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 request for
preemption

I. Introduction

The Applicant, Desert Claim Wind Power LLC ("Desert Claim"), hereby requests that the Council recommend preemption of local land use requirements and the issuance of a Site Certification Agreement authorizing construction and operation of the Desert Claim Project (the "Project"). The Council's rules require consideration of preemption requests along with the Application for Site Certification in its adjudicatory proceedings. Accordingly, Desert Claim bases its request for preemption on the materials filed herewith, together with the testimony and evidence to be presented during the adjudicatory hearings to be held in this matter.

II. Factual and Procedural Background

In 2001, enXco, Inc. began evaluating potential sites in Kittitas County for a commercial scale wind project. Declaration of David Steeb ¶ 2 (hereinafter "Steeb Decl."). In January 2003, Desert Claim filed an application with Kittitas County seeking the
approvals necessary to construct and operate the Project. Steeb Decl. ¶ 5. For more than
two years, Desert Claim met with Kittitas County Community Development Services staff,
and attended hearings and meetings of the Board of County Commissioners ("BOCC")
regarding the Project. Steeb Decl. ¶ 6. In an effort to address concerns expressed during the
County process, Desert Claim made numerous revisions to the Project and to the conditions
and mitigation requirements outlined in a draft Development Agreement. Id. Nonetheless,
in April 2005, the BOCC issued a final decision denying Desert Claim's application. Steeb
Decl. ¶ 7. Desert Claim then made some additional changes to the Project to address the
expressed concerns further, and filed an Application for Site Certification with this Council
in November 2006. Following this Council's issuance of Order No. 826 recommending
certification of the Kittitas Valley Wind Project, Desert Claim announced its intention to
incorporate the setbacks and shadow flicker mitigation recommended by the Council in the
Kittitas Valley proceedings. Desert Claim has since met with Kittitas County's Community
Development Services, but has been unable to resolve one of the County's concerns about
the Project.

A. Desert Claim's Application to Kittitas County

In 2001, enXco, Inc., Desert Claim's parent corporation, began evaluating potential
sites in Kittitas County for a commercial scale wind project. Steeb Decl. ¶ 2. At that time,
under Kittitas County Ordinance 2001-12, wind projects were allowed as a conditional use
in all Agricultural-20 ("Ag-20"), Forest and Range, Commercial Agriculture and
Commercial Forest zoning districts. Steeb Decl. ¶ 2.

In late 2002, the County enacted Ordinance 2002-19, which established the wind
power sitting provisions now found in Kittitas County Code chapter 17.61A. According to
the chapter 17.61A, a wind project may be permitted in any area zoned as Ag-20, Forest and
Range, Commercial Agriculture or Commercial Forest. KCC 17.61A.020(4). However, it requires a Wind Farm Resource Development Permit and Development Agreement with the County, a site-specific amendment to the Comprehensive Plan land use designation map, and a site-specific rezone of the project area. It is impossible to know whether a project at any particular location would be able to obtain these required approvals without filing an application and going through the County process to obtain a final decision.

After considering the wind resource, land availability, transmission access, potential environmental impacts and neighboring land uses, Desert Claim selected a location for its project approximately 8 miles northwest of Ellensburg. Steeb Decl. ¶ 2. At that point, Desert Claim considered whether to file an application with Kittitas County or with EFSEC. Looking at EFSEC’s regulations, Desert Claim understood that, if it filed with EFSEC, the Council’s proceedings would be stayed while Desert Claim tried to obtain County approvals. See WAC 463-28-030(1). However, if Desert Claim went through the County process and obtained County approvals, it would not need to obtain EFSEC’s approval as well. Desert Claim concluded that the most efficient way to proceed was to file an application with Kittitas County first. If it did not obtain County approvals, it could then proceed with an application to EFSEC. Steeb Decl. ¶ 3.

On January 28, 2003, Desert Claim filed an application with Kittitas County to obtain the approvals necessary to construct and operate a 180 MW wind power project. The Project described in the original application to the County included 120 turbines spread out over a 5,237-acre project area. Steeb Decl. ¶ 5.

For more than two years, Desert Claim’s application worked its way through the Kittitas County process. Steeb Decl. ¶ 6. The following is a summary of that process. A detailed chronology is also provided as Exhibit 2 to the Steeb Declaration.
In April 2003, the County issued a SEPA Determination of Significance. Steeb Decl. Ex. 2. In December 2003, the County published a Draft EIS and in August 2004, the County published its Final EIS. Id.

