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BEFORE THE STATE OF WASHINGTON
ENERGY FACILITY SITE EVALUATION COUNCIL

In the Matter of Application No. 2006-02
Desert Claim Wind Power Project

**DESERT CLAIM'S
POST-HEARING BRIEF IN
SUPPORT OF CERTIFICATION**

I. Introduction

The Desert Claim Wind Project ("Project") will provide significant environmental, energy and economic benefits to Washington. The Counsel for the Environment and the Washington Department of Commerce support certification of the Project, recognizing its environmental benefits and its consistency with state energy law and policy. The Economic Development Group for Kittitas County supports certification of the Project, and public comment has reflected widespread local support. In addition, the Project has received the endorsements of environmental, business, education, energy and civic organizations throughout the State. No party to the adjudicatory proceedings introduced evidence in opposition to certification. Nor did any party submit evidence to support additional mitigation measures or permit conditions beyond those agreed upon in stipulations. The Council should, therefore, recommend certification to the Governor of the Project.

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II. Background

A. Desert Claim Wind Project

The Project is a wind power project consisting of up to ninety-five two-megawatt (MW) wind turbines and associated facilities. Ex. 11 at 3-4 (Steeb). Each wind turbine will have a total tip height of 410 feet. Ex. 11 at 4 (Steeb). A complete description of the Project is found in the Revised Application (Ex.1 Tab 1).

The Project facilities will be arranged within an approximately 5,200-acre Project Area located in a sparsely populated part of unincorporated Kittitas County, approximately eight miles northwest of Ellensburg. Ex. 3 at 2-10 (FEIS). The Project Area has a gently sloping landscape that gradually increases in elevation from south to north. Ex. 12 at 4 (Weinman). It is used primarily for cattle grazing and feed crop production. Ex. 12 at 2-3 (Weinman). Several high-voltage transmission lines already cross the Project Area. Ex. 11 at 10 (Steeb); *see also* Ex. 1 at Figure 2 (Revised Application); Ex. 4 at Figure 3.4-23 (FEIS).

Most of the Project Area is zoned Agricultural-20, with the remaining portion zoned Forest and Range. Ex. 12 at 3 (Weinman). The Project Area is designated as Rural by the Kittitas County Comprehensive Plan. Ex. 12 at 3 (Weinman). The Applicant Desert Claim Wind Power LLC ("Applicant" or "Desert Claim") has leased land for the Project from four private land owners and the Washington Department of Natural Resources ("WDNR"). An affiliate of the Applicant has an option to purchase a portion of the Project Area from another private land owner. Ex. 11 at 4 (Steeb).

Unlike many wind power projects with strings of turbines located along high ridgelines, the Desert Claim Project has turbines arranged on the valley floor. Ex. 1, Tab 1 at 2 (Revised Application Project Description). The Revised Application contains conceptual drawings showing a layout of turbines, support facilities, power collection system and access

1 roads. Ex. 1, Figures 2, 9 and 11. The location of these facilities may change during final
2 engineering and micro-siting, with the understanding that final locations will comply with
3 conditions set forth in the Site Certification Agreement, including safety and visual setbacks,
4 noise level limitations, and requirements related to sensitive environments and cultural
5 resources.
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11 **B. Procedural Background**

12 Desert Claim has spent eight years developing this Project. It first tried to obtain
13 County approvals for the Project. Unable to obtain these approvals, Desert Claim made
14 further changes to the Project and filed an Application with EFSEC in late 2006. In the past
15 two and a half years, Desert Claim has continued to improve the Project, moving turbines
16 further away from residences, and agreeing upon additional mitigation measures with the
17 Counsel for the Environment ("CFE") and the Washington Department of Fish and Wildlife
18 ("WDFW").
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27 **1. 2003 Application to Kittitas County**

28 enXco began evaluating potential sites in Kittitas County for a commercial scale wind
29 project in 2001. Ex. 11.19 ¶ 2 (Steeb). In January 2003, Desert Claim filed an application
30 with Kittitas County seeking the approvals necessary under the County Code to construct and
31 operate a 120-turbine, 180 MW wind project on portions of the Project Area and other nearby
32 properties. Ex. 11.19 ¶5 (Steeb). For more than two years, Desert Claim's application worked
33 its way through the County's siting process. Ex. 11.19 ¶ 6 (Steeb). Desert Claim made
34 numerous changes to the project and incorporated mitigation measures to address concerns
35 raised during that process. *See, e.g.*, Ex. 11 at 43 (Steeb); Ex. 11.11 (transcript Mar. 9, 2005 at
36 135); Exs. 11.12-15. Despite these efforts, the Board of County Commissioners ("BOCC")
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1 voted to deny Desert Claim's application. Ex. 11.19 ¶ 7 (Steeb); Ex. 11.16 (BOCC
2 Resolution).
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5 Desert Claim appealed to Kittitas County Superior Court, but the court upheld the
6 BOCC's decision. Ex. 11.20. In doing so, the Superior Court noted that Desert Claim had
7 "made extraordinary efforts to satisfy two different boards of county commissioners over the
8 process of the application it submitted to the County." Ex. 11.20 at 10-11.
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11 12 13 **2. November 2006 EFSEC Application**

14 Following the BOCC's decision, Desert Claim considered whether additional changes
15 could be made to the Project to address concerns that were raised during the County process.
16 Ex. 11.19 ¶ 9 (Steeb). Desert Claim also obtained a lease on neighboring WDNR land so that
17 it could consolidate the turbines in a more compact area and eliminate the eastern portion of
18 the original project. *Id.*
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24 On November 6, 2006, Desert Claim submitted an Application for Site Certification
25 ("Application") to EFSEC proposing a 90-turbine, 180 MW wind project ("the Project"). Ex.
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27 2. As described in the Application, the Project was to be located in the same area as the
28 original proposal, but with some of the original property removed and some property added.
29 Ex. 2 (Application cover letter at 4). The Project had fewer turbines, fewer neighboring
30 residences, and larger setbacks than the original proposal. *Id.* The Project also avoided
31 impacts to wetlands, complied with state noise regulations, and included commitments to
32 avoid shadow flicker at neighboring residences. *Id.*
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41 Both before and after filing the Application with EFSEC, Desert Claim made efforts to
42 communicate with Kittitas County about the changes it had made to the Project. Ex. 11 at 43-
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44 44 (Steeb). The County Commissioners, however, indicated that they had "no interest" in
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1 "making a decision about the project" outside of the siting process outlined by the Kittitas
2 County Code. Ex. 11.22.
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5 **3. Land Use Consistency Determination and Preemption Request**
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7 On January 30, 2007, EFSEC held a Land Use Consistency Hearing in Ellensburg.
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9 During the hearing, both Desert Claim and Kittitas County agreed that Desert Claim had not
10 obtained the approvals required by Kittitas County Code chapter 17.61A. The Council,
11 therefore, found that the Project was not consistent with the Kittitas County land use
12 requirements in existence at the time Desert Claim filed its application with the Council. *See*
13 Council Order No. 825.
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19 Soon thereafter, Desert Claim filed a motion with the Council seeking a determination
20 that it had satisfied WAC 463-28-030(1)'s requirement that it make reasonable efforts to cure
21 the inconsistency with local land use requirements and, therefore, that Desert Claim could
22 proceed to submit a request for preemption. The Council heard argument on the motion
23 during its Council meeting on April 10, 2007, and requested supplemental briefing. Desert
24 Claim submitted additional briefing, and also offered to meet with the County again to try to
25 identify and resolve any County concerns about the Project. *See* Desert Claim's Supplemental
26 Briefing re WAC 463-28-030(1) (April 17, 2007).
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35 On May 8, 2007, the Council granted Desert Claim's motion and ruled that Desert
36 Claim is not required to file another application with Kittitas County under Kittitas County
37 Code chapter 17.61A. *See* Council Order No. 830 at 7 (May 8, 2007). The Council also sent
38 a letter to the Kittitas County Commissioners encouraging them "to use your best efforts to
39 work with the Applicant and to resolve as many issues as possible in advance of any
40 adjudication." Letter from J. Luce to Commissioners dated May 17, 2007.
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1 On May 17, 2007, Desert Claim met with Kittitas County Community Development
2 Services staff. Ex. 11.19 ¶ 13 (Steeb). During the meeting, Community Development
3 Services Director Darryl Piercy explained that he believed three issues led to the BOCC's
4 denial of Desert Claim's original application to the County: (1) inadequate mitigation of
5 potential shadow flicker, (2) the inclusion of several non-contiguous parcels in the project
6 area, and (3) inadequate setbacks from existing residences. *Id.* Mr. Piercy said that the
7 changes Desert Claim has made to the Project addressed the first two of these issues.
8 However, Mr. Piercy indicated that Desert Claim's proposal to locate all turbines at least four
9 times the turbine height from existing residences was inadequate; he believed the BOCC
10 would require a 2,500-foot setback from existing residences absent site-specific reasons
11 justifying a lesser distance. *Id.* Mr. Piercy stated that he did not believe the County had any
12 other concerns about the revised Project. *Id.*

