

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

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

**ENERGY FACILITY SITING COUNCIL
ORDER ON APPEALS OF HEARING
OFFICER ORDER ON PARTY STATUS,
AUTHORIZED REPRESENTATIVES
AND ISSUES**

OAH Case No. 2019-ABC-02833

The Energy Facility Siting Council (“Council”) conducted a hearing on appeals of the Hearing Officer’s *Order on Petitions for Party Status, Authorized Representatives and Issues for Contested Case* (“Order on Party Status”) in the matter of the Application for Site Certificate for the Boardman to Hemingway Transmission Line at the November 20, 2020 Council meeting (as Agenda Item G). The hearing was continued to November 25, 2020 through Special Council Meeting. Based on review and deliberation at the November 20 and 25, 2020 meeting, Council issues this Order on Appeals of the Order on Party Status, which incorporates the decisions made by Council at the meeting. The Council directs the Hearing Officer to issue an amended *Order on Party Status* consistent with this Order.

The Hearing Officer issued her *Order on Party Status* on October 29, 2020, granting limited party status to 35 petitioners and denying limited or full party status to the other 18 petitioners; the *Order on Party Status* identifies 70 properly raised discrete contested case issues, and denies 47 issues. The *Order on Party Status* notified petitioners of their right to appeal the Hearing Officer’s determination, pursuant to OAR 345-015-0016(6) and OAR 345-015-0057(1), within seven days (or by November 6, 2020). On October 30, 2020, Oregon Department of Justice (“DOJ”) Senior Assistant Attorney General Jesse Ratcliffe, Counsel to Council, provided petitioners, via courtesy email to the Service List, procedural information which clarified that the Council would review any properly filed appeals during its scheduled November 19-20, 2020 meeting. Written appeals were filed by 26 petitioners/parties (“appellants”), as provided on November 9, 2020 by the Hearing Officer in her *Notice to Council of Appeals Pursuant to OAR 345-015-0016(6) and Corrected Table of Identified Issues* (“Notice to Council”).

Based on the deliberation and action at the November 20 and 25, 2020 Council meetings, as documented in this determination and summarized in Subsection 27 below, the Hearing Officer shall grant 8 additional issues as properly raised contested case issues and shall further clarify 3 issues as requested by appellants. Similarly, based on 1 of the identified additional properly raised contested case issues, 1 additional petitioner should be granted party status. Based on the reasoning and analysis provided herein, Hearing Officer shall issue an amended *Order on Party Status* based on the final list of parties with standing on issues and list of identified issues (see Attachment 1 for full list of parties and issues).

A. Findings of Fact and Conclusions of Law

1. STOP B2H Coalition

a) Statement of Issues

Petitioner STOP B2H Coalition, represented by Mr. Karl Anuta, disputes the following determinations of the *Order on Party Status*:

- 1) Designation as a limited rather than full party.
- 2) Clarification on statement of Issue NC-1, as presented in the *Notice to Council*, “Whether the Department improperly modified/reduced the noise analysis area in Exhibit X from one mile of the proposed site boundary to ½ mile of the proposed site boundary and whether OAR 345-021-0010(1)(x)(E) requires notification to all owners of noise sensitive property within one mile of the site boundary.”
- 3) Clarification on statement of Issue NC-3, as presented in the *Notice to Council*, “Whether the Department erred in approving the methodology used to evaluate compliance with OAR 340-035-0035.”
- 4) Denial of the issue, “Whether Applicant’s visual impact assessments are invalid because Applicant used an outdated methodology (based on a 1974 USFS Handbook) to assess visual impacts on Morgan Lake Park and other areas instead of Landscape Aesthetic, Scenic Management System (SMS), published in 1995.”

- 5) Denial of the issue, “Whether the Soil Protection Standard and General Standard of Review require an evaluation of carbon sequestration, carbon storage and carbon loss.”
- 6) Denial of the issue, “Whether the methods used to determine the extent of an adverse impact of the proposed facility on scenic resources, protected area and recreation along the Oregon Trail were flawed and developed without peer review on public input. Specifically, whether Applicant erred in applying numeric values to the adverse impact and whether Applicant used unsatisfactory measurement locations/observation points in its visual impact assessment.”

b) Conclusions of Law

- 1) Council’s findings on appeal of limited party designation is presented in Section 27 of this determination.
- 2) Council finds that Issue NC-1, as presented in the *Notice to Council*, should be clarified as requested to, “Whether the Department improperly modified/reduced the noise analysis area and the notification area in Exhibit X from one mile of the proposed site boundary to ½ mile of the proposed site boundary and whether OAR 345-021-0010(1)(x)(E) requires notification to all owners of noise sensitive property within one mile of the site boundary” because STOP B2H Coalition comments on the record of the draft proposed order(DPO)included two distinct issues, including an issue on “noise notice area” and on “noise analysis area.”
- 3) Council finds that Issue NC-3, as presented in the *Notice to Council*, should be clarified as requested to, “Whether the methodologies used for the noise analysis to evaluate compliance with OAR 340-035-0035 were appropriate and whether the Department erred in approving the methodology used to evaluate compliance with OAR 340-035-0035” because the issues as raised in STOP B2H Coalition comments on the record of the DPO clearly included two distinct issues, including an issue on noise methodologies and of the Department’s ability to approve the methodology.