In September 2004, Desert Claim worked with Community Development Services and the County attorney to prepare a draft Development Agreement, which the County then circulated to the public. Steeb Decl. Ex. 2. On October 25 and 26, 2004, the Kittitas County Planning Commission and the Kittitas County Board of County Commissioners ("BOCC") held joint hearings. Id. At the conclusion of those hearings, the Planning Commission recommended denial of Desert Claim's application. Id.

For the next five and a half months, the BOCC held at least ten hearings and meetings to consider Desert Claim's application. Steeb Decl. ¶ 6, Ex. 2. In between them, Desert Claim worked with staff to revise the Development Agreement and try to address concerns that had been raised. Steeb Decl. ¶ 6. On March 9, 2005, the BOCC deliberated and voted to deny Desert Claim's application. Steeb Decl. ¶ 7. On April 5, 2005, more than twenty-six months after Desert Claim had filed its application with the County, the BOCC issued Findings of Facts and Resolution 2005-46 formally denying Desert Claim's application. Id.

Desert Claim appealed to Superior Court, but the court upheld the BOCC's decision. Desert Claim Wind Power, LLC v. Kittitas County, No. 05-2-00243-6, slip. Op. at 11 (Kittitas Cty. Super. Ct. Nov. 4, 2005). In doing so, the Superior Court noted that "Desert Claim made extraordinary efforts to satisfy two different boards of county commissioners over the process of the application it submitted to the County." Id. at 10-11.
B. Revised Project Description and EFSEC Application

Following the BOCC's decision, Desert Claim considered whether additional changes could be made to the Project to address concerns that were raised during the County process. Steeb Decl. ¶ 9. After obtaining a lease on neighboring DNR land, Desert Claim was able to consolidate the Project and eliminate the eastern portion of the Project. Id.

On November 6, 2006, Desert Claim submitted an Application for Site Certification ("the Application") to EFSEC. The Application described the Project, which consisted of 90 turbines (2.0 MW capacity each), located on 4,783 acres of public and private land northwest of Ellensburg. Exhibit 3 to the Steeb Declaration compares the Project Area to the area identified in the original application to Kittitas County.

The revised Project described in the November 2006 Application has several advantages over the original proposal:

- The Project Area has been consolidated from four separate parcels to one contiguous area.
- The Project Area has been reduced from 5,237 acres to 4,783 acres.
- The total number of turbines has been reduced.
- There are only 32 non-participating residences located within 3,000 feet of a proposed turbine.
- Sound from the Project will be no more than 50 dBA at adjacent properties.
- Shadow flicker at adjacent residences has been substantially reduced. For those residences (if any) that are affected by perceptible shadow flicker, Desert Claim will stop the blades of the wind turbine that causes the flicker during those hours and conditions when shadow flicker occurs, or offer a voluntary waiver agreement to the landowners in lieu of stopping the turbine.
- The Project will not result in any temporary or permanent impacts to wetlands, stream or their buffers.
Daytime white strobe lighting has been eliminated and nighttime red lighting has been reduced.

See Desert Claim Wind Power, Application for Site Certification (Nov. 2006).

Both before and after filing the Application, Desert Claim made efforts to communicate with Kittitas County about the changes it had made to the Project. In summer and fall 2005, Joe Fahrendorf (enXco Vice President Business Development) attempted to contact the Commissioners to discuss changes Desert Claim was considering to address the County's concerns, but his calls were not returned. Steeb Decl. Ex. 2. On October 24, 2006, Darin Huseby (enXco Development Director Northwest Region) met individually with each of the Commissioners to explain the changes made to the Project. Steeb Decl. Ex. 4 (Letter from D. Huseby to Commissioners dated Nov. 30, 2006). On November 6, 2006, David Steeb (Desert Claim Project Director) hand-delivered copies of the Application to each of the Commissioners and to the Director of Community Development Services. Steeb Decl.

¶ 11. Thereafter, Mr. Huseby attempted to contact each of the Commissioners again, but his calls were not returned. Steeb Decl. Ex. 4.