13 Desert Claim appreciated Mr. Piercy's candor, but also understood from Mr. Piercy
14 that the BOCC has the responsibility for making decisions concerning the Project. Ex. 11.19
15 ¶ 14. Desert Claim, therefore, requested to meet directly with the BOCC to hear the
16 Commissioners' views about the Project first-hand, but the BOCC refused to meet with Desert
17 Claim. Ex. 11.17. Shortly thereafter, Desert Claim filed a written Request for Preemption
18 and a supporting declaration. Ex. 11.19.

19 **4. February 2009 Revised Application**

20 After filing its Request for Preemption in June 2007, Desert Claim continued to
21 consider ways to further address the Project's potential impacts. During the next year and a
22 half, Desert Claim was able to acquire rights to some additional property, which allowed
23 reconfiguration of the Project and additional mitigation measures. These changes are reflected
24 in the Revised Application filed on February 6, 2009. Ex. 1.

1 As revised, the Project consists of up to 95, 2 MW turbines located on a 5,200-acre
2 Project Area. Ex. 1 Tab 1 at 1. There are now only seven non-participating residences located
3 less than 2,500 feet from a turbine. *Id.* at 2. The minimum set back is 1,640 feet, which is
4 four times the tip height of the turbines. *Id.*
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9 **5. Negotiated Agreements, Adjudicatory Hearing and Public Hearings**

10 EFSEC commenced the adjudicatory process shortly after receiving the Revised
11 Application. Desert Claim continued to work with stakeholders to try to resolve any concerns
12 about the Project. Desert Claim and the CFE negotiated a Stipulation that resolves the CFE's
13 concerns about the Project. Ex. 30. Desert Claim and WDFW also negotiated a mitigation
14 agreement that resolves the issues raised in the agency's comments on the Draft SEIS. Ex. 20.
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21 During the formal adjudicatory process, no party introduced evidence opposing
22 certification of the Project or supporting any additional mitigation measures or permit
23 conditions. Through the stipulation, the CFE supports certification. Ex. 30 § I.C. The
24 Washington Department of Commerce (formerly the Department of Community Trade and
25 Economic Development) and the Economic Development Group of Kittitas County both
26 introduced evidence supporting certification of the Project. Exs. 40-40.6 and 60-60.3.
27 Although Kittitas County intervened in the adjudicatory process, the County did not submit
28 any evidence or cross-examine any witness.
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37 The Council also held nighttime public hearings in Ellensburg and Seattle. During
38 those meetings, a substantial majority of speakers expressed support for Project certification.
39 Supporters included local organizations (e.g., Ellensburg Chamber of Commerce, Ellensburg
40 School District), local residents, and statewide environmental, energy, business, civic and
41 educational organizations (e.g. Northwest Energy Coalition, Renewable Project Northwest, the
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1 Association of Washington Business, the League of Women Voters, Highline Community
2 College), and other residents concerned about the state's energy and environmental policy.

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5 **6. SEPA Process**

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7 During the original county review process, Kittitas County published a Final
8 Environmental Impact Statement ("FEIS"), Ex. 3, which the Council has adopted. On April 2,
9 2009, the Council published a Draft Supplemental Environmental Impact Statement ("SEIS")
10 to address changes made to the Project and new information that had become available since
11 the County FEIS was published. Ex. 4. The Council made the Draft SEIS available for public
12 comment, receiving written comments and hearing oral comments during a public hearing
13 held in Ellensburg. The oral and written comments on the Draft SEIS reflected widespread
14 public support for the Project.
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23 **III. EFSEC Should Recommend Certification**

24 The evidence before the Council demonstrates that the Project will satisfy the
25 requirements of RCW chapter 80.50. The Project is consistent with State law favoring the
26 development of renewable power and the reduction of greenhouse gas emissions, and the
27 Project will have significant environmental, energy, and economic benefits. The Project has
28 been designed to avoid, minimize and mitigate potential effects on the environment and the
29 residents of Kittitas County. No party introduced evidence opposing certification, and there is
30 no evidence before the Council that would support any additional mitigation measures or
31 permit conditions. Accordingly, the Council should recommend certification of the Project to
32 the Governor.
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1 **A. State law and policy favors Certification of the Desert Claim Wind Project.**

2 Washington law and policy favors certification of the Desert Claim Project.

3 Washington's State Energy Policy has long encouraged "[t]he development and use of a
4 diverse array of energy resources with emphasis on renewable energy resources." RCW
5 43.21F.015(1). Renewable power development has also been a "guiding principle" of the
6 State Energy Strategy. Ex. 40.2 at 2-2. By enacting Initiative 937 (RCW ch. 19.285) in 2006,
7 Washington citizens went further to require Washington utilities to make renewable power a
8 larger share of their generation portfolios, which will necessitate much more wind power
9 development in Washington. Ex. 40 at 4-7 (Usibelli); Ex. 13 at 25-27 (Litchfield).

10 Washington law also requires the state to significantly reduce greenhouse gas
11 emissions. RCW ch. 70.235. Executive Order 09-05 directs state agencies to take active steps
12 to reduce greenhouse gas emissions, and to support the development of clean energy and green
13 jobs. Ex. 40 at 5 (Usibelli). Because electrical generation is a significant source of
14 greenhouse gas emissions, much more wind power development will be needed to achieve
15 Washington's greenhouse gas emission reduction goals. Ex. 13 at 23-25 (Litchfield).
16 Increasing the use of renewable power is an important component of the state plan to address
17 climate change. Ex. 40.6 at 13. In fact, achieving I-937's renewable power goals is expected
18 to contribute 12% of the emission reductions necessary to meet the state's greenhouse gas
19 reduction requirements. Ex. 40 at 9 (Usibelli).

20 Tony Usibelli, Director of the Department of Commerce's Energy Policy Division,
21 summed it up when he testified that state law and policy "very strongly" support permitting
22 the Project. Ex. 40 at 3.

1 **B. The Desert Claim Project will benefit Washington.**

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3 Construction and operation of the Project will result in numerous benefits to
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5 Washington citizens. Wind power offers substantial environmental and energy benefits over
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7 traditional electrical generation technologies. This Project will also result in significant local
8
9 and statewide economic benefits.

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11 **1. Environmental Benefits**

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13 The Project offers significant environmental benefits. As the CFE acknowledged, "it
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15 will generate electricity without the emission of air pollutants and greenhouses gases that
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17 result from the generation of electricity at fossil fuel-fired facilities." Ex. 20 § II.A; *see also*
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19 Ex. 13 at 29 (Litchfield). The Project will also generate electricity without the use of
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21 significant water resources typically associated with thermal generation facilities, Ex. 20
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23 § II.A; Ex. 13 at 29 (Litchfield), and it will avoid the adverse impacts to fish commonly
24
25 associated with hydroelectric generation. Ex. 13 at 29 (Litchfield).

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27 This particular Project would also provide additional generation capacity near existing
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29 high voltage transmission lines. As a result, the state will benefit from additional generation
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31 without the environmental impacts associated with constructing lengthy transmission lines.
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33 Ex. 40 at 13 (Usibelli); Seattle Public Hearing Transcript at 93 (Hirsh).