- 4) Council finds that Hearing Officer's framing of Stop B2H Coalition's issue on visual methodology be modified as presented in Section A.6(b) of this order to, "Whether Applicant's visual impact assessments are invalid because Applicant did not use ~~updated USFS visual assessment criteria (1995 Landscape Aesthetic, Scenic Management System (SMS))~~ incorporate Oregonians' subjective evaluation of their resources to evaluate visual impacts, thereby invalidating the visual impact analysis for Morgan Lake Park and other protected areas, scenic resources and important recreational opportunities" and that denial of the issue be overruled. Council finds that Stop B2H Coalition properly raised the issue of whether the applicant's visual impacts analysis failed to incorporate Oregonians' subjective evaluation of their resources, which Stop B2H Coalition maintains is a difference between the 1974 and 1995 USFS methodologies. Therefore, Council finds that this issue be granted as a properly raised contested case issue.
- 5) Council finds that the Hearing Officer's denial of the issue, "Whether the Soil Protection Standard and General Standard of Review require an evaluation of carbon sequestration, carbon storage and carbon loss" be overruled because Stop B2H Coalition DPO comments incorporated Ms. Fouty's comments, which for the reasons evaluated in Section A.2(b) of this order, should be granted as a properly raised contested case issue, as modified by Council, by Stop B2H Coalition.
- 6) Council finds that the Hearing Officer's denial of the issue, "Whether the methods used to determine the extent of an adverse impact of the proposed facility on scenic resources, protected area and recreation along the Oregon Trail were flawed and developed without peer review on public input. Specifically, whether Applicant erred in applying numeric values to the adverse impact and whether Applicant used unsatisfactory measurement locations/observation points in its visual impact assessment" be overruled because the issue of flawed visual impact methodology was raised in Stop B2H Coalition comments on the record of the DPO, where facts in support of the issue were provided including

data that should have been used to inform the assessment from Chamber of Commerce records on campground host daily logs. Therefore, Council finds that this issue be granted as a properly raised contested case issue.

2. Suzanne Fouty

a) Statement of Issues

Petitioner Suzanne Fouty disputes the following determinations of the *Order on Party Status*:

- 1) Designation as a limited rather than full party.
- 2) Scope of statement of Issue SP-1, as presented in the *Notice to Council*, “Whether the Soil Protection Standard and General Standard of Review require an evaluation of soil compaction, loss of soil structure and infiltration, and loss of stored carbon in the soil.”
- 3) Denial of the issue, “Whether the Soil Protection Standard and General Standard of Review require an assessment of loss of above ground organic material related to the construction and operation of transmission lines, including an assessment of the impact on soils of wildfires.”

b) Conclusions of Law

- 1) Council’s findings on appeal of limited party designation is presented in Section 27 of this determination.
- 2) Council finds that Issue SP-1, as presented in the *Notice to Council*, should be clarified as follows, “Whether the Soil Protection Standard and General Standard of Review require an evaluation of soil compaction, loss of soil structure and infiltration, ~~and~~ stored carbon in the soil and loss of soil productivity that may occur as a result of the release of stored carbon in soils” because Ms. Fouty raised the issue of soil productivity impacts from loss of stored carbon in her comments on the record of the DPO and the issue is within Council’s jurisdiction under the Soil Protection standard. The Council finds that climate change and the ability of soils to sequester carbon, or the release of carbon from soils, is not within the Council’s jurisdiction.

- 3) Council finds that Hearing Officer’s denial of the issue, “Whether the Soil Protection Standard and General Standard of Review require an assessment of loss of above ground organic material related to the construction and operation of transmission lines, including an assessment of the impact on soils of wildfires” be affirmed because Council majority decision on whether the OAR 345-015-0016(3) legal standards for properly raising a contested case issue was not reached (i.e., split vote).

3. Kathryn Andrew

a) Statement of Issues

Petitioner Kathryn Andrew disputes the following determinations of the *Order on Party Status*:

- 1) Designation as a limited rather than full party.
- 2) Denial of the following issue, “Whether noise and visual impacts of the proposed facility on Morgan Lake Park and Wallowa-Whitman National Forest is inconsistent with Statewide Land Use Planning Goal 4 (forestlands to provide for recreational opportunities).”

b) Conclusions of Law

- 1) Council’s findings on appeal of limited party designation is presented in Section 27 of this determination.
- 2) Council finds that Hearing Officer’s denial of the issue, “Whether noise and visual impacts of the proposed facility on Morgan Lake Park and Wallowa-Whitman National Forest is inconsistent with Statewide Land Use Planning Goal 4 (forestlands to provide for recreational opportunities)” be affirmed for the reasons given in the *Order on Party Status*.

4. Colin Andrew

a) Statement of Issues

Petitioner Colin Andrew disputes the following determinations of the *Order on Party Status*:

- 1) Designation as a limited rather than full party.

- 2) Denial of the issue, “Whether, as a reference for its assessing visual impacts of the proposed facility on Morgan Lake Part, Applicant was required to use updated assessment criteria, Landscape Aesthetic, Scenic Management System (SMS), published in 1995, instead of the 1974 USFS Handbook.”

b) Conclusions of Law

- 1) Council’s findings on appeal of limited party designation is presented in Section 27 of this determination.
- 2) Council finds that Hearing Officer’s denial of the issue “Whether, as a reference for its assessing visual impacts of the proposed facility on Morgan Lake Part, Applicant was required to use updated assessment criteria, Landscape Aesthetic, Scenic Management System (SMS), published in 1995, instead of the 1974 USFS Handbook ” be affirmed for the reasons given in the *Order on Party Status*.

5. Susan Geer

a) Statement of Issues

Petitioner Susan Geer disputes the following determinations of the *Order on Party Status*:

- 1) Designation as a limited rather than full party.
- 2) Denial of the issue, “Whether the Rice Glass Hill Natural Area should be evaluated as a Protected Area.”

b) Conclusions of Law

- 1) Council’s findings on appeal of limited party designation is presented in Section 27 of this determination.
- 2) Council finds that Hearing Officer’s denial of the issue, “Whether the Rice Glass Hill Natural Area should be evaluated as a Protected Area” be overruled. Council finds that it is reasonable to infer from references in her DPO comments to the “unprotected” nature of the plant communities of concern in the Rice Class Hill Natural Area, and the high priority placed on some of these plant communities in the Oregon Natural Areas Plan,

that she intended to refer to the Protected Areas standard. Therefore, Council finds that her issue be granted as a properly raised contested case issue.

