup> while Recommended Recreation Condition 1 provides H-frame towers, no taller than 130  
3 feet, coated with a weathered steel finish for towers visible from Morgan Lake Park.<sup>235</sup> As Idaho  
4 Power’s visual resources expert witness, Louise Kling, concluded in her testimony and revised  
5 supplemental analysis of potential impacts to Morgan Lake Park (including a tree study, video  
6 simulation, and updated analysis), taking into account the design changes in Recommended  
7 Recreation Condition 1, potential visual impacts to Morgan Lake Park will be less than  
8 significant.<sup>236</sup> Because Recommended Recreation Condition 1 sets forth the specific tower-type,  
9 tower-height, and tower-finish requirements that were relied upon to demonstrate compliance with  
10 the Recreation Standard, Ms. Barry’s assertion that the design changes are “unspecified” is  
11 contradicted by the plain language of Recommended Recreation Condition 1 and by the record  
12 evidence, and is therefore erroneous.

13           **2.       Lois Barry, Issue R-3, Exception 2**

14           Ms. Barry takes exception to the following conclusion of law regarding the visual impacts  
15 on Morgan Lake Park being less than significant:

16           Also as previously discussed, the Recreation standard does not require the Council  
17 to find that the project will have no impacts to Morgan Lake Park, only that overall  
18 the project has a less than significant impact on the recreational activities at the  
19 park.<sup>237</sup>

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<sup>234</sup> Idaho Power / Rebuttal Testimony of Louise Kling / Issues SR-2, SR-3, SR-7, R-1, R-2, R-3 and R-4, p. 58 of 165.

<sup>235</sup> Proposed Contested Case Order at 116. While Recommended Recreation Condition 1 provides that the design changes will be applied from milepost 6.0 to 6.9, Idaho Power has committed to extending this mitigation to mileposts 5.0 through 8.0. *See* Proposed Contested Case Order at 118. Idaho Power believes the reference to “6.0 to 6.9” is a scrivener’s error that was inadvertently omitted from the Hearing Officer’s amended recommendations and should be corrected by the Council to read “5.0 to 8.0.”

<sup>236</sup> Idaho Power’s Closing Argument for Contested Case Issues R-1, R-2, R-3, R-4, SR-2, SR-3, and SR-7 at 54-55 (Feb. 28, 2022).

<sup>237</sup> Proposed Contested Case Order at 239.

1 Ms. Barry asks: “How does one measure thirteen 130’ towers on the skyline as *less than*  
2 *significant?*”<sup>238</sup> She then concludes: “Obviously no one is ‘measuring.’ Idaho Power is  
3 deciding.”<sup>239</sup>

4 Contrary to Ms. Barry’s conclusory assertion, Idaho Power is not simply “deciding”  
5 whether an impact is significant or not. Rather, Idaho Power has provided substantial analysis and  
6 evidence in the record to demonstrate that potential visual impacts to Morgan Lake Park will be  
7 less than significant. In addition to evidence Idaho Power provided in its Application for Site  
8 Certificate and in response to comments on the Draft Proposed Order, in the contested case, Idaho  
9 Power provided an updated analysis and expert witness testimony from Louise Kling, an expert in  
10 the field of visual resources analysis with more than 20 years of experience in environmental  
11 research and planning.<sup>240</sup> Ms. Kling’s analysis included a tree study, video simulation, revised  
12 impact analysis, and viewshed analysis showing that the Project will not be visible at all from  
13 84 percent of the Park.<sup>241</sup> To minimize and mitigate the impacts to the remaining 16 percent of  
14 the Park where the Project will be visible, Recommended Recreation Condition 1 provides Idaho  
15 Power will use weathered steel, H-frame towers for all transmission structures located near  
16 Morgan Lake Park,<sup>242</sup> which will not exceed 130 feet in height.<sup>243</sup> Ms. Kling, concluded in her

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<sup>238</sup> Lois Barry’s Exceptions to Administrative Law Judge Webster’s Proposed Contested Case Order Issues R-2, R-3, & R-4 at 5.

<sup>239</sup> Lois Barry’s Exceptions to Administrative Law Judge Webster’s Proposed Contested Case Order Issues R-2, R-3, & R-4 at 5.

<sup>240</sup> Idaho Power / Rebuttal Testimony of Louise Kling / Issues SR-2, SR-3, SR-7, R-1, R-2, R-3 and R-4 / Exhibit E, Revised Morgan Lake Park Supplemental Analysis.

<sup>241</sup> Idaho Power / Rebuttal Testimony of Louise Kling / Issues SR-2, SR-3, SR-7, R-1, R-2, R-3 and R-4 / Exhibit F, Video Simulation of Potential Visual Impacts to Morgan Lake Park (Filed Nov. 12, 2021); Idaho Power / Rebuttal Testimony of Louise Kling / Issues SR-2, SR-3, SR-7, R-1, R-2, R-3 and R-4 / Exhibit G, Tree Heights and Locations at Morgan Lake Park (filed Nov. 12, 2021).

<sup>242</sup> Idaho Power / Rebuttal Testimony of Louise Kling / Issues SR-2, SR-3, SR-7, R-1, R-2, R-3 and R-4 / Exhibit E, Revised Morgan Lake Park Supplemental Analysis, p. 1 of 16.

<sup>243</sup> Proposed Order, Attachment 1, Draft Site Certificate at 35 (ODOE - B2HAPPDoc2 Proposed Order on ASC and Attachments 2019-07-02. Page 739 of 10016).

1 testimony and revised supplemental analysis, taking into account the design changes in  
2 Recommended Recreation Condition 1, potential visual impacts to Morgan Lake Park will be less  
3 than significant.<sup>244</sup> The record evidence, including Ms. Kling’s analysis, supports the finding that  
4 overall the Project will have a less than significant impact on the recreational activities at Morgan  
5 Lake Park.<sup>245</sup>

6 Ms. Barry filed testimony from several witnesses asserting that Idaho Power’s mitigation  
7 is inadequate because Project components may still be visible from some areas within Morgan  
8 Lake Park.<sup>246</sup> However, as Idaho Power explained in its Closing Argument,<sup>247</sup> this assertion  
9 misstates the applicable standard. To issue a site certificate, EFSC must conclude that the Project  
10 is not likely to result in significant adverse impacts to Morgan Lake Park.<sup>248</sup> As explained in Idaho  
11 Power’s various analyses of visual impacts, the potential impacts resulting at Morgan Lake Park  
12 will be less than significant because the Project will be visible from only discrete areas within the  
13 park,<sup>249</sup> and as a result the impacts to Morgan Lake Park will not preclude the enjoyment of the  
14 recreational opportunities for which the park was recognized.<sup>250</sup> Therefore, Idaho Power has  
15 demonstrated by a preponderance of the evidence that the Project will comply with EFSC’s  
16 Recreation Standard because the Project will not be visible from 84 percent of the Park, and in

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<sup>244</sup> Idaho Power’s Closing Argument for Contested Case Issues R-1, R-2, R-3, R-4, SR-2, SR-3, and SR-7 at 54-55 (Feb. 28, 2022).

<sup>245</sup> Idaho Power / Rebuttal Testimony of Louise Kling / Issues SR-2, SR-3, SR-7, R-1, R-2, R-3 and R-4, Exhibit E, Revised Morgan Lake Park Supplemental Analysis, p. 6 of 18.

<sup>246</sup> See, e.g., Lois Barry / Witness Susan Badger-Jones for Lois Barry (Sept. 16, 2021) / Issue R-3, p. 2 of 2 (“The only possible mitigation must be to bury the line so no part would be visible from any part of the Morgan Lake Park, including the approach road.”).

<sup>247</sup> Idaho Power’s Closing Argument for Contested Case Issues R-1, R-2, R-3, R-4, SR-2, SR-3, and SR-7 at 78-79.

<sup>248</sup> OAR 345-022-0100(1).

<sup>249</sup> Idaho Power / Rebuttal Testimony of Louise Kling / Issues SR-2, SR-3, SR-7, R-1, R-2, R-3 and R-4, p. 135 of 165.

<sup>250</sup> Idaho Power / Rebuttal Testimony of Louise Kling / Issues SR-2, SR-3, SR-7, R-1, R-2, R-3 and R-4, Exhibit E, Revised Morgan Lake Park Supplemental Analysis, p. 17 of 18.



1 those areas where it will be visible, the Company’s proposed design changes will minimize and  
2 mitigate impacts sufficiently to ensure that the impacts overall will be less than significant.

3 Ms. Barry’s Exception 2 does not identify any incorrect finding of law or fact, and for that  
4 reason Idaho Power requests that the Council adopt without modification the Hearing Officer’s  
5 findings and conclusions of law relevant to R-3.

6 **3. Lois Barry, Issue R-3, Exception 3**

7 Ms. Barry challenges the following finding by asserting that the design changes in  
8 Recommended Recreation Condition 1 are inadequate, and instead, Idaho Power should be forced  
9 to bury the portion of B2H near Morgan Lake Park consistent with the condition language  
10 proposed by Ms. Barry:<sup>251</sup>

11 Ms. Barry’s proposed condition is both untimely and inappropriate. . . . It is  
12 inappropriate because the Council cannot consider other routes or the  
13 undergrounding of segments that Idaho Power did not propose in the ASC.<sup>252</sup>

14 As explained above in response to STOP B2H, Issue SR-7, Exception 6, EFSC determined  
15 in *Wheatridge* that “the Council does not have authority to propose alternatives such as one  
16 underground transmission line versus up to two, overhead parallel transmission lines, as proposed  
17 by the applicant.”<sup>253</sup>

18 The Council should follow its prior decision in *Wheatridge*, and reject Ms. Barry’s alternate  
19 proposal.<sup>254</sup> Moreover, Ms. Barry’s factual assertions about undergrounding an Idaho Power

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<sup>251</sup> Lois Barry’s Exceptions to Administrative Law Judge Webster’s Proposed Contested Case Order Issues R-2, R-3, & R-4 at 4-5 (quoting Lois Barry, Closing Arguments Issues R-4, R-3, R-2 at 20 (February 28, 2022)).

<sup>252</sup> Proposed Contested Case Order at 243.

<sup>253</sup> *Wheatridge* Final Order at 7, n.22 (emphasis added).

<sup>254</sup> Additionally, relying on *Wheatridge*, the Hearing Officer has already addressed a related concern during the summary determination phase of this contested case. HCA-5 previously asked: *Whether Applicant adequately analyzed the feasibility of undergrounding the transmission line as mitigation for potential visual impacts at Flagstaff Hill/NHOTIC.* Idaho Power moved for summary determination on that issue, citing *Wheatridge* for the proposition

1 transmission line in the Hailey/Ketchum area should be stricken from the record. Those alleged  
2 facts are not in the record. Indeed, no party to this contested case has provided any evidence  
3 relating to undergrounding Idaho Power facilities in other locations. Therefore, this statement  
4 should be stricken from the record or, alternatively, given no weight.

5 **4. Lois Barry, Issue R-3, Exception 4**

6 Ms. Barry takes exception to the following rejection in the Proposed Contested Case Order  
7 of Ms. Barry’s proposed site certificate condition that would have required Idaho Power to  
8 underground the Project segment near Morgan Lake Park or, alternatively, reroute the Project  
9 further west of the park:

10 Ms. Barry’s proposed condition is both untimely and inappropriate. The proposed  
11 condition is untimely because Ms. Barry did not submit it in accordance with the  
12 established schedule.<sup>255</sup>

13 Ms. Barry argues that the deadline established for proposing conditions should not apply  
14 because the deadlines became “fluid,” and also argues that the Hearing Officer’s rejection of her  
15 proposed condition regarding undergrounding was substantively incorrect, stating that it is her  
16 assumption that the Council can consider requiring Idaho Power to underground the transmission  
17 line.<sup>256</sup> Ms. Barry also asserts that Idaho Power’s updated Morgan Lake Park analysis was  
18 untimely.<sup>257</sup> The Council should reject these arguments.

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that the Council lacks jurisdiction to assess alternative facilities that are not included in the applicant’s ASC. The Hearing Officer agreed with Idaho Power’s position, concluding: “Because Idaho Power did not propose to underground any portion of the transmission line route . . . [HCA-5] is not a proper matter for the Council’s consideration.” The Hearing Officer then granted Idaho Power’s motion for summary determination. Ruling and Order on Motion for Summary Determination on Contested Case Issues HCA-2 and HCA-5 at 14-15 (Aug. 10, 2021).

<sup>255</sup> Proposed Contested Case Order at 242.

<sup>256</sup> Lois Barry’s Exceptions to Administrative Law Judge Webster’s Proposed Contested Case Order Issues R-2, R-3, & R-4 at 5-6.

<sup>257</sup> Lois Barry’s Exceptions to Administrative Law Judge Webster’s Proposed Contested Case Order Issues R-2, R-3, & R-4 at 5-6.

1 First, the schedule issued by the Hearing Offer contained deadlines for proposing new  
2 conditions (September 17, 2021) and responding to newly proposed conditions (November 12,  
3 2021).<sup>258</sup> It is therefore not clear what Ms. Barry is referring to when she states that the schedule  
4 in this contested case became “fluid” at some point, but regardless of Mr. Barry’s precise meaning,  
5 the record shows that the schedule in this case was both clear and appropriate and, based on that  
6 schedule, Ms. Barry’s proposed site certificate condition was untimely.<sup>259</sup>

7 Second, regardless of the timing for Ms. Barry proposal, Ms. Barry’s proposed site  
8 certificate condition regarding undergrounding should be rejected, because, as discussed above,  
9 the Council lacks jurisdiction to require an applicant to construct a facility that the applicant has  
10 not proposed.

11 Finally, Ms. Barry’s suggestion that Idaho Power’s Revised Supplemental Analysis of  
12 Morgan Lake Park was untimely is incorrect. Consistent with the schedule established for the  
13 contested case proceeding, Idaho Power conducted that analysis in response to the limited parties’  
14 direct testimony and filed that analysis on November 12, 2021 with the Company’s Rebuttal  
15 Testimony.<sup>260</sup> At the time it was filed, no party objected to the submission as untimely or  
16 otherwise improper.

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<sup>258</sup> Second Order on Case Management at 10. Idaho Power understands that the deadline for proposing entirely new conditions was September 17, 2021. While the Hearing Officer considered proposals to amend conditions that had already been proposed after September 17, 2021, however, it is not inconsistent with the scheduling order that the Hearing Officer considered refinements of the proposed condition language later in the process, as they were not entirely new proposals.

<sup>259</sup> OAR 345-015-0085(1) (“Parties shall submit proposed site certificate conditions to the hearing officer in writing *according to a schedule set by the hearing officer.*”) (emphasis added).

<sup>260</sup> Idaho Power / Rebuttal Testimony of Louise Kling / Issues SR-2, SR-3, SR-7, R-1, R-2, R-3 and R-4, Exhibit E, Revised Morgan Lake Park Supplemental Analysis (Nov. 12, 2021).

1 Ms. Barry’s Exception 4 does not identify any incorrect finding of fact or conclusion of  
2 law, and for that reason Idaho Power requests that the Council adopt without modification the  
3 Hearing Officer’s findings of fact and conclusions of law relevant to R-3.

4 **G. Issue R-4**

5 The Hearing Officer granted limited party status to Ms. Lois Barry to raise R-4, which  
6 asks:

7 *Whether Applicant’s visual impact assessment for Morgan Lake Park adequately*  
8 *evaluates visual impacts to the more than 160 acres of undeveloped park land and*  
9 *natural surroundings, as visual simulations were only provided for high-use*  
10 *areas.*<sup>261</sup>

11 In the Proposed Contested Case Order, the Hearing Officer concluded:

12 Idaho Power’s supplemental analysis of Morgan Lake Park adequately evaluates  
13 the proposed project’s visual impacts in the undeveloped areas of the park.<sup>262</sup>

14 Ms. Barry filed exceptions to the Proposed Contested Case Order relating to R-4. For the  
15 reasons discussed below, Ms. Barry’s exceptions do not identify any incorrect finding of law or  
16 fact, and for that reason Idaho Power requests that the Council adopt without modification the  
17 Hearing Officer’s findings and conclusions of law relevant to R-4.

18 **1. Lois Barry, Issue R-4, Exception 1**

19 In her exceptions, Ms. Barry argues that Idaho Power omitted the Council’s definition of  
20 “significant” when analyzing impacts to Morgan Lake Park.<sup>263</sup> As an initial matter, Ms. Barry’s  
21 arguments are not tied to any specific exceptions to the Proposed Contested Case Order as required

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<sup>261</sup> Second Order on Case Management at 6.

<sup>262</sup> Proposed Contested Case Order at 142.

<sup>263</sup> Lois Barry Exceptions to Administrative Law Judge Webster’s Proposed Contested Case Order Issues R-2, R-3, and R-4 at 6.

1 by OAR 345-015-0085(5), and her claims should therefore be rejected.<sup>264</sup> Nevertheless, should  
2 the Council wish to consider Ms. Barry’s arguments, Idaho Power addresses her claim below.

3 Ms. Barry’s assertion is completely inconsistent with the evidence in this case. The  
4 Recreation Standard requires Idaho Power to demonstrate that impacts to Morgan Lake Park will  
5 not be significant.<sup>265</sup> Therefore, to demonstrate compliance with those standards, Idaho Power  
6 necessarily had to consider the Council’s definition of “significant.” Importantly, in the  
7 Company’s visual impact assessment methodology, Idaho Power analyzed the Council’s definition  
8 of “significant” and identified an applicable standard from each clause of the Council’s  
9 definition.<sup>266</sup> For these reasons, Ms. Barry’s exception fails to identify any error in the Hearing  
10 Officer’s findings of fact or conclusions of law, and Idaho Power requests that the Council adopt  
11 without modification the Hearing Officer’s findings and conclusions of law relevant to R-4.

12 **2. Lois Barry, Issue R-4, Exception 2**

13 Ms. Barry takes exception to the following factual finding summarizing the evidence filed  
14 in this contested case:

15 Ms. Barry provided written testimony and exhibits in support of her contentions  
16 along with written argument. In response to Ms. Barry’s claim that Idaho Power  
17 did not provide a sufficient visual impact analysis of the remote, undeveloped areas  
18 in the park, Idaho Power conducted an additional analysis of potential visual  
19 impacts in both the developed and undeveloped areas of the park where visitors  
20 engage in dispersed recreation activities. Idaho Power submitted its Revised  
21 Supplemental Analysis of Morgan Lake Park as Kling Rebuttal Exhibit E.<sup>267</sup>

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<sup>264</sup> OAR 345-015-0085(5) (“In an exception, the party shall specifically identify the finding of fact, conclusion of law or, in contested case proceedings on an application for a site certificate or a proposed site certificate amendment, recommended site certificate condition to which the party excepts and shall state the basis for the exception.”).

<sup>265</sup> OAR 345-022-0100(1).

<sup>266</sup> ASC, Exhibit R, Attachment R-1 at R-1-5 (ODOE - B2HAPPDoc3-35 ASC 18\_ Exhibit R\_ Scenic Resources\_ASC 2018-09-28. Page 144 of 570); *see also* Kling testimony, Cross-Examination Hearing Day 6, January 19, 2022 (Tr. Day 6), page 114, lines 21-22 (stating that, when analyzing the definition of “significant” to prepare the visual impact methodology, “what I was always told was every word matters”).

<sup>267</sup> Proposed Contested Case Order at 240.

1 Ms. Barry takes exception to this factual finding because she interprets it as “dismissing”  
2 the concerns that Ms. Barry raised relating to the ASC.<sup>268</sup> Ms. Barry’s exception does not relate  
3 to the challenged factual finding, because Ms. Barry raises concerns about the ASC but the Hearing  
4 Officer’s finding discusses the revised supplemental analysis that the Company prepared  
5 specifically to address Ms. Barry’s testimony. The Hearing Officer did not dismiss Ms. Barry’s  
6 concerns; rather, Idaho Power addressed in its Rebuttal Testimony the issues Ms. Barry raised.  
7 Ms. Barry’s exception does not identify any error in the Hearing Officer’s factual finding and  
8 Idaho Power requests that the Council adopt without modification the Hearing Officer’s findings  
9 and conclusions of law relevant to R-4.

10 **3. Lois Barry, Issue R-4, Exception 3**

11 Ms. Barry takes exception to the following procedural factual finding regarding Ms.  
12 Barry’s objection to admitting the Company’s revised supplemental analysis of Morgan Lake Park:

13 Like Mr. McAllister, Ms. Barry argued that Idaho Power provided the Revised  
14 Analysis “late in the game,” thereby denying the limited parties the opportunity to  
15 assess its validity. L. Barry Response to Closing Arguments at 3. However, as  
16 previously discussed, Idaho Power properly offered the Revised Analysis, video  
17 simulations, and tree study as evidence in response to limited parties’ claims that  
18 the Company did not adequately evaluate the park’s undeveloped areas. The  
19 evidence was admitted without objection; it is relevant and material to the Council’s  
20 review under the Recreation standard and is entitled to evidentiary weight.<sup>269</sup>

21 Ms. Barry argues that the fact that Idaho Power submitted a supplemental analysis supports  
22 her position that the Company’s initial analyses were not adequate, that the evidence was not  
23 timely submitted, that Ms. Barry failed to object to the evidence only because she did not know it

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<sup>268</sup> Lois Barry Exceptions to Administrative Law Judge Webster’s Proposed Contested Case Order Issues R-2, R-3, and R-4 at 7.

<sup>269</sup> Proposed Contested Case Order at 241, n.314.

1 was offered as a supplement to the ASC, and she asserts that the evidence is not relevant or entitled  
2 to evidentiary weight.<sup>270</sup>

3 None of Ms. Barry’s arguments demonstrate any error in the Hearing Officer’s procedural  
4 finding. Idaho Power agrees that its previous analysis of Morgan Lake Park focused on the  
5 developed recreation facilities located there, and when limited parties raised concerns about the  
6 undeveloped areas of the park, Idaho Power further addressed those concerns with its revised  
7 supplemental analysis.<sup>271</sup> Ms. Barry’s assertion that Idaho Power’s evidence was untimely is  
8 incorrect. Idaho Power timely filed the analysis with the Company’s Rebuttal Testimony, in  
9 accordance with the procedural schedule set forth in this proceeding. Ms. Barry appears to argue  
10 that the Company cannot supplement or revise its analysis after filing the ASC, but such an  
11 interpretation would be absurd. If Ms. Barry were correct, then there would simply be no point in  
12 soliciting public comment on an ASC or going through a contested case. The fact that Idaho Power  
13 reviewed the limited parties’ concerns and supplemented its analysis of the potential impacts to  
14 Morgan Lake Park—and proposed additional mitigation—to address those concerns shows that  
15 the Company actively engaged in the contested case process, and Ms. Barry has not provided any  
16 legal basis to dismiss that analysis.

17 Ms. Barry’s assertion that she did not understand that the Company’s rebuttal evidence  
18 supplemented the analysis in the ASC is unfounded and provides no support for her exception.  
19 Idaho Power clearly stated in the analysis that the “document provides a revised supplemental  
20 analysis for Morgan Lake Park, identified as an important recreation opportunity per OAR 345-

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<sup>270</sup> Lois Barry Exceptions to Administrative Law Judge Webster’s Proposed Contested Case Order Issues R-2, R-3, and R-4 at 7.

<sup>271</sup> Idaho Power / Rebuttal Testimony of Louise Kling / Issues SR-2, SR-3, SR-7, R-1, R-2, R-3 and R-4, Exhibit E, Revised Morgan Lake Park Supplemental Analysis, p. 6 of 18.

1 022-0100 in response to comments received on the Draft Proposed Order (DPO) and testimony  
2 provided by limited parties for the Boardman to Hemingway Project.”<sup>272</sup> Ms. Barry’s description  
3 of the document as only “appear[ing] to be relevant to Cross Examination” is not consistent with  
4 the plain text of the analysis. Finally, Ms. Barry’s argument that the analysis is not relevant is  
5 plainly false. The document contains the Company’s most recent and up-to-date analysis of  
6 potential impacts from the Project; it is clearly relevant to determining whether impacts will be  
7 significant.

8 For these reasons, Ms. Barry’s exception fails to identify any procedural error in the  
9 Hearing Officer’s factual findings and Idaho Power requests that the Council adopt without  
10 modification the Hearing Officer’s findings and conclusions of law relevant to R-4.

11 **4. Lois Barry, Issue R-4, Exception 4**

12 Ms. Barry takes exception to the following factual finding that impacts to Morgan Lake  
13 Park will be less than significant:

14 A preponderance of evidence establishes that although the project will result in  
15 long-term visual impacts of varying intensity in Morgan Lake Park, these visual  
16 impacts will not preclude visitors from engaging in recreational opportunities in the  
17 park. Hence, the project’s impacts to the park will be less than significant.<sup>273</sup>

18 Ms. Barry takes exception to this finding because the Hearing Officer concluded that the  
19 Project will not preclude visitors from “engaging” in the recreational opportunities in the park, but  
20 Idaho Power’s analysis asked whether the Project would preclude visitors from “enjoying” those  
21 opportunities.<sup>274</sup> Ms. Barry is correct that Idaho Power’s analysis referred to the enjoyment of

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<sup>272</sup> Idaho Power / Rebuttal Testimony of Louise Kling / Issues SR-2, SR-3, SR-7, R-1, R2, R-3 and R-4 / Exhibit E, Revised Morgan Lake Park Supplemental Analysis (Nov. 12, 2021), p. 1 of 16.

<sup>273</sup> Proposed Contested Case Order at 241.

<sup>274</sup> Lois Barry Exceptions to Administrative Law Judge Webster’s Proposed Contested Case Order Issues R-2, R-3, and R-4 at 7.



1 recreational opportunities, rather than engagement. However, regardless of the word used, Idaho  
2 Power’s analysis provides ample evidence that impacts will be less than significant. As explained  
3 in Ms. Kling’s Rebuttal Testimony, viewers in the vast majority of the park will not be affected by  
4 the Project because no Project component will be visible and sound levels from the Project will be  
5 “barely audible” even at the closest point of Morgan Lake Park;<sup>275</sup> it is reasonable to conclude  
6 that, where the Project components cannot be seen or heard, impacts from the Project will not  
7 affect the enjoyment of the recreation opportunities in those areas. In areas where the Project will  
8 be visible, the objective criteria like distance from the Project and the extent to which views of the  
9 Project are intermittent support a determination of how the Project will affect the viewer’s  
10 enjoyment of the recreation opportunities at the park, because those factors describe “the  
11 relationship between an object being viewed and the viewer.”<sup>276</sup> The evidence that Idaho Power  
12 provided demonstrates that impacts will be less than significant.

13 For these reasons, Ms. Barry’s exception does not identify any error in the Hearing  
14 Officer’s factual finding, and Idaho Power requests that the Council adopt without modification  
15 the Hearing Officer’s findings and conclusions of law relevant to R-4.

16 **5. Lois Barry, Issue R-4, Exception 5**

17 Ms. Barry takes exception to the following factual finding discussing Ms. Barry’s  
18 challenge to Idaho Power’s visual impact assessment methodology:

19 Ms. Barry also argues that Idaho Power should have applied the USFS SMS to  
20 assess the magnitude of impact and/or should have surveyed visitors to Morgan  
21 Lake Park to determine viewer perception. As noted above, Ms. Barry’s challenges  
22 to the methodology for assessing visual impacts fall outside the scope of Issue R-  
23 4. Issue R-4 asks whether Idaho Power adequately evaluated visual impacts “to the

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<sup>275</sup> Idaho Power / Rebuttal Testimony of Louise Kling / Issues SR-2, SR-3, SR-7, R-1, R-2, R-3 and R-4, Exhibit E, Revised Morgan Lake Park Supplemental Analysis, pp. 5-6 of 18.

<sup>276</sup> See Kling Testimony, Cross-Examination Hearing Day 6, January 19, 2022 (Tr. Day 6), page 78, lines 3-13.

1 more than 160 acres of undeveloped park land and natural surroundings.” In other  
2 words, this issue concerns the scope of the Morgan Lake Park evaluation and the  
3 Company’s conclusions regarding magnitude of impact, but it does not encompass  
4 challenges to Idaho Power’s methodology for assessing impacts to visual resources.  
5 Moreover, the ALJ previously considered and rejected these same contentions in  
6 the *Ruling and Order on Summary Determination of Issue SR-6*. While not  
7 addressed in connection with Issue SR-6, Ms. Barry’s assertions that Idaho Power’s  
8 methodology was inappropriate and not properly vetted or peer-reviewed also  
9 exceed the scope of Issue R-4.<sup>277</sup>

10 The Hearing Officer also included a footnote to that finding, which read:

11 Furthermore, even if Ms. Barry had standing to raise these other challenges to Idaho  
12 Power’s visual impact assessment methodology, she has not demonstrated that the  
13 methodology is flawed, incomplete or insufficient to establish the project’s  
14 compliance with the Council’s siting standards.<sup>278</sup>

15 Ms. Barry argues in her exception that the Hearing Officer should not have separated  
16 concerns regarding the methodology from the conclusions that Idaho Power’s consultants reached  
17 when they applied that methodology.<sup>279</sup> Ms. Barry’s assertion is not relevant to the validity of the  
18 Hearing Officer’s finding. As the Hearing Officer stated, Ms. Barry’s argument was not related  
19 to the specific question asked in R-4. Moreover, the Hearing Officer addressed Ms. Barry’s  
20 arguments on the merits, stating that Ms. Barry had not demonstrated any inadequacy in Idaho  
21 Power’s methodology. Therefore, even if Ms. Barry were correct that these methodology  
22 arguments are relevant to resolution of R-4, the Hearing Officer addressed Ms. Barry’s argument.  
23 For these reasons, Ms. Barry’s exception does not identify any error in the Hearing Officer’s  
24 factual findings and Idaho Power requests that the Council adopt without modification the Hearing  
25 Officer’s findings and conclusions of law relevant to R-4.

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<sup>277</sup> Proposed Contested Case Order at 241.

<sup>278</sup> Proposed Contested Case Order at 241 n.316.

<sup>279</sup> Lois Barry Exceptions to Administrative Law Judge Webster’s Proposed Contested Case Order Issues R-2, R-3, and R-4 at 8-9.

1 **IV. CONCLUSION**

2 For the reasons discussed above, Idaho Power respectfully requests that the Council reject  
3 the limited parties' exceptions to the Proposed Contested Case Order regarding R-2, R-3, R-4, SR-  
4 3, SR-5, SR-6, and SR-7.

DATED: July 14, 2022

**MCDOWELL RACKNER GIBSON PC**



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**CERTIFICATE OF FILING AND SERVICE**

I hereby certify that on July 14, 2022, **APPLICANT IDAHO POWER COMPANY'S RESPONSE TO LIMITED PARTIES' EXCEPTIONS FOR CONTESTED CASE ISSUES R-2, R-3, R-4, SR-3, SR-5, SR-6, AND SR-7** was emailed to:

Alison Greene Webster, Senior Administrative Law Judge  
Hearings Officer  
Office of Administrative Hearings  
[OED\\_OAH\\_Referral@oregon.gov](mailto:OED_OAH_Referral@oregon.gov)

I further certify that on July 14, 2022, **APPLICANT IDAHO POWER COMPANY'S RESPONSE TO LIMITED PARTIES' EXCEPTIONS FOR CONTESTED CASE ISSUES R-2, R-3, R-4, SR-3, SR-5, SR-6, AND SR-7** was served by First Class Mail or electronic mail as indicated below:

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*/s/ Suzanne Prinsen*

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Suzanne Prinsen  
Legal Assistant

**BEFORE THE ENERGY FACILITIES SITING COUNCIL  
for the  
STATE OF OREGON**

<b>IN THE MATTER OF:</b>	)	<b>PETITIONERS ANNE AND KEVIN MARCH'S EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE WEBSTER'S RULINGS: PROPOSED CONTESTED CASE ORDER, ISSUE FW-7</b>
<b>THE PROPOSED BOARDMAN TO HEMINGWAY TRANSMISSION LINE</b>	)	
	)	
	)	<b>DATED JUNE 30, 2022</b>
	)	
	)	
<b>OAH Case No. 2019-ABC-02833</b>	)	
	)	

**Issue FW-7:** *Whether Applicant's Fish Passage Plans, including 3A and 3B designs, complies with the Fish and Wildlife Habitat standard's Category 2 mitigation requirements; whether Applicant must revisit its plans because threatened Steelhead redds have been identified in the watershed.*

**INTRODUCTION**

Anne and Kevin March were granted limited party status by ALJ Webster-Green regarding the above issue FW-7. Idaho Power Corporation collected data prior to 2014 in its Application for the Boardman to Hemmingway powerline project. The Marches made the Applicant (IPC) and ODOE aware that ODOT had completed a Fish Passage Improvement Project in 2015 and 2018 at the I-84 crossing of Ladd Creek. However, in the Proposed order, streams continue to be potentially mis-labeled as "non-fish" when the evidence shows that Snake River Basin Steelhead (SRBS) are now potentially able to enter those streams. Streams that are considered "ephemeral" also now have the potential to contain SRBS. Lack of accurate data



invalidates IPC's claim that "Idaho Power is not proposing construction of any new, or major replacement of existing, artificial obstructions on any of the road-stream crossings in that watershed" (PCPO page 157) because streams were labeled as "non-fish" and not studied as native migratory fish bearing, and road, crossing and powerline construction could adversely affect ephemeral streams because they are not considered Waters of The State by IPC.

Mr. and Mrs. March request that the EFSC issue a reversal of the ALJ's ruling in her Proposed Contested Case Order (PCCO) for the reasons stated below. The Marches also request that this issue be remanded back to IPC so that they can provide evidence regarding ephemeral streams in the Ladd Creek watershed. The current version of the Applicant's Proposed Order is not specific enough to make a determination of compliance in the upper Ladd Creek watershed.

Mr. and Mrs. March raise four exceptions to the ALJ's PCCO as they relate to Issue FW-7. Each exception is addressed below, demonstrating that the facts, analysis and conclusion reached by the ALJ is incorrect. Each error is material to EFSC's decision.

**Exception 1: The ALJ erred when stating that the Marches said "non-fish streams are not capable of providing fish habitat."**

The ALJ wrote that "The Marches further assert that Idaho Power bears the burden to identify all streams that may provide habitat for Snake River Basin Steelhead and to "definitively state" which streams in the upper Ladd Creek watershed are not capable of providing fish habitat. March Closing Brief at 2, 16, 24." (PCCO pp 156, 157)

The ALJ's analysis is incorrect. The Marches argue that it is the potential **presence** of native migratory fish, specifically SRBS (Snake River Basin Steelhead), not that the "stream being incapable of providing habitat" is at issue.

It appears that Judge Webster used the words of IPC (IPC Closing Argument p 58) and wrongly attributed them to the March's closing. The Marches (March's Closing p 16) did not say that IPC must state which streams are "not capable of providing fish habitat," but rather that IPC mislabeled which streams potentially contain a fish presence, in this case due to the migratory and exploratory nature of SRBS and the recent ODOT Fish Passage Improvement Project which lead to the connectivity of the entire Ladd Creek watershed (Greg Apke (ODFW) Cross-Examination Testimony, p. 25, L22-25). This is an important distinction. Since the upper regions of the watershed is critical rearing habitat for SRBS, the Marches argue that SRBS presence could be in the streams IPC has labeled as "non-fish."

Consequently, the Marches argue, Fish Passage Rule 635-412-0020 has not been met because IPC has not "assumed the presence of native migratory fish" in the streams it has labeled as "non-fish". The ALJ stated (PCCO, p. 50) that Idaho Power considered all streams labeled "fish bearing" in the Fish Passage Plan to be inhabited by "native migratory fish" for purposes of the Fish Passage rules. Chris James of IPC confirmed that his report focused only on presence of native migratory fish in fish-bearing streams in his work for the Applicant (Chris James Cross-Examination Hearing Testimony, P121 L18-21).

IPC used faulty data, supplied by NOAA and ODFW (March's Testimony pp. 12-22) to reach conclusions that these streams are "non-fish," data which IPC obtained prior to the completion of the ODOT projects. Sara Reif of ODFW admitted that ODFW does not have the

“**capacity**”<sup>1</sup>, nor is it a “**priority**” to do spawning or habitat surveys in the Ladd Creek watershed<sup>2</sup> and that no surveys have been done since the completion of the Fish Passage Improvement Project. Fisheries biologist Greg Apke of ODFW concurred that data is missing when he said in Cross Examination that a better map is needed to identify crossings at “non-fish” streams (Apke Rebuttal Testimony p. 3 of 6).

The Marches argue that IPC used out of date, faulty, and incomplete data for its analysis. It did not analyze “non-fish” streams, and because of faulty maps cannot prove that crossings at these “non-fish” streams satisfies Fish Passage Rules. The Marches never contended that the issue of “non-fish” streams is that they are incapable of providing SRBS habitat, but that the “non-fish” designation of these streams is potentially inaccurate. This issue of material fact is a key distinction in the FW-7 issue and contributes directly to an erroneous ruling by the ALJ.

**Exception #2: The ALJ erred in finding that the March’s claim of incomplete analysis and data regarding ephemeral streams in the Ladd watershed cannot be considered as part of the FW-7 issue.**

Under “Findings of Fact” (PCCO, page 59), the ALJ says “Finally, the Marches assert that the ASC is missing ephemeral stream habitat data and that “OAR 635-021-0010 (1)(p)(D)(E)(F) and OAR 635-412-0020 are not fulfilled due to an assumed ‘non-fish’ designation of ephemeral streams and a lack of data to support this designation.” (March Closing Brief at 26). As the Department notes, this is a new contention not previously raised in the Marches’ petition for party status or the evidence submitted in support of Issue FW-7. Department Response to Closing Arguments at 20.”

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<sup>1</sup> See ODOE corrections to Cross-Examination Hearing Testimony transcript, day 5, P62, L19-24

<sup>2</sup> Sarah Reif (ODFW) Cross-Examination Hearing Testimony, P62, L19-24

However, the ALJ's base premise is incorrect. Because the second half of the FW-7 issue states: "Whether Applicant must revisit its plans because threatened steelhead redds have been identified in the watershed," and because the Marches have, for the entirety of the proceedings, contended that **ALL** waters in the watershed are to be considered when determining compliance with Oregon Rules, they have not made a new contention here.

Throughout the duration of this case, the Marches have continuously requested that a complete and accurate analysis of the entire watershed needs to take be undertaken since the completion of the ODOT Fish Passage Improvement Project changed potential fish presence, and have contended factually that all studies were undertaken prior to the completion of this ODOT project (March's letter to EFSC, p. 3, March's request for party status pp. 1, 4, March's testimony, pp. 4, 16, 28, 45). The Marches have been consistent in requesting that the entirety of the Ladd Creek watershed be analyzed for native migratory fish, specifically SRBS. A watershed is defined by OAR 635-415-0005 as (31) "Watershed" means a drainage basin encompassing a stream, its tributaries, and associated uplands at the USGS 4th Field Hydrologic Unit level."

The Marches brought up the issue of ephemeral streams during their cross examination of Mr. Apke, who acknowledged that ephemeral streams have the potential to contain steelhead due to the inquisitive and exploratory nature of this species. Mr Apke also acknowledged the importance of these waters for juvenile SRBS rearing habitat. (Greg Apke (ODFW) Cross-Examination Hearing Testimony, P19 L5-11).

The Marches see no evidence that IPC collected presence data on the ephemeral streams that were then considered "non-fish" streams but whose status has now possibly changed (2019-ABC-02833\_Proposed Contested Case Order.pdf. #50 page 52). In the March's closing

arguments they asserted that IPC had not considered these streams when conducting their analysis and assert that IPC does not recognize ephemeral streams as Waters of the State (WOS)((ODOE - B2HAPPDoc3-18 ASC 10a\_B2H\_2018 Exhibit J Waters of the State Part 1 2018-09-28. Page 12 of 200) when they stated “Because ephemeral streams do not flow continuously or during a portion of every year, and may not provide fish spawning, rearing or food-producing areas; ephemeral streams are not considered constantly flowing streams or intermittent streams, and in turn, are not considered WOS”<sup>3</sup>(ODOE - B2HAPPDoc3-18 ASC 10a\_B2H\_2018 Exhibit J Waters of the State Part 1 2018-09-28. Page 12 of 200).

ODOE weighed in on the importance of ephemeral streams when it stated: “Note that pursuant to ORS 509.585 and OAR 635-412- 0020, fish passage is required in all waters that currently or historically contained native migratory fish. This potentially includes waters classified as perennial, intermittent, or **ephemeral** (bolding ours).”<sup>4</sup> The Marches contend that if ephemeral streams are not considered native migratory fish bearing and WOS, that it is unknown if Rules for WOS will be followed.

The Marches recognize that IPC did not have a chance to present evidence to the contrary, and the Marches respectfully request that this portion of the case be remanded to provide evidence that construction on and near streams, ephemeral streams and associated uplands in the Ladd Canyon watershed will not degrade habitat or create fish passage issues by access road, bridge or line construction.

Mr. and Mrs March request that the issue of ephemeral streams be allowed to be

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<sup>3</sup> ODOE - B2HAPPDoc3-18 ASC 10a\_B2H\_2018 Exhibit J Waters of the State Part 1 2018-09-28. Page 12 of 200

<sup>4</sup> ODOE - B2HAPPDoc1-16.1 ApASC Exhibit P1\_Wildlife\_Main thru Att P1-6 -Includes RAIs 2013-2016\_2017-06-28. Page 2 of 957, Request #, RAI-1-P1-4

addressed within the scope of the FW-7 issue. They further request that EFSC give IPC the opportunity to provide evidence that ephemeral streams in the upper Ladd Canyon watershed will not be degraded and that fish passage problems will not be created by access road, bridge or line construction on these streams.

**Exception #3: The Marches contend that IPC has not fulfilled OAR 635-415-0020. The ALJ erred in her analysis of this argument by contending that the Marches only argue that ODFW did not fulfill this OAR.**

The Ruling (2019-ABC-02833\_Proposed Contested Case Order.pdf p-158) states that: “Furthermore, to the extent the Marches’ assert that the ODFW has not complied with OAR 635-415-0020 because it has not studied or surveyed the Ladd Creek watershed since ODOT completed the I-84 Fish Passage Improvement Project, that claim falls outside the Council’s jurisdiction.”

As Pro Se Petitioners, it appears the March’s erred in this statement and that the Judge is correct in that assessment of ODFW compliance with this OAR is outside the Council’s jurisdiction. However, FW-7 as a case repeatedly documents the incomplete and inaccurate information supplied by ODFW, information which IPC relied on to complete and refine its Application. ODFW is an agency that in Cross Examination stated that: “However, we do not have full and complete survey data to confirm this, the extent to which they have repatriated the upper basins (Sarah Reif (ODFW) Cross-Examination Hearing Testimony, P65 L14-16)” nor does it have the “capacity”, nor is it a “priority” to do spawning and habitat surveys in the Ladd Creek watershed (Sarah Reif (ODFW) Cross-Examination Hearing Testimony, P62, L19-24).

The March's state in their conclusions in Closing Arguments that: OAR 635-415-0020 is **not fulfilled by IPC** because of a lack of studies and data since the completion of the I-84 Fish Passage Improvement Project (Mitigation and Category 2 Habitat) (March closing page 26).

The March's argue that this OAR is not fulfilled because ODFW did not have the accurate and complete data to supply to IPC, making this OAR impossible to fulfill by IPC.

Furthermore, the March's argue and fail to see how ODFW can be relied on to accurately assess habitat and crossing evaluations required by ODOE in Recommended Fish Passage Condition 1, paragraph (a) when it states: "In addition, the certificate holder shall seek concurrence from ODFW on the fish- presence determinations for non-fish bearing streams within the Ladd Creek watershed, as presented in ASC Exhibit P1-7B Table 3. If the certificate holder in consultation with ODFW, determines any of the previously identified non-fish bearing streams within the Ladd Creek Watershed to be fish bearing, the certificate holder shall complete a crossing risk evaluation and obtain concurrence from ODFW on applicability of fish passage requirements." (ODOE Rebuttal to Direct Testimony, Evidence and Response to Proposed Site Certificate Conditions at 43; *see also* Apke Rebuttal Test.)

The ALJ's acceptance of the Applicant's fulfillment of OAR 635-415-0020 is wrong due to incomplete and erroneous data, and cannot be fulfilled until the accurate assessments of presence are completed by ODFW and IPC.

**Exception #4: Additionally, the ALJ erred when she ruled that OAR 345-021-0010(1)(p) is outside the scope of Issue FW-7.**

The ALJ stated that “Idaho Power similarly argues that this contention (compliance with the content requirements of OAR 345-021-0010(1)(p)) is outside the scope of Issue FW-7. Idaho Power’s Response Brief for Issue FW-7 at 68. The ALJ agrees.” (PCCO p. 59)

In their original letter to the ALJ asking for party status (March Request for Party Status, p. 4) the Marches mentioned their concern about the loss of habitat and have argued throughout the proceedings the importance of habitat and the potential loss of said on SRBS in the Ladd Creek watershed.

OAR 345-021-0010(1)(p) directly concerns state listed species. The contention of the March’s that the biological surveys performed, that the identification of state sensitive species, and that the description of potential impacts to said species in this OAR are not satisfied by IPC are within the scope of FW-7 since IPC was unaware that SRBS were and are present within the watershed.

## **SUMMARY AND CONCLUSION**

- The ALJ used so-called material facts in her analysis of FW-7 when in reality she was quoting Idaho Power’s Council’s erroneous interpretation of what the Marches wrote in several instances as noted above in Exception 1. These faulty material facts informed her decision that Fish Passage Rule **635-412-0020** has been met whereas the Marches contend it has not.
- The ALJ, concurring with ODOE, refused to allow ephemeral stream information to be a part of the FW-7 issue, calling it a “new contention” when by its very definition it is part of a watershed, as the Marches argued from the very beginning of this case. The Marches are requesting a remand so that IPC can supply needed evidence for the entire Ladd



Creek Watershed.

- In examining whether the Applicant had met the requirements of OAR 635-415-0020 (Implementation of Department Habitat Mitigation Requirements), the ALJ ruled that insufficient data supplied by the ODFW is outside of the scope of FW-7. However, the Marches contend that OAR 635-415-0020 has not been met because Idaho Power Corporation based their conclusions on insufficient and incomplete data from ODFW.
- The ALJ, again agreeing with IPC, ruled that OAR 345-021-0010(1)(p) is outside the scope of issue FW-7. This is incorrect because this OAR directly addresses state sensitive species, in this case, the Marches contend, Snake River Basin Steelhead a state listed sensitive species.

**Statements for Remedy**

Mr. and Mrs. March respectfully request that EFSC issue a reversal of the ALJ’s ruling in her Proposed Contested Case Order (PCCO) for the four reasons stated above.

The current version of the Applicant’s Proposed Order is not adequately specific to demonstrate compliance with relevant OARs in the upper Ladd Creek watershed. The Marches request a remand by EFSC for more evidence from IPC regarding ephemeral streams compliance, a new PCCO that covers this issue in detail, and when completed, that this new information be sent to ODOE for an updated analysis.

DATED This 30th day of June, 2022

/s/ Kevin March  
Kevin March

/s/ Anne March  
Anne March

**CERTIFICATE OF MAILING**

On June 30, 2022, we certify that we filed the foregoing EXCEPTIONS TO THE PROPOSED CONTESTED CASE ORDER with the Hearings Coordinator via electronic mail, and with each party entitled to service, as noted below.

/s/ Kevin March

Kevin March

/s/ Anne March

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**BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF OREGON  
for the  
OREGON DEPARTMENT OF ENERGY**

IN THE MATTER OF:

**BOARDMAN TO HEMINGWAY  
TRANSMISSION LINE**

**STOP B2H COALITION**

**EXCEPTIONS TO PROPOSED  
CONTESTED CASE ORDER**

OAH Case No. 2019-ABC-02833

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created by Idaho Power, and its sufficiency for determining the extent of impacts, are questions of fact. *See e.g.*, STOP SR-6 Opp Memo p.3.<sup>5</sup> STOP also outlined that as a matter of law, IPC was not entitled to a ruling in its favor. STOP SR-6 Opp Memo p.4. The ALJ mistakenly ignored these points and construed the evidence in a light more favorable to IPC, rather than in the light most favorable to STOP. On an MSD, that was improper.

For each of the reasons set forth in the STOP SR-6 Opp Memo, STOP takes exception to The ALJ’s SR-6 MSD Ruling and the PCCO’s reliance on the reasoning and Order therein.

*iv. Fish & Wildlife (Issue FW-1)*

In the PCCO, the ALJ incorporates her prior ruling granting IPC’s MSD on Issue FW-1, pertaining to sage grouse impacts. PCCO p.20. STOP had previously timely presented a Memorandum in Opposition to that Motion. STOP pointed out in that Memo that IPC’s characterization of the facts omitted any actual analysis of impacts to Sage Grouse habitat. *See*, STOP FW-1 Opp Memo p.3. Further, STOP pointed out that IPC was not entitled to a ruling as a matter of law, because OAR 635-140-0025 requires that development be mitigated for both direct and indirect impacts. IPC has not – to date – done the impact analysis. Consequently, there is currently no way to ensure compliance with the Rule’s requirement.