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35 **2. Energy Benefits**

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37 The Project also offers significant energy benefits for Washington and the region.
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39 Evidence introduced during the adjudicatory process demonstrated that the region has a long-
40
41 term need for additional electrical generation in order to meet growing electricity demand and
42
43 maintain system reliability. Ex. 13 at 3-13 (Litchfield). Additional wind power capacity will
44
45 also help the state and region to diversify its electrical resource base. Ex. 40 at 12 (Usibelli);
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47 Ex. 13 at 29-30 (Litchfield). As a resource that does not require purchase of a fuel supply,

1 wind power also provides a hedge against future fuel price volatility. Ex. 13 at 29-30
2
3 (Litchfield); Seattle Public Hearing Transcript at 92 (Hirsh).

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5 **3. Economic Benefits**
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7 During the public hearings, local residents and statewide organizations alike stressed
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9 the significant economic benefits associated with the Project. Expert testimony helped to
10
11 quantify those benefits. Professor Richard Mack testified regarding a Central Washington
12
13 University study that concluded that Project construction would result in more than \$17
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15 million in economic activity and almost 160 jobs in Kittitas County, and that long-term
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17 operation of the Project would result in more than \$2.8 million in economic activity annually
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19 and 24.9 jobs in Kittitas County. Ex. 14 at 6-7 (Mack); Ex. 14.2 at 4-6. Executive Director of
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21 the Economic Development Group of Kittitas County, Ronald Cridlebaugh submitted data
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23 showing the significant cumulative economic benefits of the Desert Claim and other wind
24
25 projects in Kittitas County. Ex. 60 at 3-4; Exs. 60.1, 60.2.

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27 Statewide, the economic benefits are even greater. Steven Grover, Ph.D., estimated the
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29 statewide economic activity to be more than \$33 million during construction and more than \$6
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31 million annually during Project operation, with 282 jobs during construction and 36 jobs
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33 during operation. Ex. 15 at 6 (Grover); Ex. 15.2 at 5, 7. Tony Usibelli emphasized how the
34
35 Project fits with the state's goals of increasing Washington's green economy and increasing the
36
37 number of green jobs in the state. Ex. 40 at 10-11 (Usibelli).

38
39 During the public hearings, several witnesses emphasized the opportunities presented
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41 by this Project. With projects like this, Washington has an opportunity to be an international
42
43 leader in the green energy economy. Seattle Public Hearing Transcript at 87-88 (Oxley) and
44
45 105-06 (Macfarlane). Kittitas County could become a center of renewable energy innovation.
46
47 Ellensburg Public Hearing Transcript at 55 (Gaudino); Seattle Public Hearing Transcript at 77-

1 78 (Wagnitz). The Project could provide opportunities for individuals and small businesses to
2
3 get valuable experience and technical training that would help them to take advantage of
4
5 future opportunities in the growing renewable energy sector. Seattle Public Hearing
6
7 Transcript at 102-03 (Martinez) and 113-14 (Verchot). The jobs and economic activity
8
9 generated by the Project would come at a critical time, given current economic challenges.
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11 Ellensburg Public Hearing Transcript at 42-43 (McCabe).

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13 **4. Tax Revenues**

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15 The Project is also expected to generate substantial tax revenues. Professor Mack
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17 estimated that the Project would generate more than \$1.25 million in local taxes. Ex. 14 at 8.
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19 In particular, property taxes will generate almost \$340,000 a year for state schools and almost
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21 \$340,000 a year for the Ellensburg School District. Ex. 14 at 8 (Mack). Lease payments to
22
23 WDNR will generate an additional \$435,000 a year for the State School Fund. Ex. 15.2 at 9
24
25 (Grover). Public comments emphasized the importance of these revenues, especially the
26
27 revenues for state and local schools. See Public Comment No. 114 (State Representatives
28
29 Quall and Priest, Chair and Ranking Member of House Education Committee); Public
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31 Comment No. 115 (State Senator McAuliffe, Chair K-12 Education Committee); Ellensburg
32
33 Public Hearing Transcript at 22 (Price) and 38 (Boyum).

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35 **C. The Project Avoids and Mitigates Environmental Impacts.**

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37 Desert Claim has designed the Project to avoid, minimize and mitigate adverse
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39 environmental impacts. Ex. 1 (Revised Application); Ex. 4 (Draft SEIS). The Stipulation
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41 with the CFE (Ex. 30) and the Agreement with WDFW (Ex. 20) reflect further commitments
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43 by the Applicant to address potential impacts. These agreements, taken together with the
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45 prefiled testimony, provide prima facie evidence that there will be no significant adverse
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1 impacts to the environment and potential impacts will be mitigated appropriately. No contrary
2 evidence was presented to the Council.
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5 **1. Habitat**
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7 The Project is located primarily in grassland and shrub steppe habitat types. Ex. 4 at 3-
8 3 (Draft SEIS). Although there are some federal jurisdictional waters and wetlands within the
9 Project Area, the Project has been designed so that there will be no temporary or permanent
10 impacts to these waters and wetlands. Ex. 11 at 25-26 (Steeb); Ex. 4 at 3-7 (Draft SEIS).
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14 Desert Claim has entered into agreements with WDFW and the CFE that include
15 conditions intended to minimize temporary and permanent habitat impacts to the extent
16 practical, and to provide compensatory mitigation for impacts that cannot be avoided. Exs. 20,
17 30. Desert Claim will develop a Habitat Restoration Plan in consultation with WDFW to
18 ensure that areas disturbed during construction will be reseeded with native vegetation and
19 noxious weeds will be controlled. Ex. 20 at 2-3 (WDFW Agreement); Ex. 30 § II.G. (CFE
20 Stipulation). Desert Claim will also develop a Habitat Mitigation Plan in consultation with
21 WDFW that will provide compensatory mitigation for temporary and permanent habitat
22 impacts consistent with the 2009 WDFW Wind Power Guidelines. Ex. 20 at 2-3; Ex. 30
23 § II.G.
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35 At the conclusion of the Project's life, the wind turbines, foundations and other
36 facilities will be removed to a depth of 4 feet below grade, and areas will be revegetated and
37 restored to their pre-project condition. Ex. 11 at 34 (Steeb). Desert Claim will prepare an
38 Initial Site Restoration Plan consistent with the Council's rules, and has agreed to consult with
39 WDFW in the preparation of that Plan. Ex. 20 at 11 (WDFW Agreement).
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1 In light of these commitments, WDFW has agreed that the Project is consistent with
2 the WDFW Wind Power Guidelines and that "the Project will not result in significant adverse
3 impacts to . . . habitat." Ex. 20 at 12 (WDFW Agreement).
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7 **2. Birds**
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9 The Project's effect on birds is expected to be similar to those experienced at other
10 wind projects in the region. Ex. 16 at 7-9 (Young); Ex. 1, Tab 5 at 7-17 (Revised Application,
11 West Report). Although individual birds may be harmed, the Project is not expected to have a
12 significant impact on the regional population of any species of birds. Ex. 16 at 7-9 (Young);
13 Ex. 1, Tab 5 at 7-17 (Revised Application, West Report).
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15

16 Desert Claim has incorporated many features in the Project design that are expected to
17 reduce avian impacts, including minimizing the use of overhead collector lines, using tubular
18 towers without guy wires, and minimizing tower lighting. Ex. 11 at 28 (Steeb); Ex. 20 at 4
19 (WDFW Agreement). Desert Claim has also proposed the same sort of monitoring and
20 adaptive management scheme, involving a Technical Advisory Committee ("TAC"), that
21 EFSEC has required for other wind projects. Ex. 11 at 29 (Steeb); Ex. 20 at 8-11 (WDFW
22 Agreement); Ex. 30 at §§ II. B, II.D.
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25 Desert Claim, the CFE and WDFW have also agreed to several specific measures to
26 address the potential risk to bald eagles during calving season. Private ranchers currently
27 conduct calving within fenced areas in the Project Area, and they will continue to do so.
28 Because calving can attract eagles, turbines will not be located within those fenced calving
29 areas, and all carcasses and afterbirths will be removed promptly. Ex. 20 at 8 (WDFW
30 Agreement); Ex. 30 § II.D.3. (CFE Stipulation). Desert Claim will also conduct a bald eagle
31 study during the calving season in the first two years of the Project's operation and present the
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1 study's results to the TAC, which can then consider whether to recommend additional
2 mitigation measures. Ex. 30 § II.D.3. (CFE Stipulation).
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4 With these and other measures outlined in the Revised Application, the CFE
5 Stipulation, and the WDFW Agreement, the Project adequately minimizes and mitigates
6 impacts to birds. The WDFW has concluded that "the Project will not result in significant
7 adverse impacts to . . . wildlife." Ex. 20 at 12. The CFE has stipulated that these measures
8 "fully resolve" its concerns about the Project. Ex. 30 § I.C.
9