6. Lois Barry

a) Statement of Issues

Petitioner Lois Barry disputes the following determinations of the *Order on Party Status*:

- 1) Designation as a limited rather than full party.
- 2) Denial of the issue, “Whether Applicant’s visual impact assessments are invalid because Applicant did not use updated USFS visual assessment criteria (1995 Landscape Aesthetic, Scenic Management System (SMS)) to evaluate visual impacts, thereby invalidating the visual impact analysis for Morgan Lake Park and other protected areas, scenic resources and important recreational opportunities.”

b) Conclusions of Law

- 1) Council’s findings on appeal of limited party designation is presented in Section 27 of this determination.
- 2) Council finds that Hearing Officer’s framing of Ms. Barry’s issue on visual methodology be modified to, “Whether Applicant’s visual impact assessments are invalid because Applicant did not use updated USFS visual assessment criteria (1995 Landscape Aesthetic, Scenic Management System (SMS)) incorporate Oregonians’ subjective evaluation of their resources to evaluate visual impacts, thereby invalidating the visual impact analysis for Morgan Lake Park and other protected areas, scenic resources and important recreational opportunities” and that denial of the issue be overruled. Council finds that Ms. Barry properly raised the issue of whether the applicant’s visual impacts analysis failed to incorporate Oregonians’ subjective evaluation of their resources, which Ms. Barry maintains is a difference between the 1974 and 1995 USFS methodologies. Therefore, Council finds that her issue be granted as a properly raised contested case issue.

7. Gail Carbiener

a) Statement of Issues

Petitioner Gail Carbiener disputes the following determinations of the *Order on Party Status*:

- 1) Denial of the issue, “Whether the methods Applicant use to assess visual impacts for purposes of the Protected Areas, Scenic Resources, and Recreation Standards were independently obtained. Whether the key observation points for visual simulations were adequate and whether Applicant adequately analyzed the visual impact from NHOTIC.”

b) Conclusions of Law

- 1) Council finds that denial of the issue, “Whether the methods Applicant use to assess visual impacts for purposes of the Protected Areas, Scenic Resources, and Recreation Standards were independently obtained. Whether the key observation points for visual simulations were adequate and whether Applicant adequately analyzed the visual impact from NHOTIC” be affirmed for the reasons given in the Hearing Officer’s *Order on Party Status*.

8. Greg Larkin

Petitioner Greg Larkin disputes the following determinations of the *Order on Party Status*:

a) Statement of Issues

- 1) Denial of petition for party status and requests full party status.

b) Conclusions of Law

- 1) Council finds that Hearing Officer’s denial of Mr. Larkin’s petition for party status be affirmed for the reasons given in the Hearing Officer’s *Order on Party Status*.

9. Irene Gilbert

a) Statement of Issues

Petitioner Irene Gilbert disputes the following determinations of the *Order on Party Status*:

- 1) Designation as a limited rather than full party.

- 2) Denial of the issue, “Whether the Department erred in recommending approval of Applicant’s noise consultant’s methodology for assessing noise impacts because the recommendation is based on incorrect information, such as Council’s authority to review and approve sound measurement procedures and the methods for establishing ambient noise levels specific to a linear facility.”
- 3) Denial of the issue, “Whether the impacts from the proposed facility on accepted farm practices and the cost of accepted farm practices have been adequately evaluated or mitigated.”

b) Conclusions of Law

- 1) Council’s findings on appeal of limited party designation is presented in Section 27 of this determination.
- 2) Council finds that Hearing Officer’s denial of the issue, “Whether the Department erred in recommending approval of Applicant’s noise consultant’s methodology for assessing noise impacts because the recommendation is based on incorrect information, such as Council’s authority to review and approve sound measurement procedures and the methods for establishing ambient noise levels specific to a linear facility” be affirmed for the reasons given in the Hearing Officer’s *Order on Party Status*.
- 3) Council finds that Hearing Officer’s denial of the issue, “Whether the impacts from the proposed facility on accepted farm practices and the cost of accepted farm practices have been adequately evaluated or mitigated” be overruled because the issue is within the Council’s jurisdiction under ORS 215.275(5) and was properly raised in Ms. Gilbert’s comments on the record of the DPO. Therefore, Council finds that her issue be granted as a properly raised contested case issue.

10. Kaye Foss

a) Statement of Issues

Petitioner Kaye Foss disputes the following determinations of the *Order on Party Status*:

1) Designation as a limited rather than full party.

b) Conclusions of Law

1) Council’s findings on appeal of limited party designation is presented in Section 27 of this determination.

11. John Williams

a) Statement of Issues

Petitioner John Williams disputes the following determinations of the *Order on Party Status*:

1) Designation to represent a personal interest in potential impacts from proposed facility to cultural resources located on his private property.

b) Conclusions of Law

1) Council finds that the Hearing Officer’s designation of Mr. Williams as having a personal interest in the issue raised is related to standing and would not limit the scope of his participation in the contested case on the issue.

12. Charles Lyons

a) Statement of Issues

Petitioner Charles Lyons disputes the following determinations of the *Order on Party Status*:

1) Denial of petition for party status and issue of, “Whether the Fire Prevention and Suppression Plan (Attachment U-3) is adequate and whether local service providers would be able to respond to a facility related fire.”

b) Conclusions of Law

1) Council finds that Hearing Officer’s denial of Mr. Lyons party status and issues be overruled because the issue, “Whether the Fire Prevention and Suppression Plan (Attachment U-3) is adequate and whether local service providers would be able to respond to a facility related fire” was raised on the record of the DPO with sufficient specificity. Council finds petitioner identified transportation routes, response times, and emergency services that are addressed in the Draft Fire Prevention and Suppression Plan

and that even though he did not specifically refer to the plan, he raised issues with the components/elements of the plan with sufficient specificity to allow the applicant, Department and decision maker an opportunity to respond.

13. Stacia Jo Webster

a) Statement of Issues

Petitioner Stacia Jo Webster disputes the following determinations of the *Order on Party Status*:

- 1) Full party status on the denied issue.
- 2) Denial of the issue, “Whether the Fire Prevention and Suppression Plan (Attachment U-3) is adequate and whether local service providers would be able to respond to a facility related fire.”

b) Conclusions of Law

- 1) Council infers that the appeal is on Ms. Webster’s designation as a limited party. Council findings on appeal of limited party designation is presented in Section 27 of this determination.
- 2) Council finds that Hearing Officer’s denial of the issue, “Whether the Fire Prevention and Suppression Plan (Attachment U-3) is adequate and whether local service providers would be able to respond to a facility-related fire,” be overruled because she raised the issue on the record of the DPO, where her comments referred to Table U-9 and identified facts of limited ability of public service providers to provide fire protection to the project and therefore was raised with sufficient specificity. Therefore, Council finds that her issue be granted as a properly raised contested case issue.