In her August 5, 2021 ruling on this MSD the ALJ set forth a number of allegedly “undisputed facts” and she construed those facts in IPC’s favor - not in STOP’s favor. *See*, Ruling and Order on MSD on Issue FW-1 pp.2-14 (FW-1 MSD Ruling). For example, there has been no actual analysis of impacts, something that is a clear requirement to determine the issue

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<sup>5</sup> In addition to STOP raising this issue, the Council itself emphasized the importance of having a subjective evaluation of impacts on Oregonians. *See e.g.*, EFSC ORDER ON APPEALS, November 25, 2020 pp.4, 19.



question<sup>6</sup> and compliance (or not) with OAR 345-022-0060. Viewing that fact in the light most favorable to STOP, the complete lack of any analysis of impacts indicates that the applicant's analysis of impacts is inadequate. Stated another way, since there is no impact analysis, it is reasonable to assume that there are likely **to be impacts**, that need to be mitigated – impacts that have so far been undisclosed.

Rather than do any actual analysis, IPC is banking on all of that work being done in the future by ODFW using their HQT (Habitat Quantification Tool). However, the issue presented is whether IPC **has already** “adequately analyzed” sage grouse issues. The issue is framed in the past tense. The adequacy of the analysis must be judged as of now, not some hypothetical point in the future. STOP pointed that out (*See*, STOP Corrected FW-1 Opp Memo pp.2-5) but the ALJ nonetheless construed this fact in the light favorable to IPC/ODOE, rather than in the light most favorable to STOP. On an MSD, that was error.

The ALJ's Conclusion of Law on this issue (PCCO p.14) highlights this major factual dispute. The ALJ held that no limited party “presented evidence demonstrating any insufficiencies in Idaho Power's analysis of sage grouse habitat connectivity... or its analysis of potential indirect impacts...” *Id.* As outlined, STOP had briefed that issue and noted that as a factual matter there was *no* IPC analysis, and that as a matter of law, analysis is required in order to judge its adequacy. STOP FW-1 Opp Memo at p.3-.5

STOP incorporates its arguments made in the STOP FW-1 Opp Memo. STOP takes exception to the PCCO at p.20, and its reliance on the flawed FW-1 MSD Ruling.

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<sup>6</sup> FW-1: *Whether Applicant adequately analyzed sage grouse habitat connectivity in the Baker and Cow Valley Priority Areas of Conservation (PAC), the potential indirect impacts of the proposed facility on sage grouse leks, and the existing number of sage grouse in the Baker and Cow Valley PACs.*

C. Issues Disposed of During or After Contested Case Hearing

i. *Standard of Review and Burden of Proof*

Oregon’s Administrative Procedures Act directs that an Order in a Contested Case be issued “only as supported by, and in accordance with, reliable, probative and substantive evidence.” ORS 183.450(5). Agency decisions must “be rational, principled, and fair, rather than *ad hoc* and arbitrary.” *Gordon v. Bd. of Parole & Post Prison Supervision*, 343 Or 618, 633 (2007) (describing that notion as one “embodied in the APA”). The Oregon Court of Appeals interpreted ORS 183.450(5) as prescribing the preponderance of evidence standard of proof in contested cases. *See, e.g., Gallant v. Bd. Of Medical Examiners*, 159 Or App 175, 180 (1999). However, to prevail, STOP does not have to prove the opposite of any of ODOE’s findings or conclusions in its Final Order on the B2H project. *See, Corcoran v. Board of Nursing*, 197 Or App 517, 533 n.13 (2005) (“if the agency, which has the burden of proving misconduct, failed in that burden, why should we be concerned with whether a preponderance of the evidence in the record establish that, as a matter of historical fact, the licensee did not engage in such conduct.”).

ii. *Noise Control (NC-1, NC-2, NC-3, NC-4)*

STOP had standing in this contested case on several issues related to noise control and mitigation. STOP takes exception to the PCCO findings and conclusions related to NC-1, NC-2, NC-3, and NC-4.

a. *NC-1, NC-2, NC-3, and NC-4 Exceptions to Findings of Fact*

STOP takes exception to a number of Findings of Fact related to Noise Control. STOP excepts to Finding #112 (PCCO p.73) the extent that that this Finding asserts that authority to grant variances has been delegated or transferred to other agencies or local governments without any express rulemaking or delegation by DEQ or EQC, or a statutory change by the Oregon

**BEFORE THE  
ENERGY FACILITY SITING COUNCIL  
OF THE STATE OF OREGON**

**IN THE MATTER OF THE  
APPLICATION FOR SITE  
CERTIFICATE FOR THE BOARDMAN  
TO HEMINGWAY TRANSMISSION  
LINE**

**OREGON DEPARTMENT OF  
ENERGY'S RESPONSE TO  
EXCEPTIONS – ISSUE FW-1  
(OAH Case No. 2019-ABC-02833)**

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## I. INTRODUCTION

The Hearing Officer in the above-referenced matter issued a Proposed Contested Case Order (“PCCO”) on May 31, 2022. On June 30, 2022, STOP B2H timely filed exceptions to the PCCO regarding Issue FW-1.<sup>1</sup>

In the Hearing Officer’s December 4, 2020 *Amended Order on Party Status, Authorized Representatives and Properly Raised Issue for Contested Case* Issue FW-1 was granted as a contested case issue, but was dismissed on August 5, 2021 on summary determination<sup>2</sup> by the Hearing Officer following the Motions for Summary Determination (“MSD”) filed by the applicant, Idaho Power Company (“IPC”), supported in response by the Oregon Department of Energy (“Department”).

Issue FW-1 is: Whether Applicant adequately analyzed sage grouse habitat connectivity in the Baker and Cow Valley Priority Areas of Conservation (PAC), the potential indirect impacts of the proposed facility on sage grouse leks, and the existing number of sage grouse in the Baker and Cow Valley PACs.

### A. Background on Exceptions

Parties to the contested case are entitled to file exceptions to the PCCO and present argument to the Energy Facility Siting Council (“Council”) pursuant to both the Administrative Procedures Act and the Model Rules adopted by Council.<sup>3</sup> Exceptions are written objections to the proposed findings, conclusions of law or conditions.<sup>4</sup> The exceptions must be based on the existing record, and should not include new or additional evidence.

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<sup>1</sup> STOP B2H Coalition Exceptions to Proposed Contested Case Order (hereinafter “STOP Exceptions”).

<sup>2</sup> Ruling and Order on Motions for Summary Determination of Contested Case Issue FW-1, August 5, 2021.

<sup>3</sup> ORS 183.469; OAR 137-003-0060

<sup>4</sup> OAR 345-015-0085(5)

B. Exceptions

STOP takes exception to the PCCO's incorporation of the MSD ruling granting on Issue FW-1 arguing that IPC was not entitled to the ruling as a matter of law.

C. Summary of Department Position

The Hearing Officer correctly dismissed Issue FW-1 from the contested case. STOP's allegation that IPC has not analyzed impacts to sage-grouse disregards the analysis IPC has done.

STOP's allegation that IPC must use Oregon Department of Fish and Wildlife's ("ODFW") Habitat Quantification Tool ("HQT") to assess impacts to sage-grouse and identify appropriate mitigation before Council can find compliance with the Fish and Wildlife Habitat standard fails as a matter of law. There is nothing in the Council's standard or the ODFW rules referenced therein that would require an applicant to use the HQT or identify all indirect impacts to sage-grouse and mitigation for such impacts before Council may find compliance with the Fish and Wildlife Habitat standard. Further, STOP fails to acknowledge that the HQT is currently being developed by ODFW, thus it was not necessary or even possible for IPC to utilize it when submitting its application. Nor does STOP account for conditions that would require IPC to utilize that tool to demonstrate it has sufficient compensatory mitigation to address impacts to sage-grouse identified by the HQT before it can begin construction in sage-grouse habitat areas.

**II. ANALYSIS**

A. Applicable Laws and Rules

*Standards for MSDs*

Per OAR 137-003-0580, a Motion for Summary Determination shall be granted if:

- (a) The pleadings, affidavits, supporting documents (including any interrogatories and admissions) and the record in the contested case show that there is no genuine issue

- as to any material fact<sup>5</sup> that is relevant to resolution of the legal issue as to which a decision is sought; and
- (b) The agency or party filing the motion is entitled to a favorable ruling as a matter of law.

*Council's Fish and Wildlife Standard*

For energy facilities that impact sage-grouse habitat, the Council's Fish & Wildlife Habitat standard (OAR 345-022-0060) requires that, taking into account mitigation, the design, construction and operation of the proposed facility is consistent with "the sage-grouse habitat mitigation requirements of the Greater Sage-Grouse Conservation Strategy for Oregon at OAR 635-415-0025(7) and OAR 635-140-0000 through -0025 in effect as of February 24, 2017."

B. IPC's analysis of impacts to sage grouse and the Proposed Order

IPC analyzes the proposed facility's potential impacts to sage-grouse and their habitat in Exhibit P2 to its application for site certificate ("ASC").<sup>6</sup> That analysis includes identification of project features within sage-grouse habitat, assessment of permanent and temporary direct impacts (*e.g.*, from vegetation clearing, traffic-related mortality), their expected duration<sup>7</sup> and a preliminary quantification of the proposed facility's direct impacts on sage-grouse habitat (343 acres in the Baker PAC and 200 acres in Cow Valley)<sup>8</sup>. ASC Exhibit P2-3 includes a draft Sage-Grouse Mitigation Plan that includes analysis of four potential mitigation sites with over 6,500 acres of habitat for mitigation purposes.<sup>9</sup> In ASC Exhibit P2-3, IPC also summarizes the proposed facility's potential indirect impacts to sage-grouse and their habitat (*e.g.*, tall structures

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<sup>5</sup> A material fact is "one that, under applicable law, might affect the outcome of the case. *Zygar v. Johnson*, 169 Or App 638, 646, 10 P3d 326 (2000), rev den, 331 Or 583 (2001). The standard for granting summary judgment can be thought of as proceeding in two steps: "whether a genuine issue of fact exists, and, if not, whether the moving party [is] entitled to judgment as a matter of law." *Metro. Prop. & Cas. V. Harper*, 168 Or App 358, 363, 7 P3d 541 (2000).

<sup>6</sup> ODOE – B2HAPPDoc3-32 ASC 16B\_Exhibit P2\_GRSg\_ASC 2018-09-28.

<sup>7</sup> ODOE – B2HAPPDoc3-32 ASC 16B\_Exhibit P2\_GRSg\_ASC 2018-09-28. Pages 18 – 25 of 116 .

<sup>8</sup> *Id.*, Table P2-5, Page 24 of 116.

<sup>9</sup> *Id.*, Pages 84-116

indirectly impacting sage-grouse by offering opportunities for predator use)<sup>10</sup> but as discussed below IPC has not yet quantified the indirect impacts or the amount of compensatory mitigation required for the proposed facility related to sage grouse.

The Proposed Order explains that the applicant is required to provide mitigation for permanent direct and indirect impacts resulting from construction of the facility as set forth in Oregon’s Greater Sage-Grouse Habitat Mitigation Plan and that, as discussed in that plan, ODFW is currently developing a Sage-Grouse HQT that will be used to estimate direct and indirect impacts to sage-grouse habitat resulting from transmission lines and roads, as well as associated compensatory mitigation obligations.<sup>11</sup>

The Proposed Order also notes “[t]he Sage Grouse Habitat Quantification Tool would be used to quantify both direct and indirect impacts from the proposed facility. It will also be used to determine the amount of compensatory mitigation required for impacts to sage-grouse and sage-grouse habitat.”<sup>12</sup>

As explained in the Proposed Order, pursuant to an ODFW suggestion, the applicant/certificate holder (Idaho Power) would apply a two-step mitigation process, providing mitigation “prior to or at the time of facility construction based on the known facility impacts at that time, such as direct impacts from structures, roads . . . and other facility components . Then, after three years and completion of the operational traffic study, ODFW suggests that the certificate holder provide any additional mitigation based on the results of the traffic study. All impacts would be calculated using the ODFW HQT . . .”<sup>13</sup>

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<sup>10</sup> *Id.*, Pages 25-31 of 116.

<sup>11</sup> ODOE – B2HAPPDoc2 Proposed Order on ASC and Attachments 2019-07-02. Page 362 of 10016.

<sup>12</sup> ODOE – B2HAPPDoc2 Proposed Order on ASC and Attachments 2019-07-02. Page 372 of 10016.

<sup>13</sup> ODOE – B2HAPPDoc2 Proposed Order on ASC and Attachments 2019-07-02. Page 362 of 10016.



This approach is established in, among other conditions, recommended Fish and Wildlife Habitat Conditions 16 and 17. Condition 16 (subsection f.) would require that, prior to construction of a phase or segment of the facility, Idaho Power conduct biological surveys for greater sage-grouse, as necessary for the State of Oregon to calculate the amount of sage-grouse habitat compensatory mitigation required for the facility using Oregon’s Sage-Grouse Habitat Quantification Tool.<sup>14</sup> And recommended Fish and Wildlife Habitat Condition 17 would require that, at least 90 days prior to construction of a facility phase or component in sage-grouse habitat, IPC must finalize and submit to the Department for its approval, in consultation with the Oregon Department of Fish and Wildlife, a final Sage-Grouse Habitat Mitigation Plan for the phase or segment to be constructed that, among other items:

- “a. . . . [provides] information necessary for the State of Oregon to calculate the amount of sage-grouse habitat compensatory mitigation required for the facility using Oregon’s Sage-Grouse Habitat Quantification Tool (HQT).
- b. . . . address[es] the potential sage-grouse habitat impacts through mitigation banking, an in-lieu fee program, development of mitigation projects by the certificate holder, or a combination of the same . . .
- iii. . . . As referenced in Fish and Wildlife Condition 19, the certificate holder shall demonstrate during or about the third year of operation that sage-grouse habitat mitigation shall be commensurate with the final compensatory mitigation calculations . . .
- c. [uses] Oregon’s Sage-Grouse Habitat Quantification Tool . . . to calculate the amount of sage-grouse habitat compensatory mitigation required for the facility..<sup>15</sup>

Similarly, in its ASC Exhibit P2, IPC states:

At this time, the HQT continues to be under development. Even so, ODFW has indicated the HQT will be finalized prior to commencement of construction on the Project and ODFW intends that IPC utilize the HQT to calculate the Project’s impact to sage-grouse habitat. Accordingly, in this application, IPC has not quantified indirect impacts or the amount of compensatory mitigation required for the Project related to sage-grouse. Rather, the amount of sage grouse habitat

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<sup>14</sup> ODOE – B2HAPPDoc2 Proposed Order on ASC and Attachments 2019-07-02. Page 355 of 10016.

<sup>15</sup> ODOE – B2HAPPDoc2 Proposed Order on ASC and Attachments 2019-07-02. Pages 363-365 of 10016.

compensatory mitigation required for the Project *will be determined* by the HQT *prior to commencement of construction*.<sup>16</sup>

As discussed below, STOP takes issue with the fact that IPC did not utilize the HQT in its ASC, apparently misunderstanding or overlooking the statements in IPC's ASC Exhibit P2 and the Proposed Order that ODFW is currently developing the HQT and not accounting for the aforementioned conditions in the Proposed Order that will require utilization of the HQT.

### C. Idaho Power and STOP MSD Arguments and MSD Ruling

As noted above, Issue FW-1 in the contested case asks “[w]hether Applicant adequately analyzed sage-grouse habitat connectivity in the Baker and Cow Valley Priority Areas of Conservation (PAC), the potential indirect impacts of the proposed facility on sage grouse leks, and the existing number of sage grouse in the Baker and Cow Valley PACs.”

In its MSD, IPC framed this issue as consisting of three sub-issues: (1) whether IPC adequately addressed potential indirect impacts (2) whether IPC adequately addressed sage grouse habitat connectivity, and (3) whether IPC adequately analyzed the number of sage grouse.<sup>17</sup> IPC argued the applicant was entitled to summary determination because (1) there is no evidence that its analysis of indirect impacts is inadequate; (2) there is no evidence that its discussion of habitat connectivity is inadequate and (3) no EFSC standard requires it to analyze the existing number of sage grouse.

Regarding the first sub-issue, IPC argued it was entitled to summary determination because (a) it addresses indirect impacts from predation and noxious weeds in its ASC Exhibit P2 and (b) the Oregon Sage-Grouse Action Plan requires that all indirect impacts are to be

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<sup>16</sup> ODOE – B2HAPPDoc3-32 ASC 16B\_Exhibit P2\_GRSG\_ASC 2018-09-28, Pages 30-31 of 116.

<sup>17</sup> IPC's Motion for Summary Determination of Contested Case Issues FW-1, FW-2 and FW-12, Page 3.

quantified using an HQT and the HQT will be used to quantify the indirect impacts for the Project.<sup>18</sup>

In response to IPC’s MSD, STOP focused almost entirely on the first sub issue, contending there was a dispute over “[w]hether IPC has (or has not) actually *completed* the required analysis of indirect impacts.”<sup>19</sup> STOP argued “there is nothing in the record that demonstrates any actual Sage Grouse impact analysis has been conducted by IPC.”<sup>20</sup> In so alleging, STOP apparently disregarded in its entirety the analysis IPC provided in ASC Exhibit P2. They focused instead on arguing that IPC’s “promise” to conduct the HQT does not satisfy the requirements of the Council’s Fish & Wildlife Habitat standard.<sup>21</sup> They argued that EFSC can’t approve mitigation for impacts to sage grouse “without evaluating it against the potential impacts that it is designed to mitigate for” and therefore the HQT must be conducted before the site certificate can be issued.<sup>22</sup> They ask “[w]hat happens if its analysis reveals the B2H line cannot meet the mitigation requirements in the HQT?”<sup>23</sup> The answer to that question is in the aforementioned recommended site certificate conditions – IPC would not be able to proceed with construction.

The Hearing Officer ruled in IPC’s favor on the MSD.<sup>24</sup> In the Ruling, the Hearing Officer points out that STOP (and Ms. Squire) did not raise in their comments on the DPO and petitions for party status the primary contention they raise in opposition to the MSD – that IPC’s

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<sup>18</sup> IPC’s Motion for Summary Determination of Contested Case Issues FW-1, FW-2 and FW-12, Page 7.

<sup>19</sup> STOP B2H Coalition’s Corrected Memorandum in Opposition to Idaho Power Motion for Summary Determination on Issue FW-1, Page 2.

<sup>20</sup> STOP B2H Coalition’s Corrected Memorandum in Opposition to Idaho Power Motion for Summary Determination on Issue FW-1, Page 4.

<sup>21</sup> STOP B2H Coalition’s Corrected Memorandum in Opposition to Idaho Power Motion for Summary Determination on Issue FW-1, Pages 4-5.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* Page 5.

<sup>24</sup> Ruling and Order on Motion for Summary Determination on Contested Case Issue FW-1 (August 5, 2021).

analysis of indirect impacts is incomplete because it has yet to quantify the impacts and compensatory mitigation through application of the HQT.<sup>25</sup> The Hearing Officer noted that failure to raise the contention meant it was not appropriate to consider it in the contested case, per Council rule OAR 345-015-0016(3).

Nevertheless, the Hearing Officer went on to extensively analyze STOP's and IPC's arguments regarding the adequacy of the evaluation of potential indirect impacts on sage-grouse habitat,<sup>26</sup> including STOP's argument about the HQT. The Hearing Officer found that there was no evidence creating a genuine issue of material fact to support the claim that Council does not have enough information to evaluate the adequacy of mitigation because, among other reasons, ASC Exhibit P2 satisfies the application content requirements in OAR 345-021-0010(1)(p)(B) (re: identification of fish and wildlife habitat in the analysis area)<sup>27</sup> and because the HQT is based on the best available science and accounts for indirect impacts (including sage-grouse avoidance of tall structures and the potential for noxious weeds), the limited parties' offering of additional studies and literature regarding sage-grouse avoidance of tall structures did not create a relevant factual dispute.<sup>28</sup>

With regard to the allegation the HQT must be completed before Council can find compliance with the Fish and Wildlife standard, the Hearing Officer explained as follows:

The ALJ finds that although the direct and indirect impacts to sage-grouse habitat have yet to be quantified through the HQT, Idaho Power adequately addressed the potential indirect impacts on sage grouse leks for purposes of compliance with OAR 345-022-0060(2). As set out in the findings above, both ASC Exhibit P2

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<sup>25</sup> Ruling and Order on Motion for Summary Determination on Contested Case Issue FW-1 (August 5, 2021), Page 25.

<sup>26</sup> Ruling and Order on Motion for Summary Determination on Contested Case Issue FW-1 (August 5, 2021), Pages 23-27.

<sup>27</sup> Ruling and Order on Motion for Summary Determination on Contested Case Issue FW-1 (August 5, 2021), Pages 25-26.

<sup>28</sup> Ruling and Order on Motion for Summary Determination on Contested Case Issue FW-1 (August 5, 2021), Page 27.

and the Proposed Order discuss indirect impacts of the proposed facility on sage-grouse habitat. . . .

The fact that extent of the proposed facility’s indirect impacts on sage-grouse habitat has yet to be quantified into functional acres through application of the HQT does not translate into a lack of compliance with the Fish and Wildlife Habitat standard. As discussed previously herein, the Conservation Strategy and, by association, the Council’s standard require use of the HQT to quantify impacts to the sage-grouse habitat for purposes of compensatory mitigation. The Proposed Order includes recommended conditions requiring Idaho Power to provide all necessary information to the ODFW so that the ODFW can use the HQT to calculate the extent of compensatory mitigation, and requiring that Idaho Power provide compensatory mitigation in accordance with the HQT results. As Idaho Power notes, the recommended site certificate conditions include a safeguard. [Under Recommended Fish and Wildlife Condition 17(a) and (b)] [i]f Idaho Power cannot demonstrate that it has sufficient compensatory mitigation to address the HQT-calculated impact, then it cannot begin construction in sage-grouse habitat areas.<sup>29</sup>

In the PCCO, the Hearing Officer incorporated the ruling granting IPC’s MSD on Issue FW-1. STOP takes exception to arguing “there has been no actual analysis of impacts” (again disregarding the analysis in Exhibit P2) contending it is not appropriate to do work in the future using the HQT because “the adequacy of the analysis must be judged now.”<sup>30</sup>

The Department believes the Hearing Officer correctly dismissed Issue FW-1 because IPC has provided sufficient evidence for Council to find IPC meets the Fish & Wildlife Habitat standard – *i.e.* evidence that the design, construction and operation of the facility, taking into account mitigation, are consistent with the sage-grouse habitat mitigation requirements. There is no dispute over facts that are material to this issue. STOP’s argument that the HQT must be conducted before Council may approve the site certificate fails as a matter of law. There is nothing in the Council’s standard or the ODFW rules referenced therein that would require an applicant to use the HQT or identify all indirect impacts to sage grouse and mitigation for such

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<sup>29</sup> Ruling and Order on Motion for Summary Determination on Contested Case Issue FW-1 (August 5, 2021).

<sup>30</sup> STOP Exceptions, Pages 10-11.

impacts before Council may find compliance with the Fish and Wildlife Habitat standard. Further, the aforementioned recommended Fish & Wildlife conditions would require IPC to demonstrate that it has sufficient compensatory mitigation to address impacts before it can begin construction in sage-grouse habitat areas, thus addressing STOP's concern about what would happen if analysis reveals the proposed transmission line cannot meet the mitigation obligations identified when using the HQT.

### III. CONCLUSION

For the reasons set forth above, the Department recommends that the Council reject the exceptions on Issue FW-1 and affirm the Hearing Officer's dismissal of this Issue on summary determination.

DATED this 15<sup>th</sup> day of July, 2022.

Respectfully submitted,

ELLEN F. ROSENBLUM  
Attorney General

*/s/ Patrick Rowe*  
Patrick Rowe, OSB #072122  
Senior Assistant Attorney General  
Counsel for the Oregon Department of Energy

## CERTIFICATE OF SERVICE

I hereby certify that on July 15, 2022, the foregoing Oregon Department of Energy's  
RESPONSE TO EXCEPTIONS – ISSUE FW-1, was emailed to:

Todd Cornett  
Secretary for EFSC  
[Todd.Cornett@state.or.us](mailto:Todd.Cornett@state.or.us)

I further certify that on July 15, 2022, the foregoing Oregon Department of Energy's  
RESPONSE TO EXCEPTIONS – ISSUE FW-1, was served by First Class Mail or electronic  
mail as indicated below.

### **By: First Class Mail:**

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DATED this 15<sup>th</sup> day of July, 2022.

*/s/ Svetlana Gulevkin*  
Svetlana Gulevkin  
Legal Secretary  
Natural Resources Section  
Oregon Department of Justice  
[Svetlana.m.gulevkin@doj.state.or.us](mailto:Svetlana.m.gulevkin@doj.state.or.us)





I request that council base their decisions regarding my arguments in this contested case on this document and Exhibits referenced herein, rather than ODOE description of my issues and documentation regarding the contents of this request. ODOE is a respondent in this contested case which involves a failure of the agency to require the developer to comply with State Statutes and council rules in recommending council approval of the Proposed Order.

I am also incorporating by reference the documents and arguments submitted by Susan Geer regarding FW-3 and FW-6 which relate to this document.

## INTRODUCTION

1. The language of my accepted contested case request which is the subject of this Exception Request includes the following language:

**“I am requesting standing and a contested case due to the fact the noxious weed plan fails to comply with the state statutes and will negatively impact agriculture, threatened and endangered species, wildlife habitat and the economic stability of all the counties. I commented regarding this in my oral comments document dated 5/19/19, Item 1. And in written comments included in the agency comment list, Page 1580**

**The Proposed Order changed how the plan will be completed making it impossible and unnecessary for me to comment in order to request this contested case.”**

This contested case request included not only the requirement that state law be followed, but also the fact that in the event the developer fails to comply with the Statutes, mitigation must occur due to impacts to agriculture, Threatened and Endangered species, wildlife habitat, public services and the economic stability of the counties. Noxious Weed management must occur to comply with all the rules where noxious weeds impact the decision regarding compliance with the rules and statutes. In the event that the Noxious Weed Plan fails to require monitoring and treatment of all noxious weeds to assure they will not spread beyond the site of the development, mitigation is required due to impacts and the survey area must be extended to include the area of noxious weed seed dispersal.

I am requesting Council provide an exception to the Proposed Contested Case Order failing to support this contested case due to the following facts:

1. The Propose Contested Case Order failed to include information required by the Oregon Statutes governing Contested Cases which says:

**183.470 Orders in contested cases.**

“ (2) A final order shall be accompanied **by findings of fact and conclusions of law.** The findings of fact shall consist of a **concise statement of the underlying facts supporting the findings as to each contested issue of fact and as to each ultimate fact required to support the agency’s order.**”

Areas of non-compliance with ORS 183.470:

-- Findings of fact must be supported with “a preponderance of evidence,”. In the Proposed Contested Case Order the ALJ lists undocumented statements of the developer as facts where there is no evidence other than the developer’s statement. **For EFSC or the Council to issue a site certificate the record must document with a preponderance of evidence” that the facility complies with statutory requirements and applicable standards adopted by the Council. ORS 469.503(1); OAR 345-022-0000(1)(a) and (2).**

-- There is not a preponderance of evidence that the facility complies with state law or council standards related to Noxious Weed management and control. The Proposed Contested Case Order fails to address multiple arguments I made regarding why Proposed Order fails to support an agency determination that Noxious Weeds will be controlled to the extent they will not spread to adjacent land and impact resources on that land.

--The Proposed Contested Case Order failed to include documentation I provided which conflicts with the statements made by the developer, many of which are being listed as findings of fact based solely on the statements of the developer.

Documented facts regarding this contested case which are not addressed in the Proposed Contested Case Order or listed as Findings which disprove the “Findings” listed:

Fact Number One: Contrary to the footnote on Page 144, as documented in my contested case language in bold above, I commented regarding the fact that the change in the completion of the Noxious Weed Plan allows me to address this plan in my contested case arguments. The

statement on Page 46 of the Proposed Contested Case Order indicating “no evidence or questions regarding the validity of the Noxious Weed Plan” have been introduced into evidence” is not accurate. The file contains multiple exhibits, testimony and depositions documenting that the Draft Plan fails to meet state law requirements and does not contain language that will protect surrounding resources from noxious weeds spreading from the site of the development. The restatement of the issue of the Contested Case by the Oregon Department of Energy cannot be used to eliminate significant portions of the contested case issue from argument.

Fact Number Two: The change in the completion process for the Noxious Weed Plan and the lack of a final Noxious Weed Plan mean that all findings of fact relating to items in the Draft Plan are null and void due to the fact that items in the draft plan can now be changed or removed during the finalization process included in the new procedure.

Fact Number Three: Any findings of “fact” related to statements by the developer regarding changes they have suggested making to the Draft Plan are not “findings of fact”. The Final Plan has not been developed and the only plan reviewed by Council is the one in the Proposed Order. Items 27 through 31 of Proposed Contested Case Order, Pages 45 – 47 fail to support a decision to deny this contested case as they are not included in a Final Noxious Weed Plan.

Fact Number Four: References to statements in the Proposed Order as “findings” to support denial of this contested case can not be interpreted as evidence supporting a decision in the

contested case. The contested case is challenging the Proposed Order due to its failure to comply with Council Standards dictating that there be a preponderance of evidence supporting a decision that the developer meets the requirements of the standard. "Findings" regarding compliance with the standards must be based upon evidence and documentation provided by the developer documenting with a "preponderance of evidence" that they comply with the standard. Statements from the Proposed Order only show that the Oregon Department of Energy accepted the developer's statements regarding the issues. Further, the Oregon Department of Energy is the respondent in this case and must provide evidence in the record that support their decisions.

Fact Number Five: All five of the items listed on the bottom of the Proposed Contested Case Order are facts which are documented in the case file as noted in my Opening and Closing Arguments: 1. It fails to require Idaho Power to control all noxious weeds within the site boundary: 2. It does not currently apply to all state and county listed noxious weeds: 3. It does not include provisions ensuring that no noxious weeds go to seed: 4. It fails to require sufficient monitoring and control for the life of the development and 5. It does not sufficiently account for vehicle and equipment cleaning. The proposed contested case order fails to include any documentation that challenges the validity of these items which are documented in my Opening and closing arguments and exhibits included in the case file.

Fact Number Six: The Oregon Department of Energy initiated the appropriate action regarding the control of Noxious Weeds as is necessary under council rules. They contacted the Oregon Department of Agriculture noxious weed managers to determine the necessary actions to control noxious weeds and to establish responsibility for complying with state law regarding control of noxious weeds. The written document provided in response to that contact as well as cross-examination transcript from the follow-up are included as exhibits in the contested case file. Those items document that under Oregon law, Idaho Power is responsible for the management and control of weeds on the property which they are occupying and must have monitoring and controls in place which do not allow noxious weeds from the site to go to seed and spread. They further state what is required to do so is the items included in ORS 569.

Documentation of this fact:

--On page 67 of Mr. Porters cross-examination, he was asked if a property owner no longer owns, controls or occupies land, do they continue to be responsible for controlling noxious weeds. The answer was, "Without some formal agreement with the new landowner, they would not have responsibility for those weeds, to the best of my understanding."

Fact Number Seven: The Oregon Legislature has recognized the destruction caused by a lack of control of noxious weeds and implemented laws requiring they be controlled and if possible

eradicated due to the damages they cause to natural resources, watersheds, agriculture, etc. per ORS 569.180. These resources are also protected by Council Standards.

## ORS 569.180

### **Noxious weeds as public nuisance**

"In recognition of the **imminent and continuous threat to natural resources, watershed health, livestock, wildlife, land and agricultural products of this state,** and in recognition of the widespread infestations and potential infestations of noxious weeds throughout this state, noxious weeds are declared to be a public nuisance and shall be detected, controlled and, where feasible, eradicated on all lands in this state."

Fact Number Eight: Multiple individuals, Counties and the Tribes have commented in the file regarding concerns over the spread of Noxious Weeds due to this development. For example: : The weed control supervisors from counties being crossed by the line with assistance from the Oregon Department of Agriculture Weed staff developed a list of over 30 items necessary to provide for noxious weed identification and control is included in the file. The recommendations have not been incorporated into the Noxious Weed Plan.

Documentation: --Exhibit 4 of my Cross-Examination Documents, Page 1, Item 3 Union, Umatilla, Morrow County B2H Noxious Weed Plan Comments, August 22, 2017. The weed managers from these counties state, "IPC will be held responsible for controlling



all state and county listed noxious weeds on lands they manage or hold right of way on regardless of cause or pre-existence, the same as any other landowner or manager.”

Fact Number Nine: The file contains sworn statements by the Oregon Department of Agriculture Noxious Weed managers that Noxious Weeds can appear and reappear and there is not a point in time when monitoring and control can stop if weeds are to be controlled on an ongoing basis for the life of the project. This is also confirmed by Ms. Rife representing the Oregon Department of Fish and Wildlife. Oregon Statutes and rules referenced in my previous submissions provide documentation of the procedures established by the Oregon legislature as necessary to control noxious weeds at the development for the life of the project. They are the subject of ORS 569 statutes.

Documentation:

-- ODFW, Ms. Rife stated, “Weed management should occur on all Project areas (ROW, easements, reclaimed areas, permanently disturbed area, etc.) for the life of the Project.” (B2HAppDoc8-18 ApASCReviewing AgencyComment ODFW\_Reif 2018-02-27. Page 7 of 18 Column 3)

and

--The Oregon Department of Fish and Wildlife comments from Ms. Reif states: “To meet the EFSC Fish and Wildlife Standard (OAR 345-022-0060), the Department recommends

that IPC continue the implementation of the Noxious Weed Plan for the life of the Project, and adaptive management to effectively and efficiently reclaim Habitat impacted by the Project.” “Therefore, **secession of noxious and invasive weed control after reclamation success criteria are achieved is not recommended.** The **risk of reinfestation in the areas of operation and areas of revegetation will remain high for the life of the project,** and noxious weed infestation will reduce habitat quality for wildlife. According to the Fish and Wildlife Habitat Mitigation Policy, ODFW must consider those impacts to habitat quality for the duration of impact, in this case, given the risk of reinfestation, that equates to the life of the project.” (B2HAppDoc8-18 ApASCReviewing (AgencyComment ODFW\_Reif 2018-02-27. Page 7 of 18 Column 3)

--Expert Witness testimony of Mark Darrach provided with my Cross Examination Exhibit list for FW-3 and LU-11, Page 3, states regarding the suggestion that monitoring could be limited to a five year timeframe, “It is ludicrous to even suggest this when we as professionals know all too well that even if a given occurrence has been fully eradicated there will be plenty of others taking their place somewhere in the corridor nearby – it is a constant responsibility.”

Fact Number Ten:: The findings of fact include The developer states there are no statutes or rules which extend a developer’s responsibility for controlling noxious weeds to areas where there have not been soil disturbance resulting from the development. The Proposed Contested Case Order contains no documentation to support this statement other than comments from

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the developer. Both the file and this document provide documentation which shows this statement to be false.

-- ODFW, Ms. Rife stated, "Weed management should occur on all Project areas (ROW, easements, reclaimed areas, permanently disturbed area, etc.) for the life of the Project." (B2HAppDoc8-18 ApASCREviewing AgencyComment ODFW\_Reif 2018-02-27. Page 7 of 18 Column 3)

--Exhibit 4 of my Cross-Examination Documents, Page 1, Item 3 Union, Umatilla, Morrow County B2H Noxious Weed Plan Comments, August 22, 2017. The weed managers from these counties state, "IPC will be held responsible for controlling all state and county listed noxious weeds on lands they manage or hold right of way on regardless of cause or pre-existence, the same as any other landowner or manager."

Fact Number Eleven: The proposed order is incorrect in stating in the unsupported Finding Number27, Page 45 that the developer is only responsible for noxious weeds located at the site and/or that responsibility is limited to areas on the site where ground disturbance occurs as documented previously in this exception. The minimum area the developer is responsible for managing and controlling noxious weeds is the entire site. In the event the site certificate fails to contain conditions that require monitoring and control of noxious weeds on an ongoing basis for the life of the development that preclude the spread of noxious weeds beyond the site boundary, the site certificate must include mitigation for the impacts that extend as far as the

noxious weeds will spread to mitigate for damages caused to areas protected by other council standards.

This Contested Case is specific to actions the developer must take “on the site” to avoid creating impacts off site that they must provide mitigation for. This is supported and documented by the 2<sup>nd</sup> Proposed Order for the development which states:

PROJECT ORDER, SECTION IV. “ANALYSIS AREAS FOR THE PROPOSED FACILITY The analysis areas are the minimum areas that IPC must study for potential impacts from the construction and operation of the proposed facility. Some of the analysis areas described in this Project Order do not limit the applicant’s responsibility to assess the potential impacts of the facility. The analysis areas are the areas in which impacts from the proposed facility are most likely to occur. **If significant impacts associated with the applicable Council standards could occur beyond the analysis areas described here, then the applicant must assess those impacts in the application for a site certificate and show how the facility would comply with the applicable standard with regard to the larger area where impacts could occur.**” For all potential impacts, **the analysis area includes all the area within the site boundary**, as defined in OAR 345-001-0010(55).. **All required assessments in the application apply to the entire site boundary**, which by definition includes all corridors under consideration, including alternatives, as well as related or supporting facilities, and temporary laydown and staging areas.”

Fact Number Twelve: Absent compliance with Oregon Weed Control Laws, the developer cannot document compliance with multiple Statutes and Rules listed in the Project Order due to the fact that under the currently proposed Draft Noxious Weed Plan noxious weeds from the development will be allowed to spread from the site and impact the standards.

The Project Order for the Boardman to Hemingway Transmission Line requires compliance with multiple other rules that are impacted if Noxious Weeds are allowed to spread from the site boundary. The rules such as Habitat Mitigation for habitat damage that will not be met unless the Weed Management Plan documents that noxious weeds will not be allowed to spread beyond the site boundaries.

**Please keep in mind the fact that Idaho Power continues to maintain the burden of proving the facility complies with statutes, administrative rules, and local government ordinances applicable to the issue raised in the contested case per OAR 345-021-0100(2).** The following rules are included in the Project Order and require an assessment of whether noxious weeds will impact them:

**469.401 Energy facility site certificate; conditions; effect of issuance on state and local government agencies.** (1) ...”The certificate or amended certificate shall authorize the applicant to construct, operate and retire the facility subject to the conditions set forth in the site certificate

or amended site certificate. The duration of the site certificate or amended site certificate shall be the life of the facility.

(2) The site certificate or amended site certificate shall contain conditions for the protection of the public health and safety, for the time for completion of construction, **and to ensure compliance with the standards, statutes and rules described in ORS 469.501 and 469.503. The site certificate or amended site certificate shall require both parties to abide by local ordinances and state law and the rules of the council in effect on the date the site certificate or amended site certificate is executed,**”

According to the above statute, if a site certificate is issued, the certificate holder must also comply with additional construction and operation related regulations that may apply to the proposed facility that per ORS 469.401(4), may not be covered.

Council standards require that the Proposed Order must be based upon a preponderance of evidence that the standard is met. The Proposed Contested Case Order cannot accept the developer’s unsubstantiated statements due to the plain language of council rules that are impacted by noxious weeds: If there are conflicting requirements in Oregon statutes and rules, the council cannot waive state law in deciding how to address an issue.

The Project Order requires compliance with the following rules which involve resources that according to documentation in the file will be negatively impacted in the event noxious weeds are allowed to spread outside the site. They also document the fact that the negative

impacts are not limited to the areas of soil disturbance, but rather to the construction and operation of the development. Nowhere in the statutes or rules is the evaluation of impacts limited to areas of surface disturbance or construction, however, the Draft Contested Case Order lists this as a statement of “fact”. The developer’s statement, listed in the Proposed Contested Case Order that they are only required to address weeds resulting from their activities which result in habitat disturbance have no support in the statutes or rules that the developer is to comply with and the developer failed to provide evidence to support this statement. The language of the rules listed in the Project Order reference impacts from “construction and operation”.

345-022-0000

#### **General Standard of Review**

(1) To issue a site certificate for a proposed facility or to amend a site certificate, the Council shall determine that the **preponderance of evidence** on the record supports the following conclusions:

(a) The facility complies with the requirements of the Oregon Energy Facility Siting statutes, ORS 469.300 to 469.570 and 469.590 to 469.619, and the standards adopted by the Council pursuant to 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 as described in section (2);

(2) “the facility complies with all other Oregon statutes and administrative rules identified in the project order, as amended, as applicable to the issuance of a site certificate for the proposed facility. **If the Council finds that applicable Oregon statutes and rules, other than those involving federally delegated programs, would impose conflicting requirements, the Council shall resolve the conflict consistent with the public interest. In resolving the conflict, the Council cannot waive any applicable state statute.**

The plain language of council standards impacted by noxious weeds support the need to mitigate for impacts in the event noxious weeds are not contained within the site boundary and are allowed to go to seed and impact areas outside the site. Either the developer must be required to comply with state law requiring them to monitor and manage invasive weeds at the site of the development to assure none go to seed and impact areas and rules outside the site of the development, or other mitigation must be required and implemented to address the impacts of noxious weed spread from the site to areas outside the site and mitigate for impacts they create regarding other standards they impact.

LCDC requires identification of areas where the development of the facility will impact the environment and economy. The ODOE file contains multiple exhibits and sworn statements from the Oregon Department of Agriculture managers confirming that noxious weeds impact the environment and economy and establishing that the requirements ORS 569 are necessary



to control their spread. OAR 345-022-0030 states: The **significant environmental, economic,** social and energy consequences anticipated as a result of the proposed facility have been identified and adverse impacts will be mitigated in accordance with rules of the Council applicable to the siting of the proposed facility;

and

‘(C) The proposed facility is compatible with other adjacent uses or will be made compatible through measures designed to reduce adverse impacts.’”

“(5) If the Council finds that applicable substantive local criteria and applicable statutes and state administrative rules would impose conflicting requirements, the Council shall resolve the conflict consistent with the public interest. In resolving the conflict, the Council cannot waive any applicable state statute.”

**NOTE: For impacts to Agriculture where it is clearly documented noxious weeds are a significant risk, the survey area that is a minimum for evaluating negative impacts is ½ mile.**

In the event that the site certificate fails to require the developer to control noxious weeds so they are contained at the site of the development, the survey area for impacts must be extended to include the area of seed dispersal and additional mitigation must be

required to address this problem. For example, the agricultural land will require mitigation for impacts which it currently does not

Documentation regarding the fact that failure to control noxious weeds to preclude them spreading into agricultural land will require mitigation: Exhibit 11, Oregon Department of Agriculture—Economic Impact From Selected Noxious Weeds in Oregon. This report describes the cost of addressing noxious weeds if they are not controlled by the developer and allowed to spread into surrounding areas. It documents the financial damages if the developer fails to monitor and control noxious weeds and through their actions by failing to follow state law allow them to be spread.

Exhibit 15 ODFW -Oregon Conservation Strategy, Pages 35 and 36 provides the following documentation supporting the necessity for a Noxious Weed Plan that actually works and remains viable for the life of the development. It identifies the following issues with a failure to control invasive weeds:

“Affect food chain dynamics; change habitat composition; increase wildfire risk; reduce productivity of commercial forestlands, farmlands, and rangelands; modify soil chemistry; accelerate soil erosion; reduce water quality. Invasive species are the second-largest contributing factor causing native species to become at risk of extinction,”

“natural pathways may help to spread invasive species, especially plants whose seeds or parts are easily dispersed by wind, water, and wildlife. Certain land management practices can serve

as conduits or create conditions that favor the spread of invasive organisms. Regardless of the pathway or practice implicated in the problem, experts believe that environmental disturbance is often a precursor to invasion by non-native plants. Invasive non-native species are highly adaptable and competitive, using space, water, and sunlight of disturbed ground. “

Following are rules impacted by Noxious Weed spread which are listed in the Project Order as applicable to this site certificate.

“345-022-0040

#### **Protected Areas**

(l) Except as provided in sections (2) and (3), the Council shall not issue a site certificate for a proposed facility located in the areas listed below. To issue a site certificate for a proposed facility located outside the areas listed below, the Council must find that, **taking into account mitigation, the design, construction and operation of the facility** are not likely to result in significant adverse impact to the areas listed below.”

345-022-0060

#### **Fish and Wildlife Habitat**

(1) To issue a site certificate, the Council must find that the design, **construction and operation of the facility, taking into account mitigation**, are consistent with:

(2) The general fish and wildlife habitat mitigation goals and standards of OAR 635-415-0025(1) through (6) in effect as of February 24, 2017,

(3) The Project Order also requires: **“The applicant must show how it would comply with the habitat mitigation goals and standards by appropriate monitoring and mitigation.”**

(4) 345-022-0070

#### Threatened and Endangered Species

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

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

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

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

(9) (2) For wildlife species that the Oregon Fish and Wildlife Commission has listed as threatened or endangered under ORS 496.172(2), the **design, construction and operation** of the proposed facility, taking into account mitigation, are not likely to

cause a significant reduction in the likelihood of survival or recovery of the species.”

(10) 345-022-0110

**Public Services**

(11) (1) Except for facilities described in sections (2) and (3), to issue a site certificate, the Council must find that the **construction and operation** of the facility, taking into account mitigation, are not likely to result in significant adverse impact to the ability of public and private providers within the analysis area described in the project order to provide: sewers and sewage treatment, water, storm water drainage, solid waste management, housing, traffic safety, police and fire protection, health care and schools.

Proposed Order states:

“The application shall demonstrate that the proposed facility will not result in significant adverse impact to the ability of public and private providers within the analysis area to provide those service”.

Documentation relating to fire fighting resources

- a. NOTE: Sarah Reif representing ODFW stated that noxious weeds caused an increase in the risk of fire compared to the perennial grasses that they replace impacting fire protection .

Regarding Public Noxious Weed Control

- b. --Exhibit 4 of my Cross-Examination Documents, Page 1, Item 3 Union, Umatilla, Morrow County B2H Noxious Weed Plan Comments, August 22, 2017. The weed managers from these counties state, "IPC will be held responsible for controlling all state and county listed noxious weeds on lands they manage or hold right of way on regardless of cause or pre-existence, the same as any other landowner or manager."

**Note: The service providers managing noxious weeds documented with a list of actions required to meet the requirement that the development not impact their ability to provide the service of noxious weeds management. The actions were not incorporated into the Proposed Order.**

This exception to the Proposed Hearings Order is necessary due to the following:

1. Material in Items 22 through 32 on pages 43 through 47 are devoted to reiterating Idaho Power's arguments and statements, and quotes from the Oregon Department of Energy Proposed Order which state that Idaho Power and the Oregon Department of Energy agree, but again, there is no documentation meeting the requirement that the developer document with a "preponderance of evidence in the file" that they comply with the standards. The lack of evidence supporting those statements and the changes

in the development of the final plan do not assure any of the statements made will actually be implemented for the following reasons: 1. The Certificate Holder will be the one creating the Noxious Wee4 Plan. 2. A final plan which is supposed to complies with state statutes and council rules will not be developed until after a site certificate is issued resulting in no opportunity for public review to determine if the conditions comply with Oregon statutes and rules. My Closing arguments include court decisions requiring opportunity for public review of the final Plan as well as ones restricting the interpretations of statutes and rules to exclude adding language that is not there or ignoring language that is there. As noted by this and other contested cases regarding the Proposed Order developed by the Oregon Department of Energy, there are multiple areas where the determinations and recommendations of Oregon Department of Energy fail to comply with the language of the Oregon statutes and rules.

2. The Draft Contested Case Hearings Order ignores the fact that by failing to comply with Oregon Statutes and ODOE rules requiring compliance with state law the developer is failing to comply with multiple council rules were noxious weeds will result in a failure to comply with those rules.
3. Page 145 of the Proposed Contested Case Order, “Responsibility for pre-existing weed infestations” includes a statement that the developer is not responsible for weeds throughout the site boundary and that Idaho Power has no obligation to assure noxious weeds do not go to seed. It also states that there is no requirement for the developer to

eradicate preexisting weeds that are not the result of ground disturbance associated with project construction. These statements are not supported by facts, are not accurate and the file documents that they are not “facts” since the file contains nothing to support them other than statements by the developer and their consultant. The file does contain documentation including Exhibits that show the statements to be false.

4. There remains the legal issue regarding the fact that the Draft Noxious Weed Plan allows actions which are prohibited by state law. Approval of such a plan by the council constitutes a waiver of state statutes. Oregon law states that the Council, in addressing conflicts cannot waive stated law. A decision in this contested case supporting allowing the developer to manage Noxious Weeds in a manner that conflicts with Oregon Statutes clearly constitutes a waiver of ORS 459 requirements.