10 **3. Bats**

11 Although wind power projects often result in some bat fatalities, the evidence indicates
12 that the Project will not significantly impact bat populations. Ex. 16 at 10 (Young). At the
13 request of the CFE and WDFW, Desert Claim has nonetheless agreed to conduct a pre-
14 operation bat monitoring survey and two years of fatality monitoring once the Project is in
15 operation, and to present the results to the TAC. Ex. 20 at 9 (WDFW Agreement); Ex. 30 at
16 § II.E. (CFE Stipulation).
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18 **4. Air Quality and Greenhouse Gas Emissions**

19 One of the principal environmental advantages of wind power is that it produces
20 electricity without the significant emission of air pollutants and greenhouse gases that are
21 associated with traditional fossil fuel-fired electrical generation. Ex. 40 at 7 (Usibelli); Ex. 13
22 at 29 (Litchfield). There will be no air emissions associated with the Project, except for the
23 minor emissions associated with construction, operation and maintenance vehicles and
24 equipment, and emissions of fugitive dust. Ex. 11 at 21 (Steeb); Ex. 3 at 3-30, 3-33 (FEIS).
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1 **5. Water Use and Water Quality**

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3 Another advantage of wind power is the ability to produce electricity without the
4 significant water use typically associated with traditional electrical generation. Ex. 40 at 7
5 (Usibelli); Ex. 13 at 29 (Litchfield). The Project will only use small amounts of water for dust
6 suppression, concrete mixing, and domestic and sanitary uses. Ex. 11 at 22 (Steeb); Ex. 3 at 3-
7 56 (FEIS).
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12 Construction of the Project is not expected to adversely affect surface or ground water
13 in the area. Ex. 3 at 3-53 to 3-54, 3-56 to 3-57 (FEIS). The Project will develop and
14 implement a Council-approved Construction Stormwater Pollution Prevention Plan
15 ("SWPPP"), Temporary Erosion and Sedimentation Control ("TESC") Plan, and Spill
16 Prevention Control and Countermeasures ("SPCC") Plan. Ex. 11 at 16 (Steeb); Ex. 20 at 5
17 (WDFW Agreement). Although public comments questioned the potential impact of
18 construction on wells, the analysis performed in connection with the FEIS and the Final SEIS
19 concluded that construction activities would not adversely affect groundwater or wells in the
20 vicinity. Ex. 3 at 3-54 to 3-56 (FEIS); Ex. 5 (forthcoming Final SEIS Response to
21 Comments).
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32 Once in operation, the Project will not discharge industrial waste water. It will
33 implement a Council-approved Operational SWPPP and SPCC Plan to avoid adverse impacts
34 to water quality. Ex. 20 at 7 (WDFW Agreement).
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39 **D. The Project Minimizes Impacts on Nearby Residents**

40 Although the construction and operation of any energy project will have some effects
41 on its neighbors, Desert Claim has designed the Project to minimize those effects. The studies
42 presented in the Revised Application, together with prefiled testimony, provide prima facie
43 evidence that the Project will not have significant adverse impacts and that the Project has
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1 incorporated appropriate mitigation measures. No contrary evidence was presented to the
2 Council.
3

4
5 **1. Safety**

6 Desert Claim has designed the Project to include a minimum 625-foot safety setback
7 between turbines and all occupied structures, public roads and public rights of way. Ex. 11 at
8 31 (Steeb). This distance is based upon engineering calculations of the maximum potential
9 distance of safety hazards such as tower collapse, blade throw and ice throw, plus an
10 additional 25% margin of safety. Ex. 1, Tab 7 (Revised Application, KPFF Report).
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17 **2. Noise**

18 The Council's regulations require compliance with the maximum noise limits set forth
19 in regulations promulgated by Ecology. WAC 463-62-030 (referencing WAC chapter 173-
20 60). Desert Claim has proposed that the Site Certification Agreement require compliance with
21 those regulatory noise limits. The results of predictive modeling introduced into evidence
22 indicate that the Project will comply with these noise limits. Ex. 17 at 5-6 (Meier); Ex. 1, Tab
23 6 (Revised Application, GEC Report).
24

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29
30 **3. Shadow Flicker**

31 The Project has been designed to avoid shadow flicker at neighboring residences.
32 Modeling analysis introduced into evidence indicates that the Project has a theoretical
33 potential to result in no more than 26 hours of shadow flicker a year at nearby residences. Ex.
34 17 at 11; Ex. 1, Tab 8 (Revised Application, GEC Report). However, the expert report also
35 concludes that shadow flicker is not expected to be noticeable at distances of more than 1,500
36 feet from a turbine. Ex. 1, Tab 8 at 4. With all residences more than 1,640 feet from non-
37 participating residences, no noticeable shadow flicker is anticipated. Nonetheless, Desert
38 Claim has proposed a condition in the Site Certification Agreement that would require
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1 turbines to be turned off if neighboring residences experience shadow flicker. Ex. 11 at 32-33
2
3 (Steeb).

4
5 **4. Views and Aesthetics**

6
7 The Desert Claim Project is spread out over a relatively flat valley floor. Ex. 18 at 6
8
9 (Blau). The site was selected in part because the Project would have less of a visual impact
10
11 than it might have at other locations. Ex. 11 at 23-24 (Steeb). The valley is already a working
12
13 agricultural landscape with barns, silos, hay storage and farm equipment, and views are
14
15 already dominated by several high voltage transmission lines. Ex. 18 at 6-7 (Blau). By
16
17 locating the Project in the valley, turbines do not stand out on top of area ridgelines, and
18
19 turbines do not break the horizon line when viewers in the Ellensburg area look north toward
20
21 the Stewart Range. Ex. 11 at 23-24 (Steeb).

22
23 The SEIS presents a detailed evaluation of the Project's effect on views. It concludes
24
25 that the changes that Desert Claim has made to the Project "would lessen project impacts for
26
27 most groups. While these measures and visual quality improvements would not lead to a
28
29 project that is invisible, which is impossible, they would result in a project that fits better with
30
31 the landscape of the Kittitas Valley, and that better responds to the aesthetic values of the
32
33 people who live in the region." Ex. 4 at 3-59 (Draft SEIS); *see also* Ex. 18 at 8 (Blau).

34
35 Although any commercial scale wind project will have an effect on area views, Desert
36
37 Claim has incorporated several features in the Project design to minimize and mitigate
38
39 aesthetic impacts. These include selecting a site on the valley floor rather than the more
40
41 visible hilltop ridge lines, increasing setbacks from nearby residences, systematically
42
43 organizing the layout of turbines; painting turbines a neutral color with low-reflectivity finish,
44
45 minimizing Project lighting, and a commitment to promptly repair or remove any broken or
46
47 inoperable turbines. Ex. 11 at 24-25 (Steeb); Ex. 4 at 3-61 to 3-63 (Draft SEIS) .