14. Anne March

a) Statement of Issues

Petitioner Anne March disputes the following determinations of the *Order on Party Status*:

- 1) Denial of the issue, “Whether Applicant should include in its Fish Passage Plan and be required to replace a culvert on an unnamed stream (referenced as Crossing ID R-37969 in Exhibit BB-2, Table 1) to an appropriate size for fish passage.”

b) Conclusions of Law

- 1) Council finds that the Hearing Officer’s denial of the issue, “Whether Applicant should include in its Fish Passage Plan and be required to replace a culvert on an unnamed stream (referenced as Crossing ID R-37969 in Exhibit BB-2, Table 1) to an appropriate size for fish passage” be overruled because Ms. March’s DPO comments clearly identify an issue related to potential impacts to anadromous fish in Ladd Creek, as evaluated in ASC Exhibit BB, and necessity of a 3a/3b design for the Ladd Creek bridge crossings. Therefore, Council finds that her issue be granted as a properly raised contested case issue.

15. Peter Barry

a) Statement of Issues

Petitioner Peter Barry disputes the following determinations of the *Order on Party Status*:

- 1) Designation as a limited rather than full party.
- 2) Denial of the issue, “Whether Applicant has established a need for the proposed facility.”
- 3) Denial of the issue, “Whether Morgan Lake Park should be evaluated as a protected area.”

b) Conclusions of Law

- 1) Council’s findings on appeal of limited party designation is presented in Section 27 of this determination.
- 2) Council finds that Hearing Officer’s denial of the issue, “Whether Applicant has established a need for the proposed facility” be affirmed for the reasons given in the Hearing Officer’s *Order on Party Status*.

- 3) Council finds that Hearing Officer's denial of the issue, "Whether Morgan Lake Park should be evaluated as a protected area" be affirmed for the reasons given in the Hearing Officer's *Order on Party Status*.

16. Dale and Virginia Mammen

a) Statement of Issues

Petitioners Dale and Virginia Mammen disputes the following determinations of the *Order on Party Status*:

- 1) Designation as a limited rather than full party.

b) Conclusions of Law

- 1) Council's findings on appeal of limited party designation is presented in Section 27 of this determination.

17. Sam Myers

a) Statement of Issues

Petitioner Sam Myers disputes the following determinations of the *Order on Party Status*:

- 1) Designation as a limited rather than full party.

b) Conclusions of Law

- 1) Council's findings on appeal of limited party designation is presented in Section 27 of this determination.

18. Whit Deschner

a) Statement of Issues

Petitioner Whit Deschner disputes the following determinations of the *Order on Party Status*:

- 1) Designation as a limited rather than full party.

b) Conclusions of Law

- 1) Council's findings on appeal of limited party designation is presented in Section 27 of this determination.

19. Matt Cooper

a) Statement of Issues

Petitioner Matt Cooper disputes the following determinations of the *Order on Party Status*:

- 1) Designation as a limited rather than full party.

b) Conclusions of Law

- 1) Council's findings on appeal of limited party designation is presented in Section 27 of this determination.

20. Michael McAllister

a) Statement of Issues

Petitioner Michael McAllister disputes the following determinations of the *Order on Party Status*:

- 1) Designation as a limited rather than full party.
- 2) Denial of the issue, "Whether Council's failure to consider the Agency Selected NEPA Route constitutes a violation of ORS 469.370(13)."
- 3) Denial of remaining EFSC Standards Raised in Public Comment, including "Whether the proposed Morgan Lake Alternative Route complies with the Protected Area standard" and "Whether the proposed Morgan Lake Alternative Route complies with the Scenic Resources standard."

b) Conclusions of Law

- 1) Council's findings on appeal of limited party designation is presented in Section 27 of this determination.
- 2) Council finds that Hearing Officer's denial of the issues, "Whether Council's failure to consider the Agency Selected NEPA Route constitutes a violation of ORS 469.370(13)," "Whether the proposed Morgan Lake Alternative Route complies with the Protected Area standard," and "Whether the proposed Morgan Lake Alternative Route complies with the Scenic Resources standard" be affirmed for the reasons given in the Hearing Officer's *Order on Party Status*.

- 3) Council finds that Hearing Officer's denial of issues raised related to the proposed facility's compliance with Council standards for Protected Areas and Scenic Resources be affirmed for the reasons given in the Hearing Officer's *Order on Party Status*. Council finds that Hearing Officer's denial of issues raised related to the proposed facility's compliance with Council standards for Soil Protection and Fish and Wildlife Habitat be overruled because these issues were raised with sufficient specificity, including having provided facts on the record that support his positions on these issues, including listing soil types and identifying buffer distances from bird nests and the proposed facility. Council finds that Hearing Officer's denial of the following issues be overruled and identified as properly raised contested case issues, "Whether the proposed Morgan Lake Alternative route complies with the Soil Protection standard," and "Whether the proposed Morgan Lake Alternative route complies with the Fish and Wildlife Habitat standard."

21. JoAnne Marlette

a) Statement of Issues

Petitioner JoAnne Marlette disputes the following determinations of the *Order on Party Status*:

- 1) Designation as a limited rather than full party.

b) Conclusions of Law

- 1) Council's findings on appeal of limited party designation is presented in Section 27 of this determination.

22. John Luciani

a) Statement of Issues

Petitioner John Luciani disputes the following determinations of the *Order on Party Status*:

- 1) Denial of petition for party status.

b) Conclusions of Law

- 1) Council finds that Hearing Officer's denial of Mr. Luciani's petition for party status be affirmed for the reasons given in the *Order on Party Status*.

23. Janet Aston¹

a) Statement of Issues

Ms. Aston filed an email complaint on November 2, 2020 regarding the effect of participation by the Department and Applicant on the fairness and equitability of the contested case proceeding. The email complaint did not include specific appeal of the *Order on Party Status*.

b) Conclusions of Law

- 1) To the extent the email complaint is inferred as an appeal of Hearing Officer's denial of Ms. Aston's petition for party status, Council finds that the Hearing Officer's denial be affirmed for the reasons given in the *Order on Party Status*.