The requirement that the developer control noxious weeds is mandated not only by state statute, but also by council rules. While one of the issues that has not been determined by the proposed order is whether or not the council can waive state law by a failure to include conditions that require compliance with ORS 569, the statement in the Proposed Order indicating that there is no siting standard that require the developer to assure that no noxious weeds be allowed to go to seed or that the developer is only responsible for noxious weed infestations as a result of ground disturbing activities are patently incorrect. I will rely upon the language of the Project Order and council standards as documentation that the council needs to provide an exception to the ALJ’s Proposed Contested Casen Order



and require the developer to assure noxious weeds are not allowed to go to seed. In the event that the site certificate fails to include conditions that will assure noxious weeds are not allowed to go to seed on the site, the negative impacts to surrounding farm, forest and property owners require identification of the negative impacts on them, and site specific mitigation must be required to compensate for the damages that will result and costs to local Service Providers to address the impacts.

The statement of “findings number 27 makes multiple “findings” that are not supported by facts and/or simply document the fact that the Draft Plan fails to include information that documents compliance with the rules:. They include: “The plan also requires vehicle washing stations (wheel washing) in areas identified with noxious weeds, prior to and during construction.” (No requirement during operation of development) “During construction and operation, the plan requires control and treatment measures. The final treatment methodologies would be developed based on state and country regulations; applicable land use management requirements; consultation with land managers, county weed boards, and ODOE; and site-specific circumstances; to occur based on the pre-construction Agency Review Process incorporated by the Department consistent with OAR 345-025- 0016. (In other words, the plan fails to require any specific treatment methodologies that are site specific) The Agency Review Process includes a dispute resolution process to ensure the final plan appropriately satisfies applicable regulatory requirements. \* \* \*. (In other words, the agency and council who’s support of the Proposed

Order being challenged in the contested cases will be the ones responsible for deciding that public agency arguments regarding the Final Plans they approve are not adequate.) “The plan requires agency consultation to establish frequency for long-term monitoring, which would be site-specific. In other words – there may be increased long-term monitoring frequency in disturbance areas with identified noxious weed infestations, and decreased monitoring frequency in disturbance areas without infestations.” (The representatives of the Oregon Department of Agriculture Noxious Weed Program, who are the experts in this area, as well as an expert witness have testified that a minimum of annual monitoring is necessary and noxious weeds may occur or reoccur at any time, regardless of whether or not there are currently any at a location. A plan that fails to require a minimum of annual monitoring and control of noxious weeds cannot claim that it constitutes mitigation for control of noxious weeds to assure they do not go to seed and infect other property. This statement provides documentation that the statutes and rules are not going to be enforced, “The plan also addresses ORS Chapter 569, which imposes certain obligations onto occupiers of a land within a weed district. To address those obligations, the plan requires that the applicant work with landowners or land management agencies to identify and address weed infestations within the site boundary.” Note: Responsibility for weeds in the site boundary are the responsibility of the applicant both under council rules as well state statutes as is documented in this exception request.. “ Council cannot require the applicant to control weeds outside of the site boundary, either under its standards or ORS Chapter

569, because Council's control covers the "site" of the proposed facility." (Note: The developer is held responsible for noxious weeds if they are allowed to spread outside the site as documented in the Project Order listing standards where impacts from actions or a lack of actions on the site result in impacts to resources outside the site. " \* \* \* At this time, other than presence of noxious weeds within the analysis area, no evidence has been provided on the record that questions the validity of the Noxious Weed Plan or the applicant's ability to implement and adhere to the requirements of the plan. (ODOE - B2HAPPDoc2 Proposed Order on ASC and Attachments 2019-07-02, page 324-25 of 10016.)"

**This contested case is as a result of the fact that the draft noxious weed plan is invalid due to a failure to comply with oregon statutes and rules, council statutes and rules and standards identified in the project order.** I am at a loss regarding how the ALJ could make such a statement as a "finding". Please reference my Opening and Closing Arguments, Exhibits, Susan Geer's Opening and Closing Arguments and Exhibits, court decisions and statutes and rules referenced in these documents as providing a preponderance of evidence that these statements are not factual.

Items 29, 30 and 31 are not "Findings of Fact". They are statements made by a consultant hired by Idaho Power regarding a future action that may or may not be included in a Final Noxious Weed Plan that is supposed to occur after a site certificate is issued and after the public has no opportunity to object to either the omission or content of the actions.

Item 30 under “findings” which if it does end up being included in a Final Noxious Weed Plan will provide documentation that there is no assurance that monitoring and mitigation will continue beyond the first 5 years. According to testimony by the representatives of the Department of Agriculture Noxious Weed program, noxious weeds are never “controlled”. They will require monitoring and treatment on an ongoing basis for the life of the development. In addition, this condition fails to address the impacts regarding other standards included in the Project Order requiring mitigation should the developer fail to control noxious weeds for the life of the development. These standards include LCDC Agricultural Land Protections, Wetlands, Historic and Cultural Sites including impacts to first foods and natural vegetation, Public Services including increased Fire Risks and county Weed Control Programs, Threatened and Endangered Species, Protected Areas, etc.

#### Errors in the Proposed Order:

The proposed contested case hearing order failed to address my argument that the ODOE General Standards of review require the applicant to comply with state law. OAR 245-022-0000(l)(b) necessitates this evaluation and I am requesting that the exception to the proposed order be approved requiring this evaluation prior to issuing a final contested case decision or Site Certificate.

The Proposed Contested Case Order fails to include the arguments and supporting proof provided by myself and the other petitioner showing the statements to be inconsistent with

Oregon Statutes and Rules. The ALJ list of statements on Pages 43 through 47 lack any references to statutes or rules that support treating them as legitimate findings.

The Proposed Contested Case Order appears to avoid the fact that the issue of this contested case is a failure to address noxious weeds occurring on the entire site, and in the case of Agricultural Land, noxious weeds impacting adjacent agricultural lands as well. The Proposed Contested Case Order on this issue alone should result in the council questioning whether the requirement to provide a fair and impartial contested case process was met. The proposed order does not even allude to the arguments of myself and the other petitioner showing the comments included in the Proposed Order are not consistent with Oregon Law, ODOE Rules nor do they comply with the obligation to provide for a fair and impartial contested case which addresses petitioners arguments and exhibits. For example: References the Habitat Restoration Plan which is only related to restoration of areas where there were ground disturbances and the Vegetation Management Plan related to keeping vegetation out of the transmission lines. Neither of these plans relate to this contested case issue as stated at the start of this document.

“Findings” using statements such as “Idaho Power “explained”, Idaho Power will “work with”;  
“Specific measures and agency directives will be detailed in the Noxious Weed Plan once finalized, as well as information regarding noxious weed control measures and monitoring requirements.” It appears there was an assumption by the writer of the Proposed Contested Case Order that no one would read what this Plan actually said, or in this case, failed to say.;

Idaho Power will “review the county lists on a regular basis”. All these statements included as “findings” fail to document anything.

This exception request also applies to my recommended Site Certificate Conditions which the Proposed Contested Case Order states are unnecessary. If the Site Certificate allows the developer to avoid the responsibility to monitor and control noxious weeds during the life of the development to preclude them spreading to other areas containing resources protected by Council standards the following site certificate conditions need to be included in the site certificate;

“The following rules will be reevaluated to determine impacts to costs and/or procedures as a result of predictable noxious weed spread if the noxious weed plan fails to comply with state statutes and where appropriate, mitigation will be required: Agriculture, Forest Practices, Fire Fighting, Wildlife Habitat, Threatened and Endangered Plants and Animals, Protected areas.”

Areas of the Draft Noxious Weed Plan which must be changed to avoid the need for the above site certificate condition:

Remove statements in 4,3 stating ~~For EFSC purposes, IPC will only be responsible for treating noxious weeds that are within Project ROWs and that are a result of the company's construction or operation related, surface disturbing activities in the~~

~~following areas involving ground-disturbing construction and/or improvement (e.g.,  
new cutouts;....."~~

~~"With ....respect to pre-existing weed infestations, IPC recognizes ORS Chapter 569 imposes  
onto occupiers of land within a weed district certain obligations to control and prevent  
weeds; if IPC identifies pre-existing weed infestations within a Project ROW, IPC will work  
with the relevant landowner or land management agency to address the same consistent  
with ORS Chapter 569."~~

~~"5.0 NOXIOUS WEED MANAGEMENT This section of the Plan describes the steps IPC will take to  
prevent and control the establishment and spread of noxious weed species during both  
construction and operation of the Project. For EFSC purposes, IPC will only be responsible for  
controlling noxious weeds that are within Project ROWs and that are a result of the company's  
construction or operation related, surface-disturbing activities"~~

The file contains a preponderance of evidence supporting the fact that failing to require compliance with state laws contained I ORS 569,390, ORS 569,400 ad ORS 569,445 regarding the management of Invasive Weeds is a significant threat to the environment and evidence that the Draft Noxious Weed Plan fails to comply with these laws. The developer admits that the plan does not comply with these laws.

In order to comply with the state statutes, the Proposed Order must contain conditions which will assure that noxious weeds are not allowed to go to seed for the life of the development. This same requirement is necessary to find the development is in compliance with counsel standards. The procedure for completion of the plan provides no assurance to the public that the plan will comply with the law or that it will provide for the protection of the livelihood of landowners who depend upon the management of invasive weeds in order to make a living.

I am incorporating by reference the exhibits, arguments and all submissions provided by Ms. Geer regarding this contested case issue and her arguments regarding the need for an exception to the Proposed Contested Case Order finding against us.

OAR 345-025-0016 "In the site certificate, the Council shall include conditions that address monitoring and mitigation to assure compliance with the standards contained in OAR Chapter 35, Division 22 and Division 24.

Recommended Site Condition:

1. The following rules will be reevaluated to determine impacts to costs and/or procedures as a result of predictable noxious weed spread if the noxious weed plan fails to comply with state statutes and here appropriate, mitigation will be required: Agriculture, Forest Practices, Fire Fighting, Wildlife Habitat, Threatened and Endangered Plants and Animals, Protected areas.



2. The developer must be required to establish monitoring and mitigation procedures to assure that no noxious seeds are allowed to go to seed.
3. The procedures must be required to annually document that no noxious weeds are allowed to go to seed.
4. The Site Certificate and Noxious Weed Plan must be required to remove all language that references limiting noxious weed management and monitoring to areas of “surface disturbance.”

I respectfully submit this request for an Exception to the Proposed Contested Case Order and submitted site certificate conditions due to the fact that it fails to comply with Oregon Statutes and rules. In addition, the order fails to comply with requirements of Oregon Statute **183.470**

**Orders in contested cases**

**Irene Gilbert**

**Pro-Se Petitioner,**

**Representing the Public Interest and Co-Chair of STOP B2H.**



On June 29, 2022, I certify that I filed the foregoing **EXCEPTION TO PROPOSED CONTETED CASE DECISIONS ON MY ISSUE FW-3 AND RELATED SITE CERTIFICATE CONDITIONS**

with the Hearings Coordinator via electronic mail, and with each party entitled to service, as noted below.

**By: Arrangement for hand delivery or US Mail:**

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**BEFORE THE ENERGY FACILITIES SITING COUNCIL  
for the  
STATE OF OREGON**

<b>IN THE MATTER OF:</b>	)	<b>EXCEPTIONS TO</b>
	)	<b>ADMINISTRATIVE LAW JUDGE</b>
THE PROPOSED BOARDMAN TO	)	<b>WEBSTER’S RULINGS:</b>
HEMINGWAY TRANSSMISSION LINE	)	<b>PROPOSED CONTESTED CASE</b>
	)	<b>ORDER</b>
	)	
	)	<b>BY PETITIONER SUSAN GEER</b>
	)	<b>ISSUES FW-3 and FW-6</b>
<b>OAH Case No. 2019-ABC-02833</b>	)	
	)	<b>DATED JUNE 28, 2022</b>

**INTRODUCTION**

**Issue FW-3: Whether the Draft Noxious Weed Plan adequately ensures compliance with the weed control laws, ORS 569.390, ORS 569.400, and ORS 569.445.**

**Issue FW-6: Whether the Noxious Weed Plan provides adequate mitigation for potential loss of habitat due to noxious weeds when it appears to relieve Applicant of weed monitoring and control responsibilities after five years and allows for compensatory mitigation if weed control is unsuccessful.**

Petitioner Susan Geer (Ms. Geer) disagrees with many of the factual and legal conclusions and the characterizations of the evidence that are contained in the Proposed Contested Case Order (PCCO). Ms. Geer presented evidence showing that many of the findings and conclusions stated in the PCCO are not accurate or legally appropriate.

Ms. Geer requests that Energy Facility Siting Council (EFSC) deny the site certificate and reverse the PCCO. In the alternative, Ms. Geer requests remand by EFSC to the ALJ for more evidence and a new PCCO; also, to remand this issue back to ODOE for updated analysis; and remand this issue back to ODOE for further development of the Reclamation and Revegetation Plan and Vegetation Management Plan as the current versions are not specific enough to determine compliance.

Ms. Geer adopts one exception from Petitioner Irene Gilbert (Ms. Gilbert) and raises two other specific exceptions to the ALJ Proposed Contested Case Order, as it relates to Issues FW-3 and FW-6. These exceptions are addressed below, demonstrating that the facts, or reasoning/analysis or conclusion by the ALJ is incorrect. The errors are material to EFSC's decision.

## **EXCEPTIONS**

- 1. Ms. Geer adopts Ms. Gilbert's Exception for Issue FW-3: "The Proposed Contested Case Order failed to include information required by the Oregon Statutes governing Contested Cases".**

Ms. Geer incorporates by reference the exhibits, arguments and all submissions provided by Ms. Gilbert regarding issue FW-3, and her arguments about the need for an exception to the Proposed Contested Case Order.

**2. Judge Webster ALJ erred when she summarized Issue FW-3. An important concern raised by Ms. Geer: “effects of residual herbicides on native plant communities” was omitted from the Issue.**

Ms. Geer’s comment on the DPO dated August 22, 2019 expresses great concern for effects of residual herbicides on native plant communities, especially but not exclusively those in Natural Areas. Large amounts of herbicides would be used to address invasive plants resulting from the ground disturbance of construction of the proposed transmission line. This important concern was not addressed in any other Issues or discussed in the Plans (draft Noxious Weed, Reclamation and Revegetation, or Vegetation Management) proposed by IPC as part of the ASC. This concern should be part of discussion of habitat standards and mitigation under OAR 635-415-0025, as well as consideration of Protected Areas under OAR 345-022-0040, which states that “the Council must find that, taking into account mitigation, the design, construction and operation of the facility are not likely to result in significant adverse impact to the areas”.

**3. The ALJ erred by how she addressed Issue FW-6:**

**a. By failing to address in the PCCO the “potential loss of habitat” and type of mitigation, i.e., “compensatory mitigation” raised in Issue FW-6.**

**b. By incorrectly limiting the scope of FW-6 with prejudicial wording in her Opinion<sup>1</sup>, even beyond the limited wording she originally chose for the Issue in the Amended Order on Party Status, Authorized Representatives and Issues for Contested Case (Amended Order)<sup>2</sup>.**

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<sup>1</sup> P. 144 In the Matter of Boardman to Hemmingway, OAH Case No. 2019-ABC-02833 Proposed Contested Case Order.

<sup>2</sup> P.78 In the Matter of Boardman to Hemmingway, OAH Case No. 2019-ABC-02833 Amended Order on Party Status, Authorized Representatives and Issues for Contested Case.

In the PCCO, the ALJ's Conclusion of Law<sup>3</sup> states:

“The updated draft Noxious Weed Plan is adequate to serve its intended purpose of establishing the measures the Company will take to control noxious weed species and prevent the introduction of these species during construction and operation of the project. Ms. Geer has not presented evidence or persuasive argument to show that the Noxious Weed Plan is invalid or that Idaho Power will be unable to implement and adhere to the plan when finalized.”

This Conclusion completely ignores the loss of habitat, which is central to the Issue. In a letter to the ALJ dated October 1, 2020, Ms. Geer appealed for – and gained recognition of -- this very issue stating:

“The following issue is not mentioned by ODOE but recognized as properly raised by IPC in “Response to Petitions for Party Status”:

*2. d. Fish & Wildlife Habitat Standard, OAR 345-022-0060: Mitigation for Potential Habitat Loss from Noxious Weeds*

*‘Whether the new action in the Proposed Order allowing Idaho Power to mitigate for potential loss of habitat due to noxious weeds is an adequate solution to the risk of noxious weed impacts.’”*

Reading further in the PCCO, the ALJ was able to draw this conclusion only because she chose to re-word and prejudicially narrow the scope of FW-6 in her Opinion.

In the PCCO, the ALJ's Opinion states “Idaho Power is not required to demonstrate compliance with the Weed Control Laws to satisfy the Fish and Wildlife Habitat Standard”<sup>4</sup>. The ALJ incorrectly assumes that “compliance with weed control laws” is the only factor related to

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<sup>3</sup> P. 139 In the Matter of Boardman to Hemmingway, OAH Case No. 2019-ABC-02833 Proposed Contested Case Order.

<sup>4</sup> P. 145 In the Matter of Boardman to Hemmingway, OAH Case No. 2019-ABC-02833 Proposed Contested Case Order

disturbance and invasives that would affect habitat. The opinion is mute because without beginning construction, IPC could not “demonstrate compliance” ; all they can do is demonstrate a willingness to comply, at least in writing. While the question of whether IPC is willing to comply remains at large, what is not in question is that loss of high-quality native habitat would occur under the ASC/PO. As Ms. Geer points out in her testimony<sup>5</sup>, there is no mitigation that can atone for unique high quality native habitat. This is particularly true for the Rice Glass Hill Natural Area, which has been undisturbed, undeveloped and managed solely for native plants and animals for over 20 years and has special status species and priority plant associations.<sup>6</sup>

The ALJ draws faulty conclusions about “mitigation for loss of habitat” and “compensatory mitigation” in her Opinion.<sup>7</sup> Concerning Ms. Geer’s arguments on mitigation for loss of habitat the ALJ offers “As previously discussed, Issue FW-6 is limited to whether the Noxious Weed Plan provides adequate mitigation for potential *adverse impacts* from noxious weeds resulting from project construction and/or operation”<sup>8</sup>. Here the ALJ has replaced the words “*loss of habitat*” found in her initial wording of the issue, with “adverse impacts”, taking the issue further from the concerns initially expressed by Ms. Geer<sup>9</sup>. The ALJ further dismisses concerns about habitat lost because of invasive plants by focusing only on the words “Noxious Weed Plan”. In her view, the Noxious Weed Plan is the only aspect of invasive plants under consideration. The ALJ erroneously reasons that since the Council not responsible for the Noxious Weed Plan, the

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<sup>5</sup> EXPERT WITNESS TESTIMONY OF SUSAN GEER; ISSUES FW-3 AND FW-6; DATED SEPTEMBER 17, 2021.

<sup>6</sup> See EXCEPTION TO ADMINISTRATIVE LAW JUDGE WEBSTER’S RULINGS: SUMMARY DETERMINATION AND PROPOSED CONTESTED CASE ORDER BY PETITIONER SUSAN GEER ISSUE SR-5; DATED JUNE 27, 2022 and PRO SE PETITIONER Susan Geer’s OPPOSITION TO MOTION FOR SUMMARY DETERMINATION OF CONTESTED CASE ISSUE SR-5 BY IDAHO POWER COMPANY; DATED JUNE 21, 2021.

<sup>7</sup> INSERT CITATION OF WHERE ALJ DRAWS FAULTY CONCLUSIONS

<sup>8</sup> P. 152 In the Matter of Boardman to Hemmingway, OAH Case No. 2019-ABC-02833 Proposed Contested Case Order.

<sup>9</sup> Susan Geer Comments on the DPO dated 8.22.2019.



Council retains zero responsibility for the long-term effects of introducing invasives to the landscape.

In her Opinion about Ms. Geer's concerns regarding compensatory mitigation, the ALJ once again restricts the Issue even beyond her previously chosen wording ("allows for compensatory mitigation if weed control is unsuccessful"), stating "this argument exceeds the scope of Issue FW-6, which as previously discussed, is limited to the adequacy of the weed monitoring and control provisions of the Noxious Weed Plan."<sup>10</sup> By excluding wording about habitat and compensatory mitigation, the ALJ has prejudicially changed the emphasis of Issue FW-6 and rendered her Opinion invalid.

## **CONCLUSION**

Ms. Geer adopts Ms. Gilbert's Exception for Issue FW-3: "The Proposed Contested Case Order failed to include information required by the Oregon Statutes governing Contested Cases". The ALJ erred when she summarized Issue FW-3: An important concern raised by Ms. Geer: "effects of residual herbicides on native plant communities" was omitted from the Issue.

Finally, the ALJ erred by how she addressed Issue FW-6: By failing to address in the PCCO the "potential loss of habitat" and type of mitigation, i.e., "compensatory mitigation" raised in Issue FW-6; and by incorrectly limiting the scope of FW-6 with prejudicial wording in her Opinion even beyond the limited wording she originally chose for the Issue in the Amended Order.

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<sup>10</sup> P. 152 In the Matter of Boardman to Hemmingway, OAH Case No. 2019-ABC-02833 Proposed Contested Case Order.

Ms. Geer requests that EFSC deny the application and not issue a site certificate. In the alternative, Ms. Geer requests that EFSC remand this issue back to ODOE for updated analysis; and remand this issue back to ODOE for further development of the Reclamation and Revegetation Plan and Vegetation Management Plan as the current versions are not specific enough to determine compliance; and remand the application to the ALJ for more evidence and a new PCCO.

**CERTIFICATE OF MAILING**

On June 28, 2022, I certify that I filed the foregoing EXCEPTION TO THE PROPOSED CONTESTED CASE ORDER with the Hearings Coordinator via electronic mail, and with each party entitled to service, as noted below.

*/s/ Susan M. Geer*  
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**BEFORE THE  
ENERGY FACILITY SITING COUNCIL  
OF THE STATE OF OREGON**

**IN THE MATTER OF THE  
APPLICATION FOR SITE  
CERTIFICATE FOR THE BOARDMAN  
TO HEMINGWAY TRANSMISSION  
LINE**

**OREGON DEPARTMENT OF  
ENERGY'S RESPONSE TO  
EXCEPTIONS – ISSUE FW-6  
(OAH Case No. 2019-ABC-02833)**

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## I. INTRODUCTION

The Hearing Officer in the above-referenced matter issued a Proposed Contested Case Order (“PCCO”) on May 31, 2022. On June 28, 2022, limited party Ms. Susan Geer timely filed exceptions to the PCCO regarding Issue FW-6.<sup>1</sup>

In the Hearing Officer’s December 4, 2020 *Amended Order on Party Status, Authorized Representatives and Properly Raised Issue for Contested Case* Issue FW-6 was granted as a contested case issue.

Issue FW-6 is: Whether the Noxious Weed Plan provides adequate mitigation for potential loss of habitat due to noxious weeds when it appears to relieve Applicant of weed monitoring and control responsibilities after five years and allows for compensatory mitigation if weed control is unsuccessful.

### A. Background on Exceptions

Parties to the contested case are entitled to file exceptions to the PCCO and present argument to the Energy Facility Siting Council (“Council”) pursuant to both the Administrative Procedures Act and the Model Rules adopted by Council.<sup>2</sup> Exceptions are written objections to the proposed findings, conclusions of law or conditions.<sup>3</sup> The exceptions must be based on the existing record, and should not include new or additional evidence.

### B. Exceptions

Ms. Geer filed the following exceptions related to Issue FW-6:

1. PCCO Conclusion of Law for Issue FW-6 does not address the issue because it fails to address the “potential loss of habitat” and type of mitigation, i.e., “compensatory mitigation” as specifically referenced in the statement of Issue FW-6.

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<sup>1</sup> Exceptions to Administrative Law Judge Webster’s Rulings: Proposed Contested Case Order By Limited Party Susan Geer Issues FW-3 and FW-6 Dated June 28, 2022 (hereinafter S. Geer Exceptions on Issues FW-3 and FW-6).

<sup>2</sup> ORS 183.469; OAR 137-003-0060

<sup>3</sup> OAR 345-015-0085(5)

2. Hearing Officer erred by how she addressed Issue FW-6 by incorrectly limiting the scope of FW-6 with prejudicial wording in her Opinion<sup>4</sup>, even beyond the limited wording she originally chose for the Issue in the Amended Order on Party Status, Authorized Representatives and Issues for Contested Case (Amended Order).”<sup>5</sup>

C. Summary of Department Position

First, Mr. Geer identifies a discrepancy in the PCCO’s wording of the Conclusion of Law compared to the issue statement for Issue FW-6. This discrepancy is immaterial to the ultimate evaluation and determination by Council of whether the applicant has demonstrated an ability to satisfy the requirements of the Fish and Wildlife Habitat standard.

Second, Ms. Geer takes issue with the PCCO Opinion where the Hearing Officer describes that the Noxious Weed Plan provides adequate mitigation for potential *adverse impacts* from noxious weeds, rather than referring specifically to the “loss of habitat” as presented in the issue statement for Issue FW-6. This discrepancy is also immaterial – the phrase “adverse impact” is used over 90 times throughout the PCCO and is the general phrase used to evaluate the potential significance of impacts under each contested case issue. The Department does not consider the omission of a specific phrase that exactly mirrors the language of the issue statement to result in a modification or limitation of the scope of the issue. In the PCCO, the Hearing Officer indicates that Ms. Geer’s arguments related to other mitigation plans were outside the scope of Issue FW-6, but did not otherwise narrow the scope of Issue FW-6.

## II. ANALYSIS

A. Applicable Laws and Rules

As relevant to this matter, Council’s Fish and Wildlife Habitat standard,

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<sup>4</sup> Referencing the PCCO, p. 144.

<sup>5</sup> Referencing the Hearing Officer’s Amended Order on Party Status, Authorized Representatives and Issues for Contested Case, p. 78.

OAR 345-022-0060 states: “Council must find that the design, construction and operation of the facility, taking into account mitigation, are consistent with: (1) The general fish and wildlife habitat mitigation goals and standards of OAR 635-415-0025(1) through (6) in effect as of February 24, 2017 . . .”

B. Department’s Evaluation of Exceptions

In her first exception, Ms. Geer alleges the PCCO’s Conclusion of Law for Issue FW-6 fails to address the “potential loss of habitat” and type of mitigation, i.e., “compensatory mitigation” raised in Issue FW-6. Ms. Geer is correct that the Conclusion of Law omits reference to potential loss of habitat and mitigation and somewhat misaligns with (answering or directly responding to) the issue statement. However, the presumed misalignment is immaterial. Ultimately, Council is tasked with making conclusions of law on whether the applicant has demonstrated an ability to comply with the standards. The Department considers the omission of specific wording of the issue statement within the Hearing Officer’s Conclusion of Law to be immaterial to the ultimate conclusion of law unless it were to somehow affect the Council’s ability to analyze whether the applicant can or cannot meet the standard. Based on the PCCO’s referenced findings of fact for Issue FW-6, as referenced below, the omission of language in the Conclusion of Law that has been identified by

Ms. Geer would not affect the Council’s analysis of whether the applicant can meet the standard.

In the PCCO, Findings of Fact #22-32 are identified as relevant to noxious weed control and clearly present facts related to noxious weed identification, control and monitoring and habitat mitigation. Finding of Fact #26 identifies habitat mitigation and that there are applicable requirements that would be implemented through a Reclamation and Revegetation Plan, as presented below:

“In the Proposed Order, Section IV.H.1, General Fish and Wildlife Mitigation, the Department addressed, among other things, Idaho Power’s methodology for evaluating habitat quantity and quality within the analysis area, the habitat assessment, the potential impacts to fish and wildlife habitat from construction and operation of the proposed facility, and the proposed habitat mitigation plans. (ODOE – B2HAPPDoc2 Proposed Order on ASC and Attachments 2019-07-02, pages 313-20 of 10016.) The Department described the components of the draft Reclamation and Revegetation Plan, and as Recommended Fish and Wildlife Condition 1, required Idaho Power to finalize, prior to construction of a phase or segment of the facility, the draft Reclamation and Revegetation Plan. (*Id.* at pages 320-323 of 10016.) As Recommended Fish and Wildlife Condition 2, the Department required Idaho Power to, prior to construction of a phase or segment of the facility, finalize and submit to the Department for its approval, in consultation with ODFW, a final Vegetation Management Plan.”<sup>6</sup>

...

“In ASC Exhibit P1, Idaho Power described the potential impacts of the project on fish and wildlife species and showed how the project will be consistent with the ODFW’s fish and wildlife habitat mitigation goals and standards. Idaho Power included as ASC Exhibit P1 Attachment P1-6, a draft Fish and Wildlife Habitat Mitigation Plan setting forth the mitigation measures the Company will implement to achieve the goals and standards set out in OAR 635-415-0025 . . .”

Thus, contrary to Ms. Geer’s first exception, while the PCCO’s Conclusion of Law for Issue FW-6 does not specifically refer to the “potential loss of habitat” and type of mitigation, i.e., “compensatory mitigation”, the facts relied upon to support the conclusion of law clearly address the ‘potential loss of habitat’ and type of mitigation / ‘compensatory mitigation.’

In her second exception, Ms. Geer takes issue with the Hearing Officer’s summarizing Issue FW-6 as being limited to whether the Noxious Weed Plan provides adequate mitigation *for potential adverse impacts* from noxious weeds rather than explicitly stating the question is whether it provides adequate mitigation for potential loss of habitat.<sup>7</sup> However, it is clear that the Hearing Officer understood the scope of the Issue, as she quoted it verbatim in at least two

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<sup>6</sup> PCCO, p. 44 of 337 (para. 26).

<sup>7</sup> S. Geer Exceptions on Issues FW-3 and FW-6, p. 5.

locations in the PCCO.<sup>8</sup> The use of the phrase “adverse impacts” is used throughout the PCCO and is not intended to establish a different, or generalized scope but rather is used within the context of the impacts under review. For this issue, it is clear that the Hearing Officer’s use of the phrase “adverse impacts” was intended to apply to the potential “adverse impacts” of potential habitat loss from noxious weeds if not identified, controlled and monitored within an appropriate frequency and established within an adequate plan.

### III. CONCLUSION

For the reasons set forth above, the Department recommends the Council reject the exceptions on Issue FW-6 and affirm the Hearing Officer’s findings of fact, conclusions of law and opinion on Issue FW-6.

DATED this 15<sup>th</sup> day of July, 2022.

Respectfully submitted,

ELLEN F. ROSENBLUM  
Attorney General

*/s/ Patrick Rowe*  
Patrick Rowe, OSB #072122  
Senior Assistant Attorney General  
Counsel for the Oregon Department of Energy

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<sup>8</sup> PCCO, p. 31, p. 151.

## CERTIFICATE OF SERVICE

I hereby certify that on July 15, 2022, the foregoing Oregon Department of Energy's RESPONSE TO EXCEPTIONS – ISSUE FW-6, was emailed to:

Todd Cornett  
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I further certify that on July 15, 2022, the foregoing Oregon Department of Energy's RESPONSE TO EXCEPTIONS – ISSUE FW-6, was served by First Class Mail or electronic mail as indicated below:

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**BEFORE THE ENERGY FACILITY SITING COUNCIL  
OF THE STATE OF OREGON**

In the Matter of the Application for Site  
Certificate for the

BOARDMAN TO HEMINGWAY  
TRANSMISSION LINE

APPLICANT IDAHO POWER  
COMPANY'S RESPONSE TO LIMITED  
PARTIES' EXCEPTIONS FOR  
CONTESTED CASE ISSUES FW-1,  
FW-3, FW-6, AND FW-7

OAH Case No. 2019-ABC-02833

**July 15, 2022**



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**I. INTRODUCTION**

Pursuant to OAR 345-015-0085(6) and the May 31, 2022 Proposed Contested Case Order, Applicant Idaho Power Company (“Idaho Power” or the “Company”) submits its Response to Limited Parties’ Exceptions for Issue FW-1, FW-3, FW-6, and FW-7.<sup>1</sup>

**II. STANDARD OF LAW**

In a contested case before the Energy Facility Siting Council (“EFSC” or the “Council”), the applicant bears the burden of proof to establish by a “preponderance of the evidence”<sup>2</sup> that the proposed facility complies with the Council’s statutes, ORS 469.300 to 469.570, and that the Application for Site Certificate (“ASC”) and proposed site conditions—as modified in the Oregon Department of Energy’s (“ODOE”) Proposed Order—satisfy each of the Council’s siting standards.<sup>3</sup> Proof by a preponderance of the evidence means that the fact finder is persuaded that the facts asserted are more likely than not true.<sup>4</sup> Furthermore, the applicant must demonstrate by a preponderance of evidence that the facility complies with all other statutes, administrative rules, and local government ordinances “identified in the project order, as amended, as applicable to the issuance of a site certificate for the proposed facility.”<sup>5</sup>

Parties or limited parties “with specific challenges to findings, conclusions and/or recommended site certificate conditions in [ODOE’s] Proposed Order bear the burden” of

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<sup>1</sup> While Irene Gilbert raises procedural challenges related to the Hearing Officer’s resolution of Issues FW-4, FW-9, FW-10, and FW-11, she does not raise any substantive concerns regarding those issues and accordingly they are addressed in Idaho Power’s response to exceptions addressing procedural concerns.

<sup>2</sup> OAR 345-021-0100(2) (“The applicant has the burden of proving, by a preponderance of the evidence in the decision record, that the facility complies with all applicable statutes, administrative rules and applicable local government ordinances.”); *see also* ORS 183.450(2) (“The burden of presenting evidence to support a fact or position in a contested case rests on the proponent of the fact or position.”).

<sup>3</sup> OAR 345-022-0000(1)(a).

<sup>4</sup> *Riley Hill General Contractor v. Tandy Corp.*, 303 Or 390, 402 (1987).

<sup>5</sup> OAR 345-021-0100(2); OAR 345-022-0000(1)(b).

1 producing evidence in support of the facts or positions they have asserted, and the burden of  
2 convincing the trier of fact that their alleged facts are true or their position on the identified issue  
3 is correct.<sup>6</sup> In particular, the parties or limited parties must establish how the applicant failed to  
4 satisfy EFSC’s siting standards and/or how ODOE “erred in its findings, conclusions and/or  
5 recommended site certificate conditions.”<sup>7</sup> To meet this burden of proof, parties or limited parties  
6 challenging the Proposed Order must provide factual testimony or evidence to substantiate their  
7 asserted claims;<sup>8</sup> unsubstantiated factual arguments or legal conclusions are insufficient to  
8 demonstrate the applicant’s failure to establish compliance with any applicable standard.<sup>9</sup>

9 After the hearing and briefing phases of a contested case, the Hearing Officer must issue a  
10 Proposed Contested Case Order stating the Hearing Officer’s findings of fact and conclusions of  
11 law.<sup>10</sup> Parties and limited parties may then file any exceptions to the Proposed Contested Case  
12 Order for the Council’s consideration.<sup>11</sup> If the parties or limited parties file exceptions, the parties  
13 or limited parties must identify for each exception the finding of fact, conclusion of law, or  
14 recommended site certificate condition to which the parties or limited parties except and must state  
15 the basis for their exception.<sup>12</sup>

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<sup>6</sup> Order on Case Management Matters and Contested Case Schedule at 11 (Jan. 14, 2021) (emphasis in original) [hereinafter, “First Order on Case Management”]; Second Order on Case Management Matters and Contested Case Schedule at 7 (Aug. 31, 2021) (emphasis in original) [hereinafter, “Second Order on Case Management”]; *see also* ORS 183.450(2) (the burden of presenting evidence to support a fact or position in a contested case rests on the proponent of the fact or position); *see also* Ruling on Idaho Power Company’s Motion to Dismiss Issues FW-5, HCA-6, LU-4, LU-7, LU-8, PS-1, PS-5, SS-1, and SS-2 at 3 (Nov. 2, 2021).

<sup>7</sup> First Order on Case Management at 11; Second Order on Case Management at 7.

<sup>8</sup> First Order on Case Management at 11; Second Order on Case Management at 7.

<sup>9</sup> First Order on Case Management at 11; Second Order on Case Management at 7. Idaho Power has no obligation to disprove unsubstantiated claims and allegations raised by the limited parties. *See* Ruling on Idaho Power Company’s Motion to Dismiss Issues FW-5, HCA-6, LU-4, LU-7, LU-8, PS-1, PS-5, SS-1, and SS-2 at 3.

<sup>10</sup> OAR 345-015-0085(4).

<sup>11</sup> OAR 345-015-0085(5).

<sup>12</sup> OAR 345-015-0085(5).

1 **III. RESPONSE TO EXCEPTIONS**

2 **A. Issue FW-1**

3 The Hearing Officer granted the STOP B2H Coalition (“STOP B2H”) and Louise Squire  
4 limited party status to raise Issue FW-1, which asked:

5 *Whether Applicant adequately analyzed sage grouse habitat connectivity in the*  
6 *Baker and Cow Valley Priority Areas of Conservation (PAC), the potential indirect*  
7 *impacts of the proposed facility on sage grouse leks, and the existing number of*  
8 *sage grouse in the Baker and Cow Valley PACs.*<sup>13</sup>

9 The Hearing Officer granted Idaho Power summary determination of FW-1,<sup>14</sup> and  
10 incorporated her ruling into the Proposed Contested Case Order.<sup>15</sup> In the Proposed Contested Case  
11 Order, the Hearing Officer summarized her conclusion as follows:

12 The ALJ found that neither STOP B2H nor Ms. Squire presented evidence  
13 demonstrating any insufficiencies in Idaho Power’s analysis of the proposed  
14 facility’s potential impacts to sage grouse leks and/or sage grouse habitat  
15 connectivity. The ALJ further found that Idaho Power had no obligation to ascertain  
16 the existing number of sage grouse in the Baker and Cow Valley PACs to establish  
17 the proposed facility’s compliance with the Fish and Wildlife Habitat Standard.<sup>16</sup>

18 Only STOP B2H filed exceptions on this issue. For the reasons discussed below, STOP B2H’s  
19 exceptions do not identify any incorrect finding of fact or conclusion of law, and for that reason  
20 Idaho Power requests that the Council adopt without modification the Hearing Officer’s findings  
21 of fact and conclusions of law relevant to FW-1.

22 FW-1 presented three distinct sub-issues: whether the Company adequately assessed  
23 potential indirect impacts, whether the Company adequately addressed sage grouse habitat

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<sup>13</sup> Order on Case Management at 3.

<sup>14</sup> Ruling and Order on Motion for Summary Determination on Contested Case Issue FW-1 (Aug. 5, 2021).

<sup>15</sup> Proposed Contested Case Order at 20.

<sup>16</sup> Proposed Contested Case Order at 20.

1 connectivity, and whether the Company adequately analyzed the number of sage grouse. The  
2 Hearing Officer granted Idaho Power summary determination on all three sub-issues.<sup>17</sup>

3 Regarding Idaho Power’s analysis of indirect impacts, the Hearing Officer concluded:

4 As an initial matter, the ALJ notes that neither Stop B2H or Ms. Squire raised in  
5 their comments on the Draft Proposed Order and petitions for party status the  
6 primary contention they raise in opposition to the Motion, i.e., that Idaho Power’s  
7 analysis of indirect impacts is incomplete because Idaho Power has yet to quantify  
8 the impacts and compensatory mitigation through application of the [Habitat  
9 Quantification Tool (“HQT”)]. Because the limited parties did not specifically  
10 raise this contention previously, it is not appropriate for consideration in the  
11 contested case. OAR 345-015-0016(3).

12 Nevertheless, even if the Council’s rule did not preclude the limited parties from  
13 raising this particular contention, the ALJ finds that there are no material facts in  
14 dispute with regard to this sub-issue. ASC Exhibit P2 satisfies the requirements of  
15 OAR 345-021-0020(1)(p)(B), in that it identifies sage-grouse specific habitats  
16 described in the Conservation Strategy (core, low density, and general habitats),  
17 describes the characteristics and condition of that habitat in the analysis area, and  
18 contains tables setting out the areas of permanent disturbance and temporary  
19 disturbance (in acres). In addition, as required by the rule, ASC Exhibit P includes  
20 a baseline survey of the sage-grouse habitat in the analysis area performed  
21 according to approved protocol. It includes a description of the nature, extent, and  
22 duration of potential adverse impacts on the sage-grouse habitat from the proposed  
23 facility. It also includes a description of the measures proposed to avoid, reduce, or  
24 mitigate the potential adverse impacts and a description of proposed monitoring  
25 plans to evaluate the success of the mitigation measures. See, e.g., ODOE -  
26 B2HAPPDoc3-32 ASC 16B\_Exhibit P2\_GRSB\_ASC 2018-09-28, pages 5-38.

27 The ALJ finds that although the direct and indirect impacts to sage-grouse habitat  
28 function have yet to [be] quantified through the HQT, Idaho Power adequately  
29 addressed the potential indirect impacts of the proposed facility on sage grouse leks  
30 for purposes of compliance with OAR 345-022-0060(2). As set out in the findings  
31 above, both ASC Exhibit P2 and the Proposed Order discuss indirect impacts of the  
32 proposed facility on sage-grouse habitat. In ASC Exhibit P2, Idaho Power noted  
33 that the clearing of vegetation and resulting soil disturbance could lead to the  
34 establishment of invasive plant species. It proposed plans and conditions to avoid,  
35 minimize and mitigate these impacts. It noted that the HQT will quantify the  
36 indirect impacts from construction activities and invasive species. Idaho Power also  
37 discussed the indirect impacts from the transmission towers and lines. Although  
38 Idaho Power questioned the methodology for quantifying impacts from sage-grouse

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<sup>17</sup> Ruling and Order on Motion for Summary Determination on Contested Case Issue FW-1 at 28.



1 avoidance of tall structures, it explained in ASC Exhibit P2 that, regardless of its  
2 position on the issue, “the State of Oregon has concluded that transmission lines  
3 have indirect impacts on sage-grouse habitat and Oregon’s HQT will account for  
4 such indirect impacts.” ODOE - B2HAPPDoc3-32 ASC 16B\_ Exhibit  
5 P2\_GRSg\_ASC 2018-09-28, page 27.

6 The fact that [the] extent of the proposed facility’s indirect impacts on sage-grouse  
7 habitat has yet to be quantified into functional acres through application of the HQT  
8 does not translate into a lack of compliance with the Fish and Wildlife Habitat  
9 standard. As discussed previously herein, the Conservation Strategy and, by  
10 association, the Council’s standard require use of the HQT to quantify impacts to  
11 the sage-grouse habitat for purposes of compensatory mitigation. The Proposed  
12 Order includes recommended conditions requiring Idaho Power to provide all  
13 necessary information to the [Oregon Department of Fish and Wildlife (“ODFW”)]  
14 so that the ODFW can use the HQT to calculate the extent of compensatory  
15 mitigation, and requiring that Idaho Power provide compensatory mitigation in  
16 accordance with the HQT results. As Idaho Power notes, the recommended site  
17 certificate conditions include a safeguard. If Idaho Power cannot demonstrate that  
18 it has sufficient compensatory mitigation to address the HQT-calculated impacts,  
19 then it cannot begin construction in sage-grouse habitat areas.

20 Additionally, the ALJ finds that because Idaho Power is required to use the HQT  
21 to quantify habitat function, because the HQT is based on the best available science,  
22 and because the HQT accounts for indirect impacts (including sage-grouse  
23 avoidance of tall structures and the potential for noxious weeds), the limited parties’  
24 offering of additional studies and literature regarding sage-grouse avoidance of tall  
25 structures does not create a relevant factual dispute. Consequently, Idaho Power is  
26 entitled to a favorable ruling as a matter of law on this issue.<sup>18</sup>

### 27 **1. STOP B2H, Issue FW-1, Exception 1**

28 Additionally, STOP B2H does not specifically label the exceptions it raised regarding  
29 FW-1, so Idaho Power addresses each separate argument below as if it were a distinct exception.  
30 STOP B2H first argues “OAR 635-140-0025 requires that development be mitigated for both  
31 direct and indirect impacts” and, because Idaho Power “has not – to date – done the impact  
32 analysis,” the Council “cannot ensure compliance with OAR 635-140-0025.”<sup>19</sup> However, as Idaho

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<sup>18</sup> Ruling and Order on Motion for Summary Determination on Contested Case Issue FW-1 at 25-27.

<sup>19</sup> STOP B2H Exceptions to Proposed Contested Case Order at 10

1 Power explained in the Company’s Motion for Summary Determination (“MSD”), although  
2 OAR 635-140-0025 requires mitigation for any direct and indirect impacts to sage-grouse habitat,  
3 the ODFW Oregon Sage-Grouse Action Plan (“Action Plan”) requires that all impacts be  
4 quantified using the HQT, and, because Fish and Wildlife Condition 17 requires Idaho Power to  
5 provide whatever mitigation is required per the HQT, the Project will comply with the  
6 OAR 635-140-0025.

7 The Council’s Fish and Wildlife Habitat Standard requires an applicant to demonstrate  
8 “that the design, construction and operation of the facility, taking into account mitigation, are  
9 consistent with . . . the sage-grouse specific habitat mitigation requirements of the Greater Sage-  
10 Grouse Conservation Strategy for Oregon [(“Conservation Strategy”)] at OAR 635-415-0025(7)  
11 and OAR 635-140-0000 through -0025 in effect as of February 24, 2017.”<sup>20</sup> To demonstrate  
12 compliance with the Conservation Strategy and OAR 635-140-0000 through -0025, Idaho Power  
13 detailed its analysis of potential impacts to sage grouse habitat in Exhibit P2 of the ASC.<sup>21</sup>

14 The Conservation Strategy categorizes sage-grouse habitat as core, low-density, and  
15 general habitat based on the density of sage-grouse leks and whether the sage-grouse use the  
16 habitat seasonally or year-round.<sup>22</sup> The ODFW lists among its goals “[a]void[ing] development  
17 actions in sage-grouse core, low density, and general habitats which adversely impact sage-grouse  
18 habitat or sage-grouse use of those habitats” and “[l]imit[ing] the extent, location, and negative  
19 impacts of development actions over time within sage-grouse core, low density, and general  
20 habitats.”<sup>23</sup> To achieve these goals, the Conservation Strategy includes a mitigation hierarchy that

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<sup>20</sup> OAR 345-022-0060(2).

<sup>21</sup> ASC, Exhibit P2 (ODOE - B2HAPPDoc3-32 ASC 16B\_ Exhibit P2\_ GRSG\_ASC 2018-09-28. Page 1 of 116).

<sup>22</sup> OAR 635-140-0002(2),(7), and (8).

<sup>23</sup> OAR 635-140-0010(1(c),(d).

1 requires developers to minimize impacts to sage-grouse habitat before addressing impacts through  
2 compensatory mitigation.<sup>24</sup> For any direct or indirect impacts that may still occur after  
3 minimization efforts have been exhausted, ODFW requires compensatory mitigation sufficient to  
4 “provide[] a net conservation benefit to sage-grouse and their habitat by providing an increase in  
5 the functionality of their habitat to support sage-grouse[.]”<sup>25</sup>

6 The Action Plan<sup>26</sup> was also developed as part of the effort to avoid the listing of sage-  
7 grouse under the federal Endangered Species Act through the work of the SageCon Partnership,  
8 involving collaboration among landowners, non-governmental organizations, local governments,  
9 and state and federal agencies. In September 2015, Governor Brown issued  
10 Executive Order No. 15-18 which adopted the Action Plan as the framework for the conservation  
11 of sage-grouse in Oregon.<sup>27</sup> Executive Order No. 15-18 directed all state agencies to “carry out  
12 the actions described in the Oregon Sage-Grouse Action Plan to the full extent of their authorities  
13 and funding.”<sup>28</sup>

14 One component of the Action Plan is Oregon’s Sage-Grouse Habitat Mitigation Program  
15 (“Mitigation Program”), which ODFW promulgated to, among other things, ensure that  
16 compensatory mitigation for impacts to sage-grouse habitat is “[p]redictable, transparent,

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<sup>24</sup> OAR 635-140-0025 (“Mitigation is comprised, in hierarchal order, of avoidance, minimization, and compensatory mitigation.”). Although the first priority is to avoid potential impacts, Idaho Power is not required to demonstrate compliance with the specific avoidance tests because the Company submitted the application for site certificate (“ASC”) for the Project before the effective date of those rules. See OAR 635-415-0025(7) (“For proposed developments subject to this rule with impacts to greater sage-grouse habitat in Oregon, mitigation shall be addressed as described in OAR 635-140-0000 through 635-140-0025, except that any energy facility that has submitted a preliminary application for site certificate pursuant to ORS 469.300 *et seq.* on or before the effective date of this rule is exempt from fulfilling the avoidance test contained in 635-140-0025, Policy 2, subsections (a), (b), (c) and (d)(A).”).

<sup>25</sup> OAR 635-140-0010(1)(e).