1 The greatest aesthetic impacts will likely be experienced by those living closest to the
2
3 Project. Ex.4 at 3-58 (Draft SEIS). However, the Project has been revised since its original
4
5 proposal in a way that significantly reduces the number of nearby residences, with only seven
6
7 non-participating residences now located within 2,500 feet of a turbine. Ex. 11 at 5 (Steeb);
8
9 Ex. 3 at 3-58 (Draft SEIS). Although a few individuals who commented at the public hearing
10
11 felt that turbines were still too close to residences, only one of the seven residences closest to
12
13 the Project have provided either oral or written comments to EFSEC expressing concerns
14
15 about the change in view. *See* Post-Hearing Conference (Steeb).
16

17 In order to mitigate the visual impact to those living near the Project, Desert Claim has
18
19 proposed a minimum setback of four times the turbine tip height, which is 1,640 feet. Ex. 11
20
21 at 36 (Steeb). The evidence introduced in the adjudicatory hearing demonstrates that this
22
23 setback is appropriate. Visual expert David Blau conducted extensive research and performed
24
25 a case study at a wind project that uses the same turbines proposed for this Project. Mr. Blau
26
27 concluded that a 4:1 setback would be more than sufficient to avoid any looming effect at
28
29 nearby residences. Ex. 18 at 10-13 (Blau); Exs. 18.2–18.7; *see also* Ex. 4 at 3-44 (Draft
30
31 SEIS). Mr. Steeb testified that the proposed setback is substantially greater than generally
32
33 used in the wind industry or than required by the wind power guidelines adopted by several
34
35 states. Ex. 11 at 41-42 (Steeb). No contrary evidence was introduced and neither Mr. Blau
36
37 nor Mr. Steeb were cross-examined.
38

39 No evidence was introduced during the adjudicatory proceeding indicating that the
40
41 Project's aesthetic impacts are unreasonable or that the Project's proposed mitigation is
42
43 insufficient. Indeed, during the adjudicatory hearing, no intervenor raised this issue or
44
45 advocated any additional mitigation. Although Council members asked questions concerning
46
47 setbacks during the post-hearing conference, there is simply no evidence in the record

1 suggesting that greater setbacks are needed to mitigate the Project's impacts. The evidence
2 does demonstrate, however, that requiring greater setbacks would significantly reduce the
3 environmental, energy and economic benefits of the Project. Ex. 11 at 39-40 (Steeb); Ex. 13
4 at 31-32 (Litchfield).
5
6
7

8
9 **5. Fire Hazards**

10 Although no intervenor introduced evidence concerning fire hazards, members of the
11 public raised concerns and Council members asked questions about fire hazards. The
12 evidence in the record indicates that wind turbines rarely cause fires and would be unlikely to
13 effect a fire started by some other cause. Ex. 3 at 3-166 to 3-167 (FEIS); Ex. 5 (forthcoming
14 Final SEIS Response to Comments). Desert Claim will prepare Fire Control and Emergency
15 Plans, and Desert Claim will enter into a fire services agreement to cover the entire Project
16 Area before beginning construction. Ex. 11 at 18-19 (Steeb).
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25 **E. The Project will not Adversely Affect Public Services**

26 In general, the Project is expected to have a positive effect on public services in
27 Kittitas County. While placing relatively little demand on public services, the Project will
28 generate substantial tax revenues that can be used to pay for existing or expanded public
29 services. Ex. 14 at 8 (Mack).
30
31
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33
34

35 **1. Public Roads**

36 At the County's request, Desert Claim has agreed to use video to document before and
37 after conditions of roads being used for construction access. After construction, Desert Claim
38 will make any repairs necessary to ensure that these roads are returned to as good or better
39 condition than they were before construction. Ex. 11 at 35 (Steeb). Desert Claim also agreed
40 to prepare a Road Signage Plan consistent with the Manual on Uniform Traffic Control
41 Devices prior to construction. Ex. 11 at 17 (Steeb).
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1 **2. Internal Access Roads**

2 The Project expects to have approximately 27 miles of internal access roads, allowing
3 construction and maintenance vehicles to travel to each Project turbine. In the interest of
4 avoiding unnecessary impacts to habitat and soil disturbance, Desert Claim has agreed with
5 the CFE and WDFW to minimize new road construction. Ex. 20 at 3 (WDFW Agreement);
6 Ex. 30 at § II.G.2. (CFE Stipulation). The Revised Application describes the Project's internal
7 roads as single-lane gravel roads, generally having 15-20 foot surface widths. Ex. 1 Tab 1 at
8 11. Desert Claim proposes to make these roads no wider than necessary for their intended
9 purpose. However, Desert Claim does propose to ensure that the point of ingress and egress
10 from these internal Project roads to public roads be constructed according to County standards.
11 Ex. 1 Tab 1 at 11 (Revised Application).

12 Although the County did not introduce any evidence regarding the internal Project
13 roads, a Council member asked whether these roads would comply with Kittitas County's
14 private roads standards. Kittitas County Code 12.12.010 - .020 set forth the road design
15 criteria for private roads. Desert Claim will construct the internal access roads according to
16 whatever requirements the Council imposes in the Site Certification Agreement, but Desert
17 Claim does not propose to construct all internal roads according to County private road
18 standards. The County's private road standards appear to be intended to apply to privately
19 owned roads that will allow two-way traffic within low- and high-density residential
20 developments that serve from three to forty or more lots. *See* Kittitas County Code
21 § 12.12.020, Table 12-1. For low density developments, the County requires a minimum
22 gravel surface of 20 feet. *Id.* The Project's access roads are not intended to serve two-way
23 traffic to members of the public. They seem more akin to private driveways, which the
24 County Code only requires to be 8 feet wide for single use, or 12 feet wide for joint use. *Id.*

1 Desert Claim believes its proposal to construct narrow one-lane internal access roads
2
3 appropriately balances the need for safe and effective access for construction and maintenance
4
5 with the interest in minimizing impacts to habitat in the Project Area.

6
7 **F. The Project Satisfies the RCW 80.50.010 Standard for Certification**

8
9 RCW 80.50.010 sets forth the basic standard governing this Council's site certification
10
11 recommendations as follows:

12
13 It is the policy of the state of Washington to recognize the
14 pressing need for increased energy facilities, and to ensure
15 through available and reasonable methods, that the location
16 and operation of such facilities will produce minimal
17 adverse effects on the environment, ecology of the land and
18 its wildlife, and the ecology of state waters and their
19 aquatic life.
20

21
22 It is the intent to seek courses of action that will balance the
23 increasing demands for energy facility location and
24 operation in conjunction with the broad interests of the
25 public. Such action will be based on these premises:
26

27
28 (1) To assure Washington state citizens that, where
29 applicable, operational safeguards are at least as stringent
30 as the criteria established by the federal government and
31 are technically sufficient for their welfare and protection.
32

33
34 (2) To preserve and protect the quality of the environment;
35 to enhance the public's opportunity to enjoy the aesthetic
36 and recreational benefits of the air, water and land
37 resources; to promote air cleanliness; and to pursue
38 beneficial changes in the environment.
39

40
41 (3) To provide abundant energy at reasonable cost.
42

43
44 (4) To avoid costs of complete site restoration and
45 demolition of improvements and infrastructure at
46 unfinished nuclear energy sites, and to use unfinished
47 nuclear energy facilities for public uses, including

1 economic development, under the regulatory and
2 management control of local governments and port
3 districts.
4

5 (5) To avoid costly duplication in the siting process and
6 ensure that decisions are made timely and without
7 unnecessary delay.
8

9
10 The statute establishes a presumption in favor of increasing energy facilities, but directs the
11 Council to use "available and reasonable methods" to minimize the environmental
12 consequences of energy facility siting. RCW 80.50.010.
13

14
15 RCW 80.50.010 explains that state policy requires EFSEC to recognize the pressing
16 need for more energy facilities. Evidence introduced during the adjudicatory hearing further
17 demonstrates that there is a regional need for additional electrical generation resources. Ex. 13
18 at 3-14 (Litchfield). In particular, state law requirements to increase the proportion of
19 electricity generated from renewable resources necessitate more development of renewable
20 energy such as the Desert Claim Project. Ex. 13 at 25-28 (Litchfield); Ex. 40 at 5-7 (Usibelli).
21

22
23 RCW 80.50.010 also requires EFSEC "to ensure through available and reasonable
24 methods" that the Project will produce minimal adverse environmental impacts. The
25 evidence described in Sections III.C. and III.D. above thoroughly demonstrates that the
26 Project will avoid, minimize and mitigate adverse environmental impacts. For these reasons,
27 the CFE, who is charged with representing the public and its interest in protecting the quality
28 of the environment, RCW 80.50.080, fully supports certification of the Project. Ex. 30 § I.C.
29 (CFE Stipulation).
30

31
32 RCW 80.50.010 requires EFSEC to seek course of action "that will balance the
33 increasing demands of energy facility location and operation in conjunction with the broad
34 interests of the public." In this case, the Project will both increase electricity generation
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1 capacity and serve the broad interests of the public. As described above, the Project will
2 result in energy, economic and environmental benefits, and is consistent with state law and
3 policy.
4