By letter dated December 5, 2006, Kittitas County Commissioner David Bowen explained the County's position that Desert Claim was required to submit an application to the County to seek the approvals required by the County's Wind Overly Ordinance. Steeb Decl. Ex. 5. Commissioner Bowen stated unequivocally that the County had "no interest" in "making a decision about the project" outside the process outlined by chapter 17.61A. Id. Nonetheless, he did offer to arrange a public meeting to discuss the Project changes with Desert Claim, but also emphasized that "[i]n that we do not have an application the Board will not, however, be able to make any decision on your project. As such, a meeting like this would be an information meeting only." Id. In light of the position set forth in this
letter, Desert Claim did not believe a public meeting would be productive and did not take
Commissioner Bowen up on his offer at that time.

C. EFSEC Land Use Consistency Process

On January 30, 2007, the Council held a Land Use Consistency Hearing in
Ellensburg regarding the Desert Claim Project. During the hearing, Desert Claim and
Kittitas County agreed that Desert Claim had not obtained the approvals required by Kittitas
County Code chapter 17.61A. The Council therefore found that the Project was not
consistent with the Kittitas County land use requirements in existence at the time Desert
Claim filed its application with the Council. See Council Order No. 825.

Soon thereafter, Desert Claim filed a motion with the Council seeking a
determination that it had satisfied WAC 463-28-030(1)'s requirement that it make reasonable
efforts to cure the inconsistency with local land use requirements and, therefore, could
proceed to submit a request for preemption. The Council heard argument on the motion
during its Council meeting on April 10, 2007, and requested supplemental briefing on
certain issues. Desert Claim submitted additional briefing, and in doing so, also offered to
spend another thirty days meeting with the County to try to identify and resolve any County
concerns about the revised Project. See Desert Claim's Supplemental Briefing re WAC 463-
28-030(1) (April 17, 2007).

Shortly before Desert Claim submitted its supplemental briefing, the Council issued
Order No. 826 recommending certification of the Kittitas Valley Wind Project on March 27,
2007. In its Supplemental Briefing, therefore, Desert Claim informed the Council that it
would be amending its Application to incorporate two mitigation measures that the Council
had included in the recommended K.V. Site Certification Agreement. Specifically, Desert
Claim indicated that it was re-configuring the Project to ensure that all turbines would be
located a distance from existing residences equal to at least four times the tip height of the
turbine (4 x 414 feet = 1,656 feet). See Desert Claim Supplemental Briefing at 7.¹ Desert
Claim also indicated that it would mitigate potential shadow flicker in the same manner
specified in Article VII, Section I of the Kittitas Valley Site Certification Agreement. Id.

On May 8, 2007, the Council granted Desert Claim's motion and ruled that Desert
Claim is not required to file an application with Kittitas County under Kittitas County's
Wind Overlay Ordinance, KCC chapter 17.61A. See Council Order No. 830 at 7 (May 8,
2007). The Council also sent a letter to the Kittitas County Commissioners encouraging
them "to use your best efforts to work with the Applicant and to resolve as many issues as
possible in advance of any adjudication." Letter from J. Luce to Commissioners dated May
17, 2007.

On May 17, 2007, Desert Claim met with Kittitas County Community Development
Services. Steeb Decl. ¶ 13.² During the meeting, Community Development Services
Director Darryl Piercy explained that he believed three issues led to the BOCC denial of
Desert Claim's original application to the County: (1) inadequate mitigation of potential
shadow flicker, (2) the Project area included several non-contiguous parcels, and
(3) inadequate setbacks from existing residences. Id. Mr. Piercy said that the changes
Desert Claim has made to the Project addressed the first two of these issues. However, Mr.
Piercy indicated that Desert Claim's proposal to locate all turbines at least 1,656 feet (four

¹ Desert Claim is now evaluating the revised configuration in light of the Governor's
decision last week regarding the K.V. Project.

² Desert Claim was represented at the meeting by Darin Huseby (enXco Development
Director Northwest Region), David Steeb (Claim Project Director) and Karen McGaffey (attorney).
Attending from Kittitas County Community Development Services were Darryl Piercy (Director),
Allison Kimball (Assistant Director), Joanna Valencia (Planner) and Neil Caulkins (attorney).
times the turbine height) from existing residences was inadequate; he believed the BOCC would require a 2,500-foot setback from existing residences absent site-specific reasons justifying a lesser distance. *Id.* Mr. Piercy stated that he did not believe the County had any other concerns about the revised Project. *Id.*

Desert Claim appreciated Mr. Piercy’s candor and his willingness to clearly state that he believes the County’s only remaining concern about the Desert Claim Project is the setback from existing residences. Steeb Decl. ¶ 14. However, as Mr. Piercy acknowledged, the BOCC has the responsibility for making decisions under KCC chapter 17.61A. Desert Claim, therefore, requested to meet directly with the BOCC to hear the Commissioners’ views about the Project first-hand. *Id.* In effect, Desert Claim asked to take the BOCC up on the offer that Commissioner Bowen had made back in December to hold a public meeting about the Project.