<sup>26</sup> Idaho Power / Sage-Grouse Conservation Partnership, The Oregon Sage-Grouse Action Plan / Issue FW-1 / Exhibit B (2015) (hereinafter, the “Action Plan”).

<sup>27</sup> E.O. 15-18 at 3.

<sup>28</sup> *Id.*

1 equitable, and science-based.”<sup>29</sup> To that end, the Mitigation Program includes a standardized  
2 habitat quantification tool, the HQT,<sup>30</sup> which ODFW incorporated into the Mitigation Program  
3 because standardized quantification of habitat impacts is a “key element” of the program.<sup>31</sup> The  
4 Action Plan provides that once a project is sited, the developer *must* use the HQT to quantify pre-  
5 and post-project habitat conditions for the project site and area of impact, taking into account  
6 existing and proposed development impacts, vegetation conditions and other relevant factors.<sup>32</sup>  
7 Importantly, to ensure that compensatory mitigation is standardized across all development  
8 projects, a developer must rely on the HQT to calculate impacts to sage-grouse habitat.<sup>33</sup> To  
9 calculate impacts to sage-grouse habitat, the developer must provide all necessary information to  
10 ODFW and ODFW then uses the HQT to calculate the compensatory mitigation needs of the  
11 proposed development.<sup>34</sup>

12 In sum, the Fish and Wildlife Habitat Standard requires compliance with the Conservation  
13 Strategy, which in turn requires impacts to sage grouse habitat to be calculated using the HQT. As  
14 a result of this comprehensive approach to assessing and mitigating impacts to sage grouse habitat,  
15 the Council must require an applicant to mitigate impacts commensurate with the HQT  
16 calculations. In other words, to comply with the Fish and Wildlife Habitat Standard, EFSC can  
17 require no more or less mitigation for impacts to sage grouse habitat than the acreage determined

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<sup>29</sup> Idaho Power / ODFW State of Oregon Greater Sage-Grouse Habitat Mitigation Program Operations and Administration Manual / Issue FW-1 / Exhibit C p. 7 of 54 (Oct. 2019) (hereinafter “Mitigation Program Manual”).

<sup>30</sup> Mitigation Program Manual at 12.

<sup>31</sup> Mitigation Program Manual at 15 (“A standardized quantification of habitat function affected by development impacts and credit actions is a key element of the broader mitigation Program.”).

<sup>32</sup> Action Plan at 101 and 170-71; Mitigation Manual at 37.

<sup>33</sup> Mitigation Program Manual at 40 (“A mitigation plan must include . . . [a]n assessment of direct and indirect project impacts, *as calculated by the HQT*.”) (emphasis added).

<sup>34</sup> Mitigation Program Manual at 37 (“The permittee will be required to provide the necessary project information to the program administrator. The program administrator will run the HQT in order to quantify the compensatory mitigation (debit) needs of the project.”).

1 by the HQT. ODOE acknowledged this in the Proposed Order, stating: “Under ODFW’s Greater  
2 Sage-Grouse Conservation Strategy, the applicant *must* account for direct and indirect impacts  
3 using the Sage-Grouse HQT.”<sup>35</sup> To ensure compliance with that requirement, Recommended Fish  
4 and Wildlife Condition 17 requires:

5 (a): The certificate holder shall provide to the Department the information  
6 necessary for the State of Oregon to calculate the amount of sage-grouse habitat  
7 compensatory mitigation required for the facility using Oregon’s Sage-Grouse  
8 Habitat Quantification Tool (HQT).

9 \* \* \* \* \*

10 (c): Oregon’s Sage-Grouse Habitat Quantification Tool shall be used to calculate  
11 the amount of sage-grouse habitat compensatory mitigation required for the facility  
12 and the number of credit-acres that each mitigation site will provide for the  
13 certificate holder.<sup>36</sup>

14 Because Recommended Fish and Wildlife Condition 17 requires Idaho Power to calculate  
15 the impacts to sage grouse habitat using the HQT and provide mitigation commensurate with the  
16 HQT’s results, this site certificate condition requires Idaho Power to comply with the mitigation  
17 requirements of the Conservation Strategy and, therefore, ensures compliance with the Council’s  
18 Fish and Wildlife Habitat Standard.

19 In its exception, STOP B2H argues that Idaho Power cannot demonstrate compliance  
20 because the Company has not yet calculated the extent of impacts to sage grouse habitat.<sup>37</sup>  
21 However, STOP B2H’s argument is misplaced because the Fish and Wildlife Habitat Standard, as  
22 a matter of law, specifically limits the scope of the Council’s review of sage-grouse impacts to  
23 evaluating whether the Project is consistent with the Conservation Strategy, which in turn *requires*

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<sup>35</sup> Proposed Order at 355 (July 2, 2020) (ODOE - B2HAPPDoc2 Proposed Order on ASC and Attachments 2019-07-02. Page 362 of 10016) (emphasis added).

<sup>36</sup> Proposed Order, Attachment 1: Draft Site Certificate at 29-30 (ODOE - B2HAPPDoc2 Proposed Order on ASC and Attachments 2019-07-02. Page 733-34 of 10016).

<sup>37</sup> STOP B2H Exceptions to Proposed Contested Case Order at 10-11.

1 applicants to calculate mitigation requirements using the HQT.<sup>38</sup> Idaho Power addressed this  
2 argument fully in the Company’s reply to STOP B2H’s response to the Company’s MSD,<sup>39</sup> where  
3 the Company explained that Idaho Power deferred quantifying the impacted acreage to the HQT  
4 because the Conservation Strategy requires Idaho Power to do so. Although Idaho Power provided  
5 a thorough analysis of potential impacts to sage grouse habitat, including a preliminary calculation  
6 of the direct impacts,<sup>40</sup> ODFW had not finished developing the HQT at the time the ASC was  
7 filed.<sup>41</sup> Because ODFW had indicated that it would require Idaho Power to calculate impacts to  
8 sage grouse using the HQT but had not yet completed development of the HQT, ODFW could not  
9 complete those calculations prior to Idaho Power filing the ASC. However, as discussed above,  
10 Recommended Fish and Wildlife Condition 17 will require Idaho Power to provide mitigation  
11 commensurate with the HQT’s calculations. Therefore, the fact that Idaho Power defers to the  
12 HQT does not mean that the Company’s analysis is inadequate to demonstrate compliance with  
13 the applicable standards.

14 Moreover, STOP B2H’s assertion that Idaho Power cannot demonstrate compliance with  
15 the mitigation requirements of OAR 635-140-0025 is inconsistent with the evidence in the  
16 record.<sup>42</sup> Exhibit P2 includes a draft Sage-Grouse Mitigation Plan that includes analysis of four

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<sup>38</sup> Idaho Power / ODFW State of Oregon Greater Sage-Grouse Habitat Mitigation Program Operations and Administration Manual / Issue FW-1 / Exhibit C p. 40 of 54 (“A mitigation plan must include . . . [a]n assessment of direct and indirect project impacts, *as calculated by the HQT*[.]”) (emphasis added).

<sup>39</sup> Idaho Power’s Reply to Limited Parties’ Responses to Idaho Power’s MSD of Contested Case Issues FW-1 and FW-12 at 5-7 (July 9, 2021).

<sup>40</sup> ASC, Exhibit P2 at P2-20 through P2-21 (ODOE - B2HAPPDoc3-32 ASC 16B\_Exhibit P2\_GRSg\_ASC 2018-09-28. Page 24-25 of 116). By letter dated May 9, 2017, the State of Oregon, through the Institute for Natural Resources, provided to ODOE and Idaho Power a preliminary calculation of the Project’s direct impacts using the draft Direct Impact Assessment Tool. These calculations will be finalized using the HQT, as required by Fish and Wildlife Condition 17(a).

<sup>41</sup> Proposed Order at 355 (quoting B2HAPPDoc13-21 ASC Reviewing Agency Comment ODFW\_Reif 2019-01-25).

<sup>42</sup> STOP B2H Exceptions to Proposed Contested Case Order at 10.

1 potential mitigation sites that include over 6,500 acres of habitat for mitigation purposes.<sup>43</sup> While  
2 the amount of indirect impacts will not be calculated until ODFW performs the HQT analysis for  
3 the Project, Exhibit P2 includes the State of Oregon’s preliminary calculation of the Project’s direct  
4 impacts using the draft Direct Impact Assessment Tool, which was the only component of the  
5 HQT that ODFW had fully developed at that time. The draft Direct Impact Assessment Tool  
6 estimated that direct impacts from the Project would total approximately 543 acres.<sup>44</sup> Given that  
7 Idaho Power’s potential mitigation sites exceed the amount of direct impacts by more than 10-  
8 fold, the Council clearly has sufficient information to determine that there are mitigation site  
9 opportunities sufficient to meet the needs of the Project, even assuming acres are added to account  
10 for indirect impacts. STOP B2H’s assertion that Idaho Power has not conducted any analysis of  
11 mitigation is incorrect. Additionally, ODFW permits developers to address their mitigation  
12 obligations through an “in-lieu fee” program, a State of Oregon administered program whereby  
13 developers like Idaho Power can make payments in lieu of developing mitigation projects  
14 themselves.<sup>45</sup>

15 For these reasons, STOP B2H’s exception has not identified any error in the Hearing  
16 Officer’s conclusions of law and Idaho Power requests that the Council adopt without modification  
17 the Hearing Officer’s findings of fact and conclusions of law relevant to FW-1.

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<sup>43</sup> ASC, Exhibit P2, Attachment P2-3 (Greater Sage-Grouse Habitat Mitigation Plan), Appendix A (Habitat Mitigation Sites) (ODOE - B2HAPPDoc3-32 ASC 16B\_Exhibit P2\_GRSg\_ASC 2018-09-28. Page 84-116 of 116).

<sup>44</sup> ASC, Exhibit P2 at P2-20 through P2-21 (ODOE - B2HAPPDoc3-32 ASC 16B\_Exhibit P2\_GRSg\_ASC 2018-09-28. Page 24-25 of 116). By letter dated May 9, 2017, the State of Oregon, through the Institute for Natural Resources, provided to ODOE and Idaho Power a preliminary calculation of the Project’s direct impacts using the draft Direct Impact Assessment Tool. These calculations will be finalized using the HQT, as required by Fish and Wildlife Condition 17(a).

<sup>45</sup> OAR 635-140-0025(3)(b).

1           **2. STOP B2H, Issue FW-1, Exception 2**

2           STOP B2H argues that the Hearing Officer erred because she “set forth a number of  
3 allegedly ‘undisputed facts’ and she construed those facts in [Idaho Power’s] favor - not in STOP’s  
4 favor.”<sup>46</sup> STOP B2H argues that, if the Hearing Officer had viewed the facts in the light most  
5 favorable to STOP B2H, she would have concluded that it is “reasonable to assume that there are  
6 likely **to be impacts**, that need to be mitigated” but which have not been disclosed.<sup>47</sup>

7           However, in this case, there was no genuine dispute of material fact because Idaho Power  
8 acknowledged the Company deferred quantification of the acreage of sage grouse habitat impacts  
9 to the HQT. Because that fact was undisputed, the Hearing Officer did not need to view that fact  
10 in a light most favorable to STOP B2H. The only remaining issue was solely a matter of law—  
11 whether Idaho Power’s analysis of impacts to sage grouse habitat was inadequate because the  
12 Company deferred quantification of impacts to the HQT. Because the Fish and Wildlife Habitat  
13 Standard limits the scope of the Council’s review of sage-grouse impacts to evaluating whether  
14 the Project is consistent with the Conservation Strategy, which in turn requires applicants to  
15 calculate mitigation requirements using the HQT, Idaho Power’s deferral to the HQT did not  
16 render the Company’s analysis of impacts inadequate.

17           Moreover, STOP B2H asserts that it is “reasonable to assume that there are likely to be  
18 impacts, that need to be mitigated[,]” but fails to address the fact that the site certificate will require  
19 Idaho Power to mitigate any impacts commensurate with the results of the HQT.<sup>48</sup> As a result,  
20 STOP B2H’s assumption that there will be impacts that must be mitigated has not demonstrated

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<sup>46</sup> STOP B2H Exceptions to Proposed Contested Case Order at 10-11.

<sup>47</sup> STOP B2H Exceptions to Proposed Contested Case Order at 11 (emphasis in original).

<sup>48</sup> Proposed Order at 355 (July 2, 2020) (ODOE - B2HAPPDoc2 Proposed Order on ASC and Attachments 2019-07-02. Page 362 of 10016).



1 any error in the Hearing Officer’s conclusion, because the site certificate already contains  
2 conditions that will require the Company to mitigate all impacts consistent with the requirements  
3 of ODFW’s Conservation Strategy and, therefore ensures compliance with the Council’s Fish and  
4 Wildlife Habitat Standard.

5 For these reasons, STOP B2H’s exception has not identified any error in the Hearing  
6 Officer’s conclusions of law and Idaho Power requests that the Council adopt without modification  
7 the Hearing Officer’s findings of fact and conclusions of law relevant to FW-1.

8 **3. STOP B2H, Issue FW-1, Exception 3**

9 STOP B2H asserts that Idaho Power has not “do[ne] any actual analysis” of impacts to  
10 sage grouse habitat, and that “there was no [Idaho Power] analysis” of potential indirect impacts  
11 to sage grouse.<sup>49</sup> However, STOP B2H’s assertions are plainly inconsistent with the evidence in  
12 the record. Idaho Power deferred to the HQT to calculate the necessary acreage of compensatory  
13 mitigation, as required by the Conservation Strategy, but the Company provided substantial  
14 analysis of impacts to sage grouse in Exhibit P2 of the ASC.<sup>50</sup> In Exhibit P2 to the ASC, Idaho  
15 Power provided an analysis, backed by expert biologists and scientific research, of the type, timing,  
16 duration, quantification metric, and mitigation measures related to potential permanent and  
17 temporary direct impacts and indirect impacts to sage-grouse and its habitat from vegetation  
18 clearing, the transmission line, access roads, and retirement of Project.<sup>51</sup> Exhibit P2 also includes  
19 the State of Oregon’s preliminary calculation of the Project’s direct impacts using the draft Direct

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<sup>49</sup> STOP B2H Exceptions to Proposed Contested Case Order at 11.  
<sup>50</sup> ASC, Exhibit P2; *see also* Ruling and Order on Motion for Summary Determination on Contested Case Issue FW-1 at 7-13 (summarizing Idaho Power’s analysis of impacts to sage grouse).  
<sup>51</sup> ASC, Exhibit P2 at P2-16 through P2-27 (ODOE - B2HAPPDoc3-32 ASC 16B\_ Exhibit P2\_GRSg\_ASC 2018-09-28. Page 20-31 of 116); *see also* Proposed Order at 362-365 (ODOE - B2HAPPDoc2-1 Proposed Order on ASC w Hyperlink Attachments 2019-07-02. Page 369-372 of 10016) (discussing indirect impacts to sage-grouse).

1 Impact Assessment Tool Impacts, which total approximately 543 acres.<sup>52</sup> Idaho Power also  
2 included with Exhibit P2 a draft Sage-Grouse Mitigation Plan that includes analysis of four  
3 potential mitigation sites totaling over 6,500 acres of habitat for mitigation purposes.<sup>53</sup>  
4 Accordingly, STOP B2H’s unsupported claim that Idaho Power has not completed *any* analysis is  
5 clearly erroneous and fails to identify any error in the Hearing Officer’s ruling.

6 However, it is important to note that, although STOP B2H disputes whether Idaho Power  
7 analyzed impacts to sage grouse habitat, STOP B2H’s conclusory assertions do not create a  
8 “genuine issue” of fact, because a non-moving party may not rest upon mere allegations or  
9 conclusory restatements of ultimate facts to survive a motion for summary determination.<sup>54</sup>  
10 Because the only evidence in the record demonstrated that Idaho Power had analyzed impacts to  
11 sage grouse, STOP B2H’s conclusory assertions to the contrary were not sufficient to create  
12 genuine issue of material fact relevant to resolution of FW-1, and the Hearing Officer properly  
13 granted Idaho Power’s MSD.

14 For these reasons, STOP B2H’s exception has not identified any error in the Hearing  
15 Officer’s findings of fact and Idaho Power requests that the Council adopt without modification  
16 the Hearing Officer’s findings of fact and conclusions of law relevant to FW-1.

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<sup>52</sup> ASC, Exhibit P2 at P2-20 through P2-21 (ODOE - B2HAPDoc3-32 ASC 16B\_Exhibit P2\_GRSG\_ASC 2018-09-28. Page 24-25 of 116).

<sup>53</sup> ASC, Exhibit P2, Attachment P2-3 (Greater Sage-Grouse Habitat Mitigation Plan), Appendix A (Habitat Mitigation Sites) (ODOE - B2HAPDoc3-32 ASC 16B\_Exhibit P2\_GRSG\_ASC 2018-09-28. Page 84-116 of 116).

<sup>54</sup> OAR 137-003-0580(10); *see also, e.g., Greer v. Ace Hardware Corp.*, 256 Or App 132, 141 (2013) (finding that plaintiff’s initial declarations did not create a genuine issue of fact because they did not identify any specific asbestos-containing products that plaintiff alleged were obtained from the defendants; thus, plaintiff’s declarations “amount to little more than paraphrasing of the ultimate facts that decedent had alleged in his first amended complaint. Such conclusory restatements of ultimate facts are not ‘specific facts showing that there is a genuine issue for trial’”).

1           **4.       STOP B2H, Issue FW-1, Exception 4**

2           STOP B2H argues that the Hearing Officer erred in relying on the future HQT calculations  
3 because FW-1 is framed in the past tense<sup>55</sup> —i.e., FW-1 asks whether Idaho Power “‘adequately  
4 analyzed’ sage grouse issues.” However, even though FW-3 is phrased in the past tense, FW-3  
5 asks whether Idaho Power’s analysis was adequate for purposes of demonstrating compliance with  
6 the Fish and Wildlife Habitat Standard. Idaho Power provided sufficient information in the ASC  
7 to support a determination that the Project will comply with that standard. As discussed above in  
8 response to STOP B2H, Issue FW-1, Exception 1, the Conservation Strategy requires Idaho Power  
9 to defer to ODFW’s calculations of impacts to sage grouse habitat, which must be calculated using  
10 the HQT. However, at the time that Idaho Power filed its ASC, ODFW had not completed the  
11 HQT. For that reason, as explained above in response to STOP B2H, Issue FW-1, Exception 3,  
12 Idaho Power analyzed impacts to sage grouse habitat in Exhibit P2 of the ASC but deferred the  
13 final calculation of the required mitigation until after ODFW completed the HQT. In other words,  
14 notwithstanding the fact that Idaho Power deferred calculation of the final acreage calculations to  
15 the HQT, Idaho Power’s analysis was adequate to assess potential impacts, and the site certificate  
16 conditions requiring Idaho Power to comply with the HQT calculations is adequate for the purpose  
17 of demonstrating compliance with the Fish and Wildlife Habitat Standard.

18           For these reasons, STOP B2H’s exception has not identified any error in the Hearing  
19 Officer’s conclusions of law and Idaho Power requests that the Council adopt without modification  
20 the Hearing Officer’s findings of fact and conclusions of law relevant to FW-1.

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<sup>55</sup> STOP B2H Exceptions to Proposed Contested Case Order at 11.

1 **B. Irene Gilbert Exceptions, Issue FW-3**

2 The Hearing Officer granted limited party status to Irene Gilbert and Susan Geer to raise  
3 FW-3, which asks:

4 *Whether the Draft Noxious Weed Plan (Proposed Order Attachment P1-5)*  
5 *adequately ensures compliance with the weed control laws, ORS 569.390, ORS*  
6 *569.400, and ORS 569.445.<sup>56</sup>*

7 In the Proposed Contested Case Order, the Hearing Officer concluded:

8 The draft Noxious Weed Plan complies with the Council’s standards. Idaho Power  
9 is not required to demonstrate compliance with the Weed Control Laws to satisfy  
10 the Fish and Wildlife Habitat Standard. The Council is not the agency responsible  
11 for enforcing compliance with the Weed Control Laws.<sup>57</sup>

12 Ms. Gilbert and Ms. Geer both filed exceptions relating to FW-3. However, Ms. Geer’s exceptions  
13 appear to relate to both FW-3 and FW-6, and for that reason Idaho Power addresses Ms. Geer’s  
14 exceptions separately below. For the reasons discussed below, Ms. Gilbert’s exceptions do not  
15 identify any incorrect finding of fact or conclusion of law, and Idaho Power requests that the  
16 Council adopt without modification the Hearing Officer’s findings of fact and conclusions of law  
17 relevant to FW-3.

18 Ms. Gilbert did not consistently label the exceptions that she raised. Idaho Power addresses  
19 each argument that Ms. Gilbert raised as a separate exception. Additionally, in cases where  
20 Ms. Gilbert labeled her exception, Idaho Power includes her labeling in parentheses.

21 **1. Irene Gilbert, Issue FW-3, Exception 1**

22 Ms. Gilbert did not provide numbering or otherwise label her exceptions. However, to  
23 ensure that Idaho Power addresses each of Ms. Gilbert’s concerns, Idaho Power responds to each

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<sup>56</sup> Second Order on Case Management at 4.

<sup>57</sup> Proposed Contested Case Order at 138.

1 of Ms. Gilbert’s arguments as a separate exception and has numbered the arguments in the order  
2 that Ms. Gilbert provides them.

3 Ms. Gilbert first argues that the Hearing Officer’s statement of FW-3 did not accurately  
4 portray the issue Ms. Gilbert intended to raise in her Petition for Party Status and instead adopted  
5 ODOE’s description of Ms. Gilbert’s issue.<sup>58</sup> Ms. Gilbert instead asserts that the Hearing Officer  
6 incorporated ODOE’s summary of Ms. Gilbert’s issue and relied on that summary to narrow the  
7 issue that Ms. Gilbert had raised.<sup>59</sup> Ms. Gilbert argues that this description of FW-3 prevented her  
8 from raising concerns regarding potential impacts to agriculture, threatened and endangered  
9 species, wildlife habitat, and rural economies that could result if the Company does not control  
10 noxious weeds.<sup>60</sup>

11 As an initial matter, Ms. Gilbert’s arguments are not tied to any specific exceptions to the  
12 Proposed Contested Case Order as required by OAR 345-015-0085(5), and her claims should  
13 therefore be rejected.<sup>61</sup> Nevertheless, should the Council wish to consider Ms. Gilbert’s  
14 arguments, Idaho Power addresses each of her claims below.

15 Second, Ms. Gilbert’s description of the process by which the Hearing Officer identified  
16 these contested case issues is inconsistent with the record and her request to revise the statement  
17 of FW-3 is untimely. Ms. Gilbert’s assertion that the Hearing Officer relied solely on ODOE’s  
18 summary of FW-3 is incorrect and inconsistent with the record. Ms. Gilbert is correct that, in  
19 response to the limited parties’ petitions for party status, ODOE initially provided a summary of

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<sup>58</sup> Irene Gilbert Exception for FW-3 at 2-3.

<sup>59</sup> Irene Gilbert Exception for FW-3 at 3.

<sup>60</sup> Irene Gilbert Exception for FW-3 at 3.

<sup>61</sup> OAR 345-015-0085(5) (“In an exception, the party shall specifically identify the finding of fact, conclusion of law or, in contested case proceedings on an application for a site certificate or a proposed site certificate amendment, recommended site certificate condition to which the party excepts and shall state the basis for the exception.”).

1 the issues that the petitioners had raised.<sup>62</sup> In that document, ODOE identified Ms. Gilbert's  
2 noxious weed issue as:

3 Draft Noxious Weed Plan (Proposed Order Attachment P1-5) does not include  
4 conditions requiring that applicant assure noxious weeds would not go to seed and  
5 therefore fails to comply with ORS 569.390, -400, and -445. Revisions in Proposed  
6 Order to plan, establishing the draft to final review process, omits the public from  
7 participation and does not include review by Weed Supervisors or previously  
8 identified issues.<sup>63</sup>

9 At the prehearing conference, the Hearing Officer indicated that she would like to use ODOE's  
10 issue summaries as a starting point for identifying the issues, but asked that any limited party with  
11 concerns regarding ODOE's issue summaries provide comment explaining those concerns.  
12 Ms. Gilbert filed a written comment, asking ODOE to separate Ms. Gilbert's concerns regarding  
13 compliance with ORS 569.390, ORS 569.400, and ORS 569.445 from the separate issue regarding  
14 public participation in the agency review process.<sup>64</sup> However, Ms. Gilbert did not challenge  
15 ODOE's description of her issue regarding compliance with ORS 569.390, ORS 569.400, and  
16 ORS 569.445. ODOE incorporated Ms. Gilbert's request into its Second Amended Response to  
17 Petitions for Party and Limited Party Status,<sup>65</sup> and the Hearing Officer subsequently incorporated  
18 the issue into the Second Order on Case Management.<sup>66</sup> The Hearing Officer determined,  
19 however, that Ms. Gilbert had not raised her second concern regarding the agency review process  
20 in her Draft Proposed Order ("DPO Comments"), and for that reason Ms. Gilbert was not granted

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<sup>62</sup> ODOE Response to Petitions for Party and Limited Party Status (Sept. 22, 2020).

<sup>63</sup> ODOE Response to Petitions for Party and Limited Party Status at 54. ODOE's description of the issue also raised a concern regarding the agency review process, but that was not incorporated into FW-3.

<sup>64</sup> Irene Gilbert Objection to ODOE Recommendations Regarding Contested Case Issues for the B2H Proposed Transmission Line at 2 (Oct. 2, 2020).

<sup>65</sup> ODOE's Second Amended Response to Petitions for Party/Limited Party Status at 64 (Oct. 6, 2020).

<sup>66</sup> See Second Order on Case Management at 4.

1 limited party status to raise that issue in this contested case.<sup>67</sup> Therefore, the record clearly shows  
2 that Ms. Gilbert reviewed the issue statement for FW-3 and approved of it; her assertions to the  
3 contrary should be disregarded.

4 Moreover, Ms. Gilbert’s challenge to the issue statement is untimely—and in fact is late  
5 by over a year and eight months. The Hearing Officer issued her order identifying the limited  
6 parties’ contested case issues on October 29, 2020.<sup>68</sup> Pursuant to OAR 345-015-0016(6), any party  
7 or limited party had seven days to appeal the Hearing Officer’s determinations.<sup>69</sup> Any  
8 determination in the Hearing Officer’s order became final if the limited party failed to appeal  
9 within that time.<sup>70</sup> Ms. Gilbert filed an appeal with the Council challenging several aspects of the  
10 Hearing Officer’s order, but she did not appeal the statement of FW-3.<sup>71</sup> After the issues were  
11 identified in the Hearing Officer’s Order on Party Status, Authorized Representatives and Issues  
12 for Contested Case, the parties and limited parties engaged in over 20 months of litigation—  
13 including discovery, motions for summary determination, multiple rounds of testimony,  
14 cross-examination hearing, and briefing—addressing the issue statements identified in this ruling.  
15 Ms. Gilbert would have the Council ignore the significant amount of effort that has been put into

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<sup>67</sup> Amended Order on Party Status, Authorized Representatives and Issues for Contested Case at 51-52. Ms. Gilbert did not appeal the Hearing Officer’s conclusion on this issue. *See* EFSC Order on Appeals at 9-10 (Nov. 25, 2020).

<sup>68</sup> Order on Petitions for Party Status, Authorized Representatives and Issues for Contested Case at 46 (Oct. 29, 2020) (finding that Ms. Gilbert had properly raised an issue asking “Whether the Draft Noxious Weed Plan (Proposed Order Attachment P1-5) adequately ensures compliance with the weed control laws, ORS 569.390 (owner or occupant to eradicate weeds) ORS 569.400 (enforcement), and ORS 569.445 (duty to clean machinery).”).

<sup>69</sup> *See* Order on Petitions for Party Status, Authorized Representatives and Issues for Contested Case at 85 (explaining parties’ appeal rights).

<sup>70</sup> OAR 345-015-0016(6) (“The hearing officer's determination on a request to participate as a party or limited party is final unless the requesting person submits an appeal to the Council within seven days after the date of service of the hearing officer’s determination.”).

<sup>71</sup> Irene Gilbert Appeal of Denial of Full Party Status (Nov. 5, 2020).

1 addressing these issues to date, and instead seek to re-start the proceeding from scratch—even  
2 though she had the opportunity to appeal the statement of her issue, but did not do so.

3           Additionally, the Council has already addressed a related argument and determined that the  
4 Hearing Officer’s issue statements are final at this point and cannot be revised. Specifically, earlier  
5 in this contested case, limited party Michael McAllister filed an interlocutory appeal of the Hearing  
6 Officer’s ruling that had initially granted summary determination of R-2, arguing that the issue he  
7 had raised in his comments on the DPO Comments was broader than the issue stated in the Hearing  
8 Officer’s Order on Case Management.<sup>72</sup> In its order on Mr. McAllister’s appeal, the Council  
9 rejected Mr. McAllister’s argument because the “issue statement has been ruled upon by the ALJ  
10 and is therefore final.”<sup>73</sup> Similarly, the issue statement for FW-3 is final and the Council should  
11 reject Ms. Gilbert’s attempts to redefine the issue.

12           Finally, even if Ms. Gilbert’s arguments were supported by the record and her challenge  
13 were timely, Ms. Gilbert’s attempted reframing of FW-3 would not affect the validity of the  
14 Hearing Officer’s findings. Ms. Gilbert asserts that her issue should have included discussion of  
15 mitigation for potential impacts to agriculture, habitat, and the economies of the counties through  
16 which the Project is sited.<sup>74</sup> However, Ms. Gilbert raised a related issue, LU-11, which asked:

17           Whether the impacts from the proposed facility on accepted farm practices and the  
18 cost of accepted farm practices have been adequately evaluated or mitigated.<sup>75</sup>

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<sup>72</sup> Michael McAllister’s Interlocutory Appeal of the Ruling and Order on Motions for Summary Determination of Contested Case Issues FW-13, R-2, and SP-2 at 3 (Aug. 10, 2021).

<sup>73</sup> EFSC Order on Interlocutory Appeal of Administrative Law Judge’s Ruling on MSD for Limited Party McAllister’s Issues FW-13, SP-2, and R-2 at 12-13 (Sept. 17, 2021).

<sup>74</sup> Irene Gilbert Exception for FW-3 at 3.

<sup>75</sup> Second Order on Case Management at 5.



1 Ms. Gilbert raised her concern regarding impacts to farmlands resulting from noxious  
2 weeds in her testimony and briefing on that issue.<sup>76</sup> In response to Ms. Gilbert’s testimony filed  
3 for both FW-3 and LU-11, Idaho Power provided substantial evidence supporting the conclusion  
4 that the Company will prevent impacts to surrounding landowners by controlling noxious weed  
5 infestations.<sup>77</sup> Moreover, in the event that any noxious weed impacts do occur, the Company may  
6 address those impacts through mitigation.<sup>78</sup> Therefore, the concern that Ms. Gilbert claims she  
7 would have raised had the issue statement been framed differently has in fact been adequately  
8 addressed in this contested case.

9 For these reasons, Ms. Gilbert’s exception has not identified any error in the Hearing  
10 Officer’s findings of fact or conclusions of law and Idaho Power requests that the Council adopt  
11 without modification the Hearing Officer’s findings of fact and conclusions of law relevant to  
12 FW-3.

13 **2. Irene Gilbert, Issue FW-3, Exception 2**

14 Ms. Gilbert asserts that the Proposed Contested Case Order does not include information  
15 required by ORS 183.370(2), and appears to be asserting that the Proposed Contested Case Order  
16 does not include adequate findings of fact. Ms. Gilbert asserts that the Proposed Contested Case  
17 Order “lists undocumented statements of [Idaho Power] as facts where there is no evidence other

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<sup>76</sup> See, e.g., Irene Gilbert Direct Testimony on LU-11 at 6 (Sept. 17, 2021).

<sup>77</sup> See, e.g., Idaho Power / Rebuttal Testimony of Jessica Taylor / Issues FW-3, FW-6, and LU-11, p. 17 of 106 (“The actions that Idaho Power proposes in its plans are designed to prevent new infestations of noxious weeds and prevent the spread of existing infestations resulting from Idaho Power’s surface-disturbing activities. Importantly, should new infestations occur, the plans include sufficient actions to contain and treat those infestations.”); Idaho Power / Rebuttal Testimony of Kurtis Funke / Issues LU-9 and LU-11, p. 20 of 69 (“As described in the Agricultural Lands Assessment and Mitigation Plan, on permanent right-of-way areas where Idaho Power has control of the surface use of the land, such as towers, access roads, or substations, Idaho Power will provide for weed control in a manner that does not allow the spread of weeds to adjacent lands used for agriculture.”).

<sup>78</sup> Idaho Power / Rebuttal Testimony of Jessica Taylor / Issues FW-3, FW-6 and LU-11 / Exhibit B, Updated Draft Noxious Weed Plan, p. 35 of 53.

1 than [Idaho Power’s] statement.”<sup>79</sup> Ms. Gilbert also argues that the “Proposed Contested Case  
2 Order failed to include documentation [she] provided which conflicts with” Idaho Power’s  
3 statements.<sup>80</sup> As an initial matter, Ms. Gilbert’s arguments are not tied to any specific exceptions  
4 to the Proposed Contested Case Order as required by OAR 345-015-0085(5), and her claims should  
5 therefore be rejected.<sup>81</sup> Nevertheless, should the Council wish to consider Ms. Gilbert’s  
6 arguments, Idaho Power addresses her assertion below.

7 First, Ms. Gilbert’s statement is false. Idaho Power provided expert witness testimony  
8 from Jessica Taylor—who has over 22 years of experience as a conservation planner and has  
9 supervised weed management for multiple energy facilities in Oregon—as well as numerous  
10 exhibits and a proposed update to the draft Noxious Weed Plan that supports the positions the  
11 Company has taken in this contested case, and Ms. Gilbert has not identified any specific  
12 unsupported factual finding in the Proposed Contested Case Order.

13 Furthermore, although Ms. Gilbert filed testimony challenging Idaho Power’s testimony  
14 and evidence, where there are multiple opinions filed as evidence, the Hearing Officer is not  
15 required to explain why all other opinions than the ones she relied on are less persuasive.<sup>82</sup>  
16 Therefore, the fact that Hearing Officer did not reference all Ms. Gilbert’s evidence does not affect  
17 the validity of the Hearing Officer’s findings, because the findings are supported by evidence that  
18 Idaho Power filed.

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<sup>79</sup> Irene Gilbert Exceptions for FW-3 at 4.  
<sup>80</sup> Irene Gilbert Exceptions for FW-3 at 4.  
<sup>81</sup> OAR 345-015-0085(5) (“In an exception, the party shall specifically identify the finding of fact, conclusion of law or, in contested case proceedings on an application for a site certificate or a proposed site certificate amendment, recommended site certificate condition to which the party excepts and shall state the basis for the exception.”).  
<sup>82</sup> See, e.g., *Noble v. Or. Water Res. Dep’t*, 264 Or App 110, 123 (2014) (“[I]n a case in which expert opinions have been offered on both sides of an issue, it is usually clear that a factfinder has found one or the other more persuasive, and substantial evidence and reason will exist to support the finding, without further explanation.”) (quoting *Castro v. Board of Parole*, 232 Or App 75, 84 (2009) (citing *Armstrong v. Asten-Hill Co.*, 90 Or App 200, 206 (1988))).

1 For these reasons, Ms. Gilbert’s exception does not identify any error in the Hearing  
2 Officer’s findings of fact or conclusions of law and Idaho Power requests that the Council adopt  
3 without modification the Hearing Officer’s findings of fact and conclusions of law relevant to  
4 FW-3.

5 **3. Irene Gilbert, Issue FW-3, Exception 3 (Gilbert’s “Fact Number One”, Part**  
6 **One)**

7 Ms. Gilbert takes exception to the following conclusion of law regarding the scope of  
8 arguments relevant to FW-3:

9 In their arguments, Ms. Geer and Ms. Gilbert also raise contentions that fall outside  
10 the scope of Issue FW-3. Specifically, both limited parties challenge the procedure  
11 for finalizing the Noxious Weed Plan and assert that the public is entitled another  
12 opportunity to review and comment before the Plan is finalized. Gilbert Opening  
13 Arguments Issue FW-3 at 6; Geer Surrebuttal Test. Although this contention falls  
14 outside the scope of Issue FW-3, the same challenge to the finalization of draft  
15 plans is addressed infra in connection with Issue M-6.

16 Ms. Gilbert takes exception to this conclusion of law because she asserts that, based on her  
17 DPO Comments, concerns regarding the agency review process for the final Noxious Weed Plan  
18 are, in fact, within the scope of FW-3.<sup>83</sup> As discussed above, Ms. Gilbert’s attempt to revise FW-3  
19 is untimely and should be rejected. Moreover, the Hearing Officer concluded that Ms. Gilbert did  
20 not raise in her DPO Comments an issue regarding the agency review process, so Ms. Gilbert  
21 cannot raise this issue.

22 That being said, Ms. Gilbert raised these concerns in her testimony and briefing, and Idaho  
23 Power fully briefed this issue in its Closing Arguments.<sup>84</sup> As Idaho Power explained, no applicable  
24 statute or rule requires that a plan be subject to public review and comment prior to finalization

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<sup>83</sup> Irene Gilbert Exceptions for FW-3 at 4-5.

<sup>84</sup> Idaho Power’s Closing Arguments for Contested Case Issues FW-3, FW-5, FW-6, and FW-7 at 32-33.

1 after the site certificate has been issued. Instead, a final plan must be approved by ODOE with  
2 consultation from other relevant agencies. Under ORS 469.402, EFSC may—through site  
3 certificate conditions—delegate review and approval of future actions to ODOE.<sup>85</sup> EFSC has also  
4 promulgated a rule specific to delegating approval of monitoring plans; OAR 345-025-0016  
5 provides that the Council must include conditions in the site certificate that prescribe how the  
6 applicant will develop the proposed plan in consultation with ODOE and other agencies with  
7 expertise in the area that the plan addresses.<sup>86</sup>

8 The Draft Noxious Weed Plan includes a detailed agency review process that ODOE  
9 developed to comply with OAR 345-025-0016.<sup>87</sup> The agency review process requires Idaho Power  
10 and ODOE to consult with all appropriate federal, state, and local agencies before finalizing the  
11 Noxious Weed Plan.<sup>88</sup> Recommended Fish and Wildlife Condition 3(a) expressly requires Idaho  
12 Power to follow the agency review process when finalizing the Noxious Weed Plan.<sup>89</sup> Therefore,  
13 Recommended Fish and Wildlife Condition 3(a), in tandem with the agency review process,  
14 satisfies all the requirements of OAR 345-025-0016.

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<sup>85</sup> ORS 469.402 (“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 if, in the council’s discretion, the delegation is warranted under the circumstances of the case.”).

<sup>86</sup> See OAR 345-025-0016 (process for developing the plans includes consulting with appropriate agencies, local governments, and tribes to ensure compliance with applicable standards; the process does not include a public review and comment period).

<sup>87</sup> Idaho Power / Rebuttal Testimony of Jessica Taylor / Issues FW-3, FW-6 and LU-11 / Exhibit B, Updated Draft Noxious Weed Plan, pp. 4-5 of 53.

<sup>88</sup> Idaho Power / Rebuttal Testimony of Jessica Taylor / Issues FW-3, FW-6 and LU-11 / Exhibit B, Updated Draft Noxious Weed Plan, pp. 4-5 of 53.

<sup>89</sup> Proposed Order, Attachment 1: Recommended Site Certificate Conditions at 24 (ODOE - B2HAPPDoc2 Proposed Order on ASC and Attachments 2019-07-02. Page 728 of 10016).

1           Additionally, as the Hearing Officer stated in the Proposed Contested Case Order, the  
2 Hearing Officer addressed limited parties’ challenges to the agency review process in her  
3 discussion of M-6.<sup>90</sup>

4           For these reasons, Ms. Gilbert’s exception does not identify any error in the Hearing  
5 Officer’s factual findings or conclusions of law and Idaho Power requests that the Council adopt  
6 without modification the Hearing Officer’s findings of fact and conclusions of law relevant to  
7 FW-3.

8           **4. Irene Gilbert, Issue FW-3, Exception 4 (Gilbert’s “Fact Number One, Part**  
9           **Two)**

10           Ms. Gilbert takes exception to the following statement of fact summarizing ODOE’s  
11 analysis in the Proposed Order:

12           27. In the Proposed Order, the Department described the components of the  
13 Noxious Weed Plan and found, in pertinent part, as follows:

14                           \* \* \* \* \*

15                           At this time, other than presence of noxious weeds within the  
16 analysis area, no evidence has been provided on the record that  
17 questions the validity of the Noxious Weed Plan or the applicant’s  
18 ability to implement and adhere to the requirements of the plan.<sup>91</sup>

19           Ms. Gilbert asserts that the contested case “file contains multiple exhibits, testimony and  
20 depositions documenting that the Draft Plan fails to meet state law requirements and does not  
21 contain language that will protect surrounding resources from noxious weeds spreading from the  
22 site of the development.”<sup>92</sup> However, Ms. Gilbert takes this statement entirely out of context. The  
23 Hearing Officer’s findings merely recite verbatim language from the Proposed Order. Ms. Gilbert

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<sup>90</sup> Proposed Contested Case Order at 271-73.  
<sup>91</sup> Proposed Contested Case Order at 45-46 (quoting Proposed Order at 324-25).  
<sup>92</sup> Irene Gilbert Exceptions for FW-3 at 5.

1 does not appear to question whether the Hearing Officer accurately quoted the excerpts.  
2 Additionally, because the language Ms. Gilbert challenges was actually in the Proposed Order—  
3 which was issued on July 2, 2020—that discussion preceded the development of the record in this  
4 contested case. In other words, all evidence that Ms. Gilbert filed in this contested case was filed  
5 *after* ODOE made the challenged statement in the Proposed Order.

6 Ms. Gilbert’s exception has not identified any error in the Hearing Officer’s findings of  
7 fact and Idaho Power requests that the Council adopt without modification the Hearing Officer’s  
8 findings of fact and conclusions of law relevant to FW-3.

9 **5. Irene Gilbert, Issue FW-3, Exception 5 (Gilbert’s “Fact Number Two”, “Fact**  
10 **Number Three”, and “Fact Number Four”)**

11 Ms. Gilbert next argues that “all findings of fact relating to items in the Draft Plan are null  
12 and void due to the fact that items in the draft plan can now be changed or removed during the  
13 finalization process included in the new procedure.”<sup>93</sup> Ms. Gilbert similarly argues that any  
14 finding of fact regarding the final Noxious Weed Plan are not actually findings.<sup>94</sup> Finally,  
15 Ms. Gilbert asserts that references to the Proposed Order are not “findings” and “cannot be  
16 interpreted as evidence supporting a decision in the contested case.”<sup>95</sup> For that reason, Ms. Gilbert  
17 argues that the findings of fact on pages 45-47 of the Proposed Contested Case Order do not  
18 support a finding that the final Noxious Weed Plan will be adequate.

19 Ms. Gilbert’s exception should be rejected for two reasons. *First*, Idaho Power has already  
20 provided a robust draft Noxious Weed Plan to demonstrate how the Company will address Project-  
21 related noxious weeds. Importantly, during this contested case, Idaho Power updated the draft

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<sup>93</sup> Irene Gilbert Exceptions for FW-3 at 5.  
<sup>94</sup> Irene Gilbert Exceptions for FW-3 at 5.  
<sup>95</sup> Irene Gilbert Exceptions for FW-3 at 5-6.

1 Noxious Weed Plan to address several of the concerns that the limited parties raised.<sup>96</sup> At a high  
2 level, the changes that Idaho Power proposed included the following:

- 3 • Clarifying Idaho Power’s intent to treat Class B Weeds;
- 4 • Clarifying Idaho Power’s intent to prepare a long-term monitoring plan following  
5 the initial five-year assessment period;
- 6 • Clarifying how construction equipment and contractors’ vehicles will be washed  
7 before arrival at work sites;
- 8 • Clarifying that Idaho Power will annually coordinate with federal land  
9 management agencies to ensure that the Company’s lists of approved herbicides are  
10 up-to-date;
- 11 • Clarifying that weed treatments during the initial five-year assessment period may  
12 occur more frequently than once annually;
- 13 • Amending the plan to state that noxious weed monitoring will begin the first  
14 growing season following construction, rather than the first summer following  
15 construction;
- 16 • Updating the list of designated Noxious Weeds known to occur or with the  
17 potential to occur within the site boundary in Table 1 consistent with most recent  
18 statewide and county-specific noxious weed lists;
- 19 • Clarifying that noxious weed surveyors will be trained to identify Oregon flora,  
20 specifically native plants, noxious weeds, and threatened and endangered plant  
21 species; and
- 22 • Adding an Appendix B detailing the Noxious Weeds Treatment Methods and  
23 Timing.<sup>97</sup>

24 Idaho Power’s robust Updated Draft Noxious Weed Plan supports the Hearing Officer’s findings  
25 that the Company will address Project-related noxious weeds and thereby comply with all  
26 applicable EFSC standards.

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<sup>96</sup> Idaho Power / Rebuttal Testimony of Jessica Taylor / Issues FW-3, FW-6 and LU-11 / Exhibit B, Updated Draft Noxious Weed Plan.

<sup>97</sup> Idaho Power / Rebuttal Testimony of Jessica Taylor / Issues FW-3, FW-6, and LU-11, p. 39 of 106.

1           *Second*, Ms. Gilbert’s description of the draft Noxious Weed Plan ignores the fact that  
2 ODOE will have final review of the Noxious Weed Plan and will solicit comments from all  
3 relevant state agencies before approving the final plan.<sup>98</sup> As explained above in response to Irene  
4 Gilbert, FW-3, Exception 3, the agency review process is entirely consistent with the applicable  
5 EFSC standards. Moreover, although Idaho Power’s robust Updated Draft Noxious Weed Plan  
6 could be revised, it is expected that the final plan will be based on the draft plan. To that end,  
7 Recommended Fish and Wildlife Condition 3 codifies the expectation that “[t]he protective  
8 measures as described in the draft Noxious Weed Plan provided as Attachment P1-5 to the Final  
9 Order on the ASC, shall be included and implemented as part of the final Noxious Weed Plan[.]”<sup>99</sup>

10           Moreover, Ms. Gilbert’s argument that the Hearing Officer’s findings are not actual facts  
11 because “the Final Plan has not been developed and the only plan reviewed by the Council is the  
12 one in the Proposed Order” is without merit. The Hearing Officer made those factual findings  
13 relying on the Idaho Power’s expert witness testimony and on the Company’s Updated Draft  
14 Noxious Weed Plan.<sup>100</sup> Moreover, the fact that the Council has not yet reviewed the Final Noxious  
15 Weed Plan because it will be finalized after the issuance of the site certificate is entirely beside the  
16 point. The “Agency Review Process” for finalizing the Noxious Weed Plan is consistent with the  
17 Council’s OAR 345-025-0016, as described above. At this stage, the Council may review and  
18 consider the Updated Draft Noxious Weed Plan, and affirm that the evidence in the record supports  
19 the Hearing Officer’s findings, and therefore those findings are supported findings of fact.

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<sup>98</sup> Idaho Power / Rebuttal Testimony of Jessica Taylor / Issues FW-3, FW-6 and LU-11 / Exhibit B, Updated Draft Noxious Weed Plan, pp. 4-5 of 53.

<sup>99</sup> Proposed Contested Case Order at 46.

<sup>100</sup> Idaho Power / Rebuttal Testimony of Jessica Taylor / Issues FW-3, FW-6 and LU-11 / Exhibit B, Updated Draft Noxious Weed Plan.



1           Finally, Ms. Gilbert’s argument that the Hearing Officer cannot reference statements from  
2 the Proposed Order takes the Hearing Officer’s findings out of context. The Hearing Officer  
3 quoted the Proposed Order to provide the procedural background that preceded this contested case.  
4 The Hearing Officer did not err by identifying what conclusions ODOE reached in the Proposed  
5 Order, because the Hearing Officer did *not* rely on the Proposed Order to address the issues the  
6 limited parties raise. Rather, the Hearing Officer relied on and cited the evidence and testimony  
7 submitted into the record of this contested case.

8           For these reasons, Ms. Gilbert has not identified any error in the Hearing Officer’s findings  
9 of fact and Idaho Power requests that the Council adopt without modification the Hearing Officer’s  
10 findings of fact and conclusions of law relevant to FW-3.