24. Miranda Aston²

a) Statement of Issues

Ms. Aston filed an email complaint on November 2, 2020 regarding the effect of participation by the Department and Applicant on the fairness and equitability of the contested case proceeding. The email complaint did not include specific appeal of the *Order on Party Status*.

b) Conclusions of Law

- 1) To the extent the email complaint is inferred as an appeal of Hearing Officer's denial of Ms. Aston's petition for party status, Council finds that the Hearing Officer's denial be affirmed for the reasons given in the *Order on Party Status*.

25. Tim Proesch

a) Statement of Issues

Petitioner Tim Proesch disputes the following determinations of the *Order on Party Status*:

- 1) Designation as a limited rather than full party.

¹ Ms. Janet Aston submitted a request for Timothy Proesch to provide oral argument on her behalf as an Authorized Representative at the November 20, 2020 hearing.

² Ms. Miranda Aston submitted a request for Timothy Proesch to provide oral argument on her behalf as an Authorized Representative at the November 20, 2020 hearing.

b) Conclusions of Law

- 1) Council’s findings on appeal of limited party designation is presented in Section 27 of this determination.

26. Jane and Jim Howell

a) Statement of Issues

Petitioners Jane and Jim Howell dispute the following determinations of the *Order on Party Status*:

- 1) Designation as a limited rather than full party.

b) Conclusions of Law

- 1) Council’s findings on appeal of limited party designation is presented in Section 27 of this determination.

27. Party vs. Limited Party Status

The Council finds that Hearing Officer’s designation of limited party status for petitioners granted standing in the contested case proceeding is affirmed for the reasons presented in the *Order on Party Status*. The Council also finds that, regardless of which way the Oregon Supreme Court rules in *Friends of the Columbia River Gorge, et al. v. Energy Facility Siting Council*, the Council is also relying on the Attorney General’s model rules for contested cases (OAR 137-003-0000 through OAR 137-003-0092), in affirming the Hearing Officer’s designation of limited party status based on the issues the specific party properly raised on the record of the DPO and for which the specific party met all other eligibility criteria for participation. The Council finds that the Council’s contested case rules under OAR 345 Division 15 allow for incorporation and reliance on the specified Attorney General’s model rules in this instance.

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B. Final Order

The Council affirms the determinations in the *Order on Party Status* with the following exceptions:

Overruling on 1 petition for party status:

- 1) Mr. Charles Lyons shall be granted party status in the contested case.

Modification of 3 Issue Statements

- 1) Issue NC-1 shall be clarified as follows, “Whether the Department improperly modified/reduced the noise analysis area and the notification area in Exhibit X from one mile of the proposed site boundary to ½ mile of the proposed site boundary and whether OAR 345-021-0010(1)(x)(E) requires notification to all owners of noise sensitive property within one mile of the site boundary.”
- 2) Issue NC-3 shall be clarified as follows, “Whether the methodologies used for the noise analysis to evaluate compliance with OAR 340-035-0035 were appropriate and whether the ODOE erred in approving the methodology used to evaluate compliance with OAR 340-035-0035.”
- 3) Issue SP-1 shall be clarified as follows, “Whether the Soil Protection Standard and General Standard of Review require an evaluation of soil compaction, loss of soil structure and infiltration, ~~and~~ loss of stored carbon in the soil and loss of soil productivity that may occur as a result of the release of stored carbon in soils” and identified as a properly raised contested case issue by both Ms. Fouty and STOP B2H Coalition.

Overruling on 8 Denied Issues:

- 1) The issue of, “Whether the Rice Glass Hill Natural Area should be evaluated as a Protected Area” shall be granted as properly raised contested case issue SR-5 for Ms. Geer.
- 2) The issue of, “Whether Applicant’s visual impact assessments are invalid because Applicant did not incorporate Oregonians’ subjective evaluation of their resources to evaluate visual impacts, thereby invalidating the visual impact analysis for Morgan Lake Park and other protected areas, scenic resources and important recreational opportunities,” as modified by Council, shall be granted as properly raised contested case issue SR-6 for Ms. Barry and STOP B2H Coalition.

- 3) The issue of, “Whether the impacts from the proposed facility on accepted farm practices and the cost of accepted farm practices have been adequately evaluated or mitigated” shall be granted as properly raised contested case issue LU-11 for Ms. Gilbert.
- 4) The issue of, “Whether the Fire Prevention and Suppression Plan (Attachment U-3) is adequate and whether local service providers would be able to respond to a facility-related fire” shall be granted as properly raised contested case issue PS-10 for Mr. Lyons and Ms. Webster.
- 5) The issue of, “Whether Applicant should include in its Fish Passage Plan and be required to replace a culvert on an unnamed stream (referenced as Crossing ID R-37969 in Exhibit BB-2, Table 1) to an appropriate size for fish passage” shall be granted as properly raised contested case issue FW-12 for Ms. March.
- 6) The issue of, “Whether the methods used to determine the extent of an adverse impact of the proposed facility on scenic resources, protected area and recreation along the Oregon Trail were flawed and developed without peer review on public input. Specifically, whether Applicant erred in applying numeric values to the adverse impact and whether Applicant used unsatisfactory measurement locations/observation points in its visual impact assessment” shall be granted as properly raised contested case issue SR-7 for STOP B2H Coalition.
- 7) The issue of, “Whether the proposed Morgan Lake Alternative route complies with the Fish and Wildlife Habitat standard” shall be granted as properly raised contested case issue FW-13 for Mr. McAllister.
- 8) The issue of, “Whether the proposed Morgan Lake Alternative route complies with the Soil Protection standard” shall be granted as properly raised contested case issue SP-2 for Mr. McAllister.

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Council provides, as Attachment 1, a list of petitioners granted standing and properly raised issues, based on Hearing Officer's determinations on the *Order on Party Status* and as amended based on determinations presented herein.