However, the BOCC denied Desert Claim’s request. In a letter dated May 22, 2007, Mr. Piercy explained:

In our meeting you requested we consider the possibility of conducting a public meeting with the Board of County Commissioners, prior to application, to provide you with an opportunity to hear directly from the Commissioners any concerns or issues they may have in regards to your project. The Commissioners have considered your request but must respectfully decline. It is felt that to hold a public meeting where some measure of approval or rejection seems to be the goal may leave the community and applicant to believe the Commissioners have prejudged a specific project without full and fair opportunity for public participation. Such discussion is best conducted as part of the public hearing process on your application where the full details of the project are known and the Commissioners can take specific action consistent with the County code.

Steeb Decl. Ex. 6 (Letter from D. Piercy to D. Steeb and D. Huseby dated May 22, 2007).
Short of filing an application under the County's Wind Farm Overlay Ordinance, which this Council has already ruled is not required, there appears to be nothing further Desert Claim can do to reach resolution of outstanding issues with the County. Accordingly, Desert Claim now files this request for preemption.

III. RCW Chapter 80.50 Preempts Local Authority

Through RCW chapter 80.50, the Legislature established a one-stop process for permitting certain energy facilities. A Site Certification Agreement, recommended by EFSEC and approved by the Governor, authorizes the construction and operation of energy facilities covered by RCW chapter 80.50. The decision of EFSEC and the Governor takes precedent over local land use requirements.

The Legislature unequivocally expressed its intention to preempt local regulation of energy facilities that fall within the Council's jurisdiction:

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

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

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

RCW 80.50.120.

In its recent decision regarding the Kittitas Valley Wind Project, the Council explained the tension between the Legislature's command in RCW chapter 80.50 and the wind power siting process created by ordinance in Kittitas County:
In an Application for Site Certification filed with EFSEC, site-specific details are not for a county or city to negotiate and impose, but are firmly within the jurisdictional realm of this Council. EFSEC is charged with unitary permitting authority for energy facilities seeking its site certification, allowing for a streamlined siting process. EFSEC's preemptive statutory power to certify and regulate the location, construction, and operation of energy facilities such as the proposed KVWPP simply cannot be usurped by local governments seeking to impose their own imprimatur on the siting process.

Council Order No. 826 at 17.

Despite the Legislature's clear intention to preempt local regulation, the Council has for many years had regulations that require an applicant to "request preemption" when a project is not consistent with all of the local land use requirements that otherwise apply to development of the project site. See WAC 463-28-040, -050, -060. Thus, Desert Claim requests preemption.

IV. EFSEC Should Recommend Preemption

Desert Claim will present testimony and other evidence during the Council's adjudicatory proceedings demonstrating that approval of the proposed Project is in the State's best interests, and that approval is justified under the Council's governing statute and regulations. The Council should, therefore, recommend that the Governor issue a Site Certification Agreement, preempting local land use regulation of the Project.

The Council's regulations require an applicant to submit a written request for preemption that addresses the following points:

1. That the applicant has demonstrated a good faith effort to resolve the noncompliance issues.

2. That the applicant and the local authorities are unable to reach an agreement which will resolve the issues.
(3) That alternative locations which are within the same county and city have been reviewed and have been found unacceptable.

(4) Interests of the state as delineated in RCW 80.50.010.

WAC 463-28-040. Desert Claim addresses these criteria in the following sections, and will present additional evidence regarding each of these factors during the adjudicatory proceedings.

A. Desert Claim has made good faith efforts to resolve inconsistency with local land use requirements.

As the Council is aware, Kittitas County has established a siting process for wind power projects. Under Kittitas County Code chapter 17.61A, a wind project may be permitted in any area zoned as Agricultural-20, Forest and Range, Commercial Agriculture or Commercial Forest. However, Chapter 17.61A requires an applicant to obtain a Wind Farm Development Permit and development agreement, a site-specific amendment to the Comprehensive Plan land use designation map, and a site-specific rezone. The process of obtaining these approvals amounts to a site-specific siting process, not a change in the general zoning requirements for the property at issue.