11           **6. Irene Gilbert, Issue FW-3, Exception 6 (Gilbert’s “Fact Number Five”)**

12           Ms. Gilbert next lists five “facts” which she asserts are “listed on the bottom of the  
13 Proposed Contested Case Order[.]”<sup>101</sup> It is not entirely clear which factual findings in the Proposed  
14 Contested Case Order Ms. Gilbert seeks to challenge, but Ms. Gilbert’s description appears to refer  
15 to the final paragraph on page 144, where the Hearing Officer provided the following summary of  
16 the limited parties’ arguments:

17           Limited parties Geer and Gilbert have standing on Issue FW-3. Both Ms. Geer and  
18 Ms. Gilbert contend that, in order to grant a site certificate, the Council must find  
19 that the applicant’s weed control plan complies with ORS 569.390, 569.400, and  
20 569.445. More specifically, they argue that the draft Noxious Weed Plan does not  
21 comply with Oregon’s Weed Control laws for the following reasons: (1) it does not  
22 require Idaho Power to control all noxious weeds within the site boundary; (2) it  
23 does not apply to all state and county-listed noxious weeds; (3) it does not include  
24 provisions ensuring that no noxious weeds will go to seed; (4) it does not require

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<sup>101</sup> Irene Gilbert Exceptions for FW-3 at 6.

1 sufficient monitoring and control for the life of the development; and (5) it does not  
2 sufficiently account for vehicle and equipment cleaning.<sup>102</sup>

3 It is important to note that the Hearing Officer addressed each of those arguments in the  
4 paragraphs that followed.<sup>103</sup>

5 All five of Ms. Gilbert’s issues were addressed at length in Idaho Power’s Closing  
6 Argument, where the Company explained that her assertions regarding compliance with  
7 ORS 569.390, ORS 569.400, and ORS 569.445 are all outside the scope of this contested case  
8 because those statutes are enforced by the affected counties outside of EFSC’s review.<sup>104</sup> As Idaho  
9 Power explained in its brief, noxious weeds are controlled through two related but separate  
10 processes. First, ORS Chapter 569 requires all owners or occupants of land within a weed district  
11 to destroy or prevent the seeding of noxious weeds on their property.<sup>105</sup> This obligation applies to  
12 all weed species that the Oregon Department of Agriculture (“ODA”) or the counties have  
13 designated as noxious weeds. In addition, when designating certain species as noxious weeds, the  
14 counties issue a declaration identifying the best means to control those infestations and the  
15 deadline by which a landowner or occupant must destroy those noxious weeds.<sup>106</sup> If a landowner  
16 or occupant fails to destroy noxious weeds on their property, the counties can take necessary steps  
17 to enforce ORS Chapter 569, including quarantining the infested farm to prevent the movement of  
18 infested crops or of livestock from such farm.<sup>107</sup> The ORS Chapter 569 provisions were enacted

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<sup>102</sup> Proposed Contested Case Order at 144.

<sup>103</sup> Proposed Contested Case Order at 145-46.

<sup>104</sup> Idaho Power’s Closing Arguments for Contested Case Issues FW-3, FW-5, FW-6, and FW-7 at 11-31.

<sup>105</sup> ORS 569.390.

<sup>106</sup> ORS 569.360 – ORS 569.390.

<sup>107</sup> ORS 569.400(1).

1 to address potential impacts to a wide variety of interests, including natural resources, watershed  
2 health, livestock, wildlife, land and agricultural products.<sup>108</sup>

3 Independent of ORS Chapter 569, a developer proposing an energy facility must also  
4 address noxious weeds to the extent that the introduction or spread of noxious weeds from the  
5 project could result in any impact that would be inconsistent with EFSC’s standards. As discussed  
6 above, noxious weed management in the EFSC context is focused on protecting fish and wildlife  
7 habitat—that is, if noxious weeds from the project are not controlled, they could adversely impact  
8 habitat by displacing and outcompeting native plants.<sup>109</sup> EFSC’s Fish and Wildlife Habitat  
9 Standard requires an applicant to demonstrate that it has avoided and/or mitigated the potential  
10 habitat impacts consistent with ODFW’s Habitat Mitigation Policy, which includes addressing  
11 noxious weed infestations resulting from the proposed energy facility.<sup>110</sup> Importantly, noxious  
12 weeds are the species that the ODA and/or affected counties have identified as the species  
13 “representing the greatest public menace and as a top priority for action by weed control  
14 programs.”<sup>111</sup> Because noxious weeds are the species that the state and counties have identified  
15 as the greatest threat to native habitat, targeting these species provides relevant information to the  
16 Council to determine whether an applicant will adequately avoid and/or minimize habitat impacts  
17 from displacement of native vegetation.

18 Although the actions taken to control these priority noxious weed species may be relevant  
19 to demonstrating compliance with EFSC’s siting standards, it is important to note that no siting

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<sup>108</sup> ORS 569.180.

<sup>109</sup> Idaho Power / Rebuttal Testimony of Jessica Taylor / Issues FW-3, FW-6 and LU-11 / Exhibit B, Updated Draft Noxious Weed Plan, p. 10 of 53.

<sup>110</sup> OAR 345-022-0060(1).

<sup>111</sup> ORS 569.175(1).

1 standard specifically requires an applicant to demonstrate compliance with ORS Chapter 569.  
2 Rather, EFSC’s siting standards require an applicant to demonstrate that it has addressed the  
3 impacts of the proposed development,<sup>112</sup> including the introduction and spread of noxious weed  
4 infestations resulting from the construction of the project.

5 Idaho Power next addresses each of Ms. Gilbert’s factual assertions below.

6 a. Ms. Gilbert asserts: “[The Draft Noxious Weed Plan] fails to require Idaho  
7 Power to control all noxious weeds within the site boundary.”<sup>113</sup>

8 Idaho Power addressed this issue in its Closing Argument.<sup>114</sup> As Idaho Power explained  
9 in its brief, the Noxious Weed Plan is intended to demonstrate compliance with EFSC’s standards,  
10 which require an applicant to control all noxious weeds resulting from a proposed energy facility.  
11 Idaho Power acknowledges that the Company will be an owner or occupant of land within the  
12 Project site, and for that reason, ORS 569.390 may require Idaho Power to control additional  
13 noxious weed infestations that are unrelated to the Project’s surface disturbing activities.<sup>115</sup>  
14 However, no EFSC siting standard requires Idaho Power to demonstrate compliance with  
15 ORS 569.390, and ORS 569.390 was not identified in the Second Amended Project Order as a  
16 required statute for the ASC. Additionally, as specified in the statutory text, ORS 569.390 is  
17 governed by a “declaration of the county court”<sup>116</sup> that the counties will enforce outside the EFSC  
18 ASC review process.<sup>117</sup> For that reason, to the extent that ORS 569.390 requires Idaho Power to

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<sup>112</sup> See, e.g., OAR 345-022-0070(1)(b) (“To issue a site certificate, the Council, after consultation with appropriate state agencies, must find that . . . the design, construction and operation of the proposed facility, taking into account mitigation . . . are not likely to cause a significant reduction in the likelihood of survival or recovery of the species[.]”).

<sup>113</sup> Irene Gilbert Exceptions for FW-3 at 6.

<sup>114</sup> Idaho Power’s Closing Arguments for Contested Case Issues FW-3, FW-5, FW-6, and FW-7 at 18-19.

<sup>115</sup> Idaho Power / Sur-sur-rebuttal Testimony of Jessica Taylor / Issues FW-3 and FW-6, p. 15 of 20.

<sup>116</sup> ORS 569.390.

<sup>117</sup> See also M. Porter Testimony, Cross-Examination Hearing Day 7, January 21, 2022 (Tr. Day 7), page 83, lines 3-6 (agreeing that ORS Chapter 569 is “[t]ypically” applied outside of the EFSC context).

1 destroy weeds that are unrelated to the Project and to prevent those weeds from producing seed, it  
2 is the affected counties and county courts, not EFSC, that enforce this requirement.

3           Importantly, Idaho Power has committed to coordinate with the affected counties in good  
4 faith to address any additional obligations under ORS 569.390 relating to noxious weed  
5 infestations unrelated to the Project.<sup>118</sup> However, this coordination with county weed supervisors  
6 will occur outside the EFSC process and is not required for compliance with any EFSC standard.  
7 Indeed, at the cross-examination hearing, ODA witness Mark Porter—who is the integrated  
8 noxious weed management specialist for northeast Oregon and has been working in the ODA’s  
9 noxious weed program for over a decade—reviewed Idaho Power’s commitment to work with  
10 local weed boards to address infestations unrelated to the Project and agreed that Idaho Power’s  
11 commitments were consistent with the requirements for landowners or occupants under  
12 ORS Chapter 569.<sup>119</sup>

13           Additionally, Ms. Gilbert’s assertion that Idaho Power will occupy all areas within the site  
14 boundary, and therefore must control noxious weeds in all those areas, is not correct. Rather, while  
15 the site boundary contains all areas where Idaho Power would be authorized to locate the Project,  
16 Idaho Power’s rights-of-way will be much narrower than the site boundary, and therefore, Idaho  
17 Power will not occupy all areas within the site boundary.<sup>120</sup> Furthermore, the Project itself will

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<sup>118</sup> See Idaho Power / Sur-sur-rebuttal Testimony of Jessica Taylor / Issues FW-3 and FW-6, p. 15 of 20.

<sup>119</sup> M. Porter Testimony, Cross-Examination Hearing Day 7, January 21, 2022 (Tr. Day 7), page 85, lines 15-23.

<sup>120</sup> See Proposed Order at 17 (ODOE - B2HAPPDoc2 Proposed Order on ASC and Attachments 2019-07-02. Page 24 of 10016) (explaining that the area within the site boundary includes a micrositing corridor to allow flexibility in siting the actual construction of the Project); *see also id.* (“For the 500-kV transmission line, the site boundary is a 500-foot-wide area within which the transmission line, all transmission structures, and communication stations would be located.”).

1 also have a smaller footprint within the rights-of-way.<sup>121</sup> As ODOE explained in its Closing Brief,  
2 all areas where Idaho Power proposes to construct the Project will be surveyed, treated, and  
3 monitored in accordance with the Noxious Weed Plan.<sup>122</sup> As a result, the Noxious Weed Plan will  
4 apply to all the areas that permanent Project facilities occupy.

5 *b. Ms. Gilbert asserts: “[The Draft Noxious Weed Plan] does not currently*  
6 *apply to all state and county listed noxious weeds.”<sup>123</sup>*

7 Ms. Gilbert’s factual assertion is plainly incorrect and entirely inconsistent with the record  
8 in this case. Idaho Power addressed this issue fully in the Company’s Closing Argument.<sup>124</sup> As  
9 the Company explained in its Closing Argument, the Oregon State Weed Board (“OSWB”)   
10 classifies noxious weeds as Class A, Class B, and T-designated weeds.<sup>125</sup> The previous draft of  
11 Idaho Power’s Noxious Weed Plan that had been provided as Attachment P1-5 of the Proposed  
12 Order limited the Company’s pre- and post-construction treatments to noxious weed species on  
13 Oregon’s Class A and T-designated lists; Baker, Malheur, Morrow, Umatilla, and Union county  
14 Class A lists; and priority invasive plant species on the Wallowa-Whitman National Forest.<sup>126</sup> In  
15 response to the limited parties’ testimony, Idaho Power clarified that the Company will also treat  
16 Class B noxious weeds in accordance with the OSWB and affected counties’ noxious weed

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<sup>121</sup> See Proposed Order at 17 (ODOE - B2HAPPDoc2 Proposed Order on ASC and Attachments 2019-07-02. Page 24 of 10016) (explaining that the area within the site boundary includes a micrositing corridor to allow flexibility in siting the actual construction of the Project); see also *id.* (“For the 500-kV transmission line, the site boundary is a 500-foot-wide area within which the transmission line, all transmission structures, and communication stations would be located.”).

<sup>122</sup> ODOE Closing Brief at 17.

<sup>123</sup> Irene Gilbert Exceptions for FW-3 at 6.

<sup>124</sup> Idaho Power’s Closing Arguments for Contested Case Issues FW-3, FW-5, FW-6, and FW-7 at 22-24.

<sup>125</sup> Idaho Power / Rebuttal Testimony of Jessica Taylor / Issues FW-3, FW-6, and LU-11 / Exhibit C, ODA Noxious Weed Policy and Classification System (2020), p. 6 of 11.

<sup>126</sup> Proposed Order, Attachment P1-5: Draft Noxious Weed Plan at 24 (ODOE - B2HAPPDoc2 Proposed Order on ASC and Attachments 2019-07-02. Page 9335 of 10016).

1 policies.<sup>127</sup> Therefore, the record in this case clearly demonstrates that Idaho Power has committed  
2 to treating all state-listed noxious weeds.

3 Counties similarly list noxious weeds as Class A and Class B weeds, and some also list  
4 Class C weeds.<sup>128</sup> However, no county within the Project site currently requires treatment of  
5 Class C noxious weeds. Only Malheur County has a Class C list and Malheur County’s  
6 recommended action for weeds on its Class C list is to treat them “at landowners’ discretion.”<sup>129</sup>  
7 Importantly, Idaho Power will review the state and county weed lists annually,<sup>130</sup> so if any county  
8 lists Class C weeds after Idaho Power obtains a site certificate, the Company will update its  
9 monitoring and treatment actions consistent with the updated lists.

10 c. *Ms. Gilbert asserts: “[The Draft Noxious Weed Plan] does not include*  
11 *provisions ensuring that no noxious weeds go to seed.”<sup>131</sup>*

12 Idaho Power addressed this assertion at length in its Closing Brief.<sup>132</sup> As explained above,  
13 to the extent that ORS 569.390 requires Idaho Power to destroy weeds that are unrelated to the  
14 Project and to prevent those weeds from producing seed, it is the affected counties, not EFSC, that  
15 enforces that requirement. Importantly, Idaho Power has committed to coordinate with the

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<sup>127</sup> Idaho Power / Rebuttal Testimony of Jessica Taylor / Issues FW-3, FW-6 and LU-11 / Exhibit B, Updated Draft Noxious Weed Plan, p. 35 of 53 (“Noxious weed species on Oregon’s OSWB Class A, B, and T lists; Baker, Malheur, Morrow, Umatilla, and Union county Class A and B lists; and priority invasive plant species on the Wallowa- Whitman National Forest will be treated prior to the start of ground-disturbing activities. . . . As described above, [post-construction] control efforts will be limited to noxious weed species on Oregon’s OSWB Class A, B, and T lists; Baker, Malheur, Morrow, Umatilla, and Union county Class A and B lists; and priority invasive plant species on the Wallowa-Whitman National Forest.”).

<sup>128</sup> Idaho Power’s Response to ODOE’s Proposed Conditions at 6 (Dec. 3, 2021); Idaho Power / Response to ODOE’s Proposed Conditions / Issue FW-3 / Exhibit A, Declaration of Jessica Taylor, Attachment 1, Malheur County Noxious Weed Lists (Undated), p. 4 of 4.

<sup>129</sup> Idaho Power’s Response to ODOE’s Proposed Conditions at 6 (Dec. 3, 2021); Idaho Power / Response to ODOE’s Proposed Conditions / Issue FW-3 / Exhibit A, Declaration of Jessica Taylor, Attachment 1, Malheur County Noxious Weed Lists (Undated), p. 4 of 4.

<sup>130</sup> Idaho Power / Rebuttal Testimony of Jessica Taylor / Issues FW-3, FW-6 and LU-11 / Exhibit B, Updated Draft Noxious Weed Plan, p. 12 of 53.

<sup>131</sup> Irene Gilbert Exceptions for FW-3 at 6.

<sup>132</sup> Idaho Power’s Closing Arguments for Contested Case Issues FW-3, FW-5, FW-6, and FW-7 at 18-19.

1 affected counties in good faith to address any additional obligations under ORS 569.390 relating  
2 to noxious weed infestations unrelated to the Project.<sup>133</sup> However, the Noxious Weed Plan is  
3 intended to demonstrate compliance with EFSC’s siting standards, which do not specifically  
4 require Idaho Power to prevent noxious weeds from producing seed. For this reason, Ms. Gilbert  
5 has not demonstrated any error in the Hearing Officer’s conclusions in the Proposed Contested  
6 Case Order.

7 *d. Ms. Gilbert asserts: “[The Draft Noxious Weed Plan] fails to require*  
8 *sufficient monitoring and control for the life of the development.”<sup>134</sup>*

9 Ms. Gilbert, Ms. Geer, and the ODA all filed testimony in this case relating to the  
10 frequency and duration of monitoring necessary to control noxious weeds.<sup>135</sup> Idaho Power  
11 addressed these assertions fully in its Closing Argument.<sup>136</sup> As the Company explained, to the  
12 extent that ORS Chapter 569 requires Idaho Power to take further actions to address noxious weeds  
13 unrelated to the Project, those obligations will be enforced by the counties independent of EFSC’s  
14 site certificate. For that reason, even if the limited parties are correct in asserting that  
15 ORS Chapter 569 requires lifetime monitoring, that would not dictate that the Noxious Weed Plan  
16 must also require lifetime monitoring. Idaho Power prepared the Draft Noxious Weed Plan to  
17 explain how the Company will monitor and control all noxious weed infestations resulting from  
18 Idaho Power’s Project-related surface-disturbing activities to ensure compliance with EFSC’s  
19 siting standards.<sup>137</sup> As demonstrated by the substantial evidence Idaho Power presented in the

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<sup>133</sup> See Idaho Power / Sur-sur-rebuttal Testimony of Jessica Taylor / Issues FW-3 and FW-6, p. 15 of 20.

<sup>134</sup> Irene Gilbert Exceptions for FW-3 at 6.

<sup>135</sup> See, e.g., Porter Testimony, Cross-Examination Hearing Day 7, January 21, 2022 (Tr. Day 7), page 80, line 22 – page 81, line 2 (stating that ODA would prefer to see Idaho Power make a commitment to monitoring Class A weeds at least twice a year).

<sup>136</sup> Idaho Power’s Closing Arguments for Contested Case Issues FW-3, FW-5, FW-6, and FW-7 at 19-22.

<sup>137</sup> Idaho Power / Rebuttal Testimony of Jessica Taylor / Issues FW-3, FW-6 and LU-11 / Exhibit B, Updated Draft Noxious Weed Plan, p. 11 of 53.



1 contested case, the Draft Reclamation and Revegetation Plan, as well as the Draft Noxious Weed  
2 Plan, will be able to address the noxious-weed related impacts of the Project.<sup>138</sup>

3 The Hearing Officer did not directly address whether annual, or even twice-annual,  
4 monitoring was required in the Noxious Weed Plan, because the Hearing Officer concluded that  
5 “nothing in the weed control statutes specifically require twice annual monitoring” and that, even  
6 if there were such a requirement, the counties would enforce it, not EFSC.<sup>139</sup> Idaho Power believes  
7 that the Hearing Officer’s conclusions of law are correct and further asserts that there is substantial  
8 evidence in the record to support the conclusion that Idaho Power’s Noxious Weed Plan ensures  
9 adequate monitoring of noxious weed infestations to address all Project-related weeds. However,  
10 to the extent the Council wishes to further consider the frequency of monitoring, Idaho Power  
11 notes that its expert witness, Ms. Taylor, directly addressed the other parties’ concerns in her  
12 testimony.

13 As Ms. Taylor explained, in the Updated Draft Noxious Weed Plan, Idaho Power identifies  
14 the treatment actions that the Company will apply to control noxious weeds resulting from the  
15 Project.<sup>140</sup> Importantly, Idaho Power will begin treating noxious weeds prior to construction, so  
16 noxious weeds present within the disturbed sites will be treated before the Company begins its  
17 surface-disturbing activities.<sup>141</sup> After construction, Idaho Power will begin monitoring and  
18 treating all disturbed sites the first growing season following completion of construction,<sup>142</sup> which

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<sup>138</sup> Idaho Power / Rebuttal Testimony of Jessica Taylor / Issues FW-3, FW-6, and LU-11, p. 106 of 106.

<sup>139</sup> Proposed Contested Case Order at 146.

<sup>140</sup> Idaho Power / Rebuttal Testimony of Jessica Taylor / Issues FW-3, FW-6 and LU-11 / Exhibit B, Updated Draft Noxious Weed Plan, pp. 32-35 of 53.

<sup>141</sup> Idaho Power / Rebuttal Testimony of Jessica Taylor / Issues FW-3, FW-6 and LU-11 / Exhibit B, Updated Draft Noxious Weed Plan, p. 35 of 53.

<sup>142</sup> Idaho Power / Rebuttal Testimony of Jessica Taylor / Issues FW-3, FW-6 and LU-11 / Exhibit B, Updated Draft Noxious Weed Plan, p. 35 of 53.

1 will increase the likelihood of controlling infestations before they can become established. Idaho  
2 Power will then continue this monitoring and treatment at least once annually, as needed, for the  
3 first five years to control the noxious weed infestations.<sup>143</sup> Importantly, the five-year initial  
4 assessment period is consistent with weed control plans that EFSC has accepted in previous final  
5 orders granting site certificates to other energy facilities.<sup>144</sup> EFSC has repeatedly accepted noxious  
6 weed plans with similar five-year initial assessment periods followed by long-term monitoring  
7 based on the results of those assessment.<sup>145</sup> Based on that extensive precedent, Idaho Power  
8 believes that the Company’s proposed initial assessment period is consistent with applicable EFSC  
9 standards.

10 After the initial assessment period, Idaho Power will reassess whether its control efforts  
11 are trending toward success and, if they are not, Idaho Power will propose additional or alternative  
12 actions to continue treating the noxious weed infestations.<sup>146</sup> Idaho Power will also develop  
13 specific long-term monitoring plans for each location where noxious weed infestations occur.<sup>147</sup>  
14 Notwithstanding Idaho Power’s efforts to control noxious weed infestations, if any Project-related

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<sup>143</sup> Idaho Power / Rebuttal Testimony of Jessica Taylor / Issues FW-3, FW-6 and LU-11 / Exhibit B, Updated Draft Noxious Weed Plan, p. 35 of 53.

<sup>144</sup> Idaho Power / Rebuttal Testimony of Jessica Taylor / Issues FW-3, FW-6, and LU-11, p. 78 of 106.

<sup>145</sup> See, e.g., *In re Application for a Site Certificate for the Carty Generating Station*, Final Order, Ex. 2 at 6 (Jun. 29, 2012) (“Revegetation monitoring will begin in the first year following the beginning of construction of the Carty Generating Station and continue annually for five years or until monitored sites are suitably revegetated according to the criteria described below. If needed, additional monitoring (beyond five years) of any problem revegetation sites will be scheduled in coordination with ODFW and ODOE.”); see also *In re Application for a Site Certificate for the Perennial Wind Chaser Station*, Final Order, App. P-2 at 12 (Sep. 18, 2015); *In re Request for Amendment 5 for the Montague Wind Power Facility*, Final Order on Request for Amendment 5 to the Site Certificate, Att. E at 6 (Sep. 25, 2020). Consistent with OAR 345-015-0046(1)(b), Idaho Power asks that the Council take administrative notice of these documents. Courtesy copies of these final orders are provided as Idaho Power / Closing Arguments for Contested Case Issues R-1, R-2, R-3, R-4, SR-2, SR-3, and SR-7 / Attachments B, C, and D.

<sup>146</sup> Idaho Power / Rebuttal Testimony of Jessica Taylor / Issues FW-3, FW-6 and LU-11 / Exhibit B, Updated Draft Noxious Weed Plan, p. 35 of 53.

<sup>147</sup> Proposed Order at 318 (ODOE - B2HAPPDoc2 Proposed Order on ASC and Attachments 2019-07-02. Page 325 of 10016).

1 infestations result in permanent habitat loss, Idaho Power may address those permanent impacts  
2 through compensatory mitigation.<sup>148</sup> These actions will be sufficient to avoid and/or mitigate  
3 noxious-weed-related habitat impacts resulting from the Project consistent with ODFW’s Habitat  
4 Mitigation Policy and the Council’s Fish and Wildlife Habitat Standard.<sup>149</sup>

5 Several witnesses, including ODA’s witness, proposed that treatments should occur at least  
6 twice annually.<sup>150</sup> Idaho Power agrees that there may be certain weather events or noxious weed  
7 species that may necessitate multiple treatments within a single year, but that is precisely why the  
8 Company clarified that it will treat noxious weeds “at least once annually” during the initial  
9 assessment period.<sup>151</sup> If specific species are recommended for twice-annual treatment by the  
10 Company’s local weed coordinators, then Idaho Power will plan to treat those weeds twice per  
11 year.<sup>152</sup> Similarly, if local weed coordinators identify weather conditions that may result in a  
12 second growing season for noxious weeds, Idaho Power will receive that input from the  
13 coordinators and alter its treatments plans accordingly.<sup>153</sup> Finally, with respect to ODA’s proposal  
14 to treat Class A noxious weeds twice annually,<sup>154</sup> those weeds are identified for intensive  
15 control.<sup>155</sup> However, depending on the species and other circumstances, certain infestations may

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<sup>148</sup> Idaho Power / Rebuttal Testimony of Jessica Taylor / Issues FW-3, FW-6 and LU-11 / Exhibit B, Updated Draft Noxious Weed Plan, p. 35 of 53.

<sup>149</sup> Idaho Power / Rebuttal Testimony of Jessica Taylor (Nov. 12, 2021) / Issues FW-3, FW-6, and LU-11, p. 17 of 106.

<sup>150</sup> ODOE / Written Rebuttal Testimony of Tim Butler (Nov. 10, 2021) / Issue FW-3, p. 4 of 5; Susan Geer / Written Surrebuttal Testimony of Susan Geer / Issues FW-3 and FW-6, p. 4 of 6; Susan Geer / Written Surrebuttal Testimony of Ed Mosiman / Issues FW-3 and FW-6, pp. 3-4 of 4.

<sup>151</sup> Idaho Power / Rebuttal Testimony of Jessica Taylor / Issues FW-3, FW-6 and LU-11 / Exhibit B, Updated Draft Noxious Weed Plan, p. 35 of 53.

<sup>152</sup> Idaho Power / Sur-Sur-Rebuttal Testimony of Jessica Taylor / Issues FW-3 and FW-6, p. 5 of 20.

<sup>153</sup> Idaho Power / Sur-Sur-Rebuttal Testimony of Jessica Taylor / Issues FW-3 and FW-6, pp. 4-5 of 20.

<sup>154</sup> Porter Testimony, Cross-Examination Hearing Day 7, January 21, 2022 (Tr. Day 7), page 80, line 22 – page 81, line 2.

<sup>155</sup> Idaho Power / Rebuttal Testimony of Jessica Taylor / Issues FW-3, FW-6, and LU-11 / Exhibit C, ODA Noxious Weed Policy and Classification System (2020), p. 6 of 12.

1 be effectively controlled through once annual treatment.<sup>156</sup> For these reasons, a one-size-fits-all  
2 condition requiring Idaho Power to treat and monitor all noxious weed species—or even a subset  
3 of species for Class A noxious weeds—twice each year is unnecessary and would be unduly  
4 burdensome.

5         Additionally, Idaho Power’s expert witness for noxious weed issues, Jessica Taylor,  
6 testified that Idaho Power’s Noxious Weed Plan includes adequate monitoring to ensure that any  
7 Project-related infestations will be controlled. As Ms. Taylor explained in her Sur-Sur-Rebuttal  
8 Testimony, Idaho Power will revegetate disturbed sites with seed mixes that will provide native or  
9 desirable introduced vegetation to compete with noxious weeds.<sup>157</sup> As a result, once a site is  
10 revegetated in accordance with the Revegetation and Reclamation Plan, it will be more difficult  
11 for noxious weeds to become established in that area.<sup>158</sup> Because revegetation will restore the  
12 Project-related disturbed sites with desired plant species that will compete with noxious weeds,  
13 once the site is revegetated Idaho Power will have addressed any infestations that resulted from  
14 the Company’s surface-disturbing activities. Although noxious weeds may subsequently be  
15 introduced to the site through other means,<sup>159</sup> those noxious weed infestations would not result  
16 from the Project, and therefore Idaho Power is not required to address those infestations for  
17 purposes of complying with the ODFW Habitat Mitigation Policy and the Council’s Fish and  
18 Wildlife Habitat Standard.<sup>160</sup>

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<sup>156</sup> Idaho Power / Sur-Sur-Rebuttal Testimony of Jessica Taylor / Issues FW-3 and FW-6, p. 4 of 20.  
<sup>157</sup> Proposed Order, Attachment P1-3: Draft Reclamation and Revegetation Plan at 18 (ODOE - B2HAPPDoc2  
Proposed Order on ASC and Attachments 2019-07-02. Page 9129 of 10016).  
<sup>158</sup> Idaho Power / Sur-Sur-Rebuttal Testimony of Jessica Taylor / Issues FW-3 and FW-6, p. 8 of 20.  
<sup>159</sup> J. Taylor Testimony, Cross-Examination Hearing Day 4, January 14, 2022 (Tr. Day 4), page 94, lines 5-14.  
<sup>160</sup> However, Idaho Power understands that the Company may have additional weed-control responsibilities under  
ORS Chapter 569. Idaho Power / Rebuttal Testimony of Jessica Taylor / Issues FW-3, FW-6 and LU-11 / Exhibit B,  
Updated Draft Noxious Weed Plan, p. 11 of 53.

1 e. Ms. Gilbert asserts: “[The Draft Noxious Weed Plan] does not sufficiently  
2 account for vehicle and equipment cleaning.”<sup>161</sup>

3 Idaho Power addressed this issue fully in its Closing Argument, where the Company  
4 explained that Ms. Gilbert’s argument is based solely on her incorrect assertion that ORS 569.445  
5 applies to the construction equipment and vehicles at issue in the Company’s Draft Noxious Weed  
6 Plan.<sup>162</sup> As Idaho Power explained, the Company prepared the Noxious Weed Plan to identify  
7 actions the Company will take to prevent and control the establishment and spread of noxious  
8 weeds resulting from the Project.<sup>163</sup> Idaho Power understands that construction equipment and  
9 vehicles traveling through infested sites have the potential to spread noxious weeds, and  
10 accordingly the Company proposes cleaning its equipment and vehicles before entering the work  
11 sites, and when moving equipment from an infested site to another location within the Project  
12 site.<sup>164</sup> Idaho Power believes that the Company’s proposed vehicle cleaning protocols will prevent  
13 the spread of noxious weeds resulting from Project construction, and for that reason are sufficient  
14 to demonstrate compliance with the Fish and Wildlife Habitat Standard. Idaho Power’s expert  
15 witness, Ms. Taylor, agrees that Idaho Power’s Draft Noxious Weed Plan “will prevent  
16 construction vehicles and equipment from introducing noxious weeds to non-contaminated  
17 areas.”<sup>165</sup>

18 Ms. Gilbert argues that Idaho Power must also comply with ORS 569.445, but her  
19 argument is based on an incorrect interpretation of that statute. As discussed above, Idaho Power

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<sup>161</sup> Irene Gilbert Exceptions for FW-3 at 6.

<sup>162</sup> Idaho Power’s Closing Arguments for Contested Case Issues FW-3, FW-5, FW-6, and FW-7 at 25-31.

<sup>163</sup> Idaho Power / Rebuttal Testimony of Jessica Taylor / Issues FW-3, FW-6, and LU-11 / Exhibit B, Updated Draft Noxious Weed Plan, p. 28 of 53.

<sup>164</sup> Idaho Power / Rebuttal Testimony of Jessica Taylor / Issues FW-3, FW-6, and LU-11 / Exhibit B, Updated Draft Noxious Weed Plan, p. 29 of 53.

<sup>165</sup> Idaho Power / Rebuttal Testimony of Jessica Taylor / Issues FW-3, FW-6, and LU-11, p. 93 of 106.

1 is not required to demonstrate compliance with ORS 569.445 in order to obtain a site certificate  
2 because the counties enforce ORS Chapter 569 outside the EFSC review process. Moreover, even  
3 if ORS 569.445 were relevant to EFSC’s review, Ms. Gilbert’s interpretation of that statute as  
4 applying to construction equipment and vehicles is overbroad. ORS 569.445 requires that “any  
5 threshing machinery, clover huller, hay baler, seed cleaning or treating machinery or other  
6 machinery” be washed before moving that machinery on public roads or from one farm to another.  
7 In her Opening Argument, Ms. Gilbert argued that Idaho Power’s construction equipment and  
8 vehicles are “other machinery” and therefore are subject to the vehicle washing requirements of  
9 ORS 569.445.<sup>166</sup>

10 However, Ms. Gilbert’s interpretation of ORS 569.445 is overbroad. When interpreting a  
11 statute, the goal is “to determine the meaning of the statute that the legislature that enacted it most  
12 likely intended.”<sup>167</sup> To discern the intent behind a statute, Oregon courts and agencies apply a  
13 three-step process.<sup>168</sup> The first step is “an examination of text and context.”<sup>169</sup> After examining  
14 text and context, the court may consult any legislative history that the parties have proffered.<sup>170</sup>  
15 Finally, “[i]f the legislature’s intent remains unclear after examining text, context, and legislative  
16 history, the court may resort to general maxims of statutory construction to aid in resolving the  
17 remaining uncertainty.”<sup>171</sup>

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<sup>166</sup> Irene Gilbert / Petitioner Irene Gilbert’s Opening Arguments / Issue FW-3, p. 6 of 15.

<sup>167</sup> *Chase and Chase*, 354 Or 776, 780 (2014).

<sup>168</sup> *State v. Gaines*, 346 Or 160, 171-73 (2009).

<sup>169</sup> *State v. Gaines*, 346 Or at 171.

<sup>170</sup> *State v. Gaines*, 346 Or at 172.

<sup>171</sup> *State v. Gaines*, 346 Or at 172.

1           Statutory construction starts with the language of the statute itself, because the text and  
2 context of a statute provide “the best evidence of the legislature’s intent.”<sup>172</sup> When reviewing text  
3 and context, agencies “consider[] rules of construction of the statutory text that bear directly on  
4 how to read the text.”<sup>173</sup> One of the rules that agencies consider in this first step of the analysis is  
5 *ejusdem generis*,<sup>174</sup> which dictates that where a statute enumerates a specific list followed by a  
6 general catch-all provision, “the general words are not to be construed in their broadest sense, but  
7 are to be limited to . . . the same kind or class” as the specifically enumerated list.<sup>175</sup>

8           Applying *ejusdem generis* to the relevant provisions of ORS 569.445, the phrase “other  
9 machinery” must not be interpreted to broadly apply to all vehicles and equipment. Rather, the  
10 scope of “other machinery” subject to the cleaning requirements of ORS 569.445 is limited to the  
11 same kind or class of machinery as the specific types of machinery listed in the statute.  
12 Specifically, as explained below, the “other machinery” must be limited to *agricultural* machinery  
13 used for harvesting or processing crops.

14           The specific machinery listed in ORS 569.445 are “threshing machinery, clover huller, hay  
15 baler, seed cleaning [and] treating machinery.” Relying on the plain, natural, and ordinary

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<sup>172</sup> *Portland Gen. Elec. Co. v. Bureau of Labor & Indus.*, 317 Or 606, 610-11 (1993), *overturned on other grounds* *State v. Gaines*, 346 Or 160, 171-73 (2009) [hereinafter “PGE”].

<sup>173</sup> PGE, 317 Or at 611.

<sup>174</sup> *State v. James*, 266 Or App 660, 668 n. 4 (2014) (“The principle of *ejusdem generis* is a rule of statutory construction that we employ to analyze the text and context of a statute.”).

<sup>175</sup> *Hodges v. Real Estate Div., Dep’t of Commerce*, 40 Or App 243, 247 (1979); *see also Bellikka v. Green*, 306 Or 630, 636 (1988) (“When the legislature chooses to state both a general standard and a list of specifics, the specifics do more than place their particular subjects beyond the dispute; they also refer the scope of the general standard to matters of the same kind[.]”).

1 meaning of those words,<sup>176</sup> threshing machinery,<sup>177</sup> clover huller,<sup>178</sup> hay baler,<sup>179</sup> seed cleaning<sup>180</sup>  
2 and treating<sup>181</sup> machinery are all used for specific processes relating to the harvest and processing  
3 of agricultural crops. Therefore, the scope of “other machinery” must be limited to machinery  
4 relating to the harvest and processing of agricultural crops. Idaho Power’s construction equipment  
5 and vehicles will not be used for harvesting or processing any crops, and therefore, they are not  
6 subject to the specific requirements of ORS 569.445.

7         Moreover, if the term “other machinery” were to apply to Idaho Power’s non-farming  
8 vehicles and equipment, it would necessarily apply to *all* other non-farming vehicles and  
9 equipment, because there is no limiting language to suggest it only applies to construction, or other  
10 specific types of, vehicles or equipment. Such an interpretation would lead to the absurd result of  
11 requiring *all* vehicles and equipment, including personal vehicles, to be cleaned before entering a  
12 public road, which weighs strongly against Ms. Gilbert’s and ODOE’s interpretation.<sup>182</sup>

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<sup>176</sup> *PGE*, 317 Or at 611 (in the first step of the statutory construction analysis, “words of common usage typically should be given their plain, natural, and ordinary meaning”).

<sup>177</sup> Merriam Webster’s dictionary defines “threshing machine” as “a machine for separating grain or seeds from straw.” Webster’s Third New Int’l Dictionary 2383 (unabridged ed 2002). “Thresh” is further defined as “to beat out grain or seed from (as wheat stalks) by treading, rubbing, striking with a flail, or by a threshing machine.” *Id.*

<sup>178</sup> A “huller” is “a machine that threshes clover and separates the seeds from the hulls.” Webster’s Third New Int’l Dictionary at 1100.

<sup>179</sup> A “baler” is simply “one who bales” and a “bale” is “a large bundle of goods for storage or transportation; *specif*: a large closely pressed package of merchandise bound with cord, wire, or hoops and *usu*. protected by a wrapping (as of burlap).” Webster’s Third New Int’l Dictionary at 166. Additionally, “hay” is “grass ready for mowing or esp. cut and cured for fodder” or “the entire herbage sometimes including the seeds of grasses and other forage plants (as legumes) harvested and dried esp. for feed.” *Id.* at 1040.

<sup>180</sup> To “clean” seeds is “to remove the outer shell, husk, hull, or hairy appendages from” them. Webster’s Third New Int’l Dictionary at 419.

<sup>181</sup> “Seed treatment” is “the act or process of applying a pesticide to seed.” Webster’s Third New Int’l Dictionary at 2055.

<sup>182</sup> *McKean-Coffman v. Employment Div.*, 312 Or 543, 549 (1992) (“In construing a statute, courts must refuse to give literal application to language when to do so would produce an absurd or unreasonable result.”). Idaho Power is aware of one Final Order where EFSC previously cited ORS 569.445 to require an applicant to wash its “ground disturbing equipment” “prior to entering or exiting the construction site.” *In re Request for Amendment 4 for the Summit Ridge Wind Farm Site Certificate*, Final Order at 75 n. 88 (Aug. 23, 2019). In *Summit Ridge*, Ms. Gilbert argued in comments on the Draft Proposed Order that the equipment was subject to ORS 569.445 and the Council adopted Ms. Gilbert’s



1 For these reasons, Ms. Gilbert’s exception does not identify any error in the Hearing  
2 Officer’s findings of fact or conclusions of law, and Idaho Power requests that the Council adopt  
3 without modification the Hearing Officer’s findings of fact and conclusions of law relevant to  
4 FW-3.

5 **7. Irene Gilbert, Issue FW-3, Exception 7 (Gilbert’s “Fact Number Six”, “Fact**  
6 **Number Eight”)**

7 Ms. Gilbert takes exception to the Proposed Contested Case Order for not incorporating  
8 recommendations from various county weed supervisors which “document that under Oregon law,  
9 Idaho Power is responsible for the management and control of weeds on the property which they  
10 are occupying and must have monitoring and controls in place which do not allow noxious weeds  
11 from the site to go to seed and spread” and further state “what is required to do so is the items  
12 included in ORS 569.”<sup>183</sup> Ms. Gilbert again references this same list of recommendations in her  
13 “Fact Number Eight.”<sup>184</sup> Ms. Gilbert is referencing a list of comments from the weed supervisors  
14 of Morrow, Umatilla, and Union counties that they filed relating to Idaho Power’s ASC.<sup>185</sup>  
15 Ms. Gilbert filed this document as an exhibit to her Direct Testimony, and Idaho Power’s expert  
16 witness, Ms. Taylor, addressed Ms. Gilbert’s assertion in her Rebuttal Testimony,<sup>186</sup> where she  
17 explained that, although it is correct that Idaho Power did not adopt provisions into the Noxious

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position in the Final Order. *Id.* However, it appears that the applicant did not dispute Ms. Gilbert’s interpretation, and there is no indication that EFSC applied the three-step statutory construction process to discern the legislative intent of ORS 569.445 before adopting Ms. Gilbert’s interpretation. Because EFSC did not analyze the legislative intent before applying ORS 569.445 in its *Summit Ridge*, Idaho Power believes that *Summit Ridge* is of limited precedential value and asks the Hearing Officer to consider instead Idaho Power’s analysis regarding the statutory construction for ORS 569.445.

<sup>183</sup> Irene Gilbert Exceptions for FW-3 at 7.

<sup>184</sup> Irene Gilbert Exceptions for FW-3 at 8-9.

<sup>185</sup> Irene Gilbert / Petitioner Irene Gilbert’s Opening Arguments / Issue FW-3 / Exhibit 4, Comments from Tri County Weed Supervisors (Aug. 22, 2017).

<sup>186</sup> Idaho Power / Rebuttal Testimony of Jessica Taylor / Issues FW-3, FW-6, and LU-11, pp. 104-05 of 106.

1 Weed Plan to address all the concerns raised in the weed supervisors’ letter, it is important to note  
2 that the Company has addressed several of the weed supervisors’ concerns in the draft Noxious  
3 Weed Plan and that others are outside the scope of the plan.

4 For example, the county weed supervisors included in their comments a suggestion that  
5 Idaho Power should coordinate with county weed supervisors to ensure the Company’s noxious  
6 weed lists are consistent with the up-to-date county lists;<sup>187</sup> Idaho Power’s draft Noxious Weed  
7 Plan addresses this concern by requiring that the Company review those lists annually “to ensure  
8 that monitoring and control actions are targeting the appropriate species.”<sup>188</sup> Additionally,  
9 multiple concerns raised in the weed supervisors’ comments relate to Idaho Power’s obligation to  
10 comply with the weed-control requirements of ORS Chapter 569.<sup>189</sup> As explained above, Idaho  
11 Power acknowledges that the Company may have additional weed-control obligations under  
12 ORS Chapter 569 that are addressed outside the EFSC process, but the Company does not address  
13 those obligations in the draft Noxious Weed Plan because that plan is limited to demonstrating  
14 compliance with the standards that EFSC applies when reviewing an ASC.<sup>190</sup>

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<sup>187</sup> Irene Gilbert / Petitioner Irene Gilbert’s Opening Arguments / Issue FW-3 / Exhibit 4, Comments from Tri County Weed Supervisors (Aug. 22, 2017), p. 2 of 4.

<sup>188</sup> Idaho Power / Rebuttal Testimony of Jessica Taylor / Issues FW-3, FW-6 and LU-11 / Exhibit B, Updated Draft Noxious Weed Plan (Nov. 12, 2021), p. 12 of 53.

<sup>189</sup> See, e.g., Item 1, which reads “Many sections of this document do not adhere to state and county weed laws. I have listed the areas of concern for the county weed supervisors below. In the end, every landowner and land manager is responsible for the control of ALL state and county listed noxious weeds on their property/ ROW. Whether the weeds have been here for 50 years or don’t show up till the 20th year of Operation, IPC will be held responsible for the control of noxious weeds in the areas they manage-the same as everyone else.” Irene Gilbert / Petitioner Irene Gilbert’s Opening Arguments / Issue FW-3 / Exhibit 4, Comments from Tri County Weed Supervisors (Aug. 22, 2017), p. 1 of 4.

<sup>190</sup> Proposed Order, Attachment P1-5, Draft Noxious Weed Plan at 18 (ODOE - B2HAPPDoc2 Proposed Order on ASC and Attachments 2019-07-02. Page 9329 of 10016). Finally, it should be noted that several of the weed supervisors’ comments were not critiques of the plan, but rather praised specific provisions of Idaho Power’s Noxious Weed Plan. See, e.g., Item 11, which simply reads: “Pg. 18 In 3-7: excellent idea.” Irene Gilbert / Petitioner Irene Gilbert’s Opening Arguments / Issue FW-3 / Exhibit 4, Comments from Tri County Weed Supervisors (Aug. 22, 2017), p. 2 of 4.

1           Additionally, ODA’s witness, Mr. Porter, explained at the cross-examination hearing that  
2 he had been in attendance at the meeting where the weed supervisors drafted this list of  
3 recommendations and he provided additional context.<sup>191</sup> Mr. Porter explained that ODA “had a  
4 different understanding at the time” and that he had since developed a “nuanced understanding of  
5 the difference between the process that we’re involved with [and] the ODOEs and the energy --  
6 energy siting council, EFSC, that process, and the process of” ORS Chapter 569.<sup>192</sup> Idaho Power’s  
7 attorney asked Mr. Porter to clarify his “nuanced understanding,” and Mr. Porter explained that,  
8 at the time the weed supervisors drafted the list of recommendations, nobody that drafted the list  
9 of recommendations “understood in the same way that we do now . . . the parallel process of EFSC  
10 and ODOE's jurisdiction in that process.”<sup>193</sup>

11           After explaining his understanding of the parallel processes of controlling noxious weeds,  
12 Mr. Porter reviewed Idaho Power’s commitment to work in good faith with the county weed  
13 supervisors to ensure compliance with ORS Chapter 569.<sup>194</sup> Mr. Porter agreed that, with that  
14 commitment, Idaho Power had committed to the same sort of treatment that weed supervisors  
15 would apply to other landowners.<sup>195</sup> In other words, the list of recommendations that Ms. Gilbert  
16 cites was based on a misunderstanding of the standards at issue in this contested case, and after  
17 learning more about the applicable standards, ODA’s witness agreed that Idaho Power had  
18 adequately committed to work with county weed supervisors to address compliance with

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<sup>191</sup> Porter Testimony, Cross-Examination Hearing Day 7, January 21, 2022 (Tr. Day 7), page 33, line 24 – page 34, line 1.

<sup>192</sup> Porter Testimony, Cross-Examination Hearing Day 7, January 21, 2022 (Tr. Day 7), page 34, lines 3-16.

<sup>193</sup> Porter Testimony, Cross-Examination Hearing Day 7, January 21, 2022 (Tr. Day 7), page 82, lines 3-17.

<sup>194</sup> Porter Testimony, Cross-Examination Hearing Day 7, January 21, 2022 (Tr. Day 7), page 84, line 2 – page 85, line 7.

<sup>195</sup> Porter Testimony, Cross-Examination Hearing Day 7, January 21, 2022 (Tr. Day 7), page 85, lines 15-23.

1 ORS Chapter 569—in addition to the Company’s obligation to address Project-related noxious  
2 weeds for EFSC purposes.

3           Importantly, the county weed supervisors did not resubmit these concerns in DPO  
4 Comments, and no weed supervisor filed a Petition for Party Status to raise these concerns in the  
5 contested case. However, if the weed supervisors still have concerns regarding Idaho Power’s  
6 Noxious Weed Plan, they will have an additional opportunity to provide feedback on Idaho  
7 Power’s plan when the Company finalizes its Noxious Weed Plan. As discussed above, the agency  
8 review process for the final Noxious Weed Plan will require coordination with all appropriate local  
9 agencies, including the local weed supervisors for the counties where Project components are  
10 located.<sup>196</sup> If the weed supervisors have any remaining concerns, Idaho Power will have to address  
11 those concerns through the agency review process.

12           Ms. Gilbert also references a statement from ODA’s witness, Mr. Porter, who stated that,  
13 when a landowner sells their property, “[w]ithout some formal agreement with the new landowner,  
14 they would not have responsibility for those weeds[.]”<sup>197</sup> Mr. Porter made this statement during  
15 the hearing, and Idaho Power addressed Ms. Gilbert’s reliance on that testimony in the Company’s  
16 Response Brief,<sup>198</sup> where the Company explained that Ms. Gilbert’s argument is not relevant to  
17 the validity of the Company’s Noxious Weed Plan for two reasons. First, Mr. Porter’s testimony  
18 was based on applying ORS 569.390, which is not an applicable statute for EFSC’s review of  
19 Idaho Power’s ASC. Second, Idaho Power does not intend to purchase land from impacted

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<sup>196</sup> Proposed Order, Attachment P1-5 (ODOE - B2HAPPDoc2 Proposed Order on ASC and Attachments 2019-07-02. Page 9307 of 10016).

<sup>197</sup> Irene Gilbert Exceptions for FW-3 at 7.

<sup>198</sup> Idaho Power’s Response Brief and Motion to Strike for Contested Case Issues FW-3, FW-5, FW-6, FW-7, and FW-9 at 35-36.