Issued this 25th day of November 2020

The ENERGY FACILITY SITING COUNCIL

/s/ Hanley Jenkins, II

By: _____
Hanley Jenkins II, Chair

Attachment 1: Petitioners Granted Limited Party Status and Properly Raised Contested Case Issues

Petitioners granted Limited Party Status: Changes resulting from Council's determination presented in underline format.

1. STOP B2H Coalition
2. Eastern Oregon University/Antell
3. Colin Andrew
4. Kathryn Andrew
5. Susan Badger-Jones
6. Lois Barry
7. Peter Barry
8. Ryan Browne
9. Gail Carbiener/OCTA
10. Matt Cooper
11. Whit Deschner
12. Jim and Kaye Foss
13. Suzanne Fouty
14. Susan Geer
15. Irene Gilbert
16. Charles Gillis
17. Diane Gray
18. Joe Horst and Anna Cavinato
19. Jane and Jim Howell
20. Virginia and Dale Mammen
21. Anne March
22. Kevin March
23. JoAnne Marlette
24. Michael McAllister
25. John Milbert
26. Jennifer Miller
27. David Moyal
28. Sam Myers
29. Tim Proesch
30. Louise Squire
31. Stacia Jo Webster
32. Daniel White
33. Jonathon White
34. John Williams
35. John Winters
36. Charles Lyons

Table of Properly Raised Contested Case Issues
(Changes resulting from Council’s determination
presented in underline format)

	Subject Matter/Issue	Standing
M	Misc. Issues Under OAR 345-001-0010 – 345-021-0010(1)	
M-1	Site Boundary: Whether, due to substantial modifications likely necessary but not proposed, Applicant should be required to amend the site boundary to include Morgan Lake Road (La Grande, Union County) and, if so, whether the Department should provide notice and the opportunity to comment to potentially affected landowners.	Badger-Jones
M-2	Site Boundary: Whether Applicant failed to include roads and other areas of use and potential modification from the site boundary thereby prohibiting affected landowners in the proximity of these areas from the opportunity to request a contested case during the ASC process.	Gilbert
M-3	Whether the maps provided in ASC Exhibit F, Maps 50 and 51, fail to comply with OAR 345-021-0010(1)(c)(A) because they do not name major roads or use an appropriate scale; whether Council can issue a site certificate when the proposed facility site boundary does not accurately identify access roads in Union County as related or supporting facilities.	Cooper
M-4	Whether the maps provided in ASC Exhibit B, Road Classification Guide and Access Control, fail to comply with OAR 345-021-0010(1)(c)(A) because they do not include road names or use an appropriate scale; Whether Council can issue a site certificate when the when the maps provided in the ASC are incomplete and do not accurately identify access roads in Union County as related or supporting facilities.	Howell
M-5	Whether the maps provided in the ASC were sufficient to give notice of potential impacts from the proposed facility.	Howell
M-6	Whether the Proposed Order fails to provide for a public review of final monitoring plans, fails to provide long-term hazardous materials monitoring, and improperly allows exceptions that substantially increase the likelihood of a hazardous material spill in violation of OAR 345-021-0010(w).	Marlette
M-7	Notice: Whether Mr. Proesch received adequate notice regarding the proposed transmission line.	Proesch (personal interest)
FW	Fish and Wildlife Habitat – OAR 345-022-0060	
FW-1	Whether Applicant adequately analyzed sage grouse habitat connectivity in the Baker and Cow Valley Priority Areas of	Stop B2H; Squire

¹ For clarity, corrections are underlined.

	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	
FW-2	Whether the adverse impacts from the proposed facility to current and future fish and wildlife populations on Glass Mountain (Hill) can be adequately mitigated, given the unique and irreplaceable biological environments on Glass Mountain (Hill)	EOU/Antell
FW-3	Whether the Draft Noxious Weed Plan (Proposed Order Attachment P1-5) adequately ensures compliance with the weed control laws, ORS 569.390, ORS 569.400, and ORS 569.445.	Gilbert, Geer
FW-4	Whether Applicant is required to evaluate habitat impacts of species listed as threatened or endangered under the Federal Endangered Species Act.	Gilbert
FW-5	Whether Applicant should be required to mitigate impacts to riparian areas from the setback location to the outer edges of the riparian area because the riparian habitat should be rated as Category 2 at a minimum.	Gilbert
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.	Geer
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.	A. March; K/ March
FW-8	Whether compliance with the Fish and Wildlife Habitat standard requires Applicant to analyze the proposed facility's impact on Bull Trout, a state and federally listed threatened species, in the Grande Ronde River watershed.	Milbert
FW-9	Whether State Sensitive Bat species should be removed from the list of preconstruction surveys required by F&W Condition 16	Applicant
FW-10	Whether Department-proposed revisions to F&W Condition 12 should be removed to allow specific protocol surveys to meet survey needs of other species	Applicant
FW-11	Whether Department-proposed revisions to F&W Condition 17 incorrectly assign traffic assumptions to new roads	Applicant
<u>FW-12</u>	<u>Whether Applicant should include in its Fish Passage Plan and be required to replace a culvert on an unnamed stream (referenced as Crossing ID R-37969 in Exhibit BB-2, Table 1) to an appropriate size for fish passage.</u>	<u>March</u>
<u>FW-13</u>	<u>Whether the proposed Morgan Lake Alternative route complies with the Fish and Wildlife Habitat standard.</u>	<u>McAllister</u>