5
6 RCW 80.50.010 provides that EFSEC should require, "where applicable, operation
7 safeguards [that] are at least as stringent as the criteria established by the federal government
8 and are technically sufficient for [citizens'] welfare and protection." The mitigation measures
9 outlined in the Revised Application and the conditions incorporated in the proposed Site
10 Certification Agreement are consistent with applicable federal requirements. See Ex. 1, Tab
11 10 at 12-14 (Revised Application). As outlined in Sections III.C. and III.D. above, these
12 measures are sufficient to protect the welfare of Washington citizens.
13
14

15 RCW 80.50.010 also provides that EFSEC should preserve and protect the quality of
16 the environment. As discussed in detail in Sections III.C and III.D. above, the Project will
17 avoid, minimize and mitigate adverse environmental impacts. Both the CFE and the WDFW
18 support certification. Exs. 20 and 30. The Project is consistent with the WDFW Wind
19 Power Guidelines. Ex. 20 at 12. No evidence of adverse environmental impact was
20 introduced during the adjudicatory proceedings.
21
22

23 RCW 80.50.010 directs EFSEC to make decisions that would "provide abundant
24 energy at reasonable cost." As described in greater detail above, both Tony Usibelli and
25 James Litchfield have testified that this Project will help meet regional energy demand, and
26 in particular, it will provide renewable generation that is needed for utilities to satisfy the
27 requirements of Initiative 937. Exs. 13 and 40.
28
29

30 Finally, RCW 80.50.010 directs EFSEC "to avoid costly duplication in the siting
31 process and ensure that decisions are made timely and without unnecessary delay." In light
32 of the overwhelming support for certification of the Desert Claim Project, and the absence of
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1 any contrary evidence, Desert Claim asks the Council to move quickly to provide a
2 certification recommendation to the Governor.
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5 **IV. Preemption**
6

7 By formal written filing dated June 29, 2007, Desert Claim requested that EFSEC
8 recommend preemption of the local wind power siting process outlined in Kittitas County
9 Code chapter 17.61A, and recommend certification of the Desert Claim Wind Project. *See*
10 Request for Preemption. Kittitas County did not respond to this request or introduce any
11 evidence in the adjudicatory proceedings. The Council should recommend approval of the
12 Project and preemption of local requirements.
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18 **A. Preemption Standard**
19

20 Through RCW chapter 80.50, the Legislature established a one-stop process for
21 permitting certain energy facilities. A Site Certification Agreement, recommended by
22 EFSEC and approved by the Governor, authorizes the construction and operation of energy
23 facilities covered by chapter 80.50.
24
25
26
27

28 The Legislature unequivocally expressed its intention to preempt local regulation:
29

30
31 The state hereby preempts the regulation and certification
32 of the location, construction, and operational conditions of
33 certification of the energy facilities included under RCW
34 80.50.060 as now or hereafter amended.
35

36 RCW 80.50.110(1). The Legislature further provided that a Site Certification Agreement
37 would supersede and take the place of all state and local permits that would otherwise be
38 required for these projects:
39
40

41
42 The issuance of a certification shall be in lieu of any
43 permit, certificate or similar document required by any
44 department, agency, division, bureau, commission, board,
45 or political subdivision of this state.
46
47

1 RCW 80.50.120.

2
3 In its recent decision regarding the Kittitas Valley Wind Project, the Council
4 explained the tension between the Legislature's command in RCW chapter 80.50 and the
5 wind power siting process created by ordinance in Kittitas County:
6
7

8
9 In an Application for Site Certification filed with EFSEC,
10 site-specific details are not for a county or city to negotiate
11 and impose, but are firmly within the jurisdictional realm of
12 this Council. EFSEC is charged with unitary permitting
13 authority for energy facilities seeking its site certification,
14 allowing for a streamlined siting process. EFSEC's
15 preemptive statutory power to certify and regulate the
16 location, construction, and operation of energy facilities
17 such as the proposed KVVPP simply cannot be usurped by
18 local governments seeking to impose their own imprimatur
19 on the siting process.
20
21

22
23 Council Order No. 826 at 17. The Washington Supreme Court unanimously upheld the
24 Council's preemptive authority last year. *Residents Opposed to Kittitas Turbines v. State*
25 *Energy Facility Site Evaluation Council*, 165 Wash.2d 275, 319, 197 P.3d 1153, 1176-77
26 (2008).
27
28
29

30
31 Despite the Legislature's clear intention to preempt local regulation, the Council for
32 many years had regulations that required an applicant to "request preemption" when a project
33 was not consistent with all of the local land use requirements that would otherwise apply to
34 development of the project site. See WAC 463-28-040, -050, -060. Under the Council's
35 previous regulations, before an applicant could request preemption, the applicant was required
36 to "make the necessary application for change in, or permission under, such land use plans or
37 zoning ordinances, and make all reasonable efforts to resolve the noncompliance." WAC 463-
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1 28-030 (repealed). The Council's previous regulations also required an applicant to submit a
2
3 written request for preemption that addresses the following points:

- 4
5 (1) That the applicant has demonstrated a good faith
6 effort to resolve the noncompliance issues.
7
8 (2) That the applicant and the local authorities are
9 unable to reach an agreement which will resolve the
10 issues.
11
12 (3) That alternative locations which are within the same
13 county and city have been reviewed and have been
14 found unacceptable.
15
16 (4) Interests of the state as delineated in RCW
17 80.50.010.
18
19

20 WAC 463-28-040 (repealed). The Council has since repealed these regulations, but they
21 were in effect at the time that Desert Claim filed its Application in 2006.¹
22

23
24 **B. Further County Proceedings are not Required.**
25

26 Following the Council's land use consistency determination, Desert Claim filed a
27 motion with the Council seeking a determination that it had satisfied WAC 463-28-030(1)'s
28 requirement that it make reasonable efforts to cure the inconsistency with local land use
29 requirements and, therefore, could proceed to submit a request for preemption. The Council
30 heard argument on the motion during its Council meeting on April 10, 2007, and requested
31 supplemental briefing. Following the submission of supplemental briefing, the Council
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41 ¹ An argument could be made that the repeal of these regulations was "curative" and
42 "remedial." The repeal was curative in the sense that it addressed a potential conflict with the
43 statutory intent. See EFSEC, Concise Explanatory Statement at 6. The repeal was remedial because it
44 was intended to streamline EFSEC's procedure. *Id.* at 10. Under Washington law, curative or
45 remedial changes in regulations apply retroactively. *Letourneau v. Dep't of Licensing*, 131 Wn. App.
46 657, 665, 128 P.3d 647, 651 (2006). The Council need not reach the question of whether the repealed
47 regulations apply in this case, however, because the Desert Claim Project clearly satisfies the
requirements of those regulations.

1 granted Desert Claim's motion and ruled that Desert Claim was not required to file another
2 application under Kittitas County Code chapter 17.61A. *See* Council Order No. 830 at 7
3 (May 8, 2007).
4
5

6
7 **C. Preemption is Justified.**

8
9 The evidence in the record plainly demonstrates that approval of the Project is in the
10 State's best interests, and that each of the criteria set forth in the former regulation WAC 463-
11 28-040 are satisfied.
12
13

14
15 **1. Desert Claim has demonstrated a good faith effort to resolve**
16 **noncompliance issues.**
17

18 The first requirement of former WAC 463-28-040 is that an applicant demonstrate a
19 good faith effort to resolve noncompliance issues with local land use requirements. Under
20 Kittitas County Code chapter 17.61A, a wind project may be permitted in any area zoned as
21 Agricultural-20, Forest and Range, Commercial Agriculture or Commercial Forest, only if the
22 BOCC approves a development agreement, a site-specific amendment to the Comprehensive
23 Plan land use designation map, and a site-specific rezone. The process of obtaining these
24 approvals amounts to a project-specific siting process.
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32 Desert Claim made good faith efforts to obtain these local land use approvals. In
33 January 2003, Desert Claim submitted an application for these approvals to Kittitas County.
34 Desert Claim then spent the next 26 months trying to obtain the required approvals. Ex. 11 at
35 42-43 (Steeb); Ex. 11.19 ¶¶ 5-7 (Steeb). A detailed chronology of that process is provided in
36 Exhibit 11.19. In summary, Desert Claim attended numerous hearings and meetings before
37 the BOCC, provided requested information and repeatedly revised a proposed Development
38 Agreement in an effort to address concerns about the Project. Ex. 11.19 (Ex.2); Exs. 11.12-
39 15. Despite these efforts, the BOCC was not satisfied. The Kittitas County Superior Court
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1 found that Desert Claim made "extraordinary efforts to satisfy two different boards of county
2 commissioners over the process of the application it submitted to the County." Ex. 11.20 at
3
4
5 11.