1 landowners along the Project route. Rather, Idaho Power intends to secure an easement granting  
2 them rights to access and use a right-of-way across individuals' property;<sup>199</sup> the landowners will  
3 still own the land. Under ORS 569.390, both owners and occupants of land are responsible to  
4 control weeds, and for that reason the landowners will still have noxious weed control obligations.  
5 Ms. Gilbert's reliance on Mr. Porter's testimony is misplaced for the same reason. Ms. Gilbert  
6 asked Mr. Porter specifically about obligations to continue to control noxious weeds after *selling*  
7 the property in question.<sup>200</sup> Mr. Porter did not suggest that a landowner's weed-control  
8 responsibilities would cease after another party secures a right to use a portion of the property in  
9 question.

10 For these reasons, Ms. Gilbert's exception has not identified any error in the Hearing  
11 Officer's findings of fact and Idaho Power requests that the Council adopt without modification  
12 the Hearing Officer's findings of fact and conclusions of law relevant to FW-3.

13 **8. Irene Gilbert, Issue FW-3, Exception 8 (Gilbert's "Fact Number Seven")**

14 Ms. Gilbert next cites ORS 569.180<sup>201</sup> and argues that the "Oregon Legislature has  
15 recognized the destruction caused by a lack of control of noxious weeds and implemented laws  
16 requiring they be controlled and if possible eradicated due to the damages they cause to natural  
17 resources, watersheds, agriculture, etc."<sup>202</sup> As an initial matter, Ms. Gilbert's arguments are not

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<sup>199</sup> See Proposed Order at 159 (ODOE - B2HAPPDoc2 Proposed Order on ASC and Attachments 2019-07-02. Page 166 of 10016) (explaining that the Company intends to secure easements).

<sup>200</sup> Porter Testimony, Cross-Examination Hearing Day 7, January 21, 2022 (Tr. Day 7), page 67, line 4 – page 68, line 1.

<sup>201</sup> "In recognition of the imminent and continuous threat to natural resources, watershed health, livestock, wildlife, land and agricultural products of this state, and in recognition of the widespread infestations and potential infestations of noxious weeds throughout this state, noxious weeds are declared to be a public nuisance and shall be detected, controlled and, where feasible, eradicated on all lands in this state. It is declared to be the policy of this state that priority shall be given first to the prevention of new infestations of noxious weeds and then to the control and, where feasible, eradication of noxious weeds in infested areas."

<sup>202</sup> Irene Gilbert Exceptions for FW-3 at 7-8.

1 tied to any specific exceptions to the Proposed Contested Case Order as required by  
2 OAR 345-015-0085(5), and her claims should therefore be rejected.<sup>203</sup> Nevertheless, should the  
3 Council wish to consider Ms. Gilbert’s arguments, Idaho Power addresses her assertion below.

4 This assertion is entirely irrelevant to resolution of FW-3. The existence of the potential  
5 threat of noxious weeds is not at issue in this contested case—Idaho Power has acknowledged this  
6 threat, and takes seriously the need to address noxious weed infestations that may result from the  
7 construction and operation of the Project. However, the Noxious Weed Plan is intended to address  
8 EFSC’s specific standards. The Company does not dispute that uncontrolled noxious weeds may  
9 be destructive; however, Idaho Power’s Noxious Weed Plan details the actions the Company will  
10 take to control noxious weeds and thereby avoid those harms. Ms. Gilbert’s irrelevant exception  
11 has not identified any error in the Hearing Officer’s findings of fact and Idaho Power requests that  
12 the Council adopt without modification the Hearing Officer’s findings of fact and conclusions of  
13 law relevant to FW-3.

14 **9. Irene Gilbert, Issue FW-3, Exception 9 (Gilbert’s “Fact Number Nine”)**

15 Ms. Gilbert next argues the “[administrative record] file contains sworn statements by the  
16 Oregon Department of Agriculture Noxious Weed managers that Noxious Weeds can appear and  
17 reappear and there is not a point in time when monitoring and control can stop if weeds are to be  
18 controlled on an ongoing basis for the life of the project.”<sup>204</sup> Ms. Gilbert cites comments on the  
19 amended preliminary ASC from ODFW and testimony filed from Mr. Mark Darrach to support

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<sup>203</sup> OAR 345-015-0085(5) (“In an exception, the party shall specifically identify the finding of fact, conclusion of law or, in contested case proceedings on an application for a site certificate or a proposed site certificate amendment, recommended site certificate condition to which the party excepts and shall state the basis for the exception.”).

<sup>204</sup> Irene Gilbert Exceptions for FW-3 at 9.

1 her assertion that Idaho Power must monitor for the life of the Project to ensure that noxious weeds  
2 are not reintroduced after Idaho Power revegetates the site.<sup>205</sup>

3 Ms. Gilbert raised this issue when cross-examining Idaho Power’s noxious weed expert,  
4 Ms. Taylor,<sup>206</sup> and Ms. Taylor addressed this assertion about noxious weeds reappearing in her  
5 redirect testimony.<sup>207</sup> As Ms. Taylor explained, Idaho Power will monitor any disturbed site for  
6 “as long as necessary” to ensure that the Company’s revegetation efforts are successful.<sup>208</sup> Once  
7 a site has been successfully revegetated with native plants, it can reasonably be assumed that those  
8 native plants will outcompete noxious weeds related to the Project.<sup>209</sup> Ms. Taylor further testified  
9 that, because Idaho Power may still monitor for noxious weeds in areas where weed control has  
10 been successful, if deemed appropriate based on site specific circumstances, the Company will be  
11 able to identify and control noxious weeds that may result from seeds that laid dormant in the  
12 soil.<sup>210</sup> If a noxious weed appears *after* Idaho Power has successfully revegetated a site, that  
13 noxious weed would be “introduced” from another source, so Ms. Gilbert’s characterization of  
14 those noxious weeds as “reappearing” would not be accurate.<sup>211</sup> Because those noxious weeds are  
15 introduced by another source, they are not Project-related; therefore, Idaho Power need not  
16 demonstrate control of those noxious weeds for the purpose of complying with any applicable  
17 EFSC standard. Idaho Power may have some obligation to address those infestations under  
18 ORS Chapter 569, but those obligations would be enforced outside the EFSC process.<sup>212</sup> That

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<sup>205</sup> Irene Gilbert Exceptions for FW-3 at 9.  
<sup>206</sup> Taylor Testimony, Cross-Examination Hearing Day 4, January 14, 2022 (Tr. Day 4), page 31, lines 16-24.  
<sup>207</sup> Taylor Testimony, Cross-Examination Hearing Day 4, January 14, 2022 (Tr. Day 4), page 93, line 11 – page 96, line 11.  
<sup>208</sup> Taylor Testimony, Cross-Examination Hearing Day 4, January 14, 2022 (Tr. Day 4), page 96, lines 6-11.  
<sup>209</sup> Idaho Power / Sur-Sur-Rebuttal Testimony of Jessica Taylor (Jan. 5, 2021) / Issues FW-3 and FW-6, p. 8 of 20.  
<sup>210</sup> Idaho Power / Sur-Sur-Rebuttal Testimony of Jessica Taylor / Issues FW-3 and FW-6, p. 9 of 20.  
<sup>211</sup> Taylor Testimony, Cross-Examination Hearing Day 4, January 14, 2022 (Tr. Day 4), page 94, lines 5-14.  
<sup>212</sup> Idaho Power’s Closing Arguments for Contested Case Issues FW-3, FW-5, FW-6, and FW-7 at 11-16.

1 being said, Ms. Taylor explained that Idaho Power will take actions to minimize the introduction  
2 of noxious weeds from other sources, like placing gates on Project roads to access to the site.<sup>213</sup>

3 Finally, as explained in response to Irene Gilbert, Issue FW-3, Exception 6(d), Idaho Power  
4 will create a site-specific long-term monitoring plan for each noxious weed infestation, but the  
5 limited parties' proposal to require lifetime monitoring for the entire Project site is overbroad for  
6 the purpose of compliance with EFSC standards and would be unduly burdensome.

7 For these reasons, Ms. Gilbert's exception has not identified any error in the Hearing  
8 Officer's findings of fact and Idaho Power requests that the Council adopt without modification  
9 the Hearing Officer's findings and conclusions of law relevant to FW-3.

10 **10. Irene Gilbert, Issue FW-3, Exception 10 (Gilbert's "Fact Number Ten")**

11 Ms. Gilbert asserts that Idaho Power "states there are no statutes or rules which extend a  
12 developer's responsibility for controlling noxious weeds to areas where there have not been soil  
13 disturbance resulting from the development."<sup>214</sup> As an initial matter, Ms. Gilbert's arguments are  
14 not tied to any specific exceptions to the Proposed Contested Case Order as required by  
15 OAR 345-015-0085(5), and her claims should therefore be rejected.<sup>215</sup> Nevertheless, should the  
16 Council wish to consider Ms. Gilbert's arguments, Idaho Power addresses her assertion below.  
17 First, Ms. Gilbert's exception misstates the record in this case. Idaho Power said that no *EFSC*  
18 *siting standard* requires the Company to address noxious weeds other than those resulting from  
19 the Project, and Project-related weeds will occur only where the construction or operation of the

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<sup>213</sup> Taylor Testimony, Cross-Examination Hearing Day 4, January 14, 2022 (Tr. Day 4), page 37, lines 13-24.

<sup>214</sup> Irene Gilbert Exceptions for FW-3 at 10-11.

<sup>215</sup> OAR 345-015-0085(5) ("In an exception, the party shall specifically identify the finding of fact, conclusion of law or, in contested case proceedings on an application for a site certificate or a proposed site certificate amendment, recommended site certificate condition to which the party excepts and shall state the basis for the exception.").



1 Project results in ground disturbances.<sup>216</sup> Ms. Gilbert cites testimony from ODFW witness Sarah  
2 Reif, where Ms. Reif commented that weed management should occur on the “[right-of-way],  
3 easements, reclaimed areas, permanently disturbed area, etc.”<sup>217</sup> However, as Idaho Power  
4 explained in the Company’s Closing Arguments, for EFSC purposes, an applicant is required to  
5 control only the noxious weeds resulting from the proposed energy facility.<sup>218</sup> There may be  
6 noxious weeds within the site boundary but outside the disturbed areas that did not result from the  
7 Project and will not be affected by the Company’s surface-disturbing activities. As a result, those  
8 noxious weeds are not related to the Project and the Company is not required to demonstrate that  
9 it will control those noxious weeds in order to comply with any EFSC standard. Moreover, as  
10 ODOE explained in its Closing Brief, all areas where Idaho Power proposes to construct the Project  
11 will be surveyed, treated, and monitored in accordance with the Noxious Weed Plan.<sup>219</sup> This will  
12 be adequate to ensure that the Company controls all Project-related noxious weeds. For this  
13 reason, Ms. Gilbert’s exception has not identified any error in the Hearing Officer’s findings of  
14 fact or conclusions of law, and Idaho Power requests that the Council adopt without modification  
15 the Hearing Officer’s findings of fact and conclusions of law relevant to FW-3.

16 **11. Irene Gilbert, Issue FW-3, Exception 11 (Gilbert “Fact Number Eleven”)**

17 Ms. Gilbert takes exception to the following finding of fact in the Proposed Contested Case  
18 Order summarizing ODOE’s description in the Proposed Order of the Noxious Weed Plan:

19 27. In the Proposed Order, the Department described the components of the  
20 Noxious Weed Plan and found, in pertinent part, as follows:

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<sup>216</sup> Idaho Power / Rebuttal Testimony of Jessica Taylor / Issues FW-3, FW-6 and LU-11 / Exhibit B, Updated Draft Noxious Weed Plan, p. 28 of 53.

<sup>217</sup> B2HAppDoc8-18 ApASCRewiewing AgencyComment ODFW\_Reif 2018-02-27. Page 7 of 18 Column 3.

<sup>218</sup> Idaho Power’s Closing Arguments for Contested Case Issues FW-3, FW-5, FW-6, and FW-7 at 34.

<sup>219</sup> ODOE Closing Brief at 17.

1 \* \* \* \* \*

2 The plan also addresses ORS Chapter 569, which imposes certain  
3 obligations onto occupiers of land within a weed district. To address  
4 those obligations, the plan requires that the applicant work with  
5 landowners or land management agencies to identify and address  
6 weed infestations within the site boundary. Council cannot require  
7 the applicant to control weeds outside of the site boundary, either  
8 under its standards or ORS Chapter 569, because Council’s  
9 jurisdiction covers the “site” of the proposed facility. However,  
10 landowner consultation would be an ongoing mitigation process  
11 under the Agricultural Mitigation Plan, Revegetation Plan and  
12 Noxious Weed Plan, where adequate opportunities to evaluate  
13 potential offsite impacts could be discussed – additionally, county  
14 weed districts have funding and the authority to support landowners  
15 with recommendations and implementation of control measures.<sup>220</sup>

16 Ms. Gilbert argues that this finding is “unsupported” and incorrectly concludes that “the  
17 developer is only responsible for noxious weeds located at the site and/or that responsibility is  
18 limited to areas on the site where ground disturbance occurs[.]”<sup>221</sup> Ms. Gilbert further argues  
19 “[t]he minimum area the developer is responsible for managing and controlling noxious weeds is  
20 the entire site.”<sup>222</sup> To support this assertion, Ms. Gilbert cites the following excerpt from the  
21 Second Amended Project Order:

22 If significant impacts associated with the applicable Council standards could occur  
23 beyond the analysis areas described here, then the applicant must assess those  
24 impacts in the application for a site certificate and show how the facility would  
25 comply with the applicable standard with regard to the larger area where impacts  
26 could occur. For all potential impacts, the analysis area includes all the area within  
27 the site boundary, as defined in OAR 345-001-0010(55).<sup>223</sup>

28 As an initial matter, the language that Ms. Gilbert challenges is a quotation from the  
29 Proposed Order, not the factual finding in the Proposed Contested Case Order. Unless Ms. Gilbert

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<sup>220</sup> Proposed Contested Case Order at 45-46 (quoting Proposed Order at 324-25).

<sup>221</sup> Irene Gilbert Exceptions for FW-3 at 11-12.

<sup>222</sup> Irene Gilbert Exceptions for FW-3 at 11-12.

<sup>223</sup> Second Amended Project Order at 24 (July 26, 2018).

1 shows that the Hearing Officer misquoted that order, there can be no basis for disputing the  
2 Hearing Officer’s finding.

3           Moreover, Idaho Power addressed Ms. Gilbert’s argument in the Company’s Response  
4 Brief, where the Company explained that, for purposes of demonstrating compliance with any  
5 siting standard, it was not necessary for the Council to adopt Ms. Gilbert’s proposed site certificate  
6 condition that would have required Idaho Power to implement weed control measures for the entire  
7 site.<sup>224</sup> EFSC’s Fish and Wildlife Habitat Standard requires Idaho Power to address all  
8 Project-related weed infestations, and those infestations will occur in areas where construction of  
9 the Project disturbs the surface and thereby creates an opportunity for the introduction of noxious  
10 weeds.<sup>225</sup> Preexisting noxious weeds and noxious weeds introduced in areas that are unaffected  
11 by construction and operation of the Project do not result from the Project, and therefore no EFSC  
12 standard requires Idaho Power to control those noxious weed infestations.<sup>226</sup> For that reason,  
13 Ms. Gilbert’s assertion that the Company must control noxious weeds in areas that are within the  
14 site boundary, but are not affected by the construction or operation of the Project, is not  
15 necessitated by any Council standard.

16           Additionally, Ms. Gilbert’s reliance on the Second Amended Project Order conflates the  
17 issue. The analysis area for impacts may extend to the entire site, but Idaho Power’s obligations  
18 to treat and monitor noxious weeds need not extend to the entire site because impacts will occur  
19 only in the work sites where construction of the Project will result in soil disturbances. Weeds

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<sup>224</sup> Idaho Power’s Response Brief and Motion to Strike for Contested Case Issues FW-3, FW-5, FW-6, FW-7, and FW-9 at 46.

<sup>225</sup> Idaho Power / Rebuttal Testimony of Jessica Taylor / Issues FW-3, FW-6, and LU-11, p. 15 of 106.

<sup>226</sup> Idaho Power’s Closing Arguments for Contested Case Issues FW-3, FW-5, FW-6, and FW-7 at 7-8.

1 occurring outside the work sites will not result from the Project, and therefore Idaho Power is not  
2 required to control those weeds in order to comply with any applicable Council standard.

3 For these reasons, Ms. Gilbert’s exception has not identified any error in the Hearing  
4 Officer’s findings of fact, and Idaho Power requests that the Council adopt without modification  
5 the Hearing Officer’s findings of fact and conclusions of law relevant to FW-3.

6 **12. Irene Gilbert, Issue FW-3, Exception 12 (Gilbert “Fact Number Twelve”)**

7 Ms. Gilbert argues “[a]bsent compliance with Oregon Weed Control Laws, the developer  
8 cannot document compliance with multiple Statutes and Rules listed in the Project Order due to  
9 the fact that under the currently proposed Draft Noxious Weed Plan noxious weeds from the  
10 development will be allowed to spread from the site and impact the standards.”<sup>227</sup> Ms. Gilbert  
11 asserts that noncompliance with ORS 569.390, ORS 569.400, or ORS 569.445 will prevent Idaho  
12 Power from demonstrating compliance with ORS 469.401(2), EFSC’s General Standard of  
13 Review, the Land Use Standard, and the Protected Areas Standard.

14 As an initial matter, Ms. Gilbert’s arguments are not tied to any specific exceptions to the  
15 Proposed Contested Case Order as required by OAR 345-015-0085(5), and her claims should  
16 therefore be rejected.<sup>228</sup> Nevertheless, should the Council wish to consider Ms. Gilbert’s  
17 arguments, Idaho Power addresses her assertion below. To the extent Ms. Gilbert alleges  
18 noncompliance with any statute or rule other than ORS 569.390, ORS 569.400, or ORS 569.445,  
19 those arguments are outside the scope of FW-3, and therefore not relevant to resolution of that

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<sup>227</sup> Irene Gilbert Exceptions for FW-3 at 13-17.

<sup>228</sup> OAR 345-015-0085(5) (“In an exception, the party shall specifically identify the finding of fact, conclusion of law or, in contested case proceedings on an application for a site certificate or a proposed site certificate amendment, recommended site certificate condition to which the party excepts and shall state the basis for the exception.”).

1 issue. However, to the extent the Council nonetheless considers Ms. Gilbert’s arguments, Idaho  
2 Power provides the following response.

3 a. *ORS 469.401*

4 ORS 469.401(2) requires:

5 The site certificate or amended site certificate shall contain conditions for the  
6 protection of the public health and safety, for the time for completion of  
7 construction, **and to ensure compliance with the standards, statutes and rules**  
8 **described in ORS 469.501 and 469.503. The site certificate or amended site**  
9 **certificate shall require both parties to abide by local ordinances and state law**  
10 **and the rules of the council in effect on the date the site certificate or amended**  
11 **site certificate is executed**, except that upon a clear showing of a significant threat  
12 to the public health, safety or the environment that requires application of later-  
13 adopted laws or rules, the council may require compliance with such later-adopted  
14 laws or rules. For a permit addressed in the site certificate or amended site  
15 certificate, the site certificate or amended site certificate shall provide for facility  
16 compliance with applicable state and federal laws adopted in the future to the extent  
17 that such compliance is required under the respective state agency statutes and  
18 rules. [emphasis in Ms. Gilbert’s exception].

19 Ms. Gilbert interprets ORS 469.401(2) to require the site certificate “comply with  
20 additional construction and operation related regulations that may apply to the proposed facility  
21 that per ORS 469.401(4), may not be covered.”<sup>229</sup> Idaho Power addressed Ms. Gilbert’s erroneous  
22 interpretation of ORS 469.401 in the Company’s Response Brief, where the Company explained  
23 that ORS 469.401(2) does not require Idaho Power to demonstrate compliance with the weed  
24 control statutes in ORS Chapter 569.<sup>230</sup> To determine the intent behind a statute, the first step is  
25 to examine the text and context.<sup>231</sup> The first sentence in ORS 469.401(2) plainly identifies the  
26 scope of the standards, statutes, and rules that must be specifically addressed in the site certificate

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<sup>229</sup> Irene Gilbert Exceptions for FW-3 at 14.

<sup>230</sup> Idaho Power’s Response Brief and Motion to Strike for Contested Case Issues FW-3, FW-5, FW-6, FW-7, and FW-9 at 11-13.

<sup>231</sup> See *Vasquez v. Double Press MFG., Inc.*, 364 Or 609, 615-16 (2019).

1 conditions as those “described in ORS 469.501 and 469.503.”<sup>232</sup> ORS Chapter 569 is not  
2 described in ORS 469.501 or ORS 469.503. Therefore, the text of ORS 469.401(2), ORS 469.501,  
3 and ORS 469.503 does not indicate any legislative intent to necessarily require analysis or  
4 conditions addressing compliance with ORS Chapter 569.<sup>233</sup>

5 Moreover, while ORS 469.503(3) suggests that the Council may identify in a project order  
6 additional statutes that an applicant must address beyond those specifically described in  
7 ORS 469.501 and ORS 469.503,<sup>234</sup> in this instance, the Council did not include ORS Chapter 569  
8 in the B2H Project Order.<sup>235</sup> Because ORS Chapter 569 is not included in the Project Order for  
9 B2H, Idaho Power is not required under ORS 469.503(3) to demonstrate compliance with those  
10 statutes in order to obtain a site certificate. ODOE agrees with Idaho Power’s position on this  
11 interpretation.<sup>236</sup>

12 Ms. Gilbert relies on the second sentence of ORS 469.401(2) to support her position, but  
13 as Idaho Power explained in its Response Brief,<sup>237</sup> that sentence, which requires site certificate  
14 conditions ensuring that an applicant abides by state laws in effect on the date of the site certificate,  
15 *does not* require the Council to analyze and include conditions addressing compliance with  
16 ORS Chapter 569. Rather, the text requires that the Council address whether the facility will need

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<sup>232</sup> ORS 469.401(2).

<sup>233</sup> See *State v. Gaines*, 346 Or 160, 171 (2009) (“[T]here is no more persuasive evidence of the intent of the legislature than the words by which the legislature undertook to give expression to its wishes.” (citation and internal quotation marks omitted.)); see also *Kinzua Res., LLC v. Or. Dep’t of Envi’l Quality*, 366 Or 674, 680 (2020) (“When applying our framework for construing a statute, the ‘paramount goal’ is to discern the intention of the legislature. In pursuing that goal, we give primary weight to the text and context of the disputed statutory terms.”) (internal citations omitted)).

<sup>234</sup> ORS 469.503(3).

<sup>235</sup> Second Amended Project Order at 22 (July 26, 2018) (ODOE - B2HAPPDoc15 ApASC Second Amended Project Order 2018-07-26. Page 24 of 29).

<sup>236</sup> ODOE Closing Brief at 14-15 (“The ODA weed statutes are not included in the Project Order (Second Amended Project Order) as applicable statutes for which the applicant must demonstrate compliance for the EFSC review.”).

<sup>237</sup> Idaho Power’s Response Brief and Motion to Strike for Contested Case Issues FW-3, FW-5, FW-6, FW-7, and FW-9 at 13-14.

1 to comply with the ordinances and laws in existence at the time of the site certificate, or later-  
2 adopted rules and laws. For these reasons, Ms. Gilbert’s assertion that ORS 469.401(2) requires  
3 an applicant to demonstrate compliance with ORS Chapter 569 is an incorrect interpretation of  
4 that statute.

5 *b. General Standard of Review (OAR 345-022-0000(1)(b))*

6 OAR 345-022-0000(1)(b) reads:

7 Except as provided in OAR 345-022-0030 for land use compliance and except for  
8 those statutes and rules for which the decision on compliance has been delegated  
9 by the federal government to a state agency other than the Council, the facility  
10 complies with all other Oregon statutes and administrative rules identified in the  
11 project order, as amended, as applicable to the issuance of a site certificate for the  
12 proposed facility. **If the Council finds that applicable Oregon statutes and rules,  
13 other than those involving federally delegated programs, would impose  
14 conflicting requirements, the Council shall resolve the conflict consistent with  
15 the public interest. In resolving the conflict, the Council cannot waive any  
16 applicable state statute.** [emphasis in Ms. Gilbert’s exception].

17 Ms. Gilbert relies on the final two sentences of EFSC’s General Standard of Review to  
18 argue that “to comply with state law requiring them to monitor and manage invasive weeds at the  
19 site of the development to assure none go to seed and impact areas and rules outside the site of the  
20 development, or other mitigation must be required and implemented to address the impacts of  
21 noxious weed spread from the site to areas outside the site and mitigate for impacts they create  
22 regarding other standards they impact.”<sup>238</sup> However, Ms. Gilbert’s argument appears to be based  
23 on an assumption that Idaho Power can prevent noxious weed impacts only by complying with  
24 ORS 569.390. Idaho Power has provided substantial evidence to demonstrate that the Noxious  
25 Weed Plan is adequate to address Project-related noxious weed infestations, and therefore  
26 demonstrates compliance with EFSC’s standards.

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<sup>238</sup> Irene Gilbert Exceptions for FW-3 at 16.

1           While it is not very clear why Ms. Gilbert emphasized the language in  
2 OAR 345-022-0000(1)(b) relating to conflicting requirements, Ms. Gilbert has not identified any  
3 basis to conclude that this language requires compliance with ORS Chapter 569. To the extent  
4 Ms. Gilbert suggests there is a conflict between EFSC’s standards and ORS Chapter 569,  
5 Ms. Gilbert is incorrect; Idaho Power acknowledges that *both* ORS Chapter 569 and the Council’s  
6 standards apply to lands within the site. However, the Council does not enforce ORS Chapter 569,  
7 and therefore Idaho Power is not required to demonstrate compliance with those statutes in order  
8 to obtain a site certificate.

9                   *c.       Land Use Standard (OAR 345-022-0030)*

10           Ms. Gilbert asserts that the Land Conservation and Development Commission (“LCDC”)  
11 “requires identification of areas where the development of the facility will impact the environment  
12 and economy.”<sup>239</sup> Ms. Gilbert argues that, absent compliance with ORS Chapter 569, the Project  
13 will negatively impact agricultural lands and therefore “the survey area for impacts must be  
14 extended to include the area of seed dispersal and additional mitigation must be required to address  
15 this problem.”<sup>240</sup> Ms. Gilbert cites several exhibits in the record to support her position that  
16 uncontrolled noxious weeds negatively impact agricultural and forest lands.<sup>241</sup>

17           Ms. Gilbert’s argument is unpersuasive because Idaho Power agrees that the Company will  
18 address noxious weeds that result from the Project, and thereby will address any environmental or  
19 economic impacts to agricultural lands that would result from those noxious weeds. Moreover,  
20 Idaho Power assessed potential impacts to accepted farm and forest practices resulting from

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<sup>239</sup> Irene Gilbert Exceptions for FW-3 at 16.

<sup>240</sup> Irene Gilbert Exceptions for FW-3 at 16.

<sup>241</sup> Irene Gilbert Exceptions for FW-3 at 18-19.



1 noxious weeds in the Company’s Agricultural Lands Assessment,<sup>242</sup> and Ms. Gilbert has not  
2 identified any basis to conclude that actions required under the Agricultural Lands Assessment  
3 will be inadequate to address these impacts. Ms. Gilbert argues that the Company must go further  
4 and address infestations unrelated to the Project in order to comply with ORS 569.390,  
5 ORS 569.400, and ORS 569.445. However, there is no basis to conclude that the Land Use  
6 Standard requires an applicant to do so.

7           *d. The Protected Areas Standard (OAR 345-022-0040); the Fish and Wildlife*  
8           *Habitat Standard (OAR 345-022-0060); and the Public Services Standard*  
9           *(OAR 345-022-0100)*

10           Ms. Gilbert next argues that noxious weeds could result in impacts that would violate the  
11 Protected Areas Standard, Fish and Wildlife Habitat Standard, and the Public Services Standard.<sup>243</sup>  
12 However, Ms. Gilbert’s assertion regarding compliance with those siting standards is not relevant  
13 to compliance with ORS 569.390, ORS 569.400, or ORS 569.445, and therefore is outside the  
14 scope of FW-3. The harm associated with noxious weeds is not at issue in this contested case.  
15 Moreover, Ms. Gilbert’s assertion is based on an assumption that Idaho Power will fail to control  
16 noxious weed infestations; however, Idaho Power has promulgated its Noxious Weed Plan  
17 specifically to detail the actions the Company will take to ensure that noxious weeds resulting from  
18 the Project are controlled and thereby do *not* result in the hypothetical impacts that Ms. Gilbert  
19 raises.

20           For these reasons, Ms. Gilbert’s exception has not identified any error in the Hearing  
21 Officer’s findings of fact or conclusions of law, and Idaho Power requests that the Council adopt

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<sup>242</sup> Proposed Order, Attachment K-1: Agricultural Lands Assessment at 23 (ODOE - B2HAPPDoc2 Proposed Order on ASC and Attachments 2019-07-02. Page 8904 of 10016).

<sup>243</sup> Irene Gilbert Exceptions for FW-3 at 18-21.

1 without modification the Hearing Officer’s findings of fact and conclusions of law relevant to  
2 FW-3.

3 **13. Irene Gilbert, Issue FW-3, Exception 13**

4 Irene Gilbert takes exception to “Material in Items 22 through 32 on pages 43 through 47”  
5 on the basis that those findings “are devoted to reiterating Idaho Power’s arguments and  
6 statements, and quotes from the Oregon Department of Energy Proposed Order which state that  
7 Idaho Power and the Oregon Department of [Energy] agree, but again, there is no documentation  
8 meeting the requirement that the developer document with a ‘preponderance of evidence in the  
9 file’ that they comply with the standards.”<sup>244</sup> As an initial matter, Ms. Gilbert’s broad challenge  
10 to 11 findings of fact does not “specifically identify the finding of fact, conclusion of law or . . .  
11 recommended site certificate condition” to which she excepts, as required by  
12 OAR 345-015-0085(5), and her claims should therefore be rejected.<sup>245</sup> Nevertheless, should the  
13 Council wish to consider Ms. Gilbert’s arguments, Idaho Power addresses her assertion below.

14 Ms. Gilbert’s assertion that Idaho Power has failed to prove noncompliance with any  
15 applicable standard is incorrect. As discussed above in response to Irene Gilbert, Issue FW-3,  
16 Exception 2, Idaho Power has provided substantial evidence demonstrating compliance with the  
17 Council’s standards in the ASC and in the record of this contested case. Ms. Gilbert’s assertion  
18 that Idaho Power’s evidence lacks “documentation” is inconsistent with the extensive record in  
19 this contested case.

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<sup>244</sup> Irene Gilbert Exceptions for FW-3 at 22.

<sup>245</sup> OAR 345-015-0085(5) (“In an exception, the party shall specifically identify the finding of fact, conclusion of law or, in contested case proceedings on an application for a site certificate or a proposed site certificate amendment, recommended site certificate condition to which the party excepts and shall state the basis for the exception.”).

1 For these reasons, Ms. Gilbert’s exception has not identified any error in the Hearing  
2 Officer’s findings of fact, and Idaho Power requests that the Council adopt without modification  
3 the Hearing Officer’s findings of fact and conclusions of law relevant to FW-3.

4 **14. Irene Gilbert, Issue FW-3, Exception 14**

5 Ms. Gilbert repeats her assertions that Idaho Power “will be the one creating the Noxious  
6 [Weed] Plan” and the final Noxious Weed Plan “will not be developed until after a site certificate  
7 is issued resulting in no opportunity for public review to determine if the conditions comply with  
8 Oregon statutes and rules.”<sup>246</sup> As explained above in response to Irene Gilbert, Issue FW-3,  
9 Exception 3, Recommended Fish and Wildlife Condition 3(a) in tandem with the agency review  
10 process satisfies all the requirements of OAR 345-025-0016 and for that reason Ms. Gilbert’s  
11 assertion has not identified any error in the Hearing Officer’s conclusions of law. Idaho Power  
12 therefore requests that the Council adopt without modification the Hearing Officer’s findings of  
13 fact and conclusions of law relevant to FW-3.

14 **15. Irene Gilbert, Issue FW-3, Exception 15**

15 Ms. Gilbert reiterates her concern that “failing to comply with Oregon Statutes and ODOE  
16 rules requiring compliance with state law the developer is failing to comply with multiple council  
17 rules were noxious weeds will result in a failure to comply with those rules.”<sup>247</sup> As an initial  
18 matter, Ms. Gilbert’s arguments are not tied to any specific exceptions to the Proposed Contested  
19 Case Order as required by OAR 345-015-0085(5), and her claims should therefore be rejected.<sup>248</sup>

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<sup>246</sup> Irene Gilbert Exceptions for FW-3 at 23.

<sup>247</sup> Irene Gilbert Exceptions for FW-3 at 23.

<sup>248</sup> OAR 345-015-0085(5) (“In an exception, the party shall specifically identify the finding of fact, conclusion of law or, in contested case proceedings on an application for a site certificate or a proposed site certificate amendment, recommended site certificate condition to which the party excepts and shall state the basis for the exception.”).

1 Nevertheless, should the Council wish to consider Ms. Gilbert’s arguments, Idaho Power addresses  
2 her assertion below.

3 Ms. Gilbert’s assertion is incorrect because Idaho Power acknowledges that  
4 ORS Chapter 569 may place additional obligations on the Company, and therefore the Company  
5 will not “fail to comply” with those statutes.<sup>249</sup> The Company will be bound by ORS Chapter 569,  
6 but those obligations will be enforced outside the EFSC process. Therefore, Ms. Gilbert’s  
7 exception has not identified any error in the Hearing Officer’s factual findings or legal conclusions,  
8 and Idaho Power requests that the Council adopt without modification the Hearing Officer’s  
9 findings of fact and conclusions of law relevant to FW-3.

10 **16. Irene Gilbert, Issue FW-3, Exception 16**

11 Ms. Gilbert takes exception to the following conclusion of law that no Council standard  
12 requires an applicant to control pre-existing noxious weed infestations:

13 *Responsibility for pre-existing weed infestations.* Both Ms. Gilbert and Ms. Geer  
14 argue that Idaho Power bears responsibility for weed control throughout the site  
15 boundary (and not just the ROWs) and that the Council must impose conditions to  
16 ensure that noxious weeds are not allowed to go to seed for the life of the  
17 development. However, the siting standards only require that Idaho Power address  
18 noxious weed infestations resulting from the project and that the Company prevent  
19 or mitigate those project-related adverse impacts. There is no Council rule that  
20 requires Idaho Power to demonstrate that it will eradicate preexisting noxious  
21 weeds that are not the result of ground disturbance associated with project  
22 construction. ORS Chapter 569 may impose additional obligations on Idaho Power  
23 as a landowner or occupant to control non-project-related noxious weed  
24 infestations, but as noted above, those obligations are independent from and not a  
25 requirement of demonstrating compliance with the Council’s siting standards.<sup>250</sup>

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<sup>249</sup> Idaho Power / Rebuttal Testimony of Jessica Taylor / Issues FW-3, FW-6 and LU-11 / Exhibit B, Updated Draft Noxious Weed Plan, p. 11 of 53.

<sup>250</sup> Proposed Contested Case Order at 145.

1 Ms. Gilbert appears to interpret this conclusion as the Hearing Officer determining that the  
2 Company “is not responsible for weeds throughout the site boundary and that Idaho Power has no  
3 obligation to assure noxious weeds do not go to seed. It also states that there is no requirement for  
4 the developer to eradicate preexisting weeds that are not the result of ground disturbance associated  
5 with project construction.”<sup>251</sup> Ms. Gilbert argues that these “statements are not supported by facts,  
6 are not accurate and the file documents that they are not ‘facts’ since the file contains nothing to  
7 support them other than statements by the developer and their consultant.”<sup>252</sup> Ms. Gilbert takes  
8 the Hearing Officer’s conclusion out of context; the Hearing Officer did not state that Idaho Power  
9 is not responsible for preexisting noxious weeds. The Hearing Officer concluded that no EFSC  
10 siting standard requires Idaho Power to take those actions, but specifically states that  
11 ORS Chapter 569 may require the Company to do so. However, those obligations will be enforced  
12 outside the EFSC process.

13 As explained above in response to Irene Gilbert, Issue FW-3, Exception 6(a), the affected  
14 counties and county courts enforce ORS Chapter 569, not EFSC, and for that reason Ms. Gilbert’s  
15 assertion that Idaho Power must control these preexisting noxious weeds is not relevant to  
16 compliance with any EFSC standard. For that reason, Ms. Gilbert’s exception has not identified  
17 any error in the Hearing Officer’s conclusions of law relevant to controlling preexisting noxious  
18 weed infestations.

19 Moreover, Ms. Gilbert’s assertion that the evidentiary record does not support the Hearing  
20 Officer’s factual findings regarding control of noxious weeds as required to demonstrate  
21 compliance with the EFSC standards is false. Idaho Power filed substantial testimony, exhibits,

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<sup>251</sup> Irene Gilbert Exceptions for FW-3 at 23-24.

<sup>252</sup> Irene Gilbert Exceptions for FW-3 at 24.

1 and legal argument explaining that, for EFSC purposes, the Company is required to control only  
2 Project-related noxious weeds. Ms. Gilbert seeks to disregard this substantial evidence as merely  
3 “statements by the developer and their consultant,” but Idaho Power’s testimony, evidence, and  
4 briefing clearly support the Hearing Officer’s findings that the Company will control all Project-  
5 related noxious weeds.

6 For these reasons, Ms. Gilbert has not identified any error in the Hearing Officer’s legal  
7 conclusions and Idaho Power requests that the Council adopt without modification the Hearing  
8 Officer’s findings of fact and conclusions of law relevant to FW-3.

9 **17. Irene Gilbert, Issue FW-3, Exception 17**

10 Ms. Gilbert asserts that the Draft Noxious Weed Plan “allows actions which are prohibited  
11 by state law” based on her assertion that the plan “waives” compliance with ORS Chapter 569.<sup>253</sup>  
12 Idaho Power addressed this issue fully in its Response Brief,<sup>254</sup> where the Company explained that  
13 the limited parties misrepresent Idaho Power’s position. As discussed above, Idaho Power has  
14 repeatedly acknowledged that the Company, as an occupant of land, will be subject to  
15 ORS Chapter 569.<sup>255</sup> Idaho Power has merely stated that, pursuant to the plain text of  
16 ORS 469.401(2), ORS 469.501, and ORS 469.503, the Council does not need to assess, or provide  
17 conditions related to, ORS 569.390 in this EFSC proceeding.<sup>256</sup> Rather, ORS 569.400 clearly  
18 states that ORS 569.390, ORS 569.400, and ORS 569.445 will be enforced by the county courts

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<sup>253</sup> Irene Gilbert Exceptions for FW-3 at 24.  
<sup>254</sup> Idaho Power’s Response Brief and Motion to Strike for Contested Case Issues FW-3, FW-5, FW-6, FW-7, and FW-9 at 16-17.  
<sup>255</sup> See ODOE Closing Brief at 15 (“That does not mean the applicant does not need to comply with those statutes; indeed, the applicant acknowledges that ORS Chapter 569 applies to the proposed facility/applicant.”); Idaho Power / Rebuttal Testimony of Jessica Taylor / Exhibit B, Updated Draft Noxious Weed Plan (Nov. 12, 2021), p. 11 of 53 (“IPC recognizes Oregon Revised Statute (ORS) Chapter 569 imposes onto occupiers of land within a weed district certain obligations to control and prevent weeds[.]”).  
<sup>256</sup> ORS 569.400(1).

1 outside the EFSC site certificate process.<sup>257</sup> While not required under the EFSC rules, Idaho Power  
2 nonetheless has committed to work with the counties in good faith to ensure compliance with  
3 ORS Chapter 569.<sup>258</sup>

4 Ms. Gilbert also repeats her assertion that “requirement that the developer control noxious  
5 weeds is mandated not only by state statute, but also by council rules.”<sup>259</sup> As explained above,  
6 Idaho Power agrees that Council rules require the Company to control Project-related noxious  
7 weeds. However, no Council standard requires Idaho Power to demonstrate that it will control  
8 noxious weeds that are not related to the Project. Rather, the county courts will enforce any such  
9 obligation.<sup>260</sup>

10 For these reasons, Ms. Gilbert has not identified in her exception any error in the Hearing  
11 Officer’s conclusions of law, and Idaho Power requests that the Council adopt without  
12 modification the Hearing Officer’s findings of fact and conclusions of law relevant to FW-3.

13 **18. Irene Gilbert, Issue FW-3, Exception 18**

14 Ms. Gilbert takes exception to the following finding of fact in the Proposed Contested Case  
15 Order which summarize ODOE’s assessment of the Noxious Weed Plan in the Proposed Order:

16 27. In the Proposed Order, the Department described the components of the  
17 Noxious Weed Plan and found, in pertinent part, as follows:

18 . . . The plan also requires vehicle washing stations (wheel washing)  
19 in areas identified with noxious weeds, prior to and during  
20 construction. During construction and operation, the plan requires  
21 control and treatment measures. The final treatment methodologies  
22 would be developed based on state and country regulations;

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<sup>257</sup> ORS 569.400(1) (“If the owner or occupant of the land fails or refuses to immediately destroy or cut the noxious weeds in accordance with ORS 569.360 to 569.495, the weed inspector shall at once notify the county court. The county court shall at once take necessary steps for enforcement of ORS 569.360 to 569.495.”).

<sup>258</sup> Idaho Power / Sur-Sur-Rebuttal Testimony of Jessica Taylor / Issues FW-3 and FW-6, p. 15 of 20.

<sup>259</sup> Irene Gilbert Exceptions for FW-3 at 24.

<sup>260</sup> ORS 569.400(1).

1 applicable land use management requirements; consultation with  
2 land managers, county weed boards, and ODOE; and site-specific  
3 circumstances; to occur based on the pre-construction Agency  
4 Review Process incorporated by the Department consistent with  
5 OAR 345-025-0016. The Agency Review Process includes a dispute  
6 resolution process to ensure the final plan appropriately satisfies  
7 applicable regulatory requirements.

8 The plan requires agency consultation to establish frequency for  
9 long-term monitoring, which would be site-specific. In other words  
10 – there may be increased long-term monitoring frequency in  
11 disturbance areas with identified noxious weed infestations, and  
12 decreased monitoring frequency in disturbance areas without  
13 infestations. The plan also addresses ORS Chapter 569, which  
14 imposes certain obligations onto occupiers of land within a weed  
15 district. To address those obligations, the plan requires that the  
16 applicant work with landowners or land management agencies to  
17 identify and address weed infestations within the site boundary.  
18 Council cannot require the applicant to control weeds outside of the  
19 site boundary, either under its standards or ORS Chapter 569,  
20 because Council’s jurisdiction covers the “site” of the proposed  
21 facility. However, land owner consultation would be an ongoing  
22 mitigation process under the Agricultural Mitigation Plan,  
23 Revegetation Plan and Noxious Weed Plan, where adequate  
24 opportunities to evaluate potential offsite impacts could be  
25 discussed – additionally, county weed districts have funding and the  
26 authority to support landowners with recommendations and  
27 implementation of control measures.

28 \* \* \* At this time, other than presence of noxious weeds within the  
29 analysis area, no evidence has been provided on the record that  
30 questions the validity of the Noxious Weed Plan or the applicant’s  
31 ability to implement and adhere to the requirements of the plan.<sup>261</sup>

32 Ms. Gilbert challenges this factual finding on several bases. However, Ms. Gilbert  
33 challenges quotations from the Proposed Order, not the factual finding in the Proposed Contested  
34 Case Order. Unless Ms. Gilbert shows that the Hearing Officer misquoted that order, there can be  
35 no basis for disputing the Hearing Officer’s finding.

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<sup>261</sup> Proposed Contested Case Order at 45-46 (quoting Proposed Order at 324-25).



1           Moreover, after ODOE issued the Proposed Order, Idaho Power revised its Noxious Weed  
2 Plan in response to the limited parties’ concerns,<sup>262</sup> so the language in the Proposed Order does  
3 not relate to the Company’s most up-to-date draft. Because Ms. Gilbert challenges language in  
4 the Proposed Order, rather than a factual finding in the Hearing Officer’s Proposed Contested Case  
5 Order, Ms. Gilbert’s exception should be rejected. To the extent the Council still wishes to  
6 consider Ms. Gilbert’s assertions, Idaho Power offers the following response.

7           a.       *Vehicle Washing*

8           Ms. Gilbert challenges ODOE’s finding in the Proposed Order, which the Hearing Officer  
9 quotes in the Proposed Contested Case Order, that “[t]he plan also requires vehicle washing  
10 stations (wheel washing) in areas identified with noxious weeds, prior to and during construction”  
11 on the basis that the Noxious Weed Plan does not include a “requirement during operation of” the  
12 Project.<sup>263</sup> As an initial matter, Ms. Gilbert did not raise this specific concern during the contested  
13 case, and for that reason Idaho Power has not had an opportunity to present evidence or argument  
14 addressing it. For that reason alone, this exception should be rejected.

15           However, in response to a separate question regarding the potential reintroduction of  
16 noxious weeds, Idaho Power’s expert witness, Ms. Taylor, explained that “the personnel doing the  
17 operations in management are trained in noxious weed identification and would be sure to have  
18 their vehicles cleaned before going into pristine areas.”<sup>264</sup> Therefore, the evidence in the record  
19 demonstrates that Idaho Power will continue to avoid the spread of noxious weeds during

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<sup>262</sup> Idaho Power / Rebuttal Testimony of Jessica Taylor / Issues FW-3, FW-6 and LU-11 / Exhibit B, Updated Draft Noxious Weed Plan.

<sup>263</sup> Irene Gilbert Exceptions for FW-3 at 25.

<sup>264</sup> Taylor Testimony, Cross-Examination Hearing Day 4, January 14, 2022 (Tr. Day 4), page 37, line 24 – page 38, line 2.

1 operation. Additionally, as discussed above in response to Irene Gilbert, Issue FW-3, Exception 6,  
2 the only vehicle washing standard at issue in FW-3, ORS 569.445, does not apply to passenger  
3 vehicles like those that the Company would use to monitor the Project during operation. Any  
4 assertion that Ms. Gilbert raises regarding vehicle washing other than as required under  
5 ORS 569.445 is outside the scope of FW-3; therefore, Ms. Gilbert fails to identify any error in the  
6 Hearing Officer’s factual findings or conclusions of law relevant to FW-3.

7 *b. Site-Specific Treatments*

8 Ms. Gilbert challenges ODOE’s finding in the Proposed Order, which the Hearing Officer  
9 quotes in the Proposed Contested Case Order, that “final treatment methodologies would be  
10 developed based on state and country regulations; applicable land use management requirements;  
11 consultation with land managers, county weed boards, and ODOE; and site-specific  
12 circumstances” on the basis that the Draft Noxious Weed Plan “fails to require any specific  
13 treatment methodologies that are site specific.”<sup>265</sup> Idaho Power’s expert witness, Ms. Taylor,  
14 addressed this concern at the hearing. Idaho Power includes in its Updated Draft Noxious Weed  
15 Plan a summary of the treatments that the Company will apply before and after construction to  
16 control noxious weeds.<sup>266</sup> However, as Ms. Taylor explained, Idaho Power will conduct initial  
17 benchmark surveys before construction to identify “which noxious weeds are within the right-of-  
18 way,” and the surveyors also rely on databases like Oregon Weedmappers to identify “which  
19 weeds are adjacent to the area.”<sup>267</sup> Based on these surveys, Idaho Power will then prepare an

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<sup>265</sup> Irene Gilbert Exceptions for FW-3 at 25.  
<sup>266</sup> Idaho Power / Rebuttal Testimony of Jessica Taylor / Issues FW-3, FW-6 and LU-11 / Exhibit B, Updated Draft Noxious Weed Plan, pp. 32-35 of 53.  
<sup>267</sup> Taylor Testimony, Cross-Examination Hearing Day 4, January 14, 2022 (Tr. Day 4), page 57, lines 12-18.

1 individual treatment plan for each infestation identified during those surveys.<sup>268</sup> Clearly, requiring  
2 identification of a specific treatment plan before Idaho Power selects the final route for the Project  
3 and conducts pre-construction surveys to identify which noxious weeds are located along that route  
4 would be premature. However, the evidence in the record demonstrates that the Company will  
5 implement these site-specific monitoring and treatment plans to control any noxious weeds  
6 present.

7 *c. Agency Review Process*

8 Ms. Gilbert again challenges the agency review process contained in the Noxious Weed  
9 Plan because “the agency and council [whose] support of the Proposed Order [is] being challenged  
10 in the contested cases will be the ones responsible for deciding that public agency arguments  
11 regarding the Final Plans they approve are not adequate.”<sup>269</sup> As explained above in response to  
12 Irene Gilbert, Issue FW-3, Exception 3, this concern is outside the scope of FW-3 and, more  
13 importantly, the agency review process complies with all applicable statutes and regulations.