HCA	Historic, Cultural, Archeological Resources – OAR 345-022-0090	
HCA-1	Adequacy of the surveys for Oregon Trail resources on the Webster property, an impacted property along the Mill Creek Route.	Browne
HCA-2	Whether the revision of Historic, Cultural and Archeological Resources Condition 1 (mitigation for NRHP-Eligible Oregon Trail/NHT segments) fails to consider BLM Programmatic Agreement and adds new requirements for mitigation that are inconsistent with the Department’s definition of “mitigation” in OAR 345-001-0010(33).	Carbiener/OCTA
HCA-3	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.	Gilbert; Marlette
HCA-4	Whether National Historical Oregon Trail segments with ruts located on Petitioner’s property (Hawthorne Drive, La Grande) can be adequately protected from adverse impacts from proposed facility.	Horst/Cavinato (private interest)
HCA-5	Whether Applicant adequately analyzed the feasibility of undergrounding the transmission line as mitigation for potential visual impacts at Flagstaff Hill/NHOTIC.	Miller
HCA-6	Whether, as part of the HPMP (Historic, Cultural and Archeological Resources Condition 1), Applicant should be required to have an Oregon Trail expert, recommended by OCTA and agreed to by the Field Director, added to the Cultural Resource Team and present during preconstruction surveys to adequately identify emigrant trail locations.	S. Webster
HCA-7	Whether Applicant adequately evaluated archeological resource “Site 6B2H-MC-10” on Mr. Williams’ property, Parcel 03S37E01300.	Williams (personal interest)
LU	Land Use – OAR 345-022-0030	
LU-1	Whether the proposed facility would significantly disrupt public enjoyment of forest lands within Morgan Lake Park in contravention of Statewide Planning Goal 4, protecting Forest Land.	EOU/Antell
LU-2	Whether Applicant erred in calculating the percentage of forest land in Umatilla and Union Counties, thereby underestimating and misrepresenting the amount of potentially impacted forestland.	K. Andrew
LU-3	Whether Applicant’s analysis of forestland impacts failed to consider all lands defined as Forest Land under state law, thereby misrepresenting forest land acreage.	K. Andrew

LU-4	Adequacy of the analysis of potential impacts of transmission line interference with GPS units on irrigation system.	Foss
LU-5	Whether calculation of forest lands must be based on soil class or whether it is sufficient to consider acreage where forest is predominant use.	Gilbert
LU-6	Whether the alternatives analysis under ORS 215.275 included all relevant farmland.	Gilbert
LU-7	Whether the evaluation of proposed facility impacts to the cost of forest practices accurately determined the total acres of lost production or indirect costs.	Gilbert
LU-8	The adequacy of Applicant's evaluation of proposed facility impacts to the cost of forest management practices and whether mitigation must be provided for the entire length of the transmission line for the operational lifetime.	Gilbert
LU-9	Whether Applicant adequately analyzed the risk of wildfires from operation of the proposed transmission lines, especially during "red flag" warning weather conditions, and the impact the proposed transmission lines will have on Mr. Myers's ability to use an aerial applicator on his farmland.	Myers (personal interest)
LU-10	Whether the Department-proposed revisions to the Proposed Order requiring landowner consultation pursuant to ORS 215.276 are unnecessarily specific as to high-value farmland owners.	Applicant
<u>LU-11</u>	<u>Whether the impacts from the proposed facility on accepted farm practices and the cost of accepted farm practices have been adequately evaluated or mitigated</u>	<u>Gilbert</u>
N	Need Standard - OAR 345-023-0005	
N-1	Whether the Department erred in defining capacity in terms of kilovolts instead of megawatts.	Stop B2H
N-2	Whether in evaluating capacity, the Department applied balancing considerations in contravention of OAR 345-022-0000(3)(d).	Stop B2H
N-3	Whether Applicant demonstrated need for the proposed facility when Applicant has only shown that its needs represent 21 percent of the total capacity.	Stop B2H
NC	Noise Control Regulations	
NC-1	Whether the Department improperly modified/reduced the noise analysis area and notification area in Exhibit X from one mile of the proposed site boundary to ½ mile of the proposed site boundary and whether OAR 345-021-0010(1)(x)(E) requires notification to all owners of noise sensitive property within one mile of the site boundary.	Stop B2H; Cooper

NC-2	Whether the Department erred in recommending that Council grant a variance/exception from the Oregon DEQ's Noise Rules, OAR 340-035-0035, and whether the variance/exception is inconsistent with ORS 467.010.	Stop B2H; Gilbert; Gray; Horst/Cavinato; Myers
NC-3	Whether the <u>methodologies used for the noise analysis to evaluate compliance with OAR 340-035-0035 were appropriate and whether the ODOE erred in approving the methodology used to evaluate compliance with OAR 340-035-0035.</u>	Stop B2H
NC-4	Whether the mitigation/proposed site conditions adequately protect the public health, safety and welfare.	Stop B2H
NC-5	Whether the revisions in the Proposed Order, Section IV.Q.1, Noise Control Regulation (Methods and Assumptions for Corona Noise Analysis) are inaccurate, specifically the use of the 12:00 a.m. to 5:00 a.m. timeframe to establish ambient noise levels.	Gilbert
NC-6	Whether Applicant's methodology to assess baseline noise levels (described in the Proposed Order at pp. 635-638) reflect reasonable baseline noise estimates for residents of the Morgan Lake area.	Gray
PS	Public Services – OAR 345-022-0110	
PS-1	Traffic Safety: Whether Applicant was required to evaluate traffic safety impacts from construction-related use of Morgan Lake Road.	Badger-Jones
PS-2	Fire Protection: Whether the site certificate should require that the public have the opportunity to review and comment on the final Wildfire Mitigation Plan; whether the Wildfire Mitigation Plan should include remote cameras to detect wildfire, safety procedures during red flag conditions, and the requirement that firefighting equipment be present on-site during construction.	Carbiener/OCTA; Miller
PS-3	Fire Protection: Whether Council's reliance on the Wildfire Mitigation Plan (Public Services Condition 7) prepared by Applicant for the Oregon Public Utility Commission (OPUC) is adequate to address wildfire response consistent with the Public Services standard.	Carbiener/OCTA; Miller
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.	Cooper; Winters
PS-5	Fire Protection: Whether the Wildfire Mitigation Plan is adequately developed and includes sufficient detail to allow for public participation.	Gilbert
PS-6	Traffic Safety: Whether Applicant adequately evaluated the potential traffic impacts and modifications needed on Hawthorne Drive and Modelaire Drive (Hawthorne Loop).	Horst/Cavinato; Mammen

PS-7	Traffic Safety: Whether Applicant adequately evaluated construction-related traffic impacts of the proposed facility on public service providers and emergency vehicle access routes in La Grande.	Howell
PS-8	Whether Department-proposed revisions to Public Services Condition 7 are redundant with Attachment U-3 and existing condition requirements.	Applicant
PS-9	Whether Department-proposed revisions to the Fire Prevention and Suppression Plan (Public Services Condition 6, Proposed Order Attachment U-3) incorrectly reference applicability to facility operations.	Applicant
<u>PS-10</u>	<u>Whether the Fire Prevention and Suppression Plan (Attachment U-3) is adequate and whether local service providers would be able to respond to a facility-related fire.</u>	<u>Lyons/Webster</u>
R	Recreation - OAR 345-022-0100	
R-1	Whether Applicant adequately evaluated the potential adverse impact of the proposed facility on recreational opportunities at Morgan Lake Park	C. Andrew
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 Recreational Use and Development Plan and should therefore be reevaluated.	L. Barry; McAllister
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.	L. Barry; P. Barry; C. Andrew; K. Andrew; Gilbert
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 areas.	L. Barry
RFA	Retirement and Financial Assurance - OAR 345-022-0050	
RFA-1	Whether the \$1 bond amount adequately protects the public from facility abandonment and provides a basis for the estimated useful life of the facility.	Carbiener/OCTA; Gilbert
RFA-2	Whether, in the event of retirement of the proposed transmission line, removal of concrete footings to a depth of one foot below the surface is sufficient to restore the site to a useful, nonhazardous condition.	Carbiener/OCTA
RFA-3	Whether Applicant has satisfied the Retirement and Financial Assurance standard, whether the financial assurances in the Proposed Order adequately address the risk of stranded assets, and whether Council must evaluate the ability of other project partners to meet financial assurance and retirement cost requirements.	Gillis

SR	Scenic Resources and Protected Areas – OAR 345-022-0080; -0040	
SR-1	Whether Applicant was required to evaluate impacts to Morgan Lake Park under the Scenic Resources standard because it is recognized as a scenic resource in a local plan (Morgan Lake Recreational Use and Development Plan).	L. Barry
SR-2	Whether Applicant satisfied the Scenic Resources and Protected Area standards at Flagstaff Hill/ NHOTIC and whether Applicant adequately analyzed the feasibility of undergrounding the transmission line as mitigation for potential visual impacts.	Carbiener/OCTA; Miller
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.”	Deschner
SR-4	Whether Applicant should have evaluated Union County as an important scenic resource under the Scenic Resources standard and, if so, whether the Department erred in concluding that the proposed facility is not likely to result in significant adverse impact to this scenic resource.	Moyal; D. White (personal interest)
<u>SR-5</u>	<u>Whether the Rice Glass Hill Natural Area should be evaluated as a Protected Area</u>	<u>Geer</u>
<u>SR-6</u>	<u>Whether Applicant’s visual impact assessment 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.</u>	<u>Barry, Stop B2H Coalition</u>
<u>SR-7</u>	<u>Whether the methods used to determine the extent of an adverse impact of the proposed facility on scenic resources, protected area and recreation along the Oregon Trail were flawed and developed without peer review on public input. Specifically, whether Applicant erred in applying numeric values to the adverse impact and whether Applicant used unsatisfactory measurement locations/observation points in its visual impact assessment.</u>	<u>STOP B2H Coalition</u>
SP	Soil Protection – OAR 345-022-0022	
SP-1	Whether the Soil Protection Standard and General Standard of Review require an evaluation of soil compaction, loss of soil structure and infiltration, and loss of stored carbon in the soil <u>and loss of soil productivity as a result of the release of stored carbon in soils.</u>	Fouty, Stop B2H Coalition
<u>SP-2</u>	<u>Whether the proposed Morgan Lake Alternative complies with the Soil Protection standard.</u>	<u>McAllister</u>
SS	Structural Standard – OAR 345-022-0020	

SS-1	Whether Design Feature 32 of the Proposed Order Attachment G-5 (Draft Framework Blasting Plan) should be a site certificate condition to ensure repair of landowner springs from damage caused by blasting.	Browne (personal interest); S. Webster (personal interest)
SS-2	Whether Applicant adequately analyzed the risk of flooding in areas adjacent to the proposed transmission line arising out of the construction-related blasting. Whether Applicant should be required to evaluate hydrology, including more detailed and accurate mapping of existing creeks and ditches that drain into streets and private property, and core samples of sufficient variety and depth to determine the flooding risk to neighborhoods of south and west La Grande.	Cooper
SS-3	Whether Applicant should be required to test water quality of private water wells to ensure that construction-related activities are not impacting water quality and quantity.	Horst/Cavinato
SS-4	Whether Applicant should remove the Hawthorne Loop as a construction access route due to the steep grade and the potential landslide risks if modifications are needed to support construction-related traffic.	Mammen
SS-5	Whether Applicant has adequately evaluated construction-related blasting in Union County, City of La Grande, under the Structural Standard. Specifically, whether Applicant should be required to conduct site-specific geotechnical surveys to characterize risks from slope instability and radon emissions.	J. White
TE	Threatened and Endangered Species – OAR 345-022-0072	
TE-1	Whether Applicant was required to have an Oregon Department of Agriculture botanist review the ASC.	Geer

CERTIFICATE OF FILING

I certify that on November 25, 2020, the foregoing ENERGY FACILITY SITING COUNCIL ORDER ON APPEALS OF HEARING OFFICER'S ORDER ON PARTY STATUS, AUTHORIZED REPRESENTATIVES AND ISSUES, was electronically filed to the Office of Administrative Hearings.

DATED this 25th day of November 2020.

/s/ Jeffery R. Seeley

Jeffery R. Seeley
Legal Secretary
Natural Resources Section
Oregon Department of Justice

CERTIFICATE OF SERVICE

I hereby certify that on November 25, 2020, the foregoing ENERGY FACILITY SITING COUNCIL ORDER ON APPEALS OF HEARING OFFICER'S ORDER ON PARTY STATUS, AUTHORIZED REPRESENTATIVES AND ISSUES, was served by mailing or emailing a true copy of the above-listed document as set forth below:

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DATED this 25th day of November 2020.

/s/ Jeffery R. Seeley

Jeffery R. Seeley
Legal Secretary
Natural Resources Section
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