6
7 Following the BOCC's decision in 2005, Desert Claim made several more changes to
8
9 the Project in an effort to further address concerns raised during the County process. Those
10 changes were reflected in the Application filed with this Council in November 2006. Ex. 2.
11
12 Desert Claim contacted the County Commissioners before and shortly after filing its 2006
13
14 Application, but was told that the County had "no interest" in "making a decision on the
15
16 project" outside the County's siting process. Ex. 11 at 44 (Steeb).
17

18
19 Following the Council's land use consistency determination, Desert Claim met with
20
21 the County's attorney and Community Development Services on May 17, 2007. Ex. 11 at 45
22
23 (Steeb). At that time, Community Development Services Director Darryl Piercy indicated
24
25 that the County's only remaining concern about the Project is the length of the setback from
26
27 non-participating residences. *Id.*; Ex. 11.19 ¶ 12 (Steeb). Desert Claim requested an
28
29 opportunity to meet directly with the Board of County Commissioners to discuss the setback
30
31 issue, but the Commissioners declined this request. Ex. 11 at 45 (Steeb); Ex. 11.17.
32

33 Over the more than six and a half years since Desert Claim filed its initial application
34
35 with the County, Desert Claim has attempted to resolve this setback issue. In January 2003,
36
37 Desert Claim originally proposed a 1,000-foot setback from existing residences. Ex. 11.19
38
39 ¶ 14. In 2004, Desert Claim submitted various iterations of a Draft Development Agreement
40
41 to the County, each of which proposed a 1,000 foot setback. Initial comments by the BOCC
42
43 about the setback seemed to focus primarily on noise impacts, and at a BOCC hearing on
44
45 January 25, 2005, all three commissioners seemed to find a 1,000 foot setback from the build
46
47 line on adjacent properties to be acceptable. Commissioner Bowen stated it "doesn't cause

1 me any grief." Commissioner Huston said that it was "an acceptable buffer" and that he had
2 "no issue with that." Commissioner Crankovich said "I can agree with that." Ex. 11.19
3
4 (Transcription excerpts at Ex. 7 at 48-57). However, on January 27, 2005, County Attorney
5
6 Jim Hurson told the Commissioners that the turbines could be "visually dominant" from one-
7
8 quarter to one-half mile away. Ex. 11.19 (Transcript excerpts at Ex 8 at 47). Ultimately, in
9
10 April 2005, the BOCC issued Resolution No. 2005-46, in which it concluded that "a
11
12 minimum of 1/2 mile separation from wind turbines and residences would be necessary to
13
14 reduce significant adverse impacts to moderate adverse impacts." Ex. 11.16.
15

16
17 In November 2006, Desert Claim filed its EFSEC Application with a new
18
19 configuration and the closest residence located 1,106 feet from a turbine. Ex. 2. Desert
20
21 Claim had further discussions with County staff about setbacks, but the County
22
23 Commissioners were not willing to meet with Desert Claim. Ex. 11.17. In February 2009,
24
25 Desert Claim filed a Revised Application proposing that all turbines be located more than
26
27 four times their tip height (1,640 feet) from non-participating residences. Ex. 1 (Revised
28
29 Application).

30
31 In attempting to resolve this disagreement about setbacks, Desert Claim has acted in
32
33 good faith, and Desert Claim assumes the County has also acted in good faith. As of May
34
35 2007, however, the parties simply were not able to agree upon the appropriate setback
36
37 distance. At this time, it is not clear whether any substantive disagreement remains. The
38
39 County has not opposed the four-times-height setback in the adjudicatory hearings and has
40
41 not introduced any evidence supporting an alternative setback distance.
42

43 Under RCW chapter 80.50, EFSEC should resolve this siting question. In its recent
44
45 decision regarding the Kittitas Valley Wind Project, this Council explained the "good faith
46
47 effort" requirement as follows:

1 [T]he Council believes this requirement to mean that an
2 Applicant must work through local government land use
3 processes to resolve inconsistencies as extensively as
4 possible, but not to the point where further efforts would be
5 futile. Further reasonable compromises in position must be
6 explored by both sides. Finally a good faith effort to
7 resolve a land use consistency dispute need not result in
8 actual resolution of all underlying matters.
9

10 Council Order No. 826 at 17-18.
11

12 Desert Claim has demonstrated good faith efforts. As the Council has held, WAC
13 463-28-040 does not require an applicant to make every conceivable effort to cure local land
14 use inconsistencies, or to simply agree to whatever conditions a local jurisdiction proposes.
15 The Council should find that Desert Claim has satisfied the first requirement of former WAC
16 463-28-040.
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22
23 **2. Desert Claim and local authorities have been unable to reach an**
24 **agreement to resolve the issues.**
25

26 The second requirement in WAC 463-28-040 is that the Applicant and local
27 authorities have been unable to reach agreement. Since the BOCC's April 2005 decision,
28 Desert Claim has made changes in the Project to try to address the concerns raised during the
29 County process. As explained above, however, the County Commissioners refused to meet
30 with Desert Claim unless Desert Claim filed a new application under the County siting
31 process. Ex. 11.17.
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38 Although Desert Claim and the County have reached a procedural impasse that
39 prevents resolution of land use consistency issues, it is not clear whether the County
40 continues to have any substantive concerns about the Project. The County has not submitted
41 testimony advocating greater setbacks or raising any other concerns about the revised Project
42 proposal.
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1
2 **3. Desert Claim considered alternative locations but no better location was**
3 **available.**
4

5 The third requirement of former WAC 463-28-040 is that an applicant demonstrate
6 that it has evaluated other sites in the county and found them to be unacceptable. enXco
7 began looking for potential commercial wind power project sites in Kittitas County in 2000.
8 Ex. 11 at 8 (Steeb). Like most wind power developers, enXco considers several factors in
9 identifying potential project sites:
10

11 (1) Wind Resource. The most important factor in selecting a site for a wind power
12 project is the available wind resource. Ex. 11 at 8 (Steeb). enXco was looking for a site with
13 an average wind speed of 13 to 17 miles per hour. *Id.* Potential sites are typically identified
14 using published wind maps, and then promising sites are evaluated more thoroughly, by
15 collecting on-site meteorological data. Ex. 11.19 ¶ 16(a) (Steeb). Desert Claim has validated
16 the site's wind resource using data collected over the past 7-8 years. Ex. 11 at 9-10 (Steeb).
17

18 (2) Access to Electrical Transmission. Access to existing electrical transmission lines
19 is a significant advantage in wind power project development. Ex. 11 at 8 (Steeb). Access to
20 nearby lines avoids or substantial reduces the cost associated with constructing new lines,
21 which can range from \$500,000 to \$1,000,000 per mile. *Id.* In this case, the presence of
22 transmission lines crossing the Project area avoids the cost, permitting complications and
23 aesthetic concerns associated with constructing new transmission lines. *Id.*
24