14 *d. Site-Specific Long-Term Monitoring*

15 Ms. Gilbert next challenges ODOE’s conclusion in the Proposed Order, which the Hearing  
16 Officer quotes in the Proposed Contested Case Order, that long-term monitoring will be decided  
17 on a site-specific basis and the frequency of monitoring will vary for different locations.<sup>270</sup>  
18 Ms. Gilbert asserts that, based on testimony from ODA and from other witnesses in this contested  
19 case, “a minimum of annual monitoring is necessary and noxious weeds may occur or reoccur at  
20 any time, regardless of whether or not there are currently any at a location. A plan that fails to

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<sup>268</sup> Taylor Testimony, Cross-Examination Hearing Day 4, January 14, 2022 (Tr. Day 4), page 57, lines 19-24.

<sup>269</sup> Irene Gilbert Exceptions for FW-3 at 25-26.

<sup>270</sup> Irene Gilbert Exceptions for FW-3 at 26.

1 require a minimum of annual monitoring and control of noxious weeds cannot claim that it  
2 constitutes mitigation for control of noxious weeds to assure they do not go to seed and infect other  
3 property.”<sup>271</sup>

4 As discussed above in response to Irene Gilbert, Issue FW-3, Exception 6(d), a one-size-  
5 fits-all lifetime monitoring requirement for the entire Project right-of-way is not appropriate and  
6 should not be required as a site certificate condition. Instead, Idaho Power will develop a tailored  
7 approach that will result in monitoring each infested site for as long as is necessary to control  
8 noxious weeds that were introduced by activities associated with the Project or, if any infestations  
9 cannot be controlled, to address those impacts through mitigation.<sup>272</sup> In some cases, that may  
10 require decades-long or even lifetime monitoring.<sup>273</sup> However, in other locations where noxious  
11 weeds have not been identified and/or Idaho Power’s ground disturbance is minimal, much shorter  
12 monitoring timeframes may likely be appropriate.<sup>274</sup> Idaho Power’s proposal is tailored to address  
13 the circumstances specific to the noxious weed infestations resulting from the Project, and the  
14 Company’s proposal is consistent with EFSC’s siting standards. Ms. Gilbert’s proposal to monitor  
15 the entire site for the life of the Project—which would likely also capture noxious weeds unrelated  
16 to Project impacts—is overbroad and is not necessary to demonstrate compliance with any EFSC  
17 siting standards or the statutory criteria identified in the Second Amended Project Order.

18 For these reasons, Ms. Gilbert’s challenge to ODOE’s discussion of Idaho Power’s long-  
19 term monitoring has not identified any error.

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<sup>271</sup> Irene Gilbert Exceptions for FW-3 at 26.

<sup>272</sup> Idaho Power / Sur-Sur-Rebuttal Testimony of Jessica Taylor / Issues FW-3 and FW-6, p. 7 of 20; *see also* Proposed Order at 318 (ODOE - B2HAPPDoc2 Proposed Order on ASC and Attachments 2019-07-02. Page 325 of 10016).

<sup>273</sup> Idaho Power / Sur-Sur-Rebuttal Testimony of Jessica Taylor / Issues FW-3 and FW-6, p. 7 of 20.

<sup>274</sup> Idaho Power / Sur-Sur-Rebuttal Testimony of Jessica Taylor / Issues FW-3 and FW-6, p. 7 of 20.

1                   e.       *Landowner Coordination*

2               Ms. Gilbert challenges ODOE’s finding in the Proposed Order, which the Hearing Officer  
3 quotes in the Proposed Contested Case Order, that the Noxious Weed Plan addresses  
4 ORS Chapter 569 by coordinating with landowners based on her assertion that “Responsibility for  
5 weeds in the site boundary are the responsibility of the applicant both under council rules as well  
6 state statutes[.]”<sup>275</sup> As explained above in response to Irene Gilbert, Issue FW-3, Exception 7,  
7 Idaho Power does not intend to purchase land from impacted landowners along the Project route.  
8 Rather, Idaho Power intends to secure an easement granting them rights to access and use a right-  
9 of-way across individuals’ property;<sup>276</sup> the landowners will still own the land. Under  
10 ORS 569.390, both owners and occupants of land are responsible to control weeds, and for that  
11 reason the landowners will still have noxious weed control obligations. Therefore, Ms. Gilbert’s  
12 exception to Idaho Power’s promise to coordinate with landowner to address preexisting noxious  
13 weeds fails to identify any error in the Hearing Officer’s findings of fact or conclusions of law,  
14 and therefore should be rejected.

15                   f.       *Control of Weeds Outside the Site*

16               Ms. Gilbert challenges ODOE’s finding in the Proposed Order, which the Hearing Officer  
17 quotes in the Proposed Contested Case Order, that the Council’s jurisdiction extends only to the  
18 project site, and therefore the Council cannot require control of noxious weeds outside the site  
19 boundary.<sup>277</sup> Ms. Gilbert argues that Idaho Power “is held responsible for noxious weeds if they  
20 are allowed to spread outside the site as documented in the Project Order listing standards where

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<sup>275</sup> Irene Gilbert Exceptions for FW-3 at 26.

<sup>277</sup> Irene Gilbert Exceptions for FW-3 at 27.

1 impacts from actions or a lack of actions on the site result in impacts to resources outside the  
2 site.”<sup>278</sup>

3 Even if Ms. Gilbert is correct that the Company would be responsible for controlling weeds  
4 in those situation—which the Company does not concede—those obligations would be enforced  
5 by the counties, not EFSC. ORS 569.400(1) clearly provides that the county courts will enforce  
6 ORS Chapter 569.<sup>279</sup> Idaho Power has committed to coordinate with the affected counties in good  
7 faith to address any additional obligations under ORS 569.390 relating to noxious weed  
8 infestations unrelated to the Project.<sup>280</sup> However, this coordination with county weed supervisors  
9 will occur outside the EFSC process and is not required for compliance with any EFSC standard.

10 Moreover, as explained above in response to Irene Gilbert, Issue FW-3, Exception 11,  
11 Ms. Gilbert’s reliance on the Second Amended Project Order misconstrues the analysis area as a  
12 requirement to treat noxious weeds outside the work sites. The analysis area for impacts may  
13 extend to the entire site, but Idaho Power’s obligations to treat and monitor noxious weeds need  
14 not extend to the entire site because impacts will occur only in the work sites where construction  
15 of the Project will result in soil disturbances.

16 For these reasons, Ms. Gilbert’s assertion fails to identify any incorrect conclusion of law  
17 or finding of fact.

18 g. *Validity of the Noxious Weed Plan*

19 Ms. Gilbert finally challenges ODOE’s statement in the Proposed Order, which the  
20 Hearing Officer quotes in the Proposed Contested Case Order, that “no evidence has been provided

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<sup>278</sup> Irene Gilbert Exceptions for FW-3 at 27.

<sup>279</sup> “The county court shall at once take necessary steps for enforcement of ORS 569.360 to 569.495.”

<sup>280</sup> See Idaho Power / Sur-sur-rebuttal Testimony of Jessica Taylor / Issues FW-3 and FW-6, p. 15 of 20.

1 on the record that questions the validity of the Noxious Weed Plan or the applicant’s ability to  
2 implement and adhere to the requirements of the plan” because Ms. Gilbert asserts that the  
3 contested case record contains evidence from the limited parties challenging the validity of the  
4 Noxious Weed Plan.<sup>281</sup> As explained above, the language that Ms. Gilbert challenges in  
5 Exception 18 is ODOE’s analysis in the Proposed Order, which predated this contested case. Any  
6 evidence Ms. Gilbert has filed in the contested case was not in the record at the time ODOE issued  
7 the Proposed Order, and ODOE clearly was not referring to that evidence when it published the  
8 Proposed Order. Ms. Gilbert’s assertion has failed to identify any error in the Hearing Officer’s  
9 findings of fact because she has not challenged any finding that the Hearing Officer made.

10 **19. Irene Gilbert, Issue FW-3, Exception 19**

11 Ms. Gilbert takes exception to the following findings of fact in the Proposed Contested  
12 Case Order that cite Ms. Taylor’s Rebuttal Testimony and Idaho Power’s Updated Draft Noxious  
13 Weed Plan:

14 29. After issuance of the Proposed Order, and in response to concerns raised by the  
15 limited parties, Idaho Power updated its draft Noxious Weed Plan to provide more  
16 clarity. In the updated draft Noxious Weed Plan, Idaho Power added the  
17 requirement that the Company will review the state and county lists annually to  
18 ensure that monitoring and control actions are targeting the appropriate species.  
19 (Taylor Rebuttal Ex. B at 12.) Idaho Power also updated Table 1, Designated  
20 Noxious Weeds Known to Occur or with the Potential to Occur within the Site  
21 Boundary. (*Id.* at 15.) With regard to preconstruction surveys, Idaho Power added  
22 that surveyors will be trained to identify Oregon flora, specifically native plants,  
23 noxious weeds, and threatened and endangered plant species. (*Id.* at 27.) With  
24 regard to prevention, and in particular vehicle cleaning, Idaho Power added that “all  
25 Construction Contractor(s) will clean construction vehicles and equipment at the  
26 Project multi-use areas or other cleaning stations each night or morning prior to  
27 returning to the Project construction areas.” (*Id.* at 29.) Idaho Power also noted that  
28 it may avoid cleaning construction vehicles and equipment when moving from  
29 noxious weed-contaminated areas to other areas along the transmission line ROW

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<sup>281</sup> Irene Gilbert Exceptions for FW-3 at 27.

1 if it “demonstrates, in consultation with ODOE and the relevant county weed  
2 department, that Idaho Power has sufficiently controlled the weed contamination  
3 or that seasonal limitations will be effective in avoiding the spread of the noxious  
4 weeds.” (*Id.*)

5 30. With regard to post-construction treatments, Idaho Power amended the Noxious  
6 Weed Plan to state that the Company will implement noxious weed control efforts  
7 “at least once annually” for the first five years and, with the concurrence of the  
8 Department, will “continue to monitor the sites as described below in Section 6.1,  
9 but will cease treatment unless determined to be necessary through subsequent  
10 monitoring.” (Taylor Rebuttal Ex. B at 35.) Finally, with regard to monitoring,  
11 Idaho Power added monitoring would be initiated during the first “growing season”  
12 following construction. (*Id.* at 36.) Idaho Power added that if control of noxious  
13 weeds is deemed unsuccessful after five years of monitoring and noxious weed  
14 control actions, the Company will coordinate with ODOE regarding appropriate  
15 steps forward and “will prepare a location-specific long-term monitoring plan based  
16 on the results of the initial five-year assessment period.” (*Id.* at 36.) Finally, Idaho  
17 Power added Appendix B to the Plan, addressing Noxious Weed Treatment  
18 Methods and Timing. (*Id.* at 43-53.)

19 31. The revised draft Noxious Weed Plan remains a draft. In accordance with  
20 Recommended Fish and Wildlife Condition 3, Idaho Power will update and finalize  
21 the Noxious Weed Plan based on the final facility design and agency review.  
22 (Taylor Rebuttal Test. at 40.)

23 Ms. Gilbert challenges these factual findings on the basis that they are “statements made  
24 by a consultant hired by Idaho Power regarding a future action that may or may not be included in  
25 a Final Noxious Weed Plan that is supposed to occur after a site certificate is issued and after the  
26 public has no opportunity to object to either the omission or content of the actions.”<sup>282</sup>  
27 Ms. Gilbert’s first assertion is meritless. The challenged factual findings are not statements from  
28 Idaho Power. Rather, the Hearing Officer made specific findings of fact relying on testimony and  
29 exhibits that Idaho Power’s expert witness, Ms. Taylor, filed in this contested case. Ms. Gilbert’s  
30 suggestion that an applicant’s testimony cannot support factual findings is not based on any  
31 standard of law and is wholly without merit.

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<sup>282</sup> Irene Gilbert Exceptions for FW-3 at 27.



1 Ms. Gilbert’s challenge to the Updated Draft Noxious Weed Plan, which the Hearing  
2 Officer cites in the above findings as Taylor Rebuttal Ex. B, is equally unpersuasive. As an initial  
3 matter, this argument is not relevant to compliance with ORS 569.390, ORS 569.400, or  
4 ORS 569.445, and therefore is outside the scope of FW-3. Moreover, as explained above in  
5 response to Irene Gilbert, Issue FW-3, Exception 5, although the plan could theoretically be  
6 revised, Fish and Wildlife Condition 3 codifies the expectation that “[t]he protective measures as  
7 described in the draft Noxious Weed Plan provided as Attachment P1-5 to the Final Order on the  
8 ASC, shall be included and implemented as part of the final Noxious Weed Plan[.]”<sup>283</sup> If Idaho  
9 Power were to attempt to disregard the commitments the Company had made to date, there is no  
10 reason to think that ODOE would approve of the final plan. Moreover, the Hearing Officer  
11 specifically found that the Noxious Weed Plan is still a draft, so Ms. Gilbert’s exception has not  
12 identified any inconsistency in the Hearing Officer’s findings.

13 Ms. Gilbert also challenges a specific statement in factual finding 30, quoted above.  
14 Ms. Gilbert challenges the following finding of fact regarding Idaho Power’s noxious weed  
15 treatments during the first five years following construction:

16 With regard to post-construction treatments, Idaho Power amended the Noxious  
17 Weed Plan to state that the Company will implement noxious weed control efforts  
18 “at least once annually” for the first five years and, with the concurrence of the  
19 Department, will “continue to monitor the sites as described below in Section 6.1,  
20 but will cease treatment unless determined to be necessary through subsequent  
21 monitoring.” (Taylor Rebuttal Ex. B at 35.)<sup>284</sup>

22 Ms. Gilbert appears to interpret this provision to mean that “there is no assurance that  
23 monitoring and mitigation will continue beyond the first 5 years.”<sup>285</sup> However, the Hearing

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<sup>283</sup> Proposed Contested Case Order at 46.

<sup>284</sup> Proposed Contested Case Order at 47.

<sup>285</sup> Irene Gilbert Exceptions for FW-3 at 28.

1 Officer’s finding clearly states that the Company will “continue to monitor the sites as described  
2 below in Section 6.1” of the Updated Draft Noxious Weed Plan. Section 6.1 reads:

3 If control of noxious weeds is deemed unsuccessful after 5 years of monitoring and  
4 noxious weed control IPC will coordinate with ODOE regarding appropriate steps  
5 forward. At this point, IPC will prepare a location-specific long-term monitoring  
6 plan based on the results of the initial five-year assessment period. In addition, IPC  
7 may suggest additional noxious weed control techniques or strategies, or  
8 monitoring, or IPC may propose mitigation to compensate for any permanent  
9 habitat loss. Noxious weed control measures recommended during monitoring will  
10 follow the preventive and control measures outlined in the Final Noxious Weed  
11 Plan.<sup>286</sup>

12 The Company’s Updated Draft Noxious Weed Plan clearly commits to long-term  
13 monitoring for any location where noxious weeds have not been controlled. Therefore,  
14 Ms. Gilbert’s assertion that the Company has not made such assurances is plainly inconsistent with  
15 the record in this contested case.

16 For these reasons, Ms. Gilbert’s exception has not identified any error in the Hearing  
17 Officer’s findings of fact, and Idaho Power requests that the Council adopt without modification  
18 the Hearing Officer’s findings of fact and conclusions of law relevant to FW-3.

19 **20. Irene Gilbert, Issue FW-3, Exception 20**

20 Irene Gilbert asserts that the Hearing Officer did not address Ms. Gilbert’s arguments that  
21 OAR 345-022-0000(1)(b) “requires the applicant to comply with state law” like ORS 569.390,  
22 ORS 569.400, and ORS 569.445.<sup>287</sup> As an initial matter, Ms. Gilbert’s arguments are not tied to  
23 any specific exceptions to the Proposed Contested Case Order as required by

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<sup>286</sup> Idaho Power / Rebuttal Testimony of Jessica Taylor / Issues FW-3, FW-6 and LU-11 / Exhibit B, Updated Draft Noxious Weed Plan, p. 36 of 53.

<sup>287</sup> Irene Gilbert Exceptions for FW-3 at 28.

1 OAR 345-015-0085(5), and her claims should therefore be rejected.<sup>288</sup> Nevertheless, should the  
2 Council wish to consider Ms. Gilbert’s arguments, Idaho Power addresses her assertions below.

3 Contrary to Ms. Gilbert’s assertions, she did *not* raise any argument regarding  
4 OAR 345-022-0000(1)(b) in her Closing Argument or Response Brief for FW-3, and therefore any  
5 assertion that the Hearing Officer failed to address her arguments is false. Finally, even if  
6 Ms. Gilbert had raised this argument, as explained above in response to Irene Gilbert, Issue FW-3,  
7 Exception 12(b), Ms. Gilbert misapplies OAR 345-022-0000(1)(b). That regulation requires only  
8 that an applicant demonstrate compliance with the “other Oregon statutes and administrative rules  
9 *identified in the project order[.]*”<sup>289</sup> Neither ORS 569.390, ORS 569.400, nor ORS 569.445 was  
10 identified in the Second Amended Project Order, and therefore OAR 345-022-0000(1)(b) does not  
11 support Ms. Gilbert’s assertion that the Company must demonstrate compliance with those  
12 statutes.

13 For these reasons, Ms. Gilbert’s exception has failed to demonstrate any error in Hearing  
14 Officer’s conclusions of law, and the Council should adopt without modification the Hearing  
15 Officer’s findings of fact and conclusions of law relevant to FW-3.

16 **21. Irene Gilbert, Issue FW-3, Exception 21**

17 Ms. Gilbert next argues that the Hearing Officer’s findings of fact on pages 43 through 47  
18 of the Proposed Contested Case Order “fails to include the arguments and supporting proof  
19 provided by” the limited parties and “lack any references to statutes or rules that support treating

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<sup>288</sup> OAR 345-015-0085(5) (“In an exception, the party shall specifically identify the finding of fact, conclusion of law or, in contested case proceedings on an application for a site certificate or a proposed site certificate amendment, recommended site certificate condition to which the party excepts and shall state the basis for the exception.”).

<sup>289</sup> OAR 345-022-0000(1)(b) (emphasis added).

1 them as legitimate findings.”<sup>290</sup> As an initial matter, Ms. Gilbert’s arguments are not tied to any  
2 specific exceptions to the Proposed Contested Case Order as required by OAR 345-015-0085(5),  
3 and her claims should therefore be rejected.<sup>291</sup> Nevertheless, should the Council wish to consider  
4 Ms. Gilbert’s arguments, Idaho Power addresses each of her assertions below.

5 As explained above in response to Irene Gilbert, Issue FW-3, Exception 2, where there are  
6 multiple opinions filed as evidence, the Hearing Officer is not required to explain why all other  
7 opinions than the ones she relied on are less persuasive.<sup>292</sup> The fact that the Hearing Officer found  
8 Idaho Power’s evidence persuasive and cited that evidence to support her factual findings does not  
9 identify any error in those findings. Ms. Gilbert suggests that the Hearing Officer’s lack of  
10 references to the limited parties’ arguments demonstrates that the Hearing Officer failed to provide  
11 a fair and impartial process in this contested case. However, Ms. Gilbert’s assertion is baseless.  
12 The fact that the Hearing Officer found some evidence more persuasive than other evidence is not  
13 evidence of bias, and Ms. Gilbert’s inflammatory assertion should be given no weight.

14 Moreover, Ms. Gilbert challenges the Hearing Officer’s findings for not citing to statutes  
15 or rules, but findings of fact are based on evidence in the record, not legal requirements. The  
16 Hearing Officer properly cites evidence in the record to support these challenged findings.

17 Finally, Ms. Gilbert suggests that any commitment that Idaho Power made in this contested  
18 case is not a finding of fact and that the Hearing Officer made “an assumption” that “no one would

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<sup>290</sup> Irene Gilbert Exceptions for FW-3 at 28-29.  
<sup>291</sup> OAR 345-015-0085(5) (“In an exception, the party shall specifically identify the finding of fact, conclusion of law or, in contested case proceedings on an application for a site certificate or a proposed site certificate amendment, recommended site certificate condition to which the party excepts and shall state the basis for the exception.”).  
<sup>292</sup> See, e.g., *Noble v. Or. Water Res. Dep’t*, 264 Or App 110, 123 (2014) (“[I]n a case in which expert opinions have been offered on both sides of an issue, it is usually clear that a factfinder has found one or the other more persuasive, and substantial evidence and reason will exist to support the finding, without further explanation.”) (quoting *Castro v. Board of Parole*, 232 Or App 75, 84 (2009) (citing *Armstrong v. Asten-Hill Co.*, 90 Or App 200, 206 (1988))).

1 read what [the Noxious Weed Plan] actually said, or in this case, failed to say.”<sup>293</sup> Ms. Gilbert’s  
2 assertion is not based on any legal standard, and it is clear the Company’s commitments to address  
3 noxious weeds constitute evidence that the Company will, in fact, address noxious weeds.  
4 Moreover, Ms. Gilbert’s suggestion that nobody read the Noxious Weed Plan is clearly  
5 inconsistent with the Hearing Officer’s frequent references to that plan.<sup>294</sup>

6 For these reasons, Ms. Gilbert’s exception has not identified any error in the Hearing  
7 Officer’s findings of fact, and the Council should adopt without modification the Hearing Officer’s  
8 findings of fact and conclusions of law relevant to FW-3.

9 **22. Irene Gilbert, Issue FW-3, Exception 22**

10 Ms. Gilbert next repeats her argument that the Noxious Weed Plan must be revised to  
11 remove the following statements:

12 For EFSC purposes, IPC will only be responsible for treating noxious weeds that  
13 are within Project ROWs and that are a result of the company’s construction- or  
14 operation-related, surface disturbing activities in the following areas involving  
15 ground-disturbing construction and/or improvement (e.g., new cutouts; . . .).

16 [I]f IPC identifies pre-existing weed infestations within a Project ROW, IPC will  
17 work with the relevant landowner or land management agency to address the same  
18 consistent with ORS Chapter 569.

19 Ms. Gilbert asserts that these provisions demonstrate that the Noxious Weed Plan fails to  
20 comply with ORS 569.390, ORS 569.400, and ORS 569.445 and that failure to comply with those  
21 statutes poses “a significant threat to the environment[.]”<sup>295</sup>

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<sup>293</sup> Irene Gilbert Exceptions for FW-3 at 29-30.

<sup>294</sup> *See, e.g.*, Proposed Contested Case Order at 46 (“In the updated draft Noxious Weed Plan, Idaho Power added the requirement that the Company will review the state and county lists annually to ensure that monitoring and control actions are targeting the appropriate species. (Taylor Rebuttal Ex. B at 12.)”).

<sup>295</sup> Irene Gilbert Exceptions for FW-3 at 30-32.

1 As discussed above in response to Irene Gilbert, Issue FW-3, Exception 17, Idaho Power  
2 is not required to demonstrate compliance with ORS 569.390, ORS 569.400, and ORS 569.445 in  
3 order for the Council to issue a site certificate. Idaho Power has repeatedly acknowledged that the  
4 Company, as an occupant of land, will be subject to ORS Chapter 569.<sup>296</sup> However, pursuant to  
5 the plain text of ORS 469.401(2), ORS 469.501, and ORS 469.503, the Council does not need to  
6 assess, or provide site certificate conditions related to, ORS 569.390, ORS 569.400, or  
7 ORS 569.445 in this proceeding.<sup>297</sup> Rather, ORS 569.400 clearly states that ORS 569.390,  
8 ORS 569.400, and ORS 569.445 will be enforced by the county courts outside the EFSC site  
9 certificate process.<sup>298</sup> For these reasons, Ms. Gilbert’s exception does not allege any error in the  
10 Hearing Officer’s findings of fact or conclusions of law, and Idaho Power requests that the Council  
11 adopt without modification the Hearing Officer’s findings of fact and conclusions of law relevant  
12 to FW-3.

13 **23. Irene Gilbert, Issue FW-3, Exception 23**

14 Finally, Ms. Gilbert asserts that the Hearing Officer erred by not including four site  
15 certificate conditions that Ms. Gilbert proposed.<sup>299</sup> For the reasons discussed below, each of  
16 Ms. Gilbert’s proposed conditions was properly rejected.

17 *h. Reassessment of Impacts from Noxious Weeds*

18 Ms. Gilbert first proposes requiring:

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<sup>296</sup> See, e.g., Idaho Power / Rebuttal Testimony of Jessica Taylor / Issues FW-3, FW-6 and LU-11 / Exhibit B, Updated Draft Noxious Weed Plan, p. 28 of 53 (“With respect to pre-existing noxious weed infestations, [Idaho Power] recognizes ORS Chapter 569 imposes onto occupiers of land within a weed district certain obligations to control and prevent weeds[.]”).

<sup>297</sup> ORS 569.400(1).

<sup>298</sup> ORS 569.400(1) (“If the owner or occupant of the land fails or refuses to immediately destroy or cut the noxious weeds in accordance with ORS 569.360 to 569.495, the weed inspector shall at once notify the county court. The county court shall at once take necessary steps for enforcement of ORS 569.360 to 569.495.”).

<sup>299</sup> Irene Gilbert Exceptions for FW-3 at 32-33.

1 1. The following rules will be reevaluated to determine impacts to costs and/or  
2 procedures as a result of predictable noxious weed spread if the noxious weed plan  
3 fails to comply with state statutes and here appropriate, mitigation will be required:  
4 Agriculture, Forest Practices, Fire Fighting, Wildlife Habitat, Threatened and  
5 Endangered Plants and Animals, Protected areas.<sup>300</sup>

6 This proposed condition was properly rejected because Ms. Gilbert proposes this condition  
7 based on her assumption that the Project will allow noxious weeds to spread, but Idaho Power has  
8 provided substantial evidence demonstrating that the Company will prevent the introduction and  
9 spread of noxious weeds resulting from the Project.<sup>301</sup> As explained above in response to Irene  
10 Gilbert, Issus FW-3, Exception 18(d), Idaho Power will begin treating noxious weeds prior to  
11 construction, so noxious weeds present within the disturbed sites will be treated before the  
12 Company begins its surface-disturbing activities.<sup>302</sup> After construction, Idaho Power will begin  
13 monitoring and treating all disturbed sites during the first growing season following completion of  
14 construction,<sup>303</sup> which will increase the likelihood of controlling infestations before they can  
15 become established. Idaho Power will then continue this monitoring and treatment at least once  
16 annually, as needed, for the first five years to control the noxious weed infestations.<sup>304</sup>

17 After the initial assessment period, Idaho Power will reassess whether its control efforts  
18 are trending toward success and, if they are not, Idaho Power will proposes additional or alternative  
19 actions to continue treating the noxious weed infestations.<sup>305</sup> Idaho Power will also develop

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<sup>300</sup> Irene Gilbert Exceptions for FW-3 at 32.

<sup>301</sup> See Idaho Power's Closing Arguments for Contested Case Issues FW-3, FW-5, FW-6, and FW-7 at 11-16.

<sup>302</sup> Idaho Power / Rebuttal Testimony of Jessica Taylor / Issues FW-3, FW-6 and LU-11 / Exhibit B, Updated Draft Noxious Weed Plan, p. 35 of 53.

<sup>303</sup> Idaho Power / Rebuttal Testimony of Jessica Taylor / Issues FW-3, FW-6 and LU-11 / Exhibit B, Updated Draft Noxious Weed Plan, p. 35 of 53.

<sup>304</sup> Idaho Power / Rebuttal Testimony of Jessica Taylor / Issues FW-3, FW-6 and LU-11 / Exhibit B, Updated Draft Noxious Weed Plan, p. 35 of 53.

<sup>305</sup> Idaho Power / Rebuttal Testimony of Jessica Taylor / Issues FW-3, FW-6 and LU-11 / Exhibit B, Updated Draft Noxious Weed Plan, p. 35 of 53.

1 specific long-term monitoring plans for each location where noxious weed infestations have not  
2 been controlled.<sup>306</sup> Notwithstanding Idaho Power’s efforts to control noxious weed infestations,  
3 if any Project-related infestations result in permanent habitat loss, Idaho Power may address those  
4 permanent impacts through compensatory mitigation.<sup>307</sup>

5 These actions will be sufficient to avoid and/or mitigate noxious-weed-related habitat  
6 impacts resulting from the Project consistent with ODFW’s Habitat Mitigation Policy and the  
7 Council’s Fish and Wildlife Habitat Standard.<sup>308</sup> Therefore, Ms. Gilbert’s assumption that the  
8 Company will not control noxious weeds is inconsistent with the evidence in the record, and her  
9 condition proposed based on that assumption should be rejected.

10 *i. Preventing Weeds from Producing Seed*

11 Ms. Gilbert next proposes two conditions that would require Idaho Power to prevent  
12 noxious weeds from producing seed.

13 2. The developer must be required to establish monitoring and mitigation  
14 procedures to assure that no noxious seeds are allowed to go to seed.

15 3. The procedures must be required to annually document that no noxious weeds  
16 are allowed to go to seed.<sup>309</sup>

17 Ms. Gilbert proposes these conditions based on her argument that the Council must assess  
18 compliance with ORS 569.390, which states that “no weed declared noxious shall be permitted to  
19 produce seed.” However, as explained above in response to Irene Gilbert, Issue FW-3,  
20 Exception 17, ORS 569.400 clearly states that ORS 569.390, ORS 569.400, and ORS 569.445 will

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<sup>306</sup> Proposed Order at 318 (ODOE - B2HAPPDoc2 Proposed Order on ASC and Attachments 2019-07-02. Page 325 of 10016).

<sup>307</sup> Idaho Power / Rebuttal Testimony of Jessica Taylor / Issues FW-3, FW-6 and LU-11 / Exhibit B, Updated Draft Noxious Weed Plan, p. 35 of 53.

<sup>308</sup> Idaho Power / Rebuttal Testimony of Jessica Taylor (Nov. 12, 2021) / Issues FW-3, FW-6, and LU-11, p. 17 of 106.

<sup>309</sup> Irene Gilbert Exceptions for FW-3 at 33.



1 be enforced by the county courts outside the EFSC site certificate process.<sup>310</sup> Idaho Power has  
2 acknowledged that ORS Chapter 569 may impose additional noxious weed control obligations  
3 beyond those that EFSC requires,<sup>311</sup> but those additional obligations will be enforced outside the  
4 EFSC process. Because EFSC will not be the body enforcing ORS 569.390, Ms. Gilbert’s  
5 proposed conditions requiring Idaho Power to demonstrate compliance with ORS 569.390 are  
6 unnecessary and were properly rejected. Moreover, although no EFSC standard specifically  
7 requires Idaho Power to prevent noxious weeds from producing seed, it is important to note that  
8 Idaho Power will begin treating noxious weeds prior to construction, so noxious weeds present  
9 within the disturbed sites will be treated before the Company begins its surface-disturbing  
10 activities.<sup>312</sup> After construction, Idaho Power will begin monitoring and treating all disturbed sites  
11 the first growing season following completion of construction,<sup>313</sup> which will increase the  
12 likelihood of controlling infestations before they can become established. These actions will  
13 ensure that the Company addresses all Project-related noxious weeds. For these reasons,  
14 Ms. Gilbert’s proposed site certificate conditions should be rejected.

15 *j. Removing Mention of “Surface Disturbance”*

16 Ms. Gilbert finally proposed the following condition regarding limiting the Noxious Weed  
17 Plan to areas where Project-related surface disturbances occur:

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<sup>310</sup> ORS 569.400(1) (“If the owner or occupant of the land fails or refuses to immediately destroy or cut the noxious weeds in accordance with ORS 569.360 to 569.495, the weed inspector shall at once notify the county court. The county court shall at once take necessary steps for enforcement of ORS 569.360 to 569.495.”).

<sup>311</sup> Idaho Power / Rebuttal Testimony of Jessica Taylor / Issues FW-3, FW-6 and LU-11 / Exhibit B, Updated Draft Noxious Weed Plan, p. 11 of 53.

<sup>312</sup> Idaho Power / Rebuttal Testimony of Jessica Taylor / Issues FW-3, FW-6 and LU-11 / Exhibit B, Updated Draft Noxious Weed Plan, p. 35 of 53.

<sup>313</sup> Idaho Power / Rebuttal Testimony of Jessica Taylor / Issues FW-3, FW-6 and LU-11 / Exhibit B, Updated Draft Noxious Weed Plan, p. 35 of 53.

1 4. The Site Certificate and Noxious Weed Plan must be required to remove all  
2 language that references limiting noxious weed management and monitoring to  
3 areas of “surface disturbance.”<sup>314</sup>

4 Ms. Gilbert proposes this site certificate condition which would require Idaho Power to  
5 control all noxious weeds within the entire site, including those that are unrelated to the Project.  
6 However, as explained above in response to Irene Gilbert, Issue FW-3, Exception 6(a), EFSC  
7 standards require that an applicant control only the noxious weeds resulting from the proposed  
8 energy facility, and the only infestations resulting from the Project will occur in areas where  
9 Project-related surface disturbances occur. Ms. Gilbert’s assertion that Idaho Power must control  
10 all noxious weeds within the site boundary also appears to be based on an erroneous belief that the  
11 Company will occupy the entire site. However, contrary to Ms. Gilbert’s position, the site  
12 boundary contains all areas where Idaho Power would be *authorized to* locate the Project; the  
13 Project itself will have a smaller footprint.<sup>315</sup> As ODOE explained in its Closing Brief, the Noxious  
14 Weed Plan will require Idaho Power to survey, treat, and monitor all areas where Idaho Power  
15 proposes to construct the Project.<sup>316</sup> As a result, the Noxious Weed Plan will apply to all the areas  
16 that permanent Project facilities occupy. For these reasons, Ms. Gilbert’s proposed site certificate  
17 condition should be rejected.

18 **C. Susan Geer Exceptions, Issues FW-3 and FW-6**

19 In addition to FW-3, the Hearing Officer granted limited party status to Susan Geer to raise  
20 FW-6, which asks:

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<sup>314</sup> Irene Gilbert Exceptions for FW-3 at 33.

<sup>315</sup> See Proposed Order at 17 (ODOE - B2HAPPDoc2 Proposed Order on ASC and Attachments 2019-07-02. Page 24 of 10016) (explaining that the area within the site boundary includes a micrositing corridor to allow flexibility in siting the actual construction of the Project); *see also id.* (“For the 500-kV transmission line, the site boundary is a 500-foot-wide area within which the transmission line, all transmission structures, and communication stations would be located.”).

<sup>316</sup> ODOE Closing Brief at 17.

1 *Whether the Noxious Weed Plan provides adequate mitigation for potential loss of*  
2 *habitat due to noxious weeds when it appears to relieve Applicant of weed*  
3 *monitoring and control responsibilities after five years and allows for*  
4 *compensatory mitigation if weed control is unsuccessful.*<sup>317</sup>

5 In the Proposed Contested Case Order, the Hearing Officer concluded:

6 The updated draft Noxious Weed Plan is adequate to serve its intended purpose of  
7 establishing the measures the Company will take to control noxious weed species  
8 and prevent the introduction of these species during construction and operation of  
9 the project. Ms. Geer has not presented evidence or persuasive argument to show  
10 that the Noxious Weed Plan is invalid or that Idaho Power will be unable to  
11 implement and adhere to the plan when finalized.<sup>318</sup>

12 Regarding Ms. Geer’s allegation that the Noxious Weed Plan “appears to relieve [Idaho Power] of  
13 weed monitoring and control responsibilities after five years,” the Hearing Officer concluded:

14 Contrary to Ms. Geer’s contention, the Noxious Weed Plan does not relieve Idaho  
15 Power of monitoring and control responsibilities after five years. As discussed  
16 above with regard to Issue FW-3, the updated draft Plan establishes a five-year  
17 initial assessment period, after which Idaho Power will prepare a location-specific  
18 long-term monitoring plan to ensure control or mitigation of all project-related  
19 noxious weed infestations. This five-year initial assessment period followed by a  
20 long-term monitoring plan is consistent with past Council orders and in compliance  
21 with the Fish and Wildlife Habitat standard. Ms. Geer has not demonstrated  
22 otherwise.<sup>319</sup>

23 Regarding Ms. Geer’s challenge to the use of compensatory mitigation, the Hearing Officer  
24 concluded:

25 Ms. Geer asserts that none of the draft plans (Reclamation and Revegetation,  
26 Habitat Mitigation, and draft Noxious Weed) suffices to compensate landowners  
27 for the loss of high-quality native habitat. She also asserts that the mitigation goal  
28 of no net loss is “becoming a controversial practice,” and that even mitigation that  
29 fulfills legal requirements often fails to fully compensate for lost habitat. Geer  
30 Closing Argument at 17-18. First, this argument exceeds the scope of Issue FW-6,  
31 which as previously discussed, is limited to the adequacy of the weed monitoring  
32 and control provisions of the Noxious Weed Plan. Second, Ms. Geer’s challenge is  
33 misplaced because the goal of compensatory mitigation is not to compensate the

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<sup>317</sup> Second Order on Case Management at 4.

<sup>318</sup> Proposed Contested Case Order at 138-39.

<sup>319</sup> Proposed Contested Case Order at 151-52 (footnote omitted).

1 landowner, but to compensate for the lost habitat. The Council’s Fish and Wildlife  
2 Habitat standard applies the ODFW Habitat Mitigation Policy, which is designed  
3 to address adverse impacts to fish and wildlife habitat, and not impacts to  
4 landowners. Furthermore, as Idaho Power notes in its Response Brief, if a  
5 landowner is adversely impacted by habitat loss, the Company will address this  
6 during negotiations with the landowner related to the ROW for the project. These  
7 negotiations occur outside the site certificate process and the Council’s  
8 jurisdiction.<sup>320</sup>

9 Ms. Geer filed exceptions in this case that appear to relate to both FW-3 and FW-6. For  
10 the reasons discussed below, Ms. Geer’s exceptions do not identify any incorrect finding of fact  
11 or conclusion of law, and for that reason Idaho Power requests that the Council adopt without  
12 modification the Hearing Officer’s findings of fact and conclusions of law relevant to FW-3 and  
13 FW-6.

14 Moreover, Ms. Geer’s first exception simply adopted Ms. Gilbert’s exceptions, which  
15 Idaho Power addresses above. Additionally, Ms. Geer raises multiple arguments which are all  
16 labeled as her third exception. Idaho Power separately addresses each argument as an individual  
17 exception and includes Ms. Geer’s labels in a parenthetical for clarity.

18 **1. Susan Geer, Issues FW-3 and FW-6, Exception 1 (Geer Labeled as Second**  
19 **Exception)**

20 Susan Geer takes exception to the Hearing Officer’s summary of FW-3, asserting that the  
21 Hearing Officer omitted Ms. Geer’s issue regarding the “effects of residual herbicides on native  
22 plant communities.”<sup>321</sup> Ms. Geer asserts that she raised this concern in her DPO Comments, where  
23 she explained that “[l]arge amounts of herbicides would be used to address invasive plants  
24 resulting from the ground disturbance of construction of the proposed transmission line.”<sup>322</sup>

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<sup>320</sup> Proposed Contested Case Order at 152.

<sup>321</sup> Susan Geer’s Exceptions for FW-3 and FW-6 at 3.

<sup>322</sup> Susan Geer’s Exceptions for FW-3 and FW-6 at 3.

1 Ms. Geer further asserts that “[t]his concern should be part of discussion of habitat standards and  
2 mitigation under OAR 635-415-0025, as well as consideration of Protected Areas under  
3 OAR 345-022-0040[.]”<sup>323</sup>

4 As an initial matter, Ms. Geer’s arguments are not tied to any specific exceptions to the  
5 Proposed Contested Case Order as required by OAR 345-015-0085(5), and her claims should  
6 therefore be rejected.<sup>324</sup> Nevertheless, should the Council wish to consider Ms. Geer’s arguments,  
7 Idaho Power addresses her assertions below.

8 Ms. Geer had an opportunity to appeal the Hearing Officer’s description of FW-3 and did  
9 not do so, therefore the Hearing Officer’s statement of the issue at this point in the case is untimely.

10 As discussed above in response to Irene Gilbert, Issue FW-3, Exception 1, in response to the  
11 limited parties’ petitions for party status, ODOE initially provided a summary of the issues that  
12 the petitioners had raised.<sup>325</sup> In that document, ODOE summarized Ms. Geer’s issue that became  
13 FW-3 as stating: “Applicant’s Noxious Weed Plan does not comply with ORS Chapter 569  
14 because it does not identify responsibility of applicant for control of most weed species and only  
15 requires annual control.”<sup>326</sup> At the prehearing conference, the Hearing Officer indicated that she  
16 would like to use ODOE’s issue summaries as a starting point for identifying the issues, but asked  
17 that any limited party with concerns regarding ODOE’s issue summaries provide comment  
18 explaining those concerns. Ms. Geer filed a written comment in which she asked ODOE to revise  
19 some of their summaries of her issues, but importantly did *not* challenge ODOE’s description of

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<sup>323</sup> Susan Geer’s Exceptions for FW-3 and FW-6 at 3.

<sup>324</sup> OAR 345-015-0085(5) (“In an exception, the party shall specifically identify the finding of fact, conclusion of law or, in contested case proceedings on an application for a site certificate or a proposed site certificate amendment, recommended site certificate condition to which the party excepts and shall state the basis for the exception.”).

<sup>325</sup> ODOE Response to Petitions for Party and Limited Party Status.

<sup>326</sup> ODOE Response to Petitions for Party and Limited Party Status at 52.

1 the issue that became FW-3.<sup>327</sup> Ms. Geer further stated that, although ODOE’s issue statements  
2 were summaries of her issues, she “generally agree[d] with ODOE’s summaries of [her] properly  
3 raised issues and [ODOE] combined some of [her] issues in a logical way.”<sup>328</sup> Based on  
4 Ms. Geer’s comment, ODOE did not revise the description of Ms. Geer’s noxious weed issue in  
5 its Second Amended Response to Petitions for Party and Limited Party Status,<sup>329</sup> and the Hearing  
6 Officer subsequently incorporated the issue statement that Ms. Geer had requested into the Order  
7 on Case Management, combining Ms. Geer’s issue relating to compliance with ORS Chapter 569  
8 with Ms. Gilbert’s related issue.<sup>330</sup> Therefore, the record clearly shows that Ms. Geer reviewed  
9 the summary of FW-3 and “generally agree[d]” with it. Ms. Geer’s attempt to now reframe the  
10 issue after the end of the contested case—and after 20 months of discovery, testimony, hearing,  
11 and briefing—should be rejected.

12         Additionally, as discussed above, the limited parties had seven days to appeal the Hearing  
13 Officer’s ruling on party status and, although Ms. Geer filed an appeal, Ms. Geer did not challenge  
14 the Hearing Officer’s statement of FW-3 in that appeal.<sup>331</sup> Moreover, the Council has already  
15 determined that parties and limited parties cannot reframe issue statements because those “issue  
16 statement[s] ha[ve] been ruled upon by the ALJ and [are] therefore final.”<sup>332</sup> For these reasons,  
17 Ms. Geer’s attempt to redefine the issue statement for FW-3 should be rejected.

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<sup>327</sup> Susan Geer Reply to ODOE Response to Petition in the Matter of the ASC for B2H Transmission Line (Oct. 1, 2020).

<sup>328</sup> Susan Geer Reply to ODOE Response to Petition in the Matter of the ASC for B2H Transmission Line at 1.

<sup>329</sup> ODOE’s Second Amended Response to Petitions for Party/Limited Party Status at 63.

<sup>330</sup> Second Order on Case Management at 4.

<sup>331</sup> Susan Geer Appeal of Order on Petitions for Party Status, Authorized Representatives and Issues for Contested Case (Nov. 5, 2020).

<sup>332</sup> EFSC Order on Interlocutory Appeal of Administrative Law Judge’s Ruling on MSD for Limited Party McAllister’s Issues FW-13, SP-2, and R-2 at 12-13.

1 Finally, even if Ms. Geer’s challenge to the Hearing Officer’s issue statement were timely,  
2 Ms. Geer’s exception should still be rejected because Ms. Geer failed to raise this issue in her  
3 Petition for Party Status. Ms. Geer asserts that she raised this issue in her DPO Comments, but a  
4 review of her Petition for Party Status shows that Ms. Geer did not raise any issue relating to  
5 residual herbicides.<sup>333</sup> Because Ms. Geer failed to raise this issue in her Petition, this issue was  
6 properly not included in the contested case.<sup>334</sup>

7 For these reasons, Ms. Geer’s exception has not identified any error in the Hearing  
8 Officer’s findings of fact or conclusions of law, and Idaho Powe requests that the Council adopt  
9 without modification the Hearing Officer’s findings of fact and conclusions of law relevant to  
10 FW-3.

11 **2. Susan Geer, Issues FW-3 and FW-6, Exception 2 (Geer Labeled as Third**  
12 **Exception)**

13 Ms. Geer challenges the following conclusion of law in the Proposed Contested Case  
14 Order:

15 The updated draft Noxious Weed Plan is adequate to serve its intended purpose of  
16 establishing the measures the Company will take to control noxious weed species  
17 and prevent the introduction of these species during construction and operation of  
18 the project. Ms. Geer has not presented evidence or persuasive argument to show  
19 that the Noxious Weed Plan is invalid or that Idaho Power will be unable to  
20 implement and adhere to the plan when finalized.<sup>335</sup>

21 Ms. Geer asserts that this conclusion “ignores the loss of habitat, which is central to”  
22 FW-6.<sup>336</sup> Ms. Geer’s assertion is incorrect. FW-6 asks whether the Noxious Weed Plan

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<sup>333</sup> Susan Geer Petition for Party Status (Aug. 22, 2020).  
<sup>334</sup> OAR 345-015-0016(5)(b) (“In a petition to request party or limited party status, the person requesting such status must include: . . . A short and plain statement of the issue or issues that the person desires to raise in the contested case proceeding[.]”).  
<sup>335</sup> Proposed Contested Case Order at 138-39.  
<sup>336</sup> Susan Geer’s Exceptions for FW-3 and FW-6 at 4.

1 adequately addresses “potential loss of habitat *due to noxious weeds*.”<sup>337</sup> The Hearing Officer  
2 concluded that the Noxious Weed Plan adequately establishes that the Company will “control  
3 noxious weed species and prevent the introduction of these species during construction and  
4 operation of the project.”<sup>338</sup> Because Idaho Power will control noxious weed infestations, the  
5 clear implication is that noxious weed infestations will not result in loss of habitat. In addition, as  
6 the Hearing Officer stated in the Proposed Contested Case Order, “Idaho Power’s mitigation for  
7 potential habitat loss is not limited to the requirements of the draft Noxious Weed Plan. The  
8 Council’s evaluation of whether the proposed facility meets the requirements of  
9 OAR 345-022-0060 is collectively based on the draft Reclamation and Revegetation Plan, the draft  
10 Habitat Mitigation Plan and draft Noxious Weed Plan.”<sup>339</sup> Therefore, contrary to Ms. Geer’s  
11 assertion, the Hearing Officer concluded that the Noxious Weed Plan is adequate to demonstrate  
12 that the Project will not result in any unmitigated loss of habitat.

13 Ms. Geer’s exception has not identified any error in the Hearing Officer’s conclusions of  
14 law, and for that reason Idaho Power requests that the Council adopt without modification the  
15 Hearing Officer’s findings of fact and conclusions of law relevant to FW-6.

16 **3. Susan Geer, Issues FW-3 and FW-6, Exception 3 (Geer Labeled as Third**  
17 **Exception)**

18 Ms. Geer also challenges the following conclusion of law in the Proposed Contested Case  
19 Order:

20 The draft Noxious Weed Plan complies with the Council’s standards. Idaho Power  
21 is not required to demonstrate compliance with the Weed Control Laws to satisfy

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<sup>337</sup> Second Order on Case Management at 4 (emphasis added).

<sup>338</sup> Proposed Contested Case Order at 138-39.

<sup>339</sup> Proposed Contested Case Order at 152 n.118.



1 the Fish and Wildlife Habitat Standard. The Council is not the agency responsible  
2 for enforcing compliance with the Weed Control Laws.<sup>340</sup>

3 Ms. Geer argues that the Hearing Officer “incorrectly assumes that ‘compliance with weed  
4 control laws’ is the only factor related to disturbance and invasives that would affect habitat.”<sup>341</sup>  
5 However, the conclusion that Ms. Geer challenges relates to FW-3, which specifically asks  
6 whether Idaho Power’s Noxious Weed Plan ensures compliance with ORS 569.390, ORS 569.400,  
7 and ORS 569.445.<sup>342</sup> The Hearing Officer’s conclusion that Idaho Power is not required to  
8 demonstrate compliance with those statutes in this proceeding is clearly relevant to resolution of  
9 FW-3. However, the Hearing Officer’s analysis for FW-6 was wholly distinct from her assessment  
10 of FW-3. Contrary to Ms. Geer’s assertion, the Hearing Officer’s analysis of FW-6 was *not* limited  
11 to compliance with the Weed Control Laws.<sup>343</sup> Rather, the Hearing Officer addressed the various  
12 concerns that Ms. Geer raised.