Desert Claim has made good faith efforts to obtain local land use approvals. In January 2003, Desert Claim submitted an application for these approvals to Kittitas County. Desert Claim then spent the next 26 months trying to obtain the required approvals. That lengthy process is discussed above and outlined in greater detail in a chronology attached as Exhibit 2 to the Declaration of David Steeb. In summary, Desert Claim attended numerous hearings and meetings before the BOCC, provided requested information and repeatedly revised a proposed Development Agreement in an effort to address concerns about the

3 The Council has formally proposed to repeal this regulatory requirement.
Project. The Kittitas County Superior Court found that Desert Claim made "extraordinary efforts to satisfy two different boards of county commissioners over the process of the application it submitted to the County." *Desert Claim Wind Power, LLC v. Kittitas County*, No. 05-2-00243-6, slip. op. at 11 (Kittitas Cty. Super. Ct. Nov. 4, 2005).

Following the BOCC's decision in 2005, Desert Claim made several changes to the Project in an effort to address concerns raised during the County process further, and those changes are reflected in the Application filed with this Council in November 2006. Since filing its Application, Desert Claim has made additional efforts to resolve the County's concerns about the revised Project. Most recently, in a meeting with Community Development Services on May 17, 2007, Director Darryl Piercy indicated that the County's only remaining concern about the Project is the length of the setback from existing residences. Steeb Decl. ¶ 12. Desert Claim proposes a 1,656-foot setback, based on the four-times-height standard EFSEC recommended in the Kittitas Valley proceedings, and Kittitas County apparently believes a 2,500 foot setback is appropriate.

Over the almost four and a half years since Desert Claim filed its initial application with the County, Desert Claim has attempted to resolve this setback issue. In January 2003, Desert Claim originally proposed a 1,000-foot setback from existing residences. Steeb Decl. ¶ 14. In 2004, Desert Claim submitted various iterations of a Draft Development Agreement to the County, each of which proposed a 1,000 foot setback. Initial comments by the BOCC about the proposed setback seemed to focus primarily on noise impacts, and at a BOCC hearing on January 25, 2005, all three commissioners seemed to find a 1,000 foot setback from the build line on adjacent properties to be acceptable. Commissioner Bowen stated it "doesn't cause me any grief." Commissioner Huston said that it was "an acceptable buffer" and that he had "no issue with that." Commissioner Crankovich said "I can agree with that."
Ex. 7 at 48-57. However, on January 27, 2005, County Attorney Jim Hurson advised the Commissioners that the turbines could be "visually dominant" from one-quarter to one-half mile away. Ex 8 at 47. Ultimately, in April 2005, the BOCC issued Resolution No. 2005-46, in which it concluded that "a minimum of 1/2 mile separation from wind turbines and residences would be necessary to reduce significant adverse impacts to moderate adverse impacts." In November 2006, Desert Claim filed its EFSEC Application, and configured turbines to ensure that noise levels would not exceed 50 dBA at the boundary line of adjoining properties where residences were or could be constructed. In this new configuration, the closest residence was 1,106 feet from a turbine. Following the Council's decision on the K.V. Project, Desert Claim reconfigured the Project to ensure that all turbines were at least 1,656 (four times tip height) from existing residences. Desert Claim is now evaluating the revised configuration in light of the Governor's decision last week regarding the K.V. Project.

In attempting to resolve this disagreement, Desert Claim has acted in good faith. Likewise, Desert Claim does not question the good faith of the County. The parties simply disagree about the length of setback that is necessary and appropriate. Under RCW chapter 80.50, EFSEC should resolve this siting issue.

In its recent decision regarding the Kittitas Valley Wind Project, this Council explained the "good faith effort" requirement as follows:

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

Council Order No. 826 at 17-18.
Desert Claim has demonstrated good faith efforts. WAC 463-28-040 does not require an applicant to make every conceivable effort to cure local land use inconsistencies, or to simply agree to whatever conditions a local jurisdiction proposes. Given the Legislature's clear intent that EFSEC preempt local siting authority and that the EFSEC process avoid duplication and delay in the siting process, the Council should not require Desert Claim to make any further effort to obtain local land use approvals.

B. **Desert Claim has been unable to reach agreement with Kittitas County.**

Desert Claim has applied for and been denied local land use approvals by the Kittitas County Board of County Commissioners. Since the BOCC's April 2005 decision, Desert Claim has made changes in the Project to try to address the concerns raised during the County process. According to the County's Director of Community Development Services, the changes made by Desert Claim have resolved all of the County's concerns other than the setback from existing residences. As explained above, Desert Claim has been unable to reach agreement with the County on that issue.

C. **Alternative locations were considered and found to be either unavailable or inferior to the Project site.**

WAC 463-28-040 requires a request for preemption to address the extent to which an applicant has evaluated other sites in the county and found them to be unacceptable. As a threshold matter, there are no areas in Kittitas County where wind power is an outright permitted use. Wind power projects may be permitted on any lands, such as the Project Area, zoned Ag-20, Forest and Range, Commercial Forest or Commercial Agriculture, but only if the Board of County Commissioners grants the necessary approvals following an extensive project siting process. KCC 17.61A. This is not a situation in which an applicant has selected a site that is not zoned for wind project development despite the availability of
numerous comparable sites that are zoned for wind power development. No such sites exist in Kittitas County.4

enXco began looking for potential commercial wind power project sites in Kittitas County in 2001. Like most wind power developers, enXco considers several factors in identifying potential project sites:

(1) Wind Resource. The most important factor in selecting a site for a wind power project is the available wind resource. enXco was looking for a site with an average wind speed of 13 to 17 miles per hour. Potential sites are typically identified using published wind maps, and then promising sites are evaluated more thoroughly, usually by collecting one to two years of on-site meteorological data.

(2) Access to Electrical Transmission. Access to existing electrical transmission lines is a significant advantage in wind power project development. Access to nearby lines avoids or substantial reduces the cost associated with constructing new lines, which can range from $500,000 to $1,000,000 per mile. In this case, the presence of transmission lines crossing the Project area avoids the permitting complications and aesthetic concerns associated with constructing new transmission lines to connect the Project to the regional transmission grid.

4 Desert Claim acknowledges that Kittitas County is now in the process of considering a proposal that would establish a pre-identified Wind Farm area on approximately 500 square miles in the eastern portion of the County. Steeb Decl. ¶ 18. If adopted, a wind power developer seeking to site a project within this area would still need to apply for a Development Permit and approval of a Development Agreement by the County, but would not need a site-specific rezone or a change in the Comprehensive Plan designation. Even if this proposal is adopted, however, it will not present alternative sites for the Desert Claim Project. Id. Of the land included in this proposed area, almost 90% is occupied by the Department of Defense’s Yakima Training Center or Washington Department of Fish and Wildlife designated wildlife reserves. Of the remaining 10%, approximately half is already occupied by the Wild Horse project and most of the rest is apparently under lease by Invenergy, a competing developer. Id.
(3) Environmental Constraints. Wind power developers try to avoid areas of significant known environmental concerns. Developers try to avoid lakes, rivers, wetlands, wildlife reserves, and endangered species habitat.

(4) Available Real Estate. A commercial wind power development typically requires about 5,000 acres of open land. Developers typically look for large, 10,000 to 50,000 acre open tracks of land as potential areas for development, and then gradually focus in on specific areas. Ultimately, project development requires the right to use land, the company's ability to negotiate leases with existing property owners is critical to site selection.

(5) Zoning and Land Use Regulations. Subject to the Board of County Commissioners' approval, the Kittitas County Code allows wind power project development in areas zoned Ag-20, Forest and Range, Commercial Agriculture and Commercial Forest. See Steeb Decl. ¶ 16.

Desert Claim's parent corporation enXco initially identified the Kittitas Valley, extending from Lookout Mountain on the west to the Columbia River on the east, and between the National Forest lands in the north and I-90 in the south as an area worth further investigation. Steeb Decl. ¶ 17. It then looked for large tracts of land and contacted landowners about the possibility of obtaining wind leases. Id. As a result, enXco identified a project area of over 5,000 acres made up of land owned by eight private land owners located northwest of Ellensburg, and obtained leases for those properties. Id. After performing further on-site meteorological evaluations, it designed the Desert Claim Project at this location and submitted an application to Kittitas County concerning that project area. Id. Since then, Desert Claim has been able to obtain wind leases on DNR land, and has reconfigured the Project to utilize a group of contiguous parcels, removing eastern portions of the original Project area. Id. Although enXco considered other properties and locations
in the County, enXco was not able to identify other commercially available properties that
provided a comparable combination of wind conditions, transmission access and minimal
environmental impacts. *Id.*

Kittitas County also undertook an evaluation of potential alternatives in preparation
of the County FEIS. *See* County EIS § 2.3. In the FEIS, the County concluded that there
were not "reasonable alternatives" to the Desert Claim location. The EIS 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* County
FEIS at 2-45 to 2-50.

EFSEC has also undertaken an analysis of alternative sites in its SEPA documents
relating to the Wild Horse and Kittitas Valley wind projects. In these documents, the
Council considered six potential sites in addition to the sites proposed for the Desert Claim,
Wild Horse and Kittitas Valley projects. *See* Wild Horse Power Project, Draft EIS at 2-31
to 2-41; Kittitas Valley Wind Power Project Final EIS at 2-47 to 2-78. Of those six sites,
only two – the Springwood Ranch and Swauk Valley Ranch sites – were considered to be
worthy of detailed consideration in the SEPA documents. Although the Council's SEPA
documents evaluated those two sites, they also acknowledged that neither site is actually
available for wind project development. The owner of the Springwood Ranch site is not
willing to lease it for wind farm development, and a conservation easement precludes
development on much of the Swauk Valley site.*

---

5 *See* County FEIS at 2-47.
6 *See* Kittitas Valley Wind Power Project Final EIS at 2-50.
There are no other sites in Kittitas County zoned for wind power development. Even putting aside zoning provisions, other superior wind power sites are not available in Kittitas County.

D. Preemption in this case will further the state interests set forth in RCW 80.50.010.

Preemption to authorize construction and operation of the Desert Claim Wind Project would further the state's interests as set forth in RCW 80.50.010. EFSEC's governing statute provides, in pertinent part:

The legislature finds that the present and predicted growth in energy demands in the state of Washington requires the development of a procedure for the selection and utilization of sites for energy facilities and the identification of a state position with respect to each proposed site. The legislature recognizes that the selection of sites will have a significant impact upon the welfare of the population, the location and growth of industry and the use of the natural resources of the state.

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

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

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

(2) To preserve and protect the quality of the environment; to enhance the public's opportunity to enjoy the esthetic and recreational benefits of the air, water and land resources; to promote air cleanliness; and to pursue beneficial changes in the environment.

(3) To provide abundant energy at a reasonable cost.
(4) To avoid costs of complete site restoration and demolition of improvements and infrastructure at unfinished nuclear energy sites, and to use unfinished nuclear energy facilities for public uses, including economic development, under the regulatory and management control of local governments and port districts.

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

RCW 80.50.010.

As shown in the following sections, the Desert Claim Project is consistent with the four relevant policy premises identified in 80.50.010. The fifth premise mentioned in the statute – to avoid costs of restoration at nuclear energy sites – is not relevant to this wind project proposal.

1. Federal Operational Safeguards

The Project meets or exceeds all applicable federal and state requirements for the development of a wind power project. The Application, together with the County FEIS, address applicable requirements and demonstrate that the Project has been designed in a way that will protect the welfare of Washington citizens. Public safety, welfare and environmental impacts will be addressed further in the Supplemental EIS being prepared, and in the testimony and evidence to be introduced in the adjudicatory proceedings.

2. Protect the Environment

The Desert Claim Project furthers the state's interest in preserving and protecting the quality of the environment. By utilizing a renewable resource, the Project produces electricity without the air pollutant emissions, greenhouse gas emissions and water pollutant discharges commonly associated with fossil-fuel electrical generation. Desert Claim will introduce additional evidence on these environmental advantages during the adjudicatory hearing.
The Desert Claim Project has also been designed to minimize its impact on the environment. The Project's environmental studies and mitigation proposals comply with the Washington Department of Fish and Wildlife's Wind Power Guidelines. Wetlands and surface waters will be avoided. Project sound levels will comply with EFSEC's regulatory requirements. Shadow flicker has been minimized and will be avoided through operational limitations. The Application provides information on these issues, and Desert Claim will introduce additional evidence during the adjudicatory hearing.

3. **Abundant Energy at Reasonable Cost**

The Legislature has directed EFSEC to make decisions "to provide abundant energy at reasonable cost." RCW 80.50.010(3). In enacting RCW chapter 80.50, the Legislature found there to be a "pressing need for increased energy facilities," and this Council has acknowledged that need in its regulations. See WAC 463-14-020. As the Council recognized in its recent Kittitas Valley decision, "[n]ew sources of electrical generation are needed now and will continue to be important in the future." Council Order No. 826 at 26.

In one of its recent SEPA documents, the Council described the need for additional power generating facilities and wind resources in particular:

> Recent national and regional forecasts predict increasing consumption of electrical energy will continue into the foreseeable future, requiring development of new generation resources to satisfy the increasing demand.

***

[T]he [Northwest Power and Conservation Council]'s revised 20-year demand forecast projects that electricity demand in the region will grow from 20,080 average MW in 2000 to 25,423 average MW by 2025 (medium forecast), an average annual growth rate of just less than 1% per year.

EFSEC, *Kittitas Valley Wind Power Project: Final Environmental Impact Statement* 1-8

(Febr. 2007).
In satisfying increasing electricity demand, Washington's statutory Energy Policy requires that "[t]he development and use of a diverse array of energy resources with emphasis on renewable energy shall be encouraged." RCW 43.21F.015(1). The Council recently described efforts by utilities to acquire additional renewable resources:

Many regional utilities are seeking to acquire new generating resources to meet their loads. ... PSE, PacifiCorp, and Avista have issued request for proposals specifically for wind power or other renewable resources. Avista is seeking to acquire 50 MW; PSE is seeking to acquire a minimum of 150 MW, and PacifiCorp is seeking to acquire 1,100 MW ... Thus, the regional demand for wind-generated energy exceeds the existing regional supply.

*Kittitas Valley FEIS* at 1-9. The passage of Initiative I-937 last year will increase the demand for renewable resources. The Washington Department of Community Trade and Economic Development has estimated that utilities serving Washington residents will need to acquire 1,185 average megawatts of wind renewable power by 2020.7

Wind power is cost competitive now. The Northwest Power Planning Council has identified wind power as a cost effective resource in the region. Investor-owned utilities Puget Sound Energy, Avista and PacifiCorp, have included wind in their Least Cost Plans and Integrated Resource Plans. Wind power is not subject to the price volatility that has occurred in the fossil fuel market and is expect to occur more frequently in the future. Desert Claim will introduce further evidence on these issues during the Adjudicatory Hearing.

---

4. Avoid Costly Duplication of Permitting

The Council has previously determined that preemption of the local wind power permitting requirements in Kittitas County furthers the statutory interest in avoiding costly duplication and delay in permitting. The Council explained:

Kittitas County’s Wind Farm Overlay Ordinance usurps EFSEC’s role of site-specific project evaluation. The Board of County Commissioners failed to provide the Applicant in this case with a method for resolving land use inconsistencies without submitting itself to the local permitting process that focused on the specifics of the Project. In this case, the Wind Farm Overlay Ordinance made it impossible for the Applicant to apply to Kittitas County only for an accommodation in the zoning code through the conditional use permit or variance process. Under the County’s Overlay Ordinance process, the Applicant had to obtain its site-specific permits from Kittitas County, then return to the EFSEC process and obtain those same permits a second time. The Council finds this to be exactly the type of “costly duplication in the siting process” that EFSEC was created to avoid.

***

It is in the State’s interest to see that applications for new energy facilities are processed in a timely and efficient fashion. The site-specific process demanded by Kittitas County circumvents EFSEC’s ability to achieve this statutory mandate and also seeks to preserve a local veto power over energy facility projects proposed for EFSEC approval. Therefore, the Council finds that the fourth prong of WAC 463-28-040 is satisfied by recommending preemption of the Kittitas County Wind Farm Overlay Ordinance.

Council Order No. 826 at 27. The State's interest in avoiding duplication and delay in siting energy facilities would similarly be served by preemption in this case.
V. Conclusion

For the foregoing reasons, together with the evidence to be introduced during the adjudicatory process, Desert Claim asks this Council to recommend preemption of local land use requirements and certification of the Desert Claim Wind Power Project.

DATED: June 28, 2007

PERKINS COIE LLP

By: ___________________________
Karen M. McGaffey, WSBA No. 20535
1201 Third Avenue, Suite 4800
Seattle, WA 98101-3099
Telephone: 206.359.8000
Facsimile: 206.359.9000
Email: KMcGaffey@perkinscoie.com

Attorneys for Applicant
Desert Claim Wind Power