25 (3) Environmental Constraints. Wind power developers try to avoid areas of
26 significant known environmental concerns. Ex. 11 at 9 (Steeb). Developers try to avoid
27 lakes, rivers, wetlands, wildlife reserves, and endangered species habitat. *Id.* The selected
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1 site avoids designated wildlife areas, and will allow the Project to be constructed without
2 impacts to wetlands.
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4 (4) Available Real Estate. A commercial wind power development typically requires
5 about 5,000 acres of open land. Ex. 11 at 9 (Steeb). Developers look for large open tracks of
6 land, tens of thousands of acres, as potential areas for development, and then gradually focus
7 in on specific areas. *Id.* Ultimately, project development requires the right to use land, and
8 the company's ability to negotiate leases with existing property owners is critical to site
9 selection. *Id.* Desert Claim was able to acquire development rights on the proposed site.
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12 (5) Zoning and Land Use Regulations. Project developers also consider zoning and
13 land use regulations to determine where projects are permitted. Ex. 11 at 9 (Steeb). At the
14 time Desert Claim began developing this project, wind power projects were not permitted
15 outright anywhere within the County. Subject to the approval of the BOCC, however, wind
16 power projects could be built in areas zoned Ag-20, Forest and Range, Commercial
17 Agriculture and Commercial Forest, such as the selected site. *See* Ex. 11.19 ¶ 16. Since then,
18 in 2007, the County established a pre-identified Wind Farm area in the eastern portion of the
19 County. Ex. 11 at 13 (Steeb); Ex. 11.4 (map). However, the evidence is undisputed that there
20 is no longer any available site within the pre-identified area with sufficient contiguous land
21 and sufficient wind resource for the development of a commercial wind project. Ex. 11 at 14
22 (Steeb); Ex. 4 at 1-4 (Draft SEIS).
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38 Desert Claim's parent corporation enXco initially identified the Kittitas Valley,
39 extending from Lookout Mountain on the west to the Columbia River on the east, and
40 between the National Forest lands in the north and Interstate-90 in the south, as an area worth
41 further investigation. Ex. 11.19 ¶ 17 (Steeb). It then looked for large tracts of land and
42 contacted landowners about the possibility of obtaining wind leases. *Id.* As a result, enXco
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1 identified a project area of over 5,000 acres northwest of Ellensburg, and obtained leases for
2 it. *Id.* After performing further on-site meteorological evaluations, enXco designed the
3 Desert Claim Project and submitted an application to Kittitas County. *Id.* Since then, Desert
4 Claim has been able to obtain wind leases on WDNR land, and has reconfigured the Project
5 to utilize a group of contiguous parcels, removing eastern portions of the original Project
6 area. *Id.*

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Desert Claim did consider other properties and locations in the County, but was not
able to identify other commercially available properties that provided a comparable
combination of wind conditions, transmission access and minimal environmental constraints.
Ex. 11.19 ¶ 17 (Steeb); *see also* Ex. 11 at 9-15 (Steeb).

The Applicant's assessment is supported by independent evaluations of alternatives
performed as part of the SEPA process. Kittitas County undertook an evaluation of potential
alternatives in preparation of the County FEIS and concluded that potential alternatives were
not available or practical, and therefore, were not "reasonable alternatives" to the Desert
Claim location. *See* Ex. 3 at 2-44. The County FEIS evaluated four general areas of land in
the County: the area west of Highway 97, the area immediately east of Highway 97, the
Whiskey Dick area and the Boylston area south of Whiskey Dick. Although the FEIS
identified potential sites in each of these areas, it ultimately concluded that those sites did not
present reasonable alternatives to the Desert Claim site. *See* Ex. 3 at 2-45 to 2-50.

The draft SEIS considered whether there were suitable alternative sites within the
recently designated Pre-Identified Wind Farm Area in the eastern portion of the County. Ex.
4 at 1-4. The SEIS concluded federal military operations, state wildlife conservation areas
and existing wind power project development prevent the use of much of this area, and there

1 would not be sufficient contiguous land with adequate wind resource to identify a reasonable
2 alternative site. *Id.*
3

4 EFSEC's analysis of alternatives in connection with other projects also supports
5 Desert Claim's conclusion. EFSEC undertook an analysis of alternative sites in its published
6 SEPA documents relating to the Wild Horse and Kittitas Valley wind projects. In these
7 documents, the Council considered six potential sites in addition to the sites proposed for the
8 Desert Claim, Wild Horse and Kittitas Valley projects. *See* Wild Horse Power Project, Draft
9 EIS at 2-31 to 2-41; Kittitas Valley Wind Power Project Final EIS at 2-47 to 2-78. Of those
10 six sites, only two – the Springwood Ranch and Swauk Valley Ranch sites – were considered
11 to be worthy of detailed consideration in the SEPA documents. *See* Wild Horse Draft EIS at
12 2-35; Kittitas Valley Final EIS at 2-66. Although the SEPA documents evaluated those two
13 sites, they also acknowledged that neither site is actually available for wind project
14 development. The owner of the Springwood Ranch site is not willing to lease it for wind
15 farm development, Ex. 3 at 2-47 (FEIS), and a conservation easement precludes development
16 on much of the Swauk Valley site. *See* Kittitas Valley Final EIS at 2-50.
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30 The undisputed evidence demonstrates that Desert Claim considered other locations
31 but that no superior wind power sites are available in Kittitas County. Ex. 11 at 13 (Steeb).
32 Moreover, given the need for significantly more renewable resources to comply with
33 Initiative 937, the relevant question should not be whether the Desert Claim site is the only,
34 or even the best, site available in Kittitas County, but rather, whether the site is one of the
35 many commercially viable sites that need to be developed in Washington. *See* Ex. 11 at 15
36 (Steeb); Ex. 40 at 7 (Usibelli).
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1 **4. Preemption will further the State's interests.**

2 The final requirement of former WAC 463-28-040 is that the Project further the
3 interests of the state delineated in RCW 80.50.010. As explained in Section III.F. above, the
4 Project furthers all of the interests identified in RCW 80.50.010: the Project is subject to
5 sufficient operational safeguards to protect the public welfare; it will preserve and protect the
6 quality of the environment; and it will provide new electrical generating capacity that will
7 contribute to the availability of abundant energy at a reasonable cost. The statute also
8 identifies the State's interest in avoiding "costly duplication in the siting process" and
9 ensuring that "decisions are made timely and without unnecessary delay." In recommending
10 preemption in connection with the Kittitas Valley Project, the Council found:
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20 Kittitas County's Wind Farm Overlay Ordinance usurps
21 EFSEC's role of site-specific project evaluation. The Board
22 of County Commissioners failed to provide the Applicant
23 in this case with a method for resolving land use
24 inconsistencies without submitting itself to the local
25 permitting process that focused on the specifics of the
26 Project. In this case, the Wind Farm Overlay Ordinance
27 made it impossible for the Applicant to apply to Kittitas
28 County only for an accommodation in the zoning code
29 through the conditional use permit or variance process.
30 Under the County's Overlay Ordinance process, the
31 Applicant had to obtain its site-specific permits from
32 Kittitas County, then return to the EFSEC process and
33 obtain those same permits a second time. The Council finds
34 this to be exactly the type of "costly duplication in the
35 siting process" that EFSEC was created to avoid.
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37 It is in the State's interest to see that applications for new
38 energy facilities are processed in a timely and efficient
39 fashion. The site-specific process demanded by Kittitas
40 County circumvents EFSEC's ability to achieve this
41 statutory mandate and also seeks to preserve a local veto
42 power over energy facility projects proposed for EFSEC
43 approval. Therefore, the Council finds that the fourth prong
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1 of WAC 463-28-040 is satisfied by recommending
2 preemption of the Kittitas County Wind Farm Overlay
3 Ordinance.
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5 Order No. 826 at 27. The same County process is at issue here, and the Council's previous
6 conclusions are equally true for the Desert Claim Project.
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8 For these reasons, the Council should recommend that the Governor issue a Site
9 Certification Agreement, preempting local land use regulation of the Project.
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11 **D. The Proposed SCA is in the interest of Kittitas County residents and includes**
12 **conditions that duly consider local interests and the purpose of local land use**
13 **rules and regulations.**

14 In instances of preemption, the Council's regulations provide:
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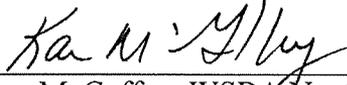
16 If the council approves the request for preemption it shall
17 include conditions in the draft certification agreement
18 which consider state or local governmental or community
19 interests affected by the construction or operation of the
20 energy facility or alternative energy resource and the
21 purposes of laws or ordinances, or rules or regulations
22 promulgated thereunder that are preempted pursuant to
23 RCW 80.50.110(2).
24

25 WAC 463-28-080.
26

27 The evidence presented during the adjudicatory hearing demonstrates that
28 construction and operation of the Project is in the interest of the residents of Kittitas County.
29 Among other things, the local community will benefit from jobs, economic activity and tax
30 revenues. Exs. 14 (Mack), 14.2 (CWU Report), 60-60.2 (Cridlebaugh). The Project will also
31 help local ranchers to keep rural rangeland in agricultural use, consistent with the County's
32 ranching history and culture. Ex. 12.6 (Weinman). Comments during the public hearings in
33 Ellensburg reflect widespread local support for the Project.
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2 DATED: July 31, 2009
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