13 Ms. Geer also argues that Idaho Power cannot demonstrate compliance with EFSC  
14 standards until the Company begins construction, and at this point the Company can only  
15 “demonstrate a willingness to comply, at least in writing.”<sup>344</sup> Ms. Geer’s interpretation of how an  
16 applicant complies with EFSC standards suggests the Council could not assess compliance with  
17 its standards until after construction. However, this question is not within the scope of FW-6, and  
18 moreover, Ms. Geer’s interpretation would lead to the absurd result that no energy facility could  
19 be sited in Oregon, as an applicant cannot begin construction without a site certificate.<sup>345</sup> Contrary

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<sup>340</sup> Proposed Contested Case Order at 138.

<sup>341</sup> Susan Geer’s Exceptions for FW-3 and FW-6 at 4-5.

<sup>342</sup> Second Order on Case Management at 4.

<sup>343</sup> See Proposed Contested Case Order at 151-53 (addressing FW-6).

<sup>344</sup> Susan Geer’s Exceptions for FW-3 and FW-6 at 5.

<sup>345</sup> ORS 469.320(1).

1 to Ms. Geer’s assertion, the willingness to comply—which is captured in binding commitments in  
2 the site certificate—provides the assurances of compliance, and then compliance is evaluated post-  
3 construction on an on-going basis. Importantly, after the site certificate is issued and the Project  
4 is constructed, Idaho Power will be subject to monitoring and reporting requirements as described  
5 in Recommended Fish and Wildlife Condition 1 (requiring Idaho Power to follow its approved  
6 Reclamation and Revegetation Plan), Recommended Fish and Wildlife Condition 2 (same for the  
7 Company’s approved Vegetation Management Plan), Recommended Fish and Wildlife  
8 Condition 3 (same for the Company’s approved Noxious Weed Plan), and Recommended Fish and  
9 Wildlife Condition 4 (same for the Company’s approved Fish and Wildlife Habitat Mitigation  
10 Plan).<sup>346</sup> For these reasons, Ms. Geer’s assertion that Idaho Power cannot demonstrate  
11 compliance with the Council’s siting standards does not identify any error in the Hearing Officer’s  
12 conclusion of law.

13 Ms. Geer further argues that, regardless of whether Idaho Power complies with the Weed  
14 Control Laws in ORS Chapter 569, “there is no mitigation that can atone for unique high quality  
15 native habitat” that she alleges will be lost as a result of Project-related noxious weeds.<sup>347</sup>  
16 Ms. Geer specifically mentions the habitat at the Glass Hill.<sup>348</sup> Idaho Power addressed Ms. Geer’s  
17 argument fully in the Company’s Closing Brief on this issue, where the Company explained that  
18 Ms. Geer’s concerns regarding the plausibility of mitigation do not demonstrate noncompliance  
19 with the Fish and Wildlife Habitat Standard because the ODFW Habitat Mitigation Policy allows

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<sup>346</sup> Draft Site Certificate at 23-25 (ODOE - B2HAPPDoc2 Proposed Order on ASC and Attachments 2019-07-02, Page 730 of 10016).

<sup>347</sup> Susan Geer’s Exceptions for FW-3 and FW-6 at 5.

<sup>348</sup> Susan Geer’s Exceptions for FW-3 and FW-6 at 5.

1 Idaho Power to rely on mitigation to address impacts to habitat located within the Project site.<sup>349</sup>  
2 In other words, Ms. Geer’s assertion that Idaho Power cannot mitigate potential habitat loss is  
3 inconsistent with the applicable ODFW standards.

4 EFSC’s Fish and Wildlife Habitat Standard requires Idaho Power to demonstrate  
5 compliance with the ODFW Habitat Mitigation Policy,<sup>350</sup> which in turn categorizes habitat from  
6 Category 1—which is the most protected because it is “irreplaceable, essential habitat”—to  
7 Category 6—which is the least protected.<sup>351</sup> The ODFW Habitat Mitigation Policy allows an  
8 applicant to rely on mitigation to address potential impacts to any habitat that is not designated as  
9 Habitat Category 1.<sup>352</sup> Idaho Power sited the Project to avoid impacts to all Habitat Category 1,<sup>353</sup>  
10 and as a result the ODFW Habitat Mitigation Policy allows Idaho Power to address any impacts  
11 to habitat resulting from the Project—including impacts resulting from noxious weed  
12 infestations—through compensatory mitigation. Ms. Geer has not identified any applicable statute  
13 or rule to support her position that the Company cannot rely on mitigation to address potential  
14 habitat impacts. Notwithstanding Ms. Geer’s personal misgivings regarding offsetting habitat  
15 impacts through compensatory mitigation, Idaho Power’s proposal to potentially mitigate any  
16 permanent habitat impacts that may result from Project-related noxious weed infestations is  
17 entirely consistent with EFSC’s Fish and Wildlife Habitat Standard and ODFW’s Habitat  
18 Mitigation Policy. Therefore, Ms. Geer’s concern about Idaho Power’s use of mitigation to

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<sup>349</sup> Idaho Power’s Closing Arguments for Contested Case Issues FW-3, FW-5, FW-6, and FW-7 at 45-47.

<sup>350</sup> OAR 345-022-0060(1).

<sup>351</sup> OAR 635-415-0025.

<sup>352</sup> *See, e.g.*, OAR 635-415-0025(2)(b)(B) (allowing mitigation for unavoidable impacts to Habitat Category 2).

<sup>353</sup> Proposed Order at 310 (ODOE - B2HAPPDoc2 Proposed Order on ASC and Attachments 2019-07-02. Page 317 of 10016).

1 address permanent habitat impacts does not demonstrate non-compliance with EFSC’s Fish and  
2 Wildlife Habitat Standard.

3 Ms. Geer’s exception has not identified any error in the Hearing Officer’s conclusion of  
4 law, and for that reason Idaho Power requests that the Council adopt without modification the  
5 Hearing Officer’s findings of fact and conclusions of law relevant to FW-6.

6 **4. Susan Geer, Issues FW-3 and FW-6, Exception 4 (Geer Labeled as Third**  
7 **Exception)**

8 Ms. Geer challenges the following conclusion of law regarding Idaho Power’s assertion  
9 that it may address permanent habitat loss through compensatory mitigation:

10 Ms. Geer asserts that none of the draft plans (Reclamation and Revegetation,  
11 Habitat Mitigation, and draft Noxious Weed) suffices to compensate landowners  
12 for the loss of high-quality native habitat. She also asserts that the mitigation goal  
13 of no net loss is “becoming a controversial practice,” and that even mitigation that  
14 fulfills legal requirements often fails to fully compensate for lost habitat. Geer  
15 Closing Argument at 17-18. First, this argument exceeds the scope of Issue FW-6,  
16 which as previously discussed, is limited to the adequacy of the weed monitoring  
17 and control provisions of the Noxious Weed Plan. Second, Ms. Geer’s challenge is  
18 misplaced because the goal of compensatory mitigation is not to compensate the  
19 landowner, but to compensate for the lost habitat. The Council’s Fish and Wildlife  
20 Habitat standard applies the ODFW Habitat Mitigation Policy, which is designed  
21 to address adverse impacts to fish and wildlife habitat, and not impacts to  
22 landowners. Furthermore, as Idaho Power notes in its Response Brief, if a  
23 landowner is adversely impacted by habitat loss, the Company will address this  
24 during negotiations with the landowner related to the [right-of-way] for the project.  
25 These negotiations occur outside the site certificate process and the Council’s  
26 jurisdiction.<sup>354</sup>

27 Ms. Geer takes exception to this conclusion because: (1) the Hearing Officer said that the  
28 ODFW Habitat Mitigation Policy is designed to address “adverse impacts” to fish and wildlife  
29 habitat when ODFW’s goal is actually to avoid the loss of habitat; (2) the Hearing Officer discusses  
30 the Noxious Weed Plan as if that plan “is the only aspect of invasive plants under consideration”;

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<sup>354</sup> Proposed Contested Case Order at 152.

1 and (3) the Hearing Officer incorrectly “reasons that since the Council [is] not responsible for the  
2 Noxious Weed Plan, the Council retains zero responsibility for the long-term effects of introducing  
3 invasives to the landscape.”<sup>355</sup>

4 Ms. Geer’s first assertion is immaterial to the validity of the Hearing Officer’s conclusion.  
5 The fact that the Hearing Officer described ODFW’s Habitat Mitigation Policy as focusing on  
6 addressing “adverse impacts to habitat” instead of “loss of habitat” does not affect whether the  
7 Hearing Officer correctly interpreted the ODFW Habitat Mitigation Policy as allowing developers  
8 to address permanent loss of habitat through compensatory mitigation. Moreover, the “loss of  
9 habitat” would clearly be an “adverse impact[] to habitat,” and thus would be captured in the  
10 Hearing Officer’s conclusion.

11 Ms. Geer’s second assertion takes the Hearing Officer’s conclusion out of context. The  
12 Hearing Officer never dismissed the fact that other plans are relevant to potential habitat loss. In  
13 fact, the Hearing Officer specifically stated that:

14 Idaho Power’s mitigation for potential habitat loss is not limited to the requirements  
15 of the draft Noxious Weed Plan. The Council’s evaluation of whether the proposed  
16 facility meets the requirements of OAR 345-022-0060 is collectively based on the  
17 draft Reclamation and Revegetation Plan, the draft Habitat Mitigation Plan and  
18 draft Noxious Weed Plan.<sup>356</sup>

19 However, FW-6 is clearly related only to the adequacy of the Noxious Weed Plan. For that reason,  
20 the Hearing Officer properly concluded Ms. Geer’s challenges to plans other than the Noxious  
21 Weed Plan exceeded the scope of FW-6—Ms. Geer did not challenge the adequacy of those plans

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<sup>355</sup> Susan Geer’s Exceptions for FW-3 and FW-6 at 5.

<sup>356</sup> Proposed Contested Case Order at 152 n.118.

1 in her DPO Comments, and therefore cannot raise an issue challenging those plans in this contested  
2 case.<sup>357</sup>

3 Finally, Ms. Geer’s third assertion is incorrect. Contrary to Ms. Geer’s assertion, the  
4 Council has jurisdiction over Idaho Power’s Noxious Weed Plan and, for that reason, the Council,  
5 through ODOE,<sup>358</sup> will retain authority over Idaho Power’s long-term monitoring and control of  
6 noxious weeds.<sup>359</sup> In the Proposed Contested Case Order, the Hearing Officer correctly found that  
7 Idaho Power “*will coordinate with ODOE regarding appropriate steps forward and will prepare a*  
8 *location-specific long-term monitoring plan based on the results of the initial five-year assessment*  
9 *period.*”<sup>360</sup>

10 For these reasons, Ms. Geer’s exception has not identified any error in the Hearing  
11 Officer’s conclusion of law, and Idaho Power requests that the Council adopt without modification  
12 the Hearing Officer’s findings of fact and conclusions of law relevant to FW-6.

13 **5. Susan Geer, Issues FW-3 and FW-6, Exception 5 (Geer Labeled as Third**  
14 **Exception)**

15 Ms. Geer challenges the following conclusion of law regarding the scope of FW-6 and the  
16 role of compensatory mitigation:

17 *Compensatory mitigation.* Ms. Geer asserts that none of the draft plans  
18 (Reclamation and Revegetation, Habitat Mitigation, and draft Noxious Weed)  
19 suffices to compensate landowners for the loss of high-quality native habitat. She  
20 also asserts that the mitigation goal of no net loss is “becoming a controversial

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<sup>357</sup> ORS 469.370(3).  
<sup>358</sup> ORS 469.402 (“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 if, in the council’s discretion, the delegation is warranted under the circumstances of the case.”).  
<sup>359</sup> Proposed Contested Case Order at 47 (“Idaho Power added that if control of noxious weeds is deemed unsuccessful after five years of monitoring and noxious weed control actions, the Company will coordinate with ODOE regarding appropriate steps forward and ‘will prepare a location-specific long-term monitoring plan based on the results of the initial five-year assessment period.’”).  
<sup>360</sup> Proposed Contested Case Order at 149 (emphasis added).

1 practice,” and that even mitigation that fulfills legal requirements often fails to fully  
2 compensate for lost habitat. Geer Closing Argument at 17-18. First, this argument  
3 exceeds the scope of Issue FW-6, which as previously discussed, is limited to the  
4 adequacy of the weed monitoring and control provisions of the Noxious Weed Plan.  
5 Second, Ms. Geer’s challenge is misplaced because the goal of compensatory  
6 mitigation is not to compensate the landowner, but to compensate for the lost  
7 habitat. The Council’s Fish and Wildlife Habitat standard applies the ODFW  
8 Habitat Mitigation Policy, which is designed to address adverse impacts to fish and  
9 wildlife habitat, and not impacts to landowners. Furthermore, as Idaho Power notes  
10 in its Response Brief, if a landowner is adversely impacted by habitat loss, the  
11 Company will address this during negotiations with the landowner related to the  
12 ROW for the project. These negotiations occur outside the site certificate process  
13 and the Council’s jurisdiction.<sup>361</sup>

14 Ms. Geer takes exception to the Hearing Officer’s determination that Ms. Geer’s  
15 arguments were outside the scope of FW-6, because Ms. Geer asserts that the Hearing Officer  
16 “restricted” discussion relevant to FW-6 and “prejudicially changed the emphasis of Issue FW-6  
17 and rendered her Opinion invalid.”<sup>362</sup> Ms. Geer appears to interpret the Hearing Officer’s  
18 statement as a determination that any discussion of compensatory mitigation would be outside the  
19 scope of FW-6, but that is not correct. Rather, the Hearing Officer found that the specific  
20 arguments Ms. Geer raised—challenging the adequacy of the Reclamation and Revegetation Plan  
21 and the Habitat Mitigation Plan and collaterally attacking ODFW’s “no net loss” standard for  
22 Habitat Category 2—are outside the scope of FW-6.

23 One of the questions asked in FW-6 is whether, as a matter of law, Idaho Power’s Noxious  
24 Weed Plan is inadequate because the plan “allows for compensatory mitigation if weed control is  
25 unsuccessful.”<sup>363</sup> As discussed above in response to Susan Geer, Issue FW-6, Exception 2, EFSC’s  
26 Fish and Wildlife Habitat Standard and ODFW’s Habitat Mitigation Policy allow a developer to

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<sup>361</sup> Proposed Contested Case Order at 152.

<sup>362</sup> Susan Geer’s Exceptions for FW-3 and FW-6 at 6.

<sup>363</sup> Second Order on Case Management at 4.

1 address impacts to most habitat through mitigation.<sup>364</sup> Therefore, the statement in Idaho Power’s  
2 Noxious Weed Plan that the Company “may propose mitigation to compensate for any permanent  
3 habitat loss” is entirely consistent with the Fish and Wildlife Habitat Standard and ODFW’s  
4 Habitat Mitigation Policy.

5 Although the applicable standards allow a developer to rely on mitigation to address  
6 impacts to habitat, Ms. Geer filed arguments challenging those standards—in other words,  
7 Ms. Geer tried to argue in this contested case whether the applicable standards *should* allow  
8 mitigation. Specifically, Ms. Geer argued in her Closing Argument that ODFW’s “no net loss”  
9 standard for Habitat Category 2 is “controversial.”<sup>365</sup> The Hearing Officer properly concluded  
10 that Ms. Geer’s collateral challenge to the ODFW Habitat Mitigation Policy was outside the scope  
11 of FW-6 because, notwithstanding Ms. Geer’s personal misgivings about compensatory  
12 mitigation, the standards applicable to the Noxious Weed Plan clearly allowed a developer to  
13 mitigate habitat impacts.<sup>366</sup>

14 Additionally, in her Closing Arguments, Ms. Geer raised new challenges to the adequacy  
15 of Idaho Power’s proposed Fish and Wildlife Habitat Mitigation Plan.<sup>367</sup> Idaho Power addressed  
16 these arguments in the Company’s Response Brief, where the Company explained that Ms. Geer  
17 could not raise an issue challenging that plan.<sup>368</sup> In her Petition for Party Status, Ms. Geer  
18 challenged the Proposed Order for allowing Idaho Power to “mitigate their way out of weed

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<sup>364</sup> See, e.g., OAR 635-415-0025(2)(b)(B) (allowing a developer to address impacts to Habitat Category 2 through “reliable in-kind, in-proximity habitat mitigation to achieve no net loss of either pre-development habitat quantity or quality”).  
<sup>365</sup> Susan Geer’s Closing Arguments on Issues FW-3 and FW-6 at 17-18 (Feb. 28, 2022).  
<sup>366</sup> Proposed Contested Case Order at 152.  
<sup>367</sup> Susan Geer Closing Arguments on Issues FW-3 and FW-6 at 17.  
<sup>368</sup> Idaho Power’s Response Brief and Motion to Strike for Contested Case Issues FW-3, FW-5, FW-6, FW-7, and FW-9 at 6, 46.



1 control,”<sup>369</sup> but Ms. Geer never raised the following arguments: Idaho Power’s proposed  
2 mitigation was inadequate; the Fish and Wildlife Mitigation Plan fails to identify the Company’s  
3 method for calculating habitat impacts; the Fish and Wildlife Habitat Mitigation Plan fails to  
4 ensure no net loss of habitat; or Idaho Power’s habitat categorizations were too broad. Because  
5 Ms. Geer did not raise these issues in her Petition, Ms. Geer has not been granted party status to  
6 challenge Idaho Power’s Fish and Wildlife Mitigation Plan. Moreover, Ms. Geer also did not raise  
7 these concerns in her DPO Comments and, as a result, the Hearing Officer could not consider these  
8 issues in the contested case.<sup>370</sup> Because Ms. Geer did not raise these issues in her DPO Comments  
9 or Petition for Party Status, the Hearing Officer properly concluded in the Proposed Contested  
10 Case Order that these newly raised arguments were outside the scope of FW-6.

11 For the reasons discussed herein, Ms. Geer’s exception has not identified any error in the  
12 Hearing Officer’s conclusion of law, and therefore Idaho Power requests that the Council adopt  
13 without modification the Hearing Officer’s findings of fact and conclusions of law relevant to  
14 FW-6.

15 **D. Issue FW-7**

16 The hearing officer granted limited party status to Anne and Kevin March to raise FW-7,  
17 which asks:

18 *Whether Applicant’s Fish Passage Plans, including 3A and 3B designs, complies*  
19 *with the Fish and Wildlife Habitat standard’s Category 2 mitigation requirements;*  
20 *whether Applicant must revisit its plans because threatened Steelhead redds have*  
21 *been identified in the watershed.*<sup>371</sup>

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<sup>369</sup> Susan Geer’s Petition for Party Status at 2 (Aug. 22, 2020) (“The Proposed Order says after 5 years and unsuccessful weed control and permanent loss of habitat, IPC can mitigate their way out of weed control. This is not a solution.”).

<sup>370</sup> OAR 345-015-0016(3).

<sup>371</sup> Order on Case Management Matters and Contested Case Schedule at 8.

1 In the Proposed Contested Case Order, the Hearing Officer concluded that Idaho Power’s  
2 fish passage plans and fish habitat categorization in the Ladd Creek watershed complies with  
3 ODFW’s Fish and Wildlife Habitat Mitigation Goals and Standards<sup>372</sup> and Fish Passage Rules;<sup>373</sup>  
4 and that Idaho Power is not required to revisit its fish passage plans due to potential new  
5 occurrences of steelhead in that watershed.<sup>374</sup> The Hearing Officer noted:

6 The following points are important to keep in mind in resolving Issue FW-7: First,  
7 Idaho Power categorized all potentially fish bearing streams in the upper Ladd  
8 Creek watershed above the I-84 culvert within the site boundary as Habitat  
9 Category 2. Therefore, the potential presence of Snake River Basin Steelhead in  
10 these streams would not change the habitat designation. Second, Idaho Power is  
11 not proposing construction of new road crossings or major replacement of existing  
12 road crossings on any identified streams in the upper Ladd Creek watershed.  
13 Consequently, there no need for Idaho Power to prepare a Fish Passage Plan for  
14 any of the crossings in the upper Ladd Creek watershed regardless of the potential  
15 presence of Snake River Basin Steelhead in these streams because all proposed  
16 project-related crossings in the upper Ladd Creed watershed will rely on the  
17 existing bridges or culverts.<sup>375</sup>

18 For the reasons discussed below, the Marches’ exceptions do not identify any incorrect  
19 finding of fact or conclusion of law, and Idaho Power therefore requests that the Council adopt  
20 without modification the Hearing Officer’s findings of fact and conclusions of law relevant to  
21 FW-7.

22 **6. Anne and Kevin March, Issue FW-7, Exception 1**

23 In the Marches’ first exception to FW-7, they assert that the Hearing Officer  
24 mischaracterized the thrust of their arguments as being limited to the claim that Idaho Power failed  
25 to properly identify all the streams “not capable of providing fish habitat;” instead, the Marches

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<sup>372</sup> OAR 635-415-0025(1) through (6).

<sup>373</sup> ORS Chapter 635, Division 412.

<sup>374</sup> Proposed Contested Case Order at 156-59.

<sup>375</sup> Proposed Contested Case Order at 157.

1 assert they were focused on the consequences of Idaho Power having “mis-labeled which streams  
2 potentially contain a fish presence,” challenging the following finding of fact in the Proposed  
3 Contested Case Order:

4 The Marches further assert that Idaho Power bears the burden to identify all streams  
5 that may provide habitat for Snake River Basin Steelhead and to “definitively state”  
6 which streams in the upper Ladd Creek watershed are not capable of providing fish  
7 habitat.<sup>376</sup>

8 The Marches argue Idaho Power identified certain streams in the Ladd Creek watershed as  
9 “non-fish” bearing; Idaho Power did not analyze the “non-fish” streams for compliance with the  
10 Fish Passage Rules; new data suggests Snake River Basin steelhead may have returned to those  
11 “non-fish” streams; and because Idaho Power did not analyze the “non-fish” streams, there is the  
12 potential those streams now contain fish, and Idaho Power cannot prove that the crossings at those  
13 streams satisfy the Fish Passage Rules.<sup>377</sup> The Marches raised all these issues in their testimony  
14 and briefing. In response, Idaho Power filed rebuttal testimony from Chris James, an expert  
15 witness with over 18 years of extensive experience in performing surveys and aquatic habitat  
16 assessments, evaluating project effects on aquatic and hydrologic resources, and designing,  
17 implementing, and monitoring stream restoration, fish passage, and other tasks associated with  
18 hydrologic projects.<sup>378</sup> Idaho Power also addressed these issues in the Company’s Closing  
19 Arguments.<sup>379</sup>

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<sup>376</sup> Anne and Kevin March’s Exceptions to Administrative Law Judge Webster’s Proposed Contested Case Order Issue FW-7 at 1-2.

<sup>377</sup> Anne and Kevin March’s Exceptions to Administrative Law Judge Webster’s Proposed Contested Case Order Issue FW-7 at 1-4.

<sup>378</sup> Idaho Power / Rebuttal Testimony of Chris James (Nov. 12, 2021) / Issue FW-7.

<sup>379</sup> Idaho Power’s Closing Arguments for Contested Case Issues FW-3, FW-5, FW-6, and FW-7 at 50-69.

1           a.       *The Assumed Redistribution of Snake River Basin Steelhead into the Upper*  
2                    *Ladd Creek Watershed Does Not Affect Idaho Power’s Conclusion That No*  
3                    *Fish Passage Plan Is Required.*

4           Idaho Power addressed this assertion in the Company’s Closing Arguments,<sup>380</sup> where the  
5   Company explained that, contrary to the Marches’ assertions, no Fish Passage Plan is required for  
6   any of the crossings in the Ladd Creek watershed—regardless of the potential redistributed of  
7   steelhead into the “non-fish” streams—because the Fish Passage Rules require a Fish Passage Plan  
8   only “[p]rior to construction, fundamental change in permit status or abandonment of an artificial  
9   obstruction,”<sup>381</sup> and Idaho Power does not propose any of those actions in the Ladd Creek  
10   watershed. Under ODFW’s regulations, “[n]o person shall construct or maintain any artificial  
11   obstruction across any waters of this state that are inhabited, or were historically inhabited, by  
12   native migratory fish without providing passage for native migratory fish.”<sup>382</sup> To ensure passage  
13   for native migratory fish, ODFW requires that the owner or operator of any artificial obstruction  
14   obtain ODFW approval of a Fish Passage Plan prior to construction or major replacement,  
15   fundamental change in permit status, or abandonment of the artificial obstruction.<sup>383</sup> Mere  
16   presence of native migratory fish does not trigger the fish passage rules; rather, the need for  
17   “construction” of an “artificial obstruction” is what triggers application of the Fish Passage Rules.  
18   All proposed Project-related crossings in the upper Ladd Creek watershed will rely on the existing  
19   bridges or culverts, and, as a result, Idaho Power does not propose to construct, change the permit  
20   status of, or abandon any artificial obstructions in the upper Ladd Creek watershed.<sup>384</sup> Therefore,

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<sup>380</sup> Idaho Power’s Closing Arguments for Contested Case Issues FW-3, FW-5, FW-6, and FW-7 at 53-56.

<sup>381</sup> OAR 635-412-0020(2).

<sup>382</sup> OAR 635-412-0020(1).

<sup>383</sup> OAR 635-412-0020(1).

<sup>384</sup> Idaho Power / Rebuttal Testimony of Chris James / Issue FW-7, p. 18 of 56.

1 the Company is not required to prepare a Fish Passage Plan for those crossings, regardless of the  
2 potential presence of steelhead.

3 At the cross-examination hearing, ODFW’s State Fish Passage Program Coordinator, Greg  
4 Apke, confirmed that mere use of an existing culvert to cross a stream does not trigger ODFW’s  
5 fish passage rules,<sup>385</sup> and that a Fish Passage Plan is not required “until a point in time that an  
6 owner/operator takes an action, that is when the owner/operator of the obstruction, the culvert, is  
7 responsible, by law, to address fish passage and not up until that point in time.”<sup>386</sup> Mr. Apke stated  
8 that “[u]nless there is a new man-made structure placed in waters of the state where fish historically  
9 occupied or are presently in occupancy, that’s when our fish passage law is invoked and that’s  
10 when the owner/operator of the project proposal is compelled to address passage.”<sup>387</sup>

11 Accordingly, notwithstanding the fact that Snake River Basin steelhead could potentially  
12 access the upper Ladd Creek watershed following the Oregon Department of Transportation’s  
13 (“ODOT”) improvement projects, ODFW’s fish passage rules do not require Idaho Power to  
14 prepare a Fish Passage Plan for any of the Project-related crossings in that watershed. Because no  
15 Fish Passage Plan is required for any Project-related crossing in the upper Ladd Creek watershed,  
16 the Marches’ assertions that Idaho Power did not analyze the “non-fish” streams and that Idaho  
17 Power cannot prove that the crossings at those streams satisfy the Fish Passage Rules are wholly  
18 without merit.

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<sup>385</sup> G. Apke Testimony, Cross-Examination Hearing Day 5, January 18, 2022 (Tr. Day 5), page 99, lines 11-20.

<sup>386</sup> G. Apke Testimony, Cross-Examination Hearing Day 5, January 18, 2022 (Tr. Day 5), page 99, lines 15-20.

<sup>387</sup> G. Apke Testimony, Cross-Examination Hearing Day 5, January 18, 2022 (Tr. Day 5), page 105, lines 13-18.

1                   b.       *Idaho Power’s Non-Fish Designations Are Accurate, Notwithstanding the*  
2                                   *Assumed Reintroduction of Snake River Basin Steelhead.*

3                   The Marches assert that, as a result of the removal of the fish passage barrier at the I-84  
4 culvert, Idaho Power’s non-fish designations in the upper Ladd Creek watershed are “potentially  
5 inaccurate.”<sup>388</sup> However, Idaho Power submitted a map in the contested comparing the Project-  
6 related crossings and their associated fish-bearing or non-fish designations, to ODFW’s most-  
7 recent distribution data for Snake River Basin steelhead.<sup>389</sup> Those maps demonstrate that Idaho  
8 Power’s identification in the ASC of potential fish presence in the upper Ladd Creek watershed is  
9 consistent with the most up-to-date data available regarding Snake River Basin distribution within  
10 that watershed.<sup>390</sup> Accordingly, it remains more likely true than not that those streams continue to  
11 be non-fish streams, notwithstanding the assumed redistribution of Snake River Basin steelhead  
12 within the upper Ladd Creek watershed following removal of the I-84 fish passage barrier.

13                   Moreover, as discussed above, Idaho Power can definitively state that the fish passage rules  
14 do not apply to the Project-related crossings in these non-fish streams, because the Company does  
15 not propose construction or major replacement of any artificial obstructions in the upper Ladd  
16 Creek watershed.<sup>391</sup> Therefore, regardless of whether those non-fish designations are accurate,  
17 there is no “trigger” event that would require Idaho Power to prepare a Fish Passage Plan for those  
18 crossings.

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<sup>388</sup> Anne and Kevin March’s Exceptions to Administrative Law Judge Webster’s Proposed Contested Case Order Issue FW-7 at 4.

<sup>389</sup> Idaho Power / Rebuttal Testimony of Chris James / Issue FW-7 / Exhibit B, Project Crossings in Upper Ladd Creek Watershed Proposed on Streams Identified in 2021 ODFW Summer Steelhead Distribution Map, p. 1 of 1; Idaho Power / Rebuttal Testimony of Chris James / Issue FW-7 / Exhibit C, Project Crossings in Upper Ladd Creek Watershed Proposed Outside Streams Identified in 2021 ODFW Summer Steelhead Distribution Map, p. 1 of 1.

<sup>390</sup> Idaho Power / Rebuttal Testimony of Chris James / Issue FW-7, pp. 38-39 of 56.

<sup>391</sup> Idaho Power / Rebuttal Testimony of Chris James (Nov. 12, 2021) / Issue FW-7, p. 16 of 56.

1                   c.       *The Amendments to Recommended Fish Passage Condition 1 Are Sufficient*  
2                   to *Ensure Any New Fish Presence Data Will be Considered.*

3                   While fish presence itself will not trigger the need for a Fish Passage Plan, as discussed  
4 above, the Hearing Officer’s Amended Recommended Fish Passage Condition 1(a) will require  
5 Idaho Power to seek concurrence from ODFW on the fish-presence determinations for non-fish  
6 bearing streams within the upper Ladd Creek watershed.<sup>392</sup>

7                   Amended Recommended Fish Passage Condition 1(a): Prior to construction, the  
8 certificate holder shall finalize, and submit to the Department for its approval in  
9 consultation with ODFW, a final Fish Passage Plan. As part of finalizing the Fish  
10 Passage Plan, the certificate holder shall request from ODFW any new information  
11 on the status of the streams within the site boundary and shall address the  
12 information in the final Fish Passage Plan. In addition, the certificate holder shall  
13 seek concurrence from ODFW on the fish-presence determinations for non-fish  
14 bearing streams within the Ladd Creek watershed, as presented in ASC Exhibit P1-  
15 7B Table 3. If the certificate holder in consultation with ODFW, determines any of  
16 the previously identified non-fish bearing streams within the Ladd Creek  
17 Watershed to be fish-bearing, the certificate holder shall complete a crossing risk  
18 evaluation and obtain concurrence from ODFW on applicability of fish passage  
19 requirements. If fish passage requirements apply, certificate holder shall seek  
20 approval from the Energy Facility Siting Council of a site certificate amendment to  
21 incorporate ODFW approval of new crossings and fish passage design/plans and  
22 conditions. The protective measures described in the draft Fish Passage Plan in  
23 Attachment BB-2 to the Final Order on the ASC, shall be included as part of the  
24 final Fish Passage Plan, unless otherwise approved by the Department.

25                   Therefore, to the extent the Marches continue to be concerned with the fish-presence  
26 determinations as a matter of principle, Amended Recommended Fish Passage Condition 1(a) will  
27 ensure the final fish presence determination are consistent with the most up-to-date data.

28                   For the reasons discussed above, the Marches’ Exception 1 does not identify any incorrect  
29 finding of fact or conclusion of law, and for that reason Idaho Power requests that the Council  
30 adopt without modification the findings of fact and conclusions set forth above.

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<sup>392</sup> Proposed Contested Case Order at 304.

1           **7. Anne and Kevin March, Issue FW-7, Exception 2**

2           In the Marches' second exception to FW-7, they assert the Hearing Officer erred in finding  
3 that the Marches' ephemeral stream arguments were outside the scope of the contested case,<sup>393</sup>  
4 challenging the following finding:

5           Finally, the Marches assert that the ASC is missing ephemeral stream habitat data  
6 and that "OAR 635-021-0010(1)(p)(D)(E)(F) and OAR 635-412-0020 are not  
7 fulfilled due to an assumed 'non-fish' designation of ephemeral streams and a lack  
8 of data to support this designation." March Closing Brief at 26. As the Department  
9 notes, this is a new contention not previously raised in the Marches' petition for  
10 party status or the evidence submitted in support of Issue FW-7. Department  
11 Response to Closing Arguments at 20. Idaho Power similarly argues that this  
12 contention (compliance with the content requirements of OAR 345-021-  
13 0010(1)(p)) is outside the scope of Issue FW-7. Idaho Power's Response Brief for  
14 Issue FW-7 at 68. The ALJ agrees. Because the Marches raised this contention for  
15 the first time in their Closing Brief, neither the Department nor Idaho Power had  
16 the opportunity to respond to this challenge with rebuttal evidence. Therefore, this  
17 particular contention (failure to include ephemeral stream habitat data in the ASC)  
18 is not properly before the ALJ.<sup>394</sup>

19           The Marches assert they properly raised ephemeral stream arguments because throughout  
20 the proceeding they contended all waters in the watershed needed to be considered when  
21 determining compliance with the relevant rules and standards; ephemeral streams were discussed  
22 during the cross examination of ODFW witness Mr. Apke; Idaho Power discussed ephemeral  
23 streams in Exhibit J; and ephemeral streams were discussed in Exhibit P1.<sup>395</sup> However, the  
24 Marches' arguments fail for the following reasons.

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<sup>393</sup> Anne and Kevin March's Exceptions to Administrative Law Judge Webster's Proposed Contested Case Order Issue FW-7 at 4.

<sup>394</sup> Proposed Contested Case Order at 159.

<sup>395</sup> Anne and Kevin March's Exceptions to Administrative Law Judge Webster's Proposed Contested Case Order Issue FW-7 at 6.



1 First, as Idaho Power explained in the Company’s Response Brief,<sup>396</sup> the Marches’  
2 ephemeral stream arguments related to compliance with the application content requirements of  
3 OAR 345-021-0010, which is outside the scope of FW-7.<sup>397</sup> In their Closing Brief, the Marches  
4 asserted that ODFW “has not supplied mandated information about [Snake River Basin steelhead]  
5 nor about location of the species to [Idaho Power] as required by OAR 345-021-0010(1)(p).”<sup>398</sup>  
6 The Marches similarly asserted that “OAR 635[sic]-021-0010(1)(p)(D)(E)(F) is not fulfilled if no  
7 studies were undertaken to identify state sensitive species in [ephemeral] streams.”<sup>399</sup> However,  
8 Issue FW-7 relates specifically to the Fish Passage Rules and the Fish and Wildlife Standard, and  
9 not the entirely separate EFSC application content requirements of OAR 635-021-0010. Because  
10 OAR 635-021-0010 raises different issues than the Fish Passage Rules and the Fish and Wildlife  
11 Standard, the Hearing Officer’s finding that the Marches arguments relating to OAR 635-021-0010  
12 were outside the scope of FW-7 is correct.<sup>400</sup>

13 Second, in their Closing Brief, the Marches asserted that some of the streams designated  
14 as non-fish use may have been ephemeral streams, and they further asserted that Idaho Power did  
15 not survey these streams.<sup>401</sup> The Marches did not provide any evidence to support their assertion  
16 that Idaho Power failed to assess ephemeral streams categorically or that the Company

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<sup>396</sup> Idaho Power’s Response Brief and Motion to Strike for Contested Case Issues FW-3, FW-5, FW-6, FW-7, and FW-9 at 68-69.

<sup>397</sup> In their exception brief, the Marches appear to be trying to expand their ephemeral stream arguments beyond what they argued in their closing brief, which was limited to compliance with OAR 345-021-0010. To the extent the Marches are now raising new issues in their exception brief, those arguments should be stricken or given no weight.

<sup>398</sup> Closing Brief of Anne and Kevin March on Issue FW-7 at 14.

<sup>399</sup> Closing Brief of Anne and Kevin March on Issue FW-7 at 22-23. While the Marches reference chapter 635, this appears to be a scrivener’s error, as the text they quote in their closing brief is from the EFSC application content requirements of OAR 345-021-0010(1)(p).

<sup>400</sup> See also Rulings on Objections to Direct Testimony and Exhibits at 7 (Oct. 15, 2021) (finding that statements in the Marches’ testimony regarding compliance with the information requirements of OAR 345-021-0010 were outside the scope of FW-7 and would be given no weight).

<sup>401</sup> Closing Brief of Anne and Kevin March on Issue FW-7 at 22-23.

1 inappropriately determined ephemeral streams were non-fish streams, nor did they raise an issue  
2 regarding ephemeral streams in their Direct Testimony or Sur-rebuttal Testimony. At the hearing,  
3 the Marches asked only whether ephemeral streams may provide habitat but did not probe Idaho  
4 Power’s assessment of the habitat located within those ephemeral streams.<sup>402</sup>

5 Contrary to the Marches’ assertion, the evidence in the record demonstrates that Idaho  
6 Power surveyed ephemeral streams. In the Company’s field surveys, the Company sought to  
7 “survey all 128 potential fish-bearing stream crossings (road and transmission line), *regardless of*  
8 *perennial, intermittent, or ephemeral designation.*”<sup>403</sup> Idaho Power then assessed the same  
9 geomorphic criteria to determine fish presence at all surveyed streams.<sup>404</sup> Because the Marches  
10 have provided no evidence to support their assertion, and Idaho Power stated in the ASC that the  
11 Company surveyed ephemeral streams, the preponderance of the evidence in the record  
12 demonstrates that Idaho Power surveyed ephemeral streams for potential fish presence.

13 Third, the Marches contend that Idaho Power did not consider ephemeral streams to be  
14 “waters of this state” and therefore did not apply the Fish Passage Rules to the crossings affecting  
15 those streams.<sup>405</sup> However, regardless of the validity of that contention, as discussed above, the  
16 Fish Passage Rules do not apply to any of the Project-related crossings in the upper Ladd Creek  
17 watershed, including crossings at ephemeral streams, because Idaho Power is not proposing  
18 construction or major replacement of any artificial obstructions in that watershed.<sup>406</sup> Accordingly,

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<sup>402</sup> Apke Testimony, Cross-Examination Hearing Day 5, January 18, 2022 (Tr. Day 5), page 18 line 25 – page 19, line 8.

<sup>403</sup> ASC, Exhibit P1-7b at 6 (ODOE - B2HAPPDoc3-28 ASC 16A\_Exhibit P1\_Wildlife\_ASC\_Part 3\_Attach P1-7B 2018-09-28. Page 10 of 164) (emphasis added).

<sup>404</sup> ASC, Exhibit P1-7b at 6 (ODOE - B2HAPPDoc3-28 ASC 16A\_Exhibit P1\_Wildlife\_ASC\_Part 3\_Attach P1-7B 2018-09-28. Page 10 of 164).

<sup>405</sup> Anne and Kevin March’s Exceptions to Administrative Law Judge Webster’s Proposed Contested Case Order Issue FW-7 at 6.

<sup>406</sup> Idaho Power / Rebuttal Testimony of Chris James (Nov. 12, 2021) / Issue FW-7, p. 16 of 56.

1 regardless of whether ephemeral streams are considered waters of this State, there is no “trigger”  
2 event that would require Idaho Power to prepare a Fish Passage Plan for the crossings in the upper  
3 Ladd Creek watershed as argued by the Marches.

4 Fourth, the Marches admit that they are raising these arguments for the first time, stating  
5 that:

6 The Marches recognize that IPC did not have a chance to present evidence to the  
7 contrary, and the Marches respectfully request that this portion of the case be  
8 remanded to provide evidence that construction on and near streams, ephemeral  
9 streams and associated uplands in the Ladd Canyon watershed will not degrade  
10 habitat or create fish passage issues by access road, bridge or line construction.<sup>407</sup>

11 Because the Marches’ Exception 2 does not identify any incorrect finding of fact or  
12 conclusion of law, Idaho Power requests that the Council adopt without modification the Hearing  
13 Officer’s findings and conclusions in the Proposed Contested Case Order that the Marches’  
14 ephemeral stream arguments were outside the scope of the contested case.

15 **8. Anne and Kevin March, Issue FW-7, Exception 3**

16 In their third exception, the Marches challenge the Hearing Officer’s findings that  
17 compliance with OAR 635-415-0020 is outside the Council’s jurisdiction.<sup>408</sup>

18 In their Closing Brief, the Marches argue that “OAR 635-415-0020 is not fulfilled  
19 because of a lack of studies and data since the completion of the I-84 Fish Passage  
20 Improvement Project.” March Closing Brief at 26. However, contrary to the  
21 Marches’ contention, and as discussed above, Idaho Power is not obligated to  
22 satisfy the provisions of OAR 635-415-0020 (Implementation of Department  
23 Habitat Mitigation Requirements). Rather, pursuant to OAR 345-022-0060 (Fish  
24 and Wildlife Habitat), Idaho Power is required to show, by a preponderance of the  
25 evidence, that taking into account mitigation, the design, construction and operation  
26 are “consistent with” the mitigation goals and standards of OAR 635-415-0025(1)  
27 through (6). Idaho Power has done so in ASC Exhibit P1, Attachment P1-6.

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<sup>407</sup> Anne and Kevin March’s Exceptions to Administrative Law Judge Webster’s Proposed Contested Case Order Issue FW-7 at 6.

<sup>408</sup> Anne and Kevin March’s Exceptions to Administrative Law Judge Webster’s Proposed Contested Case Order Issue FW-7 at 7.

1 Furthermore, to the extent the Marches’ assert that the ODFW has not complied  
2 with OAR 635-415-0020 because it has not studied or surveyed the Ladd Creek  
3 watershed since ODOT completed the I-84 Fish Passage Improvement Project, that  
4 claim falls outside the Council’s jurisdiction.<sup>409</sup>

5 The Marches admit OAR 635-415-0020 is outside the Council’s jurisdiction, stating: “As  
6 Pro Se Petitioners, it appears the March’s erred in this statement and that the Judge is correct in  
7 that assessment of ODFW compliance with this OAR is outside the Council’s jurisdiction.”<sup>410</sup>  
8 Nonetheless, the Marches continue to challenge the “fulfillment” of OAR 635-415-0020.<sup>411</sup>

9 The Marches argue OAR 635-415-0020 “is not fulfilled because ODFW did not have the  
10 accurate and complete data to supply to [Idaho Power], making this OAR impossible to fulfill by  
11 [Idaho Power].”<sup>412</sup> Despite the Marches’ concerns, because OAR 635-415-0020 is implemented  
12 by ODFW and not the Council, and because OAR 635-415-002 does not otherwise incur any  
13 obligations onto Idaho Power, as a matter of law, the Council does not have jurisdiction to evaluate  
14 ODFW’s implementation of that rule.

15 Next, the Marches make the unsupported, conclusory, and speculative claim that ODFW  
16 cannot be relied on to accurately assess the final habitat and crossing evaluations as required in  
17 Amended Recommended Fish Passage Condition 1.<sup>413</sup> However, Idaho Power has no obligation  
18 to disprove unsubstantiated claims and allegations raised by the Marches.<sup>414</sup>

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<sup>409</sup> Proposed Contested Case Order at 157-58 (internal citations omitted).

<sup>410</sup> Anne and Kevin March’s Exceptions to Administrative Law Judge Webster’s Proposed Contested Case Order Issue FW-7 at 7.

<sup>411</sup> Anne and Kevin March’s Exceptions to Administrative Law Judge Webster’s Proposed Contested Case Order Issue FW-7 at 8.

<sup>412</sup> Anne and Kevin March’s Exceptions to Administrative Law Judge Webster’s Proposed Contested Case Order Issue FW-7 at 8.

<sup>413</sup> Anne and Kevin March’s Exceptions to Administrative Law Judge Webster’s Proposed Contested Case Order Issue FW-7 at 8.

<sup>414</sup> See Second Order on Case Management at 7 (“A party or limited party challenging a finding or conclusion in the Proposed Order must provide factual testimony or evidence to substantiate the claim asserted. Unsubstantiated factual

1 In sum, the Marches' Exception 3 does not identify any incorrect finding of fact or  
2 conclusion of law, and therefore, Idaho Power requests that the Council adopt without modification  
3 the Hearing Officer's findings in the Proposed Contested Case Order that compliance with  
4 OAR 635-415-0020 is outside the Council's jurisdiction.

5 **9. Anne and Kevin March, Issue FW-7, Exception 4**

6 In the Marches' fourth exception, they challenge the Hearing Officer's findings that  
7 OAR 345-021-0010(1)(p) is outside the Council's jurisdiction:<sup>415</sup>

8 Idaho Power similarly argues that this contention (compliance with the content  
9 requirements of OAR 345-021-0010(1)(p)) is outside the scope of Issue FW-7.  
10 Idaho Power's Response Brief for Issue FW-7 at 68. The ALJ agrees.<sup>416</sup>

11 The Marches argue that they sufficiently raised OAR 345-021-0010(1)(p) because they  
12 "mentioned their concern about the loss of habitat" in their Petition for Party Status, and they  
13 "argued throughout the proceedings the importance of habitat and the potential loss of said on  
14 SRBS in the Ladd Creek watershed," and OAR 345-021-0010(1)(p) concerns state-listed  
15 species.<sup>417</sup>

16 As discussed above in Idaho Power's response to Anne and Kevin March, Issue FW-7,  
17 Exception 2, the application content requirements of OAR 345-021-0010(1)(p) are outside the  
18 scope of FW-7.<sup>418</sup> Issue FW-7 relates specifically to the Fish Passage Rules and the Fish and

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argument(s) or legal conclusions are insufficient to demonstrate the Applicant's failure to establish compliance with any applicable standard."); ORS 183.450(2) ("The burden of presenting evidence to support a fact or position in a contested case rests on the proponent of the fact or position.").

<sup>415</sup> Anne and Kevin March's Exceptions to Administrative Law Judge Webster's Proposed Contested Case Order Issue FW-7 at 8-9.

<sup>416</sup> Proposed Contested Case Order at 159.

<sup>417</sup> Anne and Kevin March's Exceptions to Administrative Law Judge Webster's Proposed Contested Case Order Issue FW-7 at 9.

<sup>418</sup> In their exception brief, the Marches appear to be trying to expand their ephemeral stream arguments beyond what they argued in their closing brief, which was limited to compliance with OAR 345-021-0010. To the extent the Marches are now raising new issues in their exception brief, those arguments should be stricken or given no weight.

1 Wildlife Standard, and not the application content requirements of OAR 635-021-0010. While  
2 some of the information presented in the contested case may relate to OAR 345-021-0010(1)(p),  
3 FW-7 itself is limited to compliance with Fish Passage Rules and the Fish and Wildlife Standard.  
4 Because OAR 635-021-0010 raises different issues than the Fish Passage Rules and the Fish and  
5 Wildlife Standard, the Hearing Officer’s finding that the Marches arguments related to OAR 635-  
6 021-0010 were outside the scope of FW-7 is correct.<sup>419</sup>

7 For the above reasons, Idaho Power requests that the Council adopt without modification  
8 the Hearing Officer’s findings of fact and conclusions of law relevant to FW-7.

9 **IV. CONCLUSION**

10 For the reasons discussed above, Idaho Power respectfully requests that the Council reject  
11 the limited parties’ exceptions to the Proposed Contested Case Order regarding FW-1, FW-3,  
12 FW-6, and FW-7.

DATED: July 15, 2022

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<sup>419</sup> See also Rulings on Objections to Direct Testimony and Exhibits at 7 (Oct. 15, 2021) (finding that statements in the Marches’ testimony regarding compliance with the information requirements of OAR 345-021-0010 were outside the scope of FW-7 and would be given no weight).

**CERTIFICATE OF FILING AND SERVICE**

I hereby certify that on July 15, 2022, **APPLICANT IDAHO POWER COMPANY'S RESPONSE TO LIMITED PARTIES' EXCEPTIONS FOR CONTESTED CASE ISSUES FW-1, FW-3, FW-6, AND FW-7** was emailed to:

Alison Greene Webster, Senior Administrative Law Judge  
Hearings Officer  
Office of Administrative Hearings  
[OED\\_OAH\\_Referral@oregon.gov](mailto:OED_OAH_Referral@oregon.gov)

I further certify that on July 15, 2022, **APPLICANT IDAHO POWER COMPANY'S RESPONSE TO LIMITED PARTIES' EXCEPTIONS FOR CONTESTED CASE ISSUES FW-1, FW-3, FW-6, AND FW-7** was served by First Class Mail or electronic mail as indicated below:

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*/s/ Suzanne Prinsen